SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. FRANK P. NERVO

Index Number : 157881/2013
SANTIAGO-MENDEZ, IVETTE
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS

PART 62

INDEX NO. 157881/13
MOTION DATE 3/14/14
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4 were read on this motion to/for dismiss (CPLR 3211(a)(5)/7)

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1, 2
Answering Affidavits — Exhibits ____ No(s). 3
Replying Affidavits ____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is granted and the complaint dismissed in the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/7/14

HON. FRANK P. NERVO, J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

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

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IVETTE SANTIAGO-MENDEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, RAYMOND KELLY, Commissioner or the New York City Police Department, LIEUTENANT JOHN AHERN, LIEUTENANT GREG FAUGHNAN, CAPTAIN TIMOTHY KELLY, INSPECTOR KENNETH CULLY, INSPECTOR JAMES SHEA, and CAPTAIN JOHN MCNALLY, all being sued in their individual and professional capacities.

Defendants.

DECISION AND ORDER
Index Number
157881/2013

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FRANK P. NERVO, J:

Defendants move to dismiss the complaint on the grounds that certain causes of action are barred by the statute of limitations (CPLR 3211 (a) 5), and that the complaint fails to state a cause of action. (CPLR 3211 (a) (7))

Plaintiff is a retired New York City detective. Her complaint, dated August 27, 2013, and filed on August 28, 2013, alleges various violations of New York Executive Law § 296, based on incidents of ethnic and gender discrimination by defendants, while she was employed. Plaintiff was employed from sometime in July, 1988, to July 31, 2012.

Plaintiff alleges that she was assigned to the Manhattan North Narcotics Squad from 1992 to 2002. She alleges that on some unspecified date, she witnessed an intoxicated supervisor urinate next to an unidentified officer's desk. On another occasion, also unspecified, she discovered a sanitary napkin doused in ketchup and "stuck" to a wall. She alleges that she complained to defendant Faughn but that he failed to report the incident although the Patrol Guide required that he make the report. She also alleges that Faughn intimidated her "into not filing an EEO complaint, for fear of retaliation." Plaintiff does not state what Faughn allegedly told her he would do if she filed a complaint. Plaintiff alleges that she also discovered pornographic movies "playing in the open in the back office." She does not give any description of the movie's content.

In 2004, plaintiff was transferred to the 9th squad and in 2005, voluntarily transferred to the Manhattan Robbery Squad.

Referring back to her tenure at Manhattan North, plaintiff alleges that she was transferred to Staten Island for two months, despite than other officers in the precinct.

Without giving the date of the alleged incident, or the precinct where the alleged incident occurred, plaintiff alleges that she found two round band aids placed in a public restroom "located in the lounge area about six inches apart-made to look like human breasts." Continuing, she alleges that she" found magazines with naked women in the gender-neutral lounge, where complainants sit while waiting."

Plaintiff next alleges that in 2009, defendants Shea and McNally created a special Central Robbery Unit and transferred many more men than women to the unit. Plaintiff does not allege that she applied for a transfer to the unit; she does not specify how many more men than women were allegedly transferred.

Next, plaintiff alleges that she was injured in a car accident and applied for terminal leave on November 23, 2010. According to plaintiff, she was told, by an unidentified individual, to do "city time" training to learn to do payroll tasks. Continuing, she alleges that when she said she was "going terminal", she was told to "do it anyway."

Plaintiff alleges that during the summer of 2011, she was attempting to put gas in her car but was unable to use her debit card; however, according to the complaint, "a nurse behind her was able to use her credit card". She called the precinct "to complain that they had taped the machine closed, so that people would be forced to pay with cash, which she believed to be against the law."

Plaintiff does not describe the location or ownership of the gas station; that is, if it were a Police Department of City owned. She does not explain how the person behind her was able to use a credit card, if the machine was taped closed. However, she alleges that "Sergeant Selkin arrived and took her ID card." She states that she was forced to wait at the gas station for ninety minutes. An officer arrived and told her, "You better call your delegate." The duty captain told her to drive to another gas station and that another car would follow her and would push her, in case she ran out of gas. Finally, the sergeant forced her to drive to the 102nd precinct, where she was made to sit at the front desk for two hours.

Plaintiff next alleges that defendant Kelly has a history of discrimination against minorities and claims that he once made a disparaging remark to a Hispanic Detective. She does not explain how she learned of this alleged remark.

On February 7, 2012, two years after plaintiff applied for terminal leave, plaintiff alleges she was passed over for promotion. However, she asserts, on information and belief, a white male detective, was about to retire, "was put in for grade." She does not allege that he actually received the promotion, or who put him in for grade.

Plaintiff alleges that defendant Shea assigned certain individuals to The Joint Terrorism Task Force who had less seniority than she did and who were eventually promoted to Detective Second Grade. She does not allege facts showing that assignment to the Task Force is a promotion and does not state when the other individuals received their promotions.

Plaintiff's next allegation is that she was " prevented from attending meetings because she was not part of the Boys' Club. " She does not explain what these meetings or the Boys' Club were.

Plaintiff alleges that when she applied for retirement, her overtime was restricted; however, she asserts that two white male detectives did not have their overtime curtailed.

Finally, plaintiff alleges that since her retirement, two other detectives were promoted to detective second grade even though they had less time in rank than plaintiff had had, prior to her retirement.

Based on the complaint, and the affirmations submitted for and in opposition to the motion, it is

ORDERED that the motion is granted and the complaint is dismissed, without costs or disbursements.

The complaint against the New York City Police Department is dismissed as that agency is not an independent municipal corporation and cannot be sued as an entity separate from New York City. (*cf. Randolph v. City of New York*, 69 NY2d 844). The complaint against defendant Kelly in his individual capacity is dismissed, as there are no allegations that link him as an individual to any of the alleged acts by the other defendants. Nothing in plaintiff's papers rebuts defendants' arguments that the Police Department may not be sued and that Kelly is not subject to individual liability

Causes of action based on employment discrimination under Executive Law § 296 are subject to a three year statute of limitations in CPLR 214(2) (*Morrison v. New York City Police Department,* 214 AD2d 394) However, plaintiff does not address defendants' argument, in their memorandum of law, that any claim that accrued prior to August 28, 2010, must be dismissed.

Plaintiff's causes of action against defendants Faughn and Cully are dismissed. Any conduct by them must have occurred during the time they and plaintiff were assigned to Manhattan North Narcotics. Plaintiff was assigned there until 2002; therefore, the statute of limitations barred any causes of action against them in 2005.

The causes of action against defendants Shea and McNally are time-barred as plaintiff's allegation is that she was denied a transfer to the unit they created in 2009; therefore, 2012 was the last date she could assert her claim against them.

The allegations of an intoxicated supervisor, pornographic movies, and ketchup doused sanitary also occurred in 2002 and so were time-barred by 2005.

The allegations of misconduct that are not barred by the statute of limitations must be dismissed, as they do not state a cause of action. The allegations do not state a cause of action cognizable under Executive Law §296. The facts, as alleged, do not simply show that plaintiff fails to state a cause of action; rather, the facts show that she has none. (cf. *Guggenheimer v. Ginzberg*, 43 NY2d 268,275)

In order to establish a *prima facie* case of employment discrimination, a plaintiff must establish three things: that he or she is a member of a protected class; that he or she was qualified to hold position but was not promoted to it; that he or she suffered an adverse employment action; and, that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*Forrest v. Jewish Guild for the Blind,* 3NY3rd 295, 305) In order to establish that the employee was

subjected to a hostile work environment, the actions complained of must be sufficiently severe or pervasive to constitute actionable harassment and stem from a retaliatory animus. (*Clauberg v. State of New York,* 95 AD3rd 1385, 1386) The conduct must have altered the conditions of the victim's employment by being subjectively perceived as abusive by the claimant and must have created an objectively hostile or abusive work environment. (*Forrest v. Jewish Guild for the Blind, id.* at 311.) Isolated remarks or occasional episodes of harassment will not support a finding of a hostile work environment.

Plaintiff fails to allege any facts that would allow her to recover under a theory of employment discrimination or hostile work environment.

Plaintiff alleges only conclusions regarding her claim that she was denied a promotion to detective second grade or that she was not promoted to a more prestigious position, the Joint Task Force. At best, she alleges that another detective was "put in" for the promotion to second grade. She does not explain what this term means or who allegedly put him in for the promotion. Crucially, she does not even allege that he received the promotion.

Plaintiff alleges no facts showing that placement on the task force was in fact a promotion and not merely a new, lateral, assignment. She does not state any facts showing the qualifications for assignment to the unit or that she possessed them.

The fact that another detective received a promotion after plaintiff retired has no bearing on her alleged denial of a promotion.

Plaintiff, by her own admission in an employment discrimination complaint, lost only six hours of overtime.

The allegation of the suggestive placement of the two band aids and the pornographic magazines are isolated instances of alleged misconduct. Moreover, the magazines were allegedly placed in a public area, not a work area.

The allegations about the alleged gas station incident and not being allowed membership in a boy's club can only be described as incomprehensible. These allegations do not form the basis for relief under any recognized theory of law and the court cannot discern any reason for including them in a complaint.

As plaintiff's claims are time-barred or fail to factually form the basis for relief under, viewing them in the most favorable light and assuming they are true, her complaint must be dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: July 7, 2014

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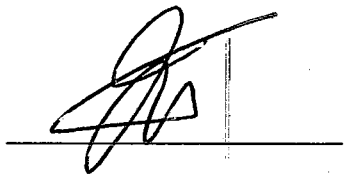

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HON. FRANK P. NERVO