Fields v Department of Educ. of the City of N.Y.
2019 NY Slip Op 30955(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 154283/2016
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS**, *Justice* **PART** **IAS MOTION 5**

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WENDY FIELDS,
Plaintiff,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, EMMANUEL POLANCO, individually as an aider and abettor, and R. IRIZARRY individually as an aider and abettor,
Defendants.

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INDEX NO. 154283/2016

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41

were read on this motion to/for **DISMISSAL**.

Defendants, the Department of Education of the City of New York, Emmanuel Polanco, and R. Irizarry, (collectively DOE)[1] move the court seeking dismissal of the amended complaint pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7) on the grounds that the complaint is barred by the applicable statute of limitations and that it fails to state a cause of action.

Plaintiff, who is a 54-year-old, African-American, licensed English teacher at M.S. 80 in Bronx, New York, commenced this action asserting a violation of the New York City Human Rights Law. Plaintiff alleges she was discriminated against and received disparate treatment due to her age, race and national origin. Specifically, plaintiff alleges that M.S. 80's principal Emmanuel Polanco favored younger Hispanic employees and "discontinued" non-Hispanic, older teachers.

Plaintiff alleges various instances in which she claims she was discriminated against. Specifically, plaintiff asserts that she received a "developing" performance score for the 2013-2014 academic year by school principal Emmanuel Polanco who conducted a biased review; that for the 2014-2015 academic year, she was given an "ineffective" score which was changed to "developing" only after plaintiff filed a grievance; that Principal Polanco and Assistant Principal Ricardo Irizarry delayed processing her line-of-duty injury claim after she fell at the school in September 2014 which resulted in her claim not being approved until June 2015; that in September 2014, Polanco and Irizarry publicly advised plaintiff to transfer to a different school after her inquiry about the school's lack of books and/or curriculum; that she was not permitted to use her cell phone as a timer while younger Hispanic teachers were permitted to do so; that she was placed on the "Teacher Assistance Plan" in March 2015; that her request for technology training during the 2014-2015 academic year was denied when younger and Hispanic teachers received such training; that she was called "Shrek" on multiple occasions during the 2014-2015 academic year and during part of the 2015-2016 academic year by Polanco; and that when a new teacher was hired, Irizarry stated that the new hire

[1] As all of the named defendants are entities of the New York City Department of Education, for the purposes of this decision and order "defendants" or "DOE" shall refer to all defendants named.

was from Argentina, speaks Spanish and, is "one of us." Plaintiff contends that, ultimately, she was forced to resign after receiving multiple letters to her file between February 2015-March 2015.

In support of its dismissal motion, defendants argue that plaintiff failed to comply with the Notice of Claim requirement in that plaintiff alleges claims which did not accrue within the ninety-day period prior to the filing of the Notice of Claim and that claims were asserted in the amended complaint which were not asserted in the Notice of Claim. Additionally, defendants argue that since plaintiff commenced this action on May 19, 2016, any claims asserted in the amended complaint which occurred prior to May 19, 2015 are time-barred by the one year the statute of limitations.[2] Finally, defendants argue that the amended complaint fails to allege facts to suggest that plaintiff suffered any adverse employment actions or that claims alleged occurred because of discrimination on the basis of her age, race or national origin. Moreover, defendants argue that the amended complaint fails to assert facts to support a claim of hostile work environment.

Plaintiff opposes the motion arguing that the claims asserted prior to June 15, 2015 are timely as plaintiff was subject to a continuing violation. Specifically, plaintiff argues that when a complaint asserts hostile work environment and a continuous violation, the court may consider acts pleaded both within and outside the statutory time periods. Plaintiff further argues that she was not only subjected to disparate treatment, but that she suffered adverse employment actions.[3]

On a motion to dismiss a cause of action pursuant to CPLR § 3211(a)(5) as barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. The court must take all allegations in the complaint as true and resolve all inferences in favor of the plaintiff. (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation and citation omitted). The burden then shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been estopped from asserting a statute of limitations defense. (See *Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]; *Zumpano v Quinn,* 6 NY3d 666, 673 [2006]).

Pursuant to Education Law § 3813(1), "No action or special proceeding . . . shall be prosecuted or maintained against any school district, board of education . . . or any officer of a school district, board of education . . . 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." Additionally, § 3813(2)(b) provides for a one-year statute of limitations for claims brought against the DOE.

Here, plaintiff failed to meet the requisite condition precedent before commencing the instant action. Plaintiff filed the Notice of Claim on September 16, 2015 and therefore, must allege claims which accrued on or after June 16, 2015. However, the amended complaint contains claims which occurred more than three months prior to the filing of the Notice of Claim. Specifically, the "developing" performance evaluation rating for the 2013-2014 academic year; the line-of-duty injury claim based on plaintiff's 2014 fall; the alleged adverse action of plaintiff being placed on the "Teacher Assistant Plan" in March 2015; and the letters to plaintiff's file in February through March 2015 are all outside of the ninety-day window outlined by Education Law § 3813(1). Even

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[2] The amended complaint was filed on February 7, 2018.
[3] Plaintiff's opposition is silent as to movant's argument that the hostile work environment claim must be dismissed for failure to comply with Notice of Claim requirements.

assuming, arguendo, that this court could permit the plaintiff to proceed on claims which occurred more than three months prior to the Notice of Claim, the claims would still not lie as any claims which accrued more than one year prior to the commencement of this action on May 19, 2016 are subject to dismissal as they are time-barred pursuant to the one-year statute of limitations set forth in Education Law § 3813.

As to plaintiff's claim connected to the "ineffective" performance rating she received in June 2016, this claim must be dismissed as it occurred after the filing of plaintiff's September 16, 2015 Notice of Claim.

