Matter of Harris v Department of Educ. of the City of N.Y.
2014 NY Slip Op 33580(U)
December 8, 2014
Supreme Court, New York County
Docket Number: 100991/13
Judge: Michael D. Stallman
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EA 12/11/14 FC

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

In the Matter of the Application of
RONALD P. HARRIS,

Petitioner,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and MARIELA GRAHAM, individually (aider and abettor),
Respondents.

INDEX NO. 100991/13
MOTION DATE 9/2/14
MOTION SEQ. NO. 001

Interim Decision and Order

The following papers, numbered 1 to 7, were read on this petition, cross motion to dismiss, and cross motion for leave to amend

Notice of Petition —Verified Petition— Exhibits A-B; Affidavit of Harris	No(s). 1-2; 3
Notice of Cross Motion to Dismiss — Affirmation in Support; Memorandum of Law in Support of Cross Motion to Dismiss	No(s). 4-5
Notice of Cross Motion to Amend Petition — Affirmation in Support — Exhibits A-B; Memorandum of Law in Opposition	No(s). 6-7
Reply Memorandum of Law in Further Support of Cross Motion to Dismiss	

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

Upon the foregoing papers, it is ORDERED that the cross motion by respondent The City School District of the Board of Education of the City of New York (BOE) to dismiss the petition is granted only to the extent that the second and third causes of action of the verified petition are dismissed as against respondent BOE, and the cross motion is otherwise denied; and it is further

ORDERED that the branch of petitioner's cross motion for leave to amend the petition is granted to the extent discussed herein, and the proposed amended verified petition annexed to petitioner's notice of cross motion and supporting affirmation as Exhibit A is deemed served on respondent BOE only upon a service of a copy of this order with notice of entry; and it is further

(Continued . . .)

ORDERED that the branch of petitioner's cross motion seeking leave to conduct discovery is denied; and it is further

ORDERED that all respondents are directed to answer the amended verified petition by January 9, 2014; and it is further

ORDERED that petitioner may serve a reply to respondents' answer(s) by February 9, 2015; and it is further

ORDERED that the petition is RECALENDARED and ADJOURNED to February 26, 2015 at 10:00 a.m. in IAS Part 21, 80 Centre Street, New York, New York, for submission only of respondents' answer(s) and petitioner's reply, if any.

In this hybrid Article 78 proceeding, petitioner, a teacher allegedly employed by respondent Department of Education of the City of New York (DOE), challenges an unsatisfactory rating (U rating) he received for the 2011-2012 school year, when petitioner was assigned to teach math at the Urban Assembly School for Criminal Justice in Brooklyn. Respondent Mariela Graham is the principal at the school. Petitioner claims he was "subjected to disparate treatment culminating in an unsatisfactory annual performance review for the 2011-2012 school year due to his gender, religion, and age." (Petition ¶ 8.)

Petitioner allegedly received the U rating on June 21, 2012. (Petition ¶ 19.) Then, petitioner filed a grievance pursuant to the collective bargaining agreement (COBA) and received a final determination on March 11, 2013 upholding the unsatisfactory rating. (Petition ¶ 20.) Petitioner commenced this Article 78 proceeding on July 9, 2013.

Petitioner alleges that he is a Jewish male, and that, "[u]pon information and belief, there is a practice of targeting older male teachers and Jewish teachers for disparate treatment in observations and evaluations." (Petition ¶ 21.) The petition asserts three causes of

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action. The first cause of action which purports to be against "DOE only", seeks to set aside and expunge the U rating and "to reinstate petitioner as a Teacher." (Petition ¶ 23.) The second and third causes of action, which are against all respondents, assert that respondents violated the New York City Human Rights Law (Administrative Code § 8-107) and New York State Human Rights Law (Executive Law § 296), by subjecting petitioner to age, gender, and religious discrimination. The petition seeks compensatory damages including but not limited to back pay against respondent Graham; equitable relief only against respondents DOE and BOE to expunge the U rating; and attorney's fees, costs, and disbursements.

Respondent BOE cross-moves to dismiss the petition on the grounds that petitioner's discrimination claims are: (1) barred by applicable statute of limitations; (2) petitioner failed to file a notice of claim for all relief other than equitable relief; and (3) the petition fails to state a cause of action.[1]

Petitioner opposes BOE's cross motion and also cross-moves for an order granting leave to amend the petition and for leave to conduct discovery. The proposed amended verified petition, which adds, removes, and modifies some allegations, notably omits the third cause of action from the original petition, which alleged violation of Executive Law § 296. In addition, attorneys' fees, which were sought in the original petition, are not included in the prayer for relief in the amended verified petition.

BOE argues that petitioner's claims under New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) are time-barred because Education Law § 3813 (2-b) mandates that any cause of action other than one founded in tort brought against respondent, including discrimination claims, be commenced within one year from when the cause of action arose. (*See also Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 368 [1st Dept 2007].)

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[1] BOE claims that the Notice of Petition and Petition were not served upon respondent Mariela Graham.

Here, this hybrid proceeding was commenced on July 9, 2013 after petitioner received a final determination on March 11, 2013 upholding the U rating. Violations of the NYSHRL and NYCHRL against the BOE that are based on any allegedly disparate treatment or other acts that occurred prior to July 9, 2012, including the U rating that petitioner received on June 21, 2012, are therefore time-barred. Because the petition does not allege any allegedly discriminatory acts by the BOE that occurred after July 9, 2012, the second and third causes of action are dismissed as against the BOE as time-barred.

Contrary to petitioner's argument, the grievance that petitioner sought under the COBA did not toll the limitations period. (*Pinder v City of New York*, 49 AD3d 280 [1st Dept 2008].)

As to issue of whether a notice of claim was required, Education Law § 3813 (1) provides, in pertinent part,

> "No action or special proceeding, for any cause whatever . . . shall be prosecuted or maintained against any school district, board of education . . . or any officer of a school district, board of education . . . or school . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

In a line of cases subject to the broad notice provision of Education Law § 3813 (1), "this Department [Appellate Division, First Department] has held that a claimant seeking only equitable relief need not file a notice of claim." (*Rose v New York City Health & Hospitals Corp.*, 122 AD3d 76 [1st Dept 2014].); *Kahn v New York City Dept. of Educ.*, 79 AD3d 521 [1st Dept 2010] [finding that petitioner's claims, which were equitable in nature, were not barred by her failure

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to file a notice of claim pursuant to section 3813].) In the instant case, petitioner did not have to file a notice of claim because he is seeking equitable relief only against BOE, i.e., expungement of the U rating. Moreover, petitioner has submitted a proposed amended verified petition that clearly indicates that petitioner is only seeking equitable relief.

As to failure to state a cause of action, BOE argues that the U rating had a rational basis and was not arbitrary and capricious. However, this argument addresses the merits of the petition. Therefore, the Court cannot decide this issue at this time and directs all respondents to submit an answer.

The branch of petitioner's cross motion for leave to amend the petition pursuant to CPLR 3025 is granted, with one exception. Respondents have not made any showing of surprise or prejudice, (*See Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993]; *Santori v Met Life*, 11 AD3d 597 [2d Dept 2004].) However, leave is not granted as to the proposed second cause of action, for violation for the NYCHRL, as against the BOE. As discussed above, BOE established that this cause of action is time-barred as against the BOE. Therefore, the second cause of action of the proposed amended verified petition is plainly lacking in merit as to the BOE.[2]

In light of the Court's denial of leave to amend with respect to the second cause of action as to the BOE, the Court need not address BOE's argument that the second cause of action is plainly lacking in merit because the U rating cannot be considered "adverse employment action" actionable under NYCHRL.

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[2] BOE points out that the amended verified petition does not seek compensatory damages against respondent Mariela Graham in her individual capacity, but the caption of the amended verified petition still names her "Mariela Graham" as a respondent. However, BOE does not yet purport to represent Graham. BOE does not explain why it would have standing to oppose a proposed amended petition concerning another respondent when that respondent has apparently not appeared in this matter. To the extent that Graham appears to have acted on the job in her capacity as an employee, corporation counsel for the City of New York should immediately clarify whether it will be representing her.

The branch of petitioner's cross motion seeking leave to conduct discovery is denied. In an Article 78 proceeding, "a petitioner is not entitled to discovery as of right" and courts have permitted such discovery only in very limited circumstances. (*See Stapleton Studios, LLC v City of New York*, 7 AD3d 273 [1st Dept 2004]; *see also* CPLR 408; 3-408 Weinstein-Korn-Miller, NY Civ Prac ¶ 408.01.) Here, petitioner has not demonstrated that discovery is warranted with respect to the Article 78 petition.

As petitioner indicates, this matter is "hybrid", in that the pleadings purport to be an Article 78 petition but assert a second cause of action for violation of NYCHRL, which is not in the nature of an Article 78 petition. Denial of leave to conduct discovery with respect to the Article 78 petition should not be construed as applying to any discovery sought with respect to the second cause of action.

Copies to counsel.

HON. MICHAEL D. STALLMAN

Dated: 12/8/14
New York, New York

_____, J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:.....PETITION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE