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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X Index No. 14981/08

In the Matter of the Application of
JENNY CHOU FISHER,

Petitioner,

- against -

DECISION AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
NEW YORK STATE VETERANS HOME MONTROSE,

Respondents.

-----X

NEARY, J.

The Petitioner brings this proceeding pursuant to CPLR Article 78 to review and set aside the May 9, 2008 decision of the Respondent, New York State Division of Human Rights, which dismissed the Petitioner's complaint upon a finding of no probable cause to believe that the Respondent, New York State Veterans Home Montrose, had engaged in the unlawful discriminatory practice complained of by the Petitioner. The Petitioner had filed a complaint alleging that she had been denied a promotion or was otherwise discriminated against in retaliation for having previously filed a sexual harassment complaint against a supervisor in 2004.

The Respondent, New York State Division of Human Rights, has filed an Answer asserting that there was sufficient evidence gathered during their investigation to support their finding of "No Probable Cause." In addition, a written transcript of the record of all prior proceedings was filed with the Court. The Respondent, New York State Veterans Home Montrose, has filed a Verified Answer and Objection in Point of Law.

FACTS

In March 2004, the Petitioner commenced employment as a Food Service Worker I at the Montrose Veterans Home. In June 2004, the Petitioner filed a sexual harassment complaint against one of her supervisors. That complaint was investigated and corrective action was taken which apparently resolved the situation at that time. In 2005, the Petitioner took a promotional civil service exam which would qualify her for the position of Food Service Worker II. In November 2005, the Petitioner was listed with a score of 95 on the civil service promotional list for Food Service Worker II.

Three employees had been provisionally appointed to Food Service Worker II positions at the Montrose Home. After the list was established, the three were permanently appointed to the positions in accordance with the Civil Service Law, notwithstanding the fact that the Petitioner had scored higher than all three on the exam. The Petitioner did register a complaint with human resources asserting that she should have been appointed to one of the positions at the Montrose Home because of her having received the highest score on the exam. Although the Petitioner believed that she should have been given one of the Food Service Worker II position at Montrose, she nevertheless accepted a Food Service Worker II position at a facility operated by the New York State Office of Mental Retardation and Developmental

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Disabilities in December 2006. The Petitioner was terminated from that position during her probationary period. The Petitioner did not seek to have her name restored to the list for Food Service Worker II positions although advised to do so. She then returned to Montrose Home in March 2007 as a part time Food Service Worker I.

Upon her return to Montrose Home, the Petitioner complained of unfair treatment and that she was unfairly denied a promotion to Food Service Worker II in 2005.

On September 6, 2007, the Petitioner filed a complaint with the Respondent, New York State Division of Human Rights, alleging unlawful discriminatory practice relating to employment in retaliation for her opposing discrimination by filing a sexual harassment complaint. The New York State Department of Human Rights conducted an investigation which included a conference between the parties, responses by a representative of the Montrose Home and numerous, detailed, submissions by the Petitioner.

On May 9, 2008, the Regional Director of the New York State Division of Human Rights issued a DETERMINATION AND ORDER AFTER INVESTIGATION which dismissed the complaint finding "NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of." The Petitioner then timely commenced this action seeking, *inter alia*, to set aside the May 9, 2008 determination.

LEGAL DISCUSSION

The New York State Division of Human Rights has broad discretion to determine the methods to be employed in investigating complaints [see *Matter of Camp v. New York State*

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Div. of Human Rights, 300 AD2d 481 (2004); *Matter of Bal v. New York State Div. of Human Rights*, 202 AD2d 236] and its determinations are entitled to considerable deference due to its expertise in evaluating discrimination claims. [See *Matter of Camp, supra*; *Matter of Bruno v. Pembroke Mgt.*, 212 AD2d 314]. The Court finds that, given the facts of this case, a hearing was not required. In reviewing a determination of the New York State Division of Human Rights, the Court is generally not free to substitute its judgment for that of the New York State Division of Human Rights. [See *Board of Educ. of Farmingdale Union Free School Dist. v. New York State Div. of Human Rights*, 56 NY2d 257]. Rather, the appropriate standard of review to be applied to the determination of the New York State Division of Human Rights is whether the decision is in accordance with the law, arbitrary and capricious or without a rational basis. [See Executive Law §298; CPLR 7803(3); *Matter of Bazile v. Aciapura et al.*, 225 AD2d 764; *Matter of Giles v. State Div. of Human Rights*, 166 AD2d 779].

Applying the foregoing standard, the Court finds that the decision of the New York State Division of Human Rights was in accordance with the law and was neither arbitrary nor capricious. In addition, the decision had a rational basis. The New York State Division of Human Rights conducted a thorough investigation during which the Petitioner made numerous, detailed submissions and participated in a conference. The Petitioner had a full opportunity to present her case and make her arguments to the New York State Division of Human Rights. The investigation was extensive and not one-sided. [See *Matter of Maltsev v. New York State Div. of Human Rights*, 31 AD3d 641; *Matter of Cornelius v. New York State Div. of Human Rights*, 286 AD2d 329]. The record contains ample support for the New York State Division of Human

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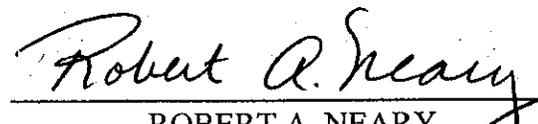
Rights' determination of no probable cause to believe that the Montrose Home had not engaged in unlawful discriminatory practices.

The Petitioner also seeks an order of this Court which would establish: the discrimination/retaliation practiced by the "Home," in terms of the promotion, also the physical suffering; reinstate the Petitioner's job to the Food Service Worker II position retroactive to October 2005 along with the monetary reward that is deemed appropriate; evaluating the Petitioner's qualifications for promotion to supervisory position; and subpoena the original score of the Food Service Worker II Civil Service Test of three individuals. The test scores referred to by the Petitioner are contained in the record submitted by the New York State Division of Human Rights. The Petitioner's applications are denied as these matters are beyond the authority of this Court and otherwise without merit.

Accordingly, the Petition to set aside the New York State Division of Human Rights's determination is denied and the Petition is dismissed.

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

Dated: White Plains, New York
March 27, 2009


ROBERT A. NEARY
ACTING SUPREME COURT JUSTICE