IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John P. Yanoshik, Petitioner	:	
v.	:	No. 1356 C.D. 2010
	:	Submitted: December 3, 2010
State Civil Service Commission (State Correctional Institute at Mercer, Department of Corrections), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** May 19, 2011

Petitioner John Yanoshik (Yanoshik) petitions for review of an order of the State Civil Service Commission (Commission). The Commission dismissed Yanoshik's appeal from the action of the Pennsylvania Department of Corrections (Employer), removing Yanoshik from his probationary employment as a Corrections Electronic Trades Instructor. We affirm.

The record and the Commission's adjudication provide the following factual and procedural background. In October 2007, Employer notified Yanoshik by letter indicating that Employer had conditionally approved him for appointment to a newly created position for Corrections Electronic Trades Instructor at the State Regional Correctional Facility at Mercer (SRCF). (Commission Adjudication

(C.A.), Finding of Fact (F.F.) 8.) The notification also stated that Yanoshik would have to pass a medical examination and background check. (*Id*.) Yanoshik advised Employer that because of a medical problem he would not be able to accept the offer at that time. (C.A., F.F. 9.) Employer left the position open for four months. (C.A., F.F. 12.) Yanoshik's physician ultimately cleared him to work. In February, Employer again offered Yanoshik the position. By letter dated February 13, 2008, Employer appointed Yanoshik to the vacant position with an effective/starting date of February 19, 2008. (C.A., F.F. 13; Yanoshik Ex. 2.)

For persons such as contractors and others performing work at a State Correctional Facility (SCF), Employer requires persons to be escorted if they are in various locations in the SCF where they may come into contact with prisoners. (C.A., F.F. 4.) Corrections Electronic Trades Instructors provide training to inmates relating to the installation and maintenance of electronic systems in SCFs, and Instructors are responsible regarding the care, custody, and control of inmate work crews they supervise. (C.A., F.F. 7.) Employer requires probationary Electronic Trades Instructors such as Yanoshik, as a prerequisite to permanent employment, to complete a training program. (C.A., F.F. 10, 11.) Employer conducts the training program in Elizabethtown for Instructors, and the program lasts approximately four weeks. (C.A., F.F. 10.) Employer will not entrust to an Instructor the care, custody, and control of inmates, or permit an Instructor to be with inmates without an escort, until an Instructor completes the basic training course. (C.A., F.F. 11.)

Employer, at some point during February 2008, but before the effective/start date of Yanoshik's employment, asked Yanoshik if he could begin the basic training course the week before his effective/start date. (C.A., F.F. 14;

Certified Record (C.R.), Notes of Testimony (N.T.) at 120-21.) Yanoshik told Employer that he could not begin the training course at that time. (C.A., F.F. 14.) On February 19, 2008, Employer provided Yanoshik with a document entitled "Conditions of Employment," through which a newly hired Instructor agrees to attend the training course. (C.A., F.F. 15.) In March 2008, Yanoshik submitted to Employer a memorandum dated March 4, 2008, prepared by his physician, in which his physician requested that because of Yanoshik's medical conditions, Employer not require Yanoshik to attend training at that time. (C.A., F.F. 16; Yanoshik Ex. 3.) The physician requested that Employer not send Yanoshik for training "for at least 2 more months, until such time as I can re-evaluate his condition." (*Id*.)

On or about March 13, Employer sent a memorandum to Yanoshik directing him to report to SRCF on Sunday, March 16, 2008, in order for Employer to transport Yanoshik to Elizabethtown for training. (C.A., F.F. 17; Yanoshik Ex. 4.) Yanoshik met with SRCF's Deputy Superintendent for Facilities Management, Michael Mahlmeister, on March 14, 2008, during which meeting, Mahlmeister advised Yanoshik that if he did not attend the training, Employer would regard that action as a failure to obey a direct order. (C.A., F.F. 18.) Employer conducted a pre-disciplinary conference (PDC) on March 17, 2008, during which Employer asked Yanoshik when he would be able to attend a training session. (C.A., F.F. 19, 20.) Yanoshik could not provide Employer with a specific date upon which he could attend training. (C.A., F.F. 20.)

Based upon Yanoshik's failure to attempt to take and complete the required training, during the period of his probationary employment, Employer could not leave inmates in Yanoshik's care, custody, or control, and Yanoshik

could not instruct inmates or direct inmate work crews. (C.A., F.F. 21.) On March 19, 2008, Employer sent a letter to Yanoshik informing him that Employer was removing Yanoshik from probationary status, effective March 17, 2008. (C.A., F.F. 1.) In the letter, Employer provided the following reasons for dismissing Yanoshik:

> Specifically, on March 13, 2008, you were given documentation to attend mandatory training . . . as a condition of your employment. You indicated that you were unable to comply. On March 14, 2008, you refused to comply with a direct order given to you by the Deputy . . . to report to basic training classes . . . Your disregard for [Employer]'s Code of Ethics, and Condition of Employment is unacceptable. Any one of these violations alone constitutes grounds for termination.

(C.A., F.F. 2; Employer Ex. A.)

Yanoshik filed an appeal with the Commission under Section 951(b) of the Civil Service Act (Act),[1] asserting that Employer had acted in a discriminatory manner in terminating his employment in violation of Section 905.1 of the Act.[2] The Commission concluded that Yanoshik failed to sustain his burden under the Act, summarizing its conclusion as follows: "[W]hen confronted with a probationary employee who could not attend required basic training for an unknown period of time, the appointing authority acted reasonably by terminating his probationary employment so that the position could be offered to someone who

[1] Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. § 741.951(b).

[2] Added by the Act of August 27, 1963, P.L. 1257, 71 P.S. § 741.905a.

was immediately ready to fully perform the requirements of the job and whose job performance could be properly evaluated."[3] (C.A. at 23.)

Yanoshik petitioned for review before this Court,[4] raising the following issues:

> 1. Whether the Commission erred in its analysis regarding the manner by which Employers must seek to make accommodations under the Americans With Disabilities Act (ADA),[5] the Pennsylvania Human Relations Act,[6] and Employer's own policies, before terminating Yanoshik?
>
> 2. Whether the Commission erred in concluding that Employer had not failed to comply with its own policies and procedures regarding Yanoshik's desire to defer his required attendance and completion of his training program?
>
> 3. Whether the Commission erred by refusing to grant Yanoshik's request to re-open the record to permit the submission of evidence relating to an adjudication of the United States Equal Employment Opportunity Commission?

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[3] The Commission also indicated that, although Employer may have unreasonably equated Yanoshik's action in refusing to attend training as insubordinate (and consequently a violation of Section B-9 of Employer's Code of Ethics), Employer "correctly assessed [Yanoshik's] actions as contrary to his duty to undertake mandated training," which violated Section B-16 of the Code of Ethics and a Condition of Employment. (C.A. at 22.)

[4] Our standard of review of an order of the Commission is limited to considering whether substantial evidence supports necessary factual findings, and whether the Commission committed errors of law or violated any of Yanoshik's constitutional rights. 2 Pa. C.S. § 704.

[5] 42 U.S.C. §§ 12101 – 12213.

[6] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§ 951-963.

Applicable Standards Under Section 905.1 of the Act

When a probationary employee seeks to appeal an employer's termination of employment, such employees may only pursue relief under Section 905.1 of the Act, which prohibits an employer from terminating a probationary employee on discriminatory grounds. *Pronko v. Dep't of Revenue*, 539 A.2d 456, 461 (Pa. Cmwlth. 1988). Section 905.1 of the Act provides as follows:

> No officer or employe of the Commonwealth shall discriminate against any person in . . . appointment [or] retention . . . with respect to the classified service because of . . . race, national origin or other non-merit factors.

The Courts have identified two distinct types of discrimination that can form the basis for reversing an employment action such as termination of a probationary employee—traditional discrimination (*e.g.*, race, gender, or "non-merit" based factors) and technical discrimination, which may arise when an employer violates procedures the Act directs employers to follow. *Pronko*, 539 A.2d at 461. In this case, Yanoshik asserted discrimination of the former variety, namely traditional discrimination.

When an employee brings a claim under Section 905.1 of the Act, the employee bears the initial burden of demonstrating a prima facie case of discrimination. *Sebastiani v. Dep't of Transp.*, 462 A.2d 942 (Pa. Cmwlth. 1983). In order to establish a prima facie case of traditional discrimination, an employee must prove that his employer's decision to terminate was more likely based on a non-merit factor than any merit-based factor suggested by the employer. *Allegheny Housing Rehabilitation Corp. v. Pa. Human Relations Comm'n*, 516 Pa. 124, 131, 532 A.2d 315, 319 (1987) (*Allegheny Housing*).

Because Yanoshik's claim is based primarily upon his assertions that Employer failed to comply with the ADA, this Court's decision in *Allen v. State Civil Service Commission*, 992 A.2d 924 (Pa. Cmwlth. 2010), is particularly instructive. In *Allen*, we considered the question of whether a terminated employee who alleged discrimination based on race and disability had pleaded sufficient facts to establish a prima facie case. The Court initially observed that "[t]he jurisprudence regarding disability discrimination can be found in the Americans With Disabilities Act (ADA) and the Pennsylvania Human Relations Act." *Id*. at 931 (footnotes and citations omitted). The Court commented that, when a person with a disability

> wants and/or needs a reasonable accommodation to successfully perform a job, one must first have disability, one must then inform the employer of the existence of the disability, and to the extent that one wants/needs a reasonable accommodation related to the disability, one should request a reasonable accommodation. Thereafter, with the assistance of the employer, one must decide what would be a reasonable accommodation under the circumstances.

Id. The Court referred to the language of the ADA, quoting Section 12112(b) of the ADA, which makes clear that the term "discrimination" includes the failure to provide a reasonable accommodation for a person's known physical or mental limitations unless the entity from which an accommodation is otherwise required can demonstrate that the provision of an "accommodation would impose an undue hardship on the operation of the business." *Id*. at 931-32. Thus, discrimination in the context of a disability under the ADA consists of both "adverse actions" of an employer "motivated by prejudice or fears of disabilities" and the failure "to make reasonable accommodations" for an individual's disabilities. *Id*. at 932. A party asserting a claim of a violation of the ADA must communicate sufficiently clearly

to an employer such that an employer knows of the disability and an individual's desire for an accommodation. *Id*. (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)).

In *Allen*, the Court concluded that the petitioner, who had only indicated to her employer that she could not perform certain tests in its training program because she felt ill, had failed to inform her employer that she had a disability. Further, the Court viewed the employer's offer to the petitioner to permit her to retake the test, and the petitioner's response "Okay," as an agreement to an accommodation. The Court concluded that the petitioner failed to demonstrate that the employer had not offered a reasonable accommodation. *Id*. at 932-33.

Yanoshik first argues that the Commission erred by failing to evaluate the question of whether Employer engaged in the "interactive process" the ADA requires when an employer is aware (or should be aware) of an employee's disability.[7] The ADA, thus, anticipates that when an employee communicates the fact that he has a disability and that he would like the employer to provide an accommodation for the disability, the parties must engage in an active colloquy in order to try to arrive at a reasonable accommodation. *Id*.

Although Yanoshik may be correct regarding the accommodation requirements contained in the ADA, we believe that Yanoshik misconstrues the

[7] 29 C.F.R. § 1630.2(o)(3) provides as follows: "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations."

analysis in which the Commission engaged. In this case, the Commission concluded that Yanoshik had presented a prima facie case of discrimination, reasoning that "(1) . . . [Employer] did not treat [Yanoshik's] request as an ADA-based request for accommodation; and (2) . . . [Employer] had the power to allow [Yanoshik] more time (up to ninety days) to complete the required training." Commission's Decision at 20. Thus, the Commission apparently agreed with Yanoshik that Employer had failed to comply with the ADA. Consequently, the Commission concluded that Yanoshik established a prima facie case based upon the fact that he adequately informed Employer regarding his disability and his desire for an accommodation and that Employer had engaged in discrimination because Employer did not offer an accommodation. Although this Court in *Allen* accepted the notion that an act that is discriminatory under the ADA may support a finding of discrimination under the Act, the analysis developed under the Act nevertheless applies, and we must review the Commission's decision to determine whether the Commission correctly concluded that a *merit*-based reason supported Employer's action.

As the Commission noted, once Yanoshik established a prima facie case of discrimination, the burden shifted to Employer to demonstrate that it had a legitimate merit-based reason to terminate Yanoshik's employment. *Allegheny Housing*, 516 Pa. at 131, 532 A.2d at 319. If an employer can establish that it had a merit-based reason to terminate an employee, the Commission's role is to evaluate the evidence of the alleged discrimination and the employer's alleged merit-based explanation for termination, and, thereafter, to decide whether to accept the offered merit-based explanation over the employee's claim that the real reason for termination was discriminatory. *Id*. Although the burdens may shift in

the Commission's review of the evidence, a probationary employee bears a continued burden of persuasion, and, consequently, must also demonstrate to the Commission that an employer's asserted merit-based explanation is pretextual. *Dep't of Health v. Nwogwugwu*, 594 A.2d 847, 850 (Pa. Cmwlth. 1991) ("Once the prima facie case is rebutted, the presumption of discrimination drops from the case. The complainant, who retains the burden of persuasion throughout must then demonstrate, by a preponderance of the evidence, that the proffered merit reason for dismissal is merely a pretext.").

