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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

In the Matter of

KATHRYN L. FERGUSON,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS and THE LONG ISLAND HOME d/b/a SOUTH OAKS HOSPITAL,

Respondents.

By: Garguilo, J.S.C.
Dated: June 29, 2012

Index No. 12-1814
Mot. Seq. # 001 - MD; CDISPSUBJ

Return Date: February 22, 2012
Adjourned: March 7, 2012

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In this proceeding pursuant to Executive Law § 298 and CPLR article 78, petitioner seeks a judgment annulling and reversing a determination of the New York State Division of Human Rights dated November 16, 2011, which dismissed petitioner's administrative complaint upon a finding that there was no probable cause to believe that respondent, The Long Island Home d/b/a South Oaks Hospital ("South Oaks"), engaged in an unlawful discriminatory practice in terminating petitioner's employment.

Petitioner was hired by South Oaks in September 2000 as a Certified Nursing Assistant/Psychiatric Attendant in its geriatric unit. She was injured at work on March 21, 2009. Petitioner thereafter returned to work with a note from her physician clearing her to work on light duty. South Oaks assigned petitioner to a light duty shift from 12 a.m. to 8 a.m. in the geriatric unit. Then, petitioner submitted a note from her physician requesting that petitioner not work said shift due to the side effects of her prescribed medications. After petitioner was told that no other light duty shifts were available, she applied for workers' compensation benefits. Petitioner did not work from April 2009 until June 2009. She returned to work on June 22, 2009 with a note from her physician indicating that she could return to work but with a restriction against lifting over 50 pounds. South Oaks assigned petitioner to work the 4 p.m. to 12 a.m. shift in the adult unit, where

petitioner worked for approximately eight weeks.

At the end of the eight weeks, petitioner was reassigned to the geriatric unit to work with patients in a "one on one" or "Constant Vision" capacity. Petitioner reminded the nursing supervisor that she could risk incurring another injury as the patients could become abusive and violent and the work involved heavy lifting, which she was still restricted from doing. The nursing supervisor told her that unless she provided a doctor's note indicating that she could return to work with no restrictions, petitioner would have to go on disability insurance. Four days later, petitioner returned with a note from her physician indicating that she could return to work on full duty but with the restriction of no heavy lifting. Petitioner requested a meeting with her union delegate, the director of nursing, the director of human resources, and the nursing supervisor, which meeting was held on September 23, 2009. South Oaks determined that petitioner's co-workers would assist her with lifting. Then, on November 3, 2009 there was a confrontation between petitioner, the charge nurse and a co-worker arising from petitioner's request that she be permitted to take bathroom breaks. Petitioner was released from duty pending an investigation of the incident. Following interviews of witnesses to the incident, South Oaks discharged petitioner on November 6, 2009.

On June 22, 2010, petitioner filed a verified complaint with the New York State Division of Human Rights ("DHR") alleging that South Oaks engaged in an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law. By her verified complaint, petitioner alleged that from the time of her work-related accident and request for an accommodation she had been harassed and wrongfully "written up" by supervisors who are all white, and that she believed that one supervisor in particular desired to fire her due to her disability, race and color. In addition, petitioner alleged that said particular supervisor wrongfully fired an entire shift that was predominantly African American and that her most recent group of newly hired employees were predominantly white. She also alleged that African American employees were treated less favorably than their white co-workers and were held responsible for the actions of white co-workers. Petitioner stated that as a result of the confrontation on November 3, 2009, she was suspended and her employment was subsequently terminated for alleged disruptive/inappropriate behavior, failure to follow the appropriate chain of command, and violation of the Constant Vision policy. Petitioner further alleged that white employees who actually caused confrontations were not suspended and their employment was not terminated. Petitioner argued that she believed the reasons given for her termination to be a pretext inasmuch as she did not cause the confrontation and that she was actually terminated due to her disability, race and color.

South Oaks submitted its response to DHR's request for a statement of its position and for preliminary information and documentation. South Oaks responded that petitioner was discharged due to her violation of its Constant Vision policy, inappropriate and hostile workplace behavior, for which she had been counseled in the past, and her violation of its "Workplace Violence" and "Chain of Command" policies.

Following an investigation without a hearing, the DHR rendered a Final Investigation Report and Basis of Determination dated November 2, 2011 and Determination and Order After Investigation dated November 16, 2011, finding no probable cause to believe that South Oaks engaged, or is engaging, in the unlawful discriminatory practices alleged in the complaint. In its Final Investigation Report and Basis of Determination dated November 2, 2011, the DHR determined that there was substantial evidence that petitioner's

employment was not terminated due to her disability, race or color but rather due to her violations of South Oaks's policies which culminated in her admitted violation of respondent's Constant Vision policy. The report recommended a finding of no probable cause inasmuch as South Oaks had provided a legitimate non-discriminatory reason for discharging petitioner which the investigation revealed not to be pretextual.

Petitioner commenced the instant proceeding on January 12, 2012. Petitioner argues that her disability caused the behavior for which she was terminated, and that South Oaks refused to engage in an interactive process and denied petitioner reasonable accommodations, thereby discriminating against her on the basis of disability. She asserts that South Oaks's alleged reason for her termination, that petitioner failed to adhere to employment rules of conduct, is merely a pretext. Petitioner claims that the determination of the DHR of no probable cause was made in violation of lawful procedure, affected by an error of law, or was arbitrary and capricious or an abuse of discretion. In addition, she claims that the findings of fact are not supported by sufficient evidence on the record. Petitioner seeks a declaration that the DHR determination is not supported by sufficient evidence, is contrary to the record, is arbitrary and capricious, and is erroneous as a matter of fact and law and that petitioner has been unlawfully discriminated against on the basis of disability. She also seeks a reversal of said determination, and an award of damages, costs and attorney's fees.

South Oaks submitted its answer and affidavit in opposition. The DHR submitted its answer together with the certified original administrative record of the matter. The DHR also submitted a copy of its Determination and Order After Investigation (determination) dated November 16, 2011 and a copy of its Final Investigation Report and Basis of Determination (final report) dated November 2, 2011. Petitioner submitted her affirmation in reply.

By its answer, the DHR notes that its determination omitted the basis of its finding of no probable cause and requests that the Court remit this matter to the DHR so that it may issue a no probable cause determination that lists the reasons for the dismissal of the complaint in accordance with its final report dated November 2, 2011. Petitioner argues that the Regional Director of the DHR, Ronald B. Brinn, signed both the determination and the final report, that the final report clearly sets forth the omitted basis, and that there is no legal support for the request by the DHR for remittal solely to correct its own non-substantive ministerial error. The Court finds that remittal is not warranted under the circumstances inasmuch as the basis of the DHR determination is clearly expounded in its attached final report and there is a sufficient record for the Court to review (*compare* ***Matter of Freeman v New York State Div. of Human Rights***, 51 AD3d 668, 858 NYS2d 246 [2d Dept 2008], *lv denied* 11 NY3d 705, 866 NYS2d 609 [2008]; *see* 9 NYCRR 465.20 [a] [2]).

The determination of the DHR was made after an investigation and without a hearing. Since a hearing pursuant to Executive Law § 297 (4) (a) was not conducted, the appropriate standard of review to be applied to the determination of the DHR is whether the determination is without a rational basis and, hence, arbitrary and capricious (*see* Executive Law § 298; CPLR 7803 [3]; ***Matter of Orosz v New York State Div. of Human Rights***, 88 AD3d 798, 930 NYS2d 288 [2d Dept 2011]; ***Matter of Bazile v Acinapura***, 225 AD2d 764, 639 NYS2d 952 [2d Dept 1996], *lv denied* 88 NY2d 807, 647 NYS2d 164 [1996]). The DHR has broad discretion in the conduct of its investigations (*see* 9 NYCRR 465.6; ***Matter of Rauch v New York State Div. of Human Rights***, 73 AD3d 930, 900 NYS2d 735 [2d Dept 2010]; ***Matter of Maltsev v New York State Div. of Human Rights***, 31 AD3d 641, 817 NYS2d 906 [2d Dept 2006]; ***Matter of Bazile v Acinapura***, 225 AD2d 764, 639

NYS2d 952) and its determinations are entitled to considerable deference due to its expertise in evaluating discrimination claims (*see* ***Matter of Camp***, 300 AD2d 481, 751 NYS2d 564 [2d Dept 2002]). It is within the discretion of the DHR to decide the method or methods to be employed in investigating a claim and a DHR determination of "no probable cause" should be overturned as capricious only where the record demonstrates that its investigation was "abbreviated or one-sided" (*see* ***Matter of Chirgotis v Mobil Oil Corp.***, 128 AD2d 400, 512 NYS2d 686 [1st Dept 1987], *appeal denied* 69 NY2d 612, 517 NYS2d 1027 [1987]). As long as a petitioner has a full opportunity to present his or her claims, neither a hearing nor a confrontation conference is mandated (*see* ***Matter of Gleason v W.C. Dean Sr. Trucking, Inc.***, 228 AD2d 678, 646 NYS2d 20 [2d Dept 1996]).

To establish liability under Executive Law § 296 (1) (a) arising from the termination of employment, a complainant must establish, before the DHR, a prima facie case of discrimination by a preponderance of the evidence (*see* ***Stephenson v Hotel Empls. & Rest. Empl. Union Local 100 of AFL-CIO***, 6 NY3d 265, 811 NYS2d 633 [2006]). This is accomplished by showing that the complainant (1) is a member of a class protected by the statute; (2) was actively or constructively discharged; (3) was qualified to hold the position from which he or she was terminated; and (4) was terminated under circumstances which give rise to an inference of discrimination (*id.*, *citing* ***Ferrante v American Lung Assn.***, 90 NY2d 623, 665 NYS2d 25 [1997]). Once such a showing has been made, the burden shifts to the employer to rebut the prima facie case by providing a legitimate, nondiscriminatory reason for the complainant's discharge (*see id.*). In response to such a rebuttal, the complainant must show by a preponderance of the evidence that the employer's reasons for the challenged termination were pretextual (*see* ***Vinokur v Sovereign Bank***, 701 F Supp 2d 276 [ED NY 2010]), with the complainant having the burden of persuasion on the ultimate issue of discrimination (*see* ***Texas Dept. of Community Affairs v Burdine***, 450 US 248, 101 S Ct 1089 [1981]; ***Stephenson v Hotel Empls. & Rest. Empl. Union Local 100 of AFL-CIO***, 6 NY3d 265, 811 NYS2d 633; *see also* ***Kaplan v New York State Div. of Human Rights***, 95 AD3d 1120, 944 NYS2d 616 [2d Dept 2012]).

A review of the return submitted to the Court reveals that the determination of the DHR was not arbitrary and capricious or lacking in rational basis (*see* ***Matter of Ghemawat v New York State Div. of Human Rights***, 240 AD2d 577, 659 NYS2d 793 [2d Dept 1997]). The investigation by the DHR showed that South Oaks made several attempts to reasonably accommodate petitioner, finally reinstating her to her unit with assistance in lifting and other duties. In addition, the DHR found that only one of the African American employees interviewed indicated that they felt that they were discriminated against because of their race and color and that said employee could not provide specific examples of discriminatory treatment by South Oaks. In response to petitioner's claim that an entire shift of African Americans were unfairly fired, the investigation revealed that the entire staff, including the white charge nurse, had been fired for misconduct and there was no evidence of discrimination based on race or color. Although one witness stated that the co-worker rather than petitioner caused the confrontation on November 3, 2009 that resulted in petitioner's employment termination, because the co-worker in the incident was also an African American, an inference of race and color discrimination could not be made. It was also noted that several witnesses confirmed that petitioner was very vocal and sometimes had angry outbursts that would be disruptive to the unit's operation, which was reflected in her personnel file. The record indicates that petitioner had received multiple disciplinary notices and warnings from her various supervisors and had been counseled for her repeated absences from work beginning in 2001 and for her behavior toward her co-workers and patients, culminating in the incident that

occurred on November 3, 2009. The DHR indicated that petitioner did not address or refute the disciplinary actions and warnings except for a statement that she grieved them unsuccessfully. Based on the statistics provided by South Oaks, the DHR found that contrary to petitioner's claim, South Oaks has hired and continues to hire African Americans in almost equal proportions to whites and has terminated the employment of African Americans and whites at the same rate.

Petitioner failed to meet her burden of proving that the independent, legitimate, and nondiscriminatory reasons proffered by her employer for discharging her were not her employer's true reasons, but a pretext for discrimination (*see* ***Matter of Pathak v New York State Div. of Human Rights***, 13 AD3d 634, 788 NYS2d 135 [2d Dept 2004]; ***Matter of Bazile v Acinapura***, 225 AD2d 764, 639 NYS2d 952). Inasmuch as petitioner was given a full opportunity to present her evidence and to discuss with the DHR the status of the investigation, and the record shows that the submissions were in fact considered, the determination cannot be held arbitrary and capricious merely because no hearing was held (*see* ***Matter of Gleason v W.C. Dean Sr. Trucking, Inc.***, 228 AD2d 678, 646 NYS2d 20; *see also* ***Witkowich v New York State Div. of Human Rights***, 56 AD3d 1170, 866 NYS2d 907 [4th Dept 2008], *lv denied* 12 NY3d 702, 876 NYS2d 349 [2009]). In addition, the DHR reviewed petitioner's complaint, reviewed South Oaks's response, interviewed multiple witnesses, conducted a field visit, requested and reviewed numerous documents from both parties, all of which was sufficient to demonstrate that the investigation by the DHR was adequate and not one-sided (*see* ***Matter of Pathak v New York State Div. of Human Rights***, 13 AD3d 634, 788 NYS2d 135). Moreover, no hearing is necessary as the record does not demonstrate the existence of inconsistencies or unresolved questions that require further scrutiny (*see* ***Matter of Orosz v New York State Div. of Human Rights***, 88 AD3d 798, 930 NYS2d 288; ***Matter of Pathak v New York State Div. of Human Rights***, 13 AD3d 634, 788 NYS2d 135; ***Matter of Bazile v Acinapura***, 225 AD2d 764, 639 NYS2d 952; *see also* Executive Law § 297 [4] [a]). Thus, the determination of no probable cause made by the DHR was not arbitrary and capricious or lacking a rational basis in the record (*see* ***Matter of Maltsev v New York State Div. of Human Rights***, 31 AD3d 641, 817 NYS2d 906).

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

June 28, 2012 _____ J.S.C.

HON. JERRY GARGUILO