IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Game Commission, Petitioner	:	
v.	:	
State Civil Service Commission (Campbell), Respondent	:	No. 2308 C.D. 2007
	:	Submitted: April 11, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE COLINS FILED: May 7, 2008

The Pennsylvania Game Commission (Employer) petitions for review of an order of the State Civil Service Commission (Commission) that sustained the appeal of Glen Campbell (Employee) from a Level-One Alternative Discipline in Lieu of a three-day suspension action and directed Employer to expunge the action from Employee's record.

The facts as found by the Commission can be summarized as follows. Employee worked for Employer as a Wildlife Conservation Officer in its Southeast Region. On June 2, 2005 Employer suspended Employee for three days for an allegedly untruthful statement he made to a supervisor to the effect that he had participated in a work-related event scheduled in his district. Employee appealed that suspension and the Commission, in a December 2005 order, granted his appeal after concluding that Employer had not sustained its burden to prove the charges.

Following that proceeding, in January 2006, Douglas Killough, Employer's Wildlife Region Director for its Southeast Region, Employee's second-level supervisor,[1] who reviewed Employee's performance reviews, met with Employee for a discussion that included Mike Beahm, the Federal Aid Supervisor.

The Commission made the following factual finding concerning dialogue that occurred during that meeting:

> Killough did most of the talking during the meeting, and told [Employee] that 'he didn't win that [prior] case,' appellant 'got one over on the Game Commission,' that 'this isn't over' and Killough's trust in appellant and the supervisors 'is about this much,' which was stated while Killough held his fingers approximately an inch apart.

Employee received an interim performance review on October 31, 2006 that rated his work as unsatisfactory for the following aspects of his performance: work performance, communications, interpersonal relations/equal employment opportunity, work habits, and supervision/management. He received a rating of satisfactory for his knowledge and skills, and a rating of "needs improvement" for initiative/problem solving. An attachment to the performance review included detailed directions for Employee to follow to improve his performance. These instructions included items that required him to write daily activity reports in a more detailed manner and to meet once every two weeks with his immediate supervisor to evaluate Employee's progress toward performance improvement.

On November 1, 2006, Employer's Personnel Chief and Human Resource Director wrote to Employee notifying him that, because of the

[1] Employee's immediate Supervisor is Charles Lincoln, who performed the duty of writing Employee's "employee performance reviews."

unsatisfactory performance review, Employer would be closely monitoring Employee's performance over a ninety-day period, with an informal evaluation to occur approximately half-way through that ninety-day period. Employer received his interim performance review on February 22, 2007 indicating that his overall rating was unsatisfactory, with that denotation for the following aspects of his work: work results and supervision/management. He received a satisfactory rating again for job knowledge skills, and a "needs improvement" rating for: communications, initiative/problem solving, interpersonal relation/equal employment opportunity, and work habits. The interim review also included an attachment with similar conditions to those included in the October review and also directed that Employee should conduct monthly training meetings with deputy wildlife conservation officers.

Although Employer's policy requires Wildlife Conservation Officers, such as Employee, to conduct deputy training sessions six times per year, and although the above-noted interim review directed Employee to hold one session each month during the ensuing three-month period, Employee conducted only one session during that time.

Killough sent a letter to Employee on March 1, 2007, reprimanding Employee for the unsatisfactory interim performance rating he received on February 22. Employer also rated Employee's overall performance for the period from February through May 2007 as unsatisfactory. Based upon this last performance review, Employer issued the Level-One Alternative Discipline in Lieu of Suspension action.

The Commission noted that Employer had directed Employee to contact the dispatch office each day to inform it of the time Employee would start

work the next day and to call the office the next day when he actually started working, so that Employer would know if Employee was starting work when he had indicated he would. The Commission found that:

> 40. During the time period from March 2006 through May 2007, appellant submitted his reports, including biweekly time and activity reports late; submitted inconsistent reports; was difficult to contact or did not respond when people attempted to contact him by radio or phone; and failed to report his current activities to the dispatch while on duty.
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> 41. [Employee] was required to submit his work schedule for the time period of May 15 through June 2007 to Lincoln by March 26. [Employee] did not submit the schedule to Lincoln until May 23.

Based upon the foregoing findings, and most significantly, the determinations that (1) Killough had indicated his disagreement with the outcome of the Commission's decision regarding Employer's previous imposition of discipline, (2) Killough's statement constituted discrimination in the form of retaliation, and (3) the similarity between the subject discipline in this case and the discipline imposed in the earlier case, i.e., the first was a three-day suspension and this one was a Letter in Lieu of a three-day suspension, was no coincidence, the Commission concluded that Employer had discriminated against Employee through retaliatory actions. The Commission reached this conclusion despite its concurrent conclusion that the evidence supported the reality reflected in Employer's evaluation of Employee's work performance as unsatisfactory.

In this appeal, Employer has raised the following issues: (1) whether the Commission's determination that Employer discriminated against Employee based solely upon the statement of Killough is supported by substantial evidence;

(2) whether the Commission's decision is supported by substantial evidence where the Commission also found that Employee's work performance was not satisfactory; and (3) whether the Commission erred as a matter of law by placing the burden on Employer to show the absence of discrimination. In an appeal of a decision of the Civil Service Commission, this Court's standard of review is limited to considering whether substantial evidence supports necessary factual findings, and whether an error of law was committed or a violation of constitutional rights occurred. 2 Pa. C.S. §704.

An employer may impose discipline upon an employee only when just or good cause exists to take such action. *White v. Commonwealth, Department of Corrections*, 532 A.2d 950 (Pa. Cmwlth. 1986). The "appointing authority" (referred to as Employer in this case) bears the burden of proving just cause for the imposition of the disciplinary action. Section 905.1 of the Civil Service Act, Act of August 5, 1941, P.L. 752, added by Section 25 of the Act of August 27, 1963, P.L. 1257, 71 P.S. §741.905.1, provides that "[n]o officer or employe of the Commonwealth shall discriminate against any person in…any…personnel action with respect to classified service because of any…other non-merit factor."

An employer can establish just cause through the submission of evidence showing merit-related conduct such as an employee's failure properly to execute assigned duties or conduct that hampers or frustrates the execution of his duties. The subject conduct should demonstrate some relationship to the employee's ability and competency to perform his duties. *Thompson v. State Civil Service Commission*, 863 A.2d 180, 184 (Pa. Cmwlth. 2004).

However, in cases in which an employee asserts that some form of discrimination, or in this case discrimination in the form of retaliation, is the

underlying reason for the employer's imposition of a disciplinary action, the employee bears the initial burden to show that the employer has acted in a discriminatory manner in its actions toward an employee. This requires an employee to offer a sufficient quantum of evidence, credible to the fact finder, suggesting that discrimination more likely than not occurred.[2]

An employer may respond to this evidence, rebutting the employee's prima facie case, by offering a non-discriminatory explanation for the disciplinary action, thus extinguishing the presumption the employee had created with his evidence of discriminatory motive. The Supreme Court in *Allegheny Housing Rehabilitation Corp.* summarized the appropriate analysis in such situations as follows:

> As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then 'decide which party's explanation of the employer's motivation it believes.' The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does not preponderate to prove discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must 'measure up.'

[2] This Court first adopted this principle in *Henderson v. Office of the Budget*, 560 A.2d 859, 863 (Pa. Cmwlth. 1989) wherein it quoted our Supreme Court's analysis in *Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Commission*, 516 Pa. 124, 131, 532 A.2d 315, 319 (1987). The Court has continued to follow this analysis, most recently in *Moore v. State Civil Service Commission*, 922 A.2d 80, 84-5 (Pa. Cmwlth. 2007).

516 Pa. at 131, 532 A.2d at 319.

This analysis applies to any "traditional discrimination" case. The courts have distinguished between such cases and those involving "technical discrimination." Although a case such as this one does not involve a traditional type of discrimination, i.e., race, gender, or age, it does involve a claim of retaliation based upon non-merit considerations and therefore falls within that class of cases. Accordingly, the Commission's duty was to consider the evidence presented under the *Henderson* standard.

In accordance with that standard, and in light of Employer's assertion that Employee failed to submit substantial evidence in support of such a determination, we will first consider whether Employee has satisfied his burden to establish that Employer engaged in discriminatory conduct.

The Commission, while noting the principle set forth in *Department of Health v. Nwogwugwu*, 594 A.2d 847 (Pa. Cmwlth. 1991), that an employee who claims that a discriminatory motive prompted disciplinary action must also establish that the employer treated him differently than others in the same situation, never addressed this initial question. In that case, the Court stated:

> It is normally incumbent upon a complainant in a disparate treatment case to compare his treatment with others similarly situated in order to prove discrimination…however, respondent introduced no evidence to compare his treatment with that of others similarly situated. These findings, therefore, cannot support a finding of discrimination.

594 A.2d at 851.

The Commission, rather than consider this initial question, simply proceeded to opine that Killough's statement supported a finding of retaliation that consequently supported a conclusion that Employer discriminated against

Employee, without first considering whether Employee submitted evidence comparing Employer's treatment of him to the manner of Employer's treatment of similarly situated employees.

In this case, the Commission accepted Employer's evaluation of Employee's work performance, finding that the reviews indicating Employee's performance was not satisfactory were supported by substantial evidence. The Commission also, while finding Employee's version of the Killough conversation credible, did not find his testimony concerning his work performance credible. Nevertheless, the Commission never engaged in an initial inquiry as to whether Employee had satisfied his burden to show that Employer treated him differently than other employees. Although the record includes the testimony of at least one of Employee's witnesses who stated that he had never heard of Employer imposing certain managerial prerogatives upon other employees, the Commission did not view the additional directives Employer imposed upon Employee as punishment, but only as a means to aid Employee improve his performance, as suggested by Employer. Further, that testimony lacks any comparative qualities pertinent to this case. The witness did not state that he had never seen Employer impose either the additional work requirements or the discipline on another employee who had obtained similarly unsatisfactory performance evaluations. Accordingly, that testimony would not be sufficient or competent to support a finding of discriminatory action.

Hence, the only evidence the Commission relied upon to determine that Employer discriminated was the conversation Killough had with Employee. The substance of that conversation is insufficient to establish that Employer treated Employee differently than other employees.

In this case, Employee offered one incident that could support his claim that Employer imposed the discipline for the purpose of discriminating against him: Killough's statement during his meeting with Employee that Employee "did not win that case" and that "this is not over."

Based upon this conclusion, we believe that Employee had not established a prima facie case of discrimination that necessitated rebuttal from Employer. Accordingly, the Commission was not required to apply the *Henderson* anlaysis, and view the entire body of evidence to determine which side had offered a preponderance of evidence in support of their position. For the same reason, the Commission's impression that the similarity of the discipline Employer imposed to its earlier attempt to discipline Employee has no relevance here: There simply is no evidence connecting that factor to establish discrimination; nothing in the record demonstrates disparate treatment.

We also note and find persuasive Employer's argument that Employee's burden to establish a prima facie case of discrimination required him to establish a causal connection between Employee's protected activity (his challenge to Employer's first disciplinary action) and the subsequent action by Employer to discipline Employee for his unsatisfactory performance.

Employer cites this Court's decision in *Robert Wholley Company Inc. v. Pennsylvania Human Relations Commission,* 606 A.2d 982 (Pa. Cmwlth. 1992) in support of its position that Employee never established a prima facie case of discrimination in the form of retaliation. We recognize that that decision involved analysis under the laws applicable to the Human Relation Commission, whereas this case involves the Civil Service Commission. However, in *Henderson*, a Civil Service Commission decision, this Court adopted the Supreme Court's analysis in a

Human Relations Commission. Because of the similarity in subject matter, the analysis from a Human Relations Commission case provides valued guidance.

In *Robert Wholley*, the Court applied a four prong test to determine whether a petitioner had established the existence of employer retaliation. The Court held that an employee must prove the following:

> (1) that the complainant engaged in a protected activity;
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> (2) that the employer was aware of the protected activity;
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> (3) that after the employee's participation in the activity the employer subjected the employee to an adverse personnel action; and
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> (4) that there is a causal connection between the activity and the personnel action.

606 A.2d at 983.

As Employer notes, Employee's evidence concerning Killough's statement reflects that Employer knew that Employee had engaged in protected activity. However, that evidence alone is insufficient to show that any animus related to Employee's challenge to the first disciplinary action was the reason why Employer imposed discipline upon Employee the second time. We note, in fact, that although Killough reviewed Employee's performance, Employer's personnel officer made the decision to impose the discipline.

Based upon the foregoing, the Court need not address the additional issues Employer has raised, and we reverse the order of the Civil Service Commission.

JAMES GARDNER COLINS, Senior Judge

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ORDER

AND NOW, this 7th day of May 2008, the order of the State Civil Service Commission is reversed.

JAMES GARDNER COLINS, Senior Judge