GONZALEZ v. NEW YORK STATE OFF. OF MENTAL HEALTH

2010 NY Slip Op 50282(U)

DR. ISAURA GONZALEZ, Plaintiff,
v.
NEW YORK STATE OFFICE OF MENTAL HEALTH, SOUTH BEACH PSYCHIATRIC CENTER AND DR. RENE VAZQUEZ AND DR. ABDUL HASAN ALI, AS AIDERS AND ABETTORS, Defendants.

28179/07.

Supreme Court, Kings County.

Decided February 25, 2010.

Plaintiff was represented by Robert Jacovetti, Esq. of Frank & Associates, P.C. Defendants were represented by Matthew Silverman, Esq. of counsel to Andrew M. Cuomo, Attorney General of the State of New York.

JACK M. BATTAGLIA, J.

The Amended Verified Complaint of plaintiff Dr. Isaura Gonzalez purports to allege five causes of action pursuant to the New York State Human Rights Law (see Executive Law § 296 et seq.) and the New York City Human Rights Law (see New York City Administrative Code § 8-107 et seq.) against defendants New York State Office of Mental Health, South Beach Psychiatric Center, Dr. Rene Vazquez, and Dr. Abdul Hasan Ali. She contends that Defendants "discriminated against [her] on the basis of her gender/sex, in that she was pregnant, by engaging in a course of conduct which included subjecting her to harassing behavior because of her gender/sex and the fact she was pregnant." (Amended Verified Complaint, I.) Defendants move for an order, pursuant to CPLR 3212, dismissing the Amended Verified Complaint in its entirety.

Plaintiff was employed as a licensed psychologist by defendant New York State Office of Mental Health at a facility of its South Beach Psychiatric Center located at 250 Baltic Street, Brooklyn, where she was supervised by defendants Vazquez and Ali. "By way of background," Plaintiff alleges that, "in or about August 2003, [she] informed Vazquez she was pregnant"; "[a] change then occurred in the manner in his attitude towards [her] work"; and "[h]e began treating [her] differently and adversely compared to her non-pregnant co-workers." (Id., ¶ 16.) The material events, however, commence at the end of January, 2005, when Plaintiff informed Dr. Vazquez that she was expecting another child, and he "resumed his hostile and offensive behavior towards her." (Id., ¶ 18.)

Under the heading "As and For the First and Second Causes of Action," Plaintiff alleges causes of action for "Gender/Sex Discrimination—Hostile Work Environment" and

"Gender/Sex Discrimination on the basis of Plaintiff's Pregnancy." Without distinction as to one or both of these claims, Plaintiff further alleges:
"As with her first pregnancy, Vazquez treated Plaintiff differently and adversely as compared to her non-pregnant co-workers. Plaintiff was continually subjected to discriminatory behavior including harsh criticisms of her work and discriminatory and unrealistic deadlines; overloading her with assignments; and a campaign of regular verbal harassment directed at her pregnancy.

Additionally, Vazquez discriminatorily and unnecessarily scrutinized Plaintiff's work; discriminatorily monitored Plaintiff's comings and goings; discriminatorily docked Plaintiff's pay for time missed from work, which required her to work compensating hours, or reimburse South Beach with the use of vacation days; singled Plaintiff out to attend weekly meetings upon her return from maternity leave, during which he complained about her work; made inappropriate comments about Plaintiff's changing body shape, and other similar derogatory comments about her weight and pregnancy; he also called Plaintiff at home while on maternity leave, and harassed her by improperly and unnecessarily complaining about work which she could not perform because she was on maternity leave." (Id., ¶ ¶ 19, 20.)

Defendant Ali allegedly "participated in the discriminatory treatment with Vazquez" (id., ¶ 23), but no specifics are given.

Plaintiff's Third Cause of Action alleges retaliation for complaints made to Dr. Ali and unidentified others "about Vazquez's inappropriate behavior and treatment toward her during and in between pregnancies" (id., ¶ 27.) Two specific retaliatory acts are alleged. First, "[o]n or about July 14, 2006, Vazquez locked Plaintiff in an office against her will, verbally assaulted her, and confined her against her will, despite her repeated request to escape, all in retaliation for Plaintiff's complaints about the manner in which she was being treated." (Id., ¶ 29.) Second, after making it known to the Office of Mental Health "and South Beach" that "she could not return to work at South Beach, because of Vazquez [sic] and Ali's actions toward her" (id., ¶ 30), "in retaliation for [her] complaints about the manner in which she was being treated, . . . [she] was left without insurance as of October 31, 2006, and . . . [her] medical bills were not being paid" (id., ¶ 32.)

Plaintiff's Fourth Cause of Action, designated "Constructive Discharge," alleges that "Defendant [sic], through Vazquez and Ali, intentionally created intolerable working conditions, by continuously harassing her" (id., ¶ 35); and that "[t]he treatment to which [she] was subjected as a result of her gender/sex and the fact she was pregnant, which culminated in the events of July 14, 2006, led Plaintiff to the conclusion she could not return to work at South Beach" (id., ¶ 36.)

Plaintiff's Fifth Cause of Action, designated "Aiding and Abetting," alleges that the alleged "discriminatory practices were aided and abetted by and with the full knowledge and consent of Vazquez and Ali." (Id., ¶ 40.)

The Court notes at the outset that "Plaintiff does not oppose defendants' motion with respect to plaintiff's claims under the [New York City Human Rights Law]." (See Memorandum of Law in Opposition to Defendants' Summary Judgment Motion [Plaintiff's Memo of Law'] at 1, fn 1); see also Jattan v Queens College of the City Univ. of NY, 64 AD3d 540, 542 [2d Dept 2009].)

Section 296 (1) of the Executive Law declares that it is an "unlawful discriminatory practice . . . [f]or an employer . . . because of an individual's . . . sex . . . 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." (Executive Law § 296 [1] [a] [emphasis added].) The statute separately declares as an "unlawful discriminatory practice" "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article" (Executive Law § 296 [6]), and for any employer "to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint under this article" (Executive Law § 296 [7].)

"The standards of recovery under section 296 of the Executive Law are similar to the federal standards under title VII of the Civil Rights Act of 1964." (Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL—CIO, 6 NY3d 265, 270 [2006]; see also 42 USC § 2000e et seq.) Generally, "federal case law in this area . . . [can] prove[ ] helpful to the resolution" of actions under the State statute. (See Aurecchione v NY State Div. of Human Rights, 98 NY2d 21, 26 [2002].)

"Despite the popular notion that sex discrimination' and sexual harassment' are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination." (Williams v NY City Hous. Auth., 61 AD3d 62, 75 [1st Dept 2009].) "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, the supervisor discriminate[s]' on the basis of sex." (Meritor Savings Bank, FSB v Vinson, 477 US 57, 64 [1986].) And "sexual harassment" includes conduct "creating an intimidating, hostile, or offensive working environment." (Id. at 65 [quoting EEOC Guidelines, 29 CFR § 1604.11 (a) (3) (1985)].) "As applied in the context of sexual harassment, . . . the relevant question is what constitutes inferior terms and conditions based on gender. (Williams v NY City Hous. Auth., 61 AD3d at 75.) "The sine qua non of a gender-based discriminatory action claim . . . is that the discrimination must be because of sex'." (Patane v Clark, 508 F3d 106, 112 [2d Cir 2007] [quoting Leibovitz v NY City Transit Auth., 252 F3d 179, 189 (2d Cir 2001)].)

Nonetheless, where both "discriminatory employment action" and a "hostile work environment" are alleged, the claims are treated analytically distinct. (See Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305-12 [2004].) Here, Plaintiff appears to allege both, but specifically with respect to pregnancy. Since the State Human Rights Law does not in terms prohibit discrimination because of pregnancy, the threshold question is whether the statute's prohibition of discrimination because of sex does so implicitly; and if so whether the prohibition extends to "hostile work environment" claims.

In General Electric Co., v Gilbert (429 US 125 [1976]), the U.S. Supreme Court held that a company's disability plan that excluded disabilities arising from pregnancy was not discrimination because of sex prohibited by Title VII. In 1978, Congress overruled Gilbert with the Pregnancy Discrimination Act, amending the "Definitions" section of Title VII to provide, "The terms because of sex' or on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes." (See Newport News Shipbuilding & Dry Dock Co. v EEOC, 462 US 669, 670 [1983] [quoting 42 USC § 2000e (k) (1976 ed., Supp. V)].)

Before the U.S. Supreme Court's decision in Gilbert, however, the New York Court of Appeals held that "a personnel policy which singles out pregnancy, among all other physical conditions to which a[n] [employee] may be subject, as a category for special treatment in determining when leave from duty shall begin is prohibited by the proscriptions of our State Human Rights Law." (Union Free School District No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd., 35 NY2d 371, 375-76 [1974].) The Court cited a prior affirmance (see id.), expressly on the basis of the Second Department's opinion below (see Board of Educ. of Union Free School Dist. No. 2, East Williston v New York State Div. of Human Rights, 35 NY2d 673, 675 [1974], aff'g 42 AD2d 49 [2d Dept 1973].)

"The [board of education's] policy does present a manifest infirmity by singling out pregnancy among all other physical conditions to which a teacher might be subject as a category for special treatment in determining when leave from duty shall begin. In the case of other conditions such as ailments or the onset of disease, a leave of absence is not required by the [board] to commence until medical necessity is demonstrated or the teacher voluntarily requests it. Hence, the female teacher is placed under a restriction dependent on sex alone by the [board's] policy." (42 AD2d at 53.)

The Court of Appeals subsequently confirmed its conclusion that "a practice of differentiated treatment of pregnancy-related disability came with the statutory ban." (See Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 NY2d 84, 86 [1976]; see also Matter of New York City Tr. Auth. v State Div. of Human Rights, 78 NY2d 207, 213 [1991] ["unlawful practice of treating pregnant employees differently from male employees with temporary disabilities"].) The Court took note of the U.S. Supreme Court's intervening decision in Gilbert, and that the"pertinent provisions of [Title VII] are substantially identical to those of section 296 of the Executive Law," but commented only that the determination of the U.S. Supreme Court, "while instructive, is not binding on our court." (See Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 NY2d at 86 n.1; see also Levin v Yeshiva Univ., 96 NY2d 484, 495-96 [2001].)

Applying a Human Rights Law prohibition of discrimination in credit terms, the Court of Appeals relied on these employment benefit cases in holding that "singling out pregnancy for different treatment from other physical or medical disabilities discriminates on the

basis of sex and is prohibited in areas addressed by the Human Rights Law." (See Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights, 77 NY2d 12, 17 [1990].) And applying the prohibition of discrimination in places of public accommodation, the Court cited the benefit cases as holding that "distinctions based solely upon a women's pregnant condition constitute sexual discrimination." (See Elaine W. v Joint Diseases N. Gen. Hosp., 81 NY2d 211, 216 [1993].) The Court's opinion in the public accommodations case is of particular note in that it referred to Title VII for the same result, although the Federal statute had by then been amended by the Pregnancy Discrimination Act, whereas the State statute does not contain similar language.

In Rainer N. Mitti, Opthalmologist, P.C. v New York State Div. of Human Rights (100 NY2d 326 [2003]), the Court of Appeals expressly held that the Human Rights Law "prohibits discharge of an employee because of pregnancy," and "[t]he standards for establishing unlawful discrimination" in this context "are the same as those governing title VII cases" (see id. at 330.) (See also Matter of Board of Educ. v New York State Div. of Human Rights, 56 NY2d 257, 261-62 [1982]; Matter of Diaz Chem. Corp. v New York State Div. of Human Rights, 91 NY2d 932 [1998], aff'g 237 AD2d 932 [4th Dept 1997]; Matter of Galante & Son v State Div. of Human Rights, 52 NY2d 962 [1981], aff'g 76 AD2d 1023 [3d Dept 1980].)

The Appellate Division has also addressed alleged termination of employment because of pregnancy, but almost always on review of a determination by the State Division of Human Rights, and the opinions are not heavy on the facts. (See Matter of Palmblad v Gibson, 63 AD3d 844 [2d Dept 2009]; Matter of Woehling v New York State Div. of Human Rights, 56 AD3d 1304 [4th Dept 2008]; Smith v Paris Int'l Corp., 267 AD2d 223 [2d Dept 1999]; State Div. of Human Rights v Demi Lass Ltd., 232 AD2d 335 [1st Dept 1996]; Matter of Heidie Tuxedos & Formals, Inc. v New York State Div. of Human Rights, 224 AD2d 1022 [4th Dept 1996]; Matter of Empbanque Cap. Corp. v White, 158 AD2d 686 [2d Dept 1990]; Matter of Energy Expo. v New York State Div. of Human Rights, 112 AD2d 302 [2d Dept 1985]; Matter of Westinghouse Elec. Corp. v State Human Rights Appeal Bd., 60 AD2d 943 [3d Dept 1978]; see also Matter of A.S.A.P. Personnel Servs., Inc., 219 AD2d 648 [2d Dept 1995] [unspecified "discriminatory practice"]; Matter of Resnick v New York State Div. of Human Rights, 204 AD2d 330 [2d Dept 1994] [unspecified conduct].)

This Court could not find any New York State court decision that recognizes a claim under the State Human Rights Law for discriminatory harassment because of pregnancy, of the hostile-environment type or otherwise, and neither of the parties here has cited any. Such a claim was recognized by Supreme Court under the City Human Rights Law, stating that the City Law "was designed to be more protective than its State and Federal counterparts." (See Wenping Tu v Loan Price Corp., 21 Misc 3d 1104 [A], 2008 NY Slip Op 51945 [U], * 7 [Sup Ct, NY County 2008].) There are, moreover, few State court decisions that address claims of pregnancy discrimination, either disparate treatment or harassment, on a motion for summary judgment. (See Elaine W. v Joint Diseases N. Gen. Hosp., 81 NY2d 211; Smith v Paris Int'l Corp., 267 AD2d 223; Wenping Tu v Loan Price

Corp., 2008 NY Slip Op 51945 [U]; Handelman v Siegelman, 7 Misc 3d 1032 [A], 2005 NY Slip Op 50847 [U] [Sup Ct, Richmond County 2005].)

In the Federal courts, this Court has found one Circuit Court opinion that addressed a pregnancy harassment claim (see Zisumbo v McLoedUSA Telecomms. Servs., 154 Fed Appx 715, 725-28 [10th Cir 2005].) Opinions addressing the merits of such a claim have been characterized by one District Court as "rare" (see Tilson v City of Lawrence, 2008 US Dist LEXIS 63945, * 24 n4 [SD Ind 2008]); and this Court has found only two by District Courts sitting in New York (see O'Gorman v Holland, 2000 US Dist LEXIS 1009, *15-*18 [SDNY 2000]; Cahill v Northeast Savings, F.A., 1993 US Dist LEXIS 11650, *23-*31 [NDNY 1993].) "Courts that have reached the merits of such claims have adapted the standards used for other harassment cases." (Tilson v City of Lawrence, 2008 US Dist LEXIS 63945, * 24 n4.) Although not binding on this Court, as noted, Federal court decisions addressing workplace harassment under Title VII provide particular guidance to New York State courts applying our State's Human Rights Law.

It seems clear enough that, although the State Human Rights Law does not contain language similar to the Federal Pregnancy Discrimination Act, discrimination because of pregnancy is prohibited by the Law; and that, when asked to rule on the question, the New York appellate courts will conclude that the Law prohibits not only disparate treatment discrimination because of pregnancy, but discriminatory harassment as well, including a discriminatory hostile work environment. (See Bond v Sterling, Inc., 997 F Supp 306, 309 n1 [NDNY 1998] ["the HRL provides the same protections as does the federal Pregnancy Discrimination Act"].) Defendants here do not contend otherwise, but rather maintain that they are entitled to judgment as a matter of law on all of Plaintiff's claims, which, again, include discriminatory disparate treatment and harassment because of pregnancy, retaliation, constructive discharge, and aiding and abetting.

Plaintiff's disparate treatment claim is to be assessed under Title VII's burden-shifting regimen first articulated by the U.S. Supreme Court in McDonnell Douglas Corp. v Green (411 US 792 [1973]), as articulated and applied by the Court of Appeals.

"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 . . . The burden then shifts to the employer 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' . . . In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proferred by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason." (Forrest v Jewish Guild for the Blind, 3 NY3d at 305-06 [quoting Ferrante v American Lung Assn., 90 NY2d 623, 629-30 (1997)]; see

also Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-C10, 6 NY3d at 270-71.)

"[T]he burden of persuasion of [sic] the ultimate issue of discrimination always remains with the plaintiff[ ]." (Id. at 271.) This burden-shifting regimen has been applied to a claim of discriminatory termination because of pregnancy. (See Rainer N. Mitti, Ophthalmologist, P.C. v New York State Div. of Human Rights, 100 NY2d at 330.)

The defendant's burden on a motion for summary judgment on a disparate treatment claim reflects the burden-shifting regimen.

"To prevail on [a] summary judgment motion, defendant[ ] must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for [its] challenged actions, the absence of a material issue of fact as to whether [its] explanations were pretextual." (Forrest v Jewish Guild for the Blind, 3 NY3d at 305 [emphasis added]; see also Balsamo v Savin Corp., 61 AD3d 622, 623 [2d Dept 2009].)

In considering whether a defendant has sufficiently demonstrated the plaintiff's inability to establish every element of intentional discrimination, the court must keep in mind that the plaintiff's prima facie showing is a "low threshold" (see Singh v State of NY Office of Real Prop. Servs., 40 AD3d 1354, 1356 [3d Dept 2007]; see also Texas Dep't of Cmty. Affairs v Burdine, 450 US 248, 253 [1981] ["not onerous"]; Abdu-Brisson v Delta Air Lines, 239 F3d 456, 467 [2d Cir 2001] ["de minimus"].)

Here, there is no dispute that Plaintiff is a member of a protected class, and that she was qualified to hold the position of licensed psychologist. Defendants do maintain that Plaintiff has not suffered an adverse employment action under circumstances giving rise to an inference of discrimination because of pregnancy, and that, in any event, Defendants had legitimate, nondiscriminatory reasons for their actions. In support of their motion, Defendants rely primarily on the deposition testimony of Plaintiff, defendant Vazquez, and defendant Ali; the affidavit of defendant Vazquez; and the affidavits of a number of current or former employees of defendant Office of Mental Health or its South Beach Psychiatric Center.

As important context, Plaintiff was employed since November 2000 as a psychologist at an outpatient clinic of South Beach Psychiatric Center, a hospital operated by the Office of Mental Health. Dr. Vazquez was Clinic Director, reporting to the then Treatment Team Leader, Wayne Santiago. In September 2005, Dr. Vazquez became Treatment Team Leader, and was succeeded as Clinic Director by Meryl Singer. As Treatment Team Leader, Dr. Vazquez reported to Dr. Ali, who was Chief of Service for the Baltic Street outpatient facility.

In or about June 2003, Plaintiff became pregnant with her first child, who was born April 5, 2004; she took maternity leave until July 2004. In or about March 2005 (according to her affidavit, January 2005 according to the Amended Verified Complaint), Plaintiff

became pregnant with her second child, who was born August 22, 2005; she took maternity leave until January 2006. In or about January 2006, she became pregnant with her third child, who was born October 30, 2006; she was no longer at the Baltic Street facility, her last day having been July 14, 2006. "[T]he legislative history of the [Pregnancy Discrimination Act] suggests it protects a woman from pregnancy-related discrimination before, during, and after her pregnancy." (Bond v Sterling, Inc., 977 F Supp at 309 [internal quotation marks and citations omitted].) "Nothing in the [Human Rights Law] suggests that its protections should be construed less broadly." (Id.)

The allegations of the Amended Verified Complaint that might fairly be understood as adverse employment actions are "harsh criticisms of her work and . . . unrealistic deadlines"; "overloading her with assignments"; "unnecessar[y] scrutin[y]" of her work; "monitor[ing] [her] comings and goings"; "dock[ing] [her] pay for time missed from work"; and "singl[ing] [her] out to attend weekly meetings . . ., during which [Dr. Vazquez] complained about her work." (Amended Verified Complaint, ¶ ¶ 19, 20.)

"An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation'." (Forrest v Jewish Guild for the Blind, 3 NY3d at 306 [quoting Galabya v New York City Bd. of Educ., 202 F3d 636, 640 (2d Cir 2000) (citations and internal quotation marks omitted)].)

"An adverse employment action may or may not entail economic loss but there must be a link between the discrimination and some tangible job benefits' such as compensation, terms, conditions or privileges' of employment." (Dotson v City of Syracuse, 2009 US Dist LEXIS 62174, *30-*31 [NDNY 2009] [quoting Alfano v Costello, 294 F3d 365, 373 (2d Cir 2002) (internal citations omitted)].) Without "negative career consequences," neither "inconvenient scheduling" nor "disparate scrutiny" constitutes an adverse employment action. (See id. at * 31, * 33.) An "alteration of plaintiff's responsibilities" "consistent with [the plaintiff's] job title" does not constitute an actionable adverse employment action. (See Messinger v Girl Scouts of the U.S.A., 16 AD3d 314, 315 [1st Dept 2005].)

In Forrest v Jewish Guild for the Blind (3 NY3d 295), the Court of Appeals concluded that a plaintiff's "alleged mistreatment suffered at the hands of her supervisor" did not "rise to the level of adverse action as defined by law" (see id. at 307.) The Court cited with approval federal district court opinions in which "excessive work, denials or requests for leave without pay and a supervisor's general negative treatment of the plaintiff" were found "not materially adverse changes in the terms, conditions or privileges of employment" (see id. [citing Frida v Henderson, 2000 US Dist. LEXIS 17295, * 22 (SDNY 2000)]; and in which "[b]eing yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments" were found not to "rise to the level

of adverse employment actions" (see id. [citing Katz v Beth Israel Med. Ctr., 2001 US Dist LEXIS 29, *44 (SDNY 2002)].)

Here, despite her alleged treatment by Defendants, primarily by Dr. Vazquez with the alleged acquiescence of Dr. Ali, Plaintiff "retained [her] work space, title, job hours and salary, and continued to perform functions consistent with [her] job title." (See Messinger v Girl Scouts of the U.S.A., 16 AD3d at 315.) Although "docking pay" might certainly qualify as actionable adverse employment action, not when the deduction is "for time missed from work."

The Court will defer a discussion of the evidence on whether the circumstances would give rise to an inference of discrimination, because, even assuming the "low threshold" of a plaintiff's prima facie showing can be made here, Defendants have sufficiently established for purposes of burden-shifting that they had legitimate, nondiscriminatory reasons for the conduct Plaintiff complains of. "[I]t matters not whether [the employer's] stated reason for [adverse employment action] was a good reason, a bad reason, or a petty one." (Forrest v Jewish Guild for the Blind, 3 NY3d at 308 n5.) "What matters is that [the employer's] stated reason for [adverse employment action] was nondiscriminatory." (Id.) "Whether job performance was satisfactory depends on the employer's criteria for the performance of the job — not the standards that may seem reasonable to the jury or judge." (Schutz v Finkelstein, Bruckman, Wohl, Most & Rothman, 275 AD2d 407, 408 [2d Dept 2000] [quoting Thornley v Penton Publ., 104 F3d 26, 29 (2d Cir 1997)].)

In his affidavit submitted in support of Defendants' motion, Dr. Vazquez summarizes his assessment of Plaintiff's work performance: "Throughout plaintiff's employment at the clinic, her clinical work was satisfactory; however, her administrative and management skills, including her record-keeping, were poor and gradually declined throughout her time at the clinic." (Affidavit of Rene Vazquez, ¶ 6.) Dr. Vazquez explains the importance of record-keeping to Medicaid billing, accreditation, quality of care, and staff management.

Dr. Vazquez's assessment is supported by documents attached to his affidavit, including numerous e-mail communications between Plaintiff and Dr. Vazquez concerning record-keeping. Particularly noteworthy are two annual Performance Evaluations completed before Plaintiff was pregnant the first time, and before she was reviewed by Dr. Vazquez, that describe problems with documentation. Dr. Vazquez specifically addresses, with significant detail, Plaintiff's allegation that she was singled-out for unfair scrutiny of her work. (See Affidavit of Rene Vazquez, ¶ ¶ 14, 17.)

Dr. Vazquez's assessment is also supported by the affidavit testimony of current and former employees at the Baltic Street clinic. Dr. Frank Cerasuolo is a psychiatrist at the clinic, and for at least 20 of his patients Plaintiff was the assigned psychologist. "Psychological progress notes were missing from approximate [sic] 90% of plaintiff's patients' charts for long periods of time"; "[t]hese problems with her chart documentation became most evident toward the later part of plaintiff's second pregnancy in late 2005." (Affidavit of Frank Cerasuolo, ¶ 6.)

Patricia Mackay is also a Licensed Psychologist at the clinic who was assigned to cover some of Plaintiff's patients while Plaintiff was on maternity leave after her first and second pregnancies. "Plaintiff's charts had few if any progress notes in them, and in some cases notes were missing for approximately four years." (Affidavit of Patricia Mackay, ¶ 5.) Ms. Mackay "complained to Dr. Vazquez, to the Clinic Director, Meryl Singer, and to other staff on several occasions regarding the condition of plaintiff's charts." (Id., ¶ 7.)

Dr. Lauren Noll is also a Licensed Psychologist at the clinic, hired after Plaintiff's last day at the site. She was transferred some of Plaintiff's patients. "Of the twenty-four charts [she] received, at least five of plaintiff's charts were not up to date, and were missing [Individualized Service Plan] reviews"; "[s]ome of plaintiff's charts were also missing physical evaluations." (Affidavit of Lauren Noll, ¶ ¶ 5, 6.)

Meryl Singer was Clinic Director when she retired in May 2009. Although "Plaintiff's caseload at the clinic was comparable to that of other psychologists," Ms. Singer "received no comparable complaints regarding pervasive lapses in chart documentation by any other clinician at the clinic." (Affidavit of Meryl Singer, ¶ ¶ 9, 11.) Ms. Singer also states that, when Plaintiff did not return to work after the July 14, 2006 incident, she was asked to pack Plaintiff's office belongings for safe keeping. She "found stacks of hundreds of case documents in plaintiff's office that were unfiled," including "progress notes, requests for information by patients, and other documents." (Id., ¶ 10.)

Dr. Ali did not submit an affidavit in support of Defendants' motion, but he testified at his deposition about Plaintiff's "chart deficiencies." Although acknowledging that other therapists experienced deficiencies, none were like Plaintiff's, with notes missing from the chart "in some cases, a year, a year and a half." (Examination Before Trial of Dr. Abdul Hasan Ali, February 24, 2008, at 40.)

A defendant's "burden of production" of evidence of a legitimate, nondiscriminatory reason "is not a demanding one; it need only offer an explanation for the employment decision." (See Dotson v City of Syracuse, 2009 US Dist LEXIS 62174, at * 37.) "The burden is merely one of production, not persuasion; it can involve no credibility assessment." (Id. [internal quotation marks and citations omitted.) Defendants have carried that burden here.

"The law is well-settled that an employee alleging unlawful discrimination must show that an employer's proffered reasons for an adverse employment action are a pretext for discrimination." (Dotson v City of Syracuse, 2009 US Dist LEXIS 62174, at * 38.) "[A] reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason." (Id. at 39 [quoting Fisher v Vassar Coll., 114 F3d 1332, 1339 (2d Cir 1997)].) "Conclusory allegations of discrimination are insufficient to defeat a motion for summary judgment." (Dickenson v Health Mgmt. Corp. of Am., 21 AD3d 326, 329 [1st Dept 2005].) The plaintiff must demonstrate that "there are triable, material issues of fact as to whether an illegitimate factor had a motivating' or substantial' role in the defendant['s] adverse employment

decisions." (Nelson v HSBC Bank USA, 41 AD3d 445, 446-47 [2d Dept 2007] [quoting Ali v Tribune Entertainment Co., 1996 US Dist LEXIS 9628 [SDNY 1996].)

Because pregnancy is a temporary condition, the timing of an adverse employment action may be probative of an inference of discrimination. (See Rainer N. Mitti, Ophthalmologist, P.C. v New York State Div. of Human Rights, 100 NY2d at 331; O'Gorman v Holland, 2000 US Dist LEXIS 1009, at *14-*15.) Here, however, during the approximately three years from June 2003, when Plaintiff became pregnant with her first child, and the July 14, 2006 incident that marked Plaintiff's last day at the South Beach clinic, Plaintiff was either pregnant, on maternity leave, or recently returned from maternity leave. Although such circumstances might arguably make any conduct of Defendants during the period relevant to an inference of discriminatory intent, it is difficult to ascribe particular probative significance to any one or more acts based upon timing alone.

Plaintiff contends that during her first pregnancy, Dr. Vazquez "treated her differently than other employees, by establishing work performance standards which only applied to her," and "changed plaintiff's work standards and set special requirements which only applied to her" (see Plaintiff's Memo of Law at 3, 4); that during her second pregnancy, he "required her to attend weekly meetings to discuss her job performance," but "did not require any other clinicians to attend weekly meetings" (id. at 5); that during her third pregnancy, he complained about her dress as "unprofessional," but did not complain about the work attire of other clinicians (id. at 6); he required her "to attend weekly meetings to discuss her alleged poor work performance," but "did not require other clinicians to attend these disciplinary or corrective weekly meetings" (id. at 6-7); he denied her requests for overtime compensation, but "granted other clinicians . . . overtime compensation" (id. at 8); and that, after she returned from maternity leave in January 2006, Dr. Vazquez and Dr. Ali set a March 31 deadline for Plaintiff to complete her charts, but "[o]ther clinicians were not required to submit their charts by that date" (id.)

"Singling out" an employee for corrective action in response to performance concerns, even "unfairly," is "not relevant to the question of pretext." (See Dickenson v Health Mgmt. Corp. of Am., 21 AD3d at 328.) "To raise an inference of discrimination in a disparate treatment claim, a plaintiff must show that the employer treated her less favorably than a similarly situated employee outside her protected group." (Dotson v City of Syracuse, 2009 US Dist LEXIS 62174, at * 34.) The court should consider "whether the plaintiff and those she maintains were similarly situated were subject to the same workplace standards; and . . . whether the conduct for which the employer imposed discipline was of comparable seriousness." (See id. at * 35.) "The mere fact that a plaintiff believes that [non-pregnant] employees similarly situated are not disciplined for similar professional failures is not a sufficient basis to infer discrimination." (Id.)

Plaintiff makes no attempt to demonstrate that she and the "other clinicians" with which she compares herself were "similarly situated" as to either job responsibilities or discipline. (See Tilson v City of Lawrence, 2008 US Dist LEXIS 63945, at *22-*23.) "Throughout [her] affidavit, clinicians collectively are defined to include social workers,

psychologists, music and art therapists, students working with patients, and psychiatrists." (See Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ 9.) Particularly with respect to documentation, which was central to the conflicts between Plaintiff and Dr. Vazquez, a licensed psychologist and a music therapist or student intern cannot be assumed to be similarly situated as to either responsibilities for quality patient care or appropriate discipline.

Nor does Plaintiff "show pretext by revealing such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proferred legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." (See Zisumbo v McLeodUSA Telecomms. Servs., 154 Fed Appx at 722 [quoting Plotke v White, 405 F3d 1092, 1102 (10th Cir 2005) (quotation omitted)].) As Plaintiff appropriately maintains, throughout her employment at the South Beach clinic, she received ratings of "outstanding," "highly effective," or "effective" on periodic evaluations of her job performance; and at his deposition Dr. Vazquez himself characterized her as an "excellent clinician" (Examination Before Trial of Dr. Rene Vazquez at 71-72.) But positive performance evaluations in some, even most, areas of professional responsibility do not in themselves create an inference that criticism in other areas is "unworthy of credence."

Indeed, performance evaluations attached to Plaintiff's affidavit show criticism of her performance in the crucial area of documentation that precedes her first pregnancy. And so, for the period November 16, 2001 through November 15, 2002, "She has struggled . . . to complete some evaluations, and ISP's in a timely fashion. A more organized approach to her documentation and record keeping is recommended." When asked at her deposition whether she agreed with the comment, she answered "I do." (Examination Before Trial of Dr. Isaura Gonzalez at 99-100.) The evaluation for November 16, 2002 through November 15, 2003 states, "Timeliness continues to be a challenge with respect to the completion of some assessments and ISP's. A more organized approach to her documentation, document filing and record organization continues as a recommendation."

The matter of the air-conditioned office is worthy of particular attention because it is the single allegation, in terms, of disparate treatment based on sex. In Spring 2006, "upon the advice of [her] physician, [Plaintiff] requested [she] be reassigned to an air conditioned office because [she] was pregnant, and [her] office was intolerably hot." (Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ 74.) The request was refused, although Plaintiff "could have been assigned the office . . ., because an air conditioned office was available from March 2006 to July 2006 and a male doctor who had been promised the air conditioned office, when he was to begin his employment in August or September 2006." (Id., ¶ 77.) The Court will assume, although there is no evidence to support it, that Dr. Vazquez and Dr. Ali knew at the time of Plaintiff's request that the air-conditioned office would be vacant until August or September.

One court has suggested that the refusal to accommodate a pregnant employee may be a basis for an inference of discrimination. (See Wenping Tu v Loan Pricing Corp., 2008

NY Slip Op 51945 [U], at * 11.) Whereas the Human Rights Law expressly requires reasonable accommodation as to employee disability (see Executive Law § 296 [3]) and religious observance (see Executive Law § 296 [10]), there is no similar requirement as to pregnancy. There is also a question as to whether accommodation should be required when to do so would violate neutral and generally applicable employment policies, such as seniority or full-time versus part-time status, as might apply here. In any event, it appears from the record that Plaintiff was permitted to use the air-conditioned offices of co-workers when one was available, and, indeed, she was using a co-worker's air conditioned office at the time of the July 14, 2006 incident.

The July 14, 2006 incident is central to Plaintiff's claim. She alleges in the Amended Verified Complaint, that "[t]he treatment to which she was subjected as a result of her gender/sex and the fact she was pregnant . . . culminated in the events of July 14, 2006," when Dr. Vazquez "locked [her] in an office against her will, verbally assaulted her, and confined her against her will, despite her repeated requests to escape"; "[a]fter this incident, Plaintiff made it known to [the Office of Mental Health] and South Beach she could not return to work at South Beach, because of Vazquez [sic] and Ali's actions toward her." (Amended Verified Complaint, ¶ ¶ 29, 30, 36.) Although the incident is only addressed in the Complaint as part of causes of action alleged for retaliation and constructive discharge, in her opposition to Defendants' motion Plaintiff alleges that the incident is sufficient in itself "to form the basis of [her] hostile work environment claim" (Plaintiff's Memo of Law at 21) and was part of the pattern of Dr. Vazquez's discriminatory conduct based upon her pregnancy (id. at 10-11.)

In Plaintiff's own words, as found in her affidavit submitted in opposition:
"On July 14, 2006, when I was pregnant with my third child, Dr. Vasquez placed me in imminent fear of my safety and the safety of my unborn child.
Early that morning there was an email exchange between me and Dr. Vasquez wherein Dr. Vasquez requested an update of the status of my charts.
I replied to Dr. Vasquez that I needed to get the information from my office and could not go into my office because it was too hot. Thus, I requested an extension to provide Dr. Vasquez with the status of the charts.
Moments later, Dr. Vasquez arrived at the office in which I was working and deliberately forced his way into the office.
I informed Dr. Vasquez I could not speak with him at the moment because I was leaving for the day. I told him it was my day off and I would talk to him next week.
Dr. Vasquez stood in front of the closed door, and told me I was not going anywhere.
I feared for my safety as well as the safety of my unborn child. I pleaded with Dr. Vasquez to move out of the way and not to block my egress from the office. Dr. Vasquez refused to move.
Because I was terrified of Dr. Vasquez, I yelled out for assistance. Dr. Vasquez still did not move and continued to block my exit.
Several minutes later, Dr. Richard Arking and Richard Johnson arrived at the scene and opened the door. I explained Dr. Vasquez was preventing me from exiting the office.
Dr. Arking told Dr. Vasquez to leave the office. Dr. Vasquez ignored his request. Finally, after the third request, Dr. Vasquez left the office.

I was so distraught by this incident I immediately submitted a written statement to Hernandez and filed a police report stating Dr. Vasquez placed me in imminent fear of physical injury.
...
As a result of the traumatic incident, I suffered physical symptoms and had to go to the emergency labor and delivery triage unit at the hospital.
...
I also suffered from severe headaches, anxiety, hypersensitivity, hyper vigilance, a racing heart, and other panic attack symptoms. These symptoms lasted several months.
Dr. Vasquez's conduct also caused me to go into preterm labor in the form of contractions and I experienced physical pain in my uterus.
On July 17, 2006, my doctor faxed a letter to personnel saying I could not return to work due to stress." (Affirmation in Opposition to Defendants' Summary Judgment Motion, ¶ ¶ 84-99.)

In the email exchange attached to the affidavit, Dr. Vazquez asked Plaintiff to set aside time the following Tuesday so that they could "review time frames in which the remaining work can be accomplished," and asked that she "[e]mail [him] an hour that is good for [her]." Her response was, "A meeting would disrupt and interrupt my day and I am not going into my office given my condition with the extreme heat in there."

At her deposition, Plaintiff testified that the incident lasted "[s]everal minutes"; that Dr. Vazquez "told [her] [she] was going nowhere and [she] was to sit down; to be quiet and to sit down." (Examination Before Trial of Dr. Isaura Gonzalez at 205, 210.) "He was telling me that he wasn't going anywhere, that I wasn't going anywhere, that I should take a seat and that I was going to sit and listen, I believe that is exactly what he said to me." (Id. at 207-08.) Nowhere in her affidavit or deposition testimony does Plaintiff allege any physical contact or that Dr. Vazquez made any statement that could be understood as referring to her sex, gender, or pregnancy. Even a physical assault has been found insufficient to support a disparate treatment claim where "not ascribable to discriminatory motive or intent." (See Mathirampuza v Potter, 548 F3d 70, 72, 78-79 [2d Cir 2008].)

Because an employer who discriminates for an unlawful reason rarely announces a discriminatory motive or intent, verbal comments may provide sufficient evidence to support a claim for employment discrimination. "As for invidious remarks, stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination'." (Coffed v Xerox Corp., 2009 US Dist LEXIS 84014, * 29 [WDNY 2009] [quoting Abdu-Brisson v Delta Air Lines, Inc., 239 F3d 456, 468 (2d Cir 2001) (citations and internal quotation marks omitted)].) "In determining whether a comment is a probative statement that evidences an intent to discriminate or whether it is a non-probative stray remark,' a court should consider the following factors: (1) who made the remark, i.e., a decision-maker, a supervisor, or a low-level co-worker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether a reasonable juror could view the remark as discriminatory, and (4) the context in which the remark was made, i.e., whether it was related to the decision-making process." (Adam

v Glen Cove School, 2008 US Dist LEXIS 13039, *24-*25 [EDNY 2008] [quoting Pronin v Raffi Custom Photo Lab, Inc., 383 F Supp 2d 628, 637 (SDNY 2005)].)

With respect to pregnancy, certain verbal comments expressly or by clear implication threaten adverse employment action. (See Rainer N. Mitti, Ophthalmologist, P.C. v New York State Div. of Human Rights, 100 NY2d at 331 ("complainant's pregnancy was becoming a problem' "; objections about too many prenatal appointments); Wenping Tu v Loan Pricing Corp., 2008 NY Slip Op 51945 [U], at * 4 (statements that "women should stay at home with their children and not return to work after childbirth"); Zisumbo v McLoedUSA Telecomms. Servs., 154 Fed Appx at 726 (plaintiff should "quit or go on disability if she could not handle the stress of being pregnant"); Walsh v National Computer Systems, Inc., 332 F3d 1150, 1160 [8th Cir 2003 ["You better not be pregnant again!"]; Bergstrom-Ek v Best Oil Co., 153 F3d 851, 858 [8th Cir 1998] [plaintiff should have an abortion]; Donaldson v American Banco Corp., Inc., 945 F Supp 1456, 1462 [D Colo 1996] ["comments regarding . . . how women who attempt simultaneously to raise children and to work after run into trouble"]; Crnokrak v Evagelical Health Systems Corp., 819 F Supp 737, 743 [ND Ill 1993] ["make sure after you have this baby you use (a condom) so that we won't have to worry about you going on maternity leave again"].)

Other comments, derogatory and offensive, do not alone threaten adverse employment action, even by implication. (See Wenping Tu v Loan Pricing Corp., 2008 NY Slip Op 51945 [U], at * 3 ["swollen face"; "prenatal mark"]; Zisumbo v McLoedUSA Telecomms. Servs., 154 Fed Appx at 726 ["new nickname is going to be prego' "]; Glunt v GES Exposition Services, Inc., 123 F Supp 2d 847, 863 [D Md 2000] ["huge"; "waddled"]; Wargo v Wal-Mart Stores, Inc., 2000 US Dist LEXIS 12328, * 4 [D Me 2000] [nickname "hormones"]; Donaldson v American Banco Corp., Inc., 945 F Supp at 1462 ["your ass is huge"; "You look like you're going to give birth to an elephant"; comments related to breastfeeding].)

Although both types of comments in context may be probative of discriminatory animus, it is a demonstrated relationship to adverse employment action that distinguishes the words of the discriminator from those of the merely boorish. "[M]ere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws become a general civility code'." (Forrest v Jewish Guild for the Blind, 3 NY3d at 309 [quoting Faragher v City of Boca Raton, 524 US 775, 778 (1998) (citation and internal quotation marks omitted)].)

In her Amended Verified Complaint, Plaintiff alleges that she "was continually subjected to . . . a campaign of regular verbal harassment directed at her pregnancy," and that Dr. Vazquez "made inappropriate comments about [her] changing body shape, and other similar derogatory comments about her weight and pregnancy." (Amended Verified Complaint, ¶ ¶ 19-20.) Similar conclusory statements are found in her affidavit: Dr. Vazquez "regularly made adverse and demeaning comments regarding my physical appearance" (Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ 21); "again made negative comments regarding my size and physical appearance" (id. at ¶ 30); and he "continued to make comments about my appearance" (id. at ¶ 42.)

Only four specific comments, however, are alleged. During Plaintiff's first pregnancy, Dr. Vazquez "asked how [she] was going to fit through the door and told [her] he did not know where [they] were going to hold staff meetings anymore because [she] was getting so fat, [he] didn't think [she] was going to fit through the door'." (Id., ¶ 21.) When Plaintiff returned from maternity leave after the birth of her first child, Dr. Vazquez "presented [her] with an unsolicited and unwelcome diet plan, and suggested [she] lose weight." (Id., ¶ 28.) In response to being told of Plaintiff's second pregnancy, Dr. Vazquez "asked [her] whether [her] husband wanted the baby." (Id., ¶ 31.) During her third pregnancy, Plaintiff "tried to conceal this pregnancy by wearing baggy clothes," but Dr. Vazquez "complained [she] looked unprofessional and dressed like an 18-year-old." (Id., ¶ ¶ 42, 43.)

None of these alleged statements expressly or by implication threaten adverse employment action, nor does either Plaintiff's affidavit or her deposition testimony relate them to the disparate treatment she alleges. Also, according to Plaintiff's deposition testimony, she and Dr. Vazquez were, at least for a while, on personal terms; he attended her wedding, and gave her a baby gift when her first child was born. (See Examination Before Trial of Dr. Isaura Gonzalez at 156-57.) Unless baby showers and all references to pregnancy are to be banned from the workplace, comments must be assessed in the context of the reality of workplace relationships that also become personal, sometimes for the good, sometimes not.

It may be that sheer quantity alone, even of a comment that is derogatory rather than threatening, can in some circumstances be probative of a discriminatory motive or intent. (See Zisumbo v McLoedUSA Telcomms. Servs., Inc., 154 Fed Appx at 726-27 [plaintiff called "prego" in 75% of supervisor's interactions with her over three months]; Wargo v Wal-Mart Stores, Inc., 2000 US Dist LEXIS 12328, at * 4 [plaintiff called "hormones" five or six times a day for the entire time of her employment].) But more than the type of vague and conclusory assertions that Plaintiff here offers should be required before the offensive is equated with illegality.

The Court concludes that Plaintiff has failed to provide sufficient evidence to support a jury finding that Defendants' legitimate, nondiscriminatory reasons for the alleged adverse employment actions taken against her were a pretext for illegal discrimination. In short, she has failed to raise a triable issue that the actions she complains of were taken "because of" her pregnancy, or otherwise "because of" sex or gender, with the consequence that, to the extent she claims unlawful discrimination based on disparate treatment, her claim must be dismissed.

Plaintiff also alleges that Defendants harassed her "because of" her pregnancy through the creation and maintenance of a hostile work environment.

"A . . . hostile work environment exists [w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

environment' . . . Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive' . . . Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment— one that a reasonable person would find to be so." (Forrest v Jewish Guild for the Blind, 3 NY3d at 310-11 [quoting Harris v Forklift Sys., Inc., 510 US 17, 21, 23 (1993) (citations and internal quotation marks omitted)].)

A defendant may obtain summary judgment on a hostile work environment claim by demonstrating that, "viewing the totality of the evidence in the light most favorable to the plaintiff . . ., the offensive conduct was not sufficiently severe or pervasive to alter the conditions of her employment and create an objectively hostile or abusive work environment." (See Barnum v New York City Tr. Auth., 62 AD3d 736, 738 [2d Dept 2009]; see also Forrest v Jewish Guild for the Blind, 3 NY3d at 311-12.) The plaintiff can defeat summary judgment by raising factual disputes as to material issues, which would not include the plaintiff's disagreement with any adverse employment action that the defendant has justified by a legitimate, nondiscriminatory reason that the plaintiff does not sufficiently challenge as pretext. (See id. at 312; see also Rodriguez v Andamios de Puerto Rico, Inc., 2009 US Dist LEXIS 39969, * 27 [D PR 2009] ["Removing the conduct underlying plaintiff's adverse employment action, the remaining alleged actions amount to rudeness, ostracism, or conclusory statements insufficient to establish a hostile work environment."].)

The Amended Verified Complaint adds to the allegations of disparate treatment and derogatory comments that Dr. Vazquez "called Plaintiff at home while on maternity leave, and harassed her by improperly and unnecessarily complaining about work which she could not perform because she was on maternity leave." (Amended Verified Complaint, ¶ 20.) Although the July 14, 2006 incident is not included in the Complaint's allegations as to disparate treatment and harassment, in opposition to Defendants' motion Plaintiff argues, "This incident alone is severe and pervasive enough to form the basis of plaintiff's hostile work environment claim" (Plaintiff's Memo of Law at 21.)

In her affidavit, Plaintiff specifies that, "[d]uring September, October, and November 2005, while on leave, Dr. Vasquez [sic] harassed [her] by unnecessarily calling [her] at home on regular and numerous occasions." (Affidavit in Opposition to Defendants' Motion for Summary Judgment, ¶ 38.) At her deposition, Plaintiff could not remember the number of time she was called at home, "but it was more than four times," and she actually spoke to Dr. Vazquez "[a] handful of times." (Examination Before Trial of Dr. Isaura Gonzalez at 168.) As for the subject of the calls: "He would speak to me about patients, patient caseload, which again, I wasn't there, so it seemed inconsequential to me to have to respond to something I'm not there." (Id.)

Plaintiff was a health care professional who was on maternity leave for four months. The Court has no difficulty concluding that it is not harassment for her supervisor to want to speak to her a "handful of times" about patients for whom she had responsibility. The Court will assume that Plaintiff did not intend to suggest at her deposition that the care of her patients was "inconsequential" to her.

The Court has already concluded that the comments Dr. Vazquez made concerning Plaintiff's pregnancy are insufficient to create a triable issue as to discriminatory motive and intent, and now concludes that they were "not sufficiently severe or pervasive to alter the conditions of her employment and create an objectively hostile or abusive work environment" (see Barnum v New York City Tr. Auth., 62 AD3d at 738.) The Court notes again the vague and conclusory nature of Plaintiff's allegations as to the derogatory comments, without specificity as to number or time; the absence of even one affidavit from a co-worker supporting the allegations; and that there is no mention of any such comments in the many e-mail communications that are attached to her deposition, most of which cover the period from February to July 2006, leading up to the July 14 incident. (See Forrest v Jewish Guild for the Blind, 3 NY3d at 310-12 ["racial epithets . . . even were they uttered . . . are insufficient to make out a hostile work environment"]; Royal Life Ins. Co. of NY, Inc. 284 AD2d 892, 893 [3d Dept 2001] ["sarcastic comments" and "heightened awareness" of Plaintiff's illness "fall short of making out a prima facie case"].)

As for the July 14 incident, "[e]ven a single incident of sexual harassment can create a hostile work environment if the alleged conduct is sufficiently severe" (see Beharry v Guzman, 33 AD3d 742, 743 [2d Dept 2006].) "A single incident of rape, for example, sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability for sex-based discrimination." (Mathirampuzha v Potter, 548 F3d at 79 [internal quotation marks and citations omitted].) "But we require that the incident constitute an intolerable alteration of the plaintiff's working conditions, . . . so as to substantially interfere with or impair his ability to do his job." (Id. [internal quotation marks and citations omitted].)

In a recent Second Circuit case, a supervisor "grabbed the plaintiff's arm, punched him in the shoulder and the chest, spit in his face, and poked him in the eye," and the employee "suffered chest pains and contusions to his shoulder blade, required eye surgery, and fell into a depression." (See id. at 73.) The court concluded that "the brief incident in this case, however regrettable, does not meet the extraordinarily severe' standard." (See id. at 79.)

This Court reaches a similar conclusion here. The Court acknowledges Plaintiff's allegations that she suffered "preterm labor in the form of contractions and . . . physical pain in [her] uterus," and "severe headaches, anxiety, hypersensitivity, hyper vigilance, a racing heart, and other panic symptoms [that] lasted several months." (Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ ¶ 97-98.) No medical records or reports, or other medical evidence in admissible form, is offered to substantiate the alleged injuries or to relate them to the July 14, 2006 incident. The non-physical restraint,

without threat of imminent physical harm, to which Plaintiff was subjected for "several minutes" cannot be equated to a rape. (Compare Anderson v State of New York, 614 F Supp 2d 404, 409 [SDNY 2009] [supervisor "grabbed (plaintiff's) hand, dug her nails into (plaintiff's) wrist, and said: "You're not leaving this office."].)

Nor is there any evidence to relate the incident to Plaintiff's pregnancy. (See Tilson v City of Lawrence, 2008 US Dist LEXIS 63945, at *23-*26 [incidents not "sufficiently connected to [the plaintiff's] pregnancy so as to satisfy . . . element of the hostile environment analysis" that "the harassment was based on her sex and/or pregnancy"].) On the contrary, the evidence Plaintiff submits shows that the encounter was prompted by Plaintiff's refusal to comply with her supervisor's request for a time when the two could meet to discuss her advice that she would be unable to meet a performance deadline. If Dr. Vazquez's conduct caused Plaintiff to feel unjustifiably restrained, in addition to the criminal complaint she made to the police, Plaintiff could have sought redress for any resulting harm in a common law tort action. Her reasons for not doing so (which do not, in any event, appear on this record) are beyond the point; they cannot convert a tort into actionable discrimination.

Even if Plaintiff's allegations could support a hostile environment claim, justifying damages for resulting emotional distress (see Matter of New York City Tr. Auth. v State Div. of Human Rights, 78 NY2d at 216-17), they would not support her alleged cause of action for constructive discharge. In order to maintain an action for constructive discharge, a plaintiff must show that his or her employer deliberately made working conditions so intolerable that he or she was forced into involuntary resignation." (Nelson v HSBC Bank USA, 41 AD3d at 447; see also Balsamo v Savin Corp., 61 AD3d 622, 623-24 [2d Dept 2009].) " Deliberate' is more than a lack of concern'; something beyond mere negligence or ineffectiveness'." (Polodori v Societe General Group, 39 AD3d 404, 405 [1st Dept 2007] [quoting Whidbel v Garzorelli Food Specialists, 223 F3d 62, 74 (2d Cir 2000)].)

Plaintiff's Amended Verified Complaint alleges that "Defendant, through Vazquez and Ali intentionally created intolerable working conditions, by continuously harassing her"; and that "[t]he treatment to which Plaintiff was subjected as a result of her gender/sex and the fact she was pregnant, which culminated in the events of July 14, 2006, led Plaintiff to the conclusion she could not return to work at South Beach, because of Vazquez [sic] and Ali's actions toward her." (Amended Verified Complaint, ¶ ¶ 35, 36.) In her affidavit, Plaintiff states that she "believed if [she] came into contact with Dr. Vasquez [sic], he would physically harm [her]," "Defendants failed to give [her] any assurances that . . . [she] would be safe upon [her] return to work," and that she "involuntarily resigned [her] employment because [she] feared [her] safety would not be protected." (Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ ¶ 106, 107, 110.)

Accepting as true all of Plaintiff's sworn statements in her affidavit and deposition testimony, the Court finds no evidence that would lead a reasonable person to conclude that Plaintiff had cause to fear that Dr. Vazquez would "physically harm" her, or that her "safety would not be protected." Nowhere does Plaintiff even allege that at any time

during her six years at the clinic Dr. Vazquez made any physical contact with her, or threatened to do so. Other than the July 14, 2006 incident, the Court finds only two alleged instances when Dr. Vazquez physically manifested anger or frustration; at a March 2005 meeting when "he threw several of [her] charts at her from across his desk" (id., ¶ 35); and at an April 2006 meeting, when he "threw charts at [her] again from across the desk" (id., ¶ 73.)

Nor is there any evidence that any Defendant "deliberately" made her working conditions intolerable so that she would be forced to quit. There can be no dispute that, soon after Plaintiff's return from maternity leave after the birth of her second child, her relationship with Dr. Vazquez became strained. She was working only part-time, three days a week, and, if Dr. Vazquez seemed to expect full-time work, it seems she too recognized the requirements of the job when she requested that she convert to full-time. Indeed, she complains about Defendants' unresponsiveness to her requests, noting that a "non-pregnant psychologist" was hired during this time. (Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ ¶ 65, 79-83.)

Adjustments of this sort occur in workplaces all the time, particularly as both employers and employees attempt to come to terms with the necessity of balancing equality in the workplace with the responsibilities of family life. This Court would not suggest that Defendants did an exemplary job in dealing with Plaintiff under these circumstances, but neither does the Court see any basis for a rational conclusion that they acted to force her from the workplace.

Indeed, although Plaintiff disputes the sworn statements in the affidavit of Jose Hernandez, Associate Personnel Administrator at defendant South Beach, that in the latter part of July 2006 he offered to Plaintiff, and she accepted, a comparable position at the main facility of South Beach (see Affidavit of Jose Hernandez, ¶ 11), she acknowledges that "defendants reassigned [her] to the Power Center at 100% pay rate so [she] could receive 50% pay and health insurance when [she] was on leave" (Affidavit in Opposition to Defendants' Summary Judgment Motion, ¶ 103.) (The other facility was closer to Plaintiff's home, and in 2005 she applied for a position there.) The Court will not recite the details of efforts made to assist Plaintiff after the July 14, 2006 incident, as described in Mr. Hernandez's affidavit, but will note his summary that "Plaintiff benefitted by being able to use all her accruals twice and being paid for those hours at a higher rate than she made while she was working (i.e. as a full-time employee rather than at 60% time)" (Affidavit of Jose Hernandez, ¶ 16), and that Plaintiff does not dispute Mr. Hernandez's statement. These actions are not consistent with a scheme to cause Plaintiff to quit.

The Human Rights Law declares that "[i]t shall be an unlawful discriminatory practice" for an employer "to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article." (Executive Law § 296 [7].) "In order to make out the claim, plaintiff must show that (1) she engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between

the protected activity and the adverse action." (Forrest v Jewish Guild for the Blind, 3 NY3d at 313.)

The U.S. Supreme Court has held that "the scope of Title VII's anti-retaliation provision is broader than that of its discriminatory action provision, and that any action that could well dissuade a reasonable worker from making or supporting a charge of discrimination' could constitute retaliation." (See Patane v Clark, 508 F3d at 116 [quoting Burligton Northern & Santa Fe Ry. v White, 548 US 53 (2006)].) "A prima facie case of retaliation requires evidence of a subjective retaliatory motive" for the adverse employment action. (See Matter of Pace Univ. v New York City Comm. on Human Rights, 85 NY2d 125, 128 [1995]; see also Martinez v Triangle Maint. Corp. 293 AD2d 721, 722 [2d Dept 2002].)

Plaintiff's Amended Verified Complaint alleges that "South Beach was made aware of the discrimination Plaintiff faced during her pregnancies," and that she "complained often to Ali about Vazquez's inappropriate behavior and treatment toward her during and in between pregnancies." (Amended Verified Complaint, ¶ ¶ 26-27.) Two retaliatory adverse employment actions are alleged: the July 14, 2006 incident, and that "Plaintiff was left without insurance as of October 31, 2006, and . . . Plaintiff's medical bills were not paid." (Id. ¶ ¶ 29, 32.)

"Summary judgment is properly granted in a discrimination case when the defendant demonstrates an absence of even a prima facie case'." (Romney v New York City Tr. Auth., 8 AD3d 254, 255 [2d Dept 2004] [quoting Ferrante v American Lung Assn., 90 NY2d 623, 631 (1997)].) Here, there is no evidence of a "subjective retaliatory motive" for either the July 14, 2006 incident or the alleged lapse of medical insurance. A plaintiff cannot avoid summary judgment on a retaliation claim "by merely pointing to the inference of causality resulting from the sequence in time of the events." (See Forrest v Jewish Guild for the Blind, 3 NY3d at 313-14 [quoting Chojar v Levitt, 773 F Supp 645, 655 (SDNY 1991)].)

Much has already been said about the July 14, 2006 incident. Whether or not Dr. Vazquez's manner of execution is legitimately the subject of complaint, the only evidence is that the encounter was motivated by his attempt to elicit from Plaintiff a time when they could meet to discuss her advice that a deadline would not be met. As for the lapse of insurance, Mr. Hernandez explains that "[i]t is possible there was some lag in processing [his] request . . . for plaintiff to be placed on her renewed accruals," which would have reactivated coverage, but that "[e]ven if her insurance coverage restarted late, the insurance company would still have had to pay any claims she made." (Affidavit of Jose Hernandez, ¶ ¶ 17, 18.) Indeed, at her deposition, Plaintiff acknowledged that the insurance problem "[c]ould have been a paperwork error," and that, once the problem was addressed, the hospital bill for the birth of her third child was paid, and that a surgery bill was still outstanding because of "a glitch in the way the computers talk to each other." (Examination Before Trial of Dr. Isaura Gonzalez at 221-24.)

Finally, the Human Rights Law declares it "an unlawful discriminatory practice for any person to aid, abet, incite compel or coerce the doing of any of the acts forbidden under [the statute] or to attempt to do so." (Executive Law § 296 [6].) The Amended Verified Complaint alleges that the other alleged "discriminatory practices were aided and abetted by and with the full knowledge and consent of Vazquez and Ali." (Amended Verified Complaint, ¶ 40.) "[A]n individual cannot be held to have aided and abetted his or her own actions" (Goldin v Engineers Country Club, 54 AD3d 658, 660 [2d Dept 2008]), nor can there be aiding and abetting liability where "no violation of the Human Rights Law by another party has been established" (see Barbato v Bowden, 63 AD3d 1580, 1582 [4th Dept 2009] [quoting Strauss v New York State Dept. of Educ., 26 AD3d 67, 73 (3d Dept 2005)].)

Defendants have established prima facie that they are entitled to judgment as a matter of law on all of the causes of action alleged in the Amended Verified Complaint. Plaintiff has failed to raise triable issues.

Defendants' motion is, therefore, granted. The Amended Verified Complaint is dismissed. Defendants may enter judgment accordingly.