



STATE OF NEW JERSEY

**DECISION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of J.E., Woodbine
Developmental Center

Discrimination Appeal

CSC Docket No. 2019-1552

CORRECTED DECISION

ISSUED: DECEMBER 23, 2019 (ABR)

J.E. a Cottage Training Supervisor at Woodbine Developmental Center (WDC), appeals the determination of the Chief of Staff, Department of Human Services (DHS), which found that he failed to present sufficient evidence to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the instant appeal stems from a June 22, 2018 incident in which the appellant, an African-American, alleges that J.F., a Licensed Practical Nurse, a Caucasian, subjected him to discrimination on the basis of his race and national origin. On June 27, 2018, J.F. filed a workplace violence complaint alleging that the appellant subjected her to a hostile work environment during the same incident. On July 2, 2018 and July 13, 2018, J.F. filed two additional complaints, alleging that the appellant further subjected to her to a hostile work environment in incidents that occurred on July 2, 2018 and July 12, 2018.¹ On July 16, 2018, the appellant filed the complaint at issue in this matter with the DHS' Office of Equal Employment Opportunity (EEO). On July 17, 2018, J.F. filed a complaint alleging that the appellant violated the State Policy by subjecting her to discrimination on the basis of her gender in the June 22, 2018, July 2, 2018 and July 12, 2018 incidents that were also the subject of her workplace violence complaints.²

¹ The EEO states that the WDC's investigation substantiated J.F.'s workplace violence complaints for the June 22, 2018 and July 2, 2018 incidents, but did not substantiate her complaint for the July 12, 2018 incident.

² The EEO did not substantiate J.F.'s claim of gender discrimination.

In the appellant's July 16, 2018 complaint, he asserted that on June 22, 2018, he went into an emergency storage room next to a nurse's station in a cottage at WDC to make a photocopy and J.F. told him that she did not want him in that room because her pocketbook was in there. He stated that he believed that she made that this statement because of his race. He also asserted that she called him racist names and made up numerous fake statements to put his job in jeopardy. He indicated that although he reported these incidents to various managers, J.F. continued to harass him.

In response to the appellant's State Policy complaint, the EEO conducted an investigation which consisted of the interviews of the appellant and J.F. on August 16, 2018, and the review of 19 relevant documents. Included among the 19 documents reviewed by the EEO were J.F.'s three workplace violence complaints, the appellant's statement from the investigation of J.F.'s workplace violence complaints, the statements of six witnesses interviewed in connection with J.F.'s workplace violence complaint investigation, the appellant's State Policy complaint and J.F.'s State Policy complaint. Based upon the foregoing, the EEO did not substantiate the appellant's allegation that J.F. violated the State Policy. Specifically, it found that J.F.'s remarks about her pocketbook did not violate the State Policy on the basis of his race. Furthermore, it noted that the appellant did not originally allege in his complaint that the alleged discrimination was based upon his national origin.

On appeal, the appellant requests a thorough and impartial investigation of this matter. He argues that J.F. challenged his presence in the emergency storage room because of his race and national origin. In this regard, he claims that nurses and other WDC staff members have always been permitted to utilize the emergency storage room in question to make photocopies. He maintains that J.F.'s statement that she didn't want him in the emergency storage room because her pocketbook was in there can only be explained by her hatred for foreigners, particularly as other staff members have routinely been able to enter that room to make photocopies. He suggests that if the EEO were to interview the three Practical Nurses and one Cottage Training Supervisor that worked with J.F., they would probably attest to her racially-charged actions. He maintains that J.F. and a "few other friends" have continued to harass, intimidate and lie about him in an effort get him in trouble. He also asserts that J.F. lied about the July 12, 2018 incident in one of the workplace violence complaints in an effort to have him removed from the cottage they had both been assigned to.

In response, the EEO argues that the record demonstrates that it conducted a proper investigation and that the appellant has failed to satisfy his burden of proof in the instant matter. The EEO indicates that during its August 16, 2018 interview of the appellant, he told its investigator that J.F. subjected him to racial profiling. He explained that he went to make a photocopy in the emergency storage room next

to the nurse's station when J.F. asked him, "[h]ow many times are you going to enter the room to make a copy?" The appellant stated that when he asked her why, she stated that she "d[id]n't want [him] in the room because [her] pocketbook [was] in there." The appellant told the EEO investigator that he believed that J.F. made this statement because he was African-American and that she looked at him as if he were a criminal. The EEO submits that when it asked the appellant what racist names J.F. called him, he stated "Brian, whatever your name is," but he denied that J.F. made any other racist remarks towards him.

The EEO states that J.F., during her August 16, 2018 interview, stated that she and most, if not all, of the nursing staff routinely placed their pocketbooks in the subject emergency storage room at WDC and kept the door to that room closed. J.F. indicated that on June 22, 2018, she saw that the door to that room was open and the appellant was making copies inside. J.F. told the EEO that she asked the appellant to shut the door behind him when he finished making copies because her pocketbook was in the office and that the appellant interpreted her request as an accusation. J.F. indicated that a verbal altercation followed. J.F. denied that she subjected the appellant to racial profiling or called him any racist names. J.F. also told the EEO that she subsequently filed workplace violence complaints against the appellant because she found his behavior towards her on June 22, 2018 and two other occasions to be hostile and intimidating. The EEO asserts that even if J.F. called the appellant "Brian, whatever your name is," it would not have violated the State Policy.

The EEO also provides copies of the documentation it reviewed in connection with its investigation, including complaints and statements from WDC's investigation of J.F.'s workplace violence complaints. It submits that J.F. and two Cottage Training Supervisors stated during the workplace violence complaint investigation that it was standard practice for Cottage Training Supervisors to ask a nurse to make copies for them or for permission to enter the subject emergency storage room if the nurses were busy. The EEO states that the appellant did not ask for permission to enter the room and it asserts that there is no evidence that the verbal exchange between him and J.F. was caused by anything other than his "misunderstanding that he could not access the emergency storage room repeatedly without permission." The EEO asserts that there is no evidence that J.F. had any discriminatory intent when she asked the appellant to shut the door behind him when he finished making copies because her pocketbook was in the office and it maintains that there is no evidence that she racially profiled the appellant.

In reply, the appellant asserts that it was against WDC policy for staff members to have personal belongings on the floor in the emergency storage room and that J.F. and other staff members did have access to cottage lockers and four other nursing offices which could be locked. He also argues that the EEO's investigation was inadequate because it did not interview supervisors who could

speak to whether Cottage Training Supervisors were permitted to access the emergency storage room to make photocopies. Furthermore, he reiterates that the EEO should have interviewed other African-American employees that had similar experiences with J.F. The appellant submits statements from five witnesses that he maintains the EEO should have interviewed, including Y.L., a Cottage Training Supervisor, and K.J., a Human Services Assistant. Y.L., asserts that all staff had access to the emergency storage room and that WDC policies prohibited staff members from having personal belongings on the floor in that location and required staff to lock their personal belongings in lockers. K.J. states that he did not witness the appellant intimidate J.F. or engage in loud conversation during the shifts on June 22, 2019 and July 2, 2018. The other three witnesses' statements relate to the workplace violence claims.

It is noted that both the appellant and J.F. indicated during the workplace violence investigation that they both contacted C.B., Assistant Supervisor of Resident Living, about the June 22, 2018 incident. There is no indication that C.B. was interviewed or provided a statement in connection with either the workplace violence investigation or the EEO's investigation of J.F.'s and the appellant's discrimination complaints. One temporary Practical Nurse and one Cottage Training Supervisor indicated in statements provided during the workplace violence investigation that they witnessed at least a portion of the interaction between the appellant and J.F. on June 22, 2018. Specifically, the temporary Practical Nurse stated during their phone interview that the appellant asked J.F. "[w]hy are you treating me this way? I feel like you are racially profiling me." This witness indicated that the door to the office was typically open or cracked and that it was rare for that door to be completely closed. This witness also stated that J.F. may have actually locked the door to the office. Moreover, the witness testified that J.F. "said she would make the copies for him" and that she "just ke[pt] the door closed because her stuff [was] in there." The Cottage Training Supervisor indicated that the appellant "was venting to [him] about not being able to go make copies because [J.F.] had he[r] pocketbook" in the office and they stated that the appellant went to the nurse's station twice to bring up why he should be able to make copies. The Cottage Training Supervisor stated that the door was closed, but they were unsure if it was locked. This indicated that they believed that J.F. was trying to tell the appellant to ask about going into the office. The aforementioned temporary Practical Nurse and Cottage Training Supervisor were not asked any questions about the appellant's discrimination complaint allegations.

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 hereditary 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)*. The State Policy is a zero tolerance policy. *See N.J.A.C. 4A:7-3.1(a)*. Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)4*.

In the instant matter, material disputes of fact exist which warrant granting a hearing at the Office of Administrative Law (OAL). The appellant asserts that J.F. told him that she did not want him entering an emergency storage room at WDC because her pocketbook was in there and that her reason for doing so was because of his race and/or national origin. J.F. stated to the EEO that she told the appellant to close the door and turn the lights off behind him. The EEO states that its investigation consisted of the review of 19 relevant documents and interviews of the appellant and J.F., and that it was unable to find by a preponderance of the evidence that J.F. subjected the appellant to racial discrimination. However, the Commission finds that there are significant deficiencies with the EEO's investigation. Initially, the EEO concluded that it was improper for the appellant to enter the emergency storage room to make photocopies without permission from a member of the nursing staff. The EEO cites statements from J.F. and two Cottage Training Supervisors who indicated that it was common for employees outside of the nursing staff to ask a nurse to make copies or request permission to enter the office. However, there is no evidence that there was a specific DHS or WDC policy which required the appellant to seek permission from the nursing staff to enter this office. Accordingly, there does not appear to be a basis for the EEO to have concluded that the appellant "could not access the [emergency storage room] repeatedly without permission."

