

Matter of Ollivierre v New York City Tr. Auth.

2011 NY Slip Op 32813(U)

October 20, 2011

Sup Ct, NY County

Docket Number: 401623/2011

Judge: Jr., Alexander W. Hunter

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

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Index Number : 401623/2011
OLLIVIERRE, TREVOR J.
vs.
N.Y.C.T.A.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-8, 9-12

13-15

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

See memorandum decision and judgment annexed hereto.

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: October 20, 2011


ALEXANDER W. HUNTER JR J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of Trevor Ollivierre,

Index No.: 401623/2011

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

Decision and Judgment

-against-

New York City Transit Authority,

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).
Respondent.

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by pro se petitioner for an order pursuant to C.P.L.R. Article 78, reopening petitioner's discrimination complaint against respondent before the New York State Division of Human Rights (NYSDHR) in violation of N.Y. Exec. Law, Art. 15 is denied. Respondent's cross-motion to dismiss petitioner's complaint is granted.

Petitioner claims that the discrimination complaint should be reopened and the determination to dismiss the claim should be reversed since petitioner was subject to discrimination when he was suspended from his position as a Metropolitan Transportation Authority (MTA) worker. Petitioner alleges that his suspension was unjustified and discriminatory based on his age, arrest record, race/color and sex. Furthermore, he claims his suspension was unfounded and retaliatory.

Petitioner asserts in his verified complaint, that respondent should have been charged with unlawful discriminatory practice relating to employment, in violation of Article 15 of Executive Law of the State of New York. Furthermore, petitioner claims that respondent, MTA/New York City Transit Authority (NYCTA), violated Title VII of the Civil Rights Act of 1964 and violated the Americans with Disabilities Act when it suspended him from his employment.

Petitioner is a "cleaner" for the NYCTA and was arrested on November 17, 2009, by the New York City Police Department. He was caught, while off duty, attempting to steal approximately 145 used metro cards from a locked New York City Transit litter box. Petitioner alleges that one of his responsibilities as an MTA "cleaner," was to clear the litter boxes. At the time of his arrest, he was collecting the discarded metro cards for the logos that appear on the face of the metro cards. Respondent indicates that petitioner was in possession of several unauthorized keys from various New York City Transit offices and gates, as well as a forged transit key. In response, petitioner asserts that he was an employee of the NYCTA and was authorized to have possession of the keys.

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Petitioner states that he had been in possession of the keys for more than fourteen (14) years and other individuals employed as cleaners possessed multiple sets of keys.

Respondent states that according to police, petitioner was also carrying burglar's tools, which petitioner addressed by claiming that the tools were necessary in his position as a cleaner. Following petitioner's arrest, petitioner was charged with one count of possession of a forged instrument, six counts of criminal possession of stolen property and two counts of possession of burglar's tools and keys. Thereafter, petitioner was suspended from his position with NYCTA and brought up on disciplinary charges, including gross misconduct, pursuant to the terms of the Collective Bargaining Agreement (CBA). While respondent recommended petitioner's dismissal, the record indicates that petitioner currently awaits a disciplinary hearing as well as the outcome of the pending criminal case. Petitioner requested and received a postponement of the disciplinary hearing until resolution of the pending criminal charges.

Petitioner alleges that several co-workers had keys to various locations within the subway system and to penalize him for possessing additional keys was unacceptable. Furthermore, petitioner asserts that his attempt to remove the metro cards was inconsequential since they were valueless. However, respondent counters by indicating that had petitioner traded in the 145 discarded metro cards, they would have been valued at \$72.50.

Petitioner brought this discriminatory action against NYCTA, alleging that NYCTA took disciplinary action against petitioner based on his age, race, and sex. Additionally, petitioner alleges, that respondent suspended him as a form of retaliation, after he spoke with the media. Following an investigation by NYSDHR, this action was dismissed, as the investigation did not reveal sufficient evidence to establish a nexus between respondent's decision to suspend the petitioner and the petitioner's age, race/color, arrest record or retaliation. The investigation determined that respondent's decision to suspend petitioner did not appear to be a pretext for discrimination.

In reaching its decision in this case, NYSDHR analyzed the disciplinary grievance procedures set forth in the Collective Bargaining Agreement between NYCTA and petitioner's union, TWU Local 100. NYSDHR determined that petitioner was suspended pursuant to the disciplinary grievance procedures set forth in the CBA, which state, "...it is understood that the right to discharge or discipline employees for cause and to maintain discipline and efficiency of employees is the responsibility of the Authority. The Authority shall be guided by a policy of progressive discipline in the administration of its disciplinary procedures." (Exhibit D, p. 36). Furthermore, the CBA says, "the penalty for a serious violation such as...theft, gross insubordination...will be based on the severity of the instant violation...in accordance with existing standards." (Exhibit D, p.38). Pursuant to the CBA, no permanent disciplinary action may be imposed until the completion of the disciplinary proceedings. However, "...the provision shall not foreclose pre-disciplinary suspension for an employee for reasons of serious misconduct detrimental to the operation of the Authority." (Exhibit D, p. 38). These guidelines set forth the basis for which NYCTA based its decision to suspend petitioner and after

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reviewing both the CBA and petitioner's claim for discrimination, the Division of Human Rights correctly concluded that this action should be dismissed.

Respondent cross-moves to dismiss petitioner's discrimination claim on the ground that petitioner failed to state a cause of action. Pursuant to C.P.L.R. Section 7801, judicial review of administrative determinations in Article 78 proceedings is limited to evaluation of whether that determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of an agency's discretion. Furthermore it is noted that, "administrative action must be upheld in an Article 78 proceeding unless it shocks judicial conscience and therefore constitutes abuse of discretion as a matter of law." Matter of Featherstone v. Franco, 95 N.Y.2d 550 (2000).

In Matter of Edwin A. Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222 (1974), the Court of Appeals determined that "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." (citations omitted). Therefore, the role of this court is strictly limited to determining whether or not there was a rational basis for the final decision made by the New York State Division of Human Rights. "Upon a conclusion that it would decide a case in a manner differently, a court is precluded from substituting its judgment for that of the agency to which the Legislature has given specific power to determine the issues before it, unless there is no rational basis for the agency's determination." Matter of IG Second Generation Partners L.P., et al. v. New York State Div. of Hous. & Community Renewal, Off. of Rent Admin., 34 A.D.3d 379 (1st Dept. 2006); see, Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd., 112 A.D.2d 72 (1st Dept. 1985).

The determination of NYSDHR, should not be re-visited or annulled, as it was not arbitrary and capricious and a rational basis was established to believe that NYCTA did not engage in discrimination when suspending petitioner after he was arrested for theft of NYCTA property and for having burglars' tools and unauthorized keys in his possession. Petitioner was afforded ample opportunity to present evidence to rebut NYCTA's determination of its legitimate nondiscriminatory reason for suspending petitioner, but he failed to do so. Considerable deference is given to NYSDHR, because of its expertise in evaluating discrimination claims and based upon their all-inclusive investigation in this matter. Matter of Bal v. New York State Div. of Human Rights, 202 A.D.2d 236, 236 (1st Dept. 1994), *lv denied* 84 N.Y.2d 805 (1994); Matter of Chirgotis v. Mobil Oil Corp., 128 A.D.2d 400, 403 (1st Dept. 1987). In Matter of Bal v. New York State Div. of Human Rights, the court determined that, "SDHR has broad discretion in determining the methods to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates its investigation was "abbreviated or one-sided." *Id.* at 236. Here, there is no implication of any bias demonstrated by respondents.

The scope of review applied by the NYSDHR was discussed in Matter of State Div. of Human Rights [Granelle], 70 N.Y.2d 100, 106 (1987), which established that

“when a rational basis for the conclusion adopted by the Commissioner is found, the judicial function is exhausted; Matter v. Bracci v. New York State Div. of Human Rights, 62 A.D.3d 1146, 1148-1149 (3rd Dept. 2009), *appeal dismissed and lv dismissed* 15 N.Y.3d 865 (2010). In the case at bar, the appropriate standard of review was applied by the NYSDHR, which determined whether in accordance with the law, the proceeding was arbitrary and capricious, or without rational basis.

“The scope of judicial review under the Human Rights Law is extremely narrow and is confined to the consideration of whether the determination is supported by substantial evidence in the record.” Matter of State Div. of Human Rights [Granelle], 70 N.Y.2d 100, 106 (1987). In the case at bar, there is substantial evidence to support NYSDHR’s determination; specifically, the guidelines set forth in the collective bargaining agreement.

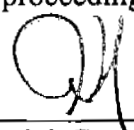
Moreover, this court finds, pursuant to C.P.L.R. Section 3211(a)(7) and C.P.L.R. 7804(f), that petitioner has failed to state a cause of action, as there were grounds for NYSDHR to dismiss petitioner’s discrimination complaint. CPLR 7804(f) provides that: “the respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition.” Matter of Wood v. Glass, 226 A.D.2d 387 (2nd Dept. 1996). Thus, respondent’s cross-motion to dismiss petitioner’s complaint should be granted since petitioner failed to show how NYSDHR’s decision violated lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. Matter of Featherstone v. Franco, 95 N.Y.2d 550 (2000).

Finally, petitioner alleges that respondent suspended him as a means of retaliation. However, petitioner failed to make a prima facie showing of retaliation. “To make a prima facie showing of retaliation, a plaintiff must show that (1) he or she has engaged in protected activity, (2) the employer was aware that he or she participated in such activity, (3) he or she suffered an adverse employment action based upon the activity, and (4) there is a causal connection between the protected activity and the adverse action.” Someone v. County of Suffolk, 36 A.D.3d 890 (2nd Dept. 2007). In the case at bar, petitioner not only failed to establish a causal connection between speaking with the media and his suspension, but the evidence shows that petitioner spoke with the media subsequent to the enforcement of his suspension. Therefore, it is impossible for respondents’ suspension to be retaliatory.

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to respondent NYCTA.

Dated: October 20, 2011



J.S.C.

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