

DENISE A. IRVIN, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF WILLINGBORO, BURLINGTON COUNTY,
 ALONSO KITTRELS, SUPERINTENDENT, :
 AND MARVIN HOPKINS, EXECUTIVE :
 DIRECTOR OF HUMAN RESOURCES, :
 :
 RESPONDENTS. :

SYNOPSIS

Petitioner asserted that she was forced to resign from the Willingboro School District, and sought, *inter alia*, reinstatement to the position of Principal, with back pay. Petitioner alleged that she had been subjected to a hostile work environment, and differential treatment and pay because of her gender and age. She further claimed constructive discharge of a tenured employee.

The ALJ found, *inter alia*, that: there is nothing in the record to support petitioner's claims of constructive discharge or hostile work environment; the petitioner's testimony and demeanor lacked credibility; and that testimony on behalf of the respondent Board was sincere and credible. The ALJ concluded that petitioner failed to prove that she was constructively discharged from employment by the Willingboro Township Board of Education, and that her petition seeking reinstatement to her untenured position of Principal of the Adult Education School should be dismissed.

The Acting Commissioner concurs with the ALJ, concluding that the petition in this matter should be dismissed because petitioner failed to prove by a preponderance of the credible evidence that she was constructively discharged from employment, and adopts the Initial Decision as the final decision, for the reasons set forth therein.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions¹ and the Willingboro Board’s (Board) reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner initially takes issue with what she characterizes as “the facts as determined by the Administrative Law Judge (ALJ)” (Petitioner’s Exceptions at 2), claiming, *inter alia*, that:

1. There was no testimony that she applied for the principal positions at the Bookbinder, McGinley and Levitt schools because of a mutiny against her while she was vice-principal at the high school. Rather, she applied to those positions because the principal positions were a promotion and the positions were more in line with her training in elementary education. (*Id.* at 2)

¹ It is noted that, although petitioner represented herself at hearing and filed *pro se* exceptions to the Initial Decision, petitioner subsequently notified the Bureau of Controversies and Disputes that Richard T. Fauntleroy, Esq., was representing her in this matter and, thus, requested that the exceptions filed by Mr. Fauntleroy be considered. Accordingly, in that a party may *either* represent him/herself *or* be represented by an attorney, and petitioner has designated Mr. Fauntleroy as attorney of record, only the exceptions filed by Mr. Fauntleroy on petitioner’s behalf have been considered by the Commissioner in making his decision. See *N.J.A.C.* 1:1-5.1.

2. All three of the principal positions for which she applied were given to men from outside the school district. Instead, she was offered the position of principal of the Adult High School, a position for which she neither applied nor interviewed. (*Ibid.*)
3. She was not provided the same status or office arrangements as her male counterparts and she did not sign the time sheets because of the warning given to her by the Payroll Administrator with respect to an indication that time was being submitted for payment when the persons had not actually worked. (*Ibid.*)
4. She had no adult high school background or experience, and no one had created a job description listing specific job requirements and objectives for this newly created position; yet her supervisors were “threatening” to evaluate her. (*Ibid.*)
5. She did not attend a meeting where her position was clarified with respect to Mr. McGee, the Director of the school. (*Ibid.*)
6. She did not take a medical leave because her request for a transfer would not be honored, but, instead, because of depression, which was indicated by a doctor on her medical leave form given to Mr. Hopkins in support of her request for a medical leave of absence. (*Id.* at 3)
7. Mr. Kittrel’s letter of October 31, 2003, stating that petitioner’s claim was “self-serving,” was written after notification that she had filed a discrimination complaint with the Division of Civil Rights while she was out on medical leave. (*Ibid.*)
8. The November 13, 2003 letter of resignation was written under duress because she was told that the offer would be taken off the table if she did not have a letter of resignation on Mr. Kittrels’ desk by 8:30 a.m. on November 13. Mr. Rocco directed petitioner to use his conference room and his secretary to prepare a letter of resignation. (*Ibid.*)
9. The ALJ found Mr. Kittrels to be more credible than petitioner in his testimony because of his calm demeanor, but gave no reasons as to why he ignored the inconsistencies in the testimonies between Mr. Kittrels, Mr. Hopkins and Mr. Rocco with respect to the facts surrounding petitioner’s transfer to the Adult High School, the manner in which the original resignation was obtained, and the reason for reassigning petitioner back to the position of Assistant Principal upon her return from stress leave. (*Ibid.*)

Moreover, petitioner contends that the ALJ's determination that her proofs on unlawful discrimination were lacking was arbitrary and capricious in light of the fact that the ALJ prevented petitioner, who was acting *pro se* at the time, from cross examining witnesses and providing direct testimony with respect to discrimination, informing her that those issues were not before him. (*Id.* at 4) Petitioner maintains that there was ample evidence that she was subjected to a hostile work environment because of her gender and age, and points to: her claim that she was forced to resign because of the discriminatory actions of administrators in hiring three men, instead of her, for the three principal positions for which she applied; her appointment to the Adult School; her removal from her position as principal of the Adult School; and her re-assignment to the position of assistant principal upon her return from medical leave. (*Ibid.*) Petitioner further repeats her assertion that her constructive discharge claim stems from her contention that these actions were retaliatory for her filing a civil rights claim against the Board. (*Ibid.*)

Additionally, petitioner avers that the ALJ overlooked the fact that she did not apply for the principal position to which she was assigned at the Adult School, noting that it was not one of the three principal positions advertised. (*Id.* at 5) Petitioner maintains that the position of principal of the Adult School was created by the Board in an effort to cover up the Board's discriminatory conduct in not appointing her to one of the three vacant principal positions for which she did apply. (*Ibid.*) Pointing to *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 603-604 (1993) – which sets forth the four-prong test for establishing a cause of action in a hostile work environment claim by requiring that “***the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive” – petitioner asserts that: hiring three

less-qualified males in positions for which she applied; placing her in a similar title without an office, staff and the other perks that her male counterparts received; treating the male consultant as the person running the Adult School rather than petitioner; and refusing to permit her to address the time sheet issue, would certainly cause a reasonable woman to believe her condition of employment was altered and the working environment was hostile or abusive. (*Ibid.*)

Petitioner also points out that, according to *Kluczyk v. Tropicana Products, Inc.*, 368 N.J. Super. 479, 493 (App. Div. 2004) and *Shepherd v. Hunterdon Center*, 174 N.J. 1, 27-28 (2000), “[a] prima facie case of constructive discharge exists in New Jersey when a plaintiff can establish that an employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to such conditions would resign.” (*Id.* at 7) If she hadn’t resigned, petitioner submits, she would have been returned to the position of assistant principal of Memorial Middle School, which would have meant a reduction in salary in the area of \$23,000.00, and would have resulted in her being humiliated among her peers as she would be going backwards in her career from principal to vice-principal. (*Ibid.*)

Moreover, petitioner contends that even if there was no underlying harassment, petitioner’s forced resignation constituted a retaliatory discharge in violation of the Law Against Discrimination because her October 22, 2003 claim of discrimination with the New Jersey Division on Civil Rights was reported to Mr. Kittrels and Mr. Hopkins and, within days of her return from her medical leave on November 3, 2003, she was required to submit a resignation letter and withdraw her pending claims before the Division on Civil Rights. (*Id.* at 8) Finally, petitioner avers that the ALJ completely ignored her arguments as to the coercive manner in which her resignations were obtained. (*Id.* at 8-9)

In reply, the Board comments that petitioner appears to take exception as to how the evidence was characterized rather than the actual basis of the evidence presented, and claims

that petitioner is trying to retry the facts and represent the brief that was originally presented before the ALJ. (Board's Reply at 3) The Board further avers that the ALJ's findings of facts are supported by the record through the parties' joint stipulation of facts and the documents submitted by the parties. (*Id.* at 4)

Pointing to *N.J.S.A. 52:14B-10(c)* and *In re Taylor*, 158 *N.J.* 644 (1999), the Board avers that there is no basis in the record that would support disturbing the credibility determinations of the ALJ and, thus, urges that deference be given to the ALJ's valuation of the testimony since assessment of such evidence may rely upon observation and demeanor, which is criteria not generally reflected in the record. (*Id.* at 5) The Board also submits that petitioner failed to meet her burden of proof that she was constructively discharged and contends that petitioner chooses to ignore that she forfeited statutory protections upon her voluntary submission of her resignation. (*Ibid.*) In support thereof, the Board notes that petitioner did not obtain tenure in her position as principal of the Adult school and that she voluntarily relinquished her rights to her tenured assistant principal position. (*Id.* at 6) Moreover, the Board claims that the record is void of any evidence that petitioner was subject to a hostile work environment. Rather, the Board contends, petitioner determined her own fate when she sought not to be the educational leader of the Adult School, when she determined not to verify the time sheets for hourly employees, when she requested a transfer from the Adult School, and when she determined that she did not wish to be transferred from the Adult School to her last tenured position of assistant principal. (*Ibid.*)

Additionally, the Board maintains that there is nothing in the record to support petitioner's claim that she was forced to resign or that the move to change the date of her resignation was done under duress, but, instead, the record shows that petitioner was told to take time to think about what she was doing and to get the advice of counsel. (*Id.* at 6-7) The Board

also sets forth its position that petitioner did not prove that the conduct occurred because of her sex, pointing out that petitioner was the one who sought the transfer. (*Id.* at 7) Moreover, the Board contends that petitioner also did not prove that the conditions of employment were so pervasive, intimidating, hostile or offensive that a reasonable woman, in a tenured assistant principal position, would have submitted a resignation of her tenured position. (*Ibid.*)

Upon a careful and independent review of the record, the Commissioner finds that this matter turns primarily on the credibility of the witnesses. In this regard, the Commissioner recognizes that the ALJ's credibility determinations are entitled to his deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 N.J. Super. 478, 485 (App. Div.) *certif. denied*, 121 N.J. 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 N.J.A.R. 2d (EDU) 549, 550. The Appellate Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record. (emphasis added) N.J.S.A. 52:14B-10(c).

Here, after considering petitioner's testimony and observing her demeanor, the ALJ found "her account of the events leading up to her leaving the District improbable, if not totally implausible, and having nothing to do with a hostile work environment." (Initial Decision

at 11) In contrast, the ALJ found the district's witnesses credible and the superintendent to be "a sincere, credible witness" whom he quotes as stating that "[w]e always tried to help you [the petitioner], and sometimes it comes back to bite you." (*Id.* at 12)

Upon review of the full record,² the Commissioner finds that the ALJ's credibility assessments are not arbitrary, capricious or unreasonable, but, instead, are supported by sufficient, competent and credible evidence in the record. The Commissioner, therefore, finds no cause to disturb the ALJ's credibility determinations.

Moreover, notwithstanding petitioner's assertions to the contrary, the Commissioner finds that the ALJ's findings of fact and conclusions of law are wholly supported by the record and that there is nothing in the record to substantiate petitioner's allegations that she was subjected to either a discriminatory or a hostile work environment. As stated by the ALJ, "there is nothing in this record to suggest that the hostile work environments alleged by petitioner to have existed in her last three positions were anything other than of her own making or in her own mind." (Initial Decision at 11) In this regard, the exhibits submitted by the parties show that the District valued petitioner's contribution and that the District demonstrated its confidence in her by promoting her to the newly-created position of principal of the Adult School when she was not selected to fill any of the open principal positions which had been advertised.³ Petitioner accepted the promotion, but less than a month thereafter expressed her unhappiness with her assignment in that position, stating that she preferred an assignment to a "more traditional principal position" and, thus, requested a principal assignment in a more traditional setting. (Exhibit P-1, No. 9) The Board declined her request and informed her that she would be returned to her tenured position of assistant principal.

² The parties did not provide the Commissioner with transcripts of the hearing before the ALJ.

³ Although petitioner claims that she was better qualified to fill these advertised positions than the individuals selected, petitioner did not introduce anything into the record in support of this allegation.

The Commissioner finds that the record clearly supports the conclusion that it was petitioner who made the decision to resign rather than to remain in the Adult School principal position to which she had been assigned, and it was petitioner who determined that she would not interview for the principal position at the Bookbinder School (see below). It was also petitioner's decision to reject the transfer to her tenured assistant principal position because she felt it would be easier to resign and get a new job as a principal if she were applying as a principal. In apparent support of petitioner's concerns to leave the district as a principal, as noted by the ALJ, the superintendent "offered her the 'parachute' of the Director of Special Projects position at the Country Club Elementary School, a temporary position created solely for her and comparable in salary to that of principal, starting immediately and continuing until the effective date of her resignation." (Initial Decision at 5)

There is also no evidence supporting petitioner's contention that she was coerced into withdrawing her claim before the Division on Civil Rights and Equal Opportunity Commission, which she filed October 22, 2003, shortly after her request for a transfer to a "more traditional principal position" was denied. In a letter withdrawing her claim, dated November 13, 2003, petitioner states:

Please cancel all activity as it relates to charges against
Willingboro Board of Education.
In other words, I would like to drop my complaint immediately.
Thank you in advance.
(Exhibit P-1, No. 31)

Almost a month later, in response, the Division on Civil Rights sent a confirming letter, dated December 8, 2003, informing petitioner that in order to withdraw her pending claims, she would need to sign a Request for Withdrawal of Charge of Discrimination, which stated, *inter alia*:

I am aware that the EEOC and the NJDCR protect my right to file
a complaint. I have been advised that it is unlawful for any person

covered by Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act (ADEA) of 1967, as amended, or Title I of the Americans with Disabilities Act (ADA) of 1991, as amended, to threaten, intimidate or harass me because I have filed this complaint.

I request the withdrawal of my charge because I no longer wish to pursue this complaint.
(Exhibit R-12)

On December 11, 2003, petitioner signed the Request for Withdrawal of Charge of Discrimination with the Division on Civil Rights and with the Equal Employment Opportunity Commission.

Additionally, there is no evidence to support petitioner's contention that she was coerced into resigning from employment with the Willingboro Board. In a letter dated November 4, 2003 to Superintendent Kittrels, petitioner states:

I met with the Board President on November 3, 2003. She told me to remain at the Adult High School to make tenure there.

Mrs. Holley told me to put this situation behind me. Also, I do not intend to interview for the Bookbinder position.

I agree with her findings that the Adult High School is not a Hostile Work Environment. I am in charge not Mr. McGee.

P.S. I also signed the timesheets this morning. Mr. Rocco should be in possession of them.
(Exhibit R-8)

Petitioner's resignation letter also supports the conclusion that she decided to resign of her own accord:

After much forethought, I would like to thank you for the tremendous experience I have gained while working for the Willingboro School District.

First of all I appreciate your appointing me the Principal of the Adult High School. However, with that said I am at this time resigning from my position effective April 2, 2004.

The position was not what I had in mind and in light of this fact, I would like to exercise my options. In hindsight, I should have probably remained at Stuart Elementary School.

With that said I wish the District much success. As the leader of this District, you have done a wonderful job. Thank you in advance.

(Exhibit P-1, No. 32)

Accordingly, as explicated above, the Initial Decision, concluding that the petition in this matter should be dismissed because petitioner failed to prove by a preponderance of the credible evidence that she was constructively discharged from employment, is adopted for the reasons set forth therein.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 16, 2005

Date of Mailing: August 16, 2005

⁴ This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*