

**Piscitelli v Deloitte Touche Tohmatsu Servs., Inc.**

2024 NY Slip Op 34472(U)

December 17, 2024

Supreme Court, New York County

Docket Number: Index No. 159272/2020

Judge: Lynn R. Kotler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

BOBBI PISCITELLI,

Plaintiff,

- v -

DELOITTE TOUCHE TOHMATSU SERVICES,
INC.,DELOITTE & TOUCHE, LLP, DELOITTE SERVICES,
LLP

Defendant.

-----X

INDEX NO. 159272/2020
MOTION DATE 09/28/2023
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200

were read on this motion to/for JUDGMENT - SUMMARY and x-motion

Upon the foregoing documents, this motion is decided as follows.

This is an employment discrimination and retaliation action. Defendant Deloitte Services LP (Deloitte) moves for summary judgment dismissing plaintiff Bobbi Piscitelli's Complaint against it in its entirety, as a matter of law, on the grounds that there are no triable issues of material fact. Piscitelli opposes the motion and cross-moves for partial summary judgment on her sex, pregnancy and disability discrimination and disparate treatment claims under New York State Human Rights Laws (NYSHRL) and New York City Human Rights Laws (NYCHRL). Issue has been joined and the motion and cross-motion were timely brought after note of issue was filed. For the reasons that follow, the motion and cross-motion are denied.

The material and relevant facts are as follows. Piscitelli began working for Deloitte in September 2015 as a Senior Administrative Assistant, in the Administration/Operations group, based in its New York City office. At the outset of her employment through February 2018, Piscitelli reported to Carole Mansley, Administrative Services Manager-Tax and Audit. After 2018, Piscitelli began reporting to Rachel Martini as interim manager. Finally, in mid-May 2018, Piscitelli began reporting to Kristen Martino, Manager – Administrative Services, who remained Piscitelli’s supervisor for the duration of Piscitelli’s employment.

During the approximately three and a half years plaintiff was employed by Deloitte, Piscitelli took 139 days of leave and another 34 days of PTO. Piscitelli also took advantage of Deloitte’s Remote Work Program, which Deloitte reviewed requests under on a case-by-case basis based on subject job title and needs of the company. In or around April/May 2016, plaintiff testified at her deposition that she told Mansley she was pregnant. Plaintiff claims that Mansley responded: “I hop you don’t plan on taking a lot of time off,” In July 2016, Piscitelli requested an accommodation to work remotely because of complications associated with her pregnancy. Mansley recommended approval of this remote work request, writing that she did not “forsee a problem with [Piscitelli] working remotely for the current future”. As a result, Piscitelli worked remotely until the birth of her daughter on November 26, 2016.

Deloitte then approved a leave of absence from November 28, 2016, through March 31, 2017 (approximately 19 weeks) as a result of the birth of Piscitelli’s daughter on November 29, 2016. Piscitelli returned to work on April 3, 2017. At that time, Piscitelli requested to work from home once per week. Mansley denied that request, saying that Piscitelli had just got back from

maternity leave. At her deposition, Mansley explained that she wanted to give Piscitelli time to establish a working relationship with the new Partners, Principals and Managing Directors (PPMDs) she supported. At this time, Mansley also created a document titled “Bobbi Chronology”, which began April 3, 2017, documenting Piscitelli’s employment status, to wit:

**Bobbi Chronology:**

April 3<sup>rd</sup> 2017 – returned from family leave/maternity;

- 3 PPMDs (Enda Kamara, Janet Moran and Martin Levitin) requested not to be moved back to her support.

April 4<sup>th</sup> 2017 – met with her to bring her up to speed on things that came up in her absence. She mentioned the work remote program and that she hadn’t taken all of her leave and would be doing so throughout the summer.

May 25<sup>th</sup>, 2017 – received the following summary from the Leaves Team:

LEAVE SUMMARY

November 28, 2016-December 2, 2016 – Paid Time Off(Returned)  
December 5, 2016-January 23, 2017-STD LOA-NY 100%(Returned)  
January 24, 2017-March 31, 2017-Family LOA – 100% pay(Returned)  
June 8, 2017-June 12, 2017- Family LOA – 100% pay(Confirmed)  
June 22, 2017-June 30, 2017 - Family LOA – 100% pay(Confirmed)  
July 5, 2017-July 19, 2017 - Family LOA – 100% pay(Confirmed)  
August 3, 2017-August 7, 2017 - Family LOA – 100% pay(Confirmed)  
August 17, 2017-August 22, 2017 - Family LOA – 100% pay(Confirmed)

Based on continuing leave, suggested waiting until after her family leave had been fully taken to discuss remote work opportunity and that would should re-evaluate in the fall and when we had re-filled her roster.

...

As outlined in the “Bobbi Chronology” document, on April 20, 2017, Piscitelli submitted a request to use her remaining eight weeks of paid family leave beginning in May to spend time with her baby daughter. Mansley approved the request, and Piscitelli took intermittent leave from May 18 to August 22, 2017, returning to work on August 23, 2017.

Meanwhile, on July 21, 2017, Piscitelli renewed her request to work from home one day per week, which Mansley again denied. At her deposition, Mansley explained that it was “too challenging, from a business prospective (sic), to start her on the work from home program while she was taking family leave days as well”. Meanwhile, plaintiff testified that Mansley said to her that plaintiff had “just returned from maternity leave” where she was “not in the office” and said “why would we give you that? ... we’re not going to consider that.”

Things were not going well at the workplace for Piscitelli. For example, in an email dated October 29, 2017 from Mansley to Piscitelli, Mansley writes:

Bobbi,

Per our discussion this morning, I just wanted to summarize the events on Friday.

At 3:15pm on Friday, October 6<sup>th</sup> it came to my attention that you were not at your desk and your desk was cleared. When I inquired about your whereabouts through IM (your status was listed as “Available”), you replied that you were in the wellness room. Out of concern and because I was working from a different location, I asked a colleague to check on you. That colleague informed me that the wellness room was vacant and they could not locate you. Even more concerned, I contacted you again but did not receive a response. It was not until I received an email at 5:30pm from your PPMO that I learned you left the office without informing your back-ups or I. Because we did not know your status for two hours, the situation was escalated to Rachel Martini, the Regional Senior Manager, who is copied on this email.

Please ensure the following steps are followed in the future:

If you need to step away from your desk due to illness or any other reason, you should alert your back-up and alter your IM status to reflect that...

Be completely transparent and truthful in your communication with your Manager and team. Truth in

communications is a major part of the Firm's Code of Ethics and Professional Conduct. If you are found to be violating that, it will affect your evaluation and could lead to further action.

If you become sick at work or need to leave for any reason you must contact your Manager and/or at least one of you back-ups to make them aware.

It is never acceptable to put a client in a position where they are doing work for you...

Further down that email chain, however, Mansley received an email from one of the PPMs, Joseph Paradiso, who stated to Mansley:

Hi Carole,

Bobbi passed on your email. I understand that she left for the day without clearing it with you. That was clearly an oversight on her part. Just wanted to let you know that she did come by my office before she left to see if I needed anything and to ask if I was ok with her leaving early and working the rest of the day at home.

I'm around next week if you want to discuss (as an fyi – her overall performance has been improving since she's been back from her LOA).

Plaintiff also explained at her deposition that Deloitte has multiple wellness rooms and Mansley did not know which wellness room Plaintiff was in at the time she advised Mansley she was there. Plaintiff further claimed that she did not advise Mansley that she did not feel well and had left early because she did not believe Mansley was in the office because Mansley was on PTO. Mansley further admitted at her deposition that approximately an hour and a half passed from when plaintiff advised Mansley that she was in the wellness room and Mansley sent the male coworker to check on Piscitelli. Further, when specifically asked if she knew plaintiff had "lied ... about where she was when she was in the office not feeling well...", Mansley responded "I

don't know." Nonetheless, there is a notation in the "Bobbi Chronology" document for Friday, October 6<sup>th</sup> which states "leaving early/lying issue".

