



STATE OF NEW JERSEY

In the Matter of D.A.,
Department of Health

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2016-3840

Discrimination Appeal

ISSUED: APR 07 2017 (JET)

D.A., a Senior Technician, Management Information Systems, with the Department of Health, appeals the determination by the Chief of Staff, Department of Health, which found sufficient evidence that she had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The Department of Health's Office of Workplace Diversity and Equity Services (ODES) received an allegation on October 2, 2015, and a formal complaint on January 5, 2016, alleging that, approximately one and one half years prior to when the complaint was filed, the appellant approached a male coworker on three separate occasions and made sexually inappropriate statements about C.D., a female coworker.

After an investigation was conducted, which included interviewing two witnesses and reviewing the available documentation, the ODES issued its April 11, 2016 determination which substantiated that the appellant violated the State Policy. Specifically, the investigation found that, on the first occasion, the appellant asked the male coworker "How is your marriage [and] What would you think about having a fling with my friend here (C.D.)." It found that, on the second occasion, the appellant approached the male coworker and stated that C.D. "has a strong sexual appetite" and "needs someone to be with," and stated that they would make a good couple. The investigation found that, on the third occasion, the appellant approached the male employee about C.D., and in response the male employee asked the appellant to stop her behavior and she obliged.

Additionally, the ODES determination explained that, although the male coworker's account varied slightly from the complainant's version of events, the accounts were consistent pertaining to the alleged incidents by the appellant. In this regard, the determination indicated that the male coworker did not recall that the appellant used the word "fling." Accordingly, the appellant was referred for counseling.

On appeal, the appellant denies that she subjected K.B.¹ and C.D. to sexual harassment, and asserts that she did not mention K.B.'s marriage or state that he should start a fling with C.D.² She also denies stating that C.D. had slept with a director. The appellant explains that K.B. is C.D.'s immediate supervisor and is using his authority to boost her credibility in this matter. Further, the appellant states that K.B. and C.D. are close friends and are fabricating stories against her. The appellant contends that, since neither K.B. nor C.D. can precisely remember the incidents that occurred, the allegations against her cannot be sustained.³ Moreover, the appellant avers that, during several conversations, K.B. stated that he was concerned about C.D., and he never asked her to stop talking about C.D.

Additionally, the appellant explains that she and C.D. were friends and that C.D. frequently discusses her personal life in the lunchroom.⁴ She states that C.D. asked her at some point if the appellant was attracted to anyone at work. However, the appellant states that their friendship ended at some point in 2014 when she was labeled as a "whistle blower." She states that C.D. has made two false complaints against her since that time and continues to harass her.⁵ Further, the appellant asserts that C.D. has made false allegations against other co-workers. In this regard, the appellant contends that C.D. accused an employee of engaging in sexual conversations at work, and as a result, various employees talked about the incident.⁶ The appellant asserts that C.D. neglected her duties and used an office computer to send letters with sexual content to a person with whom she had a romantic interest. She adds that C.D. printed the inappropriate letters from her work computer. Moreover, the appellant asserts that, as a result of the allegations

¹ The appellant contends that K.B. is the male coworker who is mentioned in ODES' determination.

² The appellant notes that she had nothing to gain by knowing that K.B. wanted a fling with C.D., and she believes K.B. is a well-grounded family man.

³ The appellant notes that, except for C.D. and K.B., there were no other witnesses to the alleged incidents of sexual harassment.

⁴ The appellant indicates that C.D. stated that she was violated by several men.

⁵ The appellant notes that the complaints were filed on January 17, 2017 and on January 27, 2017. The appellant claims that the complaints are being investigated by the Office of Employee Relations and are not yet resolved. The appellant states that the complaints involve incidents of workplace violence.

⁶ The appellant names various employees who may have overheard C.D. in the lunchroom. C.D. had many conversations in the employee break room, including M.C. (now retired), P.B., M.B., D.L., M.L., P.A., C.A., and M.M. The appellant states that she will explain the details of the conversations "in person."

against her, she received medical care for extreme anxiety and counseling, and she believes that she is being subjected to retaliation.⁷

In response, the ODES maintains that the investigation was properly conducted and the findings in its April 11, 2016 determination were proper.⁸ It explains that, on October 2, 2015, during an interview for a separate but related matter, C.D. reported that, at some point in the last year and a half, the appellant and C.D. were in an office, and the appellant called over the male employee and asked "how his marriage was" and "what do you think about having a fling with my friend (C.D.) here." The ODES explains that, on January 5, 2016, C.D. submitted a formal complaint, alleging that the appellant stated to her, "I'm going to do something just go with it" and that the appellant said loudly, "So I heard you (C.D.) are sleeping with the director." The ODES adds that C.D. reported that such statements caught the attention of other employees. In addition, C.D. reported the aforementioned allegations in the formal complaint, alleging that the appellant asked a male coworker if he was happy with his marriage, and then asked him if he would consider a relationship with C.D. The ODES adds that C.D. indicated that she did not immediately report the incidents because the appellant was her friend. However, after C.D. found out that the appellant had reported her for the alleged inappropriate sexual messages on her computer, C.D. decided to reveal the information. Moreover, the ODES asserts that, in response to the allegations, it interviewed the appellant, and she denied making statements to the male coworker, including asking him if he was happy with his marriage and if he was interested in a "fling" with C.D.

Additionally, the ODES contends that the investigation revealed that the male coworker was C.D.'s supervisor at the time. It adds that the male coworker acknowledged that the appellant and C.D. frequently discussed personal information with each other. The male coworker also reported that he remembered the appellant asking him at some point, "how is your marriage" and the appellant making a statement similar to "What would you think about having a fling with my

⁷ The appellant notes that she was on medical leave from November 16, 2015 through December 14, 2015. In support of her arguments, she includes a copy of a Preliminary Notice of Disciplinary Action (PNDA) dated October 20, 2015. She was charged with conduct unbecoming an employee and other sufficient cause – misstatement of a material fact during the course of an investigation, and breach of confidentiality.

⁸ Initially, the ODES asserts that C.D. initially filed a grievance with the Office of Human Resources in 2015, alleging that the appellant subjected her to a hostile work environment. Accordingly, Human Resources conducted an investigation of that matter. Thereafter, the ODES received a referral from Employee Relations, alleging that the appellant stated that C.D. maintained sexually explicit messages on her work computer and printed such messages at work. Accordingly, the ODES initiated an investigation of that matter. It adds that, during that investigation, C.D. alleged that the appellant asked a male coworker how his marriage was. C.D. also alleged during the investigation that the appellant stated, "What would you think about having a fling with my friend C.D. here." Accordingly, the ODES investigated the allegations of sexual harassment and issued the determination that is the subject of this appeal.

friend (C.D.).” The ODES adds that the male coworker did not recall the appellant using the word “fling.” The ODES asserts that the male employee confirmed that the appellant stated that he and C.D. would make a good couple and C.D. has a strong sexual appetite. It adds that the male coworker reported that the appellant did not bring the subject up again after he asked her to stop talking about C.D.

The ODES maintains that, although the male coworker’s statements slightly varied from C.D.’s version of events, both accounts of the incidents were consistent with the allegations. In this regard, the male coworker confirmed that the appellant approached him on three occasions suggesting that he and C.D. should become involved in a sexual relationship. As such, there was sufficient information to substantiate that the appellant made the sexually suggestive comments in violation of the State Policy. Moreover, the ODES asserts that the appellant was appropriately referred for counseling since sexually inappropriate comments are prohibited by the zero tolerance language in the State Policy.

CONCLUSION

It is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories. See *N.J.A.C. 4A:7-3.1(a)3*. The protected categories include 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 heredity cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. See *N.J.A.C. 4A:7-3.1(a)*. *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:7-3.1(c) provides that it is a violation of the State Policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex harassment. Further, *N.J.A.C. 4A:7-3.1(c)1* provides that sexual harassment is defined as unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Examples of prohibited behaviors that may constitute sexual harassment and are therefore a violation of this policy include, but are not limited to, inappropriate touching, generalized gender-based remarks and comments and verbal, written or electronic sexually suggestive or obscene comments, jokes or propositions including letters, notes, e-mail, text messages,

invitations, gestures or inappropriate comments about a person's clothing. See *N.J.A.C. 4A:7-3.1(c)2i* and *ii*.

N.J.A.C. 4A:7-3.1(e) indicates that supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. 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. For purposes of this section and *N.J.A.C. 4A:7-3.2*, a supervisor is broadly defined to include any manager or other individual who has authority to control the work environment of any other staff member (for example, a project leader). *N.J.A.C. 4A:7-3.2(d)* provides that supervisory employees shall immediately report all alleged violations of the State Policy to the EEO/AA Officer. Such a report shall include both alleged violations reported to a supervisor, and those alleged violations directly observed by the supervisor.

Additionally, 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 the State Policy. Examples of such retaliatory actions include, but are not limited to, termination of an employee; failing to promote an employee; altering an employee's work assignment for reasons other than legitimate business reasons; imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons; or ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees). See *N.J.A.C. 4A:7-3.1(h)*.

N.J.A.C. 4A:7-3.2(1)2 provides that the investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint. Additionally, *N.J.A.C. 4A:7-3.2(1)3* states that the time for completion of the investigation and the issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of Equal Employment Opportunity and Affirmative Action and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension.

Initially, the appellant argues that that the allegations against her were reported at least a year and a half before a formal complaint was filed. However, such information does not change the outcome of the case. In this regard, in

October 2015, the ODES initially received C.D.'s allegation that the appellant's language violated the State Policy. Thereafter, C.D. filed the formal complaint on January 5, 2016. Although the ODES does not specifically explain why there was a three month delay from the time it received C.D.'s initial allegation in October 2015 to the time she actually filed the formal complaint, the April 11, 2016 determination was not issued beyond the 120-day time frame. Given that C.D.'s formal complaint was received in January 2016, the ODES appropriately issued its determination on April 11, 2016. Moreover, any delay that may have occurred due to an administrative oversight does not evidence that the investigation was not impartial or thorough.

Although it also appears that the appellant is arguing that the complaint should not have been investigated since C.D. reported the incidents over a year and half after they occurred, such information is of no moment. Pursuant to the above rules, when an allegation of a violation of the State Policy is reported, the ODES is required to conduct an investigation. Although there are specific timeframes established to complete such an investigation, the rules do not prevent an allegation from being investigated due to the incident being remote in time. In other words, the fact that the incidents in this matter occurred a year and half before they were formally reported does not establish that they were improperly investigated or that this matter should be dismissed. As discussed more fully below, the ODES properly conducted an investigation of C.D.'s complaint.

In this matter, the record reflects that the ODES's determination was proper. Although the appellant disputes that she did not direct any sexually suggestive comments to the male coworker, she did not present any substantive information that would somehow change the outcome of the case. The ODES interviewed two witnesses who confirmed that the appellant directed inappropriate statements of a sexual nature to a male coworker. Such comments constitute sexual harassment and cannot be tolerated under the zero tolerance rules of the State Policy. The appellant's arguments that C.D. and the male employee did not remember the precise language at the time of the incident does not establish the appellant's contentions, as the information that they provided was substantially similar to the information provided in the formal complaint. Although the male employee did not recall stating that the appellant used the word "fling," he remembered sufficient information that language was used similar to "what do you think about having a fling with my friend here." Clearly, the use of such language can be considered to be inappropriate sexually based language and inappropriate under the State Policy. Even if the appellant used such language in the context of a joke, her intent was irrelevant. As noted above, a violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another. Moreover, there is no evidence that C.D. and the male coworker fabricated the allegations. As such, the record contains sufficient evidence to substantiate a violation of the State Policy. Further, based on the record in this matter, the Commission finds that the

corrective action taken was the appropriate remedy, and no further action is required.

With respect to the appellant's arguments that C.D. subjected her to sexually inappropriate comments, although there appears to be separate outstanding matters being investigated by ODES and the Office of Human Resources, there is no evidence that the appellant filed a complaint for the incidents complained about in this matter. Other than the appellant's allegations in this matter, she has failed to provide any substantive information to show that she was sexually harassed or discriminated against based on the protected categories listed in the State Policy. Accordingly, there is no substantive evidence presented in this matter to substantiate her claims that she was harassed by C.D. However, if the appellant has not already done so, she may file a complaint of the alleged incident of sexual harassment so that the ODES can conduct a full investigation. See *N.J.A.C. 4A:7-3.1*.

Additionally, there is no evidence in this matter to show that the appellant was retaliated against. Other than her mere allegations, she did not provide any information to confirm that she was retaliated against in violation of the State Policy. As noted above, there appears to be outstanding matters involving the appellant that are being investigated by ODES and the Office of Human Resources. It also appears that, as a result of such investigations, C.D. filed the formal complaint on January 5, 2016, alleging the incidents that are the subject of this matter. However, there is no evidence that the appellant's assignments were altered for other than legitimate business reasons, that disciplinary action was initiated for reasons other than legitimate business reasons, that she was ostracized in the workplace, or that she was not promoted as a result of those investigations. With respect to the the October 20, 2015 PNDA, it was issued before the allegations in this matter were reported and it does not appear to be directly related to the issues in this case. As such, it cannot be concluded that she has been subjected to retaliation.

One final matter warrants comment. The male coworker referenced in this matter is apparently assigned to supervise C.D. As a supervisor, he is held to a higher standard under the State Policy and must report both alleged violations reported to him and directly observed by him. A supervisor's role under the State Policy is to make every effort to maintain a work environment that is free from any form of prohibited discrimination and harassment. See *In the Matter of Paul Grayson* (CSC, decided October 6, 2010) (Supervisor held to a higher standard under State Policy and must report both alleged violations reported to him and directly observed by him). Since the male coworker clearly had knowledge of the incidents at least a year and half before C.D. filed her official complaint in January 2016, it is unclear why he did not immediately report the incidents when they occurred. It is also unclear if the male coworker withheld any information that

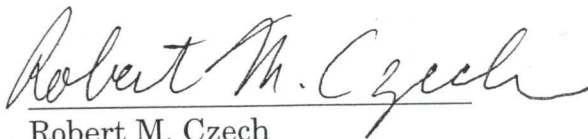
should have been disclosed in this matter. Thus, the Commission directs the ODES to investigate this issue to determine why he did not immediately report the incidents in his supervisory capacity. Additionally, the Commission warns the male coworker that any future reports or observations of matters that may be violations of the State Policy that he receives must immediately be reported to ODES.

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 5th DAY OF APRIL, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

c: D.A.
Neela Sookdeo
Mamta Patel