

Matter of Givens v Gatling

2011 NY Slip Op 31980(U)

July 11, 2011

Supreme Court, New York County

Docket Number: 101969/2011

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

VERA GIVENS,
Petitioner,

INDEX NO. 101969/11

MOTION DATE 5/20/11

- v -

MOTION SEQ. NO. 001

PATRICIA L. GATLING, COMMISSIONER OF THE NEW YORK
CITY COMMISSION ON HUMAN RIGHTS, and THE NEW
YORK CITY DEPARTMENT OF CORRECTION,

Respondents.

The following papers, numbered 1 to 6 were read on this Article 78 petition

Notice of Petition— Verified Petition — Exhibits A-D _____ | No(s). 1-2

Verified Answer — Exhibits A-G--Affirmation _____ | No(s). 3-4; 5
Verified Answer _____

Reply — Exhibit A [Affirmation] _____ | No(s). 6-7


Upon the foregoing papers, it is ADJUDGED that this Article 78 petition is
*decided in accordance with the annexed memorandum decision
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).

HON. MICHAEL D. STALLMAN

Dated: 7/11/11
New York, New York


_____, J.S.C.

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

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check If appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check If appropriate:..... SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
In the Matter of the Application of
VERA GIVENS,

Petitioner,

Index No.: 101969/2011
DECISION AND JUDGMENT

-against-

PATRICIA L. GATLING, COMMISSIONER OF
THE NEW YORK CITY COMMISSION ON HUMAN
RIGHTS, and THE NEW YORK CITY DEPARTMENT
OF CORRECTION,

Respondents.

UNFILED JUDGMENT

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141B).

Hon. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, pro se petitioner Vera Givens seeks a judgment annulling the January 18, 2011 determination of respondent Patricia L. Gatling, Commissioner of the New York City Commission on Human Rights (Commission), which determined that there was no probable cause to believe that petitioner's former employer, respondent the New York City Department of Correction (DOC), engaged in the unlawful discriminatory practices alleged.

BACKGROUND AND FACTUAL ALLEGATIONS

In 2001, petitioner was hired by DOC as a correction officer and assigned to a facility located in Queens, N.Y. In 2004, petitioner injured her right knee and right foot, which resulted in nerve and tissue damage. In July 2004, petitioner had right knee arthroscopy surgery. Petitioner's injuries required that she receive physical therapy and take medication. On December

23, 2005, petitioner's doctor wrote a letter to DOC in which he stated that petitioner was ready to return to work with inmate contact except that she should be given "[r]easonable accommodations for her right knee condition" which "include a limitation of kneeling, crawling, squatting, bending and climbing." Commission's Exhibit B, letter from Randall Ehrlich, M.D.

In January 2005, petitioner requested an accommodation of a steady day tour, which meant that petitioner would start her work day at the same time every day and it would include mostly daylight hours. DOC granted petitioner's request, and, in January 2005, petitioner was given a day tour. According to the Commission, the day tour is the most desirable tour, although most of DOC's employees are placed on a rotating shift where the workday can start at any time, day or night. In February 2006, petitioner, by her request, was transferred to a facility in the Bronx. She was placed on a rotating shift.

In August 2006, petitioner was prescribed medications to take three times a day, whose side effects included drowsiness. She was instructed not to drive for at least an hour after ingesting the medications. Petitioner's commute is approximately 90 minutes. In September 2006, petitioner requested a reasonable accommodation of a day tour, instead of a rotating tour, so that she could take her medication on a regular basis. Petitioner's

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physician suggested that petitioner be placed on a steady day tour. Commission's Exhibit B, letter from Sireen Gopal, M.D. DOC offered petitioner a steady tour, but not necessarily a steady day tour. Allegedly, a steady tour would still enable petitioner to take her medication at regular intervals without as much disruption to her work performance or commute. Apparently, petitioner was initially given a day tour in October 2006, but this was removed a week later, after petitioner met with DOC's internal medical staff. Petitioner only wanted a day tour, and refused the steady tour offered to her at that time.

After the removal of her day tour, petitioner requested several times through out 2006 and 2007 to be reassigned to a day tour allegedly to accommodate an alleged disability which necessitated that she take medications at certain times. As of August 2007, petitioner had not been granted a day tour. In August 2007, petitioner submitted a complaint to the Commission alleging that, by not accommodating her disability, DOC has discriminated against her in violation of the Administrative Code of the City of New York (Administrative Code). Pursuant to Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to refuse to hire or employ or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's disability.

In June 2008, DOC filed conduct charges against petitioner, seeking to terminate her for excessive absences. Apparently, from May 2007 through May 2008, petitioner was absent from work 95 days, which comprised at least 40% of her regular days. The record also indicates that petitioner was absent from work for an additional 41 days, from May 2008 through July 2008.

In August 2008, petitioner filed an amended complaint with the Commission, alleging that, in addition to being discriminated against, she was also retaliated against by DOC for filing the complaint. In her amended complaint, petitioner maintained that DOC retaliated against her by filing charges against her after she complained to the Commission. Petitioner further accused DOC of retaliating against her by forcing her to appear at the Health Management Division an excessive amount of times. Petitioner also noted that she believed that DOC vandalized her car in retaliation for her filing a complaint with the Commission.

A hearing was held on DOC's charges against petitioner in September 2008. In December 2008, an Administrative Law Judge determined that the charges were supported by the evidence, and recommended that the petitioner be terminated. In February 2009, DOC terminated petitioner.

In February 2009, former counsel to petitioner wrote to the Commission and informed them that there was another employee who allegedly was similarly situated to petitioner, but who had not

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been terminated. This other employee allegedly suffered from a panic disorder, was out of work for 9 months, but had not been terminated.

In August 2010, the Commission issued its "determination and order after investigation." Commission's Exhibit D. The Commission found that, after investigation, there was no probable cause to believe that DOC "engaged in the unlawful discriminatory practices alleged." *Id.* at 1. The determination set forth that DOC had accommodated petitioner with a steady day tour in 2005. Then, in 2006, after her doctor only suggested that petitioner be given a steady day tour, DOC offered the petitioner an additional accommodation of a steady tour, but not necessarily a steady day tour. After petitioner refused this accommodation, she was absent at least 95 days in one work year.

The Commission set forth that DOC had met its obligation under the law to accommodate petitioner by offering her a steady tour. Likewise, the Commission held that DOC used non-discriminatory business reasons for terminating petitioner. Petitioner had been absent too many times and, after a hearing was held, an Administrative Judge recommended that petitioner should be terminated. The Commission explained that "[o]nce a Respondent supplied what appears to be a valid non-discriminatory reason for its allegedly discriminatory actions, the burden shifts to the Complainant to prove that the reason is really a

pretext for discrimination." *Id.* at 3. The Commission did not believe that a pretext existed or that petitioner had met her burden.

Additionally, the Commission found that the petitioner could not sustain a claim for retaliation in that there was no evidence that someone from DOC vandalized her car. Likewise, no retaliation could be found based upon DOC's requiring petitioner to appear at the Health Management Division, in light of her many absences.

In October 2010, petitioner appealed the August 2010 determination. In her appeal, petitioner again noted that the other allegedly similarly situated employee was not terminated. In January 2011, the Law Enforcement Bureau submitted a letter to the Commission in response to petitioner's appeal. In its letter, the Law Enforcement Bureau noted that petitioner also requested a day tour previous to her injuries, as a way to better manage her personal life, and that her medical reports did not establish that a permanent day tour was necessary. On January 18, 2011, the Commission affirmed the no probable cause determination and dismissed petitioner's complaint of employment discrimination.

Petitioner now seeks to set aside the Commission's January 2011 review of her appeal as being arbitrary and capricious and not based on substantial evidence. Petitioner contends, among

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other things, that the Commission conducted a "one-sided and incomplete investigation" in that it did not interview witnesses who had personal knowledge of petitioner's situation. Petitioner further alleges that the Commission failed to carry out a proper investigation, in that the Commission accepted DOC's statements as being true. Petitioner contends that the Commission failed to address her claims that she was retaliated against for asking for an accommodation, and for filing a complaint with the Commission. Petitioner also claims that the Commission never investigated the allegedly similarly situated employee, who was not terminated.

The Commission contends that its determination, that found no probable cause to believe that DOC engaged in unlawful discriminatory practices, was not arbitrary and capricious, and was supported by substantial evidence in the record. The Commission also states that it did not interview witnesses, because petitioner failed to provide the Commission with this information during the investigation.

The Commission further argues that retaliatory termination was not one of the allegations in the complaint and also claims that petitioner, through her former counsel, refused to amend the complaint to include retaliation.¹ The Commission also states that neither one of petitioner's complaints alleges that she was

¹Petitioner's former counsel submitted a letter which denies this statement by the Commission.

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treated differently than someone who was similarly situated. Despite not analyzing retaliatory termination directly, the Commission also contends that there is no evidence to suggest that petitioner's disability or retaliation were motivating factors in DOC's actions. The Commission concludes, "[t]he investigation shows that Petitioner's disability, prescribed medication, and commute rendered her unable to work and, therefore, her disability could not have been accommodated." Commission's Answer, ¶ 25.

The Commission further alleges that the petitioner admitted to falling asleep on the job and that the medication compromised her alertness, no matter what shift she worked. Commission's Memorandum of Law, at 7.

DOC argues that the petition should be dismissed. It claims, among other things, that it is not a proper party to this proceeding, that the court has no personal jurisdiction over DOC and that the petitioner fails to state a cause of action.

DISCUSSION

Petitioner seeks to have the Commission's no probable cause determination annulled and remanded for further investigation or for a public hearing. Where, as here, there is an Article 78 proceeding to challenge the review of the Commission, as set forth in Administrative Code § 8-123 (e), "[t]he findings of the commission as to the facts shall be conclusive if supported by

substantial evidence on the record considered as a whole." The court does not have discretion to "weigh the evidence or reject the Commission's determination where the evidence is conflicting and room for choice exists [internal quotation marks and citations omitted]." *Matter of Orlic v Gatling*, 44 AD3d 955, 956 (2d Dept 2007).

Substantial evidence is a standard defined as, in pertinent part, "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. ... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt [emphasis in original, internal quotations and citation omitted]." *Matter of 119-121 East 97th Street Corp. v New York City Commission on Human Rights*, 220 AD2d 79, 81-82 (1st Dept 1996). Additionally, the Court of Appeals has also set forth that this section of the Administrative Code is comparable to the New York State statute, Executive Law § 298. See *Matter of Pace College v Commission on Human Rights of City of New York*, 38 NY2d 28, 33 (1975).

Petitioner argues that the Commission's investigation was one sided and incomplete, and that the Commission's determination is not based on substantial evidence. According to petitioner, the Commission based its findings solely on the information given to it by DOC. Petitioner also alleges that, although the

[* 1]

Commission was given the name of a purportedly similarly situated employee, it failed to interview this person.

The court finds that there is substantial evidence in the record to support the Commission's determination. As referenced by the Commission's August 2010 determination, which was affirmed in January 2011, the Commission set forth a comprehensive record of what transpired at DOC. The record indicates that the Commission reviewed the medical notes, DOC's internal investigations into the petitioner's disability, and memos from both parties, among other items. The Commission based its finding of no probable cause on both the evidence in the record and on the administrative law judge's findings.

A no probable cause determination should be "overturned as capricious only where the record demonstrate that its investigation was abbreviated or one-sided [internal quotation marks and citation omitted]." *Matter of Chirgotis v Mobil Oil Corporation*, 128 AD2d 400, 403 (1st Dept 1987). The petitioner also suggests that the finding of no probable cause should be considered arbitrary and capricious since the investigation was allegedly "abbreviated or one sided." As previously set forth, since the record indicates that the investigation was not abbreviated and one-sided, the determination will not overturned for being arbitrary and capricious.

The petitioner contends that the Commission did not

complete a full investigation because it did not interview the allegedly similarly-situated employee. Neither petitioner's complaint nor her amended complaint make mention of this employee. It is well settled that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency [internal quotation marks and citation omitted]." *Matter of Rizzo v New York State Division of Housing and Community Renewal*, 6 NY3d 104, 110 (2005). Since the other employee was not mentioned in the original record to the Commission, it was not error for the Commission to fail to review this matter.

Moreover, the Commission is entitled to "broad discretion in determining the method to be employed in investigating a claim." *Matter of Levin v New York City Commission on Human Rights*, 12 AD3d 328, 329 (1st Dept 2004). Courts have upheld no probable cause determinations which were based solely on written submissions. See e.g. *Matter of Chirgotis v Mobil Oil Corporation*, 128 AD2d 400, *supra*. As such, the fact that the Commission may not have interviewed witnesses is without import. Likewise, even if the Commission was made aware of the other allegedly similarly-situated employee via letter, the Commission was under no obligation to include this in their investigation.

Petitioner contends that the Commission's investigation is incomplete, since it did not address some of her claims for

retaliation. Although the Commission does not specifically address all of the retaliation claims in its determination, as explained below, the Commission's determination sufficiently resolves the fact that petitioner was not terminated in retaliation for either requesting an accommodation or for filing a complaint with the Commission.²

The petitioner had the initial burden of establishing a prima facie case of discrimination before the Commission. *Burlington Industries, Inc. v New York City Human Rights Commission*, 82 AD2d 415, 417 (1st Dept 1981), *affd* 58 NY2d 983 (1983). As the Commission concluded, once DOC set forth a valid non-discriminatory reason for the allegedly discriminatory actions, the burden shifted to the petitioner to demonstrate how that reason was really a pretext for discrimination. DOC demonstrated that DOC did try to reasonably accommodate petitioner and that petitioner's termination was motivated by valid business reasons. In light of this, petitioner could not establish that a pretext existed.

Similarly, when analyzing claims for retaliation, courts apply the burden shifting test as set forth in *McDonnell Douglas Corp. v Green* (411 US 792, 802 [1973]), which places the "initial

²Although the amended complaint evidently accuses DOC of retaliating against petitioner for filing a complaint to the Commission, petitioner only alludes that she was terminated in retaliation for asking for an accommodation.

burden" for establishing a prima facie case of retaliation on the plaintiff. One of the four elements required for a plaintiff to successfully plead a claim for retaliation, is that there is a causal connection between the protected activity and the adverse action. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 (2004).

Because the Commission already concluded that petitioner was terminated for business reasons, it necessarily follows that petitioner could not have been terminated in retaliation for either requesting an accommodation or for filing a complaint with the Commission. Therefore the Commission's findings do support substantial evidence that petitioner was not retaliated against.

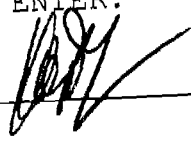
Accordingly, since the Commission's January 18, 2011 determination was supported by substantial evidence, the petitioner is not entitled to have the matter annulled and remanded, and the petition is denied.

In light of the court's decision to deny the petition on the merits, the DOC's arguments need not be addressed.

CONCLUSION

Accordingly, it is hereby
ADJUDGED that the petition is denied and the proceeding is
dismissed.

Dated: 7/11/11

ENTER:


J.S.C.

HON. MICHAEL D. STALLMAN

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