SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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BRYCE GRUBER,

Plaintiff,

- v -

GLAM, INC.,MENACHEM BEN-OR

Defendant.

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INDEX NO. 654719/2018

MOTION DATE 09/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISSAL.

Defendants' motion to dismiss certain causes of action is granted only to the extent that the sixth cause of action is severed and dismissed.

Background

This employment discrimination case arises out of plaintiff's employment with defendant Glam (defendant Ben-Or is the CEO of Glam). Plaintiff contends she was hired as a digital editor in February 2018. She contends that she was subjected to harassment and discrimination on the basis of her Jewish faith. Plaintiff argues that her observance of Jewish dietary laws was well known and defendant Ben-Or attended plaintiff's orthodox Jewish wedding in 2012.

Plaintiff alleges that two employees at Glam engaged in anti-Semitic conduct which included commenting that her editorial views were "too Jewish" and she was prohibited from selecting content for publication. She contends that these employees also made disparaging remarks about Jews, including about both plaintiff and defendant Ben-Or. Plaintiff insists she told Ben-Or about this conduct and no action was taken to remediate the problem.

Plaintiff claims that just prior to her termination, she told defendant Ben-Or that she was pregnant and he made a nasty joke about her pregnancy. She argues that when she was fired, defendant Ben-Or told her the company was downsizing and eliminating her position but soon after she discovered that Glam was advertising for her position (and a higher salary was offered).

Defendants move to dismiss first, second, third, fourth and sixth causes of action.

Discussion

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

First & Third Causes of Action: Discrimination based on Pregnancy and Religion under NYCHRL and NYSHRL

Defendants claim that plaintiff cannot sustain a cause of action for discrimination either under the city human rights law (NYCHRL) or the state statute (NYSHRL). They contend that she did not suffer an adverse employment action under the NYSHRL and was not treated less well under the NYCHRL. Defendants insist that plaintiff merely describes a litany of complaints that do not amount to a cognizable claim. They argue that the refusal to publish certain of plaintiff's articles or the purported plagiarizing of three of her articles do not support plaintiff's claims. Defendants acknowledge that plaintiff was terminated but asserts that she has not adequately alleged circumstances to give rise to an inference of discriminatory animus relating to her termination.

In opposition, plaintiff highlights that she claims she was fired based on her religion and her pregnancy. She also insists the refusal to publish her work because it was "too Jewish" or contained Jewish content is actionable under both the NYCHRL and NYSHRL. Plaintiff points to allegations in the complaint stating that her non-Jewish colleagues were not censured even for serious transgressions and defendants allowed her colleagues to block publication of plaintiff's articles based on her Jewish faith.

In reply, defendants argue that plaintiff's affidavit in opposition asserts that her claims of religious discrimination were committed by a close member of her protected class makes those claims "incredible."

A plaintiff alleging "discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show 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, 786 NYS2d 382 [2004] [discussing standard under NYSHRL]).

Claims under the NYCHR are construed more broadly than state and federal statutes involving human rights. "[T]he City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart State or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66, 872 NYS2d 27 [1st Dept 2009]).

In discrimination claims, plaintiff must plead (among other elements) "that [he] was either terminated or treated differently under circumstances giving rise to an inference of discrimination" (*Askin v Dept. of Educ. of City of New York*, 110 AD3d, 621, 973 NYS2d 629 [1st Dept 2013]).

Here, the Court finds that plaintiff has stated causes of action for religious and pregnancy discrimination under both the NYSHRL and NYCHRL. The adverse actions are clear: termination and refusal to publish articles on the basis that they were "too Jewish" or because plaintiff is Jewish. This is not a case where plaintiff complains about isolated incidents or was inconvenienced. She says she was hindered in her job by colleagues who openly expressed animus about her religion and she was eventually terminated. It is critical to point out that in employment discrimination cases, a plaintiff need only allege circumstances that give rise to the inference of discrimination. At the motion to dismiss stage, plaintiff met her burden.

Plaintiff's affidavit makes clear that she told defendant Ben-Or that she was pregnant right before she was terminated, Ben-Or claimed the position was being eliminated and then it was advertised as being an open position right after plaintiff was let go (NYSCEF Doc. No. 25 at 5). The inference is that the reason for her termination was her pregnancy. Discovery may reveal that defendants had good reason to terminate plaintiff but at this stage plaintiff has alleged pregnancy discrimination under both the NYCHRL and NYSHRL.

The text messages submitted in reply between Ben-Or's wife and plaintiff do not compel a different outcome. Plaintiff's apparent text that she thought Ben-Or "felt worse than me when he realized I'm knocked up" (after plaintiff's alleged termination) certainly supports defendants' denial that there was any pregnancy discrimination. But a text message submitted in isolation before any depositions have occurred is not sufficient to dismiss this claim. Documentary

evidence must utterly refute a cause of action; a single page of a text conversation that is contradicted by plaintiff's affidavit is not a basis to dismiss at this stage of the litigation. The Court cannot make a credibility determination or make a factual ruling on this motion.

Second & Fourth Cause of Action- Retaliation under NYCHRL and NYSHRL

"The State HRL provides, in pertinent part, that it shall be unlawful to retaliate against any person because he or she has opposed any practice forbidden under this article. To make out a claim of retaliation under the State HRL, the complaint must allege that (1) [plaintiff] engaged in a protected activity by opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) [plaintiff] was subject to adverse action; and (4) there was a causal connection between the protected activity and the adverse action " (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51, 948 NYS2d 263 [1st Dept 2012] [internal quotations and citations omitted]).

"[T]o make out a retaliation claim under the City HRL, the complaint must allege that (1) [plaintiff] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [plaintiff]; and (3) a causal connection exists between the protected activity and the adverse action" (*id.* at 51-52).

"In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities. Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable" (*Williams*, 61 AD3d at 71).

Here, plaintiff has stated causes of action for retaliation under both the NYCHRL and NYSHRL. She claims she complained about the discrimination to Ben-Or who "yelled at her or ignored her" (NYSEF Doc. No. 29, ¶ 66). Plaintiff's theory is that she was fired for raising complaints to defendant Ben-Or who had previously ignored these issues. At the motion to dismiss stage, this states a valid claim for retaliation: plaintiff says she complained about anti-Semitic comments and actions taken against her based on her religion and the response was that she was fired under a pretense that she claims was false.

Defendants' assertions that the rejection of certain articles written by plaintiff for publication are too attenuated to constitute a retaliation claim is belied by the fact that plaintiff has alleged continuous discrimination during her time at Glam. The Court cannot embrace defendants' conclusion before there has been any discovery regarding the months that led up to plaintiff's termination. Discovery might show that defendants are correct that plaintiff cannot show a connection or causal link between the alleged discriminatory acts and her termination but it is premature to credit that argument.

Claims against defendant Ben-Or

Defendants assert that the claims against Ben-Or individually must be dismissed because he cannot be held liable as an employer or as an aider or abettor of the alleged discrimination.

In opposition, plaintiff argues that an individual can be held liable and claims that defendants' argument is based on the premise that plaintiff has failed to state a cause of action for the claims upon which defendants move to dismiss.

Because the Court has found that plaintiff has stated cognizable causes of action for discrimination and retaliation, the Court denies this branch of the motion. Plaintiff claims she complained to Ben-Or and he ignored her complaints and eventually fired her.

Sixth Cause of Action: Tortious Interference with Prospective Economic Advantage

"To state a cause of action for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant directly interfered with a third party and either employed wrongful means or acted for the sole purpose of inflicting intentional harm on the plaintiff" (*Kickertz v New York Univ.*, 110 AD3d 268, 275, 971 NYS2d 271 [1st Dept 2013]).

Defendants claim that plaintiff failed to identify any conduct directed at plaintiff's prospective relationships with companies such as Patron, Sabra or Starbucks. They assert there are no allegations that defendants 'directly interfered' with plaintiff's relationships with these third parties.

In opposition, plaintiff claims that she had relationships with certain high-value sponsors and her colleagues prevented her from publishing articles that she had promised these sponsors she would publish. Plaintiff says these articles were rejected because of their Jewish content. Plaintiff argues that the purpose of defendants' rejection of her articles was malicious—it was based on animus toward her religion.

In reply, defendants stress that the alleged conduct, if true, only discusses acts directed at plaintiff rather than the third parties.

The Court dismisses this cause of action. As defendants point out, this tort concerns actions directed at third parties that damage prospective economic relationships. Preventing plaintiff from publishing articles is not conduct that directly interferes with a third party. Defendants, did not, for instance, tell these third parties to stop interacting with plaintiff.

Summary

The Court observes that defendants' argument is, in part, that plaintiff's claims are not believable because she had a close relationship with defendant Ben-Or's wife and she shared

various Jewish holidays with Ben-Or and his family. But simply because plaintiff's supervisor was of the same faith does not preclude plaintiff's claims. Defendants' arguments go to credibility and the Court cannot make such a determination on a motion to dismiss.

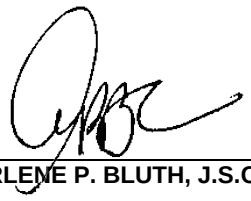
On this motion, the Court can only ascertain whether plaintiff has stated a cognizable cause of action. Plaintiff has done that here. She claims she suffered numerous discriminatory attacks at the office, her complaints were ignored, Ben-Or allegedly reacted negatively to her complaints and she was soon fired right after she told Ben-Or about her pregnancy. Plaintiff successful pled in her complaint and stated in her affidavit the required "discriminatory animus"; she contends her alleged mistreatment was rooted in religious discrimination.

The Court also acknowledges that the parties argue about whether plaintiff has stated a cause of action for hostile work environment. But plaintiff's complaint contains six causes of action, none of which are labeled "hostile work environment." Therefore, the Court need not opine on a cause of action not alleged by plaintiff.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted only to the extent that the sixth cause of action is severed and dismissed and denied as to the remaining portions of the motion.

Remote Conference: October 21 at 3:00 P.M.



9/18/2020
DATE

ARLENE P. BLUTH, J.S.C.

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