

Matter of Barnes v NYS Div. of Human Rights

2012 NY Slip Op 32908(U)

November 5, 2012

Supreme Court, New York County

Docket Number: 401119/12

Judge: Alice Schlesinger

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ALICE SCHLESINGER
Justice

PART A PART 16

Index Number : 401119/2012
BARNES, BILLY
vs.
NYS DIVISION OF HUMAN RIGHTS
SEQUENCE NUMBER : 001
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *Article 78 petition*
is denied and the proceeding is dismissed
in accordance with the accompanying
memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 5, 2012

Alice Schlesinger, J.S.C.

ALICE SCHLESINGER
 NON-FINAL DISPOSITION

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

~~PART~~ PART 16

Index Number : 401119/2012
BARNES, BILLY
vs
NYS DIVISION OF HUMAN RIGHTS
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted and the proceeding is dismissed in accordance with the memorandum decision accompanying motion sequence 001.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NOV 05 2012

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

BILLY BARNES,

Petitioner,

Index No. 401119/12
Mot. Seq. Nos. 001&002

-against-

NYS DIVISION OF HUMAN RIGHTS and
BETH ISRAEL MEDICAL CENTER,

Respondents.

-----X
SCHLESINGER, J.:

Petitioner Billy Barnes commenced this Article 78 proceeding against the New York State Division of Human Rights and his former employer Beth Israel Medical Center. Barnes seeks to annul the April 20, 2012 decision by Human Rights, which found that "no probable cause" had been established to support the complaint by Barnes that Beth Israel had terminated his employment because of discrimination against him as a black male. Barnes asserts that the decision must be vacated because Human Rights failed to conduct a proper investigation before rendering its determination, and he asks this Court to direct a new investigation that includes the use of subpoenas to compel witnesses to testify.

Beth Israel initially filed an Answer to the Petition denying the allegations by Barnes and reserving its right to move to dismiss upon receipt of the complete record from Human Rights. Human Rights also filed an Answer, simply asserting that its decision was proper based on the record, a copy of which it has provided to the Court, and deferring to Beth Israel's arguments on the merits. Beth Israel has now moved to

dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, though the motion should perhaps be more properly denominated as a motion for summary judgment pursuant to CPLR §3212 because an Answer was filed. Be that as it may, Barnes has submitted both a Reply to the Answer (denominated as a Rebuttal) and opposition to the motion to dismiss so that the matter has been fully briefed and is ripe for a determination by this Court.

Background Facts

Petitioner Billy Barnes was hired by Beth Israel Medical Center in July 2006 to work as a technician in the Hospital's Cardiology Department. He continued to work, apparently without any problems, until his employment was terminated on January 26, 2011 for "gross misconduct" after an incident two days earlier involving a Filipina nurse, Edith Aquino-Salen. Nurse Salen contends that Barnes put his hands around her neck and threatened to choke her, causing her great fear.

While acknowledging in his written statement to Beth Israel that he threatened to choke the Nurse while moving toward her, Barnes maintains that he said that in jest, and he insists that he never touched Nurse Salen, let alone choked her. According to Barnes, the incident occurred when Salen harshly told him to "do his job" and help transport a patient. When he arrived at the patient area, Barnes observed several other nurses who appeared to be unoccupied, simply "doodling," and readily available to assist with the transportation task. This observation prompted him to "joke" that he would choke Nurse Salen for calling him when other workers could have helped her. When Nurse Salen began yelling, Barnes himself called security in an attempt to ease the commotion. After an investigation the next day, which included a written statement

by Barnes, Barnes received a letter discharging him for violating Beth Israel's "zero tolerance" policy that allowed it to discharge any employee, such as Barnes here, where a good faith basis existed for the belief that the employee had engaged in violent or threatening conduct at the workplace.

With the assistance of his union, Mr. Barnes filed a grievance challenging his discharge. A hearing was held before a member of Beth Israel's human resources department at which Barnes and Nurse Salen testified, along with some other individuals who had witnessed or heard the altercation in whole or in part. The only individual who had actually witnessed the interaction between the two employees was Nurse Heather Best-Pilgrim, a black female, who indicated that she had seen Barnes place his hands on Salen's neck and not immediately remove them when Salen said "don't touch me."

It was also revealed at the hearing that Barnes' supervisor Nurse Manager Merle Nazares, also a Filipina woman, had investigated the incident the day after it occurred, had spoken to various potential witnesses and had obtained written statements from Barnes, Salen and Pilgrim. Because Pilgrim had corroborated the account reported by Salen, Nazares chose to accept as true Salen's statement that Barnes had placed his hands around her neck and threatened her. On behalf of Barnes, the union representative cross-examined all the witnesses. At the hearing, and here, Beth Israel maintains that the discharge was made in good faith based on Barnes' violation of the zero tolerance policy and not on any type of discrimination.

By decision dated March 8, 2011, the hearing officer upheld Beth Israel's determination to discharge Barnes, finding a reasonable basis existed for the Hospital's

conclusion that Barnes had violated the "zero tolerance" policy. The union declined to submit the decision to an independent arbitrator for de novo review, although empowered to do so pursuant to the collective bargaining agreement.

Barnes then filed a complaint with the New York State Division of Human Rights on or about November 9, 2011, alleging discrimination on the basis of his race and sex and as a black man and retaliation. Shortly thereafter, Barnes amended his complaint to add "national origin" as a basis for the alleged discrimination. (Copies of both complaints are included in the Record of the administrative proceedings provided by Human Rights pursuant to CPLR §7804).

In his complaint, Barnes identified Nurse Salen and Nurse Manager Nazares, both Filipina women, as the persons who had discriminated against him as a black male. While some other minor interactions with Nurse Nazares were mentioned in connection with the retaliation charge, Barnes' primary complaint related to his discharge and to Beth Israel's failure to take any action against Nurse Salen for her part in the incident that had led to his discharge.

Human Rights promptly assigned James D. Moffatt to investigate the complaint (the Investigator). In response to the Investigator's request for a statement from Beth Israel, the Hospital sent the discharge notice based on its policy against workplace violence, the eyewitness statement from Pilgrim, and the hearing officer's summary of evidence and decision. The Investigator forwarded these documents to Barnes for his response and also requested additional information from Beth Israel, including demographic information about the employees who had worked with Barnes in the Cardiology Department.

After receiving the written comments from Barnes, the Investigator interviewed Barnes on the telephone. He also left telephone messages for the three witnesses identified by Barnes and described in his petition; namely, Marylou Christobal, a Filipina woman who had been assisting the patient and who had spoken with Nurse Salen immediately before the incident, Dr. YiLi Huang, an Asian male in the fellowship program who arrived at the scene after the commotion had begun, and Christine Taylor, a black woman in charge the night of the incident who had heard part of the altercation but did not see it. The Investigator called each of those individuals once and left a telephone message, but none returned the Investigator's call.

Although it is unfortunate that none of the three proposed potential witnesses identified by Mr. Barnes returned the Investigator's phone calls, and that the Investigator did not make repeated attempts to reach them, it is highly unlikely that their testimony would have materially altered the decision rendered by Human Rights. The first of those witnesses, Christine Taylor, gave a signed written statement confirming that she had overheard part of the incident and remembered Nurse Salen saying "'Don't touch me,' to Mr. Barnes." However, Taylor was with a patient "away from the situation on the post-op side of the holding area" and, during that time, she "could not see or hear anything." (Human Rights Certification of Administrative Record, Exhibit 2).

The second witness, Dr. Huang, also had limited evidence to offer, as he arrived on the scene several minutes after the incident had begun and just before it ended. Mr. Barnes's union arranged for Dr. Huang to provide a character statement attesting to Mr. Barnes's professionalism, which is part of the record reviewed by Human Rights. (Human Rights Certification of Administrative Record, Exhibit 3). A review of the

record makes it unclear what, if anything, the testimony of the third potential witness Ms. Christobal would have added had the Investigator been able to reach her.

Each time that the Investigator received written information from Beth Israel, he forwarded it to Barnes for comment. Additionally, he spoke with Barnes three times, the last conversation being on February 16, 2012 when the Investigator advised Barnes of his final opportunity to submit written comments. Although he chose to submit nothing further, Barnes called the Division of Human Rights various times in April 2012, reiterating that he had nothing further to submit and demanding a prompt decision.

On April 20, 2012, Investigator Moffatt completed his "Final Investigation Report and Basis of Determination" describing his investigation and findings. Based on that Report, the Division's Regional Director Leon C. Dimaya issued his determination (Petition, Exh A). There he indicated that "the Division has determined that there is NO PROBABLE CAUSE to believe that the respondent [Beth Israel] has engaged in or is engaging in the unlawful discriminatory practice complained of"; that is, retaliation and race/color and sex discrimination. The Director went on to explain in his determination as follows:

The record suggests, however, that respondent terminated complainant's employment for the non-discriminatory reason that they believed complainant has engaged in gross misconduct by placing his hands around the neck of a co-worker, Edith Aquino-Salen. It is the Respondent's policy to provide a safe and secure work environment free of threats, intimidation and violence for all employees. The penalty of termination was sustained at 3rd Step Grievance and complainant's union has chosen not to bring the matter to arbitration.

In his decision, the Director further found that Beth Israel's failure to discipline Nurse Salen for her role in the incident was not evidence of discrimination, as the Nurse had not engaged in conduct similar to the conduct of Barnes. Further, the Director noted that Nurse Salen's account of the events had been corroborated by Nurse Pilgrim, an eyewitness who, like Barnes, is Black. Pilgrim had testified at the grievance and was cross-examined by the union on behalf of Barnes. Neither party had produced any other eyewitness to the actual encounter, either at the grievance or via a written statement to the Human Rights Investigator.

Barnes then timely filed this Article 78 proceeding, contending that the Investigator should have been more diligent in his efforts to contact the individuals named by Barnes, particularly since those employees might understandably be reluctant to make statements contrary to the interests of their employer Beth Israel. At no point, however, in the proceedings below or here, did Barnes indicate that he had attempted to obtain statements from these individuals to submit to Human Rights to support his claim of discrimination.

Discussion

The central claim made by Barnes in this Article 78 proceeding is that the investigation conducted by the Division of Human Rights was flawed because the Investigator relied primarily on written statements and failed to make a diligent effort to contact the witnesses identified by Mr. Barnes. The claim must fail, as the appellate courts in this jurisdiction have repeatedly emphasized that the Division of Human Rights has "broad discretion in determining the method to be employed in investigating a claim." *Cuccia v Martinez*, 61 AD3d 609, 610 (1st Dep't 2009), *appeal denied*, 13 NY3d 708; *see also, Bal v NY State Div. of Human Rights*, 202 AD2d 236, 237 (1st Dep't

1994), *appeal denied*, 84 NY2d 805. The division has no obligation to conduct an evidentiary hearing of its own, and may properly rely on written information provided by the parties, such as the summary of evidence adduced at the grievance hearing as included in the hearing officer's decision denying the grievance. See *Chirgotis v Mobil Oil Corp.*, 128 AD2d 400, 403 (1st Dep't 1987).

When presented with an Article 78 petition such as this one, a court may not annul the decision by Human Rights so long as the complainant was given a full and fair opportunity to be heard and the decision is not arbitrary and capricious. *Cuccia*, 61 AD2d at 610. Where the record before the court shows "conferences between the Division and petitioner and demonstrates that a meaningful investigation of petitioner's complaint occurred," the court is bound to uphold the Division's determination, even if the court might have reached a different result on its own. *Ramirez v NY State Div. of Human Rights*, 4 NY3d 789, 790 (2005).

In light of the broad discretion given to the Division, this Court finds that an adequate investigation was done. The Investigator spoke to Mr. Barnes several times. He also sent him all written material provided by Beth Israel and gave him an opportunity to comment in writing on those submissions. No decision was rendered until the Investigator had confirmed with Mr. Barnes that he had no other comments to submit.

Perhaps it would have been more thorough and therefore better if the Investigator had made more than one attempt to contact the potential witnesses identified by Mr. Barnes, but the failure to do so does not justify vacating the determination. Mr. Barnes could have sought written statements from witnesses for submission to the Investigator. More importantly, however, Mr. Barnes has not shown

that any of the three people he identified had significant testimony to offer in his favor, as it appears that none actually observed the entire encounter between Barnes and Nurse Salen. What is more, Huang had appeared and testified at the grievance, and Taylor had made a statement as well; neither individual was able to confirm that Barnes never touched Salen.

Nor can it be said that the Division's determination was arbitrary and capricious. First and foremost, the determination itself was extremely limited. The Division did not make an affirmative finding that Barnes choked Nurse Salen. Nor did it reject Barnes' statement of the events as incredible. Rather, as quoted above, the Division merely found that the "record suggests ... that respondent [Beth Israel] terminated complainant's [Barnes'] employment for the non-discriminatory reason that they **believed** complainant has engaged in gross misconduct by placing his hands around the neck of a co-worker, Edith Aquino-Salen." (Emphasis added). The Division found that the claims of discrimination by Barnes were countered by Beth Israel's "zero tolerance" policy "to provide a safe and secure work environment free of threats, intimidation and violence for all employees." The fact that Barnes was awarded unemployment benefits when Beth Israel chose not to contest his claim does not prove otherwise, as an award under those circumstances is not binding on another agency or a court and it does not, in any event, constitute a finding of discrimination.

Pursuant to Executive Law §298, the Division's findings of fact are "conclusive if supported by sufficient evidence on the record as a whole." The courts in this state have defined "substantial evidence" as evidence from which "an inference of the existence of the fact found may be drawn reasonably." *300 Gramatan Ave Assoc. v*

State Div of Human Rights, 45 NY2d 176, 181 (1978). In light of the acknowledgment by Barnes that he did, in fact, threaten to choke Nurse Salen, even if only in jest, it was reasonable for the Division to find that Beth Israel had a good faith, non-discriminatory basis to discharge Barnes. The finding was further supported by the statement from eyewitness Nurse Pilgrim, who is the same race as Barnes, and it was not contradicted by information from any other party, even though Barnes was given ample opportunity to submit to the Division any information he desired.

As emphasized by our highest court in this state, the Court of Appeals, the Division has "expertise in evaluating discrimination claims" and the agency's determination "may not be lightly disregarded" by the courts. *State Office of Drug Abuse Servs. v State Human Rights Appeal Bd.*, 48 NY2d 276, 284 (1979). A court may not reject the Division's determination and substitute its own judgment where a reasonable basis exists in the record for the Division's conclusion. *Board of Education of Farmingdale v NY State Div. of Human Rights*, 56 NY2d 257, 261 (1982). For the reasons explained above, this Court finds that the Division's determination was reasonably based on the record and is entitled to judicial affirmance.

Accordingly, it is hereby

ORDERED that the motion to dismiss by respondent Beth Israel Medical Center is granted; and it is further

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed without costs or disbursements.

Dated: November 5, 2012

NOV 05 2012



J.S.C.
ALICE SCHLESINGER