

Matter of Watterson v New York State Div. of Human Rights
2016 NY Slip Op 30144(U)
January 27, 2016
Supreme Court, New York County
Docket Number: 153304/15
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
KERRY WATTERSON,**

Petitioner,

INDEX NO. 153304/15

-against-

MOTION SEQ. NO. 001

**For a Judgement Pursuant to the Provisions of
Article 78 of the New York Civil Practice
Law and Rules,**

**NEW YORK STATE DIVISION OF HUMAN RIGHTS,
DONNA LIEBERMAN, AND THE NEW YORK CIVIL
LIBERTIES UNION (NYCLU),**

Respondents.

The following papers were read on this motion by petitioner for a judgment pursuant to the New York Executive Law.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

In this proceeding brought pursuant to Section 298, Art. 15 of the New York Executive law, Kerry Watterson (petitioner), the former Director of Development for the New York Civil Liberties Union (NYCLU), seeks an order (i) annulling and reversing the determination of the respondent New York State Division on Human Rights (DHR) that dismissed petitioner’s complaint on the basis that there was no probable cause to believe that respondents Donna Lieberman (Lieberman) and the NYCLU (collectively, respondents) engaged in or were engaged in unlawful discriminatory and retaliatory practices in violation of New York State Executive Law, Article 15 (Human Rights Law); (ii) referring the matter back to DHR for further proceedings, including but not limited to an Administrative Hearing; and (iii) awarding petitioner

attorneys' fees and costs. Petitioner claims that he was discriminated against by the respondents on the basis of his sex, sexual orientation, and his opposition to discrimination which culminated in retaliatory termination. Respondents are in opposition to the petition and submit a Verified Answer.

BACKGROUND

Plaintiff is a former employee of NYCLU, as the former Director of Development for NYCLU, and he reported directly to Lieberman. Petitioner, a homosexual man, claims that he was harassed, subjected to verbal abuse, including jokes about his sexual orientation, excluded from meetings based on his gender and ultimately unjustly terminated in retaliation for filing complaints of unlawful harassment against Lieberman. Petitioner avers that after his termination the respondents replaced him with a woman, who he avers "on information and belief, is not known to be or to be perceived as homosexual" (Verified Petition ¶ 5).

On or about August 12, 2014, the petitioner filed a complaint with DHR (see Verified Petition, exhibit A). In his complaint, petitioner

"charged Respondents with an unlawful discriminatory practice relating to [his] employment because of his sexual orientation and sex, as well as retaliation for his reporting such discrimination, in violation of the New York State Executive Law § 296" (Petitioner Memo of Law, p. 2).

The respondents submitted an unverified answer to petitioner's complaint, asserting, *inter alia*, that petitioner was not discriminated against and was terminated for non-discriminatory reasons regarding under performance (see Verified Petition, exhibit B). The petitioner interposed a rebuttal (see Verified Petition, exhibit C; Internal Exhibits 1 – 16). DHR subsequently dismissed petitioner's complaint, finding no probable cause to support a finding of discrimination. This special proceeding ensued.

DISCUSSION

The standard of review in this Article 78 proceeding is whether DHR's "determination

was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assocs. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

"[A]s long as the investigation is sufficient and the claimant afforded a full opportunity to present his claims, [i]t is within the discretion of the [DHR] to decide the method or methods to be employed in investigating a claim" (*Matter of McFarland v New York State Div. Human Rights*, 241 AD2d 108, 112 [1st Dept 1998] [internal quotations omitted]; *Matter of Chirgotis v Mobil Oil Corp.*, 128 AD2d 400, 403 [1st Dept 1987]). "In fact, a finding of no probable cause has been upheld in instances where the Division conducted an investigation, otherwise sufficient, but did not include a fact-finding conference" (*Matter of McFarland*, 241 AD2d at 112).

Petitioner proffers that the DHR's investigation was conducted insufficiently to allow it to form a decision of "no probable cause." He asserts that DHR arbitrarily and capriciously

dismissed his complaint, notwithstanding numerous “uncontroverted or incontrovertible facts” (see Verified Petition ¶¶ 9, i-vii). Petitioner avers, *inter alia*, that the determination of DHR should be overturned on the basis that DHR improperly disregarded allegations by petitioner as untimely, DHR then improperly held that the remaining allegations were isolated, and did not rise to a level of conduct so as to be discriminatory; DHR improperly resolved genuine issues of material fact in favor of Respondents; and on the basis that DHR did not interview the parties nor any witnesses during their investigation nor did DHR offer an explanation as to why no interviews were conducted. Petitioner requests a new investigation by the DHR.

Respondents aver, *inter alia*, that the herein petition should be dismissed because the DHR's determination and dismissal of the petitioner's complaint was not arbitrary or capricious, and petitioner's allegations fail as a matter of law. Furthermore, respondents aver that the petitioner had a full and fair opportunity to present his allegations and evidence to DHR, which he did through his submissions of a complaint, a lengthy rebuttal, an affidavit, and fifty-two pages of documentary evidence. While he was not personally interviewed, DHR asserts that all the facts in his submissions were taken liberally and as true, but they do not support a finding of probable cause.

The Court holds that DHR's determination that there was no probable cause to believe that respondents engaged in the unlawful discriminatory conduct alleged by petitioner in his complaint, was supported by the record and was not arbitrary and capricious. In rendering its determination, DHR clearly stated the basis for the determination and that it was made after an investigation and review of information and evidence submitted by the parties. The record demonstrates that petitioner had a full and fair opportunity to present his case and that DHR's investigation was neither abbreviated nor one-sided (see *Kim v New York State Div. of Human Rights*, 107 AD3d 434 [1st Dept 2013]; *Matter of Bal v New York State Div. of Human Rights*, 202 AD2d 236 [1st Dept 1994]). Although DHR did not personally interview the petitioner, the

method in which the DHR conducts an investigation is within its discretion and there is no evidence before the Court that the investigation was abbreviated or one-sided (see *Matter of McFarland*, 241 AD2d at 112; *Matter of Chirgotis*, 128 AD2d at 403 ["It is within the discretion of the DHR to decide the method or methods to be employed in investigating a claim. A DHR determination of no probable cause should be overturned as capricious only where the record demonstrates that its investigation was abbreviated or one-sided] [internal citations and quotations omitted]; see e.g., *Matter of Kushnir v New York State Div. of Human Rights*, 114 AD2d 898 [2d Dept 1985]; *Matter of Sheppard v McCall*, 112 AD2d 239 [2d Dept 1985]). DHR considered all of the petitioner's submissions and after a thorough investigation concluded that there was no probable cause. This Court has determined that there exists a rational basis to support the Division's determination (see *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69 [1983]; *Bush v Division of Human Rights*, 78 AD3d 505 [1st Dept 2010]). Accordingly, the petition is dismissed.

CONCLUSION


For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs or disbursements to the respondents; and it is further,

ORDERED that the respondents shall serve a copy of this Order, with Notice of Entry, upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/27/16

Enter: 
 PAUL WOOTEN J.S.C.

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