SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 52

TRUDY SILVER,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND EILEEN REITER, individually and on behalf of the Department of Education of the City of New York and CARMEN COLON, individually and on behalf of the Department of Education of the City of New York,

Defendants.

Index Number: 155003/2013

DECISION/ORDER

HON. MARGARET CHAN

Justice, Supreme Court

In motion sequence #001, defendants the Department of Education of the City of New York, the Board of Education of the City School District of the City of New York, Eileen Reiter, and Carmen Colon (collectively, defendants) made the instant motion to dismiss. Plaintiff submitted opposition, to which defendants replied. In motion sequence #002, plaintiff moved to "supplement the record" which was in actuality an impermissible sur-reply to motion sequence #001. The decision and order on motion sequence #001 is as follows and the motion sequence #002 is denied as the motion itself was improper. The additional submissions contained in plaintiff's moving papers in motion sequence #002 were not relied upon in this decision and order.

Plaintiff, a teacher employed by Department of Education of the City of New York (DOE), brought suit asserting claims of disparate treatment, hostile work environment, and discriminatory and retaliatory treatment based on her age (Amended Complaint, para 22). The amended complaint also alleged facts and claims that sounded in violations of State and City Human Rights Laws (*see* Executive Law § 296 *et seq.*, and Administrative Code of the City of New York § 8-107 *et seq.*, respectively). Plaintiff claimed that the individual defendants, Eileen Reiter, a principal, and Carmen Colon, an assistant principal, "aided, abetted, incited, compelled and [sic] or the aforementioned unlawful conduct in violation of New York [sic]" (Amended Complaint, para 20).

The relevant allegations in the amended complaint are as follows: Plaintiff, who was 60 years old at the time of the commencement of this action, was employed as a music teacher with the DOE since 1987. Plaintiff claimed that a "false letter" was submitted to her personnel file on or about December 19, 2012.[1] Plaintiff claimed the letter itself was the result of age discrimination. In April 2013, plaintiff was observed and received unsatisfactory informal observations. In June 2013, plaintiff received an unsatisfactory annual performance review ("2013 U rating"). Plaintiff claimed that she

[1] There was no explanation of what was contained in the "false letter."

came under disparate "microscopic scrutiny" by defendants Reiter and Colon, whom allegedly papered her personnel file with baseless and defamatory charges. Despite this claim, the only paper plaintiff made reference to is the "false letter." Plaintiff also claimed that other teachers who were 50 years of age or older had been targeted by the defendants and/or that they were "systematically denied TC training"[2] (Amended Complaint, para 16). Plaintiff does not elaborate how these other teachers were targeted in the amended complaint. Furthermore, plaintiff alleged that the "procedure set forth [in the amended complaint] was improper and in violation of DOE policy. However, no procedure is specified (Amended Complaint, para 17). Plaintiff was removed from her classroom and replaced by a younger teacher (Amended Complaint, para 10). Plaintiff alleged that defendant Reiter stated to her "you are done" on April 24, 2013, and at other times defendant Colon made comments to plaintiff about her memory and retirement. Plaintiff's amended complaint also seeks damages for back pay, however, there were no allegations in the amended complaint regarding a loss of wages. During oral argument of this motion, plaintiff conceded that for the 2014 annual performance review, plaintiff was rated as satisfactory.

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 complaint shall 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, 87 [1994]). 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]).

"[E]mployment discrimination cases are themselves generally reviewed under notice pleading standards" and plaintiff is not required to establish his *prima facie* case with any heightened level of specificity beyond what the CPLR requires (*Vig v New York Hairspray Co.*, L.P., 67 AD3d 140 [1st Dept 2009]). However, CPLR § 3013 still requires that the allegations in the pleadings alleging discrimination are "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." (*Phillips v City of New York*, 66 AD3d 170, 189 [1st Dept 2009]).

For a cause of action invoking protections under both the State and City Human Rights Laws a plaintiff must assert that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action was due to circumstances that could be deemed discriminatory (*see* Executive Law § 296 *et seq.*; Admin. Code § 8-107 *et seq.*; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Once 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 defendants produce such evidence, plaintiff must then show that the reason given is pretext for discrimination (*see Ferrante v American Lung Ass'n*, 90 NY2d 629–630 [1997]).

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[2] There was no clarification of what constitutes "TC training."

Addressing plaintiff's claims of discrimination under State and City Human Rights Laws, it was not disputed that plaintiff is a member of a protected class and is qualified for her position. Plaintiff's amended complaint stated that she was adversely affected due to the placement of the "false letter" in her personnel file, the denial of "TC training," the 2013 U rating, and the removal from her classroom.

For an employment action to be adverse, plaintiff must demonstrate that it affected a change in the terms and conditions of employment "more disruptive than a mere inconvenience or an alteration of job responsibilities." (*Forrest*, 3 NY3d at 306). Termination, a demotion, decrease in wages, or loss of a material benefit are materially adverse changes (*see Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 [2d Cir 2000]). Plaintiff cited to the second circuit case of *Sanders v. New York City Human Resources Admin.*, 361 F3d 749, 756 (2d Cir 2004), for the proposition that a critical job evaluation may constitute an adverse employment action. However, the *Sanders* court reframes the issue as whether a "negative job evaluation *must* constitute adverse employment action as a matter of law" (*id.* [emphasis in original]), and the court concludes it does not.[3] The First Department found that negative evaluations and even "excessive scrutiny do not constitute adverse employment actions in the absence of other negative results such as a decrease in pay or being placed on probation" (*Mejia v Roosevelt Island Medical Associates*, 95 AD3d 570 [1st Dept 2012][internal citations omitted]). Here, as an issue of law, the complaint does not proffer an adverse employment action. Therefore, plaintiff failed to state a cause of action. Thus, these claims are dismissed.

As to plaintiff's retaliation claims under both the State and City Human Rights Laws, it is unlawful to retaliate against someone for opposing discriminatory practices (*see* Executive Law § 296 (7); Administrative Code § 8-107(7)). A claim of unlawful retaliation requires plaintiff to show that (1) she engaged in protected activity, (2) her employer was aware that he participated in such activity, (3) she suffered adverse employment action based on the activity, and (4) there is a causal connection between the protected activity and the adverse action (*see Forrest v Jewish Guild for the Blind*, 3 NY3d at 312). The State Human Rights Law specifically directs the courts to construe the statute liberally (*see* Executive Law § 300). Under the broader interpretation of the City Human Rights Laws, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." (Administrative Code § 8-107(7)).

Plaintiff argued that the protected activity was filing a notice of claim for the instant action on April 24, 2013. It was alleged that plaintiff pulled on the arm of a special needs student resulting in him falling down on April 18, 2013. That incident formed the basis of several negative reports. On April 19, 2013, plaintiff was informally observed at a music performance that she planned with her various music classes. That informal observation report, which was signed in May 2013, was also

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[3] The *Sanders* court pointed to the case of *Treglia v. Town of Manlius*, 313 F3d 713, 720 (2d Cir 2002), for contrast, where a negative job evaluation constituted an adverse employment action. However, the *Treglia* decision was, in part, premised on the holding in *Morris v Lindau*, 196 F3d 102, 110 (2d Cir 1999), which has since been abrogated.

negative. The 2013 U rating was based, in part, on the incident with the special needs student and the negative informal observation that *preceded* the notice of claim. The alleged retaliatory activity cannot be *prior* to the protected activity. Therefore, plaintiff's retaliation claims also fail.

As to plaintiff's hostile work environment claim, it is also dismissed. Plaintiff failed to show that her workplace was "permeated with discriminatory intimidation, ridicule and insult that [was] sufficiently severe or pervasive to alter the conditions of [her] employment" (*see Harris v Forklift Sys.*, 510 US 17, 21 [1993] [citations and quotations omitted]). Plaintiff alleged that administrators made comments about her memory and discussed retirement. Those claims are insufficient to satisfy the legal standard; it was not even indicated that the comments concerning plaintiff's memory or retirement were negative in any way. The stray comment "you are done" that plaintiff claimed was uttered by defendant Reiter was an isolated remark and did not sufficiently make out a hostile work environment claim (*see Witchard v Montefiore Medical Center*, 103 AD3d 596 [1st Dept 2013]; *Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 [1st Dept 2011]).

Plaintiff also failed to allege any facts to support her aiding and abetting claims against the individual defendants Reiter and Colon. Therefore this cause of action also fails (*see Forest v Jewish guild for the Blind*, 3 NY3d at 329).

Accordingly, defendants' motion to dismiss is granted in its entirety and the complaint is dismissed. The clerk of the court is directed to enter judgment as written.

This constitutes the decision and order of the court.

Dated: December 10, 2014

Margaret A. Chan , *J.S.C.*