

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

447 Janet Cuccia,
Petitioner-Appellant,

Index 113204/07

-against-

Martinez & Ritorto, PC,
Respondent-Respondent,

New York State Division of Human Rights,
Respondent.

Janet Cuccia, appellant pro se.

O'Hare Parnagian, LLP, New York (Salvatore G. Gangemi of
counsel), for Martinez & Ritorto, PC, respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub,
J.), entered April 16, 2008, dismissing this proceeding to vacate
respondent agency's determination, unanimously affirmed, without
costs.

Petitioner was employed by respondent law firm as a legal
secretary for approximately 2½ months before her termination,
purportedly due to poor job performance including excessive
lateness. Denial of unemployment benefits on the ground of
termination for misconduct was upheld by the Unemployment
Insurance Appeal Board, and her judicial appeal of that
determination was untimely (*see Matter of Cuccia v Commissioner
of Labor*, 55 AD3d 1115 [2008]).

Petitioner also filed a complaint of disability
discrimination with respondent agency (DHR), stating that her

lateness and the adjustments to her work schedule were necessary to attend doctors' appointments and undergo diagnostic tests for a medical condition. The law firm denied that petitioner ever told them she had a disabling medical condition and pointed to her statements attributing her discharge to other factors, such as a lull in work and the firm's desire to avoid unemployment insurance claims.

After investigation, DHR determined there was no probable cause to believe the firm had engaged in unlawful discrimination, pointing to the fact that petitioner was often permitted to make medical appointments during work hours, and she never alleged that she had told the firm about her medical condition. DHR concluded that the record suggested petitioner was terminated for nondiscriminatory reasons related to her work performance.

In order to recover under New York and federal law, petitioner has the initial burden of proving, by a preponderance of the evidence, a prima facie claim of discrimination, i.e., that she suffers from a disability, was qualified to hold the position at issue, and suffered an adverse employment action or was terminated from employment under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by setting forth, through the introduction of admissible evidence, legitimate independent and nondiscriminatory reasons to support

the employment decision. If the employer's evidence raises a genuine issue of fact as to whether it discriminated, then the presumption raised by the prima facie case is rebutted.

Petitioner is still entitled to prove that the legitimate reasons proffered by the employer were merely a pretext for discrimination (see *Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630 [1997]).

In an article 78 proceeding, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only if there is a rational basis for the decision or whether it is arbitrary and capricious (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

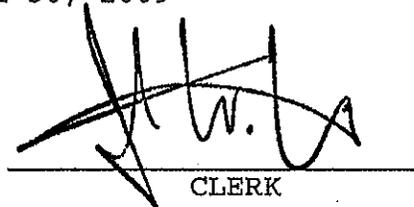
DHR's determination that petitioner failed to carry her burden of demonstrating discriminatory termination was supported by evidence in the record, including her own acknowledgment of termination for nondiscriminatory reasons. She was unable to demonstrate that the reasons provided by the law firm were pretextual.

Although petitioner takes issue with DHR's investigation, the agency has broad discretion in determining the method to be employed in investigating a claim (see *Pascual v New York State Div. of Human Rights*, 37 AD3d 215 [2007]). She was given the opportunity to provide evidence supporting her claims, and the investigation was not abbreviated.

Petitioner's remaining claims are improperly raised for the first time on appeal (see *Matter of Landmark West! v Tierney*, 25 AD3d 319 [2006], *lv denied* 6 NY3d 710 [2006]), and are, in any event, without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 30, 2009



CLERK