

**Matter of Aguilar v New York State Div. of Human Rights**

2014 NY Slip Op 31330(U)

May 20, 2014

Supreme Court, New York County

Docket Number: 160347/2013

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

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In the Matter of the Application of  
MARGARITA AGUILAR,  
Petitioner,

DECISION & ORDER  
Index No.:  
160347/2013

For a Judgment under Article 78 of the  
Civil Practice Law and Rules

-against-

THE NEW YORK STATE DIVISION OF  
HUMAN RIGHTS AND AMIGOS  
DEL MUSEO DEL BARRIO, INC.,  
Respondents.

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JOAN M. KENNEY, J.:

In this article 78 proceeding, petitioner Margarita Aguilar seeks a judgment nullifying the determination of respondent the New York State Division of Human Rights (DHR), finding that there was no probable cause to support petitioner's claim that respondent, Amigos Del Museo Del Barrio, Inc. (respondent), engaged in an unlawful discriminatory practice related to petitioner's employment. Respondents seek dismissal of the petition. In addition, the DHR has answered, stating that, "[b]ecause Petitioner and Respondent, Amigos Del Museo Del Barrio, Inc., are the parties in interest, the Division will not actively participate further in this matter and is submitting on the record." DHR's answer, ¶ 4.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Prior to being terminated on February 13, 2013, petitioner had been employed with respondent as executive director and CEO. On February 20, 2013, petitioner filed a verified complaint with

the DHR charging respondent with unlawful discriminatory practices related to employment based on gender, including retaliation, in violation of the New York State Human Rights Law (NYSHRL).

In her complaint with the DHR, petitioner stated that she was suspended, fired, sexually harassed and retaliated against. For instance, petitioner believes that she was subject to a hostile work environment based on gender, due to comments which were made at the workplace. Petitioner alleges that Tony Bechara (Bechara), respondent's chairman, called her a "hysterical woman," and also did not allow her to function at her full job capacity due to gender discrimination. Petitioner's exhibit C, DHR complaint form at 7. Petitioner further contends that Yaz Hernandez (Hernandez), respondent's president, criticized petitioner's appearance, including her weight and clothing.

The complaint with the DHR set forth that petitioner was suspended on January 14, 2013, in violation of the provisions in her employment contract, and that petitioner was given only vague reasons for this suspension. Petitioner continued that she was never given a performance review or a period to cure any alleged deficiencies, as allegedly mandated by her contract. Petitioner was terminated shortly thereafter, on February 13, 2013, purportedly without adequate notice. In her complaint, petitioner argued that these two actions constituted retaliation

because, on January 9, 2013, her lawyer had contacted respondent's lawyer to "preview" her hostile work environment and gender bias claims. *Id.*

After petitioner submitted her complaint to the DHR, the DHR conducted an investigation. Respondent submitted its comprehensive opposition statement to the complaint on March 29, 2013. Respondent noted that its workplace is predominantly female, that petitioner mismanaged respondent's finances, failing as both a financial manager and fundraiser, and that petitioner's leadership style differed from respondent's ideals. Petitioner then issued a rebuttal, where she argued, in depth, why respondent's factual and legal assertions were baseless. She also stated that she has viable claims of gender discrimination, retaliatory discharge, and hostile work environment under the New York City Human Rights Law (NYCHRL).

The DHR conducted an investigation, and provided its records to the court. Enclosed in the record is a copy of respondent's employee guidebook and petitioner's original claim, which asserts violations of article 15 of the Executive Law of the State of New York (NYSHRL). In addition, a document titled final investigation report and basis of determination sets forth a detailed summary of the investigation. Some of the witnesses contacted by the DHR included prior employees and the record contained their answers as to whether they experienced any

discrimination from respondent.

On September 12, 2013, the DHR issued its determination where it found that there was no probable cause to believe that respondent engaged in the unlawful discriminatory practice complained of. The determination set forth that, as part of the investigation, both parties submitted detailed reports of petitioner's actions. The DHR then noted that it only seeks evidence of whether discrimination occurred; "it does not and cannot rule on whether an employee's work is satisfactory." Petitioner's exhibit A at 1. The DHR, in its determination, further added that "it does not and cannot enforce the provisions of an employment contract (other than a provision barring discrimination)." *Id.* at 2. That being said, the DHR did not believe that the lack of a performance review was evidence of discrimination.

In its determination, the DHR expanded on petitioner's claims of a hostile work environment based on gender. According to the DHR, Bechara was found to have said "you are acting hysterically," and did not say "you are acting like a hysterical woman." *Id.* The DHR found that this comment, even if made, along with the comments from the female employee telling petitioner to change her appearance, did not "rise to the level of severity or pervasiveness so as to constitute a hostile work place." *Id.* The DHR stated that not only females were subject

to comments about their appearance and dress in the workplace. It concluded, "[i]n fact, the investigation revealed comments about dress have been made to other Directors, male and female." *Id.*

The DHR stated in its determination that, according to respondent, petitioner was notified in early January that her employment was "untenable." *Id.* In response, according to respondent, petitioner stopped reporting to work every day and was suspended. Respondent advised the DHR that it scheduled a meeting on February 13, 2013, before the Board, for petitioner to present her case with respect to her employment. When petitioner did not show up, her employment was terminated that day.

With respect to retaliation, the DHR maintained in its determination that there was no discrimination claim ever filed internally by petitioner. In a phone call on January 9, 2013, petitioner's attorney advised respondent's counsel that petitioner planned to file a complaint of discrimination. Respondent's attorney then notified petitioner's attorney that petitioner was going to be suspended.

The DHR dismissed the complaint and advised petitioner that she could appeal this determination with the court. It concluded with the following, in pertinent part:

"The evidence as a whole is insufficient to rule it probable that Complainant was subject to sex discrimination. The investigation does not support that Respondent's behaviors

toward Complainant regarding her appearance were gender discrimination. In addition, the investigation supports that there were ongoing work related issues between Complainant and Respondent that extended well before the Complainant retained an attorney. The Division makes no analysis on fault for the situation presented by Respondent and Complainant. Although fault is disputed by Complainant, the fact that issues existed is not disputed, and support that there were legitimate non-discriminatory business reasons for the actions towards Complainant and Complainant's termination."

*Id.*

Shortly after receiving the DHR's determination, petitioner commenced this proceeding. Petitioner argues that the DHR's investigation was one-sided and abbreviated, since the witnesses it interviewed, such as respondent's lawyer, allegedly had no first hand knowledge of petitioner's contentions. Petitioner further asserts that the DHR failed to apply the correct legal standards when it rendered its determination. For instance, petitioner claims that she has a viable hostile work environment claim under the NYCHRL, and that the DHR did not evaluate her claims under this statute. She further argues that the DHR made a mistake when it did not consider respondent's purported breaches of her employment contract. In addition, for example, petitioner alleges that the DHR erred when it found that respondent terminated her for poor performance, despite any negative performance reviews.

#### **DISCUSSION**

"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 capricious or lacking a rational basis . . . [a] determination of no probable cause will not be set aside unless it is found to be arbitrary and capricious [internal citation and quotation marks omitted]."

*Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111-112 (1<sup>st</sup> Dept 1998). An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). Pursuant to Executive Law § 298, the DHR's "findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole."

It is well settled that the DHR "has broad discretion in determining the method to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates that its investigation was abbreviated or one-sided." *Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215, 216 (1<sup>st</sup> Dept 2007). Petitioner argues that the DHR's investigation was one-sided and deficient. She claims, among other reasons, that no principal witnesses were interviewed, and that respondent's submissions to the DHR did not

include relevant statements from anyone with firsthand knowledge of the facts.

The record indicates that petitioner was able to present her claims, by providing an affidavit and also having her counsel submit arguments. The DHR interviewed witnesses, reviewed the parties' contentions and provided a detailed analysis for why it dismissed petitioner's complaint. The DHR has "broad discretion" as to how it seeks to investigate a complaint. *Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d at 216. Further, petitioner has not provided any evidence of an abbreviated investigation. As such, "[t]he information supplied by the parties was sufficient for DHR to make its determination." *Matter of Barnes v Beth Israel Med. Ctr.*, 113 AD3d 431, 431 (1<sup>st</sup> Dept 2014) (Court held information sufficient when petitioner alleged the DHR did not make adequate attempts to contact witnesses).

Petitioner argues that the DHR did not apply the correct legal standard by not examining petitioner's hostile work environment claims under the NYCHRL standards. The record indicates, however, that petitioner's original complaint to the DHR alleged discrimination in violation of the NYSHRL, not the NYCHRL. As such, it was rational for the DHR to conclude, under the NYSHRL, that petitioner was not subject to a hostile work environment due to gender. A hostile work environment is present

"when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [interior quotation marks and citation omitted]." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 (2004). The DHR was referencing case law when it stated that the alleged comments made to petitioner, even if true, did not rise to the level of severity or pervasiveness so as to constitute a hostile work place.<sup>1</sup> The DHR further concluded that both males and females were subject to scrutiny about their appearance at the workplace.

In any event, even if petitioner's hostile work environment claim was analyzed under the NYCHRL, it would fail. Despite the broader application of the NYCHRL, the comments could only be "reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 (1<sup>st</sup> Dept 2009).

Petitioner maintains that the DHR made additional mistakes in rendering its determination, which would render the determination arbitrary and capricious. For instance, she claims that she was subject to retaliation since her lawyer made a

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<sup>1</sup> Sexual harassment that results in a "hostile or abusive work environment" is prohibited as a form of employment discrimination. *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 66 (1986) (discussing Title VII).

complaint to respondent's counsel, and then she was suspended. Respondent and the DHR both maintained that petitioner was told of a possible impending termination, and then petitioner's counsel made a phone call to respondent's lawyer advising of a potential discrimination claim. The DHR also stated that petitioner had never filed an internal complaint.

It is well settled that, in reviewing an administrative determination, "courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists." *Matter of Jenkins v Novello*, 50 AD3d 381, 382 (1<sup>st</sup> Dept 2008); see also *Matter of Town of Henrietta v Department of Env'tl. Conservation of State of N.Y.*, 76 AD2d 215, 224 (4<sup>th</sup> Dept 1980) (courts must "resolve reasonable doubts in favor of administrative findings and decisions"). As such, the court finds that the DHR determination properly supported the determination that no retaliation occurred. Even assuming arguendo, that petitioner's counsel did contact respondent prior to her suspension, as the DHR already maintained, there were legitimate, non discriminatory business reasons for respondent's actions and a claim for retaliation could not be supported.

Petitioner also alleges that the DHR did not take into consideration that she had no negative performance reviews. As such, according to petitioner, the DHR incorrectly found that,

"despite the lack of any negative performance reviews, that [respondent] terminated [petitioner] for poor performance." Petition, ¶ 8. However petitioner is mistaken in her analysis. As the DHR noted in its determination, its function is to determine whether or not respondent's actions were discriminatory, not determine whether petitioner was a good employee. Without concluding if petitioner was performing satisfactorily, the DHR maintained that there were legitimate, business reasons for respondent's actions. Moreover, the DHR specifically stated in the determination that, in this situation, the lack of a performance review does not indicate discrimination.

Similarly, petitioner argues that the DHR should have considered the alleged breaches of her employment contract when rendering its determination. However, these claims were reviewed by the DHR and the determination specifically noted that the DHR does not and cannot enforce provisions of an employment contract. Any additional review of these alleged breaches will not be conducted at this time. See e.g. *Matter of Tanalski v New York State Div. of Human Rights*, 262 AD2d 117, 118 (1<sup>st</sup> Dept 1999) (courts role is limited to reviewing the information presented to the agency).

In light of the record and the investigation conducted by the DHR, it was reasonable for the DHR to find that respondent

did not engage in gender discrimination of any kind, or engage in retaliation.

Accordingly, since the DHR's determination dated September 12, 2013 is upheld, petitioner's application is denied.

The court has considered petitioner's other contentions and finds them without merit.

**CONCLUSION**

Accordingly, it is hereby

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

Dated: May 20, 2014

ENTER:

  
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JOAN M. KENNEY J.S.C.  
J.S.C.