

Peralta v State of New York

2010 NY Slip Op 31302(U)

May 20, 2010

Supreme Court, New York County

Docket Number: 100034/10

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

PERALTA,

Plaintiff,

- v -

STATE OF NEW YORK,

Defendants.

INDEX NO. 100034/10

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

1 - 7

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: X Yes No

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

J.S.C.

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

Dated: May 20, 2010



J.S.C.
HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE DATED:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
RAFAEL PERALTA, ANA M. PERALTA, and
GERARDO PICHARDO,

Index No.
100034/10

Petitioners,
-against-

**DECISION
and ORDER**

STATE OF NEW YORK, NEW YORK STATE
DIVISION OF HUMAN RIGHTS and LORD &
TAYLOR, LLC,

Mot. Seq.
001

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and Respondents are served based hereon. To
obtain entry of this judgment, the Respondents must
submit a copy of this judgment to the County Clerk.

HON. EILEEN A. RAKOWER:

Rafael Peralta (“Mr. Peralta”), Ana M. Peralta (“Ms. Peralta”), and Gerardo Pichardo (“Mr. Pichardo”) (collectively “Petitioners”) bring the instant Article 78 Petition to set aside Respondent New York State Division of Human Rights’ (“State Division”) November 3, 2009 determinations that no probable cause existed to believe that Respondent Lord & Taylor, LLC (“L&T”) had engaged in unlawful discriminatory practices in terminating any of the individual Petitioners’ employment with L&T.

Petitioners are all Hispanic individuals who were born in the Dominican Republic. Prior to their terminations, Petitioners worked in L&T’s store on Fifth Avenue in Manhattan. Ms. Peralta was a full-time employee with L&T from around October 12, 1998 until her termination. Mr. Peralta was a full-time employee with L&T from around August 11, 1999 until his termination. Mr. Pichardo worked as a full-time employee with L&T from around December 11, 2003 until his termination.

Petitioners’ respective terminations centered around L&T’s discovery of a noose in the stock and housekeeping associates’ locker room on the morning of Monday, April 14, 2008. L&T immediately removed the noose upon discovery and called a meeting with the store’s stock and housekeeping staffs. At the meeting, L&T Store Manager Dina Sturtevant informed the employees of the discovery,

condemned the hanging of the noose, and asked that any employee(s) with information about the incident speak either with her, or with other appropriate L&T officers. Ms. Sturtevant also advised employees that the incident would “not go unaddressed.”

On April 19, 2008, stock employee Manuel Nunez provided a written statement to L&T’s loss prevention unit about the incident. There, Mr. Nunez stated that, on Friday, April 11, 2008, at around 3:45 p.m., he took a white rope and some tape and hung it in the locker room while coworker Elvis Munoz watched. Shortly thereafter, Manager of Supplies Lyndon Edwards entered the locker room and observed the noose. He commented that it was “stupid.” Nunez told him that he was the person who hung the noose, and Edwards subsequently left. A few minutes later, Pichardo walked into the room “and starte[d] playing around with the rope.” Nunez stated that Pichardo grabbed the noose and stuck his head through it and started laughing. Four more employees, including Ms. Peralta and Mr. Peralta, subsequently entered the room. According to Nunez, Mr. Peralta put his neck in the noose and started laughing, and Ms. Peralta followed suit. Nunez denied that the noose was intended to be a racist symbol. He stated that it was in fact meant as a practical joke on coworker Jose Rosario, who would be returning from vacation the following Monday. Nunez stated that “[i]t was just a joke about how we Boston fans are going to hung the Yankee this year...” [sic.], as Rosario was a fan of the New York Yankees baseball team.

On April 21, 2008, Edwards provided a written statement to L&T regarding the incident. Edwards stated that he did not see who put the noose up, but that he told Mr. Peralta to take it down. However, Edwards failed to follow up and confirm that the noose was removed.

According to L&T’s Position Statements to the State Division, the decision was made to terminate Nunez as a result of his placing the noose in the locker room. In addition, L&T decided to terminate Petitioners, taking the position that their alleged conduct (putting their heads through the noose and laughing) “went too far in showing involvement with and approval of the noose and in showing a disregard for safety concerns.” L&T also terminated Edwards on the grounds that, despite his position “as an experienced manager,” he failed to ensure that the noose was immediately removed and that the incident was reported to L&T through the appropriate channels. Three employees who had seen the noose but who had refrained from laughing or joking about it were given final warnings based upon

their failure to report the situation. Although one of the three (Elieser Tavaréz) was a manager, L&T did not terminate him because he was a newly-promoted manager and had not yet received training on his special responsibilities as a manager.

Petitioners, initially proceeding *pro se*, filed three separate Verified Complaints with the State Division on April 29, 2008 in response to their terminations. Each Petitioner alleged that they were the target of unlawful discrimination based upon their race (Hispanic) and national origin (Dominican), and categorically denied any wrongdoing.

On July 7, 2008, L&T submitted its position statement. L&T states that the actions taken were in furtherance of its policy of maintaining a workplace free of harassment and discrimination, and that this policy extends to acts which have a harassing or discriminatory impact, irrespective of their actual intent. L&T asserts that Petitioners' terminations were effected solely as a result of what L&T found, through its investigation, to be Petitioners' participation in the April 11th incident, rather than mere acquiescence. L&T noted that hanging a noose in a workplace "has a profoundly disturbing racial significance" which would likely have a significant impact on African-American employees, whatever the claimed purpose of the noose was. As further evidence that Petitioners' termination was for a non-discriminatory purpose, L&T states that the persons hired in Petitioners' place were in fact Hispanic. According to L&T, Mr. Peralta was replaced by a Hispanic person, while Ms. Peralta and Pichardo's full-time positions were converted to three part-time positions, all of which were filled by Hispanics.

In mid-July of 2008, Petitioners individually sent rebuttal letters to the State Division in response to L&T's Position Statement. The Petitioners all denied actively participating in any misconduct, and specifically denied ever putting their heads through the noose and/or laughing.

Petitioners subsequently retained counsel and, on May 4, 2009, Petitioners (by counsel) submitted an additional rebuttal to L&T's Position Statement. In this rebuttal, Petitioners stated that, on April 11, 2008, Ms. Peralta observed the noose when she entered the locker room, but ignored it because she did not understand its significance. A few minutes later, Ms. Peralta and Pichardo were discussing the presence of the noose when Mr. Peralta entered the locker room. Mr. Peralta demanded that Nunez remove the noose; however, Nunez refused. Petitioners further stated that, since Edwards and Tavaréz (two managers) were in the locker

room, where they could observe the noose, there was no need to report the noose to them. Attached to this further rebuttal were affidavits from the individual Petitioners attesting to the recitation of facts contained in the rebuttal, as well as a statement from another coworker corroborating their account of events.

In response to a request by the State Division for further information, L&T provided the nationalities of the employees who were given final warnings, the other two employees who were discharged, and the employees who were hired in Petitioners' place. Of the four employees who were given final warnings, three were Dominican, while the fourth was Guyanese. Of the two other employees who were terminated one (Nunez) was Dominican, while the other (Edwards, the manager) was African-American. Of the four employees who replaced Petitioners, the one who replaced Mr. Peralta was Dominican, while two of the three employees who replaced Ms. Peralta and Pichardo were Hispanic individuals of unknown national origin, with the third employee an American.

Based on its investigation, on November 3, 2009, the State Department issued its Determination and Order After Investigation ("Determination") with respect to each Petitioner (the Determinations are substantially identical). The Determinations concluded that there was "NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of." The Determinations stated that

The record suggests that [L&T] terminated complainant's employment for the non-discriminatory reason that, after an investigation, they came to believe that [Petitioners] had been involved with co-workers in what they considered to be an inappropriate incident involving a noose hanging from the ceiling of the employee locker room.

The Determinations further noted that the differing levels of sanctions meted out by L&T correlated with each individual's level of involvement, with the lesser sanction of a final warning being given to employees who merely failed to report the noose rather than laugh and/or play with the noose. The Determinations further noted that three of the four employees who replaced Petitioners were Hispanic.

Petitioners subsequently commenced the instant Article 78 proceeding, challenging the State Division's determinations of "no probable cause." L&T cross-moves to dismiss. The State Division appears and provides the administrative records of Petitioners' State Division complaints.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

The First Department has held that where, as here, a petitioner is challenging a State Division determination of no probable cause made without holding a public hearing pursuant to Executive Law §297(4)(a), "the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis" (*McFarland v. New York State Div. Of Human Rights*, 241 A.D.2d 108, 111 [1st Dept. 1998]) (citations omitted).

The Court of Appeals has observed that the standard for establishing an unlawful discriminatory practice under Executive Law §296 mirrors the standard in Title VII cases. First, a complainant is required to establish a *prima facie* case of discrimination by showing by a preponderance of the evidence that the complainant belongs to a protected class, and that he or she was discharged from a position for which he or she was qualified under circumstances giving rise to an inference of discrimination. If the complainant makes this *prima facie* showing, the burden of proof then shifts to the employer to demonstrate that the complainant was terminated for a legitimate, non-discriminatory reason. If the employer is successful, it is then for the fact-finder to determine whether the purported justification is pretextual. If the asserted non-discriminatory reason is found to be pretextual, the fact-finder is permitted - but not required - to infer discrimination

(*Mittl v. New York State Division of Human Rights*, 100 N.Y.2d 326, 330 [2003])
(citation omitted).

Here, based on its review of the administrative record, the Court is unable to conclude that the Determinations were arbitrary and capricious, or lacked a rational basis. It was not irrational for the State Division to conclude that Petitioners' terminations were based upon the legitimate, non-discriminatory reason that L&T's investigation determined that Petitioners had participated in conduct which strongly conflicted with L&T's objective of maintaining and promoting a non-discriminatory work environment. There was little evidence in the record that L&T's actions were motivated in any way by prejudice toward either Hispanic individuals or, more specifically, persons of Dominican origin. To the contrary, the record indicates that all persons were sanctioned in a manner that comported with the conduct L&T believed them to have engaged in. This included Dominican employees who received the lesser sanction of a final warning because they were found merely to have failed to report the incident. Moreover, the fact that three of Petitioners' four replacements were Hispanic, with one of the three being Dominican, constitutes further evidence that Petitioners' terminations were not the product of an unlawful discriminatory practice against Hispanics and/or Dominicans (*see McFarland* at 113).


Wherefore, it is hereby

ORDERED and ADJUDGED that the Petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 20, 2009



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).