

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

2011 NY Slip Op 34288(U)

July 22, 2011

Supreme Court, New York County

Docket Number: 103788/11

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

In the Matter of the Application of

JUSTINA KIM,  
Petitioner,  
-against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS  
and D. E. SHAW & CO., L.P.,  
Respondents.

INDEX NO.  
MOTION DATE  
MOTION SEQ. NO.  
MOTION CAL. NO.

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06-29-2011  
001 & 002

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The following papers, numbered 1 to 9 were read on this petition to/for Article 78  
and Cross-Motion to Dismiss the Petition and Order to Show Cause for an Extension of Time

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1 - 2, 3 - 4, 8 - 9	
5	
6, 7	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered and adjudged that the petition pursuant to CPLR Article 78, is denied. The cross-motion to dismiss the petition pursuant to CPLR § 3211[a] [7] and CPLR Article 78, is granted. Motion sequence 002, DESCO's motion for an adjournment of time, was withdrawn by the movant.

Petitioner seeks a judgment pursuant to CPLR Article 78, reviewing, annulling, and reversing NYSDHR's determination that resulted in dismissal of her complaint, and a finding of lack of probable cause that DESCO engaged in or is engaging in discriminatory practices. The petitioner claims that by failing to make an appropriate investigation, the determination of Joyce Yearwood-Drury, Director of the Office of Sexual Harassment Issues (OSH I), dated January 28, 2011, was abbreviated and one-sided in favor of DESCO, arbitrary and capricious, without sound or rational basis on the record, and resulted in an abuse of discretion.

Respondent DESCO's cross-motion seeks to dismiss the petition pursuant to CPLR 3211[a][7] and CPLR Article 78, for failure to state a cause of action, claiming that the petitioner has failed to demonstrate the determination was arbitrary and capricious, without basis in reason, or one-sided.

NYSDHR submitted an answer which at paragraph 4 states that the petitioner and DESCO are the real parties in interest, therefore NYSDHR will not actively participate in this matter and is submitting on the record.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974] and 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y. 2d 176, 379 N.E. 2d 1183, 408 N.Y.S. 2d 54 [1978]). Judicial review of an administrative determination under Article 78 is confined to the facts and record adduced before the agency. (Matter of Granelle v. State Division of Human Rights, 70 N.Y.2d 100, 510 N.E. 2d 799, 517 N.Y.S. 2d 715 [1987] and Ferrer v. New York State Division of Human Rights, 82 A.D. 3d 431, 918 N.Y.S. 2d 405 [N.Y.A.D. 1<sup>st</sup> Dept. 2011] ). An agency is to be accorded wide deference in the

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

method used to investigate a claim and it will not be overturned unless it is abbreviated or one-sided. An agency determination resulting only from an investigation will not be deemed one-sided if the parties are each given the opportunity to provide evidence supporting their claims and the investigation is not abbreviated. There is no requirement that a fact finding hearing or conference be held because of an issue of fact created by conflicting evidence. The standard applied is whether a "cautious person" would find that there was possible discrimination requiring further investigation (*Matter of McFarland v. New York State Division of Human Rights*, 241 A.D. 2d 108, 671 N.Y.S. 2d 461 [N.Y.A.D. 1<sup>st</sup> Dept., 1998], *In re Ramasar v. State Division of Human Rights*, 294 A.D. 2d 249, 741 N.Y.S. 2d 870 [N.Y.A.D. 1<sup>st</sup> Dept. 2002], *Cuccia v. Martinez & Ritorto, P.C.*, 61 A.D. 3d 609, 877 N.Y.S. 2d 333 [N.Y.A.D. 1<sup>st</sup> Dept. 2009] and *In re Pajooch v. State Division of Human Rights*, 82 A.D. 3d 609, 918 N.Y.S. 2d 725 [N.Y.A.D. 1<sup>st</sup> Dept. 2011]).

To support a claim of discrimination under the Human Rights Law, the claimant by a preponderance of the evidence, must establish membership in a protected class as defined in the statute, that the claimant was actively or constructively discharged, that the claimant was terminated from a position they were qualified to hold, and that the discharge gives rise to the inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by introducing evidence of nondiscriminatory reasons to support its decision. If the employer produces evidence sufficient to raise a triable issue of fact rebutting the claims of discrimination the claimant is still entitled to prove that the legitimate reasons provided by the employer were merely a pretext for discrimination. It is not enough to disbelieve the employer, the fact finder must believe the explanation of intentional discrimination provided by the complainant (*Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 687 N.E. 2d 1308, 665 N.Y.S. 2d 25 [1997]).

A complaint of sexual harassment can proceed under two theories, "quid pro quo harassment" or "hostile work environment." A claim of "quid pro quo harassment" involves an issue of whether a person in authority has linked "tangible job benefits" to acceptance or rejection of unwelcome sexual conduct, sexual advances, requests for sexual favors or other conduct that either explicitly or implicitly forms the basis for decisions affecting employment. A complaint of "hostile work environment" is based on an unreasonable interference with a person's work related performance or an "intimidating, hostile or offensive working environment." A hostile work environment exists when the workplace is "permeated with discriminatory intimidation, ridicule, and insult" that is severe or pervasive enough to alter the work conditions of the complainant. Mere isolated remarks or occasional episodes of harassment do not support a finding of "hostile work environment." (*Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D. 2d 44, 642 N.Y.S. 2d 739 [N.Y.A.D. 2<sup>nd</sup> Dept. 1996], *lv denied* 89 N.Y. 2d 809, 655 N.Y.S. 2d 889 [1997] and *Ferrer v. New York State Division of Human Rights*, 82 A.D. 3d 431, *supra*). A prima facie case of retaliation requires evidence of a subjective retaliatory motive. Absent evidence, enforcement of a "facially neutral rule" does not result in a continuing practice of retaliation or intentional discrimination (*Pace University v. New York City Commission on Human Rights*, 85 N.Y. 2d 125, 647 N.E. 2d 1273, 623 N.Y.S. 2d 765 [1995] and *In re Robinson v. New York State Division of Human Rights*, 277 A.D. 2d 76, 716 N.Y.S. 2d 47 [N.Y.A.D. 1<sup>st</sup> Dept. 2000]).

Petitioner claims that on September 9, 2006, she has reason to believe she was sexually assaulted by another employee while attending a company sponsored event at the Taj Mahal Casino in Atlantic City. She claims that she suffered memory loss partially related to the circumstances of the incident and could not be certain whether she was sexually assaulted, but relied on information received from other co-workers at the time. Petitioner claims that she notified Laura Johansen, the Vice-President of Human Resources of the potential sexual assault on September 12, 2006, and then suffered retaliation through 2009 when she was discharged from her employment.

Petitioner claims that after reporting an incident on September 12, 2006, she requested to speak to the individual she suspected of assaulting her. DESCO denied the request because of petitioner's memory loss concerning the alleged incident. Petitioner's NYSDHR complaint dated June 9, 2010, alleges that starting with the 2007 mid-year evaluation she did not receive positive employee evaluations, was denied a management opportunity and DESCO hired a new manager that did not have training in her area of expertise. In 2008, petitioner was given a promotion and a raise, but claims that the increase was less than the previous year (2007). Petitioner notified the company on September 11, 2008, that she had filed a worker's compensation claim. Petitioner claims in 2008, she was given a Request for Family Medical Leave Act (FMLA) document concerning her "serious health condition," which she declined to accept. The complaint alleges DESCO's financial situation was discussed in the January 2009 evaluation and petitioner was advised she could have received a raise but the manager decided not to. Petitioner's employment was terminated in June of 2009. Petitioner was offered a severance package and one month's additional pay until July of 2009, but she declined the package, refusing to sign the severance agreement [Pet.Exh. B].

On July 8, 2010, DESCO submitted a statement to NYSDHR denying the sexual harassment discrimination and retaliation claims in petitioner's NYSDHR complaint. DESCO's statement sought to have the complaint dismissed because the petitioner did not meet her initial burden of proof for a discrimination claim. According to DESCO's statement, there was no causal connection because the complaint of sexual harassment occurred more than three years after the alleged sexual assault; the petitioner was given salary increases and promotions in the two years following the alleged incident, cannot establish retaliatory motive and did not prove disparate treatment of fellow employees. DESCO claimed that poor financial circumstances was a legitimate business reason for the petitioner being laid off along with twenty-two (22) other employees, including other individuals from her department [Cross-Mot. Exh. 3].

Petitioner submitted a rebuttal to NYSDHR dated July 22, 2010, in it she claimed that OSHI had advised her that although the claim of sexual harassment was time-barred it should be indicated in the complaint as a basis for her claim of retaliation. Petitioner's rebuttal also consisted of corrections, direct responses and objections to DESCO's statement. Petitioner claimed that at the time she was laid off she had two and a half years training in the Human Resources Information System (HRIS) that was being implemented at DESCO and was not just a specialized employee. She also claimed that her thirteen years of experience in the field of Human Resources made her the most experienced employee in the department when she was laid off [Cross-mot. Exh. 5].

On January 27, 2011, a Final Investigation Report and Basis of Determination was submitted by Joan Teshima, a Human Rights Specialist I, this report was reviewed and approved by Roxana Sosa, a Human Rights Specialist II on behalf of NYSDHR [Cross-Mot. Exh 8]. The Final Investigation Report was incorporated into the January 28, 2011 NYSDHR Determination and Order After Investigation. NYSDHR found that the majority of the complaint was time barred because, with the exception of the layoff, the activity complained of occurred more than one year before the complaint was filed. The determination stated that the circumstances surrounding the alleged sexual assault were too unclear to constitute sexual harassment, and there were no indications of sexually based comments or actions after the September 9, 2006 incident. The petitioner was found not to be a member of a protected class because there was no sexual harassment. The first retaliatory action alleged by the petitioner took place approximately ten months after the incident was reported and the receipt of raises and bonuses along with a promotion in 2008 does not support the claim of retaliation. NYSDHR found that DESCO had met its burden of showing the layoff had a business justification of poor finances and was not

based on pretext, especially since twenty-two other employees were laid off, including those in petitioner's department. Petitioner did not produce evidence to establish the lay off was based on pretext [Pet. Exh. A].

Petitioner filed the petition dated March 29, 2011 seeking to vacate the NYSDHR, Determination and Order After Investigation. Petitioner claims that the NYSDHR determination was inappropriately based on written submissions and not a full investigation, was one-sided in favor of DESCO, arbitrary and capricious, without sound or rational basis on the record, and resulted in an abuse of discretion.

DESCO seeks to dismiss the petition pursuant to CPLR § 3211[a][7] for failure to state a cause of action because there is no proof that the determination was arbitrary and capricious or lacking in rational basis. The motion states that NYSDHR conducted a thorough investigation and provided each of the parties with the opportunity to submit documentation and evidence in support of their claims, and that the petitioner was provided with the opportunity to submit a rebuttal. DESCO claims the determination was not one-sided merely because it credited their submissions over those of the petitioner. They seek dismissal because petitioner's rebuttal does not provide evidence that the layoff was a pretext to her claims of harassment or retaliation, and the seven page determination was detailed, well-reasoned and resulted in a proper "no probable cause" finding.

Upon review of all the papers submitted this Court finds that the petitioner has failed to sufficiently meet her burden of proof. The inability to establish her sexual harassment claim under either of the two relevant theories, prevented petitioner from proceeding under the retaliation claim. The claims made in the complaint to NYSDHR were time-barred, except for her being laid-off. Although petitioner claims the respondent only provided pretext for her being laid-off, NYSDHR was not required to believe her explanation of intentional discrimination. The investigation into petitioner's claims permitted her to provide evidence and rebuttal to DESCO's claims, it was not abbreviated or one-sided. Petitioner's challenges to the determination are not sufficient to require further investigation or a hearing. The petitioner having failed to meet her burden of proof, the respondent's motion to dismiss for failure to state a cause of action is granted.

Accordingly, it is ORDERED AND ADJUDGED that the petition pursuant to CPLR Article 78 is denied, and it is further

ORDERED and ADJUDGED, that the cross-motion to dismiss the petition pursuant to CPLR 3211[a][7] and CPLR Article 78, for failure to state a cause of action is granted, the proceeding is dismissed, and it is further

ORDERED and ADJUDGED, motion sequence 002, DESCO's motion for an adjournment of time, was withdrawn by the movant

This constitutes the decision and judgment of this court.  
Dated: July 22, 2011

MANUEL J. MENDEZ  
J.S.C.

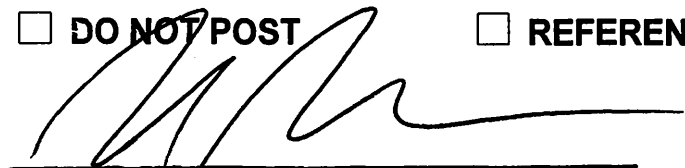
**FILED**

AUG 16 2011

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J.S.C.

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