

Matter of Robinson v Kelly

2007 NY Slip Op 32431(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0102510/2006

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Robinson, D

INDEX NO. 102510/06

- v -

MOTION DATE 6/29/07

Kelly Raymond

MOTION SEQ. NO. 03

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 _____

UNFILED JUDGMENT

his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or party's representative must appear in person at the Judgment Clerk's Desk (Room 11B).

Cross-Motion: Yes No

RECEIVED

JUL 27 2007

MOTION SUPPORT OFFICE

Upon the foregoing papers, it is ordered that this motion
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the petition seeking a judgment pursuant to CPLR Article 78, Executive Law Section 296, and 42 USC Section 1983 adjudging certain actions of respondent Raymond Kelly, Commissioner, New York City Police Department ("respondent") to be (1) arbitrary and capricious, (2) in violation of the Executive Law which prohibits discrimination based upon a perceived disability, and (3) directing respondent to reinstate petitioner to his former position as a New York City Police Officer with back pay, retroactive seniority and all benefits and emoluments of employment with the New York City Police Department, and (4) directing respondent to correct all personnel records, is denied and the petition is DISMISSED; and it is further

ORDERED that the branch of the petition which seeks an order pursuant to CPLR § 408, directing the respondent to serve and file upon the return date hereof certain discovery is denied; and it is further

ORDERED that petitioner serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and judgment of the Court.

Dated: 7/27/07

[Signature]
HON. CAROL EDMEAD J.S.C.

Handwritten: CHAS... 15185712

FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**CAROL EDMEAD
J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

In the Matter of the Application of
DAVID ROBINSON,

Index No. 102510/06

Petitioner,

-against-

DECISION/ORDER

RAYMOND KELLY, Commissioner,
New York City Police Department,

Respondent.

UNFILED JUDGMENT
His 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
41B)

Pursuant to CPLR Article 78,
Executive Law Section 296 and
42 USC, Sections 1983 and 1988

EDMEAD, J.S.C.

MEMORANDUM DECISION¹

In this Article 78 proceeding, petitioner David Robinson (“petitioner”) seeks an order adjudging certain actions of respondent Raymond Kelly, Commissioner, New York City Police Department (“NYPD”) (“respondent”) to be (1) arbitrary and capricious, (2) in violation of the Executive Law which prohibits discrimination based upon a perceived disability, (3) directing respondent to reinstate petitioner to his former position as a New York City Police Officer with back pay, retroactive seniority and all benefits and emoluments of employment with the New York City Police Department, and (4) directing respondent to correct all personnel records. Petitioner also seeks an order pursuant to CPLR § 408, directing the respondent to serve and file

¹ This decision follows this Court’s order dated March 7, 2007 which (1) granted renewal and reargument to permit the respondent to submit an Answer to the original Petition and then (2) vacated the portion of the Court’s order dated October 27, 2006, which remanded the underlying matter for a hearing before the respondent to permit petitioner an opportunity to question witnesses and establish the facts concerning his discharge. The Court now revisits the original Petition in light of the respondent’s Answer.

upon the return date hereof:

- (a) All reports, recommendations and other documents prepared, considered, utilized and relied upon by respondent in terminating petitioner's probationary employment;
- (b) Copies of any and all records, reports or notes relating to petitioner's performance at the Police Academy of the NYPD and in the Patrol Bureau; and
- (c) A copy of the petitioner's performance evaluation prepared by the NYPD, Police Academy.²

Background

According to the Petition, Petitioner took and passed the written examination for Police Officer #1049, NYPD. Petitioner satisfied all of respondent's background and character requirements for appointment as a police officer. Petitioner has no criminal history, no scoff law history and no debt history. Petitioner successfully underwent psychological tests and a structured interview conducted by a staff psychologist of the NYPD for appointment as a NYPD Police Officer. Petitioner was appointed a Probationary Police Officer at the NYPD on January 20, 2004. Upon appointment to the NYPD, petitioner satisfactorily completed the course work and met all of the physical training, firearms, tactics and driver training requirements at the Police Academy and graduated on July 7, 2004. Petitioner was not the subject of any disciplinary charges or specifications at the Police Academy. Petitioner had a good attendance and punctuality record at the Police Academy, and was assigned to Patrol Service Areas ("PSA") 3, 2 and 6 for field training and was evaluated as "competent."

² Respondent previously cross moved for an order pursuant to CPLR 3211(a)(7) and 7804(f), dismissing the petition in its entirety, on the grounds that the petition fails to state a cause of action, and entering judgment for respondent. By order dated October 27, 2006, the cross-motion was denied.

Petitioner's Contentions

In or around April 2004 and prior to graduating from the Police Academy, petitioner's downstairs neighbor, after seeing petitioner in his police uniform and out of animosity toward him, made a false allegation to the police that petitioner abused alcohol. Petitioner had previously complained to the police about noise and brawls by the downstairs neighbor who began renting there in 2002. As a result of this false complaint, petitioner was interviewed by the NYPD and questioned regarding his use of alcohol. Petitioner was subsequently cleared by the NYPD, received no disciplinary action and thereafter graduated from the Police Academy on July 7, 2004.

Petitioner alleges that in December 2004, in Queens County, petitioner was off-duty and attempting to use a parking space which was blocked in by an unidentified male motorist who had double parked in front of petitioner's car. When petitioner asked the motorist to move his car, the man refused and became belligerent. Petitioner identified himself as an off-duty police officer and again requested the man to move his van. The man then moved his van but apparently called the NYPD whereupon Police Supervisory Personnel responded to the scene and interviewed petitioner. Petitioner was examined by the Duty Captain and was found fit for duty. Thereafter, petitioner became the subject of an investigation for the underlying incident. Petitioner was not admonished or otherwise disciplined immediately following this incident and returned to his duties as a police officer. In or around February 2005, and again in March 2005, respondent's agents interviewed petitioner regarding the parking space incident and repeatedly asked him about his use of alcohol. Upon information and belief, the first Deputy Commissioner George Grasso rejected the recommendation from the aforesaid investigation that petitioner be

terminated and ordered an evaluation of petitioner's propensity for alcohol abuse and alcoholism.

On or about June 22, 2005, petitioner was placed on Restricted Duty Status by respondent and "was relieved of his shield or firearm" because of the evaluation for alcoholism. Petitioner was ordered to report to NYPD Psychological Services Division for evaluation. At two interviews at the Psychological Services Division, petitioner was questioned extensively about his use of alcohol. At the Psychological Services Division, respondent's interviewing Psychologist asked petitioner if he was a part of any 12 step program (alcoholism rehabilitation). Petitioner denied that he abused alcohol and indicated that his job performance record revealed no basis for any suspicion of alcohol abuse or alcoholism. The "Jellinek Test" for alcoholism was not administered to petitioner nor was he provided with any counseling. The NYPD maintains a Counseling Unit which provides alcohol counseling services for its officers including detoxification and rehabilitation programs. As a matter of policy, the NYPD does not terminate tenured officers who have alcohol abuse problems. Respondent did not refer petitioner to the Counseling Unit. None of petitioner's supervisors at either the Housing Bureau or the Court Division ever reported any conduct or behavior by petitioner indicative of alcohol abuse or that petitioner was an alcoholic. On October 27, 2005, petitioner was terminated. At the time of petitioner's termination, he did not have a propensity to abuse alcohol and was not an alcoholic. Petitioner applied for Unemployment Insurance benefits from the New York State Department of Labor. Respondent did not oppose petitioner's application or interpose a defense of "misconduct." Petitioner was not afforded an explanation for his termination. Petitioner's termination was based upon respondent's erroneous belief that petitioner has a propensity to abuse alcohol and is an alcoholic.

In petitioner's first cause of action, it is alleged that the Executive Law bars discrimination based alcoholism, and prohibits termination based on an employee's being regarded an alcoholic by his employer. It is alleged that petitioner's termination violates the Executive Law because it was based upon the erroneous assumption that petitioner is an alcoholic.

In the second cause of action, petitioner seeks a name clearing hearing. Petitioner claims that the summary termination of petitioner deprived petitioner of "liberty" without affording petitioner Due Process of Law in violation of 42 USC § 1983. The New York City Police Department discloses the circumstances of the termination of probationary police employment to prospective employers. The false allegations contained in the final NYPD files that petitioner is an alcoholic is a legal stigma and forecloses future employment.

In his third cause of action, petitioner alleges that the termination of petitioner based upon errors of fact is arbitrary, capricious and in violation of law.

Respondent's Contentions

Respondent argues that the petition fails to establish that respondent's termination of petitioner was made in bad faith and that petitioner is not entitled to a name clearing hearing. Respondent maintains that a probationary employee may be terminated for any reason, or no reason, so long as there is no constitutional, statutory, or decisional law violation. Petitioner has not alleged a violation of the constitution or decisional law and relies instead on the allegation that he is perceived to be an alcoholic. However, an alcoholic, as opposed to a recovering alcoholic, is not disabled under the State Human Rights Law and the termination of an alcoholic is not a violation of that statute unless the alcoholic is in recovery. Furthermore, petitioner

cannot show that respondent perceived him to be an alcoholic. After his psychological evaluation, respondent only determined that he was dishonest about his alcohol consumption. Thus, the psychologists were unable to determine whether petitioner was an alcoholic, and instead, found that he had a propensity to engage in misconduct when he consumed alcohol. Moreover, because the psychologist determined that petitioner was not credible in reporting his consumption of alcohol, respondent found him at risk for alcohol abuse. As such, respondent determined that petitioner was not psychologically suitable for police work due to his impaired judgment and a risk for alcohol abuse.

It is further argued that petitioner fails to show that he was entitled to a name-clearing hearing pursuant to the Due Process Clause. Petitioner failed to establish that respondent published false, defamatory and stigmatizing information in connection with petitioner's termination.

Respondent also contends that petitioner is not entitled to disclosure "to examine the possibility that his speculations concerning the NYPD files can be confirmed."

In reply, petitioner maintains that he does not abuse alcohol, that the psychological report is false and stigmatizing, and denies having been under the influence of alcohol during any of the incidents. Petitioner also argues that there is sufficient evidence to warrant a hearing to determine the grounds of his termination.

Analysis

It is well settled that a probationary employee is terminable without a hearing and without a statement of the reason for his or her dismissal in the absence of any demonstration that the termination was accomplished in bad faith, *i.e.*, for a constitutionally impermissible end, or in

violation of statutory or decisional law (*see, Matter of Miller v Ravitch*, 60 NY2d 527, 531, 458 NE2d 1235; *Matter of Talamo v Murphy*, 38 NY2d 637, 639, 382 NYS2d 3, 345 NE2d 546; *York v McGuire*, 63 NY2d 760 [1984]; *Hildebrand v Kerik*, 305 AD2d 181 [1st Dept 2003] [affirming dismissal of petition to vacate determination terminating petitioner's probationary employment as a New York City police officer]; *Prescott v New York City Housing Auth.*, 227 AD2d 287, 288 [1st Dept 1996]). Therefore, as a probationary employee, petitioner is only entitled to a hearing to challenge his termination if he raises questions of fact regarding whether he was discharged for an impermissible reason, in violation of law or in bad faith (*see Matter of Swinton v Safir*, 93 NY2d 758, 762-763, 697 NYS2d 869 [1999]).

The New York State Human Rights Law (Executive Law § 296[1][a]) at issue herein prohibits an employer from discriminating against an employee or job applicant because of a disability and renders such discrimination unlawful. The Human Rights Law (Exec. Law § 296[1]) provides as follows: “It shall be unlawful discriminatory practice: (a) for an employer … because of … disability … to refuse to hire or employ or to bar or to discharge from employment such individual in compensation or in terms, conditions or privileges of employment.”

Pursuant to Executive Law § 292(21), as amended L. 197, “disability” is defined as: (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.

Alcoholism is considered a “mental disability” under the Mental Hygiene Law, which 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” (Mental Hygiene Law § 1.03[3], [13]; see, *Matter of Francis [New York City Human Resources Admin.-Ross]*, 56 NY2d 600, 602, 450 NYS2d 471, 435 NE2d 1086 [alcoholism is an illness]). Manifestly, alcohol dependency qualifies as a disability within the meaning of the Human Rights Law.

The definition of disability in the New York State Human Rights Law “is [also] broad enough to embrace persons who, like plaintiff, contend they are not disabled but whom the potential employer perceives (wrongfully) to be disabled” (*John Doe v Roe, Inc.*, 160 AD2d 255, 553 NYS2d 364 [1st Dept 1990]). Indeed, the “statutory language is sufficiently broad, and the legislative history sufficiently supportive of an interpretation that [citations omitted] nondisabled individuals, like plaintiff, whom an employer wrongfully perceives as impaired, come within its reach” (*Ashker v International Business Machines Corp.*, 168 AD2d 724, 726 [3d Dept 1990] [citing *John Doe v Roe, Inc.*, *supra*, to sustain a cause of action under Exec. Law 296[1][a] where it was alleged that defendant wrongfully terminated plaintiff because defendant incorrectly believed plaintiff suffered from a mental impairment]). Thus, the Human Rights Law protects persons who are erroneously believed to be alcoholics.

Grullon v South Bronx Overall Economic Development Corp., *supra*, citing *Ashker v International Business Machines Corporation*, 168 AD2d 724, 726, 563 NYS2d 572 [3d Dept 1990]) illustrates this principle. In *Grullon*, plaintiff alleged that defendant terminated him because of his alleged disability of alcoholism, in violation of the New York State and New York City Human Rights Laws. Defendant denied that it knew of plaintiff’s alcoholism, and that the termination was due to a budget cut or budget reallocation. At the trial, plaintiff stated that he

suffered from alcoholism and that the alcoholism affected him at work. Plaintiff also testified that he began to seek treatment by attending Alcoholics Anonymous. Plaintiff also stated that at some point, he “confided” in his supervisor that he suffered from alcoholism. Immediately thereafter, plaintiff discovered a handwritten note in his mailbox, warning him to “watch [his] back.” A week or so later, plaintiff was terminated. After finding the evidence sufficient to establish a *prima facie* case of disability discrimination, the Court proceeded to find that the disability element of plaintiff’s *prima facie* case was satisfied, whether or not plaintiff was actually disabled. In this regard, the Court found that “in any event, even if plaintiff’s testimony alone was insufficient to establish that he suffered from the disability of alcoholism, plaintiff clearly submitted sufficient evidence from which the jury could infer and conclude that defendant ‘regarded’ . . . or ‘perceived’ . . . plaintiff as suffering from the disability of alcoholism.”

Petitioner bears the initial burden of raising and proving that respondent discharged him in bad faith and for discriminatory reasons (*Prescott v New York City Hous. Auth.*, 227 AD2d at 288, citing *Matter of Thomas v Abate*, 213 AD2d 251 [1995]). The mere assertion of “bad faith” or conclusory allegation of “bad faith,” without the presentation of evidence demonstrating it does not satisfy the employee’s burden (*Medina v Sielaff* citing *Matter of Cortijo v Ward*, 158 AD2d 345). Further, respondent’s admissions of good faith is not negated by petitioner’s other allegations purporting to show bad faith (*Matter of Morgan v Safir*, 281 AD2d 376, 722 NYS2d 542 [1st Dept 2001]).

Once petitioner meets his initial burden of establishing a *prima facie* case of discrimination, the burden then shifts to respondent to rebut the presumption of discrimination by providing admissible evidence setting forth legitimate, nondiscriminatory reasons to support its

employment decision (*see Forrest v Jewish Guild for Blind*, supra at 305, 786 NYS2d 382).

Thereafter, petitioner then bears the burden of proving “that the legitimate reasons proffered by [respondent] were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason” (*Forrest v Jewish Guild for Blind*, supra at 305, 786 NYS2d 382, 819 NE2d 998]).

Here, petitioner alleges that he was terminated because he was “regarded” or “perceived” by his employer as being an alcoholic. Petitioner contends that his termination violated the Human Rights Law since it was based on an erroneous assumption that he was an alcoholic. Two instances giving rise to an investigation of petitioner’s fitness for duty involved allegations of alcohol abuse. Particularly, the incident cited to by both parties involving the parking space dispute resulted in an investigation and psychological examination of petitioner’s use of alcohol.

That the Human Rights law at issue was intended to protect a rehabilitated or rehabilitating substance abusers (*North Shore University Hospital v Rosa*, 194 AD2d 727, 729 [2d Dept 1993]) does not deprive petitioner of protection under such law for perceived disability. That petitioner insists that he is not an alcoholic is not fatal to his claim, given that a plaintiff who is “incorrectly thought to be affected by a disability” “may nevertheless seek redress pursuant to” the State Human Rights Law (*see Grullon v South Bronx Overall Economic Development Corp.*, supra, citing *Ashker v International Business Machines Corporation*, 168 AD2d 724, 726, 563 NYS2d 572 [3d Dept 1990]).

However, the record before this Court indicates that respondent’s determination was based upon, *inter alia*, petitioner’s employment records and the psychologist report, which reported that petitioner had serious credibility issues and significant impairment in his judgment.

Specifically, petitioner's evaluation indicates that petitioner engages in a pattern of "behaving problematically even though, after the fact, he can recognize that his judgment was poor and that better options were available." The psychological report also states that "there is now enough evidence to identify a persisting pattern of poor judgment which leads to episodic problematic behavior on the part of" petitioner . . . Because [petitioner] is unable to learn from his past experience, it is reasonable to expect that the future will bring more problematic behavior driven by impaired judgment." The psychologist further opined that "the fact that to date he has achieved satisfactory on-the-job performance evaluations does not offset the risk presented by his pattern of off-duty and pre-hire behavior." Thus, notwithstanding the respondent's reference to petitioner's potential "risk" for alcohol abuse due to petitioner's credibility issues, it cannot be said respondent's determination was made in bad faith.

Name-Clearing Hearing

A name-clearing hearing is warranted where petitioner alleges circumstances sufficient to show the likely dissemination of stigmatizing information by respondent, foreclosing future employment opportunities (*Swinton v Safir*, 93 NY2d 758, 720 NE2d 89 [1999] citing *Codd v Velger*, 429 US 624, 627-628, 97 SCt 882, 51 LE2d 92) The sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove that the stigmatizing material in the personnel file is false (*Id*).

Petitioner failed to demonstrate that the materials contained in his personnel file are stigmatizing. The references in petitioner's employment file to "alcohol abuse" is insufficient to warrant a name-clearing hearing, since the records never indicate that petitioner was in fact an alcoholic. Instead, petitioner was found to be at "risk" for alcohol abuse, based, in large part, on

petitioner's own statements. Further, the record indicates that petitioner's termination rested on a finding that petitioner is not credible and that petitioner had exercised poor judgment in several instances. Such characterizations, though problematic, do not constitute the type of criminal, immoral, or dishonest conduct necessitating a name-clearing hearing (*see Swinton v. Safir*, 93 NY2d 758, *supra*). More importantly, while petitioner denies some of the facts underlying the incidents, petitioner has not denied the truth of the central factual assertions in investigative and psychologist's report, which formed the basis for termination (*see Johnson v. Kelly*, 35 AD3d 297, 828 NYS2d 10 [1st Dept 2006]). Essentially, petitioner denies the conclusions reached by such facts. Therefore, petitioner's request for a name-clearing hearing is denied.

Discovery

While the CPLR permits discovery in an Article 78 proceedings, discovery in such proceedings is discouraged and is permitted only at the discretion of the court (*Chapman v 2 King Street Apartments Corp.*, 8 Misc 3d 1026, 806 NYS2d 444 [Sup Ct New York County 2005]). In light of this Court's determination, discovery in this proceeding is unwarranted.

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the petition seeking a judgment pursuant to CPLR Article 78, Executive Law Section 296, and 42 USC Section 1983 adjudging certain actions of respondent Raymond Kelly, Commissioner, New York City Police Department ("NYPD") ("respondent") to be (1) arbitrary and capricious, (2) in violation of the Executive Law which prohibits discrimination based upon a perceived disability, and (3) directing respondent to reinstate petitioner to his former position as a New York City Police Officer with back pay, retroactive seniority and all benefits and emoluments of employment with the New York City Police Department, and (4) directing respondent to correct all personnel records, is denied and

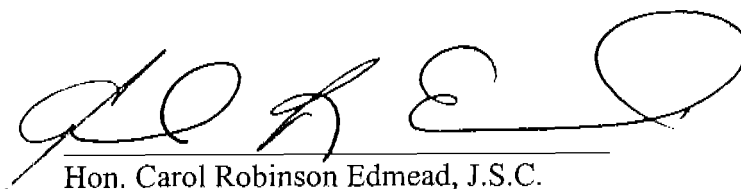
the petition is dismissed.

ORDERED that the branch of the petition which seeks an order pursuant to CPLR § 408, directing the respondent to serve and file upon the return date hereof certain discovery is denied; and it is further

ORDERED that petitioner serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and judgment of the Court.

Dated: July 27, 2007



Hon. Carol Robinson Edmead, J.S.C.

**CAROL EDM EAD
J.S.C.**

UNFILED JUDGMENT

his 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 #19)