

COMMONWEALTH OF PENNSYLVANIA

Jawana Z. Myers	:	State Civil Service Commission
	:	
v.	:	
	:	
State Correctional Institution at Phoenix,	:	
Department of Corrections	:	Appeal No. 30759
Jawana Z. Myers		Joseph M. Gavazzi
<i>Pro Se</i>		Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Jawana Z. Myers challenging her removal from probationary Corrections Officer Trainee employment with the State Correctional Institution at Phoenix, Department of Corrections. A hearing was held on January 5, 2022, via video, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before the Commission is whether the appellant established her removal was motivated by discrimination.

FINDINGS OF FACT

1. On June 21, 2021, appellant was removed from probationary Corrections Officer Trainee employment with the appointing authority, effective June 21, 2021. Comm. Ex. A; N.T. pp. 46, 49-50.
  
2. The June 21, 2021 removal letter provided the following reasons supporting appellant's removal:

**Unacceptable Attendance, More Specifically AWOL**

Specifically, it was determined that you were absent from work, or absent without leave (AW), due to late arrivals for duty on the following dates: May 8, 2021 (19 minutes), and May 9, 2021 (14 minutes). During the above-mentioned dates, you accrued 0.55 hours of AW, as you did not have leave available to cover these absences.

Previously, you received a verbal reprimand (*dated January 15, 2021*), a written reprimand (*dated March 9, 2021*), and an additional written reprimand (*dated March 23, 2021*) for the same or similar policy infractions. This behavior is unacceptable.

Comm. Ex. A (emphasis in original).

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(ii) of Act 71 of 2018. Comm. Ex. C.
4. Appellant was absent without leave from December 24, 2020, through December 29, 2020. N.T. p. 60; AA Ex. 5.
5. On January 15, 2021, appellant received written confirmation of her verbal reprimand for non-prescheduled leave usage on January 5, 2021, and January 13, 2021. N.T. p. 51; AA Ex. 2.
6. On March 9, 2021, appellant received a written reprimand for her non-prescheduled leave usage on March 4, 2021, due to an overnight stay at a hospital. N.T. p. 53; AA Ex. 3.
7. On March 23, 2021, appellant received a written reprimand for being absent without leave on March 20, 2021, where appellant did not provide documentation to support being late to work due to having difficulty breathing. N.T. p. 55; AA Ex. 4.
8. On May 8, 2021, appellant arrived late to the State Correctional Institution at Phoenix (hereinafter “SCI-Phoenix”). N.T. pp. 20, 34-35.

9. On May 9, 2021, appellant arrived late to SCI-Phoenix. N.T. pp. 20-21, 34.
10. Appellant attended and participated in her pre-disciplinary conference (hereinafter “PDC”). N.T. pp. 61-62, 63; AA Exs. 7, 8.
11. After appellant’s PDC, Field Human Resource Officer Scott Distler confirmed the Shift Lieutenants did not receive any additional or different levels of staff calling out or being late on May 8, 2021, or May 9, 2021. N.T. pp. 67, 71, 78-79.

### DISCUSSION

The issue in the present appeal is whether appellant established her removal from probationary Corrections Officer Trainee employment with the appointing authority was motivated by discrimination. Before this Commission, appellant could only bring this challenge through Section 3003(7)(ii) of Act 71 of 2018 based upon an allegation the decision to remove her was due to discrimination in violation of Section 2704 of Act 71. 71 Pa. C.S.A. §§ 2704, 3003(7)(ii).<sup>1</sup>

---

<sup>1</sup> Act of June 28, 2018 P.L. 460, No. 71, § 1.

Specifically, appellant alleges the appointing authority removed her as a result of racial discrimination, disability discrimination, and disparate treatment. Comm. Ex. B.

In an appeal alleging discrimination, the burden of presenting evidence in support of all allegations of discrimination lies with the appellant. *Nosko v. Somerset State Hospital*, 139 Pa. Commw. 367, 370-371, 590 A.2d. 844, 846 (1991). Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish her claims of discrimination. 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 non-merit factors.

71 Pa.C.S.A § 2704.<sup>2</sup> The prohibition set forth in this section encompasses two general types of discrimination. First, “traditional discrimination” encompasses claims of discrimination based on race, gender, religion, disability, political, partisan or labor union affiliation, or other non-merit factors; and second, “technical 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

---

<sup>2</sup> 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. Section 905.1 provides:

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.

71 P.S. § 741.905a.

409, 411 n. 4 (Pa. Commw. Ct. 1996), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988). In the instant matter, this appeal involves claims of traditional discrimination.

In analyzing claims of discrimination under Section 2704 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 Pa.C.S.A. § 2704; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989) *petition for allowance of appeal denied*, 524 Pa. 633, 574 A.2d 73 (1990).

Once a *prima facie* case of discrimination has been established, the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for the personnel action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretextual. *Henderson*, 126 Pa. Commw. at 614-615.

In support of her discrimination claims, appellant testified on her own behalf. In response, the appointing authority presented the testimony of Field Human Resource Officer Scott Distler.<sup>3</sup>

---

<sup>3</sup> Distler is employed as a Field Human Resource Officer for the appointing authority. N.T. p. 43. Prior to being promoted to a Field Human Resource Officer, Distler was employed as a Human Resource Analyst 2 and Human Resource Analyst 3. N.T. pp. 43-44.

Appellant argued on appeal that her removal was a result of the appointing authority discriminating against her because of her race, disability, and disparate treatment. Regarding appellant's racial discrimination claim, appellant identified herself as African American. N.T. p. 23. Appellant asserted that her removal was motivated by racial discrimination because she was called a "used person." N.T. p. 21.

Regarding her disability discrimination claim, appellant asserted the appointing authority removed her because she has suffered from asthma and complications from receiving the Johnson and Johnson vaccine for the COVID-19 virus. N.T. pp. 19-20, 21. Appellant testified the facility was aware of her asthma and of her complications with the Johnson and Johnson vaccine. Specifically, appellant claimed her complications from receiving the Johnson and Johnson vaccine resulted in blood clots in her lungs and passing out in the facility. N.T. pp. 20, 23. Appellant believed her hospitalization for the blood clots occurred for nine days during late August 2020 or early September 2020. N.T. pp. 20, 36. Appellant testified she submitted every doctor's note relating to her asthma and medical absences to the facility. N.T. p. 22.

In support of her disparate treatment claim, appellant argued that on May 8, 2021, and May 9, 2021, there were other employees experiencing the same delays going into the facility. N.T. pp. 21, 27. According to appellant, on May 8, 2021, there was an accident on Route I-476 when she was in route to the facility. Appellant asserted she called the facility and informed them about the accident. N.T. pp. 20, 34-35. Appellant also explained her lateness to the facility on May 9, 2021. While she was in route to the facility, appellant claimed there was construction on the highway causing traffic delays. N.T. pp. 20-21, 34. Similarly, appellant

contacted the prison and informed the Lieutenant about the construction. N.T. pp. 21-22, 34-35. Appellant acknowledged she did not have any accrued leave for her tardiness. Appellant reasoned she did not have enough accumulated leave because she was a probationary status employee. N.T. p. 37. Nevertheless, appellant emphasized she has never been in trouble. N.T. p. 22.

In response to appellant's presentation, the appointing authority's Field Human Resource Officer Distler described the appointing authority's expectations for its employees' attendance. An employee is expected to be present and properly attend to her post according to her work schedule. N.T. p. 49. If an employee is unable to report for work on time, then she must utilize leave that she has either earned or able to earn in the future. N.T. p. 49. When an employee has exhausted all available leave, she must be present for work or be considered absent without leave (hereinafter "AW"). N.T. p. 49. An employee also has the option to utilize prescheduled leave and non-prescheduled leave. Prescheduled leave is identified when an employee submits a leave request in advance of the leave usage. N.T. pp. 53-54. Non-prescheduled leave is identified when an employee calls off on the same day. N.T. p. 54. Correction Officers have a contractually provided amount of non-prescheduled leave. If the Corrections Officer leave usage exceeds the amount of non-prescheduled leave provided, then the appointing authority has the ability to impose discipline. N.T. p. 54.

Despite appellant's assertion that she did not have any issue regarding discipline, Distler provided instances of when appellant repetitively was absent. Distler testified appellant was absent without leave prior to her first verbal reprimand in January 2021. Specifically, appellant was absent without leave from December 24, 2020, through December 29, 2020. N.T. pp. 60; AA Ex. 5. On

January 15, 2021, appellant received written confirmation of her verbal reprimand for non-prescheduled leave usage on January 5, 2021, and January 13, 2021. N.T. p. 51; AA Ex. 2.<sup>4</sup> On March 9, 2021, appellant received a written reprimand for her non-prescheduled leave usage on March 4, 2021, due to an overnight stay at a hospital. While appellant provided documentation recording her hospitalization, the note only covers one day and appellant was in a negative leave balance.<sup>5</sup> N.T. p. 53; AA Ex. 3. Distler explained at the beginning of appellant's employment, she was allowed to anticipate and use leave within her first year of employment in response to the COVID-19 pandemic. N.T. pp. 56-57. Distler explained appellant utilized her anticipated and actual leave to the extent that she had a negative leave balance. N.T. pp. 58-59; AA Ex. 5. On March 23, 2021, appellant received a written reprimand for being absent without leave on March 20, 2021, where appellant did not provide documentation to support being late to work due to having difficulty breathing. N.T. p. 55; AA Ex. 4.

Distler confirmed appellant received her pre-disciplinary conference (hereinafter "PDC") notice on May 24, 2021. Her PDC was scheduled for May 28, 2021, for appellant to provide explanations for her May 8, 2021, and May 9, 2021, absences without leave. N.T. pp. 61-62; AA Ex. 7. Distler participated in appellant's PDC on May 28, 2021. N.T. p. 63; AA Ex. 8. During her PDC, appellant admitted to being absent without leave on May 8, 2021, because of a car accident on her route to work, and on May 9, 2021, because of construction causing traffic delays. N.T. pp. 64-65; AA Ex. 8. Distler recalled appellant explained she called

---

<sup>4</sup> Distler received appellant's January 15, 2021, written confirmation of her verbal reprimand because as the labor relations coordinator, it is his responsibility to ensure the written confirmation letter was a part of appellant's record. N.T. p. 52.

<sup>5</sup> Negative leave balance occurs when an employee has utilized anticipated leave provided to her and any leave earned. N.T. pp. 56-57.

the Shift Lieutenants regarding her tardiness at 1:21 p.m. N.T. p. 65; AA Ex. 8. Nevertheless, appellant acknowledged during her PDC that she had three occurrences of non-prescheduled leave. N.T. pp. 71-72; AA Ex. 8.

After appellant's PDC, Distler contacted the Shift Lieutenants scheduled for May 8, 2021, and May 9, 2021, to discuss and verify whether there were other employees contacting the facility to call off. N.T. pp. 66-67. Distler confirmed each Shift Lieutenant did not have any additional or different levels of staff calling out on either May 8, 2021, because of an accident, or May 9, 2021, because of construction. N.T. pp. 67, 71, 78-79.

Distler confirmed that on June 21, 2021, appellant was removed from probationary Corrections Officer Trainee employment because of her unacceptable attendance. Specifically, appellant was absent from work without leave on May 8, 2021, and May 9, 2021.<sup>6</sup> Comm. Ex. A; N.T. p. 46; AA Ex. 1. Distler also recalled appellant had prior unacceptable attendance before her removal. Comm. Ex. A; N.T. pp. 46, 49-50; AA Ex. 1.

In response to appellant's disability discrimination claim, Distler confirmed appellant applied for Family Medical Leave Act (hereinafter "FMLA") leave. N.T. p. 73; AA Ex. 6. Distler is familiar with FMLA leave requests because he coordinates with FMLA coordinators when they make determinations of whether an employee is eligible for FMLA leave. N.T. p. 73. Distler explained for an employee to be eligible for FMLA leave, she must be employed for at least one year and have at least 1,250 hours of work. N.T. p. 74. Distler confirmed appellant was

---

<sup>6</sup> Distler explained the SCI-Phoenix Superintendent Sorber provided approval for appellant's PDC to be conducted. N.T. p. 62.

denied FMLA leave because she did not obtain at least one year of service with the appointing authority. N.T. p. 74. Distler noted appellant's FMLA leave requests were associated with her child's medical condition and not appellant's own disability. N.T. p. 75; AA Ex. 6.

Having carefully reviewed the record, the Commission now turns to whether appellant successfully established her traditional claims of racial discrimination, disability discrimination, and disparate treatment. The Pennsylvania Supreme Court has adopted the analytical model for determining the merits of an employment discrimination case established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Garner v. Pennsylvania Human Rel. Comm.*, 16 A 3d 1189, 1198 (Pa. Commw. 2011). To establish a *prima facie* case of racial discrimination, appellant must show: 1) she is a member of a racial minority; 2) she was qualified for the position; 3) despite her qualifications, she suffered an adverse employment action; and 4) the circumstances of the adverse employment action would give rise to an inference of discrimination. *Id.*; citing *Spanish Council of York, Inc. v. Pennsylvania Human Relations Commission*, 879 A.2d 391, 397 (Pa. Commw. 2005); see *Henderson*, 126 Pa. Commw. at 614.<sup>7</sup>

---

<sup>7</sup> Title VII of the Civil Rights Act of 1964 provides it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. 42 U.C.S. § 2000e-2(a)(1). Similarly, the Pennsylvania Human Relations Act provides: "[i]t shall be an unlawful discriminatory practice ... [f]or any employer because of the ... race ... of any individual ... to otherwise discriminate against such individual ... with respect to compensation, hire, tenure ... if the individual ... is the best able and most competent to perform the services required." 43 Pa. Stat. Ann. § 955(a).

Upon review of appellant's presentation, we find appellant failed to establish a *prima facie* case of racial discrimination. First, there is no dispute that appellant is a member of a protected class as an African American female, and she was qualified to work as a Corrections Officer Trainee. While appellant suffered an adverse employment action, her removal, appellant did not present how the circumstances of her removal were related to her race. While her burden cannot be an onerous one, appellant's presentation that she was called a "used person" without any additional showing or connection to her removal is insufficient to indicate that more likely than not that racial discrimination had occurred. *Nwogwugwu, supra*.

Similarly, appellant failed to establish a *prima facie* case of disability discrimination. A traditional claim of discrimination based upon an employee's disability includes adverse employment actions motivated by prejudice and fear of an employee's known disability. In order for appellant to establish a *prima facie* case of disability discrimination under the American with Disabilities Act (hereinafter "ADA"), she must show 1) she is a disabled person within the meaning of the ADA, 2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the appointing authority, and 3) she has suffered an otherwise adverse employment decision as a result of discrimination. *Allen v. State Civ. Serv. Commn.*, 992 A.2d 924, 932 (Pa Commw. 2010) citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 306 (3<sup>rd</sup> Cir. 1999).

Here, appellant presented she suffers from asthma and had complications from the Johnson and Johnson COVID-19 vaccine resulting in her hospitalization in late August 2020 into September 2020. However, appellant did not show how her removal supported by her acknowledged absences without leave

on May 8, 2021, and May 9, 2021, were the result of the appointing authority discriminating against her for either her asthma or her hospitalizations in 2020. Moreover, Distler credibly<sup>8</sup> explained how appellant's continuous absences without leave depleted her leave balance, resulting in her removal. As such, appellant has failed to establish her disability discrimination claim. *Allen, supra*.

Lastly, in order to establish a *prima facie* case of disparate treatment, appellant must demonstrate that she was treated differently than others who were similarly situated. *Nwogwugwu*, 141 Pa. Commw. at 40, 594 A.2d at 851. Appellant presented that there were other employees who suffered from the traffic delays on May 8, 2021, and May 9, 2021. However, appellant failed to present how the unidentified employees were similarly situated to her, a probationary Corrections Officer Trainee. Therefore, we find appellant failed to demonstrate how she was treated differently than other similarly situated probationary Corrections Officer Trainees to meet her burden. *Nwogwugwu, supra*. Accordingly, we enter the following:

---

<sup>8</sup> It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 95 Pa. Commw. 475, 478, 505 A.2d 339, 341 (1986).

CONCLUSION OF LAW

Appellant has not presented 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 Jawana Z. Myers challenging her removal from probationary Corrections Officer Trainee employment with the State Correctional Institution at Phoenix, Department of Corrections, and sustains the action of the State Correctional Institution at Phoenix, Department of Corrections, in the removal of Jawana Z. Myers from probationary Corrections Officer Trainee employment, effective June 21, 2021.

State Civil Service Commission

---

Maria P. Donatucci  
Chairwoman

---

Gregory M. Lane  
Commissioner

---

Bryan R. Lentz  
Commissioner

Mailed: May 20, 2022