SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

S

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

VIANKA GARCIA and YEAFREISY GUERRERO.

Plaintiffs.

Sequence No.: 001, 002 & 003
Index No.: 013466/06

- against -

HOFSTRA UNIVERSITY, HOFSTRA UNIVERSITY DINING SERVICES, LACKMANN CULINARY SERVICES and JIM DUNN.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motions and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Defendant Lackmann Culinary Services, Inc.'s (hereinafter "Lackmann") and defendant Jim Dunn move under separate notices of motion for summary judgment dismissing the complaint. Plaintiffs cross-move for an order 1) vacating the note of issue; 2) compelling defendant Lackmann to produce a witness for deposition; and 3) compelling defendants to provide outstanding discovery.

The following facts are undisputed. Defendant Lackmann is a food service company which operates a restaurant facility known as the University Club and provides catering services at Hofstra University. During the summer when school is not in session the University Club provides meals to participants in summer camps and athletics operated at Hofstra's campus. Defendant Dunn was employed by Lackmann as the manager of the University Club. Plaintiff Vianka Garcia worked for Lackmann as a waitress from October, 2003 until September, 2005. She was assigned to work at the University Club for the summer of 2005. Plaintiff Yafreisy Guerrero worked for Lackmann as a waitress from July until September, 2005 and worked at the University Club during that time. During the summer of 2005 defendant Dunn was plaintiffs' supervisor at the University Club.

Ms. Garcia alleges that on a Sunday in August, 2005 Mr. Dunn inappropriately attempted to kiss and touch her. Ms. Guerrero alleges that on her first day of work at a catered event off of Hofstra's campus, defendant Dunn inappropriately touched her. Plaintiff Guerrero alleges that on two other occasions after the first incident that defendant Dunn inappropriately touched her and made advances.

Plaintiffs commenced the instant action and asserted the following causes of action: 1) on behalf of plaintiff Garcia, a violation of §8-502(c) of the New York City Administrative Code; 2) on behalf of defendant Guerrero, negligent hiring, retention and/or supervision of Dunn and allowing sexual harassment to continue during her employment in violation of the New York State Human Rights Law and the New York City Administrative Code; 3) common law negligent hiring, retention and supervision of defendant Dunn on behalf of both plaintiffs; 4) a violation of Executive Law §296 based upon Hofstra's and Lackmann's knowledge of and acquiescence in defendant Dunn's conduct on behalf of both plaintiffs; 5) discrimination as set forth in the New York City Administrative Code §8-101, et seq.; 6) assault and battery; 7) intentional infliction of emotional distress; and 8) constructive discharge.

Defendants Lackmann and Dunn separately move for summary judgment dismissing the complaint. Plaintiff cross-moves for an order vacating the note of issue and directing that certain discovery be conducted.

Plaintiffs' Cross-Motion to Vacate the Note of Issue and to Compel Discov[redacted]

The court shall first determine plaintiffs' motion to vacate the note o[redacted]or an order directing defendants to provide certain outstanding discovery. By sho[redacted]dated September 11, 2007 this court certified the matter ready for trial on the grounds that the parties failed to complete discovery as set forth in the preliminary conference order dated January 16, 2007 and the directives of the court at a May 30, 2007 conference pertaining to the progress of discovery herein. At that time examination before trial deadlines were set and the parties were directed to accomplish same and not to adjourn same without court approval. It was the parties who chose to delay discovery until perilously close to the outside date for the closure of discovery as established by the Office of Court Administration (OCA). The parties were supplied with this date on January 16, 2007 and chose to wait some eight months to conduct discovery. No party, and in particular, plaintiffs, moved to compel discovery pursuant to CPLR 3124. To grant this motion at this time would be an embarrassing acknowledgment that the parties herein can ignore the directives of this court as well as the guidelines established by the Office of Court Administration and set a precedent that this court has worked diligently to avoid setting.

This court notes that with the institution of the Differentiated Case Management System with the attendant responsibility of overseeing and directing discovery imposed upon this court, the issue of the necessity and accurateness of a certificate of readiness has in most cases become academic and this matter is one of those cases.

It should be noted that in determining the defendants' motions for summary judgment, which the court shall do below, the court shall not consider plaintiffs' position that said motions should be denied as discovery herein is not complete.

Defendant Lackmann's Motion for Summary Judgment

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing a motion for summary judgment must demonstrate a triable issue of fact through admissible evidence. *Id.*

Defendant Lackmann first moves for summary judgment dismissing plaintiffs' claims of a hostile work environment as set forth in this state's Human Rights Law. In order to constitute such a violation the employer must have become a party to the alleged unlawful conduct by encouraging, condoning or approving of it. See, Totem Taxi, Inc. v. New York State Human Rights Appeal Board, 65 N.Y.2d 300 (1985).

In his affidavit Joseph Rudolph, Lackmann's vice-president of operations, avers that:

1) in September, 2005 he was contacted by plaintiff Garcia regarding an incident with defendant Dunn;

2) he arranged for a meeting with plaintiff Garcia as well as Lackmann's Human Resources Manager, Denise Drury;

3) at the meeting Ms. Garcia advised Mr. Rudolph and Ms. Drury that defendant Dunn had touched her inappropriately at a barbeque at the University Club in August, 2005 in Mr. Dunn's office;

4) Ms. Garcia informed Mr. Rudolph and Ms. Drury that she believed that Ms. Guerrero had had a problem with defendant Dunn;

5) a meeting was arranged between Ms. Guerrero, Mr. Rudolph, Ms. Drury and a Spanish-language interpreter at which Ms. Guerrero asserted that Dunn had touched her inappropriately on three occasions during the summer of 2005 and that she no longer wished to work for Lackmann;

6) Mr. Rudolph and Ms. Drury next held a meeting with Dunn at which they informed him of the allegations made by plaintiffs herein against him which Mr. Dunn denied;

7) Mr. Rudolph advised defendant Dunn of the company's anti-harassment policy and that if the company concluded that he had violated same, it would "take strong action against him";

8) Dunn responded by saying he was aware of the policy and understood that Lackmann did not tolerate violations of same;

9) in attempting to corroborate plaintiffs' assertions Mr. Rudolph reviewed Lackmann's records and noted that none of them revealed a barbeque catered by Lackmann on a Sunday on which plaintiff Guerrero was working;

10) because of the nature of the parties' conflicting versions and the lack of any

corroborative evidence of plaintiffs' stories, defendant Lackmann concluded it could take no action against defendant Dunn;

11) Mr. Dunn was informed of the results, reminded of the company's anti-harassment policy and transferred out of the University Club;

12) Ms. Garcia was informed of the results of the investigation and offered the opportunity to work for Lackmann at a different location; and

13) Ms. Garcia declined and left Lackmann's employ.

Defendant Lackmann asserts that after its management learned of the allegations against its lower-level manager it acted promptly to investigate and enforce its long-standing policy against sexual harassment. Therefore, asserts defendant Lackmann, it cannot be held to have condoned defendant Dunn's conduct in violation of the Human Rights Law.

Generally, Executive Law §296(1), otherwise known as the Human Rights Law, prohibits discrimination against an employee by a supervisor based upon the employee's sex. Sexual harassment is considered discrimination based upon the employee's sex in violation of the Human Rights Law. See, Father Belle Community Center v. New York State Division of Human Rights, 221 A.D.2d 44 (4th Dep't 1996). An employer may be implicated in the discriminatory acts of an employee as defined by the Human Rights Law where it condones, encourages or approves of the act. See, Totem Taxi, Inc. v. New York State Human Rights Appeal Board, 65 N.Y.2d 300 (1985). Condonation may be disproved by the employer where it demonstrates that it reasonably investigated the complaint of discriminatory conduct and took corrective action. Father Belle Community Center, supra; Pace v. Ogden Service Corp., 257 A.D.2d 101 (3rd Dep't 1999). Summary judgment dismissing a claim against an employer based upon alleged discriminatory practices by one employee against another employee is proper where the employer demonstrates and plaintiff does not raise an issue of fact disputing that after learning of the behavior, the employer took prompt measures of investigation and remedy. See, Ellis v. Child Development Support Corp., 5 A.D.3d 430 (2nd Dep't 2004); Pace v. Ogden Services Corp., supra.

