BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

TERRI G. TUCKER,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 13-01-578**
v.	)	
	)	
FAMILY COURT OF THE STATE OF DELAWARE,	)	**DECISION AND ORDER**
	)	
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 September 5, 2013 at the Commission on Veterans Affairs, Robbins Building, 302 Silver Lake Boulevard, Dover, DE., 19904.

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

APPEARANCES

W. Michael Tupman
Deputy Attorney General

Deborah L. Murray-Sheppard
Board Administrator
Legal Counsel to the Board

Terri G. Tucker
Employee/Grievant *pro se*

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

BRIEF SUMMARY OF THE EVIDENCE

The Family Court of the State of Delaware (Family Court) offered and the Board admitted into evidence eleven documents marked for identification as Exhibits A-K. [1] The Family Court called one witness: Warren S. Cook, Director of Human Resources.

The employee/grievant, Terri G. Tucker (Tucker), offered and the Board admitted into evidence four documents marked for identification as Exhibits 1-4. Tucker testified on her own behalf but did not call any other witnesses.

JURISDICTIONAL ISSUE

On August 16, 2013, the Family Court moved to dismiss the appeal because Tucker did not file a timely Step 1 grievance. According to the Family Court, Lisa M. Waters of the Human Resources Unit notified Tucker by e-mail dated August 10, 2013 that "because you are out on FMLA, you will not be able to interview for the Social Service Specialist position." According to the Family Court, Tucker did not file a Step 1 grievance until September 21, 2012. Merit Rule 18.6 requires an employee to file a Step 1 grievance "within 14 calendar days of the grievance matter." According to the Family Court, the date of the grievance matter was August 10, 2012 when Waters notified Tucker that she would not be interviewed on Monday, August 13, 2013 as originally scheduled.

[1] After the Board denied the Family Court's motion to dismiss, the Family Court tried to introduce another document into evidence (an e-mail dated August 9, 2012 from Tucker to Lisa Waters) to show that Tucker was aware of the grievance matter as of that date. The Board declined to re-consider its decision to deny the motion to dismiss based on that new evidence because Waters replied to Tucker's e-mail the next day suggesting that the issue of Tucker's interview would remain open while Warren Cook went over her FMLA paperwork. However, the Board admitted the document into evidence marked for identification as Exhibit L.

Tucker filed a response to the motion to dismiss on August 20, 2012. According to Tucker, under Merit Rule 18.6 the fourteen days to file a Step 1 grievance did not begin to run until she could "reasonably be expected to have knowledge of the grievance matter." According to Tucker she could not reasonably be expected to have knowledge of the grievance matter until September 10, 2012. According to Tucker, she filed a timely Step 1 grievance (on September 21, 2012), within 14 calendar days of September 10, 2012.

Waters' August 10, 2012 e-mail to Tucker stated:

> I was scheduled to meet with Warren [Cook] today at 2:30 to discuss your FMLA [Family and Medical Leave Act] and how it affects your interviewing, however, he cancelled.
>
> So as it stands, because you are out on FMLA, you will not be able to interview for the Social Service Specialist position.
>
> On Monday [August 13], I will meet with Warren to go over your FMLA paperwork. If he has any questions, I'm sure he will call.

The Board finds that Waters' e-mail was at best ambiguous. To Tucker, it appeared that the issue of her interview was still open. All she knew for sure was that the interview would not take place as originally scheduled on August 13, 2012.

According to Tucker, she did not hear back from either Waters or Cook after August 10, 2012. As far as Tucker was concerned, the matter was still not resolved.

Tucker reached out to Duraé Johann, the Return to Work Coordinator at the Office of Management and Budget (OMB). By e-mail dated September 6, 2012, Johann advised Tucker: "You may certainly interview and accept another position if you are disabled from your current occupation. You must have documentation to support this. Please let me know how I can help."

By e-mail dated September 7, 2012 to Warren Cook, Tucker wrote: "According to the

'Return to Work Coordinator,' Duraé Johann, although I was on Short Term Disability I was certainly eligible to interview for vacant positions. I received confirmation of my eligibility for Social Services Specialist III whereas I was scheduled for an interview on Aug. 13, 2012 11:45 (and denied to participate by you) . . . ."

By e-mail later that same day, Cook responded to Tucker: "Thank you for your email. I have reviewed it and will be discussing this matter with Duraé Johann of OMB."

When Tucker did not hear back from Cook the following Monday (September 10, 2012), she realized that her attempt at an informal resolution of the interview issue was not going to work out and she had to file a formal grievance.

Under these circumstances, the Board finds as a matter of fact that Tucker could not reasonably be expected to have knowledge of the grievance matter before September 10, 2012. This finding of fact is consistent with Merit Rule 18.1 which encourages "employees and their supervisors [to] informally meet and discuss employee claims of Merit Rules or Merit law violations prior to filing a formal grievance."

The Board found Tucker a credible witness. Based on her testimony, the Board finds that she tried to resolve her problem informally with Cook before filing a formal grievance. The Board finds as a matter of fact that between August 10, 2012 and September 10, 2012, Tucker could not reasonably be expected to know that she would never be allowed to interview for the Social Service Specialist III position. [2]

[2] While the Board will hear Tucker's Family and Medical Leave Act (FMLA) retaliation claim on the merits, the Board notes that it does not have jurisdiction to hear every FMLA claim. The FMLA provides for prescriptive rights setting substantive floors for conduct by employers and creating entitlements for employees. The Board does not have jurisdiction over alleged violations of those prescriptive rights. In contrast, the Board may have jurisdiction under Merit Rule 2.1 for a violation of FMLA "*proscriptive* provisions that protect employees from discrimination or retaliation for exercising

FINDINGS OF FACT

Tucker is a Judicial Case Processor Supervisor at the Family Court.

On July 27, 2012, Tucker applied for and the Family Court approved her request for FMLA leave with an open end date.

OMB posted a vacant position for a Social Service Specialist III in the Family Court. Tucker applied for the position. By e-mail, OMB advised Tucker: "Your application for Social Service Specialist III, Recruitment 070912-MDD003-20800, was screened and determined that you have met the job requirements. Only the applicants selected for an interview will be contacted by the hiring manager."

By e-mail dated August 7, 2012, Lisa Waters notified Tucker that "you have been selected for an interview for the Social Service Specialist III position. Your interview has been scheduled for **Monday, August 13, 2012 at 11:45 am.**" (e*mphasis in original)*

According to Tucker, she contacted Waters to see if she could interview by telephone because she was out on FMLA leave. Waters brought Tucker's request to the attention of Warren Cook, the Director of Human Resources.

Cook had been the Director of Human Resources for approximately two weeks, although he had prior HR experience in the private sector. According to Cook, he reviewed Tucker's personnel file and medical records. Prior to going out on FMLA leave, Tucker had applied for worker's compensation. According to the Physician's Report (dated July 19, 2012), Tucker suffered a "stress reaction" and could not work at all. The report stated that Tucker's safe work capabilities were temporary and she could return to work on September 1, 2012.

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their substantive rights under the FMLA." *Yashenko v. Harrah's NC Casino Company, LLC*, 446 F.3d 541, 546 (4th Cir. 2006).

Tucker's doctor filled out a second Physician's Report on August 8, 2012. Again, the diagnosis was "stress reaction to work." The report stated that Tucker's safe work capabilities were temporary but her return to work date was "unknown."

Tucker's doctor also completed a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) on July 27, 2012. The certificate stated that Tucker's incapacity began on July 11, 2012 with an unknown ending date. The certificate stated that Tucker could not work at all in her position of Judicial Case Processor Supervisor.

According to Warren Cook, after reviewing Tucker's medical records he concluded that she was unable to perform the essential functions of any job at the Family Court including the Social Service Specialist III position. According to Cook, that was why he decided to cancel her interview for the position scheduled for August 13, 2012.

Cook acknowledged that he only checked Tucker's medical records and not the medical records of the other candidates selected to interview. Indeed, for those candidates outside the Family Court, he would not have had access to their records.

The Board finds as a matter of fact that Tucker applied for the position of Social Service Specialist III and she met the job requirements.

The Board finds as a matter of fact that the Family Court selected Tucker from the list of qualified job applicants and scheduled her for an interview on August 13, 2012.

The Board finds as a matter of fact that the Family Court did not interview Tucker for the position because she was on FMLA leave.

CONCLUSIONS OF LAW

Merit Rule 2.1 provides:

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

"'The term 'retaliation' does not appear in Merit Rule 2.1, but the Board believes that for an employer to retaliate against an employee's exercise of a protected activity is discrimination based on a non-merit factor.'" *Moison v. DHSS*, MERB Docket No. 07-09-400, at p.5 (June 18, 2009) (quoting *Hilferty v. Department of State*, MERB Docket No. 07-12-406, at p.10 (Aug. 27, 2008)).

Tucker claims that the Family Court retaliated against her for the exercise of her right to take FMLA leave in violation of Merit Rule 2.1. [3] "To prevail on a retaliation claim under the FMLA, [Tucker] must prove that (1) she invoked her right to FMLA qualifying leave, (2) she suffered an adverse employment decision, and (3) the adverse action was causally related to her invocation of her rights." *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 301-02 (3rd Cir. 2012).

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[3] Tucker also claims that the Family Court violated Merit Rule 1.2 and Merit Rule 6.1.2. Tucker failed to state a claim for a violation of Merit Rule 6.1.2 because she was considered for a vacant Social Service Specialist III position when she applied for the position and OMB determined that she met the job requirements. Merit Rule 6.1.2 does not require that the agency interview every candidate deemed qualified by OMB.

