

**Matter of MTA Bus Co. v New York State Div. of
Human Rights**

2016 NY Slip Op 30635(U)

April 8, 2016

Supreme Court, New York County

Docket Number: 160602/2015

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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In the Matter of the Application of

MTA BUS COMPANY,

Petitioner,

For a Judgment pursuant to § 298 of the Executive Law
vacating a Final Order,

Index No.: 160602/2015

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
on the Complaint of LLOYD MIDDELTON,

Respondents.

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
motion to vacate final order.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____
Order to Show Cause and Affidavits Annexed	_____ 1 _____
Answering Affidavits.....	_____ 2 _____
Replying Affidavits.....	_____
Memoranda.....	_____ 4 _____
Other.....cross-motion.....	_____ 3 _____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In this employment action, petitioner MTA Bus Company (MTA Bus) moves, pursuant to section 298 of the Executive Law, for an order vacating the final order of the Division of Human Rights and dismissing in its entirety the complaint filed by Lloyd Middleton (Middleton).

Respondents cross-petitions for an order, pursuant to Executive Law § 298 and 22

NYCRR § 202.57 (c) of the Uniform Rules for the Supreme Court and County Court, transferring this proceeding to the Supreme Court of the State of New York, Appellate Division, First Judicial Department for disposition.

Background

Middleton was a former bus operator who was employed by MTA Bus. Middleton was diagnosed with bipolar disorder decades before his employment with MTA Bus began. In January 2012, MTA Bus restricted Middleton from operating a bus due to a number of accidents and driving infractions that he was involved in. Ultimately, he was terminated from his employment, in September 2012, after he had vandalized three busses that were in service carrying passengers.

On February 12, 2013, Middleton filed a complaint of discrimination against MTA Bus with the New York State Human Rights Division (NYSHRD), alleging that MTA Bus discriminated against him based on his disability in violation of Executive Law § 296 (New York State Human Rights Law [NYHRL]). MTA Bus submitted a position statement denying the charges of discrimination. Pursuant to a collective bargaining agreement, Middleton grieved his dismissal, and an arbitration was held. The arbitrator upheld Middleton's termination of employment. However, after an investigation into Middleton's complaint, the NYSHRD issued a determination on August 9, 2013, finding probable cause to believe that MTA Bus engaged in unlawful discrimination.

A public hearing was held on January 21 and January 22, 2015 before Administrative Law Judge (ALJ) Robert Tuosto, who heard and received testimony and evidence from all parties. By recommended findings of fact, opinion and decision, and order dated March 3, 2015,

ALJ Tuosto found that MTA was justified in removing Middleton from his position as bus operator and reassigning him to other duties. MTA Bus and Middleton objected to the ALJ's recommended order.

On July 1, 2015, NYSHRD's adjudication counsel, Matthew Menes, issued an alternative proposed findings of fact, decision and order (Alternative Proposed Order), noting that although MTA Bus had adopted NYCTA's medical standard precluding an individual with bipolar disorder from operating a bus in passenger service, there was no evidence that Middleton suffered emotional distress damages or lost wages as a consequence of that medical standard, and further found that Middleton was placed on permanent restrictive duty for reasons unrelated to his disability. Though Menes also found that Middleton's termination was not discriminatory, he turned to examine the NYCTA's medical standard and found that given that MTA Bus "has a blanket policy disqualifying all employees with bipolar disorder from being appointed to, or remaining in, the Bus Operator position and passenger service, and because [MTA Bus] does not individually assess the ability of those with bipolar disorder to perform the essential functions of the job, [MTA Bus's] policy violates the [NYHRL]" (*see* petition, exhibit M at 8). The Alternative Proposed Order recommends that "[g]iven these circumstances, the goal of deterrence, the nature and circumstances of the violation, the degree of [MTA Bus's] culpability, and [MTA Bus's] size and financial resources, \$30,000 is an appropriate civil fine and penalty" (*id.* at 10).

On August 19, 2015, the Commissioner adopted the Alternative Proposed Order as the NYSHRD's final order in the case (*see* petition, exhibit O), and found that MTA Bus violated the NYHRL when MTA Bus failed to conduct an individualized assessment of Middleton, and every

other employee with a bipolar disorder disability holding the position of bus operator under MTA Bus's "blanket" policy automatically disqualifying all such employees with bipolar disorder. According to the notice and final order, "[a]n opportunity was given to all parties to object to the Alternative Proposed Order, and all Objections received have been reviewed" (cross petition, exhibit A).

Discussion

Executive Law § 298 provides, in pertinent part, the following:

"except that where the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of this article, the [supreme] court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced."

In other words, under Executive Law § 298, the supreme court has jurisdiction over a proceeding challenging a determination of the State Human Rights Division made after a public hearing; however, it is required to "make an order directing that the proceeding be transferred for disposition to the appellate division." In *State Division of Human Rights v YMCA of Greater New York* (139 AD2d 440, 441 [1st Dept 1988]), the First Department stated that it had "exclusive jurisdiction" to review "DHR" orders rendered after a public hearing.

Since there is no dispute that public hearings were held, the transfer of this proceeding to the Appellate Division, First Department is mandated (*see e.g. Hazen v Hill Betts & Nash, LLP*, 92 AD3d 162 [1st Dept 2012]; *Matter of State Div. of Human Rights v G.B.H Intl. Corp.*, Sup Ct, NY County, Nov. 4, 2013, Schlesinger, J., index No. 450819/13).

Conclusion

Accordingly, it is

ORDERED that the cross petition is granted, and pursuant to Executive Law § 298, the application by petitioner seeking to vacate and annul a determination by respondent is respectfully transferred to the Appellate Division, First Department, for disposition. This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (Executive Law § 298).

Petitioner is directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First Department.

Dated: April 8, 2016


GEOFFREY D. WRIGHT
AISC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court