

Matter of Macklin v New York State Div. of Human Rights

2012 NY Slip Op 32013(U)

July 25, 2012

Sup Ct, NY County

Docket Number: 401122/12

Judge: Cynthia S. Kern

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

PRESENT: _____
Justice

PART _____

Index Number : 401122/2012
MACKLIN, PATRINA
vs.
NYS DIVISION OF HUMAN RIGHTS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

| | |
|--------------------------------------------------------------------|--------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____ |
| Answering Affidavits — Exhibits _____ | No(s). _____ |
| Replying Affidavits _____ | No(s). _____ |

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

is decided in accordance with the annexed decision.

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

RECEIVED
JUL 27 2012
FILED
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL
JUL 30 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/25/12

eqk, J.S.C.

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 55

-----X
In the Matter of the Application of

PATRINA MACKLIN,

Petitioner,

Index No. 401122/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HUMAN
RIGHTS and AMERICAN BUILDING
MAINTENANCE,

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

FILED

JUL 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|------------------------------------------------------|---------------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Notice of Cross Motion and Answering Affidavits..... | <u>2</u> |
| Affirmations in Opposition to the Cross-Motion..... | <u> </u> |
| Replying Affidavits..... | <u> </u> |
| Exhibits..... | <u>3</u> |

In this Article 78 proceeding, petitioner Patrina Macklin (“petitioner”) seeks to reverse the determination made by respondent the New York State Division of Human Rights (“DHR”) that there is no probable cause to support the allegation that American Building Maintenance (“ABM”) unlawfully discriminated against petitioner with regard to her employment based on the fact that she is black and a victim of domestic violence. For the reasons set forth below, the petition is denied.

On August 18, 2008, petitioner began working for ABM as a cleaner and was assigned to 235 East 42nd Street, where she reported to Project Manager, Ricardo Billy. In October and November 2008, petitioner reported to work late or failed to report to work on at least nine documented occasions. ABM then terminated petitioner's employment in November 2008. However, on November 24, 2008, following a union grievance and subsequent "Last Chance Agreement," petitioner's employment was reinstated on December 1, 2008 and she was transferred to a new work location at Pennsylvania Station - Amtrak. Petitioner was also given a final warning that any further issues relating to lateness, leaving the work location early or unexcused absenteeism would result in further disciplinary action up to and including termination. From December 1, 2008 until December 21, 2008, petitioner reported to work late or failed to report to work on at least eight documented occasions. Following a late arrival on December 21, 2008, ABM again terminated petitioner's employment.

On December 18, 2009, petitioner filed a verified complaint with the DHR charging ABM with an unlawful discriminatory practice relating to employment because of race/color and domestic violence victim status in violation of N.Y. Exec. Law, Art. 15 (the "Human Rights Law"). In the complaint, petitioner, who is black and a victim of domestic violence, alleged that she was treated disparately and terminated because of her protected class affiliation. Specifically, petitioner alleged that she was (i) being given different or worse job duties than other workers in her same title; (ii) being paid a lower salary than other workers in her same title; (iii) being denied leave time; (iv) being demoted; (v) being suspended; and (vi) being terminated. Petitioner asserted in her complaint that she believed she was receiving this treatment because she was black and because she showed her ABM Supervisor "court papers showing that her child's father

pulled a gun on her.”

An investigation was conducted to determine the validity of petitioner’s claims. ABM asserted that petitioner’s employment was terminated because of her continued attendance and tardiness issues. Petitioner acknowledged her record of absence and lateness, but maintained that she had “legitimate reasons” for being late or absent, including that she was sick, her son was sick or because of some matter related to her abusive husband. Petitioner was unable to provide any examples of an employee of ABM who had a similar history of absence and lateness and was treated similarly or more favorably than petitioner.

Following the investigation and opportunity to review evidence submitted by both parties, the DHR determined that there is “no probable cause to believe that [ABM] has engaged in or is engaging in the unlawful discriminatory practice complained of.” The DHR noted that “the parties acknowledged that during [petitioner’s] employment and after her dismissal, [ABM] employed and continues to employ individuals of the same race as [petitioner].” Further, with regard to petitioner’s assertion that her identification as a “victim of domestic violence” was one of the bases for her termination, the DHR found that “[t]his basis cannot be applied in this matter because the most recent date of alleged discrimination occurred prior to the inclusion of domestic violence victim status in to the Human Rights Law. The aforementioned became a law on July 7, 2009 while [petitioner’s] most recent date of alleged discrimination was December 21, 2008.” Thus, the DHR dismissed the complaint and closed the file. Petitioner then commenced the instant Article 78 proceeding challenging the DHR’s decision.

It is well-settled that the DHR has “broad discretion in determining the method to be employed in investigating a claim.” *McFarland v. N.Y. State Div. Of Human Rights*, 241 A.D.2d

