Brown v Lerner, Cumbo & Assocs.

2008 NY Slip Op 31350(U)

May 9, 2008

Supreme Court, New York County

Docket Number: 0117773/2006

Judge: Jane S. Solomon

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SCANNED ON 5/13/2008

[* 1]

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

PRESENT: JANE S. SOLOMON, Justice

PART 55

Shanae Brown

INDEX NO. 117773/06

MOTION DATE 1/18/08

- v -

MOTION SEQ. NO. 01

Lerner, Cumbo, and Assoc.

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. -- Pre-trial conference is scheduled for June 9, 2008 at 2 PM.

FILED

MAY 13 2008

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 5/9/08

JANE S. SOLOMON, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

---X

SHANAE BROWN,

Plaintiff,

Index No. 117773/2006

-against-

LERNER, CUMBO, AND ASSOCIATES,

Defendant.

---X

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

SOLOMON, J.:

In this gender and pregnancy discrimination action, defendant Lerner, Cumbo, and Associates moves for an order granting it summary judgment, pursuant to CPLR 3212, dismissing the complaint.

Defendant is an employee staffing company that maintains an office at 295 Madison Avenue, New York, New York. Plaintiff Shanae Brown was formerly employed by defendant.

The following facts are not in dispute. Plaintiff was hired as a temporary receptionist in March 2006. In April 2006, defendant hired plaintiff as a full-time staff employee. Plaintiff worked as a full-time staff employee from April 2006 through the second week of August 2006. During that time, Frances Montano, defendant's Office Manager, was plaintiff's immediate supervisor. Frank Cumbo, defendant's Corporate Executive Officer, supervised the entire office. Plaintiff gave birth to a son on August 12, 2006. Plaintiff was out of work for eight weeks following the delivery of her child. During the fall of 2006, plaintiff contacted her employer to discuss her return to work. Defendant declined to provide plaintiff with any work, and plaintiff's employment relationship with defendant was terminated.

As a result, plaintiff commenced this lawsuit asserting causes of action for pregnancy discrimination, disability discrimination, and a violation of the New York State Labor Law for

unpaid wages asserting damages in the amount of one million dollars, punitive damages in the amount of one million dollars, and attorneys' fees and costs.

Defendant argues that it is entitled to summary judgment because: (1) plaintiff was not subject to any discrimination during the short period in which she was employed by defendant, (2) plaintiff was no longer pregnant when she failed to report to work on August 14, 2006, (3) there is no evidence that plaintiff was unable to perform her duties as a result of her pregnancy, and (4) plaintiff abandoned her job and was not rehired by defendant due to reasons unrelated to her pregnancy.

Plaintiff contends that defendant is not entitled to summary judgment because: (1) plaintiff has established a prima facie case of pregnancy discrimination, (2) defendant's alleged nondiscriminatory reasons for terminating plaintiff are inconsistent, (3) defendant's claim that plaintiff was terminated due to her poor work performance is contradicted by the evidence, and (4) defendant's claim that plaintiff was fired pursuant to defendant's policy of not re-hiring employees after sick or maternity leave is a per se violation of the Law.

A party moving for summary judgment, pursuant to CPLR 3212, must demonstrate its entitlement thereto as a matter of law. To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, defendant has not demonstrated its entitlement to summary judgment and plaintiff has demonstrated that a material question of fact remains, namely, whether the circumstances warranted defendant's treatment of plaintiff, demonstrating a valid, nondiscriminatory reason for her termination.

[* 4]

The standards for establishing unlawful employment discrimination under Executive Law § 296 [1], also known as the Human Rights Law, are the same as those governing title VII cases under the Federal Civil Rights Act of 1964 (*Rainer N. Mittl, Ophthamologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003]). Executive Law § 296 [1] provides:

> " 1. It shall be an unlawful discriminatory practice:
> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment."

Executive Law § 292 (21) also provides:

> "The term 'disability' means (a) a physical, mental, or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held"

(*see Matter of Caminiti v New York City Tr. Auth. Police Dept.*, 125 AD2d 306, 307 [2d Dept 1986]).

The Court of Appeals has held that employment discrimination on the basis of pregnancy falls within the prohibitions of Article15 of the Executive Law (*Rainer N. Mittl, Ophthamologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, *supra*).

Therefore, it is an unlawful discriminatory practice to terminate an individual's employment because of his or her sex or disability, which includes pregnancy (*see Matter of Energy Expo v New York State Div. of Human Rights*, 112 AD2d 302 [2d Dept 1985]).

To establish a prima facie case of discrimination, a complainant must first show by a preponderance of the evidence that he or she is a member of a protected class, discharged from a position for which he or she was qualified and that the discharge occurred under circumstances giving rise to an inference of discrimination (*Rainer N. Mittl, Ophthamologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, *supra*).

Here, plaintiff has demonstrated that she is a member of a protected class. In her affidavit, plaintiff states that in April 2006, she informed Evan Lerner, defendant's President, that she was pregnant. On the question of defendant's knowledge of plaintiff's condition, the record reveals that plaintiff did not undergo a pre-employment physical examination. However, Montano avows that in May 2006, she observed that plaintiff appeared to be pregnant and she immediately approached plaintiff and inquired whether she was in fact with child. Plaintiff responded that she was pregnant (Exhibit D to Affirmation of Robert F. D'Emilia dated November 8, 2007) (D'Emilia Aff.).

The record further demonstrates that defendant was aware of plaintiff's pregnancy. In July 2006, plaintiff and Montano exchanged e-mails regarding plaintiff's due date (Exhibit C to Affidavit of Shanae Brown, dated December 19, 2007) (Brown Aff.). In the e-mail, plaintiff states, "Also I was wondering if sometime in September if we can try to find a temp before I have the baby so that I can start the training process with them. I am not leaving until October but I thought it would be best to start training in September" (Exhibit C to Brown Aff.). The

record reveals that plaintiff went into premature labor on August 13, 2006, and delivered a son via emergency cesarean section at 34-2/7 weeks gestational age (Exhibit A to Brown Aff.). Defendant submitted plaintiff's disability papers. The document was signed by plaintiff on August 16, 2006. Her physician signed and dated the form on August 17, 2006 (Exhibit A to Affirmation of Robert F. D'Emilia, dated January 16, 2008) (D'Emilia II Aff.). Accordingly, plaintiff has met her burden of establishing that she is a member of a protected class because of her disability, which includes pregnancy (*see Matter of Energy Expo v New York State Div. of Human Rights*, 112 AD2d 302, *supra*). Defendant's argument that plaintiff was not pregnant, and therefore she was not a member of a protected class, at the time of the alleged discrimination is unpersuasive. Plaintiff has shown that her absence was the result of her pregnancy and the hospitalization and medical care arising thereof.

On the question of whether plaintiff was discharged from a position for which she was qualified and that the discharge occurred under circumstances giving rise to an inference of discrimination, the record demonstrates that plaintiff has met such burden.

It appears from the evidence in the record that plaintiff was qualified for the position of receptionist. Plaintiff was hired as a temporary receptionist in March of 2006, and in the following month, plaintiff was hired as a full-time Administrative Assistant/Receptionist. Although defendant argues that plaintiff's work performance declined shortly after she was hired as a full-time employee because of her poor telephone manners, lack of attention to detail, repeated problems with lateness, eating at the reception desk, and poor attitude toward her receptionist duties, the record reveals that defendant increased plaintiff's salary three times after hiring her as a full-time employee (Exhibit C to D'Emilia Aff.). Plaintiff was initially

compensated at an annual rate of $25,000 per year. However, her salary increased to $27,000 after her first week of employment, and increased again in two months to $29,500 (*id.*).

Plaintiff alleges that defendant was satisfied with her work. She contends that she had a conversation with Cumbo concerning her future promotion to Sales Representative (Exhibit A to D'Emilia Aff.). She also alleges that after her employment situation with defendant ended, one of defendant's employees contacted her regarding a staffing position with one of defendant's clients (Brown Aff.).

Defendant argues that plaintiff's work performance deteriorated after she was hired as a full-time employee. Defendant further argues that plaintiff was discharged because she was dishonest about her due date, she failed to show up for work during the week of August 14, 2006, and she failed to provide defendant with an explanation for her extended absence between August and October of 2006. Cumbo states that plaintiff worked a half day on Wednesday, August 9, 2006, and after that date, she did not return to work, did not respond to telephone calls and messages regarding office security codes and passwords, and that she never contacted her supervisors that she gave birth to a son prior to her expected due date (Exhibit C to D'Emilia Aff.). Cumbo further states that plaintiff had not accrued any vacation, sick, or personal days to cover her missed days from work, and thus on August 28, 2006, he hired Deborah Calderon for the receptionist position abandoned by plaintiff (*id.*).

Montano also alleges that plaintiff never requested any time off from work in connection with any disability nor did she share any information regarding the circumstances surrounding her pregnancy, birth of child or absence from work (Exhibit D to D'Emilia Aff.). Moreover, Montano states that during plaintiff's absence she was forced to perform her office

manager duties in addition to covering the receptionist position (*id.*). Montano further alleges that she phoned plaintiff at the end of the week beginning August 14, 2006 to inquire about a password for the reception computer and plaintiff responded that she could not remember the password but would get back to her and, despite Montano's attempts, plaintiff never returned her phone calls nor did she supply Montano with the sought after information (*id.*).

Defendant's testimony is controverted by evidence in the record. Gloria Brown, plaintiff's mother, states that on Monday, August 14, 2006, she telephoned defendant and spoke to Montano to inform her that on August 13, 2006, plaintiff went into premature labor and delivered a son via emergency cesarean section, and that during the four days that plaintiff was in the hospital, she phoned defendant each day on her daughter's behalf to inform them of her inability to report to work (Affidavit of Gloria Brown, dated December 19, 2007) (G.B. Aff.).

Plaintiff states that Montano phoned her for a password the week following her delivery and during that conversation, Montano told her that she had seen photos of defendant's newborn which were taken by Jennifer Saldana and Stephanie Doe, two of defendant's employees, thereby demonstrating defendant's knowledge of the reasons involving her extended absence from work (Brown Aff.). Gloria Brown also states that during her daughter's hospital stay, she spoke to Montano to confirm that the requisite disability forms were being mailed to plaintiff's correct mailing address (G.B. Aff.). Plaintiff alleges that said paperwork had been provided by Montano, and that Cumbo phoned her shortly after she delivered her son to confirm that plaintiff received the aforementioned paperwork (Brown Aff.). She also alleges that her disability benefits were approved on September 6, 2006 and that her coverage began on August 13, 2006, and terminated on October 7, 2006 (*id.*).

The record reveals that plaintiff went into premature labor on August 13, 2006 and delivered a son via emergency cesarean section at 34-2/7 weeks gestational age (Exhibit A to Brown Aff.). There is also evidence supporting plaintiff's claims that she supplied defendant with the necessary paperwork to obtain disability benefits following her delivery. Defendant submitted a copy of plaintiff's signed disability papers. The document was signed by plaintiff on August 16, 2006 and her physician signed and dated the form on August 17, 2006 (Exhibit A to Affirmation of Robert F. D'Emilia, dated January 16, 2008) (D'Emilia II Aff.). Moreover, plaintiff alleges that she phoned Cumbo on numerous occasions and spoke with him three times during her disability leave regarding her return date (*id.*). Plaintiff also alleges that toward the end of her disability leave in September, Cumbo informed her that defendant was downsizing its staff and that lay-offs were inevitable (Brown Aff.). However, plaintiff subsequently learned that defendant continued to hire new employees and had, in fact, hired another person for her position (*id.*).

According to the testimony in this case and the evidence in the record, plaintiff has demonstrated by a preponderance of the evidence that she is a member of a protected class, that she was discharged from a position for which she was qualified and that the discharge occurred under circumstances giving rise to an inference of discrimination (*Rainer N. Mittl, Ophthamologist, P.C. v New York State Div. of Human Rights,* 100 NY2d 326, *supra*).

Inasmuch as plaintiff has made out a prima facie case that she was discharged from her employment because of the gender-related condition of pregnancy and her resulting disability, it became defendant's burden to prove that the circumstances warranted their treatment of plaintiff (*Matter of Energy Expo v New York State Div. of Human Rights*, 112 AD2d at 303). Here,

defendant has failed to meet that burden on these papers. As discussed above, plaintiff submitted evidence and testimony that rebutted a valid nondiscriminatory reason for her termination presented by defendant, and thus said evidence has created a factual issue for trial. Accordingly, it hereby is

ORDERED that defendant's motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York NY on June 9, 2008 at 2 PM.

Dated: May 9, 2008

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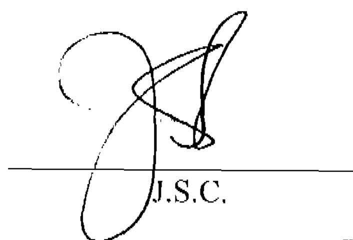

J.S.C.

JANE S. SOLOMON

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