

Hand v New York City Dept. of Corr.
2020 NY Slip Op 33822(U)
November 16, 2020
Supreme Court, New York County
Docket Number: 160415/2019
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

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INDEX NO. 160415/2019

IMARI HAND,

MOTION DATE 06/30/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

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

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

Pending before the court is a motion wherein all defendants (collectively, the “City”) seek an order and judgment, pursuant to Rule 3211 of the New York Civil Practice Law and Rules (“CPLR”), dismissing the complaint, with prejudice, on the grounds that: (1) plaintiff’s claims pursuant to Civil Service Law § 80 are barred as a matter of law and/or patently deficient; (2) plaintiff fails to state a cause of action pursuant to New York State Human Rights Law and/or New York City Human Rights Law for discrimination on the basis of her gender and/or race; (3) plaintiff cannot bring a private cause of action for employment discrimination under Article 1, § 11 of the New York State Constitution and is barred as a matter of law from doing so; and (4) granting defendants costs, fees, and disbursements. Upon the foregoing documents, it is **HEREBY ORDERED** that the motion is **GRANTED**.

In the underlying action, plaintiff alleges that the New York City Department of Correction terminated her probationary employment on May 15, 2019 because of her gender and race, and asserts claims under Civil Service Law § 80; Article I, Section 11 of the New York State Constitution; Section 296 of the New York State Human Rights Law (“SHRL”); and Section 8-107 of the New York City Human Rights Law (“CHRL”).

With respect to plaintiff’s claim under Civil Service Law § 80(1-b), the City argues that first, the proper vehicle for bringing a claim under Civil Service Law § 80 is an Article 78 proceeding, not a plenary action, and that because plaintiff was terminated in May of 2019, any such claim would now be time-barred in light of the four-month statute of limitations applicable to Article 78 proceedings. The City further argues that Civil Service Law § 80 is inapplicable because it applies to situations where an employee is terminated in an effort to avoid limitations on reductions in workforce, and this is not the case here, as the complaint makes clear that plaintiff’s probationary employment was terminated because of an “unreported use of force.”

Here, it is unclear what plaintiff’s theory of the case is with respect to her purported claim under Civil Service Law § 80(1-b). On the one hand, plaintiff argues in her complaint that she was informed that she was terminated due to an “unreported use of force” but that this stated reason was pretextual, and that in reality she was terminated due to her gender and/or race. On the other hand, plaintiff also argues in her complaint that “When, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced, Section 80 Civil Service Law protections must be implemented.” This seems to imply that plaintiff believes she was indeed terminated due to an abolishment or reduction in employment positions. In any event, plaintiff does not dispute the City’s argument that this claim should have been filed as an Article 78. “Notably, the proper remedy for challenging a

determination of a public body which abolishes a position of public employment is the commencement of a CPLR Article 78 proceeding [...], not a plenary action. The four-month Statute of Limitations contained in CPLR §217 is applicable to proceedings contesting such determinations and runs from the date abolition of the position becomes final and binding” (*see Wilson v. Madison-Oneida Bd. of Co-op. Educ. Servs.*, 268 A.D.2d 625 [Sup. Ct. App. Div. 3rd Dept. 2000]). Accordingly, this branch of the motion is GRANTED.

With respect to the plaintiff’s claims under the SHRL and the CHRL, the City argues that they are patently deficient, as plaintiff sets forth no factual allegations that would indicate that her probationary employment was terminated because of her gender, and/or race.

Here, a review of the complaint shows that other than alleging that she is a member of two protected classes (African-American, and female), plaintiff fails to assert a single concrete factual allegation in support of her claim that her probationary employment was terminated because of her gender, and/or race. *See Thomas v. Mintz*, 182 A.D.3d 490 (Sup. Ct. App. Div. 1st Dept. 2020) (“The complaint fails to state causes of action for discrimination and a hostile work environment [...] It does not allege facts that would establish that similarly situated persons who were male or were not of African American descent were treated more favorably than plaintiff was [...]. Instead, the complaint merely asserts the legal conclusion that defendants’ adverse employment actions and plaintiff’s termination were due to race and gender”) and *Askin v. Dep’t of Educ. of City of New York*, 110 A.D.3d 621 (Sup. Ct. Ap. Div. 1st Dept. 2013) (“Although plaintiff asserts that defendants’ actions were motivated by age-related bias, she does not make any concrete factual allegation in support of that claim, other than that she was 54 years old and was treated adversely under the State law or less well under the City HRL. Plaintiff’s allegations in this respect amount

to mere legal conclusions, and do not suffice to make out this element of her claim.”) Accordingly, this branch of the motion is GRANTED.

With respect to plaintiff’s claims under Article I, § 11 of the New York State Constitution, the City argues that there is no private right of action for employment discrimination and, in any event, that plaintiff’s putative claim under the State Constitution must be dismissed for failure to comply with applicable notice of claim requirements.

Plaintiff does not dispute that she failed to file a notice of claim, but argues that she was not required to do so. However, this argument lacks merit, as the New York Court of Appeals held, in 423 S. Salina St., Inc. v. City of Syracuse, 68 N.Y.2d 474 (N.Y. Ct. of Appeals 1986):

The action is, however, barred by plaintiff’s failure to serve a notice of claim as required by General Municipal Law § 50-i, which failure likewise barred any claim based upon violation of the New York State Constitution [...]

There remains for discussion whether plaintiff’s cause of action against the City for damages [resulting from the City’s alleged misuse of its taxing power] is sufficient and, if so, whether it is barred either by limitations or by the failure to file a notice of claim. We conclude that a cause of action is stated and that the action was timely brought, but that the failure to file a notice of claim is fatal to the action.

Accordingly, this branch of the motion is GRANTED.

Based on the above, IT IS HEREBY ORDERED that the motion is GRANTED and the complaint is dismissed WITH PREJUDICE.

This is the order and decision of the court.

11/16/2020

DATE



J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE