

P.E.R.C. No. 91-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-89-81

ROSA DANIEL,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted to him by the full Commission, dismisses a Complaint against the West Orange Board of Education. The Complaint, based on an unfair practice charge filed by Rosa Daniel, alleged that the Board terminated Daniel because she filed a grievance alleging sexual harassment by her supervisor. The Chairman concluded that the charging party failed to show that her protected activity motivated her discharge.

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Appearances:

For the Respondent, Stephen J. Christiano, attorney

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Daniel Maisel, of counsel)

DECISION AND ORDER

On March 9 and March 27, 1989, Rosa Daniel filed an unfair practice charge and amended charge against the West Orange Board of Education. The charge alleges that Daniel was terminated because she filed a grievance alleging that her supervisor sexually harassed her.

By agreement of the parties, the charge was not processed pending an arbitration award on the grievance. The arbitrator subsequently denied the grievance on procedural grounds.

On October 13, 1989, a Complaint and Notice of Hearing issued. On October 24, the Board filed its Answer incorporating an earlier statement of position. It claims that Daniel was discharged for good cause and that the Commission is not the appropriate forum to review allegations of sexual harassment and discrimination. A

hearing was delayed pending completion of a related Division on Civil Rights investigation. On September 11, 1990, Daniel's petition before Civil Rights was dismissed.

On December 4, 1990, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and waived post-hearing briefs.

On February 12, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. 91-24, 17 NJPER ____ (¶____ 1991). He found that Daniel's did not prove that protected activity was a substantial or motivating factor in her discharge. He further found that even if she had made such a showing, the Board proved that it would have discharged her for insubordination absent any protected activity.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due February 26, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-7) are generally accurate. I incorporate them here.^{1/}

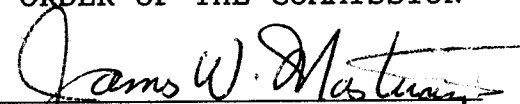
Pursuant to authority granted to me by the full Commission in the absence of exceptions, I find that Daniel failed to show that protected activity motivated her discharge and accordingly, dismiss the Complaint.

^{1/} Daniel testified that Victoria Brown, a secretary, not Donna Brown, a bus driver married to Robert Brown, told Daniel that she would not get anywhere on the job without having sex with Robert Brown (T22; T36).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 20, 1991

H.E. NO. 91-24

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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WEST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-89-81

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find the West Orange Board of Education did not commit an unfair practice when it discharged Rosa Daniel. Daniel charged that she was sexually harassed by her supervisor. When she filed a grievance against him, she was discharged. The Hearing Examiner found that although there was some evidence of sexual harassment, Daniel received a satisfactory evaluation and a reappointment two months after she filed the grievance. Rather, she was fired because of insubordination.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-24

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Appearances:

For the Respondent,
Stephen J. Christiano, attorney

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Daniel Maisel, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 9, 1989, Rosa Daniel filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the West Orange Board of Education ("Board") committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"); specifically subsection 5.4(a)(4)^{1/} when it discharged Daniel because she filed a grievance against her supervisor Robert Brown.

^{1/} These subsections prohibit public employers, their representatives or agents from: "(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."

On April 17, 1989, the Board filed a position statement alleging that: 1) Daniel's discharge was for good cause for a) repeated insubordination to superiors, b) absence without excuse from work, c) failure to perform assigned tasks and d) a pattern of excessive absence; 2) There was a pending arbitration concerning Daniel's discharge and therefore "this matter was properly before an arbitrator and P.E.R.C. cannot have jurisdiction"; and 3) The gravamen of the complaint is sexual harassment/sex discrimination. As such, P.E.R.C. is not the appropriate forum for the consideration of these charges. Daniel has filed a petition with the Division of Civil Rights, the proper forum for this matter.

By agreement of the parties, the charge was not processed pending the arbitration decision. The arbitrator denied Daniel's grievance on procedural grounds. Daniel amended her charge to allege a violation of subsection 5.4(a)(3).^{2/}

It appearing that the allegation of the unfair practice charge, if true, may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 13, 1989.

On October 24, 1989, the Board filed an answer incorporating its position statement of April 17, 1989 by

^{2/} This subsection prohibits public employers, their representatives or agents from: "(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."

reference. The hearing was pended to await the completion of the Division of Civil Rights investigation. However, on September 11, 1990, the Division of Civil Rights dismissed Daniel's charge before that agency, finding there was no probable cause.

Accordingly, this matter was activated and a hearing was held on December 4, 1990 in Newark, New Jersey.^{3/} The transcript was received on January 14, 1991.

Rosa Daniel was hired as a part-time bus driver for the West Orange Board of Education in 1983 and became a full-time bus driver in September 1985. Toward the end of the year in 1985, Daniel was assigned to be an acting dispatcher. She testified that her supervisor, Robert Brown, made a sexual advance toward her in November 1985 (T-18). Daniel stated that after she refused Brown's advances, Brown harassed her, refused to assign her to the gas crew and to other overtime work. Daniel claimed that Brown further intimated that she could be assigned overtime again only if she consented to have sexual relations with him. Daniel also testified that she was told by Donna Brown, a fellow bus driver, to ensure an equal assignment of overtime, she had to grant sexual favors to Robert Brown.

Daniel filed a grievance against Brown in March 1988, 27 months after she was propositioned by Brown. Her grievance was

^{3/} The parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties have declined to file briefs.

denied. She was terminated in September 1988. Daniel claimed the Board discharged her because she filed the grievance.

On direct examination, she denied ever having a sexual relationship with Brown (T15). However, on cross-examination, Daniel admitted she had an ongoing sexual relationship with Brown and the relationship came to an end at Daniel's insistence in November 1985. Also on cross-examination, Daniel admitted that Donna Brown was Robert Brown's wife.

James Kreiger is the Secretary - School Business Administrator for the Board. He testified that Daniel was terminated for insubordination and for excessive absenteeism. He stated that Daniel had an excellent driving record and originally was a good employee. In 1985, she was assigned as dispatcher but this assignment did not work out and within a few months was reassigned to bus driver. Krieger testified that Daniel's attitude changed at this time and she began having problems.

Kreiger testified that Daniel's level of overtime assignments did not change after her problem with Brown and her filing of a grievance. However, the records submitted by the Board (R-23 in evidence) indicate that Brown did receive less overtime in the month of April 1988 (she filed her grievance in March). But, by May, the following month, her level of overtime payment had returned to normal.

Kreiger testified that Daniel had attendance problems in 1986-87 as well as 1987-88 and the Board introduced documentary

evidence in support of Kreiger's testimony. As of March 31, 1988, Rosa Daniel exhausted her accumulated sick days and on April 25, 1988 was notified that if her attendance did not improve in the upcoming school year, Kreiger would recommend that her increment be withheld in the 1989-90 school year. Daniel's evaluation by Brown dated May 3, 1988 is good or excellent in all areas except for her "state of health as it affects her ability to do her work, attendance, etc." - which is poor. She was recommended for reappointment and increment.

Daniel was assigned to work during the summer of 1988 but neither reported to work nor notified the Board she would not accept the summer work.

Kreiger testified that a week after the school year began, on September 9, 1988, at 10:30 a.m., the Assistant Transportation Coordinator, Rosa Butts, was giving instructions to various drivers, including Rosa Daniel. Daniel was told to drive a bus to a school to check the mileage. Butts gave Daniel directions to the school. Daniel gave them back to Butts and said "Butts, you take these directions and shove it up your butt". Daniel walked out of Butts' office and sat in the garage until 11:45 when she went on her kindergarten run. Daniel called in sick the following two work days - Monday, September 12 and Tuesday, September 13. Daniel was asked to get a doctor note to verify her use of sick leave.

On the morning of Tuesday, September 20, Butts asked Daniel to clean her bus. Daniel replied that her bus was already cleaned

and was as clean as it was going to get and refused to clean her bus. Butts wrote up a complaint about this incident.

Later that morning at 7:12, Daniel confronted a fellow driver, Jean Belfour in the garage parking lot and accused him of complaining about the condition of a bus he was assigned to drive. Daniel told Belfour, "with an attitude and her index finger pointing at me, my job is to drive the bus not clean the bus. From now on you better keep your mouth shut".

At 10 a.m. that same day, Butts was at the wheel of a van talking to the head mechanic. Daniel jumped into the van shouting obscenities at Butts and acted in a physically threatening manner. She used a vulgar and racially demeaning epithet towards Butts [R-19 in evidence]. That same day, Robert Brown recommended that Daniel be terminated.

Pursuant to Brown's recommendation, the Board discharged Daniel.


Daniel did not dispute that any of these actions took place. Rather, she maintained that Butts was not her supervisor and Butts and Belfour were "put to harassing" Daniel (T38) by Brown.

Daniel was not a convincing witness. Such facts as her ongoing relationship with Robert Brown and her ascribing comments to his wife were only revealed during cross-examination. Moreover, well over two years passed between the time Daniel ended her relationship with Brown and the filing of the grievance. This prolonged period was never explained. Overall, the documentary

evidence does not support Daniel's claim that she suffered a loss of overtime assignments beyond the month of April 1988. Significantly, she received a good evaluation and a reappointment two months after she filed the grievance.

I do not believe Daniel established a prima facie showing of animus. See Tp. of Bridgewater, 95 N.J. 235 (1984). Further, assuming Daniel made a prima facie showing, I am satisfied the Board would have discharged Daniel for her insubordination in September 1988.

Accordingly, I recommend that the Commission dismiss the complaint.



Edmund G. Gerber
Hearing Examiner

DATED: February 12, 1991
Trenton, New Jersey