Warner v General Counsel, State Div. of Human Rights
2014 NY Slip Op 30650(U)
March 13, 2014
Sup Ct, New York County
Docket Number: 101295/13
Judge: Michael D. Stallman
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[* 1] SCANNED ON 3/18/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101295/2013
WARNER, CAROLYN
vs
GENERAL COUNSEL, N.Y.S.D.H.R.
Sequence Number : 001
ARTICLE 78

PART 21

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1-5

Answering Affidavits — Exhibits ____ | No(s). 6-7; 8-10

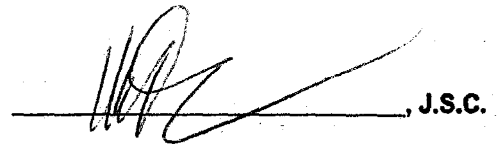
Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this ~~motion is denied~~ petition is decided in accordance with the annexed memorandum decision, order, and judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____ FOR THE FOLLOWING REASON(S): ____

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. MICHAEL D. STALLMAN



Dated: 3/13/14 ____, J.S.C.

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....PETITION ~~MOTION~~ IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 21

CAROLYN WARNER,

Index No.: 101295/13

Petitioner,

- against -

GENERAL COUNSEL, STATE DIVISION OF HUMAN RIGHTS, CORPORATION COUNSEL, CITY OF NEW YORK, and NEW YORK CITY ADMINISTRATION FOR CHILDREN SERVICES,

Respondents.

DECISION and ORDER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. MICHAEL D. STALLMAN, J.:

In this proceeding brought pursuant to CPLR Article 78 and, in effect, Executive Law § 298, petitioner Carol Warner (Warner), appearing pro se, seeks to annul a Determination and Order After Investigation of respondent New York State Division of Human Rights (SDHR), dated August 8, 2013, finding that there was no probable cause to support petitioner's claim that respondent New York City Administration for Children Services (ACS) unlawfully discriminated against her in the terms and conditions of her employment based on perceived disability.[1] The SDHR and ACS have answered, seeking dismissal of the proceeding. The

[1]Although petitioner included a retaliation claim in her original complaint filed with the SDHR, she apparently retracted this claim during the SDHR investigation. *See* Final Investigation Report, Ex. 4 of Administrative Record, at 3. Petitioner does not contest this.

SDHR submitted the certified Administrative Record (Record) of the proceedings before the SDHR, and, in its answer, states that, because petitioner and ACS "are the real parties in interest, the Division will not actively participate in this matter and is submitting on the record." SDHR Answer, ¶ 4.

Background

Petitioner Warner was hired by ACS in October 2003 as a Motor Vehicle Operator (MVO), and maintained that position until October 2012, when she was placed on leave from that position and was appointed to the position of Community Associate. *See* Stipulation of Settlement, Ex. 4 to ACS Answer. Petitioner's duties as an MVO included transporting staff and clients, often children; transporting equipment and supplies; maintaining daily records of destinations, pick-ups and deliveries; and safely operating and maintaining assigned vehicles. *See* ACS Answer, ¶ 7; Tasks & Standards, Ex. 2 to ACS Answer.

In early February 2012, an incident occurred at petitioner's residence, when a security guard at the building called the police, describing petitioner as emotionally disturbed and reporting that she was yelling and throwing things in her apartment. The police responded, restrained petitioner and transported her to a psychiatric hospital, where she was retained for a week and given anti-psychotic

medication. After her release and return to work, petitioner was directed to report to Dr. Azariah Eshkenazi, a psychiatrist designated by ACS to conduct a psychiatric examination of petitioner. Dr. Eshkenazi issued a report, in which he diagnosed petitioner as "Rule Out Psychotic Episode" and "Personality Disorder, Paranoid Type," and found petitioner to be mentally unfit to perform her duties as an MVO. *See* March 8, 2012 Report, Ex. 2B of Record, at 4.

