

**Flynn v New York State Dept. of Corr. & Community  
Supervision**

2020 NY Slip Op 34870(U)

January 30, 2020

Supreme Court, Orange County

Docket Number: Index No. EF006948/2018

Judge: Steven I. Milligram

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
RITA FLYNN

Plaintiff,

-against-

NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY SUPERVISION,  
Defendants.

-----X  
MILLIGRAM, J.

**DECISION AND ORDER**  
INDEX NO.: EF006948/2018  
Motion Date:  
Sequence No.: 5

The following papers numbered 1 to 292 were read on this motion by Defendant, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION for an Order pursuant to CPLR 3212, granting Defendant summary judgment dismissing the Amended Complaint of Plaintiff RITA FLYNN.

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/ Affirmation in Support (Walsh)/ Exhibits A-M/Gemmati Affidavit (1-3)/Exhibits A-D (1-19_	1-258
Memorandum in Opposition (Ranis)/Exhibits A-C	1-21
Memorandum in Reply (Walsh)	1-13

Upon the foregoing papers

It is ORDERED that Defendant's Motion for Summary Judgment seeking dismissal of Plaintiff's Amended Complaint is DENIED.

### **Background and Procedural History**

By Notice of Motion dated December 10, 2019, Defendant NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, moves this Court for an Order, pursuant to CPLR 3212, granting summary judgment dismissing Plaintiff's Amended Complaint.

Plaintiff, an employee of Defendant Department of Corrections and Community Supervision (DOCCS), alleges that she was removed from her long-standing assignment as an Strict and Intensive Supervision and Treatment (SIST) Parole Officer in retaliation for her criticism of the release plan devised for a serial sex offender under the supervision of DOCCS. Plaintiff purportedly filed an action in Federal District Court which, ultimately, the District Court declined to exercise jurisdiction over.

After the instant action was commenced in this Court, Defendant moved, pursuant to CPLR 3211, for an order dismissing Plaintiff's Complaint on grounds that Plaintiff waived her right to bring this action by including a claim pursuant to New York Labor Law §740 in the federal action she commenced that was dismissed in Federal District Court. Defendant further claimed that Plaintiff was relegated to the grievance procedure as outlined in the party's collective bargaining agreement pursuant to New York Labor Law §75-b (3).

By Decision And Order dated March 7, 2019, the Hon. Elaine Slobod denied Defendant's Motion to Dismiss holding that:

Commencement of the Labor Law § 740 claim did not constitute a waiver of this Civil Service Law § 75-b action because the plaintiff also pleaded Civil Service Law § 75-b in the federal action. *See Reddington v Staten Island University Hospital*, NY3d 80, 89 (2008). The plaintiff is not relegated to the grievance procedure and the collective bargaining agreement because this was not a disciplinary case, and the plaintiff could not have individually pursued binding

arbitration. Only the Public Employees Federation has the ability to take a non-disciplinary grievance to binding arbitration.

Subsequent to the March 7, 2019, Decision And Order of Justice Slobod, by Notice of Motion dated May 20, 2019, Defendant filed a second Motion To Dismiss pursuant to CPLR 3211, seeking an order dismissing Plaintiff's Amended Complaint on essentially the same grounds as their prior Motion, and adding a request that in the alternative, pursuant to CPLR 7503(a), the action be stayed and arbitration of "...any timely filed arbitrable disputes..." be ordered by the Court.

By Decision and Order dated August 22, 2019, the Hon. Elaine Slobod denied Defendant's Motion to Dismiss, holding that:

The Court previously denied a motion by the defendant to dismiss the plaintiff's original complaint in this whistleblower action. The defendant now moves to dismiss the plaintiff's amended complaint, raising essentially the same arguments which the defendant asserted on the prior motion.

Nothing in the amended complaint or in the defendant's current motion papers persuades the Court that its prior analysis was mistaken. Despite the use of the word "discipline" in the amended complaint, the retaliation alleged by the plaintiff did not involve formal disciplinary procedures.

After discovery was completed in this action,<sup>1</sup> and a Note Of Issue filed by Plaintiff as noted above, by Notice Of Motion dated December 10, 2019, Defendant moved for summary judgment; simultaneously submitting an affidavit from Frank Gemmati – who is identified as the Regional Director of the Department of Corrections and Community Supervision (DOCCS).

The Gemmati affidavit relies heavily upon communications from other individuals, be they employees of DOCCS or others who had interactions with Plaintiff concerning the placement of a certain sex offender – identified in this action as "John Doe." This affidavit depicts Plaintiff as an uncooperative employee without regard for her colleagues; who was at best rude towards others,

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<sup>1</sup> Presently pending before the Court is Defendant's Motion To Strike Plaintiffs complaint for failing to provide discovery which will be addressed separately.

in addition to being contemptuous of the supervision plan being proposed and implemented for “John Doe.”

By way of contrast, the picture painted by Plaintiff in her opposition , including references to the deposition testimony of Defendant’s representatives, is diametrically opposite that present by Defendant. Plaintiff contends that she was concerned with the propriety of placing “John Doe,” who was described as being of “...limited intelligence...,” in a motel where he would be required to navigate public transportation to travel to and from treatment facilities and other locations, and then back to the motel proposed for his lodging. Plaintiff further expressed concerns about placing “John Doe” in a motel without cooking facilities, together with the propriety of placing “John Doe” in a motel where other sex offenders were housed. Plaintiff also commented that this motel was in proximity to a school that “John Doe” would have to pass on his way to and from the bus, placing him in proximity to school age children, who had been the targets of some of his prior offenses.

Thus, in the totality of the circumstances, Plaintiff expressed her belief, perhaps rather strongly, that this placement was “...inhumane...” and improper, and amounted to a violation of the Mental Health Law (MHL) Section 10. As a result of her protestations, Plaintiff claims she lost her position/assignment as punishment.

Given the great factual disparity between the party’s proof and interpretations of those events, the Court, therefore, finds that there are issues of fact sufficient to defeat Defendant’s Motion for Summary Judgment. Rather, it will be incumbent upon the proof and testimony elicited at trial to determine the issues of fact presented.

### **Conclusion**

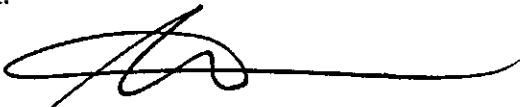
On the basis of the foregoing, it is ORDERED that Defendant’s motion for an Order, pursuant to CPLR 3212, granting Defendant summary judgment dismissing plaintiff’s complaint is denied.

The parties are directed to appear by Counsel before the Court for a pre-trial conference on February 26, 2020, at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 30, 2020  
Goshen, New York

ENTER:

  
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HON. STEVEN I. MILLIGRAM, J.S.C.

TO: All Counsel via NYSCEF Index No. EF006948/2018