



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of L.P., Woodbine Developmental Center

Discrimination Appeal

CSC Docket No. 2017-2590

ISSUED: MAY 24, 2018 (ABR)

L.P., an Institutional Transportation Supervisor with the Woodbine Developmental Center, appeals the determination of the Assistant Commissioner, Legal Affairs, Department of Human Services (DHS), which found that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

J.F., a Truck Driver filed a discrimination complaint against W.G., a Motor Vehicle Operator 1, and K.H., a Motor Vehicle Operator 1, on August 23, 2016, alleging that both referred to homosexuals using a pejorative term. The appellant was the supervisor of J.F., W.G. and K.H. In response to the complaint, the DHS' Office of Equal Employment Opportunity (EEO) conducted an investigation. On December 1, 2016, the EEO interviewed the appellant as part of that investigation. In the course of the interview, the appellant was asked if he had ever heard W.G. or K.H. refer to homosexuals as "faggots." The appellant responded as follows:

If you asked me 10 years ago, I would say yes. People didn't take it like the 'n' word. But now everythings [sic] is to that effect you cant [sic] say it. Ten years ago it was different. We could fence [sic] all we want 10 years ago you could say faggot and nothing was wrong with that, but now its [sic] different. If you say it now, its [sic] like saying the 'n' word. Things are different now.

The EEO found that the allegation was corroborated by a credible witness. Consequently, the EEO found that the appellant's failure as a supervisor to report

offensive comments related to sexual orientation by W.G. and K.H. in 2006 violated the State Policy. As a result, corrective action was taken.¹

On appeal to the Civil Service Commission (Commission), the appellant argues that in 2006 he was not the supervisor in charge of the garage or its employees. He maintains that he reported the incident to both his supervisor, an Institutional Transportation Supervisor, and the head of his department. He submits that both of his superiors told him that the matter was being reviewed and that no further action was required on his part.

In reply, the EEO asserts that while the appellant was not serving as an Institutional Transportation Supervisor in 2006, he was serving in title of Supervisor of Equipment Schedules.² Accordingly, the EEO contends that he was a supervisor who was obligated to report State Policy violations to it in 2006, but failed to do so. In support of that contention, it submits that a credible witness corroborated that W.G. and K.H. uttered derogatory remarks about homosexuals in the appellant's presence in 2006 and that the appellant failed to admonish them. Moreover, it proffers that it has no record of the appellant referring the 2006 incident to it or an appropriate designee assigned to receive State Policy violation complaints. Furthermore, it contends that the appellant's assertion on appeal contradicts his own testimony to its investigator on December 1, 2016 that there was "nothing wrong with" uttering the word "faggot" in 2006.³

CONCLUSION

Initially it is noted that this matter concerns an incident which the parties agree occurred in 2006. Therefore, the State Policy as it was written in 2006 would apply in this matter and *not* the State Policy in its current form. In this regard, in 2006, *N.J.A.C.* 4A:4-3.1(e) provided, in pertinent part:

Supervisors *should* make every effort to maintain a work environment that is free from any form of prohibited discrimination/ harassment. Supervisors *are expected to* take all allegations of discrimination/harassment, including sexual harassment, seriously,

¹ The appellant was issued a written warning.

² The appellant served as a Supervisor of Equipment Schedules from January 1998 to July 2011. He was provisionally appointed to the title of Institutional Transportation Supervisor, effective July 30, 2011 and permanently appointment to that title, effective April 10, 2012.

³ The EEO also suggests that, if the appellant's statement on appeal is accurate, his failure to disclose during his December 1, 2016 EEO interview that he timely reported the 2006 incident would have violated the requirement that he be truthful to the EEO and provide it with all information he knew about the incident. However, the EEO does not indicate whether the appellant was explicitly asked during the interview if he had reported the 2006 incident. Accordingly, there does not appear to be a basis for the Commission to address this argument from the EEO.

and to *immediately refer the matter to the individual(s) responsible for receiving such complaints.*

All supervisors *receiving complaints of* unlawful discrimination/harassment must immediately advise the department, commission, State college or authority's Equal Employment Opportunity/Affirmative Action Officer *of the complaint.* See 36 *N.J.R.* 4566(a); 37 *N.J.R.* 586(a) (emphasis added).

N.J.A.C. 4A:7-3.2(d) provided, in pertinent part, that “[s]upervisory employees *should immediately report* all alleged violations of the [State Policy], whether reported by an employee or observed directly, to [the] EEO/AA Officer.” See 33 *N.J.R.* 3281(a) (Sep. 17, 2001); 34 *N.J.R.* 261(a) (Jan. 7, 2002) (emphasis added).

The language in *N.J.A.C.* 4A:7-3.1(e) and *N.J.A.C.* 4A:7-3.2(d) changed after 2006, where language such as “expected to” and “should” was replaced with “shall” so as to strengthen State Policy violation reporting requirements for supervisors. Indeed, the proposal for the aforementioned change to *N.J.A.C.* 4A:7-3.2(d) in the New Jersey Register on April 16, 2007, indicated that “[s]upervisory employees *would be required, not just encouraged,* to immediately report allegations of violations of the revised State Policy.” See 39 *N.J.R.* 1340(a) (emphasis added).

In the instant matter, the Commission has conducted a review of the record and finds that it does not substantiate the appointing authority’s conclusion that the appellant violated the State Policy. The EEO found that the appellant had violated the State Policy, as he had acknowledged that he had witnessed W.G. and K.H. use a pejorative term for homosexuals in the workplace in 2006, but did not report the matter. However, because *N.J.A.C.* 4A:7-3.2(d), as in effect in 2006, merely “encouraged” the appellant, as a supervisor, to promptly report the alleged State Policy violation he observed to the EEO, it cannot be said that his failure to do so constituted a violation of the State Policy in 2006.

Finally, the Commission stresses that although it found in the instant matter that the appellant’s failure to report the supposed 2006 violation did not violate the State Policy, supervisors have been required to report all violations of the State Policy occurring on or after August 20, 2007, including both alleged violations reported to them and conduct that they directly observe. Moreover, the DHS’ corrective action in this matter was appropriate, as it reinforces to the appellant that all potential violations of the State Policy must be reported.

ORDER

Therefore, it is ordered that this appeal be granted.

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 MAY, 2018

Deirdre' L. Webster Cobb

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