

Matter of Cuccia v Martinez & Ritorto P.C.

2008 NY Slip Op 30890(U)

March 27, 2008

Supreme Court, New York County

Docket Number: 0113204/2004

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLLIB
Justice

PART 18

Index Number : 113204/2007

CUCCIA, JANET

vs

MARTINEZ & RITORTO P.C.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE: 11.30.07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with accompanying memorandum opinion.*

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry of judgment, the plaintiff and representative must appear in person at the Judgment Clerk's Desk (Room 1012).

Dated: 3/29/08

WALTER B. TOLLIB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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
In the Matter of the Application of

JANET CUCCIA
Petitioner,

Index No. 113204/07
Mtn Seq. 001

-against-

MARTINEZ & RITORTO, PC, and THE NEW YORK
STATE DIVISION OF HUMAN RIGHTS,

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.:

By this application, petitioner, appearing *pro se*, seeks an order vacating the decision issued by the New York State Division of Human Rights, and restoring the matter for further consideration and "amendment" (see, Notice of Petition).

Facts

In November of 2006, petitioner was hired as a legal secretary and the only administrative staff member for respondent Martinez & Ritorto, P.C., a law firm (the "law firm"). During her brief employment, petitioner was either late or absent from work on multiple occasions, three of which were due to medical appointments of a non-specific nature (see, Verified Answer, Exhibit 6). On February 6, 2007, petitioner was terminated from her position with the law firm. Ten days later, petitioner filed a complaint with the New York State Division of Human Rights ("DHR") claiming unlawful discriminatory practice because of disability, a violation of New York Executive Law Article 15 (the

Human Rights Law). The complaint, captioned, Cuccia v. Martinez & Ritorto bears case number 10116177 (see, Verified Petition, Exhibit 1).

The DHR conducted an investigation of petitioner's claims and determined that there was no probable cause for petitioner's claim of disability discrimination. Of particular note, was the DHR's finding that petitioner was able to attend medical appointments during working hours, and that there no evidence petitioner's employer ever knew that she was being tested or treated for cancer. After completion of the investigation, the DHR, on July 31, 2007, concluded that petitioner was terminated for non-discriminatory reasons: i.e. poor work performance and dismissed the complaint (see, Verified Answer, Exhibit 1, Determination and Order After Investigation). This Article 78 followed.

Discussion

It is well established under New York law that the judicial review of an administrative determination is limited to whether that determination was arbitrary, capricious, or without a rational basis (see, CPLR 7803; Pell v. Board of Education, 34 NY2d 222, 230 [1974]; Mankarios v. New York City Taxi and Limousine Commission, __ NYS2d __, 2008 WL 638263 [1st Dept 2008]). Moreover, that review must be based only upon the contents of the record before the administrative agency; no newly

submitted information may be considered (300 Gramatan Ave. Associates v. State Division of Human Rights, 45 NY2d 176 [1978]). See also, Fanelli v. New York City Conciliation and Appeals Board, 90 NY2d 623 [1st Dept 1992]). If after review, the court determines that there is a rational basis for the administrative order, the determination will not be disturbed, as the Court is prohibited from substituting its own judgment for that of an administrative agency (see, Feldman v. Axelrod, 105 AD2d 900 [3rd Dept 1984]); Awl Industries, Inc. v. Triborough Bridge and Tunnel Authority, 837 NYS2d 126 [1st Dept 2007]).

Under both New York and Federal Law (Title VII of the Civil Rights Act of 1964), success on a claim of disability discrimination first requires the petitioner to demonstrate that she (1) suffers from a disability, (2) was qualified to hold the position at issue; (3) suffered either an "adverse employment action" or was terminated from employment; and (4) that the adverse employment action or termination occurred "under circumstances giving rise to an inference of discrimination" (Ferrante v. American Lung Association, 90 NY2d 623, 629 [1997]; Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 390-391 [2004]). Once this burden is satisfied, the burden shifts to the employer who is obligated to "rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and

nondiscriminatory reasons to support its employment decision" (Ferrante, 90 NY2d 623, 629). If the employer successfully satisfies this burden, plaintiff must then demonstrate that the employer's legitimate reasons for termination were "merely a pretext for discrimination" by demonstrating that the reasons proffered by the employer were false, and that discrimination was the real reason for the employee's termination (Ferrante, 90 NY2d 623, 629-630; Forrest, 3 NY3d 295, 391).


Review of the submitted record simply does not support petitioner's claims of disability discrimination. Although petitioner requested and received time off for multiple doctors appointments, petitioner never actually told her employer that she was being tested or treated for an illness (DHR Record, Exhibit 4). As such, her employer cannot be charged with that knowledge (see, Pimentel v. Citibank N.A., 29 AD3d 141 [1st Dept 2006] (obligation of reasonable accommodation is limited to the employer's knowledge of the disability that needs to be accommodated). The record does however support her former employer's contentions that she was not performing well at her job and that she had numerous absences and requests for non medical related time off from work requiring no less than 26 time card modifications in her first 90 days of employment (see, Verified Answer, Exhibit 6; DHR Record, Exhibit 2), and these legitimate reasons for termination were not shown to be a mere

pretext for discrimination(see, Ferrante, 90 NY2d 623, 629-630;
Forrest, 3 NY3d 295, 391).

Having reviewed the DHR's decision and the underlying record, it is this court's conclusion that the determination rendered on July 31, 2007 was rationally based, and should not be disturbed. Accordingly, it is

ADJUDGED and DECLARED that the within petition is denied.

Dated 3/27/08



HON. WALTER E. TOLUB, J.S.C.

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).