SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAHABUDDEEN A. ALLY **PART 16M**
Justice

QUIETEN MCQUEEN,

Petitioner,

For a Declaratory Judgment Pursuant to Article 78 of New York Civil Practice Law and Rules,

-against-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents,

INDEX NO. 155209/2023
MOTION DATE 10/20/2023
MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion and cross-motion (Seq. No. 1) to/for **ARTICLE 78 (BODY OR OFFICER)/DISMISSAL**: 1-6, 8-12, 14-15, 17

In this Article 78 proceeding, petitioner QUIETEN MCQUEEN ("Petitioner") seeks judicial review of respondent NEW YORK CITY DEPARTMENT OF CORRECTION'S (the "DOC") decision to terminate Petitioner's employment. (*See* Verified Pet., dated June 5, 2023 ("Pet.") (NYSCEF Doc. 1)) The DOC and respondent CITY OF NEW YORK (together, "Respondents") cross-move, pursuant to CPLR § 7804(f) and Rule 3211(a)(7), to dismiss the Verified Petition for failure to state a cause of action. (*See* Notice of Cross-Mot., dated Oct. 10, 2023 (NYSCEF Doc. 8)) For the reasons discussed below, Respondents' cross-motion is **GRANTED**, and the Verified Petition is **DISMISSED**.

I. BACKGROUND

In June 2016, Petitioner was appointed as a Correction Officer for the DOC at Rikers Island. (Pet. ¶ 1-2)

In 2022, Petitioner was arrested and charged with driving under the influence of alcohol. (*Id.* ¶ 7) As a result of that arrest, on or about July 18, 2022, Petitioner and the DOC entered into a Negotiated Plea Agreement ("NPA") to resolve disciplinary charges against Petitioner. (*Id.* ¶ 8;

Affirm. of Assistant Corp. Counsel Rachel Kreutzer, dated Oct. 10, 2023 ("Kreutzer Affirm.") (NYSCEF Doc. 9), Ex. A ("NPA") (NYSCEF Doc. 10)) Pursuant to the NPA, Petitioner and the DOC agreed that Petitioner's penalty would be "limited probation for a period of One (1) YEAR limited to a conviction under any subsection of 1192 New York State Vehicle and Traffic Law or if found to be under the influence of alcohol while on duty." (NPA at p. 1) Petitioner also agreed to "periodic alcohol testing at [the DOC's] discretion." (*Id.*) Finally, Petitioner agreed to "waive[] [his] rights as a tenured employee for this probationary period and subject [him]self to termination as any other probationary employee." (*Id.* at p. 2)

On April 2, 2023, while Petitioner was still on probation pursuant to the NPA, Petitioner was accused by a coworker of having reported to work intoxicated. (Pet. ¶ 10; *see also* Kreutzer Affirm., Ex. B ("PDR") (NYSCEF Doc. 11) ("On April 2, 2023, at approximately 2356 hours, Assistant Deputy Warden Yasia Speights submitted a request for C.O. McQueen to be alcohol/drug tested.")) On April 3, 2023, the DOC ordered Petitioner to report to toxicology, where he was administered a breathalyzer test. (*See* Pet. ¶ 12; PDR at 1) According to the PDR, "Petitioner's toxicology breathalyzer results revealed a 0.082%, which is the legal definition of intoxication." (PDR at 1) Petitioner was immediately suspended and escorted from Rikers Island. (Pet. ¶ 13; PDR at 1)

On April 14, 2023, as a result of Petitioner's positive alcohol test, Petitioner's employment with the DOC was terminated. (*See* Pet. ¶ 15; PDR at 1)

A few days earlier, on April 10, 2023, Petitioner had entered into an in-patient substance abuse program allegedly for treatment for "his alcohol disability." (Pet. ¶ 14) He was released from the program on May 10, 2023. (*Id.* ¶ 17)