Following receipt of Dr. Eshkenazi's report, ACS notified petitioner that, based on the doctor's finding of unfitness and prior complaints about petitioner's conduct, it was seeking to place her on an involuntary leave of absence, pursuant to Civil Service Law § 72. *See* Letter dated March 13, 2012, Ex. 2C to Record. Petitioner requested a hearing on the proposed involuntary leave, and a trial was held at the Office of Administrative Trials and Hearings (OATH) on June 21 and July 20, 2012.

At the hearing, ACS submitted a list of 11 incidents and complaints concerning petitioner, which, it argued, showed that petitioner had a history of "bizarre, disruptive and deteriorating behavior." *See* Report and Recommendation, Ex. 3 to Record, at 2-3; Attachment A, Ex. 2A to Record. The list included the February 2012 incident leading to petitioner's hospitalization, and numerous incidents occurring in 2008, 2010 and 2011, when petitioner reportedly

was driving fast and recklessly, was rude and/or yelled, and made riders feel unsafe. *Id.*

ACS also presented witnesses, including Dr. Eshkenazi; the police officer who responded to, and testified about, the February 2012 incident that led to petitioner's hospitalization; a Child Protection Specialist, who testified about an incident in December 2011 when petitioner was driving erratically while transporting a child and her grandmother and, after stopping due to a minor accident, told her passengers that they could get out and walk; and petitioner's supervisor, who testified that there were unspecified problems with petitioner's driving, but other supervisors and drivers found her driving was "fine." *See* Report and Recommendation, Ex. 3 to Record, at 2, 3-5. Petitioner, who was represented by a union-provided attorney at the hearing, testified on her own behalf, and presented no other witnesses.

Following the hearing, the Administrative Law Judge (ALJ) found that evidence was sufficient to establish that petitioner had a mental disability, but did not show that she was unable to perform the duties of her position as a vehicle driver, and recommended that the petition to place her on involuntary leave be dismissed. *Id.* at 13. Among other things, the ALJ found that ACS provided proof of only two of the incidents included in its Attachment A, the February 2012

incident leading to petitioner's hospitalization, and the December 2011 incident described by a witness. The ALJ further found that only one of the two incidents was job-related, and the testimony regarding that incident "fell far short of establishing a 'pattern of dangerous and erratic driving.'" *Id.* at 8-9.

As was recognized by petitioner's attorney (*see* Letters dated Sept. 12 and Sept. 14, 2012, Ex. 3 to Record), ACS was not bound by the ALJ's Report and Recommendation, and could, pursuant to Civil Service Law § 72, adopt, reverse or modify it. ACS represents that it intended to reject the Report and Recommendation because it believed, based on Dr. Eshkenazi's evaluation, that petitioner posed a threat to staff and others that she transported, as well as to pedestrians. *See* ACS Position Statement, Ex. 3 to ACS Answer. Instead, however, ACS entered into a settlement of the matter with petitioner and her attorney. *See* Stipulation of Settlement, Ex. 4 to ACS Answer. The Stipulation of Settlement provided, among other things, that petitioner "shall be placed on leave from her permanent competitive title of Motor Vehicle Operator and appointed to the noncompetitive title of Community Associate with no loss in salary, seniority and/or benefits." *Id.*, ¶ 1. The stipulation also included provisions that petitioner consulted with her attorney, entered into the agreement "freely, knowingly, and openly," and waived her rights to make any claim or institute any legal

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proceedings arising out of the facts and circumstances of the case or the terms of the settlement. *Id.*, ¶¶ 2-4. In particular, paragraph 4 of the Stipulation of Settlement recites that petitioner

> "waives her rights to make any legal or equitable claims or to institute legal proceedings of any kind against the Agency or its employees, relating to or arising out of the facts and circumstances of this case or arising out of the terms and conditions of the Stipulation. This waiver specifically includes, but is not limited to claims under the Age Discrimination in Employment Act (29 USC § 621 et seq.), Title VII of the Civil Rights Act of 1964, as amended (42 USC § 2000e et seq.), and the Americans with Disabilities Act of 1990, as amended (42 USC § 12101 et seq.), the Americans with Disabilities Act Amendments Act of 2008, the Civil Rights Act of 1991, the Genetic Information Nondiscrimination Act of 2008 (GNA), Article 15 of the New York State Executive Law, Section 296, and Title 8 of the Administrative Code of the City of New York."

Petitioner claims that she objected to being assigned to the position of Community Associate and, in December 2012, wrote to her former supervisor to reject the position. *See* Petitioner's Response to ACS's Position Statement, and Email dated Dec. 17, 2012, Ex. 3 to Record. In February 2013, petitioner filed a complaint with the SDHR, alleging that ACS demoted her from her position as a Motor Vehicle Operator to the position of Community Associate because it

perceived petitioner as being mentally ill, which petitioner denies. The SDHR investigated the complaint and issued an order finding that there was no probable cause to believe that ACS engaged in the discriminatory practice complained of, and dismissing the complaint. Petitioner now appeals the SDHR determination.

Discussion

It is well settled that judicial review of an administrative agency's determination, such as the SDHR's "no probable cause" determination, is limited. *See* CPLR 7803 (3); *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). "Where, as here, a determination of no probable cause is rendered without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis." *Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111 (1st Dept 1998); *see Matter of Ramirez v New York State Div. of Human Rights*, 4 NY3d 789, 790 (2005); *Matter of Baird v New York State Div. of Human Rights*, 100 AD3d 880, 881 (2d Dept 2012); *Matter of Pajooh v State Div. of Human Rights*, 82 AD3d 609, 609 (1st Dept 2011). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative

action is without foundation in fact.'" *Matter of Pell*, 34 NY2d at 231. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009) (internal citation omitted).

"[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end and a reviewing court may not substitute its judgment for that of the agency." *Paramount Communications v Gibralter Cas. Co.*, 90 NY2d 507, 514 (1997), quoting *Matter of Pell*, 34 NY2d at 231; *see Matter of Hughes v Doherty*, 5 NY3d 100, 107 (2005); *Matter of State Div. of Human Rights (Granelle)*, 70 NY2d 100, 106 (1987). "Provided there is some--indeed, any--rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld." *Matter of Rivera v New York State Div. of Human Rights*, 18 Misc 3d 1133(A), *5 (Sup Ct, NY County 2008); *see Matter of Pell*, 34 NY2d at 231. "The court cannot and must not disturb such a decision, even if it would have arrived at a different decision itself." *Hochmuller v NYS Div. of Human Rights*, 2011 WL 3791677, 2011 NY Misc LEXIS 4097, *7 (Sup Ct, NY County 2011); *see Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd.*, 112 AD2d 72, 76 (1st Dept 1985), *affd* 66 NY2d 1032 (1985); *Matter of Friedman v New York State Div. of Human*

Rights, 2012 WL 2951184, 2012 NY Misc LEXIS 3343, *3 (Sup Ct, NY County 2012).

Moreover, when an administrative agency's determination "involves factual evaluations in an area of the agency's expertise and is supported by the record, such [determination] must be accorded great weight and judicial deference." *Flacke v Onondaga Landfill Sys., Inc.*, 69 NY2d 355, 363 (1987); *see Matter of Peckham*, 12 NY3d at 431; *Matter of Roberts v Gavin*, 96 AD3d 669, 671 (1st Dept 2012). Thus, "[t]he SDHR's determinations are entitled to considerable deference due to its expertise in evaluating discrimination claims." *Matter of Matteo v New York State Div. of Human Rights*, 306 AD2d 484, 485 (2d Dept 2003); *see Matter of Bd. of Educ. of Farmingdale Union Free School Dist. v New York State Div. of Human Rights*, 56 NY2d 257, 261 (1982); *Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights*, 71 AD3d 890, 891 (2d Dept 2010); *Washington Sq. Inst. for Psychotherapy & Mental Health v New York State Human Rights Bd.*, 108 AD2d 672, 672 (1st Dept 1985). "[W]here evidence is conflicting and room for a choice exists," the court may not re-weigh the evidence or reject the agency's decision. *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75 (1983); *Matter of State Div. of Human Rights (Granelle)*, 70 NY2d at 106; *Matter of Gormley v New York State Div. of Human Rights*, 2009

WL 3514254, 2009 NY Misc LEXIS 5560, *8 (Sup Ct, NY County 2009); *Matter of Rosario v New York State Div. of Human Rights*, 21 Misc 3d 1108A, *4 (Sup Ct, NY County 2008).

The SDHR also has broad discretion in deciding how to investigate complaints, and "its determination will not be overturned unless the record demonstrates that its investigation was 'abbreviated or one-sided.'" *Matter of Bal v New York State Div. of Human Rights*, 202 AD2d 236, 237 (1st Dept 1994); *see Matter of Pajooh*, 82 AD3d at 609; *Cuccia v Martinez & Ritorto, PC*, 61 AD3d 609, 610 (1st Dept 2009); *Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215, 216 (1st Dept 2007). As long as a petitioner has a full and fair opportunity to present her case, the SDHR is not required to hold an evidentiary hearing and may rely on the written submissions of the parties. *Matter of Barnes v NYS Div. of Human Rights*, 2012 WL 6221095, 2012 NY Misc LEXIS 5537, *11 (Sup Ct, NY County 2012), *affd* 113 AD3d 431 (1st Dept 2014); *Matter of Gleason v W.C. Dean Sr. Trucking, Inc.*, 228 AD2d 678, 679 (2d Dept 1996); *Matter of Chirgotis v Mobil Oil Corp.*, 128 AD2d 400, 403 (1st Dept 1987).

Under the New York State Human Rights Law (Executive Law § 290 et seq.) (NYSHRL), it is unlawful for an employer to fire or refuse to hire or employ, or otherwise discriminate in the terms, conditions and privileges of employment,

because of, as relevant here, an individual's disability, including a perceived disability. Executive Law § 296 (1) (a); Executive Law § 292 (21) (c). "To state a prima facie case of employment discrimination due to a disability under Executive Law § 296, a plaintiff must show that he or she suffers from a disability and that the disability engendered the behavior for which he or she was discriminated against in the terms, conditions, or privileges of his or her employment." *Thide v New York State Dept. of Transp.*, 27 AD3d 452, 453 (2d Dept 2006), citing *McEniry v Landi*, 84 NY2d 554, 558 (1994); *see Jacobsen v New York City Health & Hosps. Corp.*, 97 AD3d 428, 431 (1st Dept 2012); *Phillips v City of New York*, 66 AD3d 170, 178 (1st Dept 2009); *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 (1st Dept 2006). The statute defines "disability" as "a physical, mental or medical impairment . . . or a condition regarded by others as an impairment . . . which, upon the provision of reasonable accommodations, do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." Executive Law § 292 (21); *see Matter of Antonsen v Ward*, 77 NY2d 506, 513 (1991); *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 (1st Dept 2006); *Pimentel*, 29 AD3d at 145; *see also Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 883-884 (2013) (to state a claim, employee must show she could perform the essential functions of job with

a reasonable accommodation); *Cuccia*, 61 AD3d at 610 (prima facie case requires showing that employee was qualified for position [with or without accommodation]).

"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." *McEniry*, 84 NY2d at 558 (internal citations omitted); *see Jacobsen*, 97 AD3d at 431; *Riddick v City of New York*, 4 AD3d 242, 245 (1st Dept 2004). If the employer presents a legitimate nondiscriminatory reason for its actions, the employee must prove that "the legitimate reasons proffered by the employer were merely a pretext for discrimination." *Cuccia*, 61 AD3d at 610; *see Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630 (1997); *Kulaya v Dunbar Armored, Inc.*, 110 AD3d 772, 772 (2d Dept 2013).

In the instant proceeding, although the basis for petitioner's challenge is not clearly set out, she argues, in effect, that the determination was arbitrary and capricious because it is unsupported by the evidence. Petitioner contends, as she did before the SDHR, that she is not disabled but was wrongly perceived as mentally disabled by ACS, and, as a result, she was subjected to an involuntary

leave proceeding and was demoted. She claims that she is qualified for the position of MVO, has a good driving record, without any violations, and should be reinstated to an MVO position. Respondent ACS argues that the determination of the SDHR was not arbitrary and capricious, and further, that, pursuant to the Stipulation of Settlement, petitioner waived her claims under the NYSHRL.

The record here shows that the SDHR investigation was sufficient and not one-sided, and that petitioner was provided a full and fair opportunity to present her case. *See Matter of Barnes*, 113 AD3d at 431. The investigator considered the parties' written submissions, including ACS's response to the complaint, and petitioner's reply to ACS, and he reviewed documents submitted by both sides, including the ALJ's Report and Recommendation issued after the involuntary leave hearing; the summary of complaints against petitioner, which was submitted by ACS to the ALJ during the hearing; the report of Dr. Eshkenazi following his evaluation of petitioner; and the Stipulation of Settlement resolving the involuntary leave proceeding. After considering the submissions of the parties and holding several one-party conferences with petitioner, the SDHR determined that there was no probable cause to support petitioner's discrimination claim.

Without reaching the issue of whether petitioner had a mental disability that would justify an involuntary leave, the SDHR determined that the evidence

supported ACS's position that it was acting out of concern for the safety and well-being of its employees and others for whom it was responsible, when it sought to place petitioner on involuntary leave. Relying on the evidence of petitioner's hospitalization; Dr. Eshkenazi's examination; and the reported history of petitioner driving erratically, ejecting passengers and acting hostile toward other employees, and possibly taking medication that induced drowsiness, the SDHR concluded that ACS was motivated to act for legitimate, nondiscriminatory reasons. The SDHR noted that, while petitioner disputed ACS's version of events, she offered no witnesses to support her account of those events. It also noted that while it accepted the ALJ's Report and Recommendation as evidence, it was not determinative of the issue of whether ACS acted with a discriminatory motive. The SDHR further found that petitioner's assignment to Community Associate could not be considered an adverse action, because she voluntarily, freely and knowingly accepted the position as an alternative to involuntary leave.

As noted above, the court cannot reevaluate the evidence or substitute its own judgment where, as here, there is a rational basis for the agency's determination, including evidence that petitioner's driving and conduct as a driver was erratic and disturbing to other employees. *See Matter of CUNY-Hostos Community Coll.*, 59 NY2d at 75; *Matter of Pell*, 34 NY2d at 232; *Matter of*

Friedman, 2012 WL 2951184, 2012 NY Misc LEXIS 3343, at *4; *Matter of Smalls v Cardinal McCloskey Servs.*, 28 Misc 3d 1218(A), *5 (Sup Ct, NY County 2010). Moreover, there is a rational basis for finding that petitioner, pursuant to the Stipulation of Settlement, voluntarily accepted a change in position and also, as ACS contends, waived her right to assert the NYSHRL claims in this case. *See Nelson v Lattner Enters. of N.Y.*, 108 AD3d 970, 971 (3d Dept 2013).

"Generally, 'a valid release constitutes a complete bar to an action on a claim which is the subject of the release.'" *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 (2011), quoting *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 (1st Dept 2006); *see Allen v Riese Org., Inc.*, 106 AD3d 514, 516 (1st Dept 2013). Releases, including releases of employment discrimination claims, are

"generally analyzed the same way any release of claims would be analyzed, that is, as 'a contract whose interpretation is governed by principles of contract law.'" *Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 429-430 (1st Dept 2011), *quoting Goode v Drew Bldg. Supply, Inc.*, 266 AD2d 925, 925 (4th Dept 1999); *see Rivera v Wyckoff Hgts. Med. Ctr.*, 113 AD3d 667, 670 (2d Dept 2014); *Stone v National Bank & Trust Co.*, 188 AD2d 865, 867 (3d Dept 1992).

"In evaluating waiver of claims of employment discrimination New York

law looks at whether a release is 'knowingly and voluntarily entered into' as well as whether the agreement is 'clear and unambiguous on its face.'" *Loksen v Columbia Univ.*, 2013 WL 5549780, *5, 2013 US Dist LEXIS 144844, *15 (SD NY 2013), quoting *Skluth v United Merchants & Mfrs., Inc.*, 163 AD2d 104, 106 (1st Dept 1990); *see Johnson*, 84 AD3d at 430. "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570 (2002), quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 (1978).

"A release will not be treated lightly" (*Allen*, 106 AD3d at 516), and, as with any contract, where the language of a release is clear and unambiguous, it "is binding on the parties unless it is shown that it was procured by fraud, duress, overreaching, illegality or mutual mistake." *Id.*; *see Centro Empresarial Cempresa S.A.*, 17 NY3d at 276; *Mangini v McClurg*, 24 NY2d 556, 563 (1969); *Skluth*, 163 AD2d at 106. "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release.'" *Centro*

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Empresarial Cempresa S.A., 17 NY3d at 276 (citation omitted); *see Davis v Rochdale Vil., Inc.*, 109 AD3d 867, 867 (2d Dept 2013); *Sampson v Savoie*, 90 AD3d 1382, 1382-183 (3d Dept 2011).

Here, the release signed by petitioner clearly and unambiguously waived all claims against respondent ACS "relating to or arising out of the facts and circumstances of this case or arising out of the terms and conditions of the Stipulation," and specifically waived claims arising under federal, state or city human rights laws. *See* Stipulation of Settlement, Ex. 4 to ACS Answer, ¶ 4. Petitioner does not deny that she signed the agreement, or that the release covers her discrimination claims. *See Jacobus v Battery Park Hotel Mgt., LLC*, 81 AD3d 572, 572 (1st Dept 2011); *Toledo v West Farms Neighborhood Hous. Dev. Fund Co.*, 34 AD3d 228, 229 (1st Dept 2006). Further, petitioner was represented by an attorney when she signed the Stipulation of Settlement, and the stipulation expressly states that petitioner "consulted with her attorney regarding the terms and ramifications of this Stipulation," and was entering into the agreement "freely, knowingly, and openly and without coercion, fraud, or duress." *Id.*, ¶¶ 2, 3. Petitioner now claims, however, that she was forced to accept the terms of the settlement or she would not receive unemployment insurance. Verified Petition, ¶ 3.

To demonstrate that she was coerced into signing the settlement agreement, petitioner must show that she "was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of [her] free will." *805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 (1983); *see Madey v Carman*, 51 AD3d 985, 987 (2d Dept 2008); *767 Third Ave. LLC v Orix Capital Mkts., LLC*, 26 AD3d 216, 218 (1st Dept 2006). Although petitioner asserted that her attorney told her that "any job is better than no job" (Petitioner's Statement in Response to ACS, Ex. 3 to Record, at 5), and submitted some evidence that, after the stipulation was signed, she protested the assignment to the Community Associate position (*see* Email, dated Dec. 17, 2012, Ex. 3 of Record), she offers no evidence that she was forced to agree to the settlement by "a wrongful threat . . . which precluded the exercise of [her] free will." The Record also contains no evidence, or even a claim, that she was told that she would be denied unemployment benefits if she did not sign. *See Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 (1st Dept 2011) (claim not raised before agency may not be raised in Art. 78 proceeding). Thus, petitioner's bare allegation that she was forced to accept the terms of the Stipulation of Settlement is insufficient to set the release aside. *See Nelson*, 108 AD3d at 972; *Gant v Brooklyn Dev. Ctr.*, 307 AD2d 307, 308 (2d Dept 2003); *Cramer v Newburgh*

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Molded Prods., Inc., 228 AD2d 541, 542 (2d Dept 1996).

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: March 13, 2014
New York, New York

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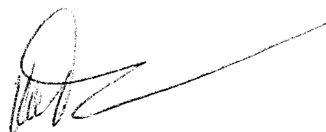

HON. MICHAEL STALLMAN, J.S.C.

HON. MICHAEL D. STALLMAN

UNFILED JUDGMENT

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