

**David v New York City Commn. on Human
Rights**

2007 NY Slip Op 31312(U)

May 14, 2007

Supreme Court, New York County

Docket Number: 0112791/2005

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER D. TRUJILLO

PART _____

Index Number : 112791/2005

DAVID, VANESSA C.

vs
COMMISSION ON HUMAN RIGHTS

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____, 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

IN ACCORDANCE WITH A COURT REPORTER'S MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/14/07

W.D.T.

WALTER D. TRUJILLO J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
VANESSA C. DAVID,

Petitioner,

Index No. 112791/05

-against-

NEW YORK CITY COMMISSION ON HUMAN
RIGHTS, NEW YORK CITY DEPARTMENT OF
EDUCATION, FRANK BORROWIEC,

Respondents.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

-----x
WALTER B. TOLUB, J:

In this Article 78 proceeding, petitioner, Vanessa C. David (referred to as petitioner or complainant), seeks a judgment granting the following relief: (1) annulling and vacating a "Determination and Order After Review," dated August 9, 2005, which affirmed a certain "Determination and Order After Investigation," dated April 15, 2005, issued by respondent New York City Commission on Human Rights (the HRC) (collectively referred to as the No Probable Cause Determination), in the matter entitled Vanessa David v New York City Board of Education, Frank Borrowiec (Complaint No. 1006891, GC No. 05-526N, Federal No. 16-F-99-0182); (2) converting this Article 78 proceeding into an action at law; or (3) in the alternative, remanding this matter back to the HRC with instructions to issue a probable cause determination.

Respondent New York City Department of Education (DOE) cross-moves for an order pursuant to CPLR 306 (b), 7804 (c) and 7804 (f), dismissing the petition on the ground that this court does not have jurisdiction over DOE.

Petitioner cross-moves for an order, pursuant to CPLR 306-b, extending the time to serve respondents DOE and its employee, Frank Borrowiec (Borrowiec), in the interests of justice.

PRIOR HISTORY

Petitioner, an African American lesbian woman, was hired on or about May 18, 1998 as a City Laborer¹ in the DOE's Division of School Facilities, Central Repair Shops. On or about February 9, 1999, her employment was terminated by Borrowiec, her former supervisor.² On February 10, 1999, petitioner filed a verified complaint with the HRC against the DOE and Borrowiec. She claimed that the DOE and Borrowiec terminated her employment because of her gender, color and race, in violation of the Administrative Code of the City of New York. Petitioner alleged

¹Petitioner's job consisted of working on a platform, lifting and transporting sheetrock, loading building materials onto trucks for delivery to various sites, driving trucks, and moving the internal equipment and furniture between buildings (HRC's Memorandum of Interview with petitioner, at 2; HRC's Memorandum of Interview with Borrowiec, at 1).

²Borrowiec had worked with petitioner in the past, and had recruited her for the position of Laborer when it became available.

that Borrowic terminated her without cause, and without any indication that there were problems with her work.

In its answer, the DOE denied the allegations of discrimination, alleging that "petitioner had failed her probationary period miserably" by, inter alia, working slowly, showing little initiative, failing to accept responsibility, and refusing to accept driving assignments. Petitioner maintained that DOE's allegations regarding her work performance and attitude were false.

After the complaint and answer were filed, petitioner submitted to HRC's investigator a petition signed by 19 of her co-workers, including the shop steward, John Powers (Powers) (referred to as petition signatories). The petition signatories attested "to the fact that [petitioner] is a conscientious and good worker [who] performed her duties"

On June 18, 2003, the DOE's Law Enforcement Bureau issued a "Determination and Order After Investigation" (the Determination), consisting of one and one-half pages. The Determination found no probable cause to believe that the respondents had engaged in the unlawful discriminatory conduct complained of by the complainant. On July 14, 2003, petitioner applied to the HRC for review of the Determination. On September 4, 2003, the Determination was affirmed. Petitioner thereafter commenced an Article 78 proceeding.

THE PRIOR ARTICLE 78 PROCEEDING

In a decision and order dated April 19, 2004 (the Prior Decision and Order), Justice Alice Schlesinger reviewed and detailed petitioner's history with the HRC. After providing a lengthy and detailed account of HRC's mishandling of petitioner's complaint, Justice Schlesinger found that HRC failed to conduct a full and fair investigation to which petitioner was entitled.³

Justice Schlesinger observed, inter alia, that petitioner was never given a reasonable opportunity by HRC to rebut DOE's answer to her complaint; and that neither Borrowiec, whose job performance evaluation of petitioner was the basis of HRC's Determination, nor the 19 petition signatories who attested to petitioner's good work practices, were interviewed by HRC's investigator.

Justice Schlesinger criticized HRC for its "complete lack of investigation." She granted the petition, annulled the Determination, and remanded the matter to HRC for them to conduct a full and fair investigation of petitioner's claims of wrongful termination. Petitioner was further granted the right to

³Justice Schlesinger indicated that "an investigation should have included interrogatories, document requests, field visits and/or interviews," and that "virtually none of that was done."

* 6.]
amend the complaint to include a claim of discrimination based upon sexual preference.⁴

On October 1, 2004, in accordance with the directive of the Prior Decision and Order, HRC mailed complainant a draft of petitioner's amended complaint. The amended complaint alleged gender, sexual orientation, race and color discrimination. It added allegations that Borrowiec subjected the petitioner to derogatory comments about her gender, sexual orientation, race and color. In support of her sexual preference discrimination claim, petitioner told HRC that Powers related the following remark to her made by Borrowiec: "[petitioner] likes what we like [presumably referring to women]." Thereafter, complainant executed the amended complaint, and on December 14, 2004, HRC served the amended complaint on respondents, DOE and Borrowiec.

In its No Probable Cause Determination, dated April 15, 2005, HRC concluded, in a 13 page decision, that "unlawful discrimination did not play a role in Respondent's decision to terminate Complainant's employment," and dismissed the amended complaint. By Determination and Order After Review, dated August 9, 2005, HRC affirmed the "Determination and Order After

⁴It was noted in the Prior Decision and Order that petitioner stated in her verified petition, that it was "only after rumors of [her] sexual preference started that [she] was terminated."

Investigation" (collectively, the No Probable Cause Determination).

THE PRESENT PETITION

In the instant petition, petitioner seeks to vacate the No Probable Cause Determination, and to have her discrimination claims heard directly by this court. In the alternative, she requests that this court remand her case to HRC with instructions to issue a Probable Cause Determination. She bases her request on her contention that HRC failed to afford her a full and fair investigation for the second time, and that it would be futile to remand back to the HRC.

Petitioner claims that her complaint of discrimination has continued to be mishandled. She argues that HRC never intended to provide petitioner with a full and fair investigation, and that, instead, it intended to issue another "no probable cause" determination. Petitioner points to an article which appeared in The Chief,⁵ dated May 14, 2004, wherein an unnamed official of HRC, in discussing the Prior Decision and Order, was quoted as saying:

Unfortunately, though the Commission conducted a thorough investigation in the David case, many of the relevant findings that justified the Commission's dismissal were not included in the closure documents... We will, however, prepare a new document containing

⁵The Chief is a New York City civil service newspaper.

sufficient facts to justify the Commission's original determination.⁶

Petitioner further states that, on September 27, 2004, she and her counsel appeared at the offices of HRC at 40 Rector Street for an interview, where she felt she was insulted and belittled. Susan Slovak-Stern (Stern) and Lanny Alexander (Alexander) of HRC conducted petitioner's interview. Powers, the shop steward, whom Justice Schlesinger described as a "prime witness" in the Prior Decision and Order, also came to the meeting. Stern and Alexander advised petitioner and Powers that they were not prepared to interview Powers since he had not been expected, and that he should leave.⁷

Petitioner contends that her interview, which was conducted after Powers left, is further evidence that HRC did not intend to conduct an objective investigation. She alleges, among other things, that in response to her attorney's pointing out that the Division of Trucking had 45 employees, of which only three were black, HRC stated that the disparity between the number of white employees and black employees was common in City agencies, and that certain trades had a heavier concentration of certain ethnic groups. Petitioner further alleges that when she stated that she

⁶Petitioner expressed these concerns to HRC (and to the court), and she was reassured that the statements set forth in the above article did not represent the views of HRC.

⁷Powers was thereafter interviewed by HRC at DOE's Department of School Facilities' warehouse.

[*9] felt uncomfortable when Borrowiec called her "gal" in the workplace⁶, she was told by HRC that calling her "gal" was not equivalent to calling a black man "boy." Petitioner also claims that she was forced into a defensive position when asked about her remarks in the workplace regarding her sexual preference, and about her lack of diligence in seeking employment after her termination from DOE.

Petitioner further claims that the investigation conducted by HRC, and the No Probable Cause Determination, were tainted because, inter alia, the investigation consisted of interviews with DOE witnesses who were "prepped" in advance by Borrowiec; and, the No Probable Cause Determination omitted mention of petitioner's interview, despite noting the interviews of 20 co-workers. Petitioner states that, of the 16 co-workers interviewed, 10 rendered favorable interviews, one never worked with petitioner, and that only the "(white) co-workers who were prepped privately by Borrowiec stood against her."

Responding to the petition, HRC generally denies the allegations, and asserts four affirmative defenses, viz: (1) the relief sought by petitioner cannot be obtained pursuant to Article 78 of the CPLR; (2) the proceeding is barred by reason that it was not commenced within the time period provided by

⁶Petitioner conceded that she never told Borrowiec that she felt uncomfortable when he called her "gal."

Section 8-123 (h) of the Administrative Code; (3) failure to state a cause of action; and (4) the No Probable Cause Determination was not arbitrary and capricious.

HRC maintains that it conducted a full and fair investigation, which included: a site visit, interviews of over 20 employees, and a review of documents, including personnel and disciplinary records. It disputes petitioner's contention that DOE employees were "prepped," and attaches a copy of a memorandum, dated March 18, 2005, that was issued by DOE's General Counsel, advising employees that interviews would be conducted, that there should be full cooperation with the investigation, that there would be no retaliation for cooperating with the investigation, and that employees were to be truthful. HRC contends that it questioned various employees who confirmed that Borrowiec limited his comments regarding the investigation to the contents of the memorandum.

HRC recounts that it interviewed 14 of the 19 petition signatories, as well as several other of petitioner's co-workers and managers, for a total of 24 persons interviewed. HRC attaches copies of various file memoranda prepared by Stern, which discuss the interviews she, Alexander, and Christine Kicinski, another HRC employee, held with petitioner's former co-workers at DOE's Department of School Facilities' Warehouse, and by telephone interview.

HRC notes that 6 of the original 19 petition signatories never worked with petitioner, could not comment on petitioner's abilities, and stated that they signed the petition at petitioner's request, and to support her as a fellow union member. Also, two of the original signatories have resigned, and three of the original signatories were terminated at Borrowiec's recommendation.⁹

HRC further relates that of the eight petition signatories who were available, and who actually had knowledge of petitioner's job performance, five said the petitioner was a good worker, and a couple questioned petitioner's endurance. Although another co-worker, Thomas Rabat (Rabat), said that petitioner was "a good worker," two other witnesses testified that Rabot "consistently complained about the Petitioner's work and the fact that she was on his team." (Aff in Opp. at 10).

All of the witnesses, except for Powers, complained that the petitioner refused to drive, even though driving was a major component of the job, and many complained that it was unfair. There were also numerous complaints about petitioner's inability to lift heavy materials and lack of endurance. All of the people interviewed (except for Powers) stated that they never heard any

⁹HRC contends that its attempts to contact them at their last known addresses failed. There were six employees who were terminated by Borrowiec during his tenure. Five were caucasian males, and one was the petitioner.

inappropriate or derogatory comments made by any crew members or Borrowiec about petitioners' race, color, gender, or sexual orientation.

The issue here is whether HRC conducted a full and fair investigation as directed by the Prior Decision and Order, and whether the No Probable Cause Determination was arbitrary or capricious. As noted in the Prior Decision and Order, judicial review herein is limited to:

(3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.

HCR's determination of no probable cause should not be overturned as capricious, unless the record demonstrates that its investigation was "abbreviated or one-sided," and that its determination was not rationally based on the record (Levin v New York City Commission on Human Rights, 12 AD3d 328 [1st Dept 2004]). After a careful review of the papers, this court finds that HRC complied with the Prior Decision and Order by conducting a full and fair investigation. HRC's investigation included interviews with petitioner and numerous other employees at petitioner's facility, as well as a review of personnel records, correspondence and other pertinent documents.

Petitioner clearly had a full opportunity to present her contentions and her evidence.

A review by this court of the exhibits shows that HRC did not act arbitrarily or capriciously. There was ample evidence to support the determination of no probable cause for petitioner's complaint. Further, there is no evidence in the papers that the acts of which petitioner complains were motivated by the fact of her race, color, sexual preference or gender. Thus, there was a rational basis in the record for the No Probable Cause Determination (see Matter of Pell v Board of Education of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]; Stern v New York City Commission on Human Rights, 38 AD3d 302 [1st Dept 2007]; Matter of Buckhout v New York City Commission on Human Rights, 203 AD2d 67 [1st Dept 1994]; Chirgotis v Mobil Oil Corp., 128 ADd 400 [1st Dept 1987]). Finally, it is not necessary that HRC's determination be the only one possible on the facts; rather, the test is whether HRC's conclusion was reasonable (Matter of Imperial Diner, Inc. v State Human Rights Appeal Bd., 52 NY2d 72, 79 [1980]). In light of the standard of review, this court denies and dismisses the petition.

CROSS MOTIONS

DOE cross-moves to dismiss the petition on the ground that this court lacks jurisdiction over the respondent. DOE argues

that the proceeding is time-barred by reason of petitioner's failure to comply with CPLR 306-b. Petitioner cross-moves for an order, pursuant to CPLR 306-b, extending the time to serve respondents DOE and Borrowiec in the interests of justice. Although petitioner filed the instant petition seeking to annul the No Probable Cause Determination, dated August 9, 2005, on September 13, 2005, petitioner did not serve DOE until July 24, 2006.

Section 8-123 (h) of the Administrative Code provides for a 30-day statute of limitations to review a No Probable Cause Determination by HRC.¹⁰

CPLR 306-b provides that:

where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitation expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

"The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interest presented by the parties" (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105 [2001]).

¹⁰It appears that Borrowiec was never served with process in the instant proceeding.

In contemplating whether to grant an extension of time, the court may consider, inter alia, lack of diligence, the meritorious nature of the claim, and whether a viable cause of action would be dismissed absent the exercise of its discretion to extend plaintiff's time to effectuate service in accordance with CPLR 306-b (id. at 105-106).

In the present case, it is undisputed that petitioner did not serve DOE in a timely manner. Inasmuch as this court has determined that there is no merit to the petition, there is no need to discuss petitioner's arguments in support of her cross motion, since there is no danger of a viable claim being dismissed. Accordingly, petitioner's cross motion to extend her time to serve DOE and Borrowiec in the interests of justice, is denied. DOE's cross motion to dismiss the petition is granted.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ADJUDGED that New York City Department of Education's cross motion to dismiss the petition is granted; and it is further

ADJUDGED that petitioner's cross motion is denied.

This constitutes the decision and judgment of the court.

DATED: 5/14/07

ENTER: _____

UNFILED JUDGMENT WALTER B. TOLUB J.S.C

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