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

PRESENT: HON. JUDITH J. GISCHE Justice PART 10

Index Number : 113453/2009
DEFRANCESCO, GINA
vs.
METRO-NORTH RAILROAD
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. 001
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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: June 18, 2012

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Gina DeFrancesco,

Plaintiff (s),

-against-

Metro-North Railroad and
Sherry Herrington,

Defendant (s).

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DECISION/ ORDER
Index No.: 113453-09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3212) w/JRF affirm, exhs	1
Pltf's opp w/SLB affirm, GD affid, exhs	2
Stips for adj	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiff Gina DeFrancesco ("plaintiff") claims defendants violated the New York State Human Rights Laws, Exec Law § 296 et seq. and New York City Human Rights Laws, Admin Code § 8-107 et seq. Defendants have answered and plaintiff filed her note of issue, certifying all discovery is complete. This motion for summary judgment is timely brought and will be decided on its merits (CPLR § 3212; Brill v City of New York, 2 NY3d 648 [2004]).

Facts

Certain facts are unrefuted, undisputed or established on this motion:

Plaintiff became employed by defendant Metro-North Railroad ("Metro-North") as an assistant conductor on June 28, 1999 and worked in that capacity until she was terminated from employment on November 16, 2009. Until 2008, Metro-North had a manual ticket punching system. In mid-2008, Metro-North implemented a pilot program using an electronic "Ticket Issuing Machine" ("TIM"). A TIM is 6 to 8 inches long and is worn in a holster directly on the body. It transmits a signal to Metro-North's accounting department via a Bluetooth and cellular signal, sending information about a ticket purchase on board a Metro-North train. Not only does a TIM issue a ticket, it simultaneously records the ticket type, date, time of sale, the train number it was sold on, the employee who sold it and the origination and destination of the ticket purchaser. At the end the employee's shift, he or she downloads the information directly from the TIM to Metro-North's accounting department.

Plaintiff was provided with a TIM in August 2008 but she refused to use it because she was planning on getting pregnant and was concerned about the device's safety. By the end of 2008, however, the pilot program became an established, formalized system-wide policy and in its On-Board Revenue Notice No. 01-09, dated January 21, 2009 ("OBRN"), Metro-North announced that "TIM usage for on-board ticket sales in mandatory. Use of C-9 duplex tickets is authorized in the event of a bonafide TIM equipment failure... Lack of TIM use will be deemed unacceptable without providing a defect report I.T. Control Number..."

Plaintiff was trained in using the TIM, but did not want to use it. Initially she contacted various Metro-North administrative personnel and her union representatives for assistance in obtaining a waiver but they all told her she had to use the TIM or risk

being fired from her job. After meeting resistance, plaintiff initially complied with using the TIM and started wearing it in February 2009. She continued to wear it through the beginning of April 2009. On April 1, 2009, plaintiff confirmed that she was pregnant. At that point plaintiff admits she left her TIM in the cab of her train for a few days and later she took it home and left it there. Plaintiff began using paper tickets exclusively although she had not obtained permission to do so. Plaintiff subsequently suffered a miscarriage on May 15, 2009 and took two months off from work.

Following her return to work in-mid July, 2009, plaintiff continued to refuse to wear the TIM. Although not directly blaming the device for her miscarriage, plaintiff remained skeptical that the device was safe to use. On August 19, 2009, Metro-North circulated a memorandum from its Office of H.R. Assessment and Compliance. The memo notified "any member who believes they have a medical condition or disability" that prevents them from using a TIM needs to complete a request through ADA for an accommodation. In response to that memo, plaintiff completed and filed a request for a reasonable accommodation under the ADA. In her form, dated August 31, 2009, plaintiff stated the following:

> I am requesting to be excused from using the TIM machine. I don't feel this equipment is safe for me to use while trying to get pregnant and while being pregnant. I stated this concern to Metro-North officials before my previous pregnancy which resulted in a miscarriage. I feel the emissions given off from TIM and the stress of being forced to wear it contributed to my miscarriage. My duties can be performed with my punch and duplexes [paper tickets] to collect fares from passengers.

When she filed the form she included a letter from her personal physician, Dr. John F. Salimbene, M.D., dated May 28, 2009 stating that:

> On January 13, 2009 [plaintiff] told me about a machine her job was requiring her to wear which she compared... to a cell phone. [Plaintiff] explained how the safety of this machine was a big concern while trying to get pregnant and during pregnancy. I advised her not to use the machine because of the stress it was causing her and the lack of safety information provided.

In the meantime (September 2, 2009), plaintiff was removed from service and disciplinary charges were filed for her failure to use a TIM for the period August 6, 2009 through September 2, 2009. A hearing was held on October 15, 2009 and plaintiff had a union representative with her. It was at the hearing that plaintiff first learned that her request for a reasonable accommodation had been denied. In the denial letter dated October 13, 2009, defendant's human resources assessment and compliance officer stated the following:

> "You provided a doctor's note dated May 28, 2009 indicating that you told your physician that the [TIM] was causing concern to you and he consequently advised you not to use the machine 'because of the stress was causing you and the lack of safety provided.' After revlewing your job description and the current medical data and information concerning the use of similar technology which indicates that the TIM is safe for use, we conclude that there is no basis to excuse you from using the TIM machine. At the same time, you are free to exercise your seniority rights under the collective bargaining agreement to work in a job that does not require the use of the TIM. In the alternative, you can seek a change of craft. If you would like to speak further or present additional information, please feel free to contact me at [phone number]."

Plaintiff testified at her EBT that she did not seriously consider either position because each required that she work outdoors in the elements. The flag job also required that plaintiff wear a radio on her person which she did not want to do. In any

event, plaintiff was not even sure she was qualified for the flag job because of her seniority and she thought the jobs might be more dangerous than her current position. Following the hearing, plaintiff was suspended for 52 days, 30 of which were deferred.

When plaintiff returned to work on October 28, 2009 following her suspension, she did not bring the TIM to work with her and she was sent home. The next time she came in, she brought the TIM with her, but then she refused to use it. Plaintiff was sent home again, this time charged with insubordination. By letter dated November 6, 2009, plaintiff asked the HR compliance department to reconsider its decision that she was not excused from using a TIM. This time she included two new documents. One was a letter dated September 15, 2009 from "Child and Family Behavioral Health-Psychiatry, LLC" ("Child and Family"). The other was a letter from "Westchester Sports & Wellness" ("Westchester Sports"). The Child and Family letter, which is unsigned, states that plaintiff:

> "Initiated psychiatric treatment in June 2009 due to developing anxiety in the context of conflicts that were arising from her job. [Plaintiff] has refused to wear the TIM... due to concerns about its potential deleterious medical consequences, as she has been trying to get pregnant and had a miscarriage about 2-3 months after wearing [the TIM] for work. Of note, the safety of the TIM has not been established and [plaintiff] has collected a large body of research that indicates that [the TIM] is not safe. Despite expressing these concerns to her supervisors and union representatives, she was taken out of service due to her refusal to use [it]. In addition, a number of inappropriate, offensive and intimidating remarks have been made to her, resulting in an exacerbation of her anxiety symptoms that culminated in necessitation of emergent treatment and evaluation on the day that she was suspended."

The Westchester Sports letter, dated September 26, 2009, is signed by Robert Inesta, DC[1], CCSP and CSCS. While stating he is not "an expert in electronic devices," Dr. Inesta nonetheless states that he told plaintiff that in his opinion "computers and the radiation they produce..." are not safe and that he did not believe the TIM was safe for anyone to wear, "especially a pregnant woman or someone trying to conceive. We are unaware of the long term side effects of exposure to electromagnetic frequencies or radiation..." Dr. Inesta then proceeds to state that he thinks it is "unethical" that her employer is forcing her to wear the TIM and that it has caused her a great deal of stress to have to do so.

Plaintiff's request for reconsideration was apparently not granted and plaintiff appeared for another hearing, again with a union representative. Plaintiff testified at the hearing that she does not believe the TIM is safe and "I had a miscarriage ... due to the stress about ... using this machine ... I was out of work [and] I came back [and] asked for an accommodation I was asked whether or not I was going to use it and I have been out of service before for the same thing..." When asked whether she had any documentation or independent testing to support this claim, she replied "no." She was also asked by the hearing officer whether she wears a cell phone on her person and she replied that she does.

Plaintiff commenced this action before the insubordination charges were decided. On November 16, 2009 those charges were sustained and she was terminated from employment. Plaintiff filed a claim with the National Mediation Board

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[1]He is apparently a chiropractor.

(Carrier File CO9/HR018 [d] and CO9/HR019) and in its findings dated April 28, 2010, her claim was denied. In denying the claim, the NMB observed that although there is some unease throughout society about health hazards involving electronic and wire technology "the ever-spreading use of technology in all sectors of employment is the order of the day..." and plaintiff had not offered "any evidence of proximate cause and effect or even possible effect..." The NMB observed that the TIM had been examined by two independent evaluators and found certified for use. NMB also noted that plaintiff had rejected Metro-North's efforts at an accommodation because she had rejected a position as a brakeman or a flagman. According to NMB, plaintiff's concern about using electronic or wireless equipment "is more extensive that just using the TIM; strongly suggesting that as the use of the technology continues to expand, so will her anxieties." Stating stated that plaintiff had also rejected an offer to change crafts, "this Board concludes that the Carrier's policy on the mandatory use of the TIM was reasonable, that the claimant would not accede to the offered accommodations and that all the notices, instructions and discipline were to no avail."

Arguments

Based on these events, plaintiff has commenced this action for alleged violations of the New York State and New York City Human Rights Laws, unlawful retaliatory discrimination, discrimination based upon disability, gender and pregnancy and punitive damages. The claim against Herrington is for aiding and abetting the violation of the New York State and New York City Human Rights Laws.

Plaintiff alleges that the TIM was never properly vetted and was only pushed

through by someone related to either a past or current officer of Metro-North. She contends she can do her job as an assistant conductor just as well using paper tickets and a hole puncher. She claims further that there is no conclusive data that TIM is safe for use by anyone, let alone a pregnant female or a female trying to conceive. Plaintiff contends that being forced to use a TIM caused her anxiety, fear and emotional distress and that she was more frightened when she learned another female conductor had miscarried on April 16, 2009. That co-worker had, unlike plaintiff, had always worn her TIM.

Plaintiff states in a sworn affidavit that she was "harassed to a greater extent than any other Conductor to wear the TIM..." and that such harassment was upon the direct orders of defendant Sherry Herring, Senior Operating Officer in the Operations Department. Plaintiff believes that the constant badgering and her anxiety about having to explain why she did not want to use the TIM contributed to her miscarriage. Plaintiff states she researched cell phones and machines that emit electro-magnetic waves and her research confirmed that a TIM is "similar to asbestos, which at one time was a miracle product [but] its effect on the human body became known many years later in causing lung cancer." Plaintiff believes she was made an example and discriminated against to intimate other conductors who might have applied for a disability accommodation. Plaintiff also claims that defendants "failed to provide an individualized interactive process to determine the feasibility of an accommodation and retaliated against [her] for making these requests and commencing this lawsuit by terminating her employment."

In support of their motion for summary judgment, defendants state that there were numerous attempts made by Metro-North officers and union officials to get plaintiff's cooperation in using a TIM. Ronald Yee ("Yee"), who is in charge of Onboard Services, testified at his EBT that he spoke to plaintiff about her use of paper tickets and the corresponding decrease in her passenger revenue accounting. He assured her that the TIMs had been certified as safe by a company called Intermec and Metro-North and that TIM meets all OSHA and FCC requirements. Yee stated that Herrington instructed him that no exceptions were to be made with respect to TIMs usage and that this company policy came resulted from a meeting at the executive level. Yee stated that other employees who did not comply with using the TIMs were investigated and suspended. After their suspension, they started using the TIMs.

Defendants state that plaintiff does not have a disability, within the meaning of the New York State Human Rights Laws ("NYSHRL") or the New York City Human Rights Law ("NYCHRL"), and that only thing she is alleging is that she is a woman of child bearing age who suffered a miscarriage. Defendants deny that plaintiff was satisfactorily doing her job or, even if she has a "disability," she can perform it with a reasonable accommodation. According to defendants, though trained in how to use a TIM, she refused to use it and when offered a different position as a reasonable accommodation, she refused that alternative as well.

Defendants point out that plaintiff has not asserted any claim under the Federal Employer Liability Act ("FELA") (45 USCA § 51 et seq) or any facts to support her intentional infliction of emotional distress claim against them. Thus, defendants seek to

have the FELA type allegations and the intentional infliction of emotion distress claim stricken from the complaint.

Defendants also claim that plaintiff shows no facts to support her hostile work environment claim under the NYSHRL or the NYCHRL because she is not claiming that she was singled because of her membership in a protected class. Defendants contend they are also entitled to summary judgment dismissing the punitive damages claim because under the New York Public Authorities Law, they are immunized.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

The NYSHRL provides that "it shall be an unlawful discriminatory practice...for an employer... because of an individual's age, race, creed ...sex, disability to discharge [such individual] from employment ... (Exec. Law § 296 [1][a]). Exec. Law § 296 [21][a] defines a disability as:

> A physical, mental or medical impairment resulting from anatomical, physiological 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 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 do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought.

The NYCHRL (Admin Code 8-102 [16][b]) has a more expansive definition of disability:

> The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.
>
> (b) The term "physical, medical, mental, or psychological impairment" means:
>
> (1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or
>
> (2) a mental or psychological impairment.

Although the term "disability" is defined more expansively under the NYSHRL and the NYCHRL, and punitive damages, costs and attorney's fees are recoverable for a violation of the NYCHRL (Administrative Code § 8–502[a] and [f]), the NYSHRL and NYCHRL are applied consistently with the Federal civil rights laws (Rosenblatt v. Bivona & Cohen, P.C., 946 F.Supp. 298 [SDNY 1996]). Thus, the New York courts require the same standard of proof for claims brought under NYSHRL as for those brought under Title VII (*see* Johnson v. Levy, 812 F.Supp.2d 167 [E.D.N.Y. 2011]; Doe v. Deer

Mountain Day Camp, Inc., 682 F.Supp.2d 324, 350 [SDNY 2010] (internal citations omitted); Davis v. Bowes, 159 F.3d 1346 [2nd Cir (N.Y.) 1998] *n.o.r.*). Unlike the ADA, however, NYSHRL's definition of disability "covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future" (Davis v. Bowes, 159 F.3d 1346 [2nd Cir (N.Y.) 1998] (*n.o.r.*) citing State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213 [1985]).

The first issue is whether plaintiff suffers from a "disability" under the NYSHRL and/or the NYCHRL. Defendants have established that plaintiff does not have a disability "demonstrable by medically accepted clinical or laboratory techniques..." (State Div. Hum Rts v. Xerox Corp., 65 NY2d 213 [1985]). The only medical proof plaintiff has ever provided in support of her claimed disability are three letters. One letter is from her treating physician. Dr. Salimbene only states that plaintiff told him she was afraid to use a TIM while trying to get pregnant. He advised her not to use a TIM because of the stress it was causing her and based upon her representation to him that the device had not been tested for its safety. Dr. Salimbene's letter is generic and does not provide a diagnosis of any disability or evidence of any kind of testing. It only recites what his patient told him.

The other proof she provides are the letters from Child & Family and Westchester Sports, neither of which are evidence in admissible form. The Child & Family letter is unsigned and there is no indication who made that statement. The letter from Westchester Sports is signed by Dr. Inesta who is not a medical doctor, osteopath

or dentist (CPLR § 2106). A chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation (Pichardo v. Blum, 267 A.D.2d [2d Dept 1999]; Feintuch v. Grella, 209 A.D.2d 377 [2d Dept 2003]). Even were the court inclined to allow plaintiff to remedy these defects by replacing these documents with properly sworn affidavits, neither document identifies any "disability" that plaintiff has, within the meaning of the NYSHRL.

Gender based discrimination encompasses pregnancy (Exec Law § 296 [1][g]). Thus an employer cannot require that a pregnant woman take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner (Exec Law § 296 [1][g]). Plaintiff did not use the TIM while pregnant and she was not suspended from employment while preganant. Subsequent to her miscarriage and prior to her termination from employment, plaintiff did not re-conceive. Therefore any pregnancy based discrimination claim is without any factual basis. Claims that she was treated differently while *trying* to conceive suggest a new class of protected persons not found in any of the statutory law identified in the complaint and, in any event, are best addressed in the context of plaintiff's gender based and retaliation claims discussed later in this decision.

Turning to plaintiff's city human rights claims, the NYCHRL is recognized as being the most progressive in the nation. The disability provisions of the NYSHRL and NYCHRL are not equivalent and require a different analysis (Phillips v. City of New York, 66 A.D.3d 170 [1st Dept. 2009]). Therefore, the jurisprudence that has developed

in interpreting both the NYSHRL and Title VII "should merely serve as a base for the New York City Human Rights Law, not its ceiling." (Jordan v. Bates Advertising Holdings, Inc., 11 Misc.3d 764, 769 [Sup Ct., N.Y. Co. 2006]). NYCHRL defines "disability" purely in terms of impairments: "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code § 8–102[16] [a]; Phillips v. City of New York, 66 A.D.3d 170 [1st Dept 2009]). For example, an employee's breast cancer has been found to constitute a disability under the NYCHRL (Phillips v. City of New York, supra).

Even under NYCHRL's very liberalized and expansive definition of disability, plaintiff has to identify what her disability is and justify it (Phillips v. City of New York, *supra* [undisputed proof that plaintiff had breast cancer and underwent surgery for that condition]). Unlike the plaintiff in Phillips, the only "disability" identified by plaintiff is her desire to conceive and suspicion that the TIM device is unsafe to use despite assurances to the contrary. Even though claims under the NYCHRL must be given an independent liberal construction, it is inconceivable that the legislature intended to set the bar of required proof as low as plaintiff suggests (Williams v. New York City Housing Authority, 61 A.D.3d 62 [1st Dept 2009]). Since plaintiff has not identified any impairment that meets the criteria of a disability under either the NYSHRL or NYCHRL, defendants have met their burden on this motion. Plaintiff has failed to raise an issue of fact that she is disable. Therefore, defendants' motion for summary judgment severing and dismissing the disability based claims is granted.

Without a "disability," there is no need for a special accommodation. Defendants

have, in any event, demonstrated that they offered plaintiff an accommodation which would have allowed her to remain employed but not have to use a TIM. Under both the NYCHRL (Admin. Code § 8-107 [15][a]) and NYSHRL (Exec. Law § 296 [3][a]) an employer must "engage in a good faith interactive process that assesses the needs of the disabled person and the reasonableness of the accommodation requested" (Phillips v. City of New York, 66 A.D.3d 170, 176 [1st Dep't 2009]). Assuming arguendo that plaintiff has a disability, defendants have also established they fulfilled their statutory obligation of assessing her need and trying to place her into a position where she would not have to use a TIM. Nonetheless, plaintiff claims this offer was hollow because it still required her to use a radio, the proposed jobs were outdoors and she thought they might be more dangerous than her job as an assistant conductor. These statements not only highlight the ambiguity of plaintiff's claimed "disability" but demonstrate her unwillingness to do any job that plaintiff personally deemed unfitting for a female trying to conceive.

Plaintiff claims she was singled out and disciplined harshly to set an example for any other employee who dared to speak out against the TIMs or refused to wear one. Presumably her claim is for gender discrimination and retaliation for making complaints. Plaintiff is not the moving party, but defendants contends she cannot establish her prima facie case. A *prima facie* case of gender discrimination requires a showing by the plaintiff that "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under

circumstances giving rise to an inference of discrimination." (Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305 [2004]). Only if these elements are satisfied will there be a rebuttable presumption of discrimination which the employer can then rebut by proving a legitimate, independent, non-discriminatory reason for the adverse employment action (McDonnell Douglas Corp. v. Green, 411 US 792 [1973]; Forrest v. Jewish Guild for the Blind, 3 NY3d at 305; Ferrante v. American Lung Association, 90 NY2d 623 [1997]). If the employer is successful, the burden then shifts back to plaintiff who has to prove that the reason being offered is a pretext, and therefore false.

The elements at issue here are the 1st and 4th: whether plaintiff was qualified to hold the position and whether she was discharged under circumstances giving rise to an inference of discrimination. Plaintiff readily admits that she refused to use a TIM no matter how many assurances she received about its safety. Use of the TIM is a requirement of her job as an assistant conductor. Her personal opinion, that she could do her job just as fast manually does not raise an issue of fact. Defendants have proved that the TIMs provide real time data and statistics and that the old paper tickets are inefficient. It is for the employer, not the employee, who decide how the employer's work is done and determine the feasibility of the accommodation requested (Pimentel v. Citibank, N.A., 29 A.D.3d 141 [1st Dept 2006]). Neither NYSHRL nor NYCHRL requires that an employer eliminate essential job functions to accommodate an employee or to comply with the law (Pimentel v. Citibank, N.A., *supra*). Consequently, by showing that plaintiff had a documented history of unsatisfactory job performance because she refused to use a TIM, defendants have established that plaintiff was not qualified to do

her job because she refused to use a TIM (see Singh v. State of N.Y. Off. of Real Prop. Servs., 40 A.D.3d 1354, 1355–1356 [2007]).

Defendants have also established (and plaintiff acknowledges) that other employees – males and females – were brought up on charges and suspended for not using their TIMs. The punishment included suspension. Plaintiff was, however, the only employee who steadfastly refused to use the device after her suspension, whereas the other employees eventually capitulated and began using their TIMS when their suspensions were over.

Examining the foregoing, defendants have proved that plaintiff cannot establish two of the material elements of a *prima facie* case for gender discrimination/ retaliation. She was not singled out because she was trying to conceive. Plaintiff has failed to come forward with any triable issues. Therefore, defendants' motion for summary judgment dismissing these the gender and retaliation based claims is granted and those claims are severed and dismissed.

Defendants contend that some of plaintiff's facts should be stricken because they tend to describe a FELA claim which has not been pleaded by her. Under FELA, an employee of a common carrier may sue his or her employer for negligence (see Ellis v. Union Pac. R. Co., 329 U.S. 649 [1947]). Plaintiff has, however, offered these facts to support her claim for intentional infliction of emotional distress. The elements of a claim for intentional infliction of emotional distress are (i) extreme and outrageous conduct, (ii) an 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) the resultant severe emotional distress (Lau v. S & M Enterprises, 72 A.D.3d 497 [1st Dept 2010]; Howell v. New York Post Co., 81 N.Y.2d 115, 121 [1993]). Defendants have not come forward with any legal precedent preventing plaintiff from suing under the common law as opposed to FELA. Therefore, the motion to strike plaintiff's factual claims as prejudicial and unnecessary is denied. The court will, however, proceed to the issue of whether defendants have proved they are entitled to summary judgment dismissing the claim for intentional infliction of emotional distress.

Here, the primary focus is on whether the conduct alleged is "extreme and outrageous" and whether defendants intended to cause or disregarded the substantial probability of causing severe emotional distress. Conduct meets the "extreme and outrageous" standard if it is "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" (Murphy v. American Home Products Corp., 58 N.Y.2d 293, 303 [1983]; Berrios v. Our Lady of Mercy Medical Center, 20 A.D.3d 361, 362 [1st Dept 2005]). The "outrageousness" element is subject to determination by the court as a matter of law (Howell v. New York Post Co., 81 N.Y.2d at 353). Furthermore, liability is based upon after-the-fact judgment about the defendant's actions (Howell v. New York Post, *supra*). Defendants' actions do not rise to that level nor does plaintiff's evidence in opposition to their motion raise a triable issue of fact. Therefore, defendants' motion for summary judgment dismissing the intentional infliction of emotional distress claim is granted and that claim is severed and dismissed.

Defendants have moved for summary judgment on plaintiff's hostile work

environment claim, assuming that she intended to plead such claim but did not specifically identify it as such. Where it is alleged that 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, Title VII is violated (Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 [1993]). One of the claims made by plaintiff is that the August 18, 2009 memo that was circulated by Metro-North caused her to feel humiliation, embarrassment and experience sexual harassment. According to plaintiff, the memo was informally referred to as the "Gina Memo" among her fellow workers. Another claim by her is that having to repeat over and over the reason she did not want to wear a TIM (trying to conceive) was embarrassing and too intrusive into her personal life, causing her embarrassment, humiliation and other negative emotions. None of these claims, even when taken cumulatively, rise to the level required to support a hostile work environment claim. In any event, plaintiff has not opposed or otherwise addressed this branch defendants' motion in her papers. Therefore, defendants' motion for summary judgment on plaintiff's hostile work environment claim is granted. That claim is hereby severed and dismissed.

Plaintiff has sued Sherry Herrington in her individual capacity. According to plaintiff, Herrington instructed plaintiff's supervisors that they were to enforce plaintiff's use of a TIM, even if she was pregnant. The question of whether individual defendants who work in a supervisory capacity can be held liable under the various discrimination statutes is complicated and the law is sometimes conflicting, largely depending on

which law the claim is made under (*see* 13 N.Y.Prac. Employment Litigation in New York § 5:22 [November 2011]). It is unrefuted, however, that Herrington is only an employee of Metro-North and has no direct ownership interest in the company (Patrowich v. Chemical Bank, 63 N.Y.2d 541 [1984] *abrogated on other grounds*). In any event, it is impossible for Herrington to "aid and abet" in Metro-North's discriminatory acts (Exec Law § 296 [6] and [7]) if, in fact, what plaintiff is claiming is that Herrington herself personally discriminated against her (Medical Exp. Ambulance Corp. v. Kirkland, 79 A.D.3d 886 [2nd Dept. 2010]). Furthermore, having in this decision dismissed all of plaintiff's discrimination claims, there is no cognizable "aiding and abetting" claim left that can be asserted against Herrington. Consequently, defendants' motion for summary judgment on the claims against Herrington is granted and those claims are severed and dismissed as well.

Plaintiff has asserted a claim for punitive damages. She has not addressed defendants' argument that Metro-North is a public benefit corporation under section 1263 of the New York Public Authorities Law and, therefore, immune from such a claim. Since defendants have correctly stated the prevailing principles of law (see Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382 [1987]) and plaintiff has not come forward with any factual issues, defendants' motion for the dismissal of the punitive damages claim against them is granted. The motion is also granted because a claim for punitive damages is "parasitic and possesses no viability absent its attachment to a substantive cause of action . . ." (Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 616 [1994]; Prote Contracting Co., Inc. v. Board of Educ.

of City of New York, 276 A.D.2d 309 [1st Dept 2000]). Having dismissed all of the plaintiff's claims, there is no ground to support a punitive damages claim.

Conclusion

Having decided that defendants are entitled to summary judgment in their favor on each of the claims asserted by the plaintiff, the complaint is hereby dismissed in its entirety.

In accordance with the foregoing,

It is hereby

ORDERED that the motion by defendants for summary judgment is granted in all respects; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants Metro-North Railroad and Sherry Herrington against plaintiff Gina DeFrancesco dismissing the complaint and this action; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 18, 2012

So Ordered:

Hon. Judith J. Gische, JSC