2016 IL App (1st) 151258-U

SIXTH DIVISION
Order filed: March 18, 2016

No. 1-15-1258

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PAMELA MERCER, Petitioner, v. ILLINOIS LABOR RELATIONS BOARD, LOCAL PANEL; THOMAS J. DART, Sheriff of Cook County, Illinois; and COUNTY OF COOK, a Municipal Corporation and Body Politic, Respondents.	)	Direct Administrative Review of the Illinois Labor Relations Board, Local Panel Nos. L-CA-13-009 L-CA-13-063

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The order of the Illinois Labor Relations Board is affirmed where the petitioner failed to establish a *prima facie* case that the Sheriff of Cook County committed unfair labor practices under sections 10(a)(1) and 10(a)(3) of the Illinois Public Labor Relations Act (5 ILCS 315/10(a)(1), (a)(3) (West 2012)).

¶ 2 The petitioner, Pamela Mercer, filed this action for direct administrative review of the final order of the respondent, the Illinois Labor Relations Board, Local Panel (Board), which found that she failed to prove that Cook County and its sheriff, Thomas J. Dart (Sheriff), violated section 10(a)(3) and, derivatively, section 10(a)(1) of the Illinois Public Labor Relations Act

(Act) (5 ILCS 315/10(a)(1), (a)(3) (West 2012)), by temporarily reassigning her work duties and suspending her for 10 days. On appeal, the petitioner argues she made a *prima facie* showing that the Sheriff violated the Act where: (1) her reassignment constituted an adverse employment action; (2) the decisions to reassign and suspend her were made in retaliation for her protected activity; and (3) the proffered reasons for taking the adverse actions were a mere pretext for the improper motive. For the reasons that follow, we affirm.

¶ 3 On July 29, 2012, the petitioner filed an unfair-labor-practice charge with the Board against the Sheriff's office, claiming it violated sections 10(a)(1) and 10(a)(3) of the Act (5 ILCS 315/10(a)(1), (a)(3) (West 2012)). The charge alleged that, on July 1, 2012, the petitioner's supervisor, Lieutenant Jerry Camel, assigned her to perform four consecutive hours of lunch-relief duty in retaliation for the unfair-labor-practice charge she filed with the Board against the Sheriff on August 15, 2011.[1] The Board investigated the charge and issued a complaint (case No. L-CA-13-009) against the Sheriff and Cook County.

¶ 4 On May 12, 2013, the petitioner filed another charge with the Board against the Sheriff, this time alleging that she was suspended for 10 days on March 18, 2013, in retaliation for the unfair labor charges she filed on August 15, 2011, and July 29, 2012. Following an investigation, the Board filed a complaint (case No. L-CA-13-063) against the Sheriff and Cook County.

¶ 5 The administrative law judge (ALJ) consolidated both complaints for an administrative hearing which was held on September 18 and 19, 2014. The evidence adduced at that hearing is

[1] The petitioner produced no evidence of the August 15, 2011, unfair-labor-practice charge that she filed with the Board against the Sheriff or its contents at the administrative hearing. However, the ALJ took judicial notice that she filed a charge against the Sheriff and Cook County on August 15.

set forth below. The petitioner began working for the Sheriff as a correctional officer in 1987 and was promoted to the rank of sergeant in November 1993. As part of her employment, she became a member of the American Federation of State, County and Municipal Employees, Council 31 (AFSCME), the union that represents correctional officers.

¶ 6 At all relevant times, the petitioner was assigned to work at the Pre-Release Center in the Cook County jail. The Pre-Release Center houses up to 449 inmates in two buildings, Buildings 3 and 4. The petitioner worked on the 11 p.m. to 7 a.m. shift and her duties included supervising the correctional officers, maintaining order, overseeing the movement of inmates, and counseling non-performing correctional officers through informal conversations or, under certain circumstances, through more severe discipline. The petitioner was supervised by Lieutenants Gus Paleologos and Camel. The supervisor above Paleologos and Camel is Commander Edward Byrne.

¶ 7 On July 1, 2012, the petitioner sent a memorandum to the president and chief steward at AFSCME regarding overtime pay and minimum staffing. In that memo, the petitioner explained that, earlier in the day, she was assigned to work at Post 1 from 12 a.m. to 4 a.m. so that the correctional officer originally assigned to that post, Officer Hathaway, could perform lunch-relief duty. Although Camel called and offered to relieve her at 2:15 a.m., she wrote that she is "not comfortable being around [him] in light of the previous incidents, documentation and charges." The petitioner also complained about "working outside of [her] job classification," being "locked into Post and unable to move for approximately 4 hours," and disparate treatment. Specifically, she stated that Sergeant Palmer leaves an hour early on most Sundays and was not assigned to lunch-relief duty on July 1. The petitioner concluded her memo by stating: "In lieu

[*sic*] of the pending legal issues I can only surmise that this is more retaliatory behavior. Will it ever end?"

