

**Hunter v JP Morgan Chase Bank, N.A.**

2014 NY Slip Op 30695(U)

February 26, 2014

Sup Ct, Kings County

Docket Number: 7272/11

Judge: Gloria M. Dabiri

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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26<sup>th</sup> day of February, 2014.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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DANA HUNTER,

Plaintiff,

**DECISION AND ORDER**

- against -

Index No. 7272/11

JP MORGAN CHASE BANK, N.A.,

Mot. Seq. No. 5

Defendant.

ECF Case

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The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed\_\_\_\_\_

1-2

Opposing Affidavits (Affirmations)\_\_\_\_\_

3

Memorandum of Law \_\_\_\_\_

4

Feb. 4, 2013, Decision and Order and Attached Documents\_\_

5

In this employment-discrimination action, plaintiff Dana M. Hunter (plaintiff) moves in Seq. No. 5 for leave to reargue and renew her motion in Seq. No. 4 for an order, pursuant to CPLR 3101, 3124, and 3126, to compel defendant JP Morgan Chase Bank, N.A. (defendant), to comply with its discovery obligations.

***Background***

Plaintiff worked as a Litigation Specialist III in defendant's Legal & Compliance – Card Services Group between February 14, 2006 and October 7, 2008. As a litigation specialist, she drafted initial pleadings, monitored the work-in-progress settlements, and prepared default judgments.

Plaintiff was a practicing Jehovah's Witness. The precepts of a Jehovah's Witness include not celebrating birthdays, Christmas, and other holidays. Attending defendant's annual Christmas luncheon was contrary to plaintiff's religious beliefs. Plaintiff requested (and received) an exemption from attending defendant's Christmas party in 2006 on the express condition that she had to remain in the office working while everyone else was attending the Christmas party. For the following year (2007), plaintiff contacted defendant's Employee Relations Advice Connection which advised her that she was entitled to a religious accommodation and could leave defendant's office while her co-workers were attending the annual Christmas party.

According to plaintiff, defendant discriminated and retaliated against her, and ultimately discharged her on October 7, 2008 on account of (1) her refusal, on religious grounds, to attend – two years in a row – the Christmas party, which defendant considered to be a team-building activity, and (2) her request to the Employee Relations Advice Connection for a religious accommodation. She claims that she was terminated for pretextual reasons when her position was eliminated on October 7, 2008, effective December 6, 2008, allegedly as part of a reduction in workforce.<sup>1</sup> Plaintiff commenced the instant action in March 2011, claiming violations of the New York State and City Human Rights

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<sup>1</sup> Defendant's termination letter to plaintiff, dated October 7, 2008, stated, in relevant part:

“Due to changes in our business, our staffing needs have changed. As a result, your position will be eliminated and your employment with JPMorgan Chase & Co. and all of its affiliates . . . will terminate effective 12/06/2008. . . .”

Laws. She is currently proceeding pro se and is facing defendant's pending motion for summary judgment.

In the course of this litigation, the Court, by order, dated February 4, 2013 (the discovery order), resolved the parties' then-ongoing discovery dispute. The Court's discovery order consists of two parts. The first part *denied* plaintiff's request for the following document categories, without prejudice to plaintiff serving a more narrowly tailored demand:

- (1) "internal and external complaints filed against all five PAN [proprietary attorney network] Litigation Offices (Second Document Demand No. 5)";
- (2) "the personnel files of employees"; and
- (3) "'documents' relating to individuals disclosed in defendant's document disclosure 'JPMC 00654' and to documents regarding 'the other positions' referred to in such disclosure."<sup>2</sup>

The second part of the discovery order *granted* plaintiff's motion to the extent of directing that the defendant provide the following categories of documents:

- (4) A response to plaintiff's First Interrogatory No. 5,<sup>3</sup> with a proviso that "such response may be limited to claims of discrimination and/or retaliation based upon religious discrimination filed by employees working at the facility in which plaintiff was employed, including any

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<sup>2</sup> Document JPMC 00654 is an e-mail, dated October 7, 2008, from Marian Palopoli to Robert Birnbaum, with a copy to Jane Sobolewski, with the subject "L&C Card – headcount status as of 10/7/08." The e-mail discusses the proposed reduction in force (RIF) and, with respect to plaintiff, indicates that plaintiff was one of the employees to be discharged in round 2 of the RIF.

<sup>3</sup> Plaintiff's First Interrogatory No. 5 requested that defendant "state whether any other employee has ever claimed discriminatory or retaliatory treatment in the facility in which plaintiff was employed at."

such claims made two years prior to plaintiff's employment and two years following plaintiff's termination";

- (5) "all complaints against Nancy DeMarco, Christine Ashman and Linda Almonte," but "only if such individual was involved in the decision making process resulting in plaintiff's termination or denial of promotion, or if such individual directly supervised plaintiff";
- (6) "supplemental documents regarding Giovanni[ ] Garcia, to the extent not already provided"; and
- (7) "documented errors for all Litigation Specialists in 2007 and 2008, . . . to the extent such documents exist."

By letters, dated April 29, 2013, and May 17, 2013 (collectively, the April-May 2013 letters), plaintiff expanded upon her demands for documents in items (1) through (3) above. Regarding item (1), plaintiff stated that she was seeking "[a]ll internal and external complaints filed against any PAN Litigation Office where plaintiff worked, from January 1, 2005, onward." With respect to items (2) and (3), she identified the following eleven individuals:<sup>4</sup>

- Christine Mertz
- Gail Siegel
- Martin Murphy
- Terri Wilkinson
- Stafford Harmitt
- Christine Ashman
- Elizabeth M. Mahoney
- Nina C. Ranschburg
- Nancy B. DeMarco
- Michelle Sosa
- Marissa Hertz Hutchinson

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<sup>4</sup> Plaintiff originally also identified Mark Arena, but, as part of the instant motion, she has withdrawn her request for documents regarding Mr. Arena (*see* Suffin Aff., August 8, 2013, ¶ 6).

In her April-May 2013 letters, plaintiff requested the following documents for the aforementioned individuals for the period from Jan. 1, 2005, onward:

- “personnel files”;
- “complaints against such persons”;
- “discipline pertaining to such persons”
- “job[ ] performances”;
- “warnings pertaining to such persons job[ ] performances”;
- “other documents regarding work performances of such persons”;
- “documents regarding the hiring of such persons”; and
- “documents regarding the termination of employment of such persons.”

In addition, plaintiff requested in her April-May 2013 letters the aforementioned documents regarding:

- “all Litigation I Specialists, Litigation II Specialists, and Litigation III Specialists” that worked in her office for the period commencing two years before inception of her employment and ending two years following termination of her employment;
- “other persons part of the RIF [reduction in force] plaintiff was a part of and the RIF immediately preceding the RIF plaintiff was a part of”;
- the total number of open positions in Legal & Compliance – Card Services Litigation Group at the time plaintiff’s position was eliminated and the locations of those positions; and
- official dates when the positions were eliminated, grade levels, job functions, and which departments had the seven open positions eliminated as referenced on document Bates stamped JPMC 00654 (*i.e.*, the October 7, 2008, headcount e-mail).

Finally, plaintiff requested in her April-May 2013 letters the following documents, for the period commencing two years before inception of her employment and ending two years after termination of her employment, regarding:

- “any complaint of religious discrimination, retaliation or hostile work environment by any current or former employee that worked in plaintiff’s office”; and

- “complaints of religious discrimination, retaliation, hostile work environment, or disparate treatment based on religion, as against any person that supervised plaintiff’s employment and any person who could have input into or make employment decisions regarding plaintiff, . . . including . . . Steve Cutler, Robert Birnbaum, Marion Paolopoli, Jane Sobolewski, Virginia E. Smith-Edmond, Martin Murphy, Terri Wilkinson, Christine Mertz, Stafford Harmitt, and Gail Siegel.”

By letter, dated April 4, 2013, defendant responded to items (4) through (7). By letter, dated August 7, 2013, defendant transmitted the First Amended Objections and Responses to Plaintiff’s First Set of Interrogatories, and documents Bates stamped JPMC 01485-01573, further responding to items (4) through (7).

Notwithstanding defendant’s responses, plaintiff, in her April-May 2013 letters, requested the following documents supplementing her prior document requests:

- (5-a) Supplementing item (5), plaintiff requested complaints *by* Nancy DeMarco, Christine Ashman and Linda Almonte, rather than *against* these individuals. This request included JPMorgan Chase & Co., Legal & Compliance – Card Services Litigation Group, Chase Bank, U.S.A., and the New York PAN. With respect to Linda Almonte, this request also included Legal & Compliance and the Collections Litigation Support.
- (6-a) Supplementing item (6), plaintiff requested documents regarding Steve Cutler’s written approval to hire Giovanni Garcia, as well as job postings, both internal and external, for the position that Mr. Garcia assumed.

In June 2013, plaintiff moved in Seq. No. 4 to compel defendant to respond to her discovery requests in accordance with the discovery order, as amplified by her April-May 2013 letters (the prior motion). Plaintiff’s sole argument in support of her prior motion (as set forth in ¶¶ 4-6 of her former counsel’s affirmation, dated June 13, 2013) reads in its entirety as follows:

“Annexed hereto . . . are [the April-May 2013] letters to defendant seeking additional discovery in the instant action, in

an attempt to cull all documents discoverable pursuant to law, in an attempt to comply with this court's [discovery] order. . . . Complaints made by Nancy DeMarco, Christine Ashman, and Linda Almonte are discoverable because Plaintiff believes such complaints concern a malicious, wanton, or discriminatory state of mind by Defendant, and Defendant's state of mind is the central issue in this action, and that the complaints fall within the scope of discovery pr[e]scribed by this court's [discovery] order. . . .

Complaints against other persons referenced in the [April-May 2013 letters] to Defendant . . . are discoverable because Plaintiff believes such documents fall into the scope of discovery pr[e]scribed by this court's [discovery] order. . . ."

Defendant opposed, raising two principal contentions. First, defendant pointed out that plaintiff, by way of the April-May 2013 letters, had broadened her request for documents in items (1) through (3), instead of narrowing her document demands in accordance with the discovery order. Second, defendant indicated that it already had responded to items (4), (5), (5-a), (6), and (7), as follows:

- (4) "Defendant's records show that Plaintiff was employed from February 14, 2006 to December 6, 2008. Defendant is unaware of any record of any religious discrimination claims or retaliation claims based upon religious discrimination asserted by any employee in the New Hyde Park, New York PAN office (aside from plaintiff) during the period February 14, 2004 to December 6, 2010" (*see* Defendant's First Amended Objections and Responses to Plaintiff's First Set of Interrogatories, dated August 7, 2013, at 5).

"With respect to other complaints of discrimination and retaliation, from the period 1/1/2006 to 12/31/2010, there were no other religious discrimination or retaliation claims based on religious discrimination asserted by employees in the New Hyde Park, New York PAN office where Plaintiff worked" (*see* Defendant's letter, dated April 4, 2013, to plaintiff's former counsel, at 1).

- (5) - (5-a) “With respect to complaints related to Nancy DeMarco, Christine Ashman and Linda Almonte, none of these individuals directly supervised Plaintiff or was involved in the decision-making process resulting in Plaintiff’s termination or alleged denial of promotion” (*see* Defendant’s letter, dated April 4, 2013, to plaintiff’s former counsel, at 2).<sup>5</sup>
- (6) Regarding Giovanni Garcia, defendant produced, as part of the First Amended Objections and Responses to Plaintiff’s First Set of Interrogatories, the documents regarding the job postings, both internal and external, for the position that Mr. Garcia assumed (*see* Documents Bates stamped JPMC 01485-JPMC 01505). However, defendant did not respond to plaintiff’s request in item (6-a) for documents regarding Steve Cutler’s written approval, if any, regarding Mr. Garcia.
- (7) As to the documented errors for all Litigation Specialists in 2007 and 2008, defendant indicated that it previously produced responsive documents in this category (*see* Defendant’s letter, dated April 4, 2013, to plaintiff’s former counsel, at 2, and documents Bates stamped JPMC 01197-JPMC 01327).

After oral argument, JHO Martin Schneier denied plaintiff’s prior motion with leave to renew (*see* Short-Form Order, dated June 21, 2013, and served with notice of entry on July 9, 2013) (the prior order). Thereafter, plaintiff timely served the instant motion for leave to reargue and renew her prior motion.

### *The Parties’ Contentions*

Plaintiff contends that JHO Schneier, in denying her prior motion, misapprehended or overlooked the facts and law. In particular, she alleges (in ¶¶ 5-9 of her former counsel’s affirmation, dated August 8, 2013) that:

“The judicial hearing officer learned of the nature of Plaintiff’s causes of actions and that Plaintiff’s [prior] motion generally

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<sup>5</sup> Whereas plaintiff asserted that the Court misunderstood her request because the discovery order referred to complaints against, rather than asserted by, DeMarco, Ashman, and Almonte, defendant read the discovery order to mean complaints asserted by these individuals and responded accordingly (*see* Defendant’s Memorandum of Law in Opposition of Plaintiff’s Motion to Compel Compliance with Discovery Obligations Filed June 12, 2013, at 5, n 2).

sought compara[ble] information that [the discovery order] left room for requesting, but the judicial hearing officer did not read the motion papers after a conference with a court attorney. . . . Therefore[,] Plaintiff seeks proper consideration of the requests for discovery set forth in [the prior] motion . . . pursuant to CPLR 2221 (d). . . .<sup>6]</sup>

Plaintiff seeks leave to renew based upon omission of the document [JPMC 00642<sup>7]</sup> from the [prior motion].

The [aforementioned] document[ ] . . . bear[s] on the controversies and [was] not included [with the prior motion] because of unintended law firm oversight.

The [aforementioned] document . . ., by its terms, strongly supports Plaintiff's request for documents regarding Stephen Cutler, General Counsel for Defendant around the time Plaintiff's employment as a paralegal was terminated, and documents regarding Stephen Cutler's input into hiring the person, identified as Giovanni Garcia, as a full-time employee to replace Plaintiff[ ] . . . at or around the time Plaintiff's position was allegedly eliminated (underlining omitted)."

Defendant opposes, advancing a two-prong argument: first, that plaintiff's instant motion papers are confusingly assembled and difficult to understand, and, second, that plaintiff is not entitled to a leave to renew because (1) she had been in possession of document Bates stamped JPMC 00642 at the time she made her prior motion, and (2) she demonstrated no valid excuse for her failure to include such document in her prior motion.

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<sup>6</sup> Here, plaintiff indicates that she withdraws her prior document request regarding Mark Arena.

<sup>7</sup> Document Bates stamped JPMC 00642 is an e-mail, dated October 22, 2008, from Gail Siegel and Patricia Texas Wilson to Marnie Clark, with the subject "Confidential Information – Lists from Attorneys." The e-mail stated that plaintiff's replacement, Mr. Garcia, was hired with permission of defendant's general counsel Stephen Cutler to assume plaintiff's position. According to the e-mail, Mr. Garcia earned about \$15,000 less than plaintiff and had a completely different skill set.

Defendant urges the Court to deny the instant motion and proceed with considering its dispositive motion for summary judgment (Seq. No. 6), which defendant served about a week after plaintiff made the instant motion.

### *Discussion*

The initial question before the court is whether the Court may properly consider plaintiff's motion notwithstanding the pendency of defendant's motion for summary judgment. Under CPLR 3214 (b), service of a summary judgment motion stays disclosure until determination of the motion unless the court orders otherwise. Although the stay under CPLR 3214 (b) is automatic, a court may direct otherwise where, as here, there is a legitimate need for discovery to enable plaintiff to respond to defendant's pending summary judgment motion (*see Reilly v Oakwood Hgts. Community Church*, 269 AD2d 582 [2d Dept 2000]). Accordingly, the stay under CPLR 3214 (b) is lifted to permit the Court to consider plaintiff's motion (*see Champion 221 LLC v Madave Prop. SPE, LLC*, 2013 NY Slip Op 30616[U], \*4 [Sup Ct, NY County 2013]; *cf. John Eric Jacoby, M.D., P.C. v Loper Assoc., Inc.*, 249 AD2d 277, 279 [2d Dept 1998]).

The next question is whether plaintiff's motion complies with the requirements of CPLR 2221 which sets forth the standards for seeking leave to reargue and/or renew a prior motion. The court's prior order denied plaintiff's motion "with leave to renew." Because the prior order explicitly provided for "leave to renew," the instant motion need not meet the requirements of CPLR 2221 as a prerequisite for plaintiff obtaining leave to renew. While there is merit to defendant's contention that motion papers should not be difficult for the

responding party to apprehend, the Court also notes the overarching principle, enunciated in CPLR 2001, that defects or irregularities in papers should be disregarded in the absence of substantial prejudice to the responding party (*see Billiny v Blagrove*, 84 AD3d 848, 849 [2d Dept 2011]). Here, the defendant was not prejudiced as evidenced by its ability to respond to plaintiff's motion on the merits (*see Key Bank Nat. Assn. v Stern*, 14 AD3d 656, 657 [2d Dept 2005]).

The final question is whether plaintiff is entitled to additional document discovery. The crux of this litigation is whether "economic conditions required cost-cutting, resulting in significant job layoffs, or [whether] . . . defendant's downsizing was contrived for the purpose of terminating [her]" (*Elizarov v Martha Stewart Living Omnimedia, Inc.*, 45 AD3d 327, 327 [1<sup>st</sup> Dept 2007]). If, in opposition to defendant's summary judgment motion, plaintiff is *unable* to raise a triable issue of fact as to whether the reasons proffered by defendant for its challenged actions were false or merely pretextual, her case may be dismissed (*see Cenzon-Decarlo v Mount Sinai Hosp.*, 101 AD3d 924, 926-927 [2d Dept 2012], *lv denied* 21 NY3d 858 [2013]). As is more fully set forth below, defendant shall produce to plaintiff the documents regarding (1) the second round of the reduction in force in which plaintiff was terminated, and (2) Steve Cutler's written approval, if any, of the decision to have an external individual Mr. Garcia, hired on August 11, 2008, assume her position which, according to defendant, was eliminated on October 7, 2008 when plaintiff was terminated.

### ***Conclusion***

Accordingly, it is

ORDERED that the stay under CPLR 3214 (b) is lifted to permit the Court to consider plaintiff's motion; and it is further

ORDERED that plaintiff's motion is granted to the extent that defendant is directed to produce to plaintiff, within 30 days of receipt of this order, the following documents:

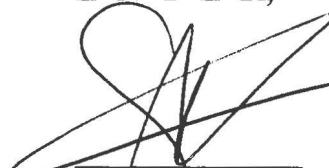
- (1) Names of other persons who were part of the reduction in force in which plaintiff was terminated and any religious discrimination claims or retaliation claims by such persons;
- (2) The total number of open positions in the Legal & Compliance – Card Services Litigation Group at the time plaintiff's position was eliminated and the locations of those positions;
- (3) Official dates when the positions were eliminated, grade levels, job functions, and which departments had the seven open positions eliminated as referenced on document Bates stamped JPMC 00654; and
- (4) Steve Cutler's written approval(s), if any, of the decisions to hire Mr. Garcia and to have Mr. Garcia assume the title of plaintiff's position;

and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the short form order of this court, entered January 31, 2014, is vacated and the parties shall appear for a conference in Part 2 on March 21, 2014, at 9:30 A.M.

**ENTER,**



**J. S. C.**  
HON. GLORIA M. DABIRI  
J.S.C.

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FILED  
 KINGS COUNTY CLERK  
 2014 MAR 17 AM 8:53

