Anderson v City of New York
2014 NY Slip Op 31503(U)
June 9, 2014
Supreme Court, New York County
Docket Number: 155400/13
Judge: Kathryn E. Freed

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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KIM ANDERSON,

Plaintiff,

- against-

DECISION/ORDER
Index No. 155400/13
Seq. No. 002

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, CAPTAIN HEDY HUBBARD, SUPERVISOR JEANETTE GONZALEZ and INSPECTOR MICHAEL PILECKI, each being sued in their individual and official capacities,

Defendants.

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KATHRYN FREED, J.:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2.(Ex A-E)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....Memos of Law.....	.....5,6.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

The defendants City of New York, New York City Police Department (NYPD), Captain Hedy Hubbard, Supervisor Jeanette Gonzalez, and Inspector Michael Pilecki (defendants) move, pursuant to CPLR 3211 (a) (2), (5), and (7) for an order dismissing the amended complaint.

The plaintiff Kim Anderson (plaintiff) is employed by the defendants as a Traffic Enforcement Agent ("TEA"). This is an action to recover damages under the New York State Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law

(New York City Administrative Code § 8-107 [7]); for alleged race and gender discrimination, and for retaliatory discipline.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was appointed to the NYPD as a School Crossing Guard on March 3,1992. Complaint, Exhibit "A," ¶¶ 15, 16.[1] Plaintiff, now a TEA II, alleges that she has been denied opportunities for promotion since March 2003. Complaint, Exhibit "A," ¶ 48. The Complaint also alleges that from June, 2010, through July, 2012, defendants discriminated against plaintiff by denying her overtime. Complaint, Exhibit "A," ¶ 49. Plaintiff further alleges that she has filed "several internal complaints" with the NYPD and two "formal EEOC [Equal Opportunity Employment Commission] New York State Division of Human Rights ("SDHR") complaints," alleging discrimination. Complaint, Exhibit "A," ¶¶ 19, 51, 52.

Plaintiff filed a charge with the SDHR on March 29, 2011. See Verified Complaint, Case No. 10147615 ("March 2011 SDHR Charge"), Exhibit "B." In the March, 2011 SDHR Charge, plaintiff alleged that the NYPD discriminated against her for filing an internal complaint and a complaint with her union. *See* Id., at 1. Specifically plaintiff alleged that:

(1) On June 16, 2010, Captain H. Hubbard informed plaintiff that she was being reassigned to a different work location and that she was being removed from summons patrol;

(2) On June 28, 2010, plaintiff was informed that she was being transferred because of "numerous complaints filed against me";

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[1] Unless indicated otherwise, all references are to the exhibits annexed to the affirmation of John S. Schowengerdt dated February 12, 2014, ("Schowengerdt Aff."). These exhibits are public records and thus, these documents may be considered on a motion to dismiss.

(3) On June 30, 2010, plaintiff filed complaints with the NYPD Equal Employment Opportunity Office and her union. Plaintiff alleged that the NYPD retaliated against her for filing these complaints by not promoting her and giving her an assignment with "very limited/selected overtime."

Id., at 1-2.

On June 9, 2011, the SDHR issued a Determination and Order After Investigation dismissing the March 2011 SDHR Charge. *See* Determination and Order After Investigation, Case No. 10147615 ("June 2011 SDHR Order"), Exhibit "C." After a thorough investigation of plaintiff's charge, the SDHR issued a finding of "No Probable Cause" to believe plaintiff's claims of discrimination and retaliation. *Id.* Specifically, the SDHR found that there was a "lack of evidence in support of [plaintiff's] allegations of retaliation." *Id.*, at 1.

The SDHR also found that "it is undisputed by both parties that [plaintiff's] reassignment in duties (from issuing traffic summonses to directing traffic) was due to complaints from the public" about plaintiff and not to any discriminatory or retaliatory animus on the part of the NYPD or individual employees of the NYPD. *See Id.,* at 1.

Furthermore, the SDHR found that "[a]lthough [plaintiff] believes that these complaints [from the public] are baseless, as they were simply a result of her doing her job, [she] does not deny that the complaints were cause for her reassignment." *Id.,* at 1. In concluding that plaintiff had failed to establish a prima facie case of retaliation, the SDHR found that:

> [Plaintiff] complained to her union about her reassignment, lack of overtime, and desire to upgrade to Level III. She had also previously complained to her internal OEEO office about disputes with other officers and accommodations. Yet none of her complaints include any allegations of discrimination so as to render her claim of retaliation protected under State Human Rights

> Law. Thus, [the NYPD] denied, and our investigation failed to substantiate, that [plaintiff] had engaged in any activity protected under Human Rights Law prior to her filing of the instant complaint with the [SDHR]. The record, therefore, does not support a determination of probable cause in this case.

Id. at 2.

Accordingly, the SDHR dismissed plaintiff's March 2011 SDHR Charge. *Id.*

Fourteen months later, on August 3, 2012, plaintiff filed a second complaint with the SDHR. See Complaint, Exhibit "A," ¶ 55; Verified Complaint, Case No. 10156570, dated August 3, 2012 ("August 2012 SDHR Charge"), Exhibit "D." In her August 2012 SDHR Charge, plaintiff alleged that the NYPD harassed her and retaliated against her for the filing of her March 2011 SDHR Charge. *See* August 2012 SDHR Charge, Exhibit "D," at 1.

Specifically, plaintiff alleged that she was reprimanded by Captain Hubbard for writing traffic violations in school zones and church zones. *Id.* Plaintiff also alleged that on February 21, 2012, she was "written up" by Traffic Manager Garcia for illegally parking her vehicle under a "No Parking Anytime" sign. *Id.* at 2. Plaintiff further alleged that on July 9, 2012, she received a verbal warning from Jeannette Gonzalez for writing traffic violations. *Id.*

On January 30, 2013, the SDHR issued a Determination and Order After Investigation dismissing plaintiff's August 2012 Charge. *See* Determination and Order After Investigation, Case No. 10156570, dated January 30, 2013 ("January 2013 SDHR Order"), Exhibit "E." Pursuant to its investigation of plaintiff's August 2012 Charge, the SDHR issued a finding of No Probable Cause to believe plaintiff's claims of discrimination and retaliation. *Id.* at 1.

Specifically, the SDHR found that the length of time between plaintiff's August 2011

SDHR Charge and the alleged adverse actions, along with plaintiff's interview by SDHR investigators, "bolsters [the NYPD's] assertions that its supervision and attendant disciplines of [plaintiff] were independent of her [August 2011 Charge]." Id. at 2. The SDHR based its determination, in part, on plaintiff's interview with the SDHR, in which she "painted a picture of her[self] as also unrestrained in her duties" and cited to several examples of her own misconduct which justified the supervision and discipline which she alleged were retaliatory. *Id.* The SDHR found that any discipline of plaintiff was the result of complaints received from agencies and individuals other than those who plaintiff had charged with discrimination and retaliation in her August 2011 SDHR Charge and that this "illustrates the absence of a nexus between her corrections and her prior Division complaint." *Id.*

Finally, the SDHR concluded that "[t]he investigation has found no indication of [plaintiff] being singled out" for retaliation and that plaintiff had not pointed to any other NYPD employees who were similarly situated to plaintiff but were treated differently. *Id.*, at 2. Accordingly, the SDHR dismissed plaintiff's charge for lack of evidence and closed the case. *Id.*; Complaint, Exhibit "A," at ¶ 56.

Plaintiff alleges in her Complaint that, in retaliation for her filing of the August 2012 SDHR Charge, she received two command disciplines, one on June 13, 2013, for improperly issuing a summons, and another on June 24, 2013 for rude and discourteous behavior towards a motorist. Complaint, Exhibit "A," at ¶¶ 57-59.

Plaintiff commenced this action on June 12, 2013. Exhibit "A".

POSITIONS OF THE PARTIES:

Defendants initially argue that plaintiff's claims accruing prior to June 12, 2010 are time-barred because both the SHRL and the New York City Human Rights Law ("CHRL"), are subject to a three-year statute of limitations. *Koerner v. State*, 62 N.Y.2d 442, 446 (1984) (SHRL); CPLR 214(2) (SHRL and CHRL); N.Y.C. Admin. Code § 8-107(1)(d) (CHRL). Plaintiff filed her original complaint in this case on June 12, 2013. Defendants also note in their reply brief that plaintiff fails to refute this point.

Next defendants argue that any charges which were fully considered and given a full and fair hearing by SDHR, are barred from being re-litigated by the Doctrine of the Election of Remedies pursuant to N. Y. Executive Law § 297 (9) and New York City Administrative Code section 8-502 (a), which provides that persons aggrieved by discriminatory practices may bring a court action to address those practices "unless such person has filed a complaint with the city commission on human rights with respect to such alleged unlawful discriminatory practice or act..."

Plaintiff argues[2] that she is only barred from bringing a claim if that claim is for "the same allegedly invidious behavior on the part of her employer over the same period of time..." *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449 (2nd Dept 1994)(citing *Scott v. Carter-Wallace, Inc.*, 147 A.D.2d 33, 35 (1st Dept 1989). Plaintiff points to the two command disciplines which she received in June 2013, which were issued after the second SDHR decision

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[2]. The Court notes that plaintiff has failed to submit an affidavit supporting her contentions and the responses referred to herein, unless otherwise indicated, were set forth by her attorney, Moshe C. Bobker, "upon information and belief,"in plaintiff's Affirmation in Opposition to Defendants' Motion to Dismiss the Verified Complaint.

was **issued** and therefore could not have been considered by that body. She alleges that she was denied overtime opportunities and was passed over for promotion for the period following that second decision. Additionally, she claims that the defendants also initiated a "quota system" "in violation of rules and regulations." Plaintiff's Affirmation in Opposition to Defendants' Motion to Dismiss the Verified Complaint, ¶ 21.

In response to the above, defendants point out that any charges of failure to promote or denial of overtime were already pleaded prior to the SDHR's decisions. Defendants specifically note that plaintiff's opposition to the "quota system" was previously raised in connection with the denial of her overtime claims and dismissed before she brought the SDHR charges. *See* Defendants' Reply Memorandum of Law, at FN 5. Additionally, plaintiff fails to allege that she suffered any adverse actions as a result of her filing of the SDHR charges. Therefore, defendants maintain that these claims are barred, that this Court lacks subject matter jurisdiction and, that this matter must therefore be dismissed. *See Benjamin v. New York City Dept. Of Health*, 57 A.D. 3d 403, 403-04 (1st Dept 2008).

Defendants also contend that plaintiff's claims are barred by the doctrine of collateral estoppel, insofar as she was afforded a full and fair opportunity to contest the issues in question before the SDHR.

In opposition to defendants' arguments, plaintiff maintains that she could not have been provided with a "full and fair opportunity" to contest the issues in question, since the SDHR's determinations were made before her current charges and, thus, collateral estoppel is inappropriate.

In reply, defendants assert that plaintiff's "claims for discipline, failure to promote,

denial of overtime and retaliation were all raised in her two previous SDHR charges, both of which were dismissed... [A]ll of plaintiff's remaining claims are barred because she alleges no new facts germane to her underlying discrimination allegations." Defendants' Reply Memorandum of Law, at ¶ 12.

Defendants' final argument is that the complaint fails to state a claim. Defendants argue that plaintiff has failed to set forth any factual or legal support for her claims of racial and gender discrimination and retaliation. Specifically, she has not shown that she was passed over for promotion in favor of any non-African American or male employees. She has admitted that the complaints against her were made not by her superiors, but by the public or agencies that were not connected with her discrimination charges, and that the discipline imposed resulted from her own misconduct. *See* Exhibit "A" Complaint, at ¶ 63.

Specifically, defendants assert that plaintiff has failed to allege or prove that the two command disciplines which were issued after the later SDHR decision constituted retaliation for plaintiff's filing of those SDHR charges. In support of their position, defendants cite *Brightman v.Prison Health Serv., Inc.,* 108 A.D.3d 739, 742 (2nd Dept 2013), in which a retaliation claim was dismissed because the plaintiff "failed to raise a triable issue of fact as to whether the individuals who allegedly retaliated against her were aware that she had engaged in a protected activity..."

Defendants also note that the two command disciplines were issued eleven months after the SDHR charges were filed and that this is well beyond the period of time in which the First Department and the Court of Appeals have held a claim of retaliation will lie, absent direct evidence of that retaliation. *See Baldwin . Cablevision Systems Corp.*, 65 A.D.3d 961, 967 (1st

Dept 2009) *lv. denied.*, 14 N.Y.3d 701 (2010) (citing *Clark Co. Sch. Dist. v Breeden*, 532 U.S. 268, 273-74 (2001).

In response, plaintiff, citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) and *State of New York v. Sprint Nextel Corp.*, 41 Misc3d 511 (Sup Ct New York County 2013), argues that, in a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.

Plaintiff further asserts, relying on *Vig v. New York Hairspray Co.,L.P.*, 67 A.D.3d 140 (1st Dept 2009), that employment discrimination cases are "generally reviewed under notice pleading standards." Thus, plaintiff argues, she has met the requisite criteria to support a cause of action for race and gender discrimination.

Finally, plaintiff argues that the New York City Human Rights Law is especially plaintiff friendly. Citing *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 65 (1st Dept 2009), she argues that it "mandates that courts be sensitive to the distinctive language, purposes, and method of analysis required by the City Human Rights Law (City HRL), requiring an analysis more stringent than that called for under either title VII or the State Human Rights Law (State HRL)." Pursuant to this holding, plaintiff maintains, the CHRL requires an "independent liberal construction ...even where state and federal civil rights laws have comparable language." Plaintiff's Affirmation in Opposition to Defendants' Motion to Dismiss the Verified Complaint, at ¶ 43. Plaintiff urges that this analysis must fulfill the CHRL's "unique, broad and remedial" purposes, which go beyond those of analogous state or federal civil rights laws. *Id* at 66.

Plaintiff argues that, based on this more lenient standard, she has met her burden of stating a claim and that defendants' motion to dismiss must therefore be denied.

CONCLUSIONS OF LAW:

A civil rights claim is a personal injury claim governed by the three-year statute of limitations set forth in CPLR 214 (5). *See Alaimo v Board of Educ. of the Tri-Valley Cent. Sch. Dist.*, 650 F Supp 2d 289 (SDNY 2009). Therefore, in this matter, any claims accruing prior to June 12, 2010, will not be considered. Additionally, it appears that the plaintiff does not contest this finding.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory. *See Morone v Morone*, 50 NY2d 481 (1980). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, *supra* at 87. The credibility of the parties is not under consideration. *See S.J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338 (1974). The only question properly before the court is whether plaintiff has alleged a prima facie case. *See Brathwaite v Frankel*, 98 AD3d 444 (1st Dept 2012).

A plaintiff alleging discrimination in employment must allege 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. *See Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997). This burden is "de minimis" *Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 196 (1st Dept 1998).

In order to set forth an unlawful retaliation claim under the Executive Law § 296 (7) and Administrative Code of the City of NY § 8-107 (7), a plaintiff must allege that "(1) she has

engaged in 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." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 (2004). Here, plaintiff has failed to meet these criteria.

Although plaintiff certainly had a right to file her discrimination complaints with the SDHR, the SDHR found in both cases that there was no basis for her complaint. Here, plaintiff has failed to allege that her superiors were aware of these complaints to the SDHR. Even more significantly, plaintiff has not set forth with any specificity any adverse employment actions taken against her because of those complaints. Even assuming that her vague references to adverse actions allegedly taken against her comprise a basis for this action, she has completely failed to show a connection between these alleged adverse actions and her complaint.

Plaintiff states, in conclusory fashion, that she "was singled-out and routinely prevented from performing overtime by the named defendants." Plaintiff's Affirmation in Opposition to Defendants' Motion to Dismiss the Verified Complaint, at ¶ 21. However, plaintiff fails to set even one specific example of any adverse action taken against her. Additionally, as noted above, plaintiff has failed to submit an affidavit attesting to any actions allegedly taken against her. Therefore, her attorney's affirmation is the sole support for this allegation. Also completely lacking is any connection between such alleged actions and the issuing of the command disciplines upon which plaintiff bases this matter.

Plaintiff argues that this matter raises facts sufficient to defeat defendants' motion to dismiss under the more lenient and plaintiff friendly City Human Rights Law, especially in light of the Local Civil Rights Restoration Act of 2005. Plaintiff's Affirmation in Opposition to

Defendants' Motion to Dismiss the Verified Complaint, at ¶ 41. However, even under this more "plaintiff friendly" local law, the plaintiff must still set forth facts supporting her claim. Even in *Williams, supra*, the case on which plaintiff primarily relies, the court held that the CHRL requires that a plaintiff must be able to link the complained of actions " to a retaliatory motivation." *Id.*, at 71. *Williams* also notes that, for a retaliation claim to succeed, there must be a showing that the plaintiff was treated differently than other employees who did not make discrimination claims. Plaintiff utterly fails to make such a showing. In *Willliams*, like the present matter, the plaintiff failed to set forth facts supporting her allegations. *Williams* held that "liability should be determined by the existence of unequal treatment..." *Id.*, at 77. It went on to note that "we recognize that the broader purposes of the City HRL do not connote an intention that the law operate as a 'general civility code' ...whereby defendants can still 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'." *Id.*, at 80-81. Here plaintiff fails to even allege that male, non-African Americans were treated differently or that the acts she alleges were discriminatory were committed either in retaliation for her filing of SDHR charges or because she was an African American. Indeed, she admits that there were non-discriminatory reasons for the issuance of the disciplines.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants' motion pursuant to CPLR 3211 (a) (2), (5), and (7) for an order dismissing the amended complaint is granted; and it is further,

ORDERED that the Complaint herein is dismissed; and it is further,

ORDERED that defendants City of New York, New York City Police Department, Captain Hedy Hubbard, Supervisor Jeanette Gonzalez, and Inspector Michael Pilecki are to serve this order, with notice of entry, on counsel for the plaintiff and on the Trial Support Office, 60 Centre Street, Room 158; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: June 9, 2014

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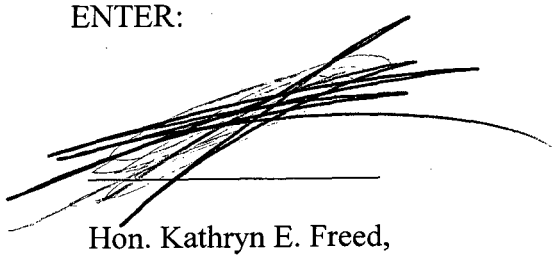

Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT