



On appeal,<sup>1</sup> the appellant maintains that she did not discriminate against any employee because of a disability. The appellant argues that she has never disclosed any medical information nor had she been previously accused of disclosing such information. The appellant denies that she told an employee that “another employee had an elective medical procedure a few years ago.” She argues that it is her word against the employee, who did not have any witnesses or evidence to support her allegation and, therefore, there is no proof that she engaged in the conversation. The appellant maintains that the employee that confirmed the conversation is “the office gossip that has been involved in other EEO matters due to . . . saying untrue stories.” Moreover, she argues that she “did not recall the medical procedure, or was even sure it ever happened.” Additionally, although the appellant acknowledged that it was standard procedure for her to sign the Medical Leave Request Form, she denied that any “additional medical documentation” was attached.

The appellant also challenges whether K.S. would qualify as “disabled” under the Americans with Disabilities Act (ADA). In this regard, she argues that the ADA requires that an individual must meet certain criteria before he or she qualifies as disabled, but that “an act of discrimination against” that individual must also occur. The appellant argues that no “act of discrimination” even occurred as K.S. was never discriminated against as she was not passed over for a promotion, or denied a desired position or opportunity. The appellant argues that even “if this had happened,” it would not be considered an “act of discrimination” under the State Policy as no derogatory statement was made, nor was any overt action taken against K.S. with regard to her work or working conditions.

Finally, the appellant asserts that she questions if the finding by the Director of Administration was not because she had violated the State Policy, but because of retaliation. In particular, she asserts that she has “had some strong disagreements and advocated in opposite directions over recent unrelated matters.” Moreover, it was clear to the appellant from the Director of Administration’s “tone and aggressive verbal stance” that the appellant “greatly agitated her.” The appellant maintains that the Director of Administration’s recent action and her “less than ideal treatment” of the appellant in the past gives the appellant “reason to pause and question her motives.”

In response, the EEO/AA reiterates that its investigation was thorough and complete. In particular, it notes that the witness who claimed that the appellant

---

<sup>1</sup> The appellant received a three-day suspension as a result of the finding that she had violated the State Policy. *N.J.A.C.* 4A:7-3.2(n)3 provides that if disciplinary action has been recommended, the parties may appeal using the disciplinary appeal procedures. However, since the appellant is serving in a Senior Executive Service title, there is no minor disciplinary appeal process in place for her to utilize. Accordingly, her appeal concerning the finding that she had violated the State Policy was accepted, but the parties were informed that issue of the three-day suspension would not be addressed.

revealed that K.S. had a particular medical procedure during the carpool had, upon her return to the office, questioned K.S. why K.S. had never told her about the medical procedure as they were friends. The EEO/AA noted that although the appellant denied the conversation and having any knowledge of the medical procedure, the appellant had signed off on the Medical Leave Request Form for K.S., as is protocol.

With regard to the appellant's allegations concerning the Director of Administration, the EEO/AA notes that its investigations are based on factual information and not personal feelings. Moreover, it asserts that the Director of Administration does not have a personal relationship with any of the parties involved in this matter. Rather, it asserts that she is a neutral party who reviews statements and documents that are obtained during the investigative process. In this matter, the investigation confirmed there was a car pool and a conversation between the appellant and the witness. Subsequently, information was taken back to K.S. by the witness who would not have knowledge of the medical procedure without someone providing the information to her. The appellant does have knowledge of an employee's medical leave and potentially even the specific diagnosis if the medical documentation was attached to the request for Medical Leave Request Form. In this matter, the medical leave form and documentation were date stamped by the Office of Human Resources on the same date, indicating they were sent together. Additionally, the form was signed by the appellant which indicates that she knew about K.S.'s request for leave, despite stating she did not recall the leave in her signed statement. Based on the foregoing, the EEO/AA asserts that it did not find the appellant's response that she did not know about the leave or the reason for the leave to be credible. Finally, the EEO/AA notes that the appellant has a history of making inappropriate EEO related comments.

### CONCLUSION

*N.J.A.C.* 4A:7-3.1(a)3 provides that 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: 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)3 further provides that the policy pertains to all employment practices such as recruitment, selection, hiring, training, promotion, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, compensation, fringe benefits, working conditions and career development.

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that the appointing authority's conclusion that the appellant violated the State Policy is not substantiated by the record. The EEO/AA determined that the appellant's alleged statement that K.S. had previously undergone a medical procedure violated the State Policy. Initially, the appellant denies that she ever knew of or made a statement related to K.S.'s medical procedure. Regardless, the appellant argues that K.S. was not a member of a protected category and that even if she was, the statement the EEO/AA claimed the appellant made did not meet the definition of harassment and/or discrimination as indicated in the State Policy. *N.J.A.C. 4A:7-1.1(c)* provides that a person with a disability includes any person who has a physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability resulting from anatomical, psychological, physiological, or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection. The record in the instant matter does not establish that K.S. met the above-noted definition of a person with a disability. Moreover, as the State Policy provides that 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, if the complainant is not a member of the claimed protected category, then by definition, he or she cannot have been subjected to a violation of the State Policy. Therefore, the Commission does not agree that the mere statement that an employee had undergone a medical procedure in the past, in and of itself, establishes that the State Policy was violated.

However, although the alleged statement did not, in the instant matter, violate the State Policy, the disclosure of medical information could violate departmental policy which requires that such information be kept confidential.

### **ORDER**

Therefore, it is ordered that this appeal be granted and the appellant's personnel record be corrected to reflect the Commission's finding that the allegations that she violated the State Policy were not substantiated.

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 SEPTEMBER, 2018



Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

c: J.S.  
Jillian Hendricks  
Mamta Patel  
Kelly Glenn  
Records Unit