COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-140

DIANE GOKAS

vs.

BEVERLY BANK & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff brought this action against her former employer Beverly Bank (bank) and two of its employees, alleging that she sustained personal injuries as a result of the defendants' creation of a "toxic work environment."[2] The defendants moved to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). The plaintiff opposed and moved to amend her complaint to add a count against the bank for

[1] Gayle Fili and Pauline Bloomer.

[2] The complaint alleged four claims for relief: count I (for negligent retention and/or supervision against the bank); count II (intentional infliction of emotional distress against all defendants); count III (negligent infliction of emotional distress against all defendants); and count IV (civil conspiracy against all defendants). The plaintiff voluntarily dismissed count IV and that count is not before us. In her primary brief the plaintiff specifies that she does not contest dismissal of counts I and III. Nor does the plaintiff contest dismissal of so much of count II as was stated against the bank. Accordingly, we are concerned here only with so much of count II as applies to the individual defendants.

Family and Medical Leave Act (FMLA) retaliation. Without ruling on the motion to amend, a Superior Court judge dismissed the plaintiff's complaint. On appeal, the plaintiff claims that the judge erred by: (i) dismissing so much of count II, for intentional infliction of emotional distress, as was against the individual bank employees only; and (ii) by not allowing her to amend her complaint.[3] We conclude that the judge properly dismissed count II but vacate the judgment to allow the plaintiff to amend her complaint to state a claim against the bank for FMLA retaliation.

1. Dismissal of intentional infliction of emotional distress count against individual defendants. The plaintiff contends that the judge erred in dismissing the intentional infliction of emotional distress claim lodged against the individual defendants because the complaint adequately set forth actionable claims. We review de novo an order allowing a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6). See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). Taking the allegations of the complaint as true and drawing all reasonable inferences in the plaintiff's favor, we look beyond conclusory allegations and focus on whether the facts alleged

[3] At oral argument, the parties agreed that the judge's dismissal of the complaint without ruling on the motion to amend constitutes an implicit denial of the motion.

plausibly suggest she is entitled to relief. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008). "[T]he presence of allegations or information constituting a conclusive affirmative defense can spell the demise of a complaint." Ryan v. Holie Donut, Inc., 82 Mass. App. Ct. 633, 635 (2012).

Here, the allegations in the complaint placed the conduct of the individual defendants, said to have constituted intentional infliction of emotional distress, squarely within the scope of the individual defendants' employment and in furtherance of their employer's interests. The claims therefore were barred by the exclusivity provisions of the workers' compensation act. See Estate of Moulton v. Puopolo, 467 Mass. 478, 490 n.16 (2014) (coemployee acting within scope of employment to further interests of employer is protected by exclusive remedy provision of workers' compensation act); Anzalone v. Massachusetts Bay Transp. Auth., 403 Mass. 119, 124 (1988) (suit for intentional tort in course of employment relationship barred by exclusivity provision of workers' compensation act).

Although the plaintiff contends that the conduct of the individual defendants went "beyond all possible bounds of decency," she couched all of it unambiguously within the course of their employment and in furtherance of their employer's interest:

> "At all times during the conduct and statements described in this Complaint, [the individual defendants] were employees of [the bank]. . . . At all times during the conduct and statements described in this Complaint, [the individual defendants] acted in their capacity as Assistant Branch Manager, and Branch Administrator/Senior Vice President, during business working hours and on the premises of the Bank's . . . branch/office locations. . . . At all times during the conduct and statements described in this Complaint, [the individual defendants] were motivated by a desire to serve the interests of [the bank]."

The judge therefore properly dismissed the claim for intentional infliction of emotional distress against the individual defendants. See Fusaro v. Blakely, 40 Mass. App. Ct. 120, 124 (1996) ("However distorted the defendants' understanding of the proper performance of their duties may have been, we cannot say that they were acting outside the scope of their employment").

2. Denial of motion to amend complaint. The plaintiff claims that the judge erred in denying her motion to amend the complaint because she had a right to amend "as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal." Mass. R. Civ. P. 15 (a), 365 Mass. 761 (1974). Yet, she did not amend prior to dismissal; she instead sought leave to amend.[4] We need not decide whether the plaintiff's request for leave to amend operated as a waiver of the right to do so because, even if the

[4] We note that the plaintiff did not assert in the trial court that she had a right to amend as a matter of course, arguing instead only that leave should be freely given.

plaintiff required leave to amend, leave should have been given as there was no good cause to deny it. See Goulet v. Whitin Mach. Works, Inc., 399 Mass. 547, 549 (1987).

The plaintiff sought to amend the complaint by adding a count against the bank for retaliation based on the assertion of her rights under the FMLA. To make out a claim for retaliation under the FMLA, a complainant must allege that (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 383 (2019). Here, the plaintiff's proposed amendment sought to put forth a claim that, upon her return to work after two months of FMLA leave, she was "targeted for termination," "experienced a reduction in her role, responsibilities and duties," and "was treated differently than other employees," and that the bank "failed to make reasonable accommodations for" and "eventually terminated" her. She supported her claim by the existing factual allegations in the complaint.

Although the complaint alleged that the plaintiff was targeted for termination long before she requested FMLA leave, she also alleged that the toxic work environment "intensified" after the plaintiff took leave and "climaxed" upon her return

from leave. As to a causal connection between the plaintiff's assertion of FMLA rights and the adverse employment action, the complaint alleged that the plaintiff was scolded for not being in touch with the office while on leave, was subjected to negative comments concerning her need for leave, and that she was disciplined and ultimately terminated for not meeting sales goals during the period in which she took leave. The complaint, as proposed to be amended, thus made out a plausible suggestion of entitlement to relief. See Esler v. Sylvia-Reardon, 473 Mass. 775, 780-781 (2016). Contrast Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 720 (1st Cir. 2014) (plaintiff gave no facts beyond timing of discharge that would lead court to conclude that FMLA leave played any part in termination).

As the plaintiff's motion to amend put forth an actionable claim of FMLA retaliation against the bank,[5] and there was otherwise no claim of undue delay or prejudice, the motion to amend should have been allowed. See Doherty v. Admiral's Flagship Condominium Trust, 80 Mass. App. Ct. 104, 112-113 (2011) (abuse of discretion to deny motion to amend complaint where amendment stated entirely new actionable cause of action

[5] By the term "actionable" we refer only to the minimal requirements to overcome a motion to dismiss pursuant to rule 12 (b) (6).

and there was no showing of undue delay or prejudice). Contrast Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264 (1991).

As such, we vacate the judgment with instructions that the plaintiff be allowed to amend her complaint in accordance with this memorandum and order.

So ordered.

By the Court (Neyman, Henry & Singh, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: November 5, 2019.

[6] The panelists are listed in order of seniority.