2016 IL App (3d) 150686-U

Order filed April 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

DWYANE McCANN, Petitioner-Appellant, v. THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL; COUNTY OF WILL, LAND USE DEPARTMENT; and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31 Respondents-Appellees.	)	Petition for Review of an Order of the Illinois Labor Relations Board Appeal No. 3-15-0686 Board No. S-CA-14-025 S-CA-14-189

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Where the charging party fails to submit evidence in support of the allegations in his complaint as requested by the Board and as required by the Code, then the Board does not err in dismissing the claim for insufficient evidence. The State Panel also acts properly when it adopts all the Board's dismissal order pursuant to the Code.

¶ 2 This case involves the employment termination of petitioner, Dwyane McCann, by respondent, County of Will Land Use Department (Employer). McCann appeals the Illinois Labor Relations Board State Panel's (State Panel) affirmation of the Illinois Labor Relations Board's (Board) dismissal of his causes of action filed against (1) the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME) for incompetent, ineffective, and inefficient union representation and against (2) Employer for unfair labor practices within the meaning of section 10(a) of the Illinois Public Labor Relations Act. (5 ILCS 315/10(a) (West 2012)) For the foregoing reasons, we confirm.

¶ 3 FACTS

¶ 4 Employer and AFSCME are parties to a collective bargaining agreement (CBA), which serves as the sole bargaining agent for and governs the terms of employment for all Employer employees who are employed, *inter alia*, in the classification indicated on Annex B of the CBA. The CBA also provides a multi-step grievance procedure to address covered issues including employee discipline and discharge culminating in final and binding arbitration.

¶ 5 McCann was employed by Employer as a building inspector from 2004 until he was laid off in 2010 due to budget cuts. In April 2013, Employer recalled McCann from his lay-off status and offered him the position of General Combination Inspector 1 which is also a classification listed in Annex B of the CBA. Employer informed McCann in his offer letter that he would have to obtain two International Code Council (ICC) certifications in Residential and Commercial Building Inspection within six months of his April 29 start date to fully attain the position. He was advised that his failure to obtain both certifications within the probationary period – approximately April 29 to October 29 – would result in the termination of his employment as he

would have failed to meet the minimum job requirement term. McCann acknowledged acceptance of this position and its terms by signing the offer letter.

¶ 6 According to the record, there was only one opportunity for McCann to take the ICC certification tests during the probationary period, September 14. McCann submitted the required registration information for the examinations on July 31. He stated that Employer initially provided him with outdated study materials and failed to provide him the hands-on field training, seminars, and classes he provided to Caucasian employees. Employer conceded that it had provided McCann with outdated materials. However, when the updated versions were received in July, Employer noted that it gave them to McCann but they were never opened. McCann conceded he did received the updated materials. On September 14, McCann took and failed both ICC examinations.

¶ 7 McCann continued to work for Employer until late September 2013, when he sustained an on-the-job injury on September 25. He sought medical treatment and was released to work but only for light duty assignments. Approximately two days later, McCann was told to report to work for front desk assignments. However, when he arrived, his supervisor assigned him an inspection to complete. After conducting and returning from the inspection, McCann fell ill and was taken by ambulance to the hospital where he remained for several days.

¶ 8 On October 2, in response to McCann's physician's billing department request for payment, Employer advised the billing department that workers' compensation would not cover the expenses incurred by McCann. On October 7, McCann received notice from Employer that he would be placed on light duty assignments and that he had been expected back as of September 30.

¶ 9 On November 7, after McCann had applied for workers' compensation benefits, he was informed that his employment with Employer had been terminated due to his failure to obtain the two required ICC certifications. Two weeks later the AFSCME filed a grievance on McCann's behalf contesting the discharge by alleging that Employer did not provide study materials necessary for McCann to sufficiently comply with the term of his employment contract requiring that he pass the ICC certification examination. After a series of grievance meetings where the AFSCME was informed that McCann had significant access to study materials, the union voted not to proceed to arbitration on McCann's grievances.

¶ 10 On April 5, 2014, McCann filed a charge with the Board alleging that Employer engaged in unfair labor practices within the meaning of section 10(a) of the Illinois Public Labor Relations Act (Act). (5 ILCS 315/10(a) (West 2012)) He alleged that there was a discriminatory recall process after his 2010 layoff; he experienced discriminatory treatment in preparation for the September 2013 ICC certification examination; Employer failed to provide the proper training or materials for the ICC certification examination; discriminatory discharge in November 2013; wrongful denial of workers compensation claim; and that Employer violated the Illinois Workers' Compensation and Occupational Disease Act, the Americans with Disabilities Act, and the Fourteenth Amendment of the United States Constitution.

¶ 11 On April 8, 2014, McCann also filed an unfair labor practice charge with the Board charging the AFSCME with incompetent, ineffective, and inefficient union representation in violation of section 10(b) of the Act. (5 ILCS 315/10(b) (West 2012)) He alleged that the AFSCME had breached the duty of fair representation owed to him, in violation of section 10(b) of the Act because it failed to adequately handle his grievance challenging his discharge from Employer. He noted that the AFSCME did not give him written notice regarding the date and

time of the grievance meetings, did not confer with him regarding what issues to present at the meetings, and deprived him of the full and equal benefit of his employment rights under the CBA.

¶ 12 McCann included with both complaints an affidavit noting a timeline of events and assertions of wrongdoing by Employer and the AFSCME. He also attached 26 exhibit documents including his AFSCME grievance form, his signed employment offer letter noting the ICC certification requirement, his ICC certification examination form noting the dates available to take the exam in 2013, a printout of a list of hourly pay amounts for various employees including McCann, printouts of statutes and sections of the CBA, reports concerning his on-the-job injury, a copy of the check he received for his medical claim and email correspondence regarding it, his termination letter, and a copy of the denial of his workers' compensation claim.

¶ 13 On August 15, 2014, after McCann submitted to the Board position statements in lieu of evidence as requested on two separate occasions by a Board agent and only the AFSCME submitted a response to its charge, the Executive Director of the Board dismissed both charges. It found it lacked jurisdiction to consider several allegations in McCann's complaint against Employer and, in both cases, the evidence submitted was insufficient to raise an issue for a hearing.

¶ 14 McCann appealed both dismissals to the State Panel. With regard to the Board's order dismissing his complaint against Employer, McCann argued that the Board (1) failed to conduct an actual investigation of Employer's complained of conduct, (2) plagiarized pleadings from his federal cause of action against Employer, (3) had jurisdiction over the untimely allegations because the it should still determine whether that conduct "represented acts of reasonable care," and (4) should have determined Employer was tortiously liable for negligence and breach of

contract and "failed to act with reasonable care" in upholding his "employment protection rights" under the CBA, the Illinois Workers' Compensation statute and handbook, the Americans with Disabilities Act, and the Fourteenth Amendment.

¶ 15 McCann argued regarding the Board's dismissal of his complaint against the AFSCME that the Board did not comply with section 1220.40(a)(1),(2) of the Illinois Administrative Code (Code) (80 Ill Admin. Code 1220.40) because (1) it did not present an accurate account of facts, (2) the Board agent did not "implement" the section, and (3) the order discussed hearsay statements made by the AFSCME, as the AFSCME did not file any affidavits or documents. He further argued that the dismissal on the merits was improper as the AFSCME failed to confer with him during the grievance process and thus failed to act with due care.

¶ 16 The AFSCME did not file a response but Employer did. Employer asserted that McCann's appeal should be rejected because he failed to identify an issue of fact or law sufficient for a hearing. It stated that the Board correctly found it did not have jurisdiction to address several of the violations alleged by McCann and that McCann failed to establish he engaged in any protected activity under the Act with which Employer interfered or acted in retaliation. McCann moved to strike the response because it addressed his appeal as an exception, it did not respond to specific allegations in his appeal, and it did not comply with the mandatory pleading requirements of section 1220.60(a) (4) of the Code. The motion was denied.

¶ 17 On October 27, 2014, the State Panel stated that “[a]fter reviewing the record and appeal, [it] affirm[ed] the Executive Director’s Dismissal for the reasons stated in the document.”

¶ 18 On November 17, 2014, McCann filed, *pro se*, an appeal from the State Panel decision to the Fourth District Appellate Court. The Board and AFSCME submitted appellee briefs and, over McCann’s objections, Employer was allowed an extension to file its brief. Upon the Board's

motion due to McCann's residence and Employer's office location in Will County, the appellate court found that pursuant to section 11(e) of the Act, the proper venue for the administrative review action is the Third Appellate Court. The appeal was thus transferred to this court on September 21, 2015, where this court also allowed Employer's motion to adopt the brief of the Board.

¶ 19 Upon review of the appellate brief filed by McCann, on February 2, 2016, this court reset the filing dates and ordered McCann to prepare and file an appropriate appellant brief in accordance with Supreme Court Rule 341 and the *pro se* manual. He complied with the order and filed, *instanter*, a new appellate brief. The respondents, AFSCME and the Board, did not submit any new filings, but moved to rely on their previously filed appellees' briefs. We allowed those motions. Respondent, Employer, renewed its notice that it would be adopting the brief of the Board. McCann filed a reply brief.

¶ 20 ANALYSIS

¶ 21 "It is within the sound discretion of the Board to dismiss an unfair labor practice charge." *Trygg v. Illinois Labor Relations Board*, 2014 IL App (4th) 130505, ¶ 53 (quoting *Michels v. Illinois Labor Relations Board*, 2012 IL App (4th) 110612, ¶ 45). Therefore, when reviewing whether that dismissal was proper, we seek to determine whether the Board abused its discretion. *Id*. An abuse is found only were " 'the decision to dismiss is clearly illogical.' " *Id*.

¶ 22 McCann's revised opening brief is still difficult to understand but it would appear that he argues the Board abused its discretion in failing to comply with the requirements of section 1220.40 of the Code. (80 Ill Admin. Code 1220.40) He asserts that it did not comply with the code's mandatory requirements and that it failed to state what evidence was accepted or rejected for the purpose of making its decision so that it could be clearly and adequately disclosed and

reviewed. He also argues that the State Panel's orders were merely conclusory findings sustaining the dismissal orders of the Board.

¶ 23 The Board counters that the State Panel's affirmation of its dismissal was proper because it did comply with section 1220.40 of the Code with respect to both charges. It first asserts that several of McCann's points of contention in his complaint were untimely. Therefore, they were properly not addressed. Pertaining to those that were timely, the Board argues that the assigned Board agent twice requested evidence from McCann in support of his allegations against Employer and the AFSCME and McCann failed to provide it. The Board notes with regard to McCann's charge against the AFSCME, that the AFSCME submitted a position statement in response to the complaint, which was never rebutted by McCann and did not conflict with any allegations or *evidence* McCann presented. It contends that such a statement was not required to be submitted, to be an affidavit, or to be supported by documentary evidence according to the section 1220.40 of the Code. It further asserts that all of the other issues McCann charged in his complaint against Employer were matters not within its jurisdiction and thus not aptly before it. It argues that both dismissals were, therefore, proper.

¶ 24 Section 1220.40 of the Code states in relevant part that the "Board or its agent shall investigate the charge" and if the charge fails to state a claim or if the investigation "reveals that there is no issue of law or fact sufficient to warrant a hearing," then the Executive Director "shall dismiss the charge." 80 Ill. Admin Code 1220.40(a). Contrary to McCann's assertions, the record here shows that the Board complied with the aforementioned requirements for both of his complaints.

¶ 25 We agree with the Board's finding that several of the claims McCann alleged against Employer were untimely as they occurred outside the six-month filing period and McCann did

not assert at any time that more than six months before he filed the charge he did not have knowledge of the events which lead to the claims. See 5 ILCS 315/11(a) (West 2014) ("no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board" unless the charging party did not "reasonably have knowledge of the alleged unfair labor practice.") Our courts have steadfastly recognized this time limitation as a firm deadline and thus it was proper for the Board not to consider the claims. See *Michels*, 2012 IL App (4th) 110612, ¶¶ 35-40; *Pace Suburban Bus Division of Regional Transportation. Authority. v. Illinois Labor Relations Board*, 406 Ill. App. 3d 484, 502 (2010); *Moore v. Illinois State Labor Relations Board*, 206 Ill. App. 3d 327, 151 (1990). Therefore, McCann's allegations of a discriminatory recall process after his 2010 layoff, discriminatory treatment in preparation for the September 2013 ICC certification examination, and Employer's alleged failure to provide the proper training or materials for the ICC certification examination are claims the Board could not consider. At most they could be used for " 'shed[ding] light on the true character of matters occurring within the limitations period' ". *Pace*, 406 Ill. App. 3d at 501 (quoting *Local Lodge No. 1424 v. National Labor Relations Board*, 362 U.S. 411, 416-17 (1960)).

