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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK, BUREAU

Present:

HON. EDWARD W. MC CARTY, III
Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

DEBORAH L. DAVIS,

Petitioner(s)

INDEX No. 1262/09

-against-

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

MOTION DATE: 3/31/09
MOTION SEQ.#001

Respondent(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	x
Cross-Motion	
Answering Affidavit	x
Replying Affidavits	x

Application by petitioner for a judgment directing respondent to reschedule a hearing for Case Numbers 10113212 and 10111490 and directing respondent to reinstate its original determination in Case Number 10113212, is denied.

On November 19, 2001, petitioner filed a complaint (Case Number 3506496) with respondent against her then employer, the Oyster Bay - East Norwich Central School District (hereinafter, "the School District"). Petitioner's attorney requested a dismissal of that complaint so that petitioner could proceed with an action in Federal Court. Petitioner then commenced an action in the United States District Court for the Eastern District of New York against the School District, and several of its employees, alleging violations of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, 42 USC 1981, 1983, 1985 and 1986, the New York State Human Rights Law 295 and breach of contract.

The School District and the individual employees named as defendants in that action moved for summary judgment, which was granted, and petitioner's action was dismissed by opinion and order of that Court dated March 9, 2006. Petitioner's appeal of that decision to the Second Circuit Court of Appeals resulted in affirmance of that dismissal in March 2007.

On April 6, 2006, the School District brought charges of misconduct against petitioner, pursuant to Civil Service Law 75. An impartial hearing examiner conducted a hearing between April 27, 2006 and May 17, 2006, and recommended petitioner's termination. The School District adopted the impartial hearing examiner's finding and terminated petitioner on July 27, 2006.

Petitioner thereafter commenced an Article 78 proceeding in this Court seeking to reverse and annul the School District's resolution terminating her employment. Petitioner's application was denied by order of this Court (Adams, J.) dated June 22, 2007. In denying petitioner's application, the Court held that the hearing examiner's finding that petitioner was guilty of misconduct and incompetence was supported by the record, and that the penalty of termination imposed upon petitioner was not so disproportionate to petitioner's conduct as to be shocking to one's sense of fairness.

After the School District brought the misconduct charges against her, petitioner filed a complaint (Case Number 10111490) with respondent on May 2, 2006, charging the School District with unlawful discriminatory practices in relation to employment because of opposed discrimination/retaliation. In its "Final Investigation Report and Basis of Determination" dated June 18, 2008, respondent held that:

"Although there may have been an inference of discrimination in the complainant's original case, the evidence submitted in this complaint cannot support the complainant's allegations. The temporal proximity of the original complaint to the instant complaint is not sufficient to establish a causal nexus of retaliatory intent on the part of the respondent."

By Determination and Order After Investigation dated June 23, 2008, respondent found no probable cause and the complaint (Case Number 10111490) was dismissed.

On August 8, 2006, petitioner filed another complaint (Case Number 10113212) with respondent charging the School District with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Human Rights Law because of opposed discrimination/retaliation. On June 25, 2008, respondent issued a Determination After Investigation finding that probable cause existed to believe that the School District had engaged in the unlawful discriminatory practice complained of by petitioner.

The School District applied to reopen the probable cause determination, which application was granted, and the matter remanded. By Determination and Order After Investigation dated November 26, 2008, respondent found no probable cause and dismissed petitioner's complaint (Case Number 10113212). Respondent based its determination on the fact that both of petitioner's complaints (Case Numbers 10111490 and 10113212) arose from the same facts and circumstances, and that the US District Court, the Second Circuit Court of Appeals, an impartial hearing examiner and this Court had all found in favor of the School District. Respondent concluded that a review of the record revealed no evidence or indication to show that petitioner's suspension, denial of benefits or termination were based upon a discriminatory animus.

Petitioner argues that respondent's November 26, 2008 determination to dismiss her case (10113212) for lack of probable cause was arbitrary and capricious. On the contrary, as respondent noted in its decision, its determination to dismiss petitioner's most recent complaint was entirely consistent with not only respondent's determination on petitioner's prior related complaint, but consistent with and supported by the determinations of the US District Court judge who granted summary judgment dismissing petitioner's Federal discrimination action; the impartial hearing examiner who found petitioner guilty of misconduct and recommended her termination; and the decision of this Court in the Article 78 proceeding which upheld the determination of the hearing examiner.

A review of the voluminous record herein reveals that the November 26, 2008 determination of no probable cause (in Case Number 10113212) by respondent was neither arbitrary nor capricious, nor lacking a rational basis in the record. (See, *Maltsev v New York State Division of Human Rights*, 31 AD3d 641.)

Petitioner's request to reschedule a hearing regarding her earlier complaint (Case Number 10111490) is without merit as the decision dismissing her earlier complaint was

rendered June 23, 2008, and any proceeding involving that determination is time-barred.
(See, CPLR 217(1).)

Application denied in its entirety.

Proceeding dismissed.

This order concludes this matter.

Date 5/27/09

EDWARD W. McCARTY III

J.S.C.

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