

ORIGINAL

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

In the Matter of the Application X
Of MARTHA BAPTISTE,

INDEX NO. 12124/2008

Petitioner,

SEQ. NO. 1

- against -

BY: GRAYS, J.

NEW YORK STATE DIVISION of HUMAN
RIGHTS and CITY of NEW YORK,
DEPARTMENT of CORRECTION, RIKERS,

DATED: JAN 09 2009

Respondents.

X

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In this proceeding, brought pursuant to CPLR Article 78 and Executive Law § 298, petitioner Martha Baptiste seeks to review and annul a Determination and Order after Investigation of respondent New York State Division of Human Rights, dated March 11, 2008, which determined that there is no probable cause to believe that respondent New York City Department of Corrections (DOC) engaged in unlawful discriminatory practices against her during the course of her employment with DOC.

The petitioner began working as an exterminator at the Rose M. Singer Center (RMSC), a DOC detention facility, on or about August 1, 2005. She resigned therefrom on or about July 7, 2006. Prior to her resignation, on January 4, 2006, the petitioner filed a complaint with the New York State Division of Human Rights (Division of Human Rights) charging DOC with sex discrimination in

violation of Executive Law § 296 and retaliatory treatment based upon her opposition to such treatment.

The petitioner alleged in her complaint to the Division of Human Rights as follows:

"On September 6, 2005, I complained to my immediate supervisor, Luis Rodriguez (who is male), about the constant harassment by my co-workers Thomas Nadjek (who is male) and Mitchell Schwardron¹ (who is male). I told him that they would not leave me alone during breakfast, lunch or when I had to do my paperwork in the maintenance shop. I explained to him that I felt very uncomfortable and annoyed with their inappropriate comments and behavior when we are together in the shop. Mr. Rodriguez stated that he would investigate the matter, however, he never did anything to stop their treatment of me."

On November 3, 2005, I made the decision to file a complaint with the respondent's Deputy Commissioner, Vanessa Singleton, regarding the continued disparate treatment by Mr. Nadjek and Mr. Schwardron and Mr. Rodriguez' refusal to rectify the situation.

On November 20, 2005, Mr. Rodriguez expressed his disappointment in my having filed a complaint with respondent's deputy commissioner. He stated that I should have waited for him to take care of the matter and that I should have 'kept it in the family.' I told him that I thought I had waited long enough and that he ignored my request for his intervention in the treatment against me by his male employees.

1

The names of Mr. Nadjek and Mr. Schwardron were sometimes misspelled in the record but have been spelled here as represented by the respondents.

On December 27, 2005, I requested a transfer from Commissioner Patricia Feeny to another prison. Because of this, my personal articles, which were in the shop, have been moved and Mr. Rodriguez has requested that I keep my chemicals in another area. I have argued, to no avail, that I do not know where to move my chemicals other than in the location where they were originally stored.

I believe I am being treated disparately by the respondent's supervisor and employees because I am the only female exterminator in this particular maintenance shop."

The Division of Human Rights forwarded a copy of the petitioner's complaint to DOC and provided the latter with an opportunity to respond to the allegations in the complaint. By letter dated June 7, 2006.

DOC provided a response to the allegations of the petitioner's complaint wherein it denied the petitioner's claims of discrimination on the ground that such allegations do not state a claim upon which relief can be granted. DOC also stated that the petitioner's allegations were investigated and acted upon, noting:

"[O]n or about November 14, 2005, after complainant [petitioner Martha Baptiste] informed Luis Rodriguez of her harassment allegations against Thomas Nadjek, Mr. Rodriguez did address these allegations with Nadjek to rectify the situation.

On or about November 21, 2005, complainant again spoke with Rodriguez and informed him that she was still having problems with the two employees, Nadjek and Schwardron. Rodriguez did then speak to all three employees separately and with the parties together to address the situation.

After the meeting, on or about November 23, 2005, complainant, Nadjek and Schwardron each drafted a memo declaring that there had been a misunderstanding and that they reconciled and agreed no further action is necessary at the present time.²

However, on or about November 25, 2005 after acknowledging that there was a misunderstanding between the individuals, complainant filed a complaint with Deputy Warden of Administration for RMSC, who reviewed the report and forwarded it to the Warden Michelle Mack of RMSC, who reviewed the report and forwarded it to the Department's EEO office for investigation. At around the same time, on November 28, 2005, Warden Mack conducted a meeting with Baptiste and Nadjek to discuss the situation and counsel both on professional [conduct] while on duty.³

The EEO office contacted complainant and learned that she had filed the present complaint with New York State Department of Human Rights and subsequently suspended their investigation for determination by the State."

2

A copy of the November 23, 2005 memos signed by petitioner Martha Baptiste and co-workers Mitchell Schwardron and Thomas Nadjek, were submitted as exhibits in opposition to the petition. In their memos, the petitioner and Mr. Schwardron acknowledged that they were involved in a "verbal confrontation" with each other and agreed that the issue was a misunderstanding that got out of control and required no further action. In his memo, Mr. Nadjek denied the allegations against him and stated that he has always acted in a professional manner with the petitioner, treated the petitioner with respect, and maintained conversations with the petitioner that were related only to their mutual work environment.

3

A copy of the November 28, 2005 memo from Michelle Mack, Warden, RMSC to Luis Burgos, Jr. Esq., Deputy Commissioner, Equal Employment Opportunity, was also submitted as an exhibit in opposition to the petition. Therein, Warden Mack indicated that she counseled the petitioner and Thomas Nadjek.

4

Thereafter, by letter dated July 7, 2006, the petitioner resigned from her position with DOC. The petitioner cited "unsuitable, unhealthy working conditions and environment" and illness due to such conditions as the reasons for her resignation.

By letter dated July 12, 2006, the petitioner submitted a rebuttal to DOC's response to her complaint. Among other things, she stated therein that when she started the job at RMSC she was welcomed by everyone except co-workers Mr. Nadjek and Mr. Schwardron. The petitioner alleged that these two men referred to women in the news in a derogatory manner and started doing and saying "inappropriate things" to her. For example, Mr. Nadjek allegedly asked her to wear a certain blouse more often because he liked the way it fit her, stood over her and breathed heavily whenever she would close her eyes while seated at the lunch table, and told her that he likes to admire her with her eyes closed. She also alleged that Mr. Nadjek would refer to women on the news as "hoes, heffers, bitches and brawds." Regarding Mr. Schwardron, he "would constantly be putting [corrections] officers through to get advice from me about pests in their house even though I told Mr. Schwardron what was happening, and even though my supervisor Mr. Rodriguez and myself asked him to direct the calls to the office so Mr. Rodriguez can decide if it is personnell [sic] or job related Mr. Schwardron continued to put through the calls to [me]." In addition, Mr. Schwardron would constantly remove paper work that

the petitioner put on Mr. Rodriguez' desk and order her to correct her grammar. Mr. Schwardron would then stand uncomfortably close to her when he handed her the paperwork that she had previously left on Mr. Rodriguez' desk and block her path as she tried to leave maintenance area where she worked.

In her rebuttal letter to the Division of Human Rights, the petitioner also stated that Mr. Rodriguez did not want her to complain and to "save Mr. Schwardron, who helps him in the office with clerical work, but he was willing to give up Mr. Nadjek, who he [had vacationed with] because he felt that Mr. Nadjek [was] taking advantage of the friendship. [H]e said he is tired of covering up for Mr. Nadjek, the ringleader of problems." The petitioner continued in her rebuttal letter to the agency as follows:

"Mr. Rodriguez said that he spoke to the boys in my area, and they have agreed that I should not report the matter, that I should keep it in the family, we are a family in the back here. [H]e said that it would bring too much heat in the area and if I insist they would make it a no win situation, I have to remember I am still on probation.

On Tuesday 22nd, November 2005, my supervisor had an emergency meeting first in his office with myself, him and two witnesses. Mr. Robert Seconden ... and Mr. Toney Grant ..., at approximately 8:45 A.M. Mr. Rodriguez informed me in front of the witnesses that he can help me if I agree to forgive Schwardron. [H]e would write a memo that would support my memo, and he would have Mr. Nadjek transferred. I agreed, and this is how I wrote [the memo indicating that Mr. Schwardron

and I had a misunderstanding that got out of control and required no further action] ...

My supervisor has never spoken to the three of us together, or two of us together only individual [sic]. My supervisor [has] never or cannot show any documents that I have agreed it was a misunderstanding between myself and Mr. Nadjek."

The petitioner further alleged retaliatory treatment by Mr. Rodriguez which occurred because she complained to the Deputy Commissioner of Corrections about the incidents of harassment. The petitioner indicated that the retaliatory treatment occurred when Mr. Rodriguez would avoid speaking to her directly and tell the locksmith to give messages to her. The petitioner also indicated that, on December 7, 2005, Mr Rodriguez instructed her to take empty cans out to the garbage and take inventory of the chemicals stored in an outdoor trailer during a time when the temperature outside was in the lower 20 degree range and a portion of the trailer had no light. The petitioner then indicated that, on December 23, 2005, the situation at work became worse. She described the worsened conditions at her work place as follows:

"[Mr. Nadjek and Mr. Schwardron were] doing whatever they wanted ... On [December 27, 2005], I decided to speak to Mrs. Feeny, the Commissioner ... about the harassment ... [After] a meeting with my supervisor Mr. Rodriguez and the Deputy Warden [of the prison facility], Mrs. Feeny came to the maintenance area. She informed me that I am supposed to empty my personal belongings ... and sit in Mr. Rodriguez office ... On December 29, 2005, when I came to work, I was told by Mr. Schwardron to take my stuff out of

the maintenance shop. He informed me that he and Mr. Nadjek had packed them by the maintenance shop entrance. I asked my supervisor if he was aware of this. He said that they told him that they were going to move them from the area, and besides these things do not belong there, near the guys. I could not see what glue boards, fly glue traps, metal rat traps in boxes could harm these men ... These same materials ... are now stored in a closet in the female bathroom, where the ventilation system is not working and the temperature in the area could reach up to 90 degrees in the bathroom so on January 4, 2006 I decided enough was enough [and filed the complaint with the State Division of Human Rights]."

After its investigation of the petitioner's complaint, the Division of Human Rights determined that the evidence gathered during the course of the investigation is not sufficient to support the petitioner's allegations of sex discrimination, hostile work environment and retaliation. In its Determination and Order that is the subject of the petition at bar, the Division of Human Rights held that "[t]he investigation does not support that complainant worked in a severe and/or pervasive hostile work environment because of her sex and/or that she suffered retaliatory actions as a result of engaging in protected activity. Respondent took reasonable action when she complained of sexual harassment and she suffered no retaliation; she resigned for reasons unrelated to discrimination." Thus, it concluded "there is NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of."

In the petition at bar dated May 9, 2008, the petitioner alleges that the determination of the Division of Human Rights was based upon an inadequate investigation. She highlights the fact that the witnesses she identified in her statements were not interviewed and claims that "crucial statements made to the investigator during a telephone conversation with the petitioner on March 11, 2008 were not considered or included in the determination and order dated the same date." The petitioner also alleges that the agency failed to provide a reasonable basis for the determination that no probable cause existed. In answer to the petition, the respondents maintain that the investigation provided the petitioner with a full and fair opportunity to be heard and that the evidence supports the agency's findings.

Judicial review of the agency's determination is limited to whether such determination is in accordance with the law, arbitrary and capricious, or lacking a rational basis in the administrative record (see CPLR 7803(3); Executive Law § 298; Goston v American Airlines, 295 AD2d 932 [2002]; McFarland v New York State Division of Human Rights, 241 AD2d 108 [1998]; Bazile v Acinapura, 225 AD2d 764 [1996]). If there is any rational basis or credible evidence to support an administrative determination, the decision must be upheld (see Rivera v New York State Division of Human Rights, 18 Misc 3d 1133(A); see also Matter of Pell v Board of Education, 34 NY2d 231 [1974]). However, the determination must

be overturned if the agency's investigation was "abbreviated or one-sided" (Bal v New York State Division of Human Rights, 202 AD2d 236 [1994]), arbitrary and capricious or lacks a rational basis in the record (CPLR 7803[3]).

Contrary to respondent Division of Human Rights' contentions, it failed properly investigate the petitioner's complaint (see generally 9 NYCRR 465.6), and thus, deprived her of a full and fair opportunity to present evidence on her behalf (cf. Goston v American Airlines, 295 AD2d 932 [2002]). The Court notes that the petitioner identified three witnesses by name during the course of the agency's investigation, none of whom were interviewed or taken into account by the investigator. Therefore, the Court agrees with the petitioner that the investigation was inadequate and abbreviated. The Court further characterizes it as careless as demonstrated by inclusion of records from another investigation in the petitioner's investigation file. (Cf. McFarland v New York State Division of Human Rights, 241 AD2d 108 [1998].)

Moreover, nor can it be stated that the determination by the Division of Human Rights of "no probable cause" is supported by the record. "Probable cause of unlawful discriminatory practice exists when, after giving full credence to the complainant's version of the events, there is some evidence of unlawful discrimination" (Robertson v State, 240 AD2d 504 [1997]). To establish a prima facie claim of unlawful discrimination by her

employer on the basis of sex, it was incumbent upon the petitioner to initially show that she is a member of a protected class, that she was qualified for the position she occupied, that she suffered an adverse employment action, and that the adverse employment action occurred under circumstances giving rise to the inference of discrimination (see Forrest v Jewish Guild for the Blind, 3 NY3d 295 [2004]). If an employee meets this burden, then the burden shifts to the employer to set forth legitimate, non-discriminatory reasons to support its action. Upon satisfying that burden, the burden shifts back to the employee to demonstrate that the stated reasons were false and that discrimination was the real reason behind the employment decision. (See Hughes v Prim Hall Enterprises, 182 Misc 2d 892 [1999]).

The respondents do not dispute that the petitioner is a member of a protected class or that she was qualified for the position she occupied. Further, based upon the record submitted herein, the Court finds that the petitioner set forth a prima facie claim of discrimination in that she demonstrated that she suffered an adverse employment action and that such action occurred under circumstances giving rise to the inference of discrimination. An adverse employment action has been defined as a material adverse change in the terms and conditions of employment (Forrest v Jewish Guild for the Blind, 3 NY3d 295 [2004] supra). "To be materially adverse, a change in working conditions must be more disruptive

than a mere inconvenience or an alteration of job responsibilities" (see Tu v Loan Pricing Corp., 2008 WL 4367589), such as the conditions reportedly experienced by the petitioner.

In light of the cursory investigation and the petitioner's demonstration of a prima facie case of unlawful discrimination, the Court finds that the Division of Human Rights' conclusion that there was no probable cause to believe that respondent DOC had engaged in discriminatory practices in its employment relationship with the petitioner was arbitrary and capricious and not supported by a rational basis in the record.

Accordingly, the determination of the Division of Human Rights, dated March 11, 2008, is hereby vacated and matter is remitted to the agency for further investigation and consideration in accordance with the applicable law.

~~This constitutes the decision, order and judgment of the~~

~~Court.~~

Settle Judgment.



J.S.C.

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