

P.E.R.C. NO. 2023-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODSTOWN-PILESGROVE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2022-017

LISA QUIRK,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the refusal of the Director of Unfair Practices to issue a complaint on an unfair practice charge filed by Lisa Quirk against the Board. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by terminating her in retaliation for grievances she filed challenging the Board's COVID-19 vaccination and testing policy. Finding that the Board had a legitimate and substantial business reason for terminating the Charging Party due to her non-compliance with the COVID-19 policy, the Commission dismisses the 5.4a(1) charge. As for the 5.4a(3) retaliation claim, the Commission finds that the majority of the grievances did not constitute protected activity but contested her personal situation related to her being placed on unpaid leave for violation of the COVID-19 policy. The Commission finds that even if some of the grievances could constitute protected activity, the Charging Party did not demonstrate a sufficient nexus between such activity and her termination because the Board's decision to terminate her was initiated prior to those grievances.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Parker McCay P.A., attorneys
(Jeffrey P. Catalano, of counsel)

For the Charging Party, (Lisa Quirk, pro se)

DECISION

On June 29, 2022, the Charging Party appealed the June 20, 2022 decision of the Director of Unfair Practices (Director) refusing to issue a complaint on an unfair practice charge she filed on February 14, 2022, amended February 28, 2022, against the Woodstown-Pilesgrove Board of Education (Board). D.U.P. No. 2022-15, 49 NJPER 45 (¶9 2022). The charge alleges that the Board violated subsections 5.4a(1), (3), and (4)^{1/} of the New

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. . . . (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. [and] (4) discharging or
(continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it terminated her employment on November 29, 2021 in retaliation for her filing of grievances on October 28, 2021 challenging the Board's COVID-19 vaccination and testing policy.

We incorporate the Director's findings of fact in D.U.P. No. 2022-15 and summarize the facts as follows. The Charging Party was a non-tenured Spanish teacher employed by the Board and was part of the collective negotiations unit represented by the Woodstown-Pilesgrove Education Association (Association). On August 23, 2021, Governor Murphy signed Executive Order No. 253 (EO 253), which required all preschool through Grade 12 public school district personnel to either be vaccinated against COVID-19 or get tested for COVID-19 at least once per week. EO 253 required all school districts to comply with the vaccination and/or testing requirements by October 18, 2021. On October 18 and 19, 2021, the Charging Party reported to work but was not permitted to enter because she had not complied with EO 253's vaccination or testing requirements. The Board then placed the Charging Party on unpaid leave until such time as she could provide proof of compliance with EO 253. On October 22, 2021, Superintendent Steven Crispin notified the Charging Party that,

1/ (...continued)
otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

at its October 28 meeting, the Board would discuss personnel matters that could impact her employment. On October 27, Crispin decided to recommend the Charging Party's termination upon 30 days notice to the Board at its October 28 meeting. On the morning of October 28, the Charging Party filed six grievances with Crispin.^{2/} All six grievances concern the Board's refusal to allow the Charging Party to return to work absent proof of COVID-19 vaccination or testing pursuant to EO 253. The grievances contest:

- The Charging Party's unpaid leave of absence, allegedly in violation of the collective negotiations agreement (CNA) between the Board and Association;
- The principal's inquiries to the Charging Party on October 18 and 19, 2021 regarding her COVID-19 vaccination and testing status in a "non-private setting" and asking her to leave work, which allegedly was meant to humiliate her in front of students and teachers and attempt to shame her into compliance with the COVID-19 policy;
- The Board's lack of accommodations for the COVID-19 testing mandates for the unvaccinated, allegedly in violation of the Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (NJLAD);
- The Board's failure to provide the Charging Party with religious, philosophical and medical exemptions to its COVID-19 policy and EO 253, which she alleges "potentially

2/ As alleged in the February 14 charge, the Association declined to pursue the grievances because, in their view, the claims were not a "grievable offense" under the Association's collective negotiations agreement. The Association nonetheless provided Quirk with a "grievance form" to pursue her claims against the Board. On February 28, Quirk amended her charge and withdrew her allegations against the Association for not pursuing her grievances.

impacts the employment of all association members" and has not been negotiated.

On October 28, 2021, the Board terminated the Charging Party's employment on 30 days notice for her refusal to undergo COVID-19 testing. On October 29, the Charging Party emailed Crispin, requesting a written statement of reasons for her termination. Crispin responded the same day and stated, in pertinent part: "You are presently not teaching because you have refused to comply with the provisions of Executive Order No. 253, to include, refusing to undergo a COVID-19 test, as required." On November 1 and December 16, 2021, Crispin and the Board afforded the Charging Party an opportunity to be heard on the grievances challenging her termination. Crispin and the Board denied the grievances on November 3 and December 20, 2021.

In D.U.P. No. 2022-15, the Director dismissed the unfair practice charge because he found: the Charging Party's complaints about EO 253 and the Board's COVID-19 policy were personal gripes and not protected activity under the Act; there was no nexus between the Charging Party's termination and her filing of grievances because Crispin had already decided to recommend termination prior to the filing of the grievances; and the Board had a managerial prerogative and substantial business justification for refusing to allow the Charging Party to return to work until she complied with EO 253.

On appeal, the Charging Party asserts that her grievances challenged the Board's COVID-19 policy that allegedly violated her rights and caused her to be terminated. She argues that Crispin recommended her termination to the Board following her October 28 grievances and that the timing of Crispin's October 22 letter notifying her of a potential employment action suggests it was retaliation for her challenges to the COVID-19 policy on October 19, 2021. The Charging Party contends she was terminated not for failing to comply with the COVID-19 policy, but in retaliation for speaking out against the COVID-19 policy.

In response, the Board asserts that the Charging Party's complaints about the COVID-19 policy were not protected activity but were personal gripes about the conditions for her return to work. It argues that there are no facts establishing a nexus between the Charging Party's grievances and her termination because the termination for refusal to comply with the COVID-19 policy was initiated before she filed grievances. The Board contends that the Charging Party had no protected right to her job absent compliance with EO 253 and that the Board had a substantial business justification for precluding employees who fail to comply with the COVID-19 policy from returning to work.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act.

N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. Where no complaint is issued, the charging party may appeal to the Commission, which may sustain the refusal to issue a complaint or may direct that further action be taken. N.J.A.C. 19:14-2.3(b). After a careful review of the parties' submissions, we sustain the Director's decision not to issue a complaint and dismiss the Charging Party's unfair practice charge.

First, we concur with the Director's decision to dismiss the Charging Party's 5.4a(1) claim. An employer violates section 5.4a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); NJ Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The record shows that the Board had a legitimate and substantial business justification for terminating the Charging Party, as she did not comply with the Board's COVID-19 policy that required either vaccination or weekly testing as a condition for returning to work. The Board's termination of the Charging Party for violating its COVID-19 policy was an exercise of its non-negotiable managerial prerogative to implement and enforce a COVID-19 vaccination mandate to protect the health and safety of its employees and the public. City of Newark, 469 N.J. Super.

366, 377, 385 (App. Div. 2021); New Jersey State PBA v. Murphy, 470 N.J. Super. 568, 592 (App. Div. 2022).

We next consider the Charging Party's 5.4a(3) allegation of retaliation for protected conduct. In re Bridgewater Tp., 95 N.J. 235, 240-246 (1984) established that the charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246. An examination of the evidence may reveal that the employer's asserted justification for the adverse action is not supportable, or was not in fact relied upon. When this occurs, the reason advanced by the employer is deemed pretextual. Since no legitimate business reason exists, there is in fact no dual motive. Id. at 241. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. Our analysis of the 5.4a(3) claim begins with determining whether the Charging Party engaged in protected

activity. Protected activity is conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual. North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd, NJPER Supp. 2d 63 (¶45 App. Div. 1979). Protected activity may include individual conduct related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. N.J. Turnpike Auth., P.E.R.C. No. 2022-38, 48 NJPER 393 (¶90 2022); Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 2010-43, 35 NJPER 455 (¶150 2009); State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005). However, mere "personal griping" does not constitute protected concerted activity. 31 NJPER at 279.

Here, the Charging Party's grievances primarily contested her personal situation involving being placed on unpaid leave for not complying with the Board's COVID-19 policy. This conduct was not related to enforcing the CNA or preserving or protesting working conditions of Association employees. Only the grievance alleging violations of the ADA and NJLAD for the Board's alleged lack of accommodations for the unvaccinated could qualify as protected activity. That grievance challenged the Board's COVID-19 policy more broadly concerning the working conditions of all unvaccinated unit employees. Nonetheless, even if some of the

Charging Party's grievance activity could constitute protected conduct, the Charging Party has failed to demonstrate a sufficient nexus between such activity and her termination.

The record demonstrates that the timing of the Board's decision to implement an adverse employment action preceded any of the Charging Party's grievance activity that might be characterized as protected conduct. Crispin had already notified the Charging Party on October 22, 2021 that an adverse employment action may be taken against her at the upcoming Board meeting. On October 27, Crispin decided to recommend her termination at the October 28 Board meeting. Thus, the termination process had already been initiated prior to the Charging Party's October 28 grievances. As Crispin's actions in preparing both the Board and the Charging Party for the possibility that he would formally recommend termination occurred prior to his knowledge of the October 28 grievances, his decision to terminate her employment could not have been in retaliation for her grievance. See, e.g., State of New Jersey (Dept. of Environmental Protection), H.E. No. 95-2, 20 NJPER 306 (¶25153 1994), adopted P.E.R.C. No. 95-6, 20 NJPER 324 (¶25166 1994) (suspension was recommended prior to grievance); State of New Jersey (Montclair State College), D.U.P. No. 89-12, 15 NJPER 201 (¶20085 1989) (decision to deny promotion made prior to grievance); Salem County Sheriff's Office, D.U.P. No. 2014-9, 40 NJPER 381 (¶131 2014) (investigation leading to

suspension was initiated prior to grievance). Accordingly, we dismiss the 5.4a(3) claim due to the lack of any nexus between the Charging Party's protected conduct and her termination. We likewise dismiss the Charging Party's 5.4a(4) claim of retaliation because the record indicates that there is no nexus between her grievance filing and her termination that had already been initiated.^{3/}

Finally, the Commission does not have jurisdiction over the Charging Party's civil rights claims based on alleged religious discrimination. N.J. Transit (Warfield), P.E.R.C. No. 2017-23, 43 NJPER 175 (¶53 2016). Alleging that an employee was discharged based upon violations of laws other than the Act does not satisfy the Bridgewater test, particularly where those laws provide a forum for review of an employer's actions. N.J. Turnpike Authority, P.E.R.C. No. 2022-38, 48 NJPER 393 (¶90 2022); Elizabeth Housing Auth. (Looney), P.E.R.C. No. 90-84, 16 NJPER 211 (¶21084 1990). The anti-discrimination laws provide their own forum for review of the Charging Party's allegations and the record indicates she has filed those claims with the New Jersey Division on Civil Rights.

^{3/} The burden of proving a 5.4a(4) violation is, in general, identical to the burden of proving a 5.4a(3) violation under Bridgewater. Randolph Tp. Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), aff'd, NJPER Supp.2d 136 (¶117 App. Div. 1983).

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos
voted in favor of this decision. None opposed.

ISSUED: November 22, 2022

Trenton, New Jersey