

Ledbetter v Department of Educ. of the City of N.Y
2021 NY Slip Op 30324(U)
February 2, 2021
Supreme Court, New York County
Docket Number: 154016/2015
Judge: J. Machelles Sweeting
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----X

KIMBERLIE LEDBETTER,

Plaintiff,

Index No.: 154016/2015

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY
OF NEW YORK, AND THE BOARD OF EDUCATION
OF THE CITY SCHOOL DISTRICT OF THE CITY OF
NEW YORK,

Defendants.

-----X

J. MACHELLE SWEETING, J.:

This action arises out of claims by Kimberlie Ledbetter (Plaintiff) that her former employer, defendants The Department of Education of the City of New York (DOE) and the Board of Education of the City School District of the City of New York (collectively, “DOE”) discriminated against her, by wrongfully terminating her probationary employment due to her disability and gender, in violation of the New York City Human Rights Law (“NYCHRL”). The DOE moves pursuant to Civil Practice Law and Rules (“CPLR”) §3212, for summary judgment dismissing the complaint. As set forth below, the DOE’s motion is granted.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff was hired by the DOE in September 2010 as a probationary Special Education teacher. At all relevant times, plaintiff worked at Anning S. Prall Intermediate School 27 (IS 27), located in Staten Island, New York, primarily “[t]eaching 12 to 1 to 1 classes, which were

emotionally disturbed children.”¹ The DOE discontinued plaintiff’s probationary employment and she was terminated, effective January 7, 2015.

Plaintiff testified that she was diagnosed with multiple sclerosis (MS) in 2008. “I stutter, sometimes. I get caught on my words. Sometimes my leg hurts. It’s not – it’s not so bad, I’ve been taking medication for it so it’s been under control.” In 2010, plaintiff advised assistant principal Marie Grandner (“Grandner”) that she had MS. In 2011, plaintiff also informed assistant principal Joseph Pecoraro (“Pecoraro”) that she had MS. She assumed that the other teachers were aware of her disability “because I had rough students, so every once in a while they would have to come in and just kind of assist, because it would get physical and they -- they wouldn’t let me get involved in that. So I assumed that is [sic] was because it was MS.”

Plaintiff was out on maternity leave twice while she worked for the DOE. As set forth below, plaintiff believes that her termination was made in bad faith, on the basis of her disability and pregnancy.

Plaintiff received satisfactory annual reviews for the 2010-2011 and the 2011-2012 school years. Plaintiff was scheduled to take her first maternity leave in May 2012. In January 2012, Kornish allegedly advised plaintiff, “I am not putting you up for tenure this year because you are pregnant and am [sic] extending your probation.”

On May 15, 2012, plaintiff and the former Superintendent Erminia Claudio (“Claudio”), entered into an “Extension of Probation Agreement.” The agreement stated, in pertinent part, that plaintiff’s probation period was being extended for the one-year period of November 30, 2012 to November 30, 2013. Further, plaintiff “waives any rights, claims or causes of action and

¹ A 12:1:1 class is a “class limited to twelve students requiring both a teacher and a paraprofessional in the classroom at all times.”

agrees not to commence any claims, motions, actions or proceedings of whatever kind [against the DOE] . . . for any actions taken or not taken, or statements made or not made by them prior to the date of this agreement.”

Plaintiff received an unsatisfactory rating for the 2012-2013 school year. On the rating, Claudio recommended “continued probationary service.” On June 26, 2013, plaintiff and Claudio entered into another Extension of Probation Agreement, extending plaintiff’s probation period from November 27, 2013 to November 27, 2014.

According to plaintiff, during the 2013-2014 school year, Kornish advised plaintiff that she would recommend her for tenure. However, at the beginning of the year, plaintiff had been assigned “classes out of my license to wit, foreign language, social studies and art to teach making it difficult for me during a year in which my probation was extended to achieve tenure.” In September 2013, plaintiff’s union “advocated” for her and plaintiff was reassigned to a Special Education class. However, plaintiff states that this class was “considered one of the most difficult classes to teach at the school.” Plaintiff received an overall rating of effective for the 2013-2014 school year.

Plaintiff took a second maternity leave in March 2014. In the fall of 2013, when she advised Kornish of her pregnancy, the following occurred:

“[Kornish] then said I better see you teaching to your full potential and you being pregnant could hurt your chances for tenure because now we will have to do all your observations during the first half of the year and we will have nothing to show for the second half. I told her she will not be disappointed and she responded by saying we will see how it goes.” (internal quotation marks omitted).

Plaintiff testified that she believed Kornish discriminated against her because “[w]ell, I feel like it was a combination of the MS and the pregnancy, to be honest. I think that Ms. Kornish, the principal, felt that I was becoming useless to her because I was pregnant and she felt that she couldn’t get all of the observations done in a correct format, or however she saw it fit.” She also believed that Kornish discriminated against her for making her move her things from her former classroom to the current classroom.

Plaintiff further claims that after she told Kornish that she was pregnant, but prior to when she took maternity leave, Kornish’s attitude towards plaintiff changed. Her attitude “when [they] interacted was markedly negative,” and Kornish kept asking plaintiff when she was going to go out on leave. On numerous times, Kornish allegedly stated to plaintiff, “[w]hy are you here, you are crazy for coming in.”

Plaintiff returned from maternity leave on May 7, 2014. Plaintiff was assigned to a sixth grade, 12:1:1 class. This was a self-contained class with “mostly emotional [sic] disturbed children.” The students took “Measurement of Student Learning” tests on May 7 and May 8. Plaintiff advised the students that if they were well behaved for the two days of testing, they “would get rewarded with free computer time on the morning of May 9, 2014,” which already had been scheduled as a half-day of school. Plaintiff states that this is an “acceptable teaching technique in Special Education.”

May 9, 2014

The paraprofessional assigned to plaintiff's classroom was out sick on May 9, 2014. Although plaintiff requested a substitute teacher, the school did not provide her with one. She claims that, "[g]iven the nature of the students, (Emotionally Disturbed) having another trained adult in the room is essential [and required by federal and state law]." That day, a student (herein referred to as "TR"²) developed a bloody nose. Given that she could not leave the students alone in the classroom, plaintiff asked the nurse if she could have TR walk there with another student. The nurse "replied 'absolutely' and that I will wait outside my door for him." On the way to the nurse's office, the students stopped by the bathroom so that TR could clean himself up. "AP Pecoraro found them and walked the students back to my classroom and left." Plaintiff alleges in her complaint that if a substitute paraprofessional had been provided, this person could have escorted the student.

Plaintiff testified that she did not have anything else planned for the day except for computer free time. She also testified that there were no paraprofessionals in the room. She testified that while the students were on their computers she was "[w]alking around the room. Talking to them. This was the type of class you had to stay active." Later that morning, plaintiff "heard a student laughing in the corner, and I observed graphic images on a computer." Plaintiff then called Alfred Norton ("Norton"), the Special Education Dean, for assistance. She states the following, in pertinent part:

"The DOE computers should have had a filter, so that students could only access certain sites, but apparently the filter was not properly functioning. It should also be noted that even though I was constantly circulating around the room, if a paraprofessional was provided as required by federal and state law, the computer access could have been even more closely monitored."

² For privacy reasons, the student's name is not used.

Plaintiff claims that allowing the students to have free computer time was a behavior modification technique and that she had been following proper protocol. Nonetheless, as a result of the two incidents occurring on May 9, 2014, her probationary employment was discontinued on January 7, 2015.

Office of Special Investigations (OSI) Investigative Report (OSI Report)

Pecoraro contacted OSI as a result of the incidents occurring on May 9, 2014. The investigative report states that Pecoraro discovered TR and the other student “in the hallway, unsupervised, and escorted them back to their classroom.” When Pecoraro arrived at plaintiff’s class room, he “saw several students playing inappropriate computer games and others watching pornography on laptops.”

Pecoraro advised OSI that when he escorted the two students back to plaintiff’s classroom, plaintiff had been sitting at her desk and a paraprofessional was sitting in the corner of the classroom.³ Several students were playing inappropriate and violent video games and others had been accessing a pornographic website. Pecoraro left the room to get a note pad and to ask Norton for assistance. “AP Pecoraro informed this investigator that [plaintiff] likely called Mr. Norton after he had left her classroom and realized that he seen [sic] her students logged into inappropriate websites.” When he and Norton returned to plaintiff’s classroom, she was still sitting at her desk.

Norton stated that when he and Pecoraro arrived at plaintiff’s classroom, she was sitting at her desk and several students had accessed and were watching pornography. The DOE’s Office

³ The OSI Report contradicts plaintiff’s testimony that no paraprofessionals were in the room.

of Safety and Youth Development generated an occurrence report for the incident based on Norton's statements.

Six students were interviewed. In brief, they confirmed that plaintiff gave them "free time" on the computer and that, while plaintiff was sitting at her desk, some students had accessed a pornographic website and others were playing a video game.

Kornish advised OSI that, when one student had a bloody nose and needed to go to the nurse's office, plaintiff should have called the main office "and a staff member would have come to her classroom to take Student A there." Kornish further advised OSI that plaintiff should not have allowed her students to have "free time" on their computers during instructional time. Further, "when using computers for instructional purposes, students should always be monitored by the classroom teacher to ensure that inappropriate websites are not accessed."

Plaintiff was interviewed by OSI on October 9, 2014 in the presence of her union representative. She claimed that, on May 9, 2014, she had notified the main office that a paraprofessional was absent. The main office informed plaintiff "that having just one paraprofessional in the room was sufficient and there would be no substitute paraprofessional coming." Plaintiff confirmed that she sent two students to the nurse's office, unsupervised. "When asked, Ms. Ledbetter could offer no explanation as to why she had not used her classroom telephone to call the main office and request that a staff member escort Student A to the nurse." Plaintiff further stated that "she did not give her students 'free computer time' but rather instructed them to access 'English Language Arts websites' via Google."

Plaintiff also confirmed that, "when she heard students laughing, she looked at one of the laptops and saw that several female students had accessed the 'Chris Brown's Dick' website." OSI asked plaintiff how, "if she was properly supervising her students, they were allowed to play

violent games and access pornographic websites.” Plaintiff claimed “that it was her understanding that the DOE is responsible to place filters on all computers.”

In response to plaintiff’s statement, Pecoraro “replied that [plaintiff] should have given the students a specific website to access.” None of the students corroborated that plaintiff instructed them to use the English Language Arts websites.

OSI concluded by substantiating both the allegation that plaintiff sent two students to the nurse’s office unsupervised, and the allegation that plaintiff failed to properly supervise her students when they were allowed free time during an instructional period and subsequently allowed to access inappropriate websites. On November 10, 2014, Investigator Dennis Boyles (“Boyles”) issued his report to Jaclyn Vargo (“Vargo”), Director, who approved it. OSI recommended that Kornish review the OSI report and “take appropriate disciplinary action against [plaintiff].” The report was sent to Kornish on November 13, 2014.

On November 7, 2014, prior to the conclusion of OSI’s investigation, plaintiff and Superintendent Anthony Lodico (“Lodico”), entered into an Extension of Probation Agreement for the period of December 1, 2014 through December 1, 2015.

