SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5
Justice

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VERONICA HOWELL,
Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF CORRECTION, CITY OF NEW YORK, CYNTHIA BRANN, ANGEL VILLALONA, KEITH POWERS, ALICKA AMPRY-SAMUEL, DONOVAN RICHARDS, CARLINA RIVERA,
Defendants.

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INDEX NO. 157581/2019

MOTION DATE 11/4/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss (sequence 001): 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19.

Plaintiff Veronica Howell, a permanent Correction Officer ("CO") employed by Defendant City of New York in its Department of Correction (the "City" and "DOC," respectively), commenced this action against the City, DOC, individual DOC employees (Brann and Villalona), and members of the New York City Council Committee on Criminal Justice (Powers, Ampry-Samuel, and Rivera) alleging gender discrimination and violations of the New York City Human Rights Law (NYCHRL), New York State Human Rights Law (NYSHRL), Civil Service Law (CSL), and New York State Constitution Equal Protection Clause. Defendants now move, pursuant to CPLR 3211(a)(5) and (7), to dismiss as untimely and for failure to state a cause of action. For the reasons below, the Court grants the motion.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff was appointed to her CO position on August 27, 2009, and assigned to the George Motchan Detention Center ("GMDC") on Rikers Island until June 30, 2018 until it closed (*NYSCEF 2* ["Complaint"] ¶¶ 3, 4, 8). In October 2018, care and custody of juvenile detainees was also transferred to Horizon Juvenile Center ("HJC"), maintained by the New York City Administration for Children's Services (ACS) (*Complaint* ¶¶ 2, 3, 10). Because HJC houses juveniles, DOC requested that COs complete the ACS pre-employment paperwork for a voluntary transfer to HJC (*Complaint* ¶¶ 10, 11). Plaintiff's union advised its member COs not to complete the paperwork, despite DOC discipline, because the HJC transfer was the subject of a legal challenge (*Complaint* ¶¶ 12-14).

After a decision in that challenge, including a determination that expunged discipline records if ACS paperwork was completed by December 29, 2018, Plaintiff's union informed its members that the ACS paperwork needed to be completed by December 29, 2019 (*Complaint* ¶¶ 15-16). DOC thereafter issued charges of misconduct against former GMDC COs stemming

from their refusal to execute ACS pre-employment paperwork (*Complaint* ¶ 17). On August 4, 2019, Plaintiff commenced this action.

Defendants now move to dismiss, arguing: (1) that the CSL § 80 claim should be dismissed because it pertains to the mass abolishment of positions, not individual employment decisions including discipline, and that in any event such claims should be brought in an Article 78 special proceeding; (2) that the Equal Protection Clause arguments are unavailable because the NYSHRL and NYCHRL provide adequate remedies; (3) that Plaintiff fails to state a cause of action as to the NYSHRL and NYCHRL claims because, among other reasons, the Complaint fails to specify the adverse action or connect any alleged action to Plaintiff's gender; (4) that DOC is an improper party; and (5) that the Complaint fails to state any personal involvement of the individual Defendants.

In opposition, Plaintiff argues: (1) in sum and substance, that Defendants' misconduct allegations against Plaintiff are pretextual and target Plaintiff on the basis of her membership in a protected class (female); and (2) that because injunctive relief is inherent to the underlying claim, DOC should not be dismissed as a non-jural entity.

DISCUSSION

In considering a motion to dismiss the court must construe the complaint liberally and accept the pleaded facts as true to determine whether the facts fit into any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375, 754 NYS2d 245 [1st Dept 2003]). The court must accept not only the material allegations of the complaint, but also whatever can be reasonably inferred therefrom in favor of the pleader (*see P.T. Bank*, 301 AD2d at 375).

I. Equal protection claims and claims against individual Defendants

In reply, Defendants correctly highlight that Plaintiff fails to oppose the branches of Defendants' motion seeking to dismiss the constitutional claims, and claims against the individual Defendants. Accordingly, those claims are dismissed (*Cassell v City of NY*, 159 AD3d 603, 603 [1st Dept 2018] [dismissing § 1983 claim as abandoned because plaintiff did not oppose the City's argument in the initial motion to dismiss], citing *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2d Dept 2010]). Even if the Court were to substantively address Defendants' arguments, the individual claims would nevertheless be dismissed, as the Complaint indeed fails to specify the involvement of any individuals. So, too, for the constitutional equal protection claim, which is not cognizable where an alternative statutory remedy is available (*see Soliman v City of NY*, 2017 US Dist LEXIS 50599, at *26 [EDNY Mar. 31, 2017, No. 15-CV-5310] ["The general trend ... is that, where alternative remedies are available for an alleged violation of rights under the New York Constitution—whether those remedies are under state or federal law—a court does not recognize an implied right of action under the New York Constitution."]).

II. DOC as a non-jural entity

Defendants argue that DOC must be dismissed as an improper party because it is a non-suable entity. Indeed, the New York City Charter provides that "[a]ll 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 in that of any agency, except where otherwise provided by law" (Ch. 17, § 396; *see Allen-David v N.Y. City Fire Dept.*, 2010 N.Y. Misc. LEXIS 7147, at *8 [Sup Ct, Bronx County Sep. 22, 2010, No. 300222/2009]; *Bailey v NY City Police Dept.*, 910 F Supp 116, 117 [EDNY 1996] [DOC is a non-suable entity]).

In opposition, Plaintiff argues that "Defendants' argument relies on six (6) cases, the first issuing in 2016," and therefore that "it is not premised on well-settled law as it pertains to state claims" (*Pl Opp* p 9). It is unclear which cases Plaintiff is referencing, but in any event the age of precedent (and persuasive authority) is irrelevant—for a trial court, case law is either binding (or persuasive), or not, regardless of age. Plaintiff's other argument, that the City Charter provision requiring actions and proceedings to name the City and not its agencies does not apply to actions seeking injunctive relief, is not supported by any citations. To the contrary, courts have rejected this argument (*Elisa W. v City of NY*, 2016 US Dist LEXIS 123332, at *29 [SDNY Sep. 12, 2016, No. 15 CV 5273-LTS-HBP], citing *Corley v. City of New York*, No. 14 CV 3202-GHW, 2014 U.S. Dist. LEXIS 121330, at *3-4 [SDNY Aug. 29, 2014] [the fact that an individual seeks declaratory and injunctive relief "does not change the fact that the [relevant city agencies] are not suable entities"]). Accordingly, the Complaint is dismissed against DOC.

III. CSL § 80

Defendants argue, pursuant to CPLR 3211(a)(5) that municipal employees aggrieved by employment determinations, including those entitled to civil service protections and, like Plaintiff, asserting a CSL § 80 claim, must bring such claims in an Article 78 proceeding, which would now be past the four-month statute of limitations (CPLR 217). In opposition, Plaintiff argues only, and without any support, that Defendants' argument "is untrue" [because w]hat is occurring is not a mistake, it is intentional discriminatory conduct" (*Pl Opp* p 9). However, even the cases cited by Plaintiff for the proposition that CSL § 80 workforce reductions may not be utilized as a subterfuge for terminating individual civil servants confirm that Article 78 proceedings are the proper vehicle for such claims (*O'Donnell v Kirby*, 112 AD2d 936, 936 [2d Dept 1985] [petitioner failed to meet burden of demonstrating that abolition of position was in bad faith]; *Della Vecchia v Town of N. Hempstead*, 207 AD2d 483, 484 [2d Dept 1994] [Article 78 proceeding regarding termination of petitioner's employment as a Laborer II]). Accordingly, the CSL claims are dismissed pursuant to CPLR 3211(a)(5) and CPLR 217 as time-barred.

Defendants also argue, pursuant to CPLR 3211(a)(7), that Plaintiff's CSL § 80 claim should be dismissed for failure to state a claim because the alleged disciplinary allegations neither implicate, nor attempt to circumvent, the statute's civil service protections for employees, including COs, in matters of workforce reduction. As Plaintiff recognizes, [p]ublic employers may abolish civil service positions for the purpose of economy or efficiency as long as a job is not eliminated as a subterfuge to avoid statutory protections afforded civil servants before they are discharged" (*Pl Opp* p 5). CSL § 80(1) provides that where a civil service position is

eliminated due to "economy, consolidation or abolition of functions, curtailment of activities or otherwise," then suspension, demotion or termination must occur "in the inverse order of original appointment" (*Matter of Leone v Sprague*, 116 AD3d 1268, 1269 [3d Dept 2014] [CSL § 80 inapplicable because respondents "did not eliminate or abolish petitioner's position," but "...simply terminated petitioner's employment so that they could fill the position with someone who was available to work."]).

In opposition, Plaintiff appears to argue, in sum and substance, that "the City has decided to reduce its uniform workforce by 1,730," that the reduction will include Plaintiff, and that DOC has leveled unfounded misconduct allegations at Plaintiff as a pretext to circumvent various statutory protections afforded to Plaintiff (*Pl Opp* pp 5-6). The problem with this argument, however, is that it is undisputed, **as of the date of oral argument**, that Plaintiff has not been terminated, reprimanded or otherwise subject to any specific adverse action; even construed liberally, the only adverse actions mentioned in the Complaint or opposition papers pertaining to Plaintiff individually are vague misconduct allegations about absences without any detail as to the date or disposition of those allegations (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004] ["A materially adverse change [in employment] might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation"]; *see e.g. Katz v Beth Israel Med. Ctr.*, 2001 U.S. Dist. LEXIS 29, *44, 2001 WL 11064, *14 [SDNY, Jan. 4, 2001] ["Being yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments . . . do not rise to the level of adverse employment actions"]).[1] As Defendants highlight in reply, Plaintiff's claims amount to speculation; Plaintiff has not alleged the actual abolishment of her—or any—civil service positions, and cites only to various reports and proposals (*NYSCEF 15-18*). Accordingly, the CSL § 80 claims are dismissed for failure to state a claim.

IV. NYCHRL/NYSHRL Claims

Defendants also argue, pursuant to CPLR 3211(a)(7), that Plaintiff fails to state any discrimination claim because the Complaint does not plead any adverse action taken against Plaintiff, or any connection between alleged actions and Plaintiff's gender. In order to state a discrimination claim, "the plaintiff bears the initial burden of making a prima facie showing that the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009], citing *Forrest*, 3 NY3d at 305). "After the plaintiff has met his obligation, the burden shifts to the employer to rebut the presumption by setting forth legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Baldwin*, 65 AD3d at 965).

As discussed above, Defendants correctly argue that Plaintiff has not pled any adverse employment action; rather, other than the vague misconduct allegations—which Plaintiff does

[1] The Complaint also mentions "charges of misconduct against former GMDC Officers as a result of their refusal to execute the ACS pre-employment paperwork, (*Complaint* ¶ 17), but again, does not mention specific charges, whether related to Plaintiff or otherwise.

not tie to any actual adverse action—Plaintiff cites only to proposed terminations which have no explicit connection to Plaintiff. Similarly, other than Plaintiff's bare mention of her gender, Plaintiff "does not make any concrete factual allegation" that her gender is in any way connected to an adverse employment action, even if the vague misconduct claims were sufficient to survive a motion to dismiss (*Askin v Dept. of Educ. of the City of NY*, 110 AD3d 621, 622 [1st Dept 2013] [plaintiff's allegation of age-related bias was a "mere legal conclusion" where she alleged only that she was 54 years old and treated less well under the NYSHRL and NYCHRL]). Plaintiff's opposition essentially restates—or, more accurately, conflates—the same arguments as Plaintiff's opposition to dismissal of the CSL § 80 claims, and is thus unavailing. Accordingly, dismissal of the NYCHRL and NYSHRL claims is appropriate.

CONCLUSION/ORDER

For the reasons above, it is

ORDERED that Defendants' motion to dismiss is **GRANTED**, and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that Defendants shall, within 30 days of receipt of this order, e-file and serve upon all parties a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

11/5/2020
New York, NY

DAKOTA D. RAMSEUR, 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