

Moise v Schiraldi

2022 NY Slip Op 32052(U)

June 30, 2022

Supreme Court, New York County

Docket Number: Index No. 160283/2021

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

RUDY MOISE,

Plaintiff,

- v -

VINCENT SCHIRALDI, THE NEW YORK CITY
DEPARTMENT OF CORRECTION, THE CITY OF NEW
YORK

Defendant.

-----X

INDEX NO. 160283/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioner brings the instant Article 78 proceeding seeking reinstatement and back pay against the New York City Department of Correction (“DOC”) based on the allegations that Respondent acted unlawfully in an arbitrary and capricious manner.¹ Upon the foregoing documents, the petition is granted in part.²

Facts

Former Correction Officer Rudy Moise (Petitioner) was hired by DOC on February 11, 2019 to a two-year probationary period where he was subsequently assigned to the George R. Vierno Center (“GRVC”) on Rikers Island. It appears that his probationary period was extended to October 2021. During his probationary period, Moise received three Command Disciplines resulting in the loss of several vacation days. Additionally, during his probationary period, Moise

¹ The Court would like to thank Olivia McCann and Jacqueline Karol for their assistance in this matter.

² While the Court grants this Article 78 application, the Court does not award monetary damages, because they are not available in an Article 78 action.

received mixed performance evaluations where his ratings wavered between satisfactory and unsatisfactory. The final evaluation occurred on January 25, 26, and 27, 2020.

On January 25, 2020, Moise responded as a probe team member to an inmate's use of force against an officer. While struggling to secure the inmate on the ground, Moise injured his left shoulder. Moise continued working, with one exception, while completing outside physical therapy work until about September 2020.

In March 2020, the COVID-19 pandemic hit and in April 2020 Moise was suspected to have the virus. Moise was instructed to stay home during that time, resulting in 22 days of absence, before being cleared to return.

In September 2020, Moise went to the Emergency Room because the shoulder pain from the January injury was “unbearable”. In November 2020, Moise returned to work with light duty and no inmate contact. In March 2021, Moise underwent surgery to repair the rotator cuff tear in his shoulder. On June 29, 2021, Moise returned to light duty and no inmate contact on the recommendation of his doctor. DOC intended for Moise to be on light duty indefinitely.

On July 16, 2021, DOC terminated Moise. Moise’s termination began with a Personnel Determination Review (“PDR”) referral. Included in the reason for referral was his “attendance, punctuality and disciplinary record.” In the comments to the PDR, there is an indication that the petitioner “abuse[d]...the sick leave policy” and that the plaintiff “sustained no injuries.” The PDR issued by the DOC notes that the plaintiff was absent for 96 days, was late 6 times without a reason given, and there had been one disciplinary action against the petitioner for which action was taken against the petitioner. While the respondent in the course of this case notes that 11 of days of absences were for reasons unrelated to his shoulder injury and COVID, there is no such indication in the PDR.

Petitioner commenced an Article 78 proceeding alleging that DOC (1) terminated him based on disability, (2) terminated him without engaging in a cooperative dialogue for reasonable accommodation and (3) refused to provide accommodation in the form of additional light duty work, in violation of the New York City Human Rights Law (“City HRL”).

Standard of Review

In an Article 78 proceeding to challenge a probationary termination, “the broad discretion enjoyed by those who are empowered to discharge probationary employees is not unbridled.” *Kroboth v Sexton*, 160 AD2d 126, 127 (1st Dept 1990); see *Matter of Castillo v Schriro*, 49 Misc.3d 774, 787-788 (NY County 2015). Per its discretion, DOC’s policies identify when termination is proper. Pursuant to Directive 2258R-A, DOC is permitted to place an officer in a “chronic absent” status and impose the loss of “discretionary benefits and privileges,” not termination, based on 12 sick days in a 12-month period. The Directive also loosely establishes 40 sick days as the minimum threshold amount for which termination might be warranted. DOC also has its own Command Discipline rule, embodied in Directive 4257R-A, which clarifies that a command discipline is a “minor infraction” that does not warrant termination. It is well-settled that “[a]n agency's failure to follow its own procedure or rules in rendering a decision is arbitrary and capricious,” *D.F. v. Carrion*, 43 Misc.3d 746, 756, 986 N.Y.S.2d 769 (Sup. Ct. 2014), citing, *Gilman v. New York State Div. of Housing and Community Renewal*, 99 N.Y.2d 144, 753 N.Y.S.2d 1 (2002).

It is well-settled that even a probationary employee may not be subjected to employment decisions based on unlawful discrimination. See *Matter of Antonsen v Ward*, 77 NY2d 506, 512-513 (1991). Under Admin Code § 8-107(1)(a), an employer is prohibited from terminating an

employee “because of” disability. To state a *prima facie* case of termination because of disability, the petitioner must allege that they (1) are disabled within the meaning of the City HRL (2) and that the disability or perceived disability cause the behavior for which the individual was terminated. *Vig v. New York Hairspray Co. L.P.*, 885 N.Y.S.2d 74, 78 (1st Dept. 2009). In *Castillo v. Schriro*, a case involving termination of a probationary officer for sick leave, Judge Ling-Cohen stated:

Furthermore, this period of time in which she was disabled, nonetheless, appears to have formed part of the basis of respondents' decision to terminate petitioner, in violation of N.Y. Admin. Code § 8-107(1)(a), given her undisputed documented temporary disability. The inclusion of this period in the termination determination, for which respondents do not dispute petitioner's illness/disability, shows respondents' lack of good faith and is violative of the law, as respondents discriminated against petitioner based on her documented disability.

Castillo v. Schriro, 49 Misc.3d 774, 793 (NY County 2015) (emphasis added).

Similarly, a newly enacted Civil Service Law (“CSL”) § 159-c prohibits employers from dismissing or taking other disciplinary or other adverse personnel action against public employees for using sick days relating to COVID-19.

Once a plaintiff has shown that the termination determination “was a product of a mixture of legitimate and illegitimate motives,” the burden shifts to the employer to show that its employment decision would have been the same absent the unlawful motive. *Card v. Sielaff*, 154 Misc. 2d at 246 citing *Price Waterhouse v. Hopkins*, 490 US 228, 270-277 (1989). To prevail on the affirmative defense, the employer must satisfy their burden by a preponderance of evidence. *Id.*

Under Admin Code § 8-107(15)(a), failure to provide reasonable accommodation to an employee’s known disability is a form of discrimination. To state a *prima facie* case of a failure to accommodate under the City HRL, the plaintiff must allege facts to suggest that: “(1) plaintiff was

disabled within the meaning of the statute; (2) the employer had notice of the disability; (3) plaintiff could perform the essential functions of his or her job, with a reasonable accommodation; and (4) the employer refused to make a reasonable accommodation." *Hyacinthe v City of NY*, 2021 NY Slip Op 30443[U] (Sup Ct, NY County 2021), citing *Miloscia v B.R. Guest Holdings LLC*, 33 Misc. 3d 466, 474, 928 N.Y.S.2d 905 (Sup Ct, NY County 2011), aff'd in part, mod in part, 94 AD3d 563, 942 N.Y.S.2d 484 (1st Dept 2012). An employer can prove an undue hardship that prevents them from providing a reasonable accommodation.

Discussion

The Court finds that Petitioner has established that his disability was likely a motivating factor in DOC terminating his employment. The PDR is sufficient evidence to show that DOC unlawfully based Petitioner's termination on the totality of his absences which included absences related to his shoulder injury and COVID illness, which is unlawful. Moreover, the only basis for his termination in this report appears to be the comment that indicates that the petitioner abused the sick leave policy and was not injured. There has been no evidentiary basis provided during this litigation that that statement was accurate. Therefore, DOC's decision appears to be a mixture of unlawful and purportedly legitimate reasons which shifts the burden onto the Respondent.

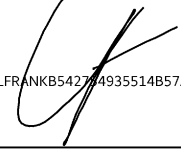
Applying a mixed motive analysis, the Court finds that the Respondent DOC has not met its burden. Respondent has failed to show that Petitioner's termination would have been the same absent the alleged unlawful motive. The Answer fails to assert, much less establish, this affirmative defense, and DOC's assertion of legitimate non-discriminatory is unsupported by the record. Likewise, Respondent has proffered no evidence that the light duty given to Petitioner

qualifies as an undue hardship to relieve them of their legal obligation to provide a reasonable accommodation. It is therefore

ADJUDGED that the petition is granted; and it is further

ORDERED that the action taken by the respondents to terminate the petitioner's employment with the New York City Department of Corrections is vacated.

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6/30/2022

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE