Postert v Department of Educ. of the City of N.Y.

2012 NY Slip Op 30868(U)

April 2, 2012

Sup Ct, NY County

Docket Number: 114178/10

Judge: Barbara Jaffe

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SCANNED ON 4/5/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice

PART 5

Tracy Lynn Postert

-v- CAL # 94

NYC Dept of Educ., City of New York

INDEX NO. 114178/10

MOTION DATE 1-3-12

MOTION SEQ. NO. 002

The following papers, numbered 1 to 4, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2

Answering Affidavits — Exhibits ____ | No(s). 3

Replying Affidavits ____ | No(s). 3 4

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
APR - 5 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/2/12
APR 02 2012

BJ
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

TRACY LYNN POSTERT,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, AND THE CITY OF NEW YORK,

Defendants.

---x

Index No. 114178/10

Motion Date: 1/3/12
Motion Seq. No.: 002
Motion Cal. No.: 94

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
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212-792-9670

For defendants:
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Michael A. Cardozo
Corporation Counsel
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By notice of motion dated May 25, 2011, defendants move pursuant to Education Law § 3813, General Municipal Law § 50-e, and CPLR 3211(a)(7) for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

In 2008, plaintiff began working for defendant The Department of Education of the City of New York (DOE). (Affirmation of Ashley Hale, ACC, dated May 25, 2011 [Hale Aff.], Exh. C). On November 17, 2009, plaintiff was working as a science teacher at the Urban Assembly School of Music and Art in Brooklyn when a mercury thermometer broke in one of the classrooms where she taught. (*Id.*). On November 23, 2009, plaintiff resigned. (*Id.*).

On January 20, 2010, plaintiff served defendants with a notice of claim, setting forth the nature of her claims, in pertinent part, as follows: "the [DOE] and [City] violated the whistle blower statutes including but not limited to the New York State Labor Law §§ 740 and 741,

federal law including OSHA and the Administrative Code of the City of New York." (*Id.*, Exh. D).

On October 28, 2010, plaintiff served DOE with a summons and complaint, and on or about December 17, 2010, DOE moved to dismiss it. (*Id.*, Exh. A; Defs.' Mem. of Law). On or about February 24, 2011, plaintiff served defendants with an amended complaint, and defendants relied on their prior motion in seeking dismissal thereof. (Hale Aff., Exh. B; Defs.' Mem. of Law). By order dated April 20, 2011, another justice of this court dismissed plaintiff's amended complaint "without prejudice to replead, for the reasons set forth on the record [that day]."

On May 6, 2011, plaintiff served defendants with a second amended complaint providing, in pertinent part, as follows:

> Plaintiff spoke to the assistant principal about the fact that the mercury spill had not been adequately cleaned up . . . .
>
> Plaintiff was advised not to report the matter any further and go ahead and teach the students in the classroom.
>
> Thereafter, [p]laintiff reported an imminent and serious danger to public health and safety to the following governmental bodies: United Federation of Teachers Safety, New York City Health Department, NYC Department of School Safety, Christine Proctor, MS, CIH, Proctor Occupational Safety and Health, New York, New York, Joan Heymount, Union representative, and NY State Laboratory Safety Department and my previous employer Harold Meiselman.
>
> Thereafter, [p]laintiff refused to report and teach the students in a classroom that posed an imminent risk to public health and safety and was compelled to resign . . . in order to avoid putting students and herself at risk.
>
> This resignation . . . was a constructive termination because [p]laintiff refused to participate in illegal activity that would have posed an imminent and serious danger to public health and safety to herself and her students.
>
> Plaintiff . . . disclosed to a governmental body information regarding violation of a law, rule or regulation (NYS Departmental Conservation Regulation 374-3 and numerous

other federal, state and local regulations) . . . .

Plaintiff made a good faith effort to provide the appointing authority's designee the information to be disclosed and provided the designee a reasonable time to take appropriate action and there was an imminent and serious danger to public health and safety.

(Hale Aff., Exh. C).

II. CONTENTIONS

Defendants assert that plaintiff's complaint must be dismissed in its entirety as City is not a proper party to this action, and plaintiff failed to include her Civil Service Law § 75-b claims in her notice of claim. (Defs.' Mem. of Law). In any event, they maintain that plaintiff has failed to state a cause of action pursuant to this section, as she pleads no facts from which it may be concluded that she reasonably believed the spill endangered public health and safety, and failed to plead an applicable law, rule, or regulation violated, that she reported the incident to a governmental body, that she gave DOE a reasonable amount of time to take appropriate action, or that she was subject to an adverse personnel action. (*Id.*).

In opposition, plaintiff asserts that another justice of this court previously determined that she sufficiently pleaded her Civil Service Law § 75-b claim in her notice of claim. (Pl. Opp. Mem.). She also maintains that she reported the incident to a governmental body, citing the entities to which she made the report listed in her second amended complaint. (*Id.*). And she claims her constructive termination constitutes an adverse personnel action. (*Id.*).

In reply, defendants contend that the statute plaintiff claims they violated, "NYS Departmental Conservation Regulation 374-3," does not exist, and even if she intended to refer to Chapter IV, Part 374 of the New York State Department of Environmental Conservation

regulations, they could not have violated this regulation as it does not pertain to mercury. (Defs.' Reply Mem.). Moreover, they argue that plaintiff pleads no facts from which it may be inferred that she reasonably believed the spill was dangerous, absent any indication of the size of the spill or the manner in which it was removed. (*Id.*). And, observing that she fails to specify when she reported the incident to the entities listed in her second amended complaint, they claim that she has failed to plead that DOE had a reasonable amount of time to take appropriate action. (*Id.*). Finally, they deny that she has set forth a claim of constructive discharge absent facts demonstrating that her work environment was so intolerable that she was forced to resign. (*Id.*).

III. ANALYSIS

A. Claims against City

City is not a proper party to actions arising out of torts allegedly committed by DOE or its employees. (*Perez ex rel Torres v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

B. Civil Service Law § 75-b claim against DOE

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party "the benefit of every possible favorable inference." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588, 590 [1st Dept 2010]). However, "conclusory allegations-claims consisting of bare legal conclusions with no factual specificity- are insufficient to survive a motion to dismiss." (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Pursuant to Civil Service Law § 75-b(2):

> A public employee shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.
>
> Prior to disclosing [this] information . . . , an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety.

"'Personnel action' shall mean an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance" (Civil Service Law § 75-b[1][d]). "Constructive discharge occurs when an employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." (*Morris v Schroder Capital Mgmt. Intl.*, 7 NY3d 616, 621 [2006]).

Here, even assuming that plaintiff reasonably believed that DOE's failure to remove the mercury constituted an improper governmental action and that the entities to which she reported the incident were governmental bodies, absent any indication of when she did so, she has failed to plead facts from which it may be inferred that she made a good faith effort to give DOE a reasonable amount of time to take appropriate action. (*See Godfrey, supra*). Moreover, even assuming that her work environment became so intolerable that she was forced to resign, absent any indication that DOE continued to refuse to remove the mercury because plaintiff reported the initial failure to do so to outside authorities, she has failed to plead facts demonstrating that she was subject to an adverse personnel action. Accordingly, plaintiff has failed to state a cause of

action pursuant to Civil Service Law § 75-b against DOE.

In light of this determination, the parties' remaining contentions, including those as to the sufficiency of plaintiff's notice of claim, need not be considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order dismissing plaintiff's complaint is granted, and the complaint is hereby dismissed in its entirety.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 2, 2012
New York, New York

APR 02 2012

FILED
APR -5 2012
COUNTY CLERK'S OFFICE
NEW YORK