

Espinal v New York City Dept. of Corr

2020 NY Slip Op 31795(U)

June 4, 2020

Supreme Court, New York County

Docket Number: 160457/2018

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

DIANA ESPINAL,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF
CORRECTIONS, THE CITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 160457/2018
MOTION DATE 11/13/2018
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

ORDER

Upon the foregoing documents, it is

ORDERED that the petition is DENIED and the proceeding is
DISMISSED; and it is further

ORDERED and ADJUDGED that the Clerk shall enter judgment
accordingly.

DECISION

Petitioner brings this proceeding challenging respondent
Department of Correction (DOCS)'s termination of her employment
as a corrections officer during a probationary period.

Petitioner claims that the termination was gender

discriminatory, as it was based on her use of sick leave arising from her pregnancy.

The standard to be applied to petitioner's claim is set forth as follows:

Absent a statute or rule to the contrary, a probationary employee may be discharged without a hearing and without a statement of reasons so long as the act is done in good faith and not for constitutionally impermissible purposes. Moreover, it is the petitioner who bears the burden of demonstrating respondent's bad faith or illegal or arbitrary action.

Rainey v McGuire, 111 AD2d 616, 618 (1st Dept. 1985).


On June 27, 2016, petitioner was appointed by DOCS as a probationary corrections officer. Petitioner states that DOCS learned about her pregnancy when she told DOCS on January 4, 2018, the date she took sick leave for that reason. On July 25, 2018, respondent terminated petitioner.

Petitioner fails to meet her burden in this proceeding. Even assuming the truth of the facts asserted in her petition and reply affidavit, she does not dispute her sick leave record wherein she was late on at least three occasions, December 29, 2017, February 26, 2018, and March 9, 2018, which dates were during the probationary period. One instance of lateness during probation justifies termination. See Garrett v Safir, 253 AD2d 700 (1st Dept.) app. den. 92 NY2d 817 (1998). Petitioner's record of lateness, in addition to her conceded four non-pregnancy related sick leave absences- January 12, 2017; March

10, 2017; March 14, 2017; May 13, 2017- and at least 25 days of compensatory and annual leave, all during the probationary period and before she notified DOCS of her pregnancy, provide sufficient support for the proposition that respondent's action was not taken in bad faith. It has been held that excessive absences and lateness are sufficient grounds for termination, where such attendance record was well established before the motive for the alleged illegal discrimination arose. See Nelson v Abate, 205 AD2d 454, (1st Dept. 1994) ("petitioner's record of excessive absence and lateness was established well before her participation in that program and provided a sufficient basis for her termination"). Thus, petitioner's claim of discrimination fails to establish that respondent's reasons for termination are pre-textual, as petitioner's pre-pregnancy attendance record vitiates any temporal nexus between petitioner's pregnancy and respondent's termination.

As petitioner has raised issues of fact with respect to whether she violated DOCS's "undue familiarity" rule, such

alleged violation, standing alone, would not establish any basis for her termination. However, petitioner's unrefuted excessive absences and lateness, which she does not claim were pregnancy related, fail to establish prima facie any bad faith on the part of respondent.

<u>6/4/2020</u> DATE	 DEBRA A. JAMES, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE