Matter of Fulcher v New York State Div. of Human Rights
2018 NY Slip Op 30431(U)
February 28, 2018
Supreme Court, Kings County
Docket Number: 511902/17
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of February, 2018.

P R E S E N T:

HON. PAMELA L. FISHER,
Justice.

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In the Matter of the Application of

WILLIAM EARL FULCHER
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

Index No. 511902/17

NEW YORK STATE DIVISION OF HUMAN RIGHTS, CITY UNIVERSITY OF NEW YORK, and MEDGAR EVERS COLLEGE,

Respondents.

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The following papers numbered 1 to 5 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 4-5
Opposing Affidavits (Affirmations)	3

Upon the foregoing papers, petitioner William Earl Fulcher, moves, pursuant to CPLR 78, for an order setting aside and vacating the determination of no probable cause by the New York State Division of Human Rights (DHR), dated April 17, 2017. City University of New York (CUNY) cross-moves to dismiss the verified petition.

Background and Procedural History

In January 2007, petitioner began working as a provisional Stationary Engineer at Medgar Evers College (Medgar Evers), which is a senior college of the CUNY system. In August 2012, he was let go from this position when he failed to pass the Stationary Engineer

civil service examination. Thereafter, he began working for the New York City Department of Citywide Administrative Services (DCAS). On or about March 27, 2014, petitioner was re-hired by Medgar Evers as a provisional Stationary Engineer while he continued to work for DCAS. Subsequently, he passed the civil service exam, and, on March 10, 2015, he was appointed as a probable permanent Stationary Engineer, which required a one-year probationary period.

On or about December 2, 2015, petitioner, who suffers from acoustic neuroma of his left ear, began experiencing severe vertigo and heightened light sensitivity. As a result, his doctor directed him to stay home from work and rest for several days. On December 15, 2015, he sent an email to Heather Grant, a Medgar Evers human resources representative, informing her that he intended to request leave pursuant to the Family Medical Leave Act (FMLA), as his condition had not resolved. Also on or around December 15, 2015, petitioner's supervisor, Kevin Collins, prepared his performance evaluation and gave him an overall rating of "meets expectations." On or about January 1, 2016, petitioner submitted FMLA forms to Ms. Grant who acknowledged receipt of said forms on January 8, 2016.

On January 21, 2016, petitioner was fired by Medgar Evers for allegedly violating CUNY's dual employment policy and exhibiting unprofessional conduct. The record reveals that CUNY has a policy which provides that a full-time employee can have another job as long as they get prior written approval from their department head, the College's Director of Human Resources and the College President. However, there cannot be any conflict between the hours the employee is required to work at CUNY and the hours working for an outside employer. It appears that petitioner filled out an External Employment Form in February 2015 informing CUNY that he also held a full-time job as an engineer at DCAS. On December 8, 2015, he was asked to submit an updated form, which he failed to promptly

submit. On December 17, 2015, Tanya Isaacs, Medgar Evers' Director of Human Resources, sent petitioner an email that directed him to submit the form no later than close of business on December 21, 2015 and warned him that failure to make such submission would subject him to disciplinary charges. This directive was also sent to petitioner by overnight, certified and regular mail. On December 21, 2015, petitioner sent Ms. Isaacs an email which informed her that he had already submitted the form in February and that the directive was just an attempt to harass and engage in retaliation against him because he had lodged a prior complaint about unsafe working conditions at Medgar Evers. Ms. Isaacs responded that he needed to submit an updated form reflecting his current work schedule, but petitioner refused to comply. As a result, CUNY contacted DCAS to determine if there was any conflict between petitioner's work hours for DCAS and those he was required to work at Medgar Evers. CUNY found two points of conflict between his hours at Medgar Evers and DCAS. Thus, CUNY terminated petitioner for violating the dual employment policy and exhibiting poor conduct in failing to obey the directive to submit an updated External Employment Form.

On or about October 21, 2016, petitioner filed a complaint with DHR claiming that CUNY discriminated against him by denying him an FMLA leave. He claimed that he suffered from acoustic neuroma which caused vertigo and heightened light sensitivity and thus requested an FMLA leave to seek treatment and to adequately recuperate. Petitioner claimed that after he made his FMLA request, CUNY, as a pretext for terminating his employment, concocted a work conflict that did not previously pose a problem. Petitioner claimed that he had filed the External Employment Form with CUNY in February 2015 and worked for both DCAS and CUNY until December 2015, a ten-month period, without issue from either employer. Petitioner maintained that he was not required to submit a new form

because it was only required to be updated if there were any changes to his external employment hours. Thus, he contends that, since his DCAS work schedule did not change, he was not required to submit a new form. Petitioner claimed that CUNY used his failure to file this form as a pretext for firing him after he requested an FMLA leave related to his disability. Moreover, he noted that he had received a favorable performance evaluation from his supervisor on or about December 15, 2015.

On or about December 22, 2016, CUNY submitted its response to petitioner's DHR complaint. In its response, CUNY noted that petitioner was terminated for violating the rules concerning dual employment. CUNY pointed out that petitioner refused to submit an updated External Employment Form when directed to provide such update and that he responded to the update request in an insubordinate and rude manner. CUNY noted that as a result of petitioner's failure to submit the form, CUNY had to contact DCAS to obtain petitioner's work schedule and compare it with his schedule at Medgar Evers. CUNY then determined that there were two points of direct conflict: petitioner's Saturday morning shift at Medgar Evers ended at 6:00 a.m., the same time his DCAS shift was supposed to begin on Saturday morning and his Sunday shift at DCAS ended at 10:00 p.m., the same time his shift at Medgar Evers was supposed to begin. CUNY maintained that these two irreconcilable conflicts, and petitioner's attempts to hide them by refusing to submit an updated form, in addition to his unprofessional and insubordinate behavior, formed the basis for his termination.

CUNY further submitted documentation of various instances where petitioner exhibited an unprofessional, unhelpful and uncooperative attitude in his job performance. Such instances included refusing a request to participate in a test of the campus' time clocks and his unhelpfulness with outside vendors, as discussed in an email from CUNY's Central

Safety Officer in which she stated that she had known petitioner for many years and had "experienced firsthand his general surliness and lack of cooperation."

Thus, CUNY claimed that petitioner's termination had nothing to do with his FMLA leave request. CUNY pointed out that petitioner was asked to submit the updated form in early December 2015 and refused to comply throughout the whole month of December. CUNY noted that his FMLA request was not even officially made until December 30, 2015 at the earliest. Thus, the conduct that led to his termination preceded his FMLA request, which CUNY noted was still pending at the time of his termination. In addition, CUNY asserted that a prior FMLA request to care for his wife in October 2015 had been granted. Finally, CUNY pointed out that in the introductory paragraph of his complaint, petitioner states that he was discriminated on the basis of age and checked the box for "age discrimination" in his charge form, but the complaint fails to state any age discrimination claims.

Several documents were submitted to DHR by petitioner and CUNY in relation to the complaint, and an investigation by DHR ensued. On April 17, 2017, DHR issued its Determination And Order After Investigation which found that there was no probable cause to believe that CUNY had engaged in the unlawful discriminatory practice which petitioner alleged. DHR found that petitioner submitted insufficient evidence to support his claim that CUNY denied him a reasonable accommodation for his disability when it failed to grant his FMLA request. In this regard, DHR noted that two previous FMLA requests by petitioner had been granted and that CUNY had been waiting for further medical documentation to evaluate petitioner's December 30, 2015 FMLA request. Thus, CUNY noted that this FMLA request was still pending at the time of his termination.

DHR noted that it was petitioner's refusal to comply with an order to submit an updated External Employment Form that resulted in CUNY having to obtain this information directly from DCAS and uncovering the two time conflicts. DHR further noted that petitioner argued that other employees had similar conflicts and were neither disciplined nor terminated. However, DHR found that even if his working the two jobs were not a violation of the dual employment policy, it did not appear that petitioner had ever obtained prior written consent from the head of his department or agency, as was required under the policy. DHR found that petitioner refused to provide the form, as requested by CUNY, and thus, it ended his probationary period, in part, for that failure to comply with this directive. Finally, DHR found there was insufficient evidence that petitioner's age was a factor in the treatment he received from CUNY. DHR found that its investigation revealed a causal connection between petitioner's failure to provide the updated External Employment Form and his termination, rather than his termination being connected to his FMLA leave accommodation request. Hence, DHR dismissed the complaint by finding that its investigation failed to reveal sufficient evidence establishing an inference of discrimination based on age, disability or retaliation. On or about December June 16, 2017, petitioner commenced the instant action challenging DHR's determination.

Petitioner's Verified Petition

Petitioner seeks an order setting aside and vacating DHR's April 17, 2017 determination of no probable cause. He argues that DHR's decision was arbitrary and capricious. Specifically, he contends that DHR's determination lacked any sound basis in reason, grossly misapplied the applicable law and was made without regard to all of the relevant facts. Petitioner maintains that DHR utilized the law applicable to retaliation claims brought under FMLA rather than the applicable law related to a disability discrimination

claim. He argues that this point is significant because DHR found that he had not established a causal connection between his termination and his disability, which is an essential element of an FMLA retaliation claim but not an element of a cause of action for disability discrimination under the New York State Human Rights Law (Human Rights Law). Moreover, he contends that DHR failed to analyze his pretext argument pertaining to CUNY's so-called non-discriminatory reason for the termination of his employment. In this regard, he contends that DHR ignored the fact that he had just received a positive performance review and had previously submitted the External Employment Form. Petitioner claims that none of this was problematic until he sought an FLMA accommodation for his disability. Petitioner contends that he was never reprimanded, let alone notified about any work schedule conflicts until he began to miss work due to his health condition. This history, he contends, raises an inference of discrimination. He argues that DHR did not even address these issues, and he maintains that there is a factual issue whether CUNY's proffered legitimate reason for his termination was just pretext. Therefore, he contends that DHR committed plain error in its factual determination. Finally, petitioner argues that DHR failed to review the documents in full because its determination discussed a non-existent age discrimination claim.

In its answer, DHR argues that it has broad discretion in the conduct of its investigations and that no hearing, interview or conference is required. DHR points out that its determination of no probable cause should only be overturned upon a finding that its investigation was abbreviated or one-sided. Here, DHR notes that its investigation included a review of the complaint and CUNY's written and detailed documentary submissions. Further, petitioner submitted a rebuttal with exhibits that was reviewed, and CUNY submitted additional documents and information at DHR's request. DHR reviewed all of

these documents and determined that they were sufficient to enable it to determine that there was no probable cause to find that petitioner was terminated based upon his disability.

CUNY's Cross Motion

CUNY opposes the verified petition and cross-moves to dismiss it and each and every cause of action and request for relief asserted therein. CUNY argues that petitioner's challenge lacks merit and that DHR's determination was rational. In support of its cross motion, CUNY notes that petitioner was terminated from his probationary employment because of insubordination, his failure to obey a directive to submit an updated External Employment Form and because his work hours with his secondary job conflicted with his work hours at Medgar Evers in violation of CUNY regulations and policy. Moreover, CUNY terminated him upon finding that his "uncooperative and insubordinate conduct at the work place is detrimental to the good order that the college mandates for its workforce." CUNY points out that his FMLA leave request for the period of December 3-6, 2015 was granted, as was his FMLA request from August 3, 2015-September 3, 2015 to care for his wife. CUNY notes that petitioner had been requested to fill out the updated External Employment Form in early December and again in mid-December 2015, and at the time of his termination, the FMLA application petitioner submitted was still pending awaiting additional medical documentation from him.

Petitioner asserts that he never alleged claims of age discrimination or retaliation, and DHR's determinations regarding these non-existent claims therefore demonstrates the shoddiness of its investigation and makes its determination questionable. CUNY points out, in response, that the cover page of petitioner's complaint, filed with DHR on October 21, 2016, specifically states that he is charging the respondents CUNY and Medgar Evers "with an unlawful discriminatory practice relating to employment in violation of Article 15 of the

Executive Law of the State of New York (Human Rights Law) because of age, disability, opposed discrimination/retaliation."

CUNY argues that DHR's determination of no probable cause was rational and not arbitrary and capricious and that the record before DHR contained ample support for its determination. CUNY maintains that DHR applied the correct legal standard noting that the applicable statute, Executive Law § 296 (1) (a) contains a causation requirement. Specifically, the statute provides in pertinent part that "[i]t shall be an unlawful discriminatory practice for an employer . . . , because of an individual's . . . disability . . . to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Next, CUNY argues that DHR's rejection of petitioner's pretext argument was not irrational, arbitrary or capricious. It notes that DHR determined that CUNY had a legitimate, non-discriminatory reason for terminating him by finding that he violated the Civil Service's Dual Employment Policy, and exhibited poor conduct in failing to obey a directive and submit an updated form despite repeated requests from his superiors. CUNY contends that petitioner had a full and fair opportunity to present his case to DHR and in this regard submitted nearly 300 pages of documents related to this matter which DHR reviewed. Thus, CUNY maintains that the record evidence provided a sufficient basis for DHR's no probable cause determination.

Finally, CUNY argues that the facts that petitioner alleges were ignored by DHR do not change the analysis of this matter. First, with regard to petitioner's claims that there was no consideration that he had received a "meets expectations" performance review, CUNY notes that this evaluation covered a time period prior to his refusal to follow the directive to

submit an updated form. Second, his contention that DHR ignored the fact that he had already filled out the External Employment Form is incorrect, as they acknowledged that he had made that submission, but the pertinent issue was his failure to submit an updated form as specifically directed by his employer. Finally, petitioner's argument that there had been no issues with his hours and possible conflicting work schedule until he requested an accommodation for his disability, in the form of an FMLA leave, is incorrect as he was requested to provide this information regarding the hours he worked at his outside employment almost a month before his official FMLA request, which occurred on or about December 30, 2105.

In opposition to DHR's answer and CUNY's cross motion, petitioner argues that both discuss a non-existent age discrimination claim and that a plain reading of his complaint shows that he never made age discrimination or retaliation claims. Rather, he explains that an age discrimination claim was inadvertently included on the cover page of his verified complaint but that there are no facts regarding such a claim in his complaint. He contends that the rebuttal he submitted to DHR corrected this error by acknowledging that "nowhere in his complaint did [petitioner] . . . make a claim for discrimination based on age and he also did not indicate age discrimination on his charge form." Petitioner again claims that DHR and CUNY are incorrect regarding the proper standard for analyzing his disability discrimination claim and contends that the disability discrimination standard imposes a less stringent threshold than a retaliation standard. Petitioner argues that DHR ignored substantial evidence of pretext in its analysis, specifically, the fact that the External Employment Form was only required to be updated if there were a change in his external employment. Finally, petitioner contends that DHR erred in its analysis of petitioner's FMLA leave request.

In reply, and in further support of its cross motion, CUNY argues that DHR applied the correct legal standard and that petitioner's arguments in this regard are simply incorrect. In addition, CUNY notes that petitioner's contention that he never raised an age discrimination claim is without merit. CUNY notes that petitioner uses this issue to claim that DHR's analysis was careless when in fact CUNY demonstrated that DHR performed a careful and thorough analysis of all claims raised by petitioner, whether intended or inadvertent.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013] [internal quotations and citation omitted]). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*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]). The DHR has extremely broad discretion in the conduct of its investigations (*see Matter of Rauch v New York State Div. of Human Rights*, 73 AD3d 930, 930 [2010]; *Matter of Maltsev v New York State Div. of Human Rights*, 31 AD3d 641, 641 [2006], *lv denied* 7 NY3d 718[2006]), and 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 Dean Sr. Trucking*, Inc., 228 AD2d 678, 679 [1996]). DHR's determinations are entitled to considerable deference due to its expertise in evaluating discrimination claims (*see Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747 [2016]; *Matter of Curtis v New York State Div. of Human Rights*, 124 AD3d 1117, 1118 [2015]; *Matter of Cornelius v New York. State Div.*

of Human Rights, 286 AD2d 329, 330 [2001]; *Matter of Bruno v Pembrook Mgt.*, 212 AD2d 314, 318 [1995]; *Matter of Sidoti v New York State Div. of Human Rights*, 212 AD2d 537, 538 [1995]). It is within the discretion of the DHR to decide the methods to be employed in investigating a discrimination claim and "[a] DHR determination of 'no probable cause' should be overturned as capricious only where the record demonstrates that DHR's investigation was 'abbreviated or one-sided'" (*see Matter of Chirgotis v Mobil Oil Corp.*, 128 AD2d 400, 403 [1987], *lv denied* 69 NY2d 612 [1987], *rearg denied* 70 NY2d 748 [1987]).

Here, DHR's determination was made after an investigation and without a hearing pursuant to Executive Law § 297 (4) (a). "Where, as here, SDHR 'renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis'" (*Matter of McDonald v New York State Div. of Human Rights*, 147 AD3d 1482, 1482 [2017] quoting *Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747 [2016]; *Matter of Orosz v New York State Div. of Human Rights*, 88 AD3d 798, 798 [2011]; *Matter of Bazile v Acinapura*, 225 AD2d 764, 765 [1996], *lv denied* 88 NY2d 807 [1996]; *see* Executive Law § 298; CPLR 7803 [3]). Although petitioner's "factual showing must be accepted as true on a probable cause determination" (*Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697 [2015] *lv denied* 26 NY3d 909 [2015]), "full credence need not be given to petitioner's allegation in his complaint that he was discriminated against on the basis of his disability, for this is the ultimate conclusion, which must be determined solely by [DHR] based upon all of the facts and circumstances" (*Matter of Vadney v State Human Rights Appeal Bd.*, 93 AD2d 935, 936 [1983]; *Matter of*

McDonald, 147 AD3d at 1483; *see Matter of Majchrzak v New York State Div. of Human Rights*, 151 AD3d 1856, 1857 [2017]).

Here, the record is clear that DHR conducted a full and thorough investigation of petitioner's claims. It reviewed the voluminous materials submitted and gave petitioner the opportunity to rebut the evidence presented by CUNY. DHR determined that CUNY had granted petitioner's previous FMLA requests, was in the process of reviewing his latest request and was awaiting additional documentation from petitioner at the time of his termination. DHR further determined that petitioner failed to follow the directive to submit an updated External Employment Form almost a month before his FMLA request herein, which occurred on or about December 30, 2015. Moreover, DHR found that petitioner was in violation of the dual employment policy on two grounds: failing to get the prior proper authorizations and two instances of overlapping work schedules. Accordingly, the court finds that DHR's determination of no probable cause was not arbitrary, capricious or without a rational basis, but, rather, was based upon all of the facts and circumstances presented. Moreover, the record is clear that the process was not abbreviated or one-sided.

The court finds that petitioner failed to meet his burden of proving that the independent, legitimate, and nondiscriminatory reasons proffered by CUNY for discharging him were not his employer's true reasons, but a pretext for discrimination (*see Matter of Miller Brewing Co. v State Div. of Human Rights*, 66 NY2d 937, 938-939 [1985]; *Grella v. St. Francis Hosp.*, 149 AD3d 1046, 1048-1049 [2017]; *Matter of Pathak v New York State Div. of Human Rights*, 13 AD3d 634, 634-635 [2004]; *Matter of Bazile*, 225 AD2d at 765; *Matter of Talt v State Div. of Human Rights*, 156 AD2d 569, 569 [1989]).

Finally, the court finds no merit to plaintiff's claim that DHR incorrectly analyzed the complaint by discussing an age discrimination claim. In fact, the opposite is evident. The

cover page submitted to DHR with petitioner's complaint does indeed state "age, disability, opposed discrimination/retaliation." Thus, DHR throughly reviewed all of petitioner's submissions and addressed all allegations, regardless of whether petitioner expounded on the claim in his complaint.

For the reason stated above, the relief requested by petitioner is denied in its entirety. CUNY's cross motion is granted, and the verified petition is hereby dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. PAMELA L. FISHER

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
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