Matter of Local 621, S.E.I.U. v New York City Dept. of Transp.
2018 NY Slip Op 33618(U)
June 28, 2018
Supreme Court, New York County
Docket Number: 101831/17
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

LOCAL 621, S.E.I.U.; SEUPERSAUD BHARAT, BISAMBHAR KUBAIR, and ANDREW COHEN,

Petitioners,

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

Index Number 101831/17

-against-

THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION; POLLY TROTTENBERG, personally and as Commissioner of the New York City Department of Transportation; JAMES L. HALLMAN, personally and as Chief Diversity/EEO Officer of the New YORK CITY DEPARTMENT of TRANSPORTATION, and the CITY OF NEW YORK,

Respondents.

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CAROL R. EDMEAD. J.:

Petitioners Local 621, S.E.I.U., Seupersaud Bharat (Bharat), Bisambhar Kubair (Kubair, and Andrew Cohen (Cohen) bring this hybrid Article 78 proceeding, seeking a judgment: (a) declaring that the actions of respondents in (I) issuing findings and determinations, dated September 15, 2017, that Kubair and Cohen engaged in retaliatory conduct, and (ii) October 4, 2017, that Bharat, Kubair, and Cohen engaged in discriminatory conduct; and (iii) failing and refusing to upgrade Bharat to SMME Class I, based on the October 4, 2017 determination, were arbitrary, capricious, unreasonable and unlawful, and violative of petitioners' right to due process; (b) annulling the September 15, 2017 and October 4, 2017 determinations (together,

Determinations); © directing respondents to expunge copies of all documents containing or referring to the Determinations from all files of respondent New York City Department of Transportation (DOT); (d) directing respondents to upgrade Bharat to SMME Class II with back pay and full retroactive seniority to the date he would have been upgraded (on or about October 14, 2017), but for the issuance of the October 17, 2017 determination against him; (e) awarding Bharat, Kubair, and Cohen compensatory and punitive damages; (f) ordering a trial, pursuant to CPLR 7408 (h), on any factual issues presented herein, including the claims of Bharat and Kubair, pursuant to the New York State and New York City Human Rights Laws; and (g) awarding petitioners costs and attorneys' fees.

Respondents DOT, Polly Trottenberg, James L. Hallman, and the City of New York (City) cross-move for a judgment: (1) dismissing the verified amended petition (petition) on the grounds that (a) the court lacks subject matter jurisdiction, inasmuch as the petition is premature as it challenges determinations that are not final and binding upon petitioners; (b) petitioners have failed to exhaust contractual and administrative remedies, © the due process claims fail as a matter of law, (d) the petition otherwise fails to state a claim with respect to discrimination or retaliation under the State or City Human Rights Laws; and (e) any claims against Trottenberg and Hallman in their individual capacities must be dismissed; and (2) awarding respondents costs, fees, and disbursements.

The immediate context giving rise to this proceeding is a complaint filed with the DOT Equal Employment Opportunity (EEO) office against the three petitioners by nonparty George Liadis, a DOT employee who was supervised, at various times, by Kubair or Bharat. At all relevant times, Kubair supervised Bharat, and Cohen supervised Kubair. Liadis's complaint

alleged that petitioners mocked him, because he had been appointed to his position as an auto mechanic pursuant to Civil Service Law §55A, which permits persons who are physically or emotionally handicapped to be appointed to civil service positions without taking the relevant examination. Petitioners contend that Liadis filed his complaint in retaliation against petitioners' refusal to support an allegedly fraudulent workers' compensation claim that he filed. The September 15, 2017 determinations concerning Kubair and Cohen is discussed below.

Respondents' argue that the Determinations, and the consequent entries into petitioners' EEO records, are not final and binding upon them, because charges and disciplinary proceedings were brought against petitioners in February, 2018. However, respondents do not contend that, if petitioners are acquitted of those charges, the Determinations will be withdrawn. Accordingly, as regards this proceeding, the Determinations are final. Indeed, Bharat alleges that he was denied a promotion solely because of those pertaining to him, and Cohen alleges that he was denied a transfer that would have led to a promotion. In addition, Kubair and Cohen were ordered to undergo "appropriate EEO training regarding DOT's anti-retaliation policy" *See* amended petition (petition), exhibit F at 1.

In *Matter of D'Angelo v Scoppeta* (19 NY3d 663 [2012]), the Court held that the Fire Department's EEO determination, that the petitioner had "exercised unprofessional conduct and made an offensive racial statement" (*id.* at 669), which determination had been placed in the petitioner's EEO file, was final, and that petitioner should have been afforded a hearing. The Court found that Fire Department " EEO's finding that [the] petitioner was in breach of its racial discrimination policy is serious misconduct, that could negatively impact his eligibility for future promotion." *Id.* at 669. Here, as in *D'Angelo,* petitioners were required to undergo additional

training. With regard to finality, this case is indistinguishable from *D'Angelo.*

Respondents' further argument, that petitioners have failed to exhaust their contractual and administrative remedies, is odd, to say the least, inasmuch as that the City has argued successfully that EEO determinations are not grievable. *See OLR & Comptroller v DC 37,* 63 OCB 47 (BCB 1999) [Decision No. B-47-99 (arb)], attached as exhibit A to petitioners' memorandum of law in opposition to cross motion. Petitioners represent that the DOT Advocate expressly told them that, consistently with the OCB decision, no administrative remedies are available to challenge EEO determinations, such as those at issue here. *See* amended petition ¶¶ 53, 74.

Respondents' argument as to petitioners' due process claims fares no better. *D'Angelo* squarely holds that the placing of a formal reprimand, such as the Determinations, in an employee's EEO file, without a hearing, constitutes a violation of the employee's right to the due process of law. *Id.* at 669. Here, the due process violations alleged are far more egregious than that in *D'Angelo.* With regard to the October 4, 2017 determination, petitioners allege that they were never given an unredacted copy of Liadis's complaint.

In 2012, Bharat filed a complaint of discrimination with the United States Equal Employment Opportunity Commission alleging that he had been passed over for promotion, while White candidates, who had scored lower than he on Civil Service Exam 2506, were promoted to the position of SMME. That charge culminated in a consent decree (Consent Decree), pursuant to which, among other provisions, the City agreed to pay Bharat back pay, grant him retroactive seniority, and pay him $150,000 in additional compensatory damages, as well as $70,000 in attorneys' fees and costs. *United States of America v City of New York,* 17

Civ 0364 (JGK) June 14, 2017. The September 15, 2017 determination regarding Kubair and Cohen had its origin in a visit to their workplace by non party Joe Paterno, whom the Consent Decree had identified as one of the persons who had discriminated against Bharat and others. Mr. Paterno, at that time, was on terminal leave. Shortly after his visit, he received a letter stating that DOT's office of EEO had received a complaint alleging retaliation, on the ground that he had discussed the Consent Decree with employees, including claimants in the federal action. The complaint alleges that, thereafter Kubair and Cohen were interviewed by a member of DOT's EEO office but were not told that any complaint had been made against them. On September 15, 2017, Kubair and Cohen received the determination of that date, stating in part:

> "Please be advised that the EEO office had concluded its investigation of ... [the complaint against Paterno] which .... DOT filed alleging discrimination on the basis of retaliation, in which you were subsequently determined to be a relevant party to this matter.
>
> Upon a review of all the pertinent facts presented in the complaint, DOT finds that the allegations were substantiated against you."

Petition, exhibit F at 1. The petition alleges that, at no time, did Kubair or Cohen receive any complaint or written statement disclosing what, if any, facts or charges had been alleged against them.

Respondents also argue that Bharat released all claims against DOT and the City, when he accepted more than $325,000, that he received as the result of the Consent Decree. The release, however, applies solely to "any and all claims, liabilities or causes of action arising out of the allegations of the Complaint . . . " O'Connor, Affirmation in further support of respondents' cross motion to dismiss, exhibit A at 2. The "Complaint," of course, is Bharat's initial complaint to the EEOC. Bharat's release, accordingly, has no bearing, here.

Bharat's and Kubair's allegation of discrimination on the basis of national origin is supported by nothing other than that they are both of East Indian descent. Accordingly the claim of discrimination is dismissed.

Bharat claims that the October 15, 2017 determination and the subsequent failure to promote him were in retaliation for the charge that he had filed with the EEOC. He argues that the investigation following Liadis's complaint was so outrageous that the October 15, 2017 determination and the subsequent failure to promote Bharat can only be understood as retaliation for his complaint to the EEOC. As the petition acknowledges, that argument requires an assumption that Bukhair and Cohen were collateral victims of such retaliation. The Court refuses to make that assumption.

Bharat also argues that the temporal proximity between the Consent Decree and the October 15 determination shows retaliation. While temporal proximity between engaging in a protected activity and an adverse employment action suffices to "support[] an inference of retaliation." (*Emengo v State of New York*, 143 AD3d 508, 509 [1st Dept 2016]; *see also Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018], Bhahar's protected activity was filing his complaint with the EEOC, not the eventual issuance of the Consent Decree. The more than four years between that filing and the October 15, 2017 determination are far too long to be considered temporally proximate. *See Bantamoi v St. Barnabas Hosp.*, 146 AD3d 420, 420 (1st Dept 2017) (five-month interval is too long to support inference of causality); *Matter of Parris v New York City Dept. Of Educ.*, 111 AD3d 528, 529 (1st Dept 2013) (same).

Finally, petitioners' claims against Trottenberg and Hallman, in their individual capacities, lack merit. Petitioners represent that Hallman signed and issued the Determinations

over the objection of the DOT EEO investigator assigned to the case. That shows no more than Hallman's disagreement with the investigator's conclusion, and it shows nothing about Trottenberg.

While the Court is granting the petition with regard to the Determinations, it is not ordering the respondents to promote Bharat, because the petition acknowledges that it is only likely that he would have been promoted, but for the October 4, 2017 determination. *See* petition ¶ 55.

Accordingly, it is hereby

ADJUDGED and DECLARED that the September 15 and October 4, 2017 determinations of respondent New York City Department of Transportation concerning petitioners Seupersaud Bharat, Bisambhar Kubair, and Andrew Cohen were entered into said respondents' employment files in violation of said employees' due process rights; and it is hereby

ORDERED that said respondent is directed to expunge said determinations from any and all of said respondents' employment files in which such determinations appear; and it is further

ADJUDGED and DECLARED that said respondent may not consider such determinations in any decision concerning the promotion of said respondents to higher titles, and the motion is otherwise denied; and it is further

ORDERED that the cross motion of respondents The New York City Department of Transportation, Polly Trottenberg, James L. Hallman, and the City of New York is granted to the extent that the third, fourth, and fifth causes of action in the amended complaint, alleging retaliation (the third and fourth) and discrimination (the fifth), are dismissed, and the action is severed and dismissed as against respondents Polly Trottenberg and James L. Hallman, and the

cross motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for petitioners shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for respondents.

Dated: June 28, 2018

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

FILED
JUL 16 2018
COUNTY CLERK'S OFFICE
NEW YORK

Clerk