12-1993

DEFENDANT-APPELLANTS BRIEF ON APPEAL

Steel, Bellman, Ritz, & Clark, P.C.

To be argued by:
Richard F. Bellman
Time requested:
20 minutes

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FIRST DEPARTMENT

MARTHA STEADMAN and ROBERT W. SURLES,

Plaintiffs-Appellees,

-against-

MICHAEL P. SINCLAIR,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

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Supreme Court New York County Clerk's Index No. 15193/92

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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MARTHA STEADMAN and ROBERT W. SURLES,

Plaintiffs-Respondents,

-against-

MICHAEL P. SINCLAIR,

Defendant-Appellant.

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STATEMENT PURSUANT TO CPLR 5531

1. The Index Number of the case in the court below is 15193/92.

2. The full names of the parties are as they appear above. There has been no change in the parties since the inception of the action.

3. The Court and County in which the action was commenced is the Supreme Court of the State of New York, County of New York.

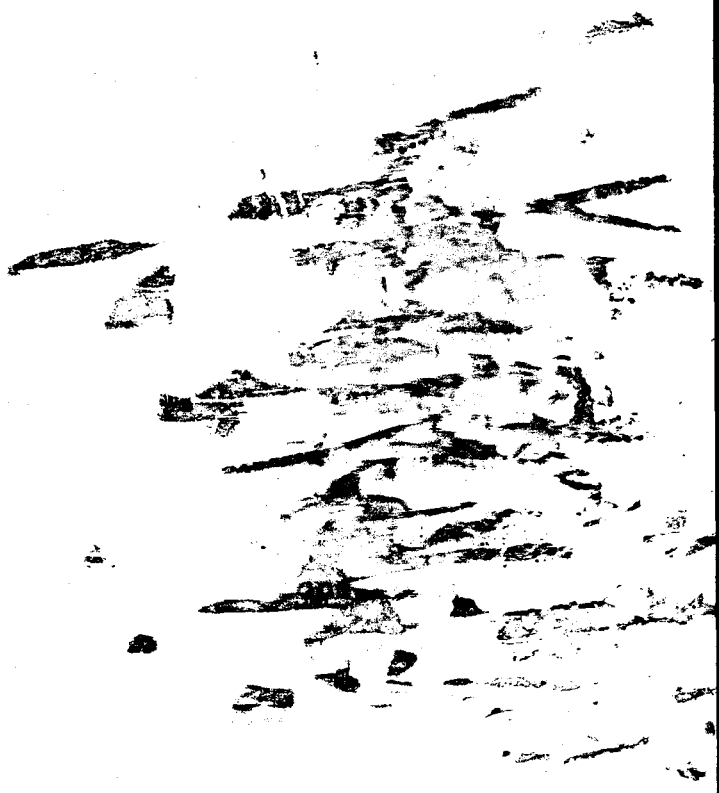
4. The action was commenced by the service of a summons on or about June 1, 1992. An answer with counterclaims was served on or about July 9, 1992.

5. The original action was brought by plaintiffs based on a claim of libel and defamation. The counterclaims were based on the plaintiffs' retaliation for the filing of a civil rights discrimination claim with the Equal Employment Opportunity Commission and the New York State Division of Human Rights and for intentional infliction of emotional harm.

6. This appeal is from an order of the Supreme Court of the State of New York, New York County, dated December 5, 1992.

7. The appendix method of appeal is being used.

8. The order to be reviewed was rendered before trial.



QUESTIONS PRESENTED

1. Does an employee who has filed a complaint of racial discrimination in employment with the New York State Division of Human Rights and the Equal Employment Opportunity Commission against his employer and who has thereafter been retaliated against by supervisory employees of the employer for undertaking that complaint, have a cause of action for retaliation, in violation of Executive Law §296(7) against these supervisory employees. The trial court answered this question in the negative, holding that only the employer itself and not supervisory employees can be sued for violations of this Section.

2. In the event that the Court agrees with the trial court that only an employer can be sued for violating Executive Law §296(7), should the trial court have determined, based on the allegations of the complaint, that the supervisory employees sued for retaliation are employers for purposes of the Human Rights Law or, alternatively, should the appellant have been given an opportunity to prove that these supervisory employees were employers for purposes of the Human Rights Law. The trial court did not consider whether the supervisory employees in question could be considered employers, stating simply that these persons were only co-employees.

3. Can the filing of a lawsuit ever be considered sufficient basis for the undertaking of a claim of intentional infliction of emotional harm. The trial court answered in the negative.

PRELIMINARY STATEMENT

This case raises an important issue of first impression under the New York State Human Rights Law: whether the statute permits high level supervisors to retaliate against an employee because the employee named them in a complaint of racial discrimination. Under the trial court's narrow interpretation of the relevant provision, Executive Law §296(7), only the corporate employer is barred from retaliating against the employee, while his supervisors are exempt from liability if they do so. This reading of the statute is contrary to the plain meaning of the relevant provision and is inconsistent with public policy.

Immediately prior to the commencement of this litigation, Michael Sinclair (who is black) filed a complaint of racial discrimination in employment against his employer, Air France, with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights ("Division"). He also wrote a letter to Bernard Morel, Air France's General Manager, setting forth the specifics of his complaint.

Shortly thereafter, in this action, plaintiffs Martha Steadman, Air France's Director of Reservations & Service Center, and Robert Surles, Air France's Personnel Director and Employment Manager, sued Sinclair for defamation because he had named them in his letter to Morel and charged them with discrimination. Sinclair answered and counterclaimed against Steadman and Surles, alleging their defamation suit constituted illegal retaliation in violation of Executive Law §296(7), conspiracy to violate Execu-

tive Law §296(7), and intentional infliction of emotional distress.

Prior to serving an answer, the appellants moved to dismiss the counterclaims for failure to state causes of action upon which relief may be granted. The Supreme Court, per the Hon. Lewis R. Friedman, granted the motion. Sinclair appeals from that ruling.

STATEMENT OF THE CASE

Appellant Sinclair filed his charge of discrimination against Air France with the EEOC and the Division on March 31, 1992 (A67). The essence of Sinclair's complaint was that he was denied promotions at Air France because of his race and that he was subjected to retaliation for complaining about this treatment. Accompanying Sinclair's EEOC-Division charge was an affidavit (A68) and a letter complaint to the EEOC (A70). The letter complaint named Steadman, the director of Sinclair's department at Air France, and Surles, the Director of Personnel for Air France, as having participated in Air France's discriminatory employment practices.

Air France's grievance mechanism is set forth in an employee manual entitled "You and Air France." This manual encourages employees to file grievances with management, stating that, "in order to promote a closer relationship between the company and its personnel . . . management encourages you to express your views . . . and to air your complaints." The manual states specifically that the employees, have the right, as well as the "obligation," to discuss with management problems pertaining to promotions, working conditions, or "any matter that may be of concern to you;" and the employee is assured that "management will avail itself of every opportunity to be helpful to you, and make every effort possible to achieve a prompt, reasonable and fair solution to your problem" (A62-A63).

In order to explain to Air France management why he had

taken the step of filing a complaint of discrimination and to comply with Air France's internal grievance mechanism, Sinclair wrote a letter on April 2, 1992 to Bernard Morel, the general manager of Air France. In this letter, Sinclair described the racial discrimination he faced at Air France, including his unsuccessful efforts to obtain a promotion, and the telling of offensive racial jokes on the job (A76). In that letter, he mentioned Steadman and Surles as participating in the discrimination.

Instead of making efforts to address Sinclair's concerns, Morel responded to Sinclair's letter on May 1, 1992 by threatening him with legal action. Morel stated that because of Sinclair's "pending legal case against Air France," and upon advice of counsel, he was "unable to respond in detail" to Sinclair's complaints. Morel ended his letter by stating, "I am disturbed that you so cavalierly choose to impugn other employees in an apparent effort to impede their careers at Air France. Accordingly, our lawyers have been instructed to review your letter and advise and counsel legal recourse against you" (A63).

Approximately one month after Morel wrote to Sinclair, Steadman and Surles, represented by Air France's lawyers, commenced this action against Sinclair alleging they were libeled and defamed by Sinclair's April 2 letter to Morel. Steadman and Surles assert in their complaint that Sinclair's April 2 letter accused them of being "incompetent and unfit" in their jobs. These terms do not, however, appear in the letter and the plain-

tiffs mischaracterize the actual language in the letter. Each plaintiff, alleging great injury to his or her "credit and reputation," requests $2,000,000 in compensatory damages and $2,000,000 in punitive damages (A9-A17, A63-A64).

On July 9, 1992, defendant Sinclair served a verified answer with three counterclaims. In his first counterclaim, Sinclair charges Steadman and Surles with violating Executive Law §296(7), which prohibits retaliation by any person engaged in any activity covered by the Human Rights Law against any person because that person has opposed discriminatory practices (A23-A24). In his second counterclaim, Sinclair charges Steadman and Surles with conspiring with Air France to deprive him of rights guaranteed to him by Executive Law §296 and with conspiring to retaliate in violation of Executive Law §296(7) (A24-A25). In his third counterclaim, Sinclair alleges intentional infliction of emotional distress (A25-A26).

Justice Friedman in his opinion dismissed the first and second counterclaims on the basis that Executive Law §296(7) applies only to employers. The Court held that because Air France was the employer and Steadman and Surles were only co-employees of Sinclair, §296(7) did not bar them from retaliating against Sinclair. Justice Friedman also held that the third counterclaim for intentional infliction of emotional harm had to be dismissed, as "the mere filing of a lawsuit is not sufficient to give rise to liability" under this tort (A4-A8).

ARGUMENT

I.

APPELLANT HAS STATED A CAUSE OF ACTION AGAINST STEADMAN AND SURLES BASED ON EXECUTIVE LAW §296(7) BY THE BRINGING OF THIS DEFAMATION ACTION

Section 296 of the Executive Law makes unlawful discriminatory practices in a wide range of fields, including employment, housing, public accommodations, nursing homes, etc. The prohibition on retaliation against persons seeking to enforce rights under this statute, appears in Executive Law §296(7). This provision reads:

> It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this Article (emphasis added).

The term "person" is defined as including one or more "individuals." Executive Law §292(1). It is well settled that as a remedial civil rights statute, §296 should be construed liberally. Holly v. Pennysaver Corp., 98 A.D.2d 570 (2d Dept. 1984).

The trial court held that the anti-retaliation provision contained in §296(7) did not apply to Steadman and Surles because these individuals were not Sinclair's employers. The Court stated:

> This statute makes no reference to prohibiting discriminatory acts by co-employees. It is not for this court to discuss the propriety of that omission. Since Section 296 prohibits discrimination by "an employer" the

> language limiting Section 296(7) to "any person engaged in any activity to which this Section applies" clearly must mean any employer. While the individuals here are "persons" they are not alleged to have been an employer. Section 296(7), of course does not use the term employer since 296 prohibits discrimination by employment agencies and the like which are not relevant to this case. It appears, therefore, that plaintiffs are simply not covered by the statute (A6-A7).

Under the plain meaning of §296(7), there is no question that the Steadman/Surles defamation claim against Sinclair constitutes retaliation barred by the statute. As already noted, "person" is defined as one or more individuals. This certainly includes Steadman and Surles. As persons holding supervisory positions at Air France, Steadman and Surles clearly were involved in activities to which §296 applies, i.e., setting the terms, conditions and/or privileges of employment at Air France. Therefore, if they engaged in retaliation, they violated the statute.

Not only did the trial court ignore the plain meaning of §296(7), the logic of the court's ruling is fundamentally flawed. Essentially, the Court attempts to explain away the plain language of the statute by stating that the Legislature used the term "person" rather than the term "employer" because it meant to include other entities, which are also covered by the statute's substantive anti-discrimination provisions, such as an employment agency. The trial court was thus of the opinion that the Legislature desired to have the anti-retaliation provision apply to all those covered by the substantive provisions of §296, but to

no one else. This argument is flawed, however, as the Legislature easily could have accomplished this purpose by simply limiting the language of the anti-retaliation provision. For example, the Legislature could have said it was unlawful for any person or entity subject to the substantive provisions of this Section to retaliate. Instead, §296(7) was written in a much broader and comprehensive fashion and bars retaliation by all persons engaged in all activities to which §296 applies.

Even if it is assumed, for purposes of argument, that the plain meaning of §296(7) does not apply and that the provision reaches only "employers," then the trial court adopted an inappropriately restrictive reading of the term "employer," which should be construed to include Steadman and Surles. In Patrowich v. Chemical Bank, 63 N.Y.2d 541 (1984), the Court of Appeals interpreted the term "employer" to include persons who have any ownership interest in the company in question or power to do more than carry out personnel decisions made by others. See also, Giuntoli v. Garvin Guybutler Corp., 726 F.Supp. 494, 506-507 (S.D.N.Y. 1989); Lapidus v. New York City Chapter of the New York State Assoc. for Retarded Children, Inc., 118 A.D.2d 122 (1st Dept. 1986); Monsanto v. Electronic Data Systems Corp., 141 A.D.2d 514 (2d Dept. 1988); Samper v. University of Rochester, 139 Misc.2d 580, 528 N.Y.S.2d 958 (Sup.Ct. Monroe Co. 1987). There is no question but that a person is to be considered an employer for purposes of §296(1) if he or she has "power over personnel decisions." Petri v. Bank of New York Co., 153 Misc.2d

426, 432, n. 3 (N.Y.Co. 1992).

On this record, it is clear that both Steadman and Surles were managerial employees with significant power over personnel decisions. Surles was the Personnel Director for the company and Steadman was director of Sinclair's department. Under the Patrowich standard, both plaintiffs were employers for purposes of the Human Rights Law.

Even if this Court does not conclude based on the allegations in the complaint that plaintiffs were employers, it should at least afford Sinclair an opportunity to show whether Steadman and Surles meet the Patrowich test as employers.

> Accordingly, plaintiffs must be given an opportunity to demonstrate that Tilton is indeed an employer within the meaning of the HRL [New York State Human Rights Law] by a factual showing that he has some ownership interest in Garvin, or that he had the power to do more than simply carry out personnel decisions. Because the Court cannot determine as a matter of law that Tilton is not an employer under the HRL, we must deny defendants' motion to dismiss this claim as to Tilton. Giuntoli v. Garvin Guybutler Corp., supra, 726 F.Supp. at 507.

Similarly, Sinclair must be afforded an opportunity to prove that Steadman and Surles functioned in capacities which bring them within the definition of employer under the statute.[1]

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[1] The trial court in its ruling stated that Sinclair did not allege that either Steadman or Surles was his employer (A7). Sinclair did allege that he was retaliated against by a person or persons covered by §296(7). If this Court holds that the term "person" as used in §296(7) applies only to an employer, then either the allegations of the counterclaims should be deemed to be sufficient to conclude that Sinclair claimed Steadman and Surles meet the employer standard or, alternatively, Sinclair should be given an opportunity to amend his counterclaims to

In addition, it may be noted that is not unusual for a civil rights statute, which contains an anti-retaliation provision separate from the substantive prohibitions of the statute, to permit legal redress for retaliation against persons other than those covered by the substantive prohibition. For example, the federal Fair Housing Act sets forth a series of prohibited acts applicable to landlords, persons renting or selling residential real estate, and real estate agents. 42 U.S.C. §3604. The coverage of the anti-retaliation provision of the Fair Housing Act, which is set forth in 42 U.S.C. §3618, is not limited to persons subject to the substantive prohibitions of the Act. Rather, §3618 makes it unlawful for any person to "coerce, intimidate, threaten or interfere with" anyone exercising rights protected by the statute and violators are subject to all the enforcement provisions of the law. 42 U.S.C. §§3610-3614. Although §296(7) is not as broad as §3618, both statutes reach actions of third parties who interfere with the exercise of rights protected by the substantive provisions of the respective civil rights laws.

There are compelling public policy reasons why a civil rights statute should contain a broad anti-retaliation provision which encompasses the actions of third parties. Historically, third parties have attempted to intimidate and interfere with minority citizens seeking to exercise rights guaranteed to them

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allege specifically that Steadman and Surles are employers within the Patrowich standard.

under civil rights laws such as in the areas of employment, housing, public accommodations, etc. Thus, for example, employers (as is alleged herein) have called upon third parties to coerce and intimidate minority workers who have attempted to break race barriers on the job. In the area of housing discrimination, groups opposed to residential integration have acted to intimidate minority citizens seeking to move into a previously white neighborhood. This is not to say that the Human Rights Law should be interpreted in a manner contrary to the Legislature's intent. But when the plain language of an anti-retaliation reaches the actions of third parties, the courts should strive to give full effect to that language as it fulfills a critical public policy.

The only case cited by the lower court to support its decision to ignore the plain meaning of §296(7) is Samper v. University of Rochester, supra. In Samper, the plaintiff was a resident in anesthesiology at the University of Rochester who brought a sex discrimination action. The opinion discusses whether the parties had an employer/employee relationship as defined in §296(1)(a). However, there is no discussion in the opinion concerning Samper's retaliation charge under §296(7). The Samper case simply does not address the issue of whether or not the term "person" in §296(7) is limited to an employer and the ruling is of no assistance in deciding the issue before this Court.

Finally, there can be no question that suing an employee

for defamation because he complained of race discrimination, may constitute illegal retaliation within the meaning of the statute. The respondents argued below that Executive Law §296(7) is not broad enough to encompass the bringing of a defamation action. The Supreme Court, while not reaching this issue, noted that it did not agree with respondents' claim that the anti-retaliation provision applied only to the setting of compensation and terms of employment (A7). It is clear from the plain reading of §296(7), that the prohibition on retaliation is without any limitation whatsoever and bars retaliation in any form. There is therefore absolutely no reason why a frivolous, vindictive and retaliatory lawsuit should not be encompassed within §296(7). Cf., Avis Rent-a-Car v. State Human Rights Appeal Board, 40 A.D. 2d 992 (2d Dept. 1972) (retaliation took form of refusal to rent car to discrimination complainant).

In the present case, the counterclaim allegations are sufficient to state a claim that the motive of the defamation action was retaliatory. First, Sinclair alleges that Steadman and Surles were aware that he had filed a charge of racial discrimination with the EEOC and the Division and that they were named as individuals who had participated in the discriminatory employment practices (A23-24). Second, Sinclair alleges that the defamation action was undertaken for the purpose of "intimidating, harming and punishing [Sinclair] for filing his charge of discrimination with the EEOC and the Division and in retaliation for said filing" (A24).

The appellant has pled a valid claim of retaliation and the trial court was in error in dismissing the first counterclaim.

In Sinclair's second counterclaim, he alleges that Steadman and Surles conspired with Morel and others to deprive him of rights guaranteed by Executive Law §296 and for the purpose of retaliating against him in violation of §296(7). The plain language of §296(7) covers this claim for the reasons set forth above. Accordingly, Sinclair's second counterclaim states a cause of action under the anti-retaliation provision and the trial court also was in error in dismissing this claim.

II.

APPELLANT'S THIRD COUNTERCLAIM RAISES A FACTUAL QUESTION AS TO WHETHER THE STEADMAN/SURLES CONDUCT WAS EXTREME AND OUTRAGEOUS WHICH MUST BE RESOLVED BY THE TRIER OF FACT

The trial court dismissed the appellant's third counterclaim in which it is alleged that Steadman and Surles intentionally inflicted emotional harm upon appellant. The court, citing to Fischer v. Maloney, 43 N.Y.2d 553 (1978), asserted the law is clear that the mere filing of a lawsuit is not sufficient to give rise to liability under this tort. The Fischer holding does not, however, stand for the proposition that the defamation claim can never be the basis for a claim of intentional infliction of emotional distress. In Fischer, a board of directors of a housing cooperative sued a tenant shareholder for defamation. The tenant shareholder in turn sued the board of directors, charging intentional infliction of emotional distress. The court held that under those circumstances, the commencement of the defamation action did not constitute conduct which forms the basis for a claim of intentional infliction of emotional distress. The Fischer court specifically left open the question of whether under different circumstances the institution of a defamation action might constitute intentional infliction of emotional distress. See also Siegel v. Smith Panish & Shapiro, 136 A.D.2d 620 (2d Dept. 1988) (plaintiff failed to show that defendants' conduct in instituting defamation action met standards set forth in Fischer).

In order to make out a claim of intentional infliction of emotional distress, the court in Fischer stated that defendants' conduct must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized [society]." Fischer, Id., at 557. In the present case, respondents did not simply file a defamation action against defendant. They did so in order to deter appellant from exercising his civil right to protest and challenge employment discrimination. Moreover, by suing Sinclair, they intended to punish him for writing to express his concern to general manager Morel, even though Air France's own employment manual specifically encouraged employees to raise such problems with management, and informed them that they had an obligation to do so.

The dismissal of the third counterclaim is especially inappropriate because this action occurs before any discovery has taken place. This is different from the situations in both Fischer and Siegel, where the emotional distress claims were dismissed upon the bringing of summary judgment motions. In the present case, respondents did not answer appellant's demand for a bill of particulars, did not provide a response to a demand for documents, nor appear for depositions, all of which have been demanded or noticed prior to the dismissal of the counterclaims.

It is appellant's position that discovery in this case will show that the defamation claims against Sinclair were not only meritless, but were brought completely in bad faith as a result

of collusion among Air France, Air France's attorneys and Steadman and Surles. The evidence ultimately will show that the sole purpose of the defamation claim was to intimidate, harass and punish Sinclair, in the hope that he could be induced to drop his racial discrimination claims against Air France. The use of defamation claims to frighten civil rights plaintiffs is utterly intolerable in a civilized society. Proof of such conduct will satisfy the standards set forth in Fischer.

The court's action dismissing the third counterclaim should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court dismissing appellant's counterclaims should be reversed.

Dated: New York, New York
December 6, 1993

Respectfully submitted,

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