II. LEGAL STANDARD

CPLR 3211(a)(7) provides that a court may dismiss a pleading for failure to state a cause of action. On a motion to dismiss brought pursuant to CPLR 3211(a)(7), a court "must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 570-71 (2005) (internal quotation marks and citation omitted). When considering such a motion, however, a court need not accept as true "conclusory

allegations of fact or law not supported by allegations of specific fact." *Wilson v. Tully*, 43 A.D.2d 229, 234 (1st Dep't 1998). Furthermore, "[i]n assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference . . . and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." *Dragonetti Bros. Landscaping Nursey & Florist, Inc. v. Verizon N.Y., Inc.*, 71 Misc. 3d 1214(A), at *2 (N.Y. Sup. Ct. N.Y. Cty. Apr. 28, 2021) (internal quotation marks and citation omitted), *aff'd*, 208 A.D.3d 1125 (1st Dep't 2022).

In the First Department, a defendant moving pursuant to CPLR 3211(a)(7) may rely on extrinsic evidence to challenge the pleading:

> A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.

Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc., 115 A.D.3d 128, 134 (1st Dep't 2014) (citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633 (1976)). "Where extrinsic evidence is used, [and the motion is *not* converted to one for summary judgment,] the standard of review under a CPLR 3211 motion is 'whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999) (quoting *Guggenheimer*, 43 N.Y.2d at 275), *aff'd*, 94 N.Y.2d 659 (2000). "'[T]he allegations are not deemed true[, and] [t]he motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.'" *Id.* (quoting *Blackgold Realty Corp. v. Milne*, 119 A.D.2d 512, 513 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 719). "[I]f the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate." *Basis Yield Alpha Fund (Master)*, 115 A.D.3d at 135.

III. DISCUSSION

A. Petitioner Fails to Demonstrate That His Termination Was In Bad Faith

Petitioner first alleges that Respondents' decision to terminate his employment with the DOC was arbitrary and capricious.

In an Article 78 proceeding a court reviews an agency decision to determine whether it violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. CPLR § 7803(3); *Kent v. Lefkowitz*, 27 N.Y.3d 499, 505 (2016); *W. 58th St. Coalition, Inc. v. City of N.Y.*, 188 A.D.3d 1, 8 (1st Dep't 2020). "This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives." *Save America's Clocks, Inc. v. City of N.Y.*, 33 N.Y.3d 198, 207 (2019) (internal quotation marks omitted). "[E]ven if different conclusions could be reached as a result of conflicting evidence," a reviewing court may not substitute its own judgment for that of the agency making the determination. *Partnership 92 LP v. N.Y.S. Div. of Hous. & Community Renewal*, 46 A.D.3d 425, 429 (1st Dep't 2007). "[T]he courts cannot interfere unless there is no rational basis for the exercise of discretion" or "the action is without sound basis in reason . . . and taken without regard to the facts." *Save America's Clocks*, 33 N.Y.3d at 207 (quoting *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974)).

When considering the termination of a civil-service employee, however, a court's review differs according to the status of the employee. *See Brown v. City of N.Y.*, 280 A.D.2d 368, 370 (1st Dep't 2001). In this case, because Petitioner was a probationary employee at the time of his termination, he could be terminated for almost any reason, or for no reason at all, provided that the termination was not made in bad faith—meaning, in violation of the Constitution, a statute, or decisional law. *Duncan v. Kelly*, 9 N.Y.3d 1024, 1025 (2008); *Venes v. Community Sch. Bd.*, 43 N.Y.2d 520, 525 (1978); *Turner v. Horn*, 69 A.D.3d 522, 522 (1st Dep't 2010). "'The burden of raising and proving such "bad faith" is on the employee and the mere assertion of "bad faith" without the presentation of evidence demonstrating it does not satisfy the employee's burden.'" *Witherspoon v. Horn*, 19 A.D.3d 250, 251 (1st Dep't 2005) (quoting *Soto v. Koehler*, 171 A.D.2d 567, 568 (1st Dep't 1991), *lv. denied* 78 N.Y.2d 855).

Here, Petitioner fails to meet his burden. Nothing in the submissions demonstrates, or even hints at, a bad-faith motive animating Respondents' decision to terminate Petitioner's

employment. To the contrary, as reflected in the PDR, Respondents' decision was expressly based on the results of Petitioner's April 3, 2023 breathalyzer test. Under the NPA,[1] the DOC had discretion to order that Petitioner submit to such a test at any point, and being found to be under the influence of alcohol while on duty was an express violation of the terms of Petitioner's probation. Petitioner does not allege that the NPA was invalid for any reason. And Petitioner's only attempt to cast doubt on the results of the breathalyzer test is to allege that the test was "administered by a supervisor who did not know how to work the breathalyzer device, and used a device that already possessed readings, prior to the examination." (Pet. ¶ 12) These allegations are entirely conclusory, however, so the Court need not, and does not, accept them as true. *See Wilson v. Tully*, 43 A.D.2d 229, 234 (1st Dep't 1998) (holding that, when considering a motion to dismiss pursuant to CPLR 3211(a)(7), a court need not accept as true "conclusory allegations of fact or law not supported by allegations of specific fact").

B. Petitioner Fails to State a Claim of Disability Discrimination

Petitioner next alleges that Respondents' decision to terminate his employment with the DOC constitutes disability discrimination based on his alcoholism in violation of both the New York State Human Rights Law (the "SHRL") and the New York City Human Rights Laws (the "CHRL").

The SHRL "prohibits an employer from discriminating against an employee because of a disability." *McEniry v. Landi*, 84 N.Y.2d 554, 558 (1994). A party states a claim for disability discrimination under the SHRL and the CHRL by alleging

> (1) that he/she is a member of a protected class, (2) that he/she was qualified for the position [held or for a promotion], (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination.

Local 621 v. N.Y.C. Dep't of Transp., 178 A.D.3d 78, 81 (1st Dep't 2019) (alteration in original) (internal quotation marks and citation omitted). More generally, "[a] complainant states a prima facie case of discrimination if the individual suffers from a disability and the disability caused the

[1] The Court may consider the NPA in deciding the motion because the NPA is incorporated into the Verified Petition by reference. *Dragonetti Bros. Landscaping Nursey & Florist, Inc. v. Verizon N.Y., Inc.*, 71 Misc. 3d 1214(A), at *2 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 28, 2021), *aff'd*, 208 A.D.3d 1125 (1st Dep't 2022).

behavior for which the individual was terminated." *McEniry*, 84 N.Y.2d at 558. "Once a prima facie case is established, the burden of proof shifts to the employer to demonstrate that the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employee's termination was motivated by a legitimate nondiscriminatory reason." *Id.*; *Riddick v. City of N.Y.*, 4 A.D.3d 242, 245 (1st Dep't 2004).

Alcohol dependency qualifies as a disability under both the SHRL and the CHRL. *See McEniry*, 84 N.Y.2d at 558-59; *Riddick*, 4 A.D.3d at 245; *Makinen v. City of N.Y.*, 30 N.Y.3d 81, 85-86 (2017). Under both statutes, however, only individuals who are (1) recovering or have recovered from their alcoholism and (2) not currently abusing alcohol at the time the agency takes action are protected. *See Makinen*, 30 N.Y.3d at 86 ("[T]he [CHRL] provides that, with respect to alcoholism, a person is considered to be disabled (so as to trigger the protections of that law) only when he or she 'is recovering or has recovered' and 'currently is free of such abuse.'" (quoting N.Y.C. Admin Code § 8-102, "Disability" definition)); *Riddick*, 4 A.D.3d at 245 ("[In *McEniry*], the Court of Appeals interpreted the [SHRL] to protect a rehabilitated or rehabilitating substance abuser from *retroactive* punishment by his or her employer." (emphasis in original)). As the Court of Appeals observed in *McEniry*, its "holding is not intended to create a safe haven for individuals who resort to recovery programs as a pretext for avoiding otherwise legitimate disciplinary action, nor do[es] [*McEniry*] imply that in every case where an alcoholic is purportedly rehabilitated all disciplinary action is prohibited." 84 N.Y.2d at 560. As the Court of Appeals further observed in *Makinen*, "by its plain language, the [CHRL] does not regulate employer actions motivated by concern with respect to the abuse of alcohol. Rather, the [CHRL] covers circumstances in which employers unfairly typecast alcoholics who have sought treatment and who are not presently abusing alcohol, so as to ensure that such persons are afforded fair opportunity at recovery." 30 N.Y.3d at 86.

Here, Petitioner fails to meet his burden to demonstrate that he was a member of a protected class—*i.e.*, an individual with a disability recognized under the SHRL or the CHRL—when his employment was terminated. In the Verified Petition, Petitioner makes a single, conclusory allegation that he *is* a recovering alcoholic: "The Petitioner, a recovery [*sic*] alcoholic, was terminated by the [DOC], because of his alcoholic disability." (Pet. ¶ 2) Nowhere, however, does Petitioner allege that he was a recovering alcoholic when he submitted to the April 3, 2023

breathalyzer test (his failure of such test constituting violation of the NPA) or when his employment was terminated by the DOC a few weeks later on April 14, 2023. Instead, the timing of Petitioner's apparent self-directed admission to a substance-abuse program on April 10, 2023, appears to be exactly what the Court of Appeals cautioned against in *McEniry*: an attempt to resort to a treatment program "as a pretext for avoiding otherwise legitimate disciplinary action." 84 N.Y.2d at 560. Petitioner's own allegations fail to establish, prima facie, that Respondents' termination of Petitioner's employment was based on Respondents' "unfairly typecast[ing]" Petitioner as an alcoholic despite post-recovery satisfactory job performance, as required under *Makinen*. 30 N.Y.3d at 86.

Even if Petitioner had satisfied his initial burden, Respondents, through submission of the PDR, satisfied their burden to demonstrate that Petitioner's "termination was motivated by a legitimate nondiscriminatory reason." *McEniry*, 84 N.Y.2d at 558. The PDR demonstrates that Petitioner's employment was terminated due to his failure of the April 3, 2023 breathalyzer test, which constituted an express violation of the NPA.

To the extent that Petitioner's discrimination claim is based on the DOC's failure to afford Petitioner a reasonable accommodation for his alleged disability, Petitioner still fails to state a cognizable claim. On such a claim, an employee bears the burden of demonstrating, prima facie, that the employer knew of the alleged disability and that he or she requested a reasonable accommodation from the employer. *See Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 145-46 (1st Dep't 2006). Here, Petitioner neither alleges that the DOC knew of Petitioner's alleged alcoholism or that he requested that the DOC provide him with an accommodation for his alleged alcoholism. (*See generally* Pet.)

Furthermore, Respondents are not required to provide Petitioner with an accommodation allowing him to be intoxicated *while on duty*. *See* N.Y.C. Admin. Code § 8-107(15)(c) ("Nothing contained in this chapter shall be construed to prohibit a covered entity from . . . prohibiting . . . the use of alcohol at the workplace or on duty impairment from . . . the use of alcohol."); 9 N.Y.C.R.R. § 466.11(g)(1)(iv) ("The Human Rights Law does not require accommodation for behaviors that do not meet the employer's workplace behavior standards that are consistently applied to all similarly situated employees, even if these behaviors are caused by a disability. This

would include, but not be limited to: . . . discipline for intoxication or impairment on the job by an alcoholic.").

Accordingly, it is hereby:

ORDERED that Respondents' cross-motion to dismiss Petitioner's Verified Petition (Seq. No. 1) is **GRANTED**; and it is further

ORDERED and ADJUDGED that Petitioner's Verified Petition and Order to Show (Seq. No. 1) are **DENIED**, and this proceeding is **DISMISSED**; and it is further

ORDERED that Respondents shall serve a copy of this Decision and Order upon Petitioner and upon the Clerk of the General Clerk's Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that service upon the Clerk of Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised August 15, 2019);[2] and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is denied; and it is further

ORDERED that the Clerk shall mark Motion Sequence No. 1 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision and order of the Court.

February 18, 2025
DATE

SHAHABUDDEEN A. ALLY, A.J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION		
MOTION:	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
CROSS-MOTION:	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
CHECK IF APPROPRIATE:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	[ ]	STAY CASE
	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[2] The protocols are available at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf.