

Merlucci v Maria Regina High Sch.
2024 NY Slip Op 35106(U)
August 15, 2024
Supreme Court, Westchester County
Docket Number: Index No: 53749/2021
Judge: Janet C. Malone
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To commence the statutory period for appeals as of right under CPLR § 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

_____ X
DIANA MERLUCCI,

Plaintiff,

- against -

DECISION AND ORDER

Index Number 53749/2021

Motion Sequence No. 3

MARIA REGINA HIGH SCHOOL,

Defendant.

----- X
MALONE, J.

This lawsuit alleging unlawful gender pregnancy discrimination was commenced by Plaintiff Diana Merlucci (Merlucci) against Defendant Maria Regina High School (MRHS) on March 29, 2021.

Now before the Court is Defendant Maria Regina High School’s (MRHS) Notice of Motion (NYSCEF Doc. No. 52) seeking an order granting it summary judgment (CPLR R. 3212) dismissing Plaintiff Diana Merlucci’s [Merlucci] Complaint with prejudice on *inter alia*¹ grounds that: (1) this Court lacks subject matter jurisdiction over Merlucci’s unlawful discrimination claims that apply to her Paid Family Leave; (2) Merlucci fails to establish prima facie pregnancy discrimination under NYSHRL § 296 (1); and (3) Merlucci’s claim for compensatory and punitive damages should be stricken.

MRHS’s motion is supported by the Affidavit of Luanne Diecchio, Chair of the Board of trustees of MRHS with attached Exhibits A-B; Affidavit of Anna E. Parra, President of MRHS

¹ The additional grounds argued for dismissal of the Complaint are that “there is no material issue of fact that [Merlucci] admittedly decided herself to apply for FMLA and STD leave benefits during the period of her pregnancy/maternity leave;” and “there is no material issue of fact that Plaintiff received all of the accrued PTO leave benefits to which she is entitled to receive under applicable laws and [MRHS] policy;” and there is not material issue of fact that [Merlucci] was prohibited from performing any work for the [MRHS] during the period of her Family Medical Leave Act (‘FMLA’) and New York State short-term disability (‘STD’) leaves by her own doctor’s recommendations” (NYSCEF Doc. No. 68, ¶ 5).

with attached Exhibits A-K; Affirmation of Daniel B. Fix, Esq. with attached Exhibits A-F; Memorandum of Law² in Support and Reply; Affidavit of Denise Kannar, Tuition & Human Resources Coordinator of MRHS with attached Exhibits A-C (*see* NYSCEF Doc. Nos. 52-76; 109-113).

Merlucci opposes the motion arguing *inter alia* that: (1) she has established her prima facie case of pregnancy discrimination; (2) MRHS' reasons for her termination are pretextual; and (3) her claims for damages should be left to the jury to decide. Merlucci's opposition is supported by a Memorandum of Law, Affidavit of Diana Merlucci with attached Exhibits 1-2, A-X; Affidavit of Rosemarie Decker, former guidance counselor, assistant principal, and principal at MRHS; Affidavit of Davida S. Perry, Esq. (*see* NYSCEF Doc. Nos. 77 -106).

History

Merlucci commenced this lawsuit on March 29, 2021, with the filing of a Summons and Verified Complaint (the "Complaint", NYSCEF Doc. No. 1), which, in summary, alleges that after approximately two years as MRHS's CFO, Merlucci, a MRHS alumna, became pregnant, gave birth in July 2020, and approximately four (4) days before Merlucci was scheduled to return to work, MRHS, by its president Anna Parra ("Parra") terminated Merlucci's employment, effective December 22, 2020 (*see* Termination Letter dated December 18, 2020 [NYSCEF Doc. No. 103] from Parra to Merlucci).

MRHS answered (NYSCEF Doc. No. 5)³ the Complaint on May 14, 2021, with general denials, and eight affirmative defenses, contending that Merlucci's employment termination was not discriminatory but based on Merlucci's work performance and MRHS' decision to eliminate and reorganize the Finance Department.

Subject Matter Jurisdiction

As an initial matter, this Court has jurisdiction to hear Merlucci's claim against MRHS, therefore, MRHS argument that Merlucci's unlawful discrimination claims that apply to her Paid

² Defendants' Memorandum of Law was filed twice (NYSCEF Doc. Nos. 75,76).

³ *The Court notes that MHRHS's counsel might have inadvertently filed an "Answer to Amended Complaint" (NYSCEF Doc. No. 8) for another case in this action and should remove the document immediately.*

Family Leave from October 12, 2020 to December 21, 2020 lies exclusively with the New York State Workers' Compensation Board is without merit.

The New York State Supreme Court is a “court of original, unlimited, and unqualified jurisdiction” (*21st Century Pharmacy v. American International Group*, 195 A.D. 3d 776, 778 (2d Dept. 2021)(internal quotations and citations omitted); *see* N.Y. Const, art. VI, § 7[a]) and has concurrent jurisdiction over discriminatory practices with the New York State Division of Human Rights. *See* Executive Law §297(9).⁴

The Complaint filed by Merlucci does not allege that Merlucci was discriminated or terminated by MRHS for filing an application for paid family leave; the Complaint claims in the first and only cause of action that when MRHS terminated Merlucci's employment as its Chief Financial Officer (“CFO”) four days before she was scheduled to return from maternity leave, MRHS committed unlawful gender pregnancy discrimination in violation of New York State Human Rights Law (NYSHRL). *See* Executive Law §296 (1)(a); *see also* NYSCEF Doc. No. 1 at ¶¶ 46-55.

Accordingly, this Court has subject matter jurisdiction to hear Merlucci's cause of action against MRHS.

Analysis

MRHS was founded in 1959; it is a Roman Catholic college-preparatory high school for girls in grades 9-12 located in Hartsdale, County of Westchester, State of New York, and as it employs approximately 70 people, it is an employer under NYSHRL. *See Villar v. City of New York*, 135 F. Supp. 3d 105, 143 (S.D.N.Y. 2015); *see also* Parra Aff. [NYSCEF Doc. No. 56] at ¶2.

“Discrimination on the basis of pregnancy is a form of gender discrimination” (*Golston-Green v City of New York*, 184 AD3d 24, 34 [2d Dept. 2020], making it unlawful under NYSHRL

⁴ “Any person claiming to be aggrieved by an unlawful [employment] discriminatory practice... shall have a cause of action in any court of appropriate jurisdiction for damages ... unless such person has filed a complaint ... with any local commission on human rights”). Further, Workers Compensation Law §120 makes “[i]t . . . unlawful for any employer . . . to discharge . . . or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer”); the provisions of Workers Compensation Law §120 are applicable to paid family leave under Workers Compensation Law §203-a.

for an employer to discriminate against an individual or to discharge such a person from employment on the basis of the individual's gender (*see* Executive Law § 296[1][a]).

For MRHS “[t]o prevail on a summary judgment motion in an action alleging discrimination in violation of NYSHRL,” MRHS must demonstrate either Merlucci’s “failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for the challenged actions, the absence of triable issues of fact as to whether the explanations were pretextual” (*Reichman v City of New York*, 179 AD3d 1115, 1117 (2d Dep’t 2020), quoting *Langton v Warwick Val. Cent. Sch. Dist.*, 144 AD3d 867, 869 (2d Dept. 2016)); *see also*, *Gregorian v. NY Life Insurance Company* 211 A.D. 3d 711, 712 (2d Dept. 2022); *Ferrante v. Amer. Lung Ass’n*, 90 N.Y.2d 623,629 (1997).

As such, to show intentional discrimination in violation of NYSHRL by MRHS, Merlucci must establish that: (1) she is a member of a protected class, (2) she was qualified to hold the position of CFO at MRHS, (3) she suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *See Ayers v Bloomberg, L.P.*, 203 A.D.3d 872, 874 (2d Dept. 2022) citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004).

If Merlucci is able to carry her burden, the burden then shifts to MRHS⁵ “to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision.” *Ferrante v. Amer. Lung Ass’n*, 90 N.Y.2d 623, 629 (1997)(internal quotations and citations omitted); *see also McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).

Here, there is no dispute that Merlucci was qualified to hold the CFO position at MRHS and suffered an adverse employment action when she was terminated; and contrary to MRHS’s contention, Merlucci has established that she is a member of a protected class due to her gender and/or pregnancy status, even if five months had elapsed since the birth of her child. *Golston-Green v City of New York*, 184 AD3d 24, 34 (2d Dept. 2020)(“Plaintiff is a member of the protected class on the basis of her ...gender” six months after return from maternity leave); *Lefort v*

⁵ Under NYSHRL an “‘employer’ is defined as having four or more employees, however, under the NYCHRL, a supervisory or other employee may be held individually liable regardless of whether he or she was an owner or had the authority to make personnel decisions (*see Villar v. City of New York*, 135 F. Supp. 3d 105, 143 (S.D.N.Y. 2015)

Kingsbrook Jewish Med. Ctr., 203 AD3d 708, 710 [2d Dept 2022](Plaintiff was a member of a protected class when she was terminated on her “first day back from maternity leave”).

Merlucci has also carried her burden that her employment termination occurred under circumstances giving rise to an inference of discrimination, as MRHS has failed to eliminate the issue of whether its proffered explanation for terminating Merlucci is a pretext for discrimination.

Parra became president of MRHS on July 8, 2019 (Para Tr. [NYSCEF Doc. No. 72] 19:12-21), overseeing fundraising, finance, building and grounds, security, and the overall operation of MRHS (*id.* at 30:7 – 22). Merlucci reported to Parra as well as MRHS Finance Committee, the Board of Trustees and the principal of MRHS (Merlucci Tr. [NYSCEF Doc. No. 73] at 15:9-16) as Merlucci was the principle [*sic*] contact for the auditors and the board for financial issues (NYSCEF Doc. No. 83).

Prior to Parra’s tenure at MRHS, there were no issues with Merlucci’s work performance (NYSCEF Doc. No. 83); her employment contracts were renewed annually with salary increases⁶ (NYSCEF Doc. Nos.84-85), and in April 2019, three months before Parra became president, Merlucci received a favorable evaluation in which she was described as reliable, knowledgeable, productive, invaluable, and having the school’s interest in mind (Administrative Evaluation, NYSCEF Doc. No. 83).

Despite the absence of any written critique of Merlucci’s work performance evaluation by Parra at the end of the 2019-2020 school year (Parra Tr. 100:16-103:17), prior to Merlucci’s return from maternity leave, Parra testified that as early as October 23, 2020, she thought about firing Merlucci (NYSCEF Doc. No. 72 at 274:4-275:7); *See, Barone v. Emmis Communications Corp.*, 151 A.D.3d 523 (1st Dept. 2017)(finding that plaintiff raised an issue of fact as to pretext where plaintiff had prior favorable performance reviews before her vacation).

This raises the question whether Parra specifically targeted Merlucci, while on maternity leave. For example, in the same month Merlucci gave birth, July 2020, MRHS hired Gina Riga (“Riga”), also a MRHS alumna, as a temporary consultant to cover Merlucci’s duties and responsibilities while Merlucci was on maternity leave. Riga’s duties also included overseeing workers who were tasked with Merlucci’s duties and responsibilities that were not being performed

⁶ In 2017, Merlucci’s starting salary was \$75,000 annually; on May 7, 2018, her salary increased to \$90,000 annually; and on May 10, 2019, her salary was \$93,000 annually (Contracts of Employment for 2017, 2018, 2019 at NYSCEF Doc. Nos. 82, 84-85).

by the Director of Finance, who was subsequently hired by MRHS in or about March 2021. Also in July 2020, Riga was also provided with information gathered from Merlucci; access to Merlucci's computer; and Merlucci's emails, under a new policy instituted by MRHS that when an employee takes leave from their employment, their access to their work computer and emails would be "cut off". See Parra Tr. 220:4-222:9; 223:24- 224:18; 233:21-235:25; 267:11-270:24; *Lefort v. Kingsbrook Jewish Med. Ctr*; 203 AD3d at 711 ("the defendant's submissions raised triable issues of fact as to whether the responsibilities of the CAC and CRM positions were essentially identical").

Why were Merlucci's duties distributed among several people? Merlucci proposed in her maternity leave plan that she would work until she went into labor on or around August 7, 2020,⁷ and beginning in September she would "work at least one day a week from home with stops at MRHS to pick up work, sign checks, answer questions, etc. and that she would be checking and responding to emails daily and would be available as needed (Merlucci Tr. [NYSCEF Doc. No. 73] 49:16-52:20, 54:3-19; Parra Tr. 110:24-112:23; see also NYSCEF Doc. Nos. 58, 87, 89).

Further, why did it take Parra three months⁸ to approve Merlucci's maternity leave plan? Perhaps it was because Parra used those months to share Merlucci's maternity leave plan with two people outside of MRHS in the field of human resources, as well as with Chair of MRHS's Board of Trustees, Luanne Diecchio ("Diecchio"), who deemed Merlucci's maternity plan unacceptable because it did not provide for who would be responsible for payroll and those who worked for Merlucci. (Merlucci Tr. [NYSCEF Doc. No. 73] 49:16-52:20, 54:3-19, 239:10-240:6; Parra Tr. 80:14-18; 110:24-112:23; 176:8-177:5; 183:21-184:25; 185:2-7; 239:10-240:6.) See also NYSCEF Doc. Nos. 58, 87, 89.

Parra did not independently review Merlucci's work (Parra Tr. 114:8-12), necessitating the assistance of Riga, Merlucci's temporary replacement, to prepare an evaluation of Merlucci's work (Parra Tr. at 273:13-275:7) and whose report was the basis for Merlucci's termination (MRHS Finance Department Findings, NYSCEF Doc. No. 55). Parra testified that Merlucci was terminated because Riga reported to Parra that Merlucci caused MRHS to lose money because the finance office was not timely paying a loan, failing to charge graduation fees, transactions not

⁷ Merlucci gave birth in July 2020.

⁸ Merlucci submitted her maternity leave plan to Parra in May 2020 (NYSCEF Doc. No. 80, 174: 14-18) and Parra approved the plan in August 2020. (NYSCEF Doc. No. 98)

being data-entered into QuickBooks, bank records not being completed, among other issues with Merlucci. Parra, having faulted Merlucci for MRHS not being able to charge a graduation fee, testified that she sent out an email that a graduation fee was being waived. Parra also admits that she did not allow Merlucci to respond to Parra and Diecchio's allegation of Merlucci's poor work performance because the decision to terminate Merlucci based on statements made by Riga was already made by Parra and Diecchio (Parra Tr. 265:3-14; 266:4-267:10).

Ironically, Parra testified that she believed an employee should be given a chance to improve their work performance before firing that employee, nonetheless, Merlucci was not afforded this courtesy before being terminated five days before her scheduled return to work (Parra Tr. 72:13-24; 72:21-24; 99:6-103:21; 263:17-265:3; 266:18-267:2). *See Bennett v. Health Mgt. Sys., Inc.* 92 A.D.3d 29, 43 (1st Dept. 2011) ("Once there is some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to coverup the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons"); *see also Bilitch v. New York City Health and Hospitals Corp.* 194 A.D.3d 999 (2d Dept. 2021) ("While the evidence may have revealed triable issues of fact as to whether ...[Plaintiff's] performance warranted negative employment evaluations, ... the question is not whether the decision was correct or wise, but whether the reason for the decision was a pretext for discrimination"); *Smith-Joyner v. Barahona*, 227 A.D.3d 924, 926 (2d Dept. 2024) ("A motion for summary judgment should not be granted where . . . there are issues of credibility.") (internal quotations and citations omitted).

Further, during and after a May 13, 2020 telephone call between Parra and Merlucci, Parra voiced to Merlucci her extreme disappointment that Merlucci did not share her pregnancy status with her earlier seeing she was her supervisor (Parra Tr. 130:1-131:6; 133:13-133:24; 136:8-139:22; 155:14 - 157:17; 161:15-20), having to learn of Merlucci's pregnancy "from others and then in a public communication was extremely unprofessional" and requested that Merlucci submit a tentative plans for "your department while you are out on maternity leave by Monday [May] 18, 2020." *See* Notes for call on 5/13/20 @ 3:30 p.m. at NYSCEF Doc. No. 87.

After the call, Parra accused Merlucci of "insubordination and disrespect in working with [Parra];" reinstated weekly Friday meetings starting "Friday, May 15 at 11am," advised Merlucci to report her concerns as CFO to Parra before reporting them to the Finance Committee; provide

Parra with a “weekly summary report of tasks completed, meetings attended, projects requiring your attention, etc.” “by 3pm every Friday” (NYSCEF Doc. No. 87). Nonetheless, Parra claimed Merlucci took her “fiduciary relationship, very seriously” (Parra Tr. 110:21-23),

Parra also stated to Merlucci that Merlucci would be too tired to work part time (Parra Tr. 169:6-18-170:2-5; Merlucci Tr. 160:24-163:8); changed the prior maternity policies and procedures (NYSCEF Doc. No. 72 at 241:14-18; 257:3-258:10; NYSCEF Doc. No. 79 at 60:61:18) and denied Merlucci her request to work part time during her leave (NYSCEF Doc. No. 79 at 81:15-22) *Santiago-Mendez v City of New York*, 136 AD3d 428, 429 (1st Dept. 2016)(finding “that the adverse action was made under circumstances giving rise to an inference of discrimination”).

The foregoing raises a triable issues of fact and credibility for the jury to determine that the MHRS’s reason were terminating Merlucci was pretextual. Accordingly, MRHS’s motion for summary judgment dismissing Merlucci’s Complaint with prejudice is denied.

Damages

MRHS seeks dismissal of Merlucci’s compensatory and punitive damages claims for a number of reasons including that Merlucci does not seek reinstatement; back pay; fails to provide psychological or other medical evidence of her emotional distress damages and fails to allege conduct that warrants an award of punitive damages.

MRHS argument is without merit. Compensatory damages under NYSHRL can be awarded for mental anguish based solely on plaintiff’s testimony so long as it is reasonably related to the wrongdoing. *NYC Tr. Auth v. St. Div. Of Human Rights*, 78 NY2d 207, 216 (1991)(“The existence of compensable mental injury may be proved, for example, by medical testimony where that is available, but psychiatric or other medical treatment is not a precondition to recovery. Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct”); *Matter of New York State Div. of Human Rights v Caprarella*, 82 A.D.3d 773, 775 (2d Dept. 2011)(“ The award for mental anguish and humiliation was supported by the complainant's testimony”); *Matter of New York State Div. of Human Rights v Boro Park Senior Living Community, LLC.*, 213 AD3d 671, 673 (2d Dept. 2023)(“The award of compensatory damages for mental anguish is reasonably related to the wrongdoing”)

Further, punitive damages may be awarded under NYSHRL to fulfill "[t]he extremely strong statutory policy of eliminating discrimination" (*Matter of New York State Div. of Human Rights v Caprarella*, 82 A.D.3d at 775)(internal quotations and citations omitted) or where the discriminatory conduct was "with willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard" (*Chauca v Abraham*, 67 NY3d 85 (2017)(internal quotations and citations omitted); *see also Tirschwell v. TCW Group, Inc.*, 194 AD3d 665, 667 (1st Dept 2021)("Punitive damages could also be awarded ... if [defendants] are found vicariously liable for [a supervisor's] conduct" and failed to establish policies to deter such conduct)

MRHS's motion to strike Merlucci's damages claim is denied.

MRHS' remaining contentions have been considered and deemed to lack merit or to be moot based on the foregoing.

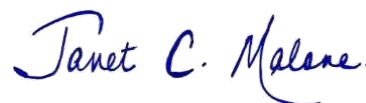
Accordingly, it is hereby

ORDERED, that Defendant Maria Regina High School's motion for summary judgment dismissing Plaintiff's Complaint is denied; and it is further

ORDERED, that the parties shall appear for a settlement conference on **September 23, 2024 at 2:30pm.** via Microsoft Teams [Click here for the videoconference](#); and it is further

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 15, 2024



HON. JANET C. MALONE, J.S.C.