

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

**PRESENT: ORIN R. KITZES
Justice**

PART 17

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**QUEENY MELVILLE.,
Plaintiff,**

**Index No.: 28882/08
Motion Date: 7/8/09
Motion Cal. No.: 48**

-against-

**BLANCHE COMMUNITY PROGRESS DAY CARE
CENTER, INC. and CONSTANCE CABELL,
INDIVIDUALLY,
Defendant.**

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The following papers numbered 1 to 8 read on this motion by defendants for an order pursuant to CPLR § 3211 (a)(1),(5) & (7), dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-6
Reply Affirmation.....	7-8

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPLR § 3211 (a)(1),(5) & (7), dismissing the complaint is granted for the following reasons:

According to the pertinent sections of the complaint, in 1996, plaintiff was hired to work at defendants' Blanche No. 2 Day Care Center. Plaintiff was subsequently promoted to Education Director of Blanche No. 2 in or around September 2003. Plaintiff claims that she was a member of Local 205, Community and Social Agency Employees Union District Council 1707, A.F.S.C.M.E., A.F.L.-C.I.O. (Local 205"). In or about July 2007, defendant Cabell, President of Blanche Community Progress Day Care Center, Inc., evaluated Plaintiff's work performance as unsatisfactory and suspended her from her employment for a period of thirty days. Plaintiff disputed her unsatisfactory evaluation and, pursuant to Article XVIII of the Collective Bargaining Agreement (" hereinafter, "CBA") between The Day Care Council and Local 205, demanded a conference to address her suspension. On August 10, 2007, at the conference, Blanche Community terminated plaintiff for, *inter alia*, using its corporate tax

exemption form to buy a laptop for herself. Plaintiff contends that the laptop was used for work purposes only and that her unsatisfactory evaluation and termination were unjustified. According to Plaintiff, pursuant to the CBA between the Day Care Council and Local 205, she requested mediation, apparently to challenge her termination. Although the mediation failed to produce a resolution satisfactory to plaintiff, the Grievance Committee of plaintiff's union elected not to pursue plaintiff's grievance to arbitration. Plaintiff claims that she has exhausted all remedies under the CBA between The Day Care Council and Local 205.

On or about November 11, 2008, plaintiff commenced this action against Defendants claiming under the first Cause of Action that her unsatisfactory evaluation was unjustified and she was wrongfully discharged; under the second Cause of Action that her discharge was based upon retaliation "of the President of the Board of Director's for plaintiff's exposure of the President's relationship and cover-up for the employee at fault."; and under the third Cause of Action that she suffered severe emotional distress. For the above, plaintiff seeks money damages in the amount of two million, seven hundred two thousand, two hundred fifty dollars.

Defendants now seek to dismiss the complaint on the grounds that a defense is founded upon documentary evidence, the action is barred by the statute of limitations, and the pleading fail to state a cause of action. Plaintiff opposes this motion.

The branch of the motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) is granted. CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence" In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" ([Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702](#); [Vanderminden v Vanderminden, 226 AD2d 1037](#); [Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248](#).)

Here, the defendants' submissions in support of its motion include the complaint, correspondence between plaintiff and defendants, the CBA and subsequent Memorandum of Understanding between the Day Care Council and plaintiff's Union, and an affidavit of defendant Cabell, President of the Blanche Community Progress Day Care Center, Inc., (hereinafter, "Blanche Community".) Defendants claim this documentary evidence shows plaintiff lacks standing to bring this action.

It is axiomatic that, absent a constitutionally impermissible purpose, a statutory proscription or an express limitation in a contract of employment, Plaintiff's employment with

the Day Care Center was terminable at any time. See, [Tramontozzi v. St. Francis College, 232 A.D.2d 629, 649 N.Y.S.2d 43 \(2nd Dep't 1996\)](#) (“It is well settled in New York State that when employment is for an indefinite term, the employee is presumed to be an employee at will, and that such employment may be terminated by either party for any reason or no reason at all.”) Plaintiff has not alleged that there was a contract of employment between herself and Blanche Community and has not alleged that she was terminated for a constitutionally or statutorily impermissible reason. As such, plaintiff’s Complaint against defendants must be dismissed as it fails to set forth a legally cognizable cause of action.

To the extent that plaintiff’s Complaint is grounded on rights that she believes she had as a member of her Union, such claims also fail to state a cause of action. “As a general proposition, when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement, but must proceed, through the union, in accordance with the contract.” [Matter of Board of Educ. v. Ambach, 70 N.Y.2d 501, 508, 522 N.Y.S.2d 831, 834 \(1987\)](#). See also [Hickey v. Hempstead Union Free School District, 36 A.D.3d 760, 829 N.Y.S.2d 163 \(2nd Dep’t 2007.\)](#) In fact, unless otherwise agreed, only when the union fails its duty of good faith representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer.” ” [Matter of Board of Educ. v. Ambach](#), *supra*.

In this case, plaintiff has not alleged that the CBA between The Day Care Council and her union provides for a direct action against Blanche Community nor does she allege that her union violated its duty of fair representation. Significantly, plaintiff has not even made her union a party to this action. Plaintiff’s union’s CBA with The Day Care Council does not provide for direct action against Blanche Community or any of the other members of The Day Care Council. As such, plaintiff has no standing to maintain an action against her employer because there was no allegation that the union had breached its duty of fair representation and the collective bargaining agreement did not grant individual employees the right to pursue contractual issues on their own. [Lundgren, supra](#). In an affidavit, submitted in her Opposition Papers, plaintiff claims that her union breached this duty. However, this affidavit fails to claim the union’s actions were arbitrary, discriminatory, or in bad faith. In fact, the affidavit merely shows plaintiff disagrees with her union’s handling of her grievance. However, the union challenged the termination in every way except submitting it to arbitration and such failure does not constitute a breach of the union’s duty of fair representation. See, [DiBenedetto v Ryan, 208 AD2d 796 \(2d Dept 1994.\)](#)

Consequently, plaintiff has failed to allege facts sufficient to show that the CBA under which she grieved her termination permits her to sue her former employer based on a contract violation or that her union violated its duty of fair representation. Accordingly, plaintiff has failed to show that she has standing to bring claims against defendants and the branch of the motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) is granted and the complaint is dismissed.

The branch of defendants' motion pursuant to CPLR 3211 (a) (5) is also granted. This section states that a party may move to dismiss one or more cause of action based on the ground that the cause of action violates the applicable statute of limitations. In the instant case plaintiff's claims are time barred pursuant to CPLR § 217 (2) (b). CPLR § 217 (2) (b) mandates that "any action or proceeding by an employee or former employer against an employer subject to article fourteen of the civil service law¹ or article twenty of the labor law, an essential element of which is that an employee organization breached its duty of fair representation to the person making the complaint, shall be commenced within four months of the date the employee or the former employee knew or should have known that the breach occurred, or within four months of the date that the employee or former employee suffers actual harm, whichever is later." CPLR § 217 (2) (b). *See also* [Dolce v. Bayport - Blue Point Union Free Sch. Dist.](#), 286 A.D.2d 316, 728 N.Y.S.2d 772 (2nd Dep't 2001) Consequently, plaintiff had four months from the date of actual harm or the date that she knew or should have known that the union allegedly breached its duty of fair representation, whichever was later, to commence action against Defendants. She failed to do so.

Plaintiff suffered actual harm on August 24, 2007, the date that her termination was effective. Furthermore, plaintiff knew or should have known about her union's alleged breach of the duty of fair representation when the union decided not to take her grievance to arbitration on or about January 7, 2008. Finally, plaintiff knew or should have known about her union's purported breach of the duty of fair representation when the National Labor Relations Board informed all parties involved, including plaintiff, that the withdrawal of the charge that she filed with the National Labor Relations Board was approved on or around February 26, 2008. Accordingly, plaintiff must have commenced this action on or before June 26, 2008. However, Plaintiff did not commence this action until on or around November 11, 2008, which is more than a year after she was terminated, more than ten months after her union decided not to take her grievance to arbitration, and almost nine months after the National

Labor Relations Board approved the withdrawal of the charges that she filed. Plaintiff's opposition is without merit since she refers to a section of law in NY Labor Law 715, that no longer exists. As such, there is no exemption for plaintiff to have brought this action within the time provision of the New York State Labor Relations Act and CPLR 217(2)(b) and the action is dismissed as time-barred, pursuant to CPLR 3211 (a) (5).

The branch of defendants' motion pursuant to CPLR 3211 (a)(7) is also granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. ([Jacobs v Macy's East, Inc., 262 AD2d 607, 608](#); [Leon v Martinez, 84 NY2d 83.](#)) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, [Stukuls v State of New York, 42 NY2d 272](#); [Jacobs v Macy's East Inc., supra](#)), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, [Rovello v Orofino Realty Co., Inc., 40 NY2d 633.](#)) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, [Rovello v Orofino Realty Co., Inc., supra](#); [Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.](#)) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, [supra](#), 770-771; [Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.](#))

In her second cause of action, Plaintiff alleges that "her dismissal was based upon the retaliation of the President of the Board of Director's (sic) for Plaintiff's exposure of the President's relationship and cover-up for the employee at fault." This activity is clearly not a protected activity subject to a retaliation claim. *See e.g.* [Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 313,\(2004.\)](#) "In order to make out a retaliation claim, plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action.") *Id.* Moreover, "filing a grievance complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws" [Pezhman v. City of New York, 47 A.D.3d 493 \(1st Dep't 2008.\)](#) Due to the fact that Plaintiff did not engage in a protected activity under New York State law, Plaintiff has not and cannot set forth a cognizable claim for retaliation. Accordingly, Plaintiff's second cause of action must be dismissed as well.

Similarly, plaintiff third cause of action must be dismissed. It is not clear from plaintiff's complaint whether she is claiming negligent infliction of emotional distress or intentional infliction of emotional distress. However, the Court finds that there is no merit to the claim of emotional distress whether is it was intentionally or negligently inflicted. Plaintiff cannot assert an emotional distress claim without being able to set forth valid claims against the defendants under the New York State law. As set forth above, there are no viable claims in the Complaint. Moreover, even if plaintiff had viable claims in her complaint, plaintiff has failed to set forth factual allegations supporting her claims of intentional and/or negligent infliction of emotional distress. The Complaint does not contain one factual allegation to support a claim that Defendants engaged in conduct "so outrageous in character, and so extreme in degree" as to warrant a claim of intentional infliction of emotional distress. *See also* [Murphy v American Home Prods. Corp., 58 N.Y.2d 293, 303, \(1983\)](#), quoting Restatement [Second] of Torts § 46, Comment d)("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").

In the instant case, plaintiff alleges that she raised certain concerns regarding Blanche No. 2's bookkeeper Lisa McCreary, that Cabell, due to her close friendship with McCreary, refused to entertain Plaintiff's criticism about McCreary and prevented plaintiff from monitoring McCreary's work, that Plaintiff was essentially held responsible for McCreary's errors and omission in bookkeeping and that Plaintiff was ultimately suspended and terminated. These alleged events do not constitute conduct so outrageous as to support a claim for intentional infliction of emotional distress. In [Lydeatte v. Bronx Overall Economic Dev. Corp., 2001 U.S. Dist. LEXIS 1670 \(S.D.N.Y. 2001.\)](#) *See also* [Fama v. Am. Int'l Group, Inc., 306 A.D.2d 310 \(2nd Dep't 2003.\)](#) Furthermore, any claim by plaintiff based on negligent infliction of emotional distress as groundless as a claim for intention infliction of emotional distress. Plaintiff has failed to allege any conduct on the part of the Defendants that endangered her physical safety or caused her to fear for her physical safety. Accordingly, any claim for intentional or negligent infliction of emotional distress must be dismissed.

For the reasons set forth above, the motion by defendants pursuant to (a)(1),(5) & (7) is granted in its entirety.

Dated: July 14, 2009

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ORIN R. KITZES, J.S.C.