Alderman v Department of Educ. of the City Of New York
2019 NY Slip Op 31181(U)
April 26, 2019
Supreme Court, New York County
Docket Number: 161100/2017
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
----------X

ANDREW ALDERMAN,

Petitioner,

v

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,

Respondent.

----------X

Index No. 161100/2017

DECISION AND ORDER

MOT SEQ 004

NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, the petitioner, Andrew Alderman, seeks to review a determination of the respondent Department of Education of the City of New York (DOE)[1] mistakenly dated August 18, 2017, and mailed on September 18, 2017, terminating the petitioner from a probationary teaching position with DOE. The petitioner further seeks reinstatement and a name-clearing hearing. The respondent cross-moves pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss the petition on the ground that it fails to state a cause of action. The cross-

[1] The DOE advises that it is, formally, the Board of Education of the City School District of the City of New York.

motion is granted, the petition is denied, and the proceeding is dismissed.

II. DISCUSSION

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference." Matter of Eastern Oaks Dev., LLC v Town of Clinton, 76 AD3d 676, 678 (2nd Dept. 2010); see Leon v Martinez, 84 NY2d 83 (1994); Matter of Gilbert v Planning Bd. of Town of Irondequoit, 148 AD3d 1587 (4th Dept. 2017); Matter of Schlemme v Planning Bd. of City of Poughkeepsie, 118 A.D.3d 893 (2nd Dept. 2014); Matter of Ferran v City of Albany, 116 AD3d 1194 (3rd Dept. 2014). "In determining motions to dismiss in the context of [a CPLR] article 78 proceeding, a court may not look beyond the petition . . . where, as here, no answer or return has been filed." Matter of Scott v Commissioner of Correctional Servs., 194 AD2d 1042, 1043 (3rd Dept. 1993); see Matter of Ball v City of Syracuse, 60 AD3d 1312 (4th Dept. 2009). "Whether a plaintiff [or petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 (2005).

The petitioner, a gym teacher formerly appointed by the DOE, subject to a four-year probationary period, alleges that the DOE acted arbitrarily and capriciously, in violation of lawful procedure, and in bad faith in discontinuing his probationary service. The DOE's decision was based on allegations at the Bronx elementary school where the petitioner was teaching that he engaged in professional misconduct and verbal abuse over a one-year period. Specifically, letters in the petitioner's file describe instances where, *inter alia*, (1) the petitioner confronted and refused to allow his colleague to remove a student from his class for academic services; (2) the petitioner failed to prepare a written lesson plan; (3) the petitioner called a student "trash" and "not college material," asked the student to spell big words as though the student could not spell, and asking him to put the words "shut" and "up" together; (4) the petitioner called a female student "disgusting" for biting her nails and asked her how her "shit" tasted, called another student a "bitch," and told a group of students that they were "zeros" and "would always be zeros"; and (5) the petitioner told his elementary school class that "statistically 80% of [them] will end up in a gang, jail, pregnant, or dead."

With some exceptions,[1] the petitioner does not deny the substance of the foregoing events, but offers various explanations and alternative interpretations for his behavior. For example, the petitioner states that he did not call his female student "disgusting," but said that her behavior in biting her nails was disgusting, and that he did not say "shit," but was making a point to her that when she bit her nails after using the bathroom she was putting germs in her mouth. With regard to item (5), the petitioner does not deny making that statement but avers that he merely intended to communicate to his class that their behavior influences their future and that they needed to "start turning things around if they wanted to be on the college track." The petitioner's explanations aside, his most serious contentions are that the investigation conducted by DOE was flawed and that the DOE did not provide him with requisite notice of his discharge. The petitioner, a Caucasian male, also claims that he was discriminated against on the basis of his race.

"It is well established that a probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose or in violations of law." Matter of Francois v Walcott, 136 AD3d 434, 434 (1st Dept 2016) (internal quotation marks and citation omitted). The burden of

[1] The petitioner denies that he used the word "bitch." However, the DOE avers that this particular accusation was not substantiated and was not a basis for his termination.

proving such an improper basis for the termination lies with the petitioner. Matter of Witherspoon v Horn, 19 AD3d 250 (1st Dept 2005). Speculation or conclusory allegations of bad faith are not sufficient to sustain that burden. See Matter of Brown v Board of Educ. of City Sch. Dist. of City of N.Y., 156 AD3d 451 (1st Dept 2017).

The petitioner asserts that the DOE did not follow its own protocols in investigating the verbal abuse allegations made against him. The petitioner cites to the investigatory procedures of Chancellor's Regulation A-421. The guidelines the petitioner alleges were not followed do not appear in Chancellor's Regulation A-421, but the petitioner avers that they are available at a link in the footnote to that regulation. The link is no longer available, and the petitioner does not attach any copy of the web page he refers to. Nonetheless, taking the petitioner at his word, the page provides in relevant part that the school administration should "try" to interview at least "1/3 of all potential witnesses," that "it is advisable" to have a neutral party sit in as an observer, and that the administration should start with general background questions to put the student at ease. The petitioner admits that he does not know how many students were interviewed with regard to the allegations against him, but believes that three to five statements were taken from his class of 48 students. The petitioner also "believes,"

without providing any basis for his beliefs, that there was no neutral party present and that the interviewer did not start with background questions.

Even if the petitioner were able to prove the foregoing claims, he would not show that the DOE acted in violation of law or in bad faith by failing to precisely adhere to protocol that appears, on its face, to be recommended, rather than mandatory. This is particularly so in light of the fact that the petitioner has admitted to the majority of the conduct he was accused of and that the petitioner does not challenge the sufficiency of the investigations into the petitioner's professional misconduct charges.

The petitioner further alleges that the interviews were conducted by the assistant principal. The petitioner avers that this was done in contravention of Chancellor's Regulation A-421, VI, A, which provides in relevant part that allegations of verbal abuse shall be investigated "either by [the Office of Special Investigations (OSI)] or by the school at which the incident occurred. After OSI receives a report of verbal abuse, OSI will inform the principal whether OSI will conduct the investigation or whether the principal must conduct a School-Based Investigation." According to the petitioner, this language permits only a principal to conduct interviews. The petitioner's argument is unpersuasive, as the regulation provides that "the

school" may conduct an investigation, and there is no indication in the language of the regulation that individual interviews cannot be conducted by a member of the administration other than the principal.

As to the petitioner's claim that he did not receive proper notice pursuant to Education Law § 2573(1)(a), the DOE correctly points out that when a probationary teacher's service is discontinued by denial of tenure at the end of the probationary period, the teacher has a right to sixty days' notice. However, when a probationary teacher's service is discontinued by termination before the end of the probationary period, for reasons other than denial of tenure, the notice requirement is as provided by Education Law § 3019-a. Pursuant to Education Law § 3019-a, the terminated teacher shall be given thirty days' written notice. Here, the DOE had only to comply with the shorter notice requirement because the petitioner's probationary service was terminated after his first year of teaching and well before the end of his probationary period. Since the DOE provided the petitioner with 31 days' notice, it fulfilled its obligations under the statute.

The petitioner also claims that he was discriminated against due to his race. To make out a claim of unlawful employment discrimination evidencing bad faith, the petitioner has the initial burden to establish that: 1) he or she is a member of a

protected class; 2) he or she was qualified to hold the position; 3) he or she was terminated from employment or suffered an adverse employment action; and 4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination See Langton v Warwick Val. Cent. Sch. Dist., 144 AD3d 867 (2nd Dept. 2016). 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. Id.

The petitioner makes his discrimination claim based on his own allegations that he was not invited to attend a school trip on which other non-white colleagues went, was instructed to post pictures of nonwhite athletes rather than white athletes such as Wayne Gretzky, was asked to teach his students dances that nonwhite children could relate better to instead of square dancing, and was harassed by a parent who called him an "uppity white Jew boy who doesn't belong in the neighborhood." The petitioner further opines that he "believes other Caucasian teachers have had similar difficulties and trumped up charges including the music teacher," without any further explanation or support.

Based on the foregoing, the petitioner has not alleged circumstances that, if true, would give rise to an inference of

discrimination on the part of the school administration. Moreover, where, as here, there are specific reasons for termination based on professional misconduct and verbal abuse, bare conclusory allegations of discrimination will not sufficient to raise an issue of bad faith. See Cohen v Koehler, 82 NY2d 882 (1994); Matter of Muller v New York City Dept. of Educ., 142 AD3d 618 (2nd Dept. 2016); see also Matter of Messenger v State of New York Dept. of Corr. & Community Supervision, 151 AD3d 1433 (3rd Dept. 2017).

For all of the foregoing reasons, the petitioner fails to state a claim for article 78 relief, and the petition must be dismissed.

Turning to the petitioner's request for a name-clearing hearing, a probationary employee may invoke the protections of the Due Process Clause where the employee has suffered a loss of reputation coupled with the deprivation of a more tangible interest, such as government employment. See Segal v City of New York, 459 F3d 207 (2nd Cir. 2006); Patterson v City of Utica, 370 F3d 322 (2nd Cir. 2004). To state a claim for deprivation of a liberty interest in reputation, known as a "stigma-plus" claim, the former government employee must show (1) that the government made stigmatizing statements about him, which call into question his good name, reputation, honor, or integrity, (2) that the statements were made public, and (3) that the statements were

made concurrently with, or in close temporal relationship to, the employee's dismissal. See Segal v City of New York, supra. The remedy for the deprivation of a constitutionally protected interest in reputation is a name-clearing hearing. See Codd v Velger, 429 US 624 (1977); Aquilone v City of New York, 262 AD2d 13 (1st Dept. 1999). Even assuming that the petitioner has satisfied the foregoing requirements, "the availability of adequate process defeats a stigma-plus claim." Segal v City of New York, supra at 213. Process adequate to protect the reputational and professional interests of a terminated probationary teacher includes the availability of a post-termination C-31 administrative hearing. See id.; Kahn v New York City Dept. of Educ., 79 AD3d 521 (1st Dept. 2010). Since this process remains available to the petitioner, his request for a name-clearing hearing is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that the respondent's motion to dismiss the petition is granted; and it is further,

ORDERED and ADJUDGED that the petition is denied in its entirety, and the proceeding is dismissed.

This constitutes the Decision and Order of the court.

Dated: April 26, 2019

ENTER: _____

J.S.C.
HON. NANCY M. BANNON