Obasi v Department of Educ. of City of N. Y.

2008 NY Slip Op 30874(U)

March 24, 2008

Supreme Court, New York County

Docket Number: 0113678/2007

Judge: Paul G. Feinman

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SCANNED ON 3/27/2008
[* 1]

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

PRESENT: Feinman PAUL G. FEINMAN PART 52
Justice

VIRGINIA OBASI

INDEX NO. 113678/07

MOTION DATE

- v -

MOTION SEQ. NO. 001

NYC DEPT OF EDUCATION

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 27 2008
NEW YORK
COUNTY CLERKS OFFICE

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

Dated: 3/24/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

---X

VIRGINIA OBASI,

Plaintiff,

against

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, AUREA PORRATA-DORIA, Principal Superintendent of District 6, YVONNE M. JOSEPH, Manager of HR Connect - Medical Department of the Department of Education of the City of New York, HEIDI LYSTAD, Administrator of the Medical Bureau of the Department of Education of the City of New York, and THE NEW YORK CITY TEACHERS' UNION, THE UNITED FEDERATION OF TEACHERS,

Defendants.

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Index Number 113678/2007
Mot. Seq. Nos. 001, 002

DECISION AND ORDER

FILED
MAR 27 2008
NEW YORK
COUNTY CLERK'S OFFICE

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Papers considered in review order to show cause seeking permanent injunction, and motion to dismiss:

	Papers	Numbered
Seq. 001	Order to Show Cause, Affidavit, Complaint	1
	Affirmation in Opposition	2
	Reply Affirmation	3
	Amended Complaint	4
	Winnemore Letter/Affirmation of Service	5
Seq. 002	Notice of Motion, Affirmation, Memo of Law	1,2
	Affidavit in Opposition, Memo of Law	3,4
	Affidavit in Support of Motion, Memo of Law	5, 6

PAUL G. FEINMAN, J.:

Plaintiff, a school teacher, seeks a preliminary injunction barring the City defendants

from compelling her to submit to a psychiatric examination; the City defendants oppose (Motion Sequence No. 001). Separately, defendant United Federation of Teachers (UFT) moves to dismiss the complaint as against it (Motion Sequence No. 002). The two motions are consolidated for purposes of decision. For the reasons which follow, plaintiff's motion is denied in its entirety. Defendant UFT's motion to dismiss the complaint as against it is granted.

Plaintiff Virginia Obasi, a tenured New York City public school teacher, brings an order to show cause seeking injunctive relief.[1] She seeks to stay the scheduling of a psychiatric examination which has been ordered by the principal of her school pursuant to Education Law § 2568, following events that occurred on August 31, 2007 involving defendant Porrata-Doria who is plaintiff's principal, plaintiff's union representatives, and certain other school staff, and culminating in a meeting on September 6, 2007, consisting of plaintiff, the principal, other staff, and a union representative (OSC, Obasi Aff. ¶¶ 45, 47, 53 et seq.). In the course of that meeting, during which plaintiff set forth her explanation as to what occurred on August 31, 2007, and responded to questions, the principal stated that she would send plaintiff for a psychiatric examination (OSC, Obasi Aff. ¶ 73). The next day, plaintiff received a letter from the principal; on September 11, 2007, she received notification from the District Superintendent that an examination had been requested (OSC, Obasi Aff. ¶ 80).

<u>Plaintiff's Motion for Preliminary Injunction (Mot. Seq. 001)</u>

A party seeking a preliminary injunction must show that there is (1) the likelihood of ultimate success; (2) immediate irreparable injury resulting from the denial of such relief; and (3)

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[1]A temporary restraining order was issued on October 10, 2007.

a balance of the equities in the movant's favor (*W.T. Grant Co. v Scrogi*, 52 NY2d 496, 517 [1981]). A party need not establish a certainty of success on the merits (*Parkmed Co. v Pro-Life Counselling*, 91 AD2d 551, 553 [1st Dept. 1982]).

Plaintiff alleges that the principal has engaged in a campaign of harassment against her, based on her age and number of years of service, because the principal would like to hire younger teachers at a lower salary whom she could more easily "control" (Winnemore Aff. in Supp. of TRO ¶¶ 1,2,5, 9). According to plaintiff, the principal has treated her with disrespect in public, tried to get her to quit and, as part of her harassment, has now orchestrated that plaintiff must undergo a psychiatric examination (Winnemore Aff. in Supp. of TRO ¶ 12). She alleges discrimination on the basis of race and ethnicity, violation of her right to free speech, violation of section 704 (a) of the Civil Rights Action of 1964, and retaliation.

Plaintiff contends that the psychiatric examination is another form of harassment, and seeks to enjoin it, arguing that the ostensible reason for the exam is "based on lies," that the examination itself is "traumatic and psychologically damaging" and damaging to her professional career, that it should not be used as a weapon to get rid of her, and that she is caught in a Department of Education bureaucratic war based on her position as an "excessed teacher" looking for reassignment (Winnemore Aff. in Supp. of TRO ¶ 15; Winnemore Aff. in Reply ¶ 1). She also challenges the constitutionality of Education Law § 2568, arguing that it violates due process by not requiring a hearing prior to the examination to determine whether a psychiatric examination is warranted (Winnemore Aff. in Supp. of TRO ¶ 21).[2]

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[2]Plaintiff suggests the court should refer the constitutionality issue to the New York State Court of Claims (Winnemore Aff. in Supp. of TRO ¶ 21).

Section 2568 of the Education Law authorizes school superintendents to require a psychiatric examination of anyone employed by the Board of Education in order to determine the mental capacity of the employee to perform the duties of the position. Under the statute, the superintendent will only authorize such an examination when he or she has received a report in writing from a person who supervises or directs the employee at issue, and recommends an examination.

Plaintiff, however, points out that the binding contract between the UFT and the Board of Education, provides that an employee's "immediate supervisor" must write the report to the superintendent and request an examination, rather than just a "person under whose supervision or direction" the employee works, as set forth in Education Law § 2568 (Winnemore Reply Aff., Unnumbered Exhibit [Agreement between Board of Educ. and UFT, p. 124]). Plaintiff avers that her immediate supervisor is not the school's principal who wrote the report and made the request, but rather the assistant principal, Ms. Carmen Mejia. She therefore argues that Porrata-Doria's request was improper, the superintendent's authorization invalid, and that the examination must be enjoined. The City defendants do not address this discrepancy between the statute and the bargained for regulations which govern plaintiff's employment contract, nor do they dispute that plaintiff's immediate supervisor is not the principal who requested the psychiatric examination.

The Taylor Law (New York Civil Service Law § 200 et seq.), grants to the Department of Education broad powers to negotiate the terms and conditions of employment (Civil Serv. L. § 204). A board of education may "voluntarily negotiate all matters in controversy unless plainly and clearly prohibited either by statute, by controlling decisional law or by public policy" (*Matter of Board of Educ. of City of Rochester v Nyquist*, 48 NY2d 97, 104 [1979], citations omitted).

"A '[s]chool [d]istrict has an interest in seeing that its teachers are fit' and, thus, teachers may be 'required to submit to an examination to determine their physical and mental fitness to perform their duties'" (*Matter of Gardner v Niskayuna Centr. Sch. Dist.*, 42 AD3d 633, 635 [3d Dept.], *lv denied* 9 NY3d 813 [2007], quoting *Matter of Patchogue-Medford Congress of Teachers v Board of Educ. of Patchogue-Medford Union Free School Dist.*, 70 NY2d 57, 69 [1987]). In *Matter of Gardner*, where the petitioner-teacher had undergone a psychiatric examination pursuant to the statute, the Court rejected her argument that the because her husband had been improperly excluded from the psychiatric examination, violating a right she had under the statute, the tests and the report should have been suppressed. The petitioner in *Gardner* pointed to nothing in the statute or its history to support her argument that a violation of her right to be accompanied to the examination, without more, required suppression or annulment of the determination (42 AD3d at 635). *Matter of Gardner* relied in part on *Matter of Grood*, 1 Ed Dept. Rep. 278 (1959) (Decision No. 6,604), which held, significantly, that under Education Law § 2568, even where the employer failed to provide the required report from the employee's supervisor, there was no need to exclude the psychiatric examination test results (*Matter of Gardner*, at 636).

Here, plaintiff has not established that the collective bargaining agreement's provision that the immediate supervisor institute the process properly overrides the applicable statute. Plaintiff points to no language in Education Law § 2568 that it only controls when there is no collective bargaining agreement in effect at to the procedure for obtaining a medical examination. Moreover, she has not shown that in this instance, the request was improper, where the principal based her request and report primarily on her own observations of plaintiff's actions on August

31 and September 6, 2007.

Plaintiff argues that Education Law § 2568 is unconstitutional and violates due process by not requiring a hearing to be conducted after a request is made that an employee undergo a mental or psychiatric hearing, so as to determine whether an examination is warranted (Winnemore Aff. in Supp. of TRO ¶ 21). At the time this motion was made, and even after it was fully submitted, plaintiff had not served the Attorney General pursuant to CPLR 1012 (b). Without the State of New York having knowledge of her challenge, the court could not consider this branch of her motion (*see,* Alexander, Supplementary Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 1012, 2008 Supp. Pamphlet, at 22, at 760, citing *Gina P. v Stephen S.*, 33 AD3d 412 [1st Dept. 2006]). By affidavit of service dated February 19, 2008, plaintiff's attorney states that he has now served copies of the entire case file upon the Attorney General's office.

Although it cannot be found that the office of the Attorney General has had a proper opportunity to put in a response to plaintiff's challenge, given that the motion was *sub judice* at the time process was served, there is no basis to find that the statute is unconstitutional. Contrary to plaintiff's argument, the medical or psychiatric examination is not a punishment or a disciplinary measure that might require due process protections (*cf., Sanford v Rockefeller*, 35 NY2d 547, 555 [1974] [where an employee can be found guilty of a violation based on evidence introduced at a hearing, he or she must be assured of due process rights at such hearing]). It is rather a tool to be used by the Department of Education both to evaluate continued service and to determine disability retirement (Educ. Law § 2568). There are due process safeguards built into the statute and the collective bargaining agreement as concerns the conduct of the examination,

and post-examination procedures, including availability of hearings to challenge the process and findings. The need for fit teachers in our school system is of sufficient importance that superintendents have properly been given the authority to obtain an independent medical assessment of a teacher's health, when needed. This cannot be found shocking or a violation of due process rights.

Plaintiff has not sufficiently established, from the evidence submitted herein which consists almost entirely of her allegations and suppositions, that she is likely to succeed on the merits of her action, the first prong of the standard for granting a preliminary injunction. Therefore, the branch of her motion seeking to quash the psychiatric examination is denied, as is the branch of her motion challenging Education Law § 2568 on constitutional grounds.

Motion to Dismiss by United Federation of Teachers (UFT) (Mot. Seq. 002)

Defendant UFT moves to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7). In a pre-answer motion to dismiss, the court must accept as true the allegations in the complaint and any submissions in opposition to the motion, accord the 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] [citations omitted]; *Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). The court is not authorized to assess the merits of the complaint or its factual allegations, but should only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept. 2003]).

The standard to determine a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) is whether the facts stated are sufficient to support any cognizable

legal theory (*Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307, 318 [1995]). The court "must take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader." (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]).

In order for a defendant to prevail in a motion to dismiss, he or she must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim (Siegel, New York Practice, § 265 [3d ed.]). The plaintiff's opposition to the motion to dismiss may include affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims." (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636, [1976]).

Plaintiff alleges six causes of action against the UFT. In sum, they all concern the intentional acts or failures to act by her union representative, Mr. Plotkin, as concerns the events on August 31, 2007, involving plaintiff and the principal of her school. Defendant UFT argues that as an unincorporated labor organization, the only claim that can be asserted against it is one that alleges the tortious conduct was authorized or ratified by every single member of the union, citing *Martin v Curran*, 303 NY 276 (1951), and progeny (*see, e.g., Roth v United Fed. of Teachers*, 5 Misc. 3d 888, 895-896 [Sup. Ct., Kings County 2004]).

The claim that a union failed to provide fair representation to one of its members is an intentional tort and as such, requires an allegation that the individual members of the Union authorized or ratified the conduct at issue (*Martin v Curran*, at 289; *Walsh v Torres-Lynch*, 266 AD2d 817, 818 [4th Dept. 1999]). This rule applies also to a cause of action by a union member alleging that the union failed to prosecute a member's grievance (*Walsh v Torres-Lynch*, at 818, citing *Saint v Pope*, 12 AD2d 168 [4th Dept. 1961]; *cf.*, *Grahame v Rochester Teachers Assoc.*, 262 AD2d 963 [4th Dept.], *lv dismissed*, 94 NY2d 796 [1999] [holding that a claim of negligent

misrepresentation against a union did not need to allege ratification by the membership, but defining negligent misrepresentation to encompass actions taken outside the collective bargaining agreement]; *Torres v Lacey*, 3 AD2d 998 [1st Dept. 1957] [holding *Martin v Curran* inapplicable to a union's unintentional tort]).

Plaintiff has not alleged that the acts and inactions of her union representative were ratified by the union's entire membership, and therefore, under *Martin v Curran*, her claims against the union cannot be sustained. The UFT's motion to dismiss the complaint as against it is granted in its entirety.

It is

ORDERED that the motion for a preliminary injunction is denied (Mot. Seq. 001), and the previously entered temporary restraining order shall be deemed vacated ten days after entry of this decision and order; and it is further

ORDERED that the branch of the motion seeking to challenge the constitutionality of Education Law § 2568 is denied; and it is further

ORDERED that the motion to dismiss is granted (Mot. Seq. 002) as against the United Federation of Teachers, and the six causes of action against the United Federation of Teachers are severed and dismissed and the Clerk of Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that the City defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the movants shall serve a copy of this decision and order with notice of

entry upon all parties and upon the Trial Support Office (60 Centre, Rm. 158), the DCM Clerk (80 Centre, Rm. 103) and the Clerk of Court (60 Centre, Bsmt).

This constitutes the decision and order of the court.

Dated: March 24, 2008
New York, New York

J.S.C.

FILED
MAR 27 2008
NEW YORK
COUNTY CLERK'S OFFICE