[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART 58**

Justice

MARLIN REYES,

Plaintiff,

-v-

ANTHONY FAILLACE, DRAKE PARTNERS LLC, and DRAKE CAPITAL MANAGEMENT LLC,

Defendants.

INDEX NO. 113706/11

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	4
Replying Affidavits	5-6

CROSS-MOTION: _____ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 1/9/14

Donna M. Mills
J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

0SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

MARLIN REYES,

Plaintiff,

-against-

INDEX NO. 113706/2011
Motion Sequence 001
DECISION & ORDER

ANTHONY FAILLACE, DRAKE PARTNERS LLC, and DRAKE CAPITAL MANAGEMENT LLC,

Defendants.

DONNA MILLS, J.:

In this action claiming, among other things, employment discrimination, plaintiff Marlin Reyes moves for summary judgment in her favor on her complaint's first cause of action, and for dismissal of defendants' counterclaims. In turn, defendants Anthony Faillace (Faillace), Drake Partners LLC, and Drake Capital Management LLC (the latter two together as Drake) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.

Factual Background

Faillace is Drake's chief investment officer. He interviewed and hired plaintiff, a certified public accountant, on April 29, 2010, with the title of Fund Operations and Accounting Manager, under terms of a written employment agreement, at a $90,000 annual salary with bonus opportunities (the Employment Agreement). Cross motion, exhibit E. The Employment Agreement specified that plaintiff was an employee "at-will," and that termination of her employment, for any reason, by either side, would generate a 30-day transition period, during which plaintiff would remain employed full time, to allow training of another employee.

The parties also executed an "Agreement to Protect Drake Management LLC's Business

Relationships and Confidential Information," on May 5, 2010 (the Confidentiality Agreement). Motion, exhibit 8. It required plaintiff, upon termination for any reason, to return all confidential information held in any form or media to Drake, and to delete any confidential information from any computer outside of Drake's premises that she owns or uses. The Confidentiality Agreement also barred plaintiff from soliciting essentially any Drake client, or Drake employee, for 12 months after her termination.

The complaint states that plaintiff informed Faillace, in February 2011, that she was pregnant. Thereafter, he allegedly "abruptly ceased all direct communication with Plaintiff, communicating with her only through other employees." Complaint, ¶ 19. He, also, allegedly "withheld information from Plaintiff critical to her job functions and responsibilities." *Id.*, ¶ 20. In March 2011, plaintiff suffered a miscarriage. Later that year, she became pregnant again.

The complaint charges that, after returning from a short leave to care for her four-year-old son, plaintiff was discharged without warning, on August 19, 2011, effective immediately. Instead of the one month of transition employment promised by the Employment Agreement, Faillace asked her to sign both a General Release Agreement (the Release) (motion, exhibit 4) and a consulting agreement (the Consulting Agreement) (*id.*, exhibit 3). She did not, and she claims that Faillace ordered another employee to withhold a job reference for her until plaintiff signed the Release.

When plaintiff continued to refuse to sign the Release, defendants allegedly withdrew the offer in the Consulting Agreement, $7,500 for one month's work, and, instead, offered her a one-time payment of $3,750 in exchange for her signature, which she still withheld. Then, Faillace allegedly ordered her former co-worker not to provide plaintiff with the requested letter of reference, resulting in her not getting a new job.

The action commenced on December 7, 2011, with the complaint asserting causes of action for gender discrimination, disability discrimination, breach of contract, and intentional infliction of emotional distress.[1] Defendants' amended verified answer asserts counterclaims, on behalf of Drake, for injunctive relief from disclosure of confidential information, and breach of confidentiality.

Discussion

Plaintiff's Summary Judgment Motion

"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), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] 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), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

"The elements of such a claim [for breach of contract] include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages."

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[1] Plaintiff's motion is not accompanied by a copy of the complaint, a requirement under CPLR 3212 (b). However, a copy of the complaint is attached, as exhibit A, to defendants' cross motion.

Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept 2010).

While the motion refers to the complaint's "First Cause of Action," it actually requests summary judgment on the breach of contract claim, the complaint's third cause of action. The Employment Agreement is explicit about the transition period following plaintiff's termination, in its third unnumbered paragraph: "Upon termination, both sides agree to a one month transition period where you agree to work full-time in order to allow another employee time to learn your position." There is no other reference to the transition period in the Employment Agreement. While plaintiff's termination, on August 19, 2011, was sudden and effective immediately, it did not obviate the Employment Agreement. However, the proffered Consulting Agreement provided for a $7,500 payment for one month, treated as a consulting fee, without any taxes withheld, which was not the manner in which plaintiff had been compensated during her regular employment. "You will be solely responsible for any taxes due to any taxing authority." Consulting Agreement, ¶ 2. Drake could end this arrangement "by providing written notice" at any time. There is no mention of the continuation of employee benefits, and, most significantly, signing the Release is a condition precedent for implementation of the Consulting Agreement.

Defendants concede that "there was a fully executed employment agreement" and that "the employment agreement clearly stated upon termination there would be a one-month transition period." Saks affirmation, ¶ 11. However, they claim that "the plain language of the offer letter [that is, the Employment Agreement] does not manifest any intention on Defendants to obligate themselves to extending a one-month transition period to Plaintiff." *Id.*, ¶ 12. They variously construe the promise of a $7,500 payment as an "exchange for the one-month transition period" (*id.*, ¶ 11), or part of "a severance package" (*id.*, ¶ 12). This severance package included a "General Release Agreement [that] was not a condition placed on Plaintiff's one-month

transition period, but rather the company's policy and procedure following the termination of an employee." *Id.*, ¶ 12. The Release "relieved defendants of any liability stemming from Plaintiff's termination." *Id.*

Defendants, who choose to label the Employment Agreement as the "At-Will Agreement," contend that their offer of $7,500 met or even exceeded the agreement's terms, because "Plaintiff's compensation and work duties during this one month period were not addressed in the offer letter." *Id.* Considering that defendants drafted the document at issue, it is unconvincing that they cannot recognize the meaning of "a one month transition period where you agree to work full-time in order to allow another employee time to learn your position." The requirement to execute a release in order allow plaintiff to do what she has already agreed to do in the Employment Agreement appears to be a convenient invention, unsupported by any reference prior to August 19, 2011. The Employment Agreement and the Confidentiality Agreement make no mention of a release, or allude to any policy that would require plaintiff to immunize Drake from its possible tortious conduct. Defendants provide no documentation of this purported "policy and procedure."

There is no question that plaintiff was an at-will employee, subject to termination at any time. However, defendants established and defined the one-month transition period succeeding termination, and the parties executed a valid contract to that effect. The condition precedent of executing a release was never proposed or agreed to in advance, and appeared only at a convenient time for defendants. Imposing this condition on plaintiff was a breach of the Employment Agreement, wherein defendants understandably created the transition period to provide continuity in their business operations. That part of plaintiff's motion for summary judgment in her favor on the cause of action for breach of contract is granted. She is awarded

$7,500, one month's salary, plus statutory interest from August 19, 2011.

In the second part of her summary judgment motion, plaintiff asks for dismissal of defendants' counterclaims for breach of the parties' Confidentiality Agreement. She maintains that there was no breach, and, even if there were, there was no harm to defendants. In asserting their counterclaims, defendants charge that "[o]n August 19, 2011, Plaintiff breached the Restrictive Covenant by downloading numerous documents containing Confidential Information, as that term is defined in the Restrictive Covenant, from the Defendants' computer network to her personal email account." Answer, ¶ 5. This allegedly resulted in "irreparable harm" to defendants. *Id.*, ¶ 6.

The provision of the Confidentiality Agreement at issue is:

> "Both during employment with the Company and after the employment relationship with the Company has ended for any reason, Employee shall not use, disclose or otherwise provide the Company's Confidential Information to anyone else, except with the company's prior permission or, during Employee's employment with the Company, in furtherance of Employee's services for the Company."

Confidentiality Agreement, § 2 (a).

Defendants submit a listing of 66 email messages that plaintiff forwarded from her Drake account (mreyes@drakemanagement.com) to herself (marces82@aol.com[2]), dating from March 8, 2011 to August 20, 2011. Cross motion, exhibit I. About half of the messages bear the latter date, one day after plaintiff's termination.[3] In the highly fragmented copy provided of Faillace's

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[2] When Faillace and Reyes are individually deposed, this email address is recorded in the transcripts as "marsis82@aol.com."

[3] Plaintiff's actual last day of work at Drake is unidentified. It is unclear what her status was on August 20, 2011, when about half the listed emails were forwarded to her personal account. Had her termination taken effect the day before, when Faillace spoke to her? It happens that August 20, 2011 was a Saturday. The Employment Agreement does not specify the form or contents of plaintiff's workday or work week.

deposition of October 16, 2012, he states that plaintiff "took the opportunity to take all of her emails and download them to her AOL email address, you know, so we sort of think that this broke a number of agreements." Cross motion, exhibit H (Faillace tr) at 203.[4] He did not identify any specific violation of the Confidentiality Agreement, but expressed his doubt that plaintiff's conduct was benign. "I know there were a lot of documents with a lot of good information on there which she had no business having, and I can't think of a reason why she would need them other than the fact to use them in some future employment." *Id.* at 210. He conceded that he had no direct knowledge of plaintiff's use of the material, but thought "maybe we need to talk to her employer." *Id.* Faillace said that "it would make logical sense" for plaintiff to provide this information to someone else, but he had no direct knowledge that she did. *Id.* He testified that, because of the volume of materials, he "can't tell you what has [confidential information] and what doesn't." *Id.* at 216.

New York courts rely upon the Restatement of Torts in examining trade secrets (confidential information).

> "Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Restatement (First) of Torts § 757 (1939), comment b; *see Ashland Mgt. v Janien*, 82 NY2d 395, 407 (1993). Defendants have not applied this measure, or any other, to the list of 66 email messages sent by plaintiff from her work account to her personal account. Faillace admits that he

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[4] A handful of other pages of Faillace's deposition are submitted by plaintiff. Affirmation in opposition, exhibit 1.

cannot identify the confidential information, if any, conveyed in these messages. Defendants have not made any effort to examine the content of the email messages dated August 20, 2011.

Faillace also spoke of "[some] hundred documents here that she sent to her home email from her work email, in violation of a policy that would basically say, you know, you are not supposed to be wholesale taking documents of the system and transferring them to your home email." *Id.* There is no further evidence of such a policy.

Plaintiff was deposed on October 23, 2012. Cross motion, exhibit J (Reyes tr); also affirmation in opposition, exhibit 2. She explained that she was "[n]ot download[ing], I will e-mail myself if I needed to work from home." *Id.* at 124. She claimed that she did not save any of this information on her home computer after using it.

> "Q. In order to open up an Excel attachment [of Drake data], would you have to download it first to your [home computer's] hard drive to open it?
>
> A. Open, you would open.
>
> Q. Would you ever download these things to your hard drive before you open it?
>
> A. I think you just mean save, I would save it, yes.
>
> Q. Would you ever keep them saved on your personal computer afterwards?
>
> A. No.
>
> Q. What would you do?
>
> A. Delete.
>
> Q. Did you ever keep any of this information saved on your personal computer?
>
> A. No.
>
> Q. Did you ever bring any of this information to your next employer?
>
> A. No."

Id. at 130-131.

Plaintiff also identified some of the forwarded messages as personal, that apparently first arrived at her work email address. *Id.* at 127-128.

The Confidentiality Agreement states that plaintiff "shall not use, disclose or otherwise provide the Company's Confidential Information to anyone else." Defendants offer no evidence that plaintiff disclosed or otherwise provided its confidential information to anyone else. Faillace's "logical sense" is no substitute for material facts. There is no dispute that plaintiff downloaded (transferred) information of one sort or another from her Drake email account to her personal account, and then onto her home computer. Some of this material plaintiff claims as private matters without contradiction by defendants, and some she describes as "needed to work [with] at home."

Defendants contend that "Plaintiff had remote access to her work files from her home computer which negated the need for her to e-mail these files to herself." Saks affirmation, ¶ 20. While it is not clear from the truncated transcripts of Faillace and Reyes whether plaintiff actually accessed Drake's system from home, if she did, it seems that defendants would not have regarded that as a breach of confidentiality. In other words, plaintiff could properly use Drake information, broadly characterized by Faillace as confidential information, at home, so long as she did it through remote access. Once, however, she moved the same information onto her home computer, any use of it was a violation of the Confidentiality Agreement, according to defendants. The Confidentiality Agreement does not make this distinction, and plaintiff may not have had reason to make this distinction herself if she was using Drake information only in conjunction with her employment.

Faillace's testimony raised no objection to the prospect of plaintiff working on-line from

home, thereby remaining safely within the bounds of the Confidentiality Agreement. Further, the Confidentiality Agreement recognizes that plaintiff may reasonably transfer or download confidential information to her own computer during her employment. Its language presupposes that plaintiff would have company information on her personal computer, without threat of sanction.

> "If Employee ceases to work for the Company for any reason, Employee shall return to the company all Confidential Information in any form or media and all copies thereof, [and] shall delete all Confidential Information from any computers Employee owns or uses other than those located on premises of the Company . . ."

Confidentiality Agreement, § 2 (c).

If plaintiff failed to delete the confidential information that she worked with at home on her personal computer, she would have violated the Confidentiality Agreement. Even assuming that it was Confidential Information that she transferred to her home computer, as defendants characterized it, they do not refute plaintiff's testimony that she deleted it after using it to work at home, retaining none for any other purpose.

Defendants have not provided any example of plaintiff's improper use of its information, in violation of the Confidentiality Agreement. In their own words, they recognized the likelihood of plaintiff transferring or downloading information from their central computer system to her own computer, and they have been unable to differentiate the legal significance of the transfer or download of its information to plaintiff's home computer from her remote access to it. In all, defendants have been unable to raise a triable issue of fact that would warrant sustaining their counterclaims. Plaintiff's motion for summary judgment dismissing defendants' counterclaims is granted.

Defendants' Summary Judgment Cross Motion

Defendants cross-move for summary judgment dismissing the complaint in its entirety. The cross motion is denied in regard to the complaint's cause of action for breach of contract, since summary judgment is granted in plaintiff's favor, as discussed above. Causes of action for gender discrimination, disability discrimination, and intentional infliction of emotional distress remain. New York's Executive Law § 296 (1) provides that it "shall be an unlawful discriminatory practice: (a) For an employer . . . , because of an individual's . . . sex, [or] disability, . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Plaintiff claims that defendants discriminated against her as a female, and then because of her pregnancy, a perceived disability. Termination of employment because of pregnancy is an unlawful discriminatory practice. *State Div. of Human Rights v Demi Lass*, 232 AD2d 335, 335-336 (1st Dept 1996).

Plaintiff has the initial burden to establish a prima facie case of discrimination by showing that "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she 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). She claims that, at the start of her employment with Drake, "she learned that all of the Defendants' female employees were treated differently than Defendants' male employees." Complaint, ¶ 15. Her complaint offers only the specific allegation of gender-based discrimination, pregnancy aside, that female employees were assigned to work in Faillace's apartment, "while all of the male employees operated out of the [Drake] offices or their home." *Id.*, ¶ 16. She testified that this gave the male employees "more flexibility in terms of if they have to take time off, if they have

to go anywhere." Reyes tr at 38-39. Yet, she acknowledged that this work arrangement was not rigidly enforced. "[Faillace] didn't really like you to work from home even though he offered it and even though everyone else was doing it, he kind of didn't like for you to do it." *Id.* at 39. Faillace's testimony confirmed this; "[o]ccasionally, I allowed somebody to work from home if we had transportation issues, weather issues, some kind of personal issues." Faillace tr at 81.

Plaintiff claimed to have seen Drake's other male employees rarely at Faillace's residence; "I saw Brian [Petrozak] at most five times for the year and a half that I was there . . . [Scott] Riley came around once a week . . . [Mr. Tabak] came if he needed to fix something if he couldn't troubleshoot from home . . . [Mr. Dill] worked from home." Reyes tr at 40. Lorena Daley (Daley), another Drake administrative employee working out of Faillace's residence, testified on December 27, 2012. Leftin affirmation, exhibit 3 (Daley tr). She essentially observed the same attendance pattern of the named male employees. Daley also said that she worked at home on a "handful" of occasions, usually because of weather or transportation problems. *Id.* at 27.

Faillace's explanation of Drake's physical working arrangements gives only passing mention to the differing job roles of the female office staff and the male sales/marketing group or technology group. Rather, he focuses upon the setting of the office in his private residence.

> "I told Marlin that we definitely feel more comfortable with women working in the home because we have our children in the house and there's certainly some obvious security risk that emanate from having male employees kicking around the house as opposed to female. . . . [T]here are instances when men work for [sic] the home, but certainly when you have a home office, a house, there's a different level of security concern for a man than for a woman. It's very safe.
> . . .
> "I think it's pretty clear that men are naturally more violent, they are given to more criminal activity. I mean, these are statistical facts, and the fact that this is a home office means that, in general, we are more comfortable with a woman in the house than a man, but that's not at ironclad rule and that's not a policy."

Faillace tr at 61-62.

Faillace's rationale for populating his home office may be stereotypical, but it does not serve as the basis for a claim of gender discrimination. Additionally, defendants offer a more reasonable explanation for having the administrative/finance staff work together out of Faillace's home office; "[t]hese employees' responsibilities involved working with records and documents that were located on-site and were expected to work together as an operations team that insured Defendants' investment business were functioning efficiently." Saks affirmation, ¶ 27. Also, plaintiff's testimony about the use of Drake's information at home demonstrates that she worked at home at some time or other during her employment. So, as Faillace testified, and confirmed by Daley and plaintiff, working from home was not prohibited to Drake employees, male or female. Plaintiff has not made a requisite showing of gender-based, disparate conditions or privileges of employment

However, in reviewing employment discrimination claims, New York courts have regarded pregnancy as a matter of "sex discrimination" (*Matter of Eric H. Green & Assoc. v Tolbert*, 306 AD2d 3, 3 [1st Dept 2003]), a "gender-specific disability" (*Matter of Heidie Tuxedos & Formals v New York State Div. of Human Rights*, 224 AD2d 1022, 1022 [4th Dept 1996]) and a "disability . . . [that] must not be treated differently from other disabilities" (*Sasso v City of Yonkers*, 213 AD2d 392, 393 [2d Dept 1995]). Therefore, the court will examine plaintiff's employment discrimination claim as based on the gender-specific disability of pregnancy, combining two of the complaint's causes of action into one.

The complaint charges that, when Faillace was told that plaintiff was pregnant, in February 2011, he responded that "we can't afford the time off or the money." Complaint, ¶ 18. Further, "Faillace abruptly ceased all direct communications with Plaintiff, communicating with

her only through other employees . . . [and] withheld information from Plaintiff critical to her job functions and responsibilities and removed her from chains of communications." *Id.*, ¶¶ 19-20. She labels this conduct as "being held *in communicado*." *Id.*, ¶ 21. This pregnancy ended in a miscarriage in March 2011, according to plaintiff. In one small extract of her deposition provided to the court, plaintiff says the following about her subsequent treatment:

> "From the time that I informed him [Faillace] that I was pregnant up until termination that was a drastic change prior to that [sic] and it continued to after the miscarriage.
> . . .
> "Well, he just basically stopped treating me. So there was a lack of communication, there was a lack of trying shun me out and that was various e-mails, as you can see, where I wanted to be involved, I wanted to help, I was a team player and I had no issues with anyone at the firm [text ends] . . ."

Reyes tr at 131.

Her termination occurred on August 19, 2011, after she became pregnant again. Plaintiff alleges that "Defendants continued their abusive conduct throughout Plaintiff's second pregnancy." *Id.*, ¶ 26. She does not inform us as to whether or when she informed defendants of this pregnancy, or their reactions, if they were so informed. She does not state that Faillace's attitude towards her changed in the period between her pregnancies. Instead, she says that, while taking "a short leave to tend to her son who was recovering from surgery – [she] was ordered by Defendant Faillace to come to the office," where she was fired. *Id.*, ¶ 27. As plaintiff presents this chronology, her absence to care for her son seems a more likely trigger event for her termination that her second pregnancy.

Defendants assert that plaintiff's termination was based on her "excessive absences and lateness as well as her poor work performance." Saks affirmation, ¶ 13. Defendants provide a copy of an email message from Daley to Faillace, dated December 13, 2011, months after

plaintiff's termination, summarizing "issues we encountered with Marlin." *Id.*, exhibit K. Daley gave a litany of complaints:

> "She was excessively absent and late. . . . was unwilling to help the team. . . . did not handle any daily operations requests or responsibilities . . . could not produce a list that would explain how her time was spent during the day. . . . refused to offer any assistance testing or troubleshooting the [tech] errors with the consulting team. . . . spent too much time on the phone with personal phone calls and was not a good fit for our small workplace."

Id.

A purported log sheet of Drake employee vacation and personal/sick days shows that, in the eight months of 2011 that plaintiff was employed, she far exceeded all others in both categories. *Id.*, exhibit L. Finally, an email message from Brian Petrozak, a consultant, to Faillace, dated February 3, 2011, itemizes about 20 errors or performance shortfalls by plaintiff in the period July 15, 2010 to February 2, 2011. *Id.*, exhibit M. Petrozak's message indicates that there is an attached email message concerning each of his observations. However, they are not included in the exhibit. Defendants do not explain the origin or timing of Petrozak's review, which emerged at or about the time that plaintiff announced her pregnancy. No party offers helpful evidence of the sequence of these events, specifically when plaintiff informed Faillace of her pregnancy. This is an unresolved issue of fact.

Faillace's testimony about his reaction to plaintiff's pregnancy, in March 2011, not surprisingly, differs from plaintiff's recollections.

> "I think I said, you know, we are under 15 employees, the law is pretty straightforward about what's required, but we're much more generous than the law. It's paid leave. You can be gone the first month without really much communication at all. The second month you have to be around to answer some questions, and the third month – we'll see how the second month goes, and depending upon the firm's needs and your needs, we'll come to the meetings [sic] of the minds, and maybe you work from home in the third month and it's all paid. That's the policy for Lorena and for Laura."

Faillace tr at 148-149.

Lorena Daley spoke of Faillace's reaction to her own pregnancy, in positive terms.[5] "He was happy for me, congratulated me and wished me the best." Daley tr at 31. She also described the maternity policy "[a]t the very former Drake," apparently a prior iteration or predecessor of either Drake Partners LLC or Drake Capital Management LLC. "I believe it was a three-month leave." *Id.* She answered "Correct," when asked if that was "three-month fully paid, no work?" *Id.* In any case, maternity leave never became an actual issue for plaintiff.

Plaintiff's allegations about Faillace's behavior after she told him about her pregnancy in February 2011 are the bases for her employment discrimination cause(s) of action, which must remain until the facts concerning the origin and timing of Petrozak's review are established. Defendants' cross motion to dismiss the complaint's employment discrimination cause(s) of action is, therefore, denied.

The standard in New York for the intentional infliction of emotional distress is quite high. "[A] plaintiff must establish: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Suarez v Bakalchuk*, 66 AD3d 419, 419 (1st Dept 2009). This is amplified by *Seltzer v Bayer* (272 AD2d 263, 264-265 [1st Dept 2000]):

> "Plaintiff's cause of action for intentional infliction of emotional distress should have been dismissed. His allegations, even if true, do not describe conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. This threshold of outrageousness is so difficult to reach

[5] The timing of Daley's pregnancy is unspecified, but plaintiff asserts that it was after the commencement of the instant action, and that Faillace's alleged reaction should be regarded in light of that. Memorandum of Law in Further Support at 12 n 5.

> that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, every one has failed because the alleged conduct was not sufficiently outrageous. Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff [citations and internal quotations omitted]."

Here, too, plaintiff's allegations, even if found true, are not sufficiently outrageous in character, and so extreme in degree, to warrant such a finding. Her cause of action for intentional infliction of emotional distress is dismissed, as requested in defendants' cross motion.

To summarize, summary judgment on plaintiff's cause of action for breach of contract is granted in her favor; the cause of action intentional infliction of emotional distress is dismissed, as cross-moved by defendants; the cause(s) of action for employment discrimination shall continue; and, defendants' counterclaims for injunctive relief from disclosure of confidential information, and breach of confidentiality are dismissed, as moved by plaintiff.

Accordingly, it is

ORDERED that that part of plaintiff Marlin Reyes's motion, pursuant to CPLR 3212, for summary judgment in her favor on her complaint's cause of action for breach of contract is granted, and she is granted judgment in the amount of $7,500 plus statutory interest from the date of August 19, 2011, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the third cause of action is severed; and it is further

ORDERED that that part of plaintiff Marlin Reyes's motion, pursuant to CPLR 3212, for summary judgment dismissing defendants' counterclaims for breach of the parties' Confidentiality Agreement is granted, and their counterclaims are dismissed; and it is further

ORDERED that defendants' cross motion, pursuant to CPLR 3212, to dismiss the

complaint is granted to the extent of dismissing the fourth cause of action, for intentional infliction of emotional distress; and it is further

ORDERED that the action shall continue as to the first and second causes of action for employment discrimination; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: January 9, 2014

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.