

**Sandiford v City of N.Y. Dept. of
Educ.**

2007 NY Slip Op 32061(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0104190/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

Index Number : 104190/2006
SANDIFORD, AYODELE
vs
CITY OF NEW YORK
Sequence Number : 002
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. 104190/2006
MOTION DATE 3/28/07
MOTION SEQ. NO. 002
MOTION CAL. NO. 8

this motion to/for QDASH

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

1,2

Answering Affidavits -- Exhibits

3,4,5

Replying Affidavits

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JUL 10 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/5/07



J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
AYODELE SANDIFORD,
Plaintiff,

against

CITY OF NEW YORK DEPARTMENT OF
EDUCATION, THE RESEARCH FOUNDATION,
LOWELL R. COLEMAN, in his official capacity and
individually, PAUL SHORTER, in his official capacity
and individually,
Defendants.

Index Number 104190/2006
Submission Date Mar. 28, 2007
Mot. Seq. No. 002
Cal. No. 8

DECISION AND ORDER

For the Plaintiff:
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For Research Foundation Defendants
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Papers considered in review of this motion for protective order and cross-motion to

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1,2</u>
Aff. in Opp., Memo of Law, Aff. of Service.....	<u>3,4,5</u>
Attorney Reply Aff.....	<u>6</u>

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

PAUL GEORGE FEINMAN, J.:

This is an employment discrimination action. Plaintiff moves pursuant to CPLR 2304 to quash, condition, or modify subpoenas served by defendants The Research Foundation and Paul Shorter (hereinafter the Foundation defendants) upon her union and a job training program coordinated by the Federated Employment Guidance Services (FEGS), and to prohibit the so ordering of subpoenae which the Foundation defendants wish to serve upon the Human Resources Administration of the City of New York (HRA). For the reasons set forth below, the motion is granted in part and otherwise denied.

Procedural and Factual Background

According to the amended complaint, plaintiff was employed by the Department of Education

as a school aide since 2001, and employed part time since 2004 by the Research Foundation at the City University of New York in an after school program as a basketball coach (Attorney Aff. Ex. A, Am. Compl. ¶¶ 9, 15, 16). She was terminated from her employment as of June 20, 2005 after the Department of Education found substantiated a corporal punishment claim brought against her, a claim and finding which plaintiff alleges to have been motivated by animus based on her sexual orientation (Am Compl. ¶ 33, 35). She alleges that the Foundation defendants adopted the accusations made by DOE and also terminated her part time employment (Am. Compl. ¶¶ 40, 42, *et seq.*). Thereafter, she sought and received public assistance benefits from the HRA, and skills and job placement through FECS. Through her union, colloquially known as DC-37, she filed a grievance concerning her termination, and was eventually offered reinstatement pursuant to a “stipulation of settlement” dated November 1, 2005 (Aff. in Opp. Ex. G). She apparently did not accept the terms of the reinstatement.

Plaintiff commenced this action, setting forth claims of disparate treatment and discrimination based upon sexual orientation, retaliation, defamation, emotional distress, and loss of past and future earnings and other employment benefits.

The Foundation defendants served a subpoena dated February 6, 2006 upon DC-37 (Attorney Aff. Ex. 3). The subpoena seeks all files pertaining to plaintiff’s membership with the union, her employment with the Department of Education, any correspondence between the two entities concerning her, any grievance materials or anything pertaining to disciplinary hearings, arbitration, and settlement documents, and any documents relating to complaints of discrimination or harassment. The Foundation defendants also served a subpoena dated February 6, 2007 upon FECS, seeking any file connected with plaintiff’s association with FECS including employment applications, job history, compensation, transfers, benefits, attendance history, discipline history, and complaints of discrimination or harassment (Attorney Aff. Ex. 3). The Foundation defendants also seek to have the

court so order subpoenae to serve upon two sections of the HRA seeking any file connected with plaintiff including applications for benefits, correspondence, medical reports, and any document relating to the providing of benefits.

Contentions

Plaintiff moves to quash or modify the subpoenae and to prevent service of newly so ordered subpoenae. According to plaintiff's counsel, at the January 31, 2007 discovery conference, defendants' attorney stated that the defendants sought the records because they were potentially relevant to the claim of lost earnings and back pay (Attorney Aff. ¶ 11). Plaintiff argues that because she received public assistance which is not considered an offset to her loss of part time employment and because she has been disabled and therefore has no need to mitigate her losses, records concerning her application for benefits and correspondence are irrelevant (Attorney Aff. ¶¶ 19-20). Similarly, she asserts that her union records are both irrelevant, as the union is not an employer nor does it pay salary or benefits, and protected because they are communications between union member and official (Attorney Aff. ¶¶ 23-24).

The Foundation defendants contend that the subpoenae to be served on the two sections within the HRA, seeking documents relating to her application after her termination for and receipt of public assistance, are required to supplement what plaintiff has voluntarily given them, so that they may ascertain the full extent of her damages, and can gauge her mitigation efforts. They also seek the public assistance records because they may reflect statements made concerning her termination and the state of her mental health, as might interviews conducted by officials, and documents gathered in connection with her application. They contend that because plaintiff received job placement assistance following her termination, went on interviews and sought subsequent employment, the HRA documents are relevant and material to the question of her efforts to mitigate as well as her assertion

that she is disabled by a psychiatric condition. They note that under the law, they have the burden to prove that she failed to adequately mitigate her damages, and argue that they are therefore entitled to any information relating to her efforts to secure subsequent employment. As for the request for the union documents, the Foundation defendants argue that they are relevant to the issue of whether the Department of Education acted in a discriminatory manner or whether its investigation justified a termination. Finally, as concerning the subpoena for FEGS documents, they note that plaintiff does not offer substantive arguments for the branch of her motion seeking to quash that subpoena.¹ In sum, the Foundation defendants argue that plaintiff previously produced some documents in response to their discovery demands that relate to her union membership and the grievance she filed, appointments at FEGS, and concerning her receipt of public assistance from the HRA, but that she improperly attempts to “pick and choose” which documents from that part of her life she will produce.

Discussion

CPLR 3101 governs discovery, and sets forth that there shall be “full disclosure of all matter material and necessary” to prosecute or defend an action. (CPLR 3101[a]). The scope of discovery is “generous, broad and is to be construed liberally” (*Mann v Cooper Tire Co.*, 33 AD3d 24, 29 [1st Dept.], *lv. denied* 7 NY3d 718 [2006]). The words “material and necessary” have been interpreted to “require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]). Full disclosure permits disclosure between all parties in the litigation regardless of the burden of proof (*Lombardo v Pecora*,

¹In reply, plaintiff states that records maintained by FEGS are related to her application for public assistance, as she was required to participate in job training so as to receive benefits, and are irrelevant to the question of mitigation because HRA, after an evaluation, found her unable to work (Attorney Reply Aff. ¶¶ 16-18).

23 AD2d 460 [2d Dept 1965]). It permits disclosure of material which may lead to the disclosure of admissible proof (*Chaudry v Abadir*, 261 AD2d 497, 498 [2d Dept. 1999]; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc.*, 226 AD2d 175 [1st Dept. 1996]).

A subpoena duces tecum is designed to compel the production of “specific documents that are relevant and material to facts at issue in a pending judicial proceeding” (*Velez v Hunts Point Multi-Services Center, Inc.*, 29 AD3d 104, 112 [1st Dept. 2006], citing *Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]). A motion to quash a subpoena duces tecum “should be granted only where the materials sought are utterly irrelevant to any proper inquiry” (*Velez*, at 112, citing *New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2d 135 [1st Dept. 1999]; *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 341 [1st Dept. 1997]). The burden of establishing that the requested materials are “utterly irrelevant” rests with the person who has been subpoenaed (*Velez*, at 112, citing *Gertz v Richards*, 233 AD2d 366 [2d Dept. 1996]).

Plaintiff argues that public benefits do not offset lost wages because they are collateral to the wrongdoer, citing *Holder v Westinghouse Elec. Corp.*, 141 Misc. 2d 104 (Sup. Ct. Kings County 1988). However, *New York State Div. of Human Rights ex rel. Dubin v Garvey*, 249 AD2d 549, 550 (2d Dept. 1998), cited by defendants, holds that where an employee had been wrongly terminated, her award of back pay should be reduced by the amount of unemployment benefits she received after her unlawful termination. Similarly, *Allender v Mercado*, 233 AD2d 153 (1st Dept. 1996), *app. dismissed* 89 NY2d 1055 (1997), also cited by defendants, held in the case of a woman wrongly terminated on the basis of age, that her award of back pay should be reduced by the amount of unemployment insurance she received during the period covered by the award. Therefore, the issue of the amount of benefits received by plaintiff from the HRA is indeed relevant to the action herein, and plaintiff’s argument to prevent their disclosure fails. In addition, the records may contain relevant information concerning

plaintiff's psychological condition following her termination, and are relevant on that basis as well.

For similar reasons, the FEGS documents must be produced as they are relevant to the issue of mitigation of damages and possibly to plaintiff's psychological condition which is put into issue by plaintiff's claim for emotional distress.

Plaintiff's argument that her union DC-37 records are not relevant as concerns lost wages or mitigation of damages is more or less conceded by the Foundation Defendants, who contend that they in fact seek the union records as being material and relevant to her claim of sexual orientation discrimination (Foundation Defendants' Memo of Law in Opp. p. 12). Plaintiff contends that in any event, the documents are privileged because they concern communications between a union member and union official, the disclosure of which would tend to inhibit employees from seeking advice and union representatives from providing advice, citing *Matter of City of Newburgh v Newman*, 70 AD2d 362 (3rd Dept. 1979). *Matter of Newburgh* holds that the communications between a union member and an officer of the union are privileged as against the public employer when the communications are made in the performance of a union duty and they concern a matter where the member has a right to be represented by a union representative (70 AD2d at 366). Thus, in *Matter of District No. 1-PCD v Apex Marin Ship Mgmt. Co., LLC*, 296 AD2d 32, 37 (1st Dept 2002), *lv denied* 98 NY2d 616 (2002), where in the course of an arbitration, the employer sought production of a document by its terminated employee which was written to his union as part of the requirements under the collective bargaining agreement, the Court upheld the union's right to withhold the document, on the basis that its production would undermine the functioning of the union under the terms of the collective bargaining agreement. However, as noted by the Federal District Court, Eastern District of New York, a bill to codify a union privilege in New York State was vetoed by the Governor in 1996 (*In re: Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp. 332, 336 [EDNY 1998]). There is no common law

privilege except as to the extent discussed above, as between employee and union representative as against the employer (*see, Grand Jury Subpoenas*, at 336).

The Foundation defendants set forth a compelling reason for seeking the records, which is that the union's investigation and the documents and evidence obtained by it during the course of the grievance, along with admissions made by plaintiff, would tend to prove or disprove the Department of Education's reasons for her termination, reasons which were allegedly adopted by the Foundation defendants. Moreover, the Foundation defendants were not the employer which entered into an agreement with DC-37, and thus the privilege articulated by *City of Newburgh* and other decisions is not applicable. To the extent that the records and documents concern materials unrelated to plaintiff's grievance proceeding, they would not need to be produced as they would be irrelevant to this matter.

After this motion was filed and prior to oral argument on the motion, the DC-37 records at issue were produced to Jessica Grossman, Esq., one of the attorneys for the Foundation defendants pursuant to their subpoena. The records were then turned over to the court pending the outcome of this motion. The court has examined *in camera* the records which it has Bates numbered pages 001 through 025 and finds nothing that is either so patently irrelevant to the claims in this action or is privileged to warrant their being withheld.

Accordingly, it is

ORDERED that the branch of the motion to quash or modify the subpoena served upon DC-37 (American Federation of State, County and Municipal Employees AFL-CIO, District Council 37) is granted only to the extent that the records to be produced are limited to those concerning the grievance procedure which derived from plaintiff's termination from her employment, and is otherwise denied, and it is further

ORDERED that the branch of the motion to quash or modify the subpoena served upon FECS

is denied in its entirety; and it is further

ORDERED that the branch of the motion seeking to prohibit the so ordering of a subpoena on the Human Resources Administration's Bureau of Eligibility and Verification, and a subpoena on the Human Resources Administration's Family Independence Administration, is denied, and it is further

ORDERED that the attorneys for the Foundation defendants are to call for the DC 37 records Bates stamped 001 to 025 from the Clerk of Part 52, Supreme Court, 80 Centre Street, Room 289, New York, NY within 20 days of entry of this order; and it is further .

ORDERED that the parties are to appear for their previously scheduled compliance conference on October 3, 2007, at 2:00 p.m., in room 103 of Supreme Court, 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: July 5, 2007
New York, New York



J.S.C.

FILED
JUL 10 2007
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