Health & Hospitals Corp. (Gotham) v. Alston-Harris

OATH Index No. 379/23 (Jan. 16, 2024)

The credible evidence established that respondent has been continuously absent without authorization since February 17, 2022. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH & HOSPITALS CORPORATION
Petitioner
- against -
CRYSTAL ALSTON-HARRIS
Respondent

REPORT AND RECOMMENDATION

ORLANDO RODRIGUEZ, *Administrative Law Judge*

Petitioner, the New York City Health and Hospitals Corporation ("HHC"), Gotham Health ("Facility" or "Gotham"), referred this employee disciplinary proceeding under section 7.5 of its Personnel Rules and Regulations. The petition alleged that respondent Crystal Alston-Harris, a Patient Care Associate, has been continuously absent without official leave ("AWOL") from February 17, 2022, to the present (Pet. Ex. 1 at 6).

Trial was conducted via videoconference on April 12, 2023, at 9:30 a.m. Petitioner presented documentary evidence. Respondent testified on her own behalf and presented documentary evidence.

For the reasons set forth below, petitioner established that respondent has been AWOL since February 17, 2022. I recommend termination of respondent's employment.

ANALYSIS

Respondent is a Patient Care Associate at Gotham. She held that position for 21 years with HHC, three years of them as an employee at Gotham (Tr. 26). In February 2022, respondent was working in the pediatric unit at Gotham's Bushwick Clinic (Tr. 27). Her duties as a Patient Care Associate included checking patients' vital signs, obtaining specimens, and recording findings on

patients' charts (Pet. Ex. 2, Attachment C). Petitioner alleges that respondent has been AWOL from this position since February 17, 2022 (Pet. Ex. 1).

In support of the charges, petitioner submitted a notarized letter outlining the Facility's general practice when an employee has been absent without approved leave, as well as the specific steps taken in respondent's case (Pet. Ex. 2). The letter was written by Regina Danielson, the Regional Director of Nursing at East New York, whose duties include handling the Nursing Department's time and leave records, corresponding with employees who are absent, and reviewing and maintaining records pertaining to the Department's employee absences (Pet. Ex. 2 ¶¶ 2-3). Ms. Danielson stated that respondent last reported to work on February 17, 2022 and has been AWOL from that date to the present (*Id.* ¶ 9). She also stated that respondent neither received approval for her absences nor was paperwork approved for her retirement or resignation (*Id*. ¶¶ 10, 13-14).

In accordance with HHC's procedures, on March 1, 2022, Shirley Kenol-Beauharnais, Supervisor of Nurses, sent a letter to respondent notifying respondent that she was AWOL (*Id.* ¶¶ 4, 11, Attachment "A"). The letter advised respondent to report her reasons for her absence to her Department supervisor immediately upon receipt of the letter (*Id.*). It further warned of possible disciplinary action that could lead to termination if she did not return to duty or receive "authorized or approved leave" (*Id.* Attachment "A"). Respondent failed to respond to the letter (*Id.* ¶ 12). The Nursing Department then contacted the Office of Labor Relations, which mailed another AWOL notice letter to respondent on March 14, 2022 (*Id*. ¶ 13, Attachment "B"). The letter directs respondent to report the reason for her absence to her supervisor upon receipt of the letter. It also advises respondent how to proceed if her absence is the result of a medical diagnosis:

> Note: Medical diagnosis information should not be provided to [respondent's] Department. Medical reasons and documentation to be provided to HRSS Leaves Administration or the Equal Employment Opportunity Office as part of any request for a leave. . . as well as to Occupational Health Services for medical clearance as required.

(*Id.* ¶¶ 6-7, 13, Attachment "B"). The letter further advised that in addition to notifying her supervisor, respondent must also have authorization or approval from her employer to be absent. The letter extended the deadline for respondent to reply to March 28, 2022 (*Id.*). The letter was mailed to respondent by first class and certified mail to her last address on file (Pet. Ex. 2 at 8).

Respondent did not respond to the letter and failed to obtain approval for her absences. Therefore, disciplinary action was commenced (*Id.* ¶ 14).

Ms. Danielson stated that respondent's absence has burdened the workplace because other employees must assume her duties, sometimes with overtime work or reassignment from other departments (*Id.* ¶ 17). According to Ms. Danielson, when those options are unavailable, respondent's absence impeded the hospital's primary goal to provide optimum patient care.

At the close of trial, respondent's counsel requested that an inference be drawn that Ms. Danielson's testimony would be adverse to petitioner's case (Tr. 48). Respondent's request is based upon the "uncalled witness" or "missing witness" jury charge, which instructs a jury that it may draw an adverse inference predicated upon the failure of a party "to call a witness who would normally be expected to support that party's version of events." *DeVito v. Feliciano*, 22 N.Y.3d 159, 165 (2013). Drawing such an inference has been held appropriate if four "preconditions" are met: (1) the witness's knowledge is material to the trial; (2) the witness is expected to give noncumulative testimony; (3) the witness is under the "control" of the party against whom the charge is sought, so that the witness would be expected to testify in that party's favor; and (4) the witness is available to that party. *Id*. at 165-66.

However, a factfinder is not required to draw an unfavorable inference from "the failure of a party to produce at trial a witness who presumably has evidence that would elucidate the transactions." *See People v. Gonzalez*, 68 N.Y.2d 424, 427-30 (1986); *see also 318 E. 93rd, LLC v. Ward*, 276 A.D.2d 277 (1st Dep't 2000) (noting, in a nonjury trial, the inference that a trier of fact may draw from the failure to call a witness is permissive rather than mandatory). Furthermore, the extent of the inference to be drawn may vary depending on the particular facts of a case, and a negative inference does not relieve a party of its burden of proof on the ultimate issue to be decided. *See Matter of Adam K*., 110 A.D.3d 168, 179 (2d Dep't 2013); *see also See Dep't of Sanitation v. Richins*, OATH Index No. 167/01 (Oct. 15, 2001) (finding that adverse inference could not be used to supply a deficiency in the requesting party's proof or be regarded as proof of an essential fact).

Although Ms. Danielson has knowledge material to the matter, I see no need to apply an adverse inference upon petitioner's decision not to call Ms. Danielson as a witness since there is nothing in the record to suggest that her testimony would not be a recital of the information contained her notarized letter. *Dep't of Consumer & Worker Protection v. Judson Management Group, Inc. and Baker Artists, LLC*, OATH Index No. 32/20 at 26 (Apr. 20, 2022), *adopted*,

Comm'r Dec. (June 30, 2022) (ALJ declined to draw adverse inference for failing to call two witnesses who "were knowledgeable about material issues," after inferring that their testimony would not have added to petitioner's case). Respondent disputes the portions of the letter pertaining to her application for leave and responses to the Facility's AWOL letters. Respondent testified that she did in fact submit requests for leave within the timeframe noted in the AWOL letters and submitted documentation to corroborate her testimony. Since respondent has had an opportunity to present testimonial and documentary evidence in support of her position, the facts at issue will be resolved by careful consideration and weighing of the credible evidence submitted by the parties.

Respondent does not dispute that she has not returned to work since February 17, 2022. According to respondent, she can no longer perform her work duties because of injuries she sustained in a car accident nine years ago, which have worsened over time (Tr. 28). Respondent testified that on February 15, 2022, while drawing blood from a patient, she experienced spasms related to her injuries. The incident led to her physician's recommendation that she stop working (*Id.*).

On February 16, 2022, respondent submitted a request for leave pursuant to the Family Medical Leave Act[1] ("FMLA") to Gotham (Resp. Ex. A). In section 3 of the FMLA request form, the word "Permanent" is noted as the total amount of time respondent would be away from work (Resp. Ex. A at 1). On March 3, 2022, respondent received an e-mail from Wilherne Benjamin, Intake Coordinator for Leave Administration in HHC's Human Resources department (Resp. Ex. D). The e-mail informed respondent that her request for leave could not be reviewed until she submitted a completed "SR-71 Request for FMLA, Child Care, and Military Leave" and "Medical Certification" completed by her healthcare provider. Respondent testified that she submitted both forms on March 8, 2022 (Tr. 42-43, Resp. Ex. A). In respondent's *Certification of Health Care Provider for Employee's Serious Health Condition* form, respondent's physician certified that respondent suffered from medical conditions which render her "unable" to work (Resp. Ex. A at 6).[2] The document is dated March 8, 2022 and is signed by respondent's physician (*Id.*).

[1] The Family Medical Leave Act entitles an eligible employee to a total of 12 workweeks of leave during any 12-month period for several reasons including "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USC 2612(a)(1).

[2] Respondent also submitted a letter dated February 17, 2022 written by her physician to the Facility advising of respondent's medical condition (Resp. Ex. B).

Respondent testified that the Facility informed her that her request for FMLA could not be reviewed because the request indicated a permanent leave of absence:

> The only response I get is, again, 'Your doctor cannot put you out permanently. He has to put a date.'

(Tr. 38).

Respondent testified that in addition to applying for FMLA leave, she attempted to reach management at the Facility to inform them that she was no longer able to work. Respondent stated that she called and sent emails to several members of management, although she could not provide any details as to with whom she spoke or when:

> Q: Okay. And how did you alert your employer?
>
> A: I called. I called every -- it seems to me, everybody was passing a bucket. Nobody knew nothing. I spoke to people more than once. So what I did, I sent out emails to, like, five different people. I sent them emails . . . I went to Staples and sent out emails . . . .

(Tr. 32). When asked to name the five people she messaged she testified the following:

> Q: And Ms. Alston-Harris, to your recollection, you say that you spoke with, you know, five or six people. Can you just tell us who those people were and their department, to your knowledge?
>
> A: I spoke to -- I can't remember everyone's name, but I did speak to someone from Gotham. I did speak to a young lady from -- she said she was from the HR department. I spoke to someone from -- I know I spoke to, like, two men and two women.
> I can't -- if I had the paper -- I can't remember their names . . . .

(Tr. 35). She further testified that starting February 16, 2022, until August 2022, she called daily to inform her superiors that she would be absent (Tr. 38). Respondent explained that the procedure for calling out from work required a phone call at least two hours prior to the start of her shift (*Id.*). Respondent testified that her calls were never answered by anyone at the Facility. Instead, a messaging service was put in place to receive the calls. Respondent testified that she left a message every time she called (Tr. 39). She never received a call back from anyone at the Facility.

In addition to applying for FMLA leave, respondent testified that she applied for disability retirement with the New York City Employees' Retirement System ("NYCERS") on October 5, 2022 (Tr. 41). Respondent's application for disability retirement notes much of the same information contained in her application for FMLA leave. Respondent answered in the affirmative

when asked whether she "feels that she is totally and permanently disabled from performing the usual duties" of her job (Resp. Ex. C at 13). She listed "2/16/22" as her last day at work (*Id*.). Respondent also listed the names of the physicians that either had provided or were providing treatment at the time. Respondent indicated that she had filed for Social Security Disability Benefits (*Id.* at 14).

In closing, respondent's counsel argued that petitioner's pursuit of disciplinary action against respondent for her absences is a violation of the City's Human Rights Law (Tr. 50). Counsel's argument is misplaced. Termination for time and leave violations has been found in violation of the New York State Human Rights Law where there is a causal link between the time and leave violations and a disability, and the employee *demonstrated rehabilitation* at the time of disciplinary action. *See McEniry v. Landi*, 84 N.Y.2d 554 (1994) (termination for alcoholism-related absences violated the Human Rights Law because a causal link between the employee's absences and his alcoholism was established, and the employer failed to show that the employee was incapable of performing the duties of his job at the time of actual termination); *Dep't of Correction v. A.S.*, OATH Index No. 2448/09 at 25-30 (Sept. 30, 2009) (finding termination of a correction officer improper where the misconduct was caused by his disability, which had been abated and no longer hindered him from satisfactorily performing his work duties).

There is no dispute that respondent's conduct is the result of a disability. It is also undisputed that unlike the plaintiff in *McEniry* and the respondent in *Dep't of Correction v. A.S.*, respondent is incapable of performing her job duties with no chance that her condition may change at any point in the future. Therefore, termination of respondent from her employment is not prohibited by Human Rights Law.

At closing respondent's counsel made an application to have the matter converted to a proceeding under section 72 of the Civil Service Law.[3] In support of his application, counsel cited *Dep't of Environmental Protection v. D'Amore*, OATH Index No. 1307/17 (May 4, 2017), *rejected*, Comm'r Dec. (May 4, 2018). Counsel's reliance on *D'Amore* here is misplaced.[4] As ALJ Zorgniotti noted, it is well settled that a government agency may choose to bring disciplinary

[3] Section 72 of the Civil Service Law provides an employee who is unable to work due to a disability resulting from an injury other than an occupational injury a leave of absence and reinstatement within one year of commencement of such leave of absence, upon showing that the employee is fit to perform the duties of their position.

[4] This tribunal acknowledges that *D'Amore* may be instructive under different circumstances than those present here.

charges for time-and-leave violations, rather than a disability proceeding, even when the misconduct is caused by a disability. *D'Amore*, OATH 1307/17 at 5. ALJ recommended that the charges of incompetence be dismissed, and she did not resolve the issue of whether to convert the matter to a disability proceeding. *Id.* at 9.

Section 75 of the Civil Service Law allows an employer to discipline an employee for misconduct or incompetence "after a hearing upon stated charges." Civ. Serv. Law § 75(1) (Lexis 2023). To prove misconduct at trial, the employer bears the burden of demonstrating fault on the employee's part and either that he acted willfully or intentionally. *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969).

Petitioner has met its burden in establishing that respondent has been absent without leave since February 17, 2022. Although I credit most of respondent's testimony, respondent did not supply a defense to the charge. *See Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). I find that respondent did inform her department of her disability by letter signed by her physician although respondent could not recall to whom the letter was sent. Respondent also submitted an application for FMLA leave but was ultimately denied review of her application because of respondent's request for permanent leave. Respondent admitted that she was made aware of that defect in her application but proceeded not to report to duty. In lieu of reporting for duty, respondent called her department each day to inform them that she was not going to report. Submitting forms requesting leave pursuant to FMLA, and calling her department every day, did not excuse respondent from reporting to duty. Both AWOL letters advised that "in addition to notifying your Department Supervisor, you must also have authorization or approval from your employer to be absent." The AWOL letters further advised that "failure to report to duty, absent an authorized or approved leave of absence, may lead to administrative or disciplinary action" (Pet. Ex. 2, Attachments "A", "B"). Respondent never received approval to be absent.

Respondent's own admission and the credible evidence establish that she has been continuously absent from work since February 17, 2022; respondent never received authorization or approval for her absence; respondent was advised of her AWOL status by letter on two occasions; and she was advised that her FMLA application could not be reviewed because "permanent" leave was not an appropriate request under FMLA. Moreover, the credible evidence shows that respondent's absence has had a significant adverse effect on the Facility's efficiency

and operations, which in turn negatively impacts the ability to provide optimal patient care. Thus, the charge should be sustained.

FINDINGS AND CONCLUSIONS

1. Respondent has been continuously absent without leave from February 17, 2022, to the present.

RECOMMENDATION

Petitioner seeks termination of respondent's employment based on her continuous absence without authorization. Respondent has been absent without authorization since February 17, 2022. Although no disciplinary history is noted, the period she has been absent from her employment without authorization warrants termination. *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Jimenez*, OATH Index No. 2039/21 at 4 (Sept. 8, 2021) *adopted*, CEO Dec. (Oct. 8, 2021); *Health and Hospitals Corp. (Jacobi Medical Ctr.) v. L.V.*, OATH Index No. 1667/20 (July 29, 2020).

Orlando Rodriguez
Administrative Law Judge

January 16, 2024

SUBMITTED TO:

MICHELLE LEWIS
Chief Executive Officer

APPEARANCES:

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