

Kingston v NYS Div. of Human Rights

2013 NY Slip Op 30847(U)

April 18, 2013

Supreme Court, New York County

Docket Number: 402414/2012

Judge: Michael D. Stallman

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discrimination against his basic right to an education. Petitioner alleges that, after he contacted the Mayor's Office about DHS's refusal to issue a late pass, he was selected for a psychiatric examination and moved from one building to another, which he claimed was retaliation, among other incidents of alleged retaliation.

By a determination and order dated September 26, 2012, SHDR determined that there was no probable cause to believe that DHS engaged in unlawful discrimination. The determination and order states, in pertinent part:

"While discrimination in education is prohibited, Complainant did not allege that any educational institution discriminated against him based on any protected category. Rather, Complainant stated that his internal complaints to the homeless shelter where he was housed, to the Respondent [DHS], and to the mayor's office concerned the fact that the homeless shelter refused to grant him a late pass so that he could attend evening classes at an education institution. He did not allege that employees of the shelter had given any other shelter resident a late pass; therefore he did not allege that she issued passes to some individuals and not others on a discriminatory basis. Consequently, even if it were true that Respondent treated Complainant differently after he complained to the mayor's office, such action on the part of the shelter would not constitute 'retaliation' under the Human Rights Law.

While it might have been appropriate for the shelter to provide Complainant with a late pass in order to support his efforts to obtain further education, the failure to do so, by itself, does not constitute a violation of New York Executive Law, Article 15, the Human Rights Law, nor does Respondent's [DHS's] alleged actions against Complainant subsequent to his complaints regarding said denial constitute 'retaliation' under the Human Rights Law."

(SDHR Verified Answer, Ex A.)

"Where, as here, a determination of no probable cause is rendered without holding a public hearing pursuant to Executive Law § 297(4)(a), the appropriate standard of review is whether the determination was arbitrary and

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capricious or lacking a rational basis.” (*Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111 [1st Dept 1998].) Petitioner bears the burden of showing probable cause as to the discriminatory acts charged. (*Id.* at 113). “Probable cause exists only when, after giving full credence to the complainant’s version of the events, there is some evidence of unlawful discrimination.” (*Matter of Doin v Continental Ins. Co.*, 114 AD2d 724, 725 [3d Dept 1985].)

Having reviewed the papers submitted on this petition, including the original administrative record from SDHR, the Court finds that SDHR’s determination of no probable cause was not arbitrary and capricious, and is rationally based.

SDHR correctly determined that no “education discrimination” occurred in violation of New York State’s Human Rights Law. Executive Law § 291 (2), which petitioner cites, provides, in relevant part, that

“The opportunity to obtain education . . . without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.”

The civil right recognized is the opportunity to obtain an education free of discrimination, as specified in Executive Law § 296. Thus, the Court must look to Executive Law § 296, which defines a series of unlawful discriminatory practices, to determine whether SDHR correctly concluded that Executive Law § 296 did not cover the circumstances alleged in petitioner’s complaint.

Under Executive Law § 296 (4), it is unlawful for a non-sectarian, education corporation or association exempt from state property taxes

“to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of

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educating persons of one sex exclusively may admit students of only one sex.”

Here, as SDHR indicated, the complaint did not allege that an educational institution discriminated against petitioner because of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status.

SDHR also examined whether the shelter’s decision to deny petitioner a late pass to attend evening classes at an educational institution constituted discrimination in violation of other provisions of New York State’s Human Right’s Law. SDHR concluded that no discrimination occurred because petitioner had not alleged that “the shelter issued passes to some individuals and not others on a discriminatory basis.” (SDHR Verified Answer, Ex A.) The record before SDHR supports its determination.

From a review of the agency record, it does not appear that petitioner alleged that the shelter treated him differently from other similarly situated individuals. That is, petitioner did not allege that the shelter denied him a late pass while granting late passes to others who were in a similar situation as petitioner. Neither did petitioner allege that he was denied a late pass due to his age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability.

Therefore, SDHR’s determination—that DHS’s failure to issue a petitioner’s late pass in order to support his efforts to obtain further education was not a violation of New York Executive Law, Article 15—was not arbitrary and capricious, and the determination had a rational basis.

To prove unlawful retaliation under New York State’s Human Rights Law, petitioner must show: (1) he has engaged in protected activity, (2) DHS knew that he participated in such activity, (3) he suffered an adverse action, and (4) there is a causal connection between the protected activity and the adverse action. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312–313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012].)

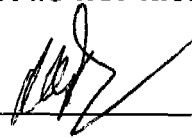
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Here, petitioner's complaint to SDHR was not a protected activity. To prove participation in a protected activity, petitioner need not establish that the conduct about which he complained in fact violated the law, but petitioner must demonstrate that he had a "good faith, reasonable belief" that the complained-of practice was unlawful under New York State's Human Rights Law. (*Illiano v Mineola Union Free School Dist.*, 585 F Supp 2d 341, 351 [ED NY 2008]; see *Matter of New York State Off. of Mental Retardation & Dev. Disabilities (Staten Island Development Center) v New York State Div. of Human Rights*, 164 AD2d 208, 210 [3d Dept 1990] ["the reasonable belief standard is appropriate"]; see *Modiano v Elliman*, 262 AD2d 223, 223 [1st Dept 1999].) It is not enough that petitioner subjectively believed that DHS was engaged in unlawful discriminatory practices; petitioner must also demonstrate that his belief was "objectively reasonable in light of the facts and record presented." (*Thomas v Westchester County Health Care Corp.*, 232 F Supp 2d 273, 279 [SD NY 2002] [citation omitted].)

Petitioner's belief that DHS discriminated against him in violation of New York State's Human Rights Law was not objectively reasonable. As SDHR indicated in its determination and order, petitioner did not allege that DHS denied him a late pass based on any protected category—i.e., because of his age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability.

Therefore, SDHR's determination that the actions of the shelter that occurred after petitioner's complaint would not constitute 'retaliation' under the Human Rights Law was neither arbitrary and capricious nor lacking a rational basis.

Dated: 4/18/13
New York, New York

 _____, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... PETITION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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).

HON. MICHAEL D. STALLMAN