

COMMONWEALTH OF PENNSYLVANIA

Alisa R. Evans : State Civil Service Commission
v. :
Department of Human Services : Appeal No. 30462

Alisa R. Evans : Jonathan L. Curtis
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Alisa R. Evans challenging her Employee Performance Review for the rating period from January 1, 2019 to December 31, 2019 in her position as a Human Services Program Specialist, regular status, with the Department of Human Services. A hearing was held January 14, 2021, at the Civil Service Commission’s Strawberry Square Office in Harrisburg, 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 appellant’s Employee Performance Review was based upon a discriminatory motive or non-merit factors.

FINDINGS OF FACT

1. On December 20, 2019, appellant received her annual Employee Performance Review (hereinafter “EPR”) for the time period of January 1, 2019 to December 31, 2019. The appointing authority provided appellant with ratings of “Satisfactory” in every EPR category: “Job Knowledge/Skills,” “Work Results,” “Communications,” “Initiative/Problem Solving,” “Interpersonal Relations/Equal Employment Opportunity (EEO),” and “Work Habits.” Appellant received an Overall Rating of “Satisfactory.” Comm. Ex. A.
2. On December 20, 2019, appellant signed her EPR, indicated she would like to discuss the rating with her Reviewing Officer, and commented, “Additional discussions requested.” Comm. Ex. A.
3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. B.
4. Appellant is an African American female. Comm. Ex. B; N.T. pp. 52, 57.

5. Appellant has been employed by the appointing authority for approximately ten years. N.T. pp. 22-23.
6. Human Services Program Specialist Supervisor Barbara Judy is appellant's supervisor and the Rater for appellant's annual EPRs. Comm. Ex. B; N.T. p. 148.
7. Welfare Program Executive 1 Sandra Migliorisi was the Reviewing Officer for appellant's 2019 annual EPR. N.T. p. 169.
8. On or about April 3, 2018, appellant heard Migliorisi use the phrase "bad brown/bronze penny." N.T. pp. 57, 171-172.
9. In June 2019, Judy assigned appellant the task of creating a Provider Enrollment: Standard Return Language Document. Appellant successfully completed the document during the 2019 rating period. N.T. pp. 34-37, 62; Ap. Ex. 2.
10. During the 2019 rating period, appellant communicated via emails with Judy and Migliorisi. N.T. pp. 75-117; Ap. Ex. 4.

11. On December 26, 2019, appellant met with Judy and Migliorisi to discuss the 2019 annual EPR ratings. Comm. Ex. A; N.T. pp. 40-41; Ap. Ex. 3.

12. Martin, a Caucasian male, is employed as a Human Services Program Specialist. He created a data base for internally tracking the tax return checks. His work on this data base earned him a “commendable” rating in one category of his annual EPR.¹ N.T. p. 171.

DISCUSSION

At issue before the Commission is whether appellant’s Employee Performance Review (hereinafter “EPR”) for the time period of January 1, 2019 to December 31, 2019 was based upon any discriminatory motives or non-merit factors. Appellant alleges discrimination based upon an alleged violation of the Civil Service Act and/or Rules. She further alleges discrimination based upon disparate treatment, age, disability, race, and in retaliation for requesting an accommodation for a medical condition and filing complaints with the appointing authority’s Bureau of Equal Employment Opportunity and with the Pennsylvania Human Relations Commission.

¹ Martin’s last name is not in the record. Similarly, the EPR category and timeframe of the EPR for which he received the “Commendable” rating are not in the record.

Appellant testified on her own behalf. The appointing authority presented the testimony of Human Services Program Specialist Supervisor Barbara Judy and Welfare Program Executive 1 Sandra Migliorisi.

We begin with appellant's assertion of discrimination based upon a violation of the Civil Service Act and/or Rules. Act 71 of 2018 addresses "procedural" discrimination. "Procedural discrimination" involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. Ct. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988) 71 Pa.C.S.A. § 2704. Where a procedural violation of the Act constitutes the alleged discrimination, no showing of intent is required. *Price, supra*. However, to obtain relief, the employee must show she was harmed because of the procedural noncompliance with the Act, or that because of the peculiar nature of the procedural impropriety, she could have been harmed, but there is no way to prove that for certain. *Price, supra*.

First, appellant alleges the EPR system is antiquated and has been used against her in a manner that does not adequately, fairly, or justly verify her work efforts, tasks, or commitment to her job. N.T. p. 52. According to appellant, during the December 26, 2019 meeting to discuss her EPR, Welfare Program Executive 1 Migliorisi stated the rating system was at least forty years old. N.T. pp. 51-52. In response, Migliorisi testified she does not know how old the EPR rating system is though she is certain she stated it was outdated. N.T. p. 174.

Appellant does not present any evidence indicating other Human Services Program Representatives received ratings based upon a different EPR rating system. Any discussion about the rating system during the December 26, 2019 occurred after Judy had determined the ratings provided in the annual EPR. Thus, appellant has not shown how she has been, or could have been harmed, by the current EPR rating system. *Price, supra.*

As an additional allegation of procedural discrimination, appellant alleges the appointing authority has issued different job performance standards in her work unit, the Provider Enrollment Unit, throughout her ten years of employment. N.T. pp. 22-23, 66; Comm. Ex. B. According to appellant, she is being held to different standards than other Human Services Program Specialists in her bureau. N.T. p. 66. However, appellant has not presented any evidence there are other Human Services Program Representatives in the Provider Enrollment Unit who were evaluated based upon performance standards different than those used to evaluate her. Additionally, appellant has not provided any documentation or evidence to show what the alleged changes were to the performance standards. Thus, appellant has not shown any evidence she was harmed or could have been harmed by any changes in the performance standards. *Price, supra.*

In conclusion, upon review of the record, the Commission finds appellant has not provided sufficient evidence to support a claim of discrimination based upon any violation of the Civil Service Act and/or Rules. Appellant has not shown how she was harmed or could have been harmed by either the age of the rating system or the performance standards which were applied to all Human Services Program Representatives. *Price, supra.* Thus, appellant has not established any procedural discrimination.

We next turn to appellant’s allegations of traditional discrimination. First, appellant alleges disparate treatment because, as the only African American Human Services Program Specialist supervised by Judy, she was denied training opportunities. She also alleges discrimination based upon her age, disability, and race. Furthermore, appellant alleges retaliation for requesting a medical accommodation and filing complaints with the appointing authority’s Bureau of Equal Employment Opportunity and with the Pennsylvania Human Relations Commission.

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

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 race, age, disability, disparate treatment, and retaliation. *Price v. Luzerne/Wyoming Counties*

² Section 905.1- Prohibition of Discrimination, provided:

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.

Area Agency on Aging, 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.

We first discuss appellant's claim of disparate treatment. Appellant asserts she has been the victim of disparate treatment because she is the only African American Human Services Program Specialist working under the supervision of Human Services Program Specialist Supervisor Judy and Program Executive 1 Migliorisi. Comm. Ex. B. As such, appellant alleges she has requested she be allowed to attend training opportunities to improve her job knowledge and skills, but Judy denied her requests. N.T. p. 69. However, appellant presents no evidence any other Human Services Program Specialist under Judy's supervision requested and was permitted to attend training. Further, appellant presents no evidence of remarks in her 2019 annual EPR regarding a lack of job-related training.

Appellant also alleges she was subjected to disparate treatment when Judy repeatedly spoke to her in a condescending and belittling manner. N.T. pp. 129-130. In this regard, appellant did not provide any examples of the alleged condescending or belittling remarks. Similarly, appellant did not present any witnesses who corroborate her allegations. Moreover, there are no condescending or belittling remarks in appellant's 2019 annual EPR.

Appellant also alleges discrimination based upon her age. According to appellant, during the December 26, 2019 meeting to discuss the EPR ratings, Migliorisi pointed to appellant's work identification badge and stated, "You look different in that picture." N.T. p. 40; Ap. Ex. 3. When appellant asked for an explanation, Migliorisi allegedly pointed to her own cheeks and chin and replied, "Your face doesn't look the same." N.T. p. 40; Ap. Ex. 3. Appellant testified she then told Migliorisi the picture had been taken several years ago and she is older now. N.T. p. 40; Ap. Ex. 3. Appellant does not provide testimony regarding her age, Migliorisi's age, or provide any evidence there were discriminatory comments regarding her age made in the process of generating the 2019 annual EPR ratings.

With respect to her allegation of disability discrimination, appellant alleges during the December 26, 2019 meeting to discuss her EPR, Migliorisi compared her husband's medical condition with appellant's medical condition. N.T. pp. 40-41; Ap. Ex. 3. Appellant stated Migliorisi provided details of the effects the medical condition has on her husband. N.T. pp. 40-41; Ap. Ex. 1. Appellant testified, "My [medical] conditions should not be used against me as part of my work performance." N.T. p. 41; Ap. Ex. 3. Appellant testified Migliorisi has "been mocking" her about the medical condition throughout 2019 but provides no

examples of such statements. N.T. p. 48. Further, appellant has not presented any evidence there were discriminatory comments regarding her medical condition made in the process of generating the ratings in her 2019 annual EPR.

We next discuss appellant's allegation of discrimination based upon her race and retaliation. With respect to race, appellant testified she is the only African American under the supervision of Judy and Migliorisi. N.T. pp. 57, 132-133. As the only African American, she is treated differently because she received "satisfactory" and "unsatisfactory" ratings on her annual EPRs for the past four years. N.T. p. 52. Appellant testified other, non-African American Human Services Program Specialists who perform fewer job tasks than her received "commendable" EPR ratings. N.T. p. 52. Specifically, in June 2019, Judy tasked appellant with creating a standard return language document and stated she was impressed with appellant's writing skills. N.T. p. 53. However, Judy did not mention appellant's final product, the Provider Enrollment: Standard Return Language document, in appellant's 2019 annual EPR or utilize the completion of the project to rate her "commendable" in any job factor. N.T. p. 53. Instead, appellant testified, at the EPR review, Judy stated appellant had only completed one project and they do not include projects on the EPR if only one was completed. N.T. p. 53.

In contrast, appellant testified, Human Services Program Specialist Martin, a Caucasian, received a "commendable" rating after he created a spreadsheet for tracking checks. N.T. p. 54. According to appellant, Martin's spreadsheet is not shared either internally with employees or externally with providers. N.T. p. 139. In contrast, the Provider Enrollment: Standard Return Language Document she created is a much more complicated document that took her seven months to create and is utilized externally by providers. N.T. pp. 53, 139.

Additionally, appellant alleges she has been retaliated against by receiving only “satisfactory” ratings on her 2019 annual EPR after seeking a medical accommodation. Specifically, in her appeal request, appellant contends throughout 2019 she asked Judy several times to consider reducing her phone duties from two times per week to once a week to minimize daily eye strain and stress on her hands. N.T. p. 49; Comm. Ex. B. Appellant testified she subsequently overheard Judy complaining to another employee about her own eye strain. N.T. p. 49. Judy told appellant she would “talk to them about it” but her phone duties have not changed. Comm. Ex. B. Appellant contends other Human Services Program Specialists have been granted the accommodation without question. Comm. Ex. B. According to appellant, the “Satisfactory” ratings on her 2019 annual EPR are in retaliation for asking to accommodate her medical conditions. In this regard, appellant has not presented sufficient evidence to support an allegation of retaliation based upon a medical condition. Appellant has not presented any evidence indicating other Human Services Program Specialists have requested or been accommodated with altered phone duties for medical reasons. Similarly, she has not shown that Judy included any remarks in the 2019 annual EPR referring to appellant’s medical condition as a reason for providing any rating.

In addition, appellant asserts the ratings in her 2019 annual EPR are issued in retaliation for filing complaints. More specifically, appellant filed complaints with the appointing authority’s Bureau of Equal Employment Opportunity and Pennsylvania Human Relations Commission after Judy and Migliorisi called her a “bad brown/bronze penny” on April 3, 2018. N.T. pp. 41-42, 57; Ap. Ex. 3.

Upon review of the record, the Commission finds appellant has not presented a *prima facie* case of discrimination based upon disparate treatment, age, disability or retaliation for requesting a medical accommodation. The burden of establishing a *prima facie* case cannot be an onerous one. *Nwogwugwu, supra*. Discrimination cannot be inferred and there must be factual support to sustain the allegations. *Price, supra*. In this matter, appellant's allegation of disparate treatment is not supported by any evidence or testimony regarding any other employees' training opportunities. Her allegation of disparate treatment based upon Judy's alleged condescending or belittling remarks is not supported by any evidence or testimony. Her allegations of age and disability discrimination stem from comments allegedly made during a meeting held on December 26, 2019, after the ratings for the 2019 annual EPR were generated. Appellant presents no evidence of disparate treatment, age, or disability discrimination in the ratings and comments provided in her 2019 annual EPR. Furthermore, her allegation of retaliation based upon her request for a medical accommodation is not supported by any evidence or testimony. Thus, appellant has not established a *prima facie* discrimination claim based upon disparate treatment, age, disability, or retaliation based upon seeking a medical accommodation. *Id.*

However, appellant has presented evidence indicating there may be a discriminatory motive based upon either her race or in retaliation for filing complaints. *See, Nwogwugwu, supra*. Specifically, a Caucasian coworker received a "Commendable" rating for completing a less comprehensive document and she filed internal and external complaints regarding Miglioriski's comment. 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, supra*.

In response to the allegation of racial discrimination, Welfare Program Executive 1 Migliorisi testified Martin did not receive an overall EPR rating of “Commendable.” N.T. p. 171. Instead, he received a rating of “Commendable” in only one category. N.T. p. 171. Migliorisi explained when Martin was given an assignment to work on tax return checks, he noticed the process was quite tedious and “messy.” N.T. p. 171. While appellant was assigned to create the Provider Enrollment: Standard Return Language Document, Martin took the initiative and worked independently to create a data base that simplified the tax return checks process. N.T. p. 171.

Both Judy and Migliorisi provided testimony in response to the allegations of retaliation. Judy credibly³ testified she never made any statement regarding a “bad brown/bronze penny.” N.T. pp. 152-153. After appellant told her Migliorisi had used the term, she explained the meaning to Migliorisi. N.T. pp. 152-153. Migliorisi credibly testified she did use the term; however, she was referring to herself in a self-deprecating manner and was unaware of the underlying meaning.

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).

N.T. p. 172. After Judy explained the term, she has not used it again in any context. N.T. p. 172. Appellant did not present any testimony indicating either Judy or Migliorisi were aware of complaints appellant filed with either the Bureau of Equal Employment Opportunity or the Pennsylvania Human Relations Commission.

With respect to the ratings provided in appellant's 2019 annual EPR, the Commission finds the appointing authority met its burden of proving a legitimate, non-discriminatory reason for the ratings in appellant's 2019 annual EPR. *Henderson, supra*. In this regard, Judy credibly testified that although appellant's communication via email during the rating period (Ap. Ex. 4) was sufficient to warrant a "Satisfactory" rating, she actually communicated less frequently than other Human Services Program Specialists. N.T. pp. 145-146. Judy explained all staff in the unit are expected to communicate effectively with their supervisor, peers, and providers; doing so results in a "Satisfactory" rating in "Communications." N.T. pp. 145-146.

Judy also testified appellant completed fewer transactions in the appointing authority's PROMISE system⁴ than other Human Services Program Specialists during the rating period, however because her number was not significantly lower, she still received an overall rating of "Satisfactory." N.T. pp. 151-152, 154-156. Judy also explained appellant's completion of the Provider Enrollment: Standard Return Language document was part of her job duties and factored into an overall rating of "Satisfactory" on the 2019 annual EPR. N.T. p. 148. Finally, Judy explained she reviewed appellant's prior EPRs, and work she completed during the current rating time period. She testified, "When I took all

⁴ The record does not provide an explanation of the PROMISE system.

things into consideration, there wasn't anywhere that I could find significant data to support going with a higher rating." N.T. p. 149. Migliorisi provided corroborating credible testimony, explaining a "Satisfactory" overall rating on an EPR indicates the employee is proficient, and performing her job duties and tasks as expected. N.T. p. 170.

Upon review of the record, the Commission finds appellant has not presented sufficient evidence to support the allegations of racial discrimination or retaliation. Specifically, we find Migliorisi credible that Martin's "commendable" rating in one rating category was the result of working independently to resolve an issue. We further find Judy credible she never made the inappropriate "penny" remark and that she explained the remark to Migliorisi. Migliorisi credibly testified the remark was intended to be self-deprecating and was never directed toward appellant. Furthermore, the appointing authority presented legitimate, nondiscriminatory reasons for the 2019 annual EPR ratings. Appellant has not presented any evidence the rationale provided by the appointing authority was mere pretext. *Henderson, supra*. Thus, appellant has not met her burden of establishing discrimination.

In summation, appellant has not established discrimination based upon a violation of the Civil Service Act and/or Rules, disparate treatment, age, disability, race, or in retaliation for requesting phone accommodations or filing Complaints against Judy and Migliorisi. Accordingly, we enter the following:

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,⁵ dismisses the appeal of Alisa R. Evans challenging her Employee Performance Review for the rating period from January 1, 2019, to December 31, 2019, in her position as a Human Services Program Specialist, regular status, and sustains the action of the Department of Human Services, in the Employee Performance Review of Alisa R. Evans for the rating period from January 1, 2019, to December 31, 2019, in her position as a Human Services Program Specialist, regular status.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: 6/24/21

⁵ Chairwoman P. Maria Donatucci, who took office June 10, 2021, did not participate in the discussion of or decision for this appeal.