BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

MARIA KHAVE, Appellant, v. OKLAHOMA DEPARTMENT OF VETERANS AFFAIRS, Appellee.	)))))))))))	Case No. MPC 13-066

ISSUED
JUN 1 8 2013
OK MERIT PROTECTION COMM.
BY

FINAL ORDER

This matter came on for hearing the 5th day of June, 2013, before the duly appointed undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, 3545 NW 58th Street, Suite 360, Oklahoma City, Oklahoma. The Appellant, Maria Khave, appeared personally, *pro se*. The Appellee, Oklahoma Department of Veterans Affairs, appeared by and through counsel, Gretchen Zumwalt-Smith.

Appellant was an unclassified, temporary state employee, working as a Patient Care Assistant at the Norman Veterans Center operated by the Oklahoma Department of Veterans Affairs. Appellant filed this appeal asserting an Alleged Violation. Specifically, Appellant claimed that she was terminated by Appellee: (1) on the basis of her race; (2) in retaliation for complaining to her supervisors that certain conditions at the Norman Veterans Center were unsafe for patients; (3) in retaliation for complaining to her supervisors that she had suffered racial discrimination at the hands of a coworker; and (4) in retaliation for filing a complaint against the Department with the United States Equal Employment Opportunity Commission.

The record was opened and the hearing began. Appellee had filed a Motion in Limine,

seeking an order prohibiting the Appellant from referring to, inquiring about, introducing, arguing, or mentioning in any way during the hearing evidence concerning the January 25, 2013, investigation report prepared by the Merit Protection Commission staff (the "MPC Report"). Appellant had filed a Motion to Deny Appellee's Motion in Limine. The undersigned ALJ overruled Appellee's Motion in Limine, and ruled that the admissibility of the MPC Report and objections to references thereto would be ruled on at the time, if any, at which the MPC Report was offered into evidence or referred to with objection.[1]

The sworn testimony of seven witnesses was presented, and exhibits were introduced. Both are part of the record. At the conclusion of Appellant's case-in-chief, Appellee moved for a directed verdict. Appellant objected. Because the undersigned ALJ found that Appellant failed to establish a prima facie case by a preponderance of evidence, the motion was granted, verdict was directed in favor of Appellee[2], and the hearing was concluded.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Background of Case

Appellant, Maria Khave (hereinafter "Ms. Khave"), was an unclassified, temporary employee of Appellee, the Oklahoma Department of Veterans Affairs (hereinafter the "Department"). Ms. Khave worked as a Patient Care Assistant at the Department's Norman

[1] The Merit Protection Commission Investigative Report was never offered into evidence or referred to during argument or witness examination or cross-examination, and is not a part of the record.

[2] The undersigned ALJ instructed the parties, prior to examination of any witness, that they would be given leave to present all evidence they intended to introduce through each witness the first time each witness was called to testify, without regard to limiting cross-examination to the scope of direct examination. Accordingly, at the time Appellant rested her case, Appellee had already submitted part of its case in the form of witness examination that exceeded the scope of Appellant's direct examination. Because Appellee had already presented part of its case, the undersigned Administrative Law Judge entered his order as a directed verdict rather than demure to the evidence.

Veterans Center, a long-term nursing care facility for veterans (the "Norman Veterans Center"). The Department hired Ms. Khave as a temporary, unclassified employee in this capacity on July 9, 2012.

On September 15, 2012, one of Ms. Khave's coworkers reported overhearing Ms. Khave call a dementia patient an "idiot" (the "Alleged Incident"). After the initial report of the Alleged Incident, the Department, following Department policy, sent Ms. Khave home and instigated an investigation of the Alleged Incident. The Department investigators issued their Final Report of Investigation of Alleged Maltreatment on September 18, 2012. The investigation report concluded, *inter alia*, that it was more likely than not that the Alleged Incident did occur as reported, and recommended the Department take appropriate disciplinary action, up to and including termination. On October 8, 2012, the Department terminated Ms. Khave's employment by letter executed by the Norman Veterans Center Administrator, Christy Howell.

The Testimony

The testimony of seven (7) witnesses, properly sworn and under oath, was taken and was made part of the record.

Stephanie Johnson is a Senior Patient Care Assistant and Certified Medication Aide. She began her employment with the Department in 2006, left during her pregnancy in 2007, and has been back at the Veterans Center since June, 2008. Ms. Johnson testified that she heard Ms. Khave verbally abuse an Alzheimer's patient by calling the patient an "idiot" because he was wearing two pairs of pants. On the date of the Alleged Incident, Ms. Johnson reported the comment to her supervisor, Connie Rhea, LPN, as required by Department Procedure. She testified that she subsequently relayed the Alleged Incident to Department employee Lisa Erwin,

who she understood was investigating the allegation. Ms. Johnson testified that she worked the 11:00 p.m. to 7:00 a.m. shift, that approximately three hundred patients are under the care of the staff, and that reporting the Alleged Incident made her own job harder because her unit was short staffed after Ms. Khave was sent home. Ms. Johnson stated that her report regarding Ms. Khave's "verbal neglect" of a patient was true and that it would have been against her own interest to make the allegation up as she would just have to do more work herself. Ms. Johnson admitted that she was the only person who overheard Ms. Khave call the patient an idiot, but denied that Ms. Khave's race was her motivation for reporting the Alleged Incident. The undersigned Administrative Law Judge found Ms. Johnson to be a credible witness.

Appellant, Maria Khave, testified on her own behalf. Ms. Khave is a Ten-Point veteran who has received an honorable discharge from the United States Air Force, has thirteen years of medical service, and has earned a healthcare administration degree. She has CNA certification, is a trained Medical Aide Technician, and has her CPR card. She testified that during her thirteen years of medical service she had never before received an allegation of abusing a patient. Ms. Khave testified that she is well aware of how to treat patients and denies all allegations that she abused any patient. Ms. Khave stated that she believes the complaint against her was made because of her race, and that the Department has no concrete evidence that she abused a patient. Under cross-examination, Ms. Khave admitted that she signed a complaint against the Department with the United States Equal Employment Opportunity Commission ("EEOC") on November 4, 2012, and that the EEOC issued its Notice of Charge of Discrimination to the Department on November 9, 2012. Aside from stating her opinion that her race was the basis of her termination, Ms. Khave gave no testimony to support the claim. Ms. Khave gave no testimony supporting either her claim that she was retaliated against because she filed an EEOC

complaint or her claim that she was fired for complaining that a coworker discriminated against her on the basis of her race. She did not testify that she was fired for reporting an unsafe patient bed. Ms. Khave's complete testimony can be summarized as (1) she believes she was fired based on race; (2) she has never abused a patient and knows how to treat patients; (3) she signed an EEOC complaint against the Department on November 4, 2012; (4) it is her opinion that the Department has no concrete evidence that she abused a patient; and (5) she is an excellent and well-credentialed healthcare worker and decorated veteran.

Christy Howell, though now retired, was Administrator of the Norman Veterans Center during Khave's employment. As Administrator, she was responsible for all operations of the Norman Veterans Center, including the hiring and firing of all employees. Ms. Howell testified that the Norman Veterans Center is a three hundred and one bed long-term nursing care facility for veterans, that it has a fifty bed dementia unit, and that some dementia patients reside outside the dementia unit. She stated that the Norman Veterans Center employs between one hundred twenty and one hundred forty Patient Care Assistants, and that members of numerous races are so employed. She stated that the Department's standard operating procedure is to investigate every allegation of abuse. Ms. Howell testified that calling a patient an idiot is verbal abuse and patient abuse. Ms. Howell stated that she reviewed the Department's final report of investigation prior to terminating Ms. Khave, and that her decision to terminate Ms. Khave was based on the investigation report. She stated that her evaluation of the proper discipline to impose on Ms. Khave included a review of the evidence and documentation presented by the investigators, and stated that race played no role in her decision to terminate Ms. Khave. She stated that her decision to terminate Ms. Khave was influenced by the fact that Ms. Khave was having performance issues so soon after her hire date, and by the fact that the allegation that Ms. Khave

verbally abused a patient was made by a long-term employee with no history of making false reports. Ms. Howell testified that no reason for termination was stated in Ms. Khave's termination letter because Department procedure was to state no grounds for termination when the employee was a temporary employee. Ms. Howell testified that, when she checked into an earlier complaint Ms. Khave had made about racial discrimination by a coworker, Ms. Khave had told her that the coworker had not discriminated against her. Ms. Howell testified that the allegation that Ms. Khave verbally abused a patient would have been reported by the Department to both the Department of Health and the Department of Human Services, and that she is certain such report was made regarding the Alleged Incident. The undersigned found Ms. Howell to be a credible witness.

Connie Rhea is an LPN who was Ms. Khave's supervisor at the time of the Alleged Incident. She testified that Stephanie Johnson reported to her that she had overheard Ms. Khave call a patient and idiot and tell him he needed to go back over to his side of the hall. Ms. Rhea stated that, following Department procedure, she reported the allegation to her supervisor, Cheryl Strong. She remembers that, also following procedure, Ms. Khave was sent home and an investigation was conducted. She stated that she had no reason to believe Stephanie Johnson was lying about the Alleged Incident, and that she was required to pass along the allegation to her supervisor. Ms. Rhea denied that race played any part in her reporting the allegation of the Alleged Incident to her supervisor. The undersigned found Ms. Rhea to be a credible witness.

Cheryl Strong was the RN in charge of the unit in which Ms. Khave worked, and was the House Supervisor at the time of the Alleged Incident. Ms. Strong recalls Connie Rhea reporting to her that Stephanie Johnson made the initial report of the Alleged Incident, and that Ms. Strong merely forwarded the report of the incident to her supervisor as required by Department

procedure. Although she knows that Department procedure calls for all abuse allegations to be reported to the administration, for the employee involved to be sent home, for an investigation to be conducted, and for a report to be made to the involved employee's licensing agency and the Department of Human Services, she is "out of" the situation after she reports the incident to her supervisor. Ms. Strong testified that she reported the Alleged Incident to the Department of Human Services hotline after instructed to do so by her supervisor. Ms. Strong testified that Ms. Khave's race had nothing to do with her passing the report of the Alleged Incident on to her supervisor. Ms. Strong testified that, prior to the alleged incident, Ms. Khave had a confrontation with an LPN who supervised Ms. Khave regarding a medical issue. Additionally, although she didn't specifically recall whether Ms. Khave ever raised concerns about improper cleaning of wheelchairs or issues with beds working improperly, she is aware that such problems arise from time to time and that they are routinely dealt with through in-service training and equipment repair, but are not viewed as a big deal. Ms. Strong was a credible witness.

Lisa Erwin was Assistant Director of Nursing at the Veterans Center at the time of the Alleged Incident, but does not currently work for the Department. Ms. Erwin worked with Jay Horne to conduct the Department's investigation into the Alleged Incident. Ms. Erwin took statements from the Department employees about the Alleged Incident, told the employees to make truthful statements, and believed the statements the employees made. The investigation was conducted in the same manner Ms. Erwin has conducted more than one hundred other investigations over twenty years for both the Department and other agencies. Ms. Erwin conducted the investigation of the Alleged Incident near the time the Alleged Incident occurred, and knows of no reason why anything in the investigation report would be incorrect. Ms. Erwin interviewed Ms. Khave as part of the investigation, and does not recall whether Ms. Khave

claimed she was being discriminated against at the time. Ms. Erwin had no reason to believe that Stephanie Johnson would have misrepresented the Alleged Incident. Ms. Erwin recalls another employee stating during the investigation that Ms. Khave had been "kind of rough" when getting another patient up, and that she believed the additional report, together with the Alleged Incident, made it her duty to not continue Ms. Khave's employment. Ms. Erwin denied that she believed the reporting employees instead of Ms. Khave on the basis of the individual's races. The undersigned found Ms. Erwin to be a credible witness.

Jay Horne is the Assistant Administrator of the Veterans Center. He participated in the investigation of the Alleged Incident as one of the two investigators. He recalls a report being made that Ms. Khave was overheard telling a patient, who was wearing two pairs of pants, one backwards, to go back to his side because Ms. Khave likes her side to look good and he looked like an idiot. In response to a question from Ms. Khave regarding why Mr. Horne believed the other employees over Ms. Khave, Mr. Horne testified that he didn't believe anyone over anyone else. He just acted on what was reported to him. He stated that he had concluded after the investigation that it was more likely the Alleged Incident occurred than did not occur. He testified that in allegations of patient abuse, the Department wants to err in favor of resident safety. Mr. Horne testified that the racial and gender breakdown of the Patient Care Assistants employed by the Norman Veterans Center is as follows: thirteen African American females; six African American males; four Hispanic females; two Hispanic males; six Asian females; zero Asian males; fifty-eight white females; and sixteen white males. In response to questioning from Ms. Khave, Mr. Horne stated that he is not a racist, and that Ms. Khave's race did not enter into the equation of the investigation or her termination. Mr. Horne was a credible witness.

Discussion

Because Ms. Khave was employed by the Department in a temporary status, this appeal is classified as an Alleged Violation. Accordingly, the burden of proof lies with Ms. Khave to establish, by a preponderance of the evidence, at least one of the four violations alleged in her prehearing filings. First, Ms. Khave claimed that she was terminated by Appellee on the basis of her race. Second, Ms. Khave claimed her termination was made in retaliation for Ms. Khave complaining to her supervisors that a patient's bed was unsafe. Third, Ms. Khave claims she was terminated in retaliation for complaining to her supervisors that she had suffered racial discrimination at the hands of a white, male coworker. Finally, Ms. Khave claims she was terminated because she filed a complaint against the Department with the United States Equal Employment Opportunity Commission.

Ms. Khave presented no evidence that she was terminated because of her race. On examination of witnesses, Ms. Khave asked each Department employee if the action taken against Ms. Khave was because of Ms. Khave's race. Each employee witness strongly denied that race had anything to do with the action taken. The undersigned ALJ found each employee witness extremely credible on the point of race. The only witness who testified that she believed Ms. Khave's termination was made on the basis of her race was Ms. Khave herself. However, Ms. Khave offered no evidence that any Department employee involved in the report or investigation of the Alleged Incident or the resulting termination was in any way motivated by race. Because no evidence of racial discrimination was presented, the undersigned ALJ determined that the claim is an unsupported allegation. The claim is not credible. Because Ms. Khave failed to meet her burden of proof on this claim, her appeal cannot be sustained on the ground that she was terminated on the basis of race.

Ms. Khave's second claim, that her termination was made in retaliation for Khave complaining to her supervisors that a patient's bed was unsafe, was similarly unsupported by evidence. Although Ms. Khave raised the issue in her Prehearing Conference Statement, she never addressed the claim at the hearing. She did not offer any evidence that she had made a complaint regarding an unsafe bed. She offered no evidence that she was terminated in retaliation for reporting an unsafe bed. She did not ask any question of any witness regarding any complaint she had made regarding the safety of a bed. The only testimony regarding an unsafe bed was given by Cheryl Strong, the RN in charge of the unit on which Ms. Khave was employed. Ms. Strong testified that reports of malfunctioning beds are routinely made and are viewed as "no big deal". No evidence even suggests that Ms. Khave was terminated for reporting an unsafe bed, and no argument to that end was offered at the hearing. Accordingly, Ms. Khave's appeal cannot be sustained on this claim.

Likewise, no evidence supports Ms. Khave's third claim, that she was terminated in retaliation for complaining to her supervisors that she had suffered racial discrimination at the hands of a white, male coworker. Once again, Ms. Khave never argued this claim at the hearing. Ms. Khave did not testify personally that she had been discriminated against by a white, male coworker. Ms. Khave did ask one witness one question that appears related to the claim. Ms. Khave asked Christy Howell, former administrator of the Norman Veterans Center, if she recalled discussing the male coworker, Damon Johnson, with Ms. Khave. Ms. Howell answered that she recalled Ms. Khave telling her that Mr. Johnson had not racially discriminated against her. No further mention of the incident between Ms. Khave and Mr. Johnson was made. No evidence was offered that Ms. Khave made a claim that Mr. Johnson racially discriminated against her. No evidence was offered that any such claim, if it existed, was a part of the

Department's decision to terminate Ms. Khave. Ms. Khave's appeal cannot be sustained on this claim.

Ms. Khave's fourth claim, that she was terminated because she filed a complaint against the Department with the United States Equal Employment Opportunity Commission, is without merit. Although Ms. Khave raised the claim in her prehearing filings, Ms. Khave did not argue at hearing that the complaint she made to the EEOC was the basis of her termination. Had Ms. Khave made the argument, however, it would have failed. It is not possible that the Department terminated Ms. Khave in retaliation for filing the EEOC complaint. The evidence at the hearing was that the Department terminated Ms. Khave by letter dated October 8, 2012. The EEOC Complaint and Notice of Charge of Discrimination, admitted into evidence together as State's Exhibit 9, were each identified and authenticated by Ms. Khave on cross-examination. State's Exhibit 9 clearly shows that Ms. Khave did not file her EEOC complaint until November 6, 2012 – some twenty-nine days after her termination. Thus, it is impossible that the Department terminated Ms. Khave in retaliation for filing an EEOC complaint because at the time of her termination, Ms. Khave's complaint to the EEOC did not yet exist.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this case.

2. Any findings of fact that are properly considered conclusions of law are so incorporated herein as conclusions of law.

3. Merit Rule 455:10-9-2 (f) (2), **Alleged Violation Appeal**, states that the burden of proof in an alleged violation appeal is on the Appellant to prove her case by a preponderance of

evidence.

4. An unclassified state employee serves at the pleasure of the appointing authority, and may be terminated, unless otherwise prohibited by law, at any time with or without cause. 74 O.S. § 840-5.1(A).

5. No state employee, including an employee in unclassified service, can be terminated from her employment because of her race, gender, color, or national origin. 74 O.S. § 840-2.9.

6. No state employee, including an employee in unclassified service, can be terminated for reporting a violation of the Oklahoma Constitution, state or federal law, rule or policy, mismanagement, or a substantial abuse and specific danger to public health or safety. 74 O.S. § 840-2.5 (B) (2).

7. No state employee, including an employee in unclassified service, can be terminated for filing a charge of discrimination, for complaining to her employer about job-related discrimination, or because she participated in an employment discrimination proceeding. Title VII of the Civil Rights Act of 1964.

8. Appellant has failed to prove, by a preponderance of the evidence, that Appellee, Oklahoma Department of Veterans Affairs terminated her or otherwise discriminated against her on the basis of her race, gender, color, national origin, or other protected status in violation of 74 O.S. § 840-2.9.

9. Appellant has failed to prove, by a preponderance of the evidence, that Appellee, Oklahoma Department of Veterans Affairs, terminated her for reporting a violation of the Oklahoma Constitution, state or federal law, rule or policy, mismanagement, or a substantial abuse and specific danger to public health or safety in violation of 74 O.S. § 840-2.5 (B) (2).

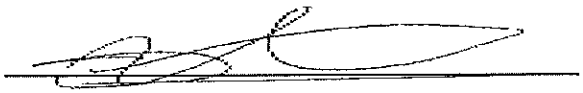
10. Appellant has failed to prove, by a preponderance of the evidence, that Appellee, Oklahoma Department of Veterans Affairs, terminated her for filing a charge of discrimination, for complaining to her employer about job-related discrimination, or because she participated in an employment discrimination proceeding, in violation of Title VII of the Civil Rights Act of 1964

11. This Administrative Law Judge finds that Appellant has failed to show by a preponderance of the evidence that Appellee, Oklahoma Department of Veterans Affairs, violated any state or federal statute, Merit Rule, or agency policy or procedure when it terminated Appellant.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge, that Appellant's petition is hereby **DENIED.**

Dated this 14th day of July, 2013.



Matt Hopkins
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 N.W. 58th Street
Oklahoma City, OK 73112