SERVED BY MAIL ON FEBRUARY 21, 2017

10 CV 2725 (WFK) (ARL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LILLIE LEON,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION, a/k/a THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and PAULA CUNNINGHAM, in her individual and Official Capacity,

Defendants.

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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City File No. 2010-025833

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

Defendants submit this reply memorandum of law in further support of their motion for summary judgment.

Plaintiff's opposition papers fail to demonstrate the existence of any material issues of fact to preclude a grant of summary judgment on her 1) failure to accommodate claim; 2) her age / disability discrimination and retaliation claims; and 3) her common law claims for intentional infliction of emotional distress and defamation. Plaintiff's opposition does not address the timeliness of her state law claims against the DOE, and thus, she impliedly concedes that all of her state law claims against the DOE are time-barred. Moreover, since the only remaining claims in this case arise solely from the 2010-11 school year, plaintiff's reference in her opposition papers to events that occurred prior to the 2010-11 school year, has no bearing on her few remaining claims from the 2010-11 school year. And, plaintiff's repeated reference to her collective bargaining agreement, and her subjective belief that its provisions were violated, is irrelevant to the analysis as there are no claims for breach of contract before this Court.

Accordingly, because plaintiff's opposition fails to articulate any material issues of fact on any of her claims, Defendants respectfully request that their motion for summary judgment be granted in its entirety, and plaintiff's action dismissed with prejudice.

ARGUMENT

POINT I

PLAINTIFF HAS NOT ESTABLISHED THAT DEFENDANTS FAILED TO ENGAGE IN THE INTERACTIVE PROCESS OR PROVIDE A REASONABLE ACCOMMODATION

Despite plaintiff's claims to the contrary, during the 2010-11 school year, defendants made repeated attempts to engage plaintiff in an interactive process to meet her informal request for a non-air conditioned classroom. See Defendants' Moving Brief ("Mov. Brf.") at Section I.B. Although plaintiff did not submit a formal accommodation request to the DOE's medical bureau at the beginning of the 2010-11 school year, Principal Cunningham nevertheless offered plaintiff various classroom options and teaching assignments in an attempt to accommodate her wishes, each of which plaintiff unreasonably rejected. See id.

Indeed, by plaintiff's own admission, she was satisfied with the temperature in Room 113, and had initially been placed there because of her previous, informal request for a non-air conditioned room. See id. Thereafter, plaintiff was offered not one, but three more, alternative teaching assignments, each in an attempt to meet her request to be in a non-air conditioned room: 1) Principal Cunningham offered to turn off the air-conditioning in room 133 (this was a kindergarten room in the new wing, which also had an internal bathroom) – plaintiff refused this offer; 2) Principal Cunningham offered plaintiff an assignment teaching "Circular 6" in Room 358, which was in the old wing of the school and had no air-conditioning – plaintiff refused this offer; and 3) Principal Cunningham offered to allow plaintiff to teach "Circular 6" in the cafeteria, on the first floor of the school – plaintiff refused this offer, too. See id. Taken together, these four separate accommodations, offered over the course of six months, were "plainly reasonably," and warrant a grant of summary judgment in favor of defendants. See Noll

v. IBM, 787 F.3d 89, 94 (2d Cir. 2015). Regardless of whether plaintiff was, or ever could have been, satisfied with any of the four different options offered to her, defendants fully complied with their obligations under all statutes. See, e.g., Noll, 787 F.3d at 95 ("[E]mployers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee.")

Plaintiff's reference to her belated, November 2010 accommodation request submitted to the DOE's Medical Bureau, is also unavailing to her. See Plaintiff's Opposition ("Pl. Opp") at 9. The Second Circuit decision in this case ruled that plaintiff is precluded from challenging the 3020-a Hearing Officer's finding that she failed to submit an accommodation request for a non-air conditioned room prior to the 2010-11 school year. See 2d Cir. Decision, ECF Dkt. No. 57, at 5-6. Regardless, plaintiff's request for a non-air conditioned room in late fall, when the building's air conditioning would have already been shut off for the season, does not remotely raise a question of fact on her failure to accommodate claim. See Pl. Opp. at 23 (November 24, 2010 denial letter).[1] As already noted, Principal Cunningham continued to offer plaintiff alternative accommodations in 2011, after she made this November 2010 request, all of which plaintiff unreasonably refused.

Accordingly, plaintiff's failure to accommodate claim fails under the ADA, NYSHRL, and NYCHRL, and should be dismissed with prejudice.

[1] Plaintiff attaches a number of exhibits to her Affirmation in Opposition, and provides a list of exhibits at the end of her Affirmation. Since all the exhibits are annexed as a single document without exhibit dividers, defendants cite to the sequential page number(s) in her Affirmation in Opposition, where plaintiff's exhibits can be found.

POINT II

PLAINTIFF HAS NOT ESTABLISHED HER CLAIMS OF DISCRIMINATION AND RETALIATION

Plaintiff's opposition also utterly fails to identify any material issues of fact on her discrimination and retaliation claims, all of which fail as a matter of law under the ADA, ADEA, NYSHRL, and NYCHRL, and should therefore be dismissed with prejudice.

As amply demonstrated by the evidentiary record in this matter, plaintiff was not treated less well than other employees on account of her age or alleged disabilities – to the contrary, Principal Cunningham took extraordinary measures to attempt to accommodate plaintiff despite, and in the face of, plaintiff's complete refusal to carry out any of her teaching assignments during the 2010-11 school year. Plaintiff was offered four different teaching assignments: in room 113, room 133, room 358, and in the cafeteria, all of which she simply refused to carry out. See Mov. Brf. at Section II.C. Neither her age nor her alleged disabilities can excuse plaintiff's willful insubordination, which formed the basis of the DOE's legitimate, non-discriminatory reason for terminating her. See McElwee v. County of Orange, 700 F.3d 635, 641 (2d Cir. 2012) ("workplace misconduct is a legitimate and nondiscriminatory reason for terminating employment, even when such misconduct is related to a disability"); Cuttler v. Fried, No. 10 Civ. 296, 2012 U.S. Dist. LEXIS 41906, at *25 (S.D.N.Y. Mar. 23, 2012) ("Unfortunately for Plaintiff, the NYSHRL and NYCHRL do not require Defendant to excuse her admitted workplace misconduct as an accommodation for her disability.")

Plaintiff has also adduced no evidence to link any of her complaints with the employment actions taken against her in the 2010-11 school year, let alone shown that retaliation was the "but for" cause of defendants' actions. See Univ. of Tex. SW. Med. Ctr. V. Nassar, 133

S. Ct. 2517 (2013). Plaintiff's recitation of events, and her subjective attribution of discriminatory or retaliatory motives to defendants, is insufficient to raise a material issue of fact on any of her discrimination or retaliation claims, all of which should be dismissed with prejudice.

Moreover, plaintiff's reference to disparate impact liability is of no moment, (see Pl. Opp. at 68-71), since there is not a disparate impact claim before the Court, nor is there any evidence that the DOE's policies and practices somehow resulted in harsher treatment for one group of protected employees than another. Nor is there a breach of contract claim at issue in this action, and plaintiff's reference to the provisions of her collective bargaining agreement, (see Pl. Opp. at 72-74), does not operate to raise any such contract claim now, or support her claims that she was treated differently because of her age or disability. Furthermore, plaintiff's subjective belief that she was entitled to her school's only pre-K class for as long as she wanted it, is unsupported by the evidence. See Defendants' 56.1 Statement, ¶¶ 18, 25-31; Mov. Brf. at Section II.C. In fact, four teachers besides plaintiff also requested to be assigned to the school's only pre-K class in 2010-11, and consequently, one of the other teachers received that assignment, while plaintiff received her second preference, a kindergarten class, which is a grade that plaintiff had taught in the past. See id. Nothing about plaintiff's assignment to kindergarten, her second choice, or her initial assignment to room 113 in the non-air conditioned wing of the school, where she had previously taught, raises a material issue of fact on her discrimination or retaliation claims.

As such, all of plaintiff's claims of discrimination and retaliation fail, and should be dismissed with prejudice.

POINT III

PLAINTIFF HAS NOT ESTABLISHED HER COMMON LAW CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND DEFAMATION

To the extent that plaintiff's opposition can be construed as even addressing either her IIED claim or her defamation claim, her opposition fails to raise a material issue of fact on either cause of action, both of which should be dismissed with prejudice.

Plaintiff's allegations of discriminatory employment actions by defendants, do not remotely meet the standard of extreme and outrageous conduct needed to support a claim for IIED in New York. See, e.g., Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 157 (2d Cir. 2014) (the IIED tort proscribes conduct "which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civil society.") As set forth in defendants' opening papers, termination, failure to hire, and disrespectful or disparate treatment, are not sufficiently outrageous acts to support an IIED claim. See Diaz v. City Univ. of N.Y., No. 13-cv-2030, 2014 U.S. Dist. LEXIS 184757, at *88 (S.D.N.Y. Nov. 7, 2014); Lee v. Sony BMG Music Entm't, Inc., 557 F. Supp. 2d 418, 426 (S.D.N.Y. 2008). In any event, plaintiff cannot make out a claim of IIED against either Principal Cunningham, or against the DOE, since such claims cannot be brought against government entities. See, e.g., Afifi v. City of New York, 104 A.D.3d 712, 713 (2d Dep't 2013); Lillian C. v. Administration for Children Servs., 48 A.D.3d 316, 317 (1st Dep't 2008).

Plaintiff's defamation claim likewise fails. She has not shown that any of the comments she attributes to Principal Cunningham or the P.S. 117 administration were either

false or published to a third party, nor has she shown that she suffered any special harm of the type required for a defamation claim. As such, she cannot make out a *prima facie* defamation claim. See, e.g., Biro v. Conde Nast, 883 F. Supp. 2d 441, 456 (S.D.N.Y 2012). Furthermore, Principal Cunningham, a government official acting in her official capacity as a school administrator, is entitled to an absolute privilege against defamation claims such as plaintiff's. See Toker v. Pollak, 44 N.Y.2d 211, 219 (1978).

Accordingly, plaintiff's IIED claim and defamation claim should both be dismissed with prejudice.

POINT IV

PLAINTIFF'S STATE LAW CLAIMS AGAINST THE DOE ARE TIME-BARRED

Claims against the DOE are subject to a one year statute of limitations. See Matter of Amorosi v. S. Colonie Ind. Cent. Sch. Dist., 9 N.Y.3d 367, 373 (2007). Plaintiff's claims arose, at the latest, on July 15, 2011, when her termination became effective. See Mov. Brf. at Section IV. She did not raise any of her claims under the NYSHRL or NYCHRL until August 13, 2012, when she filed her Amended Complaint. See id. By that point, the one year time period in which to file such claims against the DOE had already expired, and therefore, those claims are untimely and should be dismissed with prejudice.

CONCLUSION

For the reasons stated above, and in Defendants' Moving Brief, defendants respectfully request that their motion be granted in its entirety, and that all of plaintiff's claims be dismissed, with prejudice, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 21, 2017

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