

Vassallo v The Burmax Co., Inc.

2012 NY Slip Op 31447(U)

May 16, 2012

Sup Ct, Suffolk County

Docket Number: 11-12417

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 7-28-11
ADJ. DATE 1-5-12
Mot. Seq. # 002 - MotD

-----X
CARMELINA VASSALLO,

Plaintiff,

- against -

THE BURMAX COMPANY, INC., THOMAS
FORTE and DEBRA GOLDSCHMID,

Defendants.
-----X

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Upon the following papers numbered 1 to 11 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10-11; Replying Affidavits and supporting papers ___; Other plaintiff's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants seeking dismissal of plaintiff's amended complaint is decided as follows:

Plaintiff Carmella Vassallo commenced this action for damages she allegedly sustained as a result of employment discrimination by defendant, The Burmax Company Inc. ("Burmax"). The complaint also alleges that individual defendants Burmax's Chief Financial Officer, defendant Thomas Forte, and its Vice President, defendant Debra Goldschmid, are liable for discrimination. More specifically, plaintiff alleges that defendants violated her civil rights when they engaged in discriminatory and retaliatory conduct against her because she became pregnant during her employment. The amended complaint asserts eight causes of action. The first and second causes of action, asserted under the New York State Human Rights Law, Executive Law § 296, allege that defendants created a hostile work environment and caused plaintiff severe emotional distress when they engaged in discriminatory and retaliatory conduct toward her. The third and fourth causes of action, also asserted under the New York State Human Rights Law, allege that the individual defendants aided and abetted Burmax's discriminatory conduct. The fifth through eighth causes of action contain identical allegations against Burmax and the individual defendants under the Suffolk County Human Rights Law. The amended complaint also seeks an award of costs, attorney's fees and punitive damages.

Defendants now move, pursuant to CPLR 3211, for dismissal of plaintiff's complaint on the grounds that no private cause of action exists under the Suffolk County Human Rights Law, and that plaintiff failed to allege harassment that was sufficiently severe and pervasive to state a cause of action for the creation of a hostile work environment. Defendants also assert that no claim for aiding and abetting violations of the Executive Law can be stated against the individual defendants where, as here, no cognizable basis for such claims have been asserted against their employer. Defendants further contend that no claim for retaliation exists, since plaintiff's employment was terminated for a legitimate, non-discriminatory reason. In the alternative, defendants seek dismissal of plaintiff's first, second, third and fourth causes of action on the basis the claims are barred by Executive Law § 296 (9), which prohibits a plaintiff from commencing a civil action in the Supreme Court if he or she has already filed a complaint with a local human rights commission. Lastly, defendants seek dismissal of the portion of plaintiff's amended complaint requesting an award of attorney's fees and punitive damages. Plaintiff opposes the motion, arguing that the causes of action in the amended complaint were adequately pleaded, and that the Supreme Court retains subject matter jurisdiction over her claims since she has not filed a formal complaint with the Suffolk County Human Rights Commission.

Initially, the Court notes that plaintiff concedes her demands for an award of attorney's fees and punitive damages are without merit and should be dismissed as a matter of law. Therefore, the branch of defendants' motion seeking dismissal of such claims is granted.

The branch of defendants' motion seeking dismissal of plaintiff's claims under the Suffolk County Human Rights Law also is granted. An examination of the Section 89 of the Suffolk County Code reveals that it was the Suffolk County Legislature's intent that the Suffolk Human Rights Commission retain exclusive jurisdiction over any claims asserted under the statute. Suffolk County Code §89(1) states that "[t]he purpose of this law is to exercise the County's police power for the protection of the public welfare, health and peace of the people of this County to ensure that prejudice, intolerance, bigotry and discrimination will not threaten the rights of its inhabitants in securing public accommodations, employment, or housing." The code further states that "[t]he Suffolk County Human Rights Commission is hereby authorized and empowered to issue and promulgate such rules and regulations as it shall deem necessary and appropriate for the purpose of establishing procedures for the enforcement of this law, including the administrative hearing process for the imposition of the civil fines and civil remedies set forth in Sections 4(B) and 4(C) of this law." Section 4 of the statute, which provides for the imposition of civil and criminal penalties, also provides, in pertinent part, as follows:

(B.) Any violation of Section 89-11, 89-12, or 89-13 of the SUFFOLK COUNTY CODE shall be subject to a civil fine of up to \$500.00 per violation. Each and every day of such violation shall be deemed a separate offense. These civil fines shall be enforced by the Suffolk County Human Rights Commission, with the assistance of the Suffolk County Department of Law.

(C.) If, upon all the evidence at a hearing, and upon the findings of fact, conclusions of law, and relief recommended by the pertinent hearing officer, the Suffolk County Human Rights Commission finds that a respondent has engaged in any unlawful discriminatory practice as set forth in Section 89-11, 89-12, or 89-13 of this law, the Commission shall

state its findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice or statute.

Therefore, plaintiff's sixth, seventh and eighth causes of action asserting corporate and individual violations of the Suffolk County Human Rights Law are precluded as a matter of law.

As for the branch of defendants' motion seeking dismissal of plaintiff's claims under the Executive Law on the ground that such claims are barred by the statute's election of remedies provision, Section 297 (9) of the Executive Law only bars a plaintiff from commencing an action in the Supreme Court if he or she has already ". . . filed a complaint . . . with [a] local commission on human rights." Moreover, it is well settled that the election of remedies provision is only triggered if the plaintiff filed a formal complaint with the local commission, thereby availing himself or herself of its jurisdiction (*see e.g. Legg v Eastman Kodak Co.*, 248 AD2d 936, 670 NYS2d 291 [4th Dept 1998]; *Matter of James v Coughlin*, 124 AD2d 728, 508 NYS2d 231 [2d Dept 1986]; *Goosely v Binghamton City Sch. Dist. Bd. of Educ.*, 101 AD2d 942, 475 NYS2d 924 [3d Dept 1984]). Here, plaintiff merely provided the Suffolk County Human Rights Commission with a copy of the complaint she filed in this action for the purpose of notifying them of the commencement of the proceeding against her employer in the Supreme Court. Her claims under the Executive Law, therefore, are not barred by the statute's election of remedies provision. Accordingly, the branch of defendants' motion seeking dismissal of plaintiff's claims based upon the Court's alleged lack of subject matter jurisdiction is denied.

With regard to the branch of defendants' motion seeking dismissal of the complaint on the basis of failure to state a cause of action, a court considering a motion to dismiss pursuant to CPLR 3211 (a)(7), must construe the pleadings liberally, accept the allegations of the complaint as true and provide the plaintiffs the benefit of every possible favorable inference (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 N.Y.S.2d 170 [2005]; *Griffin v Anslow*, 17 AD3d 889, 891, 793 N.Y.S.2d 615 [3d Dept 2005]). A court may consider evidentiary material submitted by a plaintiff to remedy defects in the complaint, but it should not rely on evidence submitted by the proponent of the motion as a basis for dismissal unless that evidence conclusively establishes the falsity of an alleged statute (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *County of Suffolk v MHC Greenwood Village, LLC*, 91 AD3d 587, 937 NYS2d 89 [2d Dept 2012]; *Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). On a motion pursuant to CPLR 3211 (a) (7), the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez*, 84 NY2d 83, 87, 614 NYS2d 972 [1994]).

Although pregnancy in and of itself is not considered a disability (*see Martinez v NBC, Inc.*, 49 F Supp 2d 305 [SD NY 1999]; *Minott v Port Auth. of NY & NJ*, 116 F Supp 2d 513 [SD NY 2000]), Executive Law §296 (1) prohibits discrimination and discharge of an employee based on pregnancy (*see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 763 NYS2d 518 [2003]; *Elaine W. v. Joint Diseases N. Gen. Hosp.*, 81 N.Y.2d 211, 216, 597 NYS 2d 617, 613 N.E.2d 523 [1993]). The standards for establishing unlawful discrimination under section 296 of the Executive Law are the same as those governing title VII cases under the Federal Civil Rights Act of

1964 (see *Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]). To withstand a motion to dismiss in a discrimination case under state or federal law, a plaintiff need only plead the elements of a prima facie case of discrimination (see *Dugan v Martin Marietta Aerospace*, 760 F2d 397 [2d Cir 1985]; *McNulty v New York City Dept of Finance*, 941 F Supp 452 [SD NY 1996]). To establish a prima facie case of discrimination, a plaintiff must show that he or she is a member of a protected class, that plaintiff was discharged from a position for which he or she was qualified, and that the discharge occurred under circumstances giving rise to an inference of unlawful discrimination (see *Bond v Sterling, Inc.*, 997 F Supp 306 [ND NY 1998]; *Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, *supra*).

Here, plaintiff has stated a cognizable claim for discrimination and discharge based on her pregnancy (see *Dugan v Martin Marietta Aerospace*, *supra*; *Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, *supra*; *Bond v Sterling, Inc.*, *supra*). The complaint alleges, inter alia, that plaintiff became pregnant and required a caesarean delivery due to a pre-existing medical condition; that she shared the existence of her condition and the necessity for a longer maternity leave with her employer and superiors; and that defendants engaged in retaliatory conduct by terminating her employment and cancelling coverage for her and her unborn child under the Consolidated Omnibus Budget Reconciliation Act ("COBRA").

Plaintiff also stated an actionable claim against the individual defendants for aiding and abetting her employer's discriminatory conduct. An individual may be held liable under a theory of aiding and abetting pursuant to Section 296 of the Executive Law, which makes it "an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [the statute], or to attempt to do so" (*Tomka v Seiler Corp.*, 66 F3d 1295, 1317 [2d Cir 1995], *abrogated on other grounds by Burlington Indus. Inc. v Ellenrth*, 524 US 742 [1998]; see also *Turley v ISG Lackawanna Inc.*, 803 F Supp 2d 217 [WD NY 2011]; *Peck v Sony Music Corp.*, 221 AD2d 157, 632 NYS2d 963 [1st Dept 1998]). This basis for personal liability turns on whether a co-employee actually participated in the conduct giving rise to the discrimination claim (see *Tomka v Seiler Corp.*, *supra*; *Turley v ISG Lackawanna Inc.*, *supra*). Thus, where, as here, a plaintiff alleges that the individual defendants actively participated in discriminatory conduct toward her, including terminating her employment and cancelling her COBRA coverage, a cognizable claim for aiding and abetting discrimination has been stated (see *Tomka v Seiler Corp.*, *supra*; *Turley v ISG Lackawanna Inc.*, *supra*; *Murphy v ERA United Realty*, 251 AD2d 469, 674 NYS2d 415 [2d Dept 1998]). The branch of the motion seeking dismissal of plaintiff's causes of action for discrimination and unlawful discharge against her employer, and against the individual defendants for aiding and abetting such conduct, therefore, is denied.

As to plaintiff's claim alleging a failure to accommodate, to establish a prima facie case for failure to accommodate a plaintiff must show that he or she suffered from a disability, that he or she could perform the essential functions of her position with reasonable accommodation, and that his or her employer refused to make such accommodations (see *Pimental v Citibank, N.A.*, 29 AD3d 141, 811 NYS2d 381 [1st Dept 2006]; *Pembroke v New York State Office of Court Admin.*, 306 AD2d 185, 761 NYS2d 214 [1st Dept 2003]). Courts have generally held that complications arising from pregnancy do not constitute a disability (see *LaCoparra v Pergament Home Ctrs., Inc.*, 982 F Supp 213 [SD NY

1997] *overruled on other grounds by Kosakow v New Rochelle Radiology Assocs., P.C.*, 274 F 3d 706 [2d Cir 2001]; *Gudenkauf v Stauffer Communications, Inc.*, 922 F Supp 465 (D Kan1996) (typical complications of pregnancy are not disabilities). Only in extremely rare cases have courts found that conditions arising out of pregnancy qualify as a disability (*see eg Hernandez v. City of Hartford*, 959 F Supp 125 [D Conn 1997] [premature onset of labor that could only be controlled by medication constituted a disability]; *Patterson v. Xerox Corp.*, 901 F Supp 274 [ND Ill 1995] [holding that plaintiff's severe back pain from being pregnant substantially limited her ability to sit at work for extended periods of time]). Moreover, in this type of case, it is the physiological impairment resulting from the complications that renders the person disabled (*see Bond v Sterling, Inc., supra*).

Here, even accepting as true the allegations contained in the complaint, plaintiff has failed to state a cognizable claim based on failure to accommodate. Plaintiff's complaint fails to allege an essential element of such a claim, to wit, that she suffered from a pregnancy-related disability that substantially limited her ability to perform her work. Rather, plaintiff merely alleges that she suffered from a prior medical condition which necessitated that she undergo a cesarean delivery. Although plaintiff alleges that the stress of the discrimination led to premature delivery and hospitalization of her child, she failed to allege any particular physiological impairment constituting a disability (*see Bond v Sterling, Inc., supra; compare Hernandez v. City of Hartford, supra*).

Plaintiff similarly failed to state a cognizable claim for creation of a hostile work environment. An actionable discrimination claim based on the creation of a hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Harris v Forklift Systems, Inc.*, 510 U.S. 17, 23 [1993]; *see Alfano v Costello*, 294 F 3d 365 [2d Cir 2002]; *Brennan v Metropolitan Opera Assn, Inc.*, 192 F 3d 310 [2d Cir 1999]). The employer misconduct must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive (*see Harris v Forklift Sys., Inc., supra*). Further, the incidence of misconduct must be sufficiently continuous and concerted to be deemed pervasive (*see Perry v. Ethan Allen, Inc.*, 115 F 3d 143 [2d Cir. 1997]). A single incident of hostility will not meet the threshold unless it is sufficiently severe or extreme so as to work a transformation of the plaintiff's work environment (*see Alfano v Costello, supra; Brennan v Metropolitan Opera Assn, Inc., supra*).


Although the complaint alleges that plaintiff's employers became "extremely aggravated" when she requested a longer maternity leave, it does not allege facts indicating that her work environment was continuously permeated with discriminatory intimidation, ridicule, or insult which prevented her from performing her work (*see Fragher v City of Boca Raton*, 524 US 775 [1998]; *Perry v Ethan Allen, Inc., supra; cf Griffin v Lab. Synergy, LLC.*, 2011 US Dist. LEXIS 86947 [SD NY 2011]). Neither is the single incident in which one of plaintiff's superiors allegedly exclaimed "Oh No!" in response to the news of her pregnancy sufficiently extreme to significantly transform her working environment (*see Alfano v Costello, supra; Brennan v Metropolitan Opera Association, Inc., supra*).

Additionally, plaintiff failed to state a cognizable claim based on unlawful retaliation. In order to establish a prima facie case for retaliation, a plaintiff must show that he or she was engaged in a

protected activity, that his or her employer was aware of that activity, and that there was a causal connection between the protected activity and the adverse employment action (see *Manoharan v Columbia Univ. College of Physicians & Surgeons*, 842 F2d 590, 593 [2d Cir. 1988]; *Reed v A.W. Lawrence & Co. Inc.*, 95 F 3d 1170 [2d Cir 1996]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 786 NYS2d 382 [2004]; *Bennett v Health Mgt. Sys. Inc.*, 92 AD3d 29, 936 NYS2d 112 [1st Dept 2011]). Under Executive Law §296, “protected activity” refers to any action taken to protest or oppose discrimination prohibited by the statute (see *International Healthcare Exchange, Inc. v Global Healthcare Exchange, LLC*, 470 F Supp 2d 345 [SD NY 2007]; *Dooner v Keefe, Bruyette & Woods, Inc.*, 157 F Supp 2d 265 [SD NY 2001]). Thus, a cause of action asserting unlawful retaliation necessarily fails where, as here, the complaint did not allege an essential element of the claim, namely that the plaintiff was engaged in a protected activity at the time of the alleged retaliation (see *Fantini Salem State College*, 557 F 3d 22 [1 Cir 2009]; *Wimmer v Suffolk County Police Dept.*, 176 F 3d 125 [2 Cir 1997]; *Anderson v Delphi Automotive Systems Corp.*, 297 F Supp 2d 625 [WD NY 2004]).

Inasmuch as plaintiff has failed to state cognizable causes of action for the creation of a hostile work environment, failure to accommodate and unlawful retaliation, plaintiff’s claims alleging that the individual defendants aided and abetted such conduct is dismissed as a matter of law (see *Yerry v Pizza Hut of Southeast Kansas*, 186 F Supp 2d 178 [ND NY 2002]; *Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 913 NYS2d 296 [2d Dept 2010]; *Barbato v Bowden*, 63 AD3d 1580, 880 NYS2d 817 [4th Dept 2009]). Accordingly, the branch of defendants’ motion seeking dismissal of the causes of action against Burmax for the creation of a hostile work environment, unlawful retaliation, and failure to accommodate, and against the individual defendants for aiding and abetting such conduct, is granted.

Dated: 5/14/12



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION