

LEON VARJIAN, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF MIDLAND PARK,
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner – a tenured math teacher employed by the Board since 1988 – contends that since his return from treatment for lymphoma in September 2000, he has been assigned a different combination of mathematics courses to teach than he had prior to his illness, and that his advisement role in student extra curricular activities has been diminished by the school administration. Petitioner argues that he has been a victim of discrimination and subject to a hostile work environment as the result of his illness. Respondent Board made a motion to dismiss the petition on the first day of hearing, at the conclusion of petitioner’s case, arguing that petitioner has no entitlement to the relief he seeks.

The ALJ found, *inter alia*, that: petitioner was hired as a math teacher and is certified to teach any math class for grades 7 through 12, and has at all times been assigned to teach appropriate courses; petitioner has not been reduced in salary or benefits, nor have his tenure rights been violated; respondent has the discretion and managerial prerogative to assign teachers as it deems appropriate; there is absolutely no basis on which to conclude that petitioner has been discriminated against, and no evidence to sustain the relief sought by petitioner. Concluding that petitioner proved no violation of school law and failed to meet the burden of proof required to proceed with a discrimination claim, the ALJ granted respondent’s motion to dismiss.

Upon a thorough and independent review of the record, the Commissioner concurs with the ALJ that the petitioner’s appeal is without merit and adopts the Initial Decision as the final decision in this matter.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner’s exceptions and the reply of the Midland Park Board of Education (Board), both duly filed in accordance with *N.J.A.C. 1:1-18.4* and *1:1-18.8*.

In his exceptions, petitioner urges rejection of the Initial Decision in its entirety, contending that the Administrative Law Judge (ALJ) erred in treating this matter as though it were not a civil rights case¹ and in mischaracterizing or drawing erroneous conclusions from petitioner’s testimony and evidence. Petitioner reviews the Initial Decision in detail, proposing alternative findings of fact and conclusions of law (Petitioner’s Exceptions at 1-33, *passim*); he stresses that he never claimed entitlement to relief under contract or school law, but rather sought to vindicate his right under the New Jersey Law Against Discrimination (LAD) to “work in a (*sic*) environment free of

¹ According to petitioner, because the Board’s own policy states that district affirmative action determinations as to Law Against Discrimination claims may be appealed to the Commissioner of Education, the Board is estopped from arguing that petitioner’s claim cannot be heard as a civil rights case. (Petitioner’s Exceptions at 12-16, 21, 32)

discrimination and ***not to be assigned lower status job assignments because he was disabled or perceived as being disabled and likely to go out on cancer medical leave again.” (*Id.* at 3, 6, 16-21, quotation at 6)

Petitioner asserts that – had the ALJ correctly construed his claim – it would have been clear that petitioner did, in fact, meet the requisite evidentiary burden for establishing a *prima facie* case of discrimination and hostile work environment under the LAD. In petitioner’s view, he presented a factual scenario fully compatible with discriminatory intent, demonstrating that: 1) he was a member of a protected class, based on his medical disability and the perception of disability that remained even after he returned to work following treatment; 2) he was qualified for the position or rank sought, being an award-winning teacher with a long history of success in the courses and activities at issue; 3) he was denied promotion, reappointment or tenure based on the loss of status that resulted from having fewer honors and advanced courses assigned to him – notwithstanding that all assignments fell within his lawful job description – and from being deprived of his former autonomy as a student activity adviser; and 4) others with lesser qualifications achieved the rank or position denied to him, based on the Board’s assignment of “his” classes to teachers less experienced and adept in handling advanced math, and less successful in preparing students for related exams. (Petitioner’s Exceptions at 8-9, 12, 22-26) Moreover, petitioner contends, the Board’s own Affirmative Action Officer’s report concedes discrimination, openly admitting that the administration’s thinking on how teachers should be assigned henceforth was colored by petitioner’s need for medical leave, so that, “[in] other words, had [petitioner] never been disabled, he would not have suffered the loss in status of his job assignments.” (*Id.* at 27)

Petitioner argues that he additionally demonstrated a hostile work environment under the LAD, having shown that: 1) the offending conduct would not have occurred but for his protected status, and 2) that such conduct occurred consistently over several years and was severe or pervasive enough for a reasonable person to conclude that conditions of employment had been altered and the working environment rendered hostile. It was not necessary in this context, petitioner opines, for him to show a deliberate intent to discriminate or harass; what matters is the discriminatory *effect* of the conduct at issue. (Petitioner's Exceptions at 29-30)

Petitioner further contends that the Board failed to produce any legitimate, nondiscriminatory reasons for the adverse actions it took against him, relying instead on justifications that are patently pretextual. (Petitioner's Exceptions at 9-10, 21-26, 28) According to petitioner, the bases offered by the Board are belied by the fact that the district's Advanced Placement Test scores "consistently plummeted" when the preparatory classes for them were assigned to teachers other than petitioner; therefore, since the Board's actions were clearly detrimental to students and the educational program, "no trier of fact could conclude anything other than that the removal of [petitioner] from these course (*sic*) was anything other than discrimination." (*Id.* at 22, 30-31; quotation at 22)

Consequently, petitioner urges, the Commissioner must direct that he be "returned to his pre-lymphoma employment positions with all the attendant status, i.e., three Honors classes and two CP classes *which he had before he had lymphoma*, and his former autonomy for his Student Senate advisory activities;" and "more importantly, that he be given assurances that the atmosphere in his workplace will be free of the discriminatory and hostile animus that prevent him from participating in supporting the

student body in their extra-curricular activities and in their charity projects, and to allow Petitioner to continue in the level of participation of student mentoring, mentoring in extra-curricular activities and in student charity projects that he participated in *prior to lymphoma.*” (*Id.* at 22, emphasis *sic*)

In reply, the Board opines that the Initial Decision is legally and factually correct in all respects and well supported by the record, so that the Commissioner should adopt it as her own. According to the Board, the ALJ did not fail to recognize and properly address petitioner’s claims of discrimination, as petitioner contends; to the contrary, despite her statement that the case was not a civil rights case, the ALJ did, in fact consider and apply the relevant law and concluded, based upon it, that petitioner had failed to make the requisite *prima facie* showing so as to be able to continue with a discrimination claim. (Reply Exceptions at 2-4, 9-10) The Board observes that petitioner was afforded full opportunity to testify as to the reasons underlying his claim, and that the ALJ based her findings upon this testimony and the evidence supporting it – appropriately exercising her judicial discretion to conclude that petitioner’s perception of discrimination against him was without basis in fact. (Board’s Reply at 4-5)

Additionally, the Board asserts that the ALJ was correct in viewing this matter (and petitioner’s claims) in the context of well-established school law regarding the managerial rights and prerogatives of a board of education as to scheduling and teacher assignments. In the Board’s view, the predicate of petitioner’s argument is that he should be able to teach only those courses which he deems to have the appropriate level of “status,” “prestige,” and “cachet” (Board’s Reply at 6), while ignoring both applicable law

and the fact that assignment of upper-level classes to staff members other than the most senior and experienced may be made for a variety of legitimate reasons. (*Id.* at 7)

Finally, the Board notes that petitioner – in excepting to its purported failure to demonstrate legitimate reasons for its actions – ignores or misunderstands that this matter was dismissed *before* the Board was called upon to make such demonstration, as a result of petitioner’s own failure to meet his initial burden of presenting a *prima facie* case of discrimination. (Board’s Reply at 8-9) The Board additionally observes that petitioner’s demand for relief is at the very least premature, since he would not be entitled to prevail at this point in proceedings even if he *had* been found to have met his initial burden and the ALJ had not granted the Board’s motion to dismiss. (*Id.* at 10)

Having carefully reviewed the record and considered the positions of the parties, the Commissioner concurs with the ALJ that petitioner’s appeal is without merit.

In the Commissioner’s view, the ALJ appropriately decided petitioner’s LAD claim within the context of a school law dispute – which petitioner himself initiated by choosing to file his appeal with the Commissioner of Education rather than the Division on Civil Rights, as the Board policy on which petitioner relies in asserting Commissioner jurisdiction clearly gave him the option to do. Thus, the Commissioner finds, the ALJ correctly analyzed petitioner’s claim primarily in terms of school law and secondarily in terms of the standard applicable to claims under the LAD, concluding from her review of the law, testimony and evidence that petitioner had no entitlement under the former and had not met his burden of proof under the latter.

Although petitioner repeatedly stresses that he is not claiming entitlement to relief under the school laws, but solely under the LAD, he cannot ignore that the demands

he is making would – as found by the ALJ – significantly limit the Board’s lawful discretionary authority to operate and manage the schools within its district. While the Commissioner is well aware that boards of education are not permitted to exercise such authority in a discriminatory fashion, petitioner has presented no evidence that the Board in this instance has done so; thus, there is no basis on which to award even appropriately limited relief.

In essence, petitioner claims that his work environment has been rendered hostile by the cumulative effect of numerous adverse actions at the hands of the Board and its administration, for which there is no possible explanation other than discrimination toward him as a former cancer patient. Although he concedes (for example, in Exceptions at 2, 27-28) that the actions of which he complains would not have constituted harassment or discrimination under different circumstances, he repeatedly asserts that such actions began only after he took leave for treatment of cancer and have persisted ever since; thus, in his view, the nexus between his illness and the offending actions is self-evident.

The reality revealed by the record, however, is that petitioner’s absence and return to work coincided with the emergence of a new building-level administration which progressively undertook to make systematic changes in the operation of the high school, a number of which affected petitioner’s ability to maintain what he perceived as his accustomed (and rightful) position of status and autonomy. Following careful review of petitioner’s extensive testimony and evidence, the Commissioner must concur with the ALJ that petitioner presented no proof whatsoever that any of the “adverse actions” he suffered were the result of either his absence for medical treatment or any perception upon his return that he had (or would again) become disabled. All petitioner has shown is that

during his illness and in the years after he returned to work, things changed at the high school in ways he did not like: that policies and practices were put into place for reasons he did not believe valid or fair (and protested to no avail), and the resulting changes had the effect, to his mind, of diminishing the prestige and unhindered scope of activity he previously enjoyed. From this fact alone, petitioner assumes – and asks the ALJ and Commissioner to conclude – that he was the victim of adverse employment actions which were the direct and discriminatory result of his illness; in other words, he equates imposition of general policies and procedures – all within the lawful scope of a board of education’s authority – with action against him personally, and sequence of events with cause and effect – without a scintilla of evidence to support either equation.²

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter and the Petition of Appeal is dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Issue: October 15, 2007

Date of Mailing: October 15, 2007

² The Commissioner is not unmindful of petitioner’s evidence to the effect that his absence caused the district to re-think its apparent past practice of regularly assigning all or most of the advanced courses within a department to a single teacher. However – although petitioner’s situation may well have been the impetus for bringing the disadvantages of this practice to the attention of the administration – there was nothing discriminatory about the district’s response, which was to make the entirely reasonable and appropriate decision to avoid henceforth, whenever possible, assigning teachers in a way that would cause expertise to reside in only one person when other staff members within a department were also certified in the same area.

³ This decision, as the Commissioner’s final determination in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*