SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 6

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In the Matter of the Application of:
Stephen RODRIGUEZ,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice

v.

NYC HOUSING AUTHORITY,

Respondent.

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Index No.
152033/2018

Decision and
Order

Mot. Seq. 1

HON. EILEEN A. RAKOWER:

Stephen Rodriguez ("Petitioner") was a former Elevator Mechanic employed by respondent New York City Housing Authority ("Respondent" or "NYCHA"). Petitioner brings this Article 78 proceeding to challenge NYCHA's decision to terminate his employment on November 8, 2017. Petitioner contends that NYCHA deprived him of due process in violation of Civil Service Law Section §75 and the New York State Constitution. Petitioner further contends that NYCHA terminated his employment in violation of Section 296 of the N.Y. State Human Rights Law ("State HRL") and Section 8-107 of the NYC Human Rights Law ("City HRL") for failing to accommodate an alleged disability of perceived or actual alcoholism. Respondent interposed a Verified Answer. Respondent contends that the Petition should be denied because Petitioner was not deprived of due process, and Petitioner fails to establish a prima facie case of disability discrimination under the State HRL and City HRL.

Background and Factual Allegations

Petitioner was employed by NYCHA in May 2009 as an Elevator Mechanic's Helper. Petitioner was appointed to the title of Elevator Mechanic in

November 2015. (Amended Petition ["Pet."] ¶2; Answer ¶31). NYCHA terminated Petitioner's employment on November 8, 2017. (Pet. ¶11).

On February 15, 2017, Petitioner was arrested for operating a motor vehicle while intoxicated ("DWI"). (Pet. ¶4). Respondent states that Petitioner's driver's license was revoked on March 1, 2017. (Answer ¶38). According to the Petition, Petitioner informed all required NYCHA officials that he was arrested and plead guilty to the DWI offense. Petitioner thereafter entered a 30 day in patient program through NYCHA Employee Assistance Program ("EAP") and was discharged from the program on April 28, 2017. (Pet. ¶4). On April 28, 2017, the same date, Petitioner was admitted to an outpatient follow-up treatment with Seafield Medical. (Pet. ¶5). On May 1, 2017, the EAP notified NYCHA that Petitioner could return to work. (Pet. ¶6: Exh. B). On May 1, 2017, in a separate notification, the EAP notified NYCHA that Petitioner remained under its care and requested that NYCHA "accommodate the employee to leave work at 3pm on Mondays, Tuesdays and Thursdays beginning May 1, 2017 and ending May 18, 2017 for follow up appointments." (Pet. ¶6, Exh. D). Petitioner continued in this out-patient through October 2017 and received a Certification of Completion on October 19, 2017. (Pet. ¶6, Exh. E).

Petitioner was convicted for DWI on June 5, 2017. (Pet. ¶4; Answer ¶39; Exh. 5 to Answer ["CRIMS History"]). Respondent states that Petitioner's driver's license was revoked again on September 12, 2017 as a result of the conviction. (Ans. ¶39; Exh. 2 to Federman Aff. ["Driving Record Abstract"]).

By notice dated September 13, 2017, Respondent informed Petitioner that it had been notified by the Department of Motor Vehicles that Petitioner's driver's license was invalid and that Petitioner's position as an Elevator Mechanic required him to maintain a valid driver's license. (Pet. ¶¶10; Exh. F). Respondent gave Petitioner 30 days to obtain a valid driver's license and to provide proof of the same. (Pet. ¶10; Exh. F).

By notice dated October 18, 2017, Respondent notified Petitioner that as of the date of the notice, Respondent had not received proof that his license was valid. (Pet. ¶11, Ex. G). The notice stated:

> "In accordance with the job specifications of your title, you are required to possess a valid driver license in order to operate motor vehicles. Without a valid driver license, you are not able to satisfactorily perform the duties

> associated with your title. Therefore, unless the Human Resources Department receives such proof within ten (10) days of the date of this memo, you will be subject to immediate disciplinary action to remove you from your current position."

On November 8, 2017, Petitioner's employment was terminated because he was "currently not in compliance with the terms of appointment to the Elevator Mechanic title by failure to maintain the required license and thus … no longer meet the minimum qualification requirement by virtue of the Notice of Examination for the title." (Pet. ¶13; Exh. H).

Petitioner states that on October 18, 2017, Nassau County Probation Department agreed to permit him to drive his own vehicle with an interlock, or an employer's vehicle without an interlock if NYCHA provided consent. (Pet. ¶12). Petitioner states, "[t]ry as he might, Mr. Rodriguez (who spoke to a Tammy Daniels at the NYCHA Law Department and NYCHA's HR Department) could not get NYCHA's consent." (Pet. ¶12). Petitioner claims since "[h]e had rarely used a NYCHA vehicle … this should not have been an impediment to continued work." (Pet. ¶12). Petitioner further states that he had attended an Impaired Driving School program in order to regain his license. Petitioner states that he completed that program on November 27, 2017, which allowed him to obtain a conditional license (Pet. ¶7). Petitioner states that a conditional license allowed him to drive an employer's vehicle, and that he had "made the expected completion date [of the program] known to his supervisors at NYCHA." (Pet. ¶7).

Petitioner further states, "After his DWI arrest, Mr. Rodriguez worked every day; clearly, as an accommodation, he was stationary rather than driving, working at one location throughout the entire day." (Pet. ¶9).

Sharda Shrestha ("Shrestha"), who has served as NYCHA's Reasonable Accommodation Coordinator since 2014, states, "NYCHA's Human Resources Department has no record of any reasonable request submitted by" Petitioner." (Shrestha Aff. ¶2).

Jerry Massas ("Massas"), Petitioner's supervisor, claims that Petitioner's statement "that he was assigned to one location per day in order to reasonably accommodate his lack of a driver's license … is not true." (Massas Aff. ¶4). Massas states, "Petitioner did not request such an accommodation nor was he provided this accommodation. While, in 2017, Elevator Mechanics were typically

assigned to one location each day, they are required to travel to work at other developments as needed." (Massas Aff. ¶4). Massa further states that he has "reviewed Petitioner's 2017 Kronos Punch Origin Report, which identifies each location Petitioner swiped in and out of with his identification card." (Massas Aff. ¶5). Massa states, "Petitioner's records show that Petitioner did in fact travel from one development to another during his shift on May 2, 4, 8, 2017, June 21, 2017, and July 22, 2017, and that on at least one occasion, August 1, 2017, Petitioner traveled to three developments during one shift." (Massas Aff. ¶5).

Four months after his termination, Petitioner commenced this Article 78 proceeding challenging his termination as a violation of due process under New York Civil Service Law Section 75 and Article I, Section 6 of the New York State Constitution and a violation of State HRL and City HRL for failing to accommodate an alleged disability of perceived or actual alcoholism.

Petitioner's Due Process and Civil Service Law §75 Claim

Petitioner contends that NYCHA deprived him of due process in violation of Civil Service Law §75 and New York State Constitution when he was terminated without charges or a hearing. (Pet. ¶23).

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v Eldridge*, 424 U.S. 319, 333 [1976]. "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'" *Id.* at 348-349. The U.S. Constitution and New York State Constitution's guarantees of due process "are formulated in the same words and are intended for the protection of the same fundamental rights of the individual and there is, logically, no room for distinction in definition of the scope of the two clauses." *Cent. Sav. Bank in City of New York v City of New York*, 280 N.Y. 9, 10 [1939].

Civil Service Law § 75 sets forth a procedure under which certain employees, including those with permanent, civil service status, may be removed or subjected to other disciplinary action for misconduct or incompetency. Civil Service Law § 75 (1) provides, in pertinent part:

> "A person [holding a position by permanent appointment in the competitive class of the classified civil service]

> shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section."

However, failure to maintain a minimum qualification of employment is not an act of misconduct or one related to job performance that would require the disciplinary procedures mandated by Civil Service Law §75. *See Felix v. N.Y.C. Dep't of Citywide Admin. Servs.*, 3 N.Y. 3d 498 [2004](holding the discharge of an employee without a hearing following notice of and an opportunity to contest the claimed non-residency was warranted because the failure to establish residency was a minimum qualification rather than an act of misconduct); *Stolzman v. New York State Dept. of Transp.*, 68 A.D.3d 1331, 1333 [3d Dept 2009](holding that "petitioner's failure to hold a valid CDL is not a disciplinary matter, since it renders him unqualified for the position of bridge repair mechanic based upon his off-duty conduct, which is unrelated to any deficient job-related performance, misconduct or lack of competency on his part" and therefore he was not entitled to a hearing prior to his termination under Civil Service Law §75).

Alan Federman ("Federman"), who is employed by NYCHA as Associate Staff Analyst in NYCHA's Human Resources Department, states in his affidavit, "Elevator Mechanics inspect, maintain, and repair passenger and freight elevator systems." (Federman Aff. ¶3). Federman states, "As a minimum qualification for the title of Elevator Mechanic, the possession of a valid motor vehicle driver's license in the State of New York is mandatory at the time of appointment and throughout the duration of employment." (Federman Aff. ¶4). Listed under the job title of Elevator Mechanic is the requirement that the employee "possess a Motor Vehicle Driver License valid in the State of New York … [which] must be maintained for the duration of employment." (Elevator Mechanic Title Specifications; Exh. 1 to Federman Aff.). "Examples of Typical Tasks" of the position includes: "operate[] a motor vehicle in the performance of assigned duties." (*Id.*).

Here, Petitioner was terminated on November 8, 2017 because he lacked a minimum qualification of employment, specifically, a valid driver's license. As such, Petitioner was not terminated due to misconduct or incompetency and therefore was not entitled to a hearing pursuant to Civil Service Law §75. Instead, Petitioner was entitled to notice by the employer regarding the alleged lack of a qualification and an opportunity to contest the finding. Here, the record shows that Respondent afforded Petitioner the process due to him under the New York State

Constitution when it gave him two opportunities to submit documentation showing possession of a valid driver's license. Respondent sent Petitioner two letters of notice, dated September 13, 2017 and October 18, 2017, requesting proof of a valid driver's license. As Petitioner failed to provide proof of a valid driver's license, Respondent was then terminated from employment from NYCHA for failing to meet the minimum qualifications for the Elevator Mechanic title.

Petitioner claims that at the time of his termination, he "had a 'valid,' albeit conditional drivers [sic] license" and "within ten days of termination … had all restrictions lifted, a fact known by NYCHA." (Pet. ¶22) It remains undisputed, however, that Petitioner did not provide proof of a valid driver's license to Respondent after he received the two notices requesting the same.

Petitioner's State HRL §296 and City HRL §8-107 Claim

Petitioner also claims that Respondent discriminated against based on alcoholism and recovering alcoholic status in violate of State HRL and City HR.

Under both the State HRL and City HRL, recovering alcoholics qualify as disabled. See Exec. Law § 292[21]; 9 N.Y.C.R.R. § 466.11[h]; N.Y.C. Admin. Code § 8-102[16][c].

Under both the State HRL and City HRL, "it is an unlawful discriminatory practice for an employer, because of an individual's disability, to refuse to hire or to discharge such individual, or otherwise to discriminate against such individual in the terms, conditions and privileges of employment." *LaCourt v. Shenanigans Knits, Ltd.*, 38 Misc. 3d 1206(A) at *3 [Sup. Ct. 2012]. "To establish a case of disability discrimination, a plaintiff must show that she suffers from a disability, and the disability caused the behavior for which she was terminated." *Id.*.

"An employer's refusal to reasonably accommodate an employee's known disability also constitutes discrimination under the NYSHRL and the NYCHRL." *LaCourt*, 38 Misc 3d 1206(A) at *3. To maintain a claim against an employer for failure to accommodate under the State HRL and the City HRL, "a plaintiff must [state] that 1) [he] was disabled within the meaning of the statutes; 2) the employer had notice of the disability; 3) [he] could perform the essential functions of [his] job, with a reasonable accommodation; and 4) the employer refused to make a reasonable accommodation." *Id.*

[redacted]

Under State HRL, a reasonable accommodation is one which "permit[s] an employee…with a disability to perform in a reasonable manner the activities involved in the job … provided, however, that they do not impose an undue hardship on the business." Executive Law §292 [21-e]; *see also Jacobsen v. N.Y.C. Health & Hospitals Corp.*, 22 N.Y. 3d 824, 834 [2014]. "[I]f an employee has [an] impairment that prevents the employee from performing the core duties of his or her job even with a reasonable accommodation, the employee does not have a disability covered by the statute, and consequently, the employer is free to take adverse employment action against the employee based on that impairment." *Jacobsen*, 22 N.Y.3d at 834. "On the other hand, if a reasonable accommodation would permit the employee to perform the essential functions of the employee's position, the employee has a 'disability' within the meaning of the statute, and the employer cannot disadvantage the employee based on that disability." *Id.* "Thus, a proper State HRL claim must be supported by substantiated allegations that, 'upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job.'" *Id.* (citations omitted).

Similarly, the City HRL requires employers to "make reasonable accommodations to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the [employer]." Admin. Code §8-107[15][a]. The request for accommodation does not need to be in a specific form, nor be in writing. *Castillo v. Schriro*, 49 Misc 3d 774, 789 [Sup Ct 2015]. "The HRL further affirmatively requires that, even in the absence of a specific request, an employer 'shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job…provided that the disability is known or should have been known to the [employer].'" *Id.* "[U]nlike the State HRL, the City HRL places the burden on the employer to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business." *Jacobsen*, 22 N.Y.3d at 835.

The Petition alleges that "Plaintiff has, or is perceived to have a disability, to wit, alcoholism." (Pet. ¶24). Petitioner alleges "[he] had taken measures to address his disability, and had demonstrated an ability to work, with minor accommodation, at his Civil Service job." (Pet. ¶25). Petitioner states, "In fact, Respondent had accommodated his disability from the date of Plaintiff's completion of inpatient treatment on May 1, 2017 until November 8, 2017." (Pet. ¶25). Petitioner states, "After his DWI arrest, [Petitioner] worked every day; clearly, as an accommodation, he was stationary rather than driving, working at

one location throughout the entire day." (Pet. ¶9). Petitioner states since "[h]e had rarely used a NYCHA vehicle … this should not have been an impediment to continued work." (Pet. ¶12).

Petitioner alleges:

> "An employer must accommodate a disability as long as it does not cause undue hardship to an employer's business … Here, NYCHA had to do very little to accommodate Petitioner for the ten additional days he needed; it only had to let him continue to work the way he was working." (Pet. ¶26).

Petitioner alleges, "By terminating Plaintiff because of his disability, and refusing to accord him a reasonable accommodation, Respondent has violated 296 of the N.Y. State Human Rights Law and Section 8-107 of the NYC Human Rights Law." (Pet. ¶27).

CPLR §103[c] provides:

> "Improper form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs."

Certain claims such as those for discrimination are "better resolved in a plenary action rather than an Article 78 proceeding where discovery is readily available and where full legal and equitable relief is available." *See Goldman v. White Plains Ctr. for Nursing Care, LLC*, 9 Misc. 3d 977, 981 [Sup. Ct. 2005] (holding that where the petitioner has "stated colorable claims against" the respondent for age discrimination in an Article 78 proceeding, the claims are "more appropriately litigated in a plenary action."); CPLR §103[c]. Such is the case here where the claims are for discrimination and where the parties submit conflicting accounts concerning whether Petitioner requested an accommodation, whether Petitioner was provided one, the essential functions of his position, and relevant dates.

Wherefore it is hereby

ORDERED and ADJUDGED that the first and second causes of action of the Amended Petition which challenge Petitioner's termination as a violation of due process pursuant to Civil Service Law Section §75 and the New York State Constitution is denied; and it is further

ORDERED and ADJUDGED that the third cause of action of the Amended Petition which alleges discrimination in violation of Section 296 of the N.Y. State Human Rights Law and Section 8-107 of the NYC Human Rights Law shall be converted to a plenary action pursuant to CPLR §103[c]; and it is further

ORDERED that the Petitioner's Petition is hereby deemed the complaint in the plenary action and Respondent's answer to the Petition is deemed the answer in the plenary action; and it is further

ORDERED that Petitioner shall serve a copy of this order with notice of entry on the County Clerk who is directed to assign the plenary action to a non-medical malpractice part.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: SEPTEMBER 14, 2018

EILEEN A. RAKOWER