Matter of Ingram v Nassau County

2010 NY Slip Op 30878(U)

April 7, 2010

Supreme Court, Nassau County

Docket Number: 427/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

In the Matter of the Application of

CHERYL INGRAM,

Petitioner,

- against -

Index No.: 427/09
Motion Seq. No.: 02
Motion Date: 12/21/09
XXX

NASSAU COUNTY and NASSAU COUNTY POLICE DEPARTMENT,

Respondents,

The following papers have been read on this motion:

	Papers Numbered
Re-Notice of Petition, Amended Verified Petition and Exhibits	1
Verified Answer, Affidavit in Support of Verified Answer and Exhibits	2
Affirmation in Further Support of Amended Verified Petition and Exhibit	3
Affidavit in Further Support of Amended Verified Petition and Exhibits	4

Upon the foregoing papers, it is ordered that the application is decided as follows:

This is a hybrid Article 78 proceeding wherein petitioner seeks a declaration that respondents violated Civil Service Law § 72(5) and 42 USC § 1983. Petitioner also seeks compensatory damages, attorneys' fees and all other costs, disbursements and expenses of this proceeding.

The relevant facts include the following:

Petitioner is currently and was during the relevant time period, a Security Officer assigned to the Nassau County Police Department 's Public Safety Unit.

On March 21, 2008, petitioner allegedly displayed emotional outbursts and insubordination. On March 24, 2008, Detective Lieutenant Ronald J. Walsh, Jr., Commanding Officer of the Public Security Office, requested that the Chief Surgeon of the Nassau County Police perform an evaluation of petitioner to determine her fitness for duty. On March 25, 2008, petitioner was removed from her workplace pursuant to Civil Service Law § 72(5) due to her alleged emotional (psychiatric) outbursts and insubordination. Petitioner was taken to Nassau University Medical Center ("NUMC") for an independent psychiatric/medical examination.

After spending twelve days at NUMC, petitioner was found fit for duty and released on April 4, 2008.

In May, 2008, respondents notified petitioner that she "was unable to perform the duties of [her] position as a public safety officer by reason of a disability, other than disability resulting from occupational injury or disease as defined in the workers' compensation law." Respondents further notified petitioner that she be required to undergo a medical examination to be conducted by a medical officer selected by the Nassau County Civil Service Commission and that she was entitled to the procedural remedies contained in Civil Service Law § 72(1).

On May 15, 2008, Dr. Ioannou from NUMC sent a letter to respondents stating petitioner was "free of any major illness that would interfere with her capacity to work."

On June 10, 2008, petitioner was examined by Police Surgeon Robert Klugman. Police Surgeon Klugman found that petitioner was not fit for duty and requested the release of her medical records/confidential records.

On September 9, 2008, Police Surgeon Robert Klugman, M.D. examined petitioner again and found her fit for duty and medically cleared her return to work. Petitioner was reinstated to her position as a Security Officer in the Department's Public Safety Unit effective September 9, 2008.

In February 2009, the County requested that the Department calculate petitioner's time and leave use and lost pay due to the involuntary leave of absence between March 26, 2008 and

September 9, 2008. These calculations include a total of 46 lost days of pay, 320 unit of shift differential and all time and leave used during the time period was to be fully rendered.

In August 2009, an attempt was made to reimburse petitioner of all monies incurred during her involuntary leave. Petitioner declined such offer.

In January 2009, petitioner commenced this proceeding claiming respondents violated Civil Service Law § 72(5) and 42 USC § 1983.

In its answer, the County contends, *inter alia*, that the County did not violate petitioner's rights under Civil Service Law § 72(5), as petitioner was provided with proper notice of her remedies pursuant to Civil Service Law § 72(1). Petitioner, however, did not object to her leave of absence nor did she request a hearing pursuant to Civil Service Law § 72(1). The County further asserts that she was not denied due process under 42 USC § 1983 as she failed to avail herself of the remedies provided in the Collective Bargaining Agreement ("CBA") at issue or Civil Service Law § 72(1).

LAW

Civil Service Law § 72(5) states that "Notwithstanding any other provisions of this section, if the appointing authority determines that there is probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations, it may place such employee on involuntary leave of absence immediately; provided, however that the employee shall be entitled to draw all accumulated unused sick leave, vacation, overtime and other time allowances standing to his or her credit. If such an employee is finally determined not to be physically or mentally unfit to perform the duties of his or her position, he or she shall be restored to his or her position and shall have any leave credits or salary that he or she may have lost because of such involuntary leave of absence restored to him or her less any compensation he or she may have earned in other employment or occupation and any unemployment benefits he or she may have received during such period."

Civil Service Law § 72(1) provides that, after receiving notice that in the employer's opinion the employee is unable to perform his or her duties and should be removed, the

employee has ten working days in which to object and to request a hearing. *Smith v. New York State Dept. of Labor*, 191 Misc.2d 195, 741 N.Y.S.2d 676 (Sup. Ct. Albany County 2002). Civil Service Law § 72(1) sets forth the following requirements for such notice letters: "An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. Such notice shall contain the reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of his or her rights under this procedure."

Petitioner does not deny that she received the letter in May 2008 nor that she did not request a hearing within the ten working day period. Indeed, petitioner admits that the "undated letter" was "hand delivered" to her while she was at a mediation session at the CSEA headquarters regarding an unrelated pending grievance. Instead, petitioner claims that a copy of the Civil Service Law § 72(1) was not annexed to the letter as stated therein.

Petitioner's denial of receipt of a copy of Civil Service Law § 72(1) is insufficient to overcome the presumption of receipt raised by respondents' evidence of its routine mailing procedures. *See e.g. Nelson Management Group, Ltd. v. New York State Div. of Housing and Community Renewal,* 259 A.D.2d 411, 687 N.Y.S.2d 149 (1st Dept. 1999) *lv denied* 93 N.Y.2d 814, 697 N.Y.S.2d 562 (1999); *Jonathan Woodner, Co. v. Higgins*, 179 A.D.2d 444, 578 N.Y.S.2d 561 (1st Dept. 1992) *lv denied* 80 N.Y.2d 756, 588 N.Y.S.2d 824 (1992).

As noted above, petitioner failed to comply with the procedures set forth in Civil Service Law § 72(1) in that she did not object or request a hearing. In addition, petitioner failed to avail herself of the grievance procedures outlined in Section 23 of the CBA at issue. Hence, petitioner has no right to sue her employer directly. S*ee Board of Education, Commack Union Free School District v. Ambach*, 70 N.Y.2d 501, 522 N.Y.S.2d 831 (1987); *Brown v. County of Nassau,* 288 A.D.2d 216, 733 N.Y.S.2d 107 (2d Dept. 2001).

The doctrine of exhaustion of administrative remedies requires that a petitioner utilize all possibilities of obtaining relief through administrative channels before appealing to the courts. *See Cosgrove v. Klingler*, 58 A.D.2d 910, 396 N.Y.S.2d 498 (3d Dept. 1977). A party must exhaust administrative remedies as condition precedent to seeking review of administrative determination. *See Watergate II Apartments. v. Buffalo Sewer Authority,* 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978).

Under these and all the circumstances presented, petitioner's claim that respondents violated Civil Service Law § 72(5) should be dismissed.

Equally unavailing is petitioner's claim that respondent violated 42 USC § 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, 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 law, suit in equity, or other proper proceeding for redress..."

To state a claim under §1983, plaintiff must allege (1) that the conduct complained of was committed by a person acting under color of state law, and (2) that this conduct deprived plaintiff of rights, privileges, or immunities secured by the U.S. Constitution or laws of the United States. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

Because municipalities operate pursuant to authority delegated by the state, municipal employees act under color of state law. *See e.g.* Village Law § 1-102. While a municipality is also a "person" subject to suit under § 1983, it cannot be held liable for its employees' actions on a theory of respondent superior. *See Monell v. Department of Social Services of City of New York,* 436 U.S. 658 (1978). It is only when the execution of the local government's policy or custom, whether made by its lawmakers or those whose actions may fairly be said to represent official policy, inflicts injury that the municipality as an entity is responsible. *See Monell v. Department of Social Services of City of New York, supra.* Nonetheless, a municipality is immune from punitive damages under § 1983, although punitive damages are available against an individual defendant. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

In a § 1983 action, plaintiff must prove a deprivation of a constitutional or federal statutory right. *See Daniels v. Williams,* 474 U.S. 327 (1986). The term "deprive" suggests that the conduct giving rise to a § 1983 action must be intentional. However, the Supreme Court stated in *Daniels v. Williams, supra* that "§ 1983 . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Id.* at 330. Nonetheless, the Court noted that the due process clause provides that a state shall not "deprive any person of life, liberty, or property," and historically, the due process clause has

been applied only to deliberate decisions of government officials. *Id.* at 331. Thus, if a § 1983 action is predicated upon a due process violation, intentional conduct, rather than mere negligence, is required to give rise to liability. *Id.*

The state and federal courts have concurrent jurisdiction over actions brought pursuant to § 1983. *See Felder v. Casey*, 487 U.S. 131, 139 (1988). In determining the level of procedural protection required by the due process clause, the court must consider three factors: (1) the private interest affected by the official action, (2) the risk of erroneous deprivation through the procedures used, and (3) the government's interest. *See Curiale v. Ardra Ins. Co., Ltd.*, 88 N.Y.2d 268, 644 N.Y.S.2d 663 (1996).

Contrary to petitioner's contention, respondents did not deprive her of her constitutional property rights without due process. Petitioner was given notice of her remedies pursuant to Civil Service Law § 72(1) and the CBA.

Apart from the lack of merit of petitioner's claim for monetary damages and counsel fees based upon violation of 42 USC § 1983, this claim is improper in an Article 78 proceeding. *See Rosario v. Blum*, 80 A.D.2d 511, 435 N.Y.S.2d 596 (1st Dept. 1981). *See also Dunhill Mfg. & Dist. Corp. v. State Park Commission for City of New York*, 35 N.Y.2d 657, 360 N.Y.S.2d 421 (1974).

In view of the foregoing, the petition is dismissed.

This constitutes the Decision and Order of this Court.

ENTER:

DENNIS L. SHER, A.J.S.C.
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ENTERED
APR 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
April 7, 2010