SUPREME COURT
COUNTY OF CAYUGA STATE OF NEW YORK

CRYSTAL R. BAKER,

Plaintiff,

-vs-

Index No. E2022-0321

MCDONALD'S RESTAURANT STORE NUMBER 6165, CAYUGA RESTAURANT GROUP, L.L.C., MICHAEL FEEHAN, Individually and in his capacity as an owner of Cayuga Restaurant Group, L.L.C., and COURTNEY FEEHAN, Individually and her capacity as an owner of Cayuga Restaurant Group, L.L.C.,

Defendants.

BEFORE: HON. THOMAS G. LEONE
Acting Supreme Court Justice

APPEARANCES:

JARROD W. SMITH, ESQ.
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Attorney for Defendants
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DECISION & ORDER

Leone, Thomas G., J

I. **FACTS**

Plaintiff is a 38-year-old African-American female who was employed with Defendants' McDonald's franchise in Auburn, New York for approximately three-and-a-half years before being terminated. During Plaintiff's tenure, she was hired as a crew member and eventually promoted to shift manager, a position she held until her termination.

Plaintiff's termination stems from an incident occurring during her May 7, 2020 shift. On that date, Plaintiff began her 4:30 PM shift as the manager in charge. When Plaintiff arrived for work, her supervisor, Tonya Conklin, had to make a run to the bank to deposit money and get change. Plaintiff and another manager, Christina Atkin, were left in charge. Plaintiff went into the business office to print out a "DAR" form and unexpectedly stepped on a roll of approximately $220 in cash wrapped in a rubber band.

Plaintiff kept the money on her person until Conklin returned. Plaintiff asserts she immediately relinquished custody of the money to Conklin. When asked why she held the money instead of depositing it within a safe, Plaintiff responded that the safe belonged to another employee for the shift, and it was normal practice not to put money inside the safe of another employee. The following day, Plaintiff was terminated when she went to the restaurant to pick up her paycheck.

A petit larceny criminal charge was lodged against Plaintiff for the alleged attempted theft of the $220. According to the Complaint, Plaintiff had an unresolved, unrelated criminal matter at the time of the allegations, and she could have been sentenced to a new prison term in light of the allegations of new criminal activity.

According to Plaintiff, six months prior to Plaintiff's termination, a Caucasian manager was accused of being $1,500 short in his deposits, which Plaintiff submits was because the manager stole the money. Defendants sanctioned the Caucasian manager with a two-week suspension.

Additionally, Plaintiff submits that "on several night shifts leading up to Plaintiff's termination," she was forced to work alone because other employees "called in" or otherwise simply left their shifts early. Plaintiff complained about this practice to "upper management" because she believed it was creating a "dangerous condition." Plaintiff asserts Defendants did nothing to remedy the practice, acquiesced to the practice continuing, and "told Plaintiff to figure it out."

Plaintiff submits the petit larceny charges were resolved in her favor, and Defendant Courtney Feehan thereafter invited her to reapply for a position with Defendants' business.

Defendants subsequently sold the franchise. Plaintiff now works at the same business under different ownership.

II. PROCEDURAL HISTORY

On April 22, 2022, Plaintiff commenced the instant action with the filing of a summons and complaint. Plaintiff's Complaint alleged five causes of action:

1. A violation of the New York "Whistleblower" statute under Labor Law section 740,
2. Race-based discrimination under Executive Law section 296
3. Breach of contract[1] for failing to follow the Employee Handbook,
4. Negligent supervision, and
5. Negligent and intentional infliction of emotional distress.

In this motion, Defendants collectively moved pre-answer to dismiss the complaint pursuant to CPLR section 3211(a)(7). In support of their motion, Defendants submitted, and the Court has considered, an attorney affirmation by Scott P. Rogoff, Exhibit A (Plaintiff's Complaint), Exhibit B (Email communications relating to extensions of time), and a memorandum of law.

Plaintiff filed a combined Response to Defendants' motion to dismiss and a cross-motion seeking to amend the complaint. Accompanying the motion was, and the Court has considered, an attorney affirmation by Jarrod W. Smith, Exhibit A (Plaintiff's proposed First Amended Complaint), and a memorandum of law.

Defendants filed a combined opposition to the cross-motion and arguments in furtherance of their pre-answer motion to dismiss. In support of their position, Defendants submitted, and the Court has considered, an attorney affirmation by Scott P. Rogoff and a memorandum of law.

III. ANALYSIS & DECISION

a. *Plaintiff's Cross-Motion to Amend*

Plaintiff cross-moves for leave to amend her complaint and add additional facts. Defendants assert the actions of Plaintiff are procedurally improper and futile.

It is well settled that leave to amend the pleadings is to be freely granted as long as there is no prejudice or surprise to the adversary (CPLR 3025 [b]). Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties."

The Court is cognizant that "[o]n a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems" (*Sargiss v Magarelli*, 12 N.Y.3d 527 [2009]; *Leon v Martinez*, 84 N.Y.2d 83 [1994] ["In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint"]; CPLR 3211). Thus, in deciding pre-answer motions to dismiss, the Court is not inherently restricted to the four

[1] While Plaintiff does not explicitly identify the cause of action being rooted in breach of contract, the Court infers this is the intended cause of action given the arguments advanced in Plaintiff's filings.

corners of the initially-filed instrument and can consider extrinsic evidence.

In the instant case, Plaintiff's proposed alterations are entirely factual in character, do not add or otherwise change Plaintiff's legal theories, and are little more than simple amplifications or clarifications of statements already contained within the original complaint. Defendants have had an ample opportunity to substantively address the proposed amendments and the impact, if any, the new facts have on their motion to dismiss. Indeed, in Defendants' final filing, Defendants assert that, even with the new proposed facts, their position remains unchanged – the complaint still fails to establish cognizable causes of actions.

Given the relatively nominal factual changes to the complaint that are being proposed and the Defendants have been able to submit detailed, substantive arguments addressing the allegations contained in the proposed amendments, the Court finds that the Defendants will not be prejudiced if leave to amend is granted. Accordingly, Plaintiff's motion for leave to amend the complaint as submitted under NYSCEF No. 16 is hereby GRANTED.

Given that the Court is granting leave to amend the complaint and Defendant has substantively addressed the facts in their responsive filings, the Court will consider, and assume as true, the factual allegations contained in the amended complaint in determining the merits of Defendants' motion to dismiss.

b. ***Defendants' Motion to Dismiss***

In the instant motion, Defendants seek dismissal of the complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7). On a motion to dismiss the complaint for failure to state a cause of action, the test in not whether the complaint states a cause of action but whether Plaintiff has, in fact, a cognizable cause of action (*Robello v Orofino Realty Co.*, 40 N.Y.2d 633 [NY 1976]; *D'Amico v. Correctional Med. Care, Inc.*, 120 A.D. 3d 956 [4th Dept. 2014]).

In conducting its evaluation, this Court will, as it must, construe the Amended Complaint "in the light most favorable to the plaintiff and all factual allegations [will] be accepted as true. Further, ... the complaint [will] be construed liberally and all reasonable inferences [will] be drawn in favor of the plaintiff" (*see Alden Global Value Recovery Master Fund, L.P. V Keybank National Ass'n*, 159 A.D.36 618 [1st Dept 2018]).

c. ***Whistleblower Claim***

As a preliminary matter, the Court is compelled to identify a potential legal issue that has largely gone unaddressed by the parties. In 2021, the New York State Legislature substantially amended and expanded the "whistleblower" protections of the New York Labor Laws (*see* S. 4394–A).

Prior to January 26, 2022, Labor Law section 740(2)(a) read in relevant part:

> An employer shall not take any retaliatory personnel action against an employee because such employee . . . discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and represents a substantial and specific danger to the public health or safety.

Under the amendments, the same provision now reads:

> An employer shall not take any retaliatory action against an employee, whether or not within the scope of the employee's job duties, because such employee … discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety.

Concurrently, the Legislature redefined the term "law, rule, or regulation." Prior to January 26, 2022, the term was defined as:

> any duly enacted statute or ordinance or any rule or regulation promulgated pursuant to any federal, state or local statute or ordinance.

Under the amendments, the term is now defined as:

> (i) any duly enacted federal, state or local statute or ordinance or executive order;
> (ii) any rule or regulation promulgated pursuant to such statute or ordinance or executive order; or
> (iii) any judicial or administrative decision, ruling or order.

These amendments dramatically altered the foundations for "whistleblower" actions. Notably, the statute removed the requirement that a policy had to violate an actual law, rule, or regulation (see *Bordell v General Elec. Co.*, 88 N.Y.2d 869 [1996]). Accordingly, the test is no longer whether a policy violates an actual law, rule, or regulation; rather, it is whether the Plaintiff at the time they "blew the whistle" had a reasonable belief that a policy violated a law, rule, or regulation.

Additionally, the Legislature also reformed the statute to create two distinct classes of "whistleblower" actions, whereas it was previously only one: (1) claims where the whistleblower reasonably believes a policy violates a law, rule, or regulation, and (2) claims where the whistleblower reasonably believes a policy, although not necessarily a violation of a law, rule, regulation, poses a significant and specific danger to public health and safety.

Neither party directly addresses which version of the statute controls the instant motion: the prior statutory language that was in place at the time of Plaintiff's "blowing of the whistle" or the current statutory language that was in place at the time of the commencement of the action? Under the circumstances, this Court need not address this question, as under either version Plaintiff has failed to establish a cognizable cause of action.

Plaintiff's basis for her "whistleblower" action is a claim that "[o]n several night shifts leading up to Plaintiff's termination, . . . Plaintiff worked completely alone several nights. The crew would call in or just leave after being there for an hour. Plaintiff placed upper management on notice of the dangerous condition she was working under with no subordinate employees and they wouldn't let Plaintiff close the store placing Plaintiff in danger. Defendants also told Plaintiff to figure it out" (Amended Complaint at para. 23).

Under the law prior to the amendments, it was well established that, in order for whistleblower protections to be triggered, a plaintiff needed to establish that an actual law, rule, or regulation was violated by the policy at issue (*see Bordell v General Elec. Co.*, 88 N.Y.2d 869 [1996]). Despite an ample opportunity to do so, Plaintiff has failed to identify any law, rule, or regulation that the policy at issue allegedly violated. The Court is unaware of any such law, rule, or regulation, and the Court assumes that Plaintiff's inability to articulate any such law, rule, or regulation despite an ample opportunity to do so is a concession that no such contrary law, rule, or regulation exists.

Even if, for the sake of argument, the alleged practice of permitting fast-food workers to work without coworkers or supervisors on-site ran contrary to a law, rule, or regulation, such a practice nonetheless fails to "create and represent a substantial and specific danger to the public health or safety." At best, the crux of Plaintiff's claim is that working alone in a fast-food business at night makes her a more attractive target for criminal activity since there is no one to aid her or deter criminals. Plaintiff's alleged danger is neither substantial or nor specific; rather, it is generalized and speculative. Furthermore, the dangers of the policy alleged have no impact on the population at large; rather, the dangers proffered by Plaintiff were specifically limited to her (*see* Amended Complaint at para 23 [identifying her issue with the practice was that it was "...placing Plaintiff in danger"]). This type of private, personal danger is not the type of "public" health and safety danger contemplated by the statute (*see generally Remba v Federation Employment and Guidance Service,* 149 A.D.2d 131 [1st Dept. 1989], *aff'd* 78 N.Y.2d 801 [1990]; *see also Paul v Aurora Med. Group, P.C.*, 176 Misc.2d 11 [N.Y. Sup. Ct 1998]).

Assuming the state of the law at the time of the commencement of the action controls, Plaintiff nonetheless still fails to articulate a cognizable whistleblower action. As discussed previously, there exists effectively two classes of potential whistleblower actions under the amended statute. While Plaintiff does not explicitly identify which, if either, of the classes her complaint would fall under, the Court will address both.

To establish a whistleblower protection under the first class, the Plaintiff needs to show that she had a reasonable belief that the policy at issue violated a law, rule, or regulation. The complaint is

devoid of any such facts. To the contrary, the complaint does not state or imply that the Plaintiff complained about the policy because she reasonably believed it ran afoul of a law, rule, or regulation; rather, it openly states that she complained about the policy because she felt a change would increase her personal safety. Being that there is no assertion, directly or by implication, that Plaintiff's "blowing of the whistle" was motivated by a broader reasonable belief that the policy violated a law, rule, or regulation, a claim under the first class cannot stand.

Under the second class, whistleblower protections would be available to Plaintiff if she establishes that her reporting was because she had a reasonable belief that the policy, even though it does not violate a law, rule, or regulation, posed a substantial and specific danger to public health or safety. As discussed above, Plaintiff's contention is that the policy requiring or permitting workers to operate individually without the on-site assistance of other workers does not reasonably pose a substantial or specific danger to *public* health or safety as contemplated by the statute. Reviewing the contentions of the Plaintiff in the most favorable light, her complaints are private and personal in nature with limited to no concern of the impact of the policy on the general public. Mere disagreement with a business practice or policy alone does not entitle a person to whistleblower protection. More is required, and Plaintiff advances no such additional facts or evidence as to open the door to such protections.

Taken together, even if all of the allegations contained in the filings are read in a light most favorable to Plaintiff, every allegation by Plaintiff is assumed to be true, and Plaintiff is afforded every conceivable favorable inference from the facts, the allegations advanced do not identify any cognizable cause of action in which whistleblower protections would be available to Plaintiff under either version of the Labor Laws. As such, Defendants' motion to dismiss the first count of Plaintiff's Amended Complaint is hereby GRANTED.

d. ***Race-Based Discrimination***

Plaintiff claims that her termination was predicated upon racial discrimination.

Where a plaintiff alleges race-based discrimination, they "must establish that (1) she or he is a member of a protected class, (2) she or he was qualified to hold the position, (3) she or he suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination" (*Ayers v Bloomberg, L.P.*, 203 A.D.3d 872 [2nd Dept. 2022]).

In the instant case, there is no dispute that Plaintiff is part of a protected class (*i.e.*, an African-American) and was subjected to an adverse employment action (*i.e.*, her employment was terminated). The core points of contention are whether Plaintiff was "qualified" to hold the position at issue and/or

whether there exist circumstances that give rise to an inference of racial discrimination in Plaintiff's termination.

With regards to Defendants' claim that Plaintiff failed to establish evidence demonstrating she was qualified to hold the position at issue, the Court disagrees. Accepting the assertions of Plaintiff as true and extending her with all favorable inferences that can be drawn therefrom, Plaintiff has adequately pleaded this element. Plaintiff identifies that she was employed with Defendants' fast-food business for three-and-a-half years before her termination. Plaintiff further articulates she was promoted within the organization to a managerial position and routinely trusted with serving as the on-site shift supervisor. As evidenced by the date in question, Plaintiff was sufficiently trusted by the higher management to manage the business while Plaintiff's immediate supervisors were temporarily away from the business to engage in frolics like bank runs. Indeed, despite the allegations of wrongdoing, Plaintiff was invited by Defendants to reapply to work with them after the criminal charges were resolved.

Extending favorable inferences to these facts, the Court finds that it is unlikely that the business would continue to employ, promote, or otherwise trust Plaintiff to serve in a managerial capacity within the business under these circumstances if she was not qualified to perform the essential functions of the position. This is particularly true given that the Defendants invited Plaintiff to return to employment, an act that makes no sense if Plaintiff lacked the qualifications to do the job.

Defendants' alternative argument is Plaintiff's facts fail to establish any kind of cognizable nexus between her termination and race. Again, recognizing the low pleading standards and favorable inferences that must be drawn in Plaintiff's favor, the Court is compelled to find there is, at this juncture, sufficient facts to warrant an inference of discrimination based on race.

Plaintiff alleges that only months prior to Plaintiff's situation, a Caucasian employee of the same restaurant who held a similar position to Plaintiff was accused of having over $1,500 missing from his deposits, over ten times the amount involved in Plaintiff's case. Plaintiff asserts the shortage was because the Caucasian manager stole the money. Defendants suspended this Caucasian manager for two weeks for his alleged indiscretion; Plaintiff was summarily terminated.

Assuming these allegations are true and extending favorable inferences that can be drawn from them in Plaintiff's favor, Plaintiff has established that an individual in a similarly situated position allegedly committed a more egregious act of theft and was punished by Defendants to a lower sanction than the one Plaintiff received for an allegation of lower severity. If Plaintiff's claims are accepted as true, then there is a valid line of logic that Defendants were engaged in disparate treatment of its

employees with regards to allegations of theft, and Plaintiff's enhanced adverse employment action was because of her race. Accordingly, Defendants' motion to dismiss this cause of action is DENIED.

e. ***Failure to Follow Handbook Provisions Claim***

Plaintiff next asserts, albeit inartfully, that there exists a Handbook between Plaintiff and Defendant, the Handbook constituted a binding contract between Plaintiff and Defendant, and Plaintiff deviated from the agreement in terminating Plaintiff's employment.

The inherent difficulty with Plaintiff's claim is that, while she asserts the existence of an Employee Handbook, she does nothing to explain the content of the Handbook or why the Handbook should be treated as a binding contract. Plaintiff provides no actual citations, references, quotations, or attachments identifying that such a Handbook actually exists and is in a form that constitutes a binding contract. Plaintiff's submissions furthermore fail to explain why it simply references a Handbook and provides no further specifics.

While the Court recognizes the allegations set forth by Plaintiff are exceptionally scarce and necessitate considerable leaps of faith, the Court is, again, compelled to liberally construe the allegations solely in Plaintiff's favor. In doing so, the Court, cognizant that discovery has not been conducted in this case, assumes that Plaintiff's references to an Employee Handbook between Plaintiff and Defendant, a contention being made by Plaintiff's counsel under penalty of perjury, are good-faith assertions that, upon discovery practice, will reveal the existence of such a Handbook and said instrument will include provisions that address Plaintiff's employment situation.

Being that an employee handbook can conceivably create a contract between an employee and employer under appropriate circumstances, the Court finds that the contention whether or not the alleged Handbook between Plaintiff and Defendants in this case constitutes a contract is a question that is properly addressed after discovery and part of a motion for summary judgment, not a pre-answer motion to dismiss (*see Nice v Combustion Engineering, Inc.*, 192 A.D.2d 1088 [4th Dept 1993]). Accordingly, Defendants' motion to dismiss the cause of action alleging that the Employee Handbook between Plaintiff and Defendants constituted contract that was breached by Defendants is DENIED.

f. ***Negligent Supervision & Negligent Infliction of Emotional Distress Claims***

"[W]orkers' compensation is intended to be the exclusive remedy for work-related injuries" (*Barbato v Bowden*, 63 AD3d 1580 [4th Dept 2009]). In the recent decision of *Miller v National Property Management Associates, Inc.*, 191 A.D.3d 1341 [4th Dept. 2021]), the Fourth Department dismissed an employment action where the causes of action included negligent hiring, negligent training, negligent supervision, and negligent infliction of emotional distress. In finding that Workers' Compensation is the exclusive remedy for such causes of action, the Court held:

> it is well established that workers' compensation benefits are the "exclusive remedy for ... injuries allegedly caused by the negligence of [a person's] employer and fellow employee" (*O'Dette v. Parton*, 190 A.D.2d 1074, 1075 [4th Dept. 1993]; *see* Workers' Compensation Law § 29 [6]). Thus, inasmuch as defendants are plaintiff's employers and fellow employees, his causes of action against them for work-related negligence are barred by the Workers' Compensation Law's exclusivity provision, and the fifth and eighth causes of action should therefore have been dismissed (*see Thomas v. Northeast Theatre Corp.*, 51 A.D.3d 588, 589 [1st Dept. 2008]; *Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 A.D.3d 274, 275 [1st Dept. 2005]).

Here, Plaintiff asserts that she sustained injuries because of the negligent supervision of Defendants. Plaintiff additionally claims Defendants engaged in acts constituting negligent infliction of emotional distress.

In accordance with *Miller v National Property Management Associates, Inc.,* Plaintiff's causes of action relating to negligent supervision and negligent infliction of emotional distress are barred by the Workers' Compensation Law's exclusivity provision. The sole exception to this general rule, which is an "exceptional situation," is where the claim is based upon an intentional tort. Even if, for the sake of argument, this Court finds a claim of intentional infliction of emotion distress under the fifth count is properly pleaded, the causes of action relating to negligence are still subject to dismissal under the Worker's Compensation Law's exclusivity provision (*see Elson v Consolidated Edison Co. of N.Y. Inc.*, 226 A.D.26 288 [1st Dept .1996]). Accordingly, Defendants motion to dismiss the causes of action relating to negligent supervision and negligent infliction of emotional distress is GRANTED.

g. ***Intentional Infliction of Emotional Distress Claims***

Plaintiff claims that the wrongful allegations, wrongful termination, and unjust criminal charges qualify as intentional infliction of emotional distress. In support of this claim, Plaintiff submits that, as a result of the criminal charges being lodged against her, she was denied unemployment benefits and, due to an outstanding, unrelated criminal matter, she could have been subjected to a prison sentence in light of the alleged new criminal activity, consequences Defendants allegedly knew when they engaged in their course of conduct.

To establish a case for intentional infliction of emotional distress, a plaintiff must establish "(1) an extreme and outrageous act by the defendant, (2) an intent to cause severe emotional distress, (3) resulting severe emotional distress, (4) caused by the defendant's conduct" (*Burba v Rochester Gas & Elec. Corp.*, 90 A.D.2d 984 [4th Dept. 1982]).

Once more, the Court is compelled at this juncture to accept the assertions of Plaintiff as true and provide her with every favorable inference possible. Under Plaintiff's recitation, she was a

temporary innocent possessor of a relatively small amount money that was inadvertently dropped on the floor, and she immediately relinquished custody of the money without solicitation to her supervisor at the first available opportunity. Treating these assertions as true, the Court is compelled to find that Plaintiff's actions in terminating and lodging of criminal charges against an employee who innocently found money lying on the floor and, without solicitation, voluntarily and immediately relinquished custody of the money at the first available opportunity to a supervisor, knowing full-well that allegations of criminal misconduct alone could result in Plaintiff incurring a prison sentence, could be found by a trier of fact to amount to extreme and outrageous conduct which cannot be tolerated in a civilized society (*see generally Kaminski v United Parcel Service*, 120 A.D.2d [1st Dept. 1986]).

Thus, in light of the low pleading requirements and favorable inferences that must be drawn in Plaintiff's favor at this stage of the litigation process, Defendants' motion to dismiss the cause of action for intentional infliction of emotional distress is DENIED.

Based upon the foregoing, it is hereby:

ORDERED that Plaintiff's motion to amend the Complaint is hereby *granted,*

ORDERED that Defendants' motion to dismiss Count 1 (whistleblower) and Count 4 (negligent supervision) is hereby *granted* and said counts are hereby *dismissed,*

ORDERED that Defendants' motion to dismiss Count 2 (race-based discrimination) and Count 3 (failure to follow handbook procedures) is hereby *denied,*

ORDERED that Defendants' motion to dismiss Count 5 (negligent infliction of emotional distress and intentional infliction of emotional distress) is *granted in part and denied in part.* Defendant's motion to dismiss the cause of action alleging negligent infliction of emotional distress is hereby *granted* and said cause of action is hereby *dismissed.* Defendant's motion to dismiss the cause of action alleging intentional infliction of emotional distress is hereby *denied.*

Dated: December 28, 2022.

Hon. Thomas G. Leone, A.J.S.C.