

Ferrer v New York State Div. of Human Rights

2009 NY Slip Op 32077(U)

September 10, 2009

Supreme Court, New York County

Docket Number: 106174/09

Judge: Carol R. Edmead

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

PRESENT. **HON. CAROL EDMEAD**

PART 3

Index Number : 106174/2009

FERRER, ELOISA O.

VS.

NYS DIVISION OF HUMAN RIGHTS

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 106174-09

MOTION DATE 6/4/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

The instant application and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that Wilson, Elser, Moskowitz, Edelman & Dicker, LLP's cross motion to dismiss the petition is granted and the Clerk of the Court is directed to enter judgment accordingly; and it is further

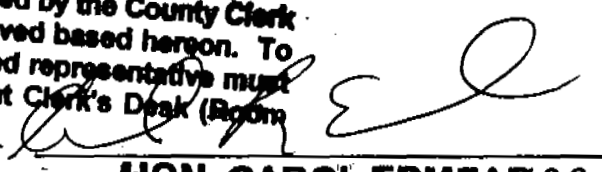
ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that counsel for Wilson Elser shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

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 1413).

Dated: 9/11/09



HON. CAROL EDMEAD 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ELOISA O. FERRER,

Petitioner,

Index No.: 106174/09

-against-

DECISION

NEW YORK STATE DIVISION OF HUMAN RIGHTS
and WILSON, ELSER, MOSKOWITZ, EDELMAN &
DICKER, LLP,

Respondent

CAROL ROBINSON EDMEAD, J.:

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 1A1B).

BACKGROUND

Petitioner Eloisa O. Ferrer moves, pursuant to CPLR Article 78 and section 298 of the Executive Law, to reverse the final order of respondent New York State Division of Human Rights (DHR) that there is no probable cause to believe that respondent Wilson, Elser, Moskowitz, Edelman & Dicker, LLP (Wilson Elser) engaged in any discriminatory practice against petitioner. DHR has filed an answer to this petition in which it states that it will not actively participate in this matter, because it believes petitioner and Wilson Elser are the real parties in interest. Wilson Elser has filed a cross motion in lieu of answer, pursuant to CPLR 3211 (a) (7), to dismiss the petition.

In her petition, petitioner states "[i]t appears that the SDHR decided to credit the statements of my employer, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP without crediting any of

my statements." Paragraph 3. She further maintains that, had DHR found her statements credible, she would have prevailed.

Petitioner was hired by Wilson Elser as a legal secretary on September 12, 2005, and went out on disability, due to a stroke, on January 9, 2006. Petitioner returned to work on May 10, 2006, after being cleared to work by her doctor. On April 4, 2007, petitioner, for the first time, sent Wilson Elser a letter requesting reasonable accommodation, couched in general terms. Petition, Ex. C. In response to petitioner's letter, Wilson Elser requested that petitioner provide them with documentation from her physician, detailing her disability and the nature of the accommodation that she would require. Later that month, Wilson Elser received an undated letter from petitioner's doctor stating:

"This patient is under treatment for multiple medical problems. She can continue to work but would benefit from a reduced work load/schedule. I hope accommodation can be made for her."

Cross Motion, Ex. A.

Wilson Elser advised petitioner that she would need more specific documentation, but none was ever received.¹ However, Wilson Elser reduced her work load, having her support two attorneys instead of three, and eventually assigned her to the word processing unit. Petitioner claims that the attorneys to

¹ The doctor did send a second note that was almost identical to the first note.

whom she was assigned were known to be difficult to work for, and that she had specifically asked not to be assigned to them, but was told that she could not choose the attorneys to whom she would be assigned. Petitioner asserts that this evidenced retaliatory discrimination against her, based on her disability.

On March 26, 2007, petitioner received a "Final Written Warning," indicating two prior verbal warnings regarding her poor performance, and stating that she was being placed on probation in order to provide her with an opportunity to improve her performance. Petition, Ex. B. Petitioner states that this was the first written warning that she had received, and that it was discriminatory and against firm policy to give a final written warning without earlier written warnings.

On September 26, 2007, petitioner requested, and was placed on, short-term disability leave, and that leave was extended at her request. Petitioner has been on disability since that date.

Petitioner asserts that the first time that she received any indication that her performance was below standard was when she received the "Final Written Warning." However, that document indicates that she had been spoken to about poor performance on at least two prior occasions, and the DHR report indicates that petitioner had received poor evaluations before she suffered her stroke. In its cross motion, Wilson Elser has provided lengthy documentation of petitioner's poor performance evaluations,

starting from as early as November 18, 2005. Cross Motion, Ex. B.

In her complaint to DHR, petitioner alleges employment discrimination, based on her disability and race, and alleges retaliatory treatment against her, based on her disability and race. In the instant petition, petitioner also claims a hostile work environment.

DISCUSSION

CPLR 7803 (3) allows for limited judicial review of administrative agency actions to determine

"whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

"It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

Petitioner has failed to meet her high burden to warrant overturning the determination made by DHR after its investigation and hearing.

To sustain an employment disability claim, the employee alleging discriminatory treatment must prove that she has a qualifying disability, that she sought and was denied reasonable accommodation, and that she was subject to adverse action because of her disability. *Pimentel v Citibank, N.A.*, 29 AD3d 141 (1st Dept 2006). In the instant matter, petitioner has failed to meet this burden so as to establish that DHR's action was arbitrary or capricious.

None of the physician's notes provided by petitioner to Wilson Elser specify either petitioner's disability or the nature of the reasonable accommodation that she would require. Further, regardless of this failure to specify the disability or requisite accommodation that the disability would require, the evidence presented indicates that Wilson Elser did provide petitioner with reasonable accommodation, by reducing her work load to supporting two attorneys instead of three, and assigning her to the word processing department. Simply because petitioner did not like working for the attorneys to whom she was assigned does not signify retaliatory treatment.

Petitioner has not alleged that the evidence presented to DHR was either incomplete or inaccurate; petitioner merely wants

the court to view the evidence in a light that is favorable to her, rather than to accept DHR's view of the evidence in a light that was favorable to Wilson Elser.

Considerable deference is given to DHR determinations because of its expertise in evaluating employment discrimination claims. *Matter of Camp v New York State Division of Human Rights*, 300 AD2d 481 (2d Dept 2002). Additionally, there is nothing in the record to indicate that DHR's determination was arbitrary or capricious. *Matter of Maltsev v New York State Division of Human Rights*, 31 AD3d 641 (2d Dept 2006).

Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion. *Matter of Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 (1st Dept), *affd* 66 NY2d 1032 (1985). Furthermore, a court cannot substitute its credibility determinations for those of the agency whose actions are being reviewed. *Matter of Rodriguez-Rivera v Kelly*, 2 NY3d 776 (2004).

Recently, the Appellate Division First Department rendered a decision detailing the requirements necessary to defend against an allegation of employment discrimination based on an employee's disability. In that case, *Phillips v City of New York* (___ AD3d ___, 2009 NY Slip Op 5990 [1st Dept 2009]), an employee who suffered with breast cancer was denied extended leave because her

employer, the Department of Homeless Services, classified her as being in a non-competitive title, which made her ineligible to receive unpaid medical leave beyond that mandated by the Family and Medical Leave Act. In reaching its ultimate conclusion, the court stated that individualized inquiry is necessary to determine whether a particular accommodation is reasonable under the specific circumstances.

"The first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested."

Id. at **10.

In the instant matter, the evidence demonstrates that Wilson Elser did attempt to discover the exact nature of the accommodation that petitioner required, both from petitioner and her physician, but no specifics were forthcoming. Regardless, Wilson Elser reduced petitioner's workload as a means of meeting petitioner's needs. It is also noted that petitioner first requested reasonable accommodation more than one year after she had returned to work, having been cleared to return to work by her doctor.

In the *Phillips* case, the Court went on to discuss the state's Human Rights Law, which indicates that

"[a] complainant states a prima facie case of discrimination if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated."

Matter of McEniry v Landi, 84 NY2d 554, 558 (1994).

In the case at bar, petitioner has not only failed to provide legally sufficient medical evidence that she suffers from a recognized disability, but the uncontradicted documentation provided indicates that within one month of her hiring, and several months prior to her stroke, there were complaints about her work performance. Further, the problems with petitioner's work performance continued, and were similar in nature to the problems identified prior to her stroke.

"Under the State HRL, 'reasonable accommodation' means actions taken which permit an employee ... with a disability to perform in a reasonable manner the activities involved in the job or occupation sought to be held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which the action is requested [internal quotation marks and citation omitted]."

Phillips v City of New York, 2009 NY Slip Op 5990 at **19.

In the case at bar, Wilson Elser restructured and modified petitioner's work schedule to accommodate her request for a reduced work load. The only request Wilson Elser did not grant was to let petitioner pick and choose the attorneys to whom she would be assigned. Eventually, Wilson Elser placed petitioner in the word processing unit to accommodate her, and Wilson Elser has had petitioner on extended medical leave, which was provided at

petitioner's request. According to the papers submitted, petitioner had not been terminated, and is still on extended leave.

To rebut the presumption of employment discrimination, the employer must demonstrate that petitioner could not perform the essential requisites of the job even with reasonable accommodation. In the instant matter, Wilson Elser has provided sufficient documentation to show that petitioner, even with the accommodation afforded her, was not capable of performing the basic functions of the position for which she was hired.

The court also notes that, unlike the *Phillips* case that involved a direct lawsuit against the employer who terminated the employee, in the case at bar, the court is asked to overturn the determination of DHR, an agency that has already investigated and reviewed the allegations, making the present determination one of review of the sufficiency of the evidence to support DHR's conclusion rather than one of initial fact-finding.

Lastly, petitioner's claims regarding hostile work environment are not properly before the court, and, therefore, cannot be addressed. In an Article 78 proceeding, only matters brought before the administrative agency whose actions are being questioned may be reviewed. *Matter of Johnson v New York State Tax Commission*, 117 AD2d 867 (3d Dept 1986).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that Wilson, Elser, Moskowitz, Edelman & Dicker, LLP's cross motion to dismiss the petition is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that counsel for Wilson Elser shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: September 10, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

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).