COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL #764	:	
	:	
v.	:	Case No. PERA-C-04-79-E
	:	
MONTOUR COUNTY	:	

FINAL ORDER

On November 12, 2004, Teamsters, Local 764, (Union) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order, dated October 27, 2004 (PDO). In the PDO, the Hearing Examiner concluded that Montour County (County) did not engage in unfair practices in violation of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) by terminating the employment of Sharon Kashner. On December 13, 2004, the County filed a brief in opposition to exceptions.

In March 1998, Ms. Kashner became a County employe in the County's Penn State Cooperative Extension Program. In July, 2002, the Union filed with the Board a petition to represent a bargaining unit of County employes, including Kashner, and began holding organizational meetings for the employes. At one such meeting in April 2003, Ms. Kashner stated that the organized employes of Northumberland County "got better" than the unorganized employes who received "sloppy seconds". Commissioner Bernice Swank knew that the Union was holding the meetings, but she did not know that Ms. Kashner attended them. The County disseminated a letter, dated May 2, 2003, to the employes asserting that those perceptions were false and that the County would treat all its employes fairly. On May 6, 2003, the Union won an election after which Ms. Kashner approached Union President Donald Deivert asking to be a Union steward and negotiator. By letter dated February 12, 2004, the County's chief clerk, Holly Brandon, wrote to Ms. Kashner that following a meeting on February 10, 2004 with the three Commissioners, Ms. Brandon, Ms. Kashner and Mr. Deivert, the Commissioners issued a suspension without pay effective immediately. The letter further stated that "the decision was based on the fact that on multiple occasions you babysat your grandson while at work and continued to do so after you were apprised by your supervisor to stop." (F.F. 8).[1] By letter dated February 25, 2004, Ms. Brandon informed Ms. Kashner that that the Commissioners unanimously voted to terminate her at their public meeting on February 24, 2004. (F.F. 9).

On February 17, 2004, the Union filed a charge of unfair practices with the Board alleging that the County discriminated against Ms. Kashner for her union activity and specifically alleged that the County's indefinite suspension of Ms. Kashner, effective February 10, 2004, was motivated by her involvement in the Union organizing campaign. On March 5, 2004, the Union filed an amended charge to include Ms. Kashner's termination on February 24, 2004.

[1] The date of the letter is incorrectly designated as February 12, 2003 in Finding of Fact No. 8.

The Examiner properly relied on the three-part conjunctive standard set forth in St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977), which provides that a complainant in a discrimination claim has the burden of proving, by substantial, legally competent evidence, each of the following: (1) the employe engaged in activity protected by PERA; (2) the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity, i.e., union animus. Id.; Delaware County Lodge 27, FOP v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997). All three elements are mandatory and the failure to establish any one requires the dismissal of the charge. Delaware County, supra; FOP v. Haverford Township, 27 PPER ¶ 27130 (Final Order, 1996); Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 (Final Order, 1992). In this case, the Examiner concluded that the Union failed to meet its burden of proving the second element required by St. Joseph's, i.e., it failed to prove that the County knew that Ms. Kashner was engaged in protected activity before they suspended her and thereafter terminated her employment. Consequently, the Examiner did not address the issue of whether the County was motivated by union animus when they terminated Ms. Kashner.

In its exceptions, the Union contends that the Examiner erred in failing to find that the County knew that Ms. Kashner was engaged in protected activity. The Union maintains that the Examiner raised the issue of the County's knowledge of Ms. Kashner's protected activity sua sponte and, in doing so, ignored an alleged stipulation to the contrary. The Union contends that, during the hearing, the County allegedly stipulated to having knowledge of Ms. Kashner's protected activity as indicated on pages 40-41 of the notes of testimony. Having received that stipulation, argues the Union, "there was no need to burden the record with repetitive, additional questions to every supervisory or management witness regarding the County's knowledge of Ms. Kashner's union activities." (Union's Brief at 2). The Union also claims that, at no time during this litigation, did the County deny that it possessed knowledge of Ms. Kashner's protected activities.

The Examiner did not raise the issue of the County's knowledge of Ms. Kashner's union activity sua sponte. The law is clear that the Union possessed the burden of proving, with substantial, legally competent evidence all three elements required by our Supreme Court in St. Joseph's Hospital. Temple, supra; Haverford Township, supra. The Examiner was obligated by law to evaluate whether the Union produced substantial evidence to satisfy all three elements. The Examiner, therefore, did not raise the issue of the County's knowledge sua sponte; rather any question regarding the County's knowledge of union activity was a necessary part of his evaluation of the Union's claim in determining whether the Union satisfied its burden of proof. As a necessary element in the Union's case in chief, the County's knowledge is always an issue before the Examiner in a cause of action alleging discrimination under 1201(a)(3). In the absence of a stipulation, the Examiner, therefore, is legally obligated to evaluate the existence of the employer's knowledge based on substantial evidence of record, produced by the complainant, regardless of whether the employer contests its existence.

For the same reason, the County was not under any obligation to contest or raise the matter of its prior knowledge. As the Board stated in Temple University, "[w]e have adopted the Wright Line test for discharge cases arising under Section 1201(a)(1) and (3) of the Act. . . . Wright Line requires the complainants to establish a prima facie case that protected activity was the motivating factor in the employer's decision. Then and only then must the employer counter that prima facie case." Id. at 64 (emphasis added)(citations omitted). In a discrimination claim, motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Accordingly, protected activity is not a motivating factor when the record fails to demonstrate by substantial evidence that the employer knew of the activities before the discharge. Therefore, the employe's activities cannot, by operation of law, be a motivating factor in the employer's decision to act against the employe. The burden, therefore, is first on a complainant to affirmatively establish every element required in a discrimination claim regardless of whether the employer specifically challenges any or all element(s).

The Union next contends that the Examiner disregarded a stipulation that the employer was aware of Ms. Kashner's union activity. A careful review of the record reveals that the County did not stipulate that it possessed the requisite knowledge before Ms. Kashner's termination. On page 16 of the notes of testimony, the County's attorney provides the following representation: "There is no dispute that Sharon Kashner was actively involved in the original efforts to organize the bargaining unit that she is in. That is not in dispute. But what is in dispute is that her termination had anything at all to do with her organization efforts." (N.T. 16-17). Also, the Union directs the Board's attention to a stipulation made by the County's attorney during Ms. Kashner's direct examination regarding her Union organizing efforts. The County's attorney stated the following: "We'll stipulate that sometime late in 2002 she started participating in early discussions that culminated later in 2003." (N.T. 41). He further stated: "We don't have any dispute on that. The effort sta[r]ted late in 2002 and got more formed in 2003 and finally got a vote in 2004." (N.T. 41). These two representations speak to the first element of the St. Joseph's standard, i.e., that Ms. Kashner was engaged in union activity. However, these two quotes from the notes of testimony do not support the Union's claim that the County stipulated that the County knew of Ms. Kashner's Union activity before she was suspended and terminated. Without establishing the County's knowledge before Ms. Kashner's termination, either by stipulation or other substantial evidence, the Union cannot, as a matter of law, establish that Ms. Kashner's organizing activities were in any way related to the County's motivation for her dismissal.

Examination of the entire record undermines the Union's claim of the existence of a stipulation because, subsequent to the above referenced exchanges, the Union attempted to demonstrate knowledge by the employer through witness examination. After the County offered the above stipulation, the Union attorney questioned Commissioner Swank and Holly Brandon on the specific issue of the County's knowledge of Ms. Kashner's organizing efforts prior to the decision to suspend and then dismiss her. However, the Union's attorney's questioning of these two managerial witnesses failed to produce substantial evidence to establish that the County possessed prior knowledge, and therefore

failed, as a matter of law, to prove that Ms. Kashner's protected activity was a motivating factor. (N.T. 102-103, 125, 131, 133-135). Moreover, in its post-hearing brief, the Union attempted to demonstrate the manner in which the record establishes each of the three elements of St. Joseph's. The Union expressly argued that the above-quoted stipulation on page 41 of the notes of testimony supports the first element of the St. Joseph's standard only and failed to mention the stipulation in support of the second element, for which it relied upon other record evidence. (Union's Post-hearing Brief at 11-12). However, now before the Board the Union has changed its position and has attempted to argue that the stipulation also supports the second element of St. Joseph's only after the Examiner concluded that the record does not satisfy that element.

The Union also argues that Joint Exhibit No. 3, a three-page "Open Letter to Montour County Employees," wherein the Commissioners quoted statements made at a Union organizing meeting, establishes that the County had the requisite knowledge of Ms. Kashner's union organizing activities. Contrary to the Union's argument, however, Joint Exhibit No. 3 and the testimony concerning the circumstances that resulted in its existence fail to demonstrate that statements made at the meeting were made or attributed to any person. Although the letter quoted statements made by Ms. Kashner at a Union organizing meeting, the letter itself and the record as a whole is devoid of substantial evidence to support a finding that any of the Commissioners or Ms. Brandon knew at the time that it was Ms. Kashner who made those statements, that she attended the meeting in question or that she affirmatively participated in the meeting. Indeed, the substantial evidence of record supports the contrary finding. (N.T 101-103, 124-125, 133-135). Knowing that Ms. Kashner was an employe in the recently certified bargaining unit is simply insufficient to distinguish Ms. Kashner from the other employes who attended the meeting in a manner contemplated by Section 1201(a)(3). "Absent specific knowledge of the individual complainant's union activities the mere general knowledge of union activity alone does not lead us to conclude the [employer's] underlying motive was to discriminate against employes for protected activity. Temple University, 23 PPER at 64. While the open letter discloses a wide range of matters of concern gleaned from a variety of sources, it does not disclose the Commissioners' specific knowledge of Ms. Kashner's union activities.

The Union also contends that the Examiner erred in failing to conclude that the County possessed knowledge of Ms. Kashner's protected activity under the "small plant" doctrine which it argued before the Examiner. The Temple Board articulated the "small plant" doctrine in the following manner:

> The small plant doctrine allows the Board to infer knowledge to a small employer when the facts establish that employes' protected activities were "carried out in such a manner, or at such times that in the normal course of events, [the employer] must have noticed [the activity]." However, the mere fact tha[t] an employer's plant is of a small size standing alone is an insufficient basis upon which to apply this small plant doctrine. . . . [W]e [have] also suggested that absent close supervision of employes by management, the small plant doctrine is inapplicable. The Federation has made no evidentiary showing

> that the dental school supervisors routinely moved throughout the faculty with such regularity that this Board could infer that the University "must have noticed" the protected activity. There is no credible evidence which puts supervisors close enough to any incident of solicitation to overhear the conversation. It is such detailed evidence which establishes employer knowledge.

Temple, 23 PPER at 64 (citations omitted). In this case, the record clearly establishes that Ms. Kashner's immediate supervisor, Janet Allis, is actually employed by Penn State and not the County. (N.T. 75). Also, Ms. Allis's job duties often require her to be absent from the County Extension Office, where Ms. Kashner worked. (N.T. 83). Indeed, Ms. Kashner brought her infant grandchild to work on days that she knew Ms. Allis was not working in the office. (N.T. 64, 79). There simply is no evidence establishing that Ms. Allis was aware of Ms. Kashner's union activities. Also, the offices of the Commissioners and Ms. Brandon were two-to-three miles away from Ms. Kashner's office and they are unaware of the daily occurrences in the Extension Office. (N.T. 117, 124-125). Further, the size and geographic presence of this employer simply do not conform to a small plant rule application. This record, therefore, lacks relevant details and substantial evidence that Ms. Kashner was closely supervised or that County supervisors routinely moved throughout the facility where Ms. Kashner worked such that the Board may infer that the County "must have noticed" her protected activity. Accordingly, the Examiner properly concluded that "the small plant doctrine is inapplicable because Local 764 did not show by substantial evidence that the County's supervision of Ms. Kashner was close enough to allow it to see and/or hear that she engaged in activity protected by the Act." (PDO at 5).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this fourteenth day of December, 2004. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.