

Matter of Harrington v City of New York

2010 NY Slip Op 33367(U)

December 3, 2010

Supreme Court, New York County

Docket Number: 106075/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 106075/2010
HARRINGTON, MICHAEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

in 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

*Cross motion to dismiss is denied
and the petition is restored to
the courts calendar for
1/27/11 @ 9:30 a.m.*

FILED

DEC 08 2010

NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 12/3/10

HON. JUDITH J. GISCHE J.S.C.
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: IAS PART 10**

-----X

In the matter of the application of
MICHAEL HARRINGTON,

Petitioner,

DECISION/ ORDER
Index No.: 1016075/10
Seq. No.: 001

for a judgment pursuant to
ARTICLE 78 of the CPLR

Present:
Hon. Judith J. Gische

-against-

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THE CITY OF NEW YORK, and THE NEW
YORK CITY POLICE DEPARTMENT,

**NEW YORK
COUNTY CLERK'S OFFICE**

Respondents.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Notice of Pet, Verified Pet w/exhs	1
Respondents' x/m (dismiss)	2
Petitioner's reply and opp to x/m w/exh	3
Respondents' reply	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an Article 78 petition brought by Michael Harrington ("Harrington"), a former police officer for respondent, the New York City Police Department ("NYPD") and the City of New York (collectively, "respondents"). Harrington contends that he resigned from the NYPD on February 11, 2009 and that when he applied for reinstatement in June of 2009, his application was wrongfully denied. Harrington seeks an order reversing the NYPD's decision, reinstating him to his pre-resignation status, on the basis that the determination was arbitrary, capricious, and intentional discriminatory

retaliation.

Respondents have not answered the petition and seek the pre answer dismissal of this action because petitioner has failed to allege any facts supporting his claim.

An Article 78 proceeding is a special proceeding which usually is summarily determined upon the pleadings, papers, and admissions. CPLR § 409(b); CPLR §§ 7801, 7804(h). Much like a motion for summary judgment, the court decide the issues raised on the papers presented and grants judgment for the prevailing party, unless there is an issue of fact requiring a trial. CPLR § 7804 (h); York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984); Battaglia v. Schumer, 60 A.D.2d 759 (4th Dept. 1977). Where there is an issue of fact a trial is required to be held forthwith. CPLR §7804(h).

When a pre-answer motion to dismiss is made premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered by the Court and all the allegations contained therein are deemed to be true. Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 (3rd dept 2003). Similar to a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant. Cron v. Hargro Fabrics, Inc., 91 NY2d 362 (1998); Sanders v. Winship, 57 NY2d 391 (1982). Thus, the court's inquiry on this motion to dismiss is whether the petitioner has a cause of action, not whether it has stated one. Guggenheimer v. Ginzberg, 43 NY2d 268 (1977); DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 (2nd Dept 1983).

At bar the Court finds that the petitioner has alleged sufficient facts to withstand a motion to dismiss.

Underlying Facts and Arguments Presented

Harrington became a police officer with the NYPD in July of 2002 and served continually as a police officer until February 11, 2009, when he voluntarily resigned from the force. Harrington states that in February of 2003, he told one of his co-workers that he was gay and that after this disclosure, he was subjected to continuous discrimination and harassment, which led to his ultimate resignation.

In September of 2007, Harrington initiated a plenary action, which is currently pending against respondents, for sexual orientation discrimination, harassment, and retaliatory discrimination (Harrington v. City of New York, et al., Index No. 112945/07) ("discrimination lawsuit"). The complaint in the discrimination lawsuit is an exhibit to the petition. The discrimination lawsuit complaint contains factual allegations of numerous particularized events that occurred over a 6 ½ year period, forming the basis for Harrington's claim that his sexual orientation led to disparate and legally prohibited treatment. Among other things, the allegations include a claim that in 2004 Harrington filed a complaint of discrimination with the NYPD Office of Equal Employment Opportunity ("OEEO"). The complaint was substantiated and resulted in training for the entire 79th precinct. Allegations of further incidents following the training are also made.

Harrington states that after he resigned, he moved to California and became employed as a police officer with the Newark Police Department. However, in June of 2009, he sought reinstatement with the NYPD. Harrington took and passed the required medical and psychological exams. Rafael Pineiro, Chief of Personnel, notified

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Harrington by letter dated January 11, 2010 that his request for reinstatement had been denied and that "reinstatement to civil service positions are made at the discretion of the employing agency."

Harrington alleges that he was an exceptional employee and was never subject to any disciplinary action. Harrington contends that a vacancy existed to which he could have been appointed and that the NYPD's failure to reinstate him was arbitrary, capricious, and intentional discriminatory retaliation. Harrington argues that respondents abused their discretion in failing to reinstate him as retaliation for commencing the discrimination lawsuit. Harrington further contends that respondents' refusal to provide a reason for why they denied his request for reinstatement suggests that the denial was for discriminatory reasons.

Respondents cross-move to dismiss the petition. Respondents argue that Harrington has failed to allege any facts that would support his allegations that the NYPD's decision to deny his request was arbitrary, capricious, and/or intentional discriminatory retaliation. Respondents also argue that the NYPD is not required to provide a reason for its decision to deny a former employee's request for reinstatement and that such a determination is entirely within the discretion of the NYPD.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: [1] was made in violation of lawful procedure; [2] affected by an error of law; [2] or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he

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proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law." Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 N.Y.2d 222, 231 (1974) (emphasis removed); see also Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967).

In general, an employee who has resigned from a permanent position may be reinstated with the approval of the commissioner of citywide administrative services, if there is a vacant position and the head of the agency to whom the employee has applied for such reinstatement is "willing to reinstate the employee." Rule 2.1(a) and 2.5 of the Personnel Rules and Regulations of the City of New York (55 RCNY 12). "A resignation constitutes a complete break in the service, and the absolute termination of relations. Thereafter, the person resigning has no rights or duties. Reentry into the service can be accomplished only by the voluntary act of the person who has power of appointment." Doering v. Hinrichs, 289 N.Y. 29 (1942); Spurling v. Police Dept. of City of New York, 49 A.D.2d 823 (1st Dept. 1975). Furthermore, the NYPD is not required to consider petitioner's job performance or the results of medical and psychological examinations when making a determination not to reinstate. Salas v. New York City Police Dept., 63 A.D.3d 468 (1st Dept. 2009).

Notwithstanding the complete discretion afforded to the NYPD in reinstating any employee, they are still prohibited from basing any such decision upon a prohibited discriminatory reason. Brennan v. Metropolitan Opera Assn, 284 AD2d 66 (1st dept. 2001); In re National Basketball Ass'n, 115 AD2d 365 (1st dept. 2001); see also: Bellamy v. City of New York, 14 AD3d 462 (1st dept. 2005). Consequently, if the

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decision not to reinstate Harrington was based upon his sexual orientation, or in retaliation for him making complaints about prior discriminatory treatment, that decision would be contrary to law and subject to challenge. NYSHRL §§ 296.1 [a]; 7.

The NYPD did not put forth any reason why it did not reinstate Harrington. Harrington, however, has alleged enough circumstantial evidence, to raise an inference that the decision not to reinstate him was based upon his sexual orientation and in retaliation for him previously seeking to enforce his rights as a gay police officer. Specifically, his petition alleges: membership in a protected class, satisfactory job performance, an adverse employment action and facts that raise an inference of discrimination on the basis of the employee's membership in that protected class. Dawson v. Bumble & Bumble, 398 F3d 211 (CA 2 2005); Garraway v. Solomon R. Guggenheim Foundation, 415 F. Supp.2d 377 (SDNY 2006). This constitutes sufficient allegations for a *prima facie* case that will withstand a motion to dismiss. Facts constituting direct evidence of discrimination are not necessary to state a valid claim. Tappe v. Alliance Capital Management LP, 198 F. Supp. 2d 368 (SDNY 2001).

The Court denies the cross-motion to dismiss the petition.

Conclusion

Accordingly it is hereby:

ORDERED that the cross-motion to dismiss the petition is denied and it is further

ORDERED that the respondent is given 20 days from the date of this order to interpose an answer, and it is further

ORDERED that the petition is restored to the calendar to be heard on January 27, 2011 at 9:30 a.m., and it is further

ORDERED this shall constitute the decision and order of the Court.

Dated: New York, New York
December 3, 2010

SO ORDERED:



HON. JUDITH J. GISCHE, J.S.C.

FILED
DEC 08 2010
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