Furthermore, there are numerous deficiencies with its interviews of the appellant and J.F. During the EEO's interview with the appellant, he asserted that he believed J.F. calling him "Brian, whatever your name is" was racist. In this regard, he maintained that if she truly did not know his name, it would not make sense for her to refer to him in that manner. In response, the EEO interviewer stated that J.F. referring to him as "Brian, whatever your name is" [was] not discrimination and she did not violate the State Policy by saying that." However, the EEO's conclusion appears to have been premature. The Commission notes that although the parties did not routinely work together, they were clearly familiar with one another. While the remark "Brian, whatever your name is," is not definitively a slur, if J.F., knowing the appellant's name, made the comment as a way of belittling the origin of his name, it could violate the State Policy. Additionally, the Commission is concerned that the EEO's dismissal of the allegation on the spot may have clouded the appearance of its impartiality in the instant matter.

The EEO's questioning of J.F. failed to get to essential facts about the appellant's complaint. The heart of the appellant's complaint was that J.F. confronted him in the emergency storage room because of his race and national origin. However, the EEO's interview was not structured in a way that would reasonably be expected to elicit material information about the appellant's racial profiling claim. The three specific questions the EEO interviewer asked J.F. about the appellant's complaint were: "At anytime, have you racially profiled [the appellant]?" "Have you ever made any derogatory remarks or called [the appellant] any racist names?" and "When [the appellant] was making copies in the room where your pocketbook was, did you refer to him as a thief?"³ It is noted that J.F. answered "no" to all of these questions. It was imprudent to ask J.F. leading questions about racial profiling and making derogatory remarks because they only lent themselves to "yes" or "no" responses which could not reasonably be expected to get to the truth of the matter. Rather, the EEO should have asked her to, for example, articulate her basis for initiating her interaction with the appellant on June 22, 2018, and for her to explain what happened.

Moreover, it appears that several material witnesses were not interviewed by the EEO. Both the appellant and J.F. indicated that they spoke with C.B. about the issue of the appellant's right to access the emergency storage room to make photocopies. Her account of their statements about the incident and her impressions about each could shed light on whether J.F. told the appellant that she did not want him in the room or whether she merely requested that he turn off the lights and shut the door after he finished making copies. Additionally, it appears that three individuals witnessed at least a portion of the exchanges between the appellant and J.F. on June 22, 2018, but were not interviewed by the EEO when it investigated the appellant's complaint: K.J., the temporary Practical Nurse whose statement appears as Attachment 7 the EEO's submission dated October 15, 2019, and the Cottage Training Supervisor whose statement appears as Attachment 8 in the EEO's submission dated October 15, 2019. Thereafter, the EEO should have utilized the statements from these witnesses to assess the credibility of J.F.'s and J.E.'s statements and determine whether the incident violated the State Policy.

The totality of the circumstances raises significant questions about the thoroughness and impartiality of the EEO's investigation in this matter. The record evidences that the EEO, when investigating the appellant's discrimination complaint, relied heavily upon witness interviews from the investigation of J.F.'s earlier workplace violence complaints. While this act alone would not be improper,

³ The Commission observes that there does not appear to have been a basis for the EEO to have asked J.F. whether she referred to the appellant as a thief, as the appellant's July 26, 2018 statement to the workplace violence claim investigator and his July 13, 2018 discrimination complaint merely suggest that J.F.'s statement that she did not want him near her purse was an insinuation that he was a thief.

the tenor and relatively limited scope of the EEO's own witness interviews, particularly the cursory questions it asked J.F. about the appellant's discrimination complaint, create the impression that the EEO may not have taken the appellant's complaint seriously because a separate workplace violence investigation found that he subjected J.F. to a hostile work environment during the subject June 22, 2018 incident and on July 2, 2018. Therefore, this matter should be referred to the Office of Administrative Law for a hearing to determine whether J.F. violated the State Policy by discriminating against the appellant on the basis of his race and/or national origin.

Finally, there does not appear to be a basis for the Commission to review any issues the appellant raises on appeal with respect to WDC's investigation of J.F.'s workplace violence complaints against him, particularly his allegation that J.F. lied about the July 12, 2018 incident. Any concerns that appellant has regarding the investigation of J.F.'s workplace violence complaints should be addressed in the proper forum, *i.e.*, by management and/or within the grievance process established by his collective bargaining agreement.

ORDER

Therefore, it is ordered that this matter be referred to the Office of Administrative Law for a hearing as a contested case.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF DECEMBER, 2019



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