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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 : 112314/2011
MCINTOSH, ALICE
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78 CAL. # 77

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of ~~Motion/Order~~ Petition to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits _____ | No(s). 5, 6

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 11/21/12
NOV 21, 2012

_____, J.S.C.
BARBARA JAFFE

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

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In the Matter of the Application of
ALICE MCINTOSH,

Plaintiff-Petitioner,

-against-

Index No. 112314/11

Argued: 6/12/12
Motion Seq. No.: 001

DECISION AND ORDER

for Judgment pursuant to Article 78, CPLR, and Claims under the Executive Law and the Administrative Code of the City of New York

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

Respondents-Defendants.

----------x

BARBARA JAFFE, JSC:

For petitioner-plaintiff:
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For respondents-defendants:
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Plaintiff-petitioner (plaintiff), a former special education teacher, was employed on a probationary basis by respondent-defendant New York City Department of Education (DOE). She received an overall unsatisfactory rating (U-rating) for the 2010-2011 school year, resulting in the termination of her employment on July 15, 2011. By notice of verified complaint and petition dated October 28, 2011, plaintiff commenced both an Article 78 and a plenary proceeding seeking an order and judgment (1) annulling the July 15, 2011 termination of her probationary employment; (2) reinstating her to her former position as a special education teacher with DOE; (3) granting her back pay and retroactive benefits and (4) awarding her $2

million in damages for pain and suffering, damage to her professional reputation, and other unspecified damages. By notice of cross-motion dated January 19, 2012, respondents cross-move, pursuant to CPLR 3211(a)(7) and 7804(f), for an order dismissing the petition and the complaint. Plaintiff opposes and cross-moves for leave to amend.

I. BACKGROUND

Plaintiff, an African-American woman born in 1963, began working as a special education teacher at Public School 15 in the Bronx in September 2009. Her employment was subject to a three-year probationary period. (*See* Affirmation of Stewart Lee Karlin, Esq. in Support of Motion to Amend and in Opposition to Motion to Dismiss, dated Feb. 16, 2012 [Karlin Aff.], Exh. A). Plaintiff claims that she had received satisfactory performance evaluations until on or around June 15, 2011, she received a U-rating for 2010-11. (*Id.*). As a result, both the principal and the superintendent recommended that her probationary employment be terminated. (*Id.*).

By notice of verified petition dated October 21, 2011, "plaintiff-petitioner" filed a "verified complaint and petition" seeking a judgment pursuant to CPLR Article 78 awarding her both monetary damages and equitable relief. By notice of cross motion dated January 9, 2012, "respondents" cross-moved for an order dismissing the complaint-petition. Then, by notice of cross-motion dated February 16, 2012, plaintiff cross-moved for leave to file an amended complaint and opposed respondents-defendants motion to dismiss. And, by memorandum of law dated March 15, 2012, respondents-defendants opposed plaintiff's motion to amend the petition, to which plaintiff responded in further support of her motion for leave to file and amended

complaint and in further opposition to the motion to dismiss.

II. DISCUSSION

A. Motion to amend

1. Contentions

In her proposed amended complaint, plaintiff adds new facts and abandons all claims brought under Article 78 and related relief, leaving the plenary action claiming race and age employment discrimination under the State and City Human Rights Laws, and seeking monetary damages including back pay, pain and suffering, damage to professional reputation, and attorney fees. (Karlin Aff., Exh. A).

Defendants observe that plaintiff's Article 78 claims are moot as she no longer seeks reinstatement or an annulment of the decision to terminate her employment. They oppose plaintiff's motion to amend on the ground that the proposed amendments fail to state a cause of action, thereby rendering the amended complaint futile. (Respondents-Defendants' Memorandum of Law in Opposition to Petitioner-Plaintiff's Motion to Amend the Petition and in Further Support of its Cross-Motion to Dismiss the Petition, dated Mar. 15, 2012 [March 15 Mem.]).

2. Analysis

In light of plaintiff's withdrawal of her requests for relief pursuant to Article 78, and pursuant to CPLR § 103(c), plaintiff's "petition-complaint" is hereby converted to a complaint in order to consider all of her claims fairly and expeditiously. Additionally, as defendants' cross-motion to dismiss extended its time to answer the complaint, thereby extending plaintiff's time

to file a responsive pleading, leave of court before serving the amended complaint is unnecessary. (*See Perez v Wegman Companies, Inc.*, 162 AD2d 959 [4th Dept 1990]).

B. Motion to dismiss

Although defendant's cross-motion to dismiss is directed to the original pleading, defendants address the merits of the amended pleading, arguing that it, too, contains insufficient facts in support of a claim of employment discrimination. As both sides have had an opportunity to address the impact of the amended complaint on defendants' cross-motion to dismiss, I consider defendants' cross-motion as one challenging the amended complaint. (*See Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998] [motion to dismiss related to initial complaint properly applied to amended complaint]).

1. Contentions

Plaintiff alleges that various DOE policies, rules, and regulations were violated when defendant evaluated her performance, observed her classrooms, disciplined her, and ultimately terminated her probationary employment. (Karlin Aff., Exh. A). According to her, defendants did not comply with 2010-2011 procedures regarding school year observations by failing to conduct timely post-observation conferences, whereas young caucasian teachers were given pre- and post-observation conferences. Although her principal agreed to mentor her, moreover, plaintiff contends that she failed to do so, whereas a particular young caucasian teacher received promised mentoring. Plaintiff complains of letters and reprimands placed in her file, dated March 4, 2022, May 13, 2011, and June 6, 2011, which she claims are unfounded. (Karlin Aff., Exh. A).

Plaintiff also maintains that she has been subjected to disparate treatment and excessive scrutiny by her principal, who placed "baseless and defamatory" memoranda in her file. Likewise, three African-American teachers are alleged by her to have been discriminated against by virtue of their age and race. She claims that one was "continually harassed and ultimately given a baseless 'U' rating"; that another was "continually harassed"; and that a third was "harassed and forced to retire." Another example of disparate treatment is plaintiff's contention that she was falsely accused of leaving her students alone, whereas a young male caucasian teacher who she says "left the building every day to move his car without informing the administration [ ] was never disciplined as a result." (*Id.*).

Plaintiff takes issue with the "U" rating she received, asserting that it does not conform with DOE policies and procedures and is the product of bias based on her race and age, and that when her probationary status was terminated approximately one month later, the procedure followed was "patently improper" and in violation of school policy. She characterizes as "substantially untrue" the related Annual Professional Performance Appraisal of her. (*Id.*).

Defendants argue that the proposed amended complaint is conclusory and insufficient to support a *prima facie* showing of discrimination, observing that the only adverse action taken against her was the termination of her employment. They also maintain that plaintiff fails to plead facts establishing that her termination was a result of racial or age discrimination. Rather, they assert that DOE had valid non-discriminatory reasons for plaintiff's termination, as evidenced by the letters placed in her file about her performance, and argue that she pleads no facts demonstrating that DOE's view that she was performing poorly was a pretext for unlawful

discrimination. (March 15 Mem.).

2. Applicable law

In considering a motion or cross-motion to dismiss for failure to state a cause of action made pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In the context of a motion to dismiss, employment discrimination cases are generally analyzed under a lenient notice pleading standard, whereby the plaintiff need not plead specific facts, but must give respondents "fair notice" of the nature and grounds of her claims. (*Swierkiewicz v Sorema N.A.*, 534 US 506, 514-515 [2002]; *Vig v New York Hairspray Co., LP*, 67 AD3d 140, 144 [1st Dept 2009]). However, "bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true on a motion to dismiss." (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477 [1st Dept 2009], *quoting O'Donnell, Fox & Gartner v R-2000* Corp., 198 AD2d 154 [1st Dept 1993]).

The State Human Rights Law and the City Human Rights Law provide, in pertinent part, that it is an unlawful discriminatory practice for an employer, because of an individual's age, race, national origin, sex, or sexual orientation, "to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (Executive Law § 296 [1] [a]; Administrative Code §8-107 [1] [a]).

Discrimination claims brought pursuant to the State and City Human Rights Laws are

reviewed under a burden-shifting framework. (*See McDonnell Douglas Corp. v Green*, 411 US 792 (1973); *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 429 [2004]; *Forrest v Jewish Guild for Blind*, 3 NY3d 295, 305 n 3 [2004]). A plaintiff alleging discrimination has the initial burden of establishing, *prima facie*, that: (1) she was a member of a class protected by the statutes; (2) she was actively or constructively discharged or suffered adverse employment action; (3) she was qualified to hold the position from which she was terminated; and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*See Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [1997]; *Balsamo v Savin Corporation*, 61 AD3d 622, 623 (2d Dept 2009); *Nelson v HSBC Bank*, 41 AD3d 445, 446 (2d Dept 2007).

Once the plaintiff satisfies this burden, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the adverse action taken. (*Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of ADL-CIO*, 6 NY3d 265, 270 [2006]). If the defendant produces such evidence, the plaintiff must then show that the proffered reason was a pretext for discrimination. (*Ferrante*, 90 NY2d at 629-630).

When a discrimination claim is based, in whole or in part, on an allegedly adverse employment action other than termination of employment, the adverse employment action may only be challenged if it is a materially adverse change in the terms and conditions of an individual's employment. (*See Richardson v New York State Dept of Corrections*, 180 F3d 426, 446 [2d Cir 1999]). Negative performance reviews or criticism of performance by themselves are not considered adverse employment actions under either the State Human Rights Law or the

City Human Rights Law. (*See Li v Educational Broadcasting Corp*, 2011 NY Slip Op 31953[U], *12-13 [Sup Ct, New York County June 30, 2011], *citing Nieves v District Council 37, AFSCME, AFL-CIO*, 2009 WL 4281454, *8 [SDNY 2009]). Moreover, "[r]eprimands, threats of disciplinary action, and excessive scrutiny do not constitute adverse employment actions." (*Lucenti v Potter,* 432 F Supp 2d 347, 364 [SDNY 2006]; *Dauer v Verizon Communications Inc.*, 613 FSupp 2d 446, 461 [SDNY 2000]). Similarly, the mere disagreement with an employer's assessment of work performance or decision to terminate an employee does not state a claim of discrimination because, even where the employer's decision is unwise or ill-founded, an employee claiming discrimination must still show a causal connection between the employee's protected class and the adverse decision. (*See Gray v New England Tel. & Tel. Co.,* 792 F2d 251, 255 [1st Cir 1986]; *Ioele v Alden Press*, 145 AD2d 29, 36 [1st Dept 1989]). And, as with any claim, vague, conclusory assertions, unsupported by factual allegations, are insufficient to sustain a cause of action under the Human Rights Laws. (*Scarfone v Village of Ossining*, 23 AD3d 540, 541 [2d Dept 2005]; *Vanscoy v Namic USA Corp.,* 234 AD2d 680, 681-82 [3d Dept 1996].

3. Analysis

Plaintiff's allegations that DOE policies, rules, and regulations were violated include no specific provisions. And, apart from the termination of her employment, the other acts of which she complains do not constitute adverse employment actions. (*See Hall v NYC DOT* , 701 FSupp 2d 318, 335-36 [EDNY 2010]).

As plaintiff conclusorily alleges that she belongs to a protected class and suffered

because of adverse employment actions taken against her, she has pleaded no facts tending to demonstrate that defendants' actions were the result of or caused by racial or age discrimination. Consequently, there is nothing in the amended complaint suggesting that plaintiff's U-rating, the subsequent termination of her employment, or any action taken by defendants occurred under circumstances giving rise to an inference of discrimination. For example, although plaintiff states that the three letters of reprimand that the principal placed in her file are "unfounded" (Karlin Aff., Exh. A), she provides no information about their contents or their context. Nor does she allege facts suggesting that they were motivated by discriminatory animus.

Plaintiff's allegation that her principal placed baseless and defamatory memoranda in her file is too vague to warrant relief, and absent facts demonstrating that defendants' view that plaintiff was performing poorly was a pretext for discrimination, the letters of reprimand and poor performance reviews presumably derive from legitimate nondiscriminatory reasons. Her references to the other African-American teachers and to two caucasian teachers whom she claims were treated more favorably than her permit no finding of unlawful discrimination, and to the extent that she sought to set forth a pattern of racial discrimination or harassment, no such pattern emerges absent facts demonstrating that defendants' actions were unwarranted. Her allegations about the caucasian teachers also contain no indication that they were probationary like her, subject to the same standards as her, or engaged in conduct comparable to her own. Although plaintiff claims that she was falsely accused of leaving her students alone and was disciplined as a result, whereas another teacher was not, she does not allege that when the other teacher left the school, he left his students alone and unsupervised.

For all of these reasons, plaintiff has not given defendants fair notice of the nature and grounds of her racial or age discrimination claims.

III. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition for an order annulling the determination to terminate the petitioner's employment is withdrawn as moot; it is further

ORDERED, that petitioner's cross-motion for leave to serve an amended complaint, although unnecessary, is hereby granted; it is further

ORDERED, that defendants' motion to dismiss the amended complaint is hereby granted and this action is dismissed, with costs and disbursements to respondents-defendants; and the clerk is directed to enter judgment accordingly.

ENTER:

_____

Barbara Jaffe, AJSC

BARBARA JAFFE
J.S.C.

Dated: November 21, 2012
New York, New York

NOV 21 2012