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NEW YORK SUPREME COURT---------COUNTY OF BRONX

PART IA - 5

MARLENA SANTANA, YASMINDA DAVIS and MELISSA RODRIGUEZ,

Plaintiffs,

-against-

G.E.B. MEDICAL MANAGEMENT, INC., BRUCE PASWALL and PETER AYENDE,

Defendants.

INDEX NUMBER: 305261/2008

Present:
HON. ALISON Y. TUITT
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion to Set Aside the Jury Verdict and Plaintiffs' Cross-Motion for Attorney's Fees, Pre-Judgment Interest and Other Post-Trial Relief

On Calendar of 1/11/16

Notices of Motion/Cross-Motion - Exhibits, Affirmations 1, 2

Affirmation in Opposition/Support 3

Upon the foregoing papers, defendants' motion to set aside the jury verdict in this matter, or in the alternative, for a new trial on the grounds that the evidence was insufficient as a matter of law to support a jury's verdict and plaintiffs' cross-motion for an Order awarding attorneys' fees, prejudgment interest and other post-trial relief are consolidated for purposes of this decision.

The within action involves plaintiffs' claims that they were subject to discrimination by their employer based on disability/pregnancy. The jury awarded plaintiffs $4.5 million in compensatory damages for physical injury/emotional distress and $1.5 million award of punitive damages. Defendants move to set aside the verdict arguing that the evidence established that plaintiffs never complained of discrimination to any member of defendants' staff, plaintiffs were told they were underperforming and defendants offered them

flexibility in their schedules to keep them employed. Defendants argue that the compensatory damage award lacks not only evidentiary support, but also materially deviates from permissible awards in employment discrimination cases and the punitive damage award is so outrageous that it shocks the judicial conscience. Defendants contend that the lack of any evidence of malice, reckless indifference to the anti-discrimination laws, any intent by defendants to violate the law, or of egregious or outrageous conduct bars an award of any punitive damages.

Pursuant to CPLR §4404(a), a court may set aside a jury verdict and direct judgment entered in favor of a party entitled to judgment as a matter of law. However, a court may grant judgment notwithstanding the verdict only where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury." Cohen v. Hallmark Cards, 45 N.Y.2d 493 (1978). A verdict may be set aside as against the weight of the evidence only where "the jury could not have reached its verdict on any fair interpretation of the evidence." McDermott v. Coffee Beanery, Ltd.,777 N.Y.S.2d 103 (1st Dept. 2004).

The branch of defendants' motion to set aside the verdict as against the weight of the evidence is denied. Contrary to defendants' contention, the evidence was sufficient to support the jury's findings. The jury's determination is supported by evidence presented at trial by plaintiffs that they were harassed once they were known or suspected of being pregnant and then fired. Plaintiff Marlena Santana (hereinafter "Santana") testified that defendant Bruce Paswall (hereinafter "Paswall") told her "not to have children"; told plaintiff Yasminda Davis (hereinafter "Davis") "you better not get pregnant", and asked an earlier pregnant employee "are you going to keep it?". The evidence presented also showed that defendants subjected plaintiffs to pregnancy-related harassment and stereotypes, including asking impermissible interview questions, stripping Santana of her job duties and imposing intolerable working conditions on her, subjecting plaintiff Melissa Rodriguez (hereinafter "Rodriguez") to forced medical testing, threatening, mocking and/or shunning plaintiffs before firing them and orchestrating false scenarios to justify firing them. At to their alleged non-discriminatory reasons for firing plaintiffs, defendants admitted in sworn interrogatory answers that there were no assignments Santana or Rodriguez did in an improper or untimely manner. Defendant Peter Ayende (hereinafter "Ayende"), plaintiffs' manager, admitted that Davis completed all of her work. Ayende admitted that he never recommended that plaintiffs be fired, never formed the belief that any of the plaintiffs should be fired, and was shocked upon learning that Paswall was firing plaintiffs. Moreover, non-party Monica Eadie testified that she

overheard defendants' own witness, Davis' supervisor, Talitha Crespo, state that Davis and Santana were fired for being pregnant.

With respect to the branch of defendants' motion that argues that the compensatory damages award is not supported by the evidence, is grossly excessive and should be vacated and a new trial ordered or, in the alternative, remittitur is warranted, it is granted. The jury awarded each plaintiff $1.5 million in compensatory damages. All three of the plaintiffs here were found to suffer post-traumatic stress disorder (hereinafter "PTSD") by plaintiffs' expert Dr. Charles Robins, a clinical psychologist, whose work the past 30 years has focused on traumatized patients. Each plaintiff was diagnosed with clinically elevated levels of depression and anxiety and long-term PTSD, i.e., five years after the fact. However, that award as compared to cases with similar facts is excessive and the award should be reduced to $400,000 per plaintiff.

"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." New York City Transit Authority v. State Division of Human Rights, 78 N.Y.2d 207 (1991). See also 119-121 East 97th Street Corp. v. New York City Commission on Human Rights, 642 N.Y.S.2d 638 (1st Dept. 1996). Three factors to be considered in reviewing mental anguish compensatory damages awarded by the State Commissioner of Human Rights are "whether the relief was reasonable related to the wrongdoing, whether the award was supported by evidence before the Commission, and how it compared with other awards for similar injuries." Id. "Due to the strong anti-discrimination policy spelled out by the Legislature of this State, an aggrieved individual need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision, and this is particularly so where, as here, the discriminatory act is intentionally committed". Cullen v. Nassau County Civil Service Commission, 53 N.Y.2d 492 (1981).

The exercise of the discretion of a trial court over damage awards should be exercised sparingly. Shurgan v. Tedesco, 578 N.Y.S.2d 658 (2d Dept. 1992) citing James v. Shanley, 423 N.Y.S.2d 312 (3rd Dept. 1979). "In the absence of indications that substantial justice had not been done, a successful litigant is entitled to the benefit of a favorable jury verdict", and a court may not employ its discretion merely because it disagrees with a verdict (McDermott v. Coffee Beanery,777 N.Y.S.2d 103(1st Dept. 2004) as such practice would "unnecessarily interfere with the fact finding function of a jury to a degree that amounts to an usurpation of the

jury's duty". Pena v. New York City Transit Authority, 587 N.Y.S.2d 331(1st Dept. 1992). A jury may accept or reject testimony in whole or in part. Mejia v. JMM Autobahn, 767 N.Y.S.2d 427 (1st Dept. 2003).

Dr. Robins testimony was unrebutted. Defendants had retained an expert but never called them to testify. A party cannot argue that undisputed expert testimony, which is not impeached, is contrary to realities or in any way illogical. Sanchez v. City of New York, 949 N.Y.S.2d 368 (1st Dept. 2012). However, based on this record, the jury's award for compensatory damages, $1.5 million per plaintiff, is not supportable in light of awards in other discrimination cases. See, Brady v. Wal-Mart Stores, Inc., 455 F.Supp.2d 157 (E.D.N.Y. 2006) (Compensatory damages of $600,000, rather than $2.5 million awarded by jury, was appropriate following determination that very large employer operating retail store violated New York Human Rights Law in its treatment of employee suffering from cerebral palsy. Award was in line with others of $400,000 to $600,000 decided during previous decade, in cases involving similar incidents of work-induced mental anguish, when those awards were adjusted for inflation); Katt v. City of New York, 151 F.Supp.2d 313 (S.D.N.Y. 2001)(Since the jury reasonably found that the plaintiff's acute psychological disabilities were caused by her experiences working in that environment, the jury's award of $400,000 in compensatory damages falls soundly within the "reasonable range" of comparable cases, and cannot be said to shock the judicial conscience); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 682 N.Y.S.2d 167 (1st Dept. 1998)(Unanimous verdict for plaintiff on claims of sexual harassment, retaliation and intentional infliction of emotional distress of $6.6 million in damages, $5 million of which were punitive damages, set aside to $650,000 for emotional pain and suffering and $3 million in punitive damages. First Department modified to the extent of directing a new trial as to damages only unless plaintiff stipulated to accept compensatory damages in the amount of $653,000, inclusive of the award for back wages and punitive damages in the amount of $1,500,000); Ettinger v. State University of New York State College of Optometry, 1998 WL 91089 (S.D.N.Y. 1999) (Jury award of $100,000 in compensatory damages where plaintiff's pregnancy was a motivating or substantial factor in the defendant's decision to fire her); Town of Hempstead v. State Division of Human Rights,649 N.Y.S.2d 942 (2d Dept. 1996) (Upholding $500,000 award where frequent sexual harassment left plaintiff nervous, upset and afraid to go out alone and plaintiff had been sexually abused as a child, although plaintiff did not see a psychiatrist and there was little, if any, proof of the severity or likely duration of the mental suffering caused by the harassment); Allender v. Mercado, 649 N.Y.S.2d 144 (1st Dept. 1996) ($100,000 award for age discrimination, where plaintiff testified that she was devastated, depressed, suffered headaches, was afraid she would not be able to support her

husband and expert witness corroborated plaintiff's testimony); Boutique Industries, Inc. v. New York State Division of Human Rights, 643 N.Y.S.2d 986 (1st Dept. 1996) (Reducing award from $150,000 to $100,000 in age discrimination and retaliation case where plaintiff worried about his family and felt sick and threatened); Tiffany & Co. v. Smith, 638 N.Y.S.2d 454 (1st Dept. 1996)(Upholding $300,000 mental anguish and compensatory damage award by State Division of Human Rights for employment discrimination); Rhoades v. Niagara Mohawk Power Corp., 608 N.Y.S.2d 733 (3d Dept. 1994) (Reducing jury award of $575,000 compensatory damages to $350,000 ($124,000 of which was for mental anguish) where the psychiatric condition plaintiff suffered from as the result of defendants' discriminatory conduct resolved itself within two years); New York City Transit Authority v. State Division of Human Rights, 581 N.Y.S.2d 426 (2d Dept. 1992) (Appellate Division's remittitur from $450,000 to $75,000 reversed by Court of Appeals, and $450,000 award affirmed on remand; plaintiff suffered a miscarriage, although there was no proof it was caused by the discrimination, and was forced to take unpaid maternity leave during second pregnancy).

Keeping in mind the wide range in awards, the jury's award of $1.5 million in compensatory damages for each plaintiff is excessive. While the jury found the defendants' conduct willful, making the award arguably related to the defendants' wrongdoing, such a large award is without support in the record. Accordingly, defendants' motion to set aside the verdict is granted to the extent of setting aside the verdict for compensatory damages as excessive and directing a new trial on the issue of compensatory damages, unless plaintiffs, within twenty (30) days after service upon its attorney of a copy hereof, with notice of entry thereon, consent to the entry of a judgment decreasing the amount awarded to each of the plaintiffs from $1.5 million to $500,000, in which event the Clerk is directed to enter judgment with the verdict as is amended and decreased.

With respect to the punitive damages award of $1.5 million, $500,000 for each plaintiff, the award is not excessive. Punitive damages are to "serve as a warning to others. They are intended as punishment for gross misbehavior for the good of the public and have been referred to as 'a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine'. Punitive damages are allowed on the ground of public policy and not because the plaintiff had suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another". Reynolds v. Pegler, 123 F.Supp. 36(S.D.N.Y.1954), aff'd 223 F.2d 429 (2d Cir.1955), cert. denied

350 U.S. 846. See also, Home Insurance Co. v. American Home Products Corp., 75 N.Y.2d 196 (1990).

Punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition". Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, (1991). An award of punitive damages should be reversed only if it is "so high as to shock the judicial conscience and constitute a denial of justice." Hughes v. Patrolmen's Benevolent Association, 850 F.2d 876 (2d Cir.) cert. denied 488 U.S. 967 (1988); Lee v. Edwards, 101 F.3d 805 (2d Cir.1996). Three "guideposts" for determining whether a punitive damage award is excessive: (1) The degree of reprehensibility; (2) the disparity between the harm or potential harm and the punitive damages award namely, the proportion or ratio of punitive damages to compensatory damages; and (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases. BMW of North America v. Gore, 517 U.S. 559 (1996). In Gore, the Court noted that "reprehensibility" is "perhaps the most important" factor, and identified certain aggravating factors that are associated with "particularly reprehensible conduct". 517 U.S. at 575. "(1) whether a defendant's conduct was violent or presented a threat of violence, (2) whether a defendant acted with deceit or malice as opposed to acting with mere negligence, and (3) whether a defendant has engaged in repeated instances of misconduct." Lee, 101 F.3d at 809 citing Gore, 517 U.S. at 575–76. As to the ratio of punitive to compensatory damages, there must be a reasonable relationship between them, but the Supreme Court has held that there is no "simple mathematical formula," Gore, 517 U.S. at 582, and has suggested that the outer limit of an acceptable ratio of punitive to compensatory damages may be as high as ten to one. See, TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). The purpose of the third guidepost is to insure that defendants have " 'fair notice' that the wrongful conduct could entail a substantial punitive award." Lee, 101 F.3d at 811.

Here, the jury awarded plaintiffs $1.5 million, $500,000 for each plaintiff, in punitive damages. Said award is not grossly excessive. See, Salemi v. Gloria's Tribeca, Inc., 982 N.Y.S.2d 458 (1st Dept. 2014)(Award of $400,000 in compensatory damages for emotional distress, and $1.2 million in punitive damages not excessive in case of religious and sexual discrimination); Zakre v. Norddeutsche Landesbank Girozentrale, 541 F.Supp.2d 555 (S.D.N.Y. 2008)(In view of the Gore factors considered, the remedial purpose of the City Law, punitive damage awards in comparable cases, and the roughly $1.5 million dollar award for compensatory damages, a punitive damage award in the amount of $600,000 is appropriate and a remittitur to that amount is directed); Bell v. Helmsley, 2003 WL 1453108 (2003), employing a Gore analysis, punitive damages award of $10 million reduced to $500,000); Greenbaum v. Handelsbanken, 67 F.Supp.2d 228

(S.D.N.Y. 1999)(Punitive damage award of $1.25 million in employment discrimination case upheld); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 682 N.Y.S.2d 167 (1st Dept. 1998)(Punitive damages award reduced from $3 million to $1.5 million).

With respect to plaintiffs' cross-motion for attorneys' fees, plaintiffs' attorneys seek a total of $871.364. Attorneys Scott A. Lucas (20 years experience) and Steven M. Sack (35 years experience) seek an hourly rate of $500.00. During the eight years this case was pending, Mr. Lucas claims to have expended 1,481.2 hours and Mr. Sack 237.6 hours investigating and litigating the case. A junior attorney Alex Huot, Esq. spent a total of 131.5 hours in 2012 and 2013 preparing for trial and was paid $6,164.06. Senior litigator Tom Moore, Esq. was paid $5,800 preparing and participating in jury selection and assisting in preparing for trial.

A prevailing plaintiff may be awarded reasonable attorneys' fee and costs under the NYCHRL. N.Y.C. Admin. Code §8-502(g). A trial court providently exercises its discretion in determining the amount of attorneys' fees and costs to be awarded plaintiffs where they are the prevailing parties in an employment discrimination case. Hernandez v. Kaisman, 30 N.Y.S.3d 99 (1st Dept. 2016). What constitutes a reasonable award depends primarily upon the degree of plaintiff's success, not only in terms of liability, but also in terms of the level of damages awarded relative to the amount that was sought. Farrar v. Hobby, 506 U.S. 103 (1992). Thus, the degree of plaintiff's overall success goes to the reasonableness of the legal fees award and thus the most critical factor is the degree of success obtained. Hensley v. Eckerhart, 461 U.S. 424 (1983). Courts use the "lodestar" method to determine the reasonableness of attorney's fees. See, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986). Under that method, a court makes an initial calculation of a lodestar amount by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. Hensley, 461 U.S. 424; LeBlanc–Sternberg v. Fletcher, 143 F.3d 748 (2d Cir.1998); Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir.1997). If the court finds that certain claimed hours are excessive, redundant, or otherwise unnecessary, it should exclude those hours from its calculation. Luciano, 109 F.3d at 116. After the initial lodestar calculation is made, the court should then consider whether a downward adjustment is warranted by a factor as to the extent of success in the litigation. Hensley, 461 U.S. at 434. The hourly rate used in the calculation must be the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Luciano, 109 F.3d at 116. In determining the lodestar calculation, the "community" to which the court should look is the district in which the court sits. Cruz v. Local Union Number 3 of the Int'l Bhd. Of Elec. Workers, 34 F.3d 1148 (2d Cir.1994). Cioffi v. New York

Community Bank, 465 F.Supp.2d 202 (E.D.N.Y. 2006).

In light of other attorneys' fees award, this Court finds that plaintiffs' attorneys' request of $500 per hour is excessive. More in line with other cases, the hourly rate should be $450. Some of the cases cited herein are from many years before this case was decided. It does not necessarily follow that the prevailing rates in those cases from years ago have remained the same and are still the prevailing rates in this 2015. This Court believes that $450.00 per hour is a reasonable rate for the work of an attorney with Mr. Sack and Mr. Lucas' skill, experience and expertise, particularly in light of the success achieved in the instant case. See, Pilitz v. Inc. Village of Freeport, 2011 WL 5825138 (E.D.N.Y. Nov. 17, 2011)(Recent opinions from the Eastern District of New York have determined that reasonable hourly rates in this district "are approximately $300–$450 per hour for partners, $200–$300 per hour for senior associates, and $100–$200 per hour for junior associates); Builders Bank v. Rockaway Equities, LLC, 2011 WL 4458851 (E.D.N.Y. Sept. 23, 2011) (The range in this district is between $300 and $450 for partners, between $200 and $300 for senior associates and between $100 and $200 for junior associates); Olsen v. County of Nassau, 2010 WL 376642 (E.D.N.Y. Jan. 26, 2010) (Determining reasonable hourly rates to be $375–$400 for partners, $200–$250 for senior associates and $100–$175 for junior associates); Gutman v. Klein, 2009 WL 3296072 (E.D.N.Y. Oct. 9, 2009) (Approving rates of $300–$400 for partners, $200–$300 for senior associates and $100–$200 for junior associates); Duke v. County of Nassau, 2003 WL 23315463 (E.D.N.Y. 2003)($300 per hour a reasonable rate); Kuper v. Empire Blue Cross and Blue Shield, 2003 WL 23350111 (S.D.N.Y. Dec. 18, 2003) (Awarding $425 instead of the $450 per hour requested to pre-eminent labor lawyer who had authored two books on job-discrimination litigation and had over 35 years of experience primarily in the field of employment discrimination); New York State National Organization for Women v. Pataki, 2003 WL 2006608 (S.D.N.Y. Apr. 30, 2003)(Awarding $430 and $400 per hour, respectively, to attorneys with more than 30 years of experience in civil rights and employment law); Skold v. Am. Int'l Group, Inc., 1999 WL 405539 (S.D.N.Y. June 18, 1999) ($400 per hour rate awarded to preeminent employment lawyer with more than 30 years of experience).

In the instant matter, the hourly rate of $450 is within the range of rates awarded to other lawyers of similar experience practicing in New York, and the number of hours worked is likewise not unreasonable, particularly in the context of a litigation that lasted eight years. See, Hernandez, 30 N.Y.S.3d at 101. See also Albunio v. City of New York, 889 N.Y.S.2d 4 (1st Dept. 2009)(Award of $366,323.75 in attorney's fees to attorneys who represented former police officer who was awarded $491,706 in compensatory damages in suit

against city for sexual orientation discrimination was not excessive.

With respect to the branch of plaintiffs' cross-motion which seeks reimbursement of expert witness fees, disbursements, prejudgment interest on the unchallenged lost wages verdict and an award to each plaintiff to offset the increased tax burden resulting from the lump-sum back-pay award is granted with no opposition.

This constitutes the decision and Order of this Court.

Dated: 10/20/17

Hon. Alison Y. Tuitt