Plaintiff and her union representative met with Kornish on November 18, 2014 to discuss the OSI report. Pursuant to a letter dated November 19, 2014, that was sent to plaintiff and Lodico, Kornish memorialized the meeting, along with plaintiff’s concerns. The letter summarized that when Pecoraro first arrived at plaintiff’s classroom, the students “were not engaged in an appropriate lesson. Students were on a laptop computer unsupervised by either adult that was in the room. . . . The 1:1 para for one child was sitting at a table without that said child. You were seated at your desk with an iced coffee not engaging any students on the lesson.” After Pecoraro left and returned, “there was no lesson going on, no adults engaging the students, and you were on

the telephone with your back to your 12:1:1 class.” The students had been accessing inappropriate websites.

Plaintiff’s union representative had stated, among other things, that plaintiff was unaware of the policy to call the main office in an emergency and that she, as opposed to Norton, took the computer away from the student who had been accessing pornographic images. The letter concluded, in relevant part:

“After reviewing the findings of OSI and your responses at our meeting, I conclude that on May 9, 2014, you sent Students A and B to the nurse s office unsupervised. In addition, I find that you failed to properly supervise your students by allowing them free computer time during an instructional period, resulting in these students accessing inappropriate websites. In doing so, you engaged in misconduct, conduct unbecoming your position and neglect of duties. The above may lead to further disciplinary action, including an adverse rating and discontinuance of your probationary services.”

Pursuant to a letter dated December 3, 2014, Lodico informed plaintiff that, on January 7, 2015, he was reviewing whether her “services as a probationer [will] be discontinued with license revocation as of the close of business January 7, 2015.” Lodico explained that the consideration was “based on the reasons included in the attached documentation and such documents constitute a written attachment of the reasons” Plaintiff was advised that she could submit a response to the reasons for her discontinuance.

On January 7, 2015, Lodico advised plaintiff that he was reaffirming her discontinuance. Plaintiff filed an internal appeal of the discontinuance with the DOE’s Office of Appeals and Review (“OAR”). On March 17, 2015, plaintiff, through her union representative, presented her appeal to the Chancellor’s Committee.

Pursuant to a letter dated March 31, 2015, Lodico informed plaintiff that he received the Chancellor Committee's report regarding the appeal and that he was reaffirming the decision to discontinue plaintiff's probationary service.

Shortly thereafter, plaintiff commenced an action against the DOE, alleging that the DOE discriminated against her on the basis of her disability and gender. The complaint sets forth that, "despite the fact that [plaintiff] followed proper protocol, she was discontinued on January 7, 2015 over the incident" As a result, the DOE "acted arbitrarily and capriciously and in bad faith in termination [plaintiff]."

The DOE's Motion for Summary Judgment and Plaintiff's Opposition

(a) Statute of Limitations

Plaintiff commenced this action on April 22, 2015. At the outset, the DOE argues that any claims stemming from incidents occurring prior to April 22, 2014, are time barred as they are outside the one-year statute of limitations.

Plaintiff does not address this argument.

(b) Disability

According to the DOE, plaintiff's claims that she was discriminated against on the basis of a protected characteristic is completely unsupported. On the contrary, the DOE maintains that plaintiff was terminated as a result of the two incidents that occurred on May 9, 2014. With respect to her disability, plaintiff only speculates that anyone at the DOE was aware that plaintiff had MS. Even if anyone had been aware, there is no connection between her disability and her 2015 discontinuance.

When asked the basis of her claim that she was discriminated against on the basis of her disability, plaintiff testified “[w]ell, I feel like it was a combination of the MS and the pregnancy, to be honest. I think that Ms. Kornish, the principal, felt that I was becoming useless to her because I was pregnant and she felt that she couldn’t get all of the observations done in a correct format, or however she saw it fit.”

In response to the DOE’s motion, plaintiff does not address the claim that she was discriminated against on the basis of her MS except to say that it was common knowledge that she suffered from this illness.

(c) Pregnancy

Regarding her pregnancy, the DOE alleges that plaintiff cannot set forth a *prima facie* case because she cannot establish that any employment action was motivated by a discriminatory animus. For instance, plaintiff received an unsatisfactory rating in 2012-2013 school year, when she was not pregnant. Kornish also agreed to extend plaintiff’s probationary employment for an additional year. In addition, although plaintiff alleged that Kornish appeared concerned that she could not rate plaintiff’s performance due to the second maternity leave, plaintiff still received an effective rating for the 2013-2014 school year.

The DOE continues that, even if plaintiff could establish a *prima facie* case, it has set forth legitimate reasons for plaintiff’s termination and plaintiff cannot demonstrate that the reasons are pretextual. The OSI investigation concluded that plaintiff failed to supervise her students by allowing them to go to the nurse’s office unsupervised and that she also failed to supervise them when she allowed them to have free time on their computers during an instructional period, resulting in access to inappropriate websites. According to the DOE, “[t]he undisputed failure of Plaintiff to actively supervise her Special Education students on May 9, 2014, which was one of

Plaintiff's primary responsibilities as an educator, provides an amply independent, good faith, legitimate business reason for Plaintiff's probationary discontinuance."

In opposition, plaintiff claims that she can establish that her termination occurred under an inference of discrimination. First, at the beginning of the 2013-2014 school year, she was assigned to teach classes outside of her license, making it difficult to achieve tenure in the year that her probation was extended. Although she was able to transfer out of this class, she was reassigned to a difficult class.

Plaintiff also maintains that her probation was extended twice after she was advised that she would be attaining tenure. Even in light of her first pregnancy, the DOE "had well over 3 years to judge her record and performance by the time of announcing her second pregnancy, thus there would be no reason to extend her probation again given her performance."

Lastly, plaintiff argues that Kornish's comments and abrupt negative attitude after plaintiff disclosed her second pregnancy are evidence of a discriminatory animus. According to plaintiff, Pecoraro also allegedly discriminated against her on the basis of her pregnancy. On the date of the incidents, in relevant part:

"[Pecoraro] came into my room and just – what's going on in here? What are you doing? You shouldn't be doing that with students. Why is this happening? Why is that happening? In front of the students. And from one colleague to another, you don't do that. And you want the students to respect you and if you are going to put me down in front of them, you lose that respect. I feel."

Further, when plaintiff was three months pregnant, Pecoraro "scolded" her in his office for her behavior when she was "screaming and yelling" at her class.

Plaintiff alleges that Lodico also discriminated against her on the basis of her pregnancy. In support of this contention, she states that Kornish and Pecoraro informed Lodico of plaintiff's "situation in the school. I think he was told by Ms. Kornish and Mr. Pecoraro about -- just my

situation in the building, from start to that point. And I think that helped him make his decision very quickly.”

Plaintiff also argues that the real reason for her termination did not stem from the incidents occurring on May 9, 2014. She continues that “[t]he real reason for my termination is due to my pregnancy and disability because there was an abrupt very negative change in the attitude of principal Kornish and because I did not violate any school policy.”

Plaintiff claims that she has met her burden to establish that issues of fact remain as to whether the DOE’s proffered reasons for her termination are pretextual. According to plaintiff, the nurse approved of plaintiff’s decision and agreed to wait outside of her door for the two students. Further, had she been provided with an additional paraprofessional, this employee could have escorted the student.⁴

According to plaintiff, the other reason proffered for her termination is also false and misleading. Plaintiff maintains that she utilized an acceptable teaching technique by allowing the students to be rewarded with free time on their computers. As soon as she discovered that the students were looking at improper websites she took immediate action. She claims that she should not be held liable for this improper access because the DOE was supposed to have a filter on the websites. Even if she had been teaching the students or they were doing research, as the filter was not working, they still would have been able to access the inappropriate websites.

