

COMMONWEALTH OF PENNSYLVANIA

David W. Grunza : State Civil Service Commission
 :
 v. :
 :
 :
 Clarks Summit State Hospital, :
 Department of Human Services : Appeal No. 30378

David W. Grunza : Peter J. Garcia
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by David W. Grunza challenging his removal from probationary Registered Nurse employment with the Clarks Summit State Hospital, Department of Human Services. A hearing was held January 24, 2020, at the Clark Summit State Hospital in Clarks Summit, Pennsylvania before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by the parties. The issue before the Commission is whether the appointing authority discriminated against appellant when removing him from employment.

FINDINGS OF FACT

1. By letter dated September 26, 2019, appellant was removed from his position as Registered Nurse, probationary status, effective September 30, 2019.

The appointing authority charged:

The reason for this removal is Violation of DHS Policy 7173, Unauthorized absence and Failure to Report to work as ordered. Specifically, beginning on August 14, 2019 you were in AW status (unauthorized Unapproved Leave) continuing for: 8/16, 17, 18, 20, 22, 25, 26, 28, 29, 30, 31; 9/3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 22, 23, 25 and absences continue.

Comm. Ex. A.

2. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of the Civil Service Act of 2018.
3. On June 17, 2019, appellant began employment with the appointing authority as a Registered Nurse, probationary status. N.T. p. 110.
4. On August 6, 2019, appellant alleged he sustained a work related injury. Comm. Ex. B; N.T. p. 20.

5. On August 6, 2019, after his shift, at approximately 7:00 p.m., appellant called the appointing authority to state he could not report to work the following day. N.T. pp. 21, 57, 70.
6. Shortly thereafter, Nursing Supervisor Greg Serafini called appellant and told him to come into the facility to complete workers compensation claim forms and immediately get examined by the workers compensation panel doctor. N.T. pp. 21, 59, 70.
7. On August 7, 2019, appellant came to the office and completed the workers compensation paperwork. N.T. pp. 21, 59, 61, 70-71.
8. Later in the day on August 7, 2019, appellant was examined by workers compensation panel doctor Mark Albert. Albert indicated appellant, “May not return to work at this time” and established a follow-up appointment for August 8, 2019. Comm. Ex. B.
9. On August 8, 2019, Albert re-examined appellant. After the examination, Albert indicated appellant could return to “Full Duty” work and advised appellant to return for re-evaluation if the symptoms got worse. N.T. p. 69; AA Ex. 3.

10. On August 8, 2019, appellant had no physical symptoms of any injury. N.T. pp. 20, 57.
11. Appellant received provisional leave without pay with benefits, pending a determination of whether his injury was work related. N.T. p. 100.
12. On August 11, 2019, Albert examined appellant a third time. Albert marked appellant's work status as "No Work" and wrote:

GO TO E.R. NOW! NO WORK
UNTIL CLEARED
NEUROLOGICALLY. WORK
STATUS DETERMINED BY
NEUROLOGY OR NEURO REHAB.

Comm. Ex. B; N.T. pp. 22-23. (Emphasis in original.)

13. By letter dated September 3, 2019, the appointing authority advised appellant his workers compensation claim was denied and he was not entitled to use injury leave to cover his absences. N.T. pp. 60-61; AA Ex. 1.

14. By letter dated September 13, 2019, the appointing authority stated:

You are hereby ordered to report to work immediately. If you believe you are unable to do so, you are ordered to contact William J. Abda, Labor Relations Coordinator...by the close of business on 9/19/19, to explain the reason for your continued absences. Such explanation must be supported by the appropriate medical documentation.”

Comm. Ex. B; N.T. p. 104.¹

15. Upon receipt of the directive to return to work immediately, appellant telephoned Abda and stated he was still undergoing medical treatment and would not be available for work for about one month. N.T. p. 103.
16. Appellant did not have any leave available to cover his work absences from August 14, 2019 through September 25, 2019. N.T. p. 72.

¹ In the September 13, 2019 letter, the appointing authority lists multiple dates appellant was absent from work without authorization. Several are indicated as occurring in January 2019. Comm. Ex. B; N.T. pp. 30-32; 98-99. During Abda’s testimony, he acknowledged making a typographical error on those specific dates, which should be August 2019. N.T. pp. 98-99.

17. Appellant was not eligible for leave under the Family and Medical Leave Act. N.T. pp. 59, 116.
18. Appellant did not submit a request for a disability accommodation to the appointing authority or to the appointing authority's Americans with Disabilities Act Coordinator. N.T. pp. 73-74.
19. Appellant's absences from work were deemed "unauthorized." N.T. pp. 103, 108
20. When appellant did not return to work, Abda contacted Labor Relations and requested permission to remove appellant from his position. N.T. p. 104.
21. On September 25, 2019, appellant attended a Pre-Disciplinary Conference. N.T. pp. 31-32, 106.
22. After the Pre-Disciplinary Conference, the panelists recommended appellant's removal. N.T. pp. 105.
23. The recommendation to remove appellant was approved by the Labor Relations Office in the Harrisburg. N.T. pp. 105-106.

DISCUSSION

The issue before the Commission is whether the appointing authority based its decision to remove appellant on any discriminatory factor. Appellant alleges he was discriminated against on the basis of his disability.

Section 2704 of Act 71 of 2018 prohibits discrimination. 71 Pa.C.S. § 7104. Section 2704 of Act 71 of 2018 provides:

§ 2704. Prohibition of discrimination.

An officer or employee of the Commonwealth may not discriminate against an individual in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of race, gender, religion, disability or political, partisan or labor union affiliation or other nonmerit factors.

71 Pa.C.S. § 2704.

The provisions of Section 2704 are substantially the same as the provisions in Section 905.1 of Act 286 (71 P.S. § 741.905a), and both sections of the respective acts use virtually the same language.² This includes prohibiting “traditional” discrimination which encompasses claims based upon disability or other non-merit factors. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*,

² Section 905.1 provides:

905.1 Prohibition of Discrimination—No officer or employe[e] of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

672 A.2d 409, 411 n. 4 (Pa. Commw. Ct. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. Ct. 428, 539 A.2d 462 (1988); 71 P.S. § 2704. In claims of traditional discrimination, the appellant must prove a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise unexplained, indicates it is more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. Ct. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. Ct. 33, 594 A.2d 847 (1991). Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate the proffered merit reason is merely a pretext for discrimination. *Henderson* at 126 Pa. Commw. Ct. 607, 560 A.2d 859.

Appellant testified on his own behalf and presented the testimony of Labor Relations Coordinator William Abda. The appointing authority did not present testimony or evidence except upon cross examination of appellant and Abda.

The facts of this case are not in dispute. According to appellant, on August 6, 2019, he sustained a work-related injury. Comm. Ex. B; N.T. p. 20. The same evening, after his shift, at approximately 7:00 p.m., appellant called into the appointing authority stating he could not report to work the following day. N.T. pp. 21, 57, 70. On August 7, 2019, at Nursing Supervisor Serafini's request, appellant completed workers compensation claim forms. N.T. pp. 21, 59, 61, 70-71. Later the same day, appellant was examined by workers compensation panel doctor Mark Albert, who concluded appellant could not return to work and established a

follow-up appointment for the next day. Comm. Ex. B. After examining appellant on August 8, 2019, Albert concluded appellant could return to full duty work and advised appellant to return for a re-evaluation if his symptoms got worse. N.T. p. 69; AA Ex. 3. Appellant testified he had no physical symptoms of any injury on August 6, 2019. N.T. pp. 20, 57.

On August 11, 2019, Albert examined appellant a third time; he concluded appellant should go directly to an emergency room and not return to work until he was cleared by neurology or neurology rehabilitation. Comm. Ex. B; N.T. pp. 22-23. During this time off, appellant had been receiving provisional leave without pay with benefits, pending a determination of whether his injury was work related. N.T. p. 100.

Subsequently, by letter dated September 3, 2019, the appointing authority advised appellant his workers compensation claim was denied and he was not entitled to use injury leave to cover his absences. N.T. pp. 60-61; AA Ex. 1. By letter dated September 13, 2019, appellant was directed to report to work immediately. Comm. Ex. B; N.T. p. 104. Upon receipt of the letter, appellant telephoned Abda and stated he was still undergoing medical treatment and would not be available for work for about one month. N.T. p. 103.

Appellant acknowledges he did not have leave available to cover his work absences from August 14, 2019 through September 25, 2019. N.T. p. 72. In addition, he was not eligible for leave under the Family and Medical Leave Act. N.T. pp. 59, 116. Furthermore, he did not submit a request for a disability

accommodation to the appointing authority or to the appointing authority's Americans with Disabilities Act Coordinator. N.T. pp. 73-74. He did not have workers compensation or injury leave available. N.T. p. 72. Labor Relations Coordinator Abda testified appellant's absences from work were deemed unauthorized because appellant had no leave available. N.T. pp. 103-104.

Labor Relations Coordinator Abda provided testimony regarding the decision to remove appellant from Registered Nurse employment. When appellant did not return to work, Abda contacted Labor Relations and requested permission to remove appellant from his position. N.T. p. 104. On September 25, 2019, appellant attended a Pre-Disciplinary Conference. N.T. pp. 31-32, 106. After the Pre-Disciplinary Conference, the panelists recommended appellant's removal, which was subsequently approved by Labor Relations in the Harrisburg Office. N.T. pp. 105-106. Abda testified the appointing authority's protocol is to remove a probationary employee with a non-work related injury who is ordered to return to work, but indicates he is not available to work. N.T. p. 111.

After appellant presented his case, the appointing authority made a Motion to Dismiss for failure to establish a *prima facie* case of discrimination based on a disability. N.T. pp. 144-145. The presiding Commissioner deferred the Motion to Dismiss for consideration by the full Commission. N.T. p. 146. When making a claim of "traditional discrimination," an appellant must initially present a *prima facie* case of discrimination by producing sufficient evidence which, if believed and otherwise unexplained, indicates it is more likely than not discrimination has

occurred. *Henderson, supra; Nwogwugwu, supra*. We have been advised, “[g]iven the critical role of circumstantial evidence in discrimination proceedings, the *prima facie* case cannot be an onerous one.” *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864.

In this instance, although appellant alleges he is disabled due to a work related injury, he has not presented any evidence establishing either: the injury is work related or he has sought disability accommodation. Moreover, appellant acknowledges his workers compensation claim was denied, he cannot use injury leave, does not qualify for leave under the Family Medical Leave Act, and he does not have any leave available to cover his absences. Appellant has not presented any evidence indicating the injury was utilized in a discriminatory manner to remove him from employment. To the contrary, Labor Relations Coordinator Abda credibly³ testified the appointing authority’s protocol is to remove probationary employees who are directed to return to work and indicate they cannot do so. Thus, appellant has not presented sufficient evidence of discrimination based upon a disability which indicates it is more likely than not discrimination has occurred. *Henderson, supra*.⁴ The appointing authority’s Motion to Dismiss is therefore granted. Accordingly, we enter the following:

³ The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. Ct. 1999).

⁴ The Commission notes if the burden of proof had shifted, the appointing authority has presented sufficient evidence of legitimate, non-discriminatory reason for removing appellant. Specifically, Labor Relations Coordinator Abda credibly testified, and appellant agrees, he was directed to return to work, did not do so, and does not have any accumulated leave, and does not qualify for Family Medical Leave Act leave. Thus, had the burden shifted, the Commission finds the appointing authority presented legitimate, non-discriminatory reasons – *i.e.*, insufficient leave to cover his work absences - for removing appellant from his probationary Registered Nurse position. *Henderson, supra; Nwogwugwu, supra*. Appellant has not presented any evidence indicating the appointing authority’s rationale was merely a pretext to discriminate against him. *Nwogwugwu, supra*.

CONCLUSION OF LAW

Appellant has failed to present evidence establishing discrimination violative of Section 2704 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of David W. Grunza challenging his removal from probationary Registered Nurse employment with the Clarks Summit State Hospital, Department of Human Services and sustains the action of the Clarks Summit State Hospital, Department of Human Services in the removal of David W. Grunza from probationary Registered Nurse employment effective September 30, 2019.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: October 26, 2020