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United States District Court, S.D. New York.

PROFESSOR DIANE SANK, Plaintiff,
v.
THE CITY UNIVERSITY OF NEW YORK, Joseph Murphy, et al., Defendants

No. 94 CIV. 0253(RWS). | April 5, 2002.

Attorneys and Law Firms

Diane Sank, Englewood Cliffs, NJ, Plaintiff Pro Se.

Honorable Eliot Spitzer, Attorney General of the State of New York, New York, By Steven L. Banks, Assistant Attorney General, Of Counsel, for Defendants.

Opinion

OPINION

SWEET, D.J.

***1** Defendants City University of New York ("CUNY"), City College of the City of New York ("CCNY") and Beverly Sowande ("Sowande") have moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment and pursuant to Fed.R.Civ.P. 39(a) to strike the jury demand of Plaintiff Diane Sank ("Sank"). Sank cross moved under Fed.R.Civ.P. 56(f) to deny or postpone the summary judgment motion until she is able to complete necessary discovery.

Sank has filed this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e *et seq.*, alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission. Plaintiff also alleges a violation of New York's Freedom of Information Law ("FOIL"), N.Y. Pub. Officers L. § 84 *et seq.*, and breach of contract.

For the reasons below, Sank's Rule 56(f) motion is granted as to her Title VII claims, but denied as to her other claims. As to the other claims, the defendants' motion for summary judgment is granted. The defendant's Rule 39(a) motion is also granted.

Parties

Pro se plaintiff Sank is a white Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed by CCNY since 1968. Sank is a resident of New Jersey and a citizen of the United States.

CUNY is a public higher education system comprised of several senior and community colleges throughout New York City and its boroughs.

CCNY is one of the colleges that makes up CUNY.

Sowande, Associate Counsel in CUNY's General Counsel's Office, was the CUNY Freedom of Information Appeals Officer.

Facts

The facts below are drawn from the plaintiff's complaint, the defendants' summary judgment motion and previous opinions of this Court. Plaintiff has not yet submitted a statement of undisputed facts, and the facts below are not limited to undisputed facts.

From 1969 to 1972, Sank served as chairperson of the CCNY Anthropology Department (the "Department"). After her term, faculty members Eleanor Leacock and June Nash each served as chairperson for alternate terms from 1972 to 1987. Both Leacock and Nash are white females.

Early in 1987, Dr. Charlene McDermott, the provost of CCNY, initiated a college-wide review of departments, including the Department. As part of this process, Sank and other members of the Department selected two outside anthropologists to evaluate the Department in December 1987.

In May 1987, the six full-time faculty members of the Department elected Sank to a three-year term as departmental chairperson. Plaintiff's salary did not change as a result of her election. Instead, Sank received a reduction in her teaching duties in order to accommodate the administrative functions the chairperson was required to perform. Sank claims that prior to the election CCNY President Bernard

W. Harleston ("Harleston") threatened to shut down the Department because it contained no black faculty, and that she was elected to address this issue.

***2** On December 3 and 4, 1987, the two outside anthropologists, Professor Owen Lynch of New York University and Professor William Pollitzer of the University of North Carolina, toured the Department. Sank organized the visit, escorting the reviewers through the library and facilities and scheduling interviews between the reviewers and each faculty member.

Lynch and Pollitzer released a report on January 13, 1988 (the "Report") based on their observations at CCNY. They stated:

> Unfortunately, and perhaps in part because of their individual accomplishments, the members of the department are unable to cooperate and govern themselves. Over the years mutual distrust has grown because of personal misunderstandings, misinterpretations, and misperceptions of the interests and intentions of one another. During her tenure, Prof. Leacock was able to hold these problems in check and was a focus whom all respected and trusted. Her departure left the department to its own self-destructive devices. Unable to govern itself it turned to Prof. Sank to rescue it by electing her Chair. Unfortunately, immediately after her election she, too, being a member of the family, became a victim of its collective neurosis. Despite her sincere efforts to create a new morale, to promote student enrollment and department publicity, to seek from the administration added funds, and to write the departmental assessment for our review, the department which elected her withdrew its collective support. Without that support it has been impossible for her to accomplish anything and she had been reduced to a symbol of the department's collective malaise. The responsibility for the department's present distemper, disarray, and drift is that of the department as a whole.

The reviewers proposed "an *immediate*, but interim, solution of semi-receivership for the department." They recommended that an anthropologist from CUNY's Graduate Center be appointed as an interim chairperson with responsibility for initiating a search for an outside educator to serve as chairperson. The Report specifically identified Professors Dell Jones ("Jones") and Jane Schneider ("Schneider") from the CUNY Graduate Center and Professor Lucie Saunders ("Saunder") from Lehman College as good candidates for the interim post. Jones is a black male; Schneider and Saunders are white females.

On February 8, 1997, the Department held a special faculty meeting to discuss the findings and recommendations set forth in the Report. The meeting ended without a clear consensus on an appropriate course of action. However, three of the six faculty members (Professors Fremont Besmer ("Besmer"), Warren Kinzey ("Kinzey"), and June Nash ("Nash")) voted to recognize the "immediate need for outside advisory input to the Department," and recommended that "Prof. Dell Jones be, or be among those who provide, that advising input."

The Department later submitted two separate responses to the Report to the CCNY Provost. Sank submitted the official response on February 16, 1988. It recognized the division in the anthropology faculty but concluded that a semi-receivership would be "an illegal, dangerous precedent and is unwarranted." Four of the six faculty members submitted a separate memorandum to the CCNY Provost, recommending that Jones immediately replace Sank as chairperson.

***3** Harleston subsequently met with the Department to discuss the proposal to appoint a new chairperson. Three of the five faculty members present voiced their approval of the recommendation. Plaintiff and Professor Arthur Spears dissented. Nash, who had supported Sank's removal in the February 18, 1998 response to the Report, was not present at the meeting.

On April 27, 1988, Harleston wrote to Joseph Murphy, the CUNY Chancellor at the time, stating his decision to remove Sank as chairperson effective June 1, 1988 and to recommend that the Board of Trustees appoint Jones as acting chairperson for the period from June 1, 1988 through August 31, 1989. Harleston sent a separate letter to Sank informing her of his decision. In 1988, the CUNY By-laws permitted CCNY's president to remove a departmental chairperson "as the interests of the college may require" after conferring with

members of the department. Sank claims that this incident was the first time in CCNY's history that a department chair was removed, rather than quietly asked to resign.

On May 11, 1988, the office of the Ombudsman at CCNY wrote to Harleston expressing surprise at his having taken action with respect to Sank prior to meeting with the Ombudsman. That letter announced a May 18, 1988 faculty meeting to consider the matter of the President's actions with respect to Sank and the Department.

Sank promptly pursued administrative remedies complaining about her removal. After being informed in a letter dated May 24, 1988 that the Professional Staff Congress of CCNY would not take the complaint to grievance because "it lacked merit," Sank filed a Step One Grievance against Harleston, the Provost, and the Dean of Social Science of CCNY for improperly removing her as Department chair. This letter did not mention allegations of discrimination. [1]

Sank filed a complaint with the New York City Human Rights Commission in late August 1988 (the "Commission"). On October 21, 1989, Sank filed a verified complaint with the Commission charging CUNY, CCNY and Harleston with sex discrimination. A copy of the verified complaint was filed with the Equal Employment Opportunities Commission ("EEOC") on September 12, 1989 for dual filing purposes.

On October 13, 1988, Sank was informed by letter that her grievance had been rejected. On December 9, 1988, Sank received a letter from the CCNY Acting Director of Affirmative Action advising her that "the Grievance Committee has not found a basis for your grievance of gender discrimination."

On June 8, 1989, the Department held a meeting to elect a new Chairperson, as Jones declined reappointment. The vote was to appoint Besmer, a white male. [2]

On June 27, 1989, Sank filed an amendment to her verified complaint withe Commission, adding charges of race discrimination.

On July 13, 1989, as part of a campus wide modernization project, [3] the architect in charge, Anthony Rodriguez ("Rodriguez") [4] issued a memorandum setting forth a schedule for the reallocation of a significant amount of space within seven buildings at CCNY. As part of this reallocation of space, the Department lost the use of two rooms to the Department of Computer Science, including the room housing the plaintiff's research laboratory ("NAC 7/105"). According to the memorandum, the contents of NAC 7/105 and NAC 7/106, the other room lost by the Department, were to be packed and moved into NAC 7/103, a remaining Department room, on July 23-24, 1989. At the time Rodriguez issued the memorandum, he claims he did not know Sank and had no knowledge of her claims of discrimination.

***4** Besmer, as acting chairperson, sent Sank a memorandum dated July 20, 1989 notifying her of the impending move. Sank testified that she received the letter, at her house, on July 27, 1989-after the contents of her laboratory had already been packed and moved across the hall into NAC 7/103. She claims that the laboratory contained invaluable, irreplaceable contents, many of which were her own personal property. Further, she claims that a 1989-90 faculty investigation determined that the administration did not have to take and should not have taken her laboratory.

Sank was offered assistance to recreate her laboratory in NAC 7/103. Sank did not recreate it, however, and in 1991, the Department permitted Kinzey to set up a laboratory there.

On August 8, 1989, Sank again amended the complaint to allege the retaliatory seizure and dismantling of her laboratory in July 1989. She named Rodriguez as a person with whom she discussed the dismantling and stated that "[h]e refused to give me back my lab room, even though there are alternative rooms to use for other departments." Correspondence between Sank and the Commission and Rodriguez and Sank discuss his role in the decision to move her lab. Rodriguez was not added to the caption. (In the Court Complaint, Sank alleges he, along with three school officials, were all responsible for the retaliatory actions and her failure to be warned of the same.)

On March 3, 1990, she amended the Commission Complaint to add Besmer, the new Department Chair, who Sank alleges threatened to take her research computer for his own use. Sank alleged in her Commission Complaint that Besmer's actions were his way of thanking Harleston for appointing him as acting Chair.

Throughout and after the period she was filing and amending her Commission complaint, Sank sought information through FOIL from CCNY and CUNY officials. The first letter request was on June 9, 1988, and the last on January 2, 1992.

On July 24, 1991, the Investigator at the Commission indicated on a file memorandum regarding Sank's complaint that there was probable cause and forwarded the complaint to the Commission's Enforcement Bureau.

The Commission issued a written determination and order on January 22, 1993, finding "no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged ...." Sank unsuccessfully appealed the Commission's decision to the EEOC, which, according to the Complaint, rejected the appeal without explanation.

On October 19, 1993, the EEOC issued a determination concurring with the conclusions of the Commission and granting Sank the right to sue within 90 days.

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. By decision dated May 23, 1995, this Court granted, in part, defendants' motion pursuant to Fed.R.Civ.P. 12(b)(1), dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U .S.C. § 1983. *Sank v. CUNY*, No. 94 Civ. 0253, 1995 WL 314696 (S.D .N.Y. May 24, 1995). Plaintiff's motion for reconsideration of the May 23, 1995 decision was denied. *Sank v. CUNY*, No. 94 Civ. 0253, 1997 U.S. Dist. LEXIS 1468 (S.D.N.Y. Feb. 13, 1997).

***5** Subsequently, individual defendants moved to dismiss the Title VII claims against them in light of the Second Circuit's holding in *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir.1995). This motion was granted on June 25, 1997. *Sank v. CUNY*, 1997 WL 362150 (S.D.N.Y. June 26, 1997).

Accordingly, the only claims remaining in this action are (1) Title VII claims against CUNY and CCNY for gender and race discrimination and retaliation; (2) a state FOIL claim against defendant Sowande; and (3) a state contract law claim against CUNY and CCNY.

Defendants filed the instant motion on April 13, 2001. They allege that plaintiff has failed to present evidence from which a trier of fact could infer a violation of her rights under Title VII and that this Court lacks subject matter jurisdiction over plaintiff's state law claims. Finally, should plaintiff's claim survive summary judgment, the Defendants claim plaintiff has no right to trial by jury or recovery of monetary damages or back pay.

A discovery dispute arose in the fall, and on October 9, 2001, this Court ordered that, "Defendant shall permit plaintiff and her son, Brian Firschein, to access and review the personnel records of current and past employees of the City College of the City University of New York during regular business hours in the presence of a City College employee. However, in accessing these personnel records, plaintiff may only review, copy or record information pertaining to an employee's hiring date, separation date, race, gender, and current (or last known) address." Order, October 9, 2001.

Following this Court's order, Sank's access to personnel records was limited to four specific dates (two of which were concurrent with classes Sank was teaching, as CCNY would have knowledge of); for a duration of three hours or less; and in a room that was used for other purposes and thus not available during other regular hours. Moreover, pursuant to the Order, Sank could only review records in the presence of a City College administrative employee. That employee was often unavailable, further limiting Sank's access to personnel records.

In addition to these limitations, defendants did not produce all the documents that they were ordered to produce. Some of the personnel records lacked any specification of race or gender-both of which are integral to Sank's contentions in this case. In at least one instance, data relating to several different employees was commingled in a single folder-despite the fact that the defendants are very unlikely to have kept the records that way in the ordinary course of business. Sank requested more of the materials from a school official, who has yet to comply with most of those requests.

On November 26, 2001, plaintiff filed a declaration in support of a motion under Rule 56(f) to deny or postpone summary judgment. The motion was deemed fully submitted on February 27, 2002.

Standard of Review

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits ... show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S.

317 (1986); *Silver v. City Univ.*, 947 F.2d 1021, 1022 (2d Cir.1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir.1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18 (2d Cir.2002).

Discussion

I. Sank's Motion Under Rule 56(f).

***6** In addressing the present motion, the Court is mindful that the plaintiff is proceeding *pro se* and that her submissions should be held " 'to less stringent standards than formal pleadings drafted by lawyers....' " *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972)); *see also Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d Cir.1993). The Court recognizes that it must make reasonable allowances so that a *pro se* plaintiff does not forfeit rights by virtue of lack of legal training. *Traguth v. Zuck*, 710 F.2d 90, 94 (2d Cir.1983).

Indeed, district courts should "read the pleadings of a *pro se* plaintiff liberally and interpret them to raise the strongest arguments they suggest." ' *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir.1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994). Nevertheless, the Court is also aware that *pro se* statute " 'does not exempt a party from compliance with relevant rules of procedural and substantive law." *Traguth*, 710 F.2d at 95 (quotations omitted).

Sank has filed a declaration under Fed.R.Civ.P. 56(f) seeking an order denying defendants' motion for summary judgment and compelling defendants to provide certain discovery. That rule states that:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Courts have interpreted Rule 56(f) to provide that when a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion. *Commercial Cleaning Servs, L.L.C. v. Colin Serv. Systems, Inc.*, 271 F.2d 374, 386 (2d Cir.2001) (citing *Meloff v.. New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir.1995) (holding that grant of judgment was premature where plaintiff submitted properly supported Rule 56(f) request for further discovery in opposition to defendant's motion for summary judgment); *Hellstrom v. U.S. Dep't of Veteran's Affairs*, 201 F.3d 94, 97 (2d Cir.2000) ("Only in the rarest cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.")). The district court is afforded discretion in making this decision. *Id.*

The Second Circuit has established a four-part test to determine the sufficiency of an affidavit or declaration submitted pursuant to Rule 56(f). The affidavit or declaration must detail: (1) the nature of the uncompleted discovery; (2) how the facts sought are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant as made to obtain those facts; and (4) why those efforts were unsuccessful. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir.1994); *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 422 (2d Cir.1989).

***7** Sank alleges that defendants have obstructed her ability to access personnel records for several hundred employees of CUNY for whom she seeks information regarding their hiring dates, race, gender, and current addresses. She also alleges that defendants interfered with her ability to depose Harleston. Defendants claim that they have provided Sank with the material she requested and that she is bound by the discovery requests of her former attorney.

A. Actions of Sank's Former Attorney

Defendants argue that Sank should be bound by the discovery requests by her former attorney.

It is true that clients are bound by the acts or omissions of their attorneys. *Pioneer Investment Serv. Co. v. Brunswick,*

507 U.S. 380, 397 (1993) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 633 (1962)) (finding that clients are bound by their attorney's omission in not filing a claim under bankruptcy law); *United States v. Cirami*, 535 F.2d 736, 741 (2d Cir.1976) (affirming summary judgment against client despite claims of attorney misconduct); *Trehern v. OMI Corp.*, No. 98 Civ. 0242, 1999 U.S. Dist. LEXIS 919, at *9 (S.D.N.Y. Feb. 1, 1999) (denying plaintiff's motion for change of venue where he claimed that he did not know that his former attorney had filed suit in New York).

As discussed below, Sank seeks only discovery that she herself has already requested [5] and that this Court has already ordered. [6] The actions of her former attorney, and the extent to which they bind her, are not at issue. What is at issue is whether the defendants have complied with this Court's October 9, 2001 order so that Sank could fairly respond to their motion for summary judgment.

B. Deposing Harleston

Sank complained in her cross motion of defendants' obstructions to her deposition of Harleston. Because Sank has taken that deposition, this issue is moot.

C. Personnel Records

It does not appear as though Sank has had a reasonable opportunity to obtain access to personnel records that she had requested and that this Court ordered made available to her.

On October 9, 2001, this Court ordered that the defendants allow Sank and her son access to personnel records. The defendants allowed Sank the ordered access, but for such constricted periods of time that she did not have sufficient time to complete her discovery. In effect, Sank had two three-hour periods, on different days, when she could sift through records. In addition, some of the personnel records lacked any specification of race or gender-both of which are integral to Sank's contentions in this case. In at least one instance, data relating to several different employees was commingled in a single folder-despite the fact that the defendants are very unlikely to have kept the records that way in the ordinary course of business. Sank has requested more of the materials that defendants were ordered to produce from a school official, who has yet to comply with most of those requests.

***8** Defendants claimed in a memorandum dated December 21, 2001, that Sank should have had access to the materials as of January 11, 2002. Sank's sur-reply to this memorandum is dated February 25, 2002. In it, she states that “Defendants have yet to make available to me the actual personnel files for any of the individuals I have been able to identify ....” Pl.'s Sur-Reply at 5. She also lists other documents that defendants have still failed to produce.

Access to these personnel materials would be integral to Sank's preparing a defense to the defendants' motion for summary judgment on Sank's Title VII claims. [7] She disputes the fact that the decision to remove her from her chairpersonship was not based on any illegitimate factors. The records she seeks could aid her argument in that regard. For instance, Sank claims that no one else in the history of CCNY had ever been removed as Chair (rather than asked to resign). These records could support or rebut that contention. In addition, she claims that CCNY impermissibly promoted persons on the basis of race and sex; she can only support her contentions by determining the races and sexes of persons who received appointments.

Therefore, summary judgment on the matter of Sank's Title VII claims will be dismissed. A pre-trial conference will be held to address the specifics of Sank's remaining request and clarify what records are available and what records Sank seeks.

However, defendants' arguments regarding the Eleventh Amendment and FOIL do not rely on these disputed issues of material fact. Therefore, the Court will address the other contentions.

II. The Eleventh Amendment Bars Sank's Breach of Contract Claim.

The Eleventh Amendment limits the ability of federal courts to entertain suits brought against the states, regardless of the relief sought, unless the state consents to be sued, or Congress enacts legislation overriding the state's Eleventh Amendment immunity. *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89,99 (1984).

It has been established that CUNY's senior colleges are arms of the State entitled to Eleventh Amendment immunity. *Hester-Bey v. New York City Technical College*, No. 98 Civ. 5129, 2000 U.S. Dist. LEXIS 5323, at *11 (E.D.N.Y.

March 24, 2000) (holding that because senior colleges are "funded and administered by the State to a great degree," they constitute an arm of the State and are immune from suit under the Eleventh Amendment); *see also Becker v. CUNY*, 94 F.Supp.2d 487, 490 (S.D.N.Y.2000) (holding that CUNY's central administration, like CUNY's senior colleges, possesses Eleventh Amendment immunity as an arm of the State). Thus defendants CUNY and CCNY are entitled to Eleventh Amendment immunity.

This does not end our inquiry, however. The State may nonetheless consent to suit in the federal courts. If it does not, however, this Court cannot hear Sank's claims. A number of courts have held that the State has not consented to suit for breach of contract claims and thus held that federal courts lacked jurisdiction to hear breach of contract claims against state entities, including CUNY. *E.g.*, *Burrell v. CUNY*, 995 F.Supp. 398, 415 (S.D.N.Y.1998); *Jungels v. SUNY*, 922 F.Supp. 779, 787 (W.D.N.Y.1996).

***9** The *Burrell* court also made the instructive point that, even if the Eleventh Amendment did not exist, this court could not entertain jurisdiction of a breach of contract claim against one of New York's "senior colleges." The New York Court of Claims has exclusive jurisdiction over such claims. N.Y. Educ. Law § 6224(9); *see also Illickal v. Roman*, 236 A.D.2d 247, 248, 653 N.Y.S.2d 562, 563 (1st Dep't 1997) (dismissing breach of contract claim against medical school).

The breach of contract claim therefore is dismissed.

III. The FOIL Claim Is Dismissed in Part

Sank's claim against Sowande does not face the same Eleventh Amendment bar discussed above. However, FOIL claims are limited to seeking injunctive, rather than monetary relief, through a specified procedure in the state courts.

The Eleventh Amendment does not bar State law claims against State officials in their individual capacities that seek money damages or prospective injunctive relief. *Huang v. Johnson*, 251 F.3d 65, 70 (2d Cir.2001); *Dwyer v. Regan*, 777 F.2d 825, 835 (2d Cir.1985). Sank sued Sowande "individually and in her official capacity ...." Amended Compl. at 2. Therefore, the Eleventh Amendment presents no bar to Sank's claim against Sowande in her individual capacity for money damages or for prospective injunctive relief.

As with the breach of contract claim above, however, the Eleventh Amendment is not the only hurdle Sank has to clear. FOIL does not give rise to a private cause of action to recover money damages. *Warburton v. State*, 173 Misc.2d 879, 881-82, 662 N.Y.S.2d 706, 708 (N.Y.Ct.Cl.1997). In the event that access to a record is denied, the affected person may bring a C.P.L.R. Article 78 proceeding, and may be awarded reasonable attorney's fees and litigation costs. *Id.* Criminal sanctions may also ensue. *Id.* "Here, the Legislature has given a civil remedy by way of an article 78 proceeding with counsel fees and court costs available, as well as a criminal sanction. To go beyond those remedies and create a private cause of action for money damages for a violation of FOIL would be an improper usurpation of the legislative function, a step the Court declines to take." *Id.*

It is unclear what remedy Sank seeks from Sowande. She may only seek injunctive relief pursuant to FOIL, and the Eleventh Amendment limits the injunctive relief she can obtain to prospective relief. Thus, to the extent that Sank seeks something other than prospective injunctive relief against Sowande, this claim is dismissed.

IV. Trial by Jury and Money Damages

Prior to the enactment of the Civil Rights Act of 1991 ("1991 Act"), plaintiffs bringing claims of discrimination under Title VII were limited to equitable relief-typically reinstatement and back pay-and were not entitled to a jury trial. *Patterson v. McLean Credit Union*, 491 U.S. 164, 182, n. 4 (1989); *see also* 105 Stat. 1071-80 (1991).

***10** In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Supreme Court addressed the issue of whether those provisions of the 1991 Act authorizing recovery of compensatory and punitive damages, as well as trial by jury, for Title VII claims applied to cases pending when it became law. *Landsgraf*, 511 U.S. at 249-50. The Court held that the provisions were not retroactive. *Id.* at 286. Accordingly, Title VII plaintiffs cannot recover compensatory or punitive damages for events arising before November 21, 1991, the effective date of the 1991 Act. *Id.* at 283, 286; *Joseph v. New York City Bd. of Educ.*, 171 F.3d 87, 91 (2d Cir.1999).

The latest conduct that Sank complained of occurred in 1990. Plaintiff therefore is not entitled to a trial by jury or an award of compensatory or punitive damages for her Title VII claim. Moreover, with respect to Sank's claims for injunctive relief, it is undisputed that she suffered no loss of wages or other pay as result of her removal as department chairperson. She is therefore not entitled to an award of back or future pay.

Conclusion

For the foregoing reasons, the plaintiff's Rule 56(f) motion is granted in part and denied in part; the defendants' motion for summary judgment is granted in part and denied in part; and the defendants' Rule 39(a) motion is granted. A pre-trial conference is ordered for April 10, 2002, at noon, in Courtroom 18-C, to discuss Sank's remaining discovery requests.

It is so ordered.

Footnotes

1 A September 15, 1988 letter from Sank to the CCNY Dean of Faculty and Staff Relations makes reference to her enclosure of a report on The Status of Women and Faculty Appointment at CUNY.

2 There was a lack of an appropriate quorum however. The lack of quorum was successfully challenged through the University grievance process. In September Besmer was properly appointed.

3 As part of the project, the college was forced to vacate between 400,000 and 500,000 square feet, or approximately 20 to 25 % of the total campus space of two million square feet.

4 Rodriguez made the ultimate decision on space allocation. However, he would routinely report his recommendations to the Space Advisory Committee, comprised of deans, faculty members, and administrative employees. The role of the committee was to provide Rodriguez with feedback and to keep the CCNY community informed of the renovation progress.

5 As early as September 1997, while prosecuting the action pro se, Sank requested “the race and gender of certain administrators and faculty personnel at City College, their qualifications (e.g. as indicated by their curriculum vitaes), as well as their titles and faculty ranks, status (permanent or acting), dates of appointment, promotion, permitted leave(s), and (if applicable) resignation/termination from their positions (as well as the reasons therefor, if known), and any changes therein, as well as the names of the officials who made each such appointment, promotion, etc.” Sank letter, October 22, 2001.

6 On October 9, 2001, This Court ordered that “Defendant shall permit plaintiff and her son, Brian Firschein, to access and review the personnel records of current and past employees of the City College of the City University of New York during regular business hours in the presence of a City College employee. However, in accessing these personnel records, plaintiff may only review, copy or record information pertaining to an employee's hiring date, separation date, race, gender, and current (or last known) address.” Order, October 9, 2001.

7 Defendants argue that Sank, a *pro se* plaintiff, did not “state with clarity” what additional facts she sought or why they would raise a genuine issue of material fact. Defs.' Mem. at 3. However, reading her submission liberally and interpreting it to raise the strongest arguments it suggests, the Court finds that Sank did address these aspects. *McPherson,* 174 F.3d at 280.