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MEMORANDUM

SUPREME COURT: QUEENS COUNTY  
IA PART 15

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JULIET FRANCIS, x

Petitioner,

-against-

STATE DIVISION OF HUMAN RIGHTS and  
NEW YORK CITY SCHOOL CONSTRUCTION  
AUTHORITY,

Respondents.

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INDEX NO. 22863/06

MOTION SEQ. NO. 1

BY: TAYLOR, J.

DATED: MAY 3, 2007

In this proceeding pursuant to Executive Law § 298, petitioner Juliet Francis seeks a judgment vacating the decision and order of the determination of the New York State Division of Human Rights (DHR), dated August 18, 2006, which dismissed her complaint upon a finding of no probable cause to believe that the respondent employer, The New York City School Construction Authority (SCA), had engaged in an unlawful discriminatory practice relating to employment.

At the outset, the court notes that although petitioner Juliet Francis has denominated the request for judicial review as an Article 78 proceeding, Executive Law § 298 exclusively governs judicial review of the respondent agency's final orders.

Petitioner Juliet Francis, who is from Nigeria, was hired by the SCA in November 2001 as a Senior Staff Support person, and became permanent in her civil service title in November 2002.

Ms. Francis was supervised by Mike Eitingon, Chief Project Officer. On August 16, 2005, Ms. Francis filed a complaint with the DHR charging her employer with unlawful discriminatory practices in relation to her employment because of her national origin. Ms. Francis alleged that on July 26, 2005, she was verbally accosted by a co-worker, Sandra Johnson, who screamed at her, "You f--ing African, don't touch me, I hate you! And don't ever use my microwave because your food stinks." She also alleged that she had previously suffered racial slurs from Mr. Eitingon, and that he constantly asked her "where she was from" and "what is Nigerian." Ms. Francis alleged that she complained to Human Resources, who referred her to the shop steward, who in turn instructed her employer to stop the discriminatory conduct. Ms. Francis alleged that the respondent did not stop the offending conduct.

The SCA, in response, stated that Ms. Francis' time, attendance and work were all satisfactory. Her probationary report indicated that she "needs improvement" in certain detailed areas, and her supervisor on occasion counseled her on her tardiness and excessive absenteeism. On July 5, 2005, prior to her filing the complaint, Mike Eitingon counseled Ms. Francis, in the presence of her union representative, regarding her time and attendance abuses, including extended lunch hours, late arrivals and morning breaks. The SCA stated that Ms. Johnson refuted the allegations against her and claimed that she made no such comments. Mr. Eitingon denied

making any racial slurs against Ms. Francis or her national origin. Finally, the SCA stated that on July 22, 2005, Ms. Francis met with the Director of Human Resources and indicated that she wanted to file an EEO complaint. Although Ms. Francis was provided with the SCA's internal policy and the information necessary to file a formal complaint, she did nothing to advance her complaint in accordance with established SCA procedures and the explicit instructions she received from the Human Resources Department. The SCA denied that any discriminatory harassment, ridicule or insults were made against Ms. Francis, and that there had been no unlawful discrimination relating to her employment.

The DHR issued a determination and order dated August 18, 2006 in which it stated that there was no probable cause to believe that the SCA had engaged or was engaging in the unlawful discriminatory practices complained of. The agency found that:

"The evidence gathered during the investigation is insufficient to support that Complainant was subjected to discriminatory actions based upon her national origin.

The evidence shows that Complainant, who is from Nigeria, was hired in 2001 as a Senior Staff Support person and was supervised by Mike Eitingon. Although Respondent claims that the national origins of its employees are not documented, Mike Eitingon supervised individuals of various national origins. The Complainant confirmed that there are other Nigerians employed by Respondent although they are not supervised by Mike Eitingon. Complainant alleged that when she began working with Mr. Eitingon, they had a good working relationship; however; around March 2003, his attitude towards her became negative. The evidence shows that Complainant occasionally arrived to work late and was counseled regarding her time, attendance and amount of time away from her desk.

A Witness for Complainant was interviewed and stated that at times the Complainant's time away from her desk was excessive. The record indicates that Mr. Eitingon attempted to use the e-mail system as a timekeeping device but was told that he could not do that. However, Complainant's allegations that Mike Eitingon made disparate comments were not supported by any evidence or witness testimony.

The evidence provided by witness testimony states that Ms. Johnson was, on occasion, involved in verbal altercations with other staff members who are not the same national origin as Complainant. Additionally, the evidence fails to show that Complainant followed through on the filing of an internal complaint with Respondent. The evidence shows that meetings were held between Human Resources, Complainant and her union representative in an attempt to resolve the issues between the Complainant and Mr. Eitingon. Complainant was assigned another supervisor in January 2006 and currently does not have any interaction with Mike Eitingon.

The evidence in the record is insufficient to demonstrate that Complainant was subjected to discriminatory treatment by Respondent based upon her national origin. In addition, the Complainant failed to utilize Respondent's internal process to address issues involving discrimination. Despite this however, the Complainant continues to remain employed with Respondent.

Based upon the foregoing analysis, I find No Probable Cause to support the complaint. The complaint is, therefore, ordered dismissed and the file is closed."

Petitioner thereafter commenced the within proceeding and asserts that the DHR failed to properly investigate her case. Petitioner restates her claim of discrimination and asserts that although she named 12 witnesses in her complaint who had pertinent information of the respondent's discriminatory practices, the agency failed to state to what extent, if at all, any of these witnesses were interviewed and the nature of the information

provided by these witnesses. Petitioner further alleges that the agency did not specifically state what factual information it relied upon as the basis for the conclusions that formed their opinion. Petitioner asserts that the decision fails to provide sufficient facts and evidence to support the finding of no probable cause, and fails to cite to factual evidence she provided, and, therefore, respondent's determination is arbitrary and capricious. Petitioner asserts that the determination should be reversed and the investigation should be reopened.

Respondent DHR asserts, in opposition, that its determination was neither arbitrary nor capricious, nor an abuse of discretion, and that the evidence gathered by the agency during the course of its investigation was sufficient to support the finding of no probable cause.

Respondent SCA, in opposition, also asserts that the DHR's determination was neither arbitrary nor capricious, nor an abuse of discretion.

It is well settled that where, as here, a determination of no probable cause is rendered without holding a public hearing pursuant to Executive Law § 297(4)(a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis (Matter of McFarland v New York State DHR, 241 AD2d 108 [1998]; Matter of Hone v New York State Div. of Human Rights, 223 AD2d 761, 762 [1996]; Matter of Giles v State Div. of

Human Rights, 166 AD2d 779, 780 [1990]). The DHR "has broad discretion in determining the method to be employed in investigating a claim" (Matter of Bal v New York State Div. of Human Rights, 202 AD2d 236, 237 [1994]). A determination of no probable cause "will not be set aside unless it is found to be arbitrary and capricious" (Matter of Albert v Beth Israel Med. Ctr., 230 AD2d 695, 697 [1996]).

The evidence in the record establishes that the petitioner properly filed her complaint with the respondent pursuant to the provisions of section 297(1) of the Executive Law and 9 NYCRR 465.3. The respondent agency thereafter served a copy of the complaint upon the respondent, who submitted an answer to the complaint.

The DHR has broad discretion to determine its method of investigating complaints, and may conduct its investigations by "field visit, written or oral inquiry, conference, or any other method or combination thereof deemed suitable in the discretion of the regional director or the director of regional affairs" (see 9 NYCRR 465.6[b]; Matter of Maltsev v New York State Div. of Human Rights, 31 AD3d 641 [2006]; Matter of Camp v New York State Div. of Human Rights, 300 AD2d 481 [2002]; Lee v New York State Human Rights Appeal Bd., 111 AD2d 748, 749 [1985]; Matter of Verderber v Roechling Steel, 110 AD2d 705, 706 [1985]). The petitioner had a full opportunity to present her case to the DHR. The agency

investigated her allegations of discrimination by reviewing the complaint, the SCA's response, and Ms. Francis' rebuttal, conducting a one-party conference with Ms. Francis, interviewing her witnesses, Pauline Cristiano, the shop steward, Sue Norton-Williams, Senior Staff Support person, and reviewing the documents submitted by the parties, including a list of Eitingon's subordinates.

Petitioner's present assertion that she provided the DHR with a list of witness and that the agency failed to contact these witnesses is not supported by the administrative record. It is noted that petitioner's rebuttal statement, which names various SCA employees, was offered to refute the SCA's claims regarding her alleged abuse of time, and she did not assert that any of these individuals witnessed the alleged discriminatory conduct. The only person named by Ms. Francis in the administrative record are Ms. Cristiano and Ms. Norton-Williams. Although Ms. Francis may not have been satisfied with the SCA's explanation, she did not present the agency with any evidence of discrimination based on her national origin which requires further investigation by the DHR.

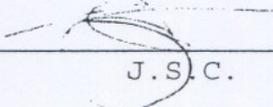
The court finds that there is no evidence that the discretion accorded to the respondent DHR in making its investigation was abused (see 9 NYCRR 465.6 [b]), or that the investigation was so abbreviated and one-sided that it resulted in a record which did not afford a reasonable basis for an

administrative determination (Matter of Verderber v Roechling Steel Inc., 110 AD2d 705 [1985]; Matter of Tirino v Long Is. Jewish-Hillside Med. Center, 99 AD2d 513 [1984]; cf. Rush v State Human Rights Appeal Bd., 108 AD2d 805 [1985]). Respondent DHR's finding that there was no probable cause to support further action upon petitioner's complaint was rationally based (see CPLR 7803[3]; Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Janvier v Urban Management Inc., 258 AD2d 359 [1998]; Matter of McFarland v New York State Div. of Human Rights, 241 AD2d 108, 111 [1988]). Petitioner's unsubstantiated allegations that the SCA discriminated against her by reason of national origin were insufficient to satisfy her burden of showing probable cause for her complaint (see Matter of McFarland v New York State Div. of Human Rights, supra, at 112). Therefore, based upon the record before the agency, it cannot be said that its finding of no probable cause was not supported by substantial evidence (see Matter of Verderber v Roechling Steel Inc., supra; State Div. of Human Rights v Oswald Hof Brau Haus, 91 AD2d 865 [1982]; State Off. of Drug Abuse Servs. v State Human Rights Appeal Bd., 48 NY2d 276 [1979]; Matter of New York City Bd. of Educ. v Batista, 54 NY2d 379 [1981]). Finally, as the affidavit submitted by petitioner's co-worker, Ms. Mills was not part of the administrative record, it cannot be considered by the court for the first time in a proceeding for judicial review (see generally Rizzo

v New York State Div. of Hous. & Cmty. Renewal, 6 NY3d 104, 110 [2005]); Matter of Yarbough v Franco, 95 NY2d 342 [2000]).

The court, therefore, finds that the determination of no probable cause made by the respondent DHR was not arbitrary and capricious or lacking a rational basis in the record. Accordingly, petitioner's request to vacate respondent agency's determination and order of August 18, 2006 is denied and the petition is dismissed.

Settle judgment.

  
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J.S.C.