

**Eric Sanders**

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**U.S. District Court**

**Eastern District of New York**

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**Case Name:** Delgado v. The City of New York et al  
**Case Number:** 1:09-cv-02544-BMC-VVP  
**Filer:** Charles V. Campisi  
ROBERT J GIANNELLI  
Rafael Pineiro  
The City of New York

**Document Number:** 23

**Docket Text:**

**Letter MOTION for pre motion conference by Charles V. Campisi, ROBERT J GIANNELLI, Rafael Pineiro, The City of New York. (Canfield, Donna)**

**1:09-cv-02544-BMC-VVP Notice has been electronically mailed to:**

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August 29, 2011

**BY ECF**

Honorable Brian M. Cogan  
United States District Court Judge  
Eastern District of New York  
225 Cadman Plaza  
East Brooklyn, New York 11201

Re: Delgado v. City of New York, et al.  
Civil Action Number: 09 CV 2544 (BMC)(VVP)  
City Number: 2009-036438

Dear Judge Cogan:

I am the Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, assigned to represent defendants City of New York, Rafael Pineiro, First Deputy Commissioner, Robert J. Giannelli, Bureau Chief, Patrol Services, and Charles V. Campisi, Bureau Chief Internal Affairs Bureau (collectively "defendants") in the above-referenced alleged employment discrimination and retaliation action. Pursuant to Your Honor's rules, defendants request a pre-motion conference to seek leave to move for summary judgment under Fed.R.Civ.P. 56. As discussed below, there are no issues of fact in dispute and as a matter of law plaintiff cannot prevail on his claims.

Plaintiff, Luis Delgado, is a Puerto Rican male police officer employed by the New York City Police Department ("NYPD") who alleges discrimination and retaliation in his employment under 42 U.S.C. §§ 1981 and 1983, and under the State and City human rights laws. Specifically, plaintiff claims that his 2004 arrest for allegedly having anal sex with a minor without a condom, the criminal charges brought by the District Attorney's (DA's) Office related to the offense, as well as the NYPD Internal Affairs Bureau ("IAB") investigation which substantiated the allegations and the subsequent proffering of disciplinary charges by the NYPD's Department Advocate's Office related to the alleged sexual misconduct were all discriminatorily motivated because of his race. Plaintiff also claims that, because the DA's Office dropped the criminal charges (after the mother of the child was uncooperative) and because plaintiff was found not guilty of the disciplinary charges related to the alleged sexual misconduct following a Department Trial (which was due to the fact that the witness who called 911 to report the incident refused to testify), his continued placement on modified duty status by defendants also constitutes discrimination by the NYPD on the basis of his race. Plaintiff claims that his modified duty status is an adverse employment action in that it prohibits him from

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carrying a shield and a weapon and according to plaintiff, makes him ineligible for promotion to Sergeant.

a. Plaintiff's Claims Are Time-Barred

Plaintiff filed his original Complaint on June 12, 2009. Under the 3-year statute of limitations for claims brought pursuant to § 1983, any allegations of discrimination occurring prior to June 12, 2006 are time-barred. Included as time-barred are plaintiff's June 11, 2004 arrest and criminal charges, plaintiff's June 14, 2004 disciplinary charges, the August 3, 2005 disposition of the IAB investigation into plaintiff's conduct, and the June 30, 2006 date plaintiff was notified that he was not selected for promotion to Sergeant. Similarly, assuming § 1981 is governed by a 4-year statute of limitations, plaintiff's arrest, his criminal and disciplinary charges are also time-barred.

b. Plaintiff Cannot Establish That He Was Subject To Discrimination, Harassment, Or A Hostile Work Environment Based Upon His Race

Assuming plaintiff's claims were somehow timely, plaintiff's discrimination claims against defendants Commissioner Rafael Pineiro, former Chief Robert J. Giannelli, and IAB Chief Charles V. Campisi fail as a matter of law. First, the evidence supports the fact that plaintiff's arrest was made in consultation with the Bronx DA's Office and plaintiff can produce no evidence that his arrest was made without probable cause. It should be noted that plaintiff does not claim that his arrest was unlawful, i.e., that there was no probable cause to support it. Moreover, the criminal charges brought against plaintiff – performing a Criminal Sexual Act in the Second Degree and Endangering the Welfare of a Child for allegedly having anal sex with a minor without a condom -- were proffered by the DA's office, not the NYPD.

Next, there is not one iota of evidence that the IAB investigation, which substantiated the allegations of sexual misconduct against the plaintiff, was flawed. Instead, the evidence in the record demonstrates that the IAB investigation into the allegations of sexual misconduct against plaintiff were subject to multi-level internal reviews and an external review conducted by the Commission to Combat Police Corruption, an independent commission appointed by the Mayor. Thus, any claim by plaintiff that the IAB investigation was flawed and motivated by discriminatory animus is without any supporting evidence.

Furthermore, plaintiff's claim that his placement on a permanent modified duty status was motivated by discriminatory animus is similarly without support and plaintiff can point to no evidence that other non-Hispanic/non-minority Police Officers who were charged, but eventually found not guilty of serious criminal misconduct, were treated more favorably. Instead, there is evidence in the record of two other Police Officers – one African American and one Caucasian -- who remain on modified duty despite being cleared criminally and administratively of criminal misconduct.

Finally, with respect to plaintiff's claims of a hostile work environment, there is absolutely no evidence in the record that plaintiff's work environment was permeated with

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discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the his employment.

c. Plaintiff Cannot Establish a Prima Facie Case of Retaliation

Plaintiff cannot establish that the defendants took adverse action against him based upon any protected activity, or establish that a causal connection existed between plaintiff's protected activity and the adverse action taken by defendants. In fact, plaintiff's complaint of discrimination to the NYPD's Office of Equal Employment Opportunity ("OEEO") was made *after* plaintiff was passed over for Sergeant and *after* the decision was made to continue plaintiff on permanent modified duty status.

d. Plaintiff Cannot Establish That He Was Discriminated Against in Violation of the Equal Protection Clause

To the extent that plaintiff claims that he was discriminated against in violation of the Equal Protection Clause, as argued above, plaintiff has not identified any individuals who were both similarly situated and who were given preferential treatment and who received such preferential treatment because they did not share plaintiff's protected status. Therefore, plaintiff cannot establish a violation of his Equal Protection rights.

e. Plaintiff Cannot Establish That He Was Denied His Right to Due Process

To allege a violation of due process, a plaintiff must demonstrate that he had a constitutionally protected property interest. As a matter of law, plaintiff has no due process right to his shield or his weapon. Boss v. Kelly, 2007 U.S. Dist. LEXIS 62348 (S.D.N.Y. August 23, 2007). Nevertheless, even if plaintiff could show that the defendants departed from whatever unidentified due process procedures supposedly applicable to him, his procedural due process claim would nonetheless fail. Where, as here, a plaintiff alleges he was denied due process due to random and unauthorized state action, the due process claim nonetheless fails if plaintiff had meaningful and adequate post-deprivation remedies to protect his asserted property rights. Here plaintiff could have, but did not, challenge his modified duty status via an Article 78 proceeding.

f. Plaintiff Cannot Establish A Monell Claim Against the City

Plaintiff cannot proffer any facts in support of his claim of municipal policy or custom. To hold a municipal entity liable, plaintiff must plead and prove that his constitutional rights were violated, that the alleged actions by the defendants were the result of an official policy, custom, or practice of the municipal defendant, and that the policy, custom, or practice caused the plaintiff's alleged injuries. See Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978). Here, plaintiff can point to no evidence that supports a policy or practice of discrimination and/or retaliation.

g. Individual Defendants Are Entitled To Qualified Immunity

Government officials performing discretionary functions are generally protected from civil liability where the challenged conduct does not violate clearly established statutory or

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constitutional rights of which a reasonable person would have known. The existence of such qualified immunity turns on the objective legal reasonableness of those actions under the legal rules prevailing at the time the actions were taken.

As set forth in detail above, none of plaintiff's rights under the Constitution have been violated. Additionally, the individual defendants are entitled to qualified immunity because, even if plaintiff could demonstrate a constitutional violation, which he cannot, the individual defendants' employment decisions concerning plaintiff are not clearly established rights of which the defendants reasonably should have been aware. Indeed, it was certainly reasonable given the facts and governing law for the individual defendants to take the complained-of actions. Accordingly, the individual defendants are entitled to qualified immunity on plaintiff's constitutional claims regardless of whether this Court ultimately determines that plaintiff's constitutional rights were violated. See Lennon v. Miller, 66 F.3d 416, 423 (2d Cir. 1995).

For the foregoing reasons, defendants respectfully request permission to move for summary judgment.

I thank the Court for its consideration of this matter.

Respectfully submitted,



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cc: Eric Sanders, Esq.