

Matter of Sills v Kerik
2002 NY Slip Op 30065(U)
July 3, 2002
Supreme Court, New York County
Docket Number:
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sherry Klein Heitler
Justice

PART 30

Edward Sills

INDEX NO.

122389/01

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

Bernard Kerik, et al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as per the memo decision of 7-3-02.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7-3-02

Sherry Klein Heitler
SHERRY KLEIN HEITLER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

..... X

In the Matter of the Application of

EDWARD SILLS,

Petitioner,

Index No. 122389/01

ORDER AND JUDGMENT

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

-against-

BERNARD KERIK, as Commissioner of the
New York City Police Department,
THE NEW YORK CITY POLICE DEPARTMENT
and THE CITY OF NEW YORK,

Respondents.

..... X

SHERRY KLEIN HEITLER, J.:

Pursuant to Article 78 of the CPLR, petitioner, Edward Sills, asks the court for an order annulling and setting aside the petitioner’s termination of employment, directing the respondent, Police Commissioner, to reinstate the petitioner to his position of Police Officer with the NYC Police Department, with all payments of salary, back pay, interest, seniority and emoluments due to him from August 10,2001. The respondent opposes this application and cross-moves for an order dismissing this petition.

BACKGROUND

Petitioner became a Police officer on January 3, 1983. In 1993 and 1996, he voluntarily entered and completed alcohol rehabilitation programs. On June 2,2000, petitioner pled guilty to Vehicle and Traffic Law § 1192.1,Driving While Impaired. Thereafter, petitioner entered an alcohol rehabilitation program connected with the New York City Police Department’s Counseling Services Unit. He completed said program on April 25,2001. Petitioner received disciplinary Charges and Specifications on October 12, 1999 for the following conduct on October 10, 1999: (1) wrongfully

operating a motor vehicle while under the influence of alcohol or drugs; (2) wrongfully and without just cause refusing to submit to a breathalyzer test; and (3) being unfit for duty due to having consumed an unknown quantity of an intoxicant. Thereafter, after being advised that the penalty recommended for the Charges and Specifications sustained against him was dismissal from the police department, petitioner pled guilty to all of the above charges and entered into a Terminate Probation Agreement. The probationary time period for this agreement was one year. In the agreement there was a clause stating that “the Police Commissioner may impose punishment of Dismissal or any lesser penalty he deems appropriate at any time during such period”. The agreement provides the following language:

I am fully aware of the fact that I am entitled to a Disciplinary Hearing pursuant to applicable laws of the City and State of New York in which I would be entitled to representation, to confront witnesses against me and to appeal an adverse decision rendered after such hearing to a Court or Administrative Agency of proper jurisdiction. (See, paragraph 3, Termination Agreement dated November 9, 2000.)

* * * * *

If this penalty is approved by the Police Commissioner, I accept said decision, and as a condition of accepting such decision of the Police Commissioner, I hereby waive any and all rights granted to me under all applicable laws of the City and State of New York and acknowledge that this acceptance is the same as a finding of guilt after a hearing. (See, paragraph 9, Termination Agreement dated November 9, 2000.)

On August 10, 2001 respondents terminated petitioner from his employment without a hearing. The following events led to his termination.

On August 4, 2001, (during the dismissal probation period) petitioner, while off duty, participated with a group of officers in drinking beer to celebrate a fellow officer’s engagement. Petitioner’s tour of duty ended at 8:00 AM. The drinking took place in a parking lot across the street from petitioner’s precinct. The parking lot had a no-fee license agreement with the 72nd Precinct

from February 1998 until November 30, 1999. Among the officers drinking was Officer Joseph Gray, who later that day hit a pregnant mother, her child and sister while allegedly driving under the influence. Petitioner claims to have consumed two beers and stayed until 10:00 a.m. before returning home. He states that at no time was he intoxicated or unfit for duty.

It is asserted that after petitioner's departure, some officers, including Joseph Gray, remained at the parking lot and then went to a strip club in the area. What occurred after was heavily covered by the media.¹ Petitioner asserts that the coverage created much negative publicity about the NYC Police Department and its practices and procedures governing the use of alcohol by police officers.

Petitioner was ordered by the police department to answer questions regarding the events of August 4, 2001. He claims to have cooperated completely with the investigation.

Petitioner argues that he did not commit any misconduct and, as such, there was no reason for his termination. Specifically, he claims that the drinking was done on private property and that off-duty police officers are not prohibited from drinking alcohol as long as they remain fit for duty. Petitioner also points to his disability (alcoholism) in claiming employment discrimination by the respondents. Petitioner claims that respondents sought to rid itself of an employee with a previously admitted drinking problem and used his probation agreement as a pretext for his termination so that he would not be entitled to a hearing. Petitioner further asserts that the real reason for his termination was to quell the intense negative publicity on the Police Department. Petitioner asserts such actions violate the ~~Human~~ Rights Law as codified by Executive Law §296(1). Petitioner further argues that since unemployment insurance compensation is not granted when there is a substantiated allegation of a termination for cause, the fact that he was able to receive unemployment insurance compensation without opposition from respondents confirms his lack of misconduct.

¹ Officer Gray was later convicted of manslaughter for these deaths.

Aside from his conviction for Driving While Impaired, petitioner claims that his employment history shows an excellent record with the Police Department including one commendation from the Police Commissioner and four medals for Meritorious Police Duty. Petitioner claims his termination is “unjustified, unduly harsh, arbitrary, capricious, made in bad faith, and...shocking to one’s sense of fairness”.

Respondent filed a cross-motion to dismiss the petition under Rule 3211(a)(7) and Rule 7804(f) of the CPLR for failure to state a cause of action. Respondent argues that at the time of petitioner’s termination, he was under dismissal probation which allowed for his termination without a hearing and without a statement of reasons absent a constitutional or statutory violation. Respondent also asserts that petitioner’s employment discrimination claim fails to state a cause of action as a matter of law.

Respondent claims that it is well-settled that as long as a dismissal is not made in bad faith, a probationary employee may be dismissed for any reason or for no reason without a hearing or statement of reasons. (See Swinton v. Safir, 93 N.Y.2d 758 (1999); York v. McGuire, 63 N.Y. 2d 760 [1984].) Respondent quotes from Wilson v. Bratton, 266 A.D.2d 140, 141-42 (1st Dept. 1999) to support his contention that the same standard applies to employees who are terminated while serving a period of dismissal probation, (“[a]bsent bad faith, a municipal agency may summarily terminate a probationary employee for any reason as petitioner acknowledged when she signed the agreement to dismissal probation...”). (See also Civil Service Law 63; Ward v. Bratton, 237 A.D.2d 204 [1st Dept. 1997]; Prestia v. Brown, 191 A.D.2d 224 [1st Dept. 1993].) Defining bad faith as a violation of constitutional or statutory law (see York, 63 N.Y.2d 760; Soto v. Koehler, 171 A.D.2d 567 [1st Dept. 1991], app. den., 78 N.Y.2d 855 [1991]), respondent asserts that petitioner carries the burden of showing that he was terminated in bad faith. (See Swinton, 93 N.Y.2d. 758; Soto, 171

A.D.2d 567.) Respondent notes that the mere assertion of bad faith without demonstrative evidence is insufficient. (See Soto 171 A..D.2d at 568.) Respondent also argues that on judicial review, the agency's decision to terminate a probationary employee should not be second-guessed. (See Soto 171 A.D.2d at 569.) Respondent claims that even if petitioner's contention that he was fired to quell the public outcry is true, it still does not articulate the constitutional or statutory violation to establish bad faith.

Respondent asserts that petitioner's claim of employment discrimination is without merit as §296 only applies to employees who are seeking rehabilitation at the time of dismissal or who have already been rehabilitated (see, Burka v. New York City Transit Authority, 680 F. Supp. 590,601 [S.D.N.Y 19881). Respondent argues that petitioner meets neither of those conditions and is therefore not required to protection under §296. In addition, respondent claims that protection is not granted from dismissal due to misconduct, which respondent claims was the reason for petitioner's dismissal. Respondent points out the Commissioner's special duty to ensure the safety and order of the city and the higher standards of fitness and character demanded of police officers.

The court must consider whether or not plaintiffs termination was unjustified, unduly harsh, arbitrary, capricious or made in bad faith. **As** long as the dismissal is not made in bad faith, a *probationary* employee may be dismissed for any reason or for no reason without a hearing or statement of reasons.(See Swinton v. Safir, 93 N. Y. 2d. 758 [1999]; York v. McGuire, 63 N. Y. 2d 760 [19841.) Therefore the issue in this case is whether the NYC Police department exercised bad faith in terminating Sills' employment. Bad faith is defined as a constitutional or statutory violation. (See York; Soto v. Koehler, 171 A.D.2d 567 [1st Dept. 19911.) The determining question, then, is whether the police department's termination of Sills violated either the Constitution or a statute. If there is no violation of the Constitution or a statute, the court will conclude that the termination was

in good faith and, therefore, petitioner's motion will be denied.

The burden is on the petitioner to show the exercise of bad faith by the respondent (see, Soto, 171 A.D.2d 567 [1st Dept., 1991]). Petitioner asserts that his termination was an attempt to quell the negative media scrutiny that had arisen due to the arrest of fellow Police Officer Joseph Gray for the killing of pedestrians while under the influence of alcohol. Ultimately petitioner is asserting that the police department's bad faith is that it offered Sills as a sacrificial lamb to an outraged public. Petitioner argues that his termination was arbitrary, capricious and otherwise unlawful. While petitioner offers some persuasive arguments, they all appear to ignore the important fact that Sills was a **probationary** officer, having been placed on probation after he pleaded guilty to Vehicle and Traffic Law § 1192.1, Driving While Impaired.

Respondent's cross-motion correctly asserts that as petitioner was on probation at the time of his termination, nothing short of a constitutional or statutory violation constitutes bad faith for Sills' termination. Subject to his probation, which had been offered in lieu of termination, petitioner signed an agreement stating that the Police Commissioner may impose punishment of Dismissal or any lesser penalty he deems appropriate at any time during such period. The words are unambiguous. Dismissal of petitioner, who, while on probation for intoxication, consumed two beers, is within the Police Commissioner's discretion (see, Walton v. Safir, 122 F.Supp.2d 466 [S.D.N.Y., 2000]). The Commissioner *may* exercise his discretion and choose a lesser punishment; however, in this case, the Commissioner chose to dismiss Sills. That was a choice which was within his discretion.

In Swinton v. Safir, 93 N.Y.2d 758 (1999), a probationary police officer in the New York City Police Department, was dismissed following an investigation by the Department of Internal Affairs Bureau (IAB). Petitioner had been accused of attempted rape by a former girlfriend who later

recanted the accusation. The court held that IAB was not obligated to accept the recantation. False statements given by petitioner to police investigators served as a proper basis for his dismissal. The court stated that while under probationary status, an officer “may be dismissed for almost any reason, or for no reason at all. As a probationary officer, petitioner had no right to challenge the termination by way of a hearing or otherwise, absent a showing that he was dismissed in bad faith or for an improper or impermissible reason.”

Similarly, in York v. McGuire, 63 N.Y.2d 760 (1984), the Court of Appeals held that a probationary officer had no right to challenge her dismissal. The fact that the probationary police officer received some favorable evaluations as well as unfavorable ones during her probationary period was insufficient to raise a triable issue of fact as to whether her dismissal was grounded in bad faith, improper motive, arbitrariness, or capriciousness. The court asserted that a probationary city employee may be discharged without a hearing and without statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law.

A case with similar facts to the current case is Wilson v. Bratton, 266 A.D.2d 140 (1999). Wilson had been placed on dismissal probation after she was found unfit for duty due to intoxication. Since joining the police force, she had accumulated a prior disciplinary record. Though, like Sills, she could have been terminated for the incident involving the intoxication, she was placed on dismissal probation for one year. She signed an agreement acknowledging that “[d]uring this period the Police Commissioner may impose the penalty of Dismissal at any time without further proceedings.” Petitioner was apparently late for duty at least 15 times during her probation. Her commanding officer had warned her that continued tardiness could lead to her dismissal. The Appellate court held that lateness is sufficient grounds to terminate a probationer’s employment.

Further, even in the case of a non-probationary officer, the Commissioner has the right to terminate for purposes of maintaining the integrity of the police department. In Hagmaier v. Bratton, 665 N.Y.S.2d 880 (1998), petitioner, not a probationary officer, was dismissed from his position as a police officer for conduct while off-duty which undermined the integrity of the police department. The court dismissed petitioner's contention that his dismissal was based on his alcoholism. The conduct occurred while the officer was out of town to attend a memorial service for slain police officers. On two occasions he slid down a hotel escalator banister, in the nude; in addition, and without cause, he discharged a fire extinguisher resulting in the hotel's evacuation in the early morning hours. Similarly, in Marrow v. Safir, 660 N.Y.S.2d 582 (1997), the court recognized respondent's accountability to the public for the integrity of the Police Department. This case arose out of the same set of circumstances as Hagmaier v. Bratton.

The circumstances in the case at bar are more serious than those described in Hagmaier and Marrow because plaintiff admits to driving home after he was drinking. Although he claims he only consumed two beers he may nonetheless have been impaired and potentially endangered innocent lives. As a policeman with a history of intoxication, he should have been sensitive to the fact that he chose to drive after he was drinking. Because policemen enforce the law, they must conduct their lives in a manner which never calls into question their respect for the law. To act otherwise undermines the dignity of the police force. In this case the petitioner ignored his history with alcohol; he further didn't appreciate the fact that, despite this history, he was given a second chance. That second chance was his being put on probation.

The court must now determine whether plaintiff may assert a claim under Executive Law, Article 15, Human Rights Law Section §296(1). Section §296(1) states:

It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

New York State defines a disability as follows:

The term “disability” means (a) a physical mental or medical impairment resulting from anatomical physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

Mental Hygiene Law §1.03(4) defines alcoholism, as:

The use of alcohol or substances or both, to the extent that there is evidence of physical or psychological reliance and impairment of normal development or functioning due to such use in one or more of the major life areas including but not limited to the social, emotional, familial, educational, vocational, and physical.

The comprehensive definition of disability, combined with the statutory definition of alcoholism in the Mental Hygiene Law resulted in the New York Court’s decision to afford protection to alcoholics in employment discrimination cases (see, Albany Law Review, Vol. 57, No. 2, P. 527, *Protecting Alcoholics under the Americans with Disabilities Act and New York Law: A Statutory Tug of War*).

In the instant matter, the plaintiff had a history of enrolling and completing alcohol rehabilitation treatment programs and relapsing thereafter. On the date in question, he concedes that

he consumed two beers before driving home that morning. He does not present evidence that he was in an alcohol rehabilitation program at the time or that he was rehabilitated. In fact, he states that he had completed a program approximately 3-1/2 months prior to the date that he consumed two beers from 8:00 AM to 10:00 AM. New York Mental Hygiene Law further defines alcoholism as a “chronic illness in which the ingestion of alcohol usually results in the further compulsive ingestion of alcohol beyond the control of the sick person to a degree which impairs normal functioning” (see, New York Mental Hygiene Law § 1.03). With this definition in mind, it is impossible to reconcile plaintiff's assertion that he is an alcoholic who merely consumed two beers one morning while off duty with the nature of this disease, which implicitly precludes drinking in moderation.

As his admitted conduct demonstrates that he is an alcoholic who continues to drink and is not in a rehabilitation program, he cannot claim protection under §296(1). Section 296 only extends protection to rehabilitated and rehabilitating drug abusers (see, Burkav. NYC Transit Authority, 680 F.Supp. 590, 601 [S.D.N.Y. 1988]). The work of police officers' is unparalleled. They are responsible for our public safety. We entrust them with the important and crucial duty of our protection and authorize them to carry arms. Under such circumstances, the Police Department cannot risk the chance that an officer may be potentially impaired when called upon to serve. The nature of the occupation requires not only that an officer be astute; he or she must also be physically sound as well.

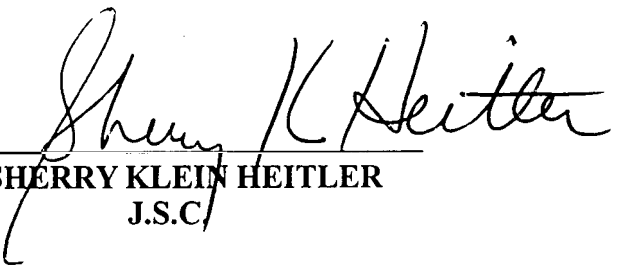
The court notes, however, that even if the plaintiff did fall within the scope of §296, the reason proffered by the Police Department for his termination is the maintenance of the integrity of the Police Force, and legitimate and non-discriminatory in nature. Similarly, in the Matter of the Claim of Joyce M. Atkinson (185 A.D.2d 415 [3rd Dept., 1993]), the court found an employer's termination of an employee for casual cocaine use not discriminatory as it was based upon adverse

effects on an employee's integrity. The integrity of the police force is sacred and their honor must be guarded. One of the most important aspects of our justice system is the idea that law enforcement personnel uphold our laws. When an officer's conduct, even while off-duty, diminishes the public's respect for the police force, it undermines the community's confidence in their function.

Finally, petitioner's argument that the fact that he collected unemployment insurance is evidence that he was not fired for misconduct, is unpersuasive. Even assuming that the Police Department objected to petitioner's application and a hearing was held finding no misconduct on the part of the petitioner, such a finding would not be dispositive of the issues raised in this application (see, Rivoli v. Stern, 160 A.D.2d 601 [1st Dept., 1990]).

In light of the totality of the circumstances, the court finds that petitioner has failed to meet his burden and grants respondents' cross-motion and dismisses this petition. The Clerk of the court shall enter judgment accordingly.

DATED: JULY 3, 2002


SHERRY KLEIN HEITLER
J.S.C.