



**STATE OF NEW JERSEY**

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

In the Matter of N.B., Department of  
Labor and Workforce Development

CSC Docket No. 2018-1467

Discrimination Appeal

**ISSUED: MAY 25, 2018 (SLK)**

N.B., a Head Clerk with the Department of Labor and Workforce Development, appeals the decision of a former Equal Employment Officer (EEO), which found that she violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, J.M., a female Vocational Rehabilitation Counselor 1, filed a sexual harassment complaint against N.B., who is female, alleging that while reprimanding her for dress code violations, N.B. stated, "I'm not sure if you have been doing something different or eating something different or what, but your butt looks extra jiggly today." The investigation revealed that while N.B. denied making the statement, a witness overheard N.B. saying that no one can say "jiggly" anymore or it turns into an issue in the office. Consequently, it was determined that N.B. violated the State Policy.

On appeal, N.B. explains that she, the Office Manager, and J.M.'s supervisor had a meeting with J.M. to discuss her dress code violations. However, N.B. denies ever making the "jiggly" comment. Instead, N.B. claims that it was J.M. who stated during the meeting that she could have possibly eaten too much while on vacation and that made her dress appear tighter and/or shorter. She claims that the other superiors who were present in the meeting can confirm that she did not make the comment in question. N.B. presents that in contrast to the statements made in the determination letter, she is not J.M.'s supervisor and was only asked to join the

meeting to provide a third-party objective perspective. She cites case law to support her claim that her actions in reprimanding an employee about repeated dress code violations did not create a hostile work environment. N.B. also complained that the Investigator advised her that she could not have a lawyer present during her interview and she was not informed what the meeting was about. N.B. requests that her appeal be granted, or in the alternative, she is seeking a hearing on this matter.

In response, the Office of Diversity and Compliance (OD&C) presents that during her interview in response to the allegations, N.B. was not forthcoming. In support of this assertion, it highlights that N.B. claims on appeal that the Investigator advised her that she could not have a lawyer present for the interview. However, as illustrated in the excerpt submitted from her interview, the Investigator specifically informed her that she had the right to have an attorney present and she replied, "Not right now." Further, the OD&C notes that the other superiors who were present during the incident stated that they could not recall what N.B. said rather than outright deny the allegations as N.B. claims. Regardless, the Investigator found that the Office Manager and J.M.'s supervisor were not credible because they gave varying accounts of the incident and contradicted each other during the investigation. Additionally, a witness who spoke with J.M. immediately following the incident confirmed that J.M. stated that "it was something about a dress and that it made her butt look extra jiggly that day." Most importantly, a witness confirmed that she overheard N.B. say that they were not allowed to say "jiggly or bitch" in the office because it turns into an issue. The OD&C argues that if N.B. never commented about J.M.'s buttocks during the incident then there would be no reason for N.B. to tell this individual that the use of the word "jiggly" is an issue in the office. The OD&C agrees that superiors have the right to enforce dress code policies; however, it presents that this duty cannot be at the expense of the State Policy. The OD&C emphasizes that N.B.'s arguments are based on State law which has a much higher evidentiary burden than the State Policy which has a zero tolerance threshold and can be triggered by a single incident.

## 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 sex/gender, is prohibited and will not be tolerated. Further, *N.J.A.C.* 4A:7-3.1(b) provides that it is a violation of the State Policy to use derogatory or demeaning references to one's gender. 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(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that the appellant violated the State Policy. A review of the record indicates that a witness confirmed that N.B. stated that you are not allowed to say “jiggly” or “bitch” in the office because it turns into an issue. According to the Merriam-Webster on-line dictionary, one of the definitions of “Bitch” is “a malicious, spiteful, or overbearing woman – sometimes used as a generalized term of abuse.” Clearly, in the context of the situation, the term was being used in this derogatory manner and is a violation of the State Policy. *See In The Matter of A.M.* (CSC, decided October 21, 2015). Additionally, N.B. has acknowledged that she discussed J.M.’s clothing during the incident, a witness confirmed that immediately after the incident that J.M. told her that N.B. made the “jiggly” comment during the incident, and the records demonstrates that the other superiors present during the incident could not confirm that she did not make the “jiggly” comment. Further, as “jiggly” is not a common expression and its use only makes sense if she made the alleged comments, the Investigator found that N.B. was not credible during the interview. Moreover, the appointing authority has refuted N.B.’s statements on appeal that she was advised that she could not have a lawyer present during the interview. Therefore, the Commission finds that N.B. used the term “jiggly” in an inappropriate manner in reference to J.M.’s buttocks and her choice of clothing, which is prohibited behavior under the State Policy. *See N.J.A.C.* under 4A:7-3.1(c)2iii.

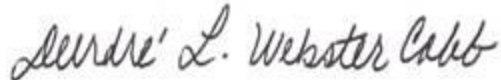
With respect to N.B.’s request for a hearing, a hearing is only required where the Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing. *See N.J. A.C.* 4A:2-1.1(d). In this matter, N.B. claims that the other superiors who were present in the meeting can confirm that she did not make the comment in question. However, as stated above, the investigation revealed that the other superiors who were present during the incident stated that they could not recall what N.B. said rather than outright deny the allegations as N.B. claims. Additionally, the Investigator found that the Office Manager and J.M.’s supervisor were not credible because they gave varying accounts of the incident and contradicted each other during the investigation. Therefore, the Commission finds that her superiors cannot refute that N.B. made the comment in question. As N.B. has offered no other potential evidence that could support her assertion that she did not make the comment in question, the Commission concludes that a hearing is not required since there are not any material and controlling facts in dispute. *See In the Matter of Juliann LoStocco, Department of Law and Public Safety*, Docket No. A-0702-03T5 (App. Div. October 17, 2005). Accordingly, the Commission finds that the investigation was thorough and impartial and that N.B. failed to support her burden of proof that she did not violate 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 23<sup>rd</sup> DAY OF MAY, 2018



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