Tucker failed to state a claim for a violation of Merit Rule 1.2. Section 5257 of Title 29 of the *Delaware Code* does not conflict with any Merit Rule. Section 5257 provides that "Once an employee has been determined to have the ability to return to employment [after disability leave] . . . Merit employees may be placed in any vacant merit position, for which they qualify, by the Office of Management and Budget." According to Tucker, when her FMLA and short-term disability leave ran out she returned to work at the Family Court in October 2012 in her former position as a Judicial Case Processor Supervisor.

The Board concludes as a matter of law that Tucker established a prima facie claim of retaliation. On July 27, 2012, the Family Court approved Tucker for FMLA leave. She suffered an adverse employment decision when the Family Court cancelled her August 13, 2012 interview for a Social Service Specialist III position. *See Stoppi v. Wal-Mart Transportation, LLC*, 2010 WL 338990 (M.D. Pa., Aug. 26, 2010) (plaintiff was denied the opportunity to interview for a promotion after she took medical leave). [4] The adverse action was causally related to her invocation of her FMLA rights. The August 10, 2012 e-mail cancelling Tucker's interview gave as the reason: "because you are out on FMLA."

Since Tucker established a prima facie case of retaliation, "the burden of production shifts to [the Family Court] to articulate some legitimate, nondiscriminatory reason for its decision." *Lichtenstein*, 691 F.3d at 302. The Board concludes as a matter of law that the Family Court did not articulate a legitimate, nondiscriminatory reason for its decision not to interview Tucker for the Social Service Specialist III position.

The Family Court's reason was that she was not qualified for the position because she was out on FMLA leave. [5] As a matter of law, that is not a legitimate, nondiscriminatory reason.

In *McFarlane v. Chao*, 2007 WL 1017604 (S.D.N.Y., Mar. 30, 2007), while a receptionist was on FMLA leave for chemotherapy her employer decided she was no longer eligible for

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[4] "In the retaliation context, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Stoppi*, 2010 WL 2298990, at p.11. "The court finds that a reasonable worker would be dissuaded from [taking FMLA leave] if [it] meant that she would be denied an interview that could lead to a promotion." *Id.*

[5] Warren Cook testified that he also took into account Tucker's filing for worker's compensation (even though, according to Cook her claim was ultimately denied). Delaware law prohibits an employer from retaliating against an employee "because such employee has claimed or attempted to claim workers' compensation benefits . . . ." 19 *Del. C.* §2365

employment because she was not qualified to do her job because of her absence. The federal district court held that the employer violated the anti-retaliation provision of the FMLA.

> The magistrate judge found that plaintiff had failed to make a prima facie showing with regard to the FMLA retaliation claim because, when the adverse employment action occurred, plaintiff was on medical leave unable to perform the functions of her position, and hence she was not "qualified." The mere absence of plaintiff from the workplace, as a result of her exercising her protected rights under the FMLA does not render her unqualified for the position. 2007 WL 1017604, at p.1.

In the first place, Cook should not have accessed Tucker's medical records to decide whether she could interview or not. The Americans with Disabilities Act (ADA) prohibits an employer from making "inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability." 29 C.F.R. §1630.13(b). An employer "may ask an applicant to describe or to demonstrate that, with or without a reasonable accommodation, the applicant will be able to perform job-related functions." *Id.* §1630.14(a). An interviewer therefore could have asked Tucker whether she could perform all of the essential functions of the position of Social Service Specialist III with or without an accommodation. But a pre-interview inquiry into her medical records was inappropriate if not unlawful.

The Board concludes as a matter of law that the Family Court violated Merit Rule 2.1 by discriminating against Tucker on the basis of a non-merit factor: the exercise of her right to take approved FMLA leave.

The Board has wide authority to remedy violations of the Merit Statutes or the Merit rules to "make employees whole." 29 *Del. C.* §5931(a). However, the Board does not believe it can award Tucker the remedy she seeks: "To be given the position I was denied the interview opportunity for – Social Service Specialist III or an agreeable position comparable with my same

pay grade 10 salary." The Board cannot turn back the clock and order the Family Court to interview Tucker for a position which may no longer be vacant and for which she may no longer be qualified. Even if the Family Court had interviewed Tucker for the position at the time, it is problematic whether she would have received the position, out of the nine other candidates interviewed for the position.

Warren Cook testified that in his last year as Director of Human Resources he has implemented job application and interview protocols to ensure that the process is consistent with all legal requirements. The Board will take him at his word with the admonition that if another case like Tucker's comes before the Board the consequences could be very different.

DECISION AND ORDER

It is this **11th** day of September, 2013, by a vote of 4-0, the Decision and Order of the Board to grant Tucker's appeal but without ordering any remedial action by the Family Court.

Martha K. Austin
MARTHA K. AUSTIN, MERB Chairwoman

Victoria D Cairns
VICTORIA D. CAIRNS, MERB Member

JOHN F. SCHMUTZ, MERB Member

Paul R Houck
PAUL R. HOUCK, MERB Member