

Matter of Oliver v Brann
2020 NY Slip Op 32240(U)
July 8, 2020
Supreme Court, New York County
Docket Number: 157911/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

In re Application

**In the Matter of the Application of
NICOLE OLIVER**

INDEX NO. 157911/2019

Petitioner,

MOTION DATE

**for a Judgment under Article 78 of the
Civil Practice Law and Rules,**

MOTION SEQ. NO. 1

MOTION CAL NO.

-against-

**CYNTHIA BRANN, Correction Commissioner
of the New York City Department of Correction;
THE NEW YORK CITY DEPARTMENT
OF CORRECTION; and THE CITY OF NEW YORK,**

Respondents.

The following papers, numbered 1 to _____ were read on this motion for/to

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

PAPERS NUMBERED

Answer — Affidavits — Exhibits _____
Replying Affidavits

Cross-Motion: Yes X No

Petitioner, Nicole Oliver (“Oliver”), brings this Article 78 proceeding against Cynthia Brann, the New York City Department of Correction (“DOC”), and the City of New York (collectively, “Respondents”), alleging that Oliver’s termination on April 16, 2019 at the behest of Warden Sharlisa Walker (“Walker”) was arbitrary, capricious, and in bad faith. Specifically, Oliver claims that “Walker abused her authority by continually harassing, punishing and then terminating Oliver (1) for having a child with the same man with whom Warden Walker also shares a child and (2) in retaliation for Oliver filing a complaint against Warden Walker with DOC’s Equal Employment Office (‘EEO’) and, later, with the New York State Division on (sic) Human Rights (‘SDHR’).” (Verified Petition at ¶3). Oliver seeks reinstatement and back pay.

BACKGROUND

The DOC hired Oliver on August 7, 2015 to a two-year probationary period, and assigned Oliver to Rikers Island’s Otis Bantum Correctional Center (“OBCC”) on December 4, 2015, after Oliver completed training. (Verified Petition at ¶7, 10). While assigned to OBCC, Oliver was injured in an off-duty car accident on May 31, 2016. (*See id.* at ¶ 12). Oliver’s injuries included a torn rotator cuff and herniated discs in her back. (*See id.*). As a result of her injuries, Oliver used sick leave, and also worked in a light duty status at various times. (*See id.*). Oliver received her first of two designations as “Chronic Absent” on June 23, 2016. (Verified Answer, Exhibit “22”). This designation is given when an employee exceeds twelve (12) absences; Oliver

had taken thirty-three (33) days of sick leave when she was designated “Chronic Absent.” (*See id.*)

Oliver suffered a hernia on June 25, 2016 and had surgery. (Verified Petition at ¶ 13). Oliver took sick days and worked restricted duty assignments until she fully recovered. (*See id.*). Pursuant to NYC Personnel Rules and Regulations 5.2.8(b), “the probationary term is extended by the number of days when the probationer does not perform the duties of the position,” such as: “limited duty status, annual leave, sick leave, leave without pay,” etc. (Personnel Rules and Regulations of the City of New York § 5.2.8). Therefore, due to her attendance, Oliver’s initial probationary period of 2 years was extended “day to day plus 6 months.” (*See id.*) Oliver’s “day to day” period began on August 6, 2017 (after her initial 2-year period) and ended October 19, 2018, and her 6-month extension period began October 20, 2018 and was set to run April 19, 2019. (Verified Answer, Exhibit “5”). Oliver acknowledged these extensions on October 5, 2018. (*See id.*).

DOC transferred Oliver to Rikers’ Eric M. Taylor Center (“EMTC”) on November 18, 2016. (Verified Petition at ¶ 15). While at EMTC, Oliver received one disciplinary charge, along with other officers, for being AWOL (“Absent Without Leave”) during a severe snowstorm. (*See id.* at ¶ 16-17). Oliver fell down the stairs and fractured her ankle on June 21, 2017, using sick leave and working light duty status. (*See id.* at ¶ 18).

