Matter of White v Kelly
2014 NY Slip Op 30130(U)
January 14, 2014
Supreme Court, New York County
Docket Number: 100044/2013
Judge: Peter H. Moulton

[* 1] SCANNED ON 1/22/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON SUPREME COURT JUSTICE **PART** 57

Justice

Index Number : 100044/2013
WHITE, ERIC
vs.
KELLY, RAYMOND W.
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

decided in accordance with the decision order + judgment of today's date

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. PETER H. MOULTON
SUPREME COURT JUSTICE

Dated: 1/14/14

_____, 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 : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 57

- X

In the Matter of ERIC WHITE

: Index No.: 100044/13

Petitioner,

:

For a Judgment Pursuant to Article 78
-against- :

RAYMOND W. KELLY, as Police Commissioner of the City of New York, THEN POLICE DEPARTMENT OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK, :

Respondents. :

- X

Peter H. Moulton, J.S.C.

Petitioner in this article 78 proceeding is a former probationary police officer who was terminated from the New York City Police Department ("NYPD") after an incident at a baby shower that petitioner attended while off duty. Petitioner states that he attempted to assist police officers arriving at the scene. Respondents state that the undisputed facts demonstrate that petitioner was belligerent at the scene, and did not comply with two commands of a Lieutenant at the scene to leave, and engaged in an "altercation" that resulted in injury to the Lieutenant.

Respondents cross-move to dismiss the petition. The motion is granted.

BACKGROUND

For purposes of deciding the motion to dismiss, the court assumes that the allegations in the petition are true. (Morone v

Morone, 50 NY2d 481, 484.)

The petition alleges that petitioner, while off-duty, attended a friend's baby shower on July 14, 2014. An altercation broke out. At the time petitioner was a 14 month probationary New York City Police Officer. The petition states that his employment record up to that date was "spotless."

Police reported to the scene. Petitioner avers that he attempted assist the officers by identifying the individuals behind the altercation. The petition admits that a Lieutenant at the scene ordered petitioner to leave and that petitioner did not follow that order. In a letter dated October 10, 2012, petitioner admitted that he was twice ordered by the Lieutenant to leave the scene. According to the letter, after disobeying the second order petitioner was handcuffed, placed inside a patrol car, and taken to a precinct where he was released that day.

Petitioner was suspended for two months after the incident.

In a letter dated September 11, 2012, petitioner was terminated from his employment as a probationary police officer effective the following day. Petitioner wrote the October 10, 2012 letter, referenced above, to seek his reinstatement. This request was denied in a letter from the NYPD dated November 14, 2012. This letter recites that the termination was "based on your belligerence and combativeness towards on-duty police officers resulting in

injury to a lieutenant." The letter also states that petitioner would be given a chance for a name-clearing hearing. According to the letter "[t]he purpose of a *Name Clearing* is to determine whether certain information regarding your termination will be disseminated or withheld in accordance with Department Policies and applicable law regarding the release of personnel records." (Emphasis in original.)

Petitioner responded in a letter dated November 26, 2012, in which he stated that he would elect to use his October 10 letter as his statement in the name clearing hearing. He also stated that the NYPD's November 14th letter was the first he'd heard that a Lieutenant had been injured during the incident.

DISCUSSION

The petition acknowledges that generally respondent NYPD has plenary authority to terminate a probationary employee. A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason. (See Matter of Swinton v. Safir, 93 N.Y.2d 758, 767 [1999].)

Petitioner asserts that he received the harsh punishment of termination because he was African-American. Petitioner offers no direct evidence of any discriminatory reason for his termination.

Instead, he relies on two cases in which NYPD employees were not terminated after misconduct. One of the cases involved a number of off-duty, apparently White, probationary NYPD police officers who got into a fight after being denied entrance to a strip club. The officers were suspended for 30 days. The other concerns a Captain with a Latin surname who was allowed to take modified duty for several months after a domestic violence incident until he was eligible for retirement.

Neither of these cases concern facts that are close to those of petitioner's case. Crucially, neither involve the disobedience of a repeated order of a superior officer, or of an alleged subsequent injury to that superior officer. A terminated probationary employee seeking to show that comparative cases give rise to an inference of unlawful discrimination must allege "differential treatment for the same or similar conduct." (Swinton v Safir, 93 NY2d 758, 763.) Here petitioner fails to offer comparators who were "similarly situated in all material respects" to himself. (Shumway v United Parcel Service, 118 F3d 60, 64; see Abdelhadi v City of New York, __ F Supp __, 2011 WL 3422832, aff'd 472 Fed Appx 44.) Accordingly, these two cases cited by petitioner do not give rise to an inference of discrimination that could defeat a motion to dismiss.

CONCLUSION

For the reasons stated, it is hereby ORDERED AND ADJUDGED that the motion to dismiss is granted, the petition is denied, and this proceeding is dismissed.

Dated: January 14, 2014

Hon. Peter Moulton

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

UNFILED JUDGMENT

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