

B-47

STATE OF NEW JERSEY

In the Matter of C.G, Department of
Transportation

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2015-3130

Discrimination Appeal

ISSUED: **NOV 06 2015** (SLK)

C.G., a Secretarial Assistant 1 (Non-Stenographic) with the Department of Transportation, appeals the attached decision of the Deputy Commissioner, which found that the appellant did not 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, C.G., a female, filed a complaint with the Division of Civil Rights and Affirmative Action (DCR/AA) alleging discrimination based on familial status and a hostile work environment. Specifically, C.G. alleged that D.M., a former Assistant Commissioner,¹ abruptly reassigned her out of the division for making a mistake despite no previous performance issues or disciplinary action; denied her a promotional opportunity; was derogatory and spoke down to her, calling her stupid or dumb; and resented her family issues and that she called her daughters in the afternoon to check on them. Additionally, C.G. alleged that D.M. failed to report her allegation of sexual harassment regarding a male co-worker. The DCR/AA conducted an investigation which included reviewing documents and interviewing witnesses. The investigation revealed that C.G. was reassigned due to a breach of confidentiality, the office environment was fast paced, hectic and intense, and D.M. was often described as a strong leader, a perfectionist, demanding, critical, and a bully. The investigation found that the appellant was not singled out as D.M. spoke tersely and critical to both male and female employees and spoke to all staff about the time they spent on personal calls at work. Therefore, the investigation was unable to substantiate the appellant's allegations regarding familial status and a hostile work environment. However, the

¹ Personnel records indicate that D.M. retired on 1/1/15.

investigation found that D.M. did not report an alleged violation of the State Policy to the DCR/AA and that matter was referred to management for appropriate action.

On appeal, the appellant states that she did not file her discrimination complaint against D.M. on the basis of her family issues. Instead, her claim is based on denial of promotional opportunities. Specially, the appellant claims that D.M. always said, "[W]hat [is] a couple thousand dollars going to do for you?" Regardless, D.M. requested a pre-qualification evaluation with the Division of Selection Services² (Selection Services) so that she could start the process of getting promoted to the Administrative Assistant 2 title. The appellant notes that in May 2012, Selection Services determined that she was performing the duties of an Administrative Assistant 2. However, instead of being promoted, some of her duties were reassigned and D.M. advised her that M.G.'s³ promotion was his first priority and that her promotion would have to wait. Thereafter, D.M. suggested that she apply for a position as an Executive Secretary⁴ and her appointment was in the process of being approved. During this process, the appellant states that she received a letter in the normal course of her duties that was not marked confidential, but was from "a concerned citizen" who indicated that an employee who she had previously worked for had gone on an interview. The appellant indicates that she advised this employee about the letter and that she was going to give it to D.M. Although she did not believe that she had broken any rules or protocol in doing this, D.M. advised her that she mishandled the situation which resulted in her being reassigned and not being promoted to Executive Secretary.

The appellant asserts that it was unfair to reassign her based on a minor mistake, particularly since she has no disciplinary actions taken against her in her 26 years of employment. Additionally, the appellant states that D.M. called her "a rough diamond" and "STAR" but only possessing the "S-T" as she has not yet earned the "A-R," as she could be "really dumb sometimes". Further, she presents that she spoke with a Confidential Assistant who indicated he thought that her reassignment was harsh and that the worst that she deserved was a write-up. The appellant submits documents demonstrating that she had always received positive performance evaluations and comments during the 10 years that she worked in that office. Additionally, the appellant emphasizes that although D.M. spoke to M.G. about her sexual harassment claim, he failed to report it to the DCR/AA. Rather, she claims that the aforementioned Confidential Assistant took her to the County Prosecutor's Office to report the matter. As a remedy, the appellant requests that she be appointed to Executive Secretary even though she has not been allowed to return to the unit.

² Now known as the Division of Agency Services.

³ In a separate matter, C.G. filed a discrimination appeal against M.G., an Administrative Analyst 2.

⁴ It appears that the appellant is referring to the title of Executive Secretarial Assistant.

In response, the DCR/AA presents that during its initial meeting with the appellant, she stated that she was treated unfairly as she was not promoted after two different opportunities arose and then she was abruptly reassigned. Although D.M. told her that she should have known that the letter from the "concerned citizen" was a confidential matter, the appellant explained that she was a team player who had previously worked for the employee who was the subject of the letter and therefore felt a degree of loyalty to him. The DCR/AA indicates that the appellant alleged that D.M. created a hostile work environment because he was a bully who created an atmosphere of intimidation, made inappropriate comments, such as calling her dumb and that to be promoted she needed to be a "STAR", but she only earned the "S-T" and not the "A-R." Then, after reviewing the 19 protected categories under the State Policy, the appellant opted to file a complaint on the basis of familial status as she believed that D.M. resented that she had family issues and would call her daughters every afternoon to check on them. Additionally, the appellant advised that she confided to a co-worker that she was being sexually harassed by another employee and this co-worker advised D.M. of the allegation. However, although D.M. spoke to the accused employee who then apologized to the appellant, D.M. failed to report the allegation to the DCR/AA.

Thereafter, it interviewed D.M. who denied the allegations and maintained that the appellant's complaint was in retaliation for being reassigned. D.M. described their relationship as tense and that he did not think that she was loyal to him. D.M. indicated that the appellant would help other staff members before helping him and that he had to note on her performance review that she had to focus on finishing his work before helping others. Additionally, D.M. represented that he tried to inspire the appellant so she could advance and outlined ways she could improve her skills. D.M. admitted that he has a strong personality and expected staff to work hard, but he denied yelling at, bullying, or calling the appellant dumb. D.M. explained that he would tell the appellant that to be a "STAR," she needed to do more. D.M. agreed that he had concerns regarding the appellant's family issues, tried to be supportive, and tolerated her frequent personal phone calls and texting. However, this became an issue when he asked her to do something and she would not put her call on hold. D.M. stated that the appellant indicated that she only showed the letter in question to the employee who was the subject of it because he was standing over her shoulder and read it. However, when D.M. approached the individual, the employee said that the appellant came into his office and showed him the letter in front of other employees. Therefore, D.M. felt that the incident was a breach of trust and confidentiality and a decision was made to immediately reassign her. During the interview, D.M. confirmed that another employee brought the appellant's sexual harassment claim about a co-worker's comments regarding a dress he would buy for her to his attention. D.M. stated that he met with the accused employee who apologized and the appellant indicated that she did not want to pursue the matter.

The DCR/AA also interviewed 10 witnesses. The witnesses agreed that the appellant was a team player, but many individuals indicated that her practices became a problem when there was an appearance that she spent too much time with one employee, focusing on his work rather than D.M.'s. The witnesses described D.M. as intense and demanding. However, most witnesses did not believe that the appellant was singled out or subjected to disparate treatment as D.M. was demanding and critical towards all staff. Several witnesses thought that D.M. treated her well, but acknowledged that they argued, while others thought that he yelled at and berated the appellant. Four witnesses believed that D.M. was demanding, but that the appellant was not treated less fairly than other employees. Four witnesses thought that the appellant was subjected to gender and familial status discrimination; however, these witnesses were contradictory, stating that it was a hostile work environment for men as well and that D.M. dealt with everyone similarly. Many witnesses confirmed that D.M. frequently complained about personal calls, but insisted that the appellant was not singled out. A number of witnesses stated that D.M. tried to accommodate her, allowing her to bring her children to work or to leave work early when she had baby-sitting issues. Five witnesses indicated that they were unaware of the appellant's sexual harassment claim while several witnesses were aware of the allegation. One witness stated that D.M. was aware of the complaint, but failed to report it while another thought he tried to bring the parties together to resolve it. A third witness stated that the appellant advised D.M. not to pursue the matter.

Based on its investigation, DCR/AA determined that the appellant was reassigned due to a breach of confidentiality and not because of her familial status or any other discriminatory reason. Further, the investigation was unable to substantiate the allegation that D.M. created a hostile work environment as creating an office environment that is hectic, intense, demanding, critical, and even bullying staff is not conduct that implicates the State Policy. Moreover, the investigation concluded that D.M.'s conduct was directed towards all staff and not just toward the appellant. Additionally, witnesses confirmed that both male and female employees received similar treatment and other employees were advised about personal calls and expected to stay late when necessary. The investigation found that rather than questioning individuals about the appellant's sexual harassment complaint, D.M. should have referred the matter to the DCR/AA for an investigation. However, as D.M. retired, the DCR/AA made recommendations to management to ensure compliance with the State Policy.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that employment discrimination or harassment based upon a protected category, such as familial status, is prohibited and will not be tolerated.

N.J.A.C. 4A:7-3.1(e) states that supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination of employment.

N.J.A.C. 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Commission has conducted a review of the record in this matter and finds that the appellant has not established that D.M. violated the State Policy on the basis of her familial status. On appeal, the appellant indicated that she did not file her complaint on the basis of her familial status, but rather, that D.M.'s actions against her resulted in lost promotional opportunities. However, the investigation revealed that men and woman were treated in the same demanding fashion by D.M. and that D.M. complained about other employees and not just the appellant when they made personal phone calls at work. The appellant also claims that she was discriminated against by D.M as he treated her unfairly when he stopped the process of her receiving one promotional opportunity so that he could promote another employee and then he had her immediately reassigned due to what she characterizes as a minor mistake, which resulted in her not receiving a second promotional opportunity. However, the investigation revealed that D.M. reassigned the appellant because he believed that she breached confidentiality and violated his trust when she informed a co-worker about a letter which was intended for him which indicated that the co-worker was interviewing for a position outside the organization. Further, the investigation revealed that another Assistant Commissioner agreed that the appellant had breached confidentiality and initiated her reassignment. Consequently, there is no evidence on the record that the appellant was not promoted and was reassigned based on her being a member of a protected class.

The Commission is in agreement with the determination that D.M. violated the State Policy by not reporting C.G.'s allegation that another employee sexually harassed her to the DCR/AA for an investigation. In this regard, *N.J.A.C.* 4A:7-3.1(e) provides that that supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer. Therefore, D.M. needed to immediately refer the allegation to the DCR/AA once he learned of the allegation regardless of who brought the allegation to his attention and even if C.G. did not wish to pursue it. Even though D.M. is now retired, it was appropriate for the DCR/AA to make recommendations to the appointing authority's management to help prevent future violations from occurring.

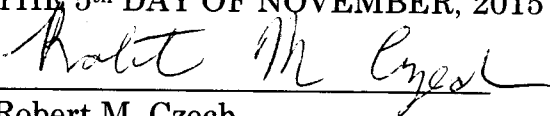
One additional matter needs to be addressed. *N.J.A.C. 4A:4-7.7* provides that reassignments shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. In the matter at hand, the appellant was reassigned based on an asserted breach of confidentiality. In other words, the appellant was reassigned based on an asserted performance issue. Consequently, it was inappropriate to reassign the appellant without first issuing a Preliminary Notice of Disciplinary Action (PDNA) and utilizing disciplinary procedures. *See In the Matter of Tameshia Russell* (CSC, decided August 17, 2011) *aff'd on reconsideration* (CSC, decided May 2, 2012) (Commission ordered appointing authority to either institute disciplinary procedures or return the appellant to her prior position where the appointing authority claimed the reassignment was due to her "performance issues"). Therefore, the appointing authority shall either initiate disciplinary procedures and issue C.G. a PNDA or return her to her prior assignment as a Secretarial Assistant 1 (Non-Stenographic) for the individual currently performing D.M.'s position in Transportation Systems Management. Accordingly, within 20 days of the issuance of this decision, the appointing authority shall issue a PDNA. If the appointing authority does not issue a PDNA within 20 days of this decision, then C.G. is to be returned to her assignment as a Secretarial Assistant 1 (Non-Stenographic) for the individual currently performing D.M.'s position in Transportation Systems Management.

ORDER

Therefore, it is ordered that this appeal be denied in part. The Commission further orders that the Department of Transportation shall either initiate disciplinary procedures and issue C.G. a PNDA or return her to her prior assignment as a Secretarial Assistant 1 (Non-Stenographic) for the individual currently performing D.M.'s position in Transportation Systems Management within 20 days of the issuance of this decision.

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 5th DAY OF NOVEMBER, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c: C.G.
Linda Legge
Michele Shapiro
Mamta Patel
Joseph Gambino



State of New Jersey

DEPARTMENT OF TRANSPORTATION

P.O. BOX 600

TRENTON, NJ 08625-0600

CHRIS CHRISTIE

Governor

KIM GUADAGNO

Lt. Governor

JAMIE FOX
Commissioner

May 12, 2015

Via Certified and Regular Mail

C [REDACTED] G [REDACTED]
[REDACTED]
[REDACTED]

Re: EEO Discrimination Complaint

Dear Ms. G [REDACTED]:

The Department of Transportation's Division of Civil Rights and Affirmative Action investigated your allegations that D [REDACTED] M [REDACTED], former Assistant Commissioner, Transportation Systems Management, subjected you to familial status discrimination and a hostile work environment in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace ("State Policy").

In your complaint you alleged Mr. M [REDACTED] had you abruptly transferred out of the division for making a mistake despite no previous performance issues or disciplinary actions. You indicated because of the transfer you were denied a promotional opportunity.

You alleged Mr. M [REDACTED] was derogatory and spoke down to you, calling you stupid or dumb. You alleged he resented your family issues and that you called your daughters in the afternoon to check on them. Although your cell phone was at hand, you insisted it never took your time or attention away from your work performance. In addition, you alleged Mr. M [REDACTED] failed to follow policy and did not report your allegations of sexual harassment regarding a co-worker.

The Division of Civil Rights and Affirmative Action conducted a thorough investigation during which many individuals were interviewed. The investigation revealed you were transferred due to a breach of confidentiality and not because of your familial status.

Familial status discrimination in violation of the State Policy involves treating someone unfavorably simply because of that person's familial status (e.g., having family responsibilities, generally those associated with caregiving).

A hostile work environment, as it relates to the State Policy is a work environment where prohibited discrimination exists which may be in the form of harassment against an individual or a group of individuals because of their membership in a protected class (e.g., sex/gender/familial status). A hostile work environment can be created by a supervisor or coworker whose discriminatory actions or behavior alter the terms, conditions and/or reasonable expectations of a work environment.

Witnesses indicated the office environment was fast paced, hectic and intense, with a heavy workload. Although the environment was often described as hostile, it did not implicate the State Policy because the conduct was not based on any of the protected categories.

Witnesses described Mr. M [REDACTED] as a strong leader, a perfectionist, demanding and critical. Nonetheless, witnesses believed Mr. M [REDACTED] was demanding and critical of all staff, and that both male and female employees received treatment similar to what you experienced. Witnesses did not believe you were singled out or subjected to disparate treatment because of your familial status. Witnesses recalled seeing Mr. M [REDACTED] speak tersely and critically to other individuals in the office. In addition, other employees were identified who were also advised about the time they spent on personal calls at work.

Mr. M [REDACTED] set high expectations in the workplace and pushed employees to obtain their best work performance. While witnesses often characterized Mr. M [REDACTED] as a bully, they indicated his behavior was directed toward all personnel and did not target an employee because of their membership in a protected category. Bullying is not conduct which is addressed in the State Policy.

The investigation did not disclose any information to indicate any action taken against you, including your transfer, was discriminatory. The investigation was unable to substantiate your allegation of familial status discrimination and a hostile work environment. However, under the New Jersey State Policy, supervisors are charged with the responsibility to maintain a work environment free from any form of prohibited discrimination or harassment. As a supervisor and Assistant Commissioner, Mr. M [REDACTED] was obligated to refer all alleged violations of the State Policy to Civil Rights; therefore, we have made recommendations to be considered by management.

If you disagree with this determination, pursuant to N.J.A.C. 4A:7-3.2, you have the right to appeal this decision. You must submit a written appeal to the New Jersey Civil Service

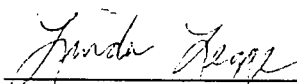
Ms. G [REDACTED]
May 12, 2015
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Commission, Division of Merit System Practices and Labor Relations, Written Record Appeals Unit, P. O. Box 312, Trenton, NJ 08625-0312, postmarked or delivered within 20 days of your receipt of this determination. Your appeal must include a copy of this determination, the reason for the appeal and the specific relief requested. Be advised that effective July 1, 2010, there is a \$20 fee for appeals. Please include a check or money order along with your appeal, payable to NJCSC. Persons receiving public assistance and those qualifying for NJCSC Veterans Preference are exempt from this fee.

Please be advised that the State Anti-Discrimination Policy prohibits retaliation against any employee who alleges that she or he was the victim of discrimination or harassment, provides information in the course of an investigation into claims of discrimination or harassment in the workplace or opposes a discriminatory practice. Please immediately contact the Division of Civil Rights and Affirmative Action at 609-530-3009, if you believe that you have been the victim of retaliation or if you have any future complaints of discrimination or harassment. Finally, we remind you that all aspects of EEO complaints are considered highly sensitive and must be kept confidential. Consequently, you should not discuss this matter, including its outcome with anyone who does not have a business reason to be involved in this matter. Persons who violate the confidentiality provision of the State Policy may be subject to discipline.

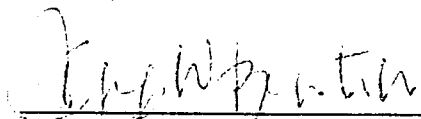
If you have any questions or concerns, please do not hesitate to contact the Division of Civil Rights and Affirmative Action at 609-530-3009.

Sincerely,



Linda Legge, Executive Director
Division of Civil Rights and Affirmative Action

In Concurrence,



Joseph Bertoni, Deputy Commissioner

c: Jamie Fox, Commissioner
Mamta Patel, Director, Division of EEO/AA - Civil Service Commission