¶ 26 Nevertheless, McCann failed to provide sufficient evidence for his timely claims for his untimely claims to shed light. Because the Board did not find, and we agree, the documents and affidavits he filed with his complaints sufficient to support any of his timely claims, it twice requested McCann to provide evidence for his claims against Employer and his charge against the AFSCME. The record shows that McCann spoke on the phone with the assigned Board agent on April 15, 2014. The Board agent told McCann he needed to provide evidence to establish (1) what protected activity he was engaged in and how Employer took adverse action against him

because of it pursuant to section 10(a) of the Act (5 ILCS 315 (a)(1) (West 2014)) and (2) how the AFSCME's conduct was intentional and involved animus directed towards him pursuant to section 10(b) of the Act (5 ILCS 315 (b) (West 2014)). Otherwise, McCann was told he could elect to withdraw the claims. McCann replied with a position statement that he did not wish to withdraw the claims and stated that the filed complaint, his affidavits, and the other submitted documents were sufficient to establish both claims.

¶ 27 In an email from the same Board agent to McCann on April 30, McCann was directly informed that he "need[ed] to show that the Employer's actions leading up to [his] discharge and the discharge itself were based on the fact that they dislike [McCann] being associated with a union." It also stated with regard to his claim against the AFSCME that McCann needed to provide evidence of his allegation that the union treated other members in similar situations more fairly. Again, McCann provided a position statement which reaffirmed his belief in the sufficiency of the evidence, his affidavits, and other documents he had already submitted. He also stated that the Board should contact individuals not party to the complaint and get statements from them in support of his assertions. In addition, he gave an account of a named African American individual who allegedly received unfair treatment from the AFSCME when compared to Caucasian Americans, but failed to provide any supporting evidence of this claim as well.

¶ 28 It would seem that McCann expected the Board to exercise overt investigatory actions beyond what the statute requires or even authorized. He notes specifically in his appeals to the State Panel that the Board did not "conduct an actual investigation" and the Board agent did not "implement" section 1220.4(a)(2) of the Code. McCann, however, fails to appreciate the entirety of the statute on which he relies. It clearly states it is the charging party's responsibility to

"submit to the Board or its agent all evidence relevant to or in support of the charge." 80 Ill Admin Code 1220.40(a) (1). McCann was responsible for submitting evidence to support his points of contention in his complaints. He failed to do so.

¶ 29 Moreover, contrary to McCann's contention regarding the position statement submitted by the AFSCME, section 1220.40 (a)(2) of the Code states only that "the respondent[s] *may* submit a complete account of the facts, a statement of its position in respect to the allegations set forth in the charge and all relevant evidence in support of its position. The evidence *may* include documents and affidavits." (Emphases added) 80 Ill Admin Code 1220.40(a) (2). Thus the statement filed by the AFSCME was proper and McCann does not deny that his proffered *evidence* did not contradict it. Thus the Board was within its discretion to rely on it in making its decision to dismiss the charges.

¶ 30 Additionally, the Board properly found that it did not have jurisdiction to consider McCann's timely filed claims concerning his November discharge and denial of his workers compensation claim. McCann's assertions that Employer violated the Illinois Worker's Compensation Act and handbook, the Civil Rights Act, and the Americans with Disabilities Act, and the Fourteenth Amendment were not within the jurisdiction of the Board to consider. See *City of Chicago v. Fair Employment Practices Commission*, 65 Ill. 2d 108, 113, (1976); see also *Community Unit School District No. 5 v. Illinois Education Labor Relations Board*, 2014 IL App (4th) 130294, ¶ 52.

¶ 31 We find McCann's last argument that the State Panel failed to identify what evidence it was relying on in making its decision to be without merit. "The [State Panel] may adopt all, part or none of the order depending on the extent to which it is consistent with the record and applicable law." 80 Ill. Admin. Code 1200.135. In both appeals, the State Panel stated it

reviewed the record and appeal. With respect to the AFSCME appeal, it stated it had also reviewed the response. In light of that information, the State Panel "affirm[ed] the [Board's] Dismissal for the reasons stated in the document" in both appeals. Thus it clearly adopted all of the information contained in the orders. It did not need to restate what the Board had already stated and the statute does not require it to discuss the documents submitted on appeal. Its ruling was proper.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we confirm the decision of the Illinois Labor Relations Board, State Panel.

¶ 34 Confirmed.