

FILED

PREPARED AND FILED BY THE COURT

8:22 am, Sep 18, 2019

STEPHANIE PEREZ,

Plaintiff,

v.

DG TRC MANAGEMENT COMPANY, LLC
a/k/a TRICENNA, THE DERMATOLOGY
GROUP, P.C. and ADP TOTALSOURCE II,
INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
ESSEX COUNTY

Docket No.: L-296-19

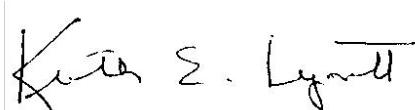
Civil Action

**ORDER DENYING MOTION
FOR
SUMMARY JUDGMENT**

THIS MATTER having been opened to the Court upon the motion of Jackson Lewis P.C., attorneys for Defendant ADP TotalSource II, Inc. (“ADPTS”), upon notice to Plaintiff and Co-Defendants, and the Court having reviewed the moving papers, any opposition thereto, and any reply thereto, and the Court having heard oral argument; and for good cause shown;

IT IS on this 18 day of September, 2019:

ORDERED that ADPTS’s motion for summary judgment is **DENIED WITHOUT PREJUDICE** for the reasons stated in the accompanying Statement of Reasons; and it is
FURTHER ORDERED that Electronic posting of this Order and accompanying Statement of Reasons shall constitute proper service upon all counsel of record.



HON. KEITH E. LYNOTT, J.S.C.

STATEMENT OF REASONS

In this action under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, alleging employment discrimination on the basis of pregnancy, the Defendant ADP TotalSource II, Inc. (“ADP TotalSource”) seeks summary judgment. It contends the record demonstrates as a matter of law that this Defendant was not an employer or “co-employer” of the Plaintiff Stephanie Perez at the time when any of the events that the Plaintiff asserts constituted unlawful discrimination took place, as the relationship between her direct employer and the moving Defendant had terminated. As a result, ADP Total Source contends it is not liable for any alleged discrimination.

The Court denies the motion without prejudice to its renewal at a later time, following appropriate discovery. This case is in its nascent stages and no discovery has taken place. The facts presently of record – undeveloped due to a lack of opportunity for discovery – present a sufficient basis for a triable claim against the Defendant ADP TotalSource and therefore require denial of its motion at this time.

The Court examines the motion record in the light most favorable to the Plaintiff. Brill v. Guardian Life Insurance Co., 142 N. J. 520 (1995). For purposes of this motion only, the Court finds the following pertinent facts.

In or about September 2017, the Plaintiff became an employee of the Defendant DG TRC Management Company, LLC, a/k/a Tricenna and the Defendant The Dermatology Group, P.C. (collectively referred to herein as “Tricenna”). At the time, Tricenna had engaged the Defendant ADP TotalSource as a Professional Employer Organization (“PEO”), providing support for the human resources function of the Defendant Tricenna.

The record reflects a sufficient basis for a trier of the facts to conclude that, during 2017, the Defendant ADP TotalSource was a co-employer of the Plaintiff for purposes of applying the Law Against Discrimination. Among other things, the Plaintiff received a pay stub that explicitly identified the Defendant ADP TotalSource as her employer. Moreover, the motion record reflects that the employee handbook distributed to the Plaintiff identifies the Defendant ADP TotalSource multiple times as a party to which to direct human resources inquiries and grievances.

In the Fall of 2017, the Plaintiff announced to her employer Tricenna that she was pregnant. In January 2018, the Plaintiff asked for family medical leave at the time of the birth of her child. The Defendant Tricenna determined that the Plaintiff was not eligible for family medical leave under the Family Medical Leave Act, or its state law equivalent, and thus denied the request.

Later in 2018, the Plaintiff asserts she asked Tricenna for an accommodation as to her work responsibilities in light of her pregnancy. She asserts that Tricenna failed to engage her in the legally required dialogue concerning such accommodation.

Finally, in or about May 2018, the Plaintiff experienced complications from her pregnancy. She requested medical leave. The Defendant Tricenna granted her a two-week medical leave. However, it informed her that, should she not return to work after such period, it would seek to fill her position. It stated that, if her position were filled, she could apply for a new position. When the Plaintiff did not return to work after the leave afforded her, the Defendant Tricenna terminated her employment. This action, alleging employment discrimination on the basis of pregnancy, followed.

As noted, the Plaintiff seeks relief against the Defendant ADP TotalSource on the theory that, as the co-employer of the Plaintiff, it is legally responsible for any discriminatory treatment she suffered. However, the present record reflects that, in late 2017, the Defendant Tricenna terminated its contractual relationship with the Defendant ADP TotalSource, effective December 24, 2017. The Defendant Tricenna engaged an affiliate of the Defendant ADP TotalSource to serve in such capacity as a PEO.¹ As a result, beginning in January 2018, Defendant was no longer functioning as a professional employer organization for the Defendant.

In its motion for summary judgment, the Defendant ADP TotalSource contends that, whatever the merits of the Plaintiff's discrimination claim, it cannot be held responsible as it was not functioning in any relationship with the Defendant when the events the Plaintiff claims constituted discriminatory conduct occurred. It notes in this regard that the Plaintiff herself contends the discrimination occurred no earlier than January 2018 when she requested and was denied family medical leave. The Defendant contends that no amount of discovery could alter the essential fact that it no longer functioned as a PEO, or in any other capacity, in relation to the Defendant Tricenna and the Plaintiff in January 2018 and thereafter when all the events on which the Plaintiff relies for her claim took place.

The Plaintiff asserts the motion is, at best, premature. She contends the Court must afford her the opportunity to pursue discovery concerning the role, if any, that the Defendant ADP TotalSource played in the decision-making concerning her employment status.

¹ The Plaintiff has cross-moved to amend the Complaint to add ADP, LLP t/a ADP Major Accounts as a Defendant. The Court has separately granted such motion. The Plaintiff has filed the Amended Complaint and asserts the same allegations as against ADP TotalSource as before. The Court treats the pending motion for Summary Judgment as directed to the Amended Complaint.

The Plaintiff asserts that the present, undeveloped record requires the conclusion that in 2017, including in the Fall of that year when she disclosed her pregnancy, the Defendant ADP TotalSource was functioning as a PEO and a co-employer of the Plaintiff. She asserts it had played a significant role in fashioning and implementing the Defendant Tricenna's human resources policies and procedures and was named multiple times in the employee handbook as a party integrally involved in the human resources function.

The Plaintiff posits that, in the circumstances, there could have been interactions between the Defendant Tricenna and the Defendant ADP TotalSource by which they jointly determined how to respond to the Plaintiff's pregnancy and how they would apply the extant human resources policies – allegedly fashioned in whole or in part by the Defendant ADP TotalSource – in her case going forward. As a result, the Plaintiff avers that she should be permitted the opportunity to attempt to further develop facts that could demonstrate that the Defendant ADP TotalSource engaged in actionable discrimination (or aided and abetted the same) while still engaged as the PEO.

The Court agrees with the Plaintiff that, notwithstanding factual showing concerning the termination of the Defendant ADP TotalSource's responsibilities as a PEO for the Defendant Tricenna as of December 24, 2017, this motion is nonetheless premature. A court should ordinarily grant a motion for summary judgment only after the non-moving party has had a reasonable opportunity for discovery. At this early juncture in the proceedings, that simply has not yet occurred.

Contrary to the Defendant ADP TotalSource's assertion, it is not a matter of mere speculation that the Defendant could have played a material role in the decision-making with respect to Plaintiff's employment status. The record permits the conclusion that the Defendant

ADP TotalSource was functioning as a PEO and is acknowledged for purposes of the motion to have been the Plaintiff's co-employer at the time the Plaintiff disclosed her pregnancy. The events of relevance—the Defendant served as PEO until the end of 2017 and the Plaintiff first sought family medical leave in January 2018— are very close in time. It is more than conceivable that the Defendant ADP TotalSource discussed the Plaintiff's pregnancy and the applicable employment policies and procedures in relation to such circumstance. It is also conceivable that the Defendant ADP TotalSource, prior to its termination as the PEO for the Defendant Tricenna, determined and/or influenced the manner in which the Defendant Tricenna addressed the Plaintiff's situation and responded to her request for leave and, subsequently, for accommodations.

The Court finds there is sufficient factual basis to permit further discovery leading to a more complete record concerning the Defendant ADP TotalSource's conduct in relation to the Plaintiff and her employment status. Facts that could support a claim for relief against the Defendant ADP TotalSource in the circumstances would not necessarily be in the Plaintiff's possession without discovery. Accordingly, the Court denies the motion without prejudice to subsequent renewal following a period for such discovery.