¶ 8 The petitioner's testimony regarding the events of July 1 was largely consistent with her memo to AFSCME. She admitted she did not relieve any correctional officers for lunch and she confirmed that Camel called and asked if she needed a relief. Nevertheless, the petitioner later testified that she did perform "lunch reliefs" and that Camel ordered her to do so "in direct retaliation [for] the legal issues that [she has] pending against the Department, against Camel, [and] against Byrne." She conceded, however, that she never filed an unfair-labor-practice charge against Camel. She also acknowledged that her charge of August 15, 2011, was sent to the Sheriff's office and was not addressed to Camel or Byrne.

¶ 9 Camel testified that on July 1, 2012, the Pre-Release Center was operating with its minimum number of staff: 11 correctional officers and 2 sergeants. He assigned Sergeant Palmer to Building 3 and the petitioner to Post 1 in Building 4. Camel explained that he specifically assigned the petitioner to Post 1 so that the correctional officer originally assigned to that post could relieve three other officers for lunch. Camel made it clear that the petitioner was not providing lunch relief; rather, she was simply relieving Hathaway so that he could perform the lunch reliefs. When asked what would have happened if the petitioner did not come to work that day, Camel testified that he would have "sat on the post." Camel explained that Post 1 is less than 20 feet from where the petitioner normally works and it has 2 computers allowing her to perform her regular job duties. Camel also stated that approximately three hours into the petitioner's shift, he called her and offered to relieve her from Post 1 so that she could take a lunch break. When the petitioner denied his offer, Camel asked if she wanted a "late lunch form" which would allow her to leave work an hour early, but she declined, stating "I don't want to owe

the county nothing." Camel stated that the petitioner never complained about working at Post 1 or informed him of any problems. Finally, Camel testified that he was not aware that the petitioner had filed any unfair-labor-practice charges against the Sheriff until he was contacted by an assistant State's Attorney in 2014.

¶ 10 Byrne corroborated Camel's testimony that on July 1, 2012, the Pre-Release Center was operating with the minimum number of correctional officers and, as a result, those in supervisory positions had to "step up" and assist the officers. Byrne explained that it is not uncommon for sergeants and lieutenants to work at posts while the correctional officer performs some other task. He also testified that the petitioner did not actually relieve anyone for lunch; rather, she covered the post while another officer performed that task.

¶ 11 The parties also presented evidence about the events leading up to the petitioner's 10-day suspension. On March 8, 2013, the petitioner sent an email to Byrne and Paleologos about a correctional officer who was not scanning or searching individuals entering the prison lobby. The petitioner wrote in her email that she confronted the officer about searching visitors in the lobby but he became "very disgruntled" and mumbled "why the F**k do I have to go to the lobby." The petitioner also wrote that some of the correctional officers are confused as to whether the officer in the lobby or at Post 1 is required to scan and search individuals entering the prison. The petitioner concluded her email by requesting clarification about the post orders. In response to the petitioner's March 8 email, Byrne testified that he instructed Paleologos to investigate whether she disciplined the officer for failing to search individuals entering the prison lobby.

¶ 12 Paleologos testified that he investigated the events described in the petitioner's March 8 email and determined that she witnessed a rule violation but failed to initiate disciplinary action

against the officer. Consequently, he disciplined the petitioner for engaging in "Major Acts of Insubordination"—namely, failing to perform her duties as a sergeant. Although Paleologos testified that the decision to discipline the petitioner was his, he acknowledged that Byrne approved the charge and imposed a 10-day suspension. Paleologos further testified that he was not aware that the petitioner had filed unfair-labor-practice charges against the Sheriff at the time that he recommended discipline and, consequently, he denied disciplining her based upon her filing charges.

¶ 13 Byrne confirmed that he imposed the 10-day suspension, but only after Paleologos completed his investigation and found that the petitioner had not disciplined the officer. He denied suspending her based upon the unfair-labor-practice charge she filed on August 15, 2011, or July 29, 2012. In fact, Byrne testified he was not aware that any charges had been filed against the Sheriff until July 2014.

¶ 14 The petitioner disputed Byrne's and Paleologos's testimony that she was insubordinate for failing to discipline the correctional officer. She claimed she had no basis to impose discipline because she never observed the officer violating the rules. Although she admitted learning of the alleged violation from another officer, the petitioner asserted that she is not required to issue discipline based upon the "say-so" of another officer and, in any event, discipline is not always warranted for a rules infraction. The petitioner also explained that her March 8 email merely sought clarification about the correctional officers' job duties and that her suspension was retaliation for "charges pending *** in Federal Court, [and] complaints in *** [the Office of Professional Responsibility.]" On cross-examination, she acknowledged that the charges she filed with the Board were not addressed to Byrne, Camel, or Paleologos.

¶ 15 On December 18, 2015, the ALJ issued a recommended decision and order finding that the Sheriff did not violate sections 10(a)(3) and, derivatively, 10(a)(1) of Act. 5 ILCS 315/10(a)(1), (a)(3) (West 2012). The ALJ determined that the petitioner engaged in protected activities when she filed unfair-labor-practice charges against the Sheriff on August 15, 2011, and July 29, 2012. However, the ALJ determined that the temporary job assignment to Post 1 did not constitute an adverse employment action because the terms and conditions of the petitioner's employment were not affected. The ALJ also found that the petitioner failed to prove that Camel knew she filed an unfair-labor-practice charge against the Sheriff or that his decision to reassign her work was motivated by retaliation for filing a charge. Similarly, the ALJ found that the petitioner failed to prove that the Sheriff committed an unfair labor practice when it suspended her for 10 days. Although the suspension was an adverse employment action, the ALJ determined that the petitioner failed to show that Paleologos was aware that she filed unfair-labor-practice charges against the Sheriff at the time he recommended discipline. The petitioner also failed to establish that her suspension was retaliation for her filing the charges. The Board adopted the ALJ's decision and recommendation on March 31, 2015, and the petitioner sought direct administrative review of the Board's final order.

¶ 16 Judicial review of the Board's decision is governed by the Administrative Review Law (5 ILCS 315/11(e) (West 2014)) and extends to all questions of law and fact presented by the record. 735 ILCS 5/3-110 (West 2014). The applicable standard of review in an administrative case depends on whether the question presented is one of law, one of fact, or a mixed question of law and fact. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board*, 216 Ill. 2d 569, 577 (2005). Questions of law are reviewed *de novo*. *City of Belvidere v. State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). The

Board's findings of fact are deemed *prima facie* true and correct and will not be disturbed on review unless they are against the manifest weight of the evidence. *Id.* And, where the Board's determination involves a mixed question of fact and law, the clearly erroneous standard of review is appropriate. *Id.* "A decision is 'clearly erroneous" when the reviewing court is left with the definite and firm conviction that a mistake has been committed. [Citation]." *Board of Education of City of Chicago v. Illinois Educational Labor Relations Board*, 2015 IL 118043, ¶ 16.

¶ 17 Section 10(a)(1) of the Act provides that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it." 5 ILCS 315/10(a)(1) (West 2012). Section 10(a)(3) of the Act provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act." 5 ILCS 315/10(a)(3) (West 2012).

¶ 18 The basic elements of an unfair labor practice claim are: (1) the employee is engaged in protected activity; (2) the employer had knowledge of the protected activity; (3) the employer took an adverse employment action against the employee; and (4) the employer's action was motivated by its animus toward the employee's protected union activity. *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 345-46 (1989). If a *prima facie* case of an unfair labor practice is established, then the burden shifts to the employer to advance a legitimate reason for the adverse employment action and to show that it relied on that reason. *County of Cook v. Illinois Labor Relations Board*, 2012 IL App (1st) 111514, ¶ 25. The employer must

establish that the employee would have suffered the adverse employment action notwithstanding her protected activity. *Id.* However, merely offering a legitimate business reason for the adverse action does not end the inquiry because the proposed reason must be *bona fide* and not pretextual. *North Shore Sanitary District v. Illinois State Labor Relations Board*, 262 Ill. App. 3d 279, 287 (1994).

¶ 19 In this case, the petitioner first contends that the Board erred in finding that she failed to make a *prima facie* showing that the Sheriff violated section 10(a)(3) and, derivatively, section 10(a)(1) of the Act, based upon her temporary assignment to Post 1. The parties do not dispute that the petitioner engaged in a protected activity when she filed an unfair-labor-practice charge against the Sheriff on August 15, 2011. The petitioner asserts, however, that being forced to perform four consecutive hours of lunch-relief duty at Post 1 amounts to an adverse employment action. She also argues that she was singled out to work at Post 1 and that such disparate treatment established that the Sheriff harbored antiunion animus.

¶ 20 The petitioner begins her argument with the assumption that she met the second element of a *prima facie* case; namely, that the Sheriff's decisionmaker had knowledge of her protected activity at the time of adverse action. However, the Board found that she failed to prove this essential element of her claim. In her brief before this court, the petitioner makes no argument challenging the Board's determination that she failed to prove that Camel, the Sheriff's decisionmaker, knew of her protected activity at the time he reassigned her work. As a consequence, any claim of error based upon the Board's findings as to this issue has been forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Forfeiture aside, our examination of the record reveals that the Board's finding in this regard is amply supported by the evidence of record.

¶ 21 To satisfy the second element of her *prima facie* case, the petitioner had to show that the decisionmaker responsible for her temporary job assignment knew that she was involved in protected activities at the time of the adverse action. See *City of Burbank*, 128 Ill. 2d at 346; *Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 503 (7th Cir. 2003). In this case, the Board found that Camel was not aware of the petitioner's protected activity at the time he assigned her to work at Post 1. In support of its finding, the Board credited Camel's testimony that he did not learn of the unfair-labor-practice charge filed by the petitioner until 2014, nearly two years after the alleged adverse action. While the petitioner testified she sent a notice of the charge to the Sheriff, she admitted she did not send a copy of the charge to Camel. The Board, in weighing the evidence, concluded that "there is insufficient basis on which to disregard [Camel's] testimony." Since the Board determines the credibility of the witnesses and the weight to be given to the testimony, we will not disturb its factual findings unless it is against the manifest of the evidence. *Board of Education of City of Chicago*, 2015 IL 118043, ¶ 15. Here, the Board's finding that Camel was not aware of the petitioner's protected activity at the time of job reassignment was not contrary to the manifest weight of the evidence.

¶ 22 Based upon the Board's determination that the petitioner failed to establish Camel's knowledge of the unfair-labor-practice charge she filed against the Sheriff at the time he reassigned her work, it necessarily follows that Camel's act in reassigning her work was not motivated by retaliation for her protected activity. See *Sears, Roebuck & Co.*, 349 F.3d at 504 (before an employer can be said to have discriminated against its employees for their protected activities, the employees must show that the supervisor responsible for the alleged discriminatory action knew about their activities).

¶ 23 Next, the petitioner challenges the Board's finding that she failed to make a *prima facie* showing that the Sheriff violated section 10(a)(3) and, derivatively, section 10(a)(1) of the Act, based upon her 10-day suspension. As noted above, the parties do not dispute that the petitioner engaged in protected activities by filing charges against the Sheriff on August 15, 2011, and July 29, 2012. Nor do the parties dispute that a 10-day suspension qualifies as an adverse action. The petitioner asserts, however, that the Board erred in finding that she failed to prove that her suspension was motivated by retaliation for her protected activities and the proffered reason for her suspension was a mere pretext.

¶ 24 Once again, the petitioner has not argued that the Board erred in finding that the Sheriff's decisionmaker, Paleologos, did not know that she filed charges against the Sheriff at the time he initiated the discipline. As a consequence, any claim of error as to this issue has been forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Forfeiture aside, the Board's findings are amply supported by the record.

¶ 25 In this case, the Board found that Paleologos was the decisionmaker who imposed the disciplinary action. In support of its finding, the Board relied on Paleologos's testimony that he investigated the petitioner's alleged misconduct and was responsible for deciding whether discipline should be imposed. Although the Board acknowledged that Byrne asked Paleologos to investigate the petitioner's email of March 8, 2013, the Board specifically found that the decision to impose discipline was Paleologos's. He investigated the petitioner's March 8 email, determined that discipline was appropriate, and issued the discipline on March 18, 2013. More importantly, the Board credited Paleologos's testimony that he was not aware that the petitioner filed unfair-labor-practice charges against the Sheriff at the time he initiated the discipline. The Board also noted that the petitioner "has offered no basis on which to question the veracity of

this testimony." Indeed, the petitioner admitted that the charges she filed with the Board were not addressed to Paleologos or Byrne. On this record, we cannot say that the Board's determination that the petitioner failed to prove that Paleologos had knowledge of her protected activities at the time he initiated discipline was against the manifest weight of the evidence.

¶ 26 Because the petitioner failed to establish that Paleologos was aware of the unfair-labor-practice charges she filed against the Sheriff at the time of the adverse action, she cannot establish that his decision to discipline her was motivated by retaliation for filing those charges.

¶ 27 For the foregoing reasons, we conclude that the Board did not clearly err when it concluded that the petitioner failed to make a *prima facie* showing that the Sheriff violated sections 10(a)(1) or 10(a)(3) of the Act by temporarily reassigning her work and suspending her for 10 days.

¶ 28 Affirmed.