SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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POLLYANN DIXON,

Plaintiff,

- v -

CITY OF NEW YORK, JOSEPH PROFETA

Defendant.

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INDEX NO. 161050/2022

MOTION DATE 02/16/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 34, 35

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiff Polyann Dixon (referred to as "Plaintiff") moves, pursuant to CPLR §2221(d), to reargue this court's February 13, 2024 Decision and Order that dismissed Plaintiff's complaint. Defendants, namely the City of New York (referred to as the "City") and Joseph Profeta (referred to as "defendant Profeta") (collectively identified as "defendants"), oppose the motion. For the reasons stated herein, the motion to reargue is granted. Furthermore, upon reargument, Plaintiff's cross-motion to amend is granted and defendants' motion to dismiss is denied to the extent indicated herein.

A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (*see* CPLR § 2221 [d][2]). To succeed on a motion for reargument, the movant must demonstrate that the court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to re-litigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co*., 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc*., 10 AD3d 374 [2d Dept 2004] *see also DeSoignies v. Cornasesk House Tenants' Corp*., 21 AD3d 715 [1st Dept 2005]).

Here, in its initial decision, the court erred when applying the standards applicable to discrimination claims litigated under the New York State Human Rights Law ("NYSHRL") (N.Y. Executive Law § 290 et seq.) and under the New York City Human Rights Law ("NYCHRL") (N.Y.C Admin. Code § 8-101 et seq.). Indeed, Plaintiff correctly highlights that the standard under the NYSHRL was amended to be construed like the NYCHRL for "conduct after the amendment's effective date of August 12, 2019" (*see Henry v. Rising Ground*, 2022 NY Slip Op 31859[U], *18 [Sup Ct, NY County 2022][internal citations omitted]). Accordingly, this court erred in its initial

determination by not considering Plaintiff's discrimination claims under the NYSHRL and the NYCHRL using the same standard.

The court further erred in denying Plaintiff's cross-motion to amend due to an incorrect factual finding that Plaintiff's proposed amended complaint (NYSCEF Doc No. 11) was largely indistinguishable for Plaintiff's initial complaint. To the contrary, Plaintiff's proposed amended complaint highlighted changes in red ink that shed additional context to Plaintiff's pleaded allegations.

Finally, this court's initial decision interpreted Plaintiff's complaint as requiring a more exacting standard than notice pleading. Contrary to that determination, the criterion for establishing whether a complaint should be dismissed pursuant to § 3211(a)(7) is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR § 3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [motion must be denied if "from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]). The court's inquiry is limited to determining whether the complaint states any cause of action, not whether there is evidentiary support for it (*Krause v Lancer & Loader Group, LLC*, 965 NYS2d 312 [Sup Ct, NY County 2013]). Moreover, employment discrimination cases are generally reviewed under a notice pleading standard, which requires that plaintiff only give defendant "fair notice" of the nature and grounds of the claims (*id.*). As such, a plaintiff need not plead specific facts (*id.*). Indeed, complaints in employment discrimination cases are held to lesser pleading standards (*Vig v. New York Hairspray Co.*, LP, 67 A.D.3d 140 [1st Dept 2009], *lv denied* 19 NY3d 807 [employment discrimination claims reviewed under notice pleading standards and need not plead specific facts establishing prima facie claim]).

Considering these legal and factually deficiencies, the court grants Plaintiff's application for reargument as it relates to Plaintiff's cross-motion to amend and defendants' application for dismissal of Plaintiff's claims pursuant to § 3211(a)(7). Likewise, the court grants reargument with respect to Plaintiff's claim for punitive damages with respect to defendant Profeta. The court notes that reargument is not granted, however, with respect to the branch of this court's decision and order that found that Plaintiff's NYSHRL and NYCHRL claims are partially time-barred. Indeed, Plaintiff has not sought to reargue that branch of the court's determination. As such, any alleged conduct that occurred prior to December 28, 2019, including but not limited to any claims related to Plaintiff's 2016 and 2018 pregnancies, remains dismissed as untimely.

Plaintiff Has Sufficiently Alleged Race and Gender Discrimination

Upon reargument, this court finds that Plaintiff has sufficiently alleged race and gender discrimination claims. To be sure, "[t]o state a discrimination, claim under the NYCHRL, a plaintiff must allege "(l) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was treated differently or worse than other employees, and (4) that

the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination" (*Harrington v. City of New York*, 157 AD3d 582 [1st Dept 2018]). Here, Plaintiff has sufficiently pleaded gender discrimination. Indeed, Plaintiff pleaded that she is a member of a protected class in that she is a woman. In addition, she alleges that she always performed her job duties as a detective in a satisfactory manner. Plaintiff further pleads with particularity that she was denied overtime, lucrative transfers, and promotions due to her gender while similarly situated male police officers were treated differently. These paragraphs are enough to defeat defendants' motion as to the gender claim (*compare Eric H. Green & Assocs. v. Jennings Tolbert*, 306 A.D.2d 3 [1st Dept 2003] [finding of discrimination supported by evidence that complainant's request for leave was denied while her male counterparts were permitted to take leave], *with Tucker v. Battery Park City Parks Corp*., 227 AD2d 318 [1st Dept 1996] [discrimination claim dismissed as plaintiff failed to allege disparate treatment of similarly-situated employees]).

Plaintiff has also sufficiently pleaded race discrimination. Plaintiff pleads that she is a member of a protected class in that she is Black. Again, she further asserts that she always performed her job duties as a detective in a satisfactory manner. Plaintiff then pleads with particularity that she was denied overtime, lucrative transfers, and promotions due to her race. Plaintiff further pleads numerous examples of unwarranted discipline (*Mirro v. City of New York*, 159 AD3d 356 [2d Dept 2018]["Allegations that disciplinary charges were based on discrimination sufficient to state cause of action"], like the exclusion from precinct events (*see Walker v. Triborough Bridge and Tunnel Authority*, 220 AD32 554 [1st Dept 2023]).

Plaintiff Has Sufficiently Alleged Hostile Work Environment

"Under the NYCHRL, a plaintiff claiming a hostile work environment need only demonstrate that he or she was treated 'less well than other employees' because of the relevant characteristic" (*Bilitch v New York City Health & Hosp. Corp*., 194 AD3d 999, 1003 [2d Dept 2021], *quoting Reichman v City of New York*, 179 AD3d 1115, 1118 [2d Dept 2022]). Here, Plaintiff pleads that she was treated worse due to her race and gender. Specifically, Plaintiff states within her complaint that men in the command did not have disrupted childcare, were granted transfers, were not forced to complete work before being granted lucrative transfers, received less discipline, were given more overtime, were not given additional assignments while waiting to transfer, were granted vacations, had approved childcare arrangements, and submitted for and received promotions. Further, Plaintiff underscores a comment defendant Profeta allegedly made in which he indicated that he did not want another Black woman he forced out to return to his command. Accordingly, upon reargument, the court finds that Plaintiff has sufficiently alleged a hostile work environment.

Plaintiff Has Sufficiently Alleged Retaliation

To establish a prima facie retaliation claim, a plaintiff must show: (1) that she engaged in a protected activity; (2) that the employer was aware of the protected activity; (3) that the employer took an adverse employment action against her; and (4) that her protected activity and the adverse employment action were causally related (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004]). Here, viewing the complaint in the light most favorable to Plaintiff, it is axiomatic that she engaged in protected activity in January 2020 when she complained about disparate treatment

related to childcare issues (*see Mitchell v. TAM Equities, Inc.* 27 AD3d 703 [2d Dept 2006]["Complaint to supervisor of discrimination is protected activity"]). Plaintiff likewise alleges that she was thereafter subjected to retaliatory actions. Consequently, upon reargument, the court finds that Plaintiff has sufficiently stated a claim for retaliation (*see Brightman v. Prison Health Svces., Inc.*, 62 AD3d 472 [1st Dept 2009] [plaintiff stated retaliation claim by alleging, among others, that defendants gave her more onerous workload than her similarly-situated colleagues]; *see also Clifton Park Apts. LLC v. New York State Div. of Human Rights*, --- N.E.3d ---, 2024 NY Slip Op 00793 [2024]).

Plaintiff Has Sufficiently Alleged Religious Discrimination Failure to Accommodate

The NYCHRL mandates that an employer must provide a reasonable accommodation for an employee's religious needs if those needs are affected by the conditions of their employment (N.Y.C. Admin. Code § 8-107[3][a]). A reasonable accommodation, in this context, refers to adjustments made to accommodate an employee's religious observances without imposing an "undue hardship" on the employer (*id.* § 8-107[3][b]). In this case, Plaintiff explicitly states that she requested an accommodation, was initially denied, appealed the decision, and was denied a second time. Plaintiff provides detailed allegations that accommodating her would not impose a hardship on defendants, and she asserts that she could still fulfill the essential duties of her job with the accommodation. Consequently, upon reargument, the court finds that Plaintiff has sufficiently alleged the elements of a failure to accommodate claim. It will be defendants' responsibility, during the trial, to demonstrate that they were unable to accommodate the due to hardship (*see Genesee Hospital v. State Division of Human Rights*, 409 NE2d 955 [1980]).

Punitive Damages

Finally, upon reargument, the court underscores that the court's determination on the initial motion with respect to punitive damages related only to the City. To be sure, the court reiterates that Plaintiff may not recover punitive damages against the City under Section 8-502 because the statute lacks a provision that waives the City's common law immunity from such liability (*see Krohn v. N.Y. City Police Dep't*, 2 NY3d 329, 333 [2004]). However, Plaintiff can bring a claim for punitive damages against defendant Profeta. Indeed, it is well settled that punitive damages against individual defendants of a municipality are allowed (*see Milliken v. Town of Cornwall* 293 AD2d 584 [2d Dept 2002] *citing Smith v. Wade*, 461 US 30, 56 [1983]). Accordingly, upon reargument, the court clarifies that Plaintiff may ultimately seek punitive damages, if appropriate, with respect to defendant Profeta.

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion to reargue is granted; and it is further

ORDERED that, upon reargument, Plaintiff's motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

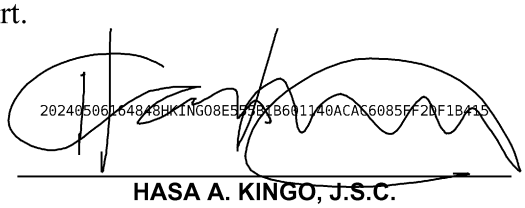
ORDERED that, upon reargument, defendants motion is denied, in part, and Plaintiff's complaint is restored to the extent that the court finds that Plaintiff has sufficiently pleaded race and gender discrimination claims, a hostile work environment claim, a retaliation claim, and a failure to accommodate claim; and it is further

ORDERED that the Clerk of the Court is directed to restore Plaintiff's case to the court's calendar accordingly; and it is further

ORDERED that. upon reargument, the court clarifies that Plaintiff may ultimately seek punitive damages, if appropriate, with respect to defendant Profeta; and it is further

ORDERED that counsel are directed to appear for a conference in the Differentiated Case Management Part, Room 103, of the courthouse located at 80 Centre Street, on June 11, 2024 at 2:00 PM.

This constitutes the decision and order of the court.



5/6/2024
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE