

Bayley v City of New York

2010 NY Slip Op 30472(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 402624/08

Judge: Cynthia S. Kern

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

CYNTHIA S. KERN

PRESENT: _____ J.S.C.

PART 52

Index Number : 402624/2008

BAYLEY, JEWEL

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the annexed decision.*

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

FILED

MAR 09 2010

NEW YORK

COUNTY CLERK'S OFFICE

Dated: 3/8/10

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

CYNTHIA S. KERN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
JEWEL BAYLEY,

Plaintiff,

Index No. 402624/08

-against-

DECISION/ORDER

THE CITY OF NEW YORK; RAYMOND W. KELLY
as Police Commissioner; NELDRA M. ZEIGLER, as
Deputy Commissioner, Office of Equal Employment
Opportunity; LJUBOMIR BELUSIC, as Captain,
Patrol Borough Brooklyn South; THOMAS KLEIN,
as Captain, Retired; JAMES SCALA, as Sergeant,
Transit District 4, each being sued individually and
in their official capacities as employees of defendant
CITY OF NEW YORK,

Defendants:

-----X
HON. CYNTHIA S. KERN, J.S.C.

FILED
MAR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action against defendants asserting claims for racial
discrimination, retaliation and hostile work environment in violation of State and City Human
Rights Laws. Defendants now move for partial summary judgment dismissing plaintiff's claims
on the following grounds: that all claims for acts of unlawful discrimination which occurred on
or before December 31, 2003 are barred by the doctrines of waiver and estopped based on

3]

plaintiff's participation in a class action settlement; that all claims accruing on or before January 16, 2005 are barred by the three year statute of limitations; and that some of plaintiff's claims are barred by res judicata and collateral estoppel based on prior disciplinary hearings. For the reasons set forth below, defendants' motion is granted in part.

The relevant facts are as follows. At the time of the alleged incidents, plaintiff, an African-American woman, was an employee of the New York City Police Department ("NYPD"). She joined the NYPD on July 2, 2001. In March 2002, she was assigned to Transit Bureau District ("TBD") No. 4. While assigned to TBD No. 4, she received three consecutive below-average annual performance evaluation scores, for the years 2003, 2004 and 2005.

On October 18, 2004, plaintiff was served with a copy of Department Charges and Specifications (the "2004 Charges and Specifications") for acts of misconduct occurring in 2003 and 2004. Specifically, plaintiff was charged with being 10 minutes late for roll call on August 27, 2003; with failing to verify the age of a recipient for a summons on December 2, 2003; with wearing an unauthorized winter cap on December 6, 2003; with failing to notify the Desk Officer of overtime worked on December 16, 2003; and with failing to respond to her radio on February 3, 2004. On May 31, 2005, a disciplinary hearing was held regarding those charges. While those charges were pending, in August 2005, plaintiff was notified that she was being placed into a Performance Monitoring Program. On November 23, 2005, the presiding Administrative Law Judge ("ALJ") issued a report and recommendation in which he found plaintiff guilty of all charges except the wearing of the unauthorized cap and stated that "Viewed together, these multiple minor violations give the impression that [plaintiff] has a cavalier attitude about complying with Departmental procedures. It is recommended that [plaintiff] forfeit ten vacation

days.” The ALJ’s recommendation was accepted by the Police Commissioner on December 12, 2005. That same month, plaintiff was administratively transferred to the 41st Precinct.

On November 15, 2005, while the above charges were pending, plaintiff was served with a second set of Charges and Specifications (the “2005 Charges and Specifications”), alleging that on October 21, 2004, she had failed to store her activity log and have it available for inspection at all times. That charge was supplemented on July 14, 2006 with an allegation that plaintiff failed to produce certain documents as required on January 17, 2005; that on June 25, 2005, she improperly lost her NYPD shield, and that on October 8, 2005, she was 15 minutes late.

Accordingly, another disciplinary hearing was held, this time on October 24, 2006. The presiding ALJ issued a report finding plaintiff guilty of all charges and recommending a penalty of the forfeiture of 20 vacation days, particularly in light of plaintiff’s prior violations. On April 30, 2007, this recommendation was also approved by the Police Commissioner.

Plaintiff alleges that these disciplinary measures were discriminatory in that they were disproportionate to the alleged violations and/or that they were retaliatory for complaints plaintiff made to the NYPD’s Office of Equal Employment Opportunity (“OEEO”) and the United States Equal Employment Opportunity Commission (“EEOC”) as described in further detail below. Plaintiff also alleges that in March 2004, the NYPD treated her differently because of her race when it allegedly did not properly report an incident concerning her locker.

The relevant procedural history is as follows. Plaintiff participated in a prior class-action discrimination lawsuit against the City, captioned *Latino Officers Association of the City of New York Inc. v City of New York*, 99 Civ. 9568 (LAK (SDNY) (“LOA”). In 2005, plaintiff was awarded a settlement in the LOA action. As a condition of settlement, she signed a general

release which precludes her from suing the City or any of its current or former employees on any claims of “unlawful discrimination, hostile work environment and retaliation occurring between September 6, 1996 and December 31, 2003.”

Plaintiff has filed multiple discrimination complaints with the NYPD’s Office of Equal Employment Opportunity (“OEEO”) and the United States Equal Employment Opportunity Commission (“EEOC”). Specifically, on July 7, 2003, plaintiff filed an OEEO complaint alleging that a Lieutenant Callaghan discriminated on the basis of race when he changed plaintiff’s assigned tour. On September 19, 2003, she filed another OEEO complaint alleging that a Captain Vincent Giastano retaliated against plaintiff by issuing her a “command discipline” for being away from her post on August 16, 2003. Plaintiff filed another OEEO complaint on December 19, 2003, alleging that Captain Ernest van Glahn retaliated against her by having her supervisor give her a poor evaluation and record her as having committed a minor violation. In April 2004, she filed another complaint with the OEEO alleging that Lieutenant Vito Labella discriminated against her by recording her as having committed a minor violation of not having secured her locker. Finally, on December 5, 2007, plaintiff filed an EEOC charge alleging that the NYPD had engaged in discrimination and retaliation and had established a hostile work environment. None of these allegations were substantiated.

On or about January 16, 2008, plaintiff commenced the instant action, alleging that the NYPD engaged in prohibited discrimination under both the State and City’s Human Rights Laws, that the NYPD engaged in prohibited retaliation under both sets of laws and that the NYPD established a hostile work environment in violation of both sets of laws.

As an initial matter, defendants are entitled to summary judgment dismissing any claims

[* 6]

based on acts of allegedly unlawful discrimination on or before December 31, 2003 pursuant to the settlement and general release plaintiff entered into in the LOA action. Thus, to the extent plaintiff is asserting any claims based on incidents which occurred in 2003, those claims are dismissed. Even if those incidents were part of a pattern of "continuing violations" constituting a hostile work environment as plaintiff alleges, (which, as explained further below, they are not), any claims based on them are barred by the LOA settlement.

The court now turns to defendants' argument that plaintiff's claims of race discrimination, hostile work environment and retaliation based on the 2004 and 2005 Charges and Specifications are collaterally estopped because they were fully determined at her disciplinary hearings. Defendants' argument is unavailing. Collateral estoppel may apply to disciplinary hearings if the issue in the instant case is identical with that previously decided, the issue was decided in the previous matter and the precluded litigant was given a full and fair opportunity to litigate the issue in the previous proceeding. *See Capital Tel. Co., Inc. v Pattersonville Tel. Co., Inc.*, 56 N.Y.2d 11, 17 (1982); *see also Ryan v N.Y. Tel. Co.*, 62 N.Y.2d 494 (1984). However, plaintiff is correct that she did not and could not have raised her discrimination claims in her disciplinary hearings. She argues that, even if she was guilty of the underlying violations, the Charges and Specifications for those violations were served on her because of her race and/or her prior complaints to the OEEEO and/or EEOC and that members of other races and/or employees who did not complain would not have been formally charged with such minor violations. Therefore, although the issue of her guilt on the underlying violations was adjudicated at the disciplinary hearings, the merits of her discrimination claims were never determined. Accordingly, plaintiff's claims that she was discriminated against or retaliated

against by the bringing of the 2004 and 2005 Charges and Specifications are not collaterally estopped and defendants' motion to dismiss these claims on this basis is denied. However, any claims based on the bringing of the 2004 Charges and Specifications are barred by the three-year statute of limitations, as discussed more fully below.

The court now turns to defendants' argument that plaintiff's discrimination, retaliation and hostile work environment claims accruing prior to January 16, 2005 are barred by the statute of limitations. Defendants are correct. The applicable statute of limitations in the instant case is three years. Therefore, any claims which accrued before January 16, 2005 are barred by the statute of limitations.

Plaintiff's argument that the acts that took place in 2003, 2004, 2005, 2006 and 2007 constitute "continuing violations" that are part of one discriminatory "practice" and, as long as one act took place during the limitations period, she may recover for them is unavailing. Plaintiff is correct that, under the "continuing violations" doctrine, only one discriminatory act need take place during the limitations period in order for a plaintiff to recover for the entire series of acts. *See Nat'l Railroad Passenger Corp. v Morgan*, 536 U.S. 101 (2002). However, the "continuing violations" doctrine only applies to hostile work environment claims, not claims for disparate treatment or retaliation. *See Morgan*, 536 U.S. 101. Therefore, as an initial matter, claims for acts of discrimination or retaliation which accrued prior to January 16, 2005 are barred by the statute of limitations. Moreover, "discrete acts of discrimination, such as termination, failure to promote, denial of transfer, or refusal to hire" cannot constitute "continuing violations." *Id.* at 114. Because the acts cited by plaintiff, such as the bringing of Charges and Specifications against her and her administrative transfer, are all discrete acts of discrimination, they do not

constitute "continuing violations." As such, any claims which accrued prior to January 16, 2005, including any claim based on the bringing of the 2004 Charges and Specifications, are barred by the statute of limitations.

Accordingly, defendants' motion for partial summary judgment is granted in part. To the extent that plaintiff's claims are based on discriminatory acts which occurred prior to and including December 31, 2003, they are dismissed, as they are barred by the LOA settlement. To the extent her claims accrued prior to January 16, 2005 they are also dismissed, as they are barred by the statute of limitations. However, plaintiff's claims for discrimination and retaliation based on the 2005 Charges and Specifications are not dismissed as they are not collaterally estopped by the disciplinary hearings which occurred pursuant thereto. This constitutes the decision and order of the court.

Dated: 3/8/10

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED
MAR 09 2010
NEW YORK
COUNTY CLERKS OFFICE