

Prade v New York City Dept. of Corr.

2020 NY Slip Op 33946(U)

October 8, 2020

Supreme Court, Queens County

Docket Number: 710465/19

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Diane Prade,

Index
Number: 710465/19 **FILED**

Plaintiff,

- against -

Motion Date: **10/9/2020**
9/28/20 **8:22 AM**

The New York City Department of
Correction and The City of New York,

COUNTY CLERK
QUEENS COUNTY

Defendants.

Motion Seq. No.: 2

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The following papers numbered E22-E28 & E32-E35 read on this motion by defendant, The City of New York, to dismiss.

Papers
Numbered

- Notice of Motion-Affirmation-Exhibits-
- Memorandum of Law..... E22-28
- Memorandum of Law in Opposition-Exhibits..... E33-35
- Memorandum of Law in Reply..... E32

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City to dismiss the complaint, pursuant to CPLR 3211(a)(7), is granted.

Plaintiff, a tenured Correction Officer employed by the New York City Department of Correction (DOC), alleges that the DOC discriminated against her on the basis of her race, age and gender through acts of retaliation and by creating a hostile work environment, in violation of the New York State Human Rights Law (NY Exec. Law §296, et seq.) (SHRL) and the New York City Human Rights Law (NYC Admin. Code §8-107, et seq.) (CHRL), and in violation of her rights under the equal protection clause of the New York State Constitution (Article 1, §11).

Plaintiff, who is African-American and was 50 years old at the time of the alleged acts of discrimination, commenced her career with the DOC as a Correction Officer in 1996 and was assigned to the George Motchan Detention Center (GMDC) on Riker's Island until June 18, 2018, when that facility was made a training and counseling facility and all the staff assigned to GMDC, including plaintiff, were reassigned to Riker's Queens Detention Complex (QDC). On July 8, 2018, plaintiff was reassigned to the EEO Training Division of DOC (EEO-TD) on a temporary basis, until February 8, 2019.

Plaintiff alleges in her complaint that on July 23, 2018, her

new supervisor, one Nicole Primus, holding the position of Training Manager, asked plaintiff to contact each Tour Commander to inquire why more uniformed staff were not showing up to EEO training sessions. Plaintiff informed her that doing so would breach proper protocol, as the chain of command prohibits a Correction Officer from calling a Tour Commander. Primus allegedly insisted, and said that she would observe plaintiff make the calls. Although plaintiff does not allege in the complaint that she did not do so, it is apparent from her subsequent factual allegations that she did not. Plaintiff also alleges that on the same day she called a fellow Correction Officer "old timer", and Primus overheard it and accused her of age discrimination in the presence of other officers. There is no allegation in the complaint or any showing, on this record, that Primus took any action against plaintiff based upon this incident.

On September 5, 2018, DOC relocated the EEO-TD to GMDC and Primus, on some unspecified date that month asked plaintiff to retrieve some EEO training binders and, and when plaintiff told her that she did not know where they were, Primus allegedly told her that she would watch plaintiff walk over to the cabinet and retrieve them and that if plaintiff did not follow her instructions, she would seek to have plaintiff reassigned from EEO-TD. Plaintiff thereupon responded that she was 50 years old and asked why Primus was speaking to her in such a hostile and disrespectful manner. Plaintiff alleges that thereafter she had a series of meetings, which included Primus to discuss the issues between her and Primus. Plaintiff also alleges in her complaint that Primus's hostile behavior was not limited to plaintiff, but was also directed widely against the DOC's uniformed staff assigned to EEO-TD.

The first meeting in October 2018 between plaintiff, Primus, the Warden of the Correction academy, the DOC Deputy Commissioner of Training, two Captains and three fellow Correction Officers, was to discuss Primus' behavior toward plaintiff and the three other Correction Officers. Plaintiff alleges that Primus was informed by the Warden that plaintiff could not contact Tour Commanders, but could only speak to Captains, in accordance with the chain of command (hence, the Court's conclusion that plaintiff did not comply with Primus' improper demand that she contact the Tour Commanders). A second, follow-up, meeting was subsequently convened by one of the Captains, one Captain Smith, with plaintiff and Primus, at which plaintiff and Primus both agreed to set aside their past difference and move forward.

Plaintiff further alleges that shortly after this meeting, Primus called another meeting with Captain Smith and another Captain, one Captain Aikhuele, complaining of plaintiff's "work ethic", and requesting that plaintiff be removed from the front desk of EEO-TD to a back office because plaintiff could not

multitask while at the front desk and had a "learning curve", and that it was her opinion that plaintiff could not "be the face of the EEO-TD". Plaintiff alleges that Primus then told her that if she could not do the job she should go back to the jails which was a job for dummies that plaintiff was best at. Three days after this encounter, on January 14, 2019, another Captain, one Captain Cook, allegedly conveyed a message to her from Primus informing that Primus wanted plaintiff out of the area and would do anything to get her out, that plaintiff was not what she envisioned for the job, that "the Hood mentality" should stay in the "Hood", that the position was a privilege to those who deserve it and if plaintiff cannot relate to the corporate world, she should stay in the jails. Plaintiff subsequently returned to work at QDC on February 11, 2019.

Plaintiff also alleges that on April 17, 2019, a few days after she threatened to file an unspecified EEO complaint against Primus, disciplinary charges were proffered against her for failure to comply with the order of her supervisor, one Captain Holms, to fill out the required pre-employment criminal background check forms issued by the City's Administration for Children's Services and submit them to her Tour Commander in connection with a request that DOC consider her for a transfer from QDC to the Horizon Juvenile Center to meet the needs of the Department. Plaintiff did not submit these forms, which resulted in the charges against her of violating DOC Rules that require Correction Officers to follow the orders of their supervisors. Plaintiff also alleges that she was not the only Correction Officer to be charged for failing to submit the ACS paperwork that was a pre-condition to employment in the juvenile facility. It is also undisputed that the DOC is seeking a five-day suspension and that the charges against plaintiff are still pending.

Plaintiff alleges in the complaint that DOC initially had requested Correction Officers to transfer to the Horizon Juvenile Center on a voluntary basis by completing the necessary pre-employment criminal background check paperwork, but that the unions representing the uniformed staff advised them not to complete such paperwork because the unions considered such transfers as "union-busting". Thereupon, alleges plaintiff, DOC began to discipline uniformed staff for refusing to complete the paperwork, notwithstanding that DOC had represented to them that transfer to the Juvenile facility was voluntary. The unions continued, however, to advise their members not to fill out this paperwork.

Plaintiff alleges that the union's dispute with the City over this transfer issue was resolved pursuant to a "decision" of Justice Joseph J. Esposito issued on December 12, 2018 under which the unions and the City agreed that uniformed Correction staff would not be disciplined, and any past disciplinary charges would be expunged on condition that uniformed staff completed the ACS

paperwork for transfer to the Juvenile facility by December 29, 2018. The unions thereupon began informing their members that they had until such date to hand in the paperwork so they would not be disciplined. DOC subsequently began proffering charges against officers for refusing to complete the paperwork and coerced them to complete the paperwork.

Plaintiff commenced the present action on June 14, 2019. Setting forth the aforementioned allegations, the complaint alleges, as a first cause of action, race, gender and age discrimination pursuant to Article 1, §11 of the NY Constitution, and the SHRL and the CHRL, for reassigning plaintiff from EEO-TD to QDC. Plaintiff alleges that Prade had her reassigned for having a "hood mentality" and a "high learning curve", which are racist/ethnic stereotypes, and because she could not be "the face of the EEO-TD", which is a sexist and age discriminatory reason.

As a second cause of action under Article 1, §11 of the NY Constitution, SHRL and CHRL, plaintiff alleges that reassigning plaintiff from EEO-TD to QDC was in retaliation for her informing DOC that she intended to file an EEO complaint against Primus.

As a third cause of action, plaintiff alleges that defendants violated Article 1, §11 of the NY Constitution, the SHRL and the CHRL by discriminating against her on the basis of her race, gender and age by "aiding and abetting" one another in their reassignment of plaintiff and for non-action regarding Primus' discriminatory actions against her.

Plaintiff alleges that her transfer constituted an adverse employment action because she was transferred from a "distinguished position" to one that was "not as distinguished".

Finally, plaintiff alleges a fourth cause of action for violation of §80 of the Civil Service Law.

It is undisputed that §80 of the Civil Service Law which relates to the laying-off or firing of an employee is clearly inapplicable to the facts of this case, as plaintiff has not been fired or laid off. Moreover, a claim under §80 to overturn an agency's termination of an employee must be brought by way of a special proceeding under CPLR Article 78, and not by way of an action. In addition, since plaintiff asserts causes of action under the SHRL and CHRL, she is precluded from asserting a cause of action under §11, the equal protection clause, of the NY Constitution, since an action under that provision of the Constitution is available only where there is no other remedy at law (see Brown v State of New York, 89 NY 2d 172 [1996]). Indeed, plaintiff's counsel, in opposition, withdraws the claims asserting violation of Civil Service Law §80 and NY Constitution, Article 1, §11.

With respect to the remaining causes of action, the facts alleged in the complaint do not establish a viable cause of action for race, gender or age discrimination under either the SHRL or the CHRL. Plaintiff has failed to allege any facts to demonstrate that she suffered any adverse employment action or that any adverse employment action occurred under circumstances giving rise to an inference of discrimination on the basis of her race, gender or age (see Forrest v Jewish Guild for the Blind, 3 NY 3d 295 [2004]; Melman v Montefiore Med. Center, 98 AD 3d 107 [1st Dept 2012]). Plaintiff alleges that her transfer from the "distinguished" position at EEO-TD to the "less distinguished" position at QDC, and Primus' hostile behavior toward her creating a hostile work environment constituted an adverse employment action, and that Primus' hostility toward plaintiff and having plaintiff transferred to QDC were motivated by racial, gender and age animus toward plaintiff as well as in retaliation for her announced intention of filing an EEOC complaint against Primus.

Even if, arguendo, an assignment at EEO-TD were a more prestigious position than one at QDC such that a transfer from the former to the latter could be considered an adverse employment action under a proper set of facts, plaintiff does not dispute, or even address, the City's contention that her assignment to EEO-TD was a temporary duty assignment and that plaintiff returned to her normal duties at QDC at the end of the temporary assignment, as supported by the DOC Temporary Duty Request/Extension Form, annexed to the moving papers, prepared on July 13, 2018, and signed by the Chief of Administration, assigning plaintiff on a temporary basis to EEO-TD commencing July 16, 2018 and ending February 8, 2019, with a further signed notation thereon stating "TDY [temporary duty assignment] completed 2/8/19; Report to QDC on 2/11/19". The undisputed showing of the City that plaintiff's EEO-TD assignment was only a temporary assignment, with the start and end dates of that assignment scheduled and arranged before any of the alleged discriminatory actions were inflicted upon her, and that plaintiff reported to QDC on the pre-arranged date for the resumption of her regular duties, and thus that her temporary stint at EEO-TD was not terminated prior to the pre-scheduled end date of her assignment there, establishes conclusively that plaintiff did not suffer an adverse employment action at all, much less that it occurred under circumstances giving rise to an inference of discrimination or retaliation.

The complaint consists of bare conclusory statements which are insufficient to state a cause of action for discrimination under either the SHRL or the CHRL (see Peterson v City of New York, 120 AD 3d 1328 [2nd Dept 2014]; Hampton v Bergreen, 173 AD 2d 220 [1st Dept 1991]). No facts are alleged linking Primus' interaction with plaintiff to racial, gender or age bias. The only bases for her complaint alleging race, gender and age discrimination are her conclusory, and parenthetically-stated, interpretations of Primus'

supposed comments conveyed to her through another employee that she had a "hood mentality" and a "high learning curve" and could not be "the face of the EEO-TD". Plaintiff does not demonstrate that "hood mentality" and "high learning curve" are prima facie racially derogative terms, and this Court is of the opinion that no reasonable jury could possibly, or logically, conclude from the alleged comment of Primus (who is a female holding a supervisory position in the EEO-TD) that plaintiff could not be "the face of the EEO-TD" as indicating that Primus did not believe that a female, and one that is of mature years, should be seen at the front desk but should be kept hidden in a back room. This Court is also at a loss to understand plaintiff's counsel's commentary that this remark demonstrates that Primus considered plaintiff to be the stereotypical "dumb blonde", since this derogative term is the opposite of a claim of discrimination against an older black female.

The complaint does not allege that Primus singled plaintiff out for abusive treatment because Primus did not like her race, gender or age. Indeed, it alleges that the same actions complained of were also leveled by Primus against the uniformed staff generally. It is notable that the complaint is devoid of any mention of the race, gender or ages of the other uniformed staff that plaintiff alleges suffered the same treatment, and plaintiff's counsel is even silent in this regard in opposition to the motion, thus demonstrating clearly that plaintiff's race, gender and age were not a basis either for her transfer back to QDC or for the hostility that she alleges she endured at the hands of Primus. The complaint thus fails to set forth any facts alleging a pattern of discriminatory conduct toward employees who were either black, female or 50 years old so as to state a cause of action under either the NYSHRL or the more liberal criteria of the NYCHRL.

Not only does the complaint fail to set forth any facts to support an allegation that plaintiff suffered an adverse employment action, but even if it did, and even if it set forth sufficient allegations that Primus created a hostile work environment for plaintiff, it does not set forth any facts that would support an allegation that such action occurred under circumstances giving rise to an inference of discrimination on the basis of plaintiff's race, gender or age. Instead, the factual allegations of the complaint at best give rise to an inference that Primus (who was a civilian employee) had a problem not with plaintiff specifically because of her race, gender or age, but with the uniformed Correction Officers in general who were assigned to the EEOC-TD.

This complaint presents the false syllogism, "I am black, I am female and I am 50 years old. Bad things were done to me at work. Therefore, the bad things were done to me because I am black, female and 50 years old." It is also made on the basis of factual allegations that conclusively establish that Primus' actions

against her were not motivated by racial, gender or age animus.

The complaint also fails to set forth any factual allegations by which it may be inferred that the disciplinary charges proffered against plaintiff for refusing to follow the orders of her superior to fill out the necessary paperwork attendant to a request for transfer to the juvenile facility was in retaliation for her announced intention to file an EEO complaint against Primus. Indeed, such a claim is a non-sequitur as a conclusion based upon the considerable space plaintiff devotes in the complaint relating how DOC had requested Correction Officers to transfer to the Horizon Juvenile Center by completing the necessary paperwork, that the uniformed officers unions considered such transfers as "union-busting", that DOC began to discipline uniformed staff for refusing to complete the paperwork, not just plaintiff, and that an action commenced by the unions against the City over this matter was resolved by what this Court presumes was a stipulation of the parties so-ordered by Justice Esposito in December 2018 in which it was agreed that uniformed staff could be required to fill out the paperwork necessary for a transfer to the juvenile facility but would not be disciplined for their past refusal to do so as long as they complied and filled out the paperwork by December 29, 2019. These alleged facts are fatal to plaintiff's cause of action alleging that the disciplinary charges filed against her for failing to obey the orders of her superior to fill out the paperwork for reassignment to the Horizon Juvenile Center was in retaliation for her threat to file an EEO complaint.

Consequently, upon the failure of the complaint to state a cause of action for discrimination under either the NYSHRL or the NYCHRL, the complaint fails to state a cause of action alleging that defendants "aided and abetted" one another in their reassignment of plaintiff based upon discrimination and by taking no action against Primus in her discriminatory treatment of plaintiff.

Inasmuch as the action must be dismissed for failure to state a cause of action, this Court need not address, and will not determine, the remaining grounds for the motion.

Accordingly, the action is dismissed.

Dated: October 8, 2020



KEVIN J. KERRIGAN, J.S.C.

FILED

**10/9/2020
8:22 AM**