COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 08-1560

JENNIFER DONCASTER-HAMILTON

vs.

ARTEL VIDEO SYSTEMS, INC., RICHARD H. DELLACANONICA, SEAN F. MACK, and JOANNE PEDERSON

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MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, alleging that her employer (defendant Artel) and its management (defendants Dellacanonia, Mack and Pederson) selected her for layoff because she was pregnant, has asserted claims for violation of G.L. c. 151, sections 4(4A) and 4(16), and of c. 12, §§11H and 11*I* (the Massachusetts Civil Rights Act). On October 31, 2008 I allowed the defendants' motion to dismiss as to the MCRA count, for failure to state a claim. The defendants have now moved for summary judgment on the remaining (Chapter 151B) counts.

For the reasons that follow, Defendants' Motion for Summary Judgment is ALLOWED.

BACKGROUND

From the summary judgment record one may glean the following facts, which are either undisputed or are here taken in the light most favorable to the plaintiff. Artel is a manufacturer of video hardware. Dellacanonica is the President and CEO; Mack, the CFO; and Pederson the Inside Sales Manager.

The plaintiff began working at Artel as a Receptionist/Administrator in early 2005. She was promoted to Inside Sales Representative in March 2006, in which position she reported to Pederson.

All three individual defendants participated in the promotion decision. In her new position, the plaintiff served as the primary internal customer support interface for all sales quotations and proposals for the Legacy product line (image processing and multiport connectivity products) and international sales of the DV6000 product line (a digital video transport system), Artel having purchased the latter line in the same month as the plaintiff's promotion.

Unfortunately, neither the DV6000 nor the Legacy product line did well. Sales of the DV6000 line have declined steadily since the March 2006 purchase. The Legacy line, too, saw a significant and steady decline in sales during 2006, such that toward year's end Artel contacted the company from which it had purchased the product to determine whether the prior owner would be interested in buying it back. In January-February 2007, with Legacy sales continuing to decline, Artel and the former owner began sale negotiations for the Legacy line. These consummated in a sale on March 12, 2007.[1]

Compounding matters was the discovery, in January 2007, that Artel had over-ordered inventory by $1 - 1.5 million, resulting in a cash flow shortage. Efforts to cancel orders and negotiate extended payment terms on orders that had already been processed were only partly successful.

Artel's executive team (defendants Dellacanonica and Mack and Richard Harrington, its Vice President of Operations) began exploring ways to cut costs. They settled on a plan to lay off 20%

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[1]The parties give somewhat differing accounts of the impact of these developments on the plaintiff's workload. The defendants say it was clear to them that the plaintiff did not have enough work to keep her busy and that there were complaints of her excessive socializing, personal phone calls, and internet-searching on company time. The plaintiff maintains that there were only two occasions when she ran out of work and asked Pederson for something to do. Even assuming that this evidence amounts to a genuine dispute, it is not material for present purposes.

of Artel's fifty employees, require employees to take mandatory paid time off the first week in July, priohibit unapproved overtime, eliminate non-essential travel, delay product development upgrades, and reduce by 20%, effective immediately, the salaries of senior management

On or about March 5, 2007 Dellacanonica instructed Harrington and Mack to review the company's organizational chart and suggest ten employees for layoff. Mack independently compiled his own list of ten. When the three met again the following day, the plaintiff's name was on all three lists. The meeting resulted in a plan to lay off ten employees – seven men and three women, including the plaintiff – at the end of April.

Sometime in early 2007, the plaintiff had learned that she was pregnant. On or about March 26, 2007 she informed Pederson of her pregnancy, and that her due date was at the end of October. No one else at Artel knew, yet, of the plaintiff's pregnancy, and Dellacanonica, Mack and Harrington had not known of it at the time of the early March meetings.

About a week before the end of April, Dellacanonica notified Pederson that the plaintiff had been selected for inclusion in a layoff at the end of the month. Pederson advocated reconsidering the decision, arguing that the plaintiff was a good and valued employee. She also letDellacanonica know that the plaintiff was pregnant and was then in the process of purchasing her first home. Right about this time, the plaintiff herself informed Mack of her pregnancy.

In the event, the plaintiff was not laid off at the end of April. Pederson met with her to discuss how she might make herself more valuable to Artel, suggesting that she devote 50% of her time to her inside sales position and the other 50% to working under another manager in the materials area. The plaintiff declined. Pederson then informed her that there were going to be layoffs and that this would be the plaintiff's "job security," that she needed "to show her

commitment to the company and be prepared to show that she was going to be around for the long haul." The plaintiff said the idea was "silly" and that she wanted no part of the materials side of the business. Pederson did not bring up the idea again.

Dellacanonica, Mack and Harrington softened. They asked Pederson to inform the plaintiff that she had been selected for layoff due to lack of work and because the inside sales position waqs no longer critical to Artel's operation,. They also asked her to ascertain the plaintiff's plans for the future so that the company could time the layoff to work best for her or, if she wished to return to Artel after having the baby, could identify a suitable position for her.

On June 6, Pederson met with the plaintiff as requested, and told her that she had been selected for layoff, that she had been scheduled to be let go that day, but that she (Pederson) had asked Dellacanonica for a postponement until after the plaintiff closed on her house in late July. She asked what the plaintiff's plans were for the future. The plaintiff was upset at the news, and told Pederson she had been planning to return to Artel after her maternity leave. Pederson promised to speak with Dellacanonica about finding a different position for her at that time. Pederson also told the plaintiff she might be happy being laid off so that she could stay home with the baby and receive unemployment compensation benefits. After the meeting, Pederson informed Dellacanonica and Mack of the plaintiff's desire to return to work after her maternity leave.

Mack met with the plaintiff later that day. He praised her abilities and said everyone enjoyed working with her, and told her she could choose either to take the layoff, or to return to a position Artel would find for her after her materinity leave. He said if she "wanted a position, that there would be a position at Artel for [her]," and suggested she take some time to consider her options.

Echoing Pederson, Mack topld the plaintiff that he and Dellacanonica thought she might like a layoff so that she could be at home with her new baby.

Still later on June 6, the plaintiff met with Dellacanonica. This meeting went much like the previous two, Dellacanonica praising her ability and her personality, telling her that she could choose between a layoff and returning to a new position following her maternity leave, and suggesting that she "would be happy with the layoff so she could be home with her baby."

A week later, on June 13, the plaintiff accepted an invitation from Pederson to join her for a walk. Pederson asked her, "Do you want to be laid off or not?" The plaintiff said it was not her decision, that the decision had already been made for her. Peterson said no, that it was the plaintiff's decision. The plaintiff said Artel was "not a comfortable place to be" for someone who had been told she'd been selected for layoff. Pederson said, "No one has job security anymore" and that she herself could be fired if she continued to run off at the mouth. She reiterated that the plaintiff could decide whether and when she wanted to be laid off.

Another week passed. On June 21, Pederson again asked the plaintiff if she wanted to take a layoff or to return to Artel after she had her baby. She added that she (Pederson) was fed up, was working on her resume, and that if the plaintiff didn't want to be laid off she would ask Artel if she could be laid off instead. The plaintiff said, "If there has to be a layoff, I'll take the layoff. I do not want to be here anymore." The plaintiff additionally recalls telling Pederson, "I was told that I was laid off"; that Pederson asked, "When, the end of July?"; and that she responded, "If that's when they want me gone."

Pederson reported to Dellacanonica and Mack that the plaintiff wanted to be laid off at the end of July, and that's what happened. On July 27, Mack conducted her exit interview and tendered

a Separation Agreement, by which she would have received three weeks' severance. The plaintiff did not sign the agreement. Since she left, Artel has not had an Inside Sales Representative position.

As matters unfolded, Artel only laid off four employees owing to a number of voluntary departures. Of the four, the plaintiff was the only one who was offered the option of taking a different job in the company, and allowed to time her departure.

There is no evidence that the plaintiff was, or was regarded by management as being, limited in any major life activity; indeed, the plaintiff admitted in her deposition to the absence of any such evidence. Her pregnancy did not restrict her from performing any aspect of her job, or from such activities as grocery shopping, cooking, caring for her eight-year-old son, or driving a car. She does not contend that she asked for any form of accommodation, or the defendants failed to accommodate her, beyond observing, "I was laid off; that is not accommodating."

DISCUSSION

A. Summary Judgment Standard.

Summary judgment must be granted where there are no material facts in dispute and the moving party has established that it is entitled to judgment as a matter of law. Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Mass. R. Civ. P. 56(c). The moving party bears the burden of establishing the absence of a triable issue. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The facts are to be read in the light most favorable to the non-moving party. G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 263 (1991). In determining whether there are genuine issues of material fact, the court may consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The non-moving party cannot defeat the motion simply by resting on the

pleadings and mere assertions that there are disputed facts. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

B. Count I: Coercion, Intimidation, Threats and Interference.

Count I alleges that the defendants subjected her to a hostile work environment "by coercing, intimidating, threatening or interfering with the exercise of [her] rights, in violation of the provisions of M.G.L. c. 1519[B], §4(4A)." Because there was no evidence that any of the defendants engaged in any such behavior, summary judgment will enter for the defendants as to Count I.

C. Count II: Discrimination Based on Perception of Handicap.

Count II alleges that the defendants "individually and collectively discriminated against the [plaintiff] on the basis of a perceived disability in violation of M.G.L. c. 151B, §4(16)." Because there is no evidence that the plaintiff was limited in any major life activity (see New Bedford v. Massachusetts Commn. Against Discrimination, 440 Mass. 450, 467 n.33 (2003); MCAD Guidelines: Employment Discrimination on the Basis of Handicap Chapter 151B, § II. A.6 (1998)), or that any defendant so regarded her (see G.L. c. 151B, §1(17); Dahill v. Police Dept. of Boston, 434 Mass. 233, 241 (2001)), or that any defendant failed to offer reasonable accommodation for her (non-existent and unperceived) disability (see G.L. c. 151B, §4(16)), summary judgment will enter for the defendants as to Count II.

D. Count III: Discrimination on Account of Pregnancy.

Count III alleges that the defendants discriminated against her because she was pregnant. While the claim is framed as one for handicap discrimination (and thus suffers from the infirmities already mentioned with respect to Count II), "[d]iscrimination on the basis of pregnancy amounts to sexual discrimination actionable under [G.L. c. 151B, § 4(1)]." Butner v. Department of State

Police, 60 Mass. App. Ct. 461, 467 (2004). See Massachusetts Elec. Co. v. Massachusetts Commn. Against Discrimination, 375 Mass. 160, 169 (1978). I here treat Count III as pleading such a claim in the alternative.

"A plaintiff must prove four elements to succeed on a claim under G.L. c. 151B: membership in a protected class, harm, discriminatory animus, and causation.'" Romero v. UHS of Westwood Pembroke, Inc., 72 Mass. App. Ct. 539, 543 (2008), quoting Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001). Here, it is undisputed that Artel's management team, in response to slumping sales in the plaintiff's area and their perception (whether founded or unfounded) that she was not busy, selected her for inclusion in a ten-employee layoff, *before* they or anyone else in the company knew she was pregnant. There is thus no evidence that this decision was motivated by any forbidden, discriminatory animus, or that the plaintiff's pregnancy was the cause of her selection for layoff.

Subsequent events somewhat cloud the picture but do not alter it. Artel did not terminate the plaintiff when it said it would, and it did not terminate all ten employees initially selected because voluntary terminations made it unnecessary. Moreover, management backed off its decision with regard to the plaintiff. In the end, however, *she* decided, for whatever reason,[2] to "take the layoff.

Suggesting to a pregnant employee that she might be happier staying home with her new baby is, to be sure, a risky business, and could well be considered – in the right context – as evidence of an unlawful discriminatory animus. In this case, however, the context is benign: the plaintiff had

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[2]The evidence would permit the inference that the plaintiff decided not to continue at Artel because she was hurt that management thought she was not working hard, or because Artel did not offer job security, or due to family circumstances. It would *not* support a finding that she was initially selected for layoff because she was pregnant, or that she subsequently suffered any adverse employment action on account of her pregnancy.

initially been selected for layoff; the company offered to find her a position in another area should she choose to return to work; and the three managers to whom the plaintiff attributes these statements were each discussing with her what her decision would be. In this context, no reasonable factfinder could draw the inference that the defendants' treatment of the plaintiff was the product of unlawful discrimination.

In short: because there is no evidence that the plaintiff suffered any adverse employment consequence as a result of her pregnancy, summary judgment will enter for the defendants on Count III.

ORDER

For the foregoing reasons, summary judgment shall enter for the defendants, dismissing all remaining Counts of the Complaint.

Thomas P. Billings, Associate Justice

Dated: October 8, 2009