

**Matter of Heyward v State of NY/Workers
Compensation Bd.**

2009 NY Slip Op 31903(U)

August 24, 2009

Supreme Court, New York County

Docket Number: 106065/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PART 5

Index Number : 106075/2009
HEYWARD, ANGELA
vs.
STATE OF NY/WORKERS COMPENSATION
SEQUENCE NUMBER : # 001
ARTICLE 78

Justice

INDEX NO. 106075-09

MOTION DATE #007

MOTION SEQ. NO. #007

MOTION CAL. NO. _____

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, 4

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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).

Dated: 8/24/09


HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of
ANGELA HEYWARD,

Index No.
106065/09

UNFILED JUDGMENT
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Not. Seq.
00

STATE OF NEW YORK/WORKERS COMPENSATION
BOARD,

DECISION
and ORDER

Respondent.

-----X

HON. EILEEN A. RAKOWER:

Angela Heyward ("Petitioner") petitions this court pursuant to Article 78 of the CPLR for a judgment annulling the decision of Respondent New York State Workers' Compensation Board ("Board") to terminate Petitioner; and ordering her reinstatement with full back pay and benefits.

Petitioner was employed by the Board as an Agency Services Representative from 1978 until her termination on December 31, 2008. The record indicates that Petitioner has had a substantial history of unauthorized absences from work, for which she faced Notices of Discipline ("NOD") in 1989, 1990, 1991, 1994, 2004, 2006, and on two occasions in 2008. As a result of the most recent NOD in September 9, 2008, Permanent Umpire Allen C. DeMarco rendered a decision on October 2, 2008 ("10/2/08 decision") after a "time and attendance hearing," which sustained the Board's recommended penalty of termination, but held the termination in abeyance for a twelve month period running from October 13, 2008 until October 12, 2009, during which time Petitioner was to serve as a probationary employee. In addition, the 10/2/08 decision set forth with specificity the number of allowed unscheduled absences Petitioner was permitted to take within a set number of biweekly pay periods. Petitioner was to have no more than one unscheduled absence in any two biweekly pay periods. The decision defined an "unscheduled absence" as "any absence that was not properly approved prior to the end of the employee's previous work shift" (emphasis in original).

By Petitioner's own admission, she had unscheduled absences from work on December 1st and 2nd of 2008, as well as unscheduled absences from December 12th through the 18th. Upon returning from both absences, Petitioner supplied documentation stating that Petitioner was diagnosed with acute bronchitis. On December 19, 2008, the Board sent Petitioner a letter advising her that she would be terminated at the close of business on December 31, 2008 due to the violation of the terms of her probation.

Petitioner commenced this Article 78 proceeding and filed her petition on or around April 29, 2009. Petitioner alleges that her termination was unlawful in that it violated the Family and Medical Leave Act ("FMLA"); that her termination was arbitrary in that it was effectuated without cause; and that the loss of her property interest in continued public employment violated due process. Annexed to the petition as exhibits are copies of the 10/2/08 decision; Petitioner's medical documentation relating to her absences in December 2008; and the 12/19/08 letter advising Petitioner of her termination.

The Board submits a verified answer to the petition; a memorandum of law; and an affidavit from Lori Reese, an Agency Labor Relations Representative 2 at the Board. Annexed to the Reese Affidavit as exhibits are copies of Petitioner's personnel history; Petitioner's NODs pertaining to time and attendance; the 10/2/08 decision; an e-mail from Petitioner's supervisor recounting his October 10, 2008 meeting with Petitioner, wherein he discussed the ramifications of the 10/2/08 decision with Petitioner;¹ Counseling Memoranda from 5/25/89 and 5/26/92 which, according to the Board, constitute evidence that Petitioner has altered medical documentation in the past; the 12/19/08 termination letter; a 12/19/08 letter from Petitioner to the Board announcing her resignation; and a 12/29/08 letter from the Board to Petitioner after Petitioner withdrew her resignation, reminding Petitioner that she would be terminated at close of business on December 31, 2008.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'."

¹Although Petitioner's supervisor first explained that a documented illness does not count as an unscheduled absence in their 10/10/08 meeting, her supervisor sent Petitioner another e-mail on 10/16/08 stating that "an unscheduled absence due to illness is still an unscheduled absence...."

(*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

After reviewing the record, the court finds that Petitioner's termination from the Board had a rational basis and was in full accordance with the law. The 10/2/08 decision plainly set forth that Petitioner was only permitted one unscheduled absence per biweekly pay period. The decision further made clear that an "unscheduled absence" was *any absence* which is not approved prior to the end of the employee's previous work shift. This point was also communicated to her by her supervisor. Nevertheless, Petitioner had over a week of unscheduled absences in the month of December alone. It is undisputed that Petitioner was a probationary employee during this time, and thus the Board could terminate Petitioner "for almost any reason, or for no reason at all as long as it is not in bad faith or for an improper or impermissible reason" (*Duncan v. Kelly*, 9 N.Y.3d 1024, 1025 [2008]) (citations and internal quotations omitted).

Petitioner's argument that the Board terminated her for an improper reason, in that the Board violated her FMLA rights, is unavailing. The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for... a serious health condition that makes the employee unable to perform the functions of the position of such employee" (26 U.S.C. §2612(a)(1)(D)). A "serious health condition" is defined by the FMLA as "an illness, injury, impairment, or physical or mental condition that involves--

- (A) inpatient care in a hospital, hospice, or residential medical care facility;
- (B) continuing treatment by a health care provider."

(26 U.S.C. 2611 §(11)).

Suffering from acute bronchitis has failed to rise to the level of a "serious health condition" as defined by the FMLA (*see Beaver v. RGIS Inventory*

Specialists, Inc., 144 F. Appx. 452, 456 [6th Cir. 2006]). Assuming *arguendo* that Petitioner did suffer from a serious health condition, she failed to notify the Board of her intent to take leave either prior to actually doing so, or as soon as practicable thereafter - an essential element of a claim of employer interference with an employee's FMLA rights (see *Esser v. Rainbow Advertising Sales Corp.*, 448 F. Supp.2d 574, 580 [S.D.N.Y. 2006]; 29 C.F.R. §825.303).

Wherefore, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

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

Dated: August 24, 2009


EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT
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