

Mitchell v New York City
2019 NY Slip Op 33816(U)
December 24, 2019
Supreme Court, New York County
Docket Number: 161543/2018
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. Verna L. Saunders

PART

IAS MOTION 5

Justice

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INDEX NO. 161543/2018

DELORES MITCHELL,

Plaintiff,

MOTION SEQ. NO. 001

- against -

NEW YORK CITY,
NEW YORK CITY POLICE DEPARTMENT,
SHERIF NASSEF, individually and in his official
capacity, DONALD SCHNEIDER, individually and
in his official capacity, JOHN AND JANE DOES 1-10,
individually and in their official capacity, AND
XYZ CORP. 1-10,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for

DISMISSAL

Defendants, New York City, New York City Police Department (NYPD), Sherif Nassef, individually and in his official capacity, Donald Schneider, individually and in his official capacity, (hereinafter collectively "City") move the court pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7) for an order seeking dismissal of plaintiff's complaint on the grounds that it is time-barred, in whole or in part, by the applicable statute of limitations and that it fails to state a cause of action. After careful review of the papers submitted, the motion is granted in part and denied in part.

Plaintiff, an African American female police officer within the New York City Police Department (NYPD), asserts that due to her race and gender she was subjected to disparate treatment and a hostile work environment. Plaintiff further asserts retaliation in the form of disciplinary charges which occurred after she filed an internal complaint alleging violations of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL).

In 2004, plaintiff began her tenure in the Highway Patrol Department¹ (HWY) within NYPD. Plaintiff asserts that upon her arrival she was constantly videotaped/under observation because she is a woman. She specifically asserts that her motorcycle instructor openly mistreated her in that he always referred to her as "her" or "she" instead of her name or title as he would address male officers. In September of 2005, plaintiff was assigned to HWY Unit #2 in Brooklyn where plaintiff was informed there were no female amenities/lockers and thus she was forced to change the public bathrooms until December of 2005 when she was designated a locker area. Thereafter, plaintiff asserts that her locker was broken into and her personal belongings were removed.

¹ HWY is a specialized unit within the NYPD. Their responsibilities include, but are not limited to, patrolling and maintaining traffic safety on limited-access highways, accident investigations, field sobriety testing, parade escorts and anti-drag racing programs.

Plaintiff also alleges a course of conduct by the HWY department as a whole, and Lieutenant Nassef and Sergeant Schnieder, individually. Specifically, plaintiff alleges that female officers are treated differently from male officers; female officers are not afforded an opportunity to progress in their careers; no female officer has ever become a detective even after receiving approval for training; Detective or Detective Boss positions are reserved for male officers; no female officers are referred to or asked to join specialized units, i.e., Motor Carrier Unit, Detective Squad; no female officer was ever allowed to be an Instructor; no female officer has ever received a Mothers Against Drunk Drivers (MADD) award; male officers rarely suffer consequences or repercussions for misconduct;² female officers are harshly punished and ridiculed; male officers are given more overtime hours than female officers; female officers are limited to working out of the Brooklyn and Bronx highway units because the other borough/units do not have proper female facilities; HWY has never allowed a female officer to participate in the main Motorcycle Motorcade for the President of the United States or the Macy Thanksgiving Day Parade; HWY never sends female officers to conduct presentations on driving while intoxicated (DWI) and/or sobriety tests; HWY encourages and supports giving female officers the silence treatment, including plaintiff, in order to alienate/harass them; and HWY refuses to recognize October as breast cancer awareness month or send a female officer to NYPD's headquarters for National Women's Month unlike other NYPD units. Plaintiff also cites various incidents regarding the varying treatment of individual female and male officers.³

In 2013, Lieutenant Nassef became plaintiff's supervisor and plaintiff began receiving poor performance evaluations. Plaintiff maintains that prior to Nassef's supervision she received satisfactory evaluations. Then, in 2014, plaintiff was transferred to the midnight tour and was assigned to the Intoxicated Drivers' Testing Unit (IDTU) purportedly due to her ongoing conflict with Lieutenant Nassef. Plaintiff asserts that, during this time, she was assigned to train a different "rookie" every three to six months and thus, was reprimanded for being unable to meet her summons quota as she spent the majority of her time training "rookies." Plaintiff contends that no male officers in HWY were similarly situated. Plaintiff also contends that Lieutenant Nassef refused to visit plaintiff at her post, as required,⁴ and would instead sign plaintiff's activity log book at the command during roll call in order to avoid plaintiff. Additionally, plaintiff contends that Lieutenant Nassef refused to recite plaintiff's name during roll call and on one occasion left plaintiff in the middle of Times Square while she was putting her gear on in violation of department policy and protocol.

Plaintiff asserts that, in or about April of 2014, she lost ten vacation days because she temporarily⁵ misplaced her off-duty gun whereas a male counterpart permanently lost his police identification, police MTA MetroCard, and police Metro North Pass, but was only given a warning as opposed to suspension or stripping of his vacation days as plaintiff suffered.

² Plaintiff avers that a male highway officer who ran over and killed two pedestrians while he was off duty and was caught driving his Uber car while he was on duty, was not terminated or reprimanded. Instead the Executive Officer wrote a sympathetic e-mail concerning said officer.

³ Plaintiff avers that a female officer was forced to leave in 2018 because HWY refused to accommodate her return to work following maternity leave in contrast to a male officer who was allowed to remain home for year due to a family situation; a male officer was allowed to work overtime in order for him to spend time litigating his divorce.

⁴ Plaintiff avers that Lieutenant Nassef is required to visit the different highway officers at their posts in order to check on them and to sign their Activity Log Book.

⁵ Plaintiff avers that she subsequently located her gun within a few hours.

In or about September 2017, plaintiff filed an internal complaint against Lieutenant Nassef with the NYPD HWY's Office of Equal Employment Opportunity (EEO). Plaintiff avers that her complaint was dismissed, and no action was taken as against Lieutenant Nassef. Thereafter, plaintiff contends that Nassef retaliated against plaintiff when he purportedly attacked plaintiff with his vehicle almost causing an accident, which plaintiff avoided by slamming on her brakes. As a result, plaintiff avers that her union delegate attempted to investigate/discuss the incident with Lieutenant Nassef but "the matter was brushed off and no resolution reached."

On April 5, 2018, plaintiff lodged a complaint with Deputy Inspector Ge in which she alleged that she was being treated differently from male officers; that she had been given the silent treatment for years; and that she was being refused re-training as the only Black female officer in NYPD HWY.

Plaintiff argues that, in retaliation for her complaint, less than one month after her April 5, 2018 complaint, plaintiff was served false and fabricated disciplinary charges on May 3, 2018. Specifically, the disciplinary charges indicated that between April 1, 2017 and March 14, 2018, while assigned to HWY Unit #2, plaintiff allegedly failed to conduct Horizontal Gaze Nystagmus (HGN) tests during over one hundred (100) Intoxicated Driver Testing Unit examinations. Plaintiff asserts that these charges are incorrect because on April 1, 2017, Sergeant Schneider gave a presentation on HGN and indicated that officers who joined NYPD HWY after 2014 would be trained for HGN. Officers who were already trained prior to 2014, were purportedly required to sign-up to be re-trained for HGN. Plaintiff avers that as of April 1, 2017, HWY officers were told that their IDTU paperwork was updated to reflect HGN and that HWY officers could now perform it on motorists arrested for DWI in the IDTU room.⁶ Plaintiff contends that she signed up for re-training but never received same. Additionally, plaintiff contends that she was the only officer accused of not following protocol despite male officers were not performing the test. Further, plaintiff also contends that Sergeant Schneider was aware of the male HWY officers were not performing the test, as he views the IDTU tapes on a weekly basis, and asserts that Sergeant Schneider did not penalize or discipline the male officers for the alleged lapse.

Lastly, plaintiff contends that HWY is known for its preferential treatment of its male Caucasian members which has been repeatedly address in complaints or suits by Black or female officers and cites various individual officers who have filed suits reflecting same.⁷

The standards for recovery under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL) are both analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green*, 411 US 792 [1973]. See also *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. (See *Stephenson*, 6

⁶ Prior to this announcement, plaintiff avers that IDTU paperwork was not updated to reflect HGN (2014-2017) and thus, HWY were not required to perform the HGN.

⁷ Plaintiff's references include, but are not limited to, that black officers were bullied and accused of being suicidal causing their weapons to be taken away; a female sergeant was falsely accused of having an affair to tarnish her name and reputation; non-black officers harassed for refusing to participate in the racially motivated harassment of Black officers.

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]).

If plaintiff makes this prima facie showing, the burden then 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, the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." (*Ferrante*, supra; see also *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 [1981]).

In addition to analyzing cases under the *McDonnell Douglas* framework, courts have also held that NYCHRL claims must be analyzed under the somewhat different 'mixed-motive' framework recognized in certain federal cases. (See *Melman*, 98 AD3d at 113; *Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 495 [1st Dept 2014]; *Carryl v MacKay Shields, LLC*, 93 AD3d 589, 589-590 [1st Dept 2012]). Therefore, when a defendant has produced evidence of a legitimate reason for its action, "[t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." (*Bennett*, 92 AD3d at 39; *Melman*, 98 AD3d at 127).

As it pertains to plaintiff's claims of discrimination, the court finds that plaintiff has not proffered evidence suggesting that on the basis of her race or gender she was subjected to a hostile work environment in the form of disparate treatment. To establish a *prima facie* case for discrimination, a plaintiff must show that he or she is a member of a protected class; was qualified for the position held; suffered an adverse employment action; and the adverse action occurred under circumstances giving rise to an inference of discrimination. Plaintiff argues generally about a culture of gender and racial discrimination within NYPD HWY but fails to assert specific instances in which she was specifically discriminated against on the basis of her race or gender. For example, plaintiff asserts that overtime is discriminately distributed to male officers over female officers but fails to assert a specific instance in which she requested to work overtime and was denied; plaintiff contends that HWY has never allowed a woman to be a part of the main motorcade for the President of the United States of America or the Macy's Thanksgiving parade but fails to assert a specific instance in which she requested same and was denied; plaintiff avers that HWY never sends female to do conduct presentations but fails to assert a specific instance in which she requested same and was denied; plaintiff also argues that female officers are barred from specialized units or supervisory titles such as Detective/Detective Boss but fails to assert that plaintiff was qualified for consideration or requested training for the position and was denied.

Further, the specific instances that are provided by plaintiff either pertain to colleagues and do not involve plaintiff directly or, as the City correctly argues, they are time-barred. For instance, plaintiff asserts that upon her arrival to the HWY unit within NYPD in 2004, her motorcycle instructor refused to use her name or title as he did with male officers and only referred to plaintiff as "her" or she." Plaintiff also asserts that upon her move to Unit #2 from September-December of 2005 she was forced to change in the public bathrooms because there were no appropriate female facilities. Lastly, plaintiff alleges a number of incidents from 2014 including, rookie assignments which purportedly barred plaintiff from reaching her quota and Lieutenant Nassef's alleged refusal to visit plaintiff at her post. The court cannot consider these incidents because they are time-barred as a civil action under NYCHRL and the NYSHRL must be commenced within three years of the alleged

discriminatory conduct. See *Jae Hee Chung v Mary Manning Walsh Nursing Home Co., Inc.*, 147 AD3d 452 (1st Dept 2017); *Jeudy v City of New York*, 142 AD3d 821 (1st Dept 2016). Plaintiff commenced this action on December 10, 2018, and thus, the court will not consider any allegations of discriminatory conduct prior to December 10, 2015.

As to plaintiff's specific claims that are not time-barred, the court finds that plaintiff fails to meet her *prima facie* burden as there are no allegations that plaintiff suffered an adverse employment action or that the adverse action occurred under circumstances giving rise to an inference of discrimination. To illustrate, in or about September 2017 plaintiff filed an internal complaint concerning an incident in which plaintiff alleges that Lieutenant Nassef attempted to attack her with his motorcycle. Plaintiff also filed a complaint on April 5, 2018 in which plaintiff alleged that she was given the silent treatment for years. Plaintiff fails to allege how the incident with Lieutenant Nassef and the purported instances of disparate treatment gave rise to an adverse employment action.

Although the court finds plaintiff failed to establish a *prima facie* case for discrimination, plaintiff has nevertheless met her burden under the *McDonnell Douglas* framework for a claim of retaliation. Plaintiff contends that the City retaliated against her resulting in disciplinary charges less than one month after she filed her April 5, 2018 complaint. Here, the City maintains that it had a legitimate reason for the disciplinary charges in that plaintiff failed to administer HGN, as required, during over one hundred (100) Intoxicated Driver Testing Unit examinations between April 1, 2017 and March 14, 2018. Plaintiff asserts that the City's contention is merely a pretext due to the proximity of the charges to her complaint, the City's failure to bring the charges at an earlier occasion, and the refusal to train/retrain plaintiff in the HGN. The court determines that the City's decision to pursue disciplinary charges after a year as opposed to an earlier timeframe does not in and of itself denote retaliation. However, whether the time frame along with the purported refusal of the City to re-train plaintiff (even after notification⁸) in the very test it sought disciplinary action amounts to retaliation is an appropriate inquiry for a jury consider. Accordingly, summary determination is not warranted as to plaintiff's retaliation claim. Based on the foregoing it is hereby

ORDERED that the City's motion for summary judgment is GRANTED as to plaintiff's causes of action for racial discrimination, gender discrimination, hostile work environment and disparate treatment and DENIED as to plaintiff's cause of action for retaliation, and it is further

ORDERED that all parties are to appear for mediation on January 21, 2020 at 2:15 P.M., Part Mediation-Non-Jury, Room 234, 80 Centre Street, New York, N.Y.

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied and this constitutes the decision and order of the Court.

December 24, 2019

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

HON. VERA L. SAUNDERS, JSC

⁸ Plaintiff included an allegation concerning the City's refusal to re-train her in the April 5, 2018 complaint.