P.E.R.C. NO. 2002-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2000-242

WILLINGBORO EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Willingboro Education Association to issue a Complaint on an amendment to an unfair practice charge filed by the Association against the Willingboro Township Board of Education. The Director of Unfair Practices had dismissed the amendment as untimely, but issued a Complaint based on the allegations in the original unfair practice charge. The Commission concludes that the allegations in the amendment relate back to the original charge. The Commission concludes that permitting this amendment before hearing makes more sense than litigating the same issue without an amendment and having to amend the Complaint to conform to the evidence or to consider the issue without an amendment. The Director of Unfair Practices shall amend the Complaint accordingly.

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 & Criscuolo, attorneys (Joan Kane Josephson, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Richard A. Friedman, of counsel; Jason E. Sokolowski, on the briefs)

DECISION

On February 17, 2000, the Willingboro Education Association filed an unfair practice charge against the Willingboro Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] by, among other things, transferring Susan Perrotta, a secretary, to an

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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."

undesirable, dangerous work location to retaliate against her for filing grievances and an affirmative action complaint.

The Board was asked to submit a statement of position and the Association was informed that it could submit a statement. In its statement, the Board argued, among other things, that Perrotta had asked to be transferred and had resigned, rendering the charge moot. In its statement, the Association relied on the contents of the unfair practice charge.

On January 12, 2001, the Association filed an amended unfair practice charge. The amended charge repeated the earlier allegations and added that because the location was untenable, oppressive, unsafe and unreasonable, Perrotta was constructively discharged and resigned her employment. On March 6, the Board filed a statement of position asserting that Perrotta agreed to be transferred and that the amendment was untimely.

On November 29, 2001, the Director of Unfair Practices dismissed the allegations in the January 12, 2001 amendment as untimely. D.U.P. No. 2002-7, 28 NJPER __ (¶_____ 2001). He found that the amendment was not filed until ten months after Perrotta's resignation. The Director noted that he would issue a Complaint based on the allegations in the original charge.

On December 10, 2001, the Association requested special permission to appeal the decision dismissing the allegations in the amendment. It argues that the amendment relates back to the original charge and should be considered timely because the

matters alleged in it are similar to and arise out of the same course of conduct as the initial charge. The Association also argues that the Board would not be prejudiced by tolling the statute of limitations.

On December 18, 2001, the Board filed a response opposing the Association's request. The Board argues that the request is untimely, the amendment is untimely, and the Association is trying to bootstrap new allegations leading up to Perrotta's resignation, which necessarily involve different administrators and different working conditions.

On December 19, 2001, the Association filed a reply. It asserts that the Director's decision was received on December 3 and that therefore its request was timely filed on December 10. This contention is correct: the request was filed within five days of the receipt of the decision. N.J.A.C. 19:14-4.6(b).

On January 24, 2002, the Chair granted special permission to appeal. She concluded that there are extraordinary circumstances warranting interlocutory review by the full Commission of the timeliness of the amendment.

N.J.S.A. 34:13A-5.4c requires that an unfair practice charge be filed within six months of the occurrence of any unfair practice, unless the aggrieved person was prevented from filing the charge. Before a Complaint issues, the Director may permit a charging party to amend a charge upon such terms as may be deemed just. N.J.A.C. 19:14-1.5. After a Complaint issues, any proposed amendment shall be filed with the Hearing Examiner. Ibid.

Under New Jersey court rules and case law, we have permitted an otherwise untimely amendment to be considered timely when it relates back to the original charge. State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985), aff'd NJPER Supp.2d 162 (¶143 App. Div. 1986). A New Jersey court rule, R. 4:9-3, provides that an amendment can relate back whenever the claim arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. The Supreme Court has explained that:

> The rule should be liberally construed. Its thrust is directed not toward technical pleading niceties, but rather to the underlying conduct, transaction or occurrence giving rise to some right of action.... When a period of limitation has expired, it is only a distinctly new or different claim...that is barred. Where the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy remains the same, it should be readily allowed and the doctrine of relation back applied. [Harr v. Allstate Ins. Co., 54 N.J. 287, 299-300 (1969)]

see also Zacharias v. Whatman PLC., 345 N.J. Super. 218, 226 (App. Div. 2001) (liberality is required irrespective of the stage of the proceedings at which an amendment is sought provided no adverse party is prejudiced).

The National Labor Relations Board has also applied the relation back analysis in the context of unfair labor practice charges. In Redd-I, Inc., 290 NLRB 1115, 129 LRRM 1229 (1988), the Board determined that amendments to a complaint were not time-barred as the allegations appeared to be "closely related" to

the allegations of the unfair labor practice charge, upon which they were based. The Board set forth these tests:

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act.... Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same period with a similar object.... Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge. Id. at 1118.

Cf. NLRB v. Fant Milling Co., 360 U.S. 301 (1959) (NLRB not precluded from considering conduct on the part of the employer that was related to that alleged in the charge and that grew out of it while the proceeding was pending before the Board); National Licorice Co. v. NLRB, 309 U.S. 350, 369 (1940).

Applying these tests, we accept this amendment. The allegation that Perrotta was constructively discharged in retaliation for her protected activity arises from the same factual allegations and the same sequence of events as the allegation that she was transferred in retaliation for the same protected activity. Perrotta's resignation was allegedly a consequence of the same anti-union animus alleged in the original

charge. We use "alleged" twice because the charging party must prove both that Perrotta was the subject of discrimination and that her resignation was, in fact, a constructive discharge. We note in particular that the amendment simply restates the original charge's assertions about the new work location and does not add any new allegations about harassment or retaliation by administrators at the new location.

Permitting this amendment before hearing makes more sense than litigating the same issue without an amendment and having to amend the Complaint to conform to the evidence or to consider the issue without an amendment. This approach puts the respondent on notice that the allegation that Perrotta was constructively discharged is related to the allegation that she was transferred for retaliatory reasons and will be an issue.

ORDER

The allegations set forth in the January 12, 2001 amendment are reinstated. The Director of Unfair Practices shall amend the Complaint accordingly.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman all voted in favor of this decision. None opposed.

DATED: January 31, 2002
Trenton, New Jersey
ISSUED: February 1, 2002