

Pinder v City of New York

2007 NY Slip Op 34440(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 113435/05

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC
Justice

PART _____

Index Number : 113435/2005

PINDER, ETELINA

vs

CITY OF NEW YORK

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is*

decided pursuant to attached Mem

FILED
JAN 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/17/07

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 62

-----X
ETELINA PINDER,

Plaintiff,

-against-

Index No. 113435/03

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

CITY OF NEW YORK, THE DEPARTMENT OF
EDUCATION OF THE CITY OF NEW YORK,
JOEL KLEIN (both as Chancellor of NYC Public
Schools and in his individual capacity, LAWRENCE
GARDNER (both as Director of Vision Services and
in his individual capacity, ADRIENNE UBERTINI
(both as Principal and in her individual capacity),

Defendants.

DECISION AND ORDER

-----X

MARILYN SHAFER, J:

In an action to recover damages for employment discrimination in violation of Executive Law Section 296 and violations of due process pursuant to 42 U.S.C. 1983, *et seq.*, defendants move to dismiss the complaint on the grounds that: 1) the court lacks subject matter jurisdiction; 2) the state discrimination claim is barred by the applicable statute of limitations and 3) the complaint fails to state a cause of action.

THE COMPLAINT

The complaint alleges that on October 29, 2004, plaintiff, an African-American paraprofessional employed by the New York City Department of Education (“DOE”), was accused by defendant Lawrence Gardner (“Gardner”), her supervisor and Adrienne Ubertini (“Ubertini”), the school principal, both Caucasian, of violating Chancellor’s Regulation A-420¹

¹ Chancellor’s Regulation A-420 states: “NO CORPORAL PUNISHMENT SHALL BE INFLICTED IN ANY OF THE PUBLIC SCHOOLS NOR PUNISHMENT OF ANY KIND TENDING TO CAUSE EXCESSIVE FEAR OR PHYSICAL OR MENTAL DISTRESS. VIOLATION OF THIS BYLAW SHALL CONSTITUTE GROUNDS FOR DISMISSAL.”

by hitting a student over the head with a book.. Plaintiff contends that the accusation was wrongful because the student witnesses against her did not see the incident; that the teacher in the room at the time stated that she did not want to be involved and that another teacher's testimony was hearsay. In addition, plaintiff states that Gardner and Ubertini did not witness the incident and that the alleged victim exculpated her by stating that "any contact was not for the purpose of punishment" (Def. Memo of Law, Ex. A, para. 15) She also claims that the other students were questioned in a suggestive manner without parents present.

However, by letter dated November 23, 2004, plaintiff was discharged effective November 29, 2004. Plaintiff states that she immediately grieved this decision and that she has been waiting for a determination since January 5, 2005.

The first cause of action in the complaint states a claim under 42 U.S.C. 1983² on the ground that the underlying complaint and grievance procedures denied plaintiff substantive and procedural due process. Moreover, she claims that the defendants have engaged in a pattern and practice of falsely confirming allegations of misconduct and failing to question the appropriate individuals in the appropriate manner. She also complains that the defendants violated her liberty interests by placing her on an "ineligible list" that effectively bars her from future

² Section 1983, titled "Civil Action for Deprivation of Rights", states in pertinent part:

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or The District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,

employment.

The second cause of action claims that the defendants discriminated against plaintiff on the basis of race in violation of the New York Human Rights Law (Executive Law 296) and the third cause of action alleges that defendants have failed to follow their own rules and regulations with regard to plaintiff's administrative remedies³.

THE ARGUMENTS

Defendants' Arguments in Support of Dismissal

Defendants argue that plaintiff's procedural due process claim must be dismissed because she is a non-tenured employee and, as such, she does not have a constitutionally protected property interest in continued employment. They also argue that, as to procedural due process, the administrative hearing procedure provided plaintiff with all the process that she was due. In addition, as to the liberty interest claim, defendants contend that plaintiff has failed to allege the necessary elements of that claim. They also contend that plaintiff's state law claims must be dismissed because plaintiff did not file a timely notice of claim.

Plaintiff's Arguments in Opposition to Dismissal

Plaintiff argues that the complaint adequately states causes of action for violation of her due process and liberty interests; that a notice of claim is not required for an action brought under federal law for violations of plaintiff's civil rights and that the complaint demonstrates that defendants did not file their own rules and regulations.

³ The third cause of action is dismissed. In plaintiff's memorandum of law in opposition to the dismissal motion (FN 1), plaintiff concedes that the court should not consider this as a separate cause of action.

DISCUSSION

Standard

On a motion addressed to the sufficiency of the pleadings, the court must accept every factual allegation as true, and, liberally construe the allegations in the light most favorable to the pleading party. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977) However, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true. Further, when the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not just whether he or she has stated one. Hartman v. Morganstern, 28 A.D.3d 423 (2nd Dept 2006).

First Cause of Action for Violation of 42 U.S.C. 1983

A. Procedural Due Process

Defendants have submitted copies of the grievance procedures contained in Articles 22 and 23 of the United Federation of Teacher's paraprofessional contract (Def. Memo in Support, App. B) as well as copies of the decisions rendered in plaintiff's grievance hearings⁴ that demonstrate that plaintiff had a right to, and made use of, sufficient process to satisfy constitutional requirements regarding procedural due process. Due process is satisfied by inclusion of a grievance procedure in the collective bargaining agreement. Barrera v. Frontier Central Sch. Dist., 249 A.D.2d 927 (4th Dept 1998) citing Plummer v. Klepak, 48 N.Y.2d 486

⁴ Plaintiff's Step One grievance was denied on December 2, 2004. Plaintiff then appealed and her Step Two grievance was denied on January 4, 2005, which denial was further appealed at a Step Three grievance which was denied on August 18, 2005. Plaintiff has not availed herself of the Step 4 Grievance procedure—Arbitration.

(1979). Moreover, once the administrative process outlined in the contract was complete, if plaintiff was still dissatisfied, she could have instituted an Article 78 proceeding. Tully Constr. Co. v. Hevçsi, 214 A.D.2d 465, 466 (1st Dept 1995) (“The availability of an Article 78 proceeding at the conclusion of the administrative process also satisfies any due process hearing requirements.”)(citations omitted) Accordingly, that part of the first cause of action alleging violation of plaintiff’s procedural due process rights is dismissed.⁵

B. Property Interest

In paragraph 27 of the complaint, plaintiff admits that, at the time of her discharge, she was a non-tenured employee of the Board of Education. Accordingly, plaintiff’s claim that she was deprived of a property interest with out due process must be dismissed as it is well settled that a non-tenured employee does not have a property interest in continued employment. Newell v. City of New York, 2002 U.S. Dist. LEXIS 4634 (S.D.N.Y. March 19, 2002) (“a non tenured employee . . . does not have a property interest in her position”); McDonald v. Bd. of Educ. Of the City of New York, 2001 U.S. Dist. LEXIS 10325 (S.D.N.Y. July 24, 2001)

C. Liberty Interest

In order to state a claim for a liberty interest in reputation a plaintiff must allege that her employer published stigmatizing information, which is false, and as a result of that stigma she has been foreclosed from other employment opportunities. Federico v. Bd. of Educ., 955 F. Supp 194 (S.D.N.Y. 1997)

In the complaint, plaintiff alleges that, based on the false assertion that she engaged in

⁵ Plaintiff’s arguments regarding a “C-31 Hearing” are without merit as the C-31 regulation sets forth the procedure to terminate the licenses of untenured pedagogical employees. Plaintiff is neither licensed nor is she a teacher.

corporal punishment, defendants placed her name on the ineligible list which, in effect bars her from future employment. Thus, the complaint satisfies two prongs of the pleading requirements—allegations of falsity and foreclosure from employment. However, plaintiff has failed to satisfy the third prong of the pleading requirement . In McDonald v. Bd. of Educ. of the City of New York, 2001 U.S. Dist. LEXIS 10325 at *8 (S.D.N.Y. July 24, 2001), the court dismissed a teacher’s due process liberty interest claim where, as here plaintiff had failed to plead that defendants published the fact that plaintiff had been found guilty of corporal punishment. In McDonald, supra, the court stated:

[plaintiff’s] name was placed on the Board’s Ineligible/ inquiry list as having been fired “for cause”. . . . Nowhere does she assert that the list disclosed the stigmatizing grounds for her dismissal or that inclusion on the List gives rise to a per se inference that plaintiff was terminated for a reason sufficiently stigmatizing to state a due process claim. Similarly, she does not allege that the grounds for her dismissal were otherwise published to potential employers. Thus, in failing to assert that defendants published a stigmatizing statement that interfered with her ability to obtain new employment, plaintiff failed to state an element of this claim.

2001 U.S. Dist. LEXIS 10325, at *23 (internal citations omitted)

Here, as in McDonald, plaintiff fails to allege that defendants published the reason or the circumstances regarding her dismissal. Merely placing her name on the ineligible list, without more, does not rise to the level of publication of stigmatizing information. Plaintiff’s liberty interest claim is therefore dismissed.

Second Cause of Action for Violation of Executive Law Section 296

The Second cause of action alleging that plaintiff was terminated as a result of racial

discrimination in violation of Executive Law Section 296 must be dismissed as plaintiff failed to file a timely notice of claim as required by Education Law Section 3813(1)⁶. See, Mills v. County of Monroe, 59 N.Y.2d 307, cert. denied 464 U.S. 1018 (filing of a timely notice of claim is a condition precedent to a cause of action pursuant to Executive Law Section 296)

Under Education Law Section 3813(1), to maintain a action or claim against the New York City Board of Education or its Officers of employees, a plaintiff must file a notice of claim within 90 days of the event giving rise to the claim. See, Sangermano v. Bd. of Cooperative Education Services, 290 A.D.2d 498 (2nd Dept 2002) The timeliness of a discrimination claim is to be measured from the date the claimant had notice of the allegedly discriminatory action. Cordone v. Wilens & Baker, P.C., 286 A.D.2d 597 (1st Dept 2001).

In this case, the allegedly discriminatory act, plaintiff's termination, occurred on November 29, 2004 (Def. Memo of Law, App. A, para. 19). Accordingly, a timely notice of claim should have been filed no later than February 27, 2005--ninety days after her termination. Here, it

⁶ Education Law 3813(1) states, in pertinent part:

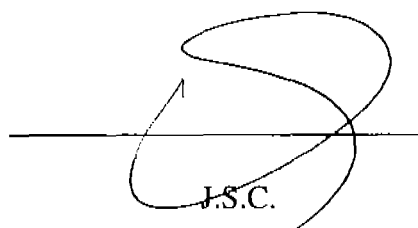
No action or proceeding, for any cause whatsoever, . . . or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education . . . or any officer of a school district, [or] board of education . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay such claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

is undisputed that plaintiff did not file her notice of claim until March 31, 2005, more than one month beyond the 90 day statutory period. (Def. Memo of Law, App. C). Accordingly, the state law discrimination claim must be dismissed.

Therefore it is ORDERED that defendants motion to dismiss the complaint is granted and the clerk is directed to enter judgment accordingly.

This decision constitutes the judgment of the court.

DATE 1/17/07


J.S.C.
HON. MARILYN SHAFER, JSC

FILED
JAN 26 2007
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