

**O'Halloran v Metropolitan Transp. Auth.**

2018 NY Slip Op 30619(U)

April 10, 2018

Supreme Court, New York County

Docket Number: 160953/2013

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

MARGARET O'HALLORAN,  
  
Plaintiff,  
  
-against-

INDEX NO. 160953/2013  
MOTION DATE 04/04/2018  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

METROPOLITAN TRANSPORTATION AUTHORITY,  
NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY,  
GEORGE MENDUINA, in his individual capacity and in his official  
capacity as an agent of MTA Bus Company and New York City Transit,  
Defendants.

The following papers, numbered 1 to 8 were read on this motion to compel disclosure.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4- 6</u>
Replying Affidavits _____	<u>7 - 8</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion to compel Defendants to produce discovery disclosure pursuant to CPLR §3124, is granted to the extent that Defendants must: (i) provide documents within the time frame of September 1, 2011 to November 25, 2015 that are responsive to Plaintiff's October 13, 2017 Supplemental Demands, (ii) provide documents responsive to Plaintiff's Second Supplemental Demands dated November 30, 2017, and (iii) provide Defendant George Menduina's personnel file with a privilege log. The remainder of Plaintiff's motion is denied.

Plaintiff was employed by Defendants Metropolitan Transportation Authority, New York City Transit Authority ("NYCTA"), MTA Bus Company for nearly thirty (30) years. Throughout Plaintiff's employment she had been rated as good and/or excellent by the Defendants. Around November 2012 Plaintiff alleges she was demoted from Assistant Chief Facilities Officer with an annual salary of approximately \$122,000.00, to Staff Analyst I with a decrease in salary to approximately \$35,000.00. Plaintiff commenced this action on November 25, 2013 to recover damages for Defendants' alleged gender discrimination and retaliatory conduct under New York Executive Law §290, et seq. This Court granted Plaintiff's motion to amend her Complaint to include allegations of sexual orientation discrimination on August 17, 2016.

Plaintiff served a Demand for Production of Documents on February 16, 2014 (Moving Papers Ex. F). Plaintiff served a Notice of Deposition for Darryl Irick on May

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

27, 2016 (*Id* at Ex. C). This Court's October 4, 2017 Status Conference Order required Defendants to produce "search results of email boxes of Menduina, Jones, Finnegan & Lemansky with O'Halloran in subject or body of email," and that parties would confer by November 15, 2017 on further search terms (Reply Papers Ex. A). Plaintiff served a Supplemental Demand for Production on October 13, 2017 demanding additional sets of emails (Moving Papers at Ex. B). Plaintiff then served her second Supplemental Demand for Production on November 30, 2017 (*Id* at Ex. H). This Court's January 31, 2018 Status Conference Order required Defendants to "produce the emails described in the 10/4/17 Order in searchable pdfs" and for Defendants to "produce Mr. Menduina's personnel file within 30 days with a privilege log" leaving the remaining outstanding discovery subject to this motion (Opposition Papers Ex. J).

Plaintiff now moves pursuant to CPLR §3124 to compel the Defendants to provide documents responsive to Plaintiff's three Discovery Demands, and produce Darryl Irick as a witness to be deposed. Defendants oppose the motion.

CPLR §3101[a] allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." The court may compel compliance upon failure of a party to provide discovery (§3124). It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepherd v Tempco Systems*, 202 AD2d 257, 608 NYS2d 647 [1<sup>st</sup> Dept. 1994]. "The words 'material and necessary' as used in §3101 must be interpreted liberally to require disclosure" (*Kapon v Koch*, 23 NY3d 32, 11 NE3d 709, 988 NYS2d 559 [2014]). It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*GS Plasticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc.*, 112 AD3d 539, 977 NYS2d 245 [1<sup>st</sup> Dept. 2013]).

Plaintiff's Supplemental Demands and Second Supplemental Demands are material and necessary as legitimate subjects of inquiry. Plaintiff alleges she was subjected to gender and sexual orientation discrimination, and was ultimately retaliated against by the Defendants after Mr. Menduina was promoted on or around September 21, 2011 to Acting-Chief Facilities Officer and Acting-Vice President. The Supplemental Demands seek email production from the Defendants that is specifically tailored and relevant to the subject inquiry. However, this Court finds that the Plaintiff failed to limit these demands to a confined time frame. Defendants must provide all documents responsive to Plaintiff's October 13, 2017 Supplemental Demands that occurred anytime from September 1, 2011 to November 25, 2015, two years after the commencement date of this action.

Plaintiff's Second Supplemental Demands, which requested copies of any EEO Complaints, inspector general investigations, and/or other complaints filed by employees of the Defendants where Mr. Menduina is named/or complained of is also material and necessary. Defendants must provide documents responsive to Plaintiff's Second Supplemental Demands.

Plaintiff fails to demonstrate that the Defendants have not properly responded to Plaintiff's February 16, 2014 Demand for Production of Documents. Defendants annex

a portion of documents responsive to those Demands. With Plaintiff's general statement that the Defendants have not responded to numerous demands without sufficient evidence, this Court is unable to ascertain whether Defendants have fully responded to Plaintiff. Furthermore, Defendants' objections to Plaintiff's Demands numbered 5, 11, and 12 are valid as the demands are overly broad. Defendants have agreed to provide documents responsive to Plaintiff's Demand number 2 ( Mr. Menduina's personnel file with a privilege log).

“A municipality has the right to determine which of its officers with knowledge of the facts may appear for pretrial examination. Only when the plaintiff establishes that the knowledge of the proffered official is insufficient to produce testimonial and documentary evidence material and necessary to the prosecution of the action, as provided in CPLR §3101[a], may the court grant a motion for the production of additional witnesses” (Colicchio v New York, 181 AD2d 528, 581 NYS2d 36 [1<sup>st</sup> Dept. 1992]). When moving for the production of additional witnesses, the party must make a detailed showing of the necessity for taking such depositions, and that the previously deposed witnesses had insufficient knowledge, the testimony was otherwise inadequate, or that there is a substantial likelihood the additional person sought for deposition possesses sufficient information (Hayden v City of New York, 26 AD3d 262, 809 NYS2d 75 [1<sup>st</sup> Dept. 2006]).

Plaintiff has not shown the necessity to depose Darryl Irick, the President of Defendant MTA Bus Company and Senior Vice President of Defendant NYCTA, at this time. Defendants, as a municipality, has the right to determine which of its officers with knowledge may appear for a deposition. Defendants served a timely CPLR 3106 notice on Plaintiff stating that Robert Finnegan, the Senior Director of Labor Relation, would be deposed in lieu of Mr. Irick (Moving Papers Ex. D). The deposition of Mr. Finnegan has not gone forward. Furthermore, Plaintiff has not yet deposed Mr. Meduina. The alleged first-hand knowledge that Mr. Irick may have due to his numerous conversations with Mr. Meduina may also likely be known by Mr. Meduina himself. Plaintiff fails to show a substantial likelihood that Mr. Irick would have information that is “material and necessary” that could not be provided through the depositions of Mr. Finnegan and Mr. Meduina at the time.

Accordingly, it is ORDERED, that Plaintiff's motion to compel Defendants to produce discovery disclosure pursuant to CPLR §3124 is granted to the extent that Defendants must: (i) provide documents within the time frame of September 1, 2011 to November 25, 2015 that are responsive to Plaintiff's October 13, 2017 Supplemental Demands, (ii) provide documents responsive to Plaintiff's Second Supplemental Demands dated November 30, 2017, and (iii) provide Defendant George Menduina's personnel file with a privilege log, and it is further,

ORDERED, that within forty-five (45) days from the date of service of a copy of this Order with Notice of Entry upon the parties, Defendants shall provide to the Plaintiff

documents within the time frame of September 1, 2011 to November 25, 2015 that are responsive to Plaintiff's October 13, 2017 Supplemental Demands, documents responsive to Plaintiff's Second Supplemental Demands dated November 30, 2017, and Defendant George Menduina's personnel file with a privilege log and it is further,

ORDERED, that the remainder of the motion is denied.

ENTER:

**MANUEL J. MENDEZ  
J.S.C.**

Dated: April 10, 2018

  
\_\_\_\_\_  
**MANUEL J. MENDEZ  
J.S.C.**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE