

**BEFORE THE MERIT EMPLOYEE RELATIONS
BOARD OF THE STATE OF DELAWARE**

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| GRIEVANT, |) | |
| |) | |
| Employee/Grievant, |) | |
| |) | <u>DOCKET No. 13-01-575</u> |
| v. |) | |
| |) | DECISION AND ORDER |
| COURT OF COMMON PLEAS OF |) | |
| THE STATE OF DELAWARE, |) | <i>(Public - redacted)</i> |
| |) | |
| Employer/Respondent. |) | |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on February 6, 2014 at the Tatnall Building, 150 Martin Luther King Boulevard, Dover, DE., 19901.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Victoria D. Cairns, and Paul R. Houck, Members, a quorum of the Board under 29 Del. C. §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Employee/Grievant, *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Court of Common
Pleas of the State of Delaware

BRIEF SUMMARY OF THE EVIDENCE

The Court of Common Pleas of the State of Delaware (CCP) offered and the Board admitted into evidence twenty-six documents marked for identification as Exhibits A-Z.

CCP called two witnesses: John Humphrey, Investigative Supervisor; and Stephanie Fitzgerald, Court Administrator.

The employee/grievant (Grievant), offered and the Board admitted into evidence thirteen pages of documents attached to the Pre-Hearing Order. The Grievant testified on her own behalf.¹

FINDINGS OF FACT

Prior to her termination on December 10, 2012, the Grievant was an Administrative Specialist I in the Investigative Services Office (ISO) at the Court of Common Pleas in New Castle County.

Over the course of January 2010 to July 2012, the Grievant had seven unsatisfactory performance reviews. The Grievant did not grieve any of those performance reviews.²

In September 2011, the Grievant complained to Chief Judge Smalls about an “Achmed the Dead Terrorist” dummy on the bookshelf in Chief Humphrey’s office and a cartoon on a staff bulletin board both of which she found offensive. According to the Grievant, the dummy could be activated to play a recording: “Silence! I kill you!”

Chief Humphrey testified that he is a big fan of Jeff Dunham, a well-known ventriloquist who uses the Achmed dummy in one of his signature comedy sketches. According

¹ At the Grievant’s request, the Board issued a subpoena to Arthur Stone. Stone did not appear for the hearing. After the Board heard the other evidence, the Board decided it did not need to hear Stone’s proffered testimony.

² According to Chief Humphrey, before he became the ISO Supervisor in 2009, the employees had never had job performance reviews. The Board does not have any information regarding the Grievant’s job performance prior to January 2010.

to Chief Humphrey, members of his staff gave the dummy to him. The dummy has several recordings which can be activated in rotation by pressing a button. According to Chief Humphrey, he sometimes played one of the recordings when staff were congregating near his office to remind them it was time to go back to work.

According to Chief Humphrey, the cartoon on the bulletin board which the Grievant complained about had been there for years at the old courthouse and was moved along with other office furnishings to the new courthouse. According to Chief Humphrey, in all those years no one had ever complained about the cartoon and he hadn't given it much thought.

Chief Judge Smalls asked Stephanie Fitzgerald, then the Deputy Court Administrator, to investigate the Grievant's complaint. After completion of the investigation, Humphrey was directed by the Court Administrator to remove the Achmed dummy from the office and to take down the cartoon from the bulletin board.³

On July 6, 2012, the Grievant signed a last chance agreement following her most recent unsatisfactory performance review (for the period May 1 through July 1, 2012). The agreement provided that the Grievant would receive two monthly progress reports, and a final performance review on October 9, 2012 by which time she must have achieved an overall rating of at least "Meets Expectations". "Failure to raise your level of performance to an overall rating of at least 'Meets Expectations' on the final Performance Review . . . will result in the Court of Common Pleas proposing your dismissal from your position as an Administrative Specialist I."

On July 9, 2012, the Grievant signed a performance plan for the period July 9-October 9, 2012. Among other things, the plan required the Grievant to create monthly statistical reports for the Investigative Services Office and compose correspondence without error, two longstanding

³ After Chief Humphrey removed the dummy, a member of his staff gave him a photograph of the doll which the Chief then placed on his bookshelf where the dummy had been. When the Deputy Court Administrator found out, he was directed to remove the photograph as well.

deficiencies in her job performance.

The Grievant's performance review for the period July 9-August 9, 2012 was unsatisfactory. Chief Humphrey attached to the review form five single-space typewritten pages of specific deficiencies in her job performance. The Grievant acknowledged receiving the review but she did not provide any written comments of her own disputing the points made by Chief Humphrey.

The Grievant performance review for the period August 9-September 9, 2012 was unsatisfactory. Again, Chief Humphrey attached five typewritten pages detailing her deficiencies. The Grievant signed the review and wrote below her signature: "I have read this Performance Evaluation but signing it does not indicate I agree to the statements made." The Grievant did not provide any detailed comments taking issue with the points made by Chief Humphrey.

The Grievant's last performance review for the period July 9-October 9, 2012 was unsatisfactory. Chief Humphrey attached seven pages of detailed deficiencies. The Grievant signed the review acknowledging she received it but "my signature does not indicate I agree to the performance review." The Grievant did not provide any detailed comments taking issue with the points made by Chief Humphrey.

By letter dated October 17, 2012, Chief Humphrey notified the Grievant of intent to terminate "for your failure to meet the terms of your Last Chance Agreement." The Grievant requested a pre-decision meeting which took place on November 14, 2012. By letter dated December 10, 2012, Stephanie Fitzgerald, Court Administrator, notified the Grievant "that effective December 10, 2012 you have been terminated from your position as an Administrative Specialist I with the Court of Common Pleas for your failure to meet the terms of your Last Chance Agreement."

The Board finds as a matter of fact that the Grievant's job performance was continuously

unsatisfactory from January 2010 to October 2012.

The Board finds as a matter of fact that the Grievant knowingly and voluntarily entered into a last chance agreement on July 6, 2012 to improve her job performance to at least “Meets Expectations” within three months.

The Board finds as a matter of fact that during the period of the last chance agreement the Grievant had three more performance reviews, all of which were unsatisfactory.

CONCLUSIONS OF LAW

A. Just Cause For Termination

Merit Rule 12.1 provides:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. “Just cause” means that management has sufficient reasons for imposing accountability. Just cause requires showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

The Board concludes as a matter of law that the CCP had just cause to terminate the Grievant for unsatisfactory job performance. For almost three years, the Grievant’s job performance was unsatisfactory. The CCP offered her re-training, individual counseling, and for eight months transferred her to another unit (Costs & Fines) to give her a fresh start with a new supervisor. Nothing worked. Her poor job performance was disrupting the office. Chief Humphrey could not rely on her monthly logs to monitor the status of cases and had to maintain his own “shadow” logs. Because of the Grievant’s poor typing skills, most of the investigators stop giving her any work to do and had to do their own typing. Chief Humphrey had to order investigators to give the Grievant work so that he would have some basis for assessing her work proficiency.

The Board believes that the CCP bent over backwards to try to help the Grievant improve her job performance. When nothing seemed to work, the agency had just cause to terminate her.

B. Discrimination

Merit Rule 2.1 provides:

Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.

The Grievant (who is a Japanese-American woman) alleges that she was discriminated against on the basis of her race and gender and religion. The Grievant did not claim discrimination on the basis of a discrete, tangible employment action (like promotion, demotion, transfer, or dismissal), but rather she alleged a number of incidents in the workplace which she felt were offensive or threatening. The Board will analyze her Merit Rule 2.1 claim as a hostile work environment claim.

“To prevail on a hostile work environment claim, [the Grievant] must prove: (1) she ‘suffered intentional discrimination’ because of her race or sex or religion; (2) ‘the discrimination was pervasive and regular’; (3) ‘the discrimination detrimentally affected [her]’; (4) ‘the discrimination would detrimentally affect a reasonable person of the same sex [or race or religion] in that position’; and (5) *respondeat superior* liability existed.” *LeCompte v. DHSS*, MERB Docket No. 12-07-550 (Feb. 15, 2003), at p.6 (quoting *Knabe v. The Boury Corp.*, 114 F.3d 407, 410 (3rd Cir. 1997)).

The Board concludes as a matter of law that the Grievant did not prove a *prima facie* claim of hostile work environment. Most of the incidents recounted by the Grievant were not targeted at her race or sex or religion, or were not pervasive or regular, or were not brought to the attention of

management so they would have an opportunity to investigate and, if necessary, to take prompt remedial action.

During the hearing, the Grievant referred several times to “racial slurs” by other CCP employees but she did not provide the Board with any dates, times, or names of the offending employee.

The Grievant testified that Chief Humphrey denied her request to take leave to attend her grandfather’s funeral in Hawaii, which she said disrespected her cultural heritage. Chief Humphrey could have had any number of non-discriminatory reasons for denying the Grievant’s request.

According to the Grievant, a co-worker asked her not to cook fish in the microwave in the staff kitchen, which the Grievant felt was a reference to her oriental heritage. That may have been a reasonable request regardless of one’s race or national origin. Many office kitchens are windowless and have poor ventilation and the smell of certain foods can carry far.

According to the Grievant, someone at the court recorded in a computer that a member of the public had called to complain that a court employee had hung up while the caller was trying to get information about her case. The caller did not know the court employee’s name, but said that she sounded like “an oriental woman.” The Board does not believe that shows any racial bias on the part of the court employee receiving the call who was only memorializing the complaint made by a member of the public.

According to the Grievant, Chief Humphrey told her to remove a religious calendar from her work area. The Board does not believe that is evidence of discrimination against the Grievant’s religious beliefs.⁴ The Grievant did not provide any evidence that Chief Humphrey

⁴ The Board notes that public employees have a qualified First Amendment right to express their religious beliefs in the workplace balanced against the employer’s legitimate need to prevent disruption in the workplace if the form of the expression is offensive to other employees. See Note, Go Tell It on the

allowed employees of other faiths to display items depicting religious content.

According to the Grievant, she had a State Fire Marshal poster above her desk which reprinted the codes for police and fire dispatch and a co-worker once said to her "Why don't you call 10-81?" (the code for an involuntary commitment). That may have been a rude and uncalled for remark, but the Board does not believe it reflects any gender or racial animus.

According to the Grievant, she overheard Chief Humphrey say to Arthur Stone, one of the ISO investigators (who is African-American), "You dress like a pimp." The Board does not know whether Stone was offended by this remark or not, or whether he filed a complaint against Humphrey. In any event, the remark was not directed towards the Grievant and the Board does not believe that the term "pimp" has any particular racial stigma.

According to the Grievant, other employees gave a gag birthday card to Arthur Stone which she found offensive. The Grievant was not asked to sign the card, but she went into Stone's office when he was not there to take a picture of it. Stone apparently found the card humorous because he displayed it on his desk. The card was not directed to the Grievant, and she did not complain about it to management.

According to the Grievant, a co-worker played a loud song by the pop star Pink and the Grievant found the lyrics offensive. There is no evidence that the music was directed at the Grievant personally, and the Grievant acknowledged that she never asked the co-worker to turn the music down.

It is incumbent on an employee who feels harassed in the workplace to come forward and make a complaint so that management has an opportunity to investigate and, if necessary, to take

Mountain, But Keep It Out of the Office: Religious Harassment in the Workplace, 31 Val.U.L.Rev. 971 (1997). However, there is a big difference between unwanted proselytizing in the workplace and a few items with religious content on an employee's desk. See *Brown v. Polk Co.*, 61 F.3d 650 (8th Cir. 1995) (absent a showing of workplace disruption, a supervisor could not order an employee to remove a Bible on his desk and two plaques hanging above, one inscribed with the Lord's Prayer and the other with the serenity prayer).

remedial action. For most of the incidents cited by the Grievant she did not do so. The only complaint the Grievant made was about the Achmed the Dead Terrorist dummy and the cartoon on the bulletin board. The Deputy Court Administrator investigated the Grievant's complaint and took remedial action to remove the dummy and the cartoon from the workplace.⁵

During the pre-decision meeting on November 14, 2012, the Grievant for the first time complained that court employees were filling in fictitious names on a court sign-in sheet which, when spoken phonetically, sounded like obscene gestures, to the embarrassment of the court employee calling people in the waiting room to their court case. According to Stephanie Fitzgerald, she followed up with an investigation. Fitzgerald was unable to determine who the culprit was (it could have been a member of the public) but she counseled all of the staff that such conduct was unacceptable.

At most, the Grievant has shown a few, isolated incidents of what may have been inappropriate or insensitive conduct in the workplace by co-workers. The Board does not believe that they were directed towards the Grievant to ridicule her race, national origin, gender, or religion. The Grievant did not report most of the incidents to management. The few that she did report were investigated by management which the Board believes took appropriate remedial action.


The Board concludes as a matter of law based on the evidence in the record that the Grievant did not meet her burden to prove that the agency subjected her to a hostile work environment.

⁵ According to the Grievant, the CCP did not act on her complaint for nearly two months and then did not put a "preventative plan" in place to prevent future occurrences as required by the CCP anti-harassment policy. Whether the agency's remedial action was prompt enough, the fact remains it took remedial action by directing Chief Humphrey to remove the Achmed dummy and the cartoon on the bulletin board. The anti-harassment policy does not call for an individualized preventative plan. As the Court Administrator explained, the preventative plan to which the Grievant referred come from the agency's workplace violence policy. The Grievant did not allege or show the Board any instances of workplace violence against her or others.

DECISION AND ORDER

It is this 17th day of February, 2014, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the Grievant's appeal.


MARTHA K. AUSTIN, MERB Chairwoman


JOHN F. SCHMUTZ, MERB Member


VICTORIA D. CAIRNS, MERB Member


PAUL R. HOUCK, MERB Member