

Okocha v City of New York

2013 NY Slip Op 31728(U)

July 26, 2013

Supreme Court, New York County

Docket Number: 103637/2009

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN
Justice

PART 52

Index Number : 103637/2009
OKOCHA, EMMANUEL O.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
COMPEL

INDEX NO. _____
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to 5, were read on this motion to/for compel and cross-motion for summary judgment.
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1
Answering Affidavits — Exhibits cross motion | No(s) 2, 3
Replying Affidavits _____ | No(s) 4, 5

Upon the foregoing papers, it is ordered that this motion is and cross-motion

Please see attached decision and order.

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

FILED

JUL 31 2013

COUNTY CLERK'S OFFICE
NEW YORK


_____, J.S.C.
HON. MARGARET A. CHAN

Dated: 7-26-13

- 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 — NEW YORK COUNTY
PRESENT: Hon. Margaret A. Chan PART 52
Justice

EMMANUAL O. OKOCHA,
Plaintiff,

INDEX NO. 103637/2009

FILED

JUL 31 2013

COUNTY CLERK'S OFFICE
NEW YORK

- v -

THE CITY OF NEW YORK, NEW YORK CITY HUMAN
RESOURCES ADMINISTRATION, and MILLICENT DAVIS,
Defendants.

Plaintiff was a Level II attorney in the Liens and Recovery Litigation Unit (LRLU) at the New York City Human Resources Administration (HRA). Co-defendant Millicent Davis was his immediate supervising manager. He claims that because of defendants' unlawful discrimination against him based on his national origin, which is Nigerian, he was never promoted to Level III. Thus, he filed a discrimination complaint against defendants on March 16, 2009 for violation of his rights under New York City Human Rights Law, New York State Human Rights Law, and New York Labor Law. He adds that as retaliation to his filing a discrimination claim, he was brought up on disciplinary charges on May 4, 2009, and ultimately, his employment was terminated on September 2, 2009. Plaintiff now moves to compel depositions of HRA Commissioner Robert Doar and HRA General Counsel Roy A. Esnard. Defendants oppose the motion and cross-move for summary judgment.

Discrimination Claim

Plaintiff was hired as a Level I attorney in 2000 and was promoted to Level II in 2002. He was recommended a promotion to Level III by General Counsel Howard Gibbs, just before Gibbs retired in 2006. However, according to plaintiff, because of unlawful discrimination exercised by the LRLU since Gibbs' retirement, he was not promoted. Plaintiff noted that there were no black or non-United States national origin attorneys who had been promoted to Level III or higher in the Office of Legal Affairs. Plaintiff also alleged that in 2008, he was harassed by defendant Millicent Davis, a Caucasian of United States national origin, who made the workplace hostile and abusive for him. He filed a complaint for discrimination against defendants, and his complaint resulted in retaliative acts by defendants which placed him under disciplinary investigation¹ (*see* Cross-Motion, Exh A, Complaint, p 4).

A cause of action invoking protections under both the New York State and City Human Rights Laws Executive Law § 296 *et seq.*, and Administrative Code of the City of New York § 8-107 *et seq.*, respectively, requires plaintiff to assert that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action

¹ Upon receiving the notice of discipline, plaintiff moved for a temporary restraining order to prevent defendants from furthering their disciplinary proceeding against him. A hearing was held by Hon. Saliann Scarpulla on June 16, July 6, and July 9, 2009. After the hearing, on August 10, 2009, plaintiff withdrew the motion.

was due to circumstances that could be deemed discriminatory (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Here, plaintiff is claiming disparate treatment due to his national origin - a protected classification. The adverse employment action was the denial of his advancement to a Level III attorney position. Plaintiff relies heavily on the recommendation by Howard Gibbs, the former General Counsel, to assert that he was qualified for the Level III position and was essentially promised a promotion. Plaintiff also points out that Gibbs had recommended that two Level III positions were needed and were to be filled by plaintiff and another African American Level II attorney, Gunther Powers. These Level III positions were needed to address the fall-out from a then recent decision by the United States Supreme Court - the Ahlborn decision - regarding Medicaid liens. Plaintiff characterizes defendants' act of not opening the Level III positions as a pretext to deny him and Powers a promotion.

Defendants respond that plaintiff did not get the Level III position because there was no open position at the time. After the departure of Howard Gibbs, there was a restructuring of the Liens and Recovery Unit in 2007. Roy A. Esnard became General Counsel. His Senior Deputy General Counsel for Operations was Mr. Chi Mo, who, among other responsibilities, oversaw the movements of attorneys from Levels I through IV. A move from Level II to Level III came with a salary increase, but the decision to allow a move was based not on good performance but on office and management needs as set out in the Labor Management Agreement (*see* Defts' Cross-mot, Exh G, p 55). The first action Chi Mo took in the restructuring was to create two management positions; Millicent Davis, a defendant in this case, and Douglas Israel were promoted to fill these positions. Israel was involved in the project concerning the Ahlborn case (Ahlborn Project) in 2006. The plan was to staff the LRLU, including Level III attorneys, for the project. However, the plan was "nixed" by then Commissioner Doar (Deft's Cross-mot, Exh H, p 42). Israel's recommendation to set up a separate unit, wherein the City would commence suits against tortfeasors on behalf of Medicaid, was accepted. In April 2008, two non-managerial supervisory positions in the LRLU - Attorney Level IV - were opened, and Richard Balsam and Mark Rosenbaum, both white, filled those positions. They reported to Davis and Israel. Chi Mo noted that Rosenbaum had applied for the managerial position, and Gibbs also had recommended Rosenbaum for the position before his retirement, but Chi Mo told Rosenbaum that Gibbs' promise cannot be honoured just as he had told plaintiff. Plaintiff sees Rosenbaum's promotion as the effect of Rosenbaum's complaint for not getting the managerial position. Chi Mo also noted that plaintiff applied for the Level IV supervisory position, but in the interview, informed Davis and Israel that he preferred a Level III attorney position. In November 2008, plaintiff responded to a posting for a Level III position, but withdrew his application as he was no longer interested in the position.

Putting the two versions of the facts together, it appears that plaintiff was recommended for a Level III position by General Counsel Gibbs just before his retirement in 2006. When Gibbs retired, Chi Mo, under General Counsel Roy Esnard, oversaw a restructuring of the LRLU, and there were then no Level III openings and no one moved to that level. The Ahlborn Project, which would have required two Level III positions, as recommended by Gibbs, went a different route, after Gibbs retired. A separate unit was set up for the Ahlborn Project so the need for the two Level III positions disappeared. There were two Level IV openings, but plaintiff was not really interested in it. Ultimately, when the Level III position opened up in 2008, plaintiff withdrew his application. Based on these facts, it cannot be said that plaintiff has shown that there was adverse action let alone a

discriminatory action on defendants' part. The crux of plaintiff's complaint is the Level III position in Gibbs' recommendation. However, there was no promotion for plaintiff the first time around because there was no opening despite what Gibbs had planned. Plaintiff's claim that the lack of position was a pretext to discriminate against him lacks force in that the reason for the openings - the Ahlborn Project - was no longer an issue for the LRLU. Thus, plaintiff's claim of adverse employment action cannot be sustained by these facts. As such, plaintiff has not made out a *prima facie* claim of discrimination based on his national origin.

Retaliation Claim

Plaintiff claims that defendants retaliated against him for filing a discrimination complaint. Soon after he filed the complaint, defendants investigated into seven (7) years of his employment in the LRLU. Based on the findings from the investigation, defendants terminated his employment. Defendants respond that plaintiff's retaliation claim must be dismissed because it is barred by collateral estoppel as this allegation was addressed at his disciplinary hearing held on various days between November 2010 to July 2011 before an independent arbitrator, Robert Tim Brown.

The doctrine of collateral estoppel bars "a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel applies only if "(1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal" (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]). Defendants point out that plaintiff was represented by counsel and had an opportunity to cross-examine witnesses. Plaintiff argues that collateral estoppel should not apply here since the retaliation issue decided by the arbitrator was not the same as that raised by him; additionally, the arbitrator exceeded his authority. Plaintiff's argument is difficult to discern, however, a review of the arbitrator's findings shows that the same issues and facts were before him as the ones before this court. Thus collateral estoppel applies.

In any event, even in considering this issue without the application of collateral estoppel, plaintiff does not have a claim for retaliation. To sustain a claim for retaliation, plaintiff must show that: (1) he engaged in a protected activity; (2) the employer was aware that he participated in this activity; (3) he suffered an adverse employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action (*see Executive Law § 296(7); Forrest v Jewish Guild for the Blind*, 3 NY3d 295). Putting aside the above finding that there was no adverse employment action, plaintiff still has not shown he has a viable claim for retaliation.

The arbitrator's decision dated October 2, 2012, did not find retaliation as the cause for defendants' investigation and discipline of plaintiff (*see* Deft's cross -mot, Exh I, p 39-40; Pltf's Mot, Exh 38). Rather, the cause of the investigation, as found by the arbitrator, started in 2008 with plaintiff's insubordination toward defendant Davis, his supervising manager. In September 2008, Davis became concerned about plaintiff's work based on complaints about his failure to return client phone calls or messages. Davis also became suspicious of plaintiff working on private cases in the office. Davis' suspicion was sparked by finding a man not affiliated with the LRLU in plaintiff's

office without the plaintiff present. When asked where the plaintiff was, the man responded that plaintiff was making copies. The mere presence of the man being in plaintiff's office was also curious as it was not customary to have visitors in the LRLU. Davis reported to Chi Mo her suspicions and plaintiff's retort after she confronted him with her suspicion, as well as plaintiff's unresponsiveness to his clients' inquiries. Davis had also relayed to Chi Mo that plaintiff had told her that "I don't work for you" and "I'm not your slave" (*id.* Exh 37). Plaintiff accused Davis of muttering about him - "stupid African, you think you're smart" (Pltf's Aff. Exh 8, p 41). Chi Mo discounted plaintiff's accusation as over the top, and very contrary to Davis' style and personality.

Davis' information to Chi Mo caused HRA Associate General Counsel for Employment Law, Paul Ligresti, to immediately conduct a cursory investigation on whether plaintiff had a private practice. Ligresti did not uncover any private matters under the name Emmanuel Okocha, which was the name plaintiff used at HRA. However, after learning his full name - Osita Emmanuel Okocha - in plaintiff's discrimination hearing in March 2009, Ligresti conducted another search and discovered that plaintiff had an extensive private practice under the name Osita Okocha. He also uncovered that plaintiff used defendants' resources including Lexis-Nexis for his own private cases, and appeared in court on his private cases while on "on the clock" at HRA (*id.* at p17). Plaintiff violated the City Charter § 2604.b, among other regulations, which precluded public servants from engaging in any business or matter that is in conflict with his/her official duties. Ligresti had uncovered, among other violations, that plaintiff was counsel for Andreas One in a 2002 case against the City of New York, and, in 2009, was listed as "of counsel" to the law firm, Nnebe and Nnebe, which litigated matters against the City of New York. Disciplinary charges were filed against plaintiff on May 4, 2009; plaintiff had filed his discrimination claim against defendants on March 16, 2009.

Viewing the facts in this retaliation claim in a time line, the disciplinary charges filed against plaintiff occurred less than two months after plaintiff filed his discrimination complaint. However, the investigation of plaintiff that was under way in September 2008 weakens plaintiff's retaliatory claim. The fact that defendants did not compile the charges against plaintiff until May 4, 2009 can be attributed to plaintiff's purposeful use of his name "Osita Okocha" or "Osita Emmanuel Okocha" for his private practice rather than just "Emmanuel Okocha" that he used at HRA. The key factor here is not so much when the disciplinary charges were filed but when the investigation started. As the investigation started in September 2008, it predated plaintiff's discrimination complaint, and therefore, the result of the investigation, which are the disciplinary charges against plaintiff and his ultimate termination, cannot be said to be retaliatory.

Accordingly, defendants' cross-motion for summary judgment dismissing the complaint is granted; and plaintiff's motion to compel depositions of Robert Doar and Roy A. Esnard is denied as moot. The previously scheduled compliance conference on October 2, 2013 is stricken from the calendar.

This constitutes the decision and order of the court.

Dated: July 26, 2013

Margaret A. Chan, J.S.C.

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