

**Matter of Leonard v City of New York**

2014 NY Slip Op 33361(U)

September 17, 2014

Supreme Court, Bronx County

Docket Number: 260452/2014

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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In the Matter of the Application of JOHN LEONARD,  
JR.,

DECISION AND ORDER

Petitioner,

Index No. 260452/2014

- against -

CITY OF NEW YORK and OFFICE OF THE DISTRICT  
ATTORNEY BRONX COUNTY,

Respondents.

For a Judgment and Order Under Article 78 of the Civil  
Practice Law and Rules.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of petition dated May 20, 2014 and the verified petition and exhibits submitted in support thereof; respondents' verified answer dated August 5, 2014 and the affidavits, exhibits and memorandum of law submitted therewith; petitioner's reply affidavit dated September 10, 2014; and due deliberation; the court finds:

Petitioner commenced this Article 78 proceeding to vacate, annul and set aside the determination made by respondent Office of the District Attorney, Bronx County, terminating petitioner's employment as a Community Associate. Petitioner argues that the determination, effective January 22, 2014, was arbitrary and capricious and made in violation of Executive Law § 296(1)(a) and New York City Administrative Code § 8-107(1)(a). He seeks a judgment restoring him to his former position with full back pay and seniority credit, compensatory damages, and costs and disbursements. Respondents have answered the petition and have submitted affidavits and exhibits from Jeannette Lopez-Lorenzi ("Lopez-Lorenzi"), an Assistant Staff Supervisor, and Concetta Petrillo ("Petrillo"), a Deputy Chief.

Judicial review of an administrative action is limited to determining whether the action was

arbitrary or capricious. *See* CPLR 7803(3). An action is deemed arbitrary or capricious when it is taken “without sound basis in reason and is generally taken without regard to the facts.” *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 230, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974). “Even though the court might have decided differently were it in the agency’s position, the court may not upset the agency’s determination in the absence of a finding, not supported by this record, that the determination had no rational basis.” *Matter of Mid-State Mgmt. Corp. v. N.Y. City Conciliation & Appeals Bd.*, 112 A.D.2d 72, 76, 491 N.Y.S.2d 634, 637 (1st Dep’t), *affirmed*, 66 N.Y.2d 1032, 489 N.E.2d 1300, 499 N.Y.S.2d 398 (1985).

Petitioner admits he is not entitled to the protections set forth in Civil Service Law § 75 since he was employed in a non-competitive civil service position for less than five years. *See* Civil Service Law § 75(1)(c). Accordingly, petitioner was an at-will employee. *See Matter of Tyson v. Hess*, 109 A.D.2d 1068, 487 N.Y.S.2d 206 (4th Dep’t), *affirmed*, 66 N.Y.2d 943, 489 N.E.2d 747, 498 N.Y.S.2d 778 (1985). An employee may be terminated “for any reason, or for no reason” so long as there is no constitutionally impermissible purpose, a statutory proscription, or an express limitation on the employee’s contract of employment. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 58, 882 N.E.2d 882, 884, 53 N.Y.S.2d 270, 272 (2008). Petitioner bears the burden of demonstrating that his employer acted in bad faith. *See Matter of Diaz v. Goldman*, 225 A.D.2d 344, 638 N.Y.S.2d 656 (1st Dep’t 1996).

Petitioner alleges that he was subjected to unwarranted criticism of his work, transferred to a less than desirable assignment, and terminated after he had obtained consent from acting supervisor Lopez-Lorenzi to leave work early on January 16, 2014. He attaches a doctor’s note excusing his absence for January 17 but no note regarding his leave for January 16. Petitioner also alleges that he was the sole white male paralegal out of a group of eight to ten paralegals. He claims he was subjected to discriminatory treatment based on his race and gender.

Respondents submit that there was a good faith basis for terminating petitioner from their

employ. According to the Agency Request - Separation form, the given cause of petitioner's dismissal was "job abandonment." Petrillo avers that she approached petitioner on January 16, 2014 to advise him of a new assignment. The change involved a reduction in the number of attorneys assigned to him and petitioner moving offices and working with Petrillo as his direct supervisor. Other paralegals were also moved and reassigned. Petitioner initially accepted then refused the assignment. In a memorandum dated January 24, 2014, Petrillo stated that petitioner appeared upset at the assignment. He did not wish to move offices and felt that he was being set up for failure based on his recent negative evaluations. At no time did petitioner inform Petrillo that he felt unwell. Shortly after petitioner's interaction with Petrillo, he approached Lopez-Lorenzi to tell her that he was leaving early because he had "things to do," even though a meeting had been scheduled that afternoon to announce changes in office assignments. Lopez-Lorenzi avers that petitioner never advised her that he was sick and never sought her permission to leave work early as indicated in her e-mail dated January 16, 2014.

Also submitted were petitioner's performance evaluations from 2009 through 2013 and an August 2, 2013 memorandum regarding a supervisor's conference with petitioner. The evaluations documented petitioner's excessive lateness and use of sick leave and indicated a need for improvement regarding the timely completion of his work. Despite an improvement in his attendance, concerns over his organization, prioritization, and timely completion of his assignments were noted in each evaluation. The memorandum, dated less than two months after a positive evaluation, noted petitioner's refusal to complete "recreation folders," his untimely completion of work, and his unilateral changing of the due dates on his assignments. Petrillo stated that several attorneys assigned to petitioner complained about the timeliness of his completed work and without close supervision, the quality and timely completion of petitioner's work fell.

Respondents have proffered a rational, good faith basis for petitioner's dismissal. Although disputed, job abandonment, including petitioner's perceived refusal to accept a new assignment, was

just one factor in his termination. Petitioner was advised that the deficiencies in his work needed to be addressed, *see e.g. Matter of Rowley v. Board of Educ. of Gloversville Enlarged City Sch. Dist.*, 192 A.D.2d 814, 596 N.Y.S.2d 561 (3d Dep't 1993), but his work did not improve. *See Matter of Johnson v. Katz*, 68 N.Y.2d 649, 496 N.E.2d 223, 505 N.Y.S.2d 64 (1986); *Matter of Gulemi v. Bradley*, 267 A.D.2d 386, 700 N.Y.S.2d 215 (2d Dep't 1999). His statement in reply that he was unaware of the complaints regarding his work is undermined by his signature on the evaluations and memorandum acknowledging his receipt of them. His attendance improved but lateness may be considered in determining whether to retain or dismiss an employee, *see Matter of Soto v. Koehler*, 171 A.D.2d 567, 567 N.Y.S.2d 652 (1st Dep't 1991), since "[b]eing present at work is an essential job function." *Matter of Dickinson v. New York State Unified Ct. Sys.*, 99 A.D.3d 569, 570, 952 N.Y.S.2d 189, 191 (1st Dep't 2012) (citations omitted). The fact that petitioner's leave balances were charged is immaterial. *See Truss v. Westchester County Health Care Corp.*, 301 A.D.2d 607, 754 N.Y.S.2d 38 (2d Dep't 2003). Petitioner failed to offer any concrete evidence indicative of bad faith. *See Matter of Dos v. Pataki*, 238 A.D.2d 338, 655 N.Y.S.2d 652 (2d Dep't 1997); *Matter of Diaz v. Goldman*, *supra*.

In an action alleging employment discrimination brought under Executive Law § 296, petitioner bears the burden of demonstrating that (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment or suffered other adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 819 N.E.2d 998, 1006, 786 N.Y.S.2d 382, 390 (2004); *see also Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25 (1997); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973). The burden then shifts to respondent to rebut the presumption of discrimination through admissible evidence of legitimate, independent, and nondiscriminatory reasons to support its employment decision. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d at 305, 819 N.E.2d at 1006-

1007, 786 N.Y.S.2d at 390-391. Petitioner in response must produce evidence that the employer's excuse was merely pretext for discrimination. *Id.* For claims brought under New York City Administrative Code § 8-107, the court must apply both the *McDonnell Douglas* and mixed motive tests. *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 45, 936 N.Y.S.2d 112, 124 (1st Dep't 2011), *lv denied*, 18 N.Y.3d 811, 968 N.E.2d 1001, 945 N.Y.S.2d 645 (2012). Once respondent has met its burden, petitioner must respond with "some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete." *Id.*

The submissions do not support petitioner's claim that respondents' actions were motivated by a discriminatory animus. Petitioner's belief that only his work was scrutinized is without merit as Petrillo acknowledged that five other paralegals required monitoring and supervision. With regard to petitioner's new assignment, Petrillo stated that he would be one of only a few in the office with access to a new program, thus giving petitioner an advantage over other paralegals. Several paralegals in addition to petitioner were moving offices and given new assignments. Petitioner may have disagreed with respondents' actions but this does not raise an inference of pretext. *See Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 946 N.Y.S.2d 27 (1st Dep't 2012).

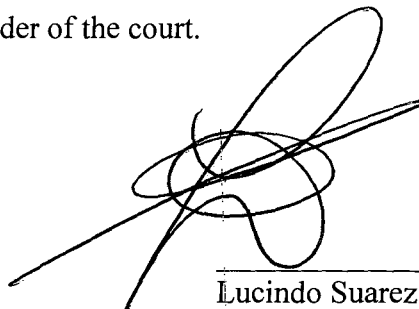
Accordingly, it is

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

ORDERED, that the clerk of the court is directed to mark the proceeding as disposed.

This constitutes the decision and order of the court.

Dated: September 17, 2014



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Lucindo Suarez, J.S.C.