IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. William J. Johnston,	:	
Relator,	:	
v.	:	No. 03AP-824
State of Ohio Employment Relations Board,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on June 3, 2004

James R. Greene & Associates, *James R. Greene, III,* and *Valerie L. Colbert*, for relator.

Jim Petro, Attorney General, and *Walter J. McNamara, IV*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, William J. Johnston, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, State of Ohio Employment

Relations Board ("SERB"), to vacate its dismissal of relator's unfair labor practice ("ULP") charge he filed against Greater Dayton Regional Transit Authority ("employer"), on grounds that there was no probable cause to find that the employer violated R.C. 4117.11(A)(1), (3), and (4) by transferring relator back to his former position of employment without providing adequate training or sufficient time to demonstrate his competency in retaliation for previously filing a ULP charge against the employer.

{¶2} The matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. On January 26, 2004, the magistrate issued a decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.) Relator has filed objections to the magistrate's decision.

{¶3} Relator asserts two objections to the magistrate's decision: (1) the magistrate erred in finding that the collective bargaining agreement did not require the employer to keep a transferred employee in a new job for a probationary period of six months before the employer could return the employee to his former position; and (2) the magistrate erred in depending upon 19 unfavorable evaluations from three of relator's supervisors in denying his ULP claim because such evaluations do not address his contention that he was inadequately trained for the new position or given the opportunity to demonstrate his competency. With regard to the first objection, relator presents no new arguments as to why the magistrate's interpretation was erroneous. After a review of the collective bargaining agreement, SERB's decision, and the magistrate's decision, we agree with the magistrate's analysis and reasoning and see no ambiguity in the language of the agreement.

{¶4} With regard to relator's second objection, we find relator's contention unconvincing. The 19 negative evaluations from three different supervisors evinces that the supervisors were observing relator's progress and his competency. Further, in many of the evaluations it is specifically stated that relator had been previously trained in the areas in which he showed deficiencies and reported various training programs in which relator participated. The evaluations also specifically document the repeated opportunities given to relator to participate in additional training to achieve an acceptable level of aptitude despite consistently poor competency evaluations. Also, not all of relator's noted deficiencies could be attributed to a lack of training. The supervisors consistently reported relator had problems retaining information, lacked cooperation with co-workers, struggled with heavy tools, demonstrated a lack of desire to obtain proficiency, and falsified work orders. For these reasons, relator's second objection is without merit.

{¶5} After an examination of the magistrate's decision, an independent review of the record, pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule the objections and find that the magistrate sufficiently discussed and determined the issues raised. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, and deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BOWMAN and SADLER, JJ., concur.

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APPENDIX A

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Relator,	:	
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M A G I S T R A T E ' S D E C I S I O N

Rendered on January 26, 2004

James R. Greene, III & Associates, *James R. Greene, III* and *Valerie L. Colbert*, for relator.

Jim Petro, Attorney General, and *Walter J. McNamara, IV*, for respondent.

IN MANDAMUS

{¶6} Relator, William J. Johnston, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, State of Ohio Employment Relations Board ("SERB"), to vacate its dismissal of relator's unfair labor practice ("ULP")

charge he filed against respondent Greater Dayton Regional Transit Authority ("employer") on grounds that there was no probable cause to find that the employer violated R.C. 4117.11(A)(1), (3), and (4), by transferring relator back to his former position of employment without providing adequate training or sufficient time to demonstrate his competency in retaliation for previously filing a ULP charge against the employer.

Findings of Fact:

{¶7} 1. In March 1999, relator was hired by the employer as a student driver. Eventually, he was promoted to the position of Project Mobility Operator ("PMO") driving buses for disabled and/or handicapped passengers.

{¶8} 2. In January 2002, relator and other co-employees took the National Occupational Competency Testing Institute Technical Skills Test, which is a requirement for the position of service and repair mechanic. Two employees passed the written portion of the test, relator was one of them. After he passed the exam, relator performed poorly during the oral interview and was not offered the promotion.

{¶9} 3. Relator filed a grievance over the matter and, following a Step 3 hearing, it was determined that relator should receive the promotion.

{¶10} 4. On April 4, 2002, relator filed a ULP charge with SERB against the employer alleging that the employer violated R.C. 4117.11(A)(1), (3), and (4), by denying him the promotion to the position of service and repair mechanic in retaliation for a ULP charge he filed against the employer in November 2001 for failure to pay him birthday pay.

{¶11} 5. On April 5, 2002, relator was transferred to the maintenance department as a probationary employee, pursuant to Article II of the Collective Bargaining Agreement ("CBA").

{¶12} 6. In July 2002, SERB dismissed relator's charge with prejudice for lack of probable cause to believe that a ULP had been committed by the employer.

{¶13} 7. Relator worked as a service and repair mechanic under a probationary status from April 2002 through August 5, 2002. During the four months relator spent in the new position, he consistently received very poor ratings from three separate supervisors.

{¶14} 8. As of August 5, 2002, relator was returned to his former position as a PMO.

{¶15} 9. Relator filed a grievance relating to his transfer. Following a Step 3 hearing, a hearing officer denied relator's grievance citing the multiple examples of supervisors' poor evaluations concerning relator's work and their collective estimation that relator lacked the mechanical skills and safety awareness necessary to perform the job. The hearing officer further noted that the employer operated a business in the community which required its employees to possess the highest degree of safety concerns and attentiveness which relator unfortunately lacked.

{¶16} 10. On September 23, 2002, the union withdrew the grievance.

{¶17} 11. On October 23, 2002, relator filed the underlying ULP with SERB.

{¶18} 12. SERB conducted an investigation and, on March 13, 2003, dismissed relator's ULP for lack of probable cause.

{¶19} 13. Relator filed a motion for reconsideration which was denied on June 13, 2003, upon a finding that relator had not demonstrated that the employer violated R.C. 4117.11(A)(1),(3), and (4), by transferring relator back to his former position without providing adequate training or sufficient time to demonstrate his competency in retaliation for relator exercising his guaranteed rights.

{¶20} 14. Thereafter, relator filed the instant mandamus action with this court.

Conclusions of Law:

{¶21} Relator asserts that SERB erred in dismissing his ULP charge and that he is entitled to a writ of mandamus to compel SERB to issue a complaint and conduct a hearing on his charges. R.C. 4117.12(B) requires SERB to issue a complaint and conduct a hearing on an ULP charge if it has probable cause for believing that a violation has occurred:

> When anyone files a charge with the board alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge. If the board has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge. * * *

{¶22} An action in mandamus is the appropriate remedy to obtain judicial review of orders by SERB in dismissing ULP charges for lack of probable cause. See *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.,* 95 Ohio St.3d 533, 2002-Ohio-2839. Mandamus will issue to correct an abuse of discretion by SERB in dismissing ULP charges. An abuse of discretion means that SERB has rendered an unreasonable, arbitrary, or unconscionable decision. Id.

{¶23} Inasmuch as the term "probable cause" is not defined in R.C. Chapter 4117., it must be given its ordinary definition. In *Portage Lakes*, the court stated as follows regarding probable cause determinations:

> Therefore, after construing R.C. 4117.12(B) in accordance with rules of grammar and common usage, we hold that SERB must issue a complaint and conduct a hearing on an unfair labor practice charge if, following an investigation, it has a reasonable ground to believe that an unfair labor practice has occurred.
>
> The role of SERB "in this early stage of the proceeding is most closely analogous to that of a public prosecutor investigating a citizen's complaint of criminal activity. In either case, the decision not to prosecute is discretionary, and not generally subject to judicial review." *Ohio Assn. of Pub. School Employees*, 59 Ohio St.3d at 160 * * *. The issue of probable cause in criminal proceedings is essentially one of fact. See, e.g., *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 153 * * *.
>
> The probable-cause determination by SERB is no different. * * * "In making its determination, SERB will consider not only the evidence that supports the allegations of the charge but also, of course, any information that may rebut the charge or offer a defense to the violation alleged. Issues such as managerial justification, the absence of protected activity by a charging party, or the failure to show any indication of unlawful motivation my be sufficient to secure dismissal of a case even when the facts alleged in the charge have been verified." Id.

Id. at ¶38-40.

{¶24} In a mandamus proceeding, relator must establish an abuse of discretion by SERB in its probable cause determination, and this court should not substitute its judgment for that of SERB. Id. at ¶41.

{¶25} Relator asserts that SERB abused its discretion in dismissing his ULP case for lack of probable cause. Relator claimed that he was transferred back to his former

position as a PMO without being properly trained for the service/repair mechanic position or given the opportunity to demonstrate his competency. Relator argued that the employer did this in retaliation for his having previously filed a ULP charge against the employer in November 2001.

{¶26} Relator argues that the employer committed a ULP in violation of R.C. 4117.11(A)(1), (3), and (4). These statutory provisions provide as follows:

> (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
>
> (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;
>
> * * *
>
> (3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.
>
> (4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code[.]

{¶27} A ULP occurs when an employer takes action regarding an employee which is motivated by antiunion animus. *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485. The motivation behind the employer's decision to take action regarding an employee is therefore the central question that must be resolved in a ULP case. Id. at 494. "Motivation is rarely clear. An employer charged with a ULP will almost always claim that the particular action was taken for sound business reasons,

totally unrelated to the employee's participation in protected activities. * * * Since evidence of the employer's motivation is rarely direct, SERB must rely on a good deal of circumstantial evidence in arriving at its conclusion." Id. at 494-495.

{¶28} The court continued as follows:

> * * * [U]nder the "in part" test to determine the actual motivation of an employer charged with a ULP, the proponent of the charge has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. Where the proponent meets this burden, a prima facie case is created which raises a presumption of antiunion animus. The employer is then given an opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity, to rebut the presumption. SERB then determines, by a preponderance of the evidence, whether a ULP has occurred.

Id. at 499.

{¶29} Furthermore, in order to establish a prima facie case for discrimination, a plaintiff cannot produce mere conclusory allegations of discriminatory conduct; some factual basis for the claims must be set forth. *Chapman v. City of Detroit* (C.A.6, 1986), 808 F.2d 459. The issue of motive on the part of the employer is a question of fact and, as the fact finder, SERB is in the best position to make this determination.

{¶30} In the present case, relator did not provide any evidence to establish his ULP charge. Instead, relator made two assertions: (1) pursuant to the CBA, the employer should have permitted him to be in the service/repair mechanic position for a full six months before determining whether he could competently perform the job duties; and (2) based upon the timing of his "discharge," it is apparent that he was moved back to his PMO job in retaliation. For the following reasons, this magistrate disagrees.

{¶31} The provisions of the union contract at issue provides as follows:

> ARTICLE II – UNION SHOP FOR ALL EMPLOYEES
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> * * *
>
> Section 2 – Probationary Employee
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> A. All new employees shall be on probation for a full period of six (6) calendar months following the date of employment. The probation period for all employees starts with the day they become employed. All new employees subject to the terms of this Agreement shall become members in good standing of the Union at the expiration of thirty (30) calendar days after starting to work.
>
> B. The Union recognizes that the Authority shall have full and exclusive power to control, direct and terminate the employment of all new employees during the probationary period, without being subject to a charge of Agreement violation or the commission of a grievance by reason of such termination or the exercise of such control.
>
> * * *
>
> * * * Present employees will be given the opportunity for advancement by transferring from department to department, provided such employees can qualify without undue penalty to the organization in meeting the requirements of the job. Such a transferred employee will be subject to a probationary period of six (6) calendar months. * * * It is further agreed that the transferring employee shall diligently apply himself/herself to establish his/her competency in the new group to the satisfaction of supervisors and that the Authority will provide him/her with the help and assistance commonly devoted to a new employee entering the group.
>
> Section 5
>
> An employee failing to establish competency within a six (6) month probationary period, will be returned to the previous department and classification subject to the provisions outlined below.

{¶32} Pursuant to the above language, relator asserts that the employer was required to keep him as a probationary employee in the new job into which he transferred for a period of six months before the employer determined that he was not able to meet the demands of the new job. This magistrate disagrees with relator's interpretation. Instead, it is clear that a probationary period lasts for six months. However, pursuant to subsection B of Section 2, the employer specifically retains full and exclusive power to control, direct, and terminate the employment of an employee during the probationary period without being subject to a charge of having violated the CBA. Furthermore, although Section 4 provides that a transferred employee is also subject to a six month probationary period and that the employer is to provide the employee with the help and assistance commonly devoted to a new employee entering the group, Section 5 provides that any employee failing to establish competency within a six month probationary period will be returned to the previous department and classification. The CBA simply does not state that the employer was required to keep relator in the new position for a total period of six months. Instead, relator was required to diligently apply himself to establish his competency in the new group to the satisfaction of his supervisors while the employer was to provide him with the help and assistance commonly devoted to a new employee in order to learn that job. The record is repleat with 19 separate evaluations from three different supervisors detailing relator's lack of competency in the new job. Inasmuch as relator presented no evidence to refute all these negative evaluations, this magistrate finds that SERB did not abuse its discretion in dismissing the ULP charge based upon a finding of no probable cause.

{¶33} Based on the foregoing, It is this magistrate's decision that relator has not demonstrated that SERB abused its discretion in dismissing his ULP charge on the basis of no probable cause and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE