

Matter of Local 621, S.E.I.U. v New York City Fire Dept.

2022 NY Slip Op 33773(U)

October 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 522335/2020

Judge: Gina Abadi

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At an IAS Term, City Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 25th day of October 2022.

P R E S E N T:

HON. GINA ABADI,
J.S.C.

IN THE MATTER OF THE APPLICATION OF
LOCAL 621, S.E.I.U. and STEVEN PERRI,

Index No.: 522335/2020
Motion Seq: 1 & 2

Petitioners,

DECISION/ORDER

-against-

THE NEW YORK CITY FIRE DEPARTMENT,
DANIEL A. NIGRO, AS COMMISSIONER OF THE NEW
YORK CITY FIRE DEPARTMENT, DON NGUYEN AS
ASSISTANT COMMISSIONER OF THE EQUAL
EMPLOYMENT OPPORTUNITY OFFICE OF THE NEW YORK
CITY FIRE DEPARTMENT, and THE CITY OF NEW YORK,

Respondents.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed.....	7-14, 20-23
Opposing Affidavits (Affirmations).....	25-26
Reply Affidavits (Affirmations).....	28
Other: Memoranda of Law.....	33-45, 47-52

Petitioners Local 621, S.E.I.U. and Steven Perri (Perri) (collectively, the petitioners) move, motion sequence 1, for a judgment, pursuant to, inter alia, CPLR Article 78, and other applicable provisions of law, rules, and regulations: a) adjudging and declaring that the actions of the New York City Fire Department (FDNY), Daniel Nigro, FDNY Commissioner, Don

Nguyen, Assistant Commissioner of the Equal Employment Opportunity Office of the FDNY and the City of New York (collectively, the respondents) in issuing a determination dated July 22, 2020, substantiating allegations made against Perri, were arbitrary, capricious, unreasonable, and unlawful and in violation of Perri's rights to due process, as well as his rights under Civil Service Law (CSL) § 75; b) annulling, rescinding, and voiding the July 22, 2020 determination; c) directing respondents forthwith to expunge copies of all documents containing or referring to the July 22, 2020 determination from all FDNY files; d) enjoining respondents, permanently and pendente lite from making any use of the July 22, 2020 determination; e) awarding Perri compensatory and punitive damages; f) ordering a trial on any and all factual issues presented herein, including but not necessarily limited to the claims of Perri pursuant to the New York City and New York State Human Rights Laws for compensatory damages and other relief; and g) awarding petitioners costs and reasonable attorneys' fees. Respondents cross-move, motion sequence 2, for an order dismissing the petition.

Background and Procedural History

Petitioner Perri began his employment with the FDNY in 2014 serving in the title of Auto Mechanic. He was provisionally promoted to the title of Supervisor of Mechanics Mechanical Equipment ("SMME") in November 2018, and has been a member of labor union Local 621, S.E.I.U. ("Local 621") since his promotion to SMME. It is undisputed that Perri is a tenured civil servant. On or about July 5, 2019, Perri was transferred to the Ladder Section of the FDNY's Fleet Services Division. As one of the two SMMEs in the Ladder Section, Perri, along with his colleague SMME John Evangelou, were responsible for supervising journey-level employees in the Ladder Section, including the auto mechanics assigned there. Evangelou and Perri reported directly to Hugh McAllister, who in turn reported to Louis Morbelli.

On September 27, 2019, Perri filed a complaint of bias with the FDNY's EEO Office in connection with the posting of a photograph in one of the stalls in the men's bathroom of Perri and another SMME, which he believed was meant to suggest a homosexual relationship between them. On October 30, 2019, he was summoned to the FDNY's EEO Office as a witness to answer questions from FDNY EEO investigators relating to a complaint that had been filed against Morbelli and McAllister.¹ This complaint accused Morbelli and McAllister of discriminating against auto mechanic Juan Pichardo in retaliation for a discrimination complaint that had been filed by Pichardo's wife, Vanessa Feeley, who worked as an auto mechanic in the FDNY's Fleet Services Division. Perri was informed that the complaint alleged that Morbelli and McAllister instructed or pressured Perri and Evangelou to make sure that Pichardo was assigned more onerous work. Perri informed the investigators that neither Morbelli nor McAllister ever told him what work to assign to Pichardo and never told him to treat Pichardo unfairly or in any manner differently from the manner he treated other auto mechanics. Additionally, he stated that the work assigned to Pichardo was not oppressive or unusual.

On November 26, 2019, Perri overheard one of the auto mechanics that he supervised refer to a fellow auto mechanic, who was of Hispanic origin, as a "fucking Mexican." Perri immediately contacted the FDNY's EEO Unit and reported this incident, which ultimately resulted in a suspension of the offending mechanic. When the auto mechanic returned to work, he reportedly told McAllister that he thought Perri was a "prick" and that Perri would "pay" for what he did in filing EEO charges about him (NYSCEF Doc No. 11, McAllister aff at ¶ 6). On February 13, 2020, an FDNY laborer who works a location near the Ladder Section called Perri a "scumbag" and an "asshole" and told him that he (Perri) was "the most hated guy in the place"

¹ The court notes that the allegations against Morbelli and McAllister were substantiated by respondents, and Morbelli and McAllister commenced a proceeding, under Index no. 519355/2020, alleging their due process rights were violated by respondents' failure to conduct a hearing.

(NYSCEF Doc No. 12, Perri aff at ¶ 36). The laborer also told Evangelou that he and others in the shop were going to "get" Perri (NYSCEF Doc No.13, Evangelou aff at ¶ 5). On February 14, 2020, Perri filed a Workplace Violence Incident Report against the laborer related to the February 13, 2020 incident (NYSCEF Doc No. 12, Perri aff at ¶ 37). Thereafter, the laborer told McAllister, that Perri was "the most hated guy in the shop" (NYSCEF Doc. No. 11, McAllister aff at ¶ 7).

On March 17, 2020, the FDNY's EEO Office notified Perri that it had received a complaint, dated March 12, 2020 ("the EEO complaint"), alleging that Perri had made the following "race-based comments" related to auto mechanic Thomas Wu, one of the auto mechanics under his supervision: (a) on February 29, 2020, stating in reference to Auto Mechanic Wu, "Watch Out. Be careful of the Asian driver"; and (b) on March 7, 2020, stating when observing Wu: "Chinese guy over there killing the coronavirus" (NYSCEF Doc. No. 12, Perri aff at ¶ 44). On July 16, 2020, Perri was questioned remotely by an agency attorney from the FDNY's EEO Office concerning the allegations contained in the EEO complaint. During questioning, Perri denied having made any of the comments attributed to him in the EEO complaint. In addition, his attorney asked to be provided with a copy of the EEO complaint, including the name(s) of the complainant(s) and of any witness(es) against Perri, but the request was denied. Perri's attorney further requested that Perri be afforded a hearing concerning the merits of the EEO complaint before any decision was reached as to whether the complaint would be deemed substantiated, which was also denied. On July 22, 2020, the FDNY's EEO Office issued a determination ("the EEO determination") purporting to substantiate the EEO complaint against Perri. The EEO determination further stated that "this matter [will] be referred to the FDNY's Bureau of Investigations and Trials ("BITS") for appropriate discipline." On

September 18, 2020, Perri was interviewed by an agency attorney from BITS and was told that the purpose of the interview was to determine whether to bring formal disciplinary charges against him.

On or about November 11, 2020, petitioners commenced the instant hybrid proceeding, pursuant to CPLR Article 78 and also pursuant to the New York City and New York States Human Rights Laws, to review, annul, and seek relief from the actions of respondents in issuing the EEO determination purporting to substantiate a complaint of discrimination against Perri without affording him a hearing in violation of his due process rights. On or about November 18, 2020, petitioners filed a motion seeking judgment in their favor on the relief sought in this hybrid proceeding. On or about January 14, 2021, respondents filed a cross motion to dismiss the petition, and the matter was marked fully submitted on or about July 25, 2022.

The court was informed that, on April 10, 2021, the FDNY brought formal disciplinary charges against Perri. He contested these charges in accordance with the disciplinary grievance process set forth in the Local 621 contract and the matter is currently at the arbitration stage which commenced on April 12, 2022.

Petitioners' Motion

Petitioners argue that Perri's due process rights were violated when the EEO complaint was substantiated against him, a person serving in a civil service title, without first affording him a hearing. They further note that he was not permitted to see the complaint filed against him, or allowed a fair opportunity to present a meaningful defense. Thus, petitioners seek rescission and annulment of this determination asserting that it was issued in blatant disregard of the Court of Appeals' holding in *Matter of D'Angelo v Scoppetta* (19 NY3d 663 [2012]),² that it is improper

² In *Matter of D'Angelo*, the Court of Appeals upheld the Second Department's determination that the respondents had failed to comport with the requirements of due process when no hearing was held

and a violation of due process for a New York City agency to substantiate an EEO complaint against one of its employees without first affording the charged employee a hearing. Additionally, petitioners point to the court's holding in *Matter of Local 621 v New York City Dept. of Transp.* (178 AD3d 78, 80-81 [1st Dept 2019]), *lv to app disp* 35 NY3d 1106 [2020]), which involved several SMMes employed by the Department of Transportation who, like Perri, were the subject of substantiated EEO complaints, but were not afforded a hearing. The court in *Matter of Local 621* held that:

Petitioners were correctly awarded judgment on their due process claims. Civil Service Law § 75 (1) provides that tenured civil service employees (such as petitioners) "shall not be . . . subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges." It is undisputed that no hearing was held before the determinations were placed into petitioners' DOT employment files. The failure to hold a hearing on the charges against these individuals violated their due process rights (*citing Matter of D'Angelo*, 19 NY3d at 667).

In addition, petitioners seek damages and other relief pursuant to the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL) alleging that the EEO determination substantiating the complaints against him constituted unlawful retaliation for his protected conduct in providing information in relation to the Morbelli/McAllister EEO complaint, as well as his protected activity in filing his own EEO complaints and for his adherence to FDNY and City rules and procedures in admonishing and seeking discipline for biased, retaliatory, and other misconduct by his subordinate FDNY employees.

In support of the motion, petitioners submit an affidavit from Joseph Giattino, who has been the President of Local 621 since 1996. He affirms that he has attended numerous EEO

regarding an EEO determination that substantiated the allegation that a firefighter had directed a racial epithet toward another employee.

interviews and been involved in representing SMMEs in EEO proceedings commenced by various City agencies. Mr. Giattino states that:

for at least the past three years New York City agencies have made it clear both by what Local 621 has been told at EEO interviews and by the actions of New York City agencies that they have no intention of affording members of Local 621 hearings before sustaining EEO complaints. During that time, EEO determinations have been issued against three SMMEs in the DOT, one SMME in the NYPD, and four SMMEs (including Petitioner Perri) in the FDNY. In none of these cases were the charged SMMEs afforded a hearing despite the ruling in D'Angelo that such hearings are required" (NYSCEF Doc No. 8, Giattino aff at ¶ 9).

Additionally, Mr. Giattino notes that Perri was not permitted see the complaint filed against him: nor was he informed of who filed such complaint. He states that Local 621, through its attorneys, has repeatedly requested that Perri be afforded a hearing on the charges brought against him, contending that Local 621's disciplinary process is no substitute for the pre-determination hearing.

Petitioners also submit an affidavit from Hugh McAlister, Perri's supervisor. Mr. McAllister affirms that Perri: filed an EEO complaint against an auto mechanic under his supervision based on a racially inappropriate comment which resulted in a suspension; filed a workplace violence complaint against a laborer for having used profanity in addressing Perri; and admonished and initiated discipline against subordinate employees for violations of FDNY and New York City policies. He further affirms that upon his return from suspension, the auto mechanic told him that he thought Perri was a "prick" and was going to "pay" for what he did in filing EEO charges against him. McAllister also states that the laborer told him that Perri was "the most hated guy in the shop" (NYSCEF Doc No. 11, McAllister aff at ¶¶ 6 & 7).

Next, petitioners submit an affidavit from Perri's co-supervisor SMME John Evangelou, who affirms that they work closely together and that he has never heard Perri use any racially

charged or inappropriate language. Further he states that “[i]n or about February 2020, I heard a Laborer yell at SMME Perri that Perri was a “scumbag,” an “asshole,” and that he and others were going to “get” SMME Perri” (NYSCEF Doc No. 13, Evangelou aff at ¶ 5). Mr. Evangelou further states that auto mechanic Thomas Wu, who was supervised by both Perri and Evangelou, always performed his work well and that he and Perri rated Mr. Wu as a “good” auto mechanic. He affirms that he never heard Perri refer to Mr. Wu as “Asian,” as “Chinese,” or by any other ethnic or racial term, and never witnessed Perri interact with Mr. Wu in other than a professional manner (*Id.* at ¶ 6).

Perri submits an affirmation in support of the motion in which he sets forth what has occurred as set forth above in the facts. He notes that prior to the EEO complaint at issue herein, he had never been the subject of any disciplinary charges, or EEO complaints. He states that he is “deeply concerned that some employees in the Ladder Section may have retaliated against me for the steps I have taken to report and oppose discrimination and retaliation and to provide truthful testimony in other FDNY EEO cases” (NYSCEF Doc No. 12, Perri aff at ¶ 16). He affirms that he never made any of the statements attributed to him in the EEO complaint, nor has he made any similar statements about Mr. Wu, or any other FDNY employee. Perri further states that he is concerned that the EEO determination will hinder and/or preclude any future opportunities for upgrade or promotion within the SMME title or otherwise within the FDNY or the City of New York, as it will remain in his personnel file regardless of the outcome of any disciplinary charges.

Respondents’ Cross-Motion

Respondents cross-move, motion sequence 2, for an order dismissing the petition and oppose petitioners’ motion in its entirety. Specifically, respondents argue that petitioners fail to

demonstrate a CSL § 75 violation, noting that this statute provides that a tenured civil service employee “shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.” Respondents contend that since Perri has not been served with disciplinary charges, and no discipline has been imposed, under CSL §75 (1), no right to due process was triggered solely by the EEO determination. In this regard, respondents contend that the EEO determination is not a disciplinary charge, and thus Perri is not entitled to an evidentiary hearing on disciplinary charges that do not exist. Respondents maintain that the EEO determination only refers to the underlying matter to BITS to determine whether to ultimately bring disciplinary charges. Further, respondents argue that the instant case is distinguishable from *Matter of D’Angelo*, in which the Court of Appeals examined whether an EEO letter being placed in an employee’s file constituted a “formal reprimand” constituting discipline within the meaning of N.Y.C. Admin. Code § 15-113 sufficient to trigger due process protections. Respondents maintain that in *Matter of D’Angelo*, the EEO letter at issue did not merely find that the allegations were substantiated, but also specifically ordered that the employee be disciplined by forcing the employee to attend EEO training. Conversely, they note that the EEO determination given to Perri states only that, based on the review and evaluation of all the evidence and information obtained during the course of the investigation, the allegations against Perri were substantiated, and the matter would be referred to BITS. Accordingly, respondents contend that the court in *Matter of D’Angelo* found that a hearing was necessary because the EEO letter at issue contained a requirement with which the employee had to comply (to attend training), and inasmuch as there is no such requirement in Perri’s EEO determination letter, no hearing is required. Finally, respondents assert that if charges are found to be warranted by

BITS, Perri will be subject to the disciplinary process envisioned in the Local 621 collective bargaining agreement and CSL § 75, which will provide him with a full evidentiary hearing.

Next, respondents argue that petitioners' reliance on *Matter of Local 621* is misplaced and is not binding on this court as it was decided by the First Department. In this regard, respondents contend that the First Department ordered that the EEO letters be expunged only because "[t]he failure to hold a hearing on the charges against these individuals violated their due process rights" (*Matter of Local 621*, 178 AD3d at 80-81, citing *Matter of D'Angelo*, 19 NY3d at 667). Here, they assert that no charges have been preferred against Perri and no discipline has been proposed, thus there is no CSL § 75 due process violation.

Respondents also argue that petitioners' retaliation claims under the SHRL and CHRL do not meet the applicable pleading standard because they fail to allege facts sufficient to establish a causal connection between the protected activities and any subsequent alleged adverse employment action. They maintain that petitioners' contention that the FDNY EEO issued the EEO determination in retaliation for various complaints Perri has made in his capacity as an FDNY employee and for his execution of an affidavit which was filed in the Morbelli/McAllister case lacks merit. Respondents contend that petitioners fail to allege facts sufficient to establish a causal connection between Perri's protected activities and the EEO determination. In this regard, they note that petitioners claim that Perri engaged in protected activities by filing an EEO complaint on September 27, 2019; initiating an EEO complaint on November 26, 2019; executing an affidavit in support of the Morbelli/McAllister case on December 12, 2019; and filing a workplace violence complaint on February 14, 2020, but fail to make any allegations supporting a causal connection between the EEO determination on July 22, 2020 and any of these protected activities. Respondents argue that the passage of time between the protected

activities and the EEO determination is too long to allow for an inference of causation. Additionally, they argue that the fact that one employee lodges a complaint alleging that another employee engaged in discriminatory behavior is not “adverse” to the latter, and there is no allegation that the employee who made the EEO complaint against Perri had knowledge of any of the alleged protected activities in which Perri purportedly engaged. Finally, respondents maintain that even if petitioners set forth a cognizable retaliation claim, such claim would be against the EEO complainant(s), not the FDNY, FDNY EEO, or any of the named respondents.

As a final matter, respondents argue that the branch of the motion seeking an order “[e]njoining Respondents, permanently and, pendente lite from making any use of the July 22, 2020 determination” must be denied. Initially they note that petitioners fail to cite any applicable law to support this drastic remedy. Moreover, they note that petitioners fail to advance any arguments in their moving papers or memorandum of law in favor of granting injunctive relief.

On or about June 28, 2022, petitioners submitted a supplemental memorandum of law and supporting affidavits to apprise the court of developments related to Perri’s EEO determination. Specifically, that on April 10, 2020, formal disciplinary charges were brought by the FDNY against Perri, who contested the charges in accordance with the disciplinary grievance process set forth in the Local 621 contract. During the course of the disciplinary process, petitioners were afforded discovery and learned the identities of the four alleged witnesses on whose testimony the EEO determination was purportedly based and was provided with summaries of their statements. Petitioners note that they learned that there was no witness who claimed to hear Perri’s alleged March 7, 2020 statement: “Chinese guy over there killing the coronavirus” in reference to Mr. Wu. Accordingly, BITS deleted all references to bias in what Perri allegedly said on March 7, 2020, and instead charged him as follows: “On or about March

7, 2020, while Mechanic Wu was using a spray bottle to clean his work area, Supervisor Perri stated in sum and substance that Mechanic Wu was cleaning his work area because of the Coronavirus.” Additionally, petitioners note that Perri was able to produce documents at the arbitration demonstrating that on February 29, 2020, he was not present in the area at the time that he was alleged to have made the racially based comments regarding Wu. Moreover, petitioners note that they discovered that the EEO charge against Perri concerning what supposedly occurred on March 7, 2020 was made by a union representative of one of the individuals against whom Perri had filed an EEO complaint.

Respondents submit a reply memorandum of law in which they assert that nothing in petitioners’ supplemental submission affects the question of whether the EEO determination qualifies as a form of discipline. Respondents reiterate the position that the right to due process and a hearing under CSL § 75 is only triggered if an individual is subjected to a “disciplinary penalty;” and that Perri’s EEO determination contained no form of discipline. Moreover, respondents note that once disciplinary charges were brought against Perri, he was afforded due process in accordance with his union’s collective bargaining agreement. Specifically, respondents note that Perri’s charges have advanced through the established grievance procedure, and are currently in arbitration before a neutral arbitrator with the Office of Collective Bargaining. Also, they note that on September 30, 2021, Judge Montalbano issued a decision in the Morbelli/McAllister case dismissing the petition in which two other members of Local 621 (Morbelli and McAllister) similarly sought relief from EEO determinations by the FDNY that were issued without first holding a hearing. This decision has been appealed to the Second Department.

Petitioners submit a supplemental reply memorandum of law asserting that the testimony presented by respondents at arbitration directly contradicts their assurances to this Court that the EEO determination solely referred the matter to the FDNY's disciplinary unit. In this regard, petitioners note that in the disciplinary arbitration, respondents argued that the EEO determination affirmatively substantiated the EEO complaint and submitted that EEO determination into evidence as purported proof of Perri's guilt, despite respondents' claim that Perri would receive a de novo hearing in his disciplinary arbitration. Petitioners argue that under any reasonable concept of due process, the evidence that was made available to petitioners in the disciplinary proceeding should have been made available prior to the EEO determination that was rendered against him. Additionally, petitioners note that the wording of the disciplinary charges related to the comments Perri was alleged to have made on March 7, 2020, differed from those contained in the EEO complaint relating to that same date. Specifically, the EEO complaint alleges that Perri said: "Chinese guy over there killing the coronavirus." Conversely, the disciplinary charge alleges that: "Supervisor Perri stated in sum and substance that Mechanic Wu was cleaning his work area because of the Coronavirus." Petitioners note that the EEO complaint has Perri referring to Mr. Wu as "Chinese" while the disciplinary charge does not refer to his ethnicity in any way. Thus, regardless of the outcome of his disciplinary hearing, the EEO determination concerning what Perri allegedly said on March 7, 2020, will remain in his record unless, and until, it is addressed on the merits by the court. Petitioners further argue that the facts of the instant case are distinguishable from the facts that were before Judge Montalbano in the Morbelli case because here, the EEO determination has resulted in a disciplinary arbitration in which Perri faces possible disciplinary action. By contrast, in Morbelli, the FDNY brought but then immediately dismissed all disciplinary charges against Morbelli and McAllister.

Conversely, here, respondents are using the EEO determination as a basis to impose discipline on Perri, which was not the case for either Morbelli or McAllister.

Discussion

Due Process

Civil Service Law § 75 provides in pertinent part that: “[a] person described in paragraph (a) . . . of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.” Paragraph (a) relates to employees, such as Perri, who hold a position by permanent appointment in the competitive class of the classified civil service. Thus, CSL § 75 provides that an employee may not be subjected to a disciplinary reprimand without a formal hearing and other due process safeguards (*see* Civil Service Law § 75 (1-3); *Civil Service Employees Ass’n v Southold Union Free School District*, 204 AD2d 445, 446 [2nd Dept 1994]. “Due process requires that an individual be afforded an opportunity to be heard at a meaningful time and in a meaningful manner” (*Smith v Board of Education*, 221 AD2d 755, 757 [3rd Dept 1995], *lv denied*, 87 NY2d 810 [1996]).

Respondents argue that the Court of Appeals holding in *Matter of D’Angelo* is not applicable as the facts herein are distinguishable. In this regard, respondents maintain that a hearing was necessary in *Matter of D’Angelo* because the EEO letter at issue did not solely find that the allegations were substantiated, but also specifically directed the employee to be disciplined through attending EEO training, and inasmuch as there is no such requirement in Perri’s EEO letter, no hearing was required.

In *Matter of D’Angelo*, which involved a firefighter alleged to have made inappropriate and offensive racially based remarks to another employee, the Court of Appeals upheld the

Second Department's determination that the respondents had failed to comport with the requirements of due process when no hearing was held regarding an EEO determination that substantiated the allegation that the firefighter had directed a racial epithet toward another worker. The Second Department annulled the determination and directed that the subject letter be expunged from the petitioner's file (*see D'Angelo*, 81 AD3d 820, 821). The Second Department distinguished the facts in the *D'Angelo* case from the Court of Appeals' decision in *Holt v Board of Educ. of Webutuck Cent. School Dist.* (52 NY2d 625 [1981]), in which the Court held that a hearing was not needed prior to the placing of a letter from an immediate supervisor merely criticizing an employee's job performance in an employee's file. The Court of Appeals, in its decision in *Matter of D'Angelo*, noted that the EEO determination letter was the culmination of a formal investigation that substantiated a complaint regarding a serious breach of the Fire Department's EEO policy by petitioner D'Angelo. The Court noted that the EEO determination (that D'Angelo was in breach of its racial discrimination policy) was serious misconduct that could negatively impact his eligibility for future promotions. Thus, the Court held that the Fire Department denied D'Angelo his right to due process by placing the letter in his file without conducting a hearing, and thus the Second Department properly directed that the letter be expunged from his permanent EEO file. Additionally, the court found that the requirement that D'Angelo attend EEO training constituted a form of discipline.

In support of their motion, petitioners point to the court's holding in *Matter of Local 621 v New York City Dept. of Transp.* (178 AD3d 78, 80-81 [1st Dept 2019]), which involved several SMMEs employed by the Department of Transportation who like Perri, were the subject of substantiated EEO complaints, but were not afforded a hearing. Although respondents correctly point out that the First Department's holding in *Matter of Local 621* is not binding on this court,

it is undisputed that the facts of that case are on point with the facts herein. In *Matter of Local 621*, the First Department held that the failure to conduct a hearing prior to placing the EEO determinations into the petitioners' DOT employment files was a violation of their due process rights.

Here, the court likewise finds that respondents violated Perri's due process rights by failing to conduct a hearing prior to substantiating the EEO complaint and issuing the EEO determination. Contrary to respondents' interpretation, the Court of Appeals in *Matter of D'Angelo* did not hold that a hearing was required therein solely because petitioner D'Angelo was required to attend additional EEO training. A letter substantiating complaints that an employee made racially offensive comments about a co-worker, which was placed in an employee's permanent personnel file, constitutes a disciplinary penalty as it could negatively impact the opportunity for further career advancement by such employee. Accordingly, as Perri was not afforded a hearing, the court directs that to the extent that the EEO determination is contained in Perri's personnel file and/or FDNY records, such documents should be expunged forthwith (*see Matter of D'Angelo*, 19 NY3d at 669; *Matter of Local 621*, 178 AD3d at 80-81).

New York State and City Human Rights Claims

It is an unlawful discriminatory practice to retaliate against a person for filing a human rights complaint (*see Executive Law § 296 [7]*). In order for an employee to set forth an unlawful retaliation claim, they must demonstrate that "(1) [he or] she has engaged in protected activity, (2) [his or] her employer was aware that [he or] she participated in such activity, (3) [he or] she suffered an adverse employment action based upon [his or] her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Matter of Copiague Union Free Sch. Dist. v Foster*, 185 AD3d 1023, 1027 [2d Dept 2020], quoting *Forrest v Jewish*

Guild for the Blind, 3 NY3d 295, 313 [2004]; see *Ruane-Wilkens v Board of Educ. of City of N.Y.*, 56 AD3d 648, 649 [2d Dept 2008]). “An adverse employment action requires a materially adverse change in the terms and conditions of employment” (*Forrest*, 3 NY3d at 306). Once the employee satisfies the four prongs, the burden shifts to the employer to demonstrate a legitimate, independent and nondiscriminatory reason for its actions (*id.*; see *Delrio v City of New York*, 91 AD3d 900, 900-901 [2d Dept 2012]; *Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104 [3d Dept 1999]). That branch of respondents’ cross motion seeking dismissal of petitioners’ retaliation claims under the NYSHRL is granted as petitioners fail to allege that Perri has suffered a materially adverse change to the terms and conditions of his employment.

“[T]o make out an unlawful retaliation claim under the NYCHRL, a plaintiff must show that (1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct” (*Reichman v City of New York*, 179 AD3d 1115, 1119 [2d Dept 2020], quoting *Sanderson-Burgess v City of New York*, 173 AD3d 1233, 1235-1236 [2d Dept 2019]; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 [2d Dept 2013]).

As an initial matter, the court finds no merit to respondents’ argument that the time period that elapsed between Perri’s engagement in protected activities and the filing of the EEO complaint was too attenuated to establish a causal connection (see *Matter of Copiague Union Free Sch. Dist. v Foster*, 185 AD3d 1023, 1027 [2d Dept 2020] [holding that the “the six-month period which elapsed between the protected activity and the retaliatory conduct was not so attenuated that there could be no causal connection between the two”]). However, the court

finds that the petitioners fail to allege sufficient facts to establish a viable claim that respondents' actions in investigating a claim that Perri made race-based remarks about one of his coworkers was undertaken in retaliation for Perri engaging in protected activities. Accordingly, that branch of respondents' cross motion seeking dismissal of petitioners' retaliation claim under the NYCHRL is granted.

Conclusion

The court, having considered the parties remaining contentions, finds them unavailing. All relief not specifically granted herein has been considered and is denied.

Accordingly, it is hereby

ORDERED that those branches of petitioners' motion seeking an order determining that Perri's due process rights under CSL § 75 were violated and seeking to expunge the EEO determination from all FDNY files are granted, and all other relief requested by petitioners is denied; and it is further

ORDERED that those branches of respondents' cross motion seeking an order dismissing petitioners' claims as based upon violations of the NYSHRL and the NYCHRL are granted, and all other branches of respondents' motion are denied.

The foregoing constitutes the decision and order of the court.

ENTER:



HON. GINA ABADI
J.S.C.