STATE OF NEW JERSEY

In the Matter of S.B., Department of Corrections	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2022-3065	Reprisal Appeal

ISSUED: August 24, 2022 (SLK)

S.B., an Assistant Social Work Supervisor, Secured Facilities with the Department of Corrections (Corrections), 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 way of background, S.B. filed a complaint with the Equal Employment Division (EED) alleging that A.R., a Social Work Supervisor 2, Secured Facilities, retaliated against him in violation of the New Jersey Conscientious Employee Protection Act (CEPA). Specifically, S.B. indicated that on September 1, 2021, he submitted a complaint to the Special Investigations Division (SID) regarding what he "believed to be a violation of our Identity Theft Prevention policy." S.B. alleged that in retaliation for submitting said complaint to the SID, on September 13, 2021, A.R. advised that he would have to resume taking an hour lunch break instead of a half hour lunch, which was an Americans with Disabilities (ADA) accommodation that he received in 2018. S.B. believed that because this was done less than two weeks after he submitted his complaint, the timing of the removal of his accommodation was evidence of retaliation. Further, he believed that the explanation that A.R. provided to him as to why this was being done, which was it had to be done because of the union contract, was invalid because he indicated that the union contract did not require this. However, the investigation revealed that A.R. did not have the authority

to change S.B.'s schedule and was doing as directed. Moreover, the evidence provided there was a legitimate business need to alter his lunch break; however, once human resources confirmed S.B.'s ADA accommodation, he was allowed to continue with his half hour lunch break. Therefore, the EED was unable to substantiate the allegation.

On appeal, S.B. presents that it is uncontested that he was granted an ADA accommodation to have a half hour lunch break and a different starting time than the majority of his department due to a disability. Further, S.B. provides that it is uncontested that he had been afforded a half lunch break since 2018 due to an ADA accommodation, which his superior knew about, he then filed the aforementioned complaint with SID and, less than two weeks later, A.R. ordered him to change his work schedule, including his half hour lunch break. S.B. states that although he was advised that his half hour lunch break needed to be changed due to the union contract, he asserts that his union contract states the opposite. Moreover, he indicates that nothing changed since 2018 that warranted modifying his lunch break accommodation. S.B. argues that there are issues of material fact that require a hearing at the Office of Administrative Law (OAL). Specifically, he states that Equal Employment Opportunity Commission (EEOC) guidance and case law provide that there are only certain reasons why an ADA accommodation can be removed and there is a dispute as to whether the appointing authority's initial decision to remove his accommodation was retaliatory or for a legitimate business reason.

S.B. confirms that although he was initially advised on September 13, 2021, that his accommodation was to be removed effective September 27, 2021, his accommodation was not removed and is still in place. He cites case law that indicates possible retaliatory action under CEPA is greater than just discharge, suspension and demotion and courts should review retaliation in the broad remedial purpose of CEPA. He states that Corrections offers no legitimate explanation as to why decisions about an existing accommodation was removed. S.B. provides that the only explanation that he received was the accommodation was in violation of the union contract, which it is not, and the decision was made for a legitimate business reason. He emphasizes that the timing of events and asserts that it would be foolish to believe that this accommodation was initially removed for any other reason other than retaliation for this complaint. He believes that Director C. ordered A.R. to remove his accommodation as A.R. seemed to have no idea as to why his accommodation was removed, and when he questioned her about it, he contends that A.R. made up a reason that it was removed due to the union contract, which he contends does not make sense since the contract says the opposite. He argues that if there was a legitimate reason to modify his accommodation, it would have ultimately done so.

In response, Corrections states that upon receipt of S.B.'s complaint, a thorough and impartial investigation was conducted, which consisted of interviewing individuals who had relevant knowledge and reviewing pertinent documentation. It indicates that the investigation did not reveal any evidence to substantiate S.B.'s

claim that he was subject to retaliation under CEPA. Rather, Corrections provides that A.R. did not have the authority to change S.B.'s schedule and was doing as directed. Additionally, while the allegation may appear to touch the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy), it found that there was no nexus between the alleged conduct and membership in a protected category. Moreover, Corrections asserts that the evidence provided that there was a legitimate business need to alter S.B.'s lunch break. However, once human resources confirmed his accommodation, S.B. was allowed to continue with his half hour break within 24 hours of his indicating his need to continue his accommodation. Corrections notes that it has the authority to affirm existing accommodations or to adjust them based on its and the employee's need through the "interactive process", a process which S.B. availed himself with a satisfactory outcome.

CONCLUSION

N.J.A.C. 4A:2-1.1(d) provides that except where a hearing is required by law, this chapter or *N.J.A.C.* 4A:8, or where the Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record.

N.J.S.A. 11A:2-24 and *N.J.A.C.* 4A:2-5.1(a) provides that an appointing authority shall not take or threaten to take any reprisal action against an employee in the career, senior executive or unclassified service in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority.

N.J.A.C. 4A:2-5.2(a) provides that an employee may appeal a reprisal or political coercion action to the Commission within 20 days of the action or the date on which the employee should reasonably have known of its occurrence.

N.J.A.C. 4A:2-1.4(c) provides that the burden of proof shall be on the appellant.

Initially, the Commission notes that it accepted S.B.'s appeal as an allegation of reprisal. *See N.J.A.C.* 4A:2-5.1 and *See N.J.A.C.* 4A:2-5.2. In general, to present a *prima facie* case of reprisal, an appellant must satisfy the "Wright Line" test articulated by the New Jersey Supreme Court in *Matter of Bridgewater Tp.,* 95 *N.J.* 235 (1984), which states that an appellant has the burden of showing that he was engaged in a protected activity, that the employer knew of the activity and was hostile to it and that such activity or disclosure of information was a substantial motivating factor in the appointing authority's action against the employee. Only after such a showing by an appellant does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See also, Wright Line,* 251 *NLRB* 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle,* 429 *U.S.* 279 (1977); *In the Matter of Jadwiga Warwas* (MSB, decided February 27, 2008).

In this matter, S.B. claimed that A.R retaliated against him in violation of CEPA after he submitted a complaint to the SID on September 1, 2021, regarding what he "believed to be a violation of our Identity Theft Prevention policy" by advising him on September 13, 2021, that he would have to resume taking an hour lunch break instead of a half hour lunch, which was an ADA accommodation that he received in 2018. However, the EED was unable to substantiate S.B.'s claim as A.R. did not have the authority to change S.B.'s schedule. Further, the investigation found that there was a legitimate business reason for the initial change and once S.B. engaged in the "interactive process," in less than 24 hours, he was advised that he could continue with his accommodation. Therefore, the EED was unable to substantiate S.B.'s claim as he provided no witnesses, documents or any other evidence to confirm that his "whistleblowing" was a substantial factor in any actions taken against him. Therefore, as there is no evidence in this matter other than S.B.'s speculation about the timing of events, mere speculation, without evidence, is insufficient for finding that S.B. presented a *prima facie* case of reprisal. *See In the Matter of C.H.* (CSC, decided July 21, 2021). Moreover, as S.B.'s accommodation was not actually removed, there is no material fact in dispute and no basis to transmit this matter to the OAL for a hearing as he requests. See *N.J.A.C.* 4A:2-1.1(d).

ORDER

Therefore, it is ordered that this petition be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF AUGUST, 2022

Dolores Gorczyca

Dolores Gorczyca
Member
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: S.B.
El-Rhonda Williams Alston, Director
Division of EEO/AA
Records Center