

**Matter of Gormley v New York State Div. of Human Rights**

2009 NY Slip Op 32461(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 106594/2009

Judge: Paul G. Feinman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **HON. PAUL G. FEINMAN**

PART 12

Index Number : 106594/2009

**GORMLEY, KAREN**

VS.

**NEW YORK STATE DIV. OF HUMAN RIGHTS**

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 106594-09

MOTION DATE 7/16/09

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2

3

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No *Administrative Read 4*

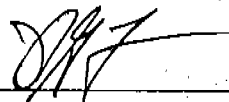
Upon the foregoing papers, it is ordered that this ~~motion~~

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

**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: 10/19/09



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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  
KAREN GORMLEY,

Pctitioner,

Index Number 106594/2009

Mot. Seq. No. 001

- against -

**DECISION, ORDER &  
JUDGMENT**

NYS DIVISION OF HUMAN RIGHTS

Respondent.

-----X

**Appearances:**

**For the Petitioner:**

Karen Gromley, *pro se*  
2047 Corle Street, 2nd Floor  
Brooklyn, NY 11209  
(718) 934-3351

**For the Respondent:**

Carolyn Downey, Esq., General Counsel  
By: Marilyn Balcacer, Esq.  
One Fordham Plaza  
Bronx, NY 10458  
(718) 741-8396

**Papers considered in review of this petition to review:**

**Papers:**

Notice of Petition and Annexed Exhibits  
Answer  
Reply Affidavit and Annexed Exhibits  
Administrative Record

**Numbered:**

1  
2  
3

---

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

Petitioner brings this CPLR Article 78 proceeding to review a determination by the respondent New York State Division of Human Rights ("DHR") that there was no probable cause to proceed upon petitioner's complaint of discrimination by the Division of Parole ("DOP"). Respondent DHR answers the petition, and seeks dismissal alleging that DHR's determination was supported by the record and not arbitrary and capricious. For the reasons set forth below, the petition is denied and the proceeding dismissed.

***Background***

Petitioner, a Caucasian female, is employed by DOP as a Senior Parole Officer (Pet., at 1). On June 26, 2008, petitioner filed a complaint with DHR against DOP alleging unlawful

discriminatory conduct on the basis of race and gender in violation of Executive Law § 296 (Pet., Ex. B). The complaint primarily arose out of two incidents, the first of which occurred on February 20, 2008, when, according to petitioner, Margot Johnson-Ervine, an African-American Parole Officer who is directly subordinate to petitioner, shouted at petitioner, "You have a plantation owner's mentality and treat me like a runaway slave" (Pet., Ex. B). According to petitioner, Parole Officer Johnson-Ervine then uttered an explicit verbal threat (Pet., Ex. D, Unusual Incident Report). Allegedly, a second incident occurred on May 14, 2008, when Raymond Taylor, another African-American Parole Officer, yelled, "SPO Gormley, you have disrespected me twice, if you do it again, I'm going to forget you're an SPO" (Pet., Ex. B). Petitioner alleges that the events that followed "evolved into an atmosphere that now makes [her] fear for [her] safety on a daily basis" (Pet., Ex. B). She also alleges that DOP failed to discipline those individuals which she contends constitutes an unlawful discriminatory practice (Pet., at 1-2).

DHR then conducted an investigation and accepted evidentiary submissions from the parties. DOP submitted a written response supported by documentary evidence (Pet., Ex. E, McIntosh letter dated July 28, 2008 annexed Exs. A-K); petitioner submitted a written rebuttal, attaching various documents in support thereof (Pet., Ex. F and annexed Exs. A-P). On March 12, 2009, DHR issued a determination and order after investigation which determined that there was no probable cause to believe that DOP had engaged in unlawful discrimination against petitioner and, accordingly, dismissed the complaint (Pet., Ex. A at 1). DHR reasoned that the conduct was neither severe nor frequent such that it rose to the level required for a hostile work environment (Pet. Ex. A, at 3). This CPLR Article 78 proceeding ensued. DHR has submitted the administrative record alleging that it sufficiently supports the determination (DHR Answer ¶

2).

### *Analysis*

Executive Law § 296 prohibits unlawful discrimination on the basis of, among other things, race or gender. In the context of a hostile work environment claim, the allegedly hostile conduct need not be “severe or pervasive” (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 76 [1st Dept 2009], *lv denied* 2009 NY Slip Op 81649, \*1 [2009]; *compare Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310-311 [2004]). Rather, “[a] focus on differential treatment better serves the purposes of the statute” (*Williams v New York City Hous. Auth.*, 61 AD3d at 77). Still, “petty slights and trivial inconveniences,” or “[a] single instance of ‘unequal’ treatment . . . may not qualify” (*id.* at 78-80), even if such conduct is “certainly offensive” (*Anderson v Abodeen*, 29 AD3d 431, 432 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006], *cert denied* 549 US 1281 [2007]).

When an agency makes an administrative determination, such as the “no probable cause” for discrimination determination that DHR made here, a CPLR Article 78 proceeding is the means by which such a determination is challenged (*see* CPLR 7801 [1]; 7803 [3]). The scope of this court’s review of such determinations is limited (*see Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d 662, 678 [1997]; *Matter of Weill v New York City Dept. of Educ.*, 61 AD3d 407, 408 [1st Dept 2009]). This court may not “substitute[] its judgment for that of the agency” (*Matter of Gebbie v Mammina*, 13 NY3d 728, 728 [2009]), 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]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see Matter of Pell v Board of Educ.*,

34 NY2d 222, 232 [1974]). The court disposes of Article 78 proceedings in the same manner as it would a motion for summary judgment (*see* CPLR 409 [b]).

Petitioner gives several reasons in support of her argument that DHR's determination was arbitrary and capricious. First, she argues that DHR's investigation was untimely because it was not held within 180 days after the complaint was filed. Executive Law § 297 (2) (a) provides that DHR "shall determine" whether probable cause of unlawful discrimination exists within 180 days of the filing of a complaint. Here, the complaint was filed on June 26, 2008 (Pet., Ex. B). DHR did not issue the determination until March 12, 2009 (Pet., Ex. A). DHR did not strictly adhere to the statutory time limits, but this court does not find that the "mere passage of time" of this delay of approximately 75 days caused respondent to suffer any "substantial prejudice" (*Matter of Sarkisian Bros. v State Div. of Human Rights*, 48 NY2d 816, 818 [1979]; *see Tiffany & Co. v Smith*, 224 AD2d 332, 332 [1st Dept 1996] ["The time limitations . . . are directory, not mandatory"], *lv denied* 88 NY2d 806 [1996]).

Next, petitioner takes exception with the fact that DHR's written determination did not specifically address each individual factual allegation that she raised in her complaint and rebuttal (Pet., at 2). Inasmuch petitioner does not allege, nor does the record indicate, that DHR's determination was based on erroneous facts, but only that the facts listed therein were not comprehensive (Pet., at 2), the determination cannot be found to be arbitrary and capricious (*see Bachman v State Div. of Human Rights*, 104 AD2d 111, 113 [1st Dept 1984]).

The heart of petitioner's argument is that DOP's failure to adequately discipline the Parole Officers led to a hostile work environment (Pet. at 1-2). DHR's no probable cause finding was based upon a significant amount of documentary evidence including a number of documents tending to substantiate the nondiscriminatory reasons for not taking harsher disciplinary actions.

For example, DOP presented evidence that DOP Regional Director Milton Brown had “firmly put PO Ray Taylor in check concerning his unwarranted outburst,” and even recommended further investigation (Pet., Ex. E, Brown Email, dated June 11, 2008). Parole Officer Taylor was immediately investigated by an Agency Employee Relations Officer, Regional Director Brown, the Deputy Regional Director, and three union officials and was verbally counseled and issued a counseling memo (Pet., Ex. E, Taylor Investigation).<sup>1</sup> Likewise, Parole Officer Johnson-Ervin was verbally counseled, issued a counseling memo, and required to attend and complete diversity training (Pet., Ex. E, Johnson-Ervin Investigation). These documents plainly demonstrate that DHR’s determination that there was no hostile work environment because action was taken upon petitioner’s complaint at the agency level was soundly based upon facts (*see Matter of Acosta v New York City Dept. of Educ.*, 62 AD3d 455, 457 [1st Dept 2009]). Even if this court were to assume that the parole officers’ actions did constitute unlawful discriminatory conduct, there is no indication that DOP “became a party to it by encouraging, condoning, or approving it” (*Clayton v Best Buy Co., Inc.*, 48 AD3d 277, 278 [1st Dept 2008]). To the contrary, DHR pointed to the fact that petitioner specifically noted that “[b]oth Bureau Chief Harvey and Deputy Regional Director McKinney . . . have been very supportive to [her] in what [she was] facing within th[e] Bureau” (Pet., Ex. F, Gormley letter, at 6), which “negat[ed] her allegations of a hostile work environment” (Pet., Ex. A, at 3). This court does not conduct a *de novo* assessment of the evidence and affords great weight to DHR’s factual findings (*see Matter of 47 Ave. B. E. Inc. v New York State Liq. Auth.*, 65 AD3d 33, 38 [1st Dept 2009]; *Hunts Point Term. Produce Coop. Assn., Inc. v New York City Economic Dev. Corp.*, 36 AD3d 234, 244 [1st Dept 2006], *lv*

---

<sup>1</sup> Civil Rights Law § 50-a prohibits DOP from providing DHR with a parole officer’s personnel record unless it is specifically required for the investigation (*see Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 152-153 [1999]).

denied 8 NY3d 827 [2007]). Accordingly, this court finds that DHR was within its discretion by determining that petitioner did not successfully rebut DOP's documentary submissions (*see Matter of Sidoti v State Bd. for Professional Med. Conduct*, 55 AD3d 1162 [1st Dept 2008]).

Given this, and because 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]), this court cannot hold that DHR's determination lacks rationality or was "taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d at 431). Thus, the petition is denied. Accordingly, it is

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

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

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

Dated: October 19, 2009  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

**HON. PAUL G. FEINMAN**

**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 1418).