

**Reaves v New York City Dept. of Educ.**

2020 NY Slip Op 32480(U)

June 3, 2020

Supreme Court, Queens County

Docket Number: 707928/2019

Judge: Joseph J. Esposito

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO  
-----X  
CHRISTINE REAVES and MAYA FRISCICGEIGER,  
on behalf of themselves and all other similarly  
situated persons,

Part 6

FILED  
6/4/2020  
11:55 AM  
COUNTY CLERK  
QUEENS COUNTY

Plaintiff,

Index No.: 707928/2019

-against-

Motion Seq No.: 2

THE NEW YORK CITY DEPARTMENT OF  
EDUCATION and P.S. 60 QUEENS PRINCIPAL  
FRANK DESARIO,

Motion Date: 01/27/2020

Defendant,  
-----X

The following papers numbered read on this motion by defendant, The New York City Department of Education (DOE) and Frank Desario, (Desario), for an order, pursuant to CPLR Section 3211(a)(5) and (7), on the grounds that plaintiffs’ claims are time-barred in part and that the complaint otherwise fails to state a cause of action for gender discrimination, retaliation, and hostile work environment under Executive Law §§ 290, et seq., the New York State Human Rights Law (“SHRL”) and New York City Administrative Code §§ 8-101, et seq., the New York City Human Rights Law (“CHRL”) for plaintiff Reaves; and gender discrimination and retaliation under the SHRL and CHRL for plaintiff Geiger, and negligence, negligent hiring, supervision, and training, intentional infliction of emotional distress and negligent infliction of emotional distress under state common law tort claims for both plaintiffs and granting defendants such other and further relief as the Court deems just and proper.

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**Statement of Facts**

Plaintiff Christine Reaves alleges, *inter alia*, intentional infliction of emotional distress, negligence, retaliation, hostile work environment and negligent supervision. Plaintiff alleges that she experienced harassment from Principal Desario during the 2016-2017 school years, which intensified into extreme and outrageous behavior during the 2018 school year. On or about August 30, 2018, plaintiff Reaves filed eleven grievances against DOE and Desario. The grievances are not general in nature and outline the essential facts of her claims against

defendant Desario. On September 14, 2018, her union filed another contract grievance arising from Desario's change of her teaching assignment. On September 28, 2018, plaintiff, through her Union, served a special complaint to District 27 Superintendent Jennifer Carreon-Ambert pursuant to Article 23 of Reaves' union's collective bargaining agreement. On October 2, 2018, plaintiff Reaves alleges that she submitted to DOE two clinic diagnoses that she suffered extreme emotional harm caused by workplace harassment. On November 5, 2018, Reaves counsel contacted Lawrence Becker, the Chief Executive Officer for DOE's Division of Human Resources by email and attached a copy of the Special Complaint and Mr. Becker acknowledged receipt of the email on November 7. On November 9, 2018 there was a meeting between Superintendent Jennifer Carreon-Ambert and Christine Reaves, Reaves' counsel and her union representative. On November 27, 2018, Superintendent Carreon-Ambert sent a letter to Reaves stating that she conducted an investigation to review Reaves' grievances and found no evidence of harassment and therefore would not be taking further action.

Plaintiff Maya Friscic-Geiger alleges that since 1999 when defendant Desario became Principal of P.S.60, she has been subjected to gender-based abuse and sexual harassment. She further states that Desario's abuse and harassment had taken the form of threatening, intimidating and abusive behavior. Plaintiff Geiger recalls various instances during which DeSario subjected her to a pattern of unwanted and inappropriate comments about her physical appearance and at the time this conduct was a daily occurrence. Ms. Friscic-Geiger also alleges that Desario has made frequent and unwanted romantic overtures towards her and inappropriate physical contact. On May 23, 2019, Geiger filed a proposed summons for Desario in the United States District Court, Eastern District. On the next business day, defendants served a disciplinary summons upon Geiger threatening her with disciplinary action based upon false and pretextual allegations of conduct which she had not committed. On June 13, 2019, plaintiff Geiger alleges that she was issued two other disciplinary letters.

### **CPLR 3211(a)(5) – Statute of Limitations**

The defendants argue that the statute of limitations for SHRL or CHRL claims against the DOE and its officers is one year pursuant to Education Law §3813(2-b). However, a three-year limitations period applies to SHRL or CHRL claims against school principals (*Konteye v NYC Dept of Educ*, 2019 US Dist LEXIS 62794 [2019]). Defendants state a claim for Intentional Infliction of Emotional Distress (IIED) accrues when each of the elements of the tort could be truthfully alleged in a complaint (*Reilly v Garden City Union Free Sch Dist*, 89 AD3d 1075 [2d Dept 2011]). Claims for IIED are governed by a one-year statute of limitations, pursuant to NY CPLR §215(3). Negligence claims accrue on the date of the alleged incident (*Rist v Town of Cortlandt*, 56 AD3d 451 [2d Dept 2008]). The statute of limitation for a negligence claim against the DOE or any teacher or member of the supervisory or administrative staff or employee is one year and ninety days from the accrual date of the claim (*Robinson v Bd of Educ of City Sch Dist of City*, 104 AD 3d 666 [2d Dept 2013]).

The plaintiffs argue that the original complaint was filed on May 6, 2019, thus all claims against Desario are timely if they accrued after May 6, 2016. All of Reaves' allegations against Desario occurred after May 6, 2016 and thus, are timely on their face. Reaves also alleged that Desario's abusive conduct intensified from mid-May 2018 through June 26, 2018. She did not

receive a diagnosis of severe emotional distress until September 21, 2019. Even if her severe emotional distress were deemed to have occurred at an earlier point, her IIED claim could not have accrued any earlier than June 26, 2019 and thus it is timely. Plaintiffs' negligence claims are also timely as plaintiffs allege that DOEs negligent supervision and training remain ongoing, and at the least, accrued after February 5, 2018.

“On a motion to dismiss a complaint pursuant to CPLR Section 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prime facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable” (*Shah v Exxis, Inc.*, 138 AD3d 970 [2d Dept 2016]). Here, the defendants assert the dates on which the claims were officially time-barred based on when the alleged actions occurred. Plaintiff, in opposition, argue that the statute of limitations is inapplicable as all the alleged actions happened within the one-year limitation against the DOE and three-year limitation against Desario, respectively. Therefore, the Court finds that the SHRL and CHRL claims against the DOE and Desario are not time-barred. The Court further finds that plaintiff has raised an issue of fact as to whether the claims against the DOE and Desario are not time-barred and therefore these claims are not dismissed.

### **CPLR 3211(a)(7) – Failure to State a Cause of Action**

In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211(a)(7), the “sole criteria is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory (*Dye v Catholic Med Ctr of Brooklyn & Queens*, 273 AD2d 1993 [2d Dept 2001]). The court is not concerned with determinations of fact or the likelihood of success on the merits (*Detmer v Acampora*, 207 AD2d 477 [2d Dept 1994]).

#### *I. Discrimination Claims*

Defendants note that discrimination claims under the SHRL and CHRL are analyzed using the three-step burden-shifting framework (*McDonnell Douglas Corp v Green*, 411 US 792 [1973]). The plaintiff has the initial burden to establish a *prima facie* case of discrimination (*Id*). In order to meet this burden, the plaintiffs must plausibly allege that: (1) they are a member of a protected class; (2) they were qualified to hold the position; (3) they suffered an adverse employment action; and (4) the circumstances of the adverse action give rise to an inference of discrimination (*Baldwin v Cablevision Sys Corp*, 65 AD3D 961 [1<sup>st</sup> Dept 2009]). If plaintiff satisfied this requirement, the burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the employment action (*Id*). If the employer then meets its burden, the plaintiff must establish the legitimate reason offered by the defendant was pretextual, and that in fact discrimination motivated the adverse employment action (*Id*). Defendants assert that the plaintiffs have failed to allege a plausible claim that any of the alleged actions occurred under circumstances which rise to an inference of gender discrimination. The defendants further

contend that none of the comments made towards the plaintiffs are tied to any alleged adverse action and are not discriminatory *animus* on the part of Desario. The defendants add that none of the allegations in the complaint made by either plaintiffs allege that male employees were treated more favorably.

Contrary to the defendants' arguments, this court finds that the plaintiffs have alleged specific instances which suggest that their gender may have been one of the motivating factors in the alleged adverse employment actions taken by the defendants. Therefore, defendants' motion is denied in part regarding the plaintiff's claim of gender discrimination pursuant to SHRL and CHRL.

## II. Retaliation

The Defendants state that plaintiff Reaves' allegation that she was retaliated against for "offering any response at all to Desario's groundless accusations, no matter how polite or respectful" does not allege any protected activity. The Defendants further note that plaintiff Geiger has not alleged any facts that Desario knew that Geiger filed a NOC, filed a proposed summons on May 23, 2018, or that Desario knew Geiger sat for a 50-h hearing on June 11, 2019. Therefore, the defendants state that plaintiff Geiger's retaliation claims also fail for failure to plead an adverse action. The defendants further add that the disciplinary letters that were served on the plaintiff do not dissuade a reasonable worker from making a charge of discrimination. The directives implementing new and punitive policy changes materially and adversely impacting all school staff, regardless of gender, were not actions taken against her.

The plaintiffs state that the CHRL does not require a showing of adverse action in a retaliation claim and that they both clearly satisfied the requirements for retaliation under the standards of the CHRL and SHRL. The plaintiffs further assert that the defendants took discriminatory actions designed to punish the plaintiffs and deter women from coming forward with their own claims, or to support the litigation.

To sufficiently plead a cause of action for retaliation, plaintiff must allege that "(1) she engaged in a 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 [2004]). Here, the plaintiffs incorrectly state that a showing of an adverse action in a retaliation claim is not required. Nevertheless, plaintiff Reaves states a cognizable cause of action for retaliation; since she alleged that she suffered adverse employment action based upon engaging in protected activities. However, plaintiff Geiger failed to plead any adverse action as the disciplinary letters that were served do not dissuade a reasonable worker from making a charge of discrimination; and it further addresses the directives implementing new and punitive policy changes materially and adversely impacting all school staff, regardless of gender, and they were not actions taken against her. Therefore, defendants' motion for an order to dismiss plaintiff Reaves' cause of action for retaliation is denied; but dismissal of plaintiff Geiger's cause of action for retaliation is granted.

### III. *Hostile Work Environment*

The defendants argue that Reaves' allegations to support her hostile work environment are nothing more than workplace criticisms and do not rise to the level of severe or persuasive. The defendants argue that plaintiff Reaves only provides a few generalized examples of Desario's behavior such as lengthy meetings and criticisms about her penmanship and the maintenance of her bulletin boards, which an objective person would not find to be a hostile work environment.

The defendants further note that Reaves does not allege that Desario's actions were directed towards her due to her gender. Reaves argues that the defendants confuse the hostile work environment claims with disparate treatment claims on the grounds that they do not constitute "adverse employment action." Plaintiff states that under SHRL, a hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment (*Croc v Town of Haverstraw*, 146 AD3d 748 [2d Dept 2017]). Under CHRL, it must be construed more broadly and only need to demonstrate by a preponderance of the evidence that she has been treated less well than other employees because of her gender (*Suri v Grey Global Group, Inc*, 164 AD3d 108 [2018]). Plaintiff states that the pleadings detail numerous instances of Desario's hostile and abusive treatment of women and pleads that he does not treat men in the same fashion.

Where a plaintiff makes claims of a hostile work environment, dismissal under CPLR 3211(a)(7) will be granted where the facts in support of plaintiff's allegations of such an environment fall short of alleging that the workplace was permeated with discriminatory intimidation, ridicule and insult that sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment (*Torres v Louzoun Enterprises, Inc.*, 105 AD3d 945 [2d Dept 2013]). Whether an environment is hostile or abusive can be determined only by looking at all circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course relevant to determining whether the plaintiff actually found the environment abusive'" (*Forrest*, 3 NY3d 295 [2004]). In the case at bar the Court finds that the plaintiffs have provided sufficient evidence in support of their allegation of a hostile work environment. Therefore, defendant's motion to dismiss plaintiffs' cause of action of hostile work environment is denied.

### IV. *Negligence*

Defendants argue that plaintiffs' negligence claim against the DOE must be dismissed because an employee cannot maintain an action for negligence against its government employer absent a special duty (*Johnson v NYC Bd of Educ*, 249 AD2d 370 [2d Dept 1998]).

The elements of a special relationship which will give rise to such a special duty are (1) the assumption by the municipality or governmental entity through promises or actions of an

affirmative duty to act on behalf of the injured party, (2) knowledge on the part of the municipality or governmental entity that inaction could lead to harm, (3) some form of direct contact between the agents of the municipality or governmental entity and the injured party, and (4) justifiable reliance by the injured party on this affirmative undertaking” (*Moreno v City of New York*, 27 AD3d 536 [2d Dept 2006]). In the instant case, the Court finds that there was in fact no special relationship between the DOE and the plaintiffs. Plaintiffs’ status as teachers is insufficient without more, to create the requisite special duty (*Bisignano v City*, 136 AD2d 671 [2d Dept 1988]). Plaintiffs failed to provide evidence of any other promises or actions of affirmative duty by the DOE and as such, plaintiffs’ negligence causes of action are dismissed.

V. *Negligent Hiring, Supervision, and Training Against Defendant BOE*

The defendants argue that plaintiffs’ claims for negligent hiring, supervision and training should also be dismissed for failure to state a cause of action and failure to identify the claims in their NOCs. Defendants add that there is no common-law duty to implement specific procedures for hiring employees “unless the employer knows of facts that would lead to a reasonably prudent person to investigate the prospective employee (*Jackson v New York Univ Downtown Hosp*, 69 AD3d 801 [2d Dept 2010]). Defendants state that the plaintiffs’ claim for negligent hiring have not alleged any facts that would suggest that defendant DOE knew of any reason that would lead a reasonably prudent person to investigate DeSario when they hired him. Plaintiff further failed to state any laws, rules, regulations or best practice standards that DeSario allegedly violated and therefore, their claims for negligent training and supervision must be dismissed.

Plaintiffs contend that the core of these causes of action is that DOE knew or should have known about Desario’s abusive and sexually harassing conduct, but nonetheless failed to address it. Plaintiffs state where a complaint pleads a history of misconduct, and an employer’s knowledge of the abusive behavior, the Complaint has pleaded claims sufficient to survive a motion to dismiss (*Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc 3d [2003]).

In the instant case, DOE was made aware of Desario’s conduct after the plaintiffs complained. Plaintiffs do not allege that Desario had a history of misconduct or that other complaints were made against him. Therefore, defendant DOE was not aware of any facts that would lead to an investigation into DeSario. Accordingly, the branch of defendants’ motion to dismiss the cause of action for negligent hiring, supervision and training against DOE is granted.

VI. *Plaintiffs Fail to State Cause of Action for IIED and NIED Against Defendant Desario*

To state a claim for IIED against an individual defendant, a plaintiff must allege and establish: (1) extreme and outrageous conduct; (2) with the intent to cause emotional distress; (3) a causal connection between the conduct and the alleged injury; and (4) that plaintiff has suffered severe emotion distress (*Howell v New York Post Co*, 81 NY2d 115 [1993]). Defendants state that adverse employment actions are simply not a sufficient basis for an IIED claim, even when coupled by verbal harassment (*Fahmy v Duane Reade, Inc*, 2005 US Dist LEXIS 20929 [2005]). Further, defendants argue that a claim of NIED generally requires that the breach of the

duty owed to the injured party must have at least endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety (*Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]). In the case at bar, defendants note that neither plaintiffs allege any actions that endangered their physical safety or caused them to fear for their own safety.

“With respect to the tort of negligent infliction of emotional distress, a breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness” *Taggart*, 131 AD3d 243 [2d Dept 2015]). “The Court of Appeals of New York has required that the mental injury be a direct, rather than a consequential, result of the negligence, and that the claim of emotional distress possess some guarantee of genuineness” (*Id*). Further, “when severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for the IIED” (*Nader v General Motors Corp*, 25 NY2d 560 [1970]). The Court finds that the plaintiffs have sufficiently alleged that their mental anguish was a direct result of Desario's actions and that there were several instances when plaintiffs were concerned of their physical safety when Desario held constant meetings in his office. Additionally, for both IIED and NIED, the court agrees that the outrageous nature of the conduct can be established when it arises from the abuse of a position of power (*Vasarhelvi v New School for Social Res*, 230 AD2d 658 [1<sup>st</sup> Dept 1996]).

Accordingly, it is ORDERED that the branch of the defendants' motion to dismiss plaintiffs' claims, pursuant to CPLR Section 3211(a)(5), is denied.

It is further ORDERED that the branch of defendants' motion to dismiss plaintiffs' claims pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action for gender discrimination against them is similarly denied.

It is further ORDERED that the branch of defendants' motion to dismiss pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action for retaliation by plaintiff Christine Reaves is denied; and the branch of defendants' motion to dismiss for failure to state a cause of action for retaliation by plaintiff Maya Friscic-Geiger is granted.

It is further ORDERED that the branch of defendants' motion to dismiss pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action for hostile work environment is denied.

It is further ORDERED that the branch of defendants' motion to dismiss pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action for negligence is granted.

It is further ORDERED that the branch of defendants' motion to dismiss pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action for negligent hiring, supervision or training against DOE is granted.

It is further ORDERED that the branch of defendants' motion to dismiss pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action for NIED and IIED is denied.



The foregoing constitutes the decision and order of this court.

Dated: June 3, 2020



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JOSEPH J. ESPOSITO, J.S.C..

FILED  
6/4/2020  
11:55 AM  
COUNTY CLERK  
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