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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

Gina Williams

-v-

The City of New York and NYC Department of Correction

INDEX NO. 109826/03

MOTION DATE 11/16/05

MOTION SEQ. NO. 002

MOTION CAL. NO. 11

The following papers, numbered 1 to 4 were read on this motion to/for SJ/Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...Memo	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4, 5

FILED
MAR 22 2006
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted for the reasons set forth in the annexed memorandum decision & order. The Clerk shall enter judgment dismissing the complaint with costs & disbursements upon submission of an appropriate bill of costs.

Dated: 3/14/06

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
GINA WILLIAMS,
Plaintiff,

against

THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF CORRECTION,
Defendants.
----------X

Index Number 109826/2003
Mot. Submit Date Nov. 16, 2005
Mot. Seq. No. 002
Cal. No. 11

DECISION AND ORDER

For the Plaintiff:
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For the Defendant:
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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Memo of Law	1,2
Answering Affidavits in Opposition	3
Replying Affirmation	4,5

PAUL G. FEINMAN, J.:

Defendants City of New York and the New York City Department of Correction move for summary judgment and dismissal of the complaint pursuant to CPLR 3212. For the reasons which follow, the motion is granted.

Introduction

Plaintiff, who is self represented, has been an employee with the New York City Housing Authority (NYCHA) since 1992 and is an assistant superintendent (Not. of Mot. Ex. C, Williams EBT, 12/4/04, at 5). According to the allegations contained in her complaint, in 2000, she was denied a civil service appointment to a position as a correction officer with defendant New York

City Department of Correction (DOC), although she met the qualifications for the position, and the denial was made in retaliation for her having previously brought a claim in 1998 of sexual harassment against the Housing Authority.[1] She alleges mental anguish, humiliation, embarrassment, and emotional injury, and seeks back pay.

Defendants move for summary judgment and dismissal of the complaint on the basis that the complaint fails to state a cause of action sounding in retaliation. They further contend, as discussed below, that even if a cause of action has sufficiently been made, they have legitimate non-discriminatory reasons for the alleged adverse employment action.

Factual Allegations

In early 1996, the Department of Personnel of the City of New York posted a Notice of Examination for the civil service title of Correction Officer (Not. of Mot. Ex. D, Vengersky Aff. [hereinafter Vengersky Aff.] ¶ 3). The list for Examination number 5176 was established as a one-year list on February 26, 1997 (Vengerskey Aff. ¶ 25, Ex. B). The Notice of Examination included a section called "Qualification Requirements" which included that candidates prove "good character and satisfactory background," and stated that convictions for offenses showing a lack of good moral character or a disposition of violence would be grounds that would "ordinarily be cause for disqualification." (Vengersky Aff. Ex. B, p. 2). Applicants were required to pass physical and psychological tests and would be rejected for any medical condition which could impair ability to perform their duties (Vengersky Aff. B, p. 3). They were also subject to investigation before appointment by the New York City Police Department (NYPD)

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[1]Although plaintiff does not indicate any further details, the complaint was apparently filed in December 1998 (Pl. Memo of Law at 10).

and had to pay for fingerprint screening (Vengersky Aff. Ex. B, p.4).

According to the Assistant Commissioner of Personnel of DOC, Alan Vengersky, plaintiff took and passed the written examination and was placed as number 6152 on the eligible list (Vengersky Aff. ¶ 4).[2] She was notified to appear for a medical and psychological screening on March 4, 1999, and passed both examinations (Vengersky Aff. ¶ 8).[3] On that date, she also completed a "screening sheet" for use in the character investigation which was conducted under the auspices of the New York Police Department. She did not indicate under the question of whether she had ever been involved in any criminal or civil actions, that she had filed a complaint against the Housing Authority alleging sexual harassment (Vengersky Aff. ¶ 8 and Ex. D, p. 1).[4] In the section concerning "Arrest/Criminal Record," she wrote that she had been arrested for assault on January 12, 1990 and that the matter had been dismissed (Vengersky Aff. Ex. D, p. 1). According to Vengersky, when there is an arrest, further investigation is undertaken because the behavior of applicants in connection with the circumstances surrounding their arrest can be revealing as to the candidates' characters (Vengersky Aff. ¶ 10). Thus, the

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[2]Although defendants assert they annexed proof of plaintiff's position on the eligible list, the document attached as Exhibit A does not include plaintiff's name. However, it is not contested that plaintiff passed the written examination.

[3]Plaintiff appears to allege that her April 26, 1999 appointment for a psychological review was canceled because she was overweight, although she had not been previously told that she was overweight, and on April 26, 1999 her medical status was found qualified (Complaint ¶ 7, and Ex. C, D). Plaintiff did not produce the letter from the NYPD or DOC that informed her that her application was being put on hold pending a weight loss and in any event, it appears only a very short time period accrued.

[4]In addition, plaintiff completed a 14-page application for the NYPD, which requested more in-depth details of the applicant's history. Plaintiff wrote in answer to question 19 that she was the complainant in an undated claim of sexual harassment against "NYCHA-OEO" (Williams Aff. in Opp. Ex. J, p. 7).

NYPD supervisor, Sergeant Morris, reviewed plaintiff's application and recommended "approval/hold pending further Investigation of Assault Arrest in 1990." (Vengersky Aff. Ex. D, p. 2).

Plaintiff was interviewed by NYPD investigator Augustus Miller on March 23, 1999 at which time a case review sheet was completed. Plaintiff indicated that she had been arrested for Robbery in the First Degree on January 12, 1990 and that the case had been disposed (Vengersky Aff. Ex. E, p. 1). There is no mention of the sexual harassment complaint. She also indicated she was the operator of a vehicle involved in an auto accident in October 1995, that there were no injuries to the best of her knowledge, and that an accident report and insurance letter would be provided (Ex. E, p. 2). Although Sergeant Miller "approved" plaintiff's application on April 1, 1999, according to Vengersky this was a "preliminary approval" and Miller's supervisor reviewed the application and directed on April 6, 1999, that it be held pending receipt of the complaint report, statement by the arresting officer, and arrest report for robbery (Vengersky Aff. ¶ 13; Ex. E, p. 2).

Plaintiff alleges that she kept in contact with the investigator, Sergeant Miller, who informed her that she was on review "because of her arrest" (Not. of Mot. Ex. A, Complaint [hereinafter Complaint] ¶ 5).[5] Defendants allege that the issue of potential liability for the 1995

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[5]Plaintiff's transcript fails to clarify how she understood the importance of producing the insurance letter:

Q. Did you have an understanding if you did not submit any information about the car accident showing no lawsuits, that could have affected your being appointed?
A. I was never told that.
Q. Did you understand - - -
A. That is for any information, I didn't receive that was the very beginning.
Q. If you don't provide that information, you could not be appointed?

automobile accident was also at issue. The sequence of events is somewhat unclear concerning the insurance letter plaintiff submitted to establish that there were no pending civil suits, with plaintiff apparently alleging that Miller requested a letter from her in 1999 but told her to hold onto the letter until she was "off of review." (Williams Aff. in Opp. ¶ 8). That letter was then "misplaced," although it is not clear if plaintiff asserts that she misplaced it or that the NYPD did (Williams Aff. in Opp. ¶¶ 8, 10). Plaintiff testified that she had to "go back twice" to retrieve the letter from the insurance company, and that she retrieved the first letter but apparently NYPD did not receive it and she had to go back for another letter (Not. of Mot. EBT of Williams, Dec, 7, 2004 [hereinafter Williams EBT], p. 44).[6] Plaintiff states that on about May 15, 2000, she was contacted by another investigator, Investigator Young, who requested that she send a letter and that if she did, she "would be pushed for the next class" (Complaint ¶ 6). Plaintiff "retrieved the letter" but was then again told by Young to hold the letter because the application was still on hold, although Young did not know why (Williams Aff. in Opp. ¶10).

In any event, the NYPD received the insurance letter from plaintiff on about May 18, 2000 (Vengersky Aff. ¶ 15, Ex. F). However, defendants allege that review of her qualifications was not yet completed and she was therefore not eligible for appointment to the next class of June 1, 2000 (Vengersky Aff. ¶ 16). She was not, however, kept informed of the course of her application, and in June 2000, plaintiff wrote to Police Commissioner Bernard Kerik complaining of an unreasonable delay in hiring her, noting that other candidates with

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A. Exactly.
(Williams EBT 55:15-25).

[6]Plaintiff has not produced a copy of the first letter.

misdemeanor convictions had been hired in a timely manner (Williams Aff. in Opp. ¶ 12). She also wrote to the Public Advocate in about July 2000, and that office wrote a letter on her behalf to the New York City Division of Citywide Personnel Services and the NYPD, asking them to clarify to plaintiff the reason for the delay in hiring her (Williams Aff. in Opp. Ex. H). In early October 2000, plaintiff filed a complaint with the State Division of Human Rights which she amended toward the end of the month, alleging retaliation and discrimination based on her arrest record (Williams Aff. in Opp. ¶ 11, Ex. F).[7]

On October 19, 2000, the City wrote mailed to plaintiff a pre-printed letter which notified her that DOC intended to disqualify her from the position of correction officer based on one or more issues, set forth in two paragraphs without specifying which were pertinent, unless she submitted proof or explained in writing why she believed she was qualified (Vengersky Aff. Ex. H). Plaintiff's October 31, 2000 letter in response attempted to address the reasons, including that she had a valid driver's license, was a citizen, had the necessary educational background, and that she was never convicted of any crime (Vengersky Aff. Ex. I).

Subsequently, on November 13, 2000, plaintiff's application was approved by NYPD's James Psomas, who concluded that the investigation established that plaintiff's January 1990 arrest for robbery and assault was terminated in her favor, that she was currently employed by the Housing Authority and that there was "nothing negative to report from previous employers," and that she had a valid New York State driver's license with no outstanding tickets or violations (Vengersky Aff. Ex. J). According to defendants, plaintiff was therefore eligible for

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[7]The complaint was amended on October 25, 2000, to include the fact of her receipt from DOC of the document described below, the notice of intention to disqualify.

appointment to the class scheduled for appointment on December 7, 2000, although because an "inordinate length of time" had passed since her initial psychological examination in March 1999, she was required to undergo a second examination prior to hiring (Vengersky Aff. ¶ 20).

To facilitate her hiring, defendants scheduled an appointment for plaintiff on November 27, 2000. However, she did not appear for the examination and therefore made herself ineligible for hiring as of December 7, 2000 (Vengersky Aff. ¶¶ 22-23). According to DOC, the next class date for appointment was targeted for June 7, 2001, a date more than four years after the establishment of the list on which plaintiff's name had been placed; under the rules, the examination list had to expire on February 26, 2001, and plaintiff could no longer be a candidate based on having passed that examination (Vengersky Aff. ¶¶ 24-26, Ex. K).

Plaintiff concedes that she was informed that she had to retake the examination based on the passage of time (Williams EBT 75, 77). She testified that she informed the DOC person who telephoned her that she would not appear for the examination as the delay in processing her application, for which she had not been provided a reason, was unreasonable (Williams EBT 75, 77). She had previously taken and passed the exam and "had no faith in taking the test again" (Williams EBT 77:15). She was aware that she had to pass a psychological evaluation but she felt that she had been "already put on review for discriminatory reasons," and that if she "took the test again, it was the same." (Williams EBT 78:23-24).

Parties' Contentions

Plaintiff argues that defendants were aware of her complaint against the Housing Authority based on sexual harassment and that they improperly retaliated against her by denying her a position as a correction officer, even though she met the criteria for the position. She

alleges that she verbally disclosed the existence of the complaint to Investigator Miller, and also indicated its existence in the candidate booklet that she filled out which was submitted to the NYPD (Williams EBT 70; Complaint ¶ 4). Because the DOC required a character investigation to be conducted by the NYPD, she argues that it can be presumed the DOC read her application and unlawfully determined to withhold hiring based on the existence of the sexual harassment complaint against her employer.

Defendants seek summary judgment and dismissal of the complaint based on a failure to state a cause of action sounding in retaliation. They argue that there is no proof that DOC was aware of her complaint against her employer concerning sexual harassment, and that it chose not to hire her based on the existence of that complaint.

Legal Analysis

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1963]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

The party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial (*W.W. Norton & Co. v Roslyn Targ Literary Agency, Inc.*, 81 AD2d 798 [1st Dept. 1981]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*see, Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, and unsubstantiated allegations and accusations (*Zuckerman v City of New York, supra,* at 557).

In order to make out a prima facie case of retaliation, plaintiff must allege that she was engaged in a protected activity; the employer was aware of her participation in that activity; there was an adverse employment action based on the activity, and a causal connection between the protected activity and the adverse action taken by the employer (*Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 [1st Dept. 2004]; *see also, Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Once plaintiff meets this initial burden, defendants must then present in the form of admissible evidence, reasons that are "legitimate, independent, and nondiscriminatory" to support their employment decision (*Ferrante* at 629). If the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, the burden shifts back to plaintiff who must then show that there is a material issue of fact as to whether defendants' asserted reasons for failing to hire her are false or unworthy of belief, and that it is more likely than not that defendants' failure to hire her was based on the fact that plaintiff had made a complaint of sexual harassment against NYCHA (*Ferrante* at 630). Ultimately, in order for defendants to prevail on their motion for summary judgment, they must demonstrate either that plaintiff has failed to establish every element of intentional discrimination or, if they offer

legitimate, nondiscriminatory reasons for their challenged actions, that there is no material issue of fact concerning whether their explanations were pretextual (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

Defendants agree that plaintiff was involved in protected activity by bringing a complaint of sexual harassment against her employer. However, they argue that plaintiff has not established the second prong of a retaliation claim, that is, she fails to sufficiently allege, let alone prove, that any decision-makers within DOC or the NYPD was aware of her discrimination complaint against her employer or that she had made such a complaint. They note that NYCHA is a public benefit corporation while DOC and NYPD are agencies of the City of New York, and that it is therefore "extremely improbable" that decision-makers within DOC or the NYPD would have been aware of her complaint against NYCHA (Memo of Law at 9). Although plaintiff states that she verbally told NYPD Investigator Miller that she had brought a complaint against NYCHA, that information was not memorialized in Miller's case review sheet dated March 23, 1999 (Not. of Mot. Ex. E). Nor had plaintiff revealed it in her screening application dated March 4, 1999 (Not. of Mot. Ex. D). However, as noted previously, she had written in her NYPD questionnaire that she was a complainant of sexual harassment against NYCHA, although she did not indicate a date as to when this occurred. Nonetheless, it is clearly in her application materials. Although she conceded at her deposition that she did not know whether the booklet was provided to decision-makers at DOC (Williams EBT 70-71), there is also no proof that the statement was not considered by NYPD or that it was not noted to someone in DOC with decision making power. Although she admits she has no evidence to show that DOC was aware of her complaint against NYCHA (Williams EBT 71), the very fact that all the investigatory

forms were completed for the NYPD which conducted the character investigation, means that there is an issue of fact as to whether DOC learned of her claim against NYCHA. Thus, there is no basis to award defendants summary judgment on this issue.

Defendants argue that plaintiff also fails to sufficiently allege a causal connection between her complaint filed against NYCHA in December 1998 and DOC's delay in hiring her, resulting in the expiration of the list in February 2001. The element of the causal connection can be established indirectly by a showing that the adverse action closely followed the protected activity, although it has also been held that merely because an adverse action occurs after the filing of a grievance, it does not by itself create an issue of fact as to causality (*Concord Limousine Inc. v Orezzoli*, 7 Misc.3d 1026A, **16-17 [Sup. Ct., Kings County 2005], citations omitted). Where "mere temporal proximity" between an employer's knowledge of a protected activity and an adverse employment action has been found sufficient to establish prima facie evidence of causality, case law has "uniformly" held that the temporal proximity must be "very close" (*Clark Co. Sch. Dist. v Breeden*, 532 U.S. 268, 273-74 [2001], citing *Richmond v ONEOK*, 120 F.3d 205, 209 [1997] [three-month period insufficient to establish causal connection], and *Hughes v Derwinski,* 967 F.2d 1168, 1174-75 [7th Cir. 1992] [four-month period insufficient]). Here, there is a "yawning temporal gap" between plaintiff's filing of her complaint in December 1998 and defendants' alleged adverse action in failing to approve her application in order for her to be hired by June 2000, that defeats a claim of causal connection between the two (*see, Stroud v New York City*, 374 F. Supp. 2d 341, 351 [SDNY 2005]). Plaintiff fails to establish the fourth prong of her claim for retaliation, and thus fails to set forth a cause of action.

Defendants sufficiently set forth various facts that show how the application process was put on hold for various periods of time in order to investigate aspects of plaintiff's application. Although plaintiff objectively was on hold for approximately two years, nothing has been established to show that this period of time was discriminatorily long. Defendants have set forth legitimate non-discriminatory reasons for failing to hire her. Nothing that plaintiff offers demonstrates that their actions were pretextual.

Plaintiff makes only surmises and unsubstantiated allegations concerning the length of time it took to process her application compared with others, including those who had misdemeanor convictions. She offers no evidence concerning those who were appointed prior to her and their ranking. In addition, she offers conflicting testimony concerning her understanding of the necessity of providing a letter from her insurance company and whether a letter was given to the investigator prior to May 2000. Finally, the fact that defendants ultimately approved her application but that she then chose not to undergo a second psychological examination and thereby forfeited her chance to be hired in December 2000, fatally undermines her case.

Plaintiff's argument that defendants failed to follow the strictures of Civil Service Law § 61 (3) which states that those persons who are eligible and considered but not selected should be given written notice, is inapposite because she was in fact approved for hiring in November 2000, subject to a second psychological examination. As she was selected, she would not have been entitled to be given written notice stating otherwise. She also argues that an employer may only require a physical or mental examination after an offer of employment has been extended, and only if all candidates undergo them, citing *Conroy v New York State Dept. of Correctional Services*, 333 F3d 88 (2d Cir. 2003). *Conroy* concerns sick leave and employees who are

covered under the Americans with Disabilities Act. The specific section of the statute in question states:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d)(4)(A). The statute provides an exception to the general rule that an employer may not inquire as to an employee's health, and the exception clearly applies to applicants for positions as correction officers, who need to be in both good physical and mental health. Plaintiff makes no claim that other applicants did not have to undergo physical and psychological testing and that she was singled out for disparate treatment.

Finally, plaintiff asserts that defendants failed to provide her with various disclosure, including her application for correction officer and the policy procedures for how long the DOC keeps records and processes employment applications (Williams Aff. in Opp. ¶ 17). She does not suggest what proof these documents would offer that would change the outcome in this case. Moreover, policy concerning how DOC processes employment applications is statutory in nature, following the Civil Service Law. Thus, it cannot be said that the record warrants denial of the motion pursuant to CPLR 3212(f).

Because plaintiff cannot established a prima facie claim of retaliation, in that there is insufficient evidence of a causal connection, defendants' motion for summary judgment must be granted and her complaint dismissed. It is therefore

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon

the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. The court has mailed courtesy copies of this decision.

Dated: March 14, 2006
New York, New York

Paul G. Feinman
J.S.C.

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