SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER **PART** 08

Justice

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INDEX NO. 152873/2024

HEATHER BELOVIN,

Petitioner,

MOTION DATE 05/20/2024, 08/12/2024

MOTION SEQ. NO. 001 002

- v -

NEW YORK CITY HOUSING AUTHORITY, SHAAN MALVANI, DANIEL GREENE, DEPARTMENT OF CITYWIDE ADMINISTRATION SERVICES (DCAS)

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 21, 22, 23, 24, 25, 26, 29, 30, 32, 38, 40

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 33, 34, 35, 39, 41

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, these motions are decided as follows. This is a special proceeding by Heather Belovin against the New York City Housing Authority ("NYCHA"), Shaan Mavani, Daniel Greene, and the Department of Citywide Administrative Services ("DCAS" and collectively "respondents") for alleged age and sex discrimination. In motion sequence 1, ("petitioner") seeks reinstatement, back pay and compensation, payment of attorneys fees and costs, a civil penalty, punitive damages and damages for pain and suffering against respondents.

Respondents have answered the petition and move in motion sequence 2 to dismiss the petition alleging that the proceeding is procedurally improper, petitioner's Article 78 and whistleblower claims are barred by the statute of limitations, and petitioner fails to state a claim in her other causes of action.

Motion sequences 1 and 2 are hereby consolidated for the court's consideration and disposition in this single decision/order. For the reasons that follow, the motion to dismiss is denied to the extent that the age and sex discrimination cause of action will be converted to a plenary action for retaliation, while the Article 78 claim will be dismissed as untimely, and the remaining causes of actions dismissed for failing to state a claim.

Facts

The relevant facts, which are based on the petition and respondent's answer are as follows. Petitioner was hired in September 2021 as Vice President of Environmental Programs (Lead Abatement) under the agreement between the City of New York and the Department of Housing and Urban Development ("HUD Agreement"). On March 21, 2022, NYCHA informed petitioner that her position was being eliminated effective March 28, 2022, and that petitioner would be demoted to a Program Health and Safety Officer with the Civil Service Title of Administrative Project Manager M-IV, her current role. NYCHA allegedly informed petitioner that her role was being eliminated as part of the merger of the Capital Projects lead abatement program with Healthy Homes lead abatement program.

Petitioner alleges this violated the July 31, 2019 HUD Agreement, Labor Law § 740(l)(d)(v) (the "Whistleblower Law"), her employment contract, and anti-discrimination laws. Petitioner claims that she was given assurances that her position was long standing when she accepted the position but has provided no employment contract or other evidence of this promise. Petitioner also claims the demotion was in retaliation to communication and reports to the Federal Lead Monitor ("Monitor"), violating the Whistleblower Law. Petitioner alleges that NYCHA attempted to stop her from communicating with the Monitor and that Mavani and Greene instructed her to "not provide much to the monitor" and ignored information requests to

stop her from relaying information to the Monitor. As part of this attempt to stop information from reaching the Monitor, petitioner claims she was excluded from a February 28, 2022 meeting with the City's Chief Housing Officer regarding lead abatement issues.

Petitioner claims that a March 23, 2022 email from Mavani instructed petitioner not to speak with the Monitor and that any requests from the Monitor should go directly to Mavani, however this email was not provided. Petitioner claims that she had complained to Steven Lovci, who was the Executive Vice President of Capital Projects at the time and petitioner's supervisor, that she was subject to gender and age-based harassment, discrimination, and retaliation at work. Petitioner claims that at a February 18, 2022 meeting, Greene yelled at petitioner that "she did not know what the first phase of capital work was supposed to be." Further, after the meeting Mavani allegedly said to petitioner that Greene "does not like to be proven wrong, especially by you." Petitioner alleges that Mavani's comment was in reference to her status as an "older woman."

Petitioner also claims that Mavani and Greene attempted to stop her from communicating with the Monitor in an attempt to get her to resign and that her demotion was a punitive measure in response to her complaints to Lovci. Petitioner claims that the attempts to control her communications with the Monitor and punish her for making protected complaints are violations of the Whistleblower Law.

On March 27, 2022, petitioner, via counsel, emailed the Monitor alleging that her demotion was discriminatory and violated the HUD Agreement. The Monitor did not respond.

Petitioner's counsel also emailed Greene and Mavani on March 27, 2022 with the same allegations. Mavani replied on March 28, 2022, stating the following:

> We are in receipt of your email. Your characterization of what transpired is not correct, and we have referred your email to our Office of Legal Affairs. As we've previously

> advised, and as you know, the lead-based paint testing and abatement standard was changed by the City of New York in December 2021…The existing lead abatement program in Healthy Homes is already heavily focused on abatement of components in CU6 apartments. Having two separate CU6 lead-based paint abatement programs in different parts of the organization is not effective, efficient, or prudent from a risk and compliance perspective. Merging the planned lead- based paint abatement program you were setting up with the more established program under Healthy Homes is a business decision made to best meet NYCHA's business needs.

Petitioner filed an internal Equal Employment Opportunity ("EEO") complaint alleging discrimination on April 7, 2022, and claims that NYCHA EEO did not provide any explanation in response to her complaint.

On April 19, 2022, and on April 26, 2023, petitioner's counsel sent letters to DCAS requesting a review of the decision to reassign petitioner, claiming NYCHA failed to follow policy and protocol, and that she was performing the same level of work for less pay. DCAS responded on October 10, 2023, determining that while there was overlap between the two position's duties, "[petitioner]'s current position of Program Health & Safety Officer does not perform important high-level tasks which were part of her work as Vice President." It specifically noted that her new position did not perform the same level of contract management or budget oversight that she did at her previous position.

Petitioner sent letters to DCAS on December 29, 2023, January 2, 2024, and January 8, 2024, alleging that the determination used incorrect facts and requested an investigation of NYCHA practices, which were not responded to by DCAS. Petitioner filed the instant Article 4 proceeding on March 22, 2024.

Article 78 Claim

Despite being brought under Article 4, the proper vehicle to bring this action challenging an administrative decision is Article 78. Petitioner argues that DCAS violated their own rules

when they issued a denial of her appeal in October 2023 and again in January 2024 when they failed to respond to her letters pursuant to their Public Service Bulletin ("PSB"). While CPLR § 103(b),(c) allow for the conversion of the special proceeding to an Article 78 special proceeding, the claims are still dismissed as untimely.

CPLR § 217 requires "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." "A determination generally becomes binding when the aggrieved party is 'notified'" (*Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 404 [1st Dept 2017] *quoting Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72 [1989]). Here, the petitioner was notified of the decision on her appeal on October 10, 2023, which represented a final determination of the agency decision. However, petitioner did not commence this action until March 22, 2024, beyond the four-month statute of limitations.

Petitioner claims that she appealed the decision again in December 2023 and January 2024 via letters sent to DCAS pursuant to PSB 320-2, however 320-2 contains the "Guidelines for Reassignments of Civilian Managers" and does not constitute an appeal of the DCAS decision. Further, the statute of limitations on a decision cannot be extended by sending letters essentially requesting a reconsideration of the denial (*see Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974, 976 [1983] *cert denied* 469 US 823 [1984]; *see also Matter of Barrett v Russ*, 199 AD3d 441 [1st Dept 2021]).

Whistleblower claim

Respondents argue that petitioner's claim under the Whistleblower Law is similarly time barred by the statute of limitations. Labor Law § 740(4)(a) states that an "employee who has been the subject of a retaliatory action in violation of this section may institute a civil action in a

court of competent jurisdiction for relief as set forth in subdivision five of this section within two years after the alleged retaliatory action was taken." The two-year period begins to run upon the notice of demotion, not upon the date of action itself (*see Matter of Queensborough Community Coll. of City Univ of N.Y. v State Human Rights Appeal Bd.*, 41 NY2d 926 [1977] ["The act of giving complainant notice that she would not be reappointed gave rise immediately to a 'cause of action', as the Appellate Division observed, and therefore started the running of the limitation period"]; *see also Dykstra v. Wyeth Pharms., Inc.*, 454 F Appx 20, 23 [2d Cir 2012]). Therefore, the statute of limitations began to run when petitioner was informed of the demotion on March 21, 2022. Petitioner did not file the instant petition until March 22, 2024, and is barred from asserting her claim.

Petitioner incorrectly argues that the date the statute of limitations should run is from the date of her demotion. She relies on *Matter of Moynihan v New York City Health & Hosps. Corp.*, where the statute of limitations began to run on the date of termination for that petitioner (120 AD3d 1029, 1031 [1st Dept 2014]). *Moynihan* is distinguishable from the current action as no advance notice of termination was given in *Moynihan* prior to the termination for the statute of limitations to begin to run (*id.*).

Failure to state a claim

Respondents assert that the remaining claims by petitioner fail to state a cause of action and move to dismiss them pursuant to CPLR § 3211(a)(7).

Under CPLR § 3211(a)(7), a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that… the pleading fails to state a cause of action." When considering a CPLR § 3211 motion to dismiss the court must "accept the facts as alleged in the [pleading] as true, accord [petitioner] the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *see also Taxi Tours Inc. v Go N.Y. Tours, Inc.*, Inc., 41 NY3d 991, 993 [2024]). Whether petitioner can ultimately establish entitlement to the relief sought is beyond the purview of a motion to dismiss for failure to state a claim (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Additionally, "a *pro se* complaint should be construed liberally in favor of the pleader" (*Pezhman v. City of New York*, 29 AD3d 164, 168 [1st Dept 2006] *quoting Rosen v Raum*, 164 AD2d 809, 810 [1st Dept 1990]).

Respondents are correct in asserting that petitioner has failed to state a breach of contract claim both in attempting to enforce the HUD Agreement and under her employment agreement. In order to properly allege a breach of contract cause of action, petitioner must allege "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The HUD Agreement, which was provided by the petitioner, contains an enforcement section determining who has standing to enforce the provisions therein, and third-parties such as the petitioner do not have standing to enforce the agreement. The Monitor, however, may enforce the agreement. Petitioner emailed the Monitor on March 27, 2022, alleging that her demotion was unlawful retaliation for communicating with the Monitor and a violation of the HUD Agreement and requested the Monitor to issue a cease and desist order to the NYCHA for the illegal demotion in violation of the agreement. The Monitor did not take any action in response to the email and the petitioner has no standing to enforce it as a non-party, nor does petitioner qualify as a third-party beneficiary to the contract. Moreover, petitioner cannot show any damages that resulted from the alleged breach of the HUD Agreement.

Petitioner also claims that she entered a contract with NYCHA that assured a long-standing position, however she has not provided a contract or alleged that one exists. The only evidence she has submitted in support of a contract is the job posting which does not give a guarantee of a long-standing position. It is proper to grant a motion to dismiss a breach of contract claim where the party alleging breach of contract has not demonstrated the existence of a contract (*id.*; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Petitioner's argument that civil service jobs create enforceable contracts under civil service rules is not persuasive, as petitioner cannot show that she was guaranteed this position for any definitive period.

Conversion of sex and age discrimination claim to plenary action for retaliation

Respondents also argue that petitioner failed to state a claim for gender or age-based discrimination as petitioner did not identify any specific anti-discrimination laws in the petition or state how they were violated. Petitioner asks the court in her response to allow her to amend her answer to allege a retaliation claim under New York City Human Rights Laws ("NYCHRL") and New York State Human Rights Laws ("NYSHRL"). Accepting the facts alleged in the petition as true, petitioner has stated a cognizable cause of action for retaliation.

To state a cause of action under either the NYCHRL or NYSHRL, plaintiff is required to show "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]). Under the Restoration Act, what qualifies as protected activity is to be broadly interpreted by the New York courts (*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 112 [2d Cir 2013]). Because the chilling effect of

retaliatory conduct is very fact and context dependent "a jury is generally best suited to evaluate the impact of retaliatory conduct" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 [1st Dept 2009]).

Petitioner has alleged that she engaged in a protected activity by making comments to Greene and Mavani regarding NYCHA compliance with the HUD Agreement and concerning communications to the Monitor and by complaining about Greene and Mavani's discrimination and mismanagement to Lovci. Petitioner further alleges that this protected behavior had a casual connection with her demotion and pay decrease as a means to deter this type of behavior. For these reasons, petitioner's retaliation cause of action will be converted to a plenary action pursuant to CPLR § 103(c).

Conclusion

Accordingly, it is hereby

ORDERED that respondent's motion is granted to the extent that petitioner's claim of retaliation shall be converted to a plenary action pursuant to CPLR § 103(c) and all other causes of action are dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/11/2024
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE