

**Miller v County of Nassau**

2009 NY Slip Op 31178(U)

May 11, 2009

Supreme Court, New York County

Docket Number: 28936/92

Judge: Ute W. Lally

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## MEMORANDUM

SUPREME COURT, STATE OF NEW YORKBy LALLY, J.  
IAS/TRIAL PART 5

ROBERTA MILLER.

Plaintiff(s),

-against-

INDEX NO.: 28936/92  
CAL. NO.: 2005H1225THE COUNTY OF NASSAU and THE NASSAU  
COUNTY CIVIL SERVICE COMMISSION,

Defendant(s).

LOUIS D. STOBBER, JR.  
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Attorney for Defendant  
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Mineola, NY 11501

This is an action by a former Nassau County employee for reinstatement with back pay pursuant to § 77 of the Civil Service Law. Plaintiff Roberta Miller was employed by the Nassau County Department of Senior Citizen Affairs as the Senior Citizen Special Program Coordinator. Beginning in January 1992, approximately 2,600 County employees were demoted or laid off from their positions because of a \$115 million budget deficit. Plaintiff was laid off from her position as of January 28, 1992. Plaintiff alleges that she was laid off in bad faith based upon her being a member of the Democratic Party. It is undisputed that the Nassau County Executive was a Republican at the time of plaintiff's layoff. Defendant County denies that plaintiff was laid off in bad faith but concedes that plaintiff is entitled to one year's salary because her position was required to be abolished by the legislature (See *Torre v Nassau*, 86 NY2d 421 [1995]).

At the conclusion of plaintiff's case, defendants moved pursuant to CPLR 4401 for judgment as a matter of law, and decision was reserved by the court. The jury having found that plaintiff was laid off in bad faith, the court will review the legal sufficiency of the evidence in support of plaintiff's cause of action. A court may grant a motion for judgment as a matter of law only where it finds that, upon the evidence presented, there is no rational process by which the trier of fact could base a finding in favor of the non-moving party (*Szczerbiak v Pilat*, 90 NY2d 553, 556

[1997])). "The trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the non-movant" (Id).

Plaintiff began her employment with Nassau County in 1979, when, after taking a civil service test, she was hired by the Office of Employment and Training as a Manpower Counselor I. In this position, plaintiff worked as a job placement counselor under the Comprehensive Employment and Training Act, a federally-funded program. After scoring high on another civil service test, plaintiff became a Job Developer with the Office of Employment and Training in 1981. As a Job Developer, plaintiff counseled employees who were transitioning from the CETA program to jobs in the private sector.

In March 1983, plaintiff was terminated as a Job Developer due to the ending of the CETA program. However, plaintiff was placed on a preferred list and in March 1984 was hired by the Department of Senior Citizen Affairs as a Job Developer. In this position, plaintiff ran several programs for people over age 55 who were seeking employment and supervised approximately ten employees. Plaintiff worked at the Department of Senior Citizen Affairs office which was located at 250 Fulton Avenue in Hempstead.

Plaintiff subsequently took a civil service test for the position of special program coordinator and received the second highest score on the examination. Plaintiff was appointed to the position of Special Program Coordinator on January 27, 1991. The Special Program Coordinator title was classified as a grade 14, as opposed to grade 12, which was the classification applicable to the title of Job Developer. Although plaintiff was the only grade 14 at the Fulton Avenue office, there were other grade 14s at the main office of the Department which is located in Mineola. The effect of the promotion was to raise plaintiff's annual salary to \$42,000, from the \$38,000 which she had been earning in her previous title. As Special Program Coordinator, plaintiff continued to run the same employment programs which she had managed as a Job Developer. These programs provided a portion of plaintiff's salary, and it was part of her responsibilities to write "grants," or funding applications, for the various programs.

There were approximately 80 employees in the Department of Senior Citizens Affairs. Including plaintiff, 27 employees of the Department were laid off in response to the revenue shortfall. According to the deposition testimony of Rena Iacono, the Deputy

Commissioner of the Department, plaintiff's position was eventually filled by another County employee. It appears that plaintiff was the only Democrat employed by the Department of Senior Citizens Affairs. However, no proof was offered as to how many Democrats were employed by other departments of the County or how they were effected by the layoffs.

The New York State Constitution contains a mandate that "[A]ppointments and promotions in the civil service ... shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which so far as practicable, shall be competitive" (Art. V, § 6). "The principle embodied in the mandate doubtless was to give something like permanency of tenure to appointees in civil service, and above all to put an end to the vicious practice which had grown up of changing employees whenever the appointing power was changed without any cause except the unrestrained will of the person who happened for the time being to be at the head of the department" (*Wipler v Klebes*, 284 NY 248, 254 [1940]).

However, "[T]hose vested with the authority to create or abolish positions and to adopt a budget [may] decide that no person should be employed to perform the duties of the position and that discontinuance of the position would promote efficiency and economy" (Id). Nevertheless, "[T]here is permanency of tenure so long as some person is employed in the same or similar position under a different title and performs substantially similar services" (Id at 255). Thus, the court "looks behind the form of the ordinance to determine its intended purpose or effect, and where an ordinance in legal form cloaks an illegal purpose and produces an illegal result ... the ordinance is not adopted in good faith and has no effect" (Id). Where members of the party not in power are targeted, not upon a change of administration, but during times of austerity, the dismissals are equally in bad faith (See *Gowan v Tully*, 45 NY2d 32, 37 [1978]).

Consistent with the constitutional mandate, § 80(1) of the Civil Service Law provides that "Where, because of economy, consolidation, or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs." A public employer may, in the absence of bad

faith, collusion, or fraud, abolish positions for purposes of economy or efficiency (*Cohen v. Central School District*, 306 AD2d 732, 733 [3d Dept 2003]). Once a decision to eliminate positions is made, § 80(1)'s requirement that suspension or demotion be in "inverse order" means that seniority rights of employees must be respected (*Chautauqua v CSEA*, 8 NY3d 513, 521 [2007]). As a matter of long-standing interpretation, the phrase "same or similar positions" refers to positions with the same title (*McDermott v Office of Mental Health*, 204 AD2d 901 [3d Dept 1994]). Thus, where a public employee is laid off, and a less senior employee is retained in the same title, the lay off will be deemed to be in bad faith.

In adopting a layoff plan in times of fiscal restraint, a public employer must be guided by principles of "efficiency and economy" and may not target employees for layoff based upon their political party affiliation. In similar fashion to an employment discrimination case, a laid off public employee is permitted to prove that fiscal austerity is merely a pretext for dismissal based upon political persuasion. See *Ferrante v American Lung Ass'n* (90 NY2d 623, 630 [1997]). Again by analogy to the discrimination area, statistical evidence, i.e. percentage of Democrats laid off as opposed to percentage of Republicans, along with "other objectively established evidence," may give rise to an inference that plaintiff's layoff was not in good faith (see *CUNY-Hostos Community College v Human Rights Appeal Board*, 59 NY2d 69, 78 [1983]). Where the number of members of a particular party employed in the unit is too small to make statistical evidence reliable, plaintiff may prove her case without statistics. The dismissal of even one employee based upon political party membership is abhorrent to the civil service system (See *People v Childress*, 81 NY2d 263, 267 [1993]).

Section 77 of the Civil Service Law provides that "[a]ny employee who is removed from a position in the service of the state or of any civil division thereof in violation of the provisions of [the Civil Service Law], and who thereafter is restored to such position by order of the Supreme Court, shall be entitled to receive ... the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal." In an action pursuant to § 77, the burden of showing lack of good faith rests upon the person challenging the abolishing of his position or his dismissal from employment (*Wipler v Klebes*, supra, 284 NY at 255). With these principles in mind, the court will review the sufficiency of the evidence presented at trial.

Although plaintiff's salary was funded in part by federal programs, dismissing plaintiff must be deemed to have resulted in a cost saving because there is no evidence that plaintiff was replaced by a new hire. Although the court must assume that plaintiff's position was taken by another County employee, there was no evidence as to the replacement's classification level. If plaintiff's position was downgraded to a level lower than grade 14, there would clearly have been a cost saving. Although plaintiff's position might have been taken by another grade 14 employee, there was no evidence as to when the other grade 14s began employment. Thus, there is no rational process by which the jury could have found that plaintiff's dismissal was in bad faith based upon a failure to respect her seniority.

The court notes the absence of statistical evidence as to the percentage of Democrats laid off by other departments within the County as compared to the percentage of Republicans. Based upon the testimony that plaintiff was the "token Democrat" within her department, it may be that the number of Democrats employed by the County was too small to develop significant statistics. Nonetheless, aside from evidence that political party affiliation may have effected the initial hiring of employees, there was little evidence that plaintiff's "discharge occurred under circumstances giving rise to an inference of" bad faith (*Ferrante v American Lung Ass'n*, supra, 90 NY2d at 629). That plaintiff was an active member of the Democratic Party does not constitute the required showing. Nevertheless, a finding of bad faith must ordinarily be based upon circumstantial evidence. From the evidence that party affiliation may have effected the initial hiring process, the jury might have inferred that the layoffs were also effected by partisan considerations. Thus, the court cannot rule that there is no rational process by which the jury could have reached its verdict. Defendants' motion for judgment as a matter of law at the close of plaintiff's case is denied.

CPLR 4404 provides that "[a]fter a trial of a cause of action or issue triable of right by a jury, upon motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence." The standard of "weight of the evidence" is a somewhat lighter burden than that which is required to set aside a verdict and enter judgment for the other party as a matter of law. A court may set aside a verdict as against the weight of the evidence if it concludes that the jury

could not have reached the verdict by any fair interpretation of the evidence (*Solon v Voziiyanov*, 56 AD3d 654 [2d Dept 2008]). Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors (Id).

The court notes that plaintiff was hired, rehired and promoted under Republican administrations. In view of the absence of statistical evidence that Democrats were more adversely effected by the layoffs, there is no fair interpretation of the evidence that plaintiff was laid off based upon her political party affiliation. Thus, the verdict in favor of plaintiff was against the weight of the evidence. Accordingly, the verdict is set aside, and a new trial is ordered with respect to the issue of whether plaintiff was laid off based upon her Democratic Party affiliation.

This shall constitute the decision and order of the court.

Dated: MAY 11 2009

*W. H. Kelly* J.S.C.

**ENTERED**

MAY 15 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**