Eric Sanders

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U.S. District Court

Eastern District of New York

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Case Name: Bartoli v. City of New York
Case Number: 1:09-cv-04163-JG -VVP
Filer: City of New York
Raymond Festino
Steven Czakany
Document Number: 39

Docket Text:
MOTION for Protective Order by City of New York, Steven Czakany, Raymond Festino. (Leighton, Maxwell)

1:09-cv-04163-JG -VVP Notice has been electronically mailed to:

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June 3, 2011

By ECF
Honorable Victor V. Pohorelsky
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Bartoli v. City, et al.
Docket No. 09 CV 4163 (JG)(VVP)

Dear Judge Pohorelsky:

I am an Assistant Corporation Counsel in the Office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for the defendants in the above-referenced action. During the telephone conference, held on May 26, 2011, Your Honor requested further briefing from the parties with respect to defendants' application for a protective order precluding the depositions of two New York City Police Department ("NYPD") Captains, Terrance Moore and Daniel Micklaus.[1]

A. Factual Background

Plaintiff brings the instant action under 42 U.S.C. § 1981, 42 U.S.C. § 1983, the New York State Executive Law § 296 and New York City Administrative Code § 8-502. Plaintiff worked for the NYPD as a police officer until his retirement in August, 2007. Plaintiff alleges that the NYPD discriminated against him based on his race, subjecting him to retaliation, a hostile work environment, and an involuntary retirement. Specifically, plaintiff asserts that the defendants "constantly stereotyped him because of his large build as an African-American male." Plaintiff alleges that on or about September 2, 2004, the NYPD told him that steroids and

[1] The Court granted defendants' application as to plaintiff's requested 30(b)(6) witnesses, but reserved further decision pending this submission.

other performance enhancing materials had been found in his personal vehicle. As a result, a drug test was administered and he was temporarily placed on modified assignment. In early-2005, the NYPD served plaintiff with disciplinary charges for possession of anabolic steroids. Between August 23 and September 15, 2005, plaintiff appeared for a disciplinary trial. On or about December 28, 2005, plaintiff was found not guilty of possessing anabolic steroids.

In late 2006 or early 2007, the NYPD sought to retire plaintiff on an ordinary disability retirement pension for psychological reasons. In March, 2007, plaintiff filed a complaint with the NYPD Office of Equal Employment Opportunity. On or about August 31, 2007, plaintiff retired on an ordinary disability retirement pension.

Plaintiff commenced the instant action on September 28, 2009.

B. Judge Gleeson's Prior Decision

By Decision, dated April 19, 2010, Judge Gleeson granted, in part, defendants' motion to dismiss. See Decision, Docket, Document No. 20. Judge Gleeson held that plaintiff's allegations of discrete discriminatory acts, concerning his alleged steroid possession, the resulting investigation, and subsequent disciplinary proceedings, having occurred more than four years before this case, were time-barred. Plaintiff's otherwise time-barred allegations regarding a hostile work environment, however, were deemed timely under a continuous violation exception.

C. Depositions of Captains Micklas and Moore

Defendants object to producing Captains Micklas and Moore for depositions. Both individuals were assigned to the NYPD's Internal Affairs Bureau ("IAB") and their sole alleged involvement in this matter concerned NYPD's 2004 internal investigation of plaintiff regarding steroid possession. Apart from this investigation, neither Micklas nor Moore had, or is alleged to have had, any substantial contact with plaintiff, apart from their investigation of him for steroid possession. Because the allegations concerning plaintiff's steroid possession and subsequent investigation or discipline are time-barred, depositions of Captains Micklas and Moore are not relevant to this case and should be precluded.

Plaintiff alleges that on September 2, 2004, following the discovery of steroids in plaintiff's vehicle, he was directed by Captain Moore to accompany him to the NYPD Medical Division, where Captain Moore inspected plaintiff's body for needle marks, directed plaintiff to provide hair and urine samples, and, thereafter, advised plaintiff that he was being placed on modified assignment. This is the only contact alleged between plaintiff and Captain Moore. Plaintiff has not stated that Captain Moore made any comments whatsoever regarding his race and, apart from directing plaintiff to strip and provide samples for drug testing, alleges that Captain Moore suggested that plaintiff resign. As for Captain Micklas, the only allegation, indeed the only mention, of him by plaintiff is in paragraph "50" of the Second Amended Complaint, which states that "sometime in Early 2005, [plaintiff] was served with Charges and Specifications and accused by Captain Daniel Micklas of [IAB] of [possession of steroids]." Captain Micklas is not alleged to have had any contact with plaintiff on September 2, 2004.

Though not contained in his papers opposing a protective order, during the May 26th phone conference, to justify a basis for deposing Captains Moore and Micklas, plaintiff's counsel conjectured that after steroids were found in plaintiff's vehicle, one of plaintiff's commanding officers had contacted IAB to investigate and, in so doing, told Captain Moore to "be rough with plaintiff."[2] With this inferential leap, plaintiff's counsel proffers a vague "transference of animus" theory for taking Captain Moore's deposition and, given the allegations, provides absolutely no basis for taking Captain Micklas' deposition.

Fed. R. Civ. Proc. 26(b)(2)(C)(iii) sets forth that the Court must limit the scope of discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case . . . , the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." The depositions sought constitute, at arguably most, background information, and are highly unlikely to have any benefit to resolving plaintiff's existing claims. Judge Gleeson dismissed plaintiff's claims of discrete discriminatory acts concerning steroid possession and the subsequent IAB investigation. Plaintiff's claim of a hostile work environment spans several years, during which time plaintiff was assigned to three different precincts, with entirely different supervisors. Plaintiff has alleged, in his complaint and during his deposition, statements made by three supervisors, who are being produced for deposition. But, in contrast, plaintiff's reasoning is entirely strained for taking Captain Moore's deposition, concerning the events of a single day at the beginning of IAB's investigation of plaintiff, and is entirely absent for taking Captain Micklas' deposition, concerning IAB's findings at its conclusion.

Accordingly, defendants seek a protective order with respect to the depositions of Captains Micklas and Moore. In the event that the Court permits either or both depositions, defendants respectfully request that such depositions be limited in time and scope.

Respectfully submitted,

Maxwell D. Leighton
Assistant Corporation Counsel

cc: Eric Sanders (By ECF)

[2] At his deposition, plaintiff stated neither this conjecture nor that Captain Moore's investigation had been "rough."