Burke v New York City Dept. of Educ.
2016 NY Slip Op 32150(U)
October 21, 2016
Supreme Court, New York County
Docket Number: 160804/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

SONIA BURKE INDEX NO. 160804/15

MOT. DATE

- v -

MOT. SEQ. NO. 001

NEW YORK CITY DEPARTMENT OF EDUCATION

The following papers, numbered 1 to 4 were read on this motion to/for DISMISS and x-mot to AMEND

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits No(s). 1

Notice of Cross-Motion/Answering Affidavits — Exhibits No(s). 2

Replying Affidavits No(s). 3, 4

In this action, plaintiff seeks to recover for alleged age discrimination, a hostile work environment and illegal retaliation. In an "everything but the kitchen sink" fashion, plaintiff alleges violations of the First Amendment, 42 USC §§ 1981, the equal protection clause of the Fourteenth Amendment pursuant to 42 USC § 1983, the New York State Human Rights Law (see Executive Law § 296[1][a]) ("NYSHRL") and the New York City Human Rights Law (NYC Administrative Code § 8–107[1][a]) ("NYCHRL"). Defendant New York City Department of Education ("DOE") moves pre-answer to dismiss plaintiff's complaint pursuant to CPLR § 3211[a][5] and [7]. Plaintiff opposes the motion and cross-moves to amend the verified complaint wherein she, *inter alia*, withdraws the age-related claims. DOE opposes the cross-motion. The court's decision follows.

The following facts are alleged in the complaint. Plaintiff was and still is employed by the DOE as a guidance counselor at the A. Phillip Randolph High School (the "school"). On or about March 4, 2014, plaintiff commenced an action in the United States District Court for the Southern District of New York against the DOE which included allegations of employment discrimination and harassment (the "federal action" or "federal complaint"). In the federal complaint, plaintiff alleged that "she was continuously targeted for mistreatment, and subjected to constant verbal abuse and belittlement on the basis of her religion, disability, and race." Plaintiff alleged that this mistreatment began in early 2010, "once [her] supervisors learned that she was not from the Dominican Republic..."

Plaintiff claimed that she was "ridiculed by her direct supervisor and others for wearing traditional Mennonite clothing to the work place", was referred to as "Harriet Tubman", and told that her dresses were "from the last century." Plaintiff further alleged that she was "continuously treated worse than her similarly situated, Dominican co-workers." The primary offender at her workplace was Assistant Principal Daniel Calcano ("AP Calcano"). Further, plaintiff claimed that the former principal and then-present

Dated: 10/26/16

HON. LYNN R. KOTLER, 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

principal failed to take action when plaintiff made complaints about the allegedly discriminatory treatment.

On or about December 10, 2014, the Plaintiff and the BOE settled the federal lawsuit and plaintiff executed a stipulation of voluntary dismissal with prejudice. The DOE has provided a copy of the stipulation to the court. The stipulation expressly provides that neither party admitted fault or liability.

Plaintiff commenced this action on October 21, 2015 by filing a summons and verified complaint alleging hostile work environment on the basis of age as well as disparate treatment and retaliation on the basis of a protected activity.

In her proposed amended complaint, plaintiff alleges that "[a]lthough [she] hoped the settlement [of the federal action] would abate her deplorable working conditions, it only gave defendant more incentive to target plaintiff, as [the DOE] has subjected [plaintiff] to a hostile work environment and pervasive harassment in clear retaliation for her lawful complaints of discrimination, and participation in legal proceedings against the DOE." Plaintiff has withdrawn the age-related claims in her proposed amended complaint, and seeks relief for retaliation in violation of the First Amendment, the NYSHRL and NYCHRL, 42 USC § 1981.

Plaintiff alleges [1] disparate treatment; [2] heightened scrutiny and harassment; and [3] frivolous and unwarranted discipline. She maintains that her immediate supervisor, Assistant Principal Daniel Calcano ("AP Calcano"), subjects her to a caustic work environment and she is treated "like a pariah in the workplace." She claims that AP Calcono refuses to address her by name and doesn't visit her office. AP Calcano allegedly told plaintiff that she can only use one of the entrances to his office and she must knock and wait for permission to enter same. AP Calcano also said to plaintiff "If you do not like working here, then you should leave."

In her proposed amended complaint, plaintiff alleges that AP Calcano withholds "vital information [from her] regarding the goings-on of the school" such as "new deadlines and procedures" which negatively affects her job performance. Therefore, plaintiff must "rely on asking her peers for th[is] information."

On or about May 7, 2015, plaintiff claims that she was "viciously attacked" by three students. She was kicked in the back and called derogatory names. Plaintiff immediately reported the incident to School Safety but the DOE "did nothing to investigate the incident" and "her report was neither submitted nor processed." Plaintiff told AP Calcano about the incident and he "dismiss[ed] plaintiff's predicament and walked away."

In 2015, Plaintiff's cell phone and notebook were stolen by students, but "upon information and belief, no investigation was instigated, no remedial measures were taken to find the culprits and [her] property was never returned."

On or about May 22, 2015, the DOE sent plaintiff a letter indicating that a formal complaint had been lodged against her from a student "alleging that [plaintiff] engaged in discrimination based on race and ethnicity/national origin." This letter was sent to plaintiff's previous address even though the DOE's Human Resources Department has plaintiff's current address on file. Plaintiff claims that the letter was sent to her previous address "in an effort to delay [her] from requesting an appointment" to appear with her union representative and refute the allegations.

On or about June 16, 2015, plaintiff met with defendant's Office of Equal Opportunity ("OEO") Investigator Susan Lee, who accused plaintiff of saying to a student: "[t]hose white people do not have

your best interests. Remember the color of your skin. Those White people are for themselves. They don't care about little black girls." Plaintiff denies making this statement and claims that the DOE accused her of making this statement in October 2014. Plaintiff alleges that the DOE "was grasping at straws to get [her] in trouble in clear retaliation for her complaints of discrimination and for her participation in legal proceedings against the DOE."

On or about December 30, 2015, plaintiff received notice that the allegations against her were unsubstantiated.

Plaintiff claims that AP Calcano's harassment and retaliation has led to "the utter destruction of [her] mental health", she seeks spiritual guidance and is undergoing treatment for elevated blood pressure and anxiety. Further, plaintiff alleges, upon information and belief, that she "was forced to take a medical leave of absence to escape the DOE's wrath."

DOE argues that plaintiff's claims must be dismissed because: [1] any claims prior to December 10, 2014 are barred based upon the stipulation dismissing the federal action and a concomitant general waiver and release; and [2] plaintiff fails to state a cause of action: [a] for hostile work environment based upon her age; and [b] for retaliation for having engaged in a protected activity.

In turn, plaintiff maintains that the underlying claims in this action accrued after December 10, 2014, that the complaint is sufficient and seeks leave to file an amended complaint which "describes in further detail how the DOE has repeatedly engaged in discriminatory and retaliatory behavior towards its minority employees."

DOE opposes the cross-motion, arguing that the proposed amendments are patently devoid of merit.

Discussion

At the outset, the court will grant plaintiff's cross-motion to amend the complaint because it should be granted in the absence of prejudice or surprise resulting directly from the delay in moving to amend. Further, the court does not find that the proposed amendments are patently devoid of merit as the DOE contends. The court will now consider defendant's motion to dismiss plaintiff's amended complaint. Since plaintiff has withdrawn her age-related discrimination/retaliation claims by way of the amended complaint, defendant's motion to dismiss these claims is denied as moot.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

The difficulty with this motion is that plaintiff has failed to specifically set forth enumerated causes of action in her complaint. Rather, in just one paragraph, plaintiff lists a number of statutory violations with the confidence that the factual allegations are sufficient to satisfy the elements of every cause of action cause of action.

Plaintiff has generally asserted claims for hostile work environment, disparate treatment and retaliation. The court will consider each claim.

Hostile work environment

Plaintiff claims that she was subjected to a hostile work environment on the basis of her protected activity. A hostile work environment exists where the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Harris v. Forklift Systems, Inc.*, 510 US 17, 21 [1993] [internal quotation marks omitted]; *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]). Here, plaintiff alleges that she suffered bullying and harassment and that her complaints have been ignored. "Bullying and harassment have no place in the workplace, but unless they are motivated by the victim's membership in a protected class, they do not provide the basis for an action" (*Johnson v. City University of New York*, 48 FSupp3d 572 [SDNY 2014]; see also *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 Fsupp2d 575 [SDNY 2010] "[E]ven if mean-spiritedness or bullying render a workplace environment abusive, there is no violation of the law.").

Here, assuming *arguendo* that the complained of conduct was severe or pervasive enough to create an abusive working environment, plaintiff has failed to allege any facts within the four corners of her amended complaint to establish that this conduct was motivated by plaintiff's membership in a protected class. Rather, plaintiff claims that she was harassed and bullied and her complaints were ignored because she filed the federal complaint alleging discrimination. Accordingly, plaintiff has not stated a hostile work environment claim and that claim is dismissed.

Disparate treatment

Plaintiff next claims that she was subjected to disparate treatment on the basis of her protected activity. The standards for proof of a disparate treatment claim are well settled:

> A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision. In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.

(*Forrest v. Jewish Guild for the Blind, supra* [internal quotation marks and citations omitted].

Disparate treatment claims are based on less favorable treatment due to plaintiff's membership in a protected group, as opposed to her participation in a protected activity (see PJI 9:1, Comment [D][2]). Accordingly, this claim fails for the same reason that the hostile work environment claim has been dismissed.

Retaliation

Plaintiff alleges that she was retaliated against because of "her lawful complaints of discrimination and participation in legal proceedings". In opposition to the motion, plaintiff's counsel maintains that

plaintiff has asserted a retaliation claim under 42 USC § 1983, the Equal Protection clause of the Fourteenth Amendment pursuant to 42 USC § 1981 and both the NYSHRL and NYCHRL and is silent about the First Amendment retaliation claim that is listed in the amended complaint. However, the parties dispute whether the federal lawsuit and the complaints of discrimination therein touch upon a matter of public concern, which is an issue that is relevant to the analysis of a First Amendment retaliation claim.

The court finds that to the extent that plaintiff has asserted a First Amendment retaliation claim, that claim fails as a matter of law. The DOE argues that the federal lawsuit concerned "essentially personal grievances and the relief sought is for herself alone". Plaintiff, on the other hand, maintains that complaints of discrimination in her workplace are necessarily matters of public concern, citing a number of cases which address public employees' speech regarding the existence of discrimination in the workplace.

The court finds that plaintiff's federal complaint cannot be construed as constitutionally protected speech touching on matters of public concern. While the complaint does raise issues concerning discrimination, that discrimination is not a matter of public concern because the underlying factual allegations solely concern plaintiff herself and her own treatment. The federal complaint is devoid of any allegations concerning systematic or widespread discrimination or discriminatory treatment of other employees or members of the public.

Nor does plaintiff complain therein about any conduct by the DOE which interfered with plaintiff's exercise of her First Amendment rights. The cases cited by plaintiff are inapposite because in those cases, there were allegations that the plaintiff's exercise of rights guaranteed by the First Amendment were interfered with. In *Konits v. Valley Stream Cent. High Sch. Dist.*, 394, F3d 121 [2d Cir. 2005], the plaintiff therein complained about discriminatory treatment received by another employee. In *Hagan v. City of New York*, 39 FSupp3d 481 [SDNY 2014], the plaintiff alleged that she was retaliated against "because she advocated for systemic reform and the rights of minority employees..." Accordingly, the court finds that plaintiff has failed to state a cause of action sounding in retaliation in violation of the First Amendment and this claim is dismissed.

As for the balance of plaintiff's retaliation claim, she alleges that she engaged in the protected activity of complaining of discrimination on the basis of "race, national origin, religion and disability (plaintiff's federal complaint, Paragraph 8). The elements of a retaliation claim under federal law are the generally the same as those under the NYSHRL: plaintiff must allege that (1) she has engaged in a protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action (*Vandewater v. Canandaigua Nat. Bank*, 70 AD3d 1434 [4th Dept 2010]; see generally *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004]). The NYCHRL differs from the aforementioned standard to the extent that a plaintiff need not show that she suffered an adverse employment activity, but rather, must show that plaintiff's employer engaged in conduct which was reasonably likely to deter a person from engaging in the protected activity at issue (*Brightman v. Prison Health Service, Inc.*, 108 AD3d 739 [2d Dept 2013]).

The court finds that plaintiff has established that she engaged in a protected activity of complaining about unlawful discrimination and filing the federal complaint (see *Borawski v. Abulafia*, 140 AD3d 817 [2d Dept 2016]; see also *Forrest v. Jewish Guild for the Blind*, *supra* at 312–313; compare *Brook v. Overseas Media, Inc.*, 69 AD3d 444 [1st Dept 2010]). Therefore, plaintiff has alleged sufficient facts to support the first element under both the federal/NYHRL and NYCHRL standards. The second element of these standards is not in dispute. The DOE, however, argues that plaintiff has not established the remaining elements under either standard.

The third element under the federal/NYHRL standard is that plaintiff must allege that she suffered an adverse employment action based upon her activity. The DOE contends that the conduct which plaintiff complains of does not rise to the level of an adverse employment action. The court agrees.

An adverse employment action requires a change in working conditions that is "more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation" (*Forrest v. Jewish Guild for the Blind, supra* at 391 quoting *Galabya v. New York City Bd. of Educ.*, 202 F3d 636 [2d Cir.2000] [citations and internal quotation marks omitted]). Reading the allegations in the most favorable light, none of the conduct which plaintiff complains of constitutes a materially adverse change in the terms and conditions of plaintiff's employment. Here, plaintiff largely complains about AP Calcano being rude to her, ignoring her, or treating her differently than her coworkers. Even at this stage of the litigation, plaintiff has not alleged sufficient facts which would establish that there was a material change to the terms of her employment (see i.e. *Fridia v. Henderson*, 2000 WL 1772779 [SDNY 2000]; *Katz v. Beth Israel Med. Ctr.*, 2001 WL 11064 [SDNY 2001]). Accordingly, plaintiff's retaliation claim under federal law and NYSHRL must be dismissed.

As for the NYCHRL standard, the court finds that when read in the light most favorable to plaintiff, she has alleged sufficient facts which would show that the complained-of conduct would reasonably deter a person from complaining about unlawful discrimination. The court rejects the DOE's characterization of the complained of conduct as an occasional offensive remark or excessive scrutiny. Here, plaintiff claims that she has been shunned and isolated, not given information which negatively impacts her job performance, falsely and unfairly investigated and ignored when she complained of an altercation and the theft of her property. These claims are sufficient to establish the third element of retaliation under the NYCHRL.

As for the fourth element under the NYCHRL standard, the court finds that this claim survives the motion to dismiss. While some of the conduct which plaintiff alleges is similar to that which was set forth in the federal complaint, there are now allegations that she was subjected to "unfair and unwarranted discipline" and that the DOE refused to investigate the verbal/physical attack on plaintiff's person or the theft of her property. Therefore, the court rejects the DOE's argument that the allegations amount to a "continue[d] course of conduct that had begun before the employee's protected activity."

The DOE also argues that plaintiff's claims regarding the OEO complaint are insufficient because a student made the complaint before the complaint was investigated. However, to the extent that plaintiff alleges that this complaint had been made before and/or was fabricated, as well as plaintiff's claim that the notice of the complaint was sent to an incorrect address, are sufficient to demonstrate that the investigation was either unfounded and/or unfair at best, and at worst, was based upon a false claim. On a motion to dismiss, the court must accept the facts as true and while plaintiff's claims might not survive a dispositive motion after issue has been joined, plaintiff has alleged sufficient facts to survive the motion to dismiss with respect to the subject claim.

Remaining issues

Based upon the foregoing, the court has dismissed all claims except retaliation for complaining of discrimination in violation of the NYCHRL. Therefore, the DOE's remaining argument that the federal claims fail because plaintiff has not established municipal liability is rejected as moot.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's cross-motion to amend the complaint is granted; and it is further

ORDERED that the amended complaint in the form annexed to the cross-motion as exhibit "B" is deemed served and filed; and it is further

ORDERED that the DOE's motion to dismiss is granted to the extent that all claims except retaliation for complaining of discrimination in violation of the NYCHRL are severed and dismissed; and it is further

ORDERED that the DOE is directed to answer the amended complaint within 20 days after the date of service of this decision/order with notice of entry.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/21/16
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.