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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ELIZABETH A. BERTINI **Plaintiff,** **vs.** **INSTINET GROUP, INC., JOSEPHINE ANGILLETTA, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **Defendants.**	CIVIL ACTION NO.: 03-CV-2797 (JCL) Date: Time: 9:00 a.m. Judge : The Hon. John C. Lifland, U.S.D.J.

PLAINTIFF=S BRIEF IN OPPOSITION
TO DEFENDANTS= MOTION TO DISMISS PLAINTIFF=S COMPLAINT
PURSUANT TO R. 4:6-2

Of Counsel:

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On the Brief:

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I. PRELIMINARY STATEMENT

Defendants, Instinet Group, Inc. (AInstinet@) and Josephine Angiletta (AAngiletta@) (hereinafter collectively the Adefendants@) Motion to Dismiss plaintiff, Elizabeth A. Bertini (Aplaintiff@ or ABertini@) must be denied as it is contested by material facts as they are set forth in the Certification of Elizabeth Bertini and is legally and factually flawed.

In fact, defendants purport to file a motion to dismiss Counts Six through Ten which defendants purport to be a New Jersey Wage and Hour Law Claim, a negligent supervision, retention and training count, and contractual and quasi-contractual breaches. However, Counts 6-8 are contractual and quasi contractual breaches, Count 9 is the Wage and Hour Law Claim, and Count 10 is the CEPA count. Thus, plaintiff will respond as if defendants are moving to dismiss the New Jersey Wage and Hour Law Claim, a negligent supervision, retention and training count, and contractual and quasi-contractual breaches (Counts 9, 5, 6-8). If this is not as defendants intend, then plaintiff reserves her rights accordingly to address issues not raised in defendants= underlying brief.

II. STATEMENT OF FACTS

III. ARGUMENT

A. LEGAL STANDARD FOR MOTION TO DISMISS

In determining a motion to dismiss, the court should view the record in favor of the non-moving party. Lexington Nat'l Ins. Corp. v. Ranger Ins. Co., 326 F.3d 416 (3rd Cir. 2003); Baldassare v. New Jersey, 250 F.3d 188, 191 n. 1 (3d Cir. 2001) (citing Fogarty v. Boles, 121 F.3d 886, 887 (3d Cir. 1997); Azzaro v. County of Allegheny, 110 F.3d 968, 970 (3d Cir. 1997) (en banc)). Thus, all reasonable inferences should be drawn in favor of the plaintiff. Persico v. City of Jersey City, 2003 U.S. App. LEXIS 8101 (3d Cir. Apr. 29, 2003). This is so because if a motion to dismiss is granted, it would deprive plaintiff to be allowed to offer evidence to support his claims. *See* Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974)); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997) (*citing* Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986)). Since this is a preliminary stage of the litigation, the court should not concern itself with the ability of plaintiff to prove any allegation contained in the complaint but rather assume that all such allegations are true. Somers Const. Co. v. Board of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961). Thus, AA motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief.@ *See* Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000). Based upon such a standard, defendant's motion to dismiss must fail.

MACKNIGHT WAS ILLEGALLY TERMINATED DUE TO INVENTED PERFORMANCE ISSUES.

Lucent=s argument and they thinly veiled attempt to claim that MacKnight was Aforced to retire@ is riddled with misstatements of fact and misquotations. By way of example, Lucent states in its brief that APlaintiff alleges that she was forced to retire.@ (Defendants= Brief at p.1). They reference paragraphs 26 and 27 of plaintiff=s Complaint for support of their allegation. However, plaintiff=s Complaint that defendants= cite to merely states: ADuring Mejia=s termination conference with MacKnight, Mejia told MacKnight words to the effect of, Ayou are old enough to retire, aren=t you?@...Subsequently, Mejia and other representatives of defendants contacted MacKnight repeatedly and demanded that she write a retirement letter and tell others she was retiring.@ (Walsh Cert. Exhibit AA@ &&26-27).

Plaintiff was never told that Lucent was offering her the option of retirement. (MacKnight Cert. & 6). In fact, plaintiff was told that Lucent was terminating her employment because of alleged performance issues.(MacKnight Cert. & 1). Lucent took such actions even though MacKnight made complaints of age discrimination during the time period she was notified that she was being terminated, no investigation was done that she was made aware of, and defendants indeed terminated her. (MacKnight Cert. & 8).

Defendants= attempt to try to convert MacKnight=s termination into a forced resignation must not be taken lightly. Defendants fail to quote the entirety of N.J.S.A. 10:5-12.1 in their papers to the Court. The remainder of the statute states that: ANotwithstanding any provision to the contrary of

section 16 of P.L.1945, c. 169 (C. 10:5-17) or any other law, relief ordered for or granted to a person in connection with his being required to retire in violation of the provisions of section 11 of P.L.1945, c. 169 (C. 10:5-12) shall be limited to his reinstatement with back pay and interest.@ N.J.S.A. 10:5-12.1. Thus, if the Court were to deprive plaintiff of access to the Courts and a jury, the effect would be substantial and draconian in that plaintiff=s only entitlement would be substantially limited to back pay and interest.

In light of the impact of granting defendants= motion, the facts before the Court, and the standard in determining dismissal motions, plaintiff respectfully states that the Court has jurisdiction over plaintiff=s Complaint.

In the discussions that MacKnight had with her supervisor, Mejia, he never referred to the The Forced Management Plan (AFMP@) as a retirement plan.[1] (MacKnight Cert. & 9). In fact, a letter from Mejia to MacKnight alleged that MacKnight was being terminated because her Aposition had been affected as part of the organizational redesign@ B not that she was being forced to retire.

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[1] Defendants referred to a program they offered to MacKnight as both an Involuntary Executive Separation Plan and The Forced Management Plan. (Hyderally Cert. Exhibit A1@; MacKnight Cert. & 9). For the purposes of simplicity only, but in no way limiting plaintiff=s future rights, her counsel refers to the plan as the FMP.

(Hyderally Cert. Exhibit A1@). Further, when MacKnight was given the FMP, Lucent characterized it as a severance package. (MacKnight Cert. & 7).

Additionally, while Mejia was openly displaying an animus towards older employees and engaging in age-ist actions and speech, he informed MacKnight that he took issue with her performance. (MacKnight Cert. & 10). One can only surmise that the reason defendants failed to mention this in their moving papers to the Court is because they realize the blatant factual inconsistency in the position they have taken and the facts *sub judice*. Further, defendants hired an Executive Coach due to MacKnight=s alleged performance difficulties. (MacKnight Cert. & 11). Subsequently, defendants informed MacKnight words to the effect that they had problems with her performance and were forced to terminate her. (MacKnight Cert. & 12).

Plaintiff queries if defendants are waiving the right to make the unsubstantiable arguments that she was terminated because of either performance issues or because her position was eliminated or both or whether defendants are conceding that the decision to terminate MacKnight was driven due to her age. Whatever the case may be, because plaintiff has not had the opportunity to conduct depositions, certainly a motion to dismiss at such an early stage in the litigation is premature as defendants have argued inconsistent reasons for terminating plaintiff.

Thus, even though defendants were completely inconsistent in telling plaintiff in writing that her position was being eliminated due to restructuring and orally that plaintiff had performance issues, they never orally informed plaintiff that she would be offered a forced retirement package. Additionally, upon information and belief, the FMP was offered to some younger employees of defendants; thus, upon information and belief, it was not a package that was offered only to employees who were retirement-eligible. (MacKnight Cert. & 13). Once again, due to the early stages of this

litigation and the fact that no discovery has occurred, plaintiff has not yet had the opportunity to explore this avenue of her litigation which will support the argument of age discrimination and prove that the FMP disparately impacted older employees but was not only limited to retirement-eligible employees. However, if the Court were to grant defendants= motion, plaintiff would be prejudiced in not being able to seek the discovery of facts.

In 1945, when the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (the ANJLAD@ or the ALAD@) was first enacted, the New Jersey Supreme Court held that it was a statute of the highest order whose Apurpose is >nothing less than the eradication of the cancer of discrimination.=@ Fuchilla v. Layman, 109 N.J. 319, 334,(*quoting* Jackson v. Concord Co., 54 N.J. 113, 124 (1969), *cert. den=d sub nom.* University of Medicine & Dentistry of N.J. v. Fuchilla, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). The statute was viewed as the protector of the very essence of seeking employment which was Arecognized as and declared to be a civil right.@ N.J.S.A. 10:5-4. In the monumental case of Lehmann v. Toys R US, Inc., the New Jersey Supreme Court held that Athe LAD was enacted to protect the fundamental principle of our society of a discrimination-free workplace as well as the protection of the civil rights of individual aggrieved employees@ such as the plaintiffs. Lehmann v. Toys R Us, Inc. , 132 N.J. 587 (1993) *citing* Fuchilla, *supra*, 109 N.J. at 335. In fact, the Supreme Court of this State has repeatedly ruled that the NJLAD is remedial social legislation that Ais deserving of a liberal construction.@ Clowes v. Terminix Int=l, Inc., 109 N.J. 575, 590 (1988); *e.g.*, Andersen v. Exxon Co., 89 N.J. 483, 495, 446 A.2d 486 (1982).

Defendants cite to Scudder v. Media General, Inc., Civ.Act.No. 95-1073, 1995 WL 495945 (D.N.J. 1995) as their central support for their argument. However, the facts in Scudder are dramatically different from the facts *sub judice* in stark contrast to defendants= representation in their moving papers.

In this case, MacKnight did not become a bona fide executive until October 3, 1999 when she was promoted to the executive level position of Vice President. (MacKnight Cert. & 14). Prior to her promotion, she was a mid-level manager and not an upper level executive or in a high policy-making position. (MacKnight Cert. & 15). Her termination date was April 15, 2001. (MacKnight Cert. & 16). Thus, she was not a bona fide executive or in a high policy-making position for two years preceding her termination. (MacKnight Cert. & 17). *See* NJSA 10:5-12(a). Thus, there is no exclusion in coverage of the LAD to the plaintiff.

In Scudder, the court found persuasive the fact that the impact of depriving plaintiff of access to the Courts was not that significant an act as Scudder Afail[ed] to state a claim under the statute.@ Scudder, *supra* at *9. In fact, the Court ruled that Asummary judgment should be granted to defendants *on the ground* that Scudder is within the executive exception to NJLAD=s age discrimination protection.@ Scudder, *supra* at *10 (emphasis added). This is certainly not the case before the Court as stated above. Thus, defendants= argument must fail.

Additionally, defendants= claim that the Court should, in essence, interpret the LAD narrowly is completely at odds with the Supreme Court of this State that has repeatedly ruled that the NJLAD is remedial social legislation that Ais deserving of a liberal construction.@ Clowes v. Terminix Int=l,

Inc., 109 N.J. 575, 590 (1988). Thus, defendants= argument must fail and plaintiff should not be deprived of pursuing her cause of action before the courts of this State.

III. THIS COURT HAS JURISDICTION OVER ALL AND EACH OF PLAINTIFF=S COUNTS.

MacKnight sets forth four separate causes of action -- one based in part upon the impact of certain age-ist policies of defendants such as their intent to terminate her; one based in part upon the age-ist treatment of MacKnight in claiming that she was a poor worker and later that her position was Aeliminated[2]@ and finally terminating her; and one based upon defendants= negligent hiring, retention, training, and supervision. Each of plaintiff=s causes of action are separate and independent of each other and certainly plaintiff=s disparate treatment claim is based upon the treatment of plaintiff=s beyond her termination.

As stated in plaintiff=s Complaint, Afrom the onset of MacKnight's interaction with Mejia she was subjected to numerous age-ist comments by Mejia to include but not be limited to constant statements that he wanted young blood in the company, that the reason he was promoted was because he had black hair, and questions pertaining to MacKnight=s eligibility for

[2]Macknight=s position was not terminated as set forth in her Complaint. (Walsh Cert. Exhibit AA@ &29).

retirement. Additionally, Mejia made numerous comments at employee gatherings that he wanted the Anew@ and not the Aold@ and referred to some associates as Agray beards@ or Awhite hairs@... On February 28, 2001, Mejia stated during a speech words to the effect of Al=m obviously representing Lucent, the new Lucent...We=re making some significant changes...creating a new company. I tell the officers of the company, I know why I am chief operating officer... I still have black hair, and I have a lot of it.@ (Walsh Cert. Exhibit AA@ && 16,18). Thus, plaintiff=s complaints of age discrimination substantially preceded the date of her termination.

D. MACKNIGHT CAN MAINTAIN HER NEGLIGENT HIRING, SUPERVISION, TRAINING, AND RETENTION CLAIM.

Defendants= heading to its= Point III only disputes the validity of Plaintiff pursuing a ANegligent Hiring/Negligent Supervision@ claim and not Negligent Training or Negligent Retention. Thus, Defendants waive any argument as to disputing the validity of plaintiff=s Negligent Training or Negligent Retention claim.

Further, the New Jersey Supreme Court recognized a cause of action for negligent hiring/retention of employees in DiCosala v. Kay, 91 NJ 159 (1982). Further, New Jersey courts have allowed common law torts to survive, even where Plaintiff has made claim to a violation of some other state law or public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). This has been particularly so where the discharge is in retaliation for the exercise of state rights and obligations. *See* Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A.2d 237 (1988) (discharge of at-will employee in retaliation for requesting information relevant to suspected employment discrimination); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (App.Div.1980), aff'd 85 N.J. 668, 428 A.2d 1317 (1981) (discharge of at-will employee in retaliation for filing workers' compensation claim); Kalman v. Grand Union Co., 183 N.J.Super. 153, 443 A.2d 728 (App.Div.1982) (discharge of at-will pharmacist in retaliation for keeping pharmacy open contrary to employer's directive but as required by state rules). Further, the courts have allowed state common-law tort claims for retaliation to survive even though the Plaintiff has alleged an independent statutory cause of action that includes a retaliation component. Lepore v. National Tool and Mfg.Co., 540 A.2d 1296, 1306 (App. Div.

1988) (wrongful discharge in retaliation for reporting safe workplace violations was not preempted under Federal Occupational Safety and Health Act, notwithstanding fact that Act prohibited retaliatory discharges and established enforcement procedures encompassing remedy therefor, where Act did not expressly prohibit state from providing aggrieved employee with alternative remedy, and tort claim did not seek to remedy violation of Act but rather violation of state laws and public policy.).

Additionally, defendants= claim that plaintiff cannot maintain her negligent hiring, supervision, training, and retention is not consistent with the Court=s ruling in Schmidt v. Smith, 294 N.J.Super. 569, 591, 684 A.2d 66 (App.Div.1996), aff'd, 155 N.J. 44, 713 A.2d 1014 (1998). The Schmidt court favorably cited to Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co., 675 F.Supp. 44 (D.N.H.1987). In Semionole, the Court reasoned that the corporate employer could be liable for its supervisory employees' alleged wrongdoing on the basis of negligent supervision and/or failure to investigate. Semionole *supra* at 47.

Plaintiff=s allegation of negligent hiring, supervision, training, and retention is certainly connected to her claim of age discrimination in that she claims that the employer failed to

supervise and retained Mejia in the face of her complaints of him discriminating against her based upon her age. Further, MacKnight claims in her complaint that Lucent supported Mejia by intentionally agreeing to terminate her as an employee of Lucent. Thus, liability attaches to Lucent for supporting such age discriminatory actions by MacKnight=s supervisor. *See* Lehmann v. Toys-R-Us, Inc., 132 N.J. 587 (1993).

The New Jersey court in Schmidt, the seminal case in the area of Worker=s Compensation, went on to state:

> Clearly, there is no language in the LAD that mandates that claims made by employees against employers under it may only be brought under the Workers' Compensation Act. N.J.S.A. 10:5-1 to -42. Indeed, the Legislature's intent in enacting the LAD appears otherwise. Its intent was to have the LAD broadly applied and liberally construed.
>
> The pertinent portion of the act provides: Such harms have under common law given rise to legal remedies including compensatory and punitive damages. The legislature intends that such damages be available to all persons protected by this

act and that this act be liberally construed in combination with other protection available under the laws of this state. [N.J.S.A. 10:5-3]. Further, the LAD was specifically amended in 1990 to grant a plaintiff under the Act the right to a jury trial. *L.*1990 *c.*12. If the Legislature had intended workers compensation to be the exclusive remedy for victims of harassment and discrimination in the workplace it would not have provided for a jury trial as well as compensatory and punitive damages.

Schmidt v. Smith, 294 N.J.Super. 569, 585-586, 684 A.2d 66,74-75 (App.Div.1996), aff'd, 155 N.J. 44, 713 A.2d 1014 (1998).

Based upon such an analysis it flows logically that where employers have an affirmative duty to investigate claims of sexual harassment or discrimination and deal appropriately with the offending personnel under the discrimination and sexual harassment statutes, because failure to investigate gives tacit support to the discrimination and because the absence of sanctions encourages abusive behavior, that MacKnight should be allowed to maintain her cause of action

arguing negligent hiring, supervision, training, and retention before this Court. *See, e.g.* Lehmann v. Toys-R-Us, Inc., 132 N.J. 587 (1993); Munford v. James T. Barnes & Co., 441 F.Supp. 459, 466 (E.D.Mich.1977). Based upon this type of analysis, courts ruled that the corporate defendant could be liable for the alleged wrongdoings for its own negligent supervision and failure to undertake an investigation to find out what was taking place. *See,* Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co., 675 F.Supp. 44 (D.N.H.1987); American States Ins. Co. v. Borbor By Borbor, 826 F.2d 888, 892 (9th Cir.1987).[3] In essence, the claim of negligent retention, supervision, hiring, and training is one aimed at the employer for wilfully failing to furnish a safe place to work. Thus, because the misconduct rises to the level

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[3] In fact, by way of comparison only, as Pennsylvania has a different Worker=s Compensation Act than New Jersey=s, The Supreme Court of Pennsylvania has stated that "the spirit and intent of the [Workers= Compensation] Act is not violated by permitting an employee injured by a co-worker for purely personal reasons to maintain a negligence action against his employer for any associated negligence in maintaining a safe workplace." Pryor v. Mercy Catholic Medical Center, 1999 WL 956376 E.D.Pa.,1999, (*citing* Kohler v. McCrory Stores, 532 Pa. 130, 615 A.2d 27, 31 (Pa.1992)) (emphasis added); see also Merritt, 1999 WL 285900, at *6-7 (Sexual harassment claim holding that a negligent supervision claim is not barred by the WCA).

of an intentional act, a plaintiff should not be barred from pursuing such a cause due the Worker=s Compensation Act.

CONCLUSION

Thus, defendants= motion to dismiss must fail as this Court has sufficient jurisdiction over Plaintiff=s Complaint and Plaintiff can maintain her negligent hiring, supervision, training, and retention claim.

Dated: June ___ , 2001

Place: Teaneck, NJ

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