

8AU5ANDC conference

1 UNITED STATES DISTRICT COURT

1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 CHRISTINE ANDERSON,

4 Plaintiff,

5 v.

07 Civ. 9599 (SAS)

6 THE STATE OF NEW YORK, et al.,

7 Defendants.

8 -----x

9 October 30, 2008

9 Before:

10 HON. SHIRA A. SCHEINDLIN,

11 District Judge

12 APPEARANCES

13 JOHN BERANBAUM

14 Attorney for Plaintiff

15 ANDREW M. CUOMO

15 Attorney General of the State of New York

16 BY: LEE ADLERSTEIN

16 WESLEY BAUMAN

17 Assistant Attorney General

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1 (Case called)
2 THE COURT: Good morning, Mr. Beranbaum.
3 MR. BERANBAUM: Yes, your Honor.
4 THE COURT: That's you.
5 And Mr. Adlerstein?
6 MR. ADLERSTEIN: Yes, your Honor.
7 THE COURT: And Mr. Bauman.
8 MR. BAUMAN: Yes, your Honor.
9 THE COURT: Okay. Is there also -- no, there is no
10 person named Sherry Cohen -- those are the clients. Okay.
11 That's who is here.
12 I received four letters in preparation for today's
13 conference; an October 3rd letter from defendant's counsel in
14 response to this Court's requirement that a letter be submitted
15 on, for every pre-motion conference saying that the defendant
16 would like to *move for summary judgment and explaining why* the
17 defendants think they could prevail, and then on October 23rd
18 plaintiff's response with respect to the potential defendant's
19 summary judgment motion, and then the letter dated October 24th
20 from plaintiff's counsel expressing a concern about a
21 deponent's testimony, and then a response dated 10/27 --
22 October 27th from the defendants responding to the plaintiff's
23 October 24th letter regarding that deponent's testimony.
24 I would like to, of course, start with the discussion
25 about summary judgment. And while -- oh. I'm sorry to

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1 interrupt myself but I want to thank you for coming early. You
2 were on for 1:30 and managed to change to 10:30 and the Court
3 appreciates that.

4 So, without asking you to repeat your entire letter
5 since I don't usually take oral argument on a motion, I do it
6 up front, so to speak, by having the pre-motion process this
7 becomes the equivalent of the oral argument. So, it is a good
8 chance for me to hear a little bit more about this proposed
9 motion even though it might, to some extent, repeat the letter.

10 So, with that, Mr. Adlerstein or your colleague, do
11 you wish to be heard?

12 MR. ADLERSTEIN: Yes, your Honor. I can speak to and
13 I want to just mention again if my voice defects me to some
14 extent, I know that the Court will understand.

15 THE COURT: Yes.

16 MR. ADLERSTEIN: We think that we have a strong motion
17 on various grounds and, essentially, there are three claims
18 here. There is a discrimination claim based on racial
19 discrimination, there is a whistle-blowing claim that's based
20 on things that the plaintiff said that she was telling people
21 during the course of events that led to her dismissal, and then
22 finally there is a retaliation claim which kind of, I guess,
23 blends into the whistle-blowing claim in very large measure.

24 The reason we think we have a strong motion for
25 summary judgment is that when the record is examined as a

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1 whole -- and we would expect in a motion, your Honor, to of
2 course delve into the record and show your Honor the specific
3 deposition testimony and documentation which pertains here and
4 there is a fair amount of deposition testimony and also a
5 substantial amount of documentation which relates to the case
6 because there was intraoffice communications of various kinds
7 that went on -- we think that the discrimination claim just
8 will not hold up to scrutiny on a summary judgment basis.

9 We think that Mr. Beranbaum, in his own letter I
10 think, in effect, acknowledges that he has some heavy lifting
11 because he relies on precedent to the effect that the person
12 who allegedly was the source of the racial animus, Sherry Cohen
13 or such is the allegation, through communications that she
14 made, infected other people who were decision makers in having
15 Ms. Anderson discharged from her position. And on the basis of
16 that infection, as it were, the decision as a whole to dismiss
17 Ms. Anderson should be regarded as resulting from racial
18 discrimination.

19 So, you have kind of a double thing that is a result
20 from the racial discrimination. There is kind of a proximate
21 cause relationship there. And I think we're going to be able
22 to show that the decision on the part of the Office of Court
23 Administration Personnel as well as the Court personnel who
24 made the decision to discharge Ms. Anderson, was not affected
25 by any kind of racial discrimination.

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1 THE COURT: But what I am worried about is whether
2 that's a fact issue. I can't comb the record and then decide
3 facts.

4 MR. ADLERSTEIN: Well, your Honor, I think again that
5 gets me to my next point, that there is simply no evidence by
6 which a fact finder could infer that there was racial
7 discrimination.

8 THE COURT: What if Ms. Cohen's behavior shows it?

9 MR. ADLERSTEIN: Ms. Cohen's behavior or alleged
10 behavior --

11 THE COURT: Yes.

12 MR. ADLERSTEIN: -- we think is based solely on
13 unsubstantiated conjecture --

14 THE COURT: Wait. Wait.

15 MR. ADLERSTEIN: -- and speculation.

16 THE COURT: What does that mean? A plaintiff can
17 create an issue of fact.

18 If a plaintiff says -- not taking this case now and
19 making up a hypothetical case, a typical case of sex
20 discrimination, let's say -- he touched me, he said, he did.
21 Whatever that plaintiff says is evidence. It is not conjecture
22 or speculation. If the plaintiff says that the defendant --
23 and I said I'm making up a difference case so you won't think
24 it is this one -- but you know, he did something inappropriate.
25 That's her version. And in that case that would be enough to

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1 get to a jury.

2 MR. ADLERSTEIN: Except the plaintiff's own language
3 doesn't link it to race and the only evidence that the
4 plaintiff even attempted to link that allegation to race is
5 based on conjectural testimony from other employees which will
6 not hold up both on a matter of fact that it would not be
7 admissible evidence and also that it is unsubstantiated and
8 speculative.

9 THE COURT: Well, wait. Ms. Anderson testified that
10 she heard Ms. Cohen making racially derogatory remarks about
11 Black people and Hispanics?

12 MR. ADLERSTEIN: I don't believe that that is actually
13 an accurate portrayal of what's in the record.

14 THE COURT: Oh. Well, I don't -- I didn't study the
15 deposition but that's what was represented to me in the letter.

16 MR. ADLERSTEIN: Right.

17 THE COURT: Did Mr. Beranbaum lie in the letter? Did
18 you lie in the letter or did she say in her deposition that she
19 personally heard Ms. Cohen making racially derogatory remarks
20 about Black people and Hispanics?

21 MR. BERANBAUM: That's correct. She has told me that.

22 THE COURT: I didn't ask you what she told you, I said
23 what did she say in her deposition under oath? Is it there or
24 not there in the transcript?

25 MR. BERANBAUM: There is -- some of it is there and

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1 some of it was not asked and so it was not -- and so, she
2 didn't need to answer it but she will provide an affidavit
3 that's not inconsistent with a deposition.

4 THE COURT: Right. An affidavit can't be
5 inconsistent. It will be completely discounted.

6 MR. BERANBAUM: It won't be.

7 THE COURT: That means it will open up another
8 deposition. I mean, if she's going to say things that are new
9 that are in an affidavit here, we haven't gotten very far.

10 MR. BERANBAUM: Well, these are remarks that Ms. Cohen
11 said about Black people and about Hispanics.

12 THE COURT: I know, but Mr. Adlerstein doesn't know
13 about this. This is not in the record. I thought the record
14 was closed. Now she wants to submit an affidavit in support of
15 defending defendant's summary judgment motion.

16 MR. BERANBAUM: Some of it isn't in the deposition
17 and, as I said, it is not going to be inconsistent.

18 THE COURT: I heard him saying that but it is new and
19 if Mr. Adlerstein did know about it he wouldn't have made the
20 motion. So, I'm wondering if you shouldn't just do the
21 affidavit right now and find out what it is that she's going to
22 say that's not in the deposition and Mr. Adlerstein can look at
23 the deposition and he can analyze for himself whether he thinks
24 it is inconsistent and write a letter to the Court saying you
25 can't accept the affidavit, it is only inconsistent, or you can

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1 say, well, I agree that wasn't asked, it is not inconsistent.
2 If that's what she's going to say in opposition to the motion I
3 can't move on that one claim.

4 Anyway, you were starting to say?

5 MR. BERANBAUM: I would be happy to do that.

6 THE COURT: Then do it. When can you get the
7 affidavit out?

8 MR. BERANBAUM: Next week.

9 THE COURT: What day? Close of business Wednesday?

10 MR. BERANBAUM: Sure.

11 THE COURT: Okay. So, in any event, let's say she did
12 say what he put in his letter that she heard Ms. Cohen making
13 racially derogatory remarks about Black people and Hispanics,
14 and then another witness would say -- and maybe this isn't good
15 enough -- but Black investigators of the DDC, you would say
16 Ms. Cohen discriminates against employees of color by routinely
17 harassing, demeaning and micro-managing them until they
18 eventually are forced out of their jobs.

19 Do you know about that testimony, this DDC
20 investigator or, again, this is new and not in the record right
21 now?

22 MR. ADLERSTEIN: Well, there is testimony from
23 co-workers where they make blanket statements to that effect.
24 However --

25 THE COURT: Do you know who this actual person is, a
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1 former Black investigator at the DDC that he quotes in the
2 letter? Do you know who that is?

3 MR. ADLERSTEIN: Yeah. The person was -- there were
4 two people.

5 THE COURT: As long as you know who it is.

6 MR. ADLERSTEIN: There were two people who were
7 deposed.

8 THE COURT: Okay.

9 MR. ADLERSTEIN: And what we have done is we have
10 taken a look at that deposition testimony which the plaintiff
11 took and that deposition testimony is wholly conclusory. There
12 is no specifics where the individual says that they were able
13 to see how the conduct toward individuals they claimed who were
14 treated differently was related to race. It was a totally
15 conclusory fact.

16 I would ask the Court to consider the fact that we
17 will be able to cite case law. We just received a decision
18 from Judge Sifton in a case that we didn't cite in our letter,
19 a case called Moore v. New York State Division of Parole, 2008
20 U.S. District Lexis 72260, where a similar testimony was
21 offered in opposition to a motion for summary judgment. And
22 Judge Sifton cited case law rejecting the import of that
23 testimony to the effect that this was wholly conclusory
24 statements, that the impression of the person who was being
25 asked was that there was discrimination going on saying that I

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1 don't like how this particular person was treated and because I
2 didn't like how this person was treated it must have been
3 because of race.

4 That kind of testimony has been rejected under case
5 law and I think that irrespective of what Mr. Beranbaum is
6 going to be coming up with, I doubt very much that it is going
7 to be able to be linked to specific conduct on Ms. Cohen's part
8 or anyone else's part which demonstrates in any way, shape, or
9 form that race was in any way linked to the decision that was
10 made with respect to Ms. Anderson.

11 THE COURT: As for this recent decision, there are
12 hundreds and hundreds of District Court opinions on employment
13 discrimination cases. It is really best to cite controlling
14 law which is Circuit or Supreme Court. One can get lost in the
15 thicket of District Courts so I think the most persuasive
16 authorities for me usually are of course starting with the
17 United States Court; second, the Second Circuit Court of
18 Appeals; and third, if I have said it in a prior opinion I
19 guess I should be reminded. But, other than that, you know,
20 the plethora of District Court cases are not too fascinating.

21 MR. ADLERSTEIN: Judge Sifton does cite a District
22 Court case.

23 THE COURT: Then you should too.

24 MR. ADLERSTEIN: A case called Schwab v. Toufayon.

25 THE COURT: Yes. I remember that case.

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1 MR. ADLERSTEIN: He cites that case.

2 THE COURT: That's fine.

3 MR. ADLERSTEIN: And I think the prevailing law is
4 along those lines.

5 So, I would submit to the Court that there is at least
6 a very serious issue here about a link to racial discrimination
7 which your Honor ought to take a look at on summary judgment as
8 to whether you have more than speculative and conclusory
9 testimony as well as whether or not there is a real link
10 between anything Ms. Cohen would have thought or said or done
11 and the actual decision to have dismissed --

12 THE COURT: Okay. Let's go to retaliation.

13 MR. ADLERSTEIN: So that's on that.

14 THE COURT: Can we go to retaliation?

15 MR. ADLERSTEIN: Absolutely. Opinion on the
16 whistle-blowing or retaliation claim, there I know your Honor
17 has recently written on it in the Fiero case. We took a look
18 at Fiero as well as other cases. We cited the Routolo case.

19 THE COURT: Oh yeah, Fiero. They're appealing that.
20 Somebody is appealing Fiero. They don't like what I did.

21 MR. ADLERSTEIN: Okay.

22 THE COURT: You didn't like it.

23 MR. ADLERSTEIN: Routolo.

24 THE COURT: No, no. Fiero.

25 MR. BERANBAUM: In Fiero your Honor decided that the
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1 speech involved was, in effect, citizen speech, it wasn't
2 because the person was actually saying that the employee was
3 saying that they had been asked to do specifically dishonest
4 acts.

5 THE COURT: It was a teacher dispute.

6 MR. ADLERSTEIN: Right. Right. And what the Routolo
7 case instructs, as well as other cases, is that essentially
8 which side of the fence the speech is on that was allegedly
9 linked to the firing --

10 THE COURT: Right.

11 MR. ADLERSTEIN: -- is to be determined by a Court as
12 a matter of law.

13 THE COURT: Okay.

14 MR. ADLERSTEIN: And so, we think that the motion for
15 summary judgment will provide an opportunity. It will be our
16 position, your Honor, that the record shows that the alleged
17 speech was essentially linked to the plaintiff's job and her
18 job duties. What she claims to have done was to have said to
19 some superiors, I think that you are going too easy on some
20 people in some cases and as a result of that we are not
21 fulfilling our mission. However, at the same time she doesn't
22 go beyond the small circle of people that she's talking to.
23 There is allegations in the complaint that somehow this was an
24 allegation relating to corruption that was going on. When the
25 plaintiff was asked about corruption inside the agency in her

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1 deposition, the plaintiff was unable to point to any specific
2 instance of corruption or any real patterns of corruption. It
3 just didn't hold up.

4 And so, we think that we are going to be able to show
5 in this motion, through a combination of all the circumstances
6 which the Courts have said contribute to a decision on what
7 kind of speech it is, whether it is in effect citizen speech or
8 whether it is job-related speech, we think we are going to be
9 able to show, your Honor, that clearly here what happened was
10 that it was job-related speech and that it was not speech as a
11 citizen.

12 We understand that the plaintiff is --

13 THE COURT: Therefore it doesn't have the same First
14 Amendment protection.

15 MR. ADLERSTEIN: That's right. That's right.

16 THE COURT: How does that help us with the retaliation
17 claim itself?

18 MR. ADLERSTEIN: Well, because the retaliation claim
19 is essentially that the plaintiff was dismissed as a result of
20 having told Katherine Wolf, who was the chief clerk, as well as
21 some other vague claims that the plaintiff has made about
22 perhaps telling others as Mr. Beranbaum said in his letter,
23 about such things. However, we have not seen substantiation of
24 that in the record. And even though Ms. Wolf denies that the
25 plaintiff made any of those kinds of comments to her, we think

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1 that even if she had said what she claims to have said to
2 Ms. Wolf, it wouldn't have comprised the kind of speech which
3 is protected. And also --

4 THE COURT: Once the speech isn't protected, let's say
5 it is in the course of her job, it is not a citizen job, then
6 they can fire her for the speech.

7 MR. ADLERSTEIN: That even if they had fired her for
8 the speech that it would have been permissible. However, we,
9 at the same time we are going to be able to show that the
10 firing itself was not linked to that speech and so that the
11 causation hasn't been shown. That's essentially the first step
12 is to show that.

13 THE COURT: You have a two-prong attack.

14 MR. ADLERSTEIN: Yes. And basically it is a two-prong
15 attack and that under Routolo, because it is an issue of law,
16 it provides the Court the opportunity to weigh into that
17 particular issue.

18 THE COURT: Well, except you are saying even if it was
19 protected speech it doesn't matter.

20 MR. ADLERSTEIN: Right.

21 THE COURT: She wasn't fired based on the speech now
22 as a matter of law, not issue of fact.

23 MR. ADLERSTEIN: Right. And we also think we are
24 going to be able to show that there was a lack of temporal
25 proximity because the conversation with Ms. Wolf took place in

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1 August of '06, the firing took place in June of '07; that this
2 would not have been linked to the -- so, there is various
3 instances that we would like to be able to present to the Court
4 on that particular issue.

5 THE COURT: Okay.

6 MR. ADLERSTEIN: And I would submit, on that basis,
7 the motion for summary judgment will be of at least substantial
8 assistance to the Court.

9 THE COURT: There is no such thing as substantial
10 assistance. Either you win it or you lose it. You think you
11 can win it.

12 MR. ADLERSTEIN: We think we can.

13 THE COURT: Because I don't need any assistance.

14 MR. ADLERSTEIN: No, but I mean in terms of the
15 parties involved in shaping the case and we think we will win.

16 THE COURT: Mr. Beranbaum, do you want to respond?

17 MR. BERANBAUM: Yes.

18 In terms of the race discrimination case, as the Court
19 well knows race discrimination, the determination is one of
20 intent and that's a province usually reserved for the jury to
21 make that decision in summary judgment.

22 THE COURT: There has to be some evidence on which
23 they can make it. What the summary judgment motion is saying
24 on the discrimination case is the record has no evidence; not
25 only little evidence but no evidence.

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1 MR. BERANBAUM: Yes. And I think that that's just an
2 incredible position to take.
3 THE COURT: Why?
4 MR. BERANBAUM: I will explain.
5 THE COURT: Okay, but yes, but here is my question.
6 Because a supervisor can harass an employee for all kinds of
7 other reasons, they just don't like the way they dress or they
8 don't like I don't know what else, they don't like the way they
9 speak or something or other. And while it is not a nice thing,
10 it is not actionable. This has to be linked to race.
11 MR. BERANBAUM: That's right.
12 THE COURT: Okay.
13 MR. BERANBAUM: And here a jury could make a
14 reasonable inference linking the adverse action, the hostility,
15 the hostile environment and the recommendation for firing --
16 THE COURT: Based on what.
17 MR. BERANBAUM: -- with race.
18 THE COURT: Because the plaintiff is a minority?
19 That's not enough.
20 MR. BERANBAUM: It is certainly not my position.
21 THE COURT: Okay. So what is the evidence?
22 MR. BERANBAUM: The evidence is that she has been
23 heard by co-workers, including my client, of making racially
24 insensitive maybe racist remarks, that she has an animus
25 towards minorities and Black people in particular as reflected
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1 by those remarks.

2 The remarks, it is contrary to counsel's
3 characterization that these remarks are simply conclusory. The
4 individual I quoted, and his name is Mr. Van Loo, and the
5 defendant took his deposition, not the plaintiff, he, in his
6 affidavit spoke specifically about disparate treatment that he
7 received --

8 THE COURT: That he himself received?

9 MR. BERANBAUM: Correct.

10 THE COURT: Not reporting about what he thinks she
11 said to others.

12 MR. BERANBAUM: That's correct, your Honor. And,
13 candidly, that's an issue. If we can show, which I think we
14 can, a generalized racial animus reflected in both her
15 treatment and disparate treatment to my client and others and
16 racially insensitive remarks, if we can show that she had that
17 animus and we can show that she was the prime mover in the
18 termination of my client, I think that's enough to get to a
19 jury and that's our case.

20 THE COURT: Funny, you don't really disagree much with
21 Mr. Adlerstein, you just think the law is broader in accepting
22 that kind of generalized proof than he does.

23 MR. BERANBAUM: No, I --

24 THE COURT: I mean, she can't say that this supervisor
25 said to me or wrote to me or did anything to me that was

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1 explicitly race discrimination so it is more of a generalized
2 allegation: She didn't treat me very well and, by the way, she
3 is a racist.

4 MR. BERANBAUM: She didn't treat me very well and, in
5 fact, she treated me differently than White people.

6 THE COURT: Right.

7 MR. BERANBAUM: She made ably insensitive remarks in
8 my presence.

9 THE COURT: We don't have that here. That's going to
10 be this affidavit.

11 MR. BERANBAUM: We do have that. I'm being perfectly
12 on the safe side. I didn't review the deposition. They might
13 all be in there but I want to be on the safe side and if there
14 is anything that is not in there I will have an affidavit but,
15 trust me, there is remarks in the deposition. And thirdly,
16 what she said to other people and how she -- minorities and how
17 she acted towards other people. That's our evidence.

18 THE COURT: Okay. It sounds like a difficult case.

19 MR. BERANBAUM: Can I just make one other point?

20 THE COURT: Yes.

21 MR. BERANBAUM: On top of that, there was
22 extraordinary efforts made against this woman and some of which
23 I referred to, these biased evaluations, not letting her
24 respond to them, keeping her in the supervision of a woman who
25 she feared because she had been assaulted. And there is case

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1 law, as I'm sure your Honor recognizes, that this kind of
2 irregular treatment one can infer in combination with other
3 evidence was caused by discriminatory animus.

4 THE COURT: All right. This may be one of the rare
5 cases where the discrimination claim may survive and the
6 retaliation won't. We often have the opposite outcome at the
7 end of the day. Do you want to address the retaliation claim
8 briefly?

9 MR. BERANBAUM: Sure.

10 The retaliation claim, and you know I think
11 Mr. Adlerstein and I agree that the issue here is under
12 Garcetti. She was speaking as a disgruntled employee.

13 THE COURT: He goes one step farther and says even if
14 the speech was protected, there is no proof she was fired.

15 MR. BERANBAUM: Yes, and that's a fact question.

16 THE COURT: Not necessarily. There, again, has to be
17 some facts in the record from which a reasonable juror could
18 find that she was fired because of her speech. There has to be
19 something to support it. A jury can't just pluck it out of the
20 air.

21 MR. BERANBAUM: Well, I can show temporally --

22 THE COURT: He said the opposite. He said temporally,
23 no, no, no, but he gave me some dates, for his part of the
24 record and I will have the transcript to look at. What do you
25 have to say? Surely the date of termination is the same. What

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1 did you tell me it was?

2 MR. ADLERSTEIN: June of '07, your Honor.

3 THE COURT: That must be agreed upon.

4 MR. BERANBAUM: Right. And the assault that I
5 mentioned that grew out of her complaint was in June of '06.
6 And thereafter there was a series of adverse -- of negative and
7 hostile actions on the part of this woman.

8 THE COURT: I know, but her speech, the complaining
9 speech. What was the complaining speech? By the way, because
10 you don't pause so there is no use talking to you.

11 MR. BERANBAUM: I'm sorry.

12 THE COURT: Mr. Adlerstein, when is the complaining
13 speech.

14 MR. ADLERSTEIN: When I was alleging to this alleged
15 whistle-blower speech, in August of '06.

16 MR. BERANBAUM: Right.

17 THE COURT: So a year.

18 MR. BERANBAUM: In September of '06.

19 THE COURT: Still close to a year earlier.

20 MR. BERANBAUM: But I think the record will make it
21 clear that she continued to make complaints. Then she spoke to
22 Mr. Cahill and there are --

23 THE COURT: What is the most recent speech to the
24 termination that you have in the record?

25 MR. BERANBAUM: In the record, she submitted a
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1 grievance in which she referred to the retaliation for her
2 complaints about the soft treatment that the DDC was according
3 attorneys and that was in the spring.

4 THE COURT: She was fired when again? June? June.

5 MR. BERANBAUM: Yes. Truly, the Garcetti issue I
6 think is really what's key.

7 THE COURT: I don't know about that. It may mean
8 there is not enough of a link no matter what.

9 Okay. I think I get the argument. If there is
10 nothing you wish to add I thank you both for coming in early.

11 We need to go over the schedule, or do we?

12 MR. ADLERSTEIN: Well, I think it would be helpful to
13 have a schedule.

14 THE COURT: But I'm saying we don't have one yet.

15 MR. ADLERSTEIN: No, we do not.

16 THE COURT: That's the next step, to set the schedule.

17 I have one other question. Have you tried to mediate
18 this employment dispute in the building? I send the case to a
19 magistrate judge or the Court Annexed Mediation Program. Did I
20 do either here?

21 MR. BERANBAUM: I suggested it. We had suggested it.

22 THE COURT: I don't wait for your consent other than
23 which one do you want, magistrate judge or Court Annexed
24 Mediation Program which of course is free, but you have to go
25 to one or the other.

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1 MR. BERANBAUM: I see.

2 THE COURT: Maybe you didn't do that because at one
3 time Ms. Anderson had a different lawyer, I think it was a
4 different setting. In any event, I didn't send you. Is that
5 it?

6 MR. BERANBAUM: Correct.

7 THE COURT: Do you want to go to magistrate judge or
8 the Court Annexed Mediator?

9 MR. ADLERSTEIN: I think the magistrate judge.

10 THE COURT: Fine. What month would you like to?

11 MR. BERANBAUM: Your Honor, may I say something?

12 THE COURT: No. Not really. It is going to go to the
13 magistrate judge.

14 MR. ADLERSTEIN: Would that be the same magistrate
15 judge because my --

16 THE COURT: As what?

17 MR. ADLERSTEIN: As has been handling the discovery.

18 THE COURT: In the Anderson case?

19 MR. ADLERSTEIN: Yes.

20 THE COURT: Who is that?

21 MR. ADLERSTEIN: Judge Peck. And the only reason I
22 say so, Judge Peck is in my eyes is great but we've had some
23 sort of discovery run ins. My client feels a little weary and
24 I don't think it would be productive in that case.

25 THE COURT: I don't know. I have to speak to the, I
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1 guess, the chief magistrate judge whether they can assign it to
2 a different one for settlement purposes only. So, I will fill
3 out the form and then I will look into that but I do want to
4 make sure it gets done. So, I will put down November. If you
5 are going to talk settlement you might as well talk. Discovery
6 is pretty well known so I will put down November and we will
7 see who it will be.

8 MR. ADLERSTEIN: Your Honor, perhaps if -- no, that's
9 okay.

10 THE COURT: I want to get you a schedule for the
11 summary judgment so I can move on to the remaining cases and
12 get out on time.

13 MR. ADLERSTEIN: Your Honor, may I make a suggestion
14 about the schedule?

15 THE COURT: All right.

16 MR. ADLERSTEIN: We were going to ask your Honor for a
17 January date for submission of the motion. There is a couple
18 of things going on. First, my hours have been curtailed
19 because of the fact that I haven't been feeling well, I'm under
20 some medication with what I have been dealing with; and
21 secondly, both Mr. Bauman and I have a trial in front of Judge
22 Sifton scheduled for December the 8th, and so we think that we
23 would be able to get a motion in by the early part of January.

24 THE COURT: Today is October 30th. I thought you
25 meant that that would be fully submitted by then. Moving

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1 papers would be before and the response papers and reply
2 papers.

3 MR. ADLERSTEIN: I respectfully request that for those
4 factors, my hours have been curtailed and also we do have that
5 trial that we need to concentrate on. In that case there is a
6 fair amount of pretrial activity that judge Sifton has ordered,
7 and it just happens that Mr. Bauman and I are both involved in
8 that trial. And so, I would respectfully request that the
9 Court allow us to see clear to --

10 THE COURT: But you have a big, big, big office. In
11 other words, are you not the only two people there. To ask
12 basically that the case go on hold for two and a half months is
13 what you are saying. You know, once the papers are filed in
14 summary judgment from the moment the first person files and
15 then the next response and then reply and then waiting for the
16 Court, it almost always takes half a year. That's my
17 experience from beginning to end and that's a long time so I
18 just wanted to start the process. I'm not saying it has to be
19 filed in a week or 10 days, but to ask for two and a half
20 months to file papers, I understand the reasons that you two
21 are but you have a big, big office.

22 MR. ADLERSTEIN: Well, the fact is, your Honor that --

23 THE COURT: And your case before Judge Sifton may
24 settle. That happens all the time.

25 MR. ADLERSTEIN: I don't expect that case is going to
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1 settle. That hasn't been successful before and also there is a
2 fair amount of ground to cover here and I'm just looking to try
3 to be realistic and not have the kind of pressure which I think
4 would be very difficult to deal with under the circumstances.

5 THE COURT: What is your view?

6 MR. ADLERSTEIN: I had mentioned that to
7 Mr. Beranbaum.

8 THE COURT: Mr. Beranbaum, what is your view?

9 MR. BERANBAUM: I'm certainly going to accommodate
10 Mr. Adlerstein's not feeling well and he's always extended me
11 courtesies and so I don't feel like I'm going to object to his
12 needs and trust what he has to say.

13 THE COURT: But, Mr. Adlerstein, since I'm not a great
14 fan of this proposal in the first place I'm not going to give
15 any adjournment. I don't see how you are better off putting it
16 the day after your trial.

17 MR. ADLERSTEIN: No, the trial is December 8.

18 THE COURT: I know.

19 MR. ADLERSTEIN: So if your Honor gave us --

20 THE COURT: How long is it supposed to last?

21 MR. ADLERSTEIN: Probably a week or a little bit more.
22 If your Honor gave us an early January date it would be my
23 expectation -- I'm not going away in the holiday period.

24 THE COURT: Okay. But, I'm telling you now I'm not
25 going to adjourn it, it is a no adjournment schedule. January

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1 7th for the moving papers.

2 MR. ADLERSTEIN: Thank you.

3 THE COURT: No adjournments.

4 Mr. Beranbaum, how long do you need to respond to it?

5 MR. BERANBAUM: I would like four weeks, please.

6 THE COURT: February 4th.

7 How long do you need to reply, Mr. Adlerstein?

8 MR. ADLERSTEIN: Three weeks, your Honor.

9 THE COURT: See my point? February 25th.

10 MR. BERANBAUM: I think two weeks is the ordinary.

11 THE COURT: There is no ordinary. February 25th is

12 it. This is a no adjournment schedule: January 7th, February

13 4th, February 25th, all page limits apply. Exhibit limits,

14 don't tinker with them they're out there in the rules. They're

15 out there in the internet. That's it. Or you can get them off

16 the court website. Thank you.

17 MR. BERANBAUM: Your Honor, would you want to address

18 my second letter?

19 THE COURT: Oh, right. Your second letter.

20 You know, I don't think there is much to address. I

21 read the letter. I'm not sure that you are asking me anything.

22 You just seem to want to tell me something or report it to me.

23 Okay. You reported it to me. You are not really asking me to

24 do anything, are you? If so, your letter didn't make that

25 clear. Do you want me to do anything? We don't need names, I

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1 know you are concerned about privacy. What do you want me to
2 do?

3 MR. BERANBAUM: As an officer of the court I wanted to
4 apprise the Court of it and, if the Court felt necessary, to
5 refer it to anybody.

6 THE COURT: I don't.

7 MR. BERANBAUM: Thank you.

8 THE COURT: Thank you.

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