

**Friedman v New York State Div. of Human Rights**

2012 NY Slip Op 31826(U)

July 12, 2012

Supreme Court, New York County

Docket Number: 101012/12

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

MOSHE FRIEDMAN,

Petitioner,

INDEX NO. 101012/12

MOTION SEQ. NO. 001

NEW YORK STATE DIVISION OF HUMAN RIGHTS,  
and THE TRUSTEES OF COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK,

Respondents.

**FILED**

JUL 13 2012

The following papers, numbered 1-5 were considered on this Article 78:

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<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3, 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: [ ] Yes [ X ] No

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

Petitioner Moshe Friedman commenced this Article 78 proceeding, *pro se*, to reverse the Determination and Order After Investigation of respondent New York State Division of Human Rights (Division), dated December 1, 2011, which dismissed petitioner's verified complaint.

BACKGROUND

Petitioner was employed by respondent The Trustees of Columbia University in the City of New York (Columbia University), until January 2010, whereupon his employment was terminated. Petitioner claims that his termination was effective as of February 1, 2010, and respondent Columbia University claims that petitioner's termination was effective as of January 31, 2010. Following petitioner's termination, he attempted to retrieve personal files he stored on respondent Columbia University's computer, but was unable to obtain access to the computer. In November 2010, petitioner and respondent Columbia University entered into a severance agreement (Severance Agreement), a portion

of which addressed petitioner's personal digital files.

In January 2011, petitioner filed a complaint with the Division (First Complaint) alleging unlawful discrimination in his termination. The First Complaint was dismissed as untimely by the Division, in a decision dated February 17, 2011. In a decision, dated August 25, 2011, by the Honorable Donna M. Mills, the New York State Supreme Court denied petitioner's petition and dismissed his Article 78 proceeding challenging the February 17, 2011 Division decision.<sup>1</sup>

On July 29, 2011, petitioner filed a verified complaint (Second Complaint), New York State Division of Human Rights case number 10149901, with the Division alleging retaliation based on petitioner's age, creed, and gender. According to petitioner, respondent Columbia University retaliated against him for filing the First Complaint, by failing to abide by a portion of the Severance Agreement. Specifically, petitioner claims that respondent Columbia University failed to work with petitioner, in good faith, to recover and return petitioner's personal digital files stored on respondent Columbia University's computer, as required by the Severance Agreement. Respondent Columbia University denied the allegations and defended against petitioner's complaint at the Division.

After an investigation, by decision dated December 1, 2011, the Division found that petitioner's allegations were not based on probable cause and the complaint was dismissed. Petitioner now brings this Article 78 proceeding arguing that such December 1, 2011 determination should be reversed because the Division arbitrarily and capriciously issued a decision without conducting an adequate investigation.

#### DISCUSSION

In deciding whether an agency's determination was arbitrary, capricious or an abuse of

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<sup>1</sup> Petitioner has filed an appeal of the decision, dated August 25, 2011, of the Honorable Donna M. Mills.

discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis has been found. *See Heintz v Brown*, 80 NY2d 998, 1001 (1992); *Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 (1972). Judicial review of an administrative determination is limited to whether the determination was made “in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion...” CPLR 7803 (3). The Court of Appeals explained the “arbitrary and capricious” standard in *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974) as follows:

“The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact’ (1 N.Y. Jur., Administrative Law, § 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.”

Thus, a court may not substitute its judgment for that of an administrative agency, if there is a rational basis for the agency’s determination. *See Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 (2001). The court may not overturn the determination of an administrative agency merely because it would have reached a contrary result. *See Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 278 (1972); *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1<sup>st</sup> Dep’t 1998).

Moreover, it is well settled that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable. *See Matter of Fineway Supermarkets, Inc. v State Liq. Auth.*, 48 NY2d 464, 468 (1979); *Matter of Howard v Wyman*, 28 NY2d 434, 438 (1971); *Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 224 (1<sup>st</sup> Dep’t 1984), *aff’d* 66 NY2d 298 (1985).

In support of the petition, petitioner proffers, *inter alia*, a copy of his Second Complaint, respondent Columbia University’s written response to the complaint, and petitioner’s rebuttal to respondent Columbia University’s written response. Petitioner argues that although he submitted material supporting his claims to the Division, the Division did not provide him with an opportunity to

submit more material, or to meet with a case worker to present and explain sensitive and confidential evidence. Petitioner further argues that the Division arbitrarily favored respondent Columbia University, as evidenced by the use of the word “claimed” when referring to arguments made by petitioner and the use of the word “asserts” when referring to arguments made by respondent Columbia University.

Respondent Division submits an answer alleging that the evidence gathered during the course of the investigation was sufficient to support its no probable cause determination. The Division proffers the written transcript of the record, and submits on such record.

In opposition to this Article 78 proceeding, respondent Columbia University argues that petitioner had no right to maintain personal information on respondent Columbia University’s business systems. It submits the affirmation of Donna P. Fenn, an Associate General Counsel for respondent Columbia University, who states that on June 2, 2011, pursuant to the Severance Agreement, she sent petitioner a flash drive containing electronic data retrieved by the IT and Human Relations departments, thus complying with the Severance Agreement. Respondent Columbia University contends that it acted in good faith and in no way retaliated against petitioner.

Here, the Division is charged with evaluating discrimination and retaliation claims. The Division found that respondent Columbia University “produced evidence that it retrieved some data off of its system that belonged to the [petitioner] and sent that data to him in a flash drive on June 2, 2011”. Determination and Order After Investigation, p. 2. In fact, petitioner admits that he received the flash drive from respondent Columbia University. However, petitioner contends that the files returned were junk files, provided to retaliate against him for filing the First Complaint. Petitioner further contends that there are still hundreds of his personal digital files on respondent Columbia University’s business systems which it is refusing to return, though no evidence is provided to support such allegation.

According to the Division’s interpretation of the Human Rights Law, respondent Columbia

University did not retaliate against petitioner. In the Division's December 1, 2011 determination, it states that the "evidence does not raise an inference that the respondent [Columbia University] was acting in a retaliatory manner towards the [petitioner]." Determination and Order After Investigation, p.

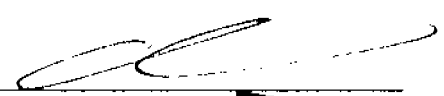
2. Both petitioner and respondent Columbia University were provided with an opportunity to submit evidence in support of their position, and the Division determined that "[t]he investigation revealed insufficient evidence that the [petitioner] was treated disparately by the respondent [Columbia University] due to [petitioner's] age, creed and sex or that he was retaliated against for opposing discrimination." Determination and Order After Investigation, p. 1. Where, as here, the Division's determination is based on the review and evaluation of a substantial amount of documentary evidence submitted by both sides, deference to the administrative agency charged with interpreting and enforcing the Human Rights law is appropriate. See *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980). Here, there was a rational basis in the Division's determination.

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that within 30 days of entry of this order, respondent Columbia University shall serve a copy upon all parties with notice of entry.

Dated: 7/12/12

  
DORIS LING-COHAN, J.S.C.  
**FILED**  
JUL 13 2012

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Check if Appropriate:  DO NOT POST

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