Based upon the foregoing, the court concludes that defendant Lackmann has demonstrated *prima facie* entitlement to summary judgment dismissing plaintiffs' Human Rights Law claims. The burden now shifts to plaintiffs to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition plaintiffs assert that defendant Lackmann's motion to dismiss the Human Rights Law claims should be denied because 1) at his deposition defendant Dunn received no reprimand or warning from Lackmann and further, Dunn was not transferred from the University Club until September, 2006, or approximately one year after its investigation of Dunn which demonstrates condonation on Lackmann's part; and 2) defendant Dunn is a high enough level manager employed by defendant Lackmann to render Lackmann liable for Dunn's actions regardless of whether or not it condoned his conduct.

First, the fact that defendant Dunn was or was not punished is not determinative of

whether Lackmann condoned his conduct. As set forth above, condonation can be disproven by a reasonable investigation and corrective action on the employer's part. Father Belle Community Center, supra. That investigation turned up no corroborative evidence against Mr. Dunn, who, it is undisputed, was reminded of Lackmann's anti-harassment policy. Notably absent from plaintiffs' opposition is any assertion that the investigation itself was unreasonable or insufficient.

Secondly, the court disagrees that an issue of fact exists as to whether Dunn was a manager of such high level that the issue of condonation on Lackmann's part is inapplicable to this matter. In determining whether the alleged harasser is an upper level manager so as to impose liability to the employer, the court will look to whether the allegedly harassed employee had the opportunity to complain to an employer of authority at a higher level than that of the alleged harasser. See, e.g., Father Belle Community Center, supra. In making such a determination it must be established whether the manager was a "superior officer" which is more than an agent, officer or employee "vested with some supervisory or decision making responsibility... [rather] it contemplate[s] a high level of general managerial authority in relation to the nature and operation of the employer's business.(Loughry v. Lincoln First Bank, 67 N.Y.2d 369)." Id. Defendant Lackmann has demonstrated and plaintiffs do not dispute that there were levels of authority within Lackmann over and above defendant Dunn to whom plaintiffs could complain. It is further undisputed that Mr. Dunn managed the facility at Hofstra on Lackmann's behalf and did not have a general supervisory authority over Lackmann's business.

Defendant Lackmann next moves for summary judgment dismissing plaintiffs' negligent hiring, retention and/or supervision claims upon the grounds that the exclusive remedy for such claims is the Workers Compensation Law. Claims for unintentional employment related injuries against a plaintiff's employer are exclusively remedied by the Workers Compensation Law. Workers Compensation Law §11. Where a defense based upon such exclusivity is asserted, no suit may be imposed against an employer for negligent hiring, retention and/or supervision for injuries arising out of and in the course of employment. See, Burlem v. American Mutual Insurance Company, 63 N.Y.2d 412 (1984); Maas v. Cornell University, 253 A.D.2d 1 (3rd Dep't 1999); Conde v. Yeshiva University, 16 A.D.3d 185 (1st Dep't 2005).

In opposition plaintiffs assert that the exclusivity provision of the Workers Compensation Law does not apply to causes of action for sexual harassment. The causes of action at issue here are not for an intentional tort such as sexual harassment, but are for unintentional torts founded in negligence on the employer's part. Accordingly, plaintiffs have failed to meet their burden on this branch of Lackmann's motion. Sormani v. Orange County Community Colleges, 240 A.D.2d 724 (2nd Dep't 1997); Conde v. Yeshiva University, supra.

Defendant Lackmann also moves for summary judgment dismissing plaintiffs' claims pursuant to the New York City Human Rights Law. The New York City Human Rights Law is only applicable to acts which occur within the boundaries of the City of New York. See, Sharb v. Wilco Systems, Inc., 27 A.D.3d 169 (1st Dep't 2005). Plaintiffs' do not oppose this branch of Lackmann's motion.

Plaintiffs' claims for assault, battery and intentional infliction of emotional distress must be dismissed as asserted against it, claims Lackmann on the grounds that an employer may not be held liable for the intentional torts of its employee where such tort is outside of the scope of the employee's employment. An employer is not liable under the doctrine of respondent superior for its employee's acts which are committed for purely personal reasons which are unrelated to the employer's business. See, Sandra M. v. St. Luke's Roosevelt Hospital Center, 33 A.D.3d 875 (2nd Dep't 2006). Such applies to situations of sexual harassment and/or assault by one employee against another. See, e.g., Conde v. Yeshiva University, supra.; Tomka v. Seiler Corp., 66 F.3d 1295 (2nd Cir. 1995).

In opposition plaintiffs take a conclusory position that this branch of defendant Lackmann's motion should be denied because a jury could find that Lackmann's employee's conduct was "sufficiently extreme and outrageous to support this claim." This in no way addresses defendant Lackmann's position and the court therefore finds that plaintiffs' have likewise failed to meet their burden on this branch of Lackmann's motion.

Lastly, defendant Lackmann moves for summary judgment dismissing plaintiffs' cause of action as asserted against this defendant for constructive discharge. Constructive discharge occurs when the employer deliberately makes its employee's working conditions so intolerable that the employee is forced to involuntarily resign from employment. See, Spence v. Maryland Casualty Insurance Co., 995 F.2d 1147 (2nd Cir. 1993). Based upon defendant Lackmann's submissions, the court concludes that it has *prima facie* demonstrated that it did not deliberately take steps to make plaintiffs' working conditions so intolerable that they were forced to leave defendant Lackmann's employment.

In opposition plaintiffs assert that defendants' Dunn's actions should be imputed to Lackmann because of his high rank in the company and that issues of fact exist as to whether his actions made plaintiffs' work lives so intolerable that they had no option but to resign. In order for a claim of constructive discharge to apply, it must be demonstrated that the employer's actions were deliberate and intentional See, Whidbee v. Garzelli Food Specialities, Inc, 223 F.3d 62 (2nd Cir. 2000). See, also, Morris v. Schroder Capital Management International, 7 N.Y.3d 616 (2006). Plaintiffs point to nothing in the record from which this court could conclude that defendant Lackmann deliberately made plaintiffs' work lives so intolerable that they were forced to involuntarily resign.

Accordingly, based upon the foregoing, defendant Lackmann's motion is granted in its entirety.

Defendant Dunn's Motion for Summary Judgment

Defendant Dunn first moves for summary judgment dismissing plaintiffs' Human Rights Law claims asserted against this defendant on the grounds that plaintiffs, by law, were required to elect their remedies between an action at law and an administrative proceeding. As plaintiffs had an administrative proceeding pending, contends Dunn, such requires dismissal of the action at

law.

Pursuant to Executive Law §297(9) a person claiming unlawful discrimination shall have a cause of action in any court of appropriate jurisdiction unless she has filed a complaint with, *inter alia*, a local commission on human rights. Where plaintiffs first file a complaint with a local commission for human rights and then commence an action at law based upon discriminatory practice pursuant to Executive Law §296 and the administrative proceeding has not been dismissed for "administrative convenience", the court will dismiss the complaint asserting claims based upon the Human Rights Law. See, Moodie v. Federal Reserve Bank of New York, 58 F.3d 897 (2nd Cir. 1995).

Plaintiff takes no position on this branch of defendant Dunn's motion.

Likewise, defendant Dunn moves to dismiss plaintiffs' claims made pursuant to the New York City Human Rights Law on the grounds that same does not apply to this matter as the plaintiffs' claims did not arise in New York City. Plaintiffs do not dispute this.

Defendant Dunn also moves for summary judgment dismissing the intentional tort claims as untimely. Pursuant to CPLR §215(3) an action for an intentional tort must be commenced within one year. With regard to plaintiff Guerrero, defendant Dunn points to this plaintiff's deposition testimony in which she testified that defendant Dunn inappropriately touched her in July, 2005 and then did so again two weeks later. (See, deposition transcript of plaintiff Yafreisy Guerrero, 6, pp. 16, 41-43). Giving plaintiff Guerrero every favorable inference, asserts Dunn, would require this action relative to these two claims to have been commenced on or before August 14, 2006. Same was commenced on August 21, 2006. Further, as to all remaining claims by plaintiffs, plaintiffs have been unable to specify a date or dates upon which same occurred. Therefore, defendant Dunn contends that all intentional torts claims based upon alleged incidents which occurred prior to August 21, 2005 should be dismissed.

In opposition to this branch of Dunn's motion, plaintiffs assert that an issue of fact exists by virtue of the fact that plaintiff Guerrero's third encounter with Dunn occurred in September, 2005 as reflected in pay roll records produced by Lackmann. Further, an internal memorandum from Lackmann reveals that plaintiff Garcia's encounter with Dunn occurred in September, 2005. Plaintiff Guerrero does not address at all defendant Dunn's assertions relative to the first two incidents she alleges against him.

The court grants defendant Dunn's motion to the extent that the claims for assault, battery and intentional infliction of emotional distress that plaintiff Guerrero claims occurred in July, 2005 and two weeks thereafter are dismissed. This branch of defendant Dunn's motion is otherwise denied.

Defendant Dunn further moves for summary judgment dismissing plaintiffs' claims for assault upon the grounds that they were never in imminent apprehension of harmful physical contact. At her deposition Ms. Garcia testified that she did not see Dunn approach and touch her

because she was bent over and facing away from him while arranging items in a closet. Further, she had no idea that Dunn was attempting to touch her until the contact occurred. (See, Garcia deposition transcript, pp. 29, 30, 71-72). Ms. Garcia further testified that she felt no fear at the time of the incident. (Id., p. 73, l. 4-10).

Although plaintiff Guerrero alleges three incidents of assault by defendant Dunn, the court has already held that two of those claims are untimely. As to the remaining claim for assault made by Guerrero, defendant Dunn fails to address same in his motion.

In asserting a cause of action for assault, a plaintiff must demonstrate physical conduct by defendant which places plaintiff in imminent apprehension of harmful or offensive conduct. See, Cotter v. Summit Secretarial Services, 14 A.D.3d 475 (2nd Dep't 2005); Bastein v. Sotto, 299 A.D.2d 432 (2nd Dep't 2002).

Defendant Dunn has made a *prima facie* demonstration of entitlement to summary judgment on this branch of his motion as to plaintiff Garcia's assault claim only. This branch of the motion is denied as to plaintiff Guerrero, defendant Dunn having failed to meet his burden. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

In opposition plaintiff Garcia asserts that an issue of fact exists as to whether she was in imminent fear of harmful contact because she testified at her deposition that she thought that Dunn attempted to rape her. (See, Garcia deposition transcript, pp. 77-78). Such to this court, does not meet the standard of imminent fear of harmful contact. This testimony does not reveal that Ms. Garcia observed Dunn engaged in conduct which caused her to feel fear of such contacts. Cotter, supra, Bastein, supra. While plaintiff Garcia may properly have a cause of action for battery, she points to no evidence in the record herein which leads the court to conclude that an issue of fact exists as to whether Ms. Garcia sufficiently felt imminent fear of harmful or offensive contact.

Accordingly, the court grants this branch of defendant Dunn's motion to the extent it seeks dismissal of plaintiff Garcia's claim for assault.

Defendant Dunn lastly moves for summary judgment dismissing plaintiffs' claim for intentional infliction of emotional distress. As set forth above, all intentional tort claims have been dismissed except for plaintiff Garcia's claims (with the exception of the assault claim) and those pertaining to the third incident as alleged by plaintiff Guerrero. In his affirmation defendant Dunn's attorney sets forth the elements of this claim and refers the court to his prior arguments set forth in the motion in order to determine if he has met his *prima facie* burden. The court declines this invitation and reminds defendant Dunn's attorney that it is movant's responsibility to demonstrate *prima facie* entitlement to summary judgment.

Accordingly, based upon the foregoing, it is hereby directed that:

1) the complaint as asserted against defendant Lackmann is dismissed in its entirety;

2) the first, second, fourth and fifth causes of action as asserted against defendant Dunn are dismissed in their entirety;

3) all claims for assault, battery and intentional infliction of emotional distress alleged to have occurred by plaintiff Guerrero prior to August 21, 2005 are dismissed; and

4) all claims for assault made by defendant Garcia are dismissed.

So Ordered.

A.J.S.C.

Dated: March 25, 2008

ENTERED
MAR 31 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE