

CV 05 2875 (RJD)(LB)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GLORY OSENI

Plaintiff,

-against-

TRISTAR PATROL SERVICES and NYC
DEPARTMENT OF EDUCATION

Defendants

**REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF DEPARTMENT OF EDUCATION'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for NYC Department of Education
100 Church Street, Room 2-103
New York, N.Y. 10007

Of Counsel: Jonathan Bardavid

Tel: (212) 788-6838

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

GLORY OSENI

Plaintiff,

CV 05 2875 (RJD)(LB)

-against-

TRISTAR PATROL SERVICES and NYC
DEPARTMENT OF EDUCATION

Defendants

----- x

**REPLY MEMORANDUM OF LAW IN
FURTHER SUPPORT OF DEPARTMENT OF
EDUCATION’S MOTION FOR JUDGMENT
ON THE PLEADINGS**

PRELIMINARY STATEMENT

Defendant, New York City Department of Education (“DOE”) has moved for judgment on the pleadings as plaintiff cannot state a *prima facie* case under Title VII as the DOE was not plaintiff’s employer. In opposition plaintiff simply repeats the allegations set forth in her complaint and argues that an employee of the DOE caused her employer to fire her and under the law of master servant the DOE should be held liable. As set forth in DOE’s moving papers and herein Title VII only provides for causes of action against one’s employer. The plaintiff admits in her complaint and in her opposition papers that she was employed by defendant Tristar Patrol Services and not the DOE. As such all Title VII claims against the DOE must be dismissed.

ARGUMENT

POINT I

THE DOE IS ENTITLED TO JUDGMENT ON THE PLEADING AS THE DOE WAS NOT PLAINTIFF'S EMPLOYER

Plaintiff brings this action against the DOE under Title VII. However, the law is clear that only the plaintiff's employer or prospective employer can be sued under Title VII. See 42 U.S.C. §§ 2000 e (b); see also Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir., 1996) ("Title VII is an employment law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers."); Tomka v. Seiler, 66 F.3d 1295, 1317 (2d Cir. 1995). In order to be considered an employer under Title VII the Second Circuit has held that as a threshold matter the plaintiff must establish that she received some form of financial benefit directly from the alleged employer. See York v. Assoc'n of the Bar, 286 F.3d 122, 125-26 (2d Cir. 2002). As set forth more fully in DOE's moving papers plaintiff candidly admits in her complaint that she was employed by Tristar Patrol Services ("Tristar") and plaintiff cannot establish that she received any form of remuneration from the DOE. See Memorandum of Law in Support of Defendant Department of Education's Motion for Judgment on the Pleadings, dated January 18, 2006 at pp. 4-6.

In opposition to DOE's motion plaintiff does not dispute that she was employed by Tristar nor does she dispute that Tristar paid her salary and all provided her benefits. Rather, plaintiff alleges that the DOE should be held liable under Title VII because an employee of the DOE, Lisa Cadavillo, allegedly caused her employer to terminate her employment. See Opposition to the Motion of Second Defendant; NYC Department of Education, dated March 28, 2006 ("Plaintiff Opp.") at p.1. Plaintiff goes to great lengths to argue that Ms. Cadavillo is a

DOE employee and under the “law” of master-servant the DOE should be held liable. Id. A “master-servant” relationship between the alleged discriminator and the defendant is not the test for determining if one is an employer under Title VII. As noted above, for the purposes of Title VII the Second Circuit has established a two-prong test for determining whether one is an employer under Title VII. See York v. Assoc'n of the Bar, 286 F.3d at 125-26. The first prong requires the plaintiff must establish that she received some form of financial benefit directly from the alleged employer. Id. The mere fact that Ms. Cadavillo received a salary from the DOE does not create a financial relationship between the plaintiff and the DOE. As such this claim fails.

Along those lines plaintiff also argues that when assigned by Tristar to the DOE location her name appeared on a schedule with other DOE employees and that a DOE employee signed her time cards. See Plaintiff Opp. at p. 2. The mere fact that plaintiff’s name appeared on a schedule prepared by the DOE does not alter the fact that plaintiff was employed by the Tristar. Again “[t]o be considered an employer, the Second Circuit has held that a direct remunerative relationship must exist between the two parties.” See Nicolae v. N.Y. State Office of Voc. & Educ. Servs. for Individuals with Disabilities, 2005 U.S. Dist. LEXIS 13651, 6-7 (E.D.N.Y. 2005); see also U.S. v. City of New York, 359 F.3d 83, 91-92 (2d Cir. 2004). As the plaintiff cannot establish that she received any direct or indirect remuneration from the DOE, as a matter of law, the DOE was not plaintiff’s employer under Title VII. Id. Accordingly, the complaint as it pertains to the DOE must be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, and for those reasons set forth in DOE’s motion for judgment on the pleadings, defendant DOE respectfully requests that this Court grant its’ motion

for judgment on the pleadings, and dismiss plaintiff's Complaint as it pertains to the DOE in its entirety¹.

Dated: New York, New York
April 10, 2006

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendant Department of
Education
100 Church Street, Room 2-103
New York, New York 10007-2601
(212) 788-6838

By:



Jonathan Bardavid (JB0072)
Assistant Corporation Counsel

Robert Katz
Jonathan Bardavid,
Of Counsel

¹ To the extent this Court dismisses the complaint as it pertains to the DOE, the Court should also dismiss Tristar Patrol Services' cross-claim against the DOE as a cross claim can only be asserted by a by a co-party. See Fed. R. Civ. P. 13(g); Wake v. United States, 1996 U.S. App. LEXIS 35578, *28 (2d Cir. 1996) (noting "[s]ince all claims against the federal defendants had been dismissed at the time Norwich filed its motion, they were no longer parties and Norwich therefore could not assert a cross-claim against them.")

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2006, I caused a true and correct copy of the foregoing **Reply Memorandum of Law In Further Support of Department Of Education's Motion for Judgment on the Pleadings** to be served on Glory Oseni, *Pro-Se* Plaintiff, 41-02 Vernon Boulevard, Apartment # 1F, Long Island City, New York 11101 that being the address designated by plaintiff for such mailings, by placing a copy of the foregoing in a pre-addressed, stamped envelope, and placing that envelope in a depository under the exclusive care and control of the United States Postal Service.



Jonathan M. Bardavid (JB0072)
Assistant Corporation Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2006, I caused a true and correct copy of the foregoing **Reply Memorandum of Law In Further Support of Department Of Education's Motion for Judgment on the Pleadings** to be served on Culleton, Marinaccio & Foglia, Attorneys for Tristar Patrol Services, at 245 Main Street, White Plains, New York 10691 that being the address designated by Tristar Patrol Services for such mailings, by placing a copy of the foregoing in a pre-addressed, stamped envelope, and placing that envelope in a depository under the exclusive care and control of the United States Postal Service.



Jonathan M. Bardavid (JB0072)
Assistant Corporation Counsel