

P.E.R.C. NO. 2016-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY BOARD OF SOCIAL SERVICES,

Respondent,

-and-

Docket No. CO-2010-183

CWA LOCAL 1089 & LAUREN BIGGAR,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the Bergen County Board of Social Services' motion for summary judgment in an unfair practice case filed by CWA Local 1089 and Lauren Biggar. Neither the union nor Ms. Biggar opposed the motion.

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, Kaufman, Semeraro & Leibman, LLP,
attorneys (Paul C. Kaufman, of counsel; Justin D.
Santagata, on the brief)

For CWA Local 1089, Bennet D. Zurofsky, attorney

For Lauren Kushnir, individually (previously Lauren
Biggar), Oxfeld Cohen, P.C., attorneys (Nancy I.
Oxfeld, of counsel)

DECISION

This case comes to us by way of the Bergen County Board of Social Services' (Board) motion for summary judgment in an unfair practice case filed by CWA Local 1089 (Local 1089) and Lauren Kushnir (Kushnir).^{1/} The unfair practice charge alleges that the

^{1/} Although the unfair practice charge names "Lauren Biggar" as a co-charging party, the respondent refers to her as "Lauren Schwartz" throughout its moving papers as that was her name of record during employment. Further, the current attorney of record for "Lauren Biggar" refers to her as "Lauren Kushnir" throughout her correspondence with the Commission. For purposes of this motion, based upon her current attorney's representation, we will refer to the co-charging party as "Lauren Kushnir."

Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3), when it terminated Kushnir without just cause in retaliation for her exercising contractual rights to claim health benefits and to pursue grievance rights. We grant the Board's motion for summary judgment.^{2/}

Local 1089 and Kushnir filed their unfair practice charge on November 19, 2009. On May 24, 2010, a Complaint was issued by the Director of Unfair Practices. On June 2, 2010, the Board filed an Answer denying the material allegations in the charge.^{3/} On January 9, 2015, a Corrected Complaint was issued by the Director of Unfair Practices and a Notice of Hearing was issued by the Hearing Examiner.^{4/}

2/ 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."

3/ This matter was held in abeyance during the pendency of Kushnir's appeal as set forth more fully hereafter.

4/ Although the original unfair practice charge named Local 1089 and Kushnir as the charging parties, the original Complaint only named Local 1089. The Corrected Complaint names both Local 1089 and Kushnir as the charging parties.

On July 7, 2015, the Board filed a motion for summary judgment supported by exhibits attached to the certification of its attorney, Justin D. Santagata, Esq. On July 15, 2015, the Hearing Examiner granted the request of Nancy I. Oxfeld, Esq. (Oxfeld) for a 30-day extension to file a response to the motion.^{5/} On July 16, 2015, the Hearing Examiner sent a follow-up letter directing Ms. Oxfeld to enter an appearance on behalf of Local 1089 and/or Kushnir immediately if she intended to do so. On August 4, 2015, the Commission Case Administrator granted Ms. Oxfeld's request for an additional extension until September 17, 2015. On October 5, 2015, the Board's motion for summary judgment was referred to the Hearing Examiner for a decision pursuant to N.J.A.C. 19:14-4.8(a). On October 7, 2015, Ms. Oxfeld entered an appearance on behalf of Kushnir and requested an additional one-month extension to file a response to the motion. On October 15, 2015, the Chair referred the Board's motion to the full Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).^{6/}

^{5/} At that time, Bennet D. Zurofsky, Esq. represented both Local 1089 and Kushnir.

^{6/} To date, neither Local 1089 nor Kushnir have filed opposition to the Board's motion for summary judgment.

FACTS

The Board asserts that the following are the material facts relevant to this matter.

The Board and Local 1089 signed a collective negotiations agreement (CNA) in effect from July 1, 2007 through June 30, 2009. The parties signed a subsequent CNA in effect from July 1, 2009 through June 30, 2012.

Article 7 of the CNA, entitled "Sick Leave," provides, in pertinent part:

A. Sick leave may be granted for:

1. Personal illness by reason of which the employee is unable to perform his or her usual duties.

Kushnir was employed by the Board as a Human Services Specialist 2. On October 14, 2008, after being directed to return to work but failing to do so from October 6-10, 2008, Kushnir faxed a note from her physician stating that she was unable to work from October 13-29, 2008 due to a stress-related illness. Kushnir's unexcused absence from work from October 6-10, 2008 was the basis for a disciplinary charge of job abandonment, carrying a penalty of termination. During the departmental hearing, Kushnir admitted that she worked for another employer from October 6-29, 2008. As a result of the departmental hearing, Kushnir's termination for job abandonment was reduced to a 25-day suspension.

However, Kushnir's testimony during the departmental hearing regarding outside employment was the basis for a disciplinary charge of accepting employment with another employer while on medical leave, carrying a penalty of termination. As a result, the Board terminated Kushnir's employment on May 29, 2009. A formal resolution memorializing the decision to terminate Kushnir was adopted by the Board on June 23, 2009.

On July 10, 2009, Kushnir filed an appeal of her termination with the Civil Service Commission. On July 28, 2009, the Civil Service Commission dismissed Kushnir's appeal as untimely. After Kushnir filed a notice of appeal, she and the Civil Service Commission stipulated to a remand and the matter was transferred to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ) on the limited issue of the timeliness of Kushnir's appeal.

On November 17, 2009, Kushnir filed the instant unfair practice charge. This matter was held in abeyance pending the outcome of Kushnir's appeal.

On May 2, 2012, the Civil Service Commission issued its final agency decision adopting the ALJ's initial decision dismissing Kushnir's appeal as untimely except in one area. Thereafter, Kushnir filed a notice of appeal with the Appellate Division. On May 22, 2014, the Appellate Division issued an unpublished decision affirming the Civil Service Commission's dismissal of Kushnir's appeal. See I/M/O Lauren Schwartz, Bergen

County Board of Social Services, 2014 N.J. Super. Unpub. LEXIS 1171 (App. Div. 2014).^{7/}

STANDARD OF REVIEW

We note that summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{8/} In determining whether summary

^{7/} We note that the Appellate Division held, in part:

In December 2008, appellant participated in a grievance hearing arising out of a disciplinary charge lodged against her for allegedly failing to return to work when directed to do so. During the hearing, it was disclosed that she had been working at another job while on sick leave from the Board. The disciplinary charge was subsequently resolved, with appellant receiving a twenty-five-day suspension in April 2009. The hearing officer who presided over the matter filed a supplemental decision recommending appellant's termination based upon her misuse of sick leave. Appellant grieved the supplemental decision, and a hearing was conducted on May 26, 2009, at which appellant admitted she had worked elsewhere while on 'sick leave.' The Board voted to terminate appellant.

[I/M/O Lauren Schwartz, 2014 N.J. Super. Unpub. LEXIS at *1-2]

^{8/} N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine

(continued...)

judgment is appropriate, we must ascertain “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolved the alleged disputed issue in favor of the non-moving party.” Id. at 523. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶16 2006).

ANALYSIS

Since the Board’s motion is unopposed, there are no material facts in dispute. Aside from the conclusory allegations set forth in the unfair practice charge itself, the record is devoid of any evidence demonstrating that the Board interfered with any rights guaranteed to Kushnir under the Act or discriminated against her for exercising any of those rights. Accordingly, no violation of N.J.S.A. 34:13A-5.4a(1) or (3) has been established, and the Board is entitled to summary judgment in its favor.

8/ (...continued)

issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

ORDER

The Bergen County Board of Social Services' motion for summary judgment is granted and the complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: December 17, 2015

Trenton, New Jersey