SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE **PART** IAS MOTION 62

Justice

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EBONY COTTMAN,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF CORRECTION, CITY OF NEW YORK

Defendant.

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INDEX NO. 155680/2019

MOTION DATE 4/9/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 22

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, the motions are decided as follows:

Plaintiff commenced the instant action by service of a Summons and Complaint dated June 4, 2019. In a stipulation dated August 23, 2019, the parties extended defendants' time to answer or otherwise move in this action to September 26, 2019 and on September 23, 2019, defendants filed the instant motion to dismiss on September 23, 2019 seeking dismissal relating to the City of New York alleging that plaintiff has failed to state a cause of action and seeking dismissal relating to the New York City Department of Correction as it is a non-suable entity. Plaintiff cross-moves to amend its complaint to add three new causes of action.

Before evaluating plaintiff's proposed causes of action, The New York City Charter provides that "all actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York, and not that of any agency, except where

provided by law." N.Y. City Charter § 396. The New York City Department of Correction is a City agency that is not a suable entity. *David v. George Motchan Det. Ctr.*, 2002 US Dist LEXIS 23733, at *8-9 (S.D.N.Y. Dec. 6, 2002). Therefore, all causes of action against the New York City Department of Corrections must be dismissed.

Plaintiff's original complaint alleges that plaintiff commenced employment with DOC on May 16, 2013. According to the complaint, Plaintiff was promoted to the rank of Captain on May 5, 2017, and "recently" began receiving "disciplinary allegations". Plaintiff does not claim any adverse employment action, but she maintains that the disciplinary allegations are made in an attempt to unlawfully reduce DOC's correction officer workforce in violation of Civil Service Law § 80. In attempting to amend the complaint, Plaintiff seeks to add three claims under the NYSHRL and the NYCHRL of gender and race discrimination and aiding and abetting same. Although leave to amend complaint shall be freely granted absent prejudice or surprise resulting from delay, "in order to conserve judicial resources, an examination of the proposed causes of action is warranted and leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law" *Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584, 585 (1st Dep't 2001).

It is well settled that on a motion to dismiss pursuant to CPLR Rule 3211(a)(7), the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs 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 N.Y.2d 83, 87-88 (1994). The Court is not required, however, to accept as true "legal conclusions that are unsupportable based upon the undisputed facts." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Nor is it required to accept

"factual claims either inherently incredible or flatly contradicted by documentary evidence." *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999).

Pursuant to Civil Service Law § 80(1-b):

> [w]here, because of economy, consolidation or abolition of function, curtailment of activities or otherwise, positions in the competitive class are abolished, or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs.

While Civil Rights Law § 80 affords plaintiff rights in the event that her position is abolished, her entire complaint is premised on the theory that the Department of Corrections may at some point reduce its workforce related to the proposed closure of Riker's Island and that the disciplinary complaints filed against plaintiff are a pretext to avoid this process. Plaintiff does not claim that she has been terminated, suffered any adverse employment action, or even that any of these investigations were substantiated or otherwise resolved, *See generally*, *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996) (holding that an employee cannot be adversely affected by charges of wrongdoing unless the charges are decided against her); *Boylan v. Arruda*, 42 F. Supp. 2d 352, 357 (S.D.N.Y. 1999) ("[S]imply undergoing an investigation is not sufficient to constitute "adverse employment action."). As plaintiff has not pled that an adverse employment action has been taken against her, plaintiff has failed to state a cause of action under Civil Rights Law § 80.

To establish a cause of action for discrimination under the NYSHRL or NYCHRL, a plaintiff must establish "(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination." *Harrington v. City of N.Y.*, 157 A.D.3d 582, 584 (1st Dep't 2018).

The proposed amended complaint does not allege that adverse or different treatment occurred under circumstances giving rise to an inference of discrimination. As such, it fails to state a claim for gender and race discrimination under the NYSHRL or the NYCHRL. Similarly, because the proposed amended complaint fails to allege that Plaintiff was subject to an adverse employment action, it fails to state a cause of action for gender and race discrimination under the NYSHRL and NYCHRL. Plaintiff's complaint further fails to plead her causes of action as plaintiff does not plead that any adverse action happened to her because she was a member of a protected class, and instead pleads that an adverse action happened to her while she was a member of a protected class.

As such, defendants' motion to dismiss pursuant to CPLR R. 3211(a)(7) must be granted in its entirety and defendant's motion seeking to amend the complaint must be denied in its entirety.

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/20/2020
DATE

LAURENCE L. LOVE, J.S.C.

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