SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M
Justice

----------X

BLEU LANZA, BRITTNEY HERRERA

Plaintiff,

- v -

WHOLE FOODS MARKET GROUP, INC.,

Defendant.

----------X

INDEX NO. 154534/2022

MOTION DATE 09/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for DISMISS.

In May 2022, Plaintiffs Blue Lanza and Brittney Herrera commenced the instant action against their employer Whole Food Market Group, Inc., alleging various violations of New York Labor Law and New York State and City Human Rights Law. Specifically, plaintiffs assert, on behalf of a putative class, that Whole Food engaged in wage and/or time theft (NYSCEF doc. no. 2, Complaint, Court I); Lanza (alone) alleges Whole Foods retaliated against her for engaging in protected activities (*Id.*, Complaint, Count II); and Herrera (alone, as well) alleges Whole Foods discriminated against her on the basis of sex during her pregnancy (*Id.*, Complaint, Counts III and IV). In this motion sequence, Whole Foods moves pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the complaint in its entirety. (Mot. Seq. 001.) For the following reasons, Whole Foods motion is denied in its entirety.

Motion to Dismiss Count I

Whole Foods contends that plaintiffs' wage-theft claims under New York Labor Law § 663 should be dismissed because the allegations do not have the requisite specificity required on CPLR (a) (7) motion. Whole Foods asserts that, quoting *Limauro v Cons. Edison Co. of N.Y. Inc.* (2021 US Dist. Lexis 62519 at *3 [SDNY March 31, 2021]), plaintiffs must "provide sufficient detail about the length and frequency of [his or her] unpaid work." According to Whole Foods, that plaintiffs instead allege only that they would "*often* clock back in from their paid break a few minutes late (emphasis original) (NYSCEF doc. no. 5 at 12)" and that they are "*routinely* time-shaved over twenty (20) minutes on those shifts (*id.*)" is insufficient to withstand a motion to dismiss for failing to statute a cause of action. The problem is that, as a Federal case, *Limauro* applies the Federal Rules of Civil Procedure and its heightened *plausibility* pleading standard rather than the CPLR *notice* pleading standard. CPLR 3013 only requires that statements in pleadings be "sufficiently particular to give the courts and parties notice of the transactions,

occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action."

Applying a notice pleading standard as required by CPLR 3013, the Court finds that the allegations in plaintiffs' complaint sufficiently notifies Whole Foods of the occurrences that give rise to their Labor Law § 663 cause of action. Plaintiffs have described with particularity the mechanism whereby Whole Foods would deduct 30-minutes from employees' total hours worked for arriving back late after a 15-minute paid break despite employees having worked for that 30-minutes. (NYSCEF doc. no. 2 at ¶11, 23.) Accordingly, plaintiffs have plead its wage theft cause of action with sufficient particularity under CPLR 3013. Whole Foods is not entitled to dismissal on this count.

Motion to Dismiss Count II

Pursuant to CPLR 3211 (a) (7), Whole Foods contends that Lanza has failed to state a cause of action for retaliation under New York Labor Law § 215. Its argument is that, in pleading a retaliation claim, a plaintiff must allege a violation of New York *Labor Law* but here, Lanza alleges that she was retaliated for enforcing New York's mask mandate, which was enacted pursuant to Governor Andrew Cuomo's executive/emergency powers. (NYSCEF doc. no. 5 at 10, 11; memo in support.) In opposition, Lanza maintains that, while her action might have been specifically aimed at enforcing the mask mandate, she was no doubt also attempting to ensure the safety and health of both herself and her coworkers. From this perspective, the mask mandate cannot be separated from New York Labor Law § 200's requirement that employers provide "reasonable and adequate protection" to their employees. As such, in complaining that Whole Foods failed to enforce the mask mandate (thereby endangering its employees), Lanza contends she has plead a cause of action for retaliation under Labor Law §200.

For purposes of determining whether the complained of conduct violates a Labor Law provision or some other statute, the Court agrees with Lanza that a strict delineation between attempting to enforce New York's mask mandate and complaining of a Labor Law § 200 violation cannot be maintained. The obligations that Labor Law § 200 impose on employers very well may have extended to enforcing the mask mandates during Lanza's employment. Moreover, contrary to Whole Foods' contention, Lanza need not plead the elements of a Labor Law violation to maintain a cause of action for retaliation—only that she "reasonably and in good faith" believes that the "employer has engaged in conduct" that violates any Labor Law provision. (*See* NY CLS Labor § 215 [1] [a].) Plaintiff has sufficiently plead that she reasonably believed that, by explaining to her supervisor that Whole Foods was not effectively enforcing the mandates, she was essentially complaining that they were jeopardizing her and her coworkers' health and safety. (*See* NYSCEF doc. no. 2 at ¶19.) Accordingly, Whole Foods is not entitled to dismissal of Count II under CPLR 3211 (a) (7) for failure to state a cause of action.

Motion to Dismiss Counts III and IV

Pursuant to CPLR 3211 (a) (1), (5), and (7), Whole Foods argues that Herrera's causes of action under New York State and New York City Human Rights Law for sexual discrimination should be dismissed because they were brought beyond the applicable three-year statute of

limitations and Herrera has not alleged that she was treated differently from other similarly situated employees. As to the statute of limitations, Whole Foods argument is unfounded. It contends that Herrera commenced the action in May 2022, but the allegations of sexual discrimination, according to the complaint, could not have lasted past April 2019. Therefore, to comply with the statute of limitations, Herrera must have commenced the action before April 2022. This argument fails to recognize that Governor Andrew Cuomo *tolled*—not suspended, as Whole Foods asserts—the statute of limitations for 228 days during the COVID-19 pandemic. (*See Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021]; *Gabin v Greenwich House, Inc.*, 2022 NY Slip Op 06428 at *2 [1st Dept 2022]; *Murphy v Harris*, 2022 NY Slip Op 06086 at *2 [1st Dept 2022].) Unlike *Gabin* and *Murphy* from the First Department, the cases that Whole Foods cite—principally, *Baker v 40 Wall St. Holdings Corp.* (161 NYS3d 732, 724-725 [Sup. Ct Kings County 2022]) and *Cruz v Guaba* (74 Misc.3d 1207 (A) at 2 [Cup. Ct. Queens County 2022])—are not binding on this Court. As the Executive Orders constitute a toll, Herrera had until December 2022 to commence the action. Consequently, her causes of action are not time barred.

Whole Foods argument that Herrera has not stated a cause of action under CPLR (a)(7) for discrimination under New York State and City Human Rights Law is similarly unfounded. New York State Human Rights Law (NYSHRL) is codified in Article 15 of the Executive Law (§ § 290-301). NYSHRL § 296 (1) (a) provides that "it shall be an unlawful discriminatory practice: for an employer…because of an individual's…sex…to discriminate against such individual in compensation or in terms, conditions, or privileges of employment." (NYCLS Exec §296.) The New York City Human Rights Law, codified in title 8 of the Administrative Code is similarly worded; § 8-107 (1) (a) (3) provides that "it shall be an unlawful discriminatory practice: for an employer…because of the actual or perceived…gender…of any person to (3) discriminate in compensation or in terms, conditions, or privileges of employment." (NYC Administrative Code § 8-107.) These statutes allow plaintiffs to recover where a plaintiff shows she has been treated less well because of her gender or sex. (*See e.g. Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009].) As Whole Foods argues, to show disparate treatment on account of one's protected status under these two statutes, ordinarily a plaintiff must bring forward similarly situated employees with which to compare their treatment. Yet, for employees with pregnancies, the above-described statutes do not provide the only avenue to recovery.

Both HRLs provide what could be considered broader protections to employees with pregnancies. NYSHRL provides, in §296 (3) (a), that "it shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities, or pregnancy-related conditions, of an employee, prospective employee or member in connection with a job or occupation sought or held." NYCHRL is essentially identical. It states, in § 8-107 (22) (a), that:

> "It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation…to the needs of an employee for the employee's pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job provided that [the employee's pregnancy] … is known or should have been known by the employer."

Instead of requiring employees who are pregnant to demonstrate that their employer treated similarly situated employees *without* pregnancies differently, these statutes instruct that a plaintiff may establish a pregnancy discrimination claim by pointing to reasonable accommodations that the employer denied. (*See Coronado v Weill Cornell Med. Coll.*, 66 Misc. 3d 404, 410-411 [Sup. Ct. NY County 2019].) Moreover, without a carve out, the language is clear that an employee with a pregnancy may prove her cause of action in this method regardless of whether she has alleged an adverse employment action. Put slightly differently, there is no reason to think, as Whole Foods appears to, that the statute applies any less here than in *Coronado* or *McKenna v Santander Inv. Sec., Inc.* (2022 US Dist. Lexis 134544 [SDNY 2022])—both of which involved plaintiffs who had alleged such adverse employment actions.

Herrera's complaint makes allegations related to an accommodation she requested but was ultimately denied by a Whole Foods manager. She alleges that, after becoming pregnant, she would be assigned monthly to an "Inventory Shift" that required heavy lifting and that a Whole Foods manager rejected her requested to be switched to a less physically demanding role. (NYSCEF doc. no. 2 at ¶28.) These concrete allegations demonstrate that Herrera has pleaded a cognizable cause of action. Accordingly, Whole Foods motion to dismiss Counts III and IV is denied.

Accordingly, it is hereby

ORDERED that defendant Whole Foods Market Group, Inc.'s motion to dismiss plaintiffs Blue Lanza and Brittney Herrera's complaint pursuant to CPLR (a) (1), (5), and (7) is denied in its entirety; and it is further

ORDERED that all parties shall appear for a status conference at 60 Centre Street, Courtroom 341 on March 14, 2023, at 10:00 am; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.

1/6/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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