



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE
ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of W.C., Department of
Human Services

CSC Docket No. 2015-2935

Discrimination Appeal

ISSUED: NOV 30 2016 (CSM)

W.C., an Administrative Analyst 1 with the Department of Human Services (Human Services), appeals the determination of the Assistant Commissioner of Human Resources, that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

On June 1, 2012, A.C., filed a complaint with Human Services' Equal Employment Opportunity Office (EEO) alleging that the appellant violated the State Policy based on gender identity. Specifically, A.C. claimed that the appellant sent an e-mail intended for a former employee about a fictional sex change for him. The EEO investigated the matter, which included interviewing witnesses and reviewing documentation, and found that the appellant confirmed that he sent an e-mail to the former employee as well as to current employees regarding a fictional sex change. As a result of this determination, the appellant received counseling.

On appeal, the appellant initially contends that the EEO did not conduct a timely investigation of the matter. In this regard, he states that he became aware of the complaint on March 30, 2015, almost two years and ten months after A.C. filed it on June 1, 2012. He also states that he was advised by the investigator that the allegation was filed in 2012, but, due to "great backlogs" his office was "just getting around to addressing old cases." As such, the appellant requests that the matter be dismissed and the violation eliminated from his personnel file since the investigation was not completed within the maximum 180-day time frame as required by *N.J.A.C. 4A:7-3.2(1)*. With respect to the specifics of the allegations, the appellant states that the matter stems from a retirement celebration for J.R. in May

2012. At that gathering, the appellant explains that there was good natured "roasting" of J.R., which included comments and speeches that might be considered off-color. Several days after the celebration, J.R. sent out an e-mail to thank everyone for their well wishes and for the retirement dinner. Within that e-mail, J.R. indicated that he was "starting a new phase in my life." In response, the appellant sent a reply questioning his "going through with a sex change" and stating "that would qualify as starting a new phase in his life." The appellant acknowledges that he advised the investigator that his statement to J.R. was in the spirit of the retirement celebration and as a joke. Thereafter, the appellant states that he received an e-mail from J.L., and copied to A.C., in which she expressed her feelings of having been offended by his comments, to which he immediately apologized. Shortly after receiving J.L.'s e-mail, he received a second e-mail from another employee asking him if he realized that he had "replied all" in his response to J.R. The appellant reiterates that his comment was meant to only add some humor to the retirement celebration and that he would never make such a comment in his official correspondence. Giving his more than 35 years of State service, the appellant states that he is outraged by the violation being in his file and the fact that the matter took almost three years to investigate.

In response, the EEO states that the appellant confirmed to the investigator that he sent the e-mail to J.R. and to the other employees. With respect to the timeliness issue, the EEO explains that due to staffing issues, it was unable to complete the investigation within the recommended 180 days. However, after its staffing issues were resolved, the complaint was investigated. Regarding the merits of his case, although the appellant claims that he meant the comment as a joke and there was no malicious intent, under the State Policy, lack of intent is irrelevant since a violation can occur in the absence of intent. Additionally, while the appellant's comments were only directed to J.R., it was copied to other employees who were offended by the statements. As the State Policy prohibits third party harassment, the EEO maintains that its determination is correct.

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(a)2 provides that the State Policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in (a) above that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do his or

her job. Third party harassment based upon any of the aforementioned protected categories is prohibited by the policy. Additionally, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)(3).*

N.J.A.C. 4A:7-3.1(b) provides that it is a violation of this policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, or ethnic background or any other protected category set forth in (a) above which have the effect of harassing an employee or creating a hostile work environment. *A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.*

N.J.A.C. 4A:7-3.2(1)2 and *N.J.A.C. 4A:7-3.2(1)3* indicated that the investigation of a complaint shall be completed no later than 120 days after the initial intake of the complaint and completion of the investigation and issuance of the final letter determination may be extended for up to 60 additional days in cases involving exceptional circumstances.

Initially, although the EEO has been experiencing staffing issues which caused delay in determination, this is not a basis on which to invalidate the findings of the investigation. While the EEO should have notified the appellant that a complaint had been filed against him in a timely manner, it cannot be ignored that when the long term staffing issues had been resolved, it conducted a thorough and impartial investigation and the appellant admitted to the complained of behavior. Nevertheless, the EEO is directed to take steps to ensure State Policy complaints and investigations are completed in the time frames required by *N.J.A.C. 4A:7-3.2(1)2* and *N.J.A.C. 4A:7-3.2(1)3*.

The Commission has conducted a review of the record and finds that the appellant has not established that he did not violate the State Policy. The appellant admitted to composing the statements regarding gender identity or expression contained in the e-mail and was advised at that time by J.L. that she was offended by the statement. As noted above, a third party violation of the State Policy can occur even if there was no intent on the part of an individual to harass or demean another. Therefore, since it is un rebutted that the appellant made the statements in his e-mail, he has not sustained his burden of proof in this matter.

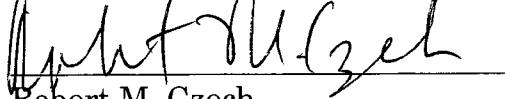
Accordingly, the Commission finds that the EED's investigation was thorough and impartial, and the record supports a finding that there was a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

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 23RD DAY OF NOVEMBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: W.C.
Christina Mongon
Rachel L. Gervais
Mamta Patel
Records Center