

**Matter of Gomez v NYS Div. of Human Rights**

2009 NY Slip Op 32286(U)

October 2, 2009

Supreme Court, New York County

Docket Number: 401027/2009

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**HON. PAUL G. FEINMAN**

DECENT.

PART 12

Index Number : 401027/2009  
**GOMEZ, RAYMOND**  
VS.  
**NYS DIV. OF HUMAN RIGHTS**  
SEQUENCE NUMBER : # 001  
ARTICLE 78

Justice

INDEX NO. 401027-09  
MOTION DATE \_\_\_\_\_  
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~~.

**PETITION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

**This judgment has not been reviewed 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: 10/2/09

[Signature]  
\_\_\_\_\_  
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: CIVIL TERM: PART 12

-----X  
In the Matter of the Application of  
RAYMOND GOMEZ,

Petitioner,

Index Number 401027/2009

Seq. No. 001

- against -

NYS DIVISION OF HUMAN RIGHTS, and  
NYS DEPARTMENT OF TRANSPORTATION  
Respondents.

**DECISION, ORDER &  
JUDGMENT**

-----X  
**Appearances:** **For the Petitioner:**  
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**For the Respondent Division of Human Rights:**  
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General Counsel  
By: Marilyn Balcacer, Esq.  
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**For the Respondent Department of Transportation:**  
Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
By: Roderick L. Arz, Esq., A.A.G.  
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New York, NY 10271  
(212) 416-8633

**Papers considered in review of this petition to reverse and cross-motion to dismiss:**

- Papers**
- Notice of Petition and Annexed Affidavit
- Respondent's Cross-Motion to Dismiss
- Mem. of Law in Support of Cross-Motion
- Answer
- Administrative Record

Numbered **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).**

**PAUL G. FEINMAN, J.:**

Petitioner seeks judicial review, pursuant to CPLR Article 78, of respondent New York State Division of Human Rights' ("DHR") dismissal of his verified complaint. Respondent Department of Transportation ("DOT"), petitioner's former employer, cross-moves for dismissal pursuant to CPLR 3211 (a) (7) arguing that it is not a proper party to the proceeding. For the

reasons set forth below, the petition is denied and the cross-motion is granted.

### ***Background***

According to the administrative record submitted by DHR, comprised of the background and investigatory materials related to petitioner's claim, petitioner was employed by respondent DOT in the Administration/Personnel Department as a calculation clerk for a number of years. During the course of his employment, petitioner received nine Notices of Discipline ("NOD") for problems with his attendance, promptness, and sleeping on the job (Ver. Pet. Ex. A; Record Ex. 4, Final Invest. Report and Basis of Determ. at 2). In 2007, petitioner's most recent NODs were "settled in exchange for a nine (9) month probation period commencing October 2, 2007" (Record Ex. 4, Final Invest. Report and Basis of Determ. at 2). Subsequently, on October 4, 2007, petitioner was apparently found sleeping on the job again, but was given yet another chance despite his violation of the settlement agreement (*id.*). Finally, on October 24, 2007, when petitioner was allegedly found sleeping on the job yet again, the DOT recommended that his employment be terminated.

Petitioner then filed a complaint which was acknowledged as received and filed by DHR as of February 25, 2008 (Record Ex. 1, Notice). The complaint alleged that he was forced "under duress" to sign resignation papers and was unlawfully discriminated against because of his gender, race, national origin, and disability. The DOT denied the allegations. Petitioner indicated that he had witnesses who could speak on his behalf. An investigation ensued and a conference was scheduled with the Regional Director of DHR on February 23, 2009, the notice of which informed petitioner that he could bring a lawyer, and should bring any "witnesses, books, records, papers, and documents relating to the matter" (Record Ex. 1, Notice). According

\* 4 ]

to the report issued following the conference, petitioner did not bring any witnesses and offered no reasons for their absence (Record Ex. 4, Final Invest. Report and Basis of Determ. at 3). Nonetheless, a telephone conference was held by DHR with petitioner and the pertinent DOT representatives, after which DHR determined that there was no probable cause to believe that DOT engaged in unlawful discrimination against petitioner (*id.* at 3-5).

On April 27, 2009, petitioner commenced this proceeding, pursuant to CPLR Article 78, seeking judicial review of the determination. He contends that respondents improperly found no discrimination against him, although they failed to call his witnesses to testify on his behalf. DOT then moved to dismiss the petition arguing that it is not a proper party in the context of this challenge to the determination issued by DHR. DHR answered the petition and indicated that as petitioner and the DOT are the real parties in interest, it would not actively participate but would submit on the record and file the written transcript of the record of the proceedings (Answer ¶¶ 4-5).

### *Analysis*

Generally speaking, CPLR Article 78 proceedings are the vehicle by which one challenges the determination of “a body or officer” (CPLR 7801 [1]; 7803 [3]), which is defined as “every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding” (CPLR 7802 [a]). It is well-settled that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency’s determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of*

*New York*, 98 AD2d 635, 636 [1st Dept 1983]). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 NY Jur Admin Law § 184).

Furthermore, an arbitrary action is one which is without sound basis in reason and taken without regard to the facts (*Matter of Pell v Board of Educ.*, 34 NY2d at 232). The court is to dispose of an Article 78 proceeding in the same manner as it would a motion for summary judgment (*see* CPLR 409[b]).

1. **DOT’s Motion to Dismiss**

Petitioner apparently seeks a ruling on his underlying discrimination claim which he brought against DOT. However, DHR, and not DOT, was the “body or officer” which determined that no probable cause existed for a finding of discrimination (*see 208 E. 30th St. Corp. v Town of N. Salem*, 88 AD2d 281, 284-285 [2d Dept 1982]). Thus, DOT is not a proper party to this proceeding (*see Matter of Capruso v New York State Police*, 300 AD2d 27, 28 [1st Dept 2002]; *D.B.C.G., Inc. v Town of Ramapo*, 97 AD2d 533, 533 [2d Dept 1983]) and DOT’s motion to dismiss the petition as against it is granted.

2. **DHR’s Determination**

The crux of the petition before this court is whether DHR’s determination was arbitrary and capricious. Petitioner seems to argue that DHR’s determination was arbitrary and capricious because the investigator did not interview any of his witnesses (Ver. Pet. ¶ 3; *see* CPLR 7803 [3]). DHR “has broad discretion in determining the method to be employed in investigating a claim” (*Matter of Bal v New York State Div. of Human Rights*, 202 AD2d 236, 237 [1<sup>st</sup> Dept

1994], *lv denied* 84 NY2d 805 [1994]) and this court cannot “substitute[] its own judgment as to the investigative methods to be employed by the [DHR]” (*Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 113 [1st Dept 1998]).

Here, DHR providently exercised its discretion by making its determination after holding a conference and an investigation. The record, which includes documents from 2006 through 2009, is replete with documentary evidence of petitioner’s repeated poor performance record, including tardiness, unexcused absences, and instances of falling asleep on the job (Record Ex. 2) which petitioner failed to rebut. Contrary to petitioner’s argument, he was directed to bring witnesses, and his failure to produce anyone, or to offer an explanation as to why he had not, buttresses the legitimacy of the agency determination. Inasmuch as petitioner bears the burden of showing probable cause of unlawful discriminatory practices (*see Matter of Janvier v Urban Mgt.*, 258 AD2d 359, 359 [1st Dept 1999]), defendant’s petition, fails as a matter of law “to allege facts sufficient to show that [DHR’s] determination was arbitrary and capricious” (*Gaskin v Westbourne Assoc., L.P.*, 59 AD3d 362, 362 [1st Dept 2009]; *see Perry v Chase Manhattan Bank*, 290 AD2d 403, 403 [1st Dept 2002]). Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed as against both respondents, and it is further

ORDERED that respondent DHR is directed to contact the Part 12 Clerk, Michael Kasper, at (646) 386-3273 to arrange a return of the administrative record.

This constitutes the decision, order, and judgment of this court.

ENTER:

J.S.C.

Dated: October 2, 2009  
New York, New York

**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). 5