

**Matter of Leiva v New York City Health & Hosps.
Corp.**

2008 NY Slip Op 33452(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 406785/07

Judge: Lewis Bart Stone

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

PRESENT: Lewis Bart Stone

PART 505

Justice

HON. LEWIS BART STONE

Maximiliana Leiva

INDEX NO. 406785/07

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

- v -

NyH & H 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 granted in part and denied in part, and the cross motion of Respondant New York City Health and Hospitals Corporation is granted, all in accordance with the annexed Decision and Order*

FILED

DEC 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 16 Dec '08

Lewis Bart Stone

HON. LEWIS BART STONE 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: PART 50S

-----X
In the Matter of the Application of :
MAXIMILIANA LEIVA, :

Petitioner, DECISION AND
: ORDER

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION, BELLEVUE HOSPITAL CENTER : INDEX NUMBER
and NEW YORK STATE DIVISION OF HUMAN 406785/07
RIGHTS,

Respondents.

FILED

DEC 29 2008

**COUNTY CLERK'S OFFICE
NEW YORK**

Hon. Lewis Bart Stone, J

Maximiliana Leiva ("Leiva") commenced this proceeding, pro se, pursuant to Civil Practice Law and Rules ("CPLR") Article 78, by Notice of Petition, dated October 25, 2007 against respondents, New York City Health and Hospital Corporation ("HHC") and New York State Division of Human Rights ("SDHR") "for reinstatement" to her prior position as a Nurse's Aide at Bellevue Hospital Center, a hospital operated by HHC, a position she held for a number of years before she was injured in 2001 in the course of her employment. After her injury, she was dismissed from her position by reason of her disability and went on Worker's Compensation.

* 3]

Subsequent back surgery cured most but not all of her problems, and after such operation, Workers Compensation, finding her able to work, terminated her benefits. Leiva then applied to HHC for reinstatement to her prior position. Under Civil Service Law §71, a former employee terminated for disability is entitled to reinstatement if within one year of the end of the disability such employee reapplies and is found fit. HHC designated Benjamin Nachamie, MD (“Nachamie”), a physician, to examine Leiva and instructed Nachamie on the scope of his duties. Following his instructions, Nachamie found Leiva unfit for the position of Nurse’s Aide. On the basis of such finding, the HHC Personnel Review Board (the “Board”) determined not to reinstate Leiva in a decision dated August 16, 2006 (the “Decision”).

Instead of seeking review of this Decision under CPLR Art. 78, Leiva applied to SDHR on March 8, 2007, alleging that HHC discriminated against her by reason of her disability. On August 29, 2007, SDHR dismissed Leiva’s complaint (the “Dismissal”) for failure to establish probable cause. As Leiva’s Petition in this proceeding was filed on October 25, 2007, within sixty days of the Dismissal, this Court has jurisdiction to review the Dismissal under CPLR Article 78. Executive Law §298. See City of Courtland v. White, 114 AD2d 641 (3d Dept. 1995), app den., 67 NY2d 601 (1986).

[* 4]

On the return of Leiva's petition, SDHR "punted," stating "Because [Leiva] and [HHC] are parties in interest, the Division will not actively participate in this matter and is submitting on the record." This abdication of SDHR's responsibility to advise the Court of the basis for the Dismissal is hardly helpful and also makes no sense, here, where HHC's meritorious statute of limitations defense to the Decision is inapplicable to SDHR and the Dismissal.

Thus, the Court is reduced to determining on its own, without meaningful input from SDHR, whether SDHR's finding that there was no probable cause to believe that an unlawful discriminatory act occurred was an arbitrary or capricious decision or in violation of law. Unfortunately, Leiva's pro se submissions are themselves hardly helpful either, being confused and presented without the benefit of knowledge of the law, procedure or precedent. While the Court must come to Leiva's aid as she, as a pro se litigant, has the excuse of not being an attorney and give her the benefit of the doubt, this Court has no obligation to SDHR which is represented by counsel, to relieve SDHR of its obligation to support its own rulings.

While New York Civil Service Law ("CSL") §71 requires an employee who has been separated by reason of a disability to be reinstated upon timely application where a medical examination conducted by the employer certifies that such person is physically and mentally fit to perform the duties of the prior position (with

alternative rights if no position is immediately open), such section also recognizes disability issues stating “This section shall not be deemed to modify or supercede and [sic] other provision of law applicable to the re-employment of persons retired from the public sector by reason of disability.”

Leiva’s application for reinstatement to her prior title of Nurse Aide , included a letter from her physician dated December 21, 2004, which stated “She is unable to fulfil the duties of a nurse assistant as it would require he to lift over twenty pounds on occasion.” The letter continued that she was “cleared for light duty work. Light duty allows for occ[asionall] lift 20lbs. freq[uent] lift 10lbs.” The Board, none-the-less, on April 6, 2006, referred Leiva to Nachamie for examination instructing Nachamie as follows:

“After your examination and evaluation of Ms. Leiva is completed, the only determination that you are to make is whether Ms. Leiva is capable of returning to work to perform her described duties. The New York City Health & Hospitals Corporation does not have a limited duty program for an employee who may be able to perform only some of her duties. Consequently, your medical opinion should be restricted to whether Ms. Leiva is capable of performing **all** of the responsibilities of the position.”

Complying with such instruction, Nachamie found Leiva incapable of performing all duties of a Nurse’s Aide and so reported to the Board on June 14, 2006. On the basis of Nachamie’s decision, the Board, on August 16, 2006, issued

the Decision dismissing Leiva's application for reinstatement.

Leiva, subsequently, requested that the Board transfer her credited service to the City Department of Health and Mental Hygiene. On August 26, 2006, the Board advised Leiva that it had no power to do so. On January 30, 2007, she again wrote the Board asking for a hearing, conceding that she had received the Decision. After having been advised on January 30, 2007, that the Decision was final, Leiva on March 20, 2007, filed her complaint with SDHR, alleging that she had been discriminated against by reason of her disability, stating that the last discriminatory date was August 16, 2006, the date of the Decision.

Following SDHR procedures, SDHR assigned Leiva's complaint to an investigator to review her complaint and make an investigation. The investigator recommended that no probable cause be found. SDHR endorsed this report in the Dismissal which found probable cause lacking by reason of a lack of evidence and that:

“Pursuant to respondent's Rules and Regulations, complainant was entitled to apply for reinstatement as a Nurse's Aide or to a similar or lower title within the same occupational field following certification by the Respondent's Personnel Review Board medical officer stating that she is “fit to perform the essential duties of her former title with or without reasonable accommodation.” Complainant failed to meet the Personnel Review Board's requirement of obtaining its medical officer's certification

that she is fit to perform the duties of a Nurse's Aide.

The problem with SDHR's finding is the fact that SDHR's file includes the April 6, 2006 letter from the Board to Nachamie which expressly excludes consideration of any accommodation. The report of the SDHR investigator does not refer to such letter, indicating to this Court that the letter was either never read, never understood, or improperly ignored. The finding in the Dismissal that Nachamie found her not fit to perform the essential duties of her former title with or without reasonable accommodation is absolutely inconsistent with the instruction letter and Nachamie's response thereto.

The letter is at least a *prima facie* indication that HHC had no intention of making any accommodation for Leiva's disability, of which they were well aware by reason of her physician's letter. New York Executive Law §296(3)¹ makes it "an unlawful discriminatory practice for an employer...to refuse to provide reasonable accommodations to the known disabilities of an employee, [or] prospective employee...in connection with a job or occupation sought." The "smoking gun" letter of HHC to Nachamie requires at least some analysis and more than a cursory dismissal as to whether HHC was required to make an accommodation to Leiva.

¹ The Federal American with Disabilities Act also require an employer to make a reasonable accommodation to an employee's disabilities, SDHR's jurisdiction is limited to the enforcement of the Human Rights Law, which is set forth in the Executive Law.

While Executive law §296(3)(b) limits the obligation of an employer to accommodate where such accommodation might impose “undue hardship,” a showing of hardship is to be established by the employer, and there is nothing in the SDHR record to show any such hardship having been established or even considered by either the investigator or SDHR. As Executive Law §296(3) was first enacted in 1997 by Laws 1997, Chapter 269, such provision, was subsequent to CSL §71 which was originally added by Laws 1958, Chapter 790. Thus, the duty to accommodate have applied to the final sentence of CSL §71 to clarify HHC’s the obligation relating to the “re-employment of persons retired from the public service on account of disability.”² The Dismissal’s failure to address HHC’s preemptory rejection of any accommodation of Leiva’s known disability is therefore arbitrary and capricious and in violation of SDHR’s own procedures.

There are many threshold and ultimate issues which need to be addressed by SDHR, either at the “probable cause” level or at the plenary hearing level, between allegations of unlawful discrimination and an adjudication that in fact such discrimination existed. These matters are especially within the jurisdiction of SDHR

² Although CSL §71 was later modified by Laws 2003, Chapter 577 to make changes unrelated to the final sentence which remained uncharged, the Legislature must be presumed to have been aware of Executive Law §296(3) when making this subsequent change to CSL §71, must be presumed to have adopted the applicability of Executive law §296(3) to CSL §71.

to which this matter must be returned. Accordingly, the Dismissal is set aside and this matter is remanded to SDHR for further proceedings not inconsistent with this Decision and Order.

HHC has invoked CPLR §217(1) as a grounds for dismissal of Leiva's Petition as against HHC and must prevail on such issue. CPLR §217(1) requires that a proceeding under CPLR Article 78 to review the Decision had to be commenced within four months of August 16, 2006, the date of the Decision. As this proceeding was not commenced until October 25, 2007 at the earliest, this requirement has not been met. While Leiva may have, by going instead to SDHR to seek relief, made a tactical error in her campaign to return to work, her error cannot save her against the strict provisions of CPLR §217(1). Leiva's petition therefore must be and hereby is dismissed as against HHC.

Leiva's petition as against SDHR is granted in accordance with the Decision and Order.

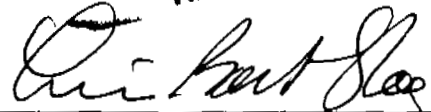
This is the Decision and Order of the Court.

DATED: DECEMBER 16, 2008
NEW YORK, NEW YORK

FILED

DEC 29 2008

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court