

**Matter of Barzey v Aviles**

2012 NY Slip Op 30384(U)

February 16, 2012

Supreme Court, New York County

Docket Number: 110335/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

Index Number : 110335/2011

PART 15

BARZEY, BEVERLY

INDEX NO. \_\_\_\_\_

vs

AVILES, ALAN D.

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

ARTICLE 78

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 3, 4

Replying Affidavits \_\_\_\_\_ No(s). 5, 6

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

FEB 21 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/17/12

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER, 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 AS 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: PART 15

-----X  
In the Matter of the Application of  
BEVERLY BARZEY,

Index No.  
110335/11

Petitioner,  
-against-

**DECISION  
and ORDER**

ALAN D. AVILES, as President & Chief Executive  
Officer of the New York City Health and Hospitals  
Corporation; ANN FRISCH, as Executive Director  
of Rehabilitation, Home & Health Care, New York City  
Health and Hospitals Corporation; VIVIAN BABIN, as  
Director of Rehabilitation, Home & Health Care,  
New York City Health and Hospitals Corporation;  
JOSEPH ALEXANDER, as Director of Labor  
Relations/EEO, Human Resources; and THE CITY OF  
NEW YORK,

Mot. Seq.  
001

**FILED**

FEB 21 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Respondents.  
-----X

HON. EILEEN A. RAKOWER:

Beverly Barzey ("Petitioner") brings this petition pursuant to Article 78 of the CPLR for a judgment annulling and reversing her termination from Home & Health Care, New York City Health and Hospitals Corporation ("HHC-HHC"), and ordering her reinstatement. Petitioner also seeks damages for lost wages and benefits, and reasonable attorney's fees.

HHC-HHC is a certified home health agency which serves Manhattan, Queens and the Bronx. Petitioner was employed by HHC-HHC as a Speech Language Pathologist, Coordinating Manager B, from January 2003 until May 2011. Petitioner worked on a part-time basis, working an average of 10 to 15 hours per week. She was paid on an hourly basis, and performed administrative tasks the majority of the time. Petitioner states that, throughout her employment with HHC-HHC, she was considered an outstanding employee, never received any warnings about her job performance, and was never the subject of disciplinary action. Her

\* 3] .  
performance evaluations, annexed as an exhibit to the petition, indicate that Petitioner met, and often exceeded employer expectations.

In April 2011, Rehabilitation Director James Ferguson left his employment and was replaced by Vivian Babin. Babin joined HHC-HHC as an hourly paid employee of an outside agency that employs therapists who work for various individuals and agencies, including HHC-HHC. Babin was responsible for assigning cases to the outside agency.

After joining HHC-HHC, Babin received a referral from a patient in the Bronx for a speech pathologist. On May 6, 2011, Babin assigned Petitioner the speech therapy assignment, as she was the only speech pathologist on staff. While Petitioner claims that she did not refuse the assignment, Respondents claim that Babin was personally notified by Petitioner that she would not accept the assignment. On May 6, 2011, Petitioner received a written memorandum memorializing Babin's request and asked Petitioner to respond by May 9, 2011.

Also on May 6, 2011, Petitioner spoke with Maureen Forster, Deputy Executive Director of Patient Services. Petitioner states that she told Forster that "she had attended a Compliance In-Service that morning and questioned whether Babin's employment was a compliance issue in that she was paid by an agency to which she assigned cases."

Petitioner did not respond to Babin's memorandum on May 9, 2011. Instead, she wrote a memorandum to Forster complaining that Babin was difficult to work with, and "exhibit[ed] rude, disrespectful and dismissive behavior" toward her. Petitioner further wrote,

My agency job description refers only to my clinical responsibilities with no reference to borough assignment but my annual evaluations refer to my field and my office assignment in Manhattan and also describe my administrative duties.

Ms. Badin [sic] cites patient need as the basis for my assignment to the Bronx. However, since the onset of my employment at H.H.C. speech referrals in the Bronx and Queens were not covered due to circumstances beyond the agency's control. Unfortunately, these patients also

\* 4]

had unmet recognized clinical needs, but I was never assigned or expected to provide therapy services in those boroughs.

Petitioner states that on May 10, 2011, Associate Director of Labor Relations Joseph Alexander called her into his office. Alexander told Petitioner that her job description was being changed effective immediately to include all of Manhattan, the Bronx, and Queens. Petitioner stated that it would be impossible for her to work outside of Manhattan. Alexander responded that if she did not take the assignment, she could either tender her resignation, effectively immediately, or be terminated. Alexander then handed her a letter dated May 10, 2011 advising her that she was terminated as of close of business that day.

Plaintiff alleges that her termination was arbitrary, capricious and made in bad faith. She alleges that she was retaliated against for making a complaint against her immediate supervisor, Babin. She states that for years, it had been the regular practice of HHC-HHC to permit therapists to refuse field patient-care assignments. Further, she argues that the termination is so disproportionate to the allegations so as to be shocking to one's sense of fairness.

Respondents submit a verified answer and a memorandum of law in response to the Petition. Respondents argue that the decision to terminate Petitioner was made in good faith based upon Petitioner's refusal to treat a patient as directed by her supervisors. Respondents annex a copy of Petitioner's job description, and note that the document contains no geographic restriction of any kind. In addition, Respondents submit the affidavit of Executive Director Ann Frisch. Frisch states that the decision to terminate employees is her responsibility, and that she made the decision to terminate Petitioner on May 10, 2011 based upon her refusal to accept the patient assignment in the Bronx. Frisch further states that she had no knowledge of Petitioner's complaints concerning Babin's behavior, or of Babin's alleged compliance issues at the time the decision was made.

It is undisputed that Petitioner was an at-will, part-time employee. As such, Petitioner could be terminated at any time and for any reason or for no reason at all, in the absence of a showing by the employee that the termination was effected in bad faith, for a constitutionally impermissible purpose, or was otherwise contrary to law (*see Miggins v. City of New York*, 286 A.D.2d 258, 728 N.Y.S.2d 666 [1st Dept. 2001]). "The burden of raising and proving ... 'bad faith' is on the employee and the mere assertion of 'bad faith' without the presentation of evidence

[\* 5]

demonstrating it does not satisfy the employee's burden" (*Witherspoon v. Horn*, 19 A.D.3d 250, 251, 800 N.Y.S.2d 377 [1st Dept. 2005]).

Here, the court finds that Petitioner was properly terminated based upon her refusal to accept a patient assignment in the Bronx. As noted above, nothing in her job title or description limited her work to the Borough of Manhattan. Moreover, the uncontradicted affidavit of Executive Director Frisch establishes that decision to terminate Petitioner was made without regard to, or knowledge of, Petitioner's complaints and concerns about Babin. While Petitioner speculates that Frisch was in fact aware of her complaints and decided to terminate her in retaliation therefore, this is insufficient to meet her burden of demonstrating bad faith on the part of her employer.

Wherefore it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 16, 2012

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**

FEB 21 2012

NEW YORK  
COUNTY CLERK'S OFFICE