SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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RACHEL TARANTUL,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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INDEX NO. 159425/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

In this workplace discrimination and retaliation action brought under the New York City Human Rights Law ("NYCHRL"), Defendant moves, pursuant to Section 7511 and CPLR 3211(a)(7), to dismiss the complaint in its entirety. After consideration of the relevant caselaw and statutes, as well as a review of motion papers, the motion is granted in part.

I. Background

On January 2, 2018, Defendant, an integrated health care system of hospitals, hired Plaintiff as a coordinating manager for the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC") in charge of counseling program participants and coordinating their needs at Coney Island Hospital (Doc 19 ¶¶ 1, 4).

In mid-March 2020, "[a]s a result of the [COVID-19] pandemic and the resulting closures, [Plaintiff] lost her child care for her three young children (ages 2, 6 and 7)" and requested leave from her supervisor Mohammad Sharafi ("Sharafi") to "oversee the care of her

three children" pursuant to New York's Family and Medical Leave Act ("FMLA"), which entitles eligible and approved employees up to a maximum of twelve weeks of paid and/or unpaid leave in a twelve-month period to care for an immediate family member (Amended Compl. ¶¶ 9, 10).

On March 19, 2020, Plaintiff's two older children began to attend school remotely when their public school was required to halt in-person classes due to the COVID-19 lockdown (id. ¶ 11).

Around March 19, 2020, Plaintiff, on her own, discovered that she was not eligible for FMLA and "contacted Sharafi [again] and … requested an accommodation to work from home" (id. ¶¶ 12, 13).

On April 14, 2020, while Plaintiff's accommodation request was pending, Defendant declared Plaintiff absent without leave ("AWOL") (id. ¶ 18; see also id. ¶¶ 1, 25).

On or around April 14, 2020, "[u]pon receipt of the AWOL letter, [Plaintiff] telephoned David Smart ("Smart"), an [equal employment opportunity officer with Defendant], but he advised her that he could not assist her unless she had a doctor's note" (id. ¶ 19).

On May 12, 2020, Plaintiff submitted a formal complaint of caregiver status discrimination to Smart (id. ¶ 23).

On June 22, 2020, Plaintiff received a letter from Smart advising her that, following an investigation into her complaint, Defendant determined that "No Reasonable Cause existed to establish a violation of [Defendant's] EEO policy" so that Plaintiff's status as "AWOL" would not be changed (id. ¶ 24).

"As a result of [Defendant's] refusal to provide [Plaintiff] with a reasonable accommodation due to her status as a caregiver, [Plaintiff's] employment has been severed … and her employment terminated causing her to suffer financially and emotionally" (id. ¶ 25).

Plaintiff further alleges that she "was required to choose between caring for her children and maintaining her employment, despite the fact that [Defendant] could have accommodated her by allowing her to continue working [since] a similarly situated employee named Shauna Dean [("Dean")] [employed by Defendant] at Lincoln Hospital was working from home, performing the same or similar tasks" (id. ¶¶ 15-17).

In her Amended Complaint, Plaintiff alleges that Defendant unlawfully discriminated and retaliated against her in violation of NYCHRL sections 8-107(1)(a), 8-107(28)(a)(2), and 8-107(7).

II. Contentions

Defendant argues, *inter alia*, that the NYCHRL and subsequent statutory guidance issued by the New York City Commission on Human Rights ("the Commission") do not require employers to accommodate employees because of their caregiving responsibilities; that Plaintiff fails to plead a materially adverse employment action; and that, even if she establishes an adverse employment action, she nonetheless fails to sufficiently plead that the alleged adverse action occurred because of her caregiver status. Regarding the Commission's guidance dated April 26, 2016 that employers "cannot … deny [accommodation] benefits to employees with caregiving responsibilities if they provide these benefits to other employees[,]" Defendant argues that Plaintiff fails to sufficiently plead the existence of a similarly situated employee in that even if Dean was able to work remotely, (1) she worked at a different hospital, (2) Plaintiff failed to establish that she worked remotely due to childcare responsibilities, and (3) it provided free

childcare to all healthcare workers who were in Plaintiff's position at her hospital and, therefore, no other worker in Plaintiff's hospital worked remotely for childcare purposes.

In opposition, Plaintiff argues that she pleads a cause of action for caregiver status discrimination pursuant to § 8-107(1)(a) of the NYCHRL since Defendant failed to offer her an accommodation to work remotely as a result of the COVID-19 pandemic even though Dean worked for Lincoln Hospital from home and performed the same or similar tasks. Plaintiff also argues that the Commission's guidance is not binding on this Court and asks that this Court liberally interpret NYCHRL §8-107(1)(a) to prevent further harm to working mothers during the pandemic.

In reply, Defendant reiterates that Plaintiff fails to plead that she suffered an adverse employment action and that any adverse action occurred under circumstances giving rise to an inference of discrimination. Defendant further contends that it did not terminate her.

III. Legal Conclusions

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference" (*Cortlandt St. Recovery Corp. v. Bonderman,* 31 NY3d 30, 38 [2018] [internal quotation marks omitted]). The ultimate question is whether, accepting the allegations and affording these inferences, "plaintiff can succeed upon any reasonable view of the facts stated" (*Aristy–Farer v. State of New York,* 29 NY3d 501, 509 [2017] [internal quotation marks omitted]).

The NYCHRL "requires an independent liberal construction analysis in all circumstances, an analysis that must be targeted to understanding and fulfilling what the statute characterizes as the NYCHRL's uniquely broad and remedial purposes, which go beyond those

of counterpart State or federal civil rights laws" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011] [citing § 8-130 of the NYCHRL]).

1. First Cause of Action (Caregiver Status Discrimination)

A plaintiff states a *prima facie* cause of action for employment discrimination by alleging facts supporting the following elements: (1) plaintiff is a member of a protected class; (2) plaintiff was qualified for the position; (3) plaintiff was treated adversely or differently by defendant; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*Askin v Dept. of Educ. of City of New York*, 110 AD3d 621, 622 [1st Dept 2013]; *Santiago-Mendez v City of New York*, 136 AD3d 428, 428 [1st Dept 2016]). "[A] plaintiff alleging employment discrimination [under the NYCHRL] need not plead specific facts establishing a prima facie case of discrimination but need only give fair notice of the nature of the claim and its grounds" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] [internal quotations and citations omitted]). The plaintiff's burden to state a cause of action and withstand a CPLR 3211(a)(7) motion is "de minimis" (*Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]).

The NYCHRL was amended to include caregivers as a protected class (see NYC Int. 0108-2014 [enacted Jan. 5, 2016]; see also 13A NY Prac, Employment Law in New York § 3:137 [2d ed.]). The NYCHRL § 8-102 defines "caregiver" and related terms as "a person who provides direct and ongoing care for a minor child.... The term 'minor child' means a child under the age of 18" (NYCHRL § 8-102).

§8-107(1)(a) of the NYCHRL provides, in relevant part, that:

> It shall be unlawful discriminatory practice . . .[f]or an employer or an employee or agent thereof, because of the caregiver status . . . of any person . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment

(NYCHRL § 8-107[1][a]).

The Commission provides the following guidance:

> Employers do NOT have to offer accommodations to employees because of their caregiving responsibilities. For example, employers are not required to change an employee's shift or allow them to leave work early just because they have caregiving responsibilities. Employers CANNOT, however, deny these benefits to employees with caregiving responsibilities if they provide these benefits to other employees.

(Protections for Workers with Caregiving Responsibilities, the Commission, dated April 26, 2016, available at https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/Caregiver_Fact Sheet-Employer.pdf [last visited December 21, 2021]). "It is well settled that an agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable" (*Smith v Donovan*, 61 AD3d 505, 508 [1st Dept 2009]).

This Court is cognizant that the NYCHRL is intended to provide uniquely broad and remedial protections for the civil rights of all persons within the statute's scope and, thus, it broadly construes NYCHRL § 8-107 in favor of discrimination to maximize deterrence of discriminatory conduct (*Bennett*, 92 AD3d at 34 [1st Dept 2011] [citing § 8-130 of the NYCHRL]). Additionally, this Court also takes judicial notice that, during the ongoing COVID-19 pandemic, caregivers like Plaintiff have been faced with the difficult decision whether to send their vaccinated and/or below-vaccination age children to childcare in order to continue being employed.

Plaintiff makes a *prima facie* claim of employment discrimination by alleging that she is a member of a protected class as a mother of three minor children, was fully qualified for her position as a WIC counselor, having been employed since 2018, and was in a position to continue working in that capacity via remote means or another arrangement, and was declared

AWOL and later terminated from her employment on or about June 22, 2020 — nearly a month after she submitted a formal complaint of caregiver status discrimination. Plaintiff need not allege that she was both treated adversely and differently (*Askin*, 110 AD3d at 622 *Santiago-Mendez*, 136 AD3d at 428). Therefore, Defendant's contention that a dismissal is warranted based on the Commissioner's guidance is unpersuasive at this stage.

2. Second Cause of Action (Refusal to Engage in Cooperative Dialogue)

§8-107(28) of the NYCHRL provides, in relevant part, that:

> It shall be an unlawful discriminatory practice for an employer … to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation … related to disability as provided in subdivision 15 of this section

(NYCHRL § 8-107[a][2]).

Plaintiff fails to plead that she has a disability under the NYCHRL. Therefore, the Second Cause of Action of the Amended Complaint (Refusal to Engage in Cooperative Dialogue) is dismissed.

3. Third Cause of Action (Retaliation)

§8-107(7) of the NYCHRL provides, *inter alia*, that:

> It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has . . . (v) requested a reasonable accommodation under this chapter . . .

(NYCHRL § 8-107[7]).

To make out a prima facie case of retaliation under the NYCHRL, plaintiff is required to show that: (1) she participated in a protected activity known to defendant, (2) defendant took an action that disadvantaged her, and (3) a causal connection exists between the protected activity and the adverse action (*Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206 [1st

Dept 2015]). Protected activity is defined as conduct "opposing or complaining about unlawful discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]).

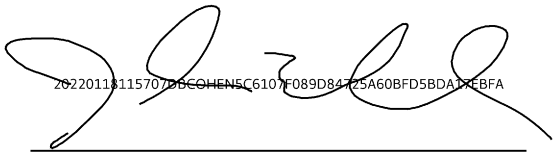
Here, Plaintiff sufficiently pleads a cause of action for retaliation alleging that she was declared AWOL and terminated a month after she formally complained of caregiver discrimination. As with her discrimination claim, Plaintiff has sufficiently alleged a causal relationship between her formal complaint and her subsequent termination, given the close temporal proximity between the two.

Accordingly, it is hereby:

ORDERED that the motion to dismiss is granted to the extent that the Second Cause of Action of the Amended Complaint (Refusal to Engage in Cooperative Dialogue) is dismissed; and the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a preliminary conference on March 1, 2022 at 3:00 PM via Microsoft TEAMS — an invite will be sent via email.



1/18/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE