



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of S.M., Trenton
Psychiatric Hospital, Department of
Health

CSC Docket No. 2022-218

Reprisal Appeal

ISSUED: MAY 23, 2022 (HS)

S.M., represented by John V. Kelly, Esq., petitions the Civil Service Commission (Commission) for relief, pursuant to *N.J.S.A.* 11A:2-24 and *N.J.A.C.* 4A:2-5.1, from alleged reprisal by the Trenton Psychiatric Hospital (TPH), Department of Health.

As background, the appellant had the following employment history with TPH. He was employed in a Temporary Special Services position from October 15, 2019 to October 25, 2019. On October 28, 2019 the appellant received an unclassified appointment to the title of Clinical Psychiatrist Board Eligible. On March 28, 2020, the appellant received an unclassified appointment to the title of Clinical Psychiatrist Board Certified. On July 16, 2021, the appellant's employment with TPH was terminated. However, he was paid for the remainder of the pay period and received payment up to and including July 30, 2021.

On appeal to the Commission, the appellant maintains that his termination was an act of reprisal. He states that his first priority was, and always is, patient care, but when it was apparent that several colleagues did not have the patient's best interest at heart and failed to follow protocols and safeguards, he complained to various offices, including the Office of Diversity and Equity Services (ODES) and the Employee Relations Office. Specifically, his complaints concerned poor work ethic of team members affecting patient care; failures to follow Health Insurance Portability and Accountability Act recommendations; non-adherence to TPH policies; failure to communicate important patient information; tardiness or lack of attendance; failure

to address safe discharge concerns; failure to address malfunctioning medical equipment; improper time management; lack of communication; inappropriate attitudes and workplace behavior; theft of time; improper wage payments; potential New Jersey Law Against Discrimination violations; abuse of power; and other unprofessional behavior. However, in the appellant's view, his complaints fell on deaf ears and a "cabal" united against him to push him out of TPH. The appellant maintains that he was subjected to petty grievances and was denied hazard pay. He further contends that it is incredible that he was terminated four days after receiving a determination on his discrimination complaint and one day after joining in an e-mail complaint by all TPH physicians against the Employee Relations Coordinator (ERC) alleging unprofessionalism and abuse of power. In support, the appellant submits copies of his grievance, joined by other doctors, concerning hazard pay, dated August 21, 2020; his discrimination complaint, dated August 21, 2020; his complaint addressed to the Employee Relations Office, dated August 19, 2020; the July 12, 2021 determination on his discrimination complaint; the July 15, 2021 e-mail complaint, addressed to the Department of Health's Director of Employee Relations, alleging unprofessionalism and abuse of power by the ERC; the July 16, 2021 termination letter signed by the Human Resources Director; and other documents.

In response, TPH, represented by the Attorney General's Office,¹ notes the three elements that an employee asserting a cause of action under *N.J.S.A. 11A:2-24* is required to prove. It maintains that any nexus between the denial of hazard pay and his termination is impossible because the grievance concerning hazard pay was finally resolved on April 1, 2021, months earlier; none of the other doctors who joined in the grievance suffered any retaliation or negative consequence from requesting hazard pay; and the denial was based on statutory guidelines. Concerning the complaint against the ERC, TPH argues that the appellant was simply one of several doctors who joined their names to the complaint. TPH argues that it is notable the appellant does not claim that everyone who joined was retaliated against because no negative action was ever taken against any of the doctors, including the appellant.² TPH adds that the ERC was not in charge of the appellant's termination. That decision, according to TPH, fell to the Human Resources Director, who was not involved in this issue in any way. TPH contends that even if the appellant could establish a *prima facie* case of reprisal, it had legitimate business reasons to terminate him, including adjusting staff according to operational needs. In addition, TPH maintains that the appellant regularly treated female staff members inappropriately and, in June 2021, put a patient at severe risk of withdrawal when he abruptly took her off her regular medication. In support, TPH submits various

¹ TPH's response was submitted by Kathryn B. Moynihan, Deputy Attorney General. The Commission was, however, advised that Gary Baldwin, Deputy Attorney General, would represent TPH going forward.

² Agency records indicate that with the exception of the appellant, every doctor who joined in the July 15, 2021 complaint remains employed at TPH.

exhibits, including a July 9, 2021 “corrective measure” e-mail issued to the appellant by the ODES. The e-mail stated, in part:

. . . While male staff can be prescribed to a patient that is violent or sexually offensive, to only request male staff to accompany you when seeing patients, with no specific documented need for a male staff member, would be disparate treatment to female staff members based on sex/gender and a violation of NJ State Policy Prohibiting Discrimination in the Work Place (State Policy).

While this is the concern of the referral, with no presumption that this is occurring, ODES is taking corrective measures by informing you that disparate treatment of employees based on sex/gender is a violation of the State Policy and inappropriate in a professional work environment. If you are requesting male staff to accompany you to see patients for other than a documented legitimate business reason, and purposely excluding female staff from accompanying you, you need to immediately stop this behavior. Again, this is not a presumption that the reported concern is occurring, this is a corrective measure by ODES to prevent continued violations of the State Policy, **if** the prohibited behavior is taking place. ODES is taking no further action in this matter.

In reply, the appellant reiterates his view that his termination was an act of reprisal. He emphasizes that in the July 9, 2021 corrective measure email, ODES stated that there was “no presumption that this is occurring.” He maintains that he has immense respect for women. As to the patient TPH maintains the appellant placed in danger, the appellant argues that TPH’s evidence demonstrates, at best, disagreement on the best course of action for treating a particularly problematic patient. In support, he submits his certified statement.

CONCLUSION

N.J.A.C. 4A:2-5.1 generally provides that an appointing authority shall not take or threaten to take any reprisal action against employees in retaliation for an employee’s lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority or on the employee’s permissible political activities or affiliations. *See also, N.J.S.A.* 11A:2-24. In *Katherine Bergmann v. Warren County Prosecutor*, Docket No. A-5665-01T5 (App. Div. December 1, 2004), it was determined that an employee asserting a cause of action under *N.J.S.A.* 11A:2-24 is required to prove the following elements:

- 1) The employee “reasonably believed” in the integrity of the disclosure at the time it was made, meaning the employee had no reasonable basis to question the substantive truth or accuracy of the content of

the disclosure just prior to communication (it is here that the term “reasonable belief” is borrowed from the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1, *et seq.*, to define what is the substantive content of a “lawful disclosure”);

- 2) The employee disclosed the information to a source “reasonably” deemed an appropriate recipient of such information just prior to communication (here, the term “reasonably” is used to describe the perceived proper channels through which a “lawful disclosure” should be communicated);
- 3) There is a connection, or nexus, between the disclosure and the complained of action (this is a standard cause-and-effect showing by the employee). *Carlino v. Gloucester City High School*, 57 *F. Supp. 2d* 1, 35 (D.N.J. 1999); *Kolb v. Burns*, 320 *N.J. Super.* 467, 476 (App. Div. 1999).

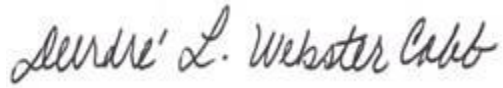
Only after the employee satisfies the criteria above does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See Wright Line*, 251 *NLRB* 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle*, 429 *U.S.* 274 (1977).

The Commission assumes, as both parties do, that the appellant has met the first and second prongs of the test enumerated above. However, the Commission finds that it cannot make a determination as to the third prong on the present record. In this regard, TPH maintains that the appellant’s termination was not due to any prior disclosures on his part. However, the Commission notes that the appellant’s termination came only four days after the determination on his discrimination complaint was issued and only one day after the July 15, 2021 e-mail complaint alleging unprofessionalism and abuse of power by the ERC, which the appellant joined. Given that close timing, it is appropriate to refer this matter to the Office of Administrative Law for a hearing.

ORDER

Therefore, it is ordered that this matter be referred to the Office of Administrative Law for a hearing.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF MAY, 2022



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