Santiago v Department of Educ. of the City of New York
2014 NY Slip Op 30624(U)
February 27, 2014
Supreme Court, New York County
Docket Number: 502752/2012
Judge: Sylvia G. Ash
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At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of February, 2014.

PRESENT:

HON. SYLVIA G. ASH,
Justice.

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ANA SANTIAGO,

Plaintiff(s),

- against -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, et. al.,

Defendant(s).

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DECISION AND ORDER

Index # 502752/2012

Motion Sequence # 1, 2

The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4, 5
Reply Affidavits (Affirmations)	6
___________Affidavit (Affirmation)	
Other Papers	

The motion to dismiss by Defendants, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK and THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK (hereinafter collectively the "City"), brought pursuant to CPLR §3211[a][7] for failure to state a cause of action is GRANTED.

Background

Plaintiff brings this action alleging disparate treatment and a hostile work environment under both New York State and City Human Rights Law ("NYSHRL" and "NYCHRL") due to Plaintiff's gender (female), race (Caucasian), disability (Anxiety Disorder) and perceived disability as well as violation of Plaintiff's right to equal protection under the New York State Constitution.

Plaintiff is employed as an itinerant attendance teacher and works within various schools within the Department of Education ("DOE"). She was appointed to this position in 2008 although

it seems that she was working for DOE in some capacity since 2000. According to Plaintiff's affidavit, which was submitted in opposition to the City's motion, Plaintiff received an unsatisfactory evaluation for the 2011-2012 school year from Defendant, Lucille Lewis, the "network leader." Plaintiff states that, with the exception of the aforementioned 2011-2012 year, she received satisfactory evaluations for every school year from 2000 through 2013.

It is Plaintiff's position that there was no basis for her to receive an unsatisfactory rating in 2011-2012 because she was neither formally or informally observed during the school year, and moreover, there is an absence of comments and supporting documentation for her unsatisfactory rating.

Plaintiff also alleges that she was subjected to disparaging gender-based remarks by Ms. Lewis such as "you girls are always shopping on DOE time" and "you girls are on another planet." Plaintiff further alleges that Ms. Lewis discriminated against a male employee when she came to believe that he was homosexual. Plaintiff states, in her affidavit, that all of the female attendance teachers and the male attendance teacher who Ms. Lewis perceived to be homosexual received unsatisfactory ratings while the lone heterosexual male was given a satisfactory rating and promoted to the position of "Supervisor/Point Person."

Due to receiving the unsatisfactory rating, Plaintiff states that she was barred from applying for "per session" work resulting in lost income, barred from transferring to a different school, unable to be promoted or to increase her salary level.

In its motion to dismiss, the City argues that Plaintiff has failed to state a plausible claim for the following reasons: (1) nothing in Plaintiff's complaint, including the unsatisfactory evaluation, constitutes an adverse employment action; and (2) Plaintiff's complaint contains only conclusory allegations that do not rise to the level of employment discrimination. The City argues that Plaintiff fails to allege any facts suggesting that her unsatisfactory rating occurred under circumstances giving rise to an inference of discrimination. Put another way, the City contends that Plaintiff merely alleges that she is a Caucasian woman with a disability but fails to allege any causal connection between those characteristics and any adverse action. The City further contends that Plaintiff cannot plausibly state a claim for gender discrimination where she acknowledges that both female and male attendance teachers received unsatisfactory ratings.

Similarly, the City argues that Plaintiff fails to state an equal protection clause claim because Plaintiff has failed to assert sufficient facts for the Court to infer that Plaintiff and her co-workers were similarly situated in all material respects and has further failed to adequately identify these co-workers or that any adverse employment actions were taken against those employees.

Discussion

In considering a motion to dismiss for failure to state a cause of action made pursuant to CPLR §3211[a][7], the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [Ct App 1994]). In the context of a motion to dismiss, employment discrimination cases are generally analyzed under a lenient notice pleading standard, whereby the plaintiff need not plead specific facts, but must give defendants "fair notice" of the nature and grounds of her claims (*Swierkiewicz v Sorema N.A.*, 534 US 506, 514-515 [2002]).

Discrimination claims brought pursuant to the State and City Human Rights Laws are reviewed under a burden-shifting framework (*see McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973]). A plaintiff alleging discrimination has the initial burden of establishing, prima facie, that: (1) she was a member of a class protected by the statutes; (2) she was actively or constructively discharged or suffered adverse employment action; (3) she was qualified to hold the position from which she was terminated; and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination (*see Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [Ct App 1997]; *Balsamo v Savin Corporation*, 61 AD3d 622, 623 [2d Dept 2009]).

When a discrimination claim is based, in whole or in part, on an allegedly adverse employment action other than termination of employment, the adverse employment action may only be challenged if it is a materially adverse change in the terms and conditions of an individual's employment (*see Richardson v New York State Dept of Corrections*, 180 F3d 426, 446 [2d Cir 1999]). This may be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation (*Hunt v Klein*, 2011 WL 651876, *5, 2011 US Dist LEXIS 14918, *14-15 [SDNY 2011]). Generally, negative performance reviews or criticism of performance by themselves are not considered adverse employment actions under either the State Human Rights Law or the City Human Rights Law (*see Li v Educational Broadcasting Corp*, 2011 NY Slip Op 31953[U], *12-13 [Sup Ct, New York County June 30, 2011][*citing Nieves v District Council 37, AFSCME, AFL-CIO*, 2009 US Dist LEXIS 112653, 2009 WL 4281454, *8 [SDNY 2009]]).

Here, Plaintiff's allegations fall short of demonstrating that she was subjected to an adverse employment action. Plaintiff's main complaints seem to center on being denied advancement and extra income opportunities as a result of the unsatisfactory rating. This does not constitute a "materially adverse change in the terms and conditions of an individual's employment," especially considering that, in the following school year of 2012-2013, Plaintiff received a satisfactory rating.

[* 4]

Moreover, Plaintiff has pleaded no facts tending to demonstrate that Ms. Lewis's actions were the result of or caused by discriminatory animus. The Court is hard-pressed to find Ms. Lewis's purported statements of "you girls are always shopping on DOE time" and "you girls are on another planet" to constitute disparaging gender-based remarks, but even so, Plaintiff, more importantly, fails to establish that her unsatisfactory rating occurred under circumstances giving rise to an inference of discrimination based on her membership in a protected class.

Therefore, the Court finds Plaintiff has failed to give Defendants fair notice of the nature and grounds of her discrimination claims. For the reasons already stated, Plaintiff has also failed to state a claim under the New York State Equal Protection Clause.

Accordingly, the City's motion to dismiss the complaint is GRANTED in its entirety.[1]

This constitutes the Decision and Order of the Court.

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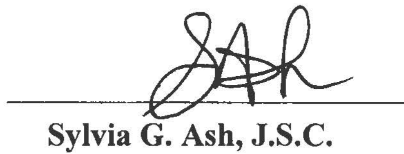
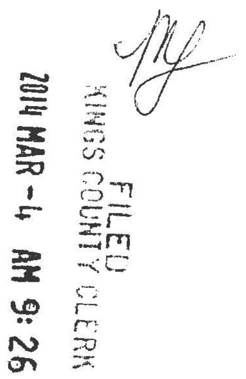


Sylvia G. Ash, J.S.C.



[1] Based on the City's representation of a calendaring error, the City made two identical motions to dismiss. This Decision shall serve to resolve both motions.