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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0222-16T1

MARY MELVIN,

Complainant-Appellant,

v.

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Respondent-Respondent.

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Submitted December 19, 2017 – Decided January 24, 2018

Before Judges Hoffman and Gilson.

On appeal from the Division on Civil Rights,  
Docket No. EL11WG-63457-A.

Mary Melvin, appellant pro se.

Christopher S. Porrino, Attorney General,  
attorney for respondent New Jersey Division  
of Child Protection and Permanency (Christian  
A. Arnold, Assistant Attorney General, of  
counsel and on the brief).

Christopher S. Porrino, Attorney General,  
attorney for respondent Division on Civil  
Rights, joins in the brief of respondent New  
Jersey Division of Child Protection and  
Permanency.

PER CURIAM

Mary Melvin, a former employee of the Division of Child Protection and Permanency (DCPP), appeals from an August 3, 2016 final agency determination by the Director of the Division on Civil Rights (Division). Following an investigation, the Division found that there was no probable cause that Melvin was suspended or terminated by DCPP because of her race or age in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. Instead, the Division found that Melvin was suspended and terminated for her failure to correct her recurring poor work performance. We affirm because the Division's findings are supported by substantial credible evidence.

I.

DCPP hired Melvin as a trainee in 2003. In 2004, she was promoted to the position of Family Service Specialist II, where her duties included screening allegations of child abuse, assessing the level of safety and well-being of her assigned children, performing the placements of her assigned children in foster homes, and managing various aspects of her cases that were involved in court proceedings.

Between 2006 and 2010, DCPP disciplined Melvin three separate times for multiple actions and inactions. Melvin was charged with neglect of duty, failure to carry out an order that could result in danger to a child, insubordination, conduct unbecoming a public

employee, and violations of DCPD's policies. After participating in disciplinary proceedings, Melvin was reprimanded and suspended for ninety days for those charges.

In April 2012, DCPD issued a fourth disciplinary notice to Melvin charging her with incompetency, insubordination, conduct unbecoming a public employee, and "other sufficient cause." Those charges were based on three incidents that involved Melvin's (1) failure to complete a foster home placement of a child in October 2011, (2) failure to carry out a court order in November 2011, and (3) unprofessional and disruptive behavior affecting a child in March 2012.

Melvin appealed the April 2012 notice of discipline, and a disciplinary hearing was conducted in June 2012. The hearing officer determined that DCPD had proven the charges against Melvin and Melvin had "consistently failed to perform her essential duties[.]" After reviewing Melvin's prior history of discipline, the hearing officer found that removal was warranted. DCPD, thereafter, terminated Melvin's employment on August 8, 2012.

In October 2012, Melvin elected to pursue an administrative process and, thus, filed a verified complaint with the Division charging DCPD with violating the LAD. In her complaint, Melvin, who is African-American and was fifty-seven years old when she was fired, alleged that she was suspended and fired in 2012 because

of her race and age. In support of her claim of discrimination, Melvin contended that a younger, non-African-American DCPD worker, A.S., was equally responsible for one of the incidents that led to Melvin's suspension and discharge, but A.S. was not suspended or discharged. That incident involved the failure to complete a foster home placement of a child in October 2011.

DCPD filed an answer to Melvin's complaint, denied the allegations, and contended that Melvin was fired because of her extensive disciplinary history and the findings and recommendations of the hearing officer.

The Division then conducted an investigation of Melvin's LAD claims. Specifically, the Division reviewed Melvin's disciplinary history prior to 2011. The Division then reviewed the three incidents cited in the April 2012 notice of discipline. That review included interviewing Melvin, A.S., and a DCPD supervisor. The Division also reviewed DCPD records regarding the disciplinary charges against Melvin, including the 2012 disciplinary hearing.

The Division noted that Melvin reported that she administratively appealed her 2012 suspension and termination to the Civil Service Commission (Commission). The Division confirmed with the Commission, however, that the Commission had no record of such an appeal. Moreover, Melvin's union engaged in an unsuccessful mediation regarding her termination. Unsatisfied

with the result, Melvin filed an unfair practices complaint against her union. She later withdrew that complaint, however. She also had the option of pursuing arbitration in connection with her termination, but elected not to do so.

Based on its investigation, the Division found that Melvin had a history of poor performance that resulted in multiple and progressive disciplines. With regard to Melvin's claim of disparate treatment compared to A.S., the Division found no support for that claim. Instead, the Division found that A.S. was assigned as a "buddy" to accompany Melvin on a foster home placement in October 2011. The Division also found that as a buddy, A.S. rode along with Melvin, but was not responsible for the handling of the placement. The Division was also provided with a certification stating that a review of A.S.'s personnel file showed that, in contrast to Melvin, A.S. had no prior history of discipline.

At the conclusion of its investigation, the Division's Director found no probable cause existed to credit Melvin's allegation that she was suspended and fired in 2012 based on her race and age. To the contrary, the Division found DCPD had shown a "legitimate non-discriminatory explanation for suspending [] and terminating [Melvin], i.e., failure to correct her reoccurring work performance issues despite [DCPD] having consistently provided her guidance and multiple opportunities to correct [her

performance]." The Division also "found no persuasive evidence – and none was produced by [Melvin] – that the explanation [by DCPD] was merely a pretext designed to mask an illegal motive."

## II.

Melvin appeals from the Division's decision finding no probable cause. She is representing herself, and she argues that she was subject to discrimination, was given too many responsibilities with insufficient supervision, and that her termination was "largely based on a web-of-lies."

Initially, we clarify what is before us on this appeal. We are not addressing Melvin's suspension or termination. Melvin has not appealed from her 2012 suspension or termination. To bring such an appeal to us, Melvin would have had to pursue an administrative appeal to the Commission. R. 2:2-3(a)(2). Melvin has not appealed from a final decision by the Commission. Moreover, the record before us reflects that Melvin did not pursue such an appeal. Instead, Melvin is appealing from the August 3, 2016 final agency decision of the Division finding no probable cause to support her allegation that DCPD suspended and terminated her in violation of the LAD.

A person claiming unlawful discrimination under the LAD has the choice to either initiate a lawsuit in the Superior Court or file a complaint with the Division. N.J.S.A. 10:5-13, -18;

Rodriguez v. Raymours Furniture Co., Inc., 225 N.J. 343, 358 (2016). If a claimant files a claim with the Division, that administrative proceeding becomes the exclusive proceeding while it is pending, and a final determination by the Division excludes any other action based on the same grievance. N.J.S.A. 10:5-27.

After a complaint is filed with the Division, the Division undertakes an investigation of the alleged discrimination. N.J.S.A. 10:5-14. At the conclusion of the investigation, the Director of the Division "shall determine whether or not probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). Probable cause exists if there is a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] . . . has been violated[.]" N.J.A.C. 13:4-10.2(b). The Director's finding of no probable cause is a final order subject to judicial review by this court. N.J.S.A. 10:5-21; N.J.A.C. 13:4-10.2(c), (e); Wojtkowiak v. N.J. Motor Vehicle Comm'n, 439 N.J. Super. 1, 12 (App. Div. 2015).

In evaluating claims under the LAD, "New Jersey has adopted the procedural burden-shifting methodology articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). Under that procedure, the plaintiff must first demonstrate a prima facie case

of employment discrimination. The employer can rebut the inference of discrimination by articulating a "legitimate, nondiscriminatory reason for the employer's action." Id. at 449. The burden then shifts back to the employee to prove the reason provided by the employer is "merely a pretext for discrimination and not the true reason for the employment decision." Ibid.


We accord "a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014). Accordingly, our review of the Director's decision is limited. We review the record to determine whether there is substantial credible evidence to support the agency head's conclusions. Clowes v. Terminex Int'l, Inc., 109 N.J. 575, 587 (1988).

Having reviewed the record in this case in light of our standard and the law, we discern no basis to disturb the Division's finding of no probable cause. The Division conducted a thorough investigation and made findings that are supported by substantial credible evidence in the record. The Division also applied the correct burden-shifting analysis, thus, the Division found that Melvin had shown a prima facie case of discrimination, but also found that DCPD had articulated a legitimate, non-discriminatory reason for suspending and terminating Melvin's employment. The Division gave Melvin the opportunity to prove pretext, but found

that Melvin had no "persuasive evidence" of a pretext. Those findings are also supported by substantial credible evidence in the record.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION