D.U.P. No. 2013-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEW JERSEY STATE JUDICIARY (OCEAN),

Respondent,

-and- Docket No. CI-2013-001

LINDA TREVELISE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge brought by Linda Trevelise, an individual. Trevelise alleged that the State of New Jersey, Judiciary engaged in conduct violating subsections 5.4a(1), (3) and (4) of the Act when they instructed her not to e-mail the chambers of the Honorable Steven F. Nemeth, J.S.C, Supervising Judge Special Civil Part, and when the following comment was incorporated into her annual performance advisory: "Judge's chambers requested that Linda not e-mail them due to the tone of her e-mails." The Director found no facts establishing that an adverse employment action was taken against Trevelise related to protected activity. The Director concluded that Trevelise had not established that the employer engaged in conduct violating subsections 5.4a(1), (3) and (4) the Act.

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Appearances:

For the Respondent,
Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts
(Steven Livingston, of counsel)

For the Charging Party,
F. Michael Daily Jr., LLC
(Amy B. Sunnergren, of counsel)

REFUSAL TO ISSUE COMPLAINT

On July 2 and 27, 2012, Linda Trevelise ("Trevelise" or "Charging Party") filed an unfair practice charge and amended charge against her employer, the State of New Jersey, Judiciary ("Judiciary"). The charge, as amended, alleges that on April 15, 2011, Trevelise was instructed not to directly e-mail the chambers of the Honorable Steven F. Nemeth, J.S.C, Supervising Judge Special Civil Part. The charge also alleges that on January 10, 2012, Trevelise received her annual performance advisory which provides [in part]: "Judge's chambers requested that Linda not e-mail them due to the tone of her e-mails."

Trevelise alleges that this sentence is in retaliation for her filing a grievance in February, 2008; an unfair practice charge in May, 2008 (in which she alleged that her Weingarten rights were violated; Docket No. CI-2008-042)[1/]; and her filing of age discrimination complaints in Superior Court and Federal Court against the Judiciary in 2009. The Judiciary's conduct allegedly violates section 5.4a(1), (3) and (4)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On September 20, 2012, the Judiciary filed a letter denying that it violated the Act, and requesting that the charge be dismissed. It asserts that the decision to order Trevelise to stop sending e-mails to the Judge Nemeth's chambers is not retaliatory, but rather is a legitimate business decision intended to promote overall efficiency of operations. The

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1/ I take administrative notice that this charge was voluntarily withdrawn on July 1, 2009, following the issuance of a complaint, and pursuant to a fully executed memorandum of agreement.

2/ These subsections 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; (4) Discharging or 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."

Judiciary also claims that no allegation reveals an adverse employment action, and that Trevelise's dissatisfaction with her performance review is not an unfair practice under the Act.

The Commission has authority to issue a complaint where it appears that the 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. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. On April 4, 2013, I issued a letter to the parties, advising them of my tentative findings and conclusions and inviting responses. Neither party filed a reply. Our review of the submissions reveals the following facts.

Trevelise is employed as a judiciary clerk 3 at Ocean County Superior Court's civil division, and is assigned to the special civil motion team. Her job responsibilities include data entry for motion calendars, court orders, and amended complaints, and reviewing court orders on motions. Her title is included in a collective negotiations unit represented by the New Jersey AFL-CIO Judiciary Council of Affiliated Unions (JCAU), which has negotiated a collective negotiations agreement with the New Jersey State Judiciary extending from July 1, 2008 through June 30, 2012. Article 29.1(f) of the collective negotiations agreement between the Judiciary and the JCAU sets forth a

procedure for employees to contest their performance advisories. The procedure prohibits the filing of contractual grievances to contest performance advisories or evaluations.

Sometime in March or April 2011, the Honorable Steven F. Nemeth, J.S.C, Supervising Judge Special Civil Part, complained to Trial Court Administrator Kenneth Kerwin ("Kerwin") about the frequency and abrasive tone of e-mails Trevelise sent to his chambers. On April 19, 2011, Court Services Supervisor Lisa Mellows ("Mellows") and Kerwin instructed Trevelise not to send e-mails directly to Judge Nemeth's chambers regarding the wording of his court orders. On April 26, 2011, Trevelise's supervisor, Jennifer Lombardi ("Lombardi") reiterated to Trevelise that she should not send e-mails regarding problematic court orders directly to Judge Nemeth's chambers, and that she should send them to her, instead.

On November 30, 2011, Trevelise e-mailed Lombardi, requesting permission to e-mail Judge Nemeth's chambers directly and inquiring if she was the only staff member prohibited from sending e-mails directly to the judge's chambers. In response, Lombardi and Patrick Conley, vicinage assistant civil division manager, met with Trevelise on December 1, 2011 and informed her that at Judge Nemeth's request, she was not to send e-mails directly to his chambers. The Judiciary asserts that Trevelise was also told in the meeting that the judge disapproved of the

tone and frequency of her e-mails. Trevelise denies that a reason was given at the meeting. The following day, Lombardi sent Trevelise an e-mail confirming that Trevelise was to send her e-mails to Lombardi and not directly to the judge's chambers.

In January, 2012, Trevelise received her annual performance advisory. It provides in a pertinent part:

> Linda worked on processing orders this year. She takes great pride in her work. When she took over orders on February 1, there were 324 orders in the queue - Linda helped cleaned them all up. Sometimes there are more or less than her standard of 175 orders but even when there are more, Linda can keep up. She e-mails as many orders as she can and mails out the others. Linda expressed concern that her 235 report (documents entered by operator) does not accurately reflect her work so some time was spent this year trying to figure out why - the bottom line is that the report is imperfect and there is much work that is not reflected on that report. Judges chambers requested that Linda not e-mail them due to the tone of her e-mails. Linda will court clerk at a moment's notice, she remembers to hand in her logs which are always complete and she learned CourtSmart easily. Linda met her data entry standards this year.

Trevelise has not contested her evaluation under Article 29.1(f) of the collective negotiations agreement.

ANALYSIS

An employer violates subsection 5.4a(3) of the Act when it discriminates with regard to any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. The standard for proving

a 5.4a(3) violation is set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proven, 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.

Trevelise engaged in protected activity when she filed a grievance in February, 2008 and an unfair practice charge in May, 2008. Her employer was aware of that activity. The facts do not support the allegation that the Judiciary was hostile to the exercise of protected activity. Specifically, they do not reveal a nexus between Trevelise's protected conduct and the April 15, 2011 instruction to Trevelise not to e-mail Judge Nemeth's chambers, and the memorialization of that instruction in her January 10, 2012 performance evaluation. It appears that the Judiciary's decision to order Trevelise to stop e-mailing Judge Nemeth's chambers was prompted by a request from Judge Nemeth.

Trevelise alleges that the sentence in her evaluation "[j]udge's chambers requested that Linda not e-mail them due to the tone of her e-mails" violates 5.4a(3) and (4) of the Act.

Even if Trevelise has alleged facts establishing a nexus between protected conduct and her January, 2012 employment advisory, I find that she has not set forth facts establishing an adverse employment action, a necessary component of a discrimination charge. In Ridgefield Park Bd. of Ed., H.E. No. 84-052, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (&15195 1984), a section 5.4a(3) allegation was dismissed because ". . . there was no threat [or] change in any terms or conditions of employment." Id., 10 NJPER at 438. See Midstate Telephone Corp. v. NLRB, 706 F.2d 401, 113 LRRM 2213 (2d. Cir. 1983).

Trevelise has not suffered an adverse employment action related to protected activity. She was not transferred, demoted, fired or suspended, and suffered no reduction in compensation, rank or title. No facts suggest that any of her terms and conditions of employment are adversely effected. Finally, it does not appear that the disputed admonition, in the context of the evaluation, is a reprimand. See also, El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176, (App. Div. 2005) (citing Cokus v. Bristol-Myers Squibb Co., 362 N.J. Super. 366, 378, (Law Div. 2002); ("A negative employment evaluation, unaccompanied by a tangible detriment, such as a salary reduction or job transfer, is insufficient to rise to the level of an adverse employment action").

Under all of these circumstances, I find that Trevelise has not alleged facts indicating that the Judiciary violated 5.4a(3) of the Act. The facts alleged do not meet the Commission's complaint issuance standard.

The 5.4a(4) allegation fails for the same reasons. That section prohibits public employers from discharging or otherwise discriminating against any employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act. The burden of proof is typically identical to the burden under 5.4a(3), as set forth in Bridgewater. Randolph Tp. Bd. of Ed. and Randolph Ed. Ass'n., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), aff'd NJPER Supp. 2d 136 (117 App. Div. 1983); Gould, Inc. v. NLRB, 612 F.2d 728, 103 LRRM 2207 (3rd Cir. 1980), cert den. subnom Moran v. Gould Corp., 449 U.S. 890, 107 LRRM 2204 (1980). For the same reasons expressed in the analysis of the 5.4a(3) allegation, I find that Trevelise has not alleged facts indicating that she suffered an adverse employment action related to conduct protected by this subsection. Accordingly, I dismiss this allegation.

Trevelise also alleges that the Judiciary violated 5.4a(1) by "placing remarks indicating that she has a 'tone' in her e-mails in an evaluation that cannot be grieved." A public employer independently violates a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks

a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 8-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Trevelise has not alleged facts indicating how a portion of a periodic performance evaluation interferes with her statutory rights, particularly when the disputed portion neither refers to, nor implicates any protected right, and her employer and majority representative have negotiated a contract provision setting forth a procedure by which employees may contest their evaluations. Consequently, I dismiss this allegation.

Under all of these circumstances, I find that the Commission's complaint issuance standard has not been met.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Gayl R. Mazuco, Director

DATED: May 9, 2013
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by May 23, 2013.