Shinaul v New York City Dept. of Corr.
2021 NY Slip Op 31806(U)
May 25, 2021
Supreme Court, New York County
Docket Number: 150454/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5

Justice

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SHAMAR SHINAUL,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF CORRECTION, CITY OF NEW YORK

Defendant.

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INDEX NO. 150454/2020

MOTION DATE 07/20/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

Plaintiff, Shamar Shinaul (plaintiff), an African American male employed by defendants the City of New York and New York City Department of Correction (DOC) (collectively, the City) as a correction officer, commenced this action seeking damages stemming from his suspension from employment under the Civil Service Law (CSL), New York City Human Rights Law (NYCHRL), and New York State Human Rights Law (NYSHRL). The City now moves pursuant to CPLR 3211(a)(7) to dismiss the complaint. Plaintiff opposes the motion. For the following reasons, the City's motion is granted.

BACKGROUND

Plaintiff commenced his employment with the DOC approximately ten years before the filing of this action (NYSCEF # 7, compl at ¶ 4). According to the complaint, at the relevant time, plaintiff was assigned to the Manhattan Detention Complex (MDC) (*id.* at ¶ 6). On August 16, 2019, a fight broke out between the inmates and uniform staff, where an inmate got hold of "K9 spray" and used it to spray plaintiff (*id.* at ¶ 9). Soon after the incident, plaintiff was "suspended indefinitely" (*id.* at ¶ 10). According to the complaint, on August 23, 2019, plaintiff was placed in a "medically monitored working status," and he was transferred to the DOC's Special Operations Unit (*id.* at ¶¶ 12-13). Uniform staff on medical working status are assigned to areas without inmates. On December 4, 2019, plaintiff was reassigned back to MDC, where he was required to work with inmates (*id.* at ¶ 14). Plaintiff claims that his suspension was a result of the DOC's practice to reduce staff due to the closure of Rikers Island and based on his race (*id.* at ¶¶ 15-35).

In support of its motion, the City argues: 1) that plaintiff's CSL § 80 claim fails because, first, plaintiff's case does not concern a reduction in workforce, and second, because the claim was required to be brought as an Article 78; 2) that plaintiff's claim under the NYCHRL and

NYSHRL must be dismissed because plaintiff fails to allege facts suggesting he was suspended because of his race; and 3) that plaintiff's state constitutional claims fail because plaintiff failed to file a notice of claim.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff 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]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, " 'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . ., are not entitled to such consideration' " (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836, [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Civil Service Law § 80(1-b) states that:

> "[w]here, because of economy, consolidation or abolition of function, curtailment of activities or otherwise, positions in the competitive class are abolished, or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs."

In other words, "provisional employees must be laid off first, then probationary employees in inverse order of civil service seniority, and then permanent employees in the affected title in inverse order of civil service seniority" (*Samuelsen v New York City Tr. Auth.*, 101 AD3d 537, 547 [1st Dept 2012]).

Here, plaintiff's CSL claims must be dismissed on basis that the complaint fails to allege that plaintiff was suspended prior to someone more junior than him or that he was suspended because of "economy, consolidation or abolition of function, curtailment of activities or otherwise." Plaintiff's opposition does not address this point.

In any event, Article 78 proceedings are the proper vehicle for claims concerning CSL § 80 workforce reductions as a subterfuge for terminating individual civil servants (*O'Donnell v Kirby*, 112 AD2d 936, 936 [2d Dept 1985] [petitioner failed to meet burden of demonstrating that abolition of position was in bad faith]; *Delia Vecchia v Town of N. Hempstead*, 207 AD2d 483, 484 [2d Dept 1994] [Article 78 proceeding regarding termination of petitioner's employment as a Laborer II]). Plaintiff's opposition fails to address why the City's actions should not be challenged in an Article 78 proceeding rather than a plenary action. Accordingly, the court converts plaintiff's CSL claim to a proceeding pursuant to CPLR 7801 (*see* CPLR 103[c]; *Dolce-*

Richard v New York City Health & Hosps. Corp., 149 AD3d 903, 904 [2d Dept 2017]). An Article 78 proceeding against an administrative body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner (CPLR 217). Plaintiff fails to allege the date of his suspension, and on this basis alone the petition must be dismissed. Even if the court were to adopt August 23, 2019, the date plaintiff was allegedly placed on medical working status, as the date of the "final determination," the proceeding would still be untimely, as this action was commenced on January 14, 2020, well over the four-month statute of limitations. Accordingly, the CSL claims are as time-barred.

Plaintiff's claims under the NYCHRL and NYSHRL must also be dismissed, as the allegations that he was suspended based on his race and those allegations concerning disparate impact are conclusory. Indeed, the complaint fails to allege any facts even suggesting that plaintiff was suspended on the basis of his race (*see Askin v Dep't of Educ. of City of New York*, 110 AD3d 621, 622 [1st Dept 2013] ["Although plaintiff asserts that defendants' actions were motivated by age-related bias, she does not make any concrete factual allegation in support of that claim, other than that she was 54 years old and was treated adversely under the State law or less well under the City HRL. Plaintiff's allegations in this respect amount to mere legal conclusions, and do not suffice to make out this element of her claim"]). Plaintiff submits the "IBO Budget Summary," which he argues "makes clear that the [DOC] is dismissing thousands of uniform staff, who are disproportionately Black and Hispanic" (NYSCEF # 10 at 7, n2). Again, the complaint is void of any facts indicating that minority uniform staff have been disproportionately dismissed. In any event, plaintiff fails to allege a causal connection between any policy to reduce uniform staff and the disproportionate effect on minority staff (*see New York State Off. of Mental Health v New York State Div. of Hum. Rts.*, 223 AD2d 88, 90 [3d Dept 1996] ["A disparate impact is not established by a simple showing of statical disparities in an employer's workforce"]).

As for plaintiff's claims for discrimination under Article I, § 11 of the New York State Constitution, "[t]he plaintiff's failure to serve a notice of claim requires dismissal of the cause of action alleging violations of the State Constitution" (*Mirro v City of New York*, 159 AD3d 964, 966 [2d Dept 2018]). Plaintiff failed to file a notice of claim and did not move to file a late notice of claim. Accordingly, plaintiff's state constitutional claims must also be dismissed.

Accordingly, it is hereby

ORDERED that the City's motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the City shall serve upon plaintiff a copy of this decision and order, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

5/25/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE