

**Matter of Sodexo, Inc. v New York State Div. of
Human Rights**

2016 NY Slip Op 32183(U)

October 19, 2016

Supreme Court, New York County

Docket Number: 154183/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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In the Matter of the Application of
SODEXO, INC.,

Petitioner,

DECISION/JUDGMENT
Index No. 154183/2016
Mot. Seq. No. 001

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS
and RHODA GRAYS,

Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

-----X
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION:

PAPERS	NUMBERED ¹
ORDER TO SHOW CAUSE, PETITION AND EXHIBITS ANNEXED.....	19, 1-15
AFF. IN OPP. AND EXHIBITS ANNEXED.....	21-25
ANSWER AND EXHIBITS ANNEXED.....	26-28
REPLY AFF.....	29

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this proceeding pursuant to Executive Law § 298, petitioner seeks an judgment annulling
the April 29, 2016 determination of respondent New York State Division of Human Rights

¹ Unless otherwise indicated, all papers are referred to by the document numbers
assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

(hereinafter the Division), which dismissed the administrative complaint of defendant Rhoda Grays for administrative convenience.² The Division submits written opposition. Defendant Rhoda Grays, despite having been personally served with the petition (Doc. No. 30), in accordance with the directions in the order to show cause signed by this Court (Doc. No. 19), has neither appeared nor joined issue. After oral argument and a review of the papers submitted, as well as the relevant statutes and case law, **the petition is granted.**

FACTUAL AND PROCEDURAL BACKGROUND

In March 2015, Grays initiated an administrative complaint before the Division alleging that petitioner, her former employer, had discriminated against her by failing to provide her a reasonable accommodation for a disability. (Doc. No. 3.) In September 2015, following an investigation, the Division issued a determination finding no probable cause to believe that petitioner had engaged in unlawful discriminatory practices. (Doc. No. 4.) The determination contained a factual recitation and reasons for arriving at that conclusion, which shall be briefly summarized.

Petitioner hired Grays to work as a caterer. According to the position profile, the job required Grays to have "agility, dexterity and long periods of walking, standing, bending, carrying or lifting

² The petition states that it is brought pursuant to CPLR article 78. As urged by the Division, however, Executive Law § 298 is "the exclusive means for . . . review" of its determinations. *Matter of Baust v New York State Div. of Human Rights*, 70 AD3d 1107, 1108 (3d Dept 2010), *lv denied* 15 NY3d 710 (2010); *see Matter of Gil v New York State Div. of Human Rights*, 17 AD3d 365, 366 (2d Dept 2005). Despite this mischaracterization by petitioner, since this proceeding was commenced within 60 days following the determination under review, as the applicable statute requires, and is in all other respects cognizable as a request for judicial review of a Division determination, this Court will construe the petition as properly made pursuant to Executive Law § 298. *See CPLR 2001; Pursuit Inv. Mgt., LLC v Alpha Beta Capital Partners, L.P.*, 134 AD3d 502, 503 (1st Dept 2015); *Thomas v New York City Hous. Auth.*, 132 AD3d 432, 432 (1st Dept 2015).

supplies and equipment weighing 30 pounds or more." Grays has arthritis in her foot, and the strenuous physical labor as a caterer exacerbated the condition, eventually causing her to seek medical attention. Her return-to-work medical certification form restricted her to "standing [no] more than one hour" and "lifting [no] more than 10 [pounds]." Grays requested, in accordance with those restrictions, to be placed on light duty. For a short period of time, while the catering business was slow, petitioner trained her as a cashier but, in reality, petitioner had no need for cashiers, since there were other individuals who had already been hired for those positions. Eventually, petitioner required Grays to resume work as a caterer, which again worsened her condition, causing her to leave work permanently. The Division concluded that Grays was not able to perform the work for which she was hired, with or without an accommodation, and that petitioner did not have any suitable alternative work to offer her. Thus, it concluded that there was no probable cause for a discrimination claim based upon a disability.

In November 2015, Grays commenced a special proceeding to review and annul the determination, under Index No. 101991/2015. Although both the Division and petitioner were named as respondents in that proceeding, petitioner claims that it was never served with the notice of petition and petition. Nevertheless, at an appearance on the petition, Grays and the Division entered into a stipulation dated March 8, 2016 whereby, in sum and substance, the petition was withdrawn and the Division agreed to "further investigat[e]" the matter. (Doc. No. 8.)³ Meanwhile, Grays commenced an action in the Southern District of New York, by complaint dated January 28, 2016. (Doc. No. 9.)

³ It is noted that petitioner simultaneously seeks to vacate that stipulation, which motion is denied herewith in an order under that index number, for the reasons stated in the memorandum accompanying the order.

Following remand to the Division, Grays, through counsel, demanded that the administrative complaint be dismissed for administrative convenience, so that she could pursue an action in federal court. (Doc. Nos. 11-13.) By letter dated April 13, 2016, the Division indicated that it was contemplating dismissing the matter for administrative convenience, and inviting any objections to such a disposition within 15 days following the date of the letter. (Doc. No. 14.) By letter dated April 28, 2016, petitioner stated that it objected to the Division's dismissal of the complaint for administrative convenience, on the ground that it had already come to a determination of no probable cause, and that a dismissal for administrative convenience was therefore improper. (Doc. No. 15.) Thereafter, on April 29, 2016, the Division dismissed the complaint for administrative convenience (Doc. No. 27.) and, in May 2016, petitioner commenced the instant proceeding.

POSITIONS OF THE PARTIES

Petitioner contends that it was arbitrary for the Division to dismiss the complaint for administrative convenience where it had already determined that there was no probable cause to believe that petitioner discriminated unlawfully against Grays. The Division contends, in response, that the dismissal for administrative convenience was within its discretion, in order to conserve its scarce resources.

CONCLUSIONS OF LAW

Judicial review of a dismissal for administrative convenience is limited to whether the Division's determination is "purely arbitrary." *Matter of East Riv. Hous. Corp. v New York State Div. of Human Rights*, 116 AD3d 562, 563 (1st Dept 2014); see *Acosta v Loews Corp.*, 276 AD2d

214, 219 (1st Dept 2000); *Matter of Universal Packaging Corp. v New York State Div. of Human Rights*, 270 AD2d 586, 588 (3d Dept 2000); *Kordich v Povill*, 244 AD2d 112, 114 (3d Dept 1998). In *Matter of East Riv. Hous. Corp. v New York State Div. of Human Rights*, the Court held that it was purely arbitrary for the Division to dismiss the complaint for administrative convenience where it had previously dismissed the complaint upon a finding of no probable cause to believe that there was discriminatory conduct. 116 AD3d at 563. The Court reasoned that, “[i]n the absence of any basis upon which to notice a hearing, the stated undesirability of noticing such a hearing cannot serve as a basis for [a dismissal for administrative convenience].” *Id.* (citation omitted). That reasoning controls here.

The Division has already found that there was no probable cause to believe that petitioner engaged in discriminatory conduct. The remand from this Court in no way affected the viability or finality of those findings. In the absence of a stated basis on which more fact finding and a public hearing was needed, it was improper for the Division to dismiss the complaint for administrative convenience merely because it “would be undesirable” to “notic[e] the complaint for hearing.” (Doc. No. 27.) Hence, the determination must be annulled. See *Matter of East Riv. Hous. Corp. v New York State Div. of Human Rights*, 116 AD3d at 563.

Accordingly, it is hereby:

ADJUDGED that the petition is granted; and it is further

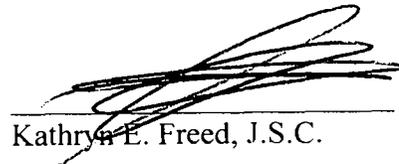
ADJUDGED that the determination of respondent State Division of Human Rights, dated

April 29, 2016, which dismissed respondent Rhoda Grays's administrative complaint for administrative convenience, is annulled; and it is further

ORDERED that this constitutes the decision and judgment of the court.

Dated: October 19, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', is written over a horizontal line.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**