

**Matter of Powell v New York State Div. of Human Rights**

2013 NY Slip Op 30745(U)

April 9, 2013

Supreme Court, New York County

Docket Number: 102828/12

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
Justice

PART IA PART 16

Index Number : 102828/2012  
POWELL, ANTHONY  
vs.  
NYS DIV OF HUMAN RIGHTS  
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 granted to the extent of permitting Pfizer Inc. to intervene as a respondent, and the Article 78 petition is granted to the extent of annulling the March 30, 2012 determination by the Division of Human Rights and remanding for a further investigation in accordance with the accompanying memorandum decision.

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 \_\_\_\_\_)

Dated: April 9, 2013 APR 9 2013  
Alice Schlesinger, J.S.C.

ALICE SCHLESINGER

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

- 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

-----X  
In the Matter of the Application of

ANTHONY POWELL,

Petitioner,

Index No. 102828/12  
Mot. Seq. No. 001

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent,

and PFIZER INC.,

Respondent-Intervenor.

-----X  
SCHLESINGER, J.:

Petitioner Anthony Powell timely commenced this Article 78 proceeding against the New York State Division of Human Rights to annul the March 30, 2012 decision, which dismissed the complaint by Powell that Pfizer Inc. had terminated his employment as a result of discrimination against him as a black male. (A copy of the decision is attached to the Answer filed by Human Rights as Exhibit A). Powell asserts that the decision must be vacated because Human Rights failed to conduct a proper investigation before rendering its determination; specifically, Powell asserts that Human Rights spoke to only one of the numerous witnesses identified by Powell and simply accepted as true the allegations made by Pfizer, which were based in large part on "confidential" documents not revealed to Powell nor subject to his challenge.

In his original Article 78 petition, Powell named only Human Rights as a respondent, prompting Pfizer to move to dismiss for failure to join a proper party, or in the alternative to intervene. As both Powell and Human Rights have consented to

intervention, and as Pfizer is indeed a proper party, intervention is granted. However, dismissal is unwarranted under these circumstances, particularly because Pfizer has been given a full and fair opportunity to be heard on the merits and has not been prejudiced in any way by the late joinder.

The competing claims are summarized in the determination rendered by Human Rights. Briefly stated, Powell charged in the proceeding below that Pfizer's evaluation methods had not been fairly applied to him and that he had been denied promotional opportunities and ultimately discharged from his position in the Contracts & Outsourcing division in a "discriminatory fashion due to race because of [his] supervisor's discomfort working with black males." Powell, about 47 years old, was replaced by a younger Caucasian male. Pfizer claimed in response that it had given Powell constructive criticism and opportunities for improvement on various occasions since he began work in November 2003, but his performance deficiencies continued. As for its evaluation system, Pfizer produced for *in camera* inspection by Human Rights written evaluations of other employees that purportedly substantiated the company's claim that it evaluated its staff based on work performance, regardless of race.

The most significant document in the record before this Court is the file maintained by Human Rights detailing its investigation. First and foremost, it is extremely noteworthy that Mr. Powell filed his complaint on April 2, 2009, but Human Rights delayed three years before rendering its determination on March 30, 2012. One might think the determination was delayed because the investigation was detailed and extended. However, even a cursory review of the file reveals that the opposite is true.

According to the Administrative Record certified by Human Rights, the investigation was conducted by Hellura Lyle, Human Rights Specialist I. The Event History indicates that Ms. Lyle promptly forwarded Powell's April 2009 complaint to Pfizer and obtained the company's response and Powell's rebuttal within sixty days. She then held a two-party conference on September 22, 2009 at the Division's offices, apparently with Powell and his supervisor Mark Sanders present. Sanders, who is Caucasian, had supervised 16 people; Powell was the only African American male, there was one African American woman Annette Ellis, and 14 Caucasian men. Powell asserted his belief that Sanders had a problem with African American men, in particular. It was at that conference that Pfizer submitted to Human Rights the performance reviews for the other members of his staff, which Powell was not permitted to review.

The Event History reveals that Ms. Lyle read the performance reviews the same day she received them and noted that Ms. Ellis had once been given an above-average rating and then an average rating. Two days later she telephoned Brent Koster, a former co-worker of Powell's, about the allegations in the complaint. Koster's name had been included in a list of about ten potential witnesses supplied by Powell. In his submission to Human Rights, Powell indicated that Koster had made various specific statements to him during their tenure together acknowledging that Sanders had ignored Powell in meetings and otherwise undervalued him without just cause. According to Lyle's notes on the interview, Koster confirmed that he had noticed that Powell had not been selected to head any of the task forces, but he added that it did not otherwise appear that Powell had been treated differently.

That was the sum and substance of Ms. Lyle's investigation. The file confirms that the matter languished on her desk for three years without any activity whatsoever. No effort was made to contact any of the other potential witnesses identified by Powell. Those included other African American employees who had purportedly been treated unfairly, as well as Caucasian employees like Koster who had worked with Powell and had purportedly observed some unfair treatment of Powell.

This investigation was woefully inadequate. As Powell properly asserts in his papers, Human Rights essentially chose to accept Pfizer's allegations as true without contacting the various former employees identified by Powell as people likely to support his position. This approach was improper, particularly since Powell's employment history did include evidence of good performance at various points in his six-year tenure, Koster arguably observed disparate treatment, and other employees had been criticized without their resultant discharge. Another, better investigation is needed.

It may well be that the passage of time has rendered some of the evidence in Powell's favor stale or unavailable. However, since any such problem is attributable to the egregious delay by Human Rights, the agency must make a diligent effort to remedy any such problems by conducting an extensive, thorough investigation. Also, Powell should be given an opportunity to review the "confidential" documents submitted by Pfizer with appropriate redactions to protect employee privacy, considering the great weight given to those documents by Human Rights, and to submit further comment.


Accordingly, it is hereby

ORDERED that the motion by Pfizer Inc. is granted to the extent of permitting Pfizer's intervention in this proceeding and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the petition is granted to the extent of annulling the March 30, 2012 determination by respondent Division of Human Rights and remanding the matter for a new investigation consistent with the terms of this decision.

Dated: April 9, 2013

APR 09 2013

  
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J.S.C.  
**ALICE SCHLESINGER**  
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