Mendez v Fire Dept. of the City of N.Y.

2023 NY Slip Op 31589(U)

May 12, 2023

Supreme Court, New York County

Docket Number: Index No. 159601/2022

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE** **PART 52**

Justice

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GLENN MENDEZ,

Petitioner,

- v -

FIRE DEPARTMENT OF THE CITY OF NEW YORK, CITY OF NEW YORK

Respondent.

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INDEX NO. 159601/2022

MOTION DATE 04/05/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

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

Upon the foregoing documents, it is

In this Article 78 petition, the petitioner Glenn Mendez ("Mendez") challenges the defendants' denial of a religious accommodation from the City of New York's ("City") mandate requiring all City workers receive the COVID-19 vaccine, and his termination for failing to show proof of his COVID-19 vaccination. The defendants contend that the petition must be dismissed pursuant to CPLR § 217(1) as it was not brought within the four-month statute of limitations applicable to Article 78 proceedings.

Background

Petitioner was an inspector employed by the Fire Department of the City of New York ("NYFD") (*see* Complaint ¶ 23). By Order of the Commissioner of Health and Mental Hygiene, all City employees (with an exemption inapplicable in the instant matter) were required to provide proof that they have received a vaccine against COVID-19 (*see* Exh. C). Petitioner applied for an accommodation, exempting him from the vaccine requirement and instead

allowing him to take weekly COVID-19 tests (Exh. D, Request for a reasonable accommodation for religious observances, practices, or beliefs). Petitioner's request for a vaccine mandate exemption was denied (*see* Exh. F, Denial letter). Petitioner appealed this denial. By email dated June 6, 2022, petitioner was informed that the City of New York Reasonable Accommodation Appeals Panel issued a final decision with respect to the reasonable accommodation request and denied petitioner's appeal of the FDNY's denial of the request, stating "FDNY has established an undue hardship if RA were to be granted" (*see* Exh. H, Reasonable Accommodation Appeal Determination). Petitioner's employment was terminated, effective July 1, 2022, for failing to provide proof of vaccination against COVID-19 (Complaint ¶ 15; Exh. E, Termination Letter). Petitioner commenced the instant action on November 8, 2022.

Statute of Limitations

The defendants contend that the instant action is time barred by the statute of limitations. A proceeding against a body or officer, such as the instant proceeding, must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner (CPLR § 217[1]). "A determination generally becomes binding when the aggrieved party is 'notified'" (*Matter of Vil. of Westbury v Dept. of Transp.*, 75 NY2d 62, 72 [1989]). An "article 78 proceeding is 'commenced by filing a notice of petition or order to show cause and a petition' (CPLR 304). Claims asserted in such proceedings are deemed 'interposed' for Statute of Limitations purposes at the time of filing (*see,* CPLR 203[c])" (*Matter of Grant v Senkowski*, 95 NY2d 605, 608 [2001]).

Petitioner argues that the statute of limitations should be extended (*see Garvey v City of New York*, 77 Misc 3d 585, 590 [Sup Ct Richmond County 2022] ["the action by the Department

of Sanitation in sending letters to the terminated employees means that the agency did *not* reach a definitive position on the issue"]). However, this court finds *Garvey* unpersuasive. "A Statute of Limitations is not open to discretionary change" (*Arnold v Mayal Realty Co.*, 299 NY 57, 60 [1949]). The final determination regarding petitioner's request for a religious accommodation became final on June 6, 2021, the date he was notified of the decision. To the extent that petitioner argues that the decision of the City of New York Reasonable Accommodation Appeals Panel was not a final determination because the City later decided to let fired city workers return to work *if they showed proof that they were fully vaccinated*, this does not indicate that the determination to deny the accommodation – seeking to allow petitioner to *avoid* becoming vaccinated – is not a final determination. There are two requirements to determine when agency action is final and binding on the petitioner. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v Dept. of Info. Tech. and Telecom. of City of New York*, 5 NY3d 30, 34 [2005]). Both requirements were met by the decision of the City of New York Reasonable Accommodation Appeals Panel – the decision inflicted a concrete injury in that it denied a religious accommodation, the determination was final in that there was no further administrative appeal from the decision. There is no ambiguity as to whether the decision to deny the religious accommodation was final – the decision states on its face "This determination represents the final decision with respect to your reasonable accommodation request" (Exh. H). Therefore, as the instant action was commenced more than four months after the petitioner received notice of the final determination of his request for a religious

accommodation, the portions of the petition challenging the denial of a religious accommodation are barred by the statute of limitations.

Likewise, the portion of the petition challenging petitioner's termination are time barred. An "employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to plaintiff, and the possibility that the determination may be reversed is insufficient to toll the limitations period" (*Pinder v City of New York*, 49 AD3d 280, 281 [1st Dept 2008]; see also *Delaware State Coll. v Ricks*, 449 US 250, 258, 101 S Ct 498, 504, 66 L Ed 2d 431 [1980]). In the instant matter, the determination to terminate petitioner's employment was transmitted to petitioner no later than July 1, 2022 (*see* Exh. E, termination letter dated June 30, 2022; Complaint ¶ 15 ["On July 1, 2022 Inspector Mendez was terminated"]). Therefore, the petition, filed on November 8, 2022, was one week late. "CPLR 201 makes clear that courts do not have discretion to excuse late filings by plaintiffs who slept on their rights" (*Bermudez Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 [2020]). Accordingly, that portion of the petition related to the termination of petitioner's employment was untimely.

Conclusion

For the reasons set forth herein, it is hereby

ORDERED that the petition is dismissed in its entirety.

This constitutes the decision and order of the court.

5/12/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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