At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of June, 2007.

P R E S E N T:

HON. DAVID SCHMIDT

Justice.

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ANTHONY CLARY,

Plaintiff,

- against -

Index No. 12759/03

STARRETT CITY, INC., FELICE MICHETTI, JEAN LERMAN, VERNON DOUGLAS, THOMAS SULLIVAN, GERARD TUOMEY, ROGER FINLEY and KATHY STEWART,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,2
Opposing Affidavits (Affirmations)	3,4
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants Starrett City, Inc. (Starrett), Felice Michetti, Jean Lerman, Vernon Douglas, Thomas Sullivan, Gerard Tuomey, Roger Finley and Kathy Stewart move for an order, pursuant to CPLR 3212, granting summary judgment dismissing

plaintiff's complaint on the grounds that plaintiff's allegations were submitted to arbitration and an opinion and award was rendered against him and that, as a matter of law, defendants cannot be held liable for any damages allegedly sustained by plaintiff.[1]

Background

Starrett hired plaintiff as a security guard on November 26, 2001, until he was allegedly terminated for having received four written disciplinary notices concerning his failure to abide by procedures, rules and regulations, and a verbal reprimand. Plaintiff alleges that defendants improperly and without just cause issued written Employee Reprimand and Warning Notices in January 2002[2], July 2002[3], February 2003[4], April 16, 2003[5] that were without merit. Plaintiff also testified that he was verbally reprimanded for

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[1]The following individually-named defendants were supervisory employees and officers of Starrett: Felice Michetti, President; Jean Lerman, Vice President; Vernon Douglas, Director of Human Resources; Thomas Sullivan (Sullivan), Chief of Department of Public Safety; Gerard Tuomey (Tuomey), Assistant Chief of Department of Public Safety; Roger Finley (Finley), Lieutenant, Department of Public Safety; and Kathy Stewart (Stewart), Sergeant, Department of Public Safety.

[2]Plaintiff was given a reprimand notice for unauthorized absence from his post, failure to follow instructions, creating an unsafe condition, conduct detrimental to Starrett operations and failure to make memo entries and prepare a patrol log.

[3]Plaintiff was given a reprimand notice for unauthorized absence from duty, failure to follow instructions, and conduct detrimental to Starrett operations for failing to appear at Police Plaza at the time he was ordered to appear.

[4] Plaintiff was given a reprimand notice for falsification of records, unauthorized absence from his post, failure to follow instructions, creating an unsafe condition, conduct detrimental to Starrett operations and failure to make proper entries.

[5]Plaintiff was given a reprimand notice for violating the provisions of the department by sleeping on duty, failing to follow instructions, insubordination, threatening fellow employees, conduct detrimental to Starrett operations, creating an unsafe condition, failing to comply with

meditating in his parked vehicle for approximately fifteen to twenty minutes during his meal period, while other employees parked in the shopping center without consequence.

According to plaintiff's allegations, his job performance was excellent and he was qualified for the position that he held. Nevertheless, he maintains that he was supervised by Sullivan, Tuomey, Finley and Stewart, who participated in, aided and abetted and failed to prevent actions against him "with the intent to discriminate against him because of his race and religion." Plaintiff alleges that he was subject to differing treatment whereby defendants: (1) arbitrarily and without just cause denied his January 23, 2003 request for a change of tour; (2) withheld providing him with training certifications despite his completion of such training; (3) bypassed him for specialized positions within the department while appointing more junior and less qualified individuals; and (4) refused to permit him to possess a gun, or to operate a scooter, despite the fact that he had acquired the requisite permits and licenses. According to plaintiff, he complained to defendants Michetti, Lerman and Douglas concerning such actions, but his concerns were ignored.

Plaintiff further contends that during his employment there were no African-American supervisors and no individuals who identified themselves as a Muslim. At his deposition, he testified that the "whole department" knew that plaintiff was a Muslim, including the supervisors, who were aware of his religion when, or shortly after, he was hired. He also testified that defendant Sullivan told plaintiff in 2001: "Don't attempt to

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interrupted patrol log and failure to comply with New York City special patrol regulations.

convert my guys here to Islam. I like them just the way they are." Accordingly, plaintiff asserts that he was treated differently from other employees because he is African American and because he is Muslim.

Prior to the commencement of this action, plaintiff's union, Local 32B-32J, filed a grievance on plaintiff's behalf regarding his discharge, and an arbitration hearing was held to determine whether there was just cause for his dismissal under the collective bargaining agreement. Plaintiff testified at the hearing, as did individual defendants Tuomey, Stewart and Finley. Plaintiff specifically testified about the four written reprimand and warning notices, as well as the verbal reprimand for meditating, that he received. He also testified that his supervisors from September 2001 until April 2003 included Sergeant Waller, who was African American, and that there were approximately 25 to 30 African Americans working as patrolman and a similar amount of Hispanics. At no point during the arbitration did plaintiff allege that any actions or inactions by Starrett or its employees were discriminatory and based on the fact that he is African American or Muslim.

An opinion and award was issued by the arbitrator which sustained plaintiff's discharge, with the arbitrator concluding:

> In the final analysis, Grievant has been disciplined on five separate occasions over the sixteen and one-half months of his employment. Despite having knowledge of the Public Safety Department's procedures, rules and regulations, Grievant engaged in conduct which violated those very procedures, rules, and regulations and in so doing, provided just cause for his termination.

The arbitrator also found that plaintiff's explanation that he had been meditating while in his car "just does not ring true," and that he impeached his own credibility at one point while testifying.

Plaintiff subsequently commenced the present action, pursuant to § 296 and § 297 of the Executive Law, alleging that defendants, their agents and their employees discriminated against him and created a hostile work environment because of his race and religion, to wit: African-American Muslim, and at the same time to favor Hispanic employees. Plaintiff also alleges intentional infliction of emotional distress by defendants.

Discussion

On a motion for summary judgment the burden rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that he or she is entitled to judgment as a matter of law, otherwise, the court must deny the requested relief (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

The Arbitration Opinion and Award

Defendants argue that plaintiff's claims are barred by *res judicata*, waiver and estoppel because the claims were previously raised, or should have been raised, in the arbitration. They assert that during the arbitration hearing, plaintiff conspicuously failed to allege that he was being discriminated against due to his race or religion, or that any employment actions taken against him had anything at all to do with such discrimination. They claim that the arbitration addressed and resolved the issues pertinent to plaintiff's present claims, and, in support, they submit the full transcript of the arbitration hearings, together with the arbitrator's opinion and award. Accordingly, defendants assert that plaintiff had the opportunity to litigate his purported discrimination claims, and that he waived such opportunity.

Plaintiff asserts that his statutory discrimination action is not precluded by the negative arbitration decision under the collective bargaining agreement. He argues that *res judicata* is inapplicable here because, whereas the union grievance arbitration involved the question of whether plaintiff was fired for good cause, the present action concerns whether defendants discriminated against him on the basis of his race and religion. Thus, plaintiff claims that the present action encompasses more issues than the action before the arbitrator.

It is well settled that the doctrines of *res judicata* and collateral estoppel apply to arbitration awards (*Azevedo & Boyd Contr., Inc., v J. Greaney Constr. Corp.*, 285 AD2d

571 [2001]; *Luppo v Waldbaum*, 131 AD2d 443 [1987]). *Res judicata*, or claim preclusion, is invoked when parties seek to relitigate entire causes of action and applies to matters which were actually litigated or could have been litigated in the earlier action. Once a claim is brought to a final conclusion, all claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking different remedies (*Fogel v Oelmann*, 7 AD3d 485 [2004]). *Res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding, as well as claims for different relief which arise out of the same transaction and which should have or could have been resolved in the prior proceeding (*O'Connell v Corcoran*, 1 NY3d 179 [2003]; *CRK Contr. of Suffolk, Inc. v Brown & Assoc., Inc.*, 260 AD2d 530 [1999]). In contrast, in order for a movant to invoke the doctrine of collateral estoppel, or issue preclusion, he or she is required to demonstrate the existence of "an identity of issues which has necessarily been decided in the prior action and is decisive of the present action," and that there was "a full and fair opportunity to contest the decision now said to be controlling" (*Schwartz v Public Adm'r*, 24 NY2d 65, 70 [1969]; *Ott v Barash*, 109 AD2d 254 [1985]; *Manitou Sand & Gravel Co., Inc. v Town of Ogden*, 81 AD2d 1019 [1981]).

An arbitration determination that a discharge of employment is supported by good cause is not conclusive in a federal or state discrimination claim (*see e.g., State Div. of Human Rights v Baker Hall, Inc.*, 80 AD2d 733, 736 [1981]). In other words, a statutory

discrimination action is not necessarily precluded by a negative arbitration decision under a collective bargaining agreement. However, the Appellate Division Second Department has held that an arbitration agreement was enforceable as a waiver of a discrimination claim when the waiver was union-negotiated, stating, "'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum'" (*Garcia v Bellmarc Property Mgmt.*, 295 AD2d 233, 234 [2002]; *citing Circuit City Stores v Adams*, 532 US 105, 123 [2001]). Here, the Local 32B-32J collective bargaining agreement provides that plaintiff's statutory discrimination claims are to be governed by the grievance and arbitration procedure:

> **NO DISCRIMINATION** - There shall be no discrimination against any present or future employee by reason of race, creed, color, disability, national origin, sex, union membership, or any characteristic protected by law . . . All such claims shall be subject to the grievance and arbitration procedure (Articles X and XI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

The arbitration in this case involved the question of whether plaintiff was fired for good cause; plaintiff's present action concerns whether, *inter alia*, defendants' actions against, and termination of, plaintiff were a pretext for illegal race and religious discrimination. Although plaintiff did not present his allegations regarding such discrimination, he had a full and fair opportunity to litigate the issue and to demonstrate that discrimination was the motivating

factor with respect to defendants' disciplinary actions and their subsequent termination of plaintiff. Plaintiff failed to sustain his burden of demonstrating that he did not have the opportunity to litigate these issues (*Martin v Geico Direct Ins.*, 31 AD3d 505, 506 [2006]), and thus the arbitrator's factual findings that plaintiff engaged in repeated infractions of procedure that justified dismissal is a collateral bar to relitigation of those facts.

In any event, the court finds that the arbitrator's opinion and award, which was reached after a full evidentiary hearing by an independent tribunal, undermines plaintiff's allegation that defendants' actions were, in fact, discriminatory (*Collins v New York City Transit Authority*, 305 F3d 113 [2002]). The arbitrator's opinion evidences defendants' legitimate, independent and nondiscriminatory reasons to support their disciplinary warnings and subsequent termination of plaintiff. The court finds that plaintiff failed to offer any evidence demonstrating that the reasons proffered by defendants were a pretext for discrimination by demonstrating that such reasons were false, and that discrimination was the real reason for defendants' actions (*Ferante v American Lung Assoc.*, 90 NY2d 623, 629-630 [1997]; *see also Jordan v American Intl. Group., Inc.*, 283 AD2d 611, 612 [2002]. Accordingly, defendants' summary judgment motion is granted.

E N T E R,

J. S. C.

HON. DAVID L. SCHMIDT