B-25

STATE OF NEW JERSEY

In the Matter of D.T., New Jersey Pinelands Commission	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2012-1239	Discrimination Appeal
	ISSUED: SEP 05 2014 (WR)

D.T., a Geographic Information Systems Specialist with the New Jersey Pinelands Commission, Department of Environmental Protection, appeals the attached determination of the Executive Director, stating that the appellant failed to present sufficient evidence to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the appellant, a female, was disciplined with a seven day suspension for parking in a restricted area in 2008. Pursuant to a settlement agreement with the appointing authority in March 2010, the appellant agreed to a three day suspension without pay and subsequently indicated that she would serve the suspension on May 6, 2010; June 25, 2010; and July 23, 2010. It is noted that the settlement agreement does not specify the dates the appellant had to serve her suspension and does not provide a deadline for the completion of the suspension. The appellant served the first day of her suspension without incident. However, the appellant took a sick day on June 25 and worked on July 23. She indicated that she would serve the remaining two days of her suspension in October and November 2010.[1] The appellant notified her supervisor at that time, R.D. of this change in June 2010, but D.C. and M.R., female employees in the appointing authority's Business Services Office, were not informed. It appears that at this point, the appointing authority believed that the appellant had served the suspension on June

[1] It is noted that the appellant did not serve her suspension in October or November 2010, or at any time thereafter.

25 and July 23 and, unbeknownst to the appellant, did not compensate her for these days. In January 2011, M.R. noticed that the appellant's timesheet did not reflect June 25 and July 23 as unpaid leave days and contacted the appellant to request that she amend her timesheet. The appellant replied that her timesheets were accurate and refused. The appellant contacted her then-supervisor J.L.,[2] a male, who suggested to the relevant parties that the appellant not be paid for the two days, but, to avoid doubly penalizing her, be credited with one sick day and one administrative day to compensate her for the sick leave she used and the time she actually worked. Nevertheless, per the advice of outside counsel, D.C. and M.R. refused in order to effectuate the settlement agreement. As a result, the appellant filed a grievance with her union and the subject discrimination complaint.[3] In the discrimination complaint, the appellant alleged that D.C. and M.R. retaliated against her because she had previously filed a complaint in which she alleged that the appointing authority discriminated against her on the basis of her gender and age. In the subject complaint, the appellant also alleged, without elaborating, that M.R. and D.C. discriminated against her. On March 1, 2011, the appointing authority settled the union grievance and credited the appellant with one sick day and seven hours of back pay.

The appointing authority referred the discrimination complaint to the Office of Equal Opportunity and Public Contract Assistance, Department of Environmental Protection, which conducted an investigation that included interviewing the appellant, D.C., M.R. and J.L. During the investigation, J.L. told the investigator that he said to D.C., "If this were anyone else, you would be handling the situation differently," to which D.C. allegedly replied, "You are probably right." D.C. claimed to the investigator that she could not recall making the statement, but had she, it was because "no other employee would have done anything like this."[4] D.C. further stated that she did not have the authority to credit the appellant with sick leave. The appointing authority determined that because the appellant failed to serve the remaining two days of her suspension, M.R. and D.C. acted reasonably in furthering the legitimate business purpose of ensuring the appellant's compliance with the settlement. Accordingly, the

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[2] It appears that J.L. became the appellant's supervisor effective October 1, 2010.

[3] The appellant also submitted a complaint with the Division on Civil Rights, Department of Law and Public Safety (DCR) on June 24, 2011, in which she essentially made the same allegations as in the present matter. On August 27, 2013, DCR determined that there was no probable cause to support the appellant's complaint. On December 9, 2013, DCR dismissed the appellant's request for reconsideration. It is noted that the appointing authority had requested that the Commission stay its decision until DCR issued its decision.

[4] The determination noted that based on D.C.'s statement, the investigator concluded that there was sufficient evidence to support the appellant's claim. However, the Executive Director disagreed, stating that there was no substantial evidence in the record that disparate treatment actually occurred or that the real reason for the disparate treatment was retaliation to sustain a violation of the State Policy.

appointing authority concluded that M.R. and D.C. neither discriminated nor retaliated against the appellant in violation of the State Policy.

On appeal to the Civil Service Commission (Commission), the appellant states that her appeal is based on her adverse history with the appointing authority and D.C.'s statement to J.L. that she probably would not have treated other employees similarly under similar circumstances. She contends that D.C. and M.R. intentionally miscategorized her timesheets and requested that she falsify them to reflect that she served her suspension on June 25 and July 23. After she refused, she claims that D.C. told her that she consulted with outside legal counsel, who informed her that she was within her legal rights to deny the appellant her salary and sick time. However, through a review of the outside legal counsel's billing invoices obtained through the Open Public Records Act, the appellant contends that it is clear that neither D.C. nor M.R. consulted outside legal counsel. The appellant posits that as the outside legal counsel was unlikely to offer free legal advice, M.R. and D.C.'s real motive was differential treatment and reprisal for previously filing a discrimination complaint with the DCR. The appellant also asserts that there was no legitimate business reason for M.R. and D.C. to deduct her salary and withhold her sick leave. She further states that she did not need to serve her suspension in October or November 2010 because she was not compensated for June 25 or July 23. The appellant also contends that the Executive Director erred in overruling the findings of the investigator. Finally, while the appellant acknowledges that she was reimbursed one sick day and compensated for the day she worked, she states that the settlement does not permit the appointing authority to treat her differently from others or retaliate against her. In support of her appeal, the appellant submits a copy of her complaint, copies of various emails, four faxes she sent to the investigator, her response to the investigation, and the aforementioned summary of the outside counsel fees from January 2008 to August 2010. It is noted that the appellant's summary does not include entries for January or February 2011.

In response, the appointing authority, represented by James Patterson, Esq., contends that the appellant's complaint is moot because she was compensated for June 25 and July 23 and therefore has not suffered any harm from the alleged discrimination or retaliation. Additionally, the appointing authority categorizes the appellant's request for relief in this matter as one for an injunction and a declaratory judgment. The appointing authority asserts that the Commission does not have the power to grant such relief. The appointing authority claims that even if the Commission has such authority, an injunction in this matter is inappropriate because the appellant has not demonstrated she would suffer irreparable harm without it. The appointing authority further asserts that D.C. and M.R. did not discriminate or retaliate against the appellant. It states that because the appellant was ultimately not required to serve the remaining two days of her suspension, there was no adverse employment action taken against her. Moreover, it states that M.R. and D.C.'s enforcing the settlement agreement presented a legitimate

business reason. Finally, the appointing authority contends that D.C.'s statement was insufficient to sustain the appellant's burden of proof that D.C. and M.R.'s actions were not motivated by a legitimate business reason. It additionally notes that the Executive Director, not the investigator, decides if a violation of the State Policy occurred. Thus, it contends that the investigator's opinion has no bearing in this matter. The appointing authority therefore maintains that there was no violation of the State Policy and requests that the Commission uphold its determination.

The appellant replies by reiterating that there was no legitimate business reason for deducting her salary and not compensating her for June 25 and July 23. She contends that the appointing authority fails to acknowledge that in total, five days were deducted from her salary. She states that she notified her supervisor that she wanted to change the remaining two days of her suspension to October or November 2010 and also indicated this on the appointing authority's calendar. Thus, she asserts that both M.R. and D.C. were aware of the change and acknowledged it when they accepted her timesheets in June and July. She contends that M.R. and D.C. could have simply resolved this issue by making the necessary "clerical adjustments" of giving back the sick day she used on June 25 and paying her for her work on July 23. Rather, she states that M.R. and D.C. bypassed their supervisors by making "unauthorized, duplicate payroll deductions." She also contends that they were insubordinate by seeking legal advice from outside legal counsel. The appellant states that the outside legal counsel was the only source of authority M.R. and D.C. relied upon and claims that outside legal counsel can neither authorize disciplinary action against an employee nor can it diminish an employee's due process rights.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides that under the State Policy, discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. *N.J.A.C.* 4A:7-3.1(b) states in part a violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another. Further, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a discriminatory practice, is prohibited by this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment

consequences based upon such involvement or be the subject of other retaliation. *See N.J.A.C.* 4A:7-3.1(h). Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C.* 4A:7-3.2(m)3.

The issue in the present matter is whether M.R. and D.C. discriminated and retaliated against the appellant by first deducting her pay for June 25 and July 23, 2010 and then later refusing to credit her with one sick day and one day of pay. The appointing authority's Executive Director determined that M.R. and D.C. took these actions because enforcing the settlement agreement was a legitimate business reason for deducting the appellant's salary and not reimbursing her for the sick day she used on June 25 and the day she worked on July 23. Upon its review of the record, the Commission finds that an adequate investigation was conducted and agrees with the Executive Director's determination that M.R. and D.C. did not discriminate or retaliate against the appellant in violation of the State Policy. It is clear from the record that M.R. and D.C. were unaware that the appellant requested that she serve the remaining two days of her suspension in October or November 2010. The record is also clear that by January 2011, the appellant had not served the remaining two days. Thus, in not compensating the appellant for June 25 and July 23, M.R. and D.C. sought to enforce the settlement agreement. In this regard, the appellant has not met her burden of proof that D.C. and M.R. discriminated or retaliated against her. Moreover, the appellant has also not met her burden of proof that D.C. and M.R.'s refusal to reimburse her for the sick leave she took and the day she worked was discriminatory or retaliatory. Rather, the unrefuted evidence indicates that D.C. did not have the authority to do so. Finally, regarding D.C.'s alleged statement that she probably would have handled the situation differently were it not the appellant who was involved, D.C. explained that she meant "no other employee would have done anything like this." However, D.C.'s comment on its face does not establish that the appellant was treated differently than other employees because of the appellant's inclusion in a protected category or for a previously filed discrimination complaint. Moreover, nothing else in the record suggests that D.C. and M.R. discriminated against the appellant due to her gender or age or retaliated against her for a previously filed discrimination complaint. While the appellant claims that D.C. and M.R. never consulted with outside legal counsel, the summary of the firm's billing invoices do not include January or February 2011, the months D.C. and M.R. most likely would have sought advice. Moreover, even if D.C. and M.R. did not contact outside legal counsel, this fact does not establish that they discriminated or retaliated against the appellant in violation of the State Policy. Therefore, the appellant has failed to meet her burden of proof in this matter. *See N.J.A.C.* 4A:7-3.2(m)3. Accordingly, under these circumstances, no basis exists to find a violation of the State Policy.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3rd DAY OF SEPTEMBER, 2014

Robert M. Czech
Chairperson
Civil Service Commission

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and
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Attachment

c: D.T.
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CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

Nancy Wittenberg
Executive Director

September 28, 2011

VIA REGULAR AND CERTIFIED MAIL

Ms. D[redacted] T[redacted]
[redacted]

Re: Complaint by D[redacted] T[redacted] Alleging Violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace

Dear Ms. T[redacted]:

This letter constitutes the Final Letter of Determination with respect to the above-referenced complaint which was dated March 18, 2011 and was submitted by you to my office.

Brief Summary of Parties' Position

D[redacted] T[redacted]

You allege that D[redacted] C[redacted] and M[redacted] R[redacted] wrongfully engaged in improper retaliation, harassment, and discrimination against you in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace ("Policy"). You contend they should have given you leave credit for two days (6/25/10 and 7/23/10) because, although you initially designated those days for leave without pay pursuant to an arbitration settlement, you subsequently changed your schedule, took 6/25/10 as a sick day and worked on 7/23/10.

D[redacted] C[redacted] and M[redacted] R[redacted]

Ms. C[redacted] and Ms. R[redacted] deny your allegations. They maintain that 6/25/10 and 7/23/10 were designated as days of leave without pay in accordance with an arbitration settlement reached in March 2010 concerning a grievance challenging your seven-day suspension. That settlement required you to be take three days leave without pay. To achieve this result, you scheduled three days of leave without pay. You took the first day on 5/6/10 and scheduled the next two days of leave without pay for 6/25/10 and 7/23/10. You later changed the second and third dates until some time in October or November, 2010. You did not inform Ms. C[redacted] or Ms. R[redacted] of this change. You did not take the two days of leave without pay in October or November as you had represented. Accordingly, in order to comply with the terms of the arbitration settlement, they did not make any adjustment in your leave entitlement. Ms. C[redacted]

and Ms. R[redacted] assert that they acted, upon the advice of outside labor counsel, to effect the arbitration settlement.

Brief Summary of Facts Developed During Investigation

At the request of the Commission, the factual investigation of your complaint was conducted by Pamela Lyons of the Department of Environmental Protection's Office of Equal Opportunity and Public Contract Assistance. The investigation established the following facts: you were required to take three days of leave without pay as part of the arbitration settlement entered into in March 2010; you had initially scheduled 6/25/10 and 7/23/10 as the second and third days for that leave; you decided not to take leave on those dates, but wanted to take the leave days later in the October or November of 2010; your supervisor apparently approved this request; Ms. C[redacted] and Ms. R[redacted] were not informed of this change until approximately nine months later; as a result 6/25/10 and 7/23/10 were counted as days of leave without pay; you did not take the remaining two days of leave without pay in the October or November of 2010 despite your initial intent to do so; when you requested leave credit for 6/25/10 and 7/23/10 Ms. C[redacted] and Ms. M[redacted] refused the request based upon the advice of labor counsel.

During the factual investigation, the investigator noted that your supervisor, John LaMacchia, believed that Ms. C[redacted] was inflexible in handling the issue. He stated that he told Ms. C[redacted] "If this were anyone else, you would be handling the situation differently." He stated that Ms. C[redacted] allegedly responded, "You are probably right." Ms. C[redacted] apparently did not recall if she made that statement, but explained to the investigator that if she said anything in response to the remark, it was because "no other employee would have done anything like this." Ms. C[redacted] further informed the investigator that she did not have the authority to credit you with a vacation day as had been requested. .

As mentioned in your Complaint, your union, CWA Local 1040, subsequently filed a grievance under the collective negotiations agreement contending that the Commission should have given you leave credit for 6/25/10 and 7/23/10. In response to the grievance, the Commission, on March 1, 2011, sent a letter to your union advising that an agreement had already been reached with you whereby you would be credited with a certain amount of sick time and leave time. Local 1040 did not appeal the response and, therefore, the grievance has been concluded. It appears that all of your demands for leave credit have been satisfied.

Final Determination

Based upon my review of this matter, I make the final determination that the allegations of your complaint were not substantiated and that a violation of the Policy did not occur.

The factual record does not support a conclusion that you were improperly retaliated against for having previously filed claims of discrimination and harassment.

The circumstances indicate that Ms. C[redacted] and Ms. [redacted] were motivated by a desire to effectuate the terms of the arbitration settlement. You had agreed as part of the March 2010 arbitration settlement, which reduced a seven-day suspension, to take three days leave without

pay. Nine months later, you had only taken one of the three days required by the settlement. You had first informed the Commission that the final two days of leave would be on 6/25/10 and 7/23/10. You later changed your mind and said you would take the leave days in October or November. Despite this statement, you never did take the last two days of leave without pay. In light of your actions, the responses of Ms. C[redacted] and Ms. M[redacted] were reasonable, were approved by the Commission's labor counsel, and were undertaken to achieve the legitimate business purposes of ensuring that you comply with the arbitration settlement. You have not demonstrated or even raised a credible inference that this legitimate business reason was not true and was, instead, a pretext for retaliation. The investigation did not reveal any other employees in similar circumstances who had received more favorable treatment.

I am aware that Investigator Lyons concluded there was sufficient evidence to believe there was a violation of the Policy. I strongly disagree with this conclusion. Ms. Lyons appears to have based her conclusion entirely upon the alleged response of Ms. C[redacted] to Mr. LaMacchia's statement that other employees would have been treated differently. Investigator Lyons appears to have believed that any suggestion of potential differential treatment, whether speculative and regardless of the reason, constituted illegal retaliation. More is required, however, before a violation of the Policy can be substantiated. In this case, in order to find a violation there must be substantial evidence in the record that disparate treatment actually occurred and that the real reason for the disparate treatment was retaliation for your having previously made complaints of discrimination and harassment. The alleged statement of Ms. C[redacted] does not constitute substantial evidence of either requirement.

If you disagree with this determination, you have the right to file an appeal with the Merit System Board within 20 days of your receipt of this letter. **The burden of proof is on the appellant.** The appeal must be in writing, state the reason(s) for the appeal and specify the relief requested. All materials presented at the department level and a copy of this determination letter must be included. The appeal should be submitted to the Merit System Board, P.O. Box 312, Trenton, NJ 08625-0312.

Very truly yours,

Nancy Wittenberg
Executive Director

cc: Division of EEO/AA
M[redacted] R[redacted]
D[redacted] C[redacted]