

D.U.P. NO. 2015-3

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

In the Matter of

NJ/STATE (DEPARTMENT OF HUMAN
SERVICES),

Respondent,

-and-

Docket No. CI-2013-029

MARY A GRIFFIN,

Charging Party.

SYNOPSIS

The Director of Unfair Practices orders the dismissal of an unfair practice charge brought by Mary Griffin, individually, against the State of New Jersey. Griffin works in the Department of Human Services' Developmental Disabilities Licensing office and alleges that the State violated 5.4a (3), (4), and (7), as well as 5.4b (1), when it mistreated and disciplined Griffin in retaliation for her complaints over out-of-title work and her filing of race discrimination charges. The Director found that Griffin did not set forth any facts demonstrating that her individual complaints amounted to protected activity under our Act. The Director further found that Griffin offered no facts to support her claims that she was disciplined in retaliation for any filings that are protected by our Act or that the State violated any Commission rules or regulations. Finally, the Director found that Griffin's charge did not set forth any facts pertaining to the conduct of her majority representative. The Director concluded that the complaint issuance standard had not been met, and therefore, dismissed the charge.

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Appearances:

For the Respondent,
John Jay Hoffman, Acting Attorney General
(Nicole M. DeMuro, Deputy Attorney General)

For the Charging Party,
Mary A. Griffin, Pro Se

REFUSAL TO ISSUE COMPLAINT

On February 1, 2013, Mary Griffin (Charging Party) filed an unfair practice charge against the State of New Jersey Department of Human Services (State or DHS). The charge alleges that the State violated 5.4a(3), (4) and (7)^{1/} of the New Jersey Employer-

^{1/} These provisions prohibit public employers, their representatives or agents from "(3) [d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) [d]ischarging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or given any information or testimony under this act; (7) [v]iolating any rules and regulations established by the commission."

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., as well as 5.4b (1)^{2/} of the Act. Griffin claims that she works out of title, and that DHS began mistreating her when she complained about the out of title work. She also alleges that she was disciplined by DHS because she filed race, religion and age discrimination charges on August 9, 2012. Griffin received a written discipline on August 15, 2012, after her supervisor claimed Griffin yelled at her twice during the course of a dispute over a change in Griffin's work hours. Griffin also received a five day unpaid suspension on August 30, 2012, stemming from a dispute over filing cabinets that her supervisors removed from Griffin's workspace. Griffin lastly alleges that her supervisors are discriminating against her because of her race.

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-5.4(c); 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. Based upon our administrative investigation, I find the following facts.

^{2/} This provision prohibits employee organizations from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this Act."

Griffin works as a Technical Assistant 3 in the Department of Human Services' Developmental Disabilities licensing office (DDL). She has been an employee for the State since 2001. The State is a public employer within the meaning of the Act. The applicable collective negotiations agreement extends from July 1, 2011 through June 30, 2015.

In her charge, Griffin alleges that she has been working out of title for close to twelve years. She claims that when she complained about her out of title work, her supervisors at DDL began to mistreat her. Consequently, on August 9, 2012 she filed a complaint with the State's Division of Equal Employment Opportunity and Affirmative Action for discrimination based on age, race and religion. Griffin also claims that her supervisors disciplined her in retaliation for the filing of her discrimination complaint. On or around August 15, 2012 she was written up by her supervisor stemming from a dispute over work hours. On or around August 30, 2012 she was suspended for five (5) days without pay stemming from a dispute over office filing cabinets that Griffin used for work. Griffin alleges that she is being discriminated against by her non-minority supervisors at DDL, based on her race. Griffin further alleges that she was the victim of race-based discrimination when a white co-worker was promoted and Griffin was not.

On April 15, 2013, an informal exploratory conference was held with the parties. The parties were unable to reach a voluntary resolution.

By letter dated November 20, 2013, the State provided its written position statement denying that it engaged in any unfair practice and contending that the charge must be dismissed. The State argues that it did not violate the Act because Griffin's complaints regarding out-of-title work and improper discipline are breach of contract claims that do not amount to an unfair practice.

By letter dated August 26, 2014, I advised the parties of my tentative findings and conclusions, and invited responses. Neither party filed a reply.

ANALYSIS

Griffin's charge alleges that the State violated 5.4a(3) of the Act by having her work out of title for twelve years. In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court upheld the Commission's standard for determining whether an employer's action violates subsection 5.4a(3) of the Act. The charging party must prove by a preponderance of the evidence on the entire record that protected activity was a substantial or motivating factor in the employer's adverse action. Id. at 244. This may be done by direct or circumstantial evidence which demonstrates all of the

following: (1) the employee engaged in protected activity under the Act; (2) the employer knew of this activity; and (3) the employer was hostile toward the exercise of the protected activity. Id. at 246.

Protected activity in this context refers to conduct by public employees that implicates their right under the Act "to form, join and assist any employee organization or to refrain from any such activity . . ." N.J.S.A. 34:13A-5.3. Therefore, absent allegations of retaliation based on activities protected by the Act, we lack jurisdiction to review other forms of personnel issues. For example, we repeatedly have dismissed charges regarding age or race discrimination based on lack of jurisdiction. See City of Atlantic City, D.U.P. No. 99-18, 25 NJPER 312 (¶30133 1999) (citing Elizabeth Ed. Ass'n (Jefferson), D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1995); State of New Jersey (Dept. of Military and Veterans Affairs), D.U.P. No. 94-12, 19 NJPER 520 (¶24240 1993); Marlboro Tp. Bd. of Ed., D.U.P. No. 91-1, 16 NJPER 420 (¶21176 1990).

Moreover, protected activity under our Act must go beyond mere "personal griping." State of New Jersey (Office of the Public Defender), P.E.R.C. 2006-11, 31 NJPER 276, 279 (¶109 2005). Individual conduct, such as complaints or arguments, can constitute protected activity, when that individual conduct occurs in concert with other employees or touches upon a matter

of common concern for the employees. See Id. (citing Atlantic Cty. Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994) (finding employee engaged in protected conduct when he questioned new evaluation system proposed by management during a group meeting). By contrast, protected activity does not include complaints that only address an individual employee's particular concerns or fail to relate to the working conditions of fellow employees. West Deptford Tp Bd of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999). Essex Cty. College, P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987) (finding a part-time employee's complaint regarding the college's policy of distributing paychecks at 4:00pm not protected activity).

I find that the State did not violate 5.4a(3) of the Act. Griffin does not set forth any facts demonstrating that she engaged in activity that is protected under the Act, which motivated the State to retaliate against Griffin, as required for a 5.4a(3) violation. As outlined in her charge, Griffin's complaints regarding out-of-title work, discrimination, a change in her work hours, and the removal of two file cabinets from her office, were all made on behalf of herself, individually, and did not relate to changes in the working conditions of employees other than herself. Therefore, her individual complaints do not

rise to the level of protected activity for the purposes of our Act.

Griffin's charge alleges that the State violated 5.4a(4) of the Act because her supervisors at DDL mistreated and disciplined her in retaliation for filing a discrimination complaint on August 9, 2012. A public employer violates this subsection when it discharges or otherwise discriminates against an employee because that employee has signed or filed an affidavit, petition or complaint or given any information or testimony pursuant to the Act.

I find that the State did not violate 5.4a(4) of the Act. Griffin's charge does not set forth any facts demonstrating that she engaged in any activity identified in 5.4a(4) of the Act. Although Griffin does allege that she filed a race, age and religious discrimination charge on August 9, 2012 and retaliatory disciplines followed shortly thereafter, her discrimination charge was filed pursuant to state statutes that address other forms of workplace discrimination that are not protected by our Act. Griffin offers no facts that indicate she was disciplined in retaliation for any filings that are protected by our Act.

Griffin's charge also alleges that the State violated 5.4a(7) of the Act, which prohibits public employers from violating the Commission's rules and regulations, because she was improperly disciplined by her supervisors. A charging party must

cite to the specific rule or regulation that was allegedly violated for a complaint to be issued. High Point Reg. Bd. of Ed., D.U.P. No. 80-23, 6 NJPER 214, 215 (¶11105 1980). Griffin's charge does not identify a specific rule or regulation established by the Commission that the State violated.

I, therefore, find that the State did not violate 5.4a(7) of the Act.

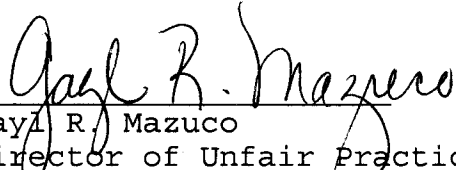
Finally, Griffin's charge alleges that the State violated 5.4b(1) of the Act because she is working out of title while her supervisors, who are white, promoted a more junior co-worker, who is also white. Section 5.3 of the Act, empowers a majority representative to exclusively represent employees in the negotiation and administration of a collective agreement, but requires the *majority representative* to "represent[] the interest of all such employees without discrimination and without regard to employee organization membership." Griffin's charge does not set forth any facts pertaining to the conduct of her majority representative, CWA. The State could not have violated 5.4b(1) because that subsection does not apply to public employers, but only to majority representatives.^{3/}

^{3/} Assuming that Griffin intended to claim a violation of 5.4a(1) by the State, which prohibits public employers' interference with rights protected by the Act, I would still find that the State did not violate that subsection. As discussed above, our agency has limited jurisdiction over discrimination claims against public employers, which means
(continued...)

For all these reasons, I find that the Commission's complaint issuance standard has not been met.^{4/}

ORDER

The unfair practice charge is dismissed.


Gayl R. Mazuco
Director of Unfair Practices

DATED: September 10, 2014
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 September 22, 2014.

^{3/} (...continued)
that we are only empowered to review discrimination based on conduct protected by our Act and not based on other types of discrimination like age and race. City of Atlantic City, 25 NJPER at 312. Therefore, I dismiss the claim that the State interfered with rights protected by the Act in promoting a white co-worker because it is a race discrimination issue, which is beyond the jurisdiction of our Act.

^{4/} N.J.A.C. 19:14-2.3.