

COMMONWEALTH OF PENNSYLVANIA

Larenda M. Derr : State Civil Service Commission
: :
v. : :
: :
State Correctional Institution at :
Coal Township, Department of :
Corrections : Appeal No. 29831

Larenda M. Derr : Brian L. Hokamp
Pro Se : Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Larenda M. Derr challenging her removal from probationary Corrections Officer Trainee employment with the State Correctional Institution at Coal Township, Department of Corrections. A hearing was held on April 3, 2018 at the State Civil Service Commission’s Strawberry Square Complex in Harrisburg, Pennsylvania, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing.¹ The issue before the Commission is whether the appointing authority removed appellant for reasons motivated by discrimination.

¹ Both the appellant and appointing authority were afforded the opportunity to submit Briefs. N.T. pp. 110. However, neither party submitted a Brief.

FINDINGS OF FACT

1. By letter dated January 3, 2018, appellant was notified of her removal from her position as a probationary Corrections Officer Trainee (hereinafter “COT”) with the State Correctional Institution at Coal Township (hereinafter “SCI”), effective January 3, 2018. Comm. Ex. A.
2. The Department of Corrections (hereinafter “appointing authority”) charged appellant with violating section B(21) of its Code of Ethics, section 44(D)(II)(1) of the SCI’s Call-Off Procedures, and Commonwealth Absence Manual 530.7² in that she was absent without notifying the institution from December 12, 2017 through December 18, 2017. Comm. Ex. A.
3. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended.
4. By letter dated October 25, 2017, appellant received a written reprimand for violating section B(21) of the appointing authority’s Code of Ethics, the SCI’s

² The removal letter mistakenly refers to Commonwealth Absence Manual 530.7 as Management Directive 530.7. The Commission will refer to it by its proper designation.

Call-Off Procedures, and the Commonwealth Absence Manual in that she failed to appear at the training academy as scheduled on October 24, 2017 and failed to call in to report her absence at least two hours prior to the start of her shift. This letter also informed appellant that further violations of the same or of a similar nature may result in additional discipline, up to and including termination. AA Ex. 1.

5. By letter dated November 20, 2017, appellant received a written reprimand for violating section B(21) of the appointing authority's Code of Ethics, the SCI's Call-Off Procedures, and undependability in that she failed to appear as scheduled and arrived late on October 30, 2017, and failed to call in to notify the SCI at least two hours prior to the start of her shift. This letter also informed appellant that further violations of the same or of a similar nature may result in additional discipline, up to and including termination. AA Ex. 2.
6. After the PDC regarding the November 20, 2017 written reprimand, the seriousness of time and attendance issues was conveyed to appellant and she was informed that if such conduct continued it could result in termination. N.T. p. 95.

7. On December 1, 2017, appellant submitted a written incident report in which she alleged Sergeant Rosa pulled her arm and held it three or four times while giving her advice. Appellant also alleged that, while she was doing the phone list, Rosa told her not to let the inmates pull a fast one on her because she is cute. Appellant alleged the preceding occurred on the same day that she filed the incident report. AA Ex. 8 (p. 2).
8. Appellant did not include in this report or any other report she submitted an allegation that she was receiving messages from higher ranking officers on Facebook. N.T. p. 23.
9. On December 12, 2017, appellant failed to appear as scheduled for her shift and failed to notify the SCI at least two hours prior to the start of her shift. N.T. p. 63.
10. The last day appellant appeared for work was December 11, 2017. N.T. p. 23.
11. Human Resources did not receive any notifications from the State Employee Assistance Program (“SEAP”) regarding appellant’s absences. N.T. p. 66, 81.

12. When an employee fails to report as scheduled, a wellness check is conducted to ensure the safety of the employee and to determine why the employee did not report. N.T. pp. 97-98.
13. At some point after appellant's December 12, 2017 absence, the Deputy Superintendent II telephoned appellant about her failure to report and informed her that she needed to follow proper call off procedures and/or report to work as scheduled. N.T. pp. 97-98.
14. On December 20, 2017, the notice for the pre-disciplinary conference (hereinafter "PDC") was mailed to appellant via regular and certified mail. This notice informed appellant that a PDC was scheduled for January 3, 2018 regarding her absences without leave from December 12, 2017 through December 18, 2017, and her failure to properly notify the SCI that she would not be reporting for duty on these dates. N.T. p. 64; AA Ex. 3.
15. The green card for the PDC notice, which was sent via certified mail, was returned. The green card showed that someone had signed for the PDC notice on December 23, 2017. N.T. p. 64.

16. On December 26, 2017, appellant submitted her written resignation to Human Resources. N.T. pp. 19, 28-29, 65.

17. Appellant's December 26, 2017 written resignation reads:

On todays [sic] date I would like to be taken off the pay list. I am handing in all of my equipment. I would also like to say I did appreciate [sic] all of the time and energy the DOC put into training me. The AMAC and interpersonal skills will come in great use to my future to come.

AA Ex. 4.

18. Appellant did not verbally allege that she was resigning due to sexual harassment or any other discriminatory conduct. N.T. p. 66; AA Ex. 4.

19. On January 3, 2018, the PDC was held. Appellant did not attend. N.T. p. 67.

20. Section 44(D)(II)(1) of Policy 4.1.1 of the SCI's Call-Off Procedures provides:

All employees assigned to positions designated as 24/7 operations to include Corrections Officers, Food Service Staff, Utility Plant Operators, Maintenance Staff and Nursing Staff,

must call their immediate supervisor or the Shift Commander a minimum of two (2) hours prior to the start of their scheduled work hours/shift if they are unable to report as scheduled.

AA Ex. 5.

21. Section B(21) of the appointing authority's Code of Ethics provides:

An employee who knows he/she will be unable to report for duty due to illness, emergency, or injury shall immediately notify his/her supervisor in accordance with their local policy, advising the supervisor of the nature of the injury, emergency, or illness and the expected date of return to duty.

AA Ex. 6 (p. 5).

22. Commonwealth Absence Manual 530.7 provides:

Absence without leave (AW) is applicable when an employee is absent from work and does not contact the supervisor or when an employee is absent for other unauthorized absences. **Note:** This is an unapproved absence.

AA Ex. 7 (emphasis in original).

DISCUSSION

The current appeal challenges the appointing authority's decision to remove appellant from probationary status employment as a COT. Before this Commission, appellant could only bring this challenge through Section 951(b) of the Civil Service Act³ (hereinafter "the Act") based upon an allegation that the decision to remove her from that position was due to discrimination in violation of Section 905.1 of the Act. 71 P.S. §§ 741.905a, 741.951(b).

In an appeal alleging discrimination, the burden of presenting evidence in support of all allegations of discrimination lies with the appellant. *Nosko v. Somerset State Hospital*, 139 Pa. Commw. 367, 370-371, 590 A.2d 844, 846 (1991); 71 P.S. § 741.951(b); 4 Pa. Code § 105.16. Accordingly, the sole question for determination by this Commission is whether appellant has presented evidence sufficient to establish her claim of discrimination.

Section 951(b) of the Act encompasses two general types of discrimination—"traditional discrimination," which encompasses claims of discrimination based on labor union affiliation, race, sex, national origin or other non-merit factors, and "technical discrimination," which involves a violation of procedures required pursuant to the Act or related Rules. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996), citing *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.2d 462 (1988). Appellant has alleged traditional discrimination, contending her removal was based

³ Act of August 5, 1941, P.L. 742, as amended.

upon her age and alleging she was sexually harassed. *See* Comm. Ex. B. Appellant has also alleged the removal was imposed in violation of the Act and Rules; this is an allegation of technical discrimination. *See* Comm. Ex. B, p. 2.

At the hearing, appellant testified on her own behalf and presented rebuttal testimony from Kristine Holt. The appointing authority also presented the testimony of Kristine Holt, as well as that of John Gregorowicz and Victor Mirarchi.

In support of her claim, appellant testified “higher-ups” messaged her on Facebook. N.T. p. 15. Appellant did not testify as to the contents of the messages, nor did she provide any screenshots or other evidence of the messages. However, appellant noted that, when she did not reply, she received messages saying, “You could at least reply.” N.T. p. 15. Appellant stated she got off Facebook for a while because she felt uncomfortable. N.T. p. 15. However, appellant noted she did not feel “too uncomfortable going to training.” N.T. p. 15. Appellant further stated she did not report the Facebook incident. N.T. p. 23.

In addition to the Facebook incident, appellant testified Sergeant Rosa made her feel uncomfortable. N.T. p. 15. Appellant stated she initially did not report Rosa because “people” told her that this might not be the career for her because she is a female. N.T. pp. 15-16. Appellant stated that, on December 1, 2017, she reported Rosa and provided a written description of what occurred.⁴ N.T. pp. 16,

⁴ In her written incident report, appellant noted that, on December 1, 2017, Rosa pulled her arm and held it three or four times while giving her advice. AA Ex. 8 (p. 2). Appellant also noted that, while she was doing the phone list on that same day, Rosa told her not to let the inmates pull a fast one on her because she is cute. AA Ex. 8 (pp. 1-2). Appellant further indicated she did not tell Rosa not to hold her arm or get close to her. AA Ex. 8 (p. 1). Appellant stated she intended to ask the Training Sergeant how to professionally confront Rosa about this if he did it again. AA Ex. 8 (p. 2).

22-23; AA Ex. 8. Appellant also noted she demonstrated for one of the lieutenants how Rosa grabbed her arm and whispered in her ear. N.T. p. 16. Appellant stated coming to work was hard because Rosa's behavior gave her anxiety. N.T. p. 16. Appellant further stated after she reported Rosa, "everyone" made jokes about it and rolled their eyes and the men "grabbed their junk" in front of her.⁵ N.T. pp. 23, 106-107.

Appellant also testified she observed one of the sergeants grab his own genitals. N.T. p. 17. Appellant explained this gesture was intended as an "F-U" to the prisoners." N.T. p. 17. Appellant also noted the prisoners said "F-U" to her prior to being let out of their cells, which made her feel uncomfortable. N.T. p. 17. Appellant stated she reported the prisoners to the Sergeant, who told her it was not a problem. N.T. p. 17. Appellant stated she also reported the prisoners in writing via a "box" that is used for that purpose. N.T. p. 17.

Appellant testified she called SEAP and notified Human Resources about the offensive behavior. N.T. pp. 17-18. Appellant stated SEAP did not help her and Human Resources told her that they could not help her if she did not come to work. N.T. pp. 18, 25. Appellant stated she told Human Resources she felt uncomfortable coming in because everyone was talking about it. N.T. p. 25. Further, while appellant acknowledged that the appointing authority investigated her allegations against Rosa, she claimed the appointing authority told her that they could not do anything after she quit. N.T. pp. 24-25. Appellant also noted she did

⁵ Appellant argued her complaint was not being taken seriously based on this behavior and because the shift commander did not sign her incident report until two days after she submitted it. N.T. p. 106; AA Ex. 8. However, appellant simultaneously claimed she felt like people were on her side. N.T. p. 107.

not provide additional information during the fact-finding investigation because she believed the investigation was over as soon as she handed in her resignation. N.T. p. 25.

Appellant testified she submitted her resignation to Human Resources on December 26, 2017. N.T. pp. 19, 28-29; AA Ex. 4. However, she acknowledged the last day she worked was December 11, 2017. N.T. p. 23. Additionally, appellant acknowledged she did not mention in her resignation letter that she was sexually harassed, nor did she mention the Facebook incident. N.T. p. 30. Appellant further noted she should have handled things differently but stated she felt uncomfortable and “just wanted out.” N.T. p. 105.

Appellant denied receiving a letter indicating that a PDC was scheduled in the instant matter.⁶ N.T. p. 27. However, she acknowledged that, prior to reporting Rosa, she received a written reprimand in October 2017 because she was absent without leave from the Training Academy. N.T. p. 20. Appellant further acknowledged she received a second written reprimand for being absent without leave from the SCI on November 20, 2017. N.T. p. 21.

John Gregorowicz is employed by the appointing authority as a Human Resource Analyst II, Employee Training. N.T. p. 34. Gregorowicz testified he has worked for the appointing authority for sixteen years. N.T. p. 35. Gregorowicz was

⁶ Appellant presented rebuttal testimony from Holt in an attempt to corroborate her claim that she did not receive the PDC notice. N.T. p. 102. During the appointing authority’s case-in-chief, Holt explained she sent the PDC notice to appellant via regular and certified mail. N.T. p. 64. During rebuttal, Holt further clarified that, while she was unable to identify the signature of the person who signed for the certified mail, the notice was delivered to appellant’s address. N.T. p. 102.

assigned to conduct the fact-finding investigation regarding appellant's allegations against Rosa. N.T. p. 36. Gregorowicz explained the investigation was initiated based on the written statement submitted by appellant. N.T. p. 36, AA Ex. 8.

Gregorowicz testified that, when conducting an investigation, he gathers all of the evidence and interviews any witnesses as well as the participants. N.T. p. 37. Regarding appellant's allegations against Rosa, Gregorowicz stated he tried to obtain video evidence and statements from other witnesses, but there was no video evidence or witnesses. N.T. p. 40. Gregorowicz testified he also attempted three or four times to contact appellant by telephone because she was not at work; however, he was unsuccessful and there was no answering machine on which he could leave a message. N.T. pp. 37-38, 46. Gregorowicz stated he was able to interview Rosa. N.T. pp. 38, 51. Gregorowicz noted Rosa acknowledged his comment about appellant being cute was inappropriate. N.T. p. 39. Rosa further explained he was merely trying to warn appellant that inmates may try to manipulate her. N.T. p. 39. Rosa also explained he touched appellant's arm and got close to her because the cell block is a small area and "pretty loud." N.T. pp. 52-53.

Gregorowicz testified that, upon concluding the investigation, the panel agreed Rosa's behavior did not violate the appointing authority's Code of Ethics or its sexual harassment policy because there was no inappropriate physical contact. N.T. p. 40. However, Gregorowicz noted it was recommended that Rosa be coached on working and talking with coworkers in a correctional environment. N.T. p. 41. Gregorowicz stated this recommendation was forwarded to the Deputies and Superintendent who are responsible for making disciplinary determinations. N.T. p. 41.

Kristine Holt is a Field Human Resource Officer III. N.T. p. 57. Holt has worked as a Field Human Resource Officer III for ten years, approximately four of which have been with the appointing authority. N.T. p. 57. Holt testified her duties include maintaining the official personnel files of the appointing authority's employees, including appellant. N.T. p. 58.

Holt testified appellant was issued two written reprimands prior to her removal. N.T. pp. 58-61; AA Exs. 1, 2. Holt stated the first written reprimand was issued to appellant by letter dated October 25, 2017, for violating section B(21) of the appointing authority's Code of Ethics, the SCI's Call-Off Procedures, and the Commonwealth Absence Manual. N.T. p. 58; AA Ex. 1. Specifically, appellant failed to call or show for one of her training days at the Training Academy. N.T. p. 59; AA Ex. 1. Holt explained the appointing authority's Code of Ethics B(21) requires all employees to report when they will not be coming to work. N.T. p. 59. Holt stated the SCI's Call-Off Procedures require officers and 24-hour staff to provide a minimum of two hours of notice if they are going to be absent. N.T. p. 59. Additionally, Holt noted the Commonwealth Absence Manual indicates being absent without leave can result in disciplinary action. N.T. pp. 59-60.

Holt testified the second written reprimand was issued to appellant by letter dated November 20, 2017, for violating the same provisions listed in the first written reprimand, as well as for an undependability infraction. N.T. pp. 60-61; AA Ex. 2. Holt noted since a pattern was emerging with appellant's failure to call, the undependability infraction was added. N.T. p. 61. Specifically, appellant was twelve minutes late and did not call prior to her shift on October 30, 2017, which was her first day back to work after attending the Training Academy. N.T. pp. 60-61; AA Ex. 2.

Holt testified appellant was a probation employee during the time she was employed by the appointing authority. N.T. pp. 61-62. Holt explained it is expected that probationary employees will never be late, unless there are extenuating circumstances. N.T. p. 62. Holt stated when attending the Training Academy, probationary employees are expected to be in class and on time, which is why the appointing authority provides lodging for the employees who are attending the Training Academy. N.T. p. 62.

Holt testified that, following the second written reprimand, appellant again was absent without leave on December 12, 2017. N.T. p. 63. Holt stated after appellant was absent for a day or two, she was instructed to issue a PDC notice informing appellant that a PDC was going to be held regarding her current absent without leave status. N.T. pp. 63-64; AA Ex. 3. Holt stated she mailed the PDC notice on December 20, 2017 via regular and certified mail. N.T. p. 64. Holt stated the green card was returned, showing that someone had signed for the certified mail PDC notice on December 23, 2017. N.T. p. 64.

Holt testified that, on December 26, 2017, appellant came to her office and submitted a handwritten resignation letter. N.T. p. 65; AA Ex. 4. Holt stated the resignation letter did not mention sexual harassment or other discriminatory conduct, nor did appellant verbally make any such allegations to her.⁷ N.T. pp. 65-66. Holt noted the only statement appellant made to her was that she felt like she could not save a sinking ship, which Holt interpreted as a reference to appellant's continued absences without leave. N.T. p. 66.

⁷ During cross-examination, Holt clarified appellant submitted an incident report to her supervisor alleging that Rosa sexually harassed her. N.T. p. 80. Holt stated this report was not forwarded to her until after the PDC. N.T. p. 80. Therefore, she did not know of it at the time. N.T. p. 80.

Additionally, Holt noted she did not contact SEAP about appellant's absences because SEAP is confidential. N.T. pp. 80-81. However, Holt noted SEAP does provide documentation if they correspond with an employee who is out of work. N.T. p. 81. Holt stated neither she nor any of the SEAP coordinators received any such notifications from SEAP regarding appellant's absences. N.T. pp. 66, 81.

Holt testified that, on January 3, 2018, the PDC was held but appellant did not attend. N.T. pp. 65, 67. Holt stated the PDC panel determined the charges against appellant were substantiated. N.T. p. 77. Holt noted appellant had been charged with violating the SCI's Call-Off Procedures, section B(21) of the appointing authority's Code of Ethics, and Commonwealth Absence Manual 530.7. N.T. p. 67.

Holt testified the SCI's Call-Off Procedures require all employees assigned to positions designated as 24/7 operations, including corrections officers, to call the shift commander a minimum of two hours prior to the start of their scheduled work shift if they are unable to report as scheduled. N.T. p. 68; AA Ex. 5. Holt stated appellant did not comply with this provision. N.T. p. 68

Holt testified the appointing authority's Code of Ethics sets forth the appointing authority's standard work rules. N.T. pp. 68-69; AA Ex. 6. Holt stated section B(21) of the appointing authority's Code of Ethics provides "an employee who knows that he or she will be unable to report for duty due to illness, emergency, or injury shall notify his or her supervisor in accordance with their local policy, advising the supervisor of the injury, emergency, or illness and the expected date of return to duty." N.T. p. 69; AA Ex. 6 (p. 5).

Holt stated the Commonwealth Absence Manual 530.7 defines absence without leave. N.T. p. 69; AA Ex. 7. Holt stated this manual provides that an employee will be charged with absence without leave when it is an unapproved absence. N.T. pp. 69-70; AA Ex. 7.

Holt testified the superintendent is responsible for determining the discipline to be imposed. N.T. p. 78. Holt stated the decision was made to terminate appellant. N.T. p. 78. Holt noted that at the time of the PDC, the fact-finding investigation regarding appellant's sexual harassment allegations toward Rosa had not been completed; however, Holt stated it was subsequently found that the allegations did not rise to the level of sexual harassment under the Commonwealth's policy, which requires the conduct to be severe and pervasive. N.T. pp. 78-79, 84-85.

Victor Mirarchi is employed by the appointing authority as the Deputy Superintendent II of the SCI. N.T. p. 93. Mirarchi has held this position since January 2018 and has been employed by the appointing authority since 1998. N.T. p. 93.

Mirarchi testified he was on the PDC panel that addressed the conduct resulting in appellant's second written reprimand. N.T. p. 94. Mirarchi stated that, after this PDC, the seriousness of time and attendance issues was conveyed to appellant and she was informed that if such conduct continued it could result in termination. N.T. p. 95. Mirarchi explained the correction officers at the SCI oversee approximately 2,300 inmates; therefore, it is crucial that staffing needs be maintained to ensure the appropriate level of security within the facility. N.T. p. 96. Mirarchi further explained, when an employee fails to come to work or report off,

other employees are affected because employees onsite cannot be relieved until a replacement is found, which may require mandating another employee to work. N.T. pp. 96-97.

Mirarchi testified that, after the second written reprimand was issued, appellant failed to report again. N.T. p. 97. Mirarchi stated when staff fails to report, a wellness check is conducted to ensure the safety of the employee and to determine why the employee did not report. N.T. pp. 97-98. Mirarchi stated he telephoned appellant about her failure to report and spoke with her. N.T. pp. 97-98. Mirarchi stated appellant informed him that she was in contact with SEAP. N.T. p. 98. Mirarchi further stated he informed appellant that, although it was her right to contact SEAP, she still needed to follow proper call-off procedures and/or report to work as scheduled. N.T. p. 98.

Mirarchi testified he was on the PDC panel that recommended appellant's removal. N.T. pp. 98-99. Mirarchi stated he based his decision on appellant's inability to follow proper call-off procedures, her absent without leave status, and her inability to take corrective actions based on her previous behavior. N.T. p. 99. Mirarchi stated appellant's sexual harassment claim did not factor into his decision. N.T. p. 99.

When making a claim of discrimination, an appellant must initially present a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). We have been advised that “[g]iven the critical role of circumstantial evidence in

discrimination proceedings, the *prima facie* case cannot be an onerous one.” *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate that the proffered merit reason is merely a pretext for discrimination. *Id.*

While appellant’s evidence that the appointing authority removed her for discriminatory reasons is not overwhelming, it is sufficient to make out a *prima facie* case. Here, appellant’s testimony is sufficient, if believed and otherwise unexplained by the appointing authority, to show that shortly before she was removed, she engaged in a protected activity—reporting alleged sexual harassment by Rosa.⁸

Although appellant met her initial burden of proof, for the reasons stated below, the Commission believes that the appointing authority presented credible evidence which establishes a legitimate non-discriminatory reason for removing appellant from her position as a probationary COT. Specifically, the appointing authority established that appellant was removed for unsatisfactory attendance.

⁸ There is no credible evidence to support appellant’s claim that her removal was based on her age or any other violation of the Act or Rules.

In order to perform one's work duties, one must be available for work. *Zielinski v. Luzerne County Assistance Office, Department of Public Welfare*, 107 Pa. Commw 414, 528 A.2d 1028 (1986). The Commonwealth has the right to have employees present at work to perform needed services. *Id.* At the hearing, credible⁹ evidence was presented establishing that appellant's continued unacceptable absence without leave was the reason for her removal.

Appellant had a history of unacceptable attendance, and prior to her removal, the appointing authority took steps to address her attendance. N.T. pp. 20-21, 58-61, 94-95; AA Exs. 1, 2. Indeed, appellant acknowledged that she received two written reprimands for being absent without leave and failing to follow the local call-off procedure. N.T. pp. 20-21; AA Exs. 1, 2. Both of these written reprimands warned appellant: "You are hereby advised that further violations of the same or similar nature may result in additional discipline, up to and including termination from your position." AA Exs. 1, 2. Additionally, after the PDC which resulted in appellant's second written reprimand, the seriousness of time and attendance issues was conveyed to appellant and she was informed that if such conduct continued it could result in termination. N.T. p. 95.

Nonetheless, appellant failed to correct her behavior. N.T. pp. 23, 63. On December 12, 2017, appellant was again absent without leave and failed to follow the SCI's Call-Off Procedures. Following this unapproved absence, appellant was again informed she needed to follow proper call-off procedures and/or report to work as scheduled. N.T. p. 98. It was also explained to appellant at this time that

⁹ It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

contacting SEAP did not excuse her from following the call-off procedures. N.T. p. 98. However, appellant continued to be absent without following the call-off procedures. N.T. pp. 63-64; AA Ex. 3. It was for this reason that appellant was removed. N.T. p. 99. There is no credible evidence that appellant was removed because she engaged in a protected activity—reporting alleged sexual harassment by Rosa.

Upon considering the above, the Commission finds that the appointing authority successfully rebutted the presumption of discrimination raised by appellant's *prima facie* case. Furthermore, the Commission is not persuaded by appellant's argument that the appointing authority's reason for the removal is pretextual. While appellant does not dispute that she stopped coming to work after December 11, 2017, she attempts to justify her actions by claiming that she was uncomfortable coming to work because she was being sexually harassed and "everyone" was talking about it. N.T. pp. 23, 25. However, there is no credible evidence appellant informed the appointing authority that this was the reason she was not coming to work. In fact, after filing the sexual harassment complaint against Rosa on December 1, 2017, appellant continued to report to work for approximately a week and a half. N.T. p. 23. Thus, we are not persuaded by appellant's attempt to justify her absences, and considering the above, we find that appellant did not meet her burden to persuade the Commission that the appointing authority's proffered merit reason is merely a pretext.

Section 603(a) of the Act, 71 P.S. § 741.603(a), provides in pertinent part that "[a]t any time during the probationary period, the appointing authority may remove an employee if in the opinion of the appointing authority the probation indicates that such employee is unable or unwilling to perform the duties

satisfactorily or that the employee's dependability does not merit continuance in the service." Thus, the probationary status civil service employee does not enjoy the job security afforded persons on regular status, who may be removed only for just cause. 71 P.S. § 741.807; *Nwogwugwu*, 594 A.2d at 849. The Commission concludes that appellant, by her actions, demonstrated she was either unable or unwilling to perform the duties of a COT and/or was not dependable enough to merit continuance in service. In sum, appellant's continued unsatisfactory attendance provided the appointing authority with a legitimate non-discriminatory reason to remove her from probationary COT employment. Accordingly, we enter the following:

CONCLUSION OF LAW

Appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,¹⁰ dismisses the appeal of Larenda M. Derr challenging her removal from probationary Corrections Officer Trainee employment with the State Correctional Institution at Coal Township, Department of Corrections, and sustains

¹⁰ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.

the action of the State Correctional Institution at Coal Township, Department of Corrections, in the removal of Larenda M. Derr from probationary Corrections Officer Trainee employment, effective January 3, 2018.

State Civil Service Commission

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: August 22, 2019