Plaintiff also alleges that the conduct which occurred was part of a continuing violation of her rights due to a hostile work environment. A "continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." (*Cornwall v Robinson*, 23 F3d 694, 704 [2d Cir 1994]). A properly plead continuing violation claim entitles a plaintiff to allege all conduct that was a part of that violation, even conduct that occurred outside of the limitations period. (*Id.*). The First Department adopted the Second Circuit's continuing violation doctrine for discrimination claims brought under the New York City Human Rights Law (NYCHRL). (See *Walsh v Covenant House*, 244 AD2d 214, 215 [1st Dept 1997]). While plaintiff asserts a hostile work environment claim in the amended complaint, this claim was not included in the Notice of Claim. Thus, plaintiff failed to comply with the condition precedent required under Education Law § 3813 and the hostile work environment claim must be dismissed.

As to the remaining claims, when considering a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457, 579 NYS2d 335 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions, as well as, factual claims which are flatly contradicted by documentary evidence. (See *Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

Under the NYCHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in compensation or in the terms, conditions or privileges of employment, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status. (See Executive Law § 296 [1][a]; Administrative Code § 8-107 [1][a]).

The standard for recovery under the NYCHRL is analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 U.S. 792 [1973]; *see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 [2006]; *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 [2004]). Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of discrimination. To meet that burden, plaintiff must show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination.

(*Stephenson*, 6 NY3d at 270, citing *Ferrante v American Lung Ass'n*, 90 NY2d 623, 629 [1997]; *Forrest*, 3 NY3d at 305; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

A plaintiff may prevail in an action under the NYCHRL if "he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision, or that the action was 'more likely than not based in whole or in part on discrimination." (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012], *quoting Aulicino v New York City Dept. of Homeless Servs.*, 580 F3d 73, 80 [2d Cir 2009]). If plaintiff makes this *prima facie* showing, then the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory, reason for its employment decision. If the employer articulates a legitimate, non-discriminatory basis for its decision, then the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." (*Ferrante*, 90 NY2d at 629-630; *see Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253, [1981]).

Here, plaintiff's complaint must be dismissed in its entirely as it fails to sufficiently assert discrimination as no adverse action or disparate treatment is shown due to one or more of her protected characteristics. Plaintiff's allegations around the use of cell phones during the school day is conclusory and speculative. Plaintiff alleges she was not allowed to use her cell phone as a timer but was forced to observe a Hispanic teacher who was permitted to utilize a cell phone as a timer. Nontheless, plaintiff fails to set forth a basis for the assertion that the teacher was administratively allowed or permitted to use a cell phone and offers mere conjecture as to same. Plaintiff also fails to establish that the prohibition against cell phone usage was based upon age, race, or national origin or that she suffered a subsequent adverse employment action in connection to cell phone use.

As to training, plaintiff alleges that she did not receive technology training, despite her request, and argues that she believes that younger and Hispanic teachers received said training. However, the complaint is devoid of facts to support the assertion that she did not receive technology training due to her age, race, or national origin or that the younger and or Hispanic teachers received the very same training she was purportedly denied. Plaintiff also fails to show how the claimed lack of technology training was a result of disparate treatment which resulted in an adverse employment action.

In addition, plaintiff's "ineffective" or "developing" performance evaluation rating for the 2014-2015 academic year, without more, fails to constitute disparate treatment. While plaintiff asserts the she suffered an adverse employment action as she will be unable to perform "per session" work after she retires because she was placed on the "ineligible list" as a result of her performance ratings, she fails to sufficiently establish how the ratings are the result of her status as a member of a protected class based on a protected characteristic. Simply stating that an event occurred is insufficient where, as here, plaintiff fails to provide facts to support the contention that she received the respective ratings based upon her age, race or national origin.

Plaintiff alleges that Principal Polanco referred to her as "Shrek." While being called disparaging names by anyone, particularly an employer, is unacceptable and completely unprofessional, plaintiff fails to assert how the comment was motivated by her age, race, or national origin and/or how it resulted in an adverse employment action. Adverse employment actions are more than inconveniences but a "materially adverse change in the terms and conditions of

employment" such as a demotion, salary decrease, loss of benefits, diminished responsibilities, etc. (*Forrest*, supra).

Regarding plaintiff's other claims, *inter alia*, being placed on the Teacher Assistant Plan but not receiving a model class for three months; her line-of-duty injury claim approval being delayed; being advised to transfer to a different school after purportedly inquiring about the curriculum and pointing to a lack of books; as well as, the claim that the new Argentinian teacher was "one of us," plaintiff fails to demonstrate that these events were the result of discrimination based on her age, race and/or national origin and resulted in adverse employment action which is the governing standard. Plaintiff here does not contend that she was demoted, passed over for promotions, received less pay, or given less responsibilities because of these events.

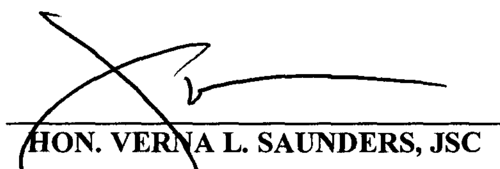
Lastly, the amended complaint fails to assert a claim for aider and abettor liability and therefore, any claims against Principal Polanco and Assistant Principal Irizarry as aider and abettor are dismissed.

Overall, the non-barred claims contained within plaintiff's amended complaint fail to establish that the events alleged were discriminatory in nature and resulted in an adverse employment action. The amended complaint consists of bare conclusory statements which are insufficient to survive defendant's motion to dismiss. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the amended complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied.



March 29, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	X	**CASE DISPOSED**		**NON-FINAL DISPOSITION**		
	X	**GRANTED**	☐ **DENIED**	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**	☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**	☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**