⁴ In the complaint, plaintiff states that the nurse approved of her decision. In opposition to the DOE’s motion, plaintiff claims that she did not violate any school policy by sending the two students unescorted to the nurse’s office because students are allowed to go to the bathroom unescorted if they are not assigned a paraprofessional. Plaintiff raises this argument, for the first time, in opposition to the DOE’s motion. Nonetheless, this policy or discrepancy is not relevant for the instant motion. There is also a discrepancy between plaintiff’s testimony and the record because it does appear that a paraprofessional assigned to a particular student in plaintiff’s classroom was present on the date of the incidents. However, this discrepancy too, is not relevant for the instant motion.

CONCLUSIONS OF LAW

I. Summary Judgment

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. New York City Human Rights Law (“NYCHRL”)

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire, employ, fire, or discriminate against an individual in the terms, conditions, or privileges of employment because of the individual’s disability or gender. *See* Administrative Code § 8-107 (1) (a). Although pregnancy is not explicitly listed in the statute, “pregnancy discrimination is a form of gender discrimination under the NYCHRL.” *Chauca v Abraham*, 841 F3d 86, 90 n 2 (2d Cir 2016).

On a motion for summary judgment dismissing a claim for discrimination under the NYCHRL, courts have reaffirmed the applicability of the burden-shifting analysis as developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), in addition to the mixed-motive analysis. See *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016) (internal quotation marks, citations and brackets omitted) (“A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the McDonnell Douglas burden-shifting framework and the mixed-motive framework”).

In the burden-shifting analysis, the plaintiff must set forth that he or she “is a member of a protected class, was qualified for the position, was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination.” *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating nondiscriminatory reasons for its employment actions. *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 965. If the employer meets this burden, the plaintiff must “prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination.” *Id.* (internal quotation marks and citation omitted).

Under the mixed-motive analysis, “the employer’s production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination.” *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 (1st Dept 2012) (internal quotation marks and citations omitted).

The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). Furthermore, under the NYCHRL, the focus is on “unequal treatment based on [a protected characteristic]” *Williams v New York City Hous. Auth.*, 61 AD3d 62, 79 (1st Dept 2009). “Thus, even assuming that a plaintiff could not prove that she was dismissed for a discriminatory reason, she could still recover for other differential treatment based on her gender [and disability].” *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 120 (1st Dept 2018) (internal citation omitted). Accordingly, to establish a discrimination claim under the NYCHRL, plaintiff has to prove by a “preponderance of the evidence that she has been treated less well than other employees because of her [protected characteristic].” *Williams v New York City Housing Auth.*, 61 AD3d at 78.

(a) *Disability Discrimination*

While the complaint alleges that plaintiff has been subject to disability discrimination, in response to the DOE’s motion for summary judgment, plaintiff only alleges that it was “common knowledge” that plaintiff was suffering from MS. “In opposing the motion for summary judgment, the plaintiff should have laid bare all of [her] evidence and arguments.” *Popalardo v Marino*, 83 AD3d 1029, 1030 (2d Dept 2011) (internal quotation marks and citations omitted). Even viewing the evidence in a light most favorable to plaintiff, plaintiff has failed to produce any evidence of a relationship between this protected characteristic and any of the actions taken. Accordingly, the DOE is granted summary judgment dismissing plaintiff’s claim for disability discrimination.⁵

⁵ As noted by the DOE, plaintiff further failed to respond to its arguments related to disability discrimination. This abandonment too, leads to the dismissal of the claim. *See e.g. Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (where plaintiff “did not oppose that branch” of the defendant’s motion for summary judgment dismissing the cause of action for wrongful termination, the plaintiff abandoned this claim and it was properly dismissed).

(b) Gender/Pregnancy Discrimination

Viewing the facts in the light most favorable to plaintiff, plaintiff has established that she belonged to a protected class, that she was qualified for his position and that she was terminated. Turning to the fourth element, plaintiff argues that she has established that the termination occurred under circumstances giving rise to an inference of pregnancy discrimination because, during the year she was trying to achieve tenure, she was assigned classes outside of her license in the year and then reassigned to a “difficult” class. However, this argument is without merit. Plaintiff is a Special Education teacher and has failed to establish how being transferred, at her request, to a class within her specialty, raises an inference of discrimination. Further, plaintiff still received an effective rating for the 2013-2014 school year.

Plaintiff states that her probation was extended twice after she was told she would be recommended for tenure. She claims that there is evidence of discriminatory animus when her probation was extended again, given that the DOE had over three years to evaluate her by the time she announced her second pregnancy. In the instant situation, the record indicates that the timing of the probation extensions were tied to external factors, and that the timing of plaintiff’s pregnancy is coincidental. Plaintiff received an unsatisfactory rating for the 2012-2013 school year, a year when she was not out on maternity leave. Claudio then approved plaintiff for continued probationary services. On November 7, 2014, plaintiff was subsequently offered an extension of probation after OSI had investigated the May 9, 2014 incidents, but had not yet issued a determination. Accordingly, “[a]lthough temporal proximity can give rise to an inference of discrimination under certain circumstances, the timing of the events [plaintiff] alleges is not suspicious enough alone to create such an inference.” *Equal Empl. Opportunity Commn. v Bloomberg L.P.*, 967 F Supp 2d 816, 855 (SD NY 2013).

[17]

“Verbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue.” *Chiara v Town of New Castle*, 126 AD3d 111, 124 (2d Dept 2015). According to plaintiff, when she told Kornish that she was pregnant, Kornish advised her that it may affect her chances for tenure because she would have to complete all the observations in the first half of the year. Kornish allegedly would ask plaintiff when she was going out on maternity leave and say “[w]hy are you here, you are crazy for coming in.” As a result, plaintiff alleges that Kornish’s “abrupt change in attitude with the accompanying comments” shows an inference of discrimination.

Plaintiff has not established on this record, a nexus between any alleged discriminatory comments and the decision to discontinue her probation. As noted, plaintiff received an unsatisfactory rating for 2012-2013 and her probation was then extended. Importantly, the ultimate decision to terminate plaintiff was not made by Kornish, but was based on the May 9, 2014 incidents.

Plaintiff testified that she thought Kornish “felt that I was becoming useless to her because I was pregnant and she felt that she couldn’t get all of the observations done in a correct format.” She further alleged that Pecoraro discriminated against her by asking her what was going on in front of her students and by reprimanding her on another occasion. However, plaintiff does not provide anything other than her subjective opinion to support her allegations. It is well settled that “a plaintiff’s sense of being discriminated against does not constitute evidence of discrimination.” *Johnson v IAC/Interactive Corp.*, 2018 NY Slip Op 31720[U], *6 (NY Sup Ct, 2018), *affd* 179 AD3d 551 (1st Dept 2020) (internal citation omitted).

Plaintiff is unable to meet her *prima facie* burden under the *McDonnell Douglas* framework. “The *McDonnell Douglas* framework and the mixed motive framework diverge only after the plaintiff has established a *prima facie* case of discrimination . . .” *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 (1st Dept 2017). Assuming, arguendo, that plaintiff could meet the “*de minimis* burden,” the DOE maintains that plaintiff’s probationary employment was discontinued, not because of her pregnancies, but for failing to perform her job in a satisfactory manner. As set forth at length above, an OSI report substantiated the allegations that plaintiff engaged in misconduct by failing to supervise her students on two instances in one day. After reviewing the evidence, which consisted of the OSI report and plaintiff’s appeal with the OAR, the Superintendent reaffirmed the determination to discontinue plaintiff’s employment.

“It is well established that a probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law.” *Matter of Francois v Wolcott*, 136 AD3d 434, 434 (1st Dept 2016) (internal quotation marks and citations omitted). “[A] bad-faith determination is defined as one based on constitutionally impermissible purpose or in violation of statutory or decisional law.” *Matter of Card v Sielaff*, 154 Misc 2d 239, 244 (NY Sup Ct, 1992). Here, the DOE has met their burden of providing a nondiscriminatory reason for the termination and has established that plaintiff’s “unsatisfactory work performance” was the nondiscriminatory motivation for the DOE’s actions (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 46 (1st Dept 2011)).

In response, plaintiff fails to raise a triable issue of fact as to whether the reasons proffered by the DOE were “merely a pretext for discrimination.” *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d at 514. Plaintiff’s belief that Lodico or the DOE’s ultimate decision to terminate her was

motivated by a discriminatory animus is based on nothing more than speculation. It is well settled that “such speculation is insufficient to defeat summary judgment.” *Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 669 (2d Dept 2019).

It is undisputed that plaintiff sent two students unsupervised to the nurse’s office and that plaintiff’s students were able to access pornographic websites and violent video games during instructional time. OSI noted in its report that plaintiff had no response as to why she had not called the main office to request that a staff member escort the student. OSI ultimately concluded that plaintiff failed to supervise her students by not doing so. There is no indication that the OSI report deviated from any school policy or that it was a mistake for the DOE to rely on this report in making its determination. “The mere fact that plaintiff may disagree with his employer’s actions or think that his behavior was justified does not raise an inference of pretext.” *Melman v Montefiore Med. Ctr.*, 98 AD3d at 121 (internal quotation marks and citations omitted).

Plaintiff blames the DOE for not having a proper filter and further maintains that if DOE had provided her with additional staff or if the website filters had been working, none of the incidents would have occurred. However, these claims do not negate the fact that it was plaintiff’s responsibility to supervise her classroom. Upon his initial visit to plaintiff’s classroom and upon his return with Norton, Pecoraro found plaintiff sitting at her desk and not circulating around the room so that she could supervise the students. Furthermore, the DOE policies indicate that “Internet access and e-mail provided by the Department are intended for educational use, instruction, research and the facilitation of communication, collaboration, and other Department related purposes. Users are subject to the standards expected in a classroom and/or professional workplace.” Moreover, in the OSI Report plaintiff stated that the students were instructed to go

on websites related to English Language Arts via Google. However, plaintiff's class corroborated that they were not instructed to go on any educational websites, let alone a particular website.

While plaintiff may have disagreed with the DOE's decision to discontinue her probation, the record is devoid of any evidence that the decision was on account of plaintiff's pregnancy. Multiple people, including the OSI investigators, Superintendent and the three-person OAR committee, reviewed the allegations of misconduct and the determination to discontinue petitioner. It is well settled that the court will "not sit as a super-personnel department that reexamines an entity's business decisions." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 966 (internal quotation marks and citation omitted).

With regard to the mixed-motive analysis under the NYCHRL, none of plaintiff's allegations can establish that her termination was motivated, even in part, by discrimination. *See e.g. Matias v New York & Presbyt. Hosp.*, 137 AD3d 649, 650 (1st Dept 2016) ("The absence of any evidence [that defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the NYCHRL]"). Plaintiff argues that her pregnancy was the reason for the DOE's behavior, however, such claims are not borne out on this record.

Contrary to plaintiff's contention, to establish gender discrimination, plaintiff must demonstrate that there was discriminatory animus based on gender. In addition, plaintiff does not allege that she was treated less well than other probationary employees due to a protected characteristic. *See e.g. Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 (1st Dept 2014) (Plaintiff's NYCHRL claim fails because it does not "contain any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff").

Lastly, even viewing the evidence in a light most favorable to her, plaintiff fails to demonstrate that pregnancy was a motivating factor in her termination. Therefore, the DOE is granted summary judgment dismissing the NYCHRL claim for gender discrimination.

CONCLUSION

Accordingly, it is hereby:

ORDERED that The Department of Education of the City of New York and The Board of Education of the City School District of the City of New York's (collectively "Defendants") motion for summary judgment dismissing plaintiff's complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further hereby:

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 2, 2021

ENTER:



Hon. J. MACHILLE SWEETING, J.S.C.