

Matter of Clift v City of New York

2009 NY Slip Op 30917(U)

April 20, 2009

Supreme Court, New York County

Docket Number: 101118/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART Part 5

Index Number : 101118/2009

CLIFT, MARY

vs

CITY OF NEW YORK

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 _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 22 2009

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 4/20/09

[Signature]
HON. EILEEN A. RAKOWER 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 5

-----X

In the Matter of the Application of
MARY CLIFT,

Petitioner,

-against-

Index No. 101118/09

DECISION and ORDER

Mot. Seq: 001

CITY OF NEW YORK
NYC TRANSIT AUTHORITY
MANHATTAN AND BRONX SURFACE
TRANSIT AUTHORITY
MTA,

Respondents.

-----X

HON. EILEEN A. RAKOWER:

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

Petitioner Mary Clift ("Petitioner") brings this Article 78 Petition requesting that the court vacate a stipulation ("the Stipulation") entered into between Petitioner and the Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA"), whereby Petitioner would accept a permanent demotion from the position of Bus Operator in settlement of nine pending disciplinary actions against her. Petitioner seeks to have the settlement vacated on the grounds that she entered into the Stipulation under duress and that she did not understand its terms. She further claims that the Stipulation shocks the conscience because some of the instances of alleged misconduct were actually manifestations of an unspecified disability which Petitioner suffers from.

MABSTOA is a public benefit corporation created by Public Authority Law §1203-a to operate various bus lines in Manhattan and the Bronx. MABSTOA employees are not employees of the New York City Transit Authority and are not civil service employees (Public Authority Law §1203-a(3)(b)).

Petitioner was employed by MABSTOA as a Bus Operator from March 10, 1997 until July 13, 2007, when she was demoted to the title of Cleaner pursuant to the Stipulation. MABSTOA Bus Operators are represented by the Transport

Workers Union, Local 100 ("TWU"), and are covered under a collective bargaining agreement ("CBA") between MABSTOA and TWU. The CBA sets forth procedures for disciplinary action against MABSTOA employees for violations of the Transit Authority's time and attendance rules; its safety rules; or for operating violations such as discourteous behavior to customers, or disruption of service. Potential violations can be reported by various sources, such as MABSTOA dispatchers, complaining customers, or investigators who ride MABSTOA buses to observe the Bus Operator's performance.

The disciplinary process for alleged violations of MABSTOA rules involves three levels of review. An employee charged with a violation appears first at a "Step I hearing," presided over by a hearing officer. The employee is entitled to union representation and may testify in his or her defense. At the conclusion of the proceeding, the hearing officer recommends a penalty if the charges are sustained, which the employee can either accept, or appeal to a "Step II hearing." The Step II hearing officer has the authority to sustain or dismiss the charges, as well as modify the penalty imposed at the Step I hearing. For the third and final step of the disciplinary process, the employee can appeal the result of his or her Step II hearing to a neutral arbitrator. The employee can be represented by either a union representative or an attorney at arbitration, and the decision of the arbitrator is final and binding on all parties.

During the course of Petitioner's employment as a MABSTOA Bus Operator, Petitioner accumulated a substantial number of disciplinary actions for various alleged violations, a number of which were found to be substantiated while others were resolved by stipulation. In 2007 alone, Petitioner was charged with nine violations of MABSTOA rules. Four of these violations each carried the potential penalty of dismissal, while the other five carried the potential for a combined total of 73 days' suspension. While they need not be elaborated upon in great detail, these violations include: (1) failure to wear her seat belt, failure to have the crowd bar in a down position, and failure to make announcements in compliance with the Americans with Disabilities Act as required (all allegedly observed by a MABSTOA inspector on 2/20/07); (2) causing a disruption in service by being four minutes ahead of schedule, in violation of operating rules (as reported by a MABSTOA dispatcher on 3/12/07); (3) failing to call in sick in a timely fashion, which constituted a time and attendance violation; (4) failing to work her scheduled tour without authorization; (5) being seven minutes ahead of schedule (serious violation of MABSTOA procedure); (6) engaging in abusive,

erratic, and threatening behavior toward passengers (as reported by two complaining passengers); (7) uttering profanities to herself while operating the bus erratically (as witnessed by a passenger on 4/30/07; (8) operated the bus with one hand, failed to engage the crowd bar, failed to make any Americans with Disabilities Act compliance announcements and failed to wear her seat belt (as attested to by a MABSTOA investigator on 5/9/07; and (9) leaving her bus unattended without proper authorization for approximately 97 minutes on 6/2/07, which constituted "an act of gross misconduct.

All nine of the 2007 charges were sustained in Step I hearings. Petitioner thereafter appealed the decisions, which were consolidated into a single Step II proceeding, held on June 14, 2007. The Step II hearing officer sustained all nine charges, and upheld the recommended penalties, which included dismissal. Petitioner subsequently appealed to arbitration, which was scheduled for July 13, 2007.

However, on July 13, 2007, prior to arbitration, a settlement of all nine charges was negotiated and a stipulation of settlement entered into between Petitioner (assisted by her union representative) and MABSTOA which provided, in pertinent part:

The charges are sustained. The penalties [for two of the actions are combined and modified to a three day suspension, while the others] are combined and modified to a time served suspension and a final warning that any future similar charges will result in her dismissal.... In addition, the grievant is permanently demoted to an available, budgeted non-safety sensitive position at the rate of pay for that title based upon her years of service....

The Stipulation also provides that "this Stipulation of Settlement constitutes a disciplinary action."

On November 3, 2008, Petitioner's attorney wrote a letter to Transit Authority President Howard H. Roberts seeking to have the Stipulation vacated. By letter dated December 19, 2008, President Roberts informed Petitioner that the Transit Authority declined to take any further action with respect to the Stipulation.

Petitioner commenced the instant Article 78 proceeding on January 27, 2009. Petitioner has submitted a Notice of Petition, an Article 78 Petition, and an Affirmation in Support. Annexed to the Affirmation as exhibits are the 12/19/08 letter from TA President Roberts; and a handwritten note from Petitioner's doctor.

The TA and MABSTOA have submitted a Verified Answer and Objections in Point of Law, a Memorandum of Law, an Affidavit Amelia Ramirez, Director of Labor Relations for MABSTOA, and a Supplemental Affidavit of Amelia Ramirez. Annexed to the Verified Answer as exhibits are a printout of Petitioner's disciplinary history as a MABSTOA employee; copies of the Step II decisions pertaining to Petitioner's nine disciplinary actions in 2007; a copy of the Stipulation; a copy of the 12/19/08 letter from Transit Authority President Roberts; and Petitioner's Job Details Summary.

Petitioner advances two principal arguments as to why the Stipulation should be nullified by the court. First, Petitioner alleges that the Stipulation is unenforceable because Petitioner signed it under duress and as a result of her alleged illness. She claims that she did not fully understand her rights at the time, as she was not represented by an attorney. Secondly, Petitioner claims that the Stipulation by its terms shocks the conscience, inasmuch it punishes conduct which arose from her disability.

CPLR §217[1] provides that

a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner... or after the respondent's refusal, upon the demand of the petitioner... to perform its duty.

Petitioner claims that her Petition is timely because this action was commenced within four months of Transit Authority President Roberts' letter, wherein he declined to take further action with regard to the Stipulation; and that this letter constituted refusal of Petitioner's demand, such that mandamus review is appropriate.

It is well settled that, in order for a challenged act to properly be considered one subject to a writ of mandamus to compel, the petitioner must have a clear legal

right to the relief sought, such that the right to performance of the duty admits of no reasonable doubt or controversy (*see Assoc. Of Surrogates & Supreme Court Reporters v. Bartlett*, 40 N.Y.2d 571, 574 [1976]). Mandamus relief is appropriate only when the nature of the performance sought by the petitioner is purely ministerial in nature, such that the act does not call for the exercise of any discretion on the part of the respondent (*see New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 184 [2005]). An act is discretionary - and thus not subject to mandamus relief - if it “involves the exercise of reasoned judgment which could typically produce different acceptable results....” (*id.*) (citation omitted).

Here, Petitioner cannot plausibly argue that she has a clear legal right to restoration to her prior position – such that there admits of no reasonable doubt or controversy – where she entered into a stipulation in which she agreed to a permanent demotion and acknowledged that the alleged violations were sustained. Moreover, the First Department has explicitly held that the accrual date for an action seeking rescission of a stipulation such as the one entered into by Petitioner on the ground of duress is the date in which the stipulation was entered into by the parties (*see Nedd v. Koehler*, 159 A.D.2d 344, 345 [1st Dept. 1990]). Accordingly, Petitioner's Article 78 Petition is barred by the four month statute of limitations.

Even if this court were to reach the merits of the Petition, it is well settled that an agreement which waives an employee's statutory or contractual rights in consideration for the curtailment of pending disciplinary proceedings is a valid and enforceable contract, if knowingly and voluntarily entered into by the employee (*see Simpson v. Abate*, 213 A.D.2d 190, 190-91 [1st Dept. 1995]) (citations omitted). While Petitioner claims that the Stipulation is invalid because (1) she did not consult with an attorney prior to executing the Stipulation (and thus did not understand her rights); (2) she did not understand the permanent nature of the demotion; and (3) she was coerced into signing it, all three arguments are unavailing. For one, Petitioner cites no authority for the proposition that the Stipulation is unenforceable because she did not consult with an attorney prior to its execution; nor does Petitioner allege that she sought the advice of counsel and was denied the opportunity to consult with an attorney prior to signing the stipulation. Furthermore, the Stipulation clearly and explicitly establishes that Petitioner is accepting a permanent demotion in consideration for withdrawal of all nine of her pending disciplinary actions (for which she faced outright termination). Further still, while the terms of the Stipulation are set forth in plain language comprehensible to any reasonable person reading it, Petitioner also had (and

utilized) the opportunity to consult with her union representative, who signed the Stipulation along with Petitioner (*see Miller v. New York State Dept. of Corr. Servs.*, 126 A.D.2d 831, 832 [3rd Dept. 1987], *aff'd* 69 N.Y.2d 970 [1987]) (no showing that stipulation not entered into knowingly and voluntarily where petitioner "was afforded union representation throughout the negotiations and he and his union representative signed the stipulation agreement.")

Finally, while Petitioner alleges that she could not understand the terms of the Stipulation due to her mental illness, and that its terms shock the conscience insofar as it punishes her for manifestations of her disability, the court notes that Petitioner has made no showing whatsoever that she actually suffers from a disability. Indeed, she does not even specify what disability she suffers from. Even her purported doctor's note does not so much as name the condition Petitioner allegedly suffers from. Accordingly, Petitioner has failed to show competent evidence that she even suffered from a mental illness, much less that (1) it was the cause of the actions underlying the disciplinary charges; (2) it prevented her from knowingly and voluntarily entering into the Stipulation; and (3) that Respondents were, or reasonably should have been aware of her condition.

On the contrary, the record before the court indicates that Petitioner engaged in a consistent and worsening pattern of misconduct which included conduct which posed a danger to the safety of MABSTOA customers and members of the general public. Despite engaging in several instances of misconduct which each individually warranted Petitioner's termination, Petitioner was allowed to remain under the employ of MABSTOA, provided she enter into an agreement whereby she would be demoted to a position in which she was not responsible for the safety of MABSTOA customers. Thus, it cannot be said that the terms of the Stipulation shock the court's conscience in any way, shape or form.

Wherefore, it is hereby

ORDERED that Petitioner's Article 78 Petition is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 20, 2009

FILED

APR 22 2009

COUNTY CLERK'S OFFICE
NEW YORK


EILEEN A. RAKOWER, J.S.C.