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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 109745/2006

FULCHER, AKEDAH

vs

HORN, MARTIN F.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Petition denied in accordance with accompanying memorandum decision of even date.

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

Dated: May 30, 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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In the matter of the application of
Akedah Fulcher,
Petitioner,

for a judgment pursuant to Article 78 of the CPLR

-against-

Martin F. Horn, commission of the New York City Department of Correction; The New York City Department of Correction; and The City of New York,
Respondents.

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DECISION/ORDER
Index No.: 109745/06
Seq No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Notice of Pet & Verified Pet, exhs	1
amended Notice of Petition (sep back)	2
DOC & City answer	3
Pet reply	4

Gische, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

Petitioner Akedah Fulcher ("petitioner" or "Ms. Fulcher") seeks an Order pursuant to Article 78 of the CPLR: 1) annulling the decision of the New York City Department of Corrections ("DOC") dated March 13, 2006 that terminated her employment as a corrections officer; and 2) restoring her to her job as a corrections officer with an award of back pay and benefits. Alternatively, petitioner seeks an order from this court

directing a hearing on the allegations she has set forth in her petition. Commissioner Horn, the Department of Corrections and the City of New York (collectively, the "defendants") have answered the petition. They deny that their decision to terminate petitioner's employment was affected by an error of law, arbitrary and capricious, or an abuse of discretion. The respondents, therefore, seek an order denying the petition, without a trial. CPLR § 7804 (h)

Background and Allegations

Petitioner is an African American female who is also a practicing Orthodox Jew and Sabbath observer. She was hired as a corrections officer and began her training with DOC on March 4, 2004. She contends that from the outset, DOC has resisted her timely and reasonable requests for accommodations on account of her religious observances, including the Sabbath and holidays. Petitioner contends further that after she filed complaints with the Equal Employment Opportunity Commission ("EEOC") she was targeted for disciplinary action by her supervisors, including Deputy Warden Davis. Thus, it is her contention that there was a mixed motive for her termination from the department in March 2006. Since each side presents statements of facts in support of their legal arguments they are examined to determine whether there are factual disputes that would require a trial to resolve them. CPLR § 7804 (h).

Petitioner does not deny that she was arrested on Grand Larceny charges stemming from her failure to return a car she rented in her name. She also does not deny that she failed to report the arrest to her commanding officers. Petitioner claims, however, that the department impermissibly fired her because they took into account other prior disciplinary actions against her involving her taking off the Sabbath, and in

retaliation for making complaints about her supervisors. Thus, it is her contention that there is a triable issue of whether there was a mixed motive for her termination. Petitioner contends that her being outspoken and unyielding about observing her religious tenets made her a target for discrimination. Petitioner claims that once the respondents saw an opportunity to rid themselves of a "troublemaker," they seized upon it.

Without conceding that petitioner's initial requests for a reasonable accommodation were neglected or mishandled in any way, respondents acknowledge that early in her career with the force, petitioner had to make individual requests in advance for each and every Sabbath day she wanted to off, or she to arrange to trade tours with her fellow officers, known as a "mutual". They also acknowledge that petitioner accumulated certain "AWOL" markings on her record (including those of March 13 and 26, 2004) in the first few months of being employed with DOC.

It was not until after petitioner complained directly to Warden Valerie Oliver in October 2004, and petitioner's lawyer sent a letter to the DOC's legal department threatening legal action, that petitioner's schedule was changed and she was assigned to a steady post from 1500 hours on Sundays to 2331 hours on Thursdays, obviating the need for weekly requests and mutuals.

Petitioner contends that despite these accommodations, and DOC's promise that it would expunge the AWOL markings on her record, they were not, in fact, expunged. Petitioner contends she then filed a complaint with the EEOC in November 2004 about DOC's discriminatory practices, including the disciplinary AWOL markings. In the complaint she identified one of her superiors, Deputy Warden JoAndrea Davis, by

name. Petitioner contends that after Deputy Davis learned of the complaint she denied her even the most routine request for time off or changes in her tour, including one she requested to attend sick relatives.

In opposition respondents first argue that petitioner was a probationary employee, therefore they had the absolute right to terminate her for any reason, or no reason at all, provided she was not terminated for a discriminatory reason. They contend that petitioner was not terminated for a discriminatory reason and that any claims by her of discrimination, including retaliation by her supervisors because of her EEOC complaints, or because her supervisors found her special accomodation requests burdensome, are makeweight arguments to detract attention from her poor work record, chronic attendance problems and demonstrated inability to properly do her job.

Respondents contend that the AWOLs that were originally placed on petitioner's employment record in 2004 were expunged by June 2005. They contend that the disciplinary markings that remained thereafter had nothing to do with petitioner being present or absent on any religious holiday or Saturday, but were violations she had earned for failing to follow protocol and were subject to command discipline. "Command discipline" is an informal disciplinary process whereby a commanding officer addresses minor violations ranked from "A" to "D" with "D" being the most severe that can be handled informally. The commanding officer decides the appropriate penalty, according to certain written guidelines, but the officer being charged can reject the findings and request a hearing. The command discipline manual (known as the "directive" or "directive 4257") provides for increased penalties as the officer

accumulates more command disciplines, or with their increased severity.

Respondents contend that petitioner accumulated a number of command disciplines and they rely on the following events in particular:

The first disciplinary action is that of May 21, 2004. Respondents contend that there is written policy that corrections officers must obtain prior permission for a mutual with another officer. Petitioner made an arrangement to trade her tour with another officer. She told the other officer that she had permission for the trade, but she had not, in fact, made the application for the mutual. Respondents provide an internal memorandum dated May 24, 2004 from the other officer (Officer Sanchez) to Warden Nadine Felton about this matter. There is another memorandum from Warden Felton indicated she investigated the matter and concluded that petitioner had, in fact, made a false statement because the mutual had not been approved through the proper channels. Petitioner does not address or deny this specific incident either in her complaint or in reply. May 24, 2004 was a Saturday and the incident predates petitioner's assignment to a steady tour of duty in October 2004.

On another occasion, respondents claim that petitioner had an approved mutual with a different officer, but petitioner failed to show up for the "payback day" (August 5, 2005). She was disciplined and her mutuals were denied for a period of three months. This punishment is consistent with available remedies under the discipline manual and it is also supported by an (unsworn) intradepartmental memo by Officer Carrington dated August 5, 2005 to Warden Riordan. Officer Carrington is the officer she had the mutual with.

Respondents contend that plaintiff failed to show up for work on June 7 and 8,

2005 and she was disciplined for being AWOL. They challenge plaintiff's claim that she properly and timely submitted a claim for emergency leave to attend to a sick relative. Both sides rely upon plaintiff's written request dated June 7, 2005 in which petitioner states she was to have worked back to back tours on June 8 as payback on a prior approved mutual, but she cannot payback as she had agreed. Petitioner further states she has arranged for a second mutual. That mutual, however, was not approved in advance and she was written up by her supervisor Captain Kolessar.

There is no dispute that charges were brought against petitioner for another incident that occurred on May 17, 2005 in which an "Orange Alert" was issued at the corrections facility. This followed a report by petitioner that there were only 59 prisoners, when in fact there were really 60 prisoners and no one was missing. Petitioner argues that this is actually further evidence of discrimination because she and her partner were equally responsible for the mistake, but her partner was not charged or disciplined.

Although it is undisputed that petitioner attended a meeting on September 21, 2005 with the EEOC, she was disciplined because her supervisors did not submit any documentation substantiating the time of her arrival and departure from the meeting. The complaint was filed by Captain Richard and DOC contends that absent the proper documentation, petitioner was AWOL.

On November 13, 2005 petitioner was arrested on charges stemming from her failure to voluntarily return a car she rented in her name a few months earlier. After a number of fruitless demands by the rental company for the car to be returned, the company reported the car stolen to the police and a copy of the report was sent to

petitioner's employer (DOC). The car was only recovered when petitioner was arrested and charged with Grand Larceny. Following her arrest, the Deputy Commissioner of DOC's Investigation Division requested that petitioner be terminated. This request was contained in a formal written memorandum dated December 2, 2005 from the Investigation Division to the Personnel Division. Petitioner was terminated March 13, 2006, the decision that is the subject of the present Article 78.

Respondents challenge a number of other claims by petitioner, including that she should have been the class valedictorian because she had the highest GPA in the graduating class. They contend that grades alone are not dispositive of who is conferred this distinction, but that other attributes such as being excellent attendance and exemplary professional demeanor also have to be taken into account, as set forth in the recruit handbook.

Notwithstanding the command disciplines against petitioner, respondents contend that her being arrested, and not reporting her arrest, was without anything more, enough of a reason to fire her. They contend she was fired following that incident, having nothing to do with any of the disciplines that were on her record. Respondents argue, in any event, that these markings on her record could have been avoided by petitioner. She could have opted for simply being docked (e.g. pay, time, etc.) but instead insisted on having hearings. The disciplines were then sustained at the hearings, and made a part of her record.

Finally, respondents contend that EEOC has already decided that that petitioner suffered no adverse employment action, but received reasonable accommodations for her religious observances. Thus, respondents argue that petitioner's claims of religious

discrimination are wholly unfounded, and this Article 78 must be denied.

Applicable Law

A probationary employee can be dismissed without a hearing and without a statement of reason so long as the termination was not for a constitutionally impermissible purpose or in violation of statutory or decisional law. Swinton v. Safir, 63 N.Y.2d 758 (1999); York v. McGuire, 63 N.Y.2d 760 (1984). Thus the court must decide whether the decision (in this case, to terminate petitioner from employment) was made in violation of lawful procedure, affected by an error of law, or arbitrary or capricious or an abuse of discretion. CPLR § 7803 (3). The determination of an administrative agency is entitled to great deference where, for example, the employee's termination is due to claims related to integrity reasons, for example filing false reports, positive drug testing, or trustworthiness. *See*: Soto v. Koehler, 171 AD2d at 571 (*citing* Matter of Trotta v. Ward, 77 NY2d 827 (1991).

Petitioner contends that she was fired because she is an Orthodox Jew. More particularly, petitioner claims the defendants fired her for filing complaints with the EEOC (retaliation) and even if they did fire her following her arrest, they had a mixed motive in doing so. Respondents assert they had a non-discriminatory reason for firing her, to wit: her arrest, and her failure to report her arrest.

For her petition to proceed to trial, petitioner must present facts that would tend to show that a discriminatory factor (e.g. here, her religion) was a motivating factor in the adverse employment action taken against her. Price Waterhouse v. Hopkins, 490 US 228 (1989). Once (and only if) she makes this initial showing does the burden then shift to her employer who must present facts tending to show that it would have made

the same decision (e.g. fire her) without the discriminatory reason. Price Waterhouse v. Hopkins, *supra*; Ostrowski v. Atlantic Mutual Ins. Co., 968 F2d 171 (2d Circuit 1992); McDonnell Douglas Corp v. Green, 411 US 792 (1973); Forrest v. Jewish Guild for the Blind, 3 NY3d at 305; Ferrante v. American Lung Association, 90 NY2d at 629.

The facts and indirect evidence offered by petitioner do not support her claim, that she was fired because of her religion or that religion was a motivating factor in her termination Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Card v. Sielaff, Department of Corrections,et al., 154 Misc2d 239 (Sup Ct NY Co. 1992) (*citing* Soto v. Koehler, 171 AD2d 567, 568 [1st Dept 1991]). Petitioner was fired after she was arrested for not returning the rental car. She does not claim the deputy commissioner who sent the memorandum calling for her termination knew anything about her, other than that she had been arrested. She makes no claim, for example, that he contacted her superiors and talked about her employment record. The memo expressly refers to her arrest and it provides details about the efforts the rental agency made to settle the dispute with petitioner without resorting to legal charges. There is no mention at all of petitioner's work record in the memorandum, only that she is a probationary employee. The memo is not carbon copied to any of the petitioner's supervisors at the facility, for example, Deputy Warden Davis, who she contends was angry about her complaints to the EEOC. Notably, petitioner does not deny that she was arrested, or that the incident occurred as described, or that she failed to report her arrest to her commanding officers.

Even were the court to find that a discriminatory factor played any role in petitioner's discharge, petitioner has failed to present any facts that rebut her

employer's showing that it would not have made the same decision (e.g. to fire her) without the claimed discriminatory reason. Price Waterhouse v. Hopkins, *supra*; Ostrowski v. Atlantic Mutual Ins. Co., *supra*; McDonnell Douglas Corp v. Green, supra Forrest v. Jewish Guild for the Blind, supra; Ferrante v. American Lung Association, supra.

Regardless of how these charges against petitioner are ultimately resolved (e.g. ACD, acquittal, etc.), the fact remains that petitioner was arrested and charged. It was only then that the "stolen" rental car recovered. Since petitioner is in charge of prisoners who are themselves incarcerated for (or charged with) having committed crimes, her termination by respondents following an arrest is not an irrational act by the respondents. Their decision to terminate her for being arrested is entitled to substantial deference by this court. Nor is it irrational for respondents to insist that an arrested officer notify the department when arrested. The respondents are accountable to the public for the integrity of the department and their officers. Soto v. Koehler, *supra*; Matter of Trotta v. Ward, *supra*. They cannot have officer who is arrested - and could be him or herself incarcerated - working with the prison population. Moreover, not only was petitioner on probationary status, and therefore dischargeable for any reason, or no reason at all, the arrest and charges against her were serious. Petitioner has come forward with no legal argument why she could not have been fired based upon the arrest alone.

Nor has petitioner provided any support for her claim that she was fired in retaliation for filing an EEOC claim or because other command disciplines stayed on her record, but should have been expunged. Although offered for different reasons,

each side relies upon the same documents that tend to show the AWOLs against petitioner in 2004 were dismissed and then removed. The other command disciplines were placed on petitioner's record only after a formal hearing. In at least one instance she participated in the hearings with the assistance of a union delegate (e.g. the family emergency, 6/7 and 6/8/05 incident). In fact the hearing was postponed so a delegate could be present. Petitioner has not shown that these decisions were part of a pattern of discrimination against her against her.

The court is not, however, denying the petition because, as respondents argue, the EEOC dismissed her complaint. The EEOC decided not to pursue the complaint simply because it chose not to allocate resources to this particular claim. The EEOC's decision is not, however, *res judicata*. *See*: Ott v. Perk Development Corp., 846 F. Supp (W.D.N.Y. 1994). The EEOC only concluded that at the time she filed her complaint petitioner had not suffered any actionable adverse employment action against her. In fact, the EEOC's decision expressly reserves to petitioner the right to pursue other legal remedies available to her, if that is what she decided to

Based upon the foregoing, petitioner has not met her burden of putting forth facts that would support her claim that the respondents terminated her because of discriminatory reasons, including absences or disciplinary actions or complaints made by her in connection with her observance of religious doctrine. *Compare*: Card v. Sielaff, Department of Corrections,et al., *supra* (termination of pregnant officer for chronic absence because of pregnancy-related sickness absences). There are no facts offered by petitioner, a probationary officer, that religion "was a motivating factor in the adverse work conditions imposed on her. . ." following her arrest in November 2005.

Desert Palace, Inc. v. Costa, supra. Even were the court to find that she did meet her initial burden, the respondents have presented a rational basis for petitioner's termination. The reason is neither impermissible nor in violation of statutory or decisional law. Soto v. Koehler, *supra*.

The petition is denied without a trial [CPLR § 7804 (h)] because petitioner has failed to present facts that she was fired for a discriminatory reason or that her religion was a motivating factor. Respondents' decision to fire petitioner is not based on a constitutionally impermissible purpose or in violation of statutory or decisional law. The decision is, therefore, not subject to judicial review.

Conclusion

Petition denied. The clerk shall enter judgment in favor of respondents against the petitioner. Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 30, 2007

So Ordered:

J.S.C.