

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 4869-01
DCR DOCKET NO. EL11JG-46328-E
DECIDED: MARCH 1, 2004

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
Maria B. Desautelle, Deputy Attorney General, for Respondent (Peter C. Harvey, Attorney
General of New Jersey)

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 the complainant, Viola Pressley (Complainant), alleging that her employer, New Jersey Trenton Psychiatric Hospital of the New Jersey Department of Human Services (Respondent), engaged in unlawful discrimination and reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On December 3, 2003, the Honorable Robert S. Miller, Administrative Law Judge (ALJ), issued an initial decision (ID) dismissing the complaint. Having independently reviewed the record and the ALJ's decision, the Director rejects the ALJ's initial decision and remands this matter to the Office of Administrative

Law (OAL) to hear Complainant's LAD claims on the merits.

THE ALJ'S DECISION

Procedural History And Factual Background

The ALJ set forth the procedural history and factual background to this matter on pages 2-3 of the initial decision, and these may be summarized as follows. Complainant was employed by Respondent as a Word Processing Specialist 2. Due to the number of sick days Complainant had used in 1999, Respondent placed her on "medical verification requirement" status, which required that Complainant submit medical verification for her absences. During the first three months of 2000, Complainant was absent or took partial days off from work on nine occasions. On May 10, 2000, Respondent served Complainant with a "Notice of Official Reprimand" (reprimand) for abuse of sick time. Complainant appealed the reprimand and requested a hearing with the Department of Human Services (DHS). There is no transcript of the hearing, which was held in September 2000. However, according to the "Disciplinary Action Appeal and Recommendation," Complainant, represented by a staff representative from CWA Local 1040, alleged that she was discriminated against based on her race in that Respondent issued a reprimand to Carol Povia, a white co-employee also charged with excessive absenteeism, and Respondent later rescinded the reprimand. Complainant's reprimand was sustained by the Departmental hearing officer and on October 7, 2000, she appealed the decision to the Merit System Board (MSB), again alleging that she was discriminated against based on the disparate treatment she received from her supervisors (ID 2). On January 4, 2001, the MSB issued a letter to Complainant denying review of the hearing officer's decision because the appeal "did not involve general issues of applicability that interpret law, rule, regulation or policy." The letter further stated that because Complainant had not substantiated the allegation of disparate treatment there was no basis for the review of that allegation. On May 23,

2001, the Commissioner of the New Jersey Department of Personnel (DOP) issued a final administrative determination affirming the hearing officer's decision that the official written reprimand was proper and justified, and that there was no substantial credible evidence to support Complainant's allegations of disparate treatment. Complainant did not appeal the Commissioner's final decision.

On September 22, 2000, prior to the determination by the Departmental hearing officer, Complainant filed a verified complaint with the New Jersey Division on Civil Rights, alleging that she was subjected to disciplinary action because of her race and as a reprisal for having previously filed a complaint alleging race discrimination and reprisal against Respondent with the Department of Human Services in February 1999, and that this violated the LAD. More specifically, Complainant alleged in her Division complaint that she had not abused her sick time since she had produced a doctor's note for every absence, and further that she had been subjected to disparate treatment in retaliation for filing a previous internal complaint (ID 3).

On August 22, 2001, upon Complainant's request, Complainant's LAD complaint was transmitted by the Division to the OAL for determination as a contested case pursuant to the New Jersey Administrative Procedure Act (ID 2). Respondent then moved for summary decision, Complainant filed an answering brief, and reply memoranda were submitted by both parties. The ALJ granted Respondent's motion for summary decision in an initial decision mailed to the parties on December 4, 2003 (ID 3). On December 19, 2003, the Director granted Complainant's request for an extension of time to file exceptions to the ALJ's initial decision. Complainant's exceptions were timely received on January 8, 2004. Respondent's reply to Complainant's exceptions was received on January 20, 2004. The Director requested and was granted an extension of time to issue his final order, and the final order in this matter is due to be issued on or before March 4, 2004.

Conclusions of Law

The ALJ preliminarily found that Respondent's motion for summary decision is timely and appropriate because the essential facts in this case are not in dispute (ID 2, citing Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995)). The ALJ then briefly reviewed the standards governing the application of res judicata, collateral estoppel, and the entire controversy doctrine and, applying these standards, concluded that Respondent's motion should be granted and Complainant's claim dismissed (ID 3-6).