In November 2017, Piscitelli requested leave to take care of her daughter again, which Mansley approved. As a result, Piscitelli took leave from November 9 through 13, 2017 and returned to work on November 14, 2017. Plaintiff claims that she actually worked on November 9, 10 and 13, but was told by Mansley that she could not work while on family leave.

In January 2018, Plaintiff contacted Deloitte Talent (HR) and complained to Pamela Seats, HR Manager, that Mansley was refusing to grant her remote work request after she returned from pregnancy and an approved intermittent FMLA leave and further that Mansley was mistreating her i.e. comments such as "work from home is not childcare," "who's taking care of your kids?" "maybe you should look for a new job," and "I don't have children...so this is not my concern." Plaintiff further complained to Seats about "favoritism" and claimed that she was treated unfairly since returning from her pregnancy leave. Plaintiff reiterated these complaints on a conference call with Seats and Mansley's manager, Rachel Martini, to whom Mansley reported. After that meeting, Martini allegedly asked plaintiff a week later why plaintiff had not come directly to her. Plaintiff claims that she stated, that there was a "consensus among admins [ ] never to go to [Martini] because ... you're going to be fired." Martini purportedly responded, "you could always come to me, please spread the word among the admins that I am here for them...can you go back to them and I am approving your one day work from home."

Meanwhile, on January 3, 2018, after Piscitelli had returned from PTO for a family matter, Mansley informed Piscitelli's PPMDs of her interest in working remotely on Tuesdays and Fridays. Deloitte asserts that certain PPMD's noted that Piscitelli's performance "need[ed] improvement." Nonetheless, Mansley permitted Piscitelli to work from home on January 5, 12, and 26, 2018. Mansley claimed that she approved Piscitelli's request to work remotely one day a week beginning in March 2018 after Piscitelli's PPMDs were "okay" with plaintiff working from home as requested.

Meanwhile, on February 12, 2018, following Plaintiff's complaints to HR, Mansley emailed Martini, subject "Talent Questions" asking if she "miss[ed] an invite regarding the Bobbi Piscitelli complaint?" Martini responded:

I have a call tomorrow with Pam [Seats HR] and Bobbi so there may not be a call coming from Talent [HR] that includes you. I suspect Pam will connect Bobbi with me on the call, which is the logical next step, so I can hear her issues...

Mansley then responded: "Okay, all good. If it helps, I put together a chronology of events around Bobbi's work from home request and happy to go over that with you after you spoke to Bobbi."

In May or June 2018, Piscitelli again requested to work from home two days a week. On June 14, 2018, after plaintiff began reporting to Kristen Martino as her immediate supervisor, Rachel Martini responded to Piscitelli's request in an email which provides in pertinent part as follows:

I spoke with [Kristin Martino] about your request to work from home an additional day. She has not yet checked in with your PPMD's but has made the decision, based on the current cluster needs, to decline the request for an additional 6 months. During that time she will schedule meetings with your PPMD's to gather feedback

around the success of your remote work thus far. I need you to be patient with these requests. You've only been working from home a short period of time and are being treated the same as all of our professionals. [Martino] will revisit this topic with you in 6 months. Until then, ensure you are successful with your current one day arrangement.

Meanwhile, Martino testified at her deposition that she had a conversation with Mansley about Piscitelli to inquire about Mansley's notes on plaintiff which indicated that Piscitelli was "erratic" and "unpredictable". According to Martino, Mansley stated: "it had been really challenging managing Bobbi because of the emotional swings" and that she "decided to back away from the Bobbi situation, because it made her a little nervous, because she wasn't sure what Bobbi might complain" and Mansley did not want to "screw up" her transition to another role.

Martini also directed Martino to start her own timeline of plaintiff and "see where it goes". As a result, Martino created a document entitled "TIMELINE OF SIGNIFICANT EVENTS RELATED TO PERFORMANCE" which contains all of Mansley's notes as well as her own. Martino testified that although she had never created such a document before in connection with another Deloitte employee, this document was able to assist with the decision whether to terminate Piscitelli.

Also in June 2018, Martino wrote an email to Martini noting that Plaintiff's PPMD, Larry Orenstein, told Martino that Plaintiff "is doing very well with SWIFT and that is of great value to all her clients, himself included..." Although this positive information was not included in Martino's "timeline", Martini explained that it was not important to include such positive performance information "[b]ecause we are presenting a case for separation."

On June 22, 2018, Kim Hayes from HR emailed Martini and directed her to take Piscitelli “off list” because plaintiff “does a good job when she is here; meets expectations”. Martini admitted Piscitelli “improved” and that Piscitelli “did a good job when she is in the office, when she is there.”

On July 4, 2018, Piscitelli informed Martino that she would be using PTO for a “family medical emergency” from July 10 to 30, 2018. During July, Martino asked various PPMDs whether Deloitte should grant Piscitelli’s request for a second work-from-home day, which resulted in mixed opinions. Meanwhile, Piscitelli returned to work on August 1, 2018 and worked from home with Martino’s approval on four dates in August.

On September 10, 2018, Piscitelli began working remotely two days a week, which she continued for the duration of her employment. This request was granted following conversations with Chelsea Swanhart, from Deloitte’s Talent Relations Department, after Piscitelli requested a second remote workday in order to attend therapy sessions with her husband.

On October 22, 2018, Piscitelli requested Family and Medical Leave Act (“FMLA”) leave to care for her husband intermittently to span certain blocks of weeks/days from October 29, 2018, to June 28, 2019.

On October 25, 2018, Piscitelli informed Marino that she would be taking leave “due to an emergency in [her] family” from October 29 through November 2; she took leave on

those dates because of her husband's medical condition. Piscitelli took additional leave from November 19 through 23, 2018, returning to the office on November 26, 2018, and then went on leave again on December 17, 2018 as planned as part of an approved FMLA leave, all to take care of her husband. By e-mail on December 4, 2018, Piscitelli informed Martino that she would be returning to work on January 4, 2019, as she would "not be needing the additional dates [she had] originally requested"; Piscitelli returned on January 2, 2019.

Plaintiff was terminated on February 27, 2019. On that day, Plaintiff was called into a meeting where either Martini or Martino advised her that "today's your last day at Deloitte." At her deposition, plaintiff asked "is this because I filed complaints on you? Is this retaliation? You know that I'm pregnant. I told you that. Why are you doing this? There's no justice" and asked them to give her a reason for her termination. (Piscitelli Dep. 263: 20-264: 6).

### **Discussion**

In her complaint, plaintiff asserts the following causes of action: sex discrimination in violation of the NYSHRL (first cause of action), sex discrimination in violation of the NYCHRL (second cause of action), pregnancy/disability discrimination in violation of the NYSHRL (third cause of action), pregnancy/disability discrimination in violation of the NYCHRL (fourth cause of action), hostile work environment in violation of both the NYSHRL and NYCRHL (fifth cause of action), retaliation under the NYSHRL (sixth cause of action), retaliation under the NYCHLR (seventh cause of action), inference with NYS Paid Family Leave under NYCRR § 355.2(c) (eighth cause of action), and violation of the New York State Paid Family Leave Law (ninth cause of action).

While Deloitte moves for summary judgment dismissing plaintiff's complaint, Piscitelli moves for summary judgment on her first, second, third and fourth causes of action. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the court notes that Deloitte has not advanced any substantive argument in support of their request for relief with respect to plaintiff's eighth and ninth causes of action. Therefore, this portion of the motion is denied, as Deloitte has not met its burden. The court will consider the parties arguments as to the remainder of plaintiff's claims.

### Discrimination

Deloitte argues that Piscitelli's claim for sex/pregnancy discrimination should be dismissed because plaintiff cannot establish the fourth prong of a prima facie case and that Deloitte terminated plaintiff because of her performance.

A *prima facie* case of discrimination requires a showing by the plaintiff that: [1] he is a member of a protected class; [2] he was qualified to hold the position; [3] he 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 NY3d 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 (*id.* citing *Ferrante v. American Lung Association*, 90 NY2d 623 [1997]; see also *McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). If the employer is successful, the burden then shifts back to plaintiff who must prove that the reason being offered is a pretext, and therefore false.

Deloitte argues that Piscitelli cannot establish an inference of sex/pregnancy discrimination because "she testified at her deposition that she only disclosed her pregnancy during "the first week of February 2019." However, the fact that Deloitte was preparing a case for termination against Piscitelli, which, as plaintiff alleges began because of unlawful discrimination on the basis of sex and Piscitelli's first pregnancy. On this record, there is a triable issue of fact as to

whether the conduct plaintiff complains of gives rise to the inference of discrimination, which implicitly requires credibility determinations of Piscitelli and Deloitte's employees as well. There is also a triable issue of fact as to whether, if plaintiff has established a prima facie case of discrimination, a jury must determine whether Deloitte's proffered reasons for refusing to grant Piscitelli remote work days, identifying Piscitelli as having performance problems, etc., were pretextual, particularly in light of Piscitelli's claims about contemporaneous comments she endured and targeting by her supervisors, i.e. how she was treated regarding the October 6, 2017 incident and the fact that Deloitte created a timeline recording only negative information about Piscitelli and her supervisors did not create such a timeline for any other employee.

On this record, neither side is entitled to summary judgment on Piscitelli's first through fourth causes of action, and the motion and cross-motion with respect to these claims is denied.

To establish a claim of retaliation under the broad standards of the New York City Human Rights Law, Plaintiff must demonstrate: "(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse action" (*Feingold v. New York*, 366 F.3d 138, 156 [2nd Cir, 2004]).

#### Retaliation

To establish a claim of retaliation under the broad standards of the New York State Human Rights Law, Plaintiff must demonstrate: "(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection

between the protected activity and the adverse action” (*Fletcher v. Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]). Similarly, to establish a retaliation claim under the NYCHRL, Piscitelli must show that she took an action opposing her employer’s discrimination and that, as a result, the employer engaged in conduct that was “reasonably likely to deter a person from engaging in protected activity” *Williams v. New York City Housing Authority*, 61 AD3d 62, 71 [1st Dept 2009]) (internal citation omitted).

The court also agrees with Piscitelli that there is a triable issue of fact as to what connection, if any, existed between plaintiff’s complaints and her termination and other various adverse actions which occurred throughout her employment. Accordingly, Deloitte’s motion is denied as to the sixth cause of action.

#### Hostile work environment

Finally, the court must consider whether Piscitelli’s hostile work environment claims survive summary judgment. Under the NYSHRL, a plaintiff claiming a hostile work environment must show 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” (*Forrest*, 3 N.Y.3d at 310). Meanwhile, to establish a hostile work environment claim under the NYCHRL, the plaintiff must show by a “preponderance of the evidence that she has been treated less well than other employees because of her [protected status]” *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]); *see also Abe v New York Univ.* 169 AD3d 445 [1st Dept 2019]). Nevertheless, the NYCHRL is not a “general

civility code”; “petty slights and trivial inconveniences” are not actionable. *Williams, supra* at at 79-80.

The court does not agree with Deloitte that “Piscitelli’s own deposition testimony, together with the indisputable business reasons for Deloitte’s actions, leave no doubt that these claims should be dismissed.” Rather, a jury could reasonably determine on this record that Piscitelli was subjected to a hostile work environment under either the City or State standards. Accordingly, the balance of Deloitte’s motion is also denied.

**Conclusion**

In accordance herewith, it is hereby

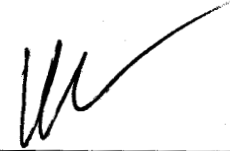
**ORDERED** that defendant’s motion for summary judgment is denied; and it is further

**ORDERED** that plaintiff’s cross-motion for partial summary judgment on her first through fourth causes of action is also denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/17/2024

DATE



LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE