SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

BARBARA HERBST

Plaintiff

-against-

HOSPICE OF NEW YORK, LLC d/b/a HOSPICE OF NEW YORK

Defendant.

Index No. 27595/2019E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

Pursuant to CPLR 3211 (a) (7), defendant moves to dismiss the Complaint, which alleges that based on age and gender discrimination, defendant retaliated against plaintiff by wrongfully terminating her employment, in violation of the New York State Human Rights Law (NYSHRL; Executive Law § 296), and the New York City Human Rights Law (NYCHRL; and the New York City Administrative Code, § 8–101 *et seq.*). Plaintiff cross-moves to amend the Complaint pursuant to CPLR 3025, providing a proposed First Amended Complaint.

The following facts are set forth in the proposed First Amended Complaint: From 2004 to April 5, 2019, plaintiff was employed by defendant as a Nurse Liaison at a hospice located in Long Island City, in Queens County. Plaintiff was sixty-two years old on the date of her termination and was one of the highest paid Nurse Liaisons. None of the four or five Nurse Liaisons known to plaintiff and still employed by the defendant, is over the age of sixty. Plaintiff consistently received high performance reviews.

On March 21, 2019, plaintiff was called to a meeting with her direct supervisor, Rebecca Freeman (Freeman), and defendant's newly hired Director of Business Development, Ravi Patel (Patel). During, and subsequent to this meeting, plaintiff was offered a re-assignment to Jamaica

Hospital, which she declined because it was a less desirable opportunity. Patel stated that plaintiff's current department was "changing" and that it would be moving to more "metrics centered accountability" (Proposed First Amended Complaint ¶ 11).

On March 26, 2019, Patel and Freeman met with Dr. Lourdes Merlo (Merlo) about alleged incidents involving plaintiff in which Merlo felt plaintiff was out of line. Merlo did not file a formal complaint against plaintiff and plaintiff contends that she was vague when questioned about what plaintiff did wrong. On March 27, 2019, plaintiff met with Freeman, who gave plaintiff a positive annual performance review, despite the meeting of the day before where Patel, Freeman and Merlo discussed allegedly negative incidents involving plaintiff.

On March 28, 2019, plaintiff had a disagreement about patient protocols with a Calvary Hospital Liaison over the transfer of a patient. Plaintiff reported the disagreement to Freeman, however, plaintiff declined to file a formal complaint against the Calvary Hospital Liaison, opting to work things out. On March 29, 2019, plaintiff met with Patel, who advised plaintiff that he had received a complaint from the Calvary Hospital Liaison and Merlo. Despite her request, plaintiff was not shown any written complaints, nor provided with any details that substantiated any complaint. Patel told plaintiff that she should not work that day and provided no further details or direction.

On April 4, 2019, Patel summoned plaintiff, who advised him that she felt harassed and that he was creating a toxic work environment. In response, Patel directed plaintiff not to return to her duties until an investigation was completed. Plaintiff's requests for further information were ignored.

On April 5, 2019, plaintiff met with Patel and Vada Rosen (Rosen) in Human Resources, whereupon, she was terminated without an investigation and during which time Patel stated that plaintiff was "showing her age" (Proposed First Amended Complaint ¶ 22). Patel also stated that

plaintiff was "not a good fit" and was "like a square peg in a round hole," despite not providing any further information or details. (Proposed First Amended Complaint ¶ 22.)

On April 8, 2019, three days after plaintiff's termination, Patel filed a complaint investigation form against plaintiff for an alleged problem she experienced with Merlo. In a letter of termination, dated April 8, 2019, from Celeste Schubert (Schubert), a Human Resources Generalist for defendant, plaintiff was told that her termination was "due to the changes in Hospice of New York's business model which included the recent business development department restructuring and plaintiff's denial of accepting a job position in the Jamaica Hospital IPU" (Proposed First Amended Complaint ¶ 23).

On April 9, 2019, plaintiff met with Schubert and told her that she was never told that her continued employment depended on her taking the position offered by Patel. Plaintiff also disputed the accuracy of the complaint allegedly made by Merlo. Freeman was brought to the office and, according to plaintiff, confirmed that the written complaint by Merlo, which Patel signed off on, was not accurate.

In a second letter of termination dated April 10, 2019, Schubert for the first time stated that plaintiff was terminated due to numerous complaints of lack of professionalism and inappropriate behavior, and that her decision not to accept the previously offered position had no weight in the final decision to terminate her. Plaintiff was replaced by two Nurse Liaisons who were younger than plaintiff.

Plaintiff contends that she was subjected to retaliation by Patel and Schubert, who failed to provide plaintiff with any concrete substantiated allegations of the alleged lack of professionalism and inappropriate behavior which resulted in her termination.

On a motion pursuant to CPLR 3211 (a) (7), the Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all

favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) Affidavits may be considered freely "to preserve inartfully pleaded, but potentially meritorious, claims" in a Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]). Vague and conclusory allegations are insufficient to maintain a cause of action (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]).

In *Rovello*, the Court stated that where a plaintiff asserts claims "on his pleading alone, confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint." Relying on *Rovello*, the Court in *E & D Grp., LLC v Vialet* (134 AD3d 981, 982 [2nd Dept 2015]), stated that " 'on a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party' (*Sokol v Leader*, 74 AD3d at 1181), and a plaintiff 'will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint.'"

Pursuant to CPLR 3025 (b), leave to amend a pleading shall be freely given "upon such terms as may be just" and "absent prejudice or surprise directly resulting from the delay" (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *see Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420 [1st Dept 2014]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and

these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]). As noted in *MBIA Ins. Corp. v Greystone & Co., Inc.* (74 AD3d 499, 500 [1st Dept 2010]), a plaintiff does not need to establish the merit of its proposed new allegations, he or she must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." The facts alleged in the First Amended Complaint are not insufficient or devoid of merit, and no prejudice to defendant has been shown.

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against an employee for filing a discrimination complaint or otherwise opposing any practice prohibited by the statutes (Executive Law § 296 [7]; Administrative Code § 8-107 [7]).

To establish a claim of unlawful retaliation under the NYSHRL, a plaintiff "must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 312-313; *see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009]). "An adverse employment action requires a materially adverse change in the terms and conditions of employment ... [such as] 'a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities....' " (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 306; *see Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]). "To be materially adverse, a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job

responsibilities.'" (*id.*; *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 571 [1st Dept 2012]; *Matter of Block v Gatling*, 84 AD3d 445 [1st Dept 2011).

Under the more protective NYCHRL, a retaliation claim does not require "a materially adverse change in the terms and conditions of employment," but, instead, the alleged retaliatory acts need only "be reasonably likely to deter a person from engaging in protected activity" (*Williams v New York City Hous. Auth.*, 61 AD3d at 71; Administrative Code § 8-107 [7]). To establish *prima facie* a claim of retaliation under the NYCHRL, a plaintiff must show that (1) she participated in a protected activity known to defendants; (2) defendants took an employment action that disadvantaged the plaintiff; and, (3) a causal connection existed between the protected activity and the adverse employment action (*see Fletcher v Dakota, Inc.*, 99 AD3d at 51-52).

In *Williams v New York City Hous. Auth.* (61 AD3d 62, 71 [1st Dept 2009]), the Court cautioned that the NYCHRL "does not permit any type of challenged conduct to be categorically rejected as nonactionable." The standard stated by the Court is that "no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'" (*id.*; *see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012].)

In this case, plaintiff engaged in protected activity on April 4, 2019, when she advised Patel that she felt harassed and that he was creating a toxic work environment. Patel's response was to direct plaintiff not to return to her duties until his investigation was completed. Plaintiff was terminated the following day. Plaintiff has alleged sufficient facts to make out a retaliation claim under the NYSHRL and NYCHRL.

With respect to plaintiff's wrongful termination claim, in *Leibowitz v Bank Leumi Trust Co. of N.Y.* (152 AD2d 169, 173 [2nd Dept 1989]), the Court stated the general rule that "if the employment is not for a definite term, and if there is no contractual or statutory restriction on the right to discharge, an employer may lawfully discharge an employee whenever and for whatever cause, without incurring liability for wrongful discharge." (*See Horn v New York Times*, 100 NY2d 85 [2003]; *Gootee v Global Credit Servs., LLC*, 139 AD3d 551, 553 [1st Dept 2016].) The rule is applicable absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment (*see Sullivan v Harnisch*, 81 AD3d 117, 122 [1st Dept 2010]). Pursuant to both, the NYSHRL and NYCHRL it is an unlawful discriminatory practice for an employer to refuse to hire, discharge, or otherwise discriminate in compensation or in terms, conditions or privileges of employment on the basis of a person's age (Executive Law § 296; Administrative Code of the City of New York § 8–107).

Specifically, with regard to age discrimination, plaintiff must allege that the adverse employment action occurred under circumstances giving rise to an inference of age discrimination (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6NY3d 265, 270 [2006]). In *Ashker v International Bus. Machs. Corp.* (168 AD2d 724, 725 [3rd Dept 1990]), the Court added an element: "when age discrimination is charged, the complaint must also allege that someone younger replaced the terminated employee...." (*See Miller v News Am.*, 162 AD3d 422 [1st Dept 2018]; *Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 290 [1st Dept 2005].) Plaintiff sets forth comments which were made which she claims tend to show that the reason for her termination was age related. Moreover, she alleges that she was replaced by two younger Nurse Liaisons.

In *Vig v New York Hairspray Co., L.P.* (67 AD3d 140, 145 [1st Dept 2009]), the Court instructed that "employment discrimination cases are ... generally reviewed under notice pleading standards." Thus, plaintiff need not plead specific facts, but need only give defendant "fair notice" of the nature and grounds of her claims (*id.*). The function of a liberal notice pleading standard is to permit an opportunity for disclosure. In *Mohammad v Board of Mgrs. of 50 E. 72nd St. Condominium* (262 AD2d 76, 77 [1st Dept 1999]), the Court stated that although the defendants "arguably articulated a legitimate, nondiscriminatory reason for some of the allegedly retaliatory conduct, discovery has yet to be conducted and plaintiffs, having adequately stated a claim for employment discrimination, should be afforded a full and fair opportunity to support their allegations." Plaintiff's retaliation and wrongful termination claims are sufficiently pled to give defendant fair notice of her claims (*see Sanchez v Brown, Harris, Stevens*, 234 AD2d 170 [1st Dept 1996]; *Artis v Random House, Inc.*, 34 Misc3d 858 [Sup Ct, NY County 2011]).

Accordingly, plaintiff's cross motion to amend the Complaint is granted.

Defendant's motion to dismiss the Complaint is denied.

Plaintiff is directed to serve a copy of this Order with Notice of Entry on defendant within thirty days of the date of entry of this Order.

Defendant shall serve and file its Answer to the First Amended Complaint, or otherwise move, within 30 days of receipt of this Order with Notice of Entry.

This constitutes the Decision and Order of the court.

Dated: January 6, 2020

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO