Matter of Leiva v Department of Educ. of the City of N.Y.

2011 NY Slip Op 32165(U)

July 20, 2011

Sup Ct, NY County

Docket Number: 101640/11

Judge: Cynthia S. Kern

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SCANNED ON 7/21/2011

[* 1]

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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Justice

Index Number : 101640/2011
LEIVA, ROSE
VS.
NYC DEPT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 101640/11

MOTION DATE

MOTION SEQ. NO. 01

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.

FILED

JUL 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/20/11

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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In the Matter of the Application of ROSA LEIVA,

Petitioner,

Index No. 101640/11

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules and Claims Under the Executive Law and the Administrative Code of the City of New York,

-against-

The Department of Education of the City of New York and the City of New York,

Respondents.

----------x

FILED

JUL 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA KERN, J.S.C.

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.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner brings this petition seeking reinstatement to her prior teaching position, annulment of an unsatisfactory ("U") rating, back pay and related expenses, a declaration that terminating her probationary status and her unsatisfactory rating were arbitrary and capricious, damages in the amount of $2 million and attorneys' fees and costs. Defendants the Department of Education of the City of New York (the "DOE") and the City of New York (the "City") now move to dismiss the petition on the grounds that the City is not petitioner's employer and thus

not a proper party to this proceeding, that petitioner's claims are, in part, time-barred, that the DOE acted properly and in a way that was not arbitrary or capricious and that the City did not discriminate against her on the basis of her age or national origin.

The relevant facts are as follows. Petitioner was hired as a probationary bilingual biology and general science teacher at Norman Thomas High School in Manhattan in or about September 2007. She received a satisfactory rating for the 2007-2008 school year but an unsatisfactory rating for the 2008-2009 academic year and her supervisor recommend that her probation be discontinued - i.e., that she be fired. The evaluation which contained her U rating was dated June 8, 2009. That same day petitioner appealed her U rating and discontinuance. The appeal document is annotated with the note "amended 7/9/09" but it is not clear how it was amended, if at all, on that date. By letter dated June 10, 2009, Elaine Gorman, the Manhattan High Schools Superintendent, informed petitioner that she would review petitioner's file and determine whether her probationary status would be discontinued and her teaching license terminated as of July 10, 2009. By letter dated July 10, 2009, Ms. Gorman informed petitioner that her discontinuance and termination had been "reaffirmed," that her discontinuance and termination were effective as of close of business of that very day and that she had the right to appeal this decision to the Office of Appeals and Reviews within 15 days.

On May 21, 2010, a Chancellor's Committee comprised of a chairperson and two panel members reviewed the decision to discontinue petitioner's probationary service and terminate her teaching license. At the review, school administrators submitted documents and Stacy Torres, an assistant principal, testified as to the reasons for their decision. Petitioner spoke on her own behalf and her UFT advisor had the opportunity to question the school administrators present.

The school administrators submitted evidence to the effect that petitioner's performance was poor and specifically, that both her instructional and classroom management skills were unsatisfactory. Reports of classroom observations indicated that, among other deficiencies, petitioner taught her classes almost completely in Spanish, she did not follow through on the stated "Aim" of the lesson, she did not follow up on the assigned "Do Now," she did not assign work to assess what the students had learned, she stopped teaching before the bell rang, students were seated haphazardly, many students were not paying attention and many students were absent. Petitioner asserted that the lesson observations had not been held properly because no pre-observation conferences were held, she was not given a remediation plan after the observations, the lessons were not observed by Spanish-speakers and that she had too many students. Respondent submitted doumentation indicating that two formal lesson observations and two informal observations were held. Respondent asserts that two pre-observation conferences were held and maintained that the observers did not need to speak Spanish in order to perceive the disorder in the classroom and lack of follow-up by the teacher. The Committee unanimously recommended that petitioner's probationary service be discontinued and her U rating sustained but not that her teaching license should be terminated. By letter dated October 29, 2010, Deputy Chancellor Eric Nadelstern informed petitioner that effective July 3, 2009, her service was discontinued and her teaching license was terminated. Petitioner commenced this action on or about February 9, 2011, asserting that her discontinuance and termination were in bad faith and that she was discriminated against on the basis of her age and national origin in violation of New York City Administrative Code §8-107 and Executive Law §296.

The court first turns to a preliminary matter. Initially, the petition is dismissed as against

the City as it is not and was not petitioner's employer and therefore is not a proper party to this action.

The court now turns to petitioner's claim regarding her discontinuance, which was effective July 10, 2009. That claim is dismissed as it is time-barred. The statute of limitations for an Article 78 proceeding is four months. NY CPLR 217(1). The statute of limitations begins running on the date that the determination became final and binding. *See James v Klein*, 43 A.D.3d 764 (1st Dept 2007) (citing CPLR 217(1); *Mateo v Board of Education of the City of New York*, 285 A.D.2d 552 (2nd Dept 2001); *Schulman v Board of Education fo the City of New York*, 184 A.D.2d 643 (2nd Dept 1992). A letter stating that a probationary teacher's service has been discontinued is final. *See Frasier v Board of Education of the City School District of the City of New York*, 71 N.Y.2d 763 (1988). The date the statute of limitations begins to run is not delayed because the letter of termination refers to available administrative appeals. *See Lipton v New York City Board of Education*, 284 A.D.2d 140 (1st Dept 2001); *Andersen v Klein*, 50 A.D.3d 296 (1st Dept 2008).

In the instant case, the discontinuance of petitioner's services became final on July 10, 2009, the date that she received a letter affirming her dismissal, effective that day. *See Frasier*, 71 N.Y.2d 763; *Lipton*, 284 A.D.2d 140; *Andersen*, 50 A.D.3d 296. The fact that the letter apprised petitioner of review procedures does not affect the running of the statute of limitations. *See Lipton*, 284 A.D.2d 140; *Andersen*, 50 A.D.3d 296. Therefore, she had four months from July 10, 2009, the date of the final decision regarding her discontinuance to bring a timely Article 78 proceeding. The instant proceeding, which petitioner commenced on February 9, 2011, more than a year-and-a-half after the effective date of her termination is therefore time-barred.

As for petitioner's challenge of her unsatisfactory rating, respondent concedes that claim is timely. However, it must still be dismissed because that rating was not arbitrary and capricious as a matter of law. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974). It is petitioner's burden to show that her rating was "in bad faith, for a constitutionally impermissible purpose or in violation of law." *Smith v NYC Dept. of Correction*, 292 A.D.2d 198, 199 (1st Dept 2002).

In the instant case, there is no evidence that petitioner's U rating was arbitrary and capricious or was in bad faith or was given without regard to the facts. To the contrary, the reasons for the U rating are well-documented. Respondent has submitted four reports of observations of petitioner's lessons, all of which, as noted above, identified multiple problems with her teaching and classroom management. Petitioner's argument that only two of the classroom observations were "formal" is irrelevant. Based on those two classroom observations alone, respondent has a rational basis for giving the U rating. Moreover, it is apparent that petitioner's inability to follow-through with her lesson plan and to maintain order in her classroom transcended any language barriers.

Petitioner fails to provide any support for her assertion that the U rating was given in bad faith. Self-serving and conclusory assertions of bad faith, without more, are insufficient to meet petitioner's burden. *Thomas v Abate,* 213 A.D.2d 251 (1st Dept 1995); *Soto v Koehler*, 171 A.D.2d 567, 568 (1st Dept 1991). Petitioner submits only such self-serving assertions. Her allegations that her reviews and observations were not properly conducted and that she had too many students are inadequate to rise to the level of bad faith.

Finally, to the extent that petitioner asserts discrimination claims under Sections 296 of Article 15 of the New York State Executive Law and Section 8-107 of the New York City Administrative Code, these claims are also dismissed. In order to establish such a claim, petitioner must demonstrate (1) membership in a protected class, (2) qualification for the employment, (3) an adverse employment action and (4) circumstances that give rise to an inference of discrimination. *See McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 (1973). If the petitioner establishes her prima facie case using this analysis, the burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for the challenged action. *See id.* at 802-04. If the respondent does so, the burden shifts back to petitioner to show that respondent's stated reason was merely a pretext for discrimination. *See id.* Petitioner here fails to allege any circumstances that give rise to an inference of discrimination. She does not cite to any comments regarding her age or national origin. She merely states that she is over 40 years old and Hispanic and then brings a cause of action for discrimination on these grounds. This is insufficient to make out a claim for age and national origin discrimination.

Accordingly, respondent DOE's motion is granted and the petition is dismissed. This constitutes the decision, judgment and order of the court.

Dated: 7/20/11

CK
J.S.C.

FILED CYNTHIA S. KERN J.S.C.
JUL 21 2011
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