DOC transferred Oliver to Rikers’ North Infirmery Command (“NIC”) on September 25, 2017 (October 16, 2017 per the Verified Petition), where Walker held the position of Assistant Deputy Warden under Warden Williams. (Verified Answer at ¶ 20).

Command Discipline Proceeding - December 17, 2017

On December 17, 2017, Walker “presided over a command discipline proceeding against Oliver for being AWOL on December 10, 2017.” (Verified Petition at ¶ 23). The AWOL charge was brought by Captain Nichols. (Verified Answer, Exhibit “10”). Oliver was represented by a union delegate and brought documents to show that she was on vacation on the day in question. Walker dismissed the charge. (Verified Petition at ¶ 23-24). Oliver contends that Walker was “unhappy” about having to dismiss the charge, and used profane language toward Oliver and her union delegate. (*See id.*). Walker denied using obscene language and stated that she spoke with her staff because the charge should not have been brought, due to Oliver having requested the day off. (Verified Answer, Exhibit “10”).

Denied Transfer

Oliver also alleges that on February 19, 2018, Walker denied a transfer to Oliver for the position of a Mental Health Escort under Captain Wilkinson’s supervision. (“Wilkerson” in Oliver’s Petition). (Verified Petition at ¶ 27). Oliver contends she was offered the job, but needed Walker’s approval, which she did not receive. (*See id.*). Respondents maintain that no such offer was made, and that the position in question had been filled since October 16, 2017. (Verified Answer, Exhibit “10”).

EEO Complaint

Oliver filed a complaint of harassment against Walker with DOC's EEO office in March 2018, which was dismissed in May 2018. (Verified Answer, Exhibit "8"). The EEO officer determined that the allegations were not "within the purview of EEO." (*See id.*)

Command Discipline Proceeding¹ - March 8, 2018

On March 8, 2018, Oliver failed to report for her tour of duty. (Verified Answer, Exhibit "11"). DOC charged Oliver with violating DOC Employee Rules and Regulations 3.05.100: "Members of the Department shall report to their appointed place of duty at the time scheduled." (Verified Answer, Exhibit "3"). Oliver pled guilty and accepted the charges and her penalty at a proceeding on May 14, 2018. (Verified Answer, Exhibit "1"). Captain Skinner prepared the Charges, Specifications, and Disposition ("CSD") report. (Verified Answer, Exhibit "11").

Oliver contends that she was AWOL on March 8, 2018 because she was visiting a doctor for her anxiety and that she intended to resign. (Verified Petition at ¶ 33). Oliver maintains that she missed work because of the stress Walker caused her. (*See id.*). Specifically, Oliver alleges that Walker threatened that she would "bury her," and the anxiety of this conversation caused Oliver's absence. *See id.* at ¶ 28. Further, Oliver contends that Warden Williams called her and dissuaded her from resigning, but nonetheless penalized her with an AWOL charge. (*See id.* at ¶ 33). Oliver includes an affidavit from correction officer June Jackson ("Officer Jackson") (Verified Petition, Exhibit "A"). Officer Jackson claims she witnessed Walker's threat; however, she did not actually hear the threat, but only observed the verbal altercation through plexiglass. (*See id.* at ¶ 3).

Oliver was placed on sick leave from April 1, 2018 to April 25, 2018. (Verified Answer, Exhibit "9"). Oliver claims this was due to having trouble functioning with anxiety. (Verified Petition at ¶ 38-39). DOC designated Oliver as "Chronic Absent" for the second time on May 2, 2018. (Verified Answer Exhibit "24").

¹ When an officer violates a department rule, pursuant to Command Discipline Directive 427R-A, "the supervisor shall complete Section #1...and submit Form #454 (the CSD report) to the Hearing Officer for disposition". (Verified Answer, Exhibit "18"). The Hearing Officer then determines "if the alleged violation(s) is/are appropriate for Command Discipline." (*See id.*). If appropriate, the Hearing Officer "investigates to determine if the allegation warrants a hearing." (*See id.* at IV(A)(1)(a)(1) and (2)). "If the allegation warrants a hearing...the Hearing Officer shall schedule a Command Discipline interview." (*See id.*). "If the allegation(s) is/are substantiated, the Hearing Officer shall inform the member of the proposed penalty." (*See id.*) The member may then either "accept the findings and proposed penalty" or "decline to accept Command Discipline and...have the matter referred...for formal charges and specifications." (*See id.*) DOC refers to these Command Discipline interviews as "hearings." (Verified Answer, Exhibit "1").

Changing Oliver's Scheduled Post Assignments

Oliver alleges that Walker, after being promoted to Warden in April 2018, began changing Oliver's post assignments. (Verified Petition at ¶ 25-26). Officer Jackson attests to the fact that Oliver was often changed from her assigned post to so-called "punishment" posts in a way that singled Oliver out. (Verified Petition, Exhibit "A" at ¶ 5-6).

Command Discipline Proceeding - June 14, 2018

On June 14, 2018, Oliver arrived at DOC for training. (Verified Answer, Exhibit "12"). Because Oliver missed the first day of the training block, she could not complete the training, and Captain Peacock sent Oliver back to NIC for her tour of duty. (*See id.*). Captain Peacock notified Captain Wilson that Oliver would be returning to NIC. However, Oliver did not return to NIC, did not answer when Captain Wilson called, and did not return Captain Wilson's voicemail. (*See id.*). DOC charged Oliver with violating Department Rules and Regulations 3.05.100, to which Oliver pled guilty at a proceeding on July 18, 2018. (Verified Answer, Exhibit "1"). Captain Wilson prepared the CSD report. *See id.*

Oliver asserts that she wore business attire for training on June 14, 2018, and upon returning to NIC, Walker gave her an hour to change into uniform. (Verified Petition at ¶ 46). Oliver alleges that she had no choice but to leave and accept an AWOL charge. (*See id.*).

On October 5, 2018, DOC notified Oliver that her "Automatic Day to Day Extension" probationary period would expire on October 19, 2018 and her additional 6-month extension would expire on April 19, 2019. (Verified Answer, Exhibit "5"). This extension was "based on an evaluation of [Oliver's] work performance" and for "time which [Oliver] did not perform the full duties of [her] position." (*See id.*). Oliver accepted the extension on October 5, 2018 and it was signed by Oliver's commanding officer, C. Carter, and Deputy Commissioner Pinnock, on October 19, 2018 and October 23, 2018, respectively. (*See id.*).

Oliver alleges that on November 4, 2018, an inmate informed her that Walker had offered contraband in exchange for the inmate "splashing" (throwing bodily fluids) Oliver. (Verified Petition at ¶ 51-52). Oliver alleges that Officer Mark Johnson informed Oliver that the inmate told him this as well.

Command Discipline Proceeding - November 9, 2018

On November 9, 2018, Oliver called in sick to the Health Management Division ("HMD") desk at 3:30 AM and then reported for her tour of duty at 7 AM. (Verified Answer, Exhibit "14"). Assistant Deputy Warden ("ADW") Tindal ordered Oliver to go home and return the following day for her tour. (*See id.*). ADW Tindal observed Oliver walking to the locker room, and Oliver asserted that she was staying. (*See id.*). Oliver refused to admit she had "banged in" (called in sick), and ADW Tindal directed Captain Steele to reprimand Oliver for refusing a direct order. ADW Tindal then referred Oliver to the Correction Assistance Response for Employees unit, thinking Oliver may have been unwell. (*See id.*). ADW Tindal prepared the CSD report for this charge. (*See id.*).

At her Command Discipline proceeding on January 22, 2019, DOC charged Oliver with violating:

i. Department Rules and Regulations 3.20.070: Members of the Department shall promptly obey all lawful orders of their supervisor. Members of the Department who are given a lawful order that conflicts with a previously-issued lawful order shall advise the supervisor issuing the second order of the conflict. If the second order is not altered or retracted, the member of the Department shall obey the second lawful order. Responsibility for countermanning the original lawful order rests with the supervisor issuing the second lawful order. Members of the Department must not obey an order that violates any law. Responsibility for a refusal to obey rests with the member of the Department, the member of the Department shall report such unlawful order to the next higher-ranking supervisor;

ii. Department Rules and Regulations 3.20.190: Members of the Department shall not willfully disobey a lawful order of supervisor. In addition, members shall not act disrespectfully in language or demeanor toward a supervisor;

iii. Directive #2262R Sick Leave Regulations for Members of the Uniform Force III. Procedure /F. Return to Duty/ 1. A member of the uniform force who has reported sick shall not return to duty until ordered to do so by an HMD physician, physician's assistant, registered nurse of the HMD scheduling Unit/Sick Desk; and,

iv. Department Rules and Regulations 3.20.180: Acting disrespectfully toward a supervisor.

(Verified Answer, Exhibit "1," "3," "14").

Oliver pled guilty to these charges and accepted DOC's penalty of four vacation days. (Verified Answer, Exhibit "9").

In her Petition, Oliver contends that HMD told her she could return to work on November 9, 2018, pending clearance as "fit for duty" from Oliver's tour commander. (Reply Aff. at ¶ 24). Oliver claims that DOC charged her because she objected to her "supervisor's loud and public attempt to discuss her medical condition." (Verified Petition at ¶ 58). Oliver attaches an affidavit from former Officer Frederick Hertz (Reply Aff., Exhibit "E"), in order to rebut Respondents' claim that "banging in" and then reporting for duty was against policy. Oliver does not dispute that she refused the order to go home and return to duty on November 10, 2018.

Command Discipline Proceeding - December 16, 2018

On December 16, 2018, Oliver failed to report to her scheduled “mutual” tour, which is an exchange of shifts between two officers. Captain Wickham prepared the CSD report. (Verified Answer, Exhibit “16”). Oliver accepted the charges at the proceeding on January 22, 2019. (Verified Answer, Exhibit “9”).

At the January 22, 2019 proceeding, DOC charged her with violating:

- i. Department Rules and Regulations 3.05.100: Members of the Department shall report to their appointed place of duty at the time scheduled;
- ii. Department Rules and Regulations 3.05.110: Members of the Department shall perform the tours of duty scheduled by the Commanding Officer.

(Verified Answer, Exhibit “16”).

The “mutual” tour was on the facility schedule for December 16, 2018; however, Oliver asserts that DOC never communicated its approval of the “mutual” tour, and therefore, she was unaware she was expected on December 16. (Verified Petition at ¶ 59). Oliver attaches an example of a mutual exchange form for a different day, approved by DOC. (Reply Aff., Exhibit “D”). Oliver does not dispute that the facility schedule listed her as working the tour in question.

On December 20, 2018, Walker began serving as Acting Warden. (Verified Answer at ¶9)

Command Discipline Proceeding - December 30, 2018

On December 30, 2018, Captain Wilson offered Oliver a choice of work locations for her following overtime shift on December 30. (Verified Answer, Exhibit “17”). Captain Nichols relieved Captain Wilson at the control desk, and Oliver failed to report to Oliver’s scheduled tour. (*See id.*). Oliver informed Captain Nichols that she had never spoken with Captain Wilson and left the facility due to an emergency. (*See id.*). DOC charged Oliver with violating:

- i. Department Rules and Regulations 3.05.130: Members of the Department shall not leave their post or place of assignment without the permission of a superior. Employees who are authorized to leave their post for any reason must return to the post as quickly as possible. If the nature of the employees' duties are such that the safety of the inmates or the facility/command is involved, employees shall not be permitted to leave until they have been properly relieved;
- ii. Department Rules and Regulations 3.20.190: Members of the Department shall not willfully disobey a lawful order of a

supervisor. In addition, members shall not act disrespectfully in language or demeanor toward a supervisor.

(*See id.*)

Captain Wilson prepared the CSD report, and Oliver accepted the charges at her proceeding on January 22, 2019. (Verified Answer, Exhibit “1,” “17”).

On January 28, 2019, Walker filed a Personnel Determination Review (“PDR”) requesting Oliver’s termination because Oliver violated department rules and regulations leading to her poor disciplinary and attendance records, and “her actions are far below the expectations of a Correction Officer.” (Verified Answer, Exhibit “9”). Additionally, Walker noted that Oliver had been AWOL 3 times during her 6 month probation extension. (*See id.*).

On February 1, 2019, Oliver filed a complaint with the SDHR. (Verified Answer, Exhibit “8”). The complaint alleged that Walker had discriminated against Oliver based on familial status. (*See id.*). Although Oliver later withdrew the complaint (Verified Petition, Exhibit “C”), DOC denied Oliver’s claims regarding the December 17, 2017 Command Discipline proceeding and the alleged changes made to Oliver’s post schedule. (Verified Answer, Exhibit “10”).

STANDARD OF REVIEW

“Petitioner, as a probationary employee, may be discharged without a hearing, or statement of reasons, for any reason or no reason at all, in the absence of a demonstration that the dismissal was in bad faith, for a constitutionally impermissible reason, or in violation of the law.” *Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]. “Judicial review of the determination to discharge this probationary employee is limited to an inquiry as to whether the termination was made in bad faith. *Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]. “Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith.” *Matter of Jackson*, 68 NY2d at 650. “While a hearing may be necessary in those instances where an issue of a substantial nature is raised regarding the probationary employee’s dismissal ..., the burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason ... and mere speculation, or bald, conclusory allegations are insufficient to shoulder this burden.” *Che Lin Tsao*, 28 AD3d at 321. The function of the Court “should not be to second guess ... [but] is simply to determine if petitioner has shown bad faith on the part of the respondent.” *Soto*, 171 AD2d at 569.

“In order to make out a retaliation claim, plaintiff must show that (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that activity; (3) she suffered adverse employment action based on her activity; and (4) there is a causal connection between the protected activity and the adverse action.” *Koester v. New York Blood Ctr.*, 55 AD3D 447, 449 (1st Dept 2008). “[I]t is important that the assessment [of a retaliation claim] be made with a keen sense of [the] realities [of the circumstances surrounding the plaintiff], of the fact that the ‘chilling effect’ of particular conduct is context-dependent, and of the fact that a jury

is generally best suited to evaluate the impact of retaliatory conduct in light of those realities.” *Fletcher v. Dakota, Inc.*, 99 AD3d 43, 51 (1st Dept 2012). Moreover, absent other evidence, “five months is insufficient to establish temporal proximity” to find a causal connection for a retaliation claim. *Parris v. City of New York*, 111 AD3d 528, 529 (1st Dept 2013). However, the “fact that actions are not temporally proximate is not necessarily fatal to a retaliation claim.” *Harrington v. City of New York*, 157 AD3d 582, 586 (1st Dept 2018). “The absence of temporal proximity will not defeat the claim, where...there are other facts supporting causation.” *Harrington*, 157 AD3d at 586.

DISCUSSION

I. Oliver’s Allegation of Bad Faith

Oliver claims that her termination was arbitrary, capricious and in bad faith. Oliver claims that Walker “abused her authority as Petitioner’s supervisor by ostensibly harassing, punishing and then terminating Petitioner for having a child with the same man with whom Warden Walker also shares a child.” (Verified Petition at ¶ 3). Oliver also claims that she was terminated in retaliation for her filing of a complaint against Walker with DOC’s EEO and SHDR. (*See id.*).

Here, Petitioner fails to point to any competent evidence demonstrating that the DOC’s determination to terminate her employment was made in bad faith, for an impermissible reason, or in violation of statutory or decisional law. *Che Lin Tsao v. Kelly*, 28 AD3d at 320. Further, Respondents have established good faith reasons for her termination, i.e. lateness, absenteeism, rebutting any potential presumption of bad faith raised. *Beissel v. New York City Police Dep’t*, No. 6992/16, 2016 WL 6893809, *5 (Sup. Ct. N.Y. Co. Nov. 3, 2016).

While Oliver alleges a motive for bad faith in that herself and Walker each had a child with the same man, there is nothing in the record to demonstrate that this connection motivated Walker in any negative way. To the contrary, the majority of Oliver’s absences preceded her transfer to NIC and the alleged negative treatment. Similarly, four of Oliver’s five AWOL charges were brought before Walker began serving as Acting Warden. (Verified Answer at ¶ 9). Moreover, there is no corroboration for Oliver’s allegations of Walker blocking her transfer.

Oliver’s allegations amount to speculation, and are insufficient to raise an issue of bad faith. Further, as Respondents assert, even assuming Oliver’s allegations were sufficient to raise an issue of bad faith, DOC established good faith bases upon which it terminated Oliver. Given that probationary employees “may be discharged for any or no reason at all” (*Brown*, 280 A.D.2d at 370), these good faith bases provide ample support for Oliver’s termination. Thus, DOC’s determination was not made in bad faith, and the decision was not arbitrary or capricious.

II. Oliver’s Retaliation Claim

Oliver contends that if Walker’s harassment does not raise a triable issue to warrant a hearing, alternatively, the temporal proximity of her complaints against Walker raises an

inference of retaliation. (Verified Petition at ¶ 3). “In order to make out a retaliation claim, plaintiff must show that (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that activity; (3) she suffered adverse employment action based on her activity; and (4) there is a causal connection between the protected activity and the adverse action.” *Koester*, 55 AD3d at 449.

Oliver has failed to establish bad faith through temporal proximity. Oliver’s first complaint to the DOC EEO was in March or April of 2018, and she was terminated in April of 2019. (Memorandum of Law). Oliver filed her complaint a year before she was terminated. Further, the investigation was dismissed on May 24, 2018 and yielded no evidence of discrimination. Even considering the PDR request from Walker was sent on January 28, 2019, this was still 9 to 10 months after Oliver filed the EEO complaint. The Appellate Division has previously held that five months is insufficient to establish temporal proximity. *See Parris*, 111 AD3d at 529, *Bantamoi v. St. Barnabus Hosp.*, 146 AD3d 420, 420 (1st Dept 2017).

In addition, Oliver’s SDHR complaint was verified on January 29, 2019, notarized on January 31, 2019, and filed February 1, 2019 (Verified Answer, Exhibit “8”). Walker’s PDR request was filed on January 28, 2019 (Verified Answer, Exhibit “13”). Oliver engaged in a protected activity, satisfying the first prong of the retaliation test articulated in *Koester*. However, Oliver has not demonstrated that Walker knew about the complaint, and therefore cannot satisfy the second prong. Moreover, Oliver filed her SDHR complaint after Walker filed the PDR, and Walker did not make the final decision to terminate her. Oliver has not established temporal proximity nor any causal connection between her complaint and her termination.

Even if temporal proximity exists between the SDHR complaint and termination, Oliver’s attendance and disciplinary record provide good faith bases for termination, negating any presumption of bad faith. Therefore, Oliver has failed to raise a triable issue of bad faith, and thus, DOC’s decision was not arbitrary or capricious.

III. Oliver’s “Splashing” Claim

Oliver contends that on November 4, 2018, an inmate informed Oliver that Walker had approached and offered contraband in exchange for the inmate “splashing” (throwing some form of bodily fluid) Oliver. (Verified Petition at ¶ 51-52). To support her claim, Oliver claims that the inmate also told Officer Johnson, who informed Oliver. (*See id.*). According to Johnson, the inmate was aware that Oliver and Walker had a child with the same man. (*See id.*). In her Reply, Oliver contends that at the very least, in light of her “extremely serious allegations,” (Reply Aff. at ¶ 44), this Court should grant an evidentiary hearing as to this incident.

Oliver’s allegations alone do not require this Court to disturb the agency’s action.

IV. Conclusion

Oliver failed to meet her burden of establishing that her termination from the DOC was made in bad faith, for a constitutionally impermissible reason or in violation of the law. *Che Lin*

Tsao, 28 AD3d 321. Further, DOC’s decision to terminate was not arbitrary or capricious in light of Oliver’s various admitted violations of DOC rules and regulations.

Wherefore it is hereby

ORDERED that the Petition is denied, and the proceeding is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: July 8, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**