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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE *J.S.C.* **PART** 5
Justice

Index Number : 113520/2008
FRUCHTMAN, SUNITA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

CAL. # 51

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/30/12
JAN 30 2012

_____, **J.S.C.**
BARBARA JAFFE
J.S.C.

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

SUNITA FRUCHTMAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GEROULD MCCOY, KEVIN GOYETTE, ANTHONY BELLANTONI,

Defendants.

----------x

Index No. 113520/08

Motion Date: 11/1/11
Motion Seq. No.: 004

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Shelley-Ann Quilty, Esq.
Meenan & Assocs., LLC
64 Fulton St., Ste. 502
New York, NY 10038
212-226-7334

For defendants:
Daniel Chiu, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., Rm. 2-118
New York, NY 10007
212-788-1158

By notice of motion dated August 9, 2011, plaintiff moves pursuant to CPLR 2221 for an order granting her reconsideration of a prior application for discovery, which resulted in an order dated July 28, 2011. Defendants oppose.

In this action, plaintiff sues defendants for their alleged employment discrimination and retaliation against her, based on her allegations that McCoy, her former supervisor, disciplined her differently than he disciplined Goyette and Bellantoni, her former co-workers, and that she was terminated after complaining about the disparate treatment and other matters. Specifically, plaintiff contends that Goyette and Bellantoni lived in Connecticut in violation of defendant Department of Environmental Protection's (DEP) employee residence rules and that McCoy

failed to address the issue, although he allegedly referred plaintiff's complaint about it to the Department of Investigation (DOI).

By letter application dated January 10, 2011, plaintiff sought an order requiring defendants to provide any documents relating to DOI's investigation, and by decision and order dated July 28, 2011, I denied the request, finding that plaintiff and Goyette and Bellantoni were not similarly situated as required for her claim of disparate treatment, as she was a probationary employee and Industrial Hygienist while they were neither probationary employees, nor Industrial Hygienists, and as she was terminated for improperly using a DEP vehicle for her personal use, while she had accused Goyette and Bellantoni of violating City residency rules, and that the records sought were thus not likely to lead to relevant evidence.

Plaintiff now argues that I overlooked the fact that defendants raised the DOI investigation as a defense to her claim, that Goyette and Bellantoni's non-compliance with the residency rules is relevant to her claim of disparate treatment as she raised the issue in her complaints, and that they were similarly situated as they were all subject to the same residency rules and McCoy was their supervisor and responsible for disciplining them. (Affirmation of Shelley-Ann Quilty, Esq., dated Aug. 9, 2011).

Defendants deny that I overlooked any matter of fact or law raised by plaintiff on her letter application or that plaintiff and Goyette and Bellantoni were similarly situated. (Affirmation of Daniel Chiu, ACC, dated Sept. 23, 2011).

In reply, plaintiff reiterates her prior arguments. (Reply Affirmation, dated Sept. 29, 2011).

A motion for leave to reargue "shall be based upon matters of fact or law allegedly

overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

In the July 2011 order, I addressed plaintiff's argument that she and Goyette and Bellantoni were similarly situated, and, in any event, she submits no authority warranting a different result. Moreover, the Second Circuit has held that a probationary employee is not similarly situated to a non-probationary employee (*Desir v City of New York*, 2011 WL 5176178 [2011] [as other employees were tenured while plaintiff was probationary, they were not subject to same performance evaluation and discipline standards and thus not similarly-situated]), and it is undisputed that she and Goyette and Bellantoni had different job titles and responsibilities (*see Jones v Yonkers Pub. Schools*, 326 F Supp 2d 536 [SD NY 2004] ["a probationary civil service employee generally is not situated similarly to a non-probationary employee as a matter of law;" responsibilities and seniority of employees relevant to whether they are similarly-situated]).

Plaintiff also fails to explain how the records of the DOI investigation bear on her claims against defendants, as she knows the result of the investigation and does not state how the facts uncovered during it relate to whether defendants discriminated or retaliated against her. (*See eg Fitzgerald v City of Troy*, 2011 WL 6030868 [ND NY 2011] [finding that as plaintiff already knew details of investigation, request for statements contained in investigative file not calculated to lead to admissible evidence of disparate treatment but to impeachment material]).

Moreover, plaintiff's assertion that defendants rely on the facts underlying the investigation is supported by no evidence. However, should defendants subsequently seek to introduce any evidence relating to the facts of the investigation, plaintiff may move for leave to renew her application. (*Compare McGrath v Nassau County Health Care Corp.*, 204 FRD 240 [ED NY 2001] [defendant ordered to produce documents relating to internal investigation of plaintiff's complaint as it put sufficiency of investigation at issue in its defense]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to reargue is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: January 30, 2012
New York, New York

JAN 30 2012