

Perez v City of New York
2012 NY Slip Op 31838(U)
July 5, 2012
Supreme Court, New York County
Docket Number: 111768/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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

PART 5

Index Number : 111768/2011

PEREZ, IRMA

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS

CAL # 68

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) 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s) 4

Replying Affidavits _____ | No(s) _____

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

RECEIVED

JUL 9 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/5/12
JUL 05 2012

BARBARA JAFFE, J.S.C.
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
IRMA PEREZ,

Index No. 111768/11

Plaintiff,

Motion arg.: 4/3/12

Motion seq. no.: 001

-against-

DECISION & ORDER

THE CITY OF NEW YORK,

FILED

Defendant.

JUL 11 2012

-----X
BARBARA JAFFE, JSC:

NEW YORK
COUNTY CLERK'S OFFICE

For plaintiff:
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By notice of motion dated December 13, 2011, defendant City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint. Plaintiff opposes and, by notice of cross motion, moves for an order granting her leave to amend the complaint.

I. PLEADINGS

In her complaint, plaintiff alleges, as pertinent here, that since 2000 she has been employed by the New York City Police Department as a police officer, that on July 25, 2011, her request for overtime was denied, she was disciplined instead, discriminated against based on her gender, and was then assigned to the "graveyard shift," and that City has taken adverse employment actions against her and subjected her to disparate treatment based on her gender. (Affirmation of James L. Hallman, ACC, dated Dec. 13, 2011, Exh. A).

In her proposed amended complaint, plaintiff adds that other similarly-situated male

police officers have had their overtime approved and not been disciplined, and also alleges that since commencing the action, she has been retaliated against with disciplinary actions for conduct engaged in by male officers who have not been so disciplined. (Affirmation of Stewart Karlin, Esq., dated Feb. 29, 2012, Exh. A).

II. ANALYSIS

A. Motion to amend

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether a party may amend its complaint. (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977], *rearg dismissed* 45 NY2d 966 [1978]; *Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209 [1st Dept 1997]). The factors to be considered are whether the proposed amendment would “surprise or prejudice” the opposing party (*Murray*, 43 NY2d at 405; *Lanpont*, 244 AD2d at 209, 211; *Norwood v City of New York*, 203 AD2d 147, 148 [1st Dept 1994], *lv dismissed* 84 NY2d 849), and whether the amendment has merit (*Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989]). “Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied” (*Id.* at 170); *360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Ancrum v St. Barnabas Hosp.*, 01 AD2d 474, 475 [1st Dept 2003]).

Here, as plaintiff seeks to cure deficiencies cited by City in her first complaint, and as she also seeks to add a retaliation claim related to events that occurred after she commenced the action, the amendment appears meritorious and would not prejudice City. (*See Janssen v Inc. Vil.*

of *Rockville Centre*, 59 AD3d 15 [2d Dept 2008] [plaintiff properly granted leave to amend complaint as proposed amendment sought to cure deficiencies in original complaint which led to dismissal of complaint]).

B. Motion to dismiss

1. Applicable law

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 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*).

Moreover, complaints in employment discrimination cases are held to lesser pleading standards. (*Vig v New York Hairspray Co., LP*, 67 AD3d 140 [1st Dept 2009], *lv denied* __ NY3d __, 2012 NY Slip Op 77207[U] [employment discrimination claims reviewed under notice pleading standards and need not plead specific facts establishing *prima facie* claim]).

2. Discrimination claim

Pursuant to Executive Law § 296(1)(a), it is unlawful “[f]or an employer . . . , because of an individual’s age . . . , to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.” In order to establish a *prima facie* discrimination claim, the plaintiff must demonstrate: (1) that she is a member of a protected class; (2) that she was qualified to hold her position; (3) that she suffered an adverse employment action; and (4) that the adverse

employment action occurred under circumstances giving rise to an inference of discrimination. (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 271 [2006]; *Ferrante v Am. Lung. Assn.*, 90 NY2d 623 [1997]; *Mete v N.Y. State Office of Mental Retardation & Dev. Disabilities*, 21 AD3d 288 [1st Dept 2005]).

Here, as plaintiff has alleged that she was not granted overtime and was instead disciplined while similarly-situated male police officers were treated differently, she has sufficiently stated a claim for gender discrimination. (*Compare Eric H. Green & Assocs. v Jennings Tolbert*, 306 AD2d 3 [1st Dept 2003] [finding of discrimination supported by evidence that complainant's request for leave was denied while her male counterparts were permitted to take leave], with *Tucker v Battery Park City Parks Corp.*, 227 AD2d 318 [1st Dept 1996] [discrimination claim dismissed as plaintiff failed to allege disparate treatment of similarly-situated employees]).

3. Retaliation claim

Pursuant to Executive Law § 296(7), an employer may not "retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified, or assisted in any proceeding under this article." To establish a *prima facie* retaliation claim, the plaintiff must show: (1) that she engaged in a protected activity; (2) that the employer was aware of the protected activity; (3) that the employer took an adverse employment action against her; and (4) that her protected activity and the adverse employment action were causally related. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]).

Plaintiff alleges that since commencing the action, she has been disciplined for certain

actions while her male counterparts have not been disciplined for the same actions. She has thus sufficiently stated a claim for retaliation. (See *Brightman v Prison Health Svces., Inc.*, 62 AD3d 472 [1st Dept 2009] [plaintiff stated retaliation claim by alleging, among others, that defendants gave her more onerous workload than her similarly-situated colleagues]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion to dismiss is denied; it is further

ORDERED, that plaintiff's cross motion for leave to amend her complaint is granted; and

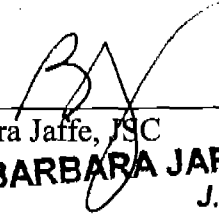
it is further

ORDERED, that the amended complaint, in the form annexed to the motion papers, shall

be deemed served upon service of a copy of this order with notice of entry upon all parties who

have appeared in the action.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: July 5, 2012
New York, New York

JUL 05 2012

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE