BEFORE THE PERSONNEL BOARD OF THE STATE OF ALABAMA
IN THE MATTER OF THE APPEAL OF

TRACEY BROWN-EDWARDS

ORDER

August 17, 2022

This matter came before the Board upon the dismissal of the Employee from her employment with the Office of the Attorney General ("AGO"). The Employee was dismissed from her employment on February 16, 2022, based upon charges contained in a letter dated the same. This matter was assigned to Administrative Law Judge Randy Sallé and a hearing was held on April 28, 2022. The Administrative Law Judge’s Recommended Order is now before the Board for consideration. The Board has also had the benefit of oral argument.

AGO charges that the Employee violated State Personnel Board (SPB) Rules: 670-X-19-.01(1)(a)(4) – (Failure to perform job properly); 670-X-19-.01(1)(a)(8) – (Violation of specific department rules); 670-X-19-.01(1)(b)(10) – (Serious violation of any other department rule); and 670-X-19-.01(1)(b)(13) – (Conduct unbecoming a state employee). Additionally, the Employee violated many provisions of the AGO’s Employee Policies and Procedures Handbook, specifically sections titled expected employee behavior, care of official documents, confidentiality of information, and use of recording devices.
A review of the Employee's recent work history shows one (1) Written Warning in July 2004 for using her state telephone for personal reasons that resulted in monetary charges to the AGO.

The Employee had served as an employee with the AGO since 1998. The Employee was employed by the AGO as a Special Agent in the Medicaid Fraud Control Unit ("MFCU"). In May 2019, the Employee filed an EEOC complaint against the AGO. In July 2020, the EEOC provided the Employee with a "right to sue" letter. On October 27, 2020, the Employee filed a lawsuit in federal court. On November 12, 2021, the Employee was deposed in her lawsuit against the AGO. During her deposition, the Employee admitted she recorded conversations between herself and many AGO employees, including the Attorney General and her supervisor, without notifying them that she was recording the conversation. Additionally, the Employee acknowledged during her deposition that she removed confidential MFCU case file information from the AGO offices and gave the documents, without permission, to her private attorney representing her in the federal lawsuit.

At her hearing, the Employee acknowledged that she signed a confidentiality of information form and received and agreed to read and follow the AGO Employee Handbook. The Employee testified that she did not record any of the AGO employees within the AGO offices, but instead
in public spaces. Additionally, the Employee testified that the documents she removed from the AGO office were left in an area by the copier where anyone could see them. The Employee believes her dismissal from the AGO was retaliation for her complaints to the EEOC and her federal lawsuit. The Employee testified that she took case file information to her attorney and tried to record co-workers in an attempt to get relief.

The MFCU Division Chief testified at the hearing. He testified about the work of the MFCU and that case files contain confidential information that is regulated by federal regulations as well as AGO policies. The MFCU office is in a secured area set apart from other offices within the AGO and only MFCU employees and a few others have access to the area. During his testimony, the MFCU Division Chief recalled three other AGO employees that were fired for violating one or both of the infractions the Employee violated. The ramifications of the Employee's actions required the MFCU Division Chief to notify the United States Department of Health and Human Services about the data breach and that he will be required to include the data breach in the annual recertification which determines whether the AGO will receive federal grant funds. His testimony made clear that the disclosure of the confidential documents to the Employee's private attorney for a non-legitimate business reason was the issue, not the actual removal of the confidential documents from the office.
Additionally, the Assistant Chief Deputy, Criminal Division testified at the hearing. She testified that the AGO policy expressly prohibits employees from recording conversations with co-workers anywhere, including in public, without their knowledge. The Employee was free to record employees anywhere, so long as she notified them, she was recording the conversation. She also reiterated that the case files in MFCU were extremely sensitive and confidential because they contained HIPAA related information as well as personal information. Lastly, she testified that the Employee desired to be promoted to a Special Agent, Senior position, but that there was only one of those position available within MFCU. A Special Agent, Senior position opened up in another unit, but the Employee failed to apply for that position.

A Nurse Analyst testified on behalf of the Employee that she recalled two times that the wife of the Special Agent, Senior in the MFCU discussed case information with her. She believed that the Special Agent, Senior was discussing confidential, case sensitive information with his wife. The Nurse Analyst admitted during her testimony that she did not report any of the above violation she claimed to witness.

During the Employee's tenure with the AGO, she filed multiple complaints about certain work conditions. She was certainly within her right as an employee to bring these complaints to those within her
supervisory chain. The AGO worked with the Employee on her complaints. The Employee complained about discriminatory language that was used around her, but she testified that there had not been any racial comments made since December 2018. There is documentation showing that the AGO staff met with and listened to the Employee’s complaints and took affirmative steps to help resolve those complaints.

The AGO provided substantial evidence that the Employee violated AGO’s policy prohibiting the disclosure of confidential case sensitive information by removing case file information from the AGO and giving it to her attorney and AGO’s policy prohibiting the recording of a co-worker without their knowledge.

The Employee asserted some specific defenses:

(1) First, the Employee alleges the AGO’s proffered reasons for the Employee’s dismissal were pre-textual and they fired her in retaliation of her EEOC complaints and subsequent lawsuit. The three-part McDonnel Douglas burden-shifting framework is the well-established test for a retaliation claim. First, the plaintiff must establish a prima facie case by showing she was engaged in a statutorily protected expression; she suffered an adverse employment action; and that there is some causal relationship between the two events. The Employee was engaged in a statutorily protected activity, she filed an EEOC complaint and a federal
lawsuit. Ultimately, she suffered an adverse employment action by being dismissed from State service. Lastly, the Employee relied on a short period of time between when she requested an overdue performance appraisal and her firing to show the causal connection.

Next, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for its employment decision. The AGO's legitimate business reason for the Employee's termination was her admitted violations of AGO policies. The AGO supported this claim by showing that three white, male employees were dismissed from State service for engaging in one or both of the same rule violations as the Employee.

Lastly, if the defendant offers a legitimate, non-discriminatory reason for its employment decision, the burden shifts back to the plaintiff to establish that the reason offered by the defendant was not the real basis for the decision, also known as pretext. The Employee failed to provide any credible evidence of pretext. The evidence supports consistent discipline for the same offense(s). Also, the evidence indicates that the AGO was willing to work with the Employee on her complaints and made positive changes in response to her protected activity.

(2) Second, the Employee alleges the AGO's prohibition of recording co-workers is unconstitutional and violates the First
Amendment. A government entity that acts as an employer does have broader discretion to restrict speech, but the restrictions must be directed at speech that has some potential to affect the entity’s operations. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The AGO’s policy states its intended purpose: “All employee should know they are free to exchange information and express ideas in an environment of trust, free from fear that someone is baiting a trap for a misspoken word.” Additionally, MFCU cases involve confidential, sensitive, and protected material that MFCU has a legal obligation to safeguard. Under the AGO policy, employees are free to record each other anywhere at any time so long as they inform their co-worker of their intention.

There are additional limitations on secretly recording supervisors in a law enforcement environment. AGO is a law enforcement entity and their policy helps to maintain an atmosphere of trust. Filing a Title VII complaint does not insulate an employee from following their employer’s rules and policies. Other jurisdictions have dealt with similar situations, where employees attempted to record conversations with other employees and were terminated. Title VII does not “grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination.” *Argyropoulos v. City of Alton*, 539 F. 3d 724 (2008).
(3) Third, the Employee believed that other employees engaged in similar conduct and were not disciplined. The Employee removed confidential, sensitive case files from the AGO and gave them to a non-privileged third party. Her attorney then used the information in the case files during the depositions. The Employee based this defense on the testimony of the Nurse Analyst where she alleged that the Special Agent, Senior was discussing confidential information to his wife and engaged in similar breaches of confidentiality. During the Nurse Analyst testimony, she admitted she never reported the breaches or what she witnessed. The Attorney General and the Assistant Chief Deputy, Criminal Division were the individuals that determined what the appropriate discipline was for the Employee. They cannot be held responsible for rule violations that occur outside their knowledge and are not reported.

The Administrative Law Judge found the totality of the evidence does warrant dismissal in this cause and recommended that the Employee's dismissal be upheld. The Board hereby adopts by reference the findings of fact and conclusions of law as found by the Administrative Law Judge as a part of this Order as if fully set forth herein.

The Board has carefully considered the Administrative Law Judge’s Recommended Order and the oral argument presented in this matter
and is of the opinion that the decision of the appointing authority to
dismiss the Employee is supported by the evidence and that the
termination is warranted.

It is therefore the Order of this Board that the decision of the
appointing authority to dismiss the Employee is hereby affirmed.

JACKIE GRAHAM
SECRETARY

FAYE NELSON
CHAIR

MYRON PENN
MEMBER

Evan M. Thornton
MEMBER

David R. Mellon
MEMBER

Rachel Bunning
MEMBER