

Applewhite v NYC Dept. of Educ.

2020 NY Slip Op 32990(U)

September 10, 2020

Supreme Court, New York County

Docket Number: 159909/2019

Judge: Carol R. Edmead

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

-----X

CARMEN APPLEWHITE,

Plaintiff,

- v -

NYC DEPARTMENT OF EDUCATION, KRISTINA
BEECHER

Defendant.

-----X

INDEX NO. 159909/2019

MOTION DATE 8/3/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for JUDGMENT - MONEY.

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Carmen Applewhite (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents New York City Department of Education and Kristina Beecher (motion sequence number 001) is granted and the petition is dismissed in its entirety as against said respondents, and the Clerk of the Court is directed to enter judgment accordingly in favor of said respondents; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on petitioner within 20 days of this order.

In this Article 78 proceeding, petitioner Carmen Applewhite (Applewhite) seeks a judgment to overturn an order of the respondent New York City Department of Education (DOE) as arbitrary and capricious, and the DOE cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted and this proceeding is dismissed.

FACTS

Applewhite has been employed by the DOE in various elementary school teaching positions since 1998. *See* verified petition, ¶¶ 2, 19. Co-respondent Kristina Beecher (Beecher) is the principal of the school to which Applewhite has been assigned since 2008 - District 13, Public School 03 (PS-3), a/k/a “The Bedford Village School,” which is located at 50 Jefferson Avenue in the County of Kings, City and State of New York. *Id.*, ¶¶ 9, 15. Applewhite also notes that she is currently a chapter leader at her union, the United Federation of Teachers (UFT), of which she has been a member for over 17 years, and which has executed a collective bargaining agreement (CBA) with the DOE that governs the terms of her employment. *Id.*, ¶¶ 2, 18, 20, 28.

Applewhite’s petition sets forth a number of troubling allegations that Beecher abused her position as PS-3’s principal to violate both DOE regulations and the UFT’s CBA by, inter alia, committing acts of harassment and/or retaliation, making or failing to make appropriate class teaching assignments, improperly conducting and/or interfering with her performance review, failing to provide special education students with legally mandated “individual education plans” (IEPs) and/or assigning them to inappropriate classes, and wrongfully denying and/or misappropriating teachers’ needed classroom supplies and materials. *See* verified petition, ¶¶ 18-77. However, the focus of Applewhite’s application for Article 78 relief is her request that

the “I-rating” (i.e., “ineffective”) that Beecher purportedly gave her for the 2018-2019 school year be “annulled.” *Id.*, ¶¶ 71-75, 125-126. Applewhite specifically alleges that: 1) she received the I-rating “at or about the beginning of the 2018-2019 school year”; 2) she then filed a grievance concerning that rating with the DOE at the UFT’s suggestion; 2) the DOE denied her grievance; 3) she appealed that denial; 4) the DOE also denied her appeal; and 5) she received the DOE’s decision denying her appeal on June 13, 2019. *Id.*, ¶¶ 75-76. For its part, the DOE has presented a copy of Applewhite’s I-rating, which was actually for the 2017-2018 school year, and which was dated September 4, 2018. *See* notice of cross motion, Nierman affirmation, exhibit B. The court notes that this date falls “at or about the beginning of the 2018-2019 school year,” and that it is therefore not possible that the I-rating applied *to* the 2018-2019 school year, as Applewhite alleges.

In any case, Applewhite subsequently filed a notice of claim against the DOE and the City of New York (the City) on September 10, 2019 (the notice of claim). *See* verified petition, ¶ 77; notice of cross motion, Nierman affirmation, exhibit A. The pertinent portion of the notice of claim states as follows:

“2. Nature Of The Claims

This claim is based on the violations of Defendants [DOE] and principal Kristina Beecher, as well as those of other DOE employees, agents, and/or representatives, for improperly, wrongfully, and undeservedly grading Claimant [i.e., Applewhite] as “ineffective” under the Danielson Rubric and for retaliation experienced for grievances filed against Defendants, and/or other DOE administrators, employees, agents, and/or representatives for violations of the union contract, and/or violations of federal, state or city laws and/or regulations of same.

“3. Date, Time, Nature and Manner In Which the Claims Arose

The claim is based on continuing violations of law since Claimant’s complaints against Defendants [DOE and Beecher], including [DOE’s] employees, agents, and/or representatives, and the subsequent and resultant retaliation and harassment experienced during the 2018-2019 school year.”

Id. Applewhite then commenced this Article 78 proceeding on October 10, 2019 by filing a verified petition/complaint that sets forth causes of action for: 1) violating Executive Law §296 via acts of retaliation forbidden by the New York State Human Rights Law (NYSHRL) including “switching her grade levels in the middle of the academic year, assigning the most troublesome students to Plaintiff’s class, failing to provide Plaintiff with paraprofessional services, stripping her of her position on the UFT and, inter alia, giving Plaintiff an ‘ineffective’ rating despite her more than 20 years as an effective and well-respected teacher”; 2) violating New York Labor Law § 740 which forbids retaliation against whistleblowers; 3) intentional infliction of emotional distress; 4) negligent infliction of emotional distress; 5) negligent supervision; 6) violating the NYSHRL by “subjecting Plaintiff to a hostile work environment”; 7) violating Executive Law § 296 for acts of retaliation forbidden by the New York City Human Rights Law (NYCHRL) including “switching her grade levels in the middle of the academic year, assigning the most troublesome students to Plaintiff’s class, failing to provide Plaintiff with paraprofessional services, stripping her of her position on the UFT and, inter alia, giving Plaintiff an ‘ineffective’ rating despite her more than 20 years as an effective and well-respected teacher”; 8) violating NYCHRL § 8–107(6) by “aiding and abetting Defendants’ discriminatory and retaliatory actions against Plaintiff for filing complaints against Ms. Beecher”; 9) libel; and 10) violating Education Law § 3012 by with respect to her performance review. *See* verified petition. Rather than file an answer, the DOE submitted a cross motion to dismiss the verified petition/complaint on February 7, 2020. *See* notice of cross motion. Despite the ongoing Covid-19 national pandemic, counsel for both parties diligently sought and obtained the necessary extensions to file timely opposition and reply papers. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

Normally, a court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). Among other things, Applewhite's petition asks the court to annul the DOE's I-rating of her for the 2018-2019 school year as an arbitrary and capricious act. *See* verified petition, ¶¶ 125-133. However, the DOE's cross motion asserts that the court cannot perform the normal Article 78 analysis in this case because the claims in Applewhite's petition are either untimely or improper. *See* notice of cross motion, Nierman affirmation, ¶¶ 1-5. For the following reasons, the court agrees.

The DOE first asserts that "most of Applewhite's claims against DOE must be dismissed for failure to file a timely notice of claim." *See* respondents' mem of law at 6-8. The DOE correctly notes that Education Law § 3813 requires an aggrieved teacher to file a notice of claim prior to commencing any action or proceeding against it. *Id.* at 6. The statute particularly specifies that an aggrieved teacher must file such a notice of claim within 90 days of the date that an alleged claim accrues, whether the claim be tort-based (Education Law § 3813 [2]), or non-tort-based (Education Law § 3813 [1]). Education Law § 3813's notice of claim requirement has been recognized to apply to any claims based on alleged violations of the NYSHRL or the NYCHRL. *See e.g., Seifullah v City of New York*, 161 AD3d 1206 (2d Dept 2018); *Bray v New York City Dept. of Educ.*, 59 Misc 3d 1222(A), 2018 NY Slip Op 50643(U) (Sup Ct, NY County 2018). Here, Applewhite's first, sixth, seventh and eighth causes of action allege violations of either the NYSHRL or the NYCHRL. *See* verified petition, ¶¶ 78-82, 99-112. The DOE asserts

that all of these claims accrued more than a year before Applewhite filed her notice of claim on September 10, 2019. *See* respondents' mem of law at 6-7. Based on the allegations in the petition, the DOE is correct. Applewhite's NYSHRL- and NYCHRL-based causes of action all claim that the DOE and Beecher committed eight improper acts, i.e.: 1) switching her grade levels in the middle of the academic year; 2) assigning the most troublesome students to her class; 3) failing to provide her with paraprofessional services; 4) stripping her of her position with the UFT; 5) giving her an I-rating; 6) retaliation for filing grievances; 7) aiding and abetting such retaliation; and 8) harassment/creating a hostile work environment. *See* verified petition, ¶¶ 80, 105. However, the petition states that: 1) Beecher switched Applewhite's grade levels during the 2012-2013 and 2016-2017 school years (*see* verified petition, ¶¶ 32, 51); 2) Beecher assigned troublesome students to Applewhite's class during the 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016 and 2016-2017 school years (*Id.*, ¶¶ 23, 26, 27, 31, 37, 44, 47-49, 51, 53); 3) Beecher failed to provide Applewhite with a paraprofessional in late October of 2018 (*Id.*, ¶ 60); 4) there are no specific allegations in the petition regarding Applewhite's assertion that Beecher and/or the DOE "stripped" her of her position with the UFT (indeed, the petition alleges that Applewhite is still a UFT chapter leader; *Id.*, ¶¶ 18, 20, 28, 111); 5) Beecher gave Applewhite an I-rating on September 4, 2018 (*see* notice of cross motion, Nierman affirmation, exhibit B); 6) Beecher committed acts of retaliation during the 2012-2013 and 2013-2014 school years (*see* verified petition, ¶¶ 30-33, 44); 7) the DOE aided and abetted Beecher in performing those alleged acts of retaliation during those same school years (*Id.*); and 8) Beecher committed acts of harassment and/or acts which contributed to a hostile work environment during the 2016-2017 school year and in June, September and October of 2018 (*Id.*, ¶¶ 50, 56-60, 62-64, 73). As was previously mentioned, Applewhite filed her notice of claim

against the DOE and the City on September 10, 2019. *See* notice of cross motion, Nierman affirmation, exhibit A. However, the foregoing paragraphs of the verified petition clearly allege that the acts on which Applewhite based her NYSHL and NYCHL claims all accrued more than 90 days before September 10, 2019.¹ The court therefore concludes that Applewhite's first, sixth, seventh and eighth causes of action are all untimely pursuant to Education Law § 3813 (1) and (2). *See also Seifullah v City of New York*, 161 AD3d at 1206.² Accordingly, the court finds that so much of the DOE's cross motion as seeks to dismiss those causes of action pursuant to CPLR 3211 (a) (5) (i.e., claims barred by the statute of limitations) should be granted.

The DOE next asserts that "most of [Applewhite's] claims are outside the scope of the notice of claim." *See* respondents' mem of law at 7-8. The DOE correctly notes that Education Law § 3813 (2) requires a notice of claim to comply with Section 50-e of the General Municipal Law, the pertinent subparagraphs of which, in turn, require that a notice of claim must set forth: "(2) the nature of the claim; [and] (3) the time when, the place where and the manner in which the claim arose." *Id.*; *see e.g., Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9

¹ Applewhite argued the 90-day period in which to file her notice of claim did not begin to run when she received her I-rating on September 4, 2018, but rather on June 13, 2019, the date when her administrative appeal was denied. *See* petitioner's mem of law at 24-25. However, the court rejects this argument pursuant to the Court of Appeals' holding in *Kahn v New York City Dept. of Educ.* (18 NY3d 457 [2012]) that an administrative appeal process, such as one by which a teacher may challenge an I-rating and which is solely the product of the provisions of the UFT's CBA, only constitutes "an optional procedure under which a teacher may ask [DOE] to reconsider and reverse [its] initial decision, . . . which is final . . . when made." 18 NY3d at 462 (internal citations and emphasis omitted). As a result, the statute of limitations began to run on the day that the DOE issued Applewhite's I-rating, and not the day on which it rejected her administrative appeal.

² Applewhite argued that the court should instead apply the Court of Appeals holding in *Margerum v City of Buffalo* (24 NY3d 721 [2015]) to find that her NYSHRL and NYCHRL claims are not subject to Education Law § 3813's notice of claim requirement. *See* petitioner's mem of law at 20-22. However, the court declines to do so because the Appellate Division, First Department, has determined that reliance on *Margerum* is misplaced because its holding does not support such an argument. *Seifullah v City of New York*, 161 AD3d at 1206.

NY3d 367 (2007). The DOE also correctly notes that settled First Department precedent recognizes that any theory of liability which is omitted from a petitioner's notice of claim may not be included in a petitioner's subsequent complaint, and a court may not grant leave to amend such a notice of claim after the statute of limitations on an omitted claim has expired." *Id.*; see e.g., *Matter of Corwin v City of New York*, 141 AD3d 484 (1st Dept 2016); *Fleming v City of New York*, 89 AD3d 405 (1st Dept 2011); *Pezhman v City of New York*, 47 AD3d 493 (1st Dept 2008). Here, the pertinent portion of Applewhite's notice of claim states that her claim is based on Beecher and the DOE: 1) "improperly, wrongfully, and undeservedly grading" her with an I-rating; and 2) committing acts of "retaliation experienced for grievances filed." See notice of cross motion, Nierman affirmation, exhibit A. However, Applewhite's third, fourth, fifth and ninth causes of action respectively assert tort-based theories of liability for, inter alia, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision and libel. See verified petition, ¶¶ 88-98, 113-117. The DOE's reply papers note that Applewhite's opposition papers did not include any response to the DOE's original argument that those causes of action should be dismissed because they were not set forth in her notice of claim. See respondents' reply mem at 11-12. The court deems that Applewhite has conceded this point, and determines that the above-cited case law mandates that Applewhite's omission of the four tort-based causes of action from her notice of claim is fatal to her attempt to assert them in the instant verified petition. Accordingly, the court finds that so much of the DOE's cross motion as seeks to dismiss Applewhite's third, fourth, fifth and ninth causes of action pursuant to Education Law § 3813 (2) should be granted.

Applewhite's remaining causes of action are her second and tenth, which respectively allege that respondents violated New York Labor Law § 740, and Education Law § 3012. *Id.*;

verified petition, ¶¶ 83-87, 118-120. Regarding the former, Applewhite avers that “[t]he citation to Labor Law § 740 was a ministerial error, the correct and applicable law is Civil Service Law § 75-b which specifically applies to claims against public employers and the Administrative Code whistleblower’s statute.” *See* petitioner’s mem of law at 51-52. In its reply papers, the DOE argues that New York law does not permit a tenured public employee with a CBA which provides for an administrative grievance procedure to also assert claims under Civil Service Law § 75-b. *See* respondents’ reply mem at 12-13. The DOE is correct. *See e.g., DiGregorio v MTA Metro-N. R.R.*, 140 AD3d 530 (1st Dept 2016) (Metro North employee whose CBA included a binding arbitration provision could not bring a Civil Service Law § 75-b claim); *Ehrlich v Department of Educ. Of the City of N.Y.*, 2013 NY Slip Op 32875(U) (Sup Ct, NY County 2013, Coin, J.) (DOE employee and UFT member could not maintain a Civil Service Law § 75-b claim where her CBA provided for an administrative grievance procedure), *citing Matter of Hall v Town of Henderson*, 17 AD3d 981, 982 (4th Dept 2005), *Matter of Cantres v Board of Educ. Of the City of N.Y.*, 145 AD2d 359 (1st Dept 1988). Applewhite’s opposition papers do not include any challenge to this case law, and the court again deems that she has conceded the argument. Accordingly, the court finds that so much of the DOE’s cross motion as seeks to dismiss Applewhite’s second cause of action should be granted.

With respect to Applewhite’s Education Law § 3012 claim, which alleges that “[r]espondents failed to adhere to the proper procedures in [connection with her] . . . performance review,” the DOE argues that this cause of action is untimely pursuant to the one-year statute of limitations that Education Law § 3813 (2-b) proscribes for such claims. *See* respondents’ mem of law at 11-12; verified petition, ¶¶ 118-120. Applewhite’s opposition papers do not address this statute of limitations argument, but rather assert that she pled the claim

adequately. *See* petitioner’s mem of law at 52-53. The DOE’s reply papers contest this assertion. *See* respondents’ reply mem at 13-14. For its part, the court first observes that Education Law § 3813 (2-b) indisputably imposes a one-year statute of limitations on all claims that an aggrieved teacher might assert against the DOE. *See e.g., Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d at 370-371; *Thompson v District Council 37*, 155 AD3d 469 (1st Dept 2017). The court also observes that the documentary evidence herein conclusively shows that Applewhite received her I-rating on September 4, 2018, and commenced this Article 78 proceeding on October 10, 2019, more than a year later. *See* notice of cross motion, Nierman affirmation, exhibit B; verified petition. As a result, the court concludes that Applewhite’s Education Law § 3012 claim is clearly untimely.³ Accordingly, the court finds that so much of the DOE’s cross motion as seeks to dismiss Applewhite’s tenth cause of action should be granted.

The court concludes with the observation that Applewhite’s unassuming statement that her notice of claim is “based on continuing violations of law,” does not diminish her legal obligation to seek redress for such violations within the appropriate limitations periods.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby


ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Carmen Applewhite (motion sequence number 001) is denied; and it is further

³ The court here notes that New York law required Applewhite to make use of the administrative grievance procedure that is provided for in her CBA, and that she evidently did so. *See e.g., Villalba v Department of Educ. Of the City of N.Y.*, 50 AD3d 279 (1st Dept 2008); verified petition, ¶¶ 75-76. However, her invocation of that procedure did not automatically toll the statute of limitations on her Education Law § 3012 claim. *See e.g., Matter of Mawn v County of Suffolk*, 17 AD3d 467 (2d Dept 2005); *Matter of Levine v Board of Educ. of City of N.Y.*, 272 AD2d 328 (2d Dept 2000).

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents New York City Department of Education and Kristina Beecher (motion sequence number 001) is granted and the petition is dismissed in its entirety as against said respondents, and the Clerk of the Court is directed to enter judgment accordingly in favor of said respondents; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on petitioner within 20 days of this order.

9/10/2020
DATE


HON. CAROL R. EDMÉAD
J.S.C.
J.S.C.

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