

Stepper v Department of Educ. of City of New York
2011 NY Slip Op 33694(U)
June 23, 2011
Supreme Court, New York County
Docket Number: 115721/2010
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 52

Index Number : 115721/2010
STEPPER, PHYLLIS MURIEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 115721/10
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

FILED

JUN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

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

Dated: 6/23/11

CK
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.

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

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

-----X
PHYLLIS MURIEL STEPPER,

Plaintiff,

Index No. 115721/10

-against-

DECISION/ORDER

THE DEPARTMENT OF EDUCATION OF
THE CITY OF NEW YORK and THE CITY
OF NEW YORK,

FILED

JUN 27 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CYNTHIA S. 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.....	<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 a claim for discrimination on the basis of age, religion, disability and perceived disability and a claim for retaliation. Defendants now move to dismiss plaintiff's complaint on the grounds that the City of New York is not plaintiff's employer and that her complaint is barred pursuant to the statute of limitations. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff is employed by the New York City Department of Education ("DOE"). At the time of the incidents at issue, she taught at P.S. 396 in Brooklyn. On June 16, 2008, she received an unsatisfactory "U" rating for the 2007-2008 school

year. She received a satisfactory rating the following year. On August 14, 2009, she then received another U rating for the summer of 2009 from Dr. Lawrence Gardner, a director, although her immediate supervisor had rated her performance for the same period satisfactory. Plaintiff appealed the rating and received a final decision dated June 28, 2010 from Acting Interim Director Taveras. She commenced the instant action on December 3, 2010 pursuant to Executive Law 296, alleging that the unsatisfactory ratings had been motivated by discrimination.

As an initial matter, plaintiff's complaint against the City of New York (the "City") is hereby dismissed as the City is not a proper party. The City and the DOE are separate and distinct entities. *See Perez v City of New York*, 41 A.D.3d 378 (1st Dept 2007); *Gold v City of New York*, 80 A.D.2d 138 (1st Dept 1981). Plaintiff was employed by the DOE, not the City. As such, the City is not a proper party in this action and its motion for summary judgment is granted.

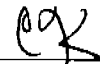
The DOE is also entitled to summary judgment because the instant action is barred by the statute of limitations. The Court of Appeals has made it clear that "the plain language of Education Law 3813 (2-b) [which] provides for a one-year statute of limitations for all non-tort claims, including actions to redress discriminatory practices" applies to claims brought under Executive Law 296. *Amorosi v South Colonie Independent Cent. School Dist.*, 9 N.Y.3d 367, 371 (2007). In *Amorosi*, the court held that petitioner's claim of pregnancy discrimination was time-barred where she was asked to resign in December 2003, did so in January 2004, and brought her claim in September 2005. *See id.* Moreover, "[c]ontrary to plaintiff's argument that her claim did not accrue until she had exhausted all administrative remedies, an employment discrimination claim accrues on the date that an adverse employment determination is made and

communicated to plaintiff, and the possibility that the determination may be reversed is insufficient to toll the limitations period.” *Pinder v City of New York*, 49 A.D.3d 280, 281 (1st Dept 2008) (citation omitted).

In the instant case, plaintiff’s claims accrued on June 16, 2008 and August 14, 2009, respectively. She brought her action on December 3, 2010, more than one year after each of those dates. *See Amorosi*, 9 N.Y.3d at 371. Accordingly, those claims are time-barred. Her appeal of the unsatisfactory rating she received in August 2009 did not toll the statute of limitations. *See Pinder*, 49 A.D.3d at 281.

Accordingly, respondent DOE’s motion is granted and plaintiff’s complaint is dismissed in its entirety. This constitutes the decision, judgment and order of the court.

Dated: 6/23/11



J.S.C.

CYNTHIA S. KERN
J.S.C.

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