In this case, the Commission observed that, at the time Employer terminated Yanoshik, Yanoshik had indicated that he could not provide Employer with a date by which he might be able to take the training course.[8] Yanoshik's response left Employer uncertain not only as to a date by which Yanoshik might be able to comply with the training requirement, but also left Employer uncertain as whether Yanoshik could ever comply with the requirement. The Commission apparently concluded that Employer acted reasonably in terminating an employee who could not provide even a guess as to when he could satisfy the training requirement of the position for which employer hired him. Yanoshik provides no response to the Commission's reasoning other than to raise the ADA as a prospect

[8] Yanoshik testified that he told Employer during the PDC that "I just want to hold it a little while because of my health and I want to wait for my doctors to tell me the right time to get me there." (Reproduced Record (R.R.) at 210a.) Yanoshik also offered the testimony of Ronald Lewis, who works for Employer as a corrections officer and is a union representative for his collective bargaining unit. Lewis accompanied Yanoshik to the PDC. Lewis testified that Yanoshik, in response to questions Employer posed regarding when he would be able to attend training, stated that "he could not attend right now due to his medical condition. And he was unaware of when he would be able to be attending and he needed to be able to somehow delay the training." Lewis stated that Yanoshik also testified that Yanoshik indicated that he had no idea when he could go to training. (R.R. at 257-58.)

of overarching significance, despite the Commission's conclusion that Employer had non-pretextual, merit-based reason to terminate Yanoshik. Yanoshik does not argue that the Commission erred in concluding that the merit-based reason the Commission accepted—Yanoshik's indefinite inability to perform all of the duties of his job (albeit an inability that was related to his disability)—is actually a non-merit basis by virtue of the underlying cause of Yanoshik's inability to perform his duties—his disability.

In summary, although Yanoshik established a prima facie case of discrimination, Employer offered credible evidence that the reason it terminated Yanoshik was not because Employer feared or had feelings of prejudice toward Yanoshik based upon his disability. Rather, the Commission accepted as a more persuasive, and non-pretextual, reason, Employer's evidence that retaining someone who could not perform his duties and could not indicate whether or when he would ever be able to complete a necessary prerequisite for his job created an undue burden for Employer.[9]

[9] Yanoshik also argues that the Commission erred by concluding that Employer did not apply its own policies regarding Yanoshik's inability to attend the training program. In support of this argument, Yanoshik relies upon Management Directive 205.25 and a provision of the Human Resources and Labor Relations Procedures Manual, identified as 4.1.1, Section 25 (Manual), which appear to relate to the Commonwealth's duties under the ADA to provide a reasonable accommodation to an employee with a disability. Yanoshik has failed to provide any specific discussion regarding the Manual, other than indicating in the heading of his argument that this provision relates to accommodations. Further, as indicated above, the Commission accepted Yanoshik's contention that Employer had engaged in discrimination based upon its imputed knowledge of Yanoshik's disability and Employer's failure to provide an accommodation. Thus, because this argument essentially relates to Yanoshik's claim that Employer's conduct was discriminatory, we need not further address Yanoshik's ADA/accommodation-related arguments.

Yanoshik's final argument is that the Commission erred by refusing to re-open the record in order to admit a copy of a decision the federal Equal Employment Opportunity Commission (EEOC) issued relating to the facts in this case.[10] Yanoshik argues that the EEOC's decision would have informed the Commission as to how to approach the discrimination-related question of whether Employer failed to engage in the ADA's "interactive process" necessary for seeking to accommodate a person with a disability. Yanoshik argues that the Commission's fundamental error was to confine its analysis to the Act rather than by sole reference to the ADA. As noted above, however, the Commission did consider Employer's failure to engage in a process to reach an accommodation. The Commission apparently found that aspect of the case significant when it determined that Yanoshik had made out a prima facie case of discrimination. Further, the apparent focus of Yanoshik's reason to submit the EEOC's decision was simply to provide the Commission with the benefit of the EEOC's reasoning with regard to the application of the federal law. We note also that Employer has the right to appeal the EEOC's decision and, thus, there is the possibility that the EEOC decision could ultimately have no authority. For these reason, we cannot agree with Yanoshik that the Commission erred as a matter of law in refusing to open the record.

As indicated above, an individual asserting that an employer terminated his employment for discriminatory reasons, must demonstrate that the employer terminated the employment for non-merit based reasons, and must

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[10] Yanoshik improperly included a copy of this determination in his Reproduced Record. (R.R. at 421a.) The EEOC "Area Director" determined in this decision that Employer violated the ADA by failing to engage in the "interactive process." (R.R. at 423a.)

establish that the employer treated him differently from other similarly situated individuals. In this case, Employer persuaded the Commission that the reason Employer provided for terminating Yanoshik was not a pretext. Consequently, we affirm the Commission's order.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 19th day of May, 2011, the order of the State Civil Service Commission is AFFIRMED.

P. KEVIN BROBSON, Judge