S

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

---x

MARLEEN WALNER, PH.D.,

Plaintiff(s),

-against-

HICKSVILLE UNION FREE SCHOOL DISTRICT, PAUL SCHWEYER and MICHAEL O'CONNELL,

Defendant(s).

---x

Index No. 22536/08

Motion Submitted: 6/17/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....XX

Defendants, Hicksville Union Free School District [hereinafter the District], Paul Schweyer and Michael O'Connell, move pursuant to CPLR §3212, for an order dismissing the plaintiff's complaint.

Plaintiff, Dr. Marleen Walner, was hired by the District as a probationary chemistry teacher effective September 1, 2005 and remained in said position until August 30, 2008, when her employment was terminated (*see* Heyward Affidavit in Support at Exhs. A, D). During her first year of employment, defendant, Paul S. Schweyer, a tenured chemistry teacher in the District, served as the plaintiff's mentor and met with the plaintiff on a regular basis so as to assist her with her teaching career (*see* Waters Affirmation in Support at ¶¶18,19,20; *see also* Exhs. H, I). Throughout the plaintiff's second and third years with the District, defendant, Michael O'Connell, also a tenured chemistry teacher, served as the

Supervisor of the Science Department, and was involved in several classroom observations of Dr. Walner (*id.* at ¶21).

Over the course of her three years with the District, the plaintiff's classroom performance was observed and evaluated on numerous occasions, the last of which occurred on April 15, 2008 and was conducted by Marianne Litzman, Assistant Superintendent for Curriculum and Instruction, who opined that the class she observed was "unsatisfactory" with respect to the areas of "Effective Planning", "Classroom Atmosphere" and "Instructional Performance" (*see* Waters Affirmation in Support at Exh. EE). Thereafter, on May 5, 2008, the plaintiff participated in her required "Portfolio Presentation", the purpose of which is to afford a probationary teacher with a "final opportunity to demonstrate and highlight his [or] her accomplishments, professional growth and examples of student development for those involved in making a recommendation on his [or] her tenure candidacy" (*id.* at Exh. GG; *see also* Heyward Affidavit at ¶19). Subsequent thereto, a tenure meeting was held after which Principal Brijinder Singh, Assistant Superintendent Marianne Litzman and Michael O'Connell unanimously advised Superintendent Maureen Bright that they were recommending the plaintiff not receive tenure (*id.* at ¶30).

Subsequently on August 7, 2008, Dr. Walner received a letter informing her that "[t]he Board of Education, at its meeting on August 6, 2008, has approved the recommendation of the Superintendent of Schools to terminate your appointment as a Science teacher in the Hicksville Union Free School District effective at the close of business, August 30, 2008" (*see* Heyward Affidavit at Exh. D).

As a result of the foregoing, Dr. Walner commenced the within action on or about December 18, 2008 wherein she alleges that the termination of her employment was impermissibly predicated upon her gender in violation of Executive Law §296 (*see* Waters Affirmation in Support at Exh. A). The application interposed by the moving defendants herein thereafter ensued and is determined as set forth hereinafter.

In support of the instant application, counsel asserts that the District's decision to deny tenure to Dr. Walner was predicated upon an unacceptably low student passage rate in relation to the chemistry regents for two consecutive years, in addition to various classroom observations and evaluations, the substance of which documented job performance deficiencies as to presentation, feedback and responsiveness, as well as management of student behavior. As to this latter category, the issue of lateness on behalf of Dr. Walner's students was noted on at least six of the classroom observation reports (*see* Waters Affirmation in Support at Exhs. M, N, AA, CC, DD, EE).

Counsel provides, *inter alia*, the affidavit of Brian K. Heyward, the Assistant Superintendent for Personnel for the District, who avers that he has "personal knowledge

concerning the reasons the District did not recommend to the Board of Education that Marlene [sic] Walner be granted tenure in 2008 . . . ." (*see* Heyward Affidavit at ¶1). Mr. Heyward states that when the plaintiff "taught Regents Chemistry classes during the 2006-07 and 2007-08 school years, the passing rates of her students on the State Regents Examination were thirty-six percent (36%) and fifty-seven (57%), respectively" while the students assigned to Mark Schnittman's (another probationary Chemistry teacher) classes achieved a passage rate of seventy-two percent (72%) on the Regents Chemistry examination for the 2005-2006 class year" (***id.*** at ¶14; *see also* Exh. B). Mr. Heyward additionally states that Dr. Walner "did not receive positive classroom observations or end of school year evaluations" and that same "included several marks of 'Needs Improvement' throughout her three (3) years" with the District (***id.*** at ¶23). With particular regard to the composition of the Science Department based upon gender, Mr. Heyward states that during the time that Dr. Walner was employed with the District, "there were a total of 34 teachers in the Science Department of which twenty-three (23) were tenured" and of those teachers that were tenured "thirteen (13) were female and ten (10) were male" (***id.*** at ¶7). Finally, with respect to Dr. Walner's Portfolio Presentation, which Mr. Heyward personally attended, he states the plaintiff "did not present herself coherently" and failed to "address her evaluations" and based thereon found "Dr. Walner's presentation not deserving of a recommendation for tenure"(***id.*** at ¶27).

In opposing the instant application, Dr. Walner contends that during the course of her employment with the District she was discriminated against based upon her gender with respect to the classes to which she was assigned, the lack of mentoring, as well as the amount of criticism she received from defendant, Michael O'Connell. Dr. Walner provides an affidavit wherein she avers that during her first year with the District, she was assigned to teach a remedial chemistry course, while Mr. Schnittman, a male teacher hired at the same time, was assigned to teach regents level chemistry notwithstanding that he possessed lesser academic qualifications (*see* Walner Affidavit at ¶5). With respect to her second year, Dr. Walner asserts that while Mr. Schnittman was chosen to teach the top level students in the honors section, she was assigned to teach lower achieving students in regents level chemistry thereby explaining why a lower percentage of her students passed the chemistry regents. As to her last year with the District, Dr. Walner contends that the discrimination continued when she was assigned two regents classes and two remedial classes, while Mr. Schnittman was assigned to teach a full complement of honors classes.

In addition to the issue of class assignments, Dr. Walner asserts that she did not receive the quality of mentoring as that afforded to Mr. Schnittman, thus further evidencing that she was the victim of gender discrimination (***id.*** at ¶7). Particularly, Dr. Walner avers that while defendant Schweyer, "was a positive mentor to Mr. Schnittman", he failed to "provide any actual mentoring or help to me" and "repeatedly told me that he could not help me" (***id.***).

As to the matter of criticism, Dr. Walner states that Defendant O'Connell demanded she meet with him on a weekly basis to review her performance and that she type up all her lesson plans, yet such requirements were not imposed upon her male co-workers (***id.*** at ¶9). Finally, Dr. Walner contends that during her three years with the District she never had any issues which required her meeting with the school board, principal or the union yet Mr. Schittman had "documented" issues as to his alleged use of inappropriate language but nonetheless received tenure (***id.*** at ¶¶3,11).

Dr. Walner argues that her treatment by the District as outlined herein constitutes *prima facie* evidence of gender discrimination, which is bolstered by the fact that over the past 14 years the District has not denied tenure to any male science teacher, while at least 7 female science teachers have had their employment terminated (*see* Plaintiff's Memorandum of Law at p. 10). To this latter point, Dr. Walner relies with particularity upon the deposition testimony Dr. Pnina Powell, Diane Muscolino and Laurie Alexander, all of whom are science teachers with the District.

A school board is imbued with broad discretion in deciding whether or not to grant tenure to a probationary teacher (***Merhige v. Copiague School District***, 76 A.D.2d 926, 429 N.Y.S.2d 456 (2d Dept., 1980); ***Harrison v. Goldstein***, 204 A.D.2d 451, 611 N.Y.S.2d 623 [2d Dept., 1994]). "This discretion is 'unfettered' unless the teacher establishes that the board acted for a constitutionally impermissible reason or in violation of a statutory proscription" (***Merhige v. Copiague School District***, ***supra*** at 927). Moreover, tenure may be denied notwithstanding evidence of satisfactory ratings during the probationary period (***Wilson v. Macchiarola***, 79 A.D.2d 638, 433 N.Y.S.2d 814 (2d Dept., 1980); ***Harrison v. Goldstein***, ***supra***).

The standards applicable to claims predicated upon Executive Law §296, "are in accord with Federal standards under title VII of the Civil Rights Acts of 1964" (***Ferrante v. American Lung Association***, 90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25 (1997) at 629 [internal citations omitted]). In order to establish a *prima facie* case of gender discrimination, a plaintiff is required to demonstrate the following: (1) that he or she is a member of a protected class; (2) that he or she was discharged; (3) that he or she was qualified for the position, and; (4) that the discharge from employment occurred under circumstances which give rise to an inference of discrimination (***id.***; *see also* ***McDonnell Douglas Corp. v. Green***, 411 U.S .792, 93 S. Ct. 1817 (1973) at 802; ***Schwaller v. Squire Sanders & Dempsey***, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept., 1998); ***Pearlstein v. Staten Island University Hospital***, 886 F. Supp. 260, [E.D. N.Y., 1995] at 265). Said burden is considered "de minimus" and can be met by the introduction of the plaintiff's deposition testimony (***Schwaller v. Squire Sanders & Dempsey***, ***supra*** at 196).

If the plaintiff succeeds in making this initial showing, a rebuttable presumption of discrimination is created and the burden then shifts to the defendant employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (***Ferrante v. American Lung Association***, ***supra*** at 629; ***Stratton v. Department for the Aging for City of New York***, 132 F.3d 869 [2d Cir., 1997] at 879). If the defendant meets this burden, it thereafter again shifts back to the plaintiff, who can no longer rely on the presumption of discrimination but must demonstrate the existence of a question of fact as to whether the reasons proffered for the termination were a pretext for discrimination (***Ferrante v. American Lung Association***, ***supra*** at 629-630). A plaintiff can make such a showing by establishing that the employer's reason for the termination was false and that the employee's gender was the genuine reason for the challenged employment action (***id.*** at 630).

The Court initially addresses whether the plaintiff has established a *prima facie* case of gender discrimination. In the matter *sub judice*, it is quite apparent that Dr. Walner, as a female, is a member of a protected class (***Ferrante v. American Lung Association***, ***id.***; ***McDonnell Douglas Corp. v. Green***, ***supra***). Moreover, it is undisputed that Dr. Walner, who possesses a Ph.D in chemistry, was qualified for the position as a chemistry teacher and was ultimately discharged therefrom (***id.***). Further, based upon the plaintiff's affidavit submitted herein, together with her deposition testimony, the Court finds that Dr. Walner has proffered sufficient *prima facie* evidence to demonstrate that she was treated in a manner different from that which was accorded to Mr. Schnittman (***id.***). However, notwithstanding Dr. Walner's *prima facie* showing, in moving for summary judgment, the Court finds that the District has articulated non-discriminatory reasons for its decision to deny tenure to the plaintiff, to wit: impermissibly low student passage rates on the chemistry regents, and; unsatisfactory class room evaluations (***Ferrante v. American Lung Association***, ***supra***; ***Stratton v. Department for the Aging for City of New York***, ***supra***).

In the instant matter, in addition to the above referenced affidavit of Assistant Superintendent Heyward, as well as the various unsatisfactory classroom observations, the record herein includes Dr. Walners' final year end evaluation collectively authored and conducted in May of 2008 by Principal Singh, Assistant Principal Sweeney, and Supervisor O'Connell. Said evaluation states that "Dr. Walner's performance this year needs improvement in the areas of presentation, feedback and responsiveness to students, and management of student behavior" (***id.***). The record further includes a numerical break down demonstrating that during the 2006/07 and 2007/08 academic years, the percentages of Dr. Walner's students who passed the chemistry regents were respectively 36% and 57% and that said results were significantly lower than those achieved by Mr. Schnittman (***id.***).

In addition to the foregoing, the Court notes the record establishes that Dr. Walner was replaced by a female teacher, which, while not dispositive of the issue of gender discrimination, militates against a finding thereof (***Romanello v. Shiseido Cosmetics America Ltd.***, 2002 WL 31190169 * 6 (S.D. N.Y., 2002); ***Williams v. Palladia*, Inc.**, 2009 WL 362100 * 9-10 (S.D. N.Y., 2009); ***Stouter v. Smithtown Central School Dist.***, 687 F. Supp.2d 224, [E.D. N.Y., 2010] at 233). Finally, having thoughtfully reviewed the record, the Court finds that it is improbable that the District's decision to terminate Dr. Walner's employment was motivated by discrimination based upon gender (***Ford v. New York City Dept. of Health and Mental Hygiene***, 545 F. Supp.2d 377 [S.D. N.Y., 2008], at 390). Here, Dr. Walner was hired and fired by Superintendent Maureen Bright. "[W]hen the person who made the decision to fire is the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire" (***Grady v. Affiliated Cent.***, 130 F.3d 553 [2d Cir., 1997] at 560). Stated differently, "[I]t is suspect to claim that the same [individual] who hired a person in the protected class would suddenly develop an aversion to members of that class" (***Ford v. New York City Dept. of Health and Mental Hygiene***, ***supra*** at 390 quoting ***Cooper v. Morgenthau***, 2001 WL 868003 [S.D. N.Y., 2001] * 6).

In opposing the District's application and in support of her claims of gender discrimination, Dr. Walner relies heavily upon the deposition testimony of Dr. Pnina Powell, Diane Muscolino and Laurie Alexander. However, having reviewed the depositions of these witnesses, the Court finds that said testimony is insufficient to demonstrate that the reasons proffered by the District in relation to her termination were a pretext offered to obscure an act of invidious discrimination (***Ferrante v. American Lung Association***, ***supra***).

Dr. Powell stated that she was aware of an incident whereby a female science teacher, Ms. Slawitsky, was not praised for her work while a male counterpart received accolades for the same type of work. Dr. Powell further testified there was a perception that female teachers are more frequently reprimanded than male teachers. However, notwithstanding this testimony Dr. Powell was unable to provided any specifics and stated that she could not give any "details" with respect to either the incident involving Ms. Slawitsky[1] or the perception that female teachers were more frequently reprimanded. Moreover, the Court notes Dr. Powell further testified that she never personally observed any differences in the treatment accorded to the teachers based upon their gender.

As to Ms. Muscolino, while this witness testified she overheard two other female teachers discussing that male science teachers were treated in a more favorable manner, she

---

[1] The Court notes that Ms. Slawitsky was ultimately awarded tenure by the District (*see* Defendants' Reply Memorandum of Law at p.9).

unequivocally stated she did not agree with said opinion. With respect to Ms. Alexander, this witness testified she could identify only two female teachers who were denied tenure and while she recalled hearing comments that male teachers were treated more favorably than female teachers, she was unable to state when said comments were made or the individuals to whom said statements could be attributed. Ms. Alexander further stated that she has never observed any differences in the treatment afforded to male and female teachers within the department.

Thus, while the foregoing testimony sets forth anecdotal incidents of perceived inequity *vis a vis* the treatment purportedly afforded to the female science teachers, said testimony does not demonstrate the existence of factual questions with respect to whether the District's stated reasons for terminating the plaintiff's employment were false or that Dr. Walner's gender was the genuine rationale underlying the District's determination (***Ferrante v. American Lung Association, supra*** at 629-630).

Based upon the foregoing, the application interposed by defendants, Hicksville Union Free School District, Paul Schweyer and Michael O'Connell, for an order granting summary judgment dismissing the plaintiff's complaint, is hereby Granted in its entirety.

All applications not specifically addressed are Denied.

The foregoing constitutes the Order of this Court.

Dated: August 16, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
XXX