

**Williams v Police Dept. of City of N.Y. Sch. Safety
Div.**

2012 NY Slip Op 33638(U)

April 4, 2012

Supreme Court, New York County

Docket Number: 106746/2011.

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

HON. CAROL EDMEAD

PRESENT:

PART 35

Index Number : 106746/2011
WILLIAMS, ROBIN
vs
N.Y.P.D. SCHOOL SAFETY
Sequence Number : 001
DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 9.26.2011
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

PAPERS NUMBERED

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendant's motion to dismiss is granted to the extent of dismissing plaintiff's claim seeking resolution of her worker's compensation claim, and is otherwise denied; and it is further

ORDERED that defendant is directed to answer the complaint within 20 days of service of a copy of this order with notice of entry; and it is further

Dated: 4/4/2012


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
ROBIN WILLIAMS,

Plaintiff,

-against-

Index No. 106746/11

POLICE DEPARTMENT OF THE CITY OF NEW
YORK SCHOOL SAFETY DIVISION,

Defendant.

-----X
HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Defendant New York City Police Department (NYPD) moves, pursuant to CPLR 3211 (a) (2) and (5), to dismiss the complaint brought by *pro se* plaintiff Robin Williams, for lack of subject matter jurisdiction and as time-barred.

Background

The following facts are taken from the complaint. Plaintiff alleges that she was employed by the NYPD as a School Safety Agent Level I (SSA-1) from September 26, 2005 through June 9, 2008. While working on May 17, 2006, she experienced respiratory distress in the rear of P.S. 64 located at 1425 Walton Avenue in the Bronx. Plaintiff alleges that she inhaled dust particles resulting from work being performed at the school. Plaintiff was given oxygen and subsequently taken to the hospital. Plaintiff alleges that her fiancé and union representative, Edward Kiura, helped her to complete a worker's compensation form, except for a portion which was to be completed by her supervisor. According to plaintiff, her supervisor told her that the incident was not work-related and refused to accept the completed worker's compensation package.

Plaintiff alleges that her breathing worsened as a result of the incident. Plaintiff thereafter

requested a transfer to Manhattan. On June 3, 2008, she was ordered to report to Martin Luther King, Jr. High School the following day. On June 4, 2008, she used two-and-a-half inhalers. When plaintiff requested reasonable accommodations, she was ignored and was forced to walk up and down stairs all day. Additionally, plaintiff alleges that she was subjected to profanity, including the “n” word and the “f” word. Plaintiff also alleges that her locker was in the male section, requiring her to change with male agents walking in on her half dressed.

On June 5 and 6, 2008, plaintiff called out sick due to breathing difficulties. Plaintiff alleges that, on June 9, 2008, she resigned from NYPD after filling out what she thought were papers requesting reasonable accommodations. Plaintiff attempted to be reinstated within the 30 days allowed by NYPD. However, she was told at the Employment Section at One Police Plaza that her papers could not be located. On the thirty-first day, NYPD allegedly found her papers and told her that it was too late to reinstate her to her position. In the complaint filed on June 9, 2011, plaintiff seeks reinstatement as a School Safety Agent Level I with reasonable accommodations, three year’s back pay, and to have her “worker’s compensation issue resolved.”

Arguments

NYPD moves to dismiss the complaint, arguing that that the court lacks subject matter jurisdiction over plaintiff’s worker’s compensation claims. Specifically, NYPD notes that plaintiff filed a claim with the Worker’s Compensation Board on October 18, 2009 regarding the same respiratory distress that she allegedly suffered on May 17, 2006 (Khandakar Affirm. in Support, Exh. B).

Additionally, NYPD contends that plaintiff’s claims regarding her request for reinstatement seek review of an administrative determination, and are time-barred by the four-

month statute of limitations for challenging an administrative determination. According to NYPD, plaintiff was aware, at the latest, on July 11, 2008, that her request for reinstatement was denied, and was required to commence an Article 78 proceeding no later than November 11, 2008.

Finally, NYPD argues that plaintiff's New York State Human Rights Law and New York City Human Rights Law claims are untimely in light of the three-year statute of limitations for such claims. NYPD contends that all of plaintiff's claims that could be construed to be brought under these statutes occurred prior to June 9, 2008.

In opposition, plaintiff argues that the complaint was timely filed and states a viable claim. In an affidavit, plaintiff states that she was ordered in while on LODI to respond to her request for reasonable accommodation (Plaintiff Aff. in Opposition, at 1). She states that she inadvertently filled out the resignation form, believing it to be pursuant to her request for reasonable accommodation under OEOE and the Americans with Disabilities Act (*id.* at 1-2). Plaintiff states that she was instructed to write "I need a career change" and told to sign and surrender her shield and identification card and leave the premises (*id.* at 2). When plaintiff realized what happened, she requested that the papers be rescinded (*id.*). However, the papers were unavailable for 30 calendar days, the time allowed to regain her title (*id.*). On the 31st day, when the papers became available, the time had already expired (*id.*). Plaintiff states that she filed a retaliation and whistleblower claim with the New York State Division of Human Rights (NYSDHR) within three years of the loss of her job (*id.*). Plaintiff states that the resignation form was altered (*id.*).

In reply, NYPD contends that plaintiff's allegation that she was "instructed" to fill out the

resignation form is inherently incredible and contradicted by the contemporaneous documents that she filled out and signed during her resignation. NYPD notes that the form she completed on June 9, 2008 is titled "RESIGNATION AND EXIT INTERVIEW," in all capital letters. According to NYPD, plaintiff admits to writing on the resignation form, under the heading "Reasons," "I need a career change." NYPD points out that plaintiff indicated on that form that her resignation was a voluntary act and was not caused by threat or an act of coercion, and that she was not a victim of discrimination or sexual harassment.

Discussion

Initially, the court must determine whether to entertain plaintiff's claims that she was injured in the course of her employment.

"[P]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board and . . . it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board" (*Botwinick v Ogden*, 59 NY2d 909, 911 [1983]; *see also O'Rourke v Long*, 41 NY2d 219, 228 [1976]). Here, it appears that plaintiff filed a worker's compensation claim concerning the respiratory distress that she suffered on May 17, 2006 (Khandakar Affirm. in Support, Exh. B). NYPD asserts in its moving papers that the case was still pending before the Workers' Compensation Board. Accordingly, the issue of whether plaintiff was injured in the course of her employment and is entitled to worker's compensation benefits must be deferred to the Workers' Compensation Board (*see Valenziano v Niki Trading Corp.*, 21 AD3d 818, 820 [1st

Dept 2005]),¹

The next issues are whether plaintiff's discrimination claims and requests for reinstatement and back pay are barred by the applicable statutes of limitations.

“On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Benn v Benn*, 82 AD3d 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]). If the defendant meets that burden, then the burden shifts to the plaintiff “to aver evidentiary facts” establishing that the case falls within an exception to the statute of limitations (*Assad v City of New York*, 238 AD2d 456, 457 [2d Dept], *lv dismissed* 91 NY2d 848 [1997] [internal quotation marks and citation omitted]).

Generally, “the appropriate statute of limitations is determined by the substance of the action and the relief sought” (see *Matter of Foley v Masiello*, 38 AD3d 1201 [4th Dept 2007] [citation omitted]; *Rosenthal v City of New York*, 283 AD2d 156, 157 [1st Dept], *lv dismissed* 97 NY2d 654 [2001]).

Although NYPD contends that plaintiff's requests for reinstatement and back pay are subject to the statute of limitations for Article 78 proceedings, the Executive Law also permits the award of reinstatement and back pay (Executive Law § 297 [4] [c], [9]). The court notes that

¹It is unclear whether plaintiff seeks relief from the Workers' Compensation Board. To the extent that plaintiff does seek such relief, the board is not a party to this action.

plaintiff states, in opposition, that she timely filed a complaint with the NYSDHR within three years of the loss of her job.

Discrimination claims have three-year statutes of limitations (CPLR 214 [2]; *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442, 446 [1984]). Generally, such claims accrue on the date that each discrete discriminatory act occurs (*see National R.R. Passenger Corp. v Morgan*, 536 US 101, 113 [2002]).

The statute of limitations for a claim filed in a court of law pursuant to Executive Law § 297 (9) may in some instances be tolled. An aggrieved person may seek redress under the Executive Law in either an administrative or judicial forum, but may not choose both, the remedies being mutually exclusive (Executive Law § 297 [9]). However, under Executive Law § 297 (9), if “the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division.” A complainant must bring an administrative complaint to the NYSDHR within one year of the alleged unlawful discriminatory acts (Executive Law § 297 [5]). “If the division has dismissed the complaint on the grounds of administrative convenience or untimeliness, the statute of limitations is tolled during the pendency of the person’s complaint before the [NYSDHR]” (*Geslak v Suffolk County*, 2008 US Dist LEXIS 16947, *7, 2008 WL 620732, *3 [ED NY 2008] [internal quotation marks and citation omitted]). Nonetheless, where a complainant annuls his or her election of remedies, there is no tolling period for the period that the complaint was pending before the NYSDHR (*Henderson v Town of Van Buren*, 15 AD3d 980, 981 [4th Dept], *lv denied* 4 NY3d 710 [2005]; *Farrugia v North Shore Univ. Hosp.*, 13

Misc 3d 740, 746 [Sup Ct, NY County 2006]).

In the complaint, plaintiff alleges that, on June 4, 2008, she requested reasonable accommodations due to her breathing difficulties, was subjected to profanity and racist comments, and that her locker was located in a male section (Complaint, at 3). Plaintiff filed the instant complaint on June 9, 2011 – just over three years from the date of the alleged discriminatory acts. As indicated above, plaintiff states in an affidavit that she filed an administrative complaint with the NYSDHR within three years of the loss of her job (Plaintiff Aff. in Opposition, at 2). Notably, NYPD has not addressed this assertion in reply. It appears that plaintiff's administrative complaint was not brought within one year of the alleged discriminatory acts. However, the record does not indicate whether and how plaintiff's case before the NYSDHR was resolved. Plaintiff's discrimination claims could have been tolled while her complaint was pending before the NYSDHR. Thus, the court cannot determine at this juncture whether plaintiff's discrimination claims are untimely.

Conclusion

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted to the extent of dismissing plaintiff's claim seeking resolution of her worker's compensation claim, and is otherwise denied; and it is further

ORDERED that defendant is directed to answer the complaint within 20 days of service

of a copy of this order with notice of entry; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on plaintiff.

Dated: April 4, 2012

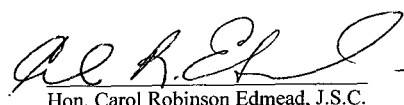
ENTER:

Hon. Carol Robinson Edmead, J.S.C.

of a copy of this order with notice of entry.

Dated: April 4, 2012

ENTER:

A handwritten signature in black ink, appearing to read 'Carol Robinson Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED