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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Heather Foley

INDEX NO. 114157/06

MOTION DATE 10/3/07

- v -

MOTION SEQ. NO. 002

Town Sports International et.al

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the plaintiff's motion to amend the second verified amended complaint is granted, except as to plaintiff's claims for constructive termination and intentional infliction of emotional distress; and it is further

ORDERED that plaintiff serve a copy of this order and memorandum decision with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/17/07

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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HEATHER FOLEY,

Index No. 114157-2006

Plaintiff,

-against-

DECISION/ORDER

TOWN SPORTS INTERNATIONAL, D/B/A
NEW YORK SPORTS CLUB A/K/A
TOWN SPORTS INTERNATIONAL LLC, AND F/K/A
TOWN SPORTS INTERNATIONAL, INC.
MARGARET M. STEVENS, FREDERICK TALTY,
ROBERT GIARDINA,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this employment discrimination action, plaintiff Heather Foley ("plaintiff") moves in accordance with a prior order of this Court, dated June 27, 2007 and pursuant to CPLR 3025, to amend the second amended complaint against defendants, Town Sports International, d/b/a, New York Sports Club a/k/a, Town Sports International LLC ("TSI"), and f/k/a Town Sports International, Inc., Margaret M. Stevens ("Ms. Stevens"), Frederick Talty ("Mr. Talty") (collectively, "defendants") and Robert Giardina. This action arises out of plaintiff's employment at various health clubs owned and/or managed by defendants.

In plaintiff's third amended verified complaint, she alleges employment discrimination based on gender, hostile work environment, constructive discharge and intentional infliction of emotional distress.

Plaintiff seeks to amend the preliminary statement and more clearly set forth material, factual information specifically clarifying and supporting the various causes of action against

defendants. Plaintiff argues that defendants would not be prejudiced by the amendment as the previous verified complaints were all served upon defendants within the last 6 months, and the allegations sufficiently give notice of the claims asserted by Plaintiff.

In opposition, defendants argue that leave to file a third amended verified complaint should be denied with prejudice because the proposed amendments are futile as a matter of law. According to defendants, any of Plaintiff's claims arising prior to October 2, 2003 are time-barred. Further, the allegations regarding defendants' conduct on or after October 2, 2003 fail to state a cause of action for discrimination as a matter of law. Plaintiff's new allegations relate to communications that the plaintiff purportedly had with defendants Mr. Talty and Mrs. Stevens on October 2nd and October 3rd. However, such alleged communications clearly relate to plaintiff's work performance and do not support an inference of unlawful discrimination. And, the stray remarks by Mrs. Stevens that plaintiff was the last person Mrs. Stevens would expect to become pregnant is inconsistent with the claim that Mrs. Stevens took adverse employment action against the plaintiff.

In addition, the conduct complained of does not rise to the level of severity or pervasiveness to sustain a claim for hostile or abusive work environment.

Furthermore, plaintiff's cause of action sounding in constructive discharge is futile, in that it is time-barred and plaintiff failed to allege that defendants made working conditions so intolerable that a reasonable person would have felt compelled to resign. The fact that defendants asked plaintiff to stay after she purportedly quit belies the claim that conditions were so intolerable that she had no choice but to leave. And, defendants' alleged extra attention to plaintiff's performance and questions about her plans for another child is not enough to create a

claim for constructive discharge.

Finally, the third cause of action sounding in intentional infliction of emotional distress is futile because it is barred by the applicable one-year statute of limitations and fails to sufficiently plead extreme and outrageous conduct. Since plaintiff failed to allege that defendants committed any misconduct towards plaintiff after she allegedly resigned from TSI in October 2003, such claim is barred. Moreover, the verbal interactions with plaintiff's supervisors do not rise to the level of "extreme and outrageous" behavior.

In reply, plaintiff argues that her allegations show discriminatory conduct within the limitations period sufficiently similar to the alleged conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice, and that plaintiff's claim is therefore timely in its entirety under the continuing violation doctrine. Plaintiff's detailed description of the discriminatory acts identifies the singular nature of the discrimination and harassment, sufficient to invoke application of the continuing violation doctrine.

Furthermore, plaintiff has sufficiently stated causes of action for intentional infliction of emotional distress and punitive damages. And, any statute of limitations bar to the claim of intentional infliction of emotional distress has been waived by defendants since they failed to raise that issue in their first motion.

ANALYSIS

It is well settled that leave to amend an answer pursuant to CPLR §3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st

Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dep 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Consistent with these principles, the Court granted defendants' previous motion to dismiss the plaintiff's verified complaint "without prejudice to permit plaintiff to seek leave to serve an amended verified complaint alleging, in sufficient detail, specific acts performed by specific persons during the period of September 3, 2003 and the date of plaintiff's resignation or constructive discharge . . . .") (June 27, 2007 order).

In her third amended verified complaint, plaintiff alleges that she was with TSI for a total of 9 years and 5 months. In 2001, after receiving years of promotions and bonuses, Mrs. Stevens told plaintiff that the CEO, Mark Smith advised that plaintiff would be promoted to Director by the spring or fall of 2002. Plaintiff became pregnant soon after that conversation and upon advising Mrs. Stevens, Mrs. Stevens responded "Great, now you're going to get stupid on me." When the time came for the promotion, Dan Nolan, corporate sales manager was promoted to Director instead of plaintiff. When plaintiff spoke to the CEO, he was surprised. When plaintiff confronted Mrs. Stevens, plaintiff was told that "TSI was not ready yet for that position."

During a monthly sales meeting with Mrs. Stevens and her supervisor Fred Talty, Mrs. Stevens asked plaintiff if she planned on having more children and when plaintiff would be

turning 40. Plaintiff responded that she was considering having a second child.

Almost immediately thereafter, Mr. Talty began a campaign to harass and discredit the plaintiff. Mr. Talty made "frequent derogatory generalizations about [her] performance[,]" complained of his inability to reach plaintiff, and questioned her attendance at work at the health clubs. On one occasion, Mr. Talty requested that she attend an unscheduled meeting, which caused plaintiff to become sick for that weekend since "being pulled from your region for an unscheduled meeting . . . meant you were being seriously reprimanded or fired." During that unscheduled meeting, Mr. Talty expressed concerns about plaintiff's accessibility, presence in the health clubs, and work hours. Despite her superior work performance, Mr. Talty continually harassed plaintiff while other non-child bearing or male supervisors were not harassed in any manner. When plaintiff questioned Mrs. Stevens as to whether Mr. Talty's behavior had anything to do with her having children, Mrs. Stevens advised plaintiff to keep such concerns to herself.

At a meeting in June 2003, Mr. Talty, in the presence of "Kelly Bubolo" gave plaintiff a "communication notice," (notification of an adverse performance issue), which contained no details or examples. Plaintiff approached Mrs. Bubolo before leaving the building and asked her to intervene on plaintiff's behalf.

In September 2003, plaintiff received the worst review of all the Sales Managers in her "group." When plaintiff attempted to resign, Mrs. Stevens urged plaintiff to reconsider and that she would take steps to implement changes. However, no changes were made.

During the period following September 2003 through October 2003 period, Mr. Talty called plaintiff to discuss her resignation, asked for items he claimed he needed that she had

already provided, and avoided plaintiff at meetings, except to express his concern about plaintiff's consultant's abilities on the new computer system. Mr. Talty also left three voice mails asking where plaintiff's report was.

On September 17, 2003, Mrs. Stevens and Mr. Talty attended plaintiff's regional meeting and asked again when plaintiff planned to have another child. She made numerous comments about how much more pressure there would be. On September 18th, plaintiff complained to Human Resources that she felt harassed by Mr. Talty and that she was constantly subjected to Mrs. Steven's "discriminatory comments and treatment," and was advised that it would be looked into.

On September 24th, plaintiff was chastised *via* voice mail by Mr. Talty for not having final totals. Further, on October 2nd and 3rd, Mr. Talty called for plaintiff to send items that she had already sent and continued to make unfounded comments about plaintiff's untimely submissions. According to plaintiff, other Sales Managers were not being barraged with phone calls of this nature. Human Resources advised plaintiff on October 3rd that there was nothing that could be done about the behavior of Mr. Talty and Mrs. Stevens. Also on October 3rd, Mrs. Stevens asked plaintiff if she was trying for a second child because the clock was ticking, as plaintiff was the last person on her staff that she had to be concerned with about becoming pregnant. On October 3rd, plaintiff left her position.

It is uncontested that the gender discrimination and harassment claims as alleged in the proposed third amended verified complaint are governed by a three-year statute of limitations (*see also* CPLR §214 [2]; *Koerner v State*, 62 NY2d 442, 447 [1984]; *Amalia Cordone v Wilens*, 286 AD2d 597, 730 NYS2d 89 [1st Dept 2001]). It is settled that an employment discrimination

claim accrues on the date when the employee receives definite notice of the allegedly discriminatory decision (*Roddini v City Univ. of New York*, 2003 WL 435981 [SDNY 2003] *citing Delaware State Coll. v Ricks*, 449 US 250, 258 [1980]; *Amalia Cordone v Wilens*, 286 AD2d 597, 730 NYS2d 89, *supra*).[1] "The focus, therefore is on the date on which the [employer] established and communicated their official position with respect to plaintiff's employment" (*Roddini v City Univ. of New York*, 2003 WL 435981 at 5). Each discrete discriminatory act or determination starts a new clock for filing charges alleging that act (*Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130 [2d Cir 2003]). Discrete discriminatory acts, *to wit*: single completed actions such as termination, failure to promote, denial of transfer, or refusal to hire, are not actionable if time barred, even when they are related to acts alleged in a timely manner (*id.* at 134). Thus, a plaintiff is precluded from recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period (*National R.R. Passenger Corp. v Morgan*, 536 US 101 [2002]). Further, no continuing violation theory may be applied to allegations that involve discrete acts *(Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130, *supra*).

Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination (*Roddini v City Univ. of New York*, 2003 WL 435981, *supra*, citing *Delaware State Coll. v Ricks*, 449 US 250, *supra*). The possibility that the determination may have been reversed, is insufficient to toll the limitations period, where there is no evidence that the employer actively misled plaintiff about his or her status, or that it restricted

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[1] Throughout this decision this court will refer to federal case law, in light of the observation that "New York courts rely on federal law when determining claims under the New York Human Rights Law" (*McIntyre v Manhattan Ford, Lincoln-Mercury, Inc., 175* Misc 2d 795, 669 NYS2d 122 [Sup Ct, New York County 1997] *citing Reed v A.W. Lawrence & Co., Inc.*, 95 F3d 1170, 1177 [2d Cir1996] and *Miller Brewing Co. v State Div. Of Human Rights*, 66 NY2d 937 [1985]).

her in some extraordinary way from exercising his or her rights to allege discrimination (*Cordone v Wilens & Baker*, 286 AD2d 597, *supra*).

With respect to her first cause of action for employment discrimination and harassment, the third amended verified complaint makes clear that many of the events of which plaintiff complains to support her discrimination claims occurred prior to September 2003 and therefore, were outside the statutory period. As such, they cannot serve as a basis for plaintiff's employment discrimination claim. However, plaintiff's complaint alleges two instances, September 17th and October 3rd, in which defendants commented on the amount of pressure plaintiff would experience in the event she became pregnant in the future.

Accordingly, the court must determine whether such "facts as alleged fit within any cognizable legal theory" (*Hynes v Griebel*, 300 AD2d 628 [2002]; *see also PT Bank Central Asia v ABN Amro Bank, N.V.*, 301 AD2d 373, 375 [2003]; *Gruen v County of Suffolk,* 187 AD2d 560, 562 [1991]). "[I]f from the [pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Employment discrimination on the basis of pregnancy falls within the prohibitions of the State Human Rights Law (Executive Law § 296[1][a]). Such section provides that it is an unlawful discriminatory practice for an employer "to refuse to hire or employ or to bar or to discharge from employment [an] individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" because of that individual's sex or disability, including pregnancy (*see, e.g., Matter of Energy Expo, Inc. v New York State Division of Human Rights*, 112 AD2d 302 [2d Dept 985]). To make out a *prima facie* case of

employment discrimination under the Human Rights Law, plaintiff is required to establish that she was a member of a group protected by statute, that she was qualified for the position in question, that she was denied the position, and that denial occurred under circumstances that give rise to an inference of discrimination (*Gilroy v Continental Corp.*, 237 AD2d 251 [2d Dept], lv denied, 90 NY2d 809 [1997]; *Sogg v American Airlines, Inc.*, 193 AD2d 153 [1st Dept 1993]), *lv denied,* 83 NY2d 754 [1994]).

Assuming the truth of the facts pleaded, and giving the plaintiff the benefit of every favorable inference, the acts complained of occurring after September 3, 2003 *could* be found by a trier of fact to amount to discrimination based on pregnancy. Although many of the acts complained during the period after September 3rd related to communications plaintiff had concerning the quality of her work, such communications also contained references to plaintiff's future pregnancy. Contrary to defendants' contention, the two instances, in which defendants commented on the possibility that plaintiff would become pregnant, occurred almost contemporaneously with Mr. Talty's "barrages" of phone calls and unfounded comments about plaintiff's untimely submissions that other Sales Managers did not experience.

Mete v New York State Off. of Mental Retardation & Dev. Disabilities (21 AD3d 288, 800 NYS2d 161 [1st Dept 2005]) on which defendants rely, does not support dismissal of plaintiff's discrimination claim. Although the Court in *Mete* held that a "decision maker's stray remark, without more, does not constitute evidence of discrimination," the stray remark in *Mete* that the Office of Mental Retardation and Development Disabilities "needed new and younger employees . . . ." "was the only remark in evidence that" met the criteria for being probative of an intent to discriminate. Further, the remaining remarks, which "were not probative of an intent

to discriminate" were not made by decision makers or close in time to the decision to eliminate the Chiefs of Developmental Center Treatment Services position. Further, "no nexus has been shown to exist between the discriminatory remarks of certain directors and [former Commissioner] Webb's decision to eliminate the Chiefs."

Here, however, two remarks concerning plaintiff's pregnancy were made in relation to plaintiff's ability to perform her work, and were made close in time to the alleged disparate treatment she received from Mr. Talty. Thus, it cannot be said that plaintiff failed to state a cause of action for employment discrimination based on pregnancy.

On the other hand, a claim for harassment or hostile work environment, which is subject to the continuing violation doctrine exception, involves a series of separate acts which "collectively constitute" an unlawful employment practice, and will not be time barred if all of the acts constituting the claim are part of the same unlawful practice and at least one discriminatory act falls within the filing period (*Elmenayer v ABF Freight Sys., Inc.*, 318 F3d 130, *supra*). In this regard, the Court must examine whether acts about which the employee complains *are part of* the same actionable hostile work environment practice, and if so, whether any acts falls within the statutory period (*National R.R. Passenger Corp. v Morgan, supra*).

Here, the Court finds that the remarks concerning plaintiff's pregnancy outside the statute of limitations period were sufficiently similar in nature to be considered part of the same alleged discriminatory acts falling within the filing period. Mrs. Stevens' remarks outside the limitations period, *to wit*: "Great, now you're going to get stupid on me" in response to plaintiff's pregnancy, and asking plaintiff if she planned on having more children, were compounded by further

remarks made within the limitations period concerning plaintiff's plan to have another child. Thus, the hostile work environment claim is not time-barred.

With respect to plaintiff's ability to maintain such a claim, a claim based on a hostile work environment requires allegations that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' sufficiently severe or pervasive to alter the conditions of the victim's employment'" (*Cruz v Coach Stores, Inc., supra* 202 F3d, at 570, *citing Harris v Forklift Systems, Inc.*, 510 US 17, 21 [1993]). An actionable claim of harassment may be based on either a single incident "extraordinarily severe," or a series of incidents "'sufficiently continuous and concerted' as to have altered the conditions" of a plaintiff's working environment (*Cruz, supra*, citing *Perry v Ethan Allen, Inc.*, 115 F3d 143 [2d Cir 1997]; *see San Juan v Leach*, 278 AD2d 299 [2d Dept 2000]). However, "isolated, minor acts or occasional episodes do not warrant relief" (*Brennan v Metropolitan Opera Ass'n*, 192 F3d 310, 318 [2d Cir 1999]). Not only must the victim herself "subjectively perceive [the] environment to be abusive," but the misconduct of which a plaintiff complains also must be "severe or pervasive enough to create an objectively hostile or abusive work environment" (*Petrosino v Bell Atlantic*, 385 F3d 210, 221 [2d Cir 2004]).

The series of incidents included remarks made throughout plaintiff's employment with TSI. It is alleged that upon learning of plaintiff's pregnancy and plaintiff's plans to have another child, defendants repeatedly made unwarranted criticisms of plaintiff's job performance, wrongfully cited plaintiff for inadequate work performance, and ostracized plaintiff among her colleagues, resulting in an unwarranted performance review. Assuming the facts in the third amended verified complaint as true, it cannot be said that such complaint fails to state a claim of

hostile work environment.

With respect to plaintiff's second cause of action for constructive discharge, the statute of limitations for such a claim is three years (*Williams v Environmental Defense Fund*, 246 AD2d 644, 668 NYS2d 240 [2d Dept 1998]). To maintain this claim, plaintiff must make a showing that the defendants created an "abusive working environment" so intolerable that plaintiff's "resignation qualified as a fitting response" (*see Pennsylvania State Police v Suders*, 542 US 129, 124 SCt 2342, 2354 [2004]). The conditions are assessed under an objective standard: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" (*Suders*, 124 SCt at 2351; *Stetson v NYNEX Serv Co.*, 995 F2d 355, 361, *supra*; *see also Vorel v NBA Prop., Inc.*, 285 AD2d 641, 642 [2d Cir 2000]; *Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 203, *supra*). Plaintiff must then demonstrate that her constructive discharge resulted under circumstances that give rise to an inference of gender discrimination (*see Chertovka Connecticut Gen. Life Ins.*, *supra*). Events which fall outside the limitations period for the purposes of the discrimination, hostile work environment, and retaliation claims, "may be considered as evidence of discriminatory atmosphere to the extent that they amount to intolerable working conditions" (*see Parker v Chrysler Corp.*, 929 F Supp 162 [SDNY 1996], *citing United Air Lines Inc. v Evans*, 431 US 553, 558 [1977]; *Malarkey v Texaco*, 983 F2d 1204, 1210-11 [2d Cir 1993]).

"Constructive discharge occurs only where an employee is subjected to an 'unreasonable risk of physical harm, to significant verbal abuse, or is forced to accept significantly lower pay or inferior working conditions'" (*Viera v Olsten/Kimberly Quality Care*, 63 FSupp2d 413 [SDNY 1999] *citing Ternullo*, 8 FSupp2d at 191). A change in job responsibilities with no

decrease in pay or benefits does not reach the threshold required for a viable constructive discharge claim (*Viera, supra citing Pena,* 702 F2d at 326; *Stetson v NYNEX Service Co.*, 995 F2d 355, 360 [2d Cir 1993]). The third amended verified complaint herein fails to assert any facts indicating that plaintiff was forced to resign under circumstances creating a risk of physical harm, or that plaintiff received significant verbal abuse, or was forced to accept significantly lower pay or inferior working conditions. Although plaintiff may have been required to answer repeated requests for information pertaining to her responsibilities, such conduct does not amount to "inferior working conditions" which would cause an employee no choice but to resign (*see Nakis v Potter*, 422 FSupp2d 398 [SDNY 2006] ["relocation of her desk to an isolated location and reassignment of plaintiff's prior desk to a younger, non-disabled, male employee; deletion of plaintiff's name from an e-mail distribution list which was corrected within one day of notice; denial of permission to retake a training course; failure to assign plaintiff meaningful work; requiring plaintiff to pay for annual leave which she requested to buy back; and delay in providing plaintiff with an estimate of her disability annuity, even if considered in conjunction with the e-mails and comments noted above, deemed "not so pervasive and intolerable that a reasonable person would have felt compelled to resign"]).

Therefore, plaintiff's application to amend the second amended verified complaint is denied with respect to a claim for constructive discharge.

As to plaintiff's claim for intentional infliction of emotional distress, which is governe by the one-year statute of limitations (*Misek-Falkoff v International Business Machines Corp.*, 162 AD2d 211, 556 NYS2d 331 [1st Dept 1990]), plaintiff's complaint must allege (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing,

severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress (*see Graupner v Roth*, 293 AD2d 408 [1st Dept 2002] citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must be "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" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978]).

This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, "every one has failed because the alleged conduct was not sufficiently outrageous" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]). Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff (*Seltzer v Bayer*, 272 AD2d 263 [1st Dept 2000]; *see, e.g., Shannon v MTA Metro-North R. R.*, 269 AD2d 218, 219 [1st Dept 2000] ["a pattern of harassment, intimidation, humiliation and abuse, causing him unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years"]; *Warner v Druckier*, 266 AD2d 2, 3 [1st Dept 1999] ["through various specified acts, deliberately, systematically and maliciously harassed him over a period of years so as to injure him in his capacity as a tenant"]; *Harvey v Cramer*, 235 AD2d 315 [1st Dept 1997] [misdiagnosis of HIV status is sufficiently outrageous if intentional, as to which an issue of fact was raised by evidence that doctor also told plaintiff's long-term partner the diagnosis and provided free medical care to the partner in exchange for sexual favors]).

Even assuming that defendants waived their right to assert the defense of statute of

limitations, the allegations in the third amended verified complaint fails to state a cause of action for intentional infliction of emotional distress. The communications between plaintiff and her supervisors at TSI during her tenure at TSI as well as the two instances, in which defendants commented on plaintiff's future pregnancy simply do not rise to the level of malicious harassment or were of such "outrageous" or "extreme" character. Thus, the branch of plaintiff's motion to amend the second verified amended complaint is denied as to the claim of intentional infliction of emotional distress.

Based on the foregoing, it is hereby

ORDERED that the plaintiff's motion to amend the second verified amended complaint is granted, except as to plaintiff's claims for constructive termination and intentional infliction of emotional distress; and it is further

ORDERED that plaintiff serve a copy of this order and memorandum decision with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

HON. CAROL EDMEAD

Dated: October 17, 2007

Hon. Carol Robinson Edmead, J.S.C.