

**Matter of Zarinfar v Board of Educ. of the City Sch.
Dist. of the City of N.Y.**

2015 NY Slip Op 32628(U)

May 15, 2015

Supreme Court, New York County

Docket Number: 116457/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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In the Matter of the Application of

MAJID ZARINFAR,

Petitioner

Index No. 116457/2010

DECISION and ORDER

- against -

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK and
JOEL I. KLEIN, in his official capacity
as CHANCELLOR OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

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LUCY BILLINGS, J.:

I. BACKGROUND

In this proceeding pursuant to C.P.L.R. Article 78
challenging petitioner's termination from his probationary
teaching position as arbitrary, petitioner sought a declaratory
judgment that he obtained tenure and that the termination
violated New York Education Law §§ 2573, 3012, and 3020-a, and
therefore was void. He further seeks reinstatement to his
teaching position with retroactive pay plus interest, employment
benefits, and seniority to which he would have been entitled had
he not been discharged.

In its prior decision, the court found that substantiated
allegations of verbal abuse by petitioner toward the end of the
2009-2010 school year, after an investigation by school

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administrators, proffered a legitimate reason for the discontinuance of his probationary employment. Nevertheless, conflicting evidence regarding the change in his rating from satisfactory to unsatisfactory for that school year, the absence of any connection drawn between the abuse and the rating or it and the discontinuance, and irregularities in effecting the discontinuance suggested its subsequent justification was pretextual. Zarinfar v. Board of Educ. of City Sch. Dist. of City of N.Y., 44 Misc. 3d 1215 (Sup. Ct. N.Y. Co. 2013), appeal dismissed, ___ A.D.3d ___, 4 N.Y.S.3d 530 (1st Dep't Apr. 9, 2015). These anomalies opened the door for petitioner's claim that the true reason for his discontinuance was unlawful.

Although in this proceeding petitioner first raised his claims of discrimination and bias against his national origin and age in reply to respondents' answer, respondents' administrative record filed with their answer already set forth these claims. The record showed that petitioner had complained to respondents' administrators regarding repeated comments to him that he was culturally out of place, disparaging his Iranian descent or advanced age in comparison to his fellow employees. Yet school administrators never addressed these complaints, at minimum suggesting that the administrators acquiesced in these biases and that they were motivating factors for his discharge.

Petitioner, however, had pursued these claims before the New York State Division of Human Rights (NYSDHR). Therefore the court granted the petition to annul respondents' discontinuance

of his probationary employment and reinstate him to his teaching position with retroactive compensation and benefits only to the extent of granting a further hearing on the preclusive effect of his complaint to NYSDHR.

II. ELECTION OF REMEDIES

Both New York Executive Law § 297(9) and New York City Administrative Code § 8-502(a) provide that, once a claim of an unlawful discriminatory practice has been filed with NYSDHR, that forum is an exclusive election of remedies. Hollander v. City of N.Y. Commn. on Human Rights, 118 A.D.3d 418, 418 (1st Dep't 2014); Benjamin v. New York City Dept. of Health, 57 A.D.3d 403, 403-404 (1st Dep't 2008); Acosta v. Lowes Corp., 276 A.D.2d 214, 218 (1st Dep't 2000). In his complaint to NYSDHR for employment discrimination because of age, creed, and national origin, petitioner claimed respondents terminated him in retaliation for his request for an investigation of the claimed discrimination and for seeking legal advice from his union regarding respondent Board of Education's discriminatory practice.

In the NYSDHR proceeding, petitioner further alleged that respondents failed to address or remedy the same discriminatory acts against him that he alleges in this proceeding, including his colleague's discriminatory remark to petitioner that: "You do not fit in to teach here because you have a cultural problem. You should go back to your country to teach your people." Aff. of Lori M. Smith (Feb. 28, 2014) Ex. A, NYSDHR Compl., at 14. Those acts also included his student's disparagement of

petitioner's teaching due to his national origin, labelling petitioner "you fucking foreigner," id. Ex. C, at 15, and echoing his colleague's remark that he "should go back to [your] old country because [you] do not fit in here." Id. Ex. C, at 18.

Also consistent with his claims before the court, petitioner maintained that respondents accused him of verbally abusing his students and changed his satisfactory rating to unsatisfactory in retaliation for his request that they address the disparaging statements by his colleague and his student. Id. Ex. A, NYSDHR Compl., at 23. Petitioner further claimed in the NYSDHR proceeding that respondents discriminated against him due to his age by replacing him with a younger teacher whose compensation cost much less than petitioner's much higher compensation, id. Ex. A, NYSDHR Compl., at 13, 15, and cited three colleagues whom respondents discriminated against due to their age in favor of younger teachers: again the same claims he raises here. Id. Ex. A, NYSDHR Compl., at 11.

After investigation and review of the evidence submitted by the parties, NYSDHR dismissed petitioner's complaint, finding no evidence that respondents' discontinuance of his probationary employment was motivated by a discriminatory reason. NYSDHR's decision specifically found petitioner's allegation of age discrimination meritless, because respondents hired petitioner at age 46 years, and found his colleague's discriminatory remark not probative of respondents' motive because the remark was by another teacher without authority to influence petitioner's

employment. Id. Ex. D, at 1. Despite petitioner's insistence to the contrary, the decision does not neglect or overlook his complaint's allegations regarding other instances of discrimination. Instead, NYSDHR determined that the record before the agency presented "no other evidence relevant to issues of discrimination." Id.

Although petitioner was entitled to seek judicial review to vacate NYSDHR's dismissal of his complaint because NYSDHR discounted or disregarded the discriminatory statements and acts he alleged or on other grounds, he has failed to seek any review. He may not now maintain the same claims in this proceeding, collaterally attacking NYSDHR's determination. Bevillacqua v. CRP/Extell Parcel I, L.P., 126 A.D.3d 429, 429-30 (1st Dep't 2015); Katz 737 Corp. v. Cohen, 104 A.D.3d 144, 148 (1st Dep't 2012). Since petitioner elected to file his complaint with NYSDHR before raising those claims in this proceeding, that complaint precluded him from maintaining the same claims based on the same alleged incidents here. N.Y. Exec. Law § 297(9); N.Y.C. Admin. Code § 8-502 (a); Hollander v. City of N.Y. Commn. on Human Rights, 118 A.D.3d at 418; Benjamin v. New York City Dept. of Health, 57 A.D.3d at 404; Acosta v. Loews Corp., 276 A.D.2d at 218; Wrenn v. Verizon, 106 A.D.3d 995, 665-96 (2d Dep't 2013).

While another decisionmaker might reach different conclusions, it is uncontroverted that NYSDHR issued a decision on the merits on petitioner's complaint claiming that discrimination due to his age, creed, and national origin

motivated respondents' discontinuance of his probationary employment. NYSDHR's unchallenged finding that no discriminatory reason motivated the discontinuance of petitioner's probationary employment now binds this court. Katz 737 Corp. v. Cohen, 104 A.D.3d at 148; Camacho v. New York City Hous. Auth., 83 A.D.3d 475, 476 (1st Dep't 2011).

III. DISPOSITION

For the reasons explained above, the court denies the petition to annul respondents' discontinuance of petitioner's probationary employment and to reinstate petitioner to his teaching position with retroactive compensation and related entitlements. In sum, the allegations of verbal abuse in May 2010, sustained after an investigation by petitioner's school administrators, supported the discontinuance of petitioner's probationary employment, which NYSDHR's preclusive determination establishes was not motivated by discrimination. Goonewardena v. State of N.Y. Workers' Compensation Bd., 95 A.D.3d 638, 638 (1st Dep't 2012); Bienz v. Kelly, 73 A.D.3d 489, 490 (1st Dep't 2010).

As set forth in this court's prior decision, because petitioner has shown that respondents failed to give him the requisite notice of his discontinuance before his probationary period expired, N.Y. Educ. Law §§ 2573(1)(a), 3012(2), he is entitled to 60 days of compensation at his final rate of pay, plus interest from the date his probationary period expired. C.P.L.R. § 7803(3). If respondents have not compensated him for the 60 days when he received no written notice of his

discontinuance, the court awards him a judgment for that compensation plus interest from August 30, 2010. C.P.L.R. § 7806. The court dismisses this proceeding insofar as it seeks any other relief. Id.

DATED: May 15, 2015

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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