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| **Robbins v City of New York** |
| 2017 NY Slip Op 32422(U) |
| October 5, 2017 |
| Supreme Court, Queens County |
| Docket Number: 707732/17 |
| Judge: Kevin J. Kerrigan |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Janice Robbins,

Plaintiff,

- against -

The City of New York, Department of Education of the City of New York, Department of Health & Mental Hygiene of the City of New York, Dana Gerendasi, Katie McGillicaddy, Maureen Ryan and Diane Triunfo,

Defendants.

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Index Number: 707732/17

Motion Date: 9/6/17

Motion Cal. Number: 138

Motion Seq. No.: 1

The following papers numbered 1 to 6 read on this motion by defendants, The City of New York, Department of Education of the City of New York (DOE), Department of Health & Mental Hygiene of the City of New York, Dana Gerendasi, Katie McGillicaddy, Maureen Ryan and Diana Triunfo, to dismiss.

| | Papers Numbered |
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| Notice of Motion-Exhibits.......................... | 1-2 |
| Memorandum of Law.................................. | 3 |
| Affirmation in Opposition.......................... | 4-5 |
| Reply.............................................. | 6 |

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted.

In the first instance, since the Department of Health and Mental Hygiene of the City of New York is not a distinct entity but is merely a department, or agency, of the City, it is not a cognizable party and, therefore, the complaint must be dismissed as against it as a matter of law.

Plaintiff, employed by the DOE as a nurse at P.S. 317 in Queens County, alleges in her complaint causes of action under Article 1, Section 11 of the New York State Constitution, the New York State Human Rights Law (SHRL) (Exec. L. §290, et. seq.), and the New York City Human Rights Law (CHRL) (NYC Admin. Code §8-101, et. seq.) for discrimination upon the basis of her age and her religion.

Plaintiff, who informs in her complaint that she is "a female Caucasian of the Jewish faith and is over the age of 50 years", alleges that between May 2016 and September 7, 2016, defendants Ryan (her nursing supervisor), Triunfo (the assistant nursing supervisor), Gerendasi (the school principal) and McGillicaddy (the assistant principal), all of whom plaintiff informs are "Caucasians of non-Jewish descent and are each under the age of 50 years", "continuously harassed the plaintiff, both publicly and privately, in their place of work" and made it "appear as if the plaintiff was incompetent and unable to perform her duties as the school nurse", and further alleges that commencing in September 2016 to the present, they "directed the payroll secretary" to "tamper with the plaintiff's payroll records", all in order to force her to "leave her job" so that she could be replaced by a nurse "who was not of the Jewish faith and who was younger than the plaintiff". As a result of the foregoing, alleged plaintiff, she was "unable to complete her work as was required". Plaintiff, however, does not allege that she resigned, was fired, suspended, demoted, reassigned or, in any specified manner suffered any adverse employment action. Indeed, it is undisputed that plaintiff continues to be employed in the same position and assignment that she occupied prior to the commencement of the alleged discriminatory acts of defendants against her.

Plaintiff has thus failed to set forth any facts to demonstrate that she suffered any adverse employment action or that any adverse employment action occurred under circumstances giving rise to an inference of discrimination on the basis of her religion and age (see Forrest v Jewish Guild for the Blind, 3 NY 3d 295 [2004]; Melman v Montefiore Med. Center, 98 AD 3d 107 [1st Dept 2012]). The complaint herein consists of bare conclusory statements which are insufficient to state a cause of action for discrimination under either the SHRL or the CHRL (see Peterson v City of New York, 120 AD 3d 1328 [2nd Dept 2014]; Hampton v Bergreen, 173 AD 2d 220 [1st Dept 1991]).

This Court notes that plaintiff originally commenced an action against defendants (Index Number 703216/17) that set forth the aforementioned state law causes of action but also included, as a first cause of action, a claim for "violation of federal constitutional rights", to wit, that "plaintiff was deprived of certain rights guaranteed by the 14th amendment of the United States Constitution by reason of her religious beliefs and of her age". Defendants removed that action to the United States District Court for the Eastern District of New York, pursuant to 28 U.S.C. §1441, et. seq., and filed a notice of removal with the Supreme Court on April 13, 2017. District Judge Brian Cogan relates in his memorandum decision and order issued on May 19, 2017 (17 Civ. 2229[BMC]), that plaintiff amended her complaint to delete her federal cause of action, after being informed by that Court that she had failed to meet the federal pleading requirements and that defendants' motion to dismiss such cause of action would likely be granted. Upon said amendment, Judge Cogan declined to exercise supplemental jurisdiction over plaintiff's remaining state law causes of action and dismissed the complaint without prejudice to recommencement in state court. Plaintiff thereafter commenced the present action.

Judge Cogan stated, inter alia, in dictum, "There is not one adverse employment action alleged, as the term is defined under federal employment discrimination law...and the totality of her grievances do not approach the 'severe and pervasive' abuse required for a federal hostile work environment claim. Moreover, there remains a complete absence of any factual allegation that would tend to show her grievances were the result of her being over 50 and/or Jewish. This remains a classically deficient case of a plaintiff alleging 'nothing more than the recitation of a false syllogism: (1) I am (insert name of a protected class); (2) something bad happened to me at work; (3) therefore, it happened to me because I am (insert name of protected class)'" (17 Civ. 2229[BMC], at 9-10). Judge Cogan further noted that although he could not properly pass upon the sufficiency of the pleadings regarding the state law claims, "plaintiff should consider whether the case has enough merit to warrant a second filing fee and recommencement" "in the absence of any allegations showing causation - and grievances that do not rise to a level beyond dissatisfaction with the way she is treated on the job" (id. at 10). This Court concurs with, and adopts with respect to plaintiff's state law causes of action set forth in the present complaint, the aforesaid assessment of Judge Cogan, since the same pleading standards required to state a cause of action for discrimination under federal law apply to discrimination claims brought under the SHRL and CHRL (see Forrest v Jewish Guild for the Blind, 3 NY 3d 295, supra; Melman v Montefiore Med. Center, 98 AD 3d 107, supra). The complaint fails to plead facts that state causes of action for discrimination under either the SHRL or the

CHRL.

In addition to the foregoing, plaintiff's causes of action under the SHRL and CHRL must also be dismissed against defendants Gerendasi and McGillicaddy upon the additional ground that plaintiff failed to serve them with a notice of claim, which is a condition precedent to commencement of an action for discrimination under the SHRL and the CHRL (see Education Law §3818; Amorosi v South Colonie Ind. Cent. School Dist., 9 NY 3d 367 [2007]; DeRise v Kreinik, 10 AD 3d 381 [2nd Dept 2004]).

Finally, with respect to plaintiff's first cause of action alleging violation of Article I, Section 11 of the New York State Constitution, New York's equivalent to the equal protection clause of the 14th Amendment to the U.S. Constitution, plaintiff cannot assert a private cause of action for violation of said section of the NY Constitution for defendants' alleged acts of discrimination, since avenues of redress for alleged claims of discrimination are provided under the SHRL and the CHRL and, therefore, had plaintiff alleged facts to support a claim of discrimination upon the basis of religion or age, a cause of action under Article I, Section 11 of the Constitution would not have been her only remedy (see Brown v State of New York, 89 NY 2d 172 [1996]).

Finally, although plaintiff's counsel, in his opposition, informs that he wishes to amend the complaint and annexes a proposed amended complaint, he has not cross-moved for leave to amend the complaint, pursuant to CPLR 3025(b), and therefore, the proposed amended complaint annexed merely to the opposition may not be considered. The instant motion to dismiss was served on July 27, 2017. Even were the proposed amended complaint annexed to the opposition deemed filed as of the date of filing of the opposition, which was August 18, 2017, such filing was beyond the 20 days within which plaintiff could have amended her pleading as of right pursuant to CPLR 3025(a). In any event, even were this Court to consider the amended complaint, it still fails to state a cause of action for discrimination under either the SHRL or the CHRL.

Accordingly, the action is dismissed.

Dated: October 5, 2017

KEVIN J. KERRIGAN, J.S.C.

FILED
OCT 16 2017
COUNTY CLERK
QUEENS COUNTY