

Eric Sanders

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Eastern District of New York

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Case Number: 1:10-cv-04659-JG -ALC
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Letter MOTION for pre motion conference by Eloise Archiblad, City of New York, Raymond W. Kelly, Ronald Lynch, Michael Marshall, Christopher Mirro, Michael Osgood, Simi Paul, Patrick Rodrigo, Neldra M. Zeigler. (Huntone, Jeremy)

1:10-cv-04659-JG -ALC Notice has been electronically mailed to:

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May 11, 2011

Via ECF

Judge John Gleeson
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Bronstein v. The City of New York, et al.
10 CV 4659 (JG)(ALC)

Dear Judge Gleeson:

I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for defendants in the above-referenced action. Pursuant to Your Honor's Individual Rules of Practice, I write to respectfully request a pre-motion conference to discuss defendants' proposed motion to dismiss the Amended Complaint in the above-referenced action. The bases for the anticipated motion pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) are set forth below.

Plaintiff, a detective with the New York City Police Department ("NYPD"), brings this action pursuant to, inter alia, Title VII of the Civil Rights act of 1964, 42 U.S.C. § 1983, New York State Executive Law § 296, and New York City Administrative Code § 8-502, alleging that defendants discriminated against her based on gender, that they created a hostile work environment for her, and that they retaliated against for opposing gender discrimination. Specifically, plaintiff states, in wholly conclusory fashion, that the City of New York has "a long history of discriminating against its female officers," and that driven by this alleged discriminatory animus, the NYPD improperly referred plaintiff for psychological evaluation, and was critical of her work ethic and performance. See Amended Complaint, ¶¶ 11-82. However,

as set forth below, the Amended Complaint should be dismissed as time-barred, in part, and for failure to state a claim.

A prerequisite to the filing of a federal civil action under Title VII is the timely filing of a charge of discrimination with the United States Equal Employment Opportunity Commission (“EEOC”). See Harris v. City of New York, 186 F.3d 243, 247-48 (2d Cir. 1999). Where, as here, the alleged acts of discrimination occur in a state that has its own anti-discrimination laws and a state agency is empowered to enforce the laws, the charge of discrimination must be filed with the EEOC within 300 days after the date of the alleged unlawful acts. See 42 U.S.C. § 2000e-5(e) (statute’s time limits cover acts of discrimination as well as acts of retaliation for complaints of discrimination); Harris, 186 F.3d at 247. The 300-day period starts to run when the claimant receives notice of the allegedly discriminatory conduct, not when the allegedly discriminatory decision takes effect. See Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980); DeSalvo v. Metro. Opera Ass’n, 1997 U.S. Dist. LEXIS 8619 (S.D.N.Y. 1997), aff’d, 162 F.3d 1147 (2d Cir. 1998). Plaintiff alleges that she “sought assistance” from the United States Equal Employment Opportunity Commission (“EEOC”) on May 24, 2010. See Amended Complaint, ¶ 6. Construing plaintiff’s allegation to mean that she filed a charge of discrimination with the EEOC on May 24, 2010, any claims derived from incidents occurring before July 28, 2009 must be dismissed. See Harris, 186 F.3d at 247. This applies to most, if not all, of the claims in the Amended Complaint.

Plaintiff’s remaining claims should be dismissed because she otherwise fails to plead facts adequate “to state a claim for relief that is plausible on its face” in order to survive a motion to dismiss under Rule 12(b)(6). See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal citations omitted). The Supreme Court explained the plausibility standard in Iqbal, stating that “[w]here a complaint pleads facts that are merely consistent with a [d]efendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” Id. (internal quotation marks and alteration omitted). The facts set forth in the complaint “must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555. A party’s “obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions” Id. (internal quotation marks and alteration omitted). Rather, it must support conclusions with factual allegations. See Iqbal, 129 S. Ct. at 1950.

The pleading standard articulated in Twombly and, more recently in Iqbal, is applicable to employment discrimination cases like plaintiff’s. See Ruotolo v. City of New York, 514 F.3d 184 (2d Cir. 2008) (citing Twombly as applicable standard and affirming dismissal of retaliation claim on a 12(b)(6) motion); Perry v. New York Dep’t of Labor, 2009 U.S. Dist. LEXIS 74006 *4 (S.D.N.Y. 2009) (citing Iqbal and Twombly as applicable standard and granting defendant’s motion to dismiss including dismissing plaintiff’s retaliation claim); Fordham v. Islip Union Free Sch. Dist., 2009 U.S. Dist. LEXIS 82767 (S.D.N.Y. 2009) (citing Iqbal and Twombly as applicable standard and dismissing the plaintiff’s hostile work environment claim); Maisonet v. Metropolitan Hospital and Health Hospital Corp., 640 F. Supp.2d 345 (S.D.N.Y. 2009) (citing Iqbal and Twombly as applicable standard and granting defendants’ motion to dismiss with respect to plaintiff’s Title VII claims).

Plaintiff's conclusory allegations of being subject to gender discrimination by the NYPD because of an alleged bias against female officers, followed by allegations of hostile/retaliatory acts on the part of the individual defendants because of this alleged bias, absent any specific factual allegations showing gender-motivated discrimination or state action, does not sufficiently state a case under any of the federal, state, or local laws that plaintiff cites. The Amended Complaint contains no plausible claims of gender discrimination or constitutional violations under Title VII, the New York State and City Human Rights Laws, or 42 U.S.C. § 1983. Moreover, in order to prove a retaliation claim, plaintiff must demonstrate in the first instance that she engaged in protected activity which thereafter caused defendants to retaliate against her. See Kaytor v. Elec. Boat Corp., 609 F.3d 537 (2d Cir. 2010); Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005). Plaintiff fails to even allege that she engaged in protected activity. Rather, she alleges that she complained to the EEOC on May 24, 2010, well after all of the allegedly discriminatory acts by defendants occurred. Therefore, the Amended Complaint should be dismissed based on plaintiff's failure to state a claim for relief that is plausible on its face. See Twombly and Iqbal.

Pursuant to Twombly and Iqbal, plaintiff's pleadings do not comply with Rule 8 as her allegations are conclusory and based on adequately plead, specific facts. A working principle underlying Twombly is the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Id. at 555. Accordingly, plaintiff's Amended Complaint is amenable to a motion to dismiss based on her failure to state a claim for relief that is plausible on its face.

For all of these reasons, among others, defendants respectfully request that the Court schedule a pre-motion conference to discuss their proposed motion to dismiss the Amended Complaint. Please note that a pretrial conference in this case is scheduled for 3:30 p.m. on May 19, 2010, and that I will be unavailable the afternoons of May 18 and May 20, 2011 and from May 24, 2011 through May 27, 2011. Defendants further request that the Court extend their time to respond to the Amended Complaint pending a scheduling order regarding the proposed motion.

Thank you for your consideration herein.

Respectfully submitted,

/s/

Jeremy I. Huntone
Assistant Corporation Counsel

cc: Via ECF
THE SANDERS FIRM, P.C.