

Matter of Franklin v SAGE, USA

2012 NY Slip Op 31818(U)

July 10, 2012

Sup Ct, NY County

Docket Number: 400771/2012

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PETER H. MOULTON

PRESENT: _____
Justice

PART 40B

Index Number : 400771/2012
FRANKLIN, KEN LAMONTE
vs.
SAGE USA
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is per attached
Patina is deleted

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UNFILED JUDGMENT

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

Dated: 6/26/12

_____, J.S.C.
HON. PETER H. MOULTON

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York: Part 40B

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-----X
In the Matter of the Application of
KEN L. FRANKLIN,

Petitioner,

Index No.: 400771/2012
DECISION AND JUDGMENT

-against-

SAGE, USA

UNFILED JUDGMENT

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Respondent.

-----X
Hon. PETER H. MOULTON, J.S.C.:

In this special proceeding for judicial review pursuant to Executive Law § 298, petitioner Ken Franklin, a former volunteer with Respondent SAGE, USA ("SAGE"), seeks review of a determination of the New York State Division of Human Rights ("the Agency"), which found after investigation that there is "no probable cause to believe that the Respondent (SAGE) has engaged [...] in the unlawful discriminatory practice complained of." Petitioner filed a complaint with the Agency, charging Respondent with unlawful discrimination and retaliation.¹ The issue before the court is whether the Agency abused its discretion in its no probable cause determination.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner started volunteering in the AARP Worksearch Senior Community Service Employment Program with SAGE in June

¹ Petitioner originally filed a claim with the Agency, in which he checked the box indicating that his claim was based on age discrimination. However, Petitioner retracted this claim during a phone interview with the Agency, stating that the mark through the box on the complaint form was an error.

2010, with a goal toward employment and the hope that he would be hired as part of a new program. Petitioner claims that during his interview with Michele D'Amato, a program manager at SAGE, on May 31, 2010, he was promised future employment, which was to begin in November 2010 with the launch of the new SAGEWorks Program (Exhibit B, P.1). While a volunteer at the organization, petitioner was listed on SAGE's website as a staff member and given the title "program manager". He also received his own business card, keys, and security codes (Exhibit C).

From October 2010 to May 2011, Petitioner inquired on many occasions about employment opportunities with SAGE, and was told by Ms. D'Amato that nothing was definite and that it would be wise to "continue to seek employment elsewhere" (Exhibit B, P.2). Petitioner wrote to Tom Weber, the Director of Community Services, on three different occasions² to complain about the fact that the promise of employment had yet to be fulfilled, and that he suspected he was not being hired because Michael Adams, Executive Director and SAGE, and Catherine Thurston, Senior Director of Programs, ordered it (Exhibit B).

Petitioner describes an incident involving a birthday cake that he baked for Mr. Adams as the focal point of this dispute. Petitioner left the cake with Mr. Adams' assistant. A few days later, he went to the directors to inquire whether Mr. Adams had received the cake, after which Petitioner was instructed not to "force food on people" (Exhibit B, P.8).

On August 3rd, 2011, Petitioner was discharged of his duties as volunteer program assistant and was told that should he wish to apply for a position in the new SAGEWorks Program, he would need to apply "like everybody else" (Exhibit A, p.8).

² May 11, June 6, and September 16, 2011.

PARTIES' ARGUMENTS

Petitioner alleges that Mr. Adams and Ms. Thurston were "malicious" and deliberately instructed other SAGE employees not to hire him "out of spite and revenge" for the birthday cake incident and other complaints (Exhibit B, P.5). In his November 15, 2011 complaint with the Agency, Petitioner alleges that Mr. Adams and Ms. Thurston retaliated against him for the incident involving the birthday cake. Petitioner also claims that following this incident, Respondent failed to fulfill a promise of employment.

Petitioner seeks to have the Agency's no probable cause determination reversed, claiming that the Agency failed to investigate on the record and altered his sworn statement.

Respondent SAGE argues that Petitioner makes an improper claim for retaliation in that "he did not file a discrimination complaint, help another individual fight discrimination or report discrimination on any basis prior to the filing of the complaint" (Agency's Final Investigation Report). Respondent claims, and the Agency found, that there was no retaliation as there was no protected activity on which to base retaliation.

DISCUSSION

"Where, as here, a determination of no probable cause is rendered 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" (Matter of McFarland v New York State Div. of Human Rights, 241 AD2d 108, 111 [1st Dept 1998]). "A DHR determination of 'no probable cause' should be overturned as capricious only where the record demonstrates that its investigation was 'abbreviated or one-sided'" (Matter of Chirgotis v Mobil Oil Corp., 128 AD2d 400, 403 [1st Dept 1987]). "Determinations of the New York State Division of Human Rights are accor-

ded 'considerable deference due to its expertise in evaluating discrimination claims'" (Hilal v New York State Div. of Human Rights, 57 AD3d 898, 898 [2008], citing Matter of Matteo v New York State Div. of Human Rights, 306 AD2d 484, 485 [2003]).

The Agency's no probable cause determination was rationally based, and was not arbitrary or capricious. The agency found that Petitioner did not participate in a protected activity as defined by law, and that Respondent cannot be held liable for a basis not grounded in discrimination law.

To prevail on a discrimination claim, the plaintiff has the burden of showing probable cause as to the discriminatory acts charged (McFarland, 241 AD2d at 113). In order to make a retaliation claim, Petitioner has the burden of showing that he engaged in a protected activity protected by Executive Law § 296. (Pace v Ogden Servs. Corp., 257 AD2d 101, 104 [1999]). "Protected activity" is described in Executive Law § 296 (e) as whether "[plaintiff] has opposed any practices forbidden under this article³ or [whether] he or she has filed a complaint, testified or assisted in any proceeding under this article."

Since there is no evidence on the record of a protected activity based on discrimination law, it cannot be said that the Agency's decision was arbitrary or capricious. Petitioner alleges that SAGE management refused to hire him "in direct retaliation of [his] actions regarding [his] gift to Mr. Adams" (Reason for Appeal attached to petitioner's moving papers), and that this decision was "clearly out of spite and revenge"

³Practices forbidden under this article include: "(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ [such individual]." Executive Law § 296.

[*6]
(Exhibit B, P. 5). Petitioner also maintains that "to rescind and deny the offer [of employment] was nothing short of being vindictive, malicious, mean-spirited and retaliatory." (Exhibit A, P.9). While the circumstances surrounding Petitioner's dismissal may have been unfortunate, Respondent's actions were not retaliation for a protected activity and, therefore, Respondent cannot be held liable in discrimination law.

Petitioner failed to explain in what ways the Agency altered his sworn statement, and therefore there is no basis to explain how this would have supported his claim. In any event, since Petitioner fails to demonstrate his participation in a protected activity, his claim that the Agency altered his sworn statement is irrelevant.

Although Petitioner was a valued volunteer at SAGE, this does not constitute retaliation as described in Executive Law § 296.

CONCLUSION

Accordingly, it is hereby

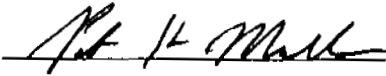
ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: July 10, 2012

ENTER:

UNFILED JUDGMENT

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J.S.C.

**HON. PETER H. MOULTON
SUPREME COURT JUSTICE**