The ALJ noted that res judicata, or claim preclusion, prevents a party from relitigating a claim that was the subject matter of a judgment between the same parties, and that the application of this doctrine requires "a final judgment by a court or tribunal of competent jurisdiction, and identity of issues, parties, and causes of action or thing sued for" (ID 4, citing Hackensack v. Winner, 162 N.J. Super. 1, 28 (App. Div. 1978), mod. 82 N.J. 1 (1980)). The ALJ also observed that collateral estoppel, or issue preclusion, has been defined as "that branch of the broader law of res judicata" which bars re-litigation of "any issue or fact actually determined" in the "prior action ... involving a different claim or cause of action" (ID 4, citing Hackensack v. Winner, *supra*, 162 N.J. Super. 1, 28; State v. Gonzalez, 75 N.J. 181, 186 (1977) and Continental Can Co. v. Hudson Foam Latex Prod., 129 N.J. Super. 426 (App. Div. 1974)).

Applying these standards, the ALJ then concluded that the requirements of res judicata are satisfied as to (1) the identity of parties in the DOP and Division actions; (2) the identity of cause of action since each suit challenged the motivation for, and the appropriateness of, the issuance of a reprimand to Complainant; and (3) a final determination having been rendered by a tribunal of competent jurisdiction (ID 4). Specifically, the ALJ noted that in both cases, Complainant alleged that she was injured by receiving a reprimand for abusing sick leave, and that the reprimand was

racially motivated. The DOP disagreed, finding that the reprimand was warranted, and concluded that Complainant failed to provide any evidence of discrimination or differential treatment. Ibid.

Additionally, the ALJ relied on the entire controversy doctrine to preclude Complainant from litigating the reprisal component of her LAD claim. He asserted that New Jersey's legal policy against claim splitting is "grounded on the proposition that the sound administration of a judicial system requires that all facets of a single dispute between parties be completely determined in one action" (ID 5, quoting Gareeb v. Weinstein, 161 N.J. Super. 1, 9 (App. Div. 1978) and Applestein v. United Board and Carton Corp., 35 N.J. 343, 356 (1961)). Thus, the entire controversy doctrine "requires that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding" (ID 5, quoting William Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 292-93 (App. Div. 1977)). The ALJ stated that because Complainant failed to raise the issue of retaliation at the DOP hearing and before the Merit System Board, the entire controversy doctrine precludes her from doing so in a subsequent administrative proceeding (ID 5).

EXCEPTIONS

The Director received Complainant's exceptions on January 8, 2004.¹ Therein, Complainant contends that the ALJ's decision to grant Respondent's motion for summary judgment should be reversed because the DOP hearing lacked the procedural due process that should be afforded a claim of discrimination, and therefore was not a forum equal to the OAL or the Division (Ce 2).

In support of this argument, Complainant maintains that the Departmental hearing did not afford her an opportunity to properly appeal her reprimand and fairly litigate the discrimination

¹Hereinafter, "Ce" refers to Complainant's exceptions to the ID; "Re" refers to Respondent's reply to Complainant's exceptions; and "P" refers to Complainant's exhibits.

complaint of disparate treatment. Specifically, Complainant avers that the Departmental hearing did not provide her the opportunity to conduct discovery or present evidence relevant to her disparate treatment claim. She also contends that she did not have an opportunity to subpoena or cross-examine witnesses, and her decision not to testify at that hearing may have been considered by the hearing officer in making a determination. Complainant further contends that the hearing officer was not an independent or unbiased trier of facts because she was an employee of Respondent's personnel department (Ce 13-21).

Complainant also contends that the preclusionary principles used by the ALJ to grant Respondent's motion for summary judgment were misapplied because the claims at the Departmental hearing were different claims from those alleged in the verified complaint. Complainant states that at the departmental hearing and in her appeal to the Merit System Board, she raised only the issue of differential treatment as compared to a Caucasian employee. Her complaint before the Division, however, alleges unlawful reprisal. Further, Complainant states that she was unable to fully explore this claim at the Departmental hearing because she was unable to ascertain the identity of the individuals who engaged in the allegedly discriminatory or retaliatory action against her (Ce 21-22).

On January 20, 2004, Respondent submitted a reply to Complainant's exceptions claiming the ALJ properly dismissed the complaint based on preclusionary principles. Respondent asserts that Complainant had a full and fair opportunity to present all of her discrimination claims at the Departmental hearing and subsequently to the MSB. Relying on Mancuso v. Borough of North Arlington, 203 N.J. Super. 427, 432 (Law Division 1985), Respondent argues that Complainant need only have had the opportunity to conduct discovery, present witnesses, introduce evidence and conduct cross-examination. Respondent stated that Complainant failed to utilize those opportunities

and presented no evidence whatsoever to show that she was denied those opportunities. Finally, Respondent asserts that Complainant's retaliation claim was properly dismissed because it involves the same series of events already adversely determined in the Departmental hearing.

THE DIRECTOR'S DECISION

The Director's Factual Findings

The essential facts of this claim are undisputed, and the exceptions reflect no material dispute. Therefore, the Director adopts the procedural history and factual findings as set forth by the ALJ.

The Legal Standards and Analysis

Summary Decision

Under the Uniform Administrative Procedure Act, summary decision may be granted if the papers and discovery which have been filed, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5 (b). The standard for summary decision in an administrative hearing is substantially the same as that applied to a motion for summary decision in the Superior Court of New Jersey pursuant to R.4:46-2. When deciding a motion for summary decision under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider 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 fact-finder to resolve the alleged dispute issue in favor of the non-moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520, 523 (1995). Because there is no genuine issue as to any material fact in the instant matter, the Director must determine, based on this record, whether Respondent is entitled to prevail as a matter of law.

The LAD

In her verified complaint, Complainant alleged that she was subjected to unlawful reprisal in that she had filed a race discrimination and reprisal claim against Respondent with DHS in February 1999, and in May 2000 she received an official reprimand for abuse of sick time by the same supervisors against whom she initially complained. Under the Law Against Discrimination, it is an unlawful employment practice for any person to take reprisals against any person because that person has opposed any practice or act forbidden by the LAD, or because that person has filed a complaint under the LAD. N.J.S.A. 10:5-4 and 10:5-12(d). To state a claim of unlawful reprisal, an employee must show that (1) he or she engaged in protected activity known to the employer; (2) he or she was subjected to an adverse employment decision; and (3) there was a causal link between the protected activity and the adverse decision. Marrerro v. Camden County Bd. Of Social Services, 164 F. Supp.2d 455 (D. N.J. 2001). Thus, Complainant has stated a cognizable claim of retaliation under the LAD.

Preclusive Effect of the Prior Determination

The ALJ applied the principles of res judicata, collateral estoppel and the entire controversy doctrine to conclude that Complainant's DHS hearing and subsequent DOP determination have preclusive effect compelling the dismissal of Complainant's LAD claim before the Division. Res judicata, or claim preclusion, is a common-law doctrine that "provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding. " Velasquez v. Franz, 123 N.J. 498, 505 (1991). In order for claim preclusion to apply, three requirements must be met: (1) the prior judgment must be valid, final and on the merits; (2) the parties in the succeeding action must be identical to or in privity with those in the prior action; and (3) the claim in the subsequent action

must grow out of the same transaction or occurrence as the claim in the earlier one. Watkins v. Resorts International Hotel and Casino, 124 N.J. 398, 412 (1991).

Collateral estoppel, or issue preclusion, is “that branch of the broader law of res judicata” which bars relitigation of “any issue or fact actually determined” in a prior action, generally between the same parties, involving a different claim or cause of action. Hackensack v. Winner, supra, 162 N.J. Super. at 28. Thus, “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.” Velasquez v. Franz, supra, 123 N.J. at 506. Moreover, the entire controversy doctrine, a related principle, is predicated on the notion that “the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in one litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy.” Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15 (1989).

Although the New Jersey Supreme Court has noted that there are “important goals to be achieved from the prudent and selective application in administrative proceedings of such doctrines as res judicata, collateral estoppel, and the single controversy rule,” City of Hackensack v. Winner, supra, 162 N.J. at 31, New Jersey has recognized five exceptions to the general rule of preclusion. Zoneraich v. Overlook Hospital, 212 N.J. Super. 83, 94 (App. Div.), certif. denied, 107 N.J. 32 (1986). Thus, under the recognized exceptions preclusion is not warranted when: (1) the party against whom preclusion is sought could not, as a matter of law, obtain review of the judgment in the initial action; or (2) the issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or (3) a new

determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or (4) the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent one; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or (5) there is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 370 (App. Div. 1994), citing Restatement (Second) of Judgments, §28 (1982).

After careful review the record and the submissions of the parties, the Director finds that Complainant's LAD reprisal claim before the Division is not precluded by the prior DOP proceeding because of the differences in the quality or extensiveness of the procedures followed in the two forums. In this instance, the DOP proceeding simply does not merit such deference. Under DOP regulations, a written official reprimand is a minor disciplinary action, and as such, Complainant was afforded the minimum process available to an aggrieved employee (N.J.A.C. 4A:2-3.2, 3.6; P-4, p. 13-14). Complainant was afforded an informal hearing before the Department of Human Services presided over by a hearing officer, not an ALJ. Significantly, the hearing officer was not an independent hearing officer, but a designee of the agency head (P-4, p.13). This is contrasted with Complainant's LAD claim, a contested case before the OAL, which will be heard by a trained

and independent Administrative Law Judge. See Zoneraich v. Overlook Hospital, *supra*, 212 N.J. Super. at 95-96. Further, as noted by Complainant in her exceptions, the DOP procedure did not provide her with the opportunity to conduct discovery and subpoena witnesses and documents, opportunities that are available in contested cases before the OAL. N.J.A.C. 1:1-10.6, 11.1.² Further, DOP hearing officers are instructed to disregard formal rules of evidence, (P-3), and the diminished role of competent evidentiary rules also affects the quality of the DOP proceeding. Moreover, minor disciplinary actions such as official reprimands are not appealable beyond the departmental hearing unless the Merit System Board exercises its discretion to review departmental determinations (P-4, 14). The MSB did not review Complainant's appeal in this matter. Thus, the Director concludes that Complainant was not afforded a hearing before a tribunal with procedural protections comparable to those afforded to a Division complainant appearing before the OAL and, therefore, the determination rendered therein should not be accorded preclusive effect.

In further support of his decision to remand this matter for a hearing, the Director notes that Complainant's Division claim includes an allegation of unlawful reprisal, which is a charge distinct from her claim of race-based differential treatment that was asserted before DOP. Thus, on remand, Complainant will have the opportunity to demonstrate that her reprimand was motivated by retaliatory animus on the part of Respondent, a claim that may involve an entirely different set of proofs from those relied upon in the prior proceeding. Accordingly, the second exception to the general principle of preclusion may be implicated since Complainant's Division proceeding may involve legal claims that are substantially unrelated.

²Respondent's reliance on Mancuso v. Borough of North Arlington, *supra*, is misplaced since, in that case, the prior proceeding was heard by an Administrative Law Judge who conducted a full adversarial hearing. 203 N.J. Super. at 433. Therefore, Mancuso is clearly distinguishable from the present matter.

Finally, the Director concludes that it is also improper to apply the entire controversy doctrine to bar Complainant from proceeding with her LAD claim. In order to properly apply the entire controversy doctrine, the first forum must have been able to provide all parties with the same full and fair opportunity to litigate the issues with the same remedial opportunities as the second forum. Perry v. Tuzzio, 288 N.J. Super. 223, 230 (1996). The remedies available under the LAD include the award of incidental monetary relief in the form of compensatory damages for pain and suffering, Zahorian v. Rusell Fitt Real Estate Agency, 62 N.J. 399, 409, 301 (1973), as well as the award of attorney's fees. N.J.S.A. 10:5-27.1. The Director finds that because the remedies available to Complainant in the DOP proceeding would be mere modification or rescission of the penalty imposed, and because the Departmental hearing did not provide comparable procedural protections, Complainant must be allowed the full opportunity to prove her discrimination claims in a forum where she would be able to assert her rights to the full panoply of remedies applicable to her claims.

Courts have clearly recognized that they have the responsibility and authority to deal with the compelling policy concerns of efficiency and fairness. However, implicit in the development of the entire controversy doctrine is the recognition that economies and the efficient administration of justice should not be achieved at the expense of fairness and a just result. Here, it would be unfair to deny Complainant the opportunity to adequately present her claims in a forum with the procedural due process necessary to hear a discrimination claim under the LAD.

CONCLUSION AND ORDER

Based on all the above, the Director concludes that the preclusionary principles of res judicata, collateral estoppel, and the entire controversy doctrine do not bar Complainant from pursuing her discrimination and reprisal claims under the Law Against Discrimination . Therefore, the Director finds good cause to reject the ALJ's initial decision granting Respondents' summary judgment motion. Accordingly, the Director reverses the ALJ's order dismissing Complainant's complaint, and remands this matter to the OAL for a hearing on the merits.

DATE _____

J. FRANK VESPA-PAPALEO, ESQ.,
DIRECTOR