

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 2483-01
DCR DOCKET NO.: EF05RM-40805
DATED: February 2, 2005

JOANNE L. SERVAIS,)
)
Complainant,)
)
v.)
)
TOWNSHIP OF FAIRFIELD,)
)
Respondent.)

ADMINISTRATIVE ACTION
ORDER AFTER REMAND

APPEARANCES:

James R. Michael, Deputy Attorney General, prosecuting this matter for the NJ Division on Civil Rights (Peter C. Harvey, Attorney General of New Jersey, attorney).

Philip G. George, Esq., for the respondent (Eric M. Bernstein & Associates, LLC, attorneys).

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) on remand from the Appellate Division of the Superior Court of New Jersey. By order dated September 24, 2004, the Appellate Division remanded this matter for consideration of a new defense raised by Respondent for the first time on appeal. Specifically, the Appellate Division directed the Director to consider and rule on the question of whether the Director's April 23, 2003 order finding Respondent liable for back pay, damages and civil penalties is barred by the doctrine of legislative immunity. The Director has now considered the submissions of the parties and the existing record. For the reasons discussed below, the Director concludes that Respondent's actions are not protected by legislative immunity.

PROCEDURAL HISTORY

On April 22, 1996, JoAnne Servais (Complainant) filed a verified complaint with the Division alleging that the Township of Fairfield (Respondent) terminated her employment based on her race in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent filed an answer on June 10, 1996, denying the allegations of unlawful discrimination. The Division conducted an investigation, and on December 17, 1998, issued a finding of probable cause supporting the allegations of the complaint. On May 7, 2001, after attempts to conciliate this case failed, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case.

The Honorable Joseph F. Martone, Administrative Law Judge (ALJ), conducted a hearing on the merits on January 10 and 18, 2002 and May 29, 2002. On January 23, 2003, the ALJ issued an initial decision concluding that Respondent violated the LAD, awarding damages to Complainant and assessing statutory penalties. On April 23, 2003, after independently reviewing the record and the exceptions and replies of the parties, the Director issued an order adopting the ALJ's initial decision with certain modifications, assessing statutory penalties, and awarding Complainant back pay and compensatory damages. On June 5, 2003, Respondent filed an appeal of the Director's order with the Appellate Division. On September 24, 2004, the Appellate Division issued an order finding the Director's factual findings and legal conclusions to be amply supported by the credible evidence, but remanding this matter to address the defense of legislative immunity, which Respondent raised for the first time on appeal.

On December 2, 2004, Respondent filed a letter brief with the Director, arguing that Complainant's claims against it are barred by legislative immunity. Complainant filed opposing arguments on December 20, 2004. Respondent filed an additional brief dated December 28, 2004.

FACTUAL FINDINGS

Initially, the Director notes that, after review of the parties' submissions on remand, neither party has raised factual disputes that are material to the issue to be addressed, and the Director's own analysis raises no such factual disputes. For this reason, there is no need to re-transmit this matter to OAL for presentation of supplemental evidence or additional factual findings.

The Director's Factual Findings, incorporating in large part the factual determinations of the ALJ, are set forth in his April 23, 2003 order. These findings were summarized by the Appellate Division without modification, and are hereby incorporated into the within decision. The facts relevant to the issue on remand are briefly summarized as follows.

Respondent's housing/zoning officer position was a paid, part time position appointed by majority vote of the township committee for a one year term commencing each January. Complainant, a Caucasian female, served as Respondent's housing/zoning officer for various terms beginning in 1986 and including 1994 and 1995. Respondent had no concerns about the quality of her performance in that position. In late December 1995, the township committee published a newspaper advertisement for the position of housing/zoning officer, stating that applications would be accepted until January 10, 1996. Complainant submitted an application after she learned of the advertisement.

At the January 2, 1996 township reorganization meeting, a resolution to appoint Complainant for housing/zoning officer was tabled. At the January 16, 1996 meeting, Respondent's township committee voted on that resolution, but it did not pass. A majority of the township committee voted against Complainant's reappointment as housing/zoning officer and appointed Curtis Kennedy, a Black male, to replace her. Kennedy had not submitted an application for the position, and his qualifications were suspect. Committeemembers Pierce and Munson voted for Complainant's appointment; Committeemembers Taylor, Dawson and Thomas-Hughes voted against Complainant's appointment.

Prior to the January 16, 1996 vote on Complainant's appointment, Committeemember Taylor, who is Black, met with Committeemembers Pierce and Thomas-Hughes, who are also Black, and enunciated a plan to appoint Blacks to replace Caucasian appointees. Thomas-Hughes apparently supported Taylor's plan.

On the day following the township committee's vote to replace her, newly appointed Committeemember John Dawson visited Complainant and advised her that, immediately prior to the township committee meeting, Committeemembers Don Taylor and Viola Thomas-Hughes told him that it was a conflict of interest for the township to have Complainant serve as housing/zoning officer while Complainant's husband was employed as the township's construction official. Dawson informed Complainant that he voted against her reappointment to avoid the purported conflict. The information Taylor and Thomas-Hughes gave Dawson prior to the public meeting misrepresented that reappointing Complainant would constitute an unresolved conflict of interest.

ARGUMENTS OF THE PARTIES

In support of its claim of legislative immunity, Respondent argues that because the decision to replace Complainant was made by a vote of the township committee, the decision was legislative in nature and therefore protected by legislative immunity. Respondent also argues that although some individual committeemembers might be liable for discriminatory conduct, the municipality is the only respondent named in the complaint, and it is protected by legislative immunity.

In opposing Respondent's claim, Complainant argues that the discriminatory conduct in this case was administrative in nature, and legislative immunity only attaches to legislative, as opposed to administrative or executive actions. To support her contention that Respondent's decision to replace her was administrative in nature, Complainant argues that an action must be both procedurally and substantively legislative to be protected by legislative immunity, and the mere act of voting on Complainant's reappointment does not convert an otherwise administrative task into

legislative action. Complainant further argues that the pre-vote private meetings of a majority of the township committee violated the Open Public Meetings Act, and cannot constitute legitimate legislative activity.

In a supplemental submission, Respondent argues that if the Township is not afforded legislative immunity, the threat of litigation will impose a chilling effect on the manner in which the Township conducts its business. Respondent further contends that the Division seeks to substitute its will for the will of the Township regarding the politics of public employment. Respondent also argues that because none of the individuals who were found to have discriminated against Complainant based on her race are named as respondents in the complaint, the Township cannot now be held liable for the actions of those individuals under respondeat superior or any other theory. Respondent reiterates that even if individual committeemembers may not be immune from liability, the Township is entitled to legislative immunity.

Both parties draw support from the Appellate Division decision in Brown v. City of Bordentown, 348 N.J. Super. 143 (App. Div. 2002), interpreting that holding in conflicting ways. The Brown decision will be discussed below.

DISCUSSION

The LAD bars employers from race discrimination in hiring and terminating employees. N.J.S.A. 10:5-12(a). Government entities, including municipalities, are employers subject to the LAD. N.J.S.A. 10:5-5(e). Just as individual supervisors in a private corporation are not “employers” under the LAD, Herman v. Coastal Corporation, 348 N.J. 1, 24 (2002), individual members of a township committee are not “employers” as defined by the LAD. A corporation or other business entity can act only through its supervisory or managerial employees, and similarly, a municipality can only act through its employees and elected or appointed officials. Because only the employer is liable under the LAD, it is not appropriate to assert that a supervisor or other non-employer individual

has violated the LAD in terminating or refusing to hire an employee.¹ Accordingly, the Township is the only proper respondent in this case, and there is no merit to Respondent's contention that the Director's decision is somehow flawed in holding the Township, as opposed to any individual committeemembers, liable for the employment discrimination against Complainant.

Common law legislative immunity is a viable defense to actions brought under the LAD. Brown v. City of Bordentown, 348 N.J. Super. 143, 148-149 (App. Div. 2002). Legislative immunity does not, however, automatically immunize all conduct merely because of the actor's status as a member of the legislative branch of government. Id. at 149. Local governmental bodies have administrative or managerial functions as well as legislative powers. If a government official discriminates based on race while acting in an administrative or executive capacity, as distinguished from his or her role as a legislator, no legislative immunity will attach. Id. at 150. Thus, the issue to be addressed on this remand is whether the discriminatory conduct for which Respondent has been held liable was legislative in nature.

Respondent argues that the Appellate Division in Brown, supra, held that actions taken by vote of an elected body are "absolutely immune under legislative immunity." Rp brief at 3.² The Director disagrees. The Brown decision does not hold that a public body's vote automatically converts administrative acts into legislative activity. See also, Acevedo-Garcia v. Vera-Monroig, 204 F. 3d 1, 9 (1st Cir. 2000)(Legislative ratification does not shield municipal officials from liability for administrative actions in terminating and replacing employees.) To the contrary, Brown relied on the United States Supreme Court ruling in Bogan v. Scott-Harris, 523 U.S. 44 (1998), which directed

¹Although supervisors or other individuals who are not employers may be in some cases be personally liable for aiding, abetting, inciting, compelling or coercing unlawful discrimination committed by an employer, N.J.S.A. 10:5-12(e); Herman v. Coastal Corp., 348 N.J. Super. 1, 28 (App. Div. 2002) cert. denied 174 N.J. 363, that liability theory is inapplicable to the facts of this case.

²Respondent's December 2, 2004 brief will be referred to as "Rp brief"; Respondent's December 28, 2004 brief will be referred to as "Rp 2nd brief."

that the distinction between legislative and administrative or ministerial actions must be discerned from the nature of the act. Id. at 54.

In Bogan, the Supreme Court held that, in determining whether immunity applies, the motives of public officials should not be a factor in determining whether an act is “legislative.” 523 U.S. at 54. Setting aside any consideration of the propriety of the officials’ motives, the Court concluded that a mayor’s action in proposing a budget abolishing a city department of which the plaintiff was the sole employee, as well as the city council chair’s vote to enact an ordinance implementing the mayor’s proposal, were legislative in nature. Id. at 55. In reaching this conclusion, the Bogan Court noted that elimination of the plaintiff’s position,

...reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office.

Id. at 55-56.

In contrast to the result in Bogan, the court in Brown v. Bordentown, supra, when faced with a claim that the city and one of its commissioners discriminated based on race in hiring a police chief, concluded that the fact that the city commissioners voted on a resolution to fill that position was not alone sufficient to render the hiring “legislative” for immunity purposes. 343 N.J. Super. at 149 -150. The court found that there was insufficient evidence in the record to determine whether the allegedly discriminatory conduct was legislative or administrative in nature, and noted that if the commissioner unlawfully discriminated while acting in an administrative or executive capacity, both he and the city could be held liable under the LAD. Id. at 150-151.

Contrary to Respondent’s contention, the Brown court did not hold or even imply that where individual public officials’ actions might not be protected by legislative immunity, the municipality or

other public entity would nonetheless be protected by such immunity. See, e.g., Rp brief at 4; Rp 2nd brief at 2-3. Instead, the Appellate Division reversed the trial court's summary grant of legislative immunity to the city, and specifically held that any legislative immunity the city might enjoy would be derivative of the commissioner's own entitlement to such immunity. 348 N.J. Super. at 151. Thus, where immunity is conferred based on the legislative nature of the challenged action, the municipality is entitled to no broader immunity than the public official who carried out that action.

Following the U.S. Supreme Court's ruling in Bogan v. Scott-Harris, supra, the Third Circuit set forth a two pronged analysis for determining whether a government entity's action is administrative or legislative. In re Montgomery County, 215 F. 3d 367 (3rd Cir. 2000), cert. denied 531 U.S. 1126. To trigger legislative immunity, an act must be both procedurally legislative ("undertaken by means of established legislative procedures") and substantively legislative (involving "policy-making of a general purpose.") 215 F. 3d at 376. ³ In the Montgomery County decision, the court concluded that the county commissioners' vote to terminate the county director of housing services was not substantively legislative, because the action targeted a particular employee and did not involve a matter of general policy. Ibid. In distinguishing the facts before it from Bogan-Harris, the court focused on the fact that the public officials in Bogan-Harris voted to entirely eliminate a position, rather than to terminate a particular employee, and the position in Bogan-Harris was cut as part of a city-wide downsizing carried out for budgetary reasons. Ibid.

³In Bogan v. Scott-Harris, supra, the Court also acknowledged the two distinct aspects of a legislative action -- its formal or procedural characteristics, and its substance. Because the Court concluded that challenged action was both procedurally and substantively legislative, it did not reach the issue of whether meeting the procedural criteria alone would be sufficient to qualify an action for legislative immunity. 523 U.S. at 54-55. Lower court rulings, both before and after Bogan, have considered the substantive as well as procedural aspects of a challenged action, see, e.g., Carver v. Foerster, 102 F. 3d 96, (3rd Cir. 1996); Canary v. Osborn, 211 F.3d 324, 330 (6th Cir. 2000), and as seen by the Montgomery County decision, supra, the Third Circuit continues to require both substantive and procedural aspects of an act to be legislative in nature. See also, Larsen v. Senate of Com. of Pa., 152 F.3d 240, 252 (3rd Cir. 1998).

In the present case, the challenged actions fail the substantively legislative test. As the Third Circuit stated in another matter, “Employment decisions generally are administrative’ except when they are ‘accomplished through traditional legislative functions’ such as policymaking and budgetary restructuring that ‘strike at the heart of the legislative process’.” Acevedo-Garcia, supra, 204 F. 3d at 8, citing Rateree v. Rockett, 852 F. 2d 946, 950-51 (7th Cir. 1988). Here, Respondent did not eliminate the housing/zoning officer position. It did not otherwise effect any policy to modify the office or its government structure or implement cost-saving measures. Instead, it merely decided to replace one municipal employee with a new hire in precisely the same position. Its decision had no prospective impact on the manner in which anyone who might serve as housing/zoning officer in the future would do his or her job. Thus, just as in the county commissioners’ vote in the Montgomery County case, the township committee’s vote in the present case was not substantively legislative.

In Ryan v. Burlington County, 889 F. 2d 1286 (3rd Cir. 1989), the court explained that the procedural aspect of legislative conduct requires that actions be carried out through established legislative procedures, “in order to assure that the act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve.” 889 F. 2d at 1291. The Third Circuit noted that “the proper procedures for legislating must be followed or that governing body...risks running afoul of constitutionally mandated due process rights.” Ibid. In the present case, a majority of the township committee met privately on two occasions to discuss Complainant’s application for reappointment, which was official business, in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21. Because of these material deviations from proper legislative procedure, Respondent’s decision not to reappoint Complainant to the housing/zoning officer position was not procedurally legislative, and lost any legislative immunity that otherwise might have attached to a substantively legislative decision.

Respondent’s contention that without legislative immunity, the Director will be substituting

his “will” in employment decisions for that of the township, thereby stifling public politics, is without merit. The LAD does not interfere with the right of any employer, including a municipality, to make any employment decision it wishes based on “politics,” political affiliation or any other lawful factor, whether prudent or not. See, e.g., Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994)(employee cannot prevail merely by demonstrating that employer’s action was wrong, mistaken, unwise, imprudent or incompetent, but must prove that the employer was motivated by discriminatory animus.) The LAD does, however, prohibit a municipality from hiring or firing employees based on race or other protected characteristic. As an administrative act, Respondent’s decision to replace Complainant was not protected by legislative immunity, and characterizing a hiring as “political” does not change that.⁴

In its submissions on this remand, Respondent reiterates its prior contention that Complainant had no right or guarantee to continue in the housing/zoning officer position. As the Appellate Division observed, “of course, complainant’s 1996 appointment was not ‘guaranteed to her.’ What that has to do with the claim of legislative immunity is beyond us.” Appellate Decision at 5. Respondent has provided the Director with no additional explanation of the relevance of job guarantees to its claim that Complainant’s race discrimination action is barred by legislative immunity. Respondent’s lengthy quote from Merlino v. Borough of Midland Park, 172 N.J. 1 (2002), a New Jersey Supreme Court decision addressing the role of statutory tenure in protecting municipal construction code officials from politically motivated firings, has no relevance to legislative immunity or race discrimination. Complainant raised no claim that she had actual or constructive tenure in her position, and the Director’s decision was premised on the assumption that she was an employee at will, just like the vast majority of employees who bring employment discrimination claims before

⁴ After a hearing on the merits, Respondent presented no competent evidence that its decision to replace Complainant was based on political party rather than race. This matter has been remanded only for a ruling on the issue of legislative immunity, and the Director will not revisit Respondent’s claim that its decision to replace Complainant was based on political affiliation or any other factor rather than race.

the Division. The LAD protects all employees from race discrimination, whether tenured, contractual, temporary or at will.

Respondent also argues that without a blanket legislative immunity for all of its decisions reached by vote of the township committee, there will be a chilling effect on the manner in which the township conducts its business. Rp brief 2 at 1. The within ruling does not impair or limit any immunity that would attach to Respondent's actions which are legislative in nature, and for this reason it can impose no chilling effect on Respondent's legislative conduct. As discussed above, the doctrine of legislative immunity simply is not available to insulate administrative activities from liability.⁵

CONCLUSION

For the reasons discussed above, the Director concludes that Respondent is not immune from liability for Complainant's claims.

ORDER

The Director hereby vacates the informal stay entered pending Respondent's appeal of the

⁵Moreover, the principles underlying legislative immunity weigh against applying a "chilling effect" rationale to immunizing the government entity itself, as opposed to immunizing an individual government official from personal liability. In addressing legislative immunity as applied to §1983 claims, the U.S. Supreme Court has reasoned that "imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds." Owen v. City of Independence, 445 U.S. 622, 653, fn 37(1980). The societal interest in compensating innocent victims of governmental misconduct is best served by spreading the loss flowing from official acts among the public at large, rather than imposing the burden on one "unlucky" victim. Id. at 653-657. The risk of municipal liability for violations of constitutional rights will encourage municipal officials to recognize that they must consider such rights when taking action in their official capacity. Id. at 656. See also, Timber Properties, Inc. v. Township of Chester, 205 N.J. Super. 273, 294, fn 3 (Law Div. 1984), applying Owen to a §1983 action in state court. ("It is only individual municipal officials who enjoy this [legislative] immunity, not a municipality"). Brown v. City of Bordentown, supra, appears to be the only reported decision addressing the applicability of legislative immunity to LAD claims, and as discussed above, that case does not limit legislative immunity to protecting municipal officials from individual liability for unlawful discrimination. Nevertheless, the rationale for limiting legislative immunity to individuals in §1983 actions at the very least provides additional support for the conclusion that a municipality can enjoy no greater legislative immunity than is afforded to its government officials.

Director's Findings, Determination and Order of April 23, 2003, and ORDERS that Respondent comply with all provisions of the Director's April 23, 2003 Order. The remedial provisions of the April 23, 2003 Order are restated in full as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of \$24,126.70 for her lost wages with interest thereon, and as compensation for her pain and humiliation.

3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of \$7,500 as a statutory penalty.

4. The penalty and all payments to be made by the Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

In addition, pursuant to the April 23, 2003 Order, Respondent is now responsible for post-judgment interest on the lost wages and monetary damages payable to Complainant, and the statutory penalty payable to the State Treasurer, from June 7, 2003 to the date of payment. The interest due to Complainant totals \$912.85, and the interest due to the State Treasurer totals \$284.54, through January 31, 2005. Additional interest in the amount of 66 cents per diem shall be due on the payment due to Complainant, and 20 cents per diem on the payment due to the State Treasurer, until payment is received by the Division. All of the above payments, plus the accrued interest, shall be made within 45 days of the within Order.

DATE: _____

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