

<b>Matter of Page v New York State Div. of Human Rights</b>
2009 NY Slip Op 30787(U)
April 3, 2009
Supreme Court, New York County
Docket Number: 111737/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN  
J.S.C. Justice

PART 11

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MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

NYS DHR

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is determined in accordance with the annexed decision, order and judgment.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel or the interested party must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 3, 2008

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----x  
In the Matter of the Application of

HILARIE PAGE,

Petitioner,

Index No. 111737/08

-against-

NYS DIVISION OF HUMAN RIGHTS,

Respondent.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel or other authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

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JOAN MADDEN, J.:

In this Article 78 proceeding, petitioner Hilarie Page (Page) seeks to reverse the "Determination and Order After Investigation" of the respondent New York State Division of Human Rights (the Division), dated May 29, 2008, and to remand the matter to the Division of Human Rights for further proceedings.

Page, who is caucasian and 47 years old, filed a Verified Complaint with the Division on February 2, 2007 against her former employer, Bad Boy Entertainment (BBE)<sup>1</sup>, alleging that BBE engaged in unlawful age and race discriminatory practices.

BACKGROUND

Page claims that, on or about January 24, 2006, she was hired by BBE as an estate manager of all of the houses of Sean Combs, CEO of BBE. Page's employment was terminated on February

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<sup>1</sup>BBE disputes that it was petitioner's employer during the relevant period.

3, 2006, less than two weeks after being hired, by Vashta Dunlap (Dunlap), BBE's Vice-President of Operations. In her complaint filed with the Division, Page alleged that Dunlap, who is African-American and 40 years of age, told her that she was being terminated because of "a cultural thing" and because "this is a youth-oriented company."<sup>2</sup> In its answer to the complaint, BBE generally denied the allegations and asserted as a defense that it was incorrectly named a party to the proceeding.

On May 3, 2007, Acting Regional Director Wilson Ortiz (Ortiz) issued a determination after an investigation finding that there was probable cause to believe that BBE had engaged in unlawful discrimination (the Probable Cause Determination). On or about May 9, 2007, BBE submitted a request to the Division to reopen the proceeding in order to vacate the Probable Cause Determination. This was based on, inter alia, BBE's contention, which Page disputed, that petitioner's employer was 207 Anderson Avenue, LLC (LLC), not BBE, during the period alleged in the complaint.

In a Division internal memorandum dated July 2, 2007 from Thelma Rodriguez (Rodriguez) to Caroline J. Downey (Downey), Rodriguez recommended that BBE's application be granted, that the investigation be reopened to amend the complaint to add LLC as a

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<sup>2</sup>During a fact-finding conference conducted on April 17, 2008 by the Division, Dunlap disputed that she ever made this comment.

respondent, and that there be a full investigation into LLC's involvement in the case. On the same date, Downey granted BBE's and LLC's (hereinafter collectively referred to as respondent) application to reopen the Probable Cause Determination issued by Ortiz, and remanded the case to the Regional Director, in accordance with the aforesaid memorandum. An Amendment to the Complaint adding 207 Anderson Avenue, LLC (LLC) as a respondent was served on the respondents on July 5, 2007.

On April 17, 2008, both parties appeared at the Division for a conference with investigator Alton Wolff (Wolff).<sup>3</sup> Page was accompanied by a witness who claimed to have overheard the alleged statements of discrimination made by Dunlap, respondent's V.P. of Human Resources. Page claims that Wolff told her and her witness that he would be speaking to both parties separately, since respondent's attorney was not comfortable with the two-party conference plan which Wolff had originally planned. Wolff proceeded to hear separately each party's version of the facts and arguments, including, among others, the testimony of Page's witness, and the testimony of Dunlap.

On May 29, 2008, Wolff submitted a "Final Investigation Report and Basis of Determination," setting forth each of the parties' positions, and detailing his observations. He concluded

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<sup>3</sup>Petitioner claims that she was previously apprised by Wolff that Ortiz no longer worked at the Division.

that there was insufficient evidence to support Page's claim of discrimination based on age and race.

By Determination and Order After Investigation, dated May 29, 2008, Acting Regional Director Leon C. Dimaya (Dimaya) determined that there was no probable cause to believe that the respondent had engaged in the unlawful discriminatory practice complained of (the No Probable Cause Determination). He noted respondent's statement that Page's employment was terminated based on performance issues and issues related to personal preference, and found these reasons not to be a pretext. He also noted that, even assuming, arguendo, respondent's stated reasons for discharging complainant were false, the investigation failed to demonstrate that complainant's termination was connected to her age and/or race.

Specifically, Dimaya observed, inter alia, that Dunlap was a long-time employee of respondent and was 60 years of age.<sup>4</sup> He also noted that Page was hired out of a group of five individuals comprised of 3 caucasians, an African-American, and a Hispanic, two of whom were in their forties, and three in their thirties. Finally, he pointed out that Page's predecessor had been caucasian and in her forties. Based upon the aforesaid, Dimaya

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<sup>4</sup>The record reflects Dunlap's age as both around 40 years of age and 60 years of age.

dismissed the complaint and closed the file. Thereafter, Page commenced the instant proceeding.

THE PRESENT ARTICLE 78 PROCEEDING

Page seeks to reverse the No Probable Cause Determination and to remand the matter for further investigation based on the Division's alleged failure to follow its own rules pertaining to witness testimony. Page argues that the Division exceeded its authority by determining her witness's credibility at the fact-finding conference because her witness was not under oath. Page also claims that Wolff exhibited "extreme bias" during the investigation conference.

9 NYCRR 465.12, entitled "Hearings," sets forth the procedures for the administrative law judge to follow in conducting a hearing. It provides, inter alia, that "Oral testimony shall be given under oath." A hearing is required before the Division on an employment discrimination claim only if the complaint is not dismissed (*Patel v New York State*, 212 AD2d 715 [2d Dept 1995]). Here, since Page's complaint was dismissed, she was not entitled to a hearing, and consequently, the testimony provided by her witness at the fact-finding conference did not have to be under oath. There is no showing that the Division failed to follow its own rules.

With regard to the bias claim, a review of the record fails to demonstrate bias on behalf of Wolff in conducting the fact-

finding conference. Page asserts that Wolff exhibited bias by accommodating the wishes of respondent as to the format of the conference, i.e., by not having a "two-party conference," but instead, speaking to the parties separately. She also argues that the only issue which should have been addressed at the conference was LLC's involvement in the subject matter.

It is well settled that the standard for judicial review of an administrative determination pursuant to CPLR Article 78 is limited to inquiry into whether the agency acted arbitrarily or capriciously, without any sound basis in reason (see *Matter of Arrocha v Board of Education*, 93 NY2d 361, 363 [1999]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231-232 [1974]). If there is any rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld (*id.* at 231; *Matter of Guzman v Safir*, 293 AD2d 281 [1<sup>st</sup> Dept 2002]).

A determination of "no probable cause" by the Division "will not be set aside unless it is found to be arbitrary and capricious" (*Matter of Albert v Beth Israel Medical Center*, 230 AD2d 695, 697 [1<sup>st</sup> Dept 1996]), as the agency has "broad discretion in determining the method to be employed in investigating a claim" (*Bal v New York State Div. Of Human Rights*, 202 AD2d 236, 237 [1<sup>st</sup> Dept 1994]; see also *McFarland v*

[\* 8] .  
New York State Div. Of Human Rights, 241 AD2d 108, 112 [1<sup>st</sup> Dept 1998]).

Furthermore, as long as the investigation is sufficient and the complainant is afforded a full opportunity to present his or her claims, an agency's determination will not be overturned unless the record demonstrates that its investigation was "abbreviated or one-sided" (*Matter of Chirgotis v Mobil Oil Corp.*, 128 AD2d 400, 403 [1<sup>st</sup> Dept 1987]).

Here, Page had a full and fair opportunity to present her claims, which included a fact-finding conference with an opportunity for her to testify, and to have her witness testify. There is no evidence that the investigation was abbreviated and one-sided. Finally, on this record, the court cannot find that the Division's No Probable Cause Determination was arbitrary or capricious, or without a rational basis. Page bore the burden of showing probable cause as to the discriminatory acts charged (*Matter of Shay v City of Elmira*, 108 AD2d 968, 969 [3d Dept 1985]).

Page failed to demonstrate that respondent's decision to terminate her employment less than two weeks after she was hired was motivated by any discrimination, particularly in light of the fact that Page's predecessor had a similar racial and age profile as Page, and the fact that similarly situated individuals were among the hiring pool. Absent any proof of unlawful

discrimination, the Division properly concluded that there was no probable cause to believe that respondent had engaged in discriminatory practices in terminating petitioner's employment.

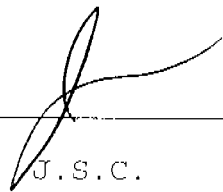
Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision, order and judgment of the court.

DATED: *April 3, 2009*  
~~March, 2009~~

ENTER:

  
\_\_\_\_\_  
J.S.C.

*This judgment is a final order of the County Clerk and notice of entry of this judgment shall be given to the parties by the County Clerk. The parties shall appear in person or by counsel at the hearing (see Section 1415).*