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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDGE GEOFFREY D. WRIGHT Justice

PART 62

Index Number : 100238/2012
MONTANO, GUILLERMINA
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/~~for~~ to dismiss

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

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

Replying Affidavits _____ | No(s). _____

other _____ nos) 2, 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed here to decision

FILED
SEP 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

GEOFFREY D. WRIGHT
AJSC

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

Dated: August 30, 2012

_____, 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

----------x

GUILLERMINA MONTANO,

Plaintiff,

Index # 100238/12

-against-

DECISION

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK.

Defendants.

Present:
Hon. Geoffrey D. Wright

----------x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion to dismiss.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	
Exhibits.....	
Other.....cross-motion.....	3, 4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants, The Department of Education of the City of New York, and the City School District of the City of New York[1] ("Defendants") move to dismiss the Plaintiff's complaint in its entirety on the grounds that the complaint fails to state a cause of action. Specifically, Defendant's claim that Plaintiff fails to state facts supporting her allegations of gender discrimination and that Plaintiff has not alleged that she suffered an adverse employment action. The motion to dismiss is granted.

This is a civil action based upon Defendant's violations of the Executive Law §296, and New York City Administrative Code 8-107 and alleges discrimination against

[1]Plaintiff withdrew her claims against the City of New York only.

Plaintiff due to her gender and a violation of equal protection. Plaintiff, Guillermina Montana, currently employed by the Department of Education as a probationary Assistant Principal ("AP") commenced this action pursuant to New York State Executive Law §296 ("SHRL") and New York City Administrative Code § 8-107 ("CHRL"), alleging that Defendants discriminated against her due to her gender. Plaintiff received satisfactory evaluations for the 2007-2008, 2008-2009, 2009-2010, 2010-2011 school years and has successfully completed the first four years of her probation. Plaintiff claims the Defendants subjected her to defamatory charges, disparate treatment, a hostile work environment, and discriminatory treatment due to her gender.

The crux of Plaintiff's claims involve the Principal, Ms. Zigelman ("Zigelman") who is also a woman. Specifically, Plaintiff accuses Zigelman of speaking to her in a hostile tone, increasing her workload while ignoring the other APs, repeatedly harassing her with letters summoning her to meetings that may result in disciplinary action and favoring and accommodating the males in her school to the detriment of the females. In particular, Plaintiff claims Zigelman, accused Plaintiff of being solely responsible for the NYS Ed., Dept., sanctioning the school for not properly storing state exams even though two male APs had keys and access to the testing closet. In addition, Plaintiff alleges that when new directives are given she is the only one held accountable and that she was Testing Coordinator for two consecutive years at which time the Zigelman did everything to sabotage her performance. Plaintiff contends she has been excluded from meetings, not invited to lunch and had to perform a greater amount of formal and informal observations. Moreover, Plaintiff argues that she was late once or twice and was forced to punch in, while her male counterparts were repeatedly late and were not required to punch in. As a result of these actions, Plaintiff alleges that Defendants violated Executive Law §296 and thus, she has been damaged.

Defendants argue that Plaintiff's complaint fails to provide Defendant's with "fair notice" of the nature and grounds of her gender discrimination claims and that instead Plaintiff provides conclusory statements. Defendants argue Plaintiff's complaint is devoid of any factual allegations that suggest she suffered an adverse employment action or that the alleged adverse action, being issued a single letter to her file and a warning was motivated by discriminatory animus based on her gender. Moreover, Defendants point out that Plaintiff accuses the Principal, Zigelman of trying to sabotage her performance and that Zigelman, like the Plaintiff is also a woman.

In considering a motion to dismiss for failure to state a cause of action under (CPLR 3211 [a] [7]), the Court is required to accept as true the facts as alleged in the complaint, accord the Plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory (Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]. In addition, employment discrimination cases are themselves generally reviewed under a notice pleading standard.

Under the standard, Plaintiff need not plead specific facts establishing a prima facie case of discrimination, but need only give a fair notice of the nature of the claim and its grounds (Vig v. New York Hairspray Co., 67 A.D.3d 140, 145 (1st Dept. 2009) citing Swierkiewicz v Sorema N.A., 534 U.S. 506, 514-515 [2002]).

The standards for recovery under SHRL is reviewed using the McDonnell Douglas (411 US 792 [1973]) burden-shifting approach which requires that the Plaintiff establish (1) she is a member of a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Once that minimal showing is made, the burden shifts to the defendant to articulate through competent evidence nondiscriminatory reasons that actually motivated defendant at the time of its action (id. At 802). The standard under the (CHRL) is required to be liberally construed independently from its state and federal counterparts in order to accomplish the statute's uniquely broad and remedial purposes the broader purposes. However the liberal construction does not connote an intention that the law operates as a general civility code. Rather, it allows for defendants to avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences (Williams v. New York City Housing Authority, 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dept. 2009)).

To determine whether an actionable hostile work environment claim exists, the court must examine the totality of the c circumstances including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance (Khalil v. State, 17 Misc.3d 777, 847 N.Y.S.2d 390, N.Y. Sup., [2007]) citing (Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, [1993]). Isolated, minor acts or accessional episodes are generally insufficient to meet the threshold required of a hostile work environment. However, a single act can meet the threshold if it is extraordinary severe or it can and does work a transformation of the plaintiff's work place (Id.at 784).

In this case, Plaintiff's opposition papers are rife with conclusory assertions, contradictions and devoid of any evidence she was discriminated based on her gender or subjected to a hostile work environment. Moreover, Plaintiff fails to make out a prima facie case of gender discrimination because she cannot establish she suffered an adverse employment action or that the adverse action occurred under circumstances giving rise to an inference of gender discrimination. It is unclear how the facts as alleged by Plaintiff fit within any cognizable legal theory nor has Plaintiff demonstrated her workplace was permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the terms or conditions of employment so as to make out a claim for hostile work environment (Ferrer v. New York State Div. Of Human Rights, 82

A.D.3d 431, 918 N.Y.S.2d 405[2011], quoting Harris v. forklift Sys., Inc., 510 U.S. 17, 21, [1993]).

Notably, Plaintiff's contends that she was the target of unfounded letters but only references the letter to file dated November 1, 2011. It appears that the letter was given to Plaintiff as a result of the disappearance of state exams. The State Department of Education sanctioned the school for not storing the exams properly. Plaintiff claims Zigelman was completely responsible for, yet blamed the Plaintiff, even though the male APs had keys to the closet. The fact that Plaintiff received a letter to file and a warning of the possibility of being rated unsatisfactory and terminated from her probationary AP position docs not constitute an adverse employment action. Indeed, none of these actions actually occurred. Plaintiff does not allege that she received an unsatisfactory rating on her evaluation, her probation was discontinued, or that she suffered some type of demotion to include financial, or job title. Notably, Plaintiff contends she was given additional responsibility. Plaintiff fails to demonstrate how receiving the letter was motivated by gender discrimination.

Furthermore, Plaintiff's assertions that she had to perform a greater amount of formal and informal observations, was subjected to hostile tones, excluded from meetings, not invited to lunch and threatened with discipline is not evidence of an adverse employment action or do they prove that these alleged actions were based on her gender. These are all conclusory assertions that are unsupported by Plaintiff's factual allegations and are insufficient to state a cause of action for gender discrimination.

For the reasons discussed, Defendant's motion to dismiss the complaint is granted.

GEOFFREY D. WRIGHT
AJSC

Dated: August 30, 2012

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court