2-8-1994

DEFENDANT-APPELLANT'S REPLY BRIEF

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

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 REPLY BRIEF

STEEL BELLMAN RITZ & CLARK, P.C.
Attorneys for Defendant-Appellant
351 Broadway
New York, New York 10013
(212) 925-7400

On the Brief:
RICHARD F. BELLMAN
MIRIAM F. CLARK

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

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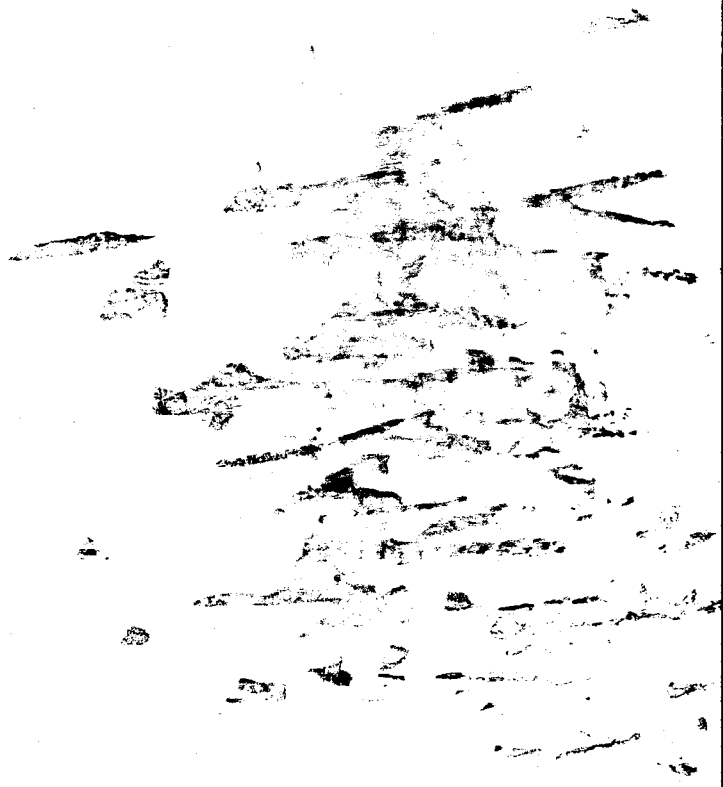
PRELIMINARY STATEMENT

Appellant in his principal brief showed that under the plain meaning of Executive Law §296(7) all persons, not just employers, are prohibited from retaliating against a complainant charging discrimination in his employment. Appellant also showed that there are significant public policy reasons dictating such a statutory approach. The respondents in their brief failed to explain why the plain meaning of the statute does not apply, nor do they address the public policy considerations. Instead, respondents have elected to set forth in their brief a series of irrelevant or legally incorrect propositions in their attempt to have this Court impose an extremely limiting and unwarranted restriction on a critical provision of this State's Human Rights Law.

Moreover, respondents in their brief set forth numerous contentions based on matters outside the record in this appeal. For example, the respondents discuss at length appellant Sinclair's federal court litigation filed in the United States District Court for the Southern District of New York against Air France (Resp. Br. at 4). That action was not commenced until December 9, 1992, several days after Justice Friedman's decision of December 5, 1992 dismissing the counterclaims in this case. In the absence of a record on these matters, respondents adopt the rather curious procedure in their appellate brief of asserting factual claims based "upon information and belief" (Resp. Br. at 4). In any event, it is a well accepted rule that, except in very limited and special circumstances, appeals are to be decided

based solely on the record. Crawford v. Merrill Lynch Pierce Fenner & Smith, 35 N.Y.2d 291, 298 (1974).



ARGUMENT

I.

RESPONDENTS FAIL ADEQUATELY TO EXPLAIN WHY THE PLAIN MEANING OF EXECUTIVE LAW §296(7) DOES NOT APPLY

Respondents' principal argument appears to be that Executive Law §296(7) cannot apply to their conduct, as it "was never alleged in the EEOC Charge that Steadman or Surles" engaged in discriminatory activity. This is a strange argument as §296(7) makes clear that retaliatory actions are prohibited 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). Thus, even if Sinclair had not filed an EEOC charge, but had only complained to management about racially discriminatory employment practices at Air France, as he did, he would be protected against retaliatory actions. In that event, Sinclair would have been opposing "practices forbidden under" the Executive Law. Respondents' argument is not even one adopted by the Supreme Court. The lower court, in dismissing the counterclaims, determined that only an employer is subject to a lawsuit brought pursuant to §296(7). The court did not hold that the filing of an EEOC charge (or state complaint) was a prerequisite to a §296(7) claim.

Respondents' alternative argument in support of the Supreme Court holding is equally without merit. Respondents state that "even if the EEOC complaint had charged Ms. Steadman and Mr.

Surles with discriminatory conduct . . . Appellant could not prevail in his retaliation claim without presenting evidence that Steadman and Surles had knowledge of such Complaint" (emphasis added) (Resp. Br. at 14). Respondents continue that, in the absence of an allegation in the EEOC charge that Steadman and Surles had knowledge that Sinclair was charging them with discrimination, then Steadman and Surles apparently could not have "had retaliatory motives when they filed the defamation suit . . ." (Resp. Br. at 15).

Respondents' argument makes no sense. Obviously, appellant Sinclair at trial must prove a retaliatory motive on the part of Steadman and Surles. That motive could be based on Sinclair charging these individuals with discrimination or simply on his having charged Air France with discrimination. Ultimately, appellant will have to meet his burden of proof in an evidentiary hearing, but issues as to the adequacy of proof are irrelevant at the pleading stage. It is sufficient that Sinclair pled in his First Counterclaim based on retaliation under §296(7) that, "at all times relevant herein, plaintiffs Steadman and Surles were aware of the fact that defendant had filed a charge of racial discrimination with the EEOC and Division and that they were named as individuals who had participated in the alleged illegal employment practices" (A23-A24). For purposes of a motion to dismiss, this allegation must be taken as true.

The holdings in Anderson v. University Health Center of Pittsburgh, 623 F.Supp. 795 (D.C.Pa. 1985) and Tunis v. Corning

Glass Works, 747 F.Supp. 951 (S.D.N.Y. 1990), cited by respondents, do not stand for the proposition that a particular form of evidence of intent to retaliate will be required at the pleading stage of an action premised on retaliation. In Anderson, the court in ruling upon a motion for summary judgment dismissed a plaintiff's substantive discrimination claims and his retaliation claim based upon insufficient evidence. The court explicitly noted that the motion came before the court after "the matter has been extensively discovered and the defendant's motion is fully supported by evidentiary materials and brief." 623 F.Supp. at 796. In Tunis, the court dismissed a retaliation claim, but only after a full trial. The court concluded that the employer had adequately rebutted whatever prima facie case of retaliation may have existed. The Anderson and Tunis holdings are simply inapplicable to the instant matter, where the counterclaims were dismissed prior to discovery and on the basis of the pleadings alone.

Moreover, based on the record, it is clear that respondents had knowledge that they were charged with discrimination. Sinclair stated explicitly in his April 2, 1992 letter to Morel, the letter upon which respondents' premise their libel action, that Steadman and Surles had discriminated against him and that these actions led him to file his civil rights complaint with a governmental agency (A54). In response to this letter, Morel wrote Sinclair on May 1, 1992 stating that, because of Sinclair's "pending legal case against Air France," he was "unable to

respond in detail" to Sinclair's complaints, but that he was disturbed that Sinclair had elected to "impugn other employees." Morel concluded that he had instructed Air France's lawyers to review Sinclair's letter and "advise and counsel legal recourse against you" (A63). Thereafter, Air France's legal counsel commenced the defamation action on behalf of Steadman and Surles against Sinclair (A24). In light of these facts, it is inconceivable that Steadman and Surles were unaware that Sinclair was claiming that their actions formed the basis of his charge of discrimination.

In addition, appellant does not argue, as respondents assert, that the Executive Law "preempts" Steadman and Surles' right to bring a defamation action, nor does Sinclair claim he has "carte blanche" . . . to demean and defame his fellow employees" without opening himself up to the possibility of being sued for libel. Resp. Br. at 16-17. Appellant does maintain that the bringing of a spurious defamation action by persons charged with discrimination can constitute grounds for a retaliation claim under §296(7). This is precisely the claim that the appellant sets forth in his counterclaims. For example, in the First Counterclaim Sinclair alleges that Steadman and Surles knew that Sinclair had named them as "individuals who had participated in the alleged illegal employment practices," that Steadman and Surles knew or should have known Sinclair's charges against them in his letter to Morel "did not constitute libel or defamation and/or were privileged," and that Steadman and Surles brought

their defamation action "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" (A23-A24).

With respect to the federal Equal Employment Opportunities Act (Title VII) the courts have held that the bringing a state court defamation action by a person charged with discrimination can constitute grounds for retaliation under the federal civil rights law. Equal Employment Opportunity Commission v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 778 (W.D. Va. 1980). Similarly, in Beckham v. Grand Affair of North Carolina, Inc., 671 F.Supp. 415 (W.D.N.C. 1987), a defendant company which was the subject of an EEOC charge and which had the complainant arrested and prosecuted for trespass, opened itself to a charge of retaliation under the Equal Employment Opportunities Act. The Beckham court stated, that "the allegation that Defendant caused Plaintiff to be arrested and prosecuted in retaliation for her having filed or contemplated an EEOC charge against Defendant states a cause of action against Defendant under 42 U.S.C. §2000e-3(a)." 671 F.Supp. at 419. These decisions make clear that a person, who in response to being charged with discrimination invokes legal process against the complainant (i.e. commencing a defamation lawsuit or filing criminal charges), is not immunized from a claim of retaliation under the civil rights laws.

II.

ASSUMING ONLY AN EMPLOYER CAN SUE FOR VIOLATIONS OF §296(7), RESPONDENTS HAVE FAILED TO SHOW THAT STEADMAN AND SURLES AS SUPERVISORY EMPLOYEES CANNOT BE SUED AS EMPLOYERS OR THAT APPELLANT SHOULD NOT BE GIVEN AN OPPORTUNITY TO PROVE THAT THESE SUPERVISORY EMPLOYEES WERE EMPLOYERS FOR PURPOSES OF THE HUMAN RIGHTS LAW

Appellant argued in his principal brief that if the plain meaning of §296(7) does not apply and that this provision reaches only "employers," then the trial court adopted an inappropriate and restrictive reading of the term "employer." The appellant contends that the term "employer" is to be construed to include Steadman and Surles under the test set forth in Patrowich v. Chemical Bank, 63 N.Y.2d 541 (1984). See Appellant's principal brief at 8-9.

In response, respondents make three arguments. First, respondents state that Sinclair did not plead that Steadman and Surles were employers within the Patrowich test and he is therefore barred from raising this claim. Second, respondents assert that even if Steadman and Surles were employers for purposes of §296(7), Sinclair's claims would be barred as he elected an exclusive administrative remedy "at the time he filed his charge of discrimination and retaliation with the New York State Division of Human Rights" (Resp. Br. at 8). Third, respondents argue that, even if Steadman and Surles are to be considered employers, they then would be agents of a foreign sovereign falling within the purview of the Foreign Sovereign Immunities Act ("FSIA") and that the "sole basis of jurisdiction over a foreign sovereign

employer . . . is the Federal District Court" (Resp. Br. at 8). There is no merit to any of these arguments.

1. Appellant Adequately Pled That He Was Retaliated Against by a Person or Persons Covered by §296(7)

The Supreme Court in its ruling did state that appellant did not allege that either Steadman or Surles was his employer (A7). Sinclair, however, relied on the plain meaning of §296(7) and alleged that he was retaliated against by a person or persons covered by §296(7). This provision does not state that only an employer may bring an action under this statute, but uses the term "person." Therefore, even if this Court holds that the term person, as used in §296(7), applies only to an employer, the allegations of the counterclaims should be sufficient to permit Sinclair to prove that Steadman and Surles meet the employer test under the Patrowich holding. In the alternative, Sinclair should be given an opportunity to amend his counterclaims to allege specifically that Steadman and Surles are employers within the Patrowich standard.

Any other approach would be inherently unfair. The plain language of the statute led Sinclair to believe that he was entitled to bring a §296(7) action against Steadman and Surles as persons. Prior to the lower court ruling, no court ever held that §296(7) applied only to employers. That being the case, appellant's complaint should be liberally construed or an amendment should be permitted.

2. The Election of Remedies Provision in Executive Law §297(9) Does Not Apply to Appellant Sinclair's EEOC Complaint

Respondents argue that if this Court holds that Steadman and Surles are "employers" for purposes of §296(7), then Sinclair's complaint "must be dismissed as a matter of law because he elected an administrative remedy against his 'employer' when he filed a Charge of Discrimination alleging discrimination and retaliation against his 'employer' with the New York State Division of Human Rights" (Resp. Br. at 10). Respondents rely on the election of remedies language in Executive Law §297(9) for this contention.

The claim being made is that when Sinclair filed his charge against Air France with the EEOC, the charge automatically was jointly filed with the State Division on Human Rights by virtue of federal law. In Scott v. Carter-Wallace, 147 A.D.2d 33 (App.Div. 1989), a decision relied on by respondents, the court held that even though the complainant did not elect to file with the state agency and even though it was filed automatically by EEOC with the state, the state filing constituted an election of remedies under §297(9) foreclosing a judicial action.

The respondents fail to note, however, that the Legislature acted to correct this anomalous situation and to negate the Carter-Wallace holding. Thus, §297(9) now provides that, "A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c) . . . shall not constitute the filing of a complaint within the meaning of this

subdivision." Sinclair's EEOC filing against Air France falls squarely within this provision. Sinclair filed only with EEOC and EEOC then caused the complaint to be jointly filed with the state, pursuant to 42 U.S.C. 2000e-5(c).

The amendment to §297(9) took effect July 15, 1991 and applies to all complaints filed with EEOC on or after that date. See McKinney's, Session Law News of New York, No. 5, September 1991, Chapter 342, p. 707. Since Sinclair filed with EEOC on March 31, 1992, there is no election of remedies problem and Sinclair is not precluded from maintaining this action by virtue of §297(9).[1]

3. The FSIA Does Not Establish That the Sole Basis for Jurisdiction Over a Foreign Sovereign Employer, Its Agents or Employees, is the United States District Court

Respondents argue that if Steadman and Surles are to be treated as employers, the claims against them must be dismissed because the state court "lacks jurisdiction to hear this claim" (Resp. Br. at 11). Respondents assert that under the FSIA, if Steadman and Surles are agents of Air France, they come within the purview of the FSIA. The respondents also state that it is "undisputed" that Air France is a French corporation which is 98% owned by the French government and, thus, an agency or instrumentality of a foreign state within the meaning of the FSIA. Respondents continue that if they are deemed to be employers,

[1] In addition, the election of remedies provision would never apply to Sinclair's claims against Steadman and Surles, as he did not name these individuals in his EEOC charge.

they are thus agents of Air France and appellant's claims cannot be maintained in state court.

The respondents have misrepresented as to the effect of the FSIA. Assuming Air France is an entity of a foreign sovereign and that Steadman and Surles come within the protections of the FSIA, the respondents are incorrect in their claim that the FSIA deprives the state court of jurisdiction. The respondents do not claim that Air France is immune from the jurisdiction of the courts of the United States or the states by virtue of the "act of state" doctrine. Rather, they in effect concede that this matter comes within the general exceptions to the jurisdictional immunity of a foreign state, as set forth in 28 U.S.C. §1605. Thus, for example, under 28 U.S.C. §1605(a)(2), a foreign state is not immune from suit within this country when "the action is based on a commercial activity carried on in the United States by the foreign state . . ."

If Air France or its employees are not immune from suit pursuant to the FSIA, then the state courts clearly have jurisdiction over suits brought against the company and/or its employees. Section §1605 specifically provides that, where the above-noted exception applies, a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States . . ." (emphasis added). The provisions of 28 U.S.C. §1330, cited by respondents, do not limit the jurisdictional reach of §1605. Section 1330 merely establishes federal jurisdiction over claims against foreign states: it does not estab-

lish exclusive jurisdiction in the federal courts.

This principle was made clear in J. Baxter Brinkman Corp. v. Thomas, 682 F.Supp. 898, 900 (N.D.Tex. 1988):

> Daqing first argues that, pursuant to statutory authority, all actions involving a foreign state must be litigated in the United States Courts. Daqing relies on 28 U.S.C. §1330, which provides that:
>
> > The district court shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in §1603(a) of this title. . . .
>
> Daqing incorrectly interprets that statute to confer exclusive jurisdiction on the federal courts in any action involving a foreign state. While the purpose of §1330 was to assure access to the federal courts in actions involving foreign states when no basis for federal jurisdiction otherwise exists, plaintiffs may still elect between proceeding in a federal court or a state court . . . .

Respondents also argue that appellant is already adjudicating his claims against Air France in federal court and that "the very claims which were pending in the State Court and which are the subject of this appeal, are also presently pending in the federal district court, which could lead to two different adjudications with two different results" (Resp. Br. at 12-13). Again, respondents are totally incorrect. There are no claims pending in federal court against Steadman and Surles. Even if Steadman and Surles are deemed to be employers, pursuant to §296(7), they can be sued individually under that statute for their own acts of retaliation.

CONCLUSION

For the reasons set forth in appellant's principal brief and for the reasons set forth above, it is respectfully requested that the decision of the Supreme Court dismissing appellant's counterclaims be reversed.

Dated: New York, New York
February 8, 1994

Respectfully submitted,

STEEL BELLMAN RITZ & CLARK, P.C.
Attorneys for Appellant
351 Broadway
New York, New York 10013
(212) 925-7400

On the Brief
RICHARD F. BELLMAN
MIRIAM F. CLARK