ANN TWOMEY,
Petitioner,
v.
ENGLEWOOD HOSPITAL ASSOCIATION,
Respondent.

Decided February 2, 1981

Initial Decision

SYNOPSIS

Petitioner was employed since 1971 as a registered nurse at the Englewood Hospital from which she has been suspended for three and one-half days in 1976 for failure to obey the hospital's policy of requiring her to wear her nurse's cap while on duty. This policy, she alleged, constituted unlawful discrimination on the basis of sex in violation of *N.J.S.A.* 10:5-4 and 10:5-12(a) because the policy did not apply to male nurses.

The administrative law judge assigned to the case determined that in order for remediable discrimination to be proven, the alleged improper classification must be shown to have been based on sex plus some other characteristic of an immutable nature or involving the fundamental rights of an employee or have a significant affect on the employment opportunities of one sex. On the basis of such a requirement, the judge concluded that petitioner had failed to establish a *prima facie* case of discrimination and dismissed the complaint.

Priscilla E. Hayes, Deputy Attorney General, for petitioner (John J. Degnan, Attorney General of New Jersey, attorney)

John H. Yauch, Jr. Esq., for respondent (Yauch, Peterpaul and Clark, attorneys)

WEISS, ALJ:

Petitioner, Ann Twomey, has been employed since since 1971 as a registered nurse at the Englewood Hospital, a facility which is owned and operated by the respondent, Englewood Hospital Association. In July 1976, petitioner filed a Verified Complaint with the Division on Civil Rights alleging that she had been suspended for three and one-

half days for refusing to obey a policy of respondent requiring her to wear her nurse's cap while on duty. This policy, she alleged, did not apply to male nurses and thus constituted unlawful discrimination on account of sex in violation of *N.J.S.A.* 10:5-4 and 10:5-12(a). In September 1976 the Director entered a Finding of Probable Cause crediting the allegations of the Verified Complaint. The matter moved no further until July 1980 when it was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Following the prehearing conference a Motion for Summary Decision was made by respondent upon the ground that the Division lacked jurisdiction over it. Briefs in connection with that Motion were duly filed and in a Letter Decision dated November 3, 1980, I determined that although the Englewood Hospital Association was not an "employer" within the definition contained in the Law against Discrimination when the Verified Complaint was filed in 1976 nevertheless, the material submitted by petitioner in opposition to the motion revealed that the policy and hence the alleged discriminatory practice had been continuous in nature up to and including the present time.[1] Accordingly, since Laws 1977, Ch. 1222, which amended *N.J.S.A.* 10:5-5(e), added charitable corporations to the class of employers subject to the Law, I held that jurisdiction presently did exist for me to hear and decide the case.

A hearing was conducted on Dececer 8, 1980, and a Stipulation of Facts together with a Joint Exhibit was marked directly into evidence. The stipulation set forth that Ann Twomey is a female registered nurse who has been continuously employed by the Englewood Hospital Association since September 1971. During that entire period respondent has had a written policy which requires all female nurses to wear caps. Male nurses are not required to do so. The stipulation further set forth that the differntial treatment was based, in part, upon "tradition." Attached to the stipulation was the latest version of the respondent's dress code, dated April 1980, which specifically provides that female nurses are required to wear, among other items, a "Cap of respective School of Nursing or cap of preference." No similar cap requirement was imposed upon male registered or licensed practical nurses.

[1]Indeed, as late as April 1980 the respondent readopted a dress code policy which expressly continued the challenged cap requirement.

The Prehearing Order listed several potential defenses raised by respondent. At the hearing however, the testimony related solely to whether the respondent's cap policy constituted remediable discrimination in violation of the statute. The additional issues of laches, acquiescence and estoppel were not addressed at all, nor was any testimony introduced with respect to respondent's claim that the four-year delay since the entry of the Finding of Probable Cause impermissibly intruded upon its due process rights. Since those issues were also ignored in respondent's posthearing letter memorandum, I therefore will consider them to be abandoned.

Petitioner's main case consisted of her own testimony. In addition, by way of rebuttal, the testimony of a male nurse employed at Englewood Hospital, William Younger, also was offered. Miss Twomey stated that she had been made aware of the existence of the dress code policy since the beginning of her employment and was informed by her supervisor from time to time that wearing her nurse's cap was required for the following three reasons: (a) it was the policy of the hospital; (b) it was a tradition; and (c) it served to identify an individual as a nurse.

Ms. Twomey maintained that her cap interfered with her ability effectively to perform her work, particularly the procedures surrounding use of intravenous apparatus. She observed that since the cap was "cumbersome" it occasionally would knock against equipment, get caught in tubing and fall off. She said she was aware of similar problems encountered by other nurses and had been told that another nurse's cap fell off while cardiac massage was being administered to a patient.

Petitioner said that she does not wear her cap on duty and that on occasion her supervisors have "mentioned" the policy requirement and suggested she wear her cap so that there would not be any "trouble."

Petitioner insisted that although the policy did not now appear to be enforced, she had been disciplined in 1976 for a violation and therefore continued to believe that as long as it existed she could be terminated from employment if again charged with disobeying it. The respondent's general discipline policy provides that violations of specific hospital rules can result in the imposition of a hierarchy of potential sanctions culminating in termination.

Further, petitioner maintained that oral "warnings" given to her in front of other persons "upset" her and produced anxiety.

On cross-examination, petitioner agreed that if a female nurse did not wear her cap it was probable that she could not readily be

distinguished from other non-nurse female employees who wore white uniforms. She also conceded that although she had been warned by her head nurse every few months about the cap policy the last time she actually wore her cap was at the end of 1977. She further acknowledged that many of the female nurses at Englewood Hospital do not wear their caps and to her knowledge none had been penalized for that practice. Indeed, she readily agreed that the cap requirement is treated as "optional." Nevertheless, Miss Twomey insisted she honestly feared possible termination in the event she was again charged with a policy violation even though she had not worn her cap since 1977 nor been disciplined for that conduct since 1976.

The sole witness on behalf of the respondent was Mrs. V. Rita Gaunt, R.N., respondent's Assistant Administrator of Nursing. She has been employed at Englewood Hospital for 27 years and graduated from its School of Nursing. She confirmed that although there still is a written policy requiring female nurses to wear their caps, in practice they only are "urged" to wear them and head nurses are instructed merely to "remind" other nurses about the policy. She agreed with petitioner that many female nurses do not bother to wear their caps. Although, in Mrs. Gaunt's opinion, the cap requirement was soundly based upon tradition, served as a means of identific and was an element of personal pride, no nurse since June 1977 had ever been refused employment, denied promotion or disciplined in any way for failure to comply with the policy. Simply put, the policy was "just not enforced." On cross-examination, Mrs. Gaunt confirmed that the policy is treated as optional although she, personally, never told any nurse that this was the case. She agreed, as well, that with respect to identification, one could not distinguish a male nurse from other male hospital employees who wore similar type uniforms unless there was a self-identification or some specific recognition of a nurse's pin.

Mr. Younger, the rebuttal witness called by petitioner, is a registered male nurse employed at Englewood Hospital since February 1976. He said that he observed female nurses being told to put their caps on, the last time about one year ago.

As no evidence was proffered by respondent to indicate how, if at all, it has been harmed by the time delay which took place between the filing of the original complaint in 1976 and the hearing in December 1980, **I CONCLUDE** that its defenses of laches, acquiescence and estoppel must be rejected. For the same reason **I** also **CONCLUDE** that no due process rights of respondent have been violated because of the time lapse which had occurred.

Essentially, then, the issues to be determined are whether or not

a violation of the Law against Discrimination has been proven by Ms. Twomey and, if so, the nature and extent of any remedy which ought to be provided to her as a result of such a determination.

In post-hearing memoranda filed by counsel a variety of federal decisions are cited. The petitioner places primary reliance upon the case of *Carroll v. Talman Federal S. & L. Ass'n of Chicago*, 448 *F. Supp.* 79 (N.D. 111. 1978), reversed and remanded, 604 *F.* 2d 1028 (7th Cir. 1979), *cert. den.*, 445 *U.S.* 929 (1980). In *Talman* the employer had imposed a requirement on female employees whereby they had to wear certain specified types of clothing consisting of either a color-coordinated skirt or slacks and either a jacket, tunic or vest. No similar requirement was imposed upon male employees although they were expected to wear business suits or business-type sport jackets, slacks and ties. A challenge to the requirement for female employees was lodged under Title VII of the Civil Rights Act of 1964. The trial court determined that the imposition of the dress code did not interfere with or prevent any employment opportunity under a particular section of Title VII and dismissed the complaint. On appeal, the 7th Circuit Court of Appeals, in a 2-1 decision, reversed and remanded upon the ground that the District Court applied the wrong section of the statute and therefore its particular employment opportunity test was erroneous. *See*, *Carroll*, *supra*, at 1029. As noted by the petitioner in the matter *sub judice*, the *Talman* case articulated certain elements that it believed could be applied to determine whether a given set of "appearance" requirements could stand judicial scrutiny. In essence, the inquiry is designed to determine whether or not there has been created "offensive sterotypes" as an underlying justification for the particular rule being challenged. Thus, with respect to the imposition of what was tantamount to "two entirely separate dress codes," the *Talman* court noted that the different treatment was demeaning to women as, "there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes." *Carroll*, *supra*, at 1032. The majority clearly was annoyed by the fast that the employer used the term "career ensemble" rather than "uniform" to describe the attire required for female employees and that even this requirement was relaxed on certain occasions known as "glamour days." Thus, the decision in *Carroll* turned on the court's belief that compelling a female employee to wear a particular "uniform," while permitting males to wear "a variety of normal business attire," was predicated upon an assumption that in choosing appropriate business apparel

the exercise of good judgment could not be expected of women. This stereotyping was simply too offensive.

Petitioner therefore argues, on the basis *Carrol* that requiring females to wear caps is impermissible discrimination since there is no business necessity for it and it is not based on any commonly accepted social norm.

In the *Carroll* case several other federal decisions were cited including *Fountain v. Safeway Stores, Inc.*, 555 *F.* 2d 753 (9th Cir. 1977) and *Fagan v. National Cash Register Co.*, 481 *F.* 2d 1115 (D.C. Cir. 1973). Those and other cases have noted that employer-imposed dress and grooming code distinctions are not necessarily defective even if based upon sex differentials. Indeed, there is a line of cases which have developed what is known as the "sex plus" standard. That concept requires that in order for remediable discrimination under Title VII to be proven the alleged improper classification must be shown to have been based on sex, plus: (1) some other characteristic of an immutable nature; or (2) involving a fundamental right of an employee; or (3) significantly affecting the employment opportunities of one sex. *See, e.g., Willingham v. Macon Telegraph Publishing Co.,* 507 *F.* 2d 1084 (5th Cir. 1975); *Lannigan v. Bartlett & Co. Grain,* 466 *F. Supp.* 1388 (W.D. Mo. 1979); *see also, Baker v. California Land Title Co.* 507 *F.* 2d 895 (9th Cir. 1974), *cert. den.* 422 *U.S.* 1046 (1975).

Based upon my reading of the federal cases cited, together with other decisions which are mentioned in those cases, I am compelled to conclude, as a matter of law, that the cap policy challenged in this case is not discriminatory within the meaning and intent of the New Jersey Law against Discrimination. While one may certainly take issue with the justifications advanced by respondent to support the policy, such as tradition, personal pride and ease of identification; nevertheless, there is a total absence here of any factual proofs to support the proposition that the policy is designed to demean or sterotype female nurses, or that it is a mere pretext for the imposition of deliberately disparate treatment. The fact that wearing the cap occasionally interferes with nursing procedures is a matter of business concern—it is not pertinent to a discrimination allegation.

I agree with petitioner that tradition cannot be used as a basis for otherwise invidious discrimination. I further agree that male nurses and female nurses who do not wear their caps can have just as much pride in their profession as a nurse who does wear a cap and that ease of identification is not an excuse for an otherwise improper discrimination. Nevertheless, as I read the federal cases, it seems to

me that the threshhold requirement of establishing a *prima facie* case of discrimination has not been met. The cap requirement clearly is not immutable, it does not involve a "fundamental" right and it does not significantly affect employment opportunities.

I have no doubt that petitioner is, and other female nurses may be most unhappy with the cap requirement. However, for the reasons noted, the policy does not contravene the standards to be applied in determining whether actionable sex discrimination has occurred and the Verified Complaint therefore should be dismissed. I would be remiss if I did not observe, gratuitously, that since the policy is actually deemed by respondent to be "optional," it should be amended promptly to make this clear to all concerned and to eliminate all doubt

Accordingly, for the reasons stated above, **I CONCLUDE** that the policy of respondent which requires female nurses to wear their caps is not a violation of the New Jersey Law against Discrimination and therefore the Petition in this case should be *DISMISSED.*

After reviewing the Initial Decision the Division on Civil Rights on March 20, 1981 issued the following Final Decision:

Complainant, Ann Twomey, a registered nurse alleged that on July 11, 1976 she was suspended for three and one-half days for refusing to obey a policy of respondent requiring her to wear her nurse's cap while on duty. The complainant further alleged that this policy did not apply to male nurses and thus constituted unlawful discrimination on account of sex in violation of *N.J.S.A.* 10:5-4 and 10:5-12 (a).

A Finding of Probable Cause was entered by the Director on September 31, 1976.

I have reviewed the entire record of this matter including the exceptions and post-hearing brief filed by Ms. Hayes, Deputy Attorney General on behalf of the complainant; the exceptions and post-hearing letter memorandum filed by Mr. Yauch, Jr., counsel on behalf of respondent and the initial decision rendered by Judge Weiss.

I find that I am unable to concur with the Recommended Findings of Fact and Conclusions of Law submitted by Judge Weiss as set forth in his initial decision, wherein he dismissed the complaint because he did not find the respondent's policy which requires female nurses, but not male nurses to wear caps to be discriminatory.

Complainant asserts that Judge Weiss dismissed the instant complaint, because he deemed that she had not made out a prima facie

case of sex discrimination. In so finding, Judge Weiss relied most significantly on the reasoning of various federal decisions which have applied what is termed a "sex plus" analysis to certain specific sex based grooming code requirements. In the three decisions cited by Judge Weiss the courts have held that in order for remediable discrimination under Title VII to be proven the alleged improper classification must be shown to have been based on sex plus: (1) some other characteristic of an immutable nature; or (2) involving a fundamental right of an employee; or (3) significantl affect the employment opportunities of one sex, citing to *Willingham v. Macon Telegraph Publishing Co.*, 507 *F.* 2d 1084 (5th Cir. 1975); *Lannigan v. Bartlett& Co. Grain,* 466 *F.* Supp. 1388 (W.D. Mo. 1979); see also *Baker v. California Land Title Co.*, 507 *F.* 2d 895 (9th Cir. 1974), *cert. den.* 422 U.S. 1046 (1975). Since Judge Weiss held that none of these three prongs had been demonstrated inthe instant case. He concluded that complainant had not had not made out a prima facie case under the "sex plus analysis". However, Judge Weiss appears to treat the case of *Carroll v. Talman Federal S. & L. Assn. of Chicago,* 604 *F.* 2d 1028 (7th Cir. 1979), *cert. den.* 445 *U.S.* 929 (1980) as an exception of sorts to the foregoing test in cases involving sex-based dress code or grooming code distinctions. In *Carroll, supra,* the defendant employer required female employees to wear a uniform, while similarly situated male employees could wear any customary business attire of their choice. The *Carroll* court struck the dress code distinction down as discriminatory on the basis of sex. Judge Weiss appatently deemed the *Carro* decision to be based totally on that court's perception that the dress code distinction at issue served to create offensive sex sterotypes, and must be struck down on that basis. Since Judge Weiss found no design to demean or sterotype female nurses in the instant case, he held that no case of discrimination had been made out under the reasoning of the *Carroll* case.

As a preliminary matter, it must be noted that the complainant is proceeding under the provisions of *N.J.S.A.* 10:5-14 and 10:5-12(a). *N.J.S.A.* 10:5-4 provides, in relevent part, that:

> "*All persons* shall have the opportunity to obtain employment, and to obtain *all* accomodations, advantages . . . and privileges . . . without discrimination because of . . . sex, subject only to *conditions* and *limitations applicable alike* to *all persons*. This opportunity is recognized as and declared to be a civil right. (emphasis added).

I find that this particular provision resolves the question in favor of complainant that respondent's policy requiring female nurses to wear nurse's caps, while not imposing a similar requirement upon male registered or licensed practical nurses as violative of the New Jersey Law Against Discrimination. Accordingly, Judge Weiss' initial decision to dismiss is rejected.

The judge mistakenly required the complainant to prove the "sex plus" standard in the instant case. However, *N.J.S.A* 10:5-4 and 10:5-12(a) imposes no such requirement on an employee in order to demonstrate a prima facie case of discrimination. Rather, the complainant need only demonstrate a difference in the terms, conditions and privileges of employment based on sex. *See*, *Peper v. Princetion Unvi. Bd. of Trustees*, 77 *N.J.* 55 (1978) and *Countiss v. Trenton State College,* 77 *N.J.* 590, 595 (1978).

I find that in *Carroll Supra*, the court set forth elements that render unlawful a given set of personal appearance standards promulgated by an employer on the basis of sex like those at issue here:

> So long as [personal appearance standards] find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women. However, the situation is different where, as here, two sets of employees performing the same function are subjected on the basis of sex to two entirely separate dress codes. . . . [604 F. 2d at 1032].

Complainant here argues that the sex-based requirement for nurse's caps is not "reasonable related to the employer's business needs," and as such has no basis in "commonly accepted social norms."

In determining whether or not complainant adequately made out a prima facie case of sex discrimination at hearing, Judge Weiss relied on a line of federal grooming code cases based on a "sex plus" analysis: *Willingham v. Macon Telegraph Publishing Co.*, *supra*; *Lannigan v. Bartlett & Co. Grain*, *supra*; and *Baker v. California Land Title Co.*, *supra*. After a careful comparison of the above three cases with the facts in the instant case along the lines set forth in *Carroll, supra.,* I conclude that the cases are readily distinguishable for the reasons set forth in the complainant's brief and exceptions. Further, I agree with complainant's arguments as outlined in her brief and exceptions and same are incorporated herein by reference.

In his initial decision, Judge Weiss Points out that:

> I also find that respondent's admitted policy of requiring female nurses to wear caps on the basis of sex is a violation of the New Jersey Law Against Discrimination *N.J.S.A.* 10:5-4 and 10:5-12(a). Therefore, having determined that complainant made out a prima facie case of illegal discrimination, I concur with Judge Weiss "that tradition cannot be used as a basis for otherwise invidious discrimination. I further agree that male nurses and female nurses who do not wear their caps can have just as much pride in their profession as a nurse who does wear a cap and that ease of identification is not an excuse for an otherwise improper discrimiantion"

In April 1980 respondent revised its dress code for nurses and specifically include a formal written continuation of its sex-based policy with regard to caps.

In conclusion, I find prior to June 1977, the Division on Civil Rights did not proscribe the conduct in question. On November 3, 1980, by letter decision, Judge Weiss denied respondent's Motion to dismiss and granted complainant, Ann Twomey's Cross Motion to amend her complaint to cover continuou acts of discrimination. In the Judges' letter decision, he pointed out that "Responent correctly takes the position that so much of the original Verified Complaint as sought monetary redress for the three and one-half day suspension should be considered 'out of the case' ". I agree. The judge continued, "however, relief by way of damages for humiliation, mental pain and suffering as a result of the alleged discrimination is still properly a part of any demand for relief". I concur with the judge's analysis with respect to humiliation as still properly a part of any demand for relief. In the instant case, I find that complainant experienced anxiety and suffering due to the respondent's discriminatory policy, and therefore is entitled to compensatory damages for pain, humiliation and suffering. *See, e.g., Zahorian v. Russell Fitt Real Estate Agency*, 62 *N.J.* 399 (1973); *Castellano v. Linden Board of Education*, 79 *N.J.* 407 (1979); *Gray v. Serruto Builders, Inc.*, 110 *N.J. Super.* 297 (Ch. Div. 1970).

Accordingly, it is on this 20th day of March 1981, **ORDERED** that:

1. Respondent, Englewood Hospital Association shall cease and desist from the doing of any act prohibited by the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5 *et seq.*, and more specifically *N.J.S.A.* 10:5-4 and 10:5-12(a)
2. In accordance with Judge Weiss' observation that since the cap requirement policy is actually deemed by Respondent to be

"optional," said policy shall be amended forthwith to make this clear to all concerned by deleting the written requirement that female nurses *must* wear nurses caps.

3. Respondent shall expunge from complainant's personnel records and any other relevant hospital records all references to her July 1976 suspension for failure to comply with the nurse's cap policy and references to the filing of the within complaint.
4. Respondent shall not take reprisal against complainant by presently relying on the 1976 suspension, or any other forms of reprisal as a result of filig her complaint. Nor shall respondent take reprisal against anyone who participated in these proceedings.
5. Respondent shall pay complainant $750 compensatory damages for mental pain, suffering and humiliation she suffered as a result of the act of discrimination. Said chech shall be made payable to Ann Twomey and forwarded to the Division on Civil Rights, 1100 Raymond Boulevard, Room 400, Newark, New Jersey 07102, within thirty days after receipt of this Order.

If payment is not made on or before thirty days after receipt of this Order, interest at 8 percent will start from the date of this Order and continue to run until paid.

6. Jurisdiction is retained by the Division on Civil Rights to observe and require compliance and to issue Supplemental Orders, if necessary to insure compliance with the foregoing provisions of this Order.