Matter of Fort v American Fedn. of State, County & Mun. Empls.
2018 NY Slip Op 30186(U)
February 1, 2018
Supreme Court, New York County
Docket Number: 155493/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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In the Matter of the Petition/Complaint
CLAUDE FORT,

Petitioner,

Index No. 155493/2017
Motion Seq: 002

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and Rules of the N.Y.C. Human Rights Law

-against-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES

Respondent.

DECISION & ORDER
ARLENE P. BLUTH, JSC

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The motion to dismiss the petition is granted and this proceeding is dismissed.

Background

This proceeding arises out of petitioner's affiliation with respondent ("AFSCME"), a nationwide labor union. Petitioner was formerly president of an AFSCME local union in New York City ("Local 375") made up of engineers. Petitioner alleges that the vast majority of Local 375's members were not born in the United States.

At an executive committee meeting of Local 375 held on March 2, 2016, petitioner sought approval to file an EEOC complaint, was met with resistance and shelved the idea. However, later that month, petitioner held a press conference on the steps of New York's City Hall in which he stated that foreign-born engineers were receiving less pay because of their national origin. Petitioner insisted that the members of Local 375, mostly foreign-born engineers employed by the City, were paid less than engineers in the private sector and that foreign-born engineers were shut off from private sector employment due to discrimination. At this press

conference, it was announced that a class-action complaint would be filed with the Equal Employment Opportunity Commission ("EEOC") on behalf of Local 375. No EEOC complaint was ever filed.

Following this press conference, members of Local 375's Executive Committee filed internal union charges against petitioner arising out of his actions at the press conference. Because the charges involved an dispute between the local's members, the parent union, respondent AFSCME, appointed Richard Abelson as the Judicial Panel Chair to hear the charges against petitioner. A hearing was held in August 2016 and the Judicial Panel Chair issued a decision in October 2016. Abelson found petitioner guilty of abusing his authority and barred petitioner from running for union office for four years. Petitioner filed an internal appeal.

Petitioner brought the instant petition alleging two causes of action: (1) a violation of the New York City Human Rights Law ("NYCHRL") for unlawful retaliation and (2) for breach of the AFSCME constitution. AFSCME removed the instant proceeding to federal court. Petitioner voluntarily dismissed the second cause of action and the petition was remanded to this Court. Only the NYCHRL claim remains.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]).

NYCHRL 8-107(7) provides that:

> "Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity."

AFSCME claims that it cannot be held liable for a purported violation of NYCHRL because it is not petitioner's employer. AFSCME stresses that petitioner failed to allege how AFSCME engaged in conduct reasonably likely to deter petitioner from engaging in protected activity. AFSCME contends that the only actions that could be described as retaliatory were the filing of charges by petitioner's fellow union members, not AFSCME's role in appointing Abelson as the Judicial Panel Chair.

AFSCME further argues that there is no causal connection between its actions (processing the internal union charges) and petitioner's protected activity. AFSCME points out that Abelson's decision was about whether petitioner had used Local 375's name in an unauthorized manner; it was not about the substance of his claim about national origin discrimination.

In opposition, petitioner insists that the NYCHRL can apply to labor organizations as well as employers and emphasizes that it is AFSCME who took the retaliatory action. Petitioner

claims that he was barred from running for office because he spoke out about discriminatory conduct and that AFSCME should face severe sanctions.

The Court finds that petitioner fails to state a cause of action under the NYCHRL for unlawful retaliation against AFSCME. AFSCME only got involved in the instant dispute because the internal charges could not be addressed within by Local 375 since the charges were brought by petitioner's opponents in an upcoming election.[1] As AFSCME points out, if this Court were to adopt petitioner's theory of liability, then AFSCME would be held accountable for the motives of those members who filed the charges against petitioner.

This Court declines to ascribe the motives of the local union members who filed the charges to AFSCME. Even assuming the members' motives were improper, the instant petition does not allege that AFSCME's motives were to prevent Brother Fort from speaking out. AFSCME stepped in to provide a tribunal to hear the charges. The Court cannot assume that AFSCME had a nefarious intent when it followed internal union procedures and held a hearing. Simply because petitioner does not agree with AFSCME's appointed hearing officer's decision does not transform AFSCME into a party liable for a violation of NYCHRL.

Further, the content of Abelson's determination makes clear that it cannot form the basis of an unlawful retaliation claim against AFSCME. The decision stressed that "No [EEOC] complaint was ever filed. Yet during the pendency of the rerun of the Local 375 election, Brother Fort falsely claimed that he was going to file an EEOC Complaint for engineers within the membership of Local 375. It is not unrealistic to assume that [petitioner] did so to benefit his

[1]Petitioner complains that although he won an election for president of Local 375 in 2016, AFSCME voided the election and instituted an 'administratorship' over Local 375.

candidacy for president of the local. He falsely elevated the expectations of the membership causing them to believe that action would be taken, credited to him, to increase their pay. Brother Fort did so even though he sought approval to file such complaint at the March 2, 2016 executive committee meeting and failed to accomplish such approval" (NYSCEF Doc. No. 9 at 6-7).

Abelson concluded that "By holding the press conference and announcing Local 375's commitment to the filing of the complaint and its underlying principles, Brother Fort is found guilty . . . by using the name of the subordinate body in an unauthorized manner; and . . . by acting as an agent for the local union and acting on behalf of the local union without authorization" (*id.* at 7).

Abelson further found that petitioner's "guilt is exacerbated by his failed efforts to gain approval to file the complaint at the March 2, 2016 executive committee meeting. He abandoned those efforts when he successfully moved to adjourn the meeting after it was clear that the discussion had become controversial and before any action for, or against, the EEOC complaint was taken" (*id.* at 8).

Abelson's decision makes clear that the charges were about whether petitioner had permission to act on behalf of Local 375 at the press conference. There is nothing in Abelson's conclusions that evidences unlawful retaliation by AFSCME. Instead, it appears that Abelson credited the testimony of certain union members who filed the charges against petitioner and concluded that the press conference was a "theatrical stunt" designed to generate support for an upcoming union election. The fact that petitioner disagrees with that conclusion or the characterization of the press conference does not transform Abelson's decision into a NYCHRL violation. Petitioner was punished because he took action on behalf of Local 375 without

permission and despite knowing that the issue was controversial. Certainly, petitioner was allowed to complain about purported discrimination; but that does not mean he could represent that he, on behalf of Local 375, was lodging a complaint without receiving proper authorization.

Evidently, Abelson was convinced both by the fact that petitioner held the press conference even though he did not get executive committee approval to file the complaint and the fact that the EEOC complaint was never filed. Whatever the reasons petitioner may have had for not filing the EEOC complaint (or even whether the executive committee approval was required) are not relevant to this discussion. The justifications cited by Abelson support AFSCME's claim that merely handling the union charges and rendering a decision was not an unlawful retaliatory act.

The case cited extensively by petitioner, *Madden v Atkins* (4 NY2d 283, 174 NYS2d 633 [1958]) is easily distinguishable. In *Madden,* local union members filed charges against fellow union members and a trial committee (made up of local union members) found the accused members guilty of forming a dual union and imposed a penalty of expulsion (*id.* at 289-90). The local members approved the trial committee's findings (*id.* at 290). Critically, in *Madden*, the national committee did not act on the expelled members' appeals of the local union's actions and the New York Court of Appeals expressed concern with the expelled members' inability to challenge their removal (*id.* at 294-95). The plaintiffs in *Madden* did not have an impartial remedy other than to pursue a claim in court.

Here, AFSCME, the national body, appointed an impartial judicial panel member to hold a hearing precisely to avoid the situation in *Madden* where local union members forced out the defeated candidates in a local union's election and the national body refused to get involved.

That type of suspect process is not present here– petitioner has not claimed that AFSCME refused to hear his appeal.

Summary

To be clear, this Court's decision is focused only on whether AFSCME violated the NYCHRL by engaging in retaliatory conduct. This Court is not reviewing the rationality of Abelson's opinion or assessing whether the penalty imposed was proportionate to petitioner's wrongdoing.

Abelson did not bar petitioner from seeking the necessary approval for filing an EEOC complaint from Local 375 or from speaking out about discrimination in public in his own personal capacity. Abelson was tasked with considering whether petitioner acted on behalf of the union without authorization and found, after considering the evidence, that he did. Abelson's conclusion that petitioner's goal was to garner support for an upcoming election rather than to raise a legitimate grievance does not change this Court's finding. Even if that conclusion was incorrect, it does not form a basis for liability under the NYCHRL.

Accordingly, it is hereby

ORDERED that the motion to dismiss the petition is granted and this proceeding is dismissed.

This is the Decision and Order of the Court.

Dated: February 1, 2018
New York, New York

ARLENE P. BLUTH, JSC