STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 2268-04
(On Remand CRT 4869-01)
DCR DOCKET NO. EL11JG-46328-E

VIOLA PRESSLEY, Complainant, v. NEW JERSEY TRENTON PSYCHIATRIC HOSPITAL, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, Respondent.	)	**ADMINISTRATIVE ACTION** FINDINGS, DETERMINATION, AND ORDER

APPEARANCES:

Viola Pressley, complainant, pro se.

Gerard Hughes, Deputy Attorney General, for the respondent (Stuart Rabner, Attorney General of New Jersey, attorney).

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Viola Pressley (Complainant), alleging that the New Jersey Trenton Psychiatric Hospital, New Jersey Department of Human Services (Respondent) subjected her to unlawful discrimination and reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On February 16, 2007, the Honorable Beatrice S. Tylutki, Administrative Law Judge (ALJ), issued an initial decision dismissing Complainant's

complaint, finding that Respondent did not engage in unlawful racial discrimination or reprisal against Complainant. Having independently reviewed the record, the Director adopts the ALJ's decision, as modified herein.

PROCEDURAL HISTORY

On May 10, 2000, Complainant was served by Respondent with a notice of official reprimand for abuse of sick leave. Complainant appealed, and in September of 2000 this matter was the subject of a departmental hearing at which Complainant was represented by Benjamin Spivack, Esq., staff representative of CWA Local 1040. During the hearing Complainant, who is Black, alleged disparate treatment in that another employee, C.P. (Caucasian), had received a similar reprimand but that it had been withdrawn. As no evidence was found to support this claim, the hearing officer sustained the reprimand. Complainant filed an appeal with the Merit System Board on October 7, 2000, also alleging disparate treatment.

During the pendency of the hearing and appeal, on September 22, 2000, Complainant filed a verified complaint with the Division alleging that Respondent engaged in disparate treatment constituting unlawful race discrimination and reprisal against her in violation of the LAD. Specifically, Complainant alleged that subsequent to filing a race and reprisal complaint with the NJ Department of Human Services against her supervisor on February 26, 1999, she was served with the aforementioned Notice of Official Reprimand on May 10, 2000. The verified complaint was served on Respondent on or about January 3, 2001.

On January 4, 2001, the Merit System Board declined to review the hearing officer's decision, stating that Complainant had not substantiated her allegation of disparate treatment. The Board held that the facts underlying C.P.'s reprimand were distinguishable. On May 23, 2001, the Commissioner of the New Jersey Department of Personnel (DOP) issued a final determination in which the decision of the hearing officer was affirmed. Complainant did not appeal this final determination.

On August 22, 2001, Complainant's LAD claim was transmitted to the Office of Administrative Law (OAL) as contested, at the request of Complainant, where it was assigned to ALJ Robert S. Miller, now retired. Respondent filed a motion for summary decision and, after reviewing the submissions of both parties, ALJ Miller granted the motion and dismissed the matter in an initial decision dated December 3, 2003. In holding that there were no factual disputes, ALJ Miller concluded that the verified complaint in issue should be dismissed as it was barred by the doctrines of *res judicata* and *collateral estoppel*, and by application of the entire controversy doctrine, since the matter already had been adjudicated by the DOP.

Complainant filed exceptions to the initial decision, and Respondent filed a reply. In an order dated March 1, 2004, the Director of the Division rejected the initial decision, concluding that Respondent's motion was not properly granted, and remanded the matter to the OAL for a hearing on the merits. The matter was received by the OAL on March 31, 2004 and assigned to ALJ Beatrice S. Tylutki.

A hearing scheduled in this matter for October 20 and 21, 2004 was adjourned due to serious illness in the family of Complainant's counsel, as well as a substitution of attorney for Respondent. After a telephone conference with counsel for the parties on March 9, 2005, a hearing was re-scheduled for May 16, 20 and 23, 2005. This hearing was again adjourned as Mr. Spivack had left the CWA and the union needed time to find alternate counsel to represent Complainant. By letter dated June 16, 2005, the union informed the ALJ that it had retained the law firm of Weissman & Mintz as substitute counsel, and the hearing was scheduled for October 14, 24 and 25, 2005. By letter dated September 20, 2005, Complainant's counsel informed the ALJ that complainant no longer wanted to be represented by that firm or any other CWA counsel, and asked to be relieved. This was confirmed by Complainant in writing, and on October 7, 2005, Weissman & Mintz was relieved as counsel. The hearing date was again adjourned in order to allow Complainant time to obtain the services of another attorney.

The ALJ wrote to Complainant on June 19, 2006 stating that since she had been given more than sufficient time to find a new attorney the hearing was now being scheduled for October 23, 2006. The hearing was conducted on that date, Complainant subsequently submitted additional documents and Respondent submitted written comments thereon, and the record in this matter was closed on November 21, 2006. The ALJ issued her initial decision on February 16, 2007.[1]

THE ALJ'S DECISION

THE ALJ's FINDINGS OF FACT

The ALJ recounted the following undisputed facts. Complainant began employment at Trenton Psychiatric Hospital (TPH) in 1997 and is still employed there. ID-5[2]. She was a Word Processing Specialist II at the time this matter arose. Complainant testified that, before receiving the Notice of Official Reprimand on May 10, 2000, she had taken time off on a number of occasions for her own health reasons and because her son had problems with the police which required her to go to court with him. Complainant stated that she always sought permission from her supervisors beforehand, and submitted appropriate notes for her absences. ID-5.

Complainant admitted that she had filed a number of grievances and complaints regarding her job and her supervisors. Complainant stated that, because of her complaints and

[1]The Director's order is due to be issued on or before April 2, 2007.

[2]Hereinafter, "ID" refers to the ALJ's initial decision issued on February 16, 2007.

grievances, her supervisors switched the dates on her time sheets, forged her signature on time sheets, lost her notes explaining the reasons for her absences and otherwise harassed her in the workplace. She complained that on one occasion her supervisor contacted her doctor to verify whether she had an appointment as stated in one of her notes. She considered this to be harassment of the doctor's staff and an invasion of her privacy. During her testimony Complainant did not state that these actions were due to the fact that she is African-American. ID-5.

Complainant's disciplinary record with TPH includes a written warning on January 8, 1998 for being absent without permission and without giving proper notice of intent to be absent; a written warning on January 8, 1998 for insubordination; and counseling or oral warning on November 12, 1998 for failure to work overtime without an acceptable excuse. Complainant received a notice of a five-day suspension for absence from work without permission and without giving proper notice on February 18, 1999. Complainant appealed the five-day suspension, which was affirmed at the departmental hearing level, but subsequently reduced to a three-day suspension on appeal to the Division of Personnel within the Department of Human Services. ID-5.

Thereafter, Complainant was given the Notice of Official Reprimand that is at issue here. This Notice alleged that she abused her sick leave in that she used it in conjunction with scheduled time off on January 6 and 16, 2000, February 6, 25 and 27, 2000, and March 3, 6, 13 and 27, 2000. Complainant did not deny that she was absent on the nine days set forth in the Notice of Official Reprimand or that these absences were in conjunction with scheduled time off. ID-6.

Complainant testified that at the departmental hearing she presented notes for most of the nine absences, but that she had notes in her records for all of them. She stated that at the

departmental hearing and on appeal, her attorney alleged discrimination due to differential treatment since he had learned that C.P. had received a similar Notice of Official Reprimand that was later dropped. Complainant stated that her attorney suggested to her that she had grounds to file a civil rights complaint. She then filed the verified complaint at issue in this matter. ID-6.

Respondent presented the testimony of Linda L. Randolph (formerly Mitchell), who was the employee relations coordinator for TPH at the time of the events which gave rise to Complainant's complaint. Ms. Randolph is familiar with the Notices of Official Reprimand issued to both Complainant and to C.P. Ms. Randolph testified that the official reprimand issued to Complainant was appropriate based on the number of her absences over a short period of time, her failure to submit notes for all of her absences, and her prior disciplinary record. ID-6-7.

Ms. Randolph also testified that she was concerned at first when C.P.'s supervisor decided not to pursue the official reprimand against C.P.; however, she was advised that C.P. was involved in a marital abuse situation. Additionally, Ms. Randolph stated that there were substantial differences between the two employees, in that C.P. had no prior disciplinary record, she had four absences in issue during an approximate three-month period, and C.P. was not on medical verification requirement status during the three-month period. More importantly, Ms. Randolph further stated that C.P. continued to have an absentee problem and, on December 5, 2005, the TPH filed charges and asked for her removal. As a result of settlement negotiations, C.P. resigned in good standing. ID-7.

Ms. Randolph noted that an official reprimand is kept in the employee's permanent personnel file, and that it is the lowest form of discipline. According to Randolph, other steps – such as counseling, oral warning or written warning – do not constitute discipline and are not part of the employee's permanent record. ID-7.

Counsel for Respondent also stated that during the departmental hearing on the official reprimand, Complainant submitted written notes for only four of the nine absences cited in the Notice of Official Reprimand. Complainant argued that she has tried not to abuse her sick leave time, that she always had notes for using sick time, and that her supervisors retaliated against her because of her grievances and complaints. She stated that she had retained copies of the notes for her absences but admitted that she did not have notes for all the absences with her at the departmental hearing. The ALJ gave her the opportunity to submit copies of the notes for all the absences cited in the Notice of Official Reprimand after the hearing, but noted that she failed to do so. In his written submission, counsel for Respondent observed that after the hearing Complainant did submit five notes, but that only one of them related to a date in the official reprimand. ID-8.

THE ALJ'S LEGAL CONCLUSIONS

The LAD prohibits race discrimination as well as reprisal for seeking redress for unlawful discrimination in employment. The ALJ found that the burden of proof rests on the complainant, and that it is initially her burden to establish a prima facie case of discrimination. ID-4, citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once a prima facie case has been established by the complainant, it is presumed that discrimination has in fact occurred. According to the ALJ, the burden of persuasion then shifts to the employer who must then articulate a legitimate, non-discriminatory basis for its action. ID-4**,** citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Anderson v. Exxon Co., 89 N.J. 483 (1982); Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005). The ALJ noted that when the employer produces such evidence, the presumption of discrimination disappears. The burden then shifts back to the complainant, who must establish that the articulated reason was merely a pretext for

discrimination and not the true reason for the employment decision. ID-4, citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

The ALJ found that Complainant did establish a prima facie case of discrimination based on race and reprisal, as she is African-American, had filed a number of grievances and complaints regarding her job and supervisors, thereafter received a Notice of Official Reprimand, and that a similar notice given to C.P., a Caucasian employee, was later dropped. ID-6. Based on the facts in the record, the ALJ also found that Respondent presented persuasive reasons for the official reprimand given to Complainant and for rescinding the reprimand against C.P., and that the reasons for its actions were not pretextual for either race or reprisal discrimination. ID-7. The ALJ found that Complainant failed to dispute the testimony provided on behalf of Respondent as to why the official reprimand was dropped against C.P., and thus did not demonstrate any racial discrimination on the part of Respondent. The ALJ felt it was clear from Complainant's testimony that she thought that any person, regardless of race, would be subject to harassment if he or she complained or filed grievances. As to reprisal, the ALJ concluded that Respondent showed legitimate, non-discriminatory reasons for the issuance of an official reprimand to Complainant, and that Complainant presented no persuasive proof that the official reprimand was given to her because of her complaints and grievances. ID-8.

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

After careful review of the record, the Director concludes that the ALJ's factual findings as recited herein are supported by sufficient evidence, and he adopts them as his own. The ALJ did not make any specific findings with regard to the credibility of either Complainant or Respondent. However, the ALJ did note that Complainant was given the opportunity to provide

the court with copies of notes to substantiate her claim that she always had notes for her sick time, but that she failed to do so.

THE DIRECTOR'S LEGAL ANALYSIS AND CONCLUSIONS

As a general rule, courts have found that intent to discriminate is a critical element in order for an employer's personnel actions to be considered unlawful. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005), citing Marzano v. Computer Sci. Corp., 91 F.3d 497, 507 (3d Cir. 1996). [3] Providing actual physical evidence of such intent, however - either through testimony or the production of written records - has been categorized as "difficult" at best. Marzano, supra at 507, citing U.S. Postal Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983); see also, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987). "Even an employer who knowingly discriminates on the basis of [protected status] may leave no written records revealing the forbidden motive and may communicate it orally to no one." Chipollini, supra, citing LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984). Thus, courts recognize that a plaintiff asserting a discrimination claim may rely on circumstantial evidence to make her case. Marzano, supra at 507. Moreover, it has been held that the evidentiary burden at the prima facie stage is rather modest: it is simply "to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent -- i.e., that discrimination could be a reason for the employer's action." Marzano, supra at 508, citing Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

In the context of a disciplinary action, a prima facie case for discrimination can be established by the employee who is a member of a protected class showing that he or she was

[3]The New Jersey Supreme Court has "in a variety of contexts involving allegations of unlawful discrimination...looked to federal law as a key source of interpretive authority" in applying Title VII analysis to LAD claims. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97-98 (1990). Accordingly, while New Jersey state courts are not bound by federal precedent, it can be relied upon for guidance.

treated differently than another similarly situated employee who was not a member of the same protected case. Jason v. Showboat Casino and Hotel, 329 N. J. Super. 295, 305 (App. Div. 2000). This differential treatment can take the form of unequal discipline in the workplace, where one employee is disciplined more severely for committing violations of "comparable seriousness." Lynn v. Deaconess Med. Ctr., 160 F. 3d 484 (8th Cir. 1988). In order to present a prima facie case based upon discriminatory discipline, the employee must show that 1) he or she was a member of a protected class; 2) that there was a policy or practice concerning the activity for which he or she was disciplined; 3) that the non-minority employee was given the benefit of a more lenient practice or was not held to compliance with the policy; and 4) the minority employee was disciplined without application of the lenient policy or in conformity with the strict one. Jason v. Showboat, supra at 304-05. Complainant, bearing the burden at all times of sustaining a claim of disparate treatment based on race, demonstrated here that while both she and C.P. were issued Notices of Official Reprimand based on attendance, C.P.'s was withdrawn while Complainant's was not. The Director finds this difference in treatment sufficient for Complainant to have established a prima facie case of discrimination based on race.

Once a prima facie case of discrimination is established, the employer must then articulate a legitimate, non-discriminatory reason for its actions. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). Linda Randolph, Respondent's employee relations coordinator, testified that Complainant's discipline was appropriate based on the number of absences she incurred over a short period of time, her failure to submit notes for all her absences, and her prior disciplinary record. ID-6-7. Ms. Randolph also testified that there were substantial differences between the circumstances of Complainant and C.P. in that C.P. had no prior disciplinary record, had only four absences at issue over a three month period, and was not on medical verification status during the three month period. ID-7. The Director concludes that this

testimony satisfies Respondent's burden to articulate a legitimate, non-discriminatory reason for its action.[4]

If the employer satisfies this burden, the employee in order to prevail must establish through admissible evidence that Respondent's proffered reason was a pretext for discrimination. St. Mary's, supra at 507-508; Burdine, supra at 254. Thus, it always remains "the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Burdine, supra at 258, citing McDonnell, supra at 804. In this matter, the Director finds that Complainant has failed to provide any evidence or substantiation for her claim that Respondent's articulated reasons were pretextual, and finds no racially motivated discriminatory animus for Respondent's action. As demonstrated through the undisputed testimony of Respondent's employee relations coordinator, Complainant and C.P. were not in fact similarly situated. ID-7. The record shows that Complainant's employment record contained numerous undocumented absences as well as other infractions and disciplinary actions. C.P. had no such record. Because of her unsatisfactory attendance record, Complainant was required to produce medical documentation for subsequent absences. Complainant was unable to demonstrate that she produced these notes for the absences that prompted her reprimand. Furthermore, Complainant was disciplined for many more absences than C.P., and many of those were in conjunction with approved absences. The record supports Respondent's position that Complainant's conduct was more serious than that of C.P., and warranted more serious

[4] The ALJ incorrectly stated that Respondent bore the burden of persuasion; Respondent merely had to articulate a legitimate business reason for its decision. Brown and Williamson, supra. See also, Burdine, supra.

discipline. Complainant presented no evidence beyond Respondent's treatment of C.P. in support of her race claim. Accordingly, the Director adopts the ALJ's conclusion that there was no racial discrimination against Complainant.

The LAD also makes it unlawful for any person to take reprisals against any other person because that person has filed a discrimination complaint or objected to practices that are unlawful under the LAD. N.J. S.A. 10:5-12(d). A prima facie case of reprisal under the LAD is established if an employee can show that 1) he or she engaged in a protected activity known to the employer; 2) he or she was thereafter subjected to an adverse employment action; and (3) there was a causal link between the two. Shepherd v. Hunterdon Development Center, 336 N.J. Super. 395, 418 (App. Div.) aff'd in part, rev'd in part ,174 N.J. 1 (2002). The employer may rebut the prima facie case by articulating a legitimate, non retaliatory reason for its action. When an employer presents evidence of a non-retaliatory motive, the burden then shifts to the employee to establish that the explanation was pretextual by either persuading the trier of fact directly that a retaliatory reason motivated the employer, or indirectly by showing the employer's proffered explanation is not worthy of belief. Id., citing Bergen Commercial Bank v. Sisler, 157 N.J. 188, 211 (1999).

Applying these standards to this case, it is undisputed that Complainant engaged in a protected activity that was known to Respondent, by filing her original discrimination complaints and grievances. However, there are no bright-line rules under the LAD to determine whether there has been sufficient "adverse employment action" to support a prima facie case of reprisal, and the determination must be made based on the specific facts of the case. Mancini v. Twp of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002). New Jersey courts have not limited adverse actions to ultimate decisions such as hiring, firing, demotion, or change in compensation, and have acknowledged that less drastic employment actions such as providing

negative references to prospective employers or attempting to revoke a former employee's teaching license may constitute retaliatory adverse actions. Cokus v. Bristol Myers Squibb, 362 N.J. Super. 366, 378 (Law Div. 2002) aff'd 362 N.J. Super. 245 (App. Div. 2003).[5] Assignment to different or less desirable tasks may constitute adverse employment action. Mancini, supra, at 564-565. A number of less drastic employment actions combined can also constitute sufficient adverse action for a prima facie case. Nardello v. Township of Voorhees, 377 N.J. Super. 428, 434-435 (App. Div. 2005) (In CEPA case, court found a combination of actions including denial of training, change in duties and removal of supervisory duties to constitute adverse action). Still, "not everything that makes an employee unhappy is an actionable adverse action." Cokus v. Bristol-Myers Squibb Co., supra, 362 N.J. Super. at 378. The employment action must be "sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner." El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145,176 (App. Div. 2005), citing Cokus, supra., 362 N.J. Super. at 246; see also, Prince v. Howmet Corporation, 2005 U.S. Dist. LEXIS 16035 (D.C.N.J. 2005); Rodriguez v. Torres, 60 F. Supp. 2d 334, 353 (D.C.N.J. 1999).

In this case, the "adverse employment action" was the Notice of Official Reprimand, which was described during Respondent's testimony as "the lowest form of discipline." ID-7. Complainant offered no testimony as to any impact this document may have had on her employment – which presumably continues to this day with Respondent. Complainant's proofs fail to show that her conditions of employment were altered in any substantive way, or that the "employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing

[5]Although Cokus was a CEPA case, the court noted that the standards for LAD and federal anti-discrimination claims apply to such cases.

a significant change in benefits." Cardenas v. Massey, et als., 269 F. 3d 251, 267 (3d Cir. 2001), citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Nevertheless, for purposes of analysis of the instant matter, it shall be assumed arguendo that the notice constituted an adverse employment action and that Complainant has satisfied this prong of the prima facie standard.

In order to satisfy her prima facie burden, Complainant must also offer proof that she was subjected to adverse action that was causally related to this protected activity. Complainant has met this burden, allowing for the "rather modest" evidentiary burden for establishing a prima facie case as recently articulated by the New Jersey Supreme Court in Zive, supra at 447. Subsequent to Complainant's filing of her complaints and grievances, she was served with the Notice of Official Reprimand. A broad array of factors may be used to show this causal connection, including temporal proximity, intervening antagonism, inconsistent reasons for the adverse action, or other circumstantial evidence supporting an inference of causation. The Director finds that Complainant has satisfied this standard because her reprimand "closely followed" her protected activity or was temporally related to it. McBride v. Princeton University, 1991 WL 66758 at 4 (D.N.J. 1991); see also, Farrell v. Planters Lifesavers Co., 206 F. 3d 271, 280-281 (3rd Cir. 2000). Applying these legal standards to the facts of this case, the Director concludes that Complainant has established a prima facie case of unlawful reprisal under the LAD.

Respondent successfully rebutted Complainant's prima facie case by presenting testimony of legitimate, non-retaliatory reasons for the issuance of an official reprimand to Complainant. ID-8. The Director concludes that Complainant failed to demonstrate that Respondent's proffered reasons for Complainant's disciplinary action - the number of absences in a short period of time, her failure to substantiate several instances of sick leave, as well as

the differences between Complainant's situation and that of C.P. - were a pretext for unlawful reprisal. As concluded in the race discrimination analysis, Complainant and C.P. were not similarly situated. The record clearly establishes that Complainant's record justified the reprimand. Accordingly, the Director concludes that Complainant has failed to establish that Respondent engaged in reprisal in violation of the LAD.

CONCLUSION AND ORDER

After a careful review of the record, the Director concludes that Complainant has failed to meet her burden to establish that Respondent discriminated against Complainant based on her race or took a reprisal against her for complaining about discrimination. Therefore, the Director adopts the ALJ's initial decision dismissing Complainant's complaint, as modified herein.

April 2, 2007
DATE

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR, DIVISION ON CIVIL RIGHTS