

Gondal v NYC Department of Education

2004 NY Slip Op 30294(U)

September 30, 2004

Supreme Court, New York County

Docket Number: 107295/04

Judge: Faviola Soto

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

PRESENT: SOTO
Justice

PART 52

GIONDAL, RISWAN

INDEX NO. 107295/04

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

N.Y.C. DEPT. OF EDU.
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The following papers, numbered 1 to _____ were read on this motion to/for

FILED

PAPERS NUMBERED
OCT 06 2004

NEW YORK
COUNTY CLERK'S OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits
Notice of Cross-Motion - Affidavits - Exhibits
Answering Affidavits — Exhibits _____

Replying Affidavits _____ 3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion

are
**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: September 30, 2004

FAVIOLA SOTO
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

----- X
RIZWAN GONDAL,

Plaintiff,

- against-

Index No. 107295/04
DECISION AND ORDER

NYC DEPARTMENT OF EDUCATION, ANTHONY
ALDORASI, CYNTHIA KATSOUNIS, MIRANDA
PAVLOU, MINDY CHERMAK, VICKI BERNSTEIN,
LORRAINE SMITH, MARIANNE ALVAREZ,
Defendants.

----- X
HONORABLE FAVIOLA A. SOTO, J:

Plaintiff Rizwan Gondal, appearing pro se, moves, by order to show cause, for the relief demanded in the accompanying complaint and exhibits. Plaintiff, a former teacher with the New York City public schools, brings this action to recover damages for defamation, mental anguish, and loss of employment after he was given an "unsatisfactory" rating by his school principal. Gondal contends that the unsatisfactory rating was discriminatory, libelous, and motivated by malice.

FILED

OCT 06 2004

NEW YORK COUNTY CLERK

Defendants DOE and the individuals, various employees at DOE, (collectively, DOE) cross-move, pursuant to CPLR 3211 (a) (7), 7801, and Education Law § 3813, to dismiss the action. They argue that the action should have been brought as an Article 78 proceeding, that the defamation claim is untimely, and that the complaint fails to state a cause of action for which relief may be granted. Plaintiff opposes the cross-motion by way of affidavit and memorandum of law submitted on July 23, 2004.

Plaintiff alleges that: he was hired by defendant Anthony Aldorasi, the Principal at IS 141Q, and began teaching 7th grade science classes in that school in September 2002; Aldorasi

and defendant Cynthia Katsounis (Assistant Principal for Science), almost immediately became angry with him and tried to discredit him by making the false accusation that he was not able to control his classes; in September, Katsounis wrote a letter accusing him of not following instructions; Gondal filed a grievance, but Aldorsai advised him that if he dropped the grievance, the letter would be taken out of his personnel file at the end of December 2002.

Plaintiff further alleges that: Aldorasi's first "Observation Report" of Gondal, dated October 30, 2002, was fairly positive, and found Gondal's lesson "satisfactory." In that report, Aldorasi stated, *inter alia*, that:

I want to commend Mr. Gondal on this attempt to have the students complete work in cooperative groups. I believe the students in class 7-2 appeared focused and were given good information and proper direction toward completing this activity. This particular lesson followed the syllabus for this time period. There was also an appropriate basis laid for new material.

Additionally, plaintiff alleges that, on January 21, 2003, Gondal received a "Consultation Letter" from Katsounis, stating that Gondal had missed appointments with her on three separate occasions, on January 14, 15, and 16; Gondal states that he met with Aldorasi and Katsounis on January 17, at which time they both intimidated and harassed him. Gondal does not specify how he was intimidated or harassed.

Plaintiff alleges that in December 2002, he applied to the Teaching Fellows at the DOE and was given an interview, and, on January 28, 2003, he was accepted into the program.

Plaintiff alleges that: in February 2003, Katsounis informed him that she would perform a mandatory observation and rate the plaintiff according to her criteria; after the observation, Katsounis informed plaintiff that she was not satisfied with his performance, and that Gondal would have to work a lot harder for a satisfactory rating, but that she would give him another

chance; Katsounis' observation report, dated February 13, 2003, gives Gondal a satisfactory rating and has a list of "Commendable Features" including:

1. Your questioning technique focused on a variety of questions that strengthened and reinforced the concept of oil fractionation.
2. You gave explicit explanations to questions asked by the boys and girls such as clarifying the formula on kinetic energy
* * *
7. You had good control of time management, and the lesson flowed smoothly.

Plaintiff alleges that on April 3, 2003, he received an e-mail from the DOE Teaching Fellows Program congratulating him on being accepted into the program, and asking him to make a commitment to the program; he responded by accepting a position into the program, and by signing a commitment to enroll in the program.

Plaintiff further alleges that: on April 15, 2004, Katsounis asked him to meet with her and the parent of a student who had complained of not getting the grade that the student deserved; the parent was irate because plaintiff had not allowed the child to complete a group project by himself when his group did not want to work on the project and felt that her son should be given a chance to do the project on his own; according to Katsounis, in a letter dated April 16, 2003, "the discussion concluded when you [Gondal] looked at me and stated, 'I will not have you use me as a mat to step on.' "; Katsounis continued: "Please be advised that this is a formal reprimand, and it is essential for you to conduct your choice of language in a more mannerly fashion".

Additionally, plaintiff alleges that: on April 17, 2003, he received an e-mail from the DOE Teaching Fellows Program stating that he was being placed in a math immersion program which was to start on June 2, 2003; the letter noted that: "If it is *impossible* for you to begin

pre-service training on June 2, please send a brief email describing your circumstances...we will provide you with more information about any alternatives as soon as possible" (emphasis in original); Gondal does not indicate that he sought alternatives to the June 2nd start date.

Plaintiff alleges that on May 15, 2003, he received the following letter from Aldorasi:

Dear Mr. Gondal,

It was brought to my attention that you were caught by several of our staff members taking photographs in and around our building. You took pictures of school aides, and several students claim you took their picture as well. Needless to say that this practice is totally against school policy. It makes people feel extremely uncomfortable.

In addition, in today's climate when everyone is afraid about bombs, and violence, this places you in a very bad light. Your actions may be totally innocent, but certainly the approach that you have used by offering no explanation has people extremely concerned, nervous and I have received at least seven different complaints.

Please refrain from this type of behavior and bring the film that you used for your camera to me. If you have any questions, my door is always open.

Gondal alleges that, since his attendance on June 2, 2003 was mandatory, he informed his students, and, after entering grades for the students, he left IS 141Q for the remainder of the school year. Gondal asserts that he subsequently informed Aldorasi that he, Gondal, would not be coming back to teach at the school. Gondal does not, however, state when he did so.

Respondents' contend that they made numerous telephone calls to Gondal's home to inquire as to his whereabouts.

On June 12, 2003, Aldorasi sent plaintiff the following letter:

Dear Mr. Gondal:

This letter is notification that you are in jeopardy of receiving an Unsatisfactory Rating on your Annual Review. As of this date, you have been absent for a total of 17 days for this school year. Your responsibility to the children and our school as per our agreement and your contract mandates that you teach until Thursday, June 26th. You are also responsible for all of the details

that pertain to your position as Science Teacher and Official 7th Grade Teacher.

I expect you will be reporting to work immediately upon receipt of this letter.

Plaintiff did not report to his position and teach until June 26, 2003 or otherwise attend to his responsibilities of his position as Science Teacher and Official 7th Grade Teacher.

He received an unsatisfactory, or "U" rating, for the 2002-2003 school year.

Gondal alleges that: he subsequently successfully completed the math immersion program and took the required teacher certification tests; he passed all the tests and met the New York State and City certification requirements; he was fully certified by the Chancellors' Office to teach secondary mathematics in New York City public schools.

Plaintiff alleges that: on August 5, 2003, defendant Mindy Chermak, the principal of the Professional Performing Arts School in Manhattan (PPAS), offered him a job teaching math; he accepted her offer, and was to begin teaching on September 2, 2003; on August 27, 2003, Chermak sent plaintiff the following message, via e-mail: "Due to unforeseen circumstances, we cannot offer you a position to teach at PPAS. Good luck in the future."

Plaintiff further alleges that: he reported to work at the PPAS on September 2, 2003; at that time, he was informed by Chermak that she had spoken with Aldorasi, Aldorasi informed her that he had given Gondal an "unsatisfactory" rating on his year-end evaluation, and, as a result, Chermak was not able to hire Gondal.

Thereafter, Chermak sent Gondal's evaluation to the Teaching Fellows Program office. By letter dated September 16, 2003, the program terminated Gondal, stating that he was no longer eligible to remain a NYC Teaching Fellow as a result of his failure to meet the

requirements of the program, which state that in order to remain a Teaching Fellow, a candidate must "maintain good standing as an employee of the New York City Department of Education."

Gondal then filed a grievance at the DOE based on Aldorasi's year-end review. A hearing was held on October 21, 2003. Gondal alleges that at that review, Aldorasi made several threatening remarks and admitted that the letter that he wrote to Gondal dated May 15, 2003 was not completely true, in that only school aides had complained to Aldorasi about Gondal taking any pictures. Gondal further alleges that Aldorasi stated that he had given Gondal an unsatisfactory rating because Gondal had left the school on June 3, 2003, a few weeks earlier than the end of the term.

By letter dated February 18, 2004, the DOE upheld the unsatisfactory rating.

Gondal commenced the within action in May 2004. Among other relief, plaintiff seeks an award : for damages for loss of compensation and financial harm, including past and future lost salary, bonuses, and fringe benefits for a period of twenty years, in the estimated amount exceeding \$1 Million; not less than \$10 million dollars to compensate him for physical and emotional injury; for all other economic or special loss in an amount not less than \$25 million; of punitive damages not less than \$100 Million; and an award of exemplary damages not less than \$1 billion. Plaintiff states in his relief paragraphs of his order to show cause and complaint that he seeks injunctive relief to enjoin defendants from any retaliatory proceeding or action for filing the complaint and that the DOE be restrained from terminating him until the outcome of the action. Plaintiff also states that he reserves the right to initiate separate proceedings for relief for violation of federal, state, and local laws.

Defendants seek to dismiss on the ground that the substance of plaintiff's claim requires a

review of an administrative determination made by the DOE, that the within action should have been brought as an Article 78 proceeding, that it is barred by the applicable statute of limitations, and that the complaint fails to state a cause of action. .

As for Gondal's defamation claim, Aldorasi's year-end evaluation is subject to a qualified privilege. A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty (Byam v Collins, 111 NY 143, 150 [1888], see also Toker v Pollak, 44 NY2d 211 [1978]). As a rule, employee evaluations are protected by a qualified privilege (Lambert v General Electric Company, 244 AD2d 841 [3rd Dept 1997]).

Here, Gondal does not allege that the evaluation was given to anyone other than Mindy Chermak, and the Office of the Teaching Fellows Program, both of whom had a legitimate interest in that evaluation.

A qualified privilege serves to negate any presumption of implied malice or ill will flowing from a defamatory statement (Toker v Pollak, 44 NY2d at 219; Dunajewski v Bellmore-Merrick Cent. High School Dist., 138 AD2d 557, 558 [2d Dept 1988]). Where a defendant's communication is protected by a qualified privilege, the plaintiff must present proof that the statements contained in the letter were motivated by actual malice (id.).

Here, Gondal's claims that the defendants regarded him with malice and discriminatory intent is belied by the facts as he presents them, and even assuming that the allegations are true for purposes of the cross-motion to dismiss, plaintiff has failed to state a cause of action.

First, although Gondal alleges states that, from the start, Aldorasi and Katsounis did not

like him and were out to discredit him, he also alleges that he received two satisfactory and even favorable evaluations, and does not allege any facts setting forth a claim for discrimination.

Second, plaintiff alleges that Aldorasi's May 15, 2003 letter shows hostile and discriminatory intent. That letter, however, does not so demonstrate and does not demonstrate malice. It merely informs Gondal that Aldorasi had received complaints that Gondal had been taking pictures, and asks him to turn in the film in his camera. Plaintiff does not allege that Aldorasi sent the letter to anyone else, nor that Aldorasi ever said anything negative to others about Gondal.

The next correspondence sent by Aldorasi was after Gondal had abandoned his teaching position before the end of the school year. In that letter, Aldorasi merely states that Gondal is in jeopardy of receiving an unsatisfactory evaluation. Aldorasi, in fact, demonstrates a distinct absence of malice by stating in the final sentence that Gondal is expected to return to his classroom.

Finally, the unsatisfactory year-end evaluation was given after plaintiff had failed to show up for work for the last three weeks of school. In that light, an unsatisfactory evaluation does not even appear to be defamatory.

As for his allegations of discrimination, Gondal alleges that he is a Muslim, was a victim of disparate treatment in that he was not given time off on Friday afternoons so that he could pray at the local mosque, was not given access to the science lab, and was excluded from faculty meetings. Gondal filed a discrimination complaint with the DOE Office of Equal Opportunity, which was dismissed on July 2, 2003. Gondal has chosen not to pursue that claim in this action, stating that "plaintiff reserves the right to initiate separate proceedings for relief in

the appropriate Court of Law for violation of Federal, State and Local Laws against appropriate parties that has not been sought in this proceeding" (Complaint, ¶ 10). As these claims are not before the court, the court makes no ruling on them or on whether he may pursue them by way of separate proceedings.

To the extent that plaintiff now seeks to challenge in this court his unsatisfactory rating by relying on these allegations of discrimination, or by otherwise arguing that the agency determination was arbitrary, capricious, or unlawful, he has failed to show entitlement to this relief on this record. Moreover, even reading this pro-se complaint liberally, plaintiff has failed to state a cause of action.

Accordingly, it is

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross-motion is granted, and the complaint is dismissed, without costs or disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
September 30, 2004

ENTER:

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FAVIOLA A. SOTO, J.S.C.

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