



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matters of B.M., Department
of Human Services

CSC Docket No. 2020-2582

Discrimination Appeal

ISSUED: JULY 20, 2020 (SLK)

B.M., a Supervisor of Professional Residential Services with Vineland Developmental Center (VDC), appeals the decision of the Chief of Staff, which did not substantiate her allegations that she was subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, B.M., who is female, alleged that M.H., a male Quality Assurance Coordinator, sexually harassed her by showing her a picture of a birthday cake with a vagina on it in the workplace. Additionally, she alleged that M.H. sent her inappropriate text messages between September 21, 2018¹ and October 19, 2018. Further, she alleged that M.T., a male Supervisor of Professional Residential Services, failed to report her allegation that M.H. sent her potentially inappropriate text messages, “from you I will eat anything” and “your presence is my cake.” B.M. also alleged that M.H. and S.H., a female Chief Executive Officer, Care Facilities, retaliated against her for her involvement in a prior Equal Employment Opportunity (EEO) complaint by subjecting her to differential treatment with respect to the terms and conditions of direct care employees who were not put on “no client contact” when accused of client abuse on March 21, 2019, but she was put on “no client contact” when she was accused of client abuse on April 23, 2019. Moreover, she alleged that

¹ The determination letter indicates that the texts were between September 28, 2018 and October 19, 2018. However, it appears that the first text message submitted during the investigation was September 21, 2018.

S.H. and/or M.H. ordered the lock on her office door changed as an act of retaliation for her involvement in an EEO matter. She also alleged that S.H. and M.H. breached the confidentiality of the investigation. Further, she alleged that L.K., a female Senior Clerk Transcriber, alleged that M.H. referred to her as a “bitch” during a conversation on speakerphone with D.T., a Supervisor of Professional Residential Services. B.M. also alleged that L.K. said that certain management staff were aware of her allegations of sexual harassment against M.H. since around March 2019, but failed to report them to the EEO. Finally, she alleged that S.H. discriminated against her based on her affectional/sexual orientation. The investigation consisted of 17 interviews and a review of at least 21 relevant documents. The investigation substantiated that M.T. failed to report a State Policy allegation to the EEO, but was unable to substantiate any other allegation.

On appeal, regarding the allegations that M.H. sexually harassed her, B.M. states that M.H.’s secretary also witnessed M.H. showing B.M. a picture of a cake with a woman’s vagina on it², but claims that his secretary will not validate her claim due to fear for her and her husband’s jobs. She indicates that M.H. does the majority of the hiring for the VDC and notes that the secretary’s husband also works for the VDC.

B.M. submits a text conversation that she had with M.H. on February 14, 2018.³ The conversation is as follows:

B.M.: “Good morning boss. I had an emergency come up just now and need a few hours off. I will use AL. Thanks and talk to you soon”
 M.H.: “No problems, Happy Valentine Day (with a red lips emoji)”

B.M. submits a text conversation she had with M.H. on September 21, 2018. The conversation is as follows:

M.H.: “Is that you driving ahead of me?”
 B.M.: “Where are you”
 M.H.: “Delsea drive”
 M.H.: “In Franklin”
 B.M.: “Yes, that was me. Was you in a white care”
 B.M.: “Yes, trying to find someone. You went to the liquor store right.”
 B.M.: “You should have called me, we could of stopped and had a drink”
 M.H.: “Yes my bmw”
 M.H.: “That’s why I text you”
 B.M.: “No should have let me know it was you. I didn’t get the text until afterwards.”

² The record does not indicate the date that M.H. allegedly showed B.M. the inappropriate picture.

³ This text conversation was submitted by B.M. on appeal. It does not appear that B.M. had submitted this text conversation during the investigation.

M.H.: “You turned into the shopping and I turned around to come over to you and you drove off again so I said to myself this lady doesn’t want to bother”

B.M.: “Not true. You should have called me. I was going to that hairdresser in the plaza, but forgot I had to pick up something from the dollar store. I always have my phone in silent, but it will ring through the car. Text I don’t get unless I look at the phone”

B.M.: “And I never see you a white care”

M.H.: “For real I had this car for many years but my daughter was using it”

B.M.: “Nope only seen you drive the truck and black car”

B.M. also submits a text conversation she had with M.H. on October 8, 2018⁴. The conversation is as follows:

M.H.: “Do you know today is my birthday where is my cake? Remember you spoiled me already”

B.M.: “I totally forgot. I remembered earlier in the week and then forgot. And you do not eat cake. You don’t do sweets.”

B.M.: “Happy Birthday Boss. I’m so sorry.”

M.H.: “From you I will eat anything”

M.H.: “Thanks you are my best partner”

B.M.: “Well, what type of cake do you want? For you I will run to the bakery”

B.M.: “Any you are the Best Boss.”

M.H.: “No don’t spend no money your presence is my cake”

B.M. states that on September 21, M.H. followed her in his car while she was driving. She asserts that without M.H. showing her the inappropriate cake, M.H.’s comments would have been permitted. She also accused M.H. of stating that he is allowed to have many wives. Further, although B.M. acknowledges that she gave M.H. cards for certain occasions, she claims that one of the cards that M.H. presented during the investigation that said, “I think you’re special,” was not sent by her. She believes that he presented it to the investigator to discredit her.

In response, the EEO presents B.M. indicated that she did not know what M.H. meant by his comment, “Remember you spoiled me already,” but assumed it was for the birthday/bosses cards that she had given him. Regarding the “From you I will eat anything. Thanks you are my best partner” comments, B.M. indicated that she thought the comments had to do with M.H. showing her the picture of a birthday cake with a woman’s vagina in it and the “From you I will eat anything” text message “had

⁴ The date is not on the beginning of text messages in the screen shot B.M. submitted. However, M.H. indicated during the investigation that his birthday is October 8th.

sexual innuendo behind it.” B.M. indicated that her husband was upset by these messages and was going to approach M.H. at church as they went to the same church. She also indicated that her husband and she had dinner with M.H. and his wife on at least once occasion, and her husband and she had attended outside work celebratory events for his daughter’s wedding.

The investigation revealed that M.H. denied sending her the inappropriate picture and his secretary denied witnessing M.H. showing the inappropriate picture to B.M. M.H. said that the “don’t spend no money, your presence is my cake” comment referred to a birthday club where they brought in food. He said that he is a diabetic, so he usually does not eat cake. Further, the “from you I will eat anything” comment was referring to the food she was going to bring into work. M.H. stated that B.M. never said to him that his messages made her uncomfortable. The EEO determined that the preponderance of the evidence was unable to substantiate her claims.

Concerning the allegations that M.H. and S.H. retaliated against her for her involvement in a prior EEO complaint where she was immediately subjected to “no client contact” after she was accused of client abuse, while direct care employees under her supervision were not, B.M. states that on March 21, 2019, M.H. told her that she was going to regret filing a previous EEO matter. Thereafter, on April 22, M.H. placed her on the “no contact list” for abuse. She states that M.H. stated that the allegation was that she kicked a child, while the investigator claimed it was for something different. Further, she claims that several employees were asked to write statements about client abuse allegations, but M.H. only went after her.

In response, the EEO indicates that the investigation revealed that M.H. and S.H. indicated that per VDC policy, B.M. was immediately placed on the “no client contact list” because she was accused of physical abuse. M.H. indicated that the direct care employees were not immediately placed on the “no client contact” list because they were accused of verbal abuse, which has a different procedure. However, the investigation revealed that the direct care employees were placed on the “no client contact list” while they were investigated. After the investigations, neither B.M. nor the direct care employees were found to have committed abuse. Therefore, the EEO found that this allegation was not substantiated based on the differences in the procedures based on the different abuse allegations.

Referring to B.M.’s allegations that S.H. and/or M.H. ordered the lock on her office door changed as an act of retaliation for her involvement in an EEO matter, B.M. states that S.H.’s explanation that she ordered B.M.’s office door be locked while she was on leave so that the confidentiality of information in her office could be secured regarding a matter that was being litigated is unfathomable. She presents that she took pictures of everything that was in her office and the information regarding the litigation had been locked for months. B.M. states that someone would need multiple keys to get into her file cabinet, she was the only one with a key and

she had already submitted the information for this matter. B.M. indicates that she was able to get into her office from May 2019 through January 2020 and that S.H. only had her office door lock changed once she knew about the EEO investigation. Therefore, B.M. believes that S.H. is not being truthful.

In response, the EEO indicates that the investigation revealed that S.H. stated that while B.M. was on administrative leave, there were people coming in and out of her office. Further, one of the individuals who was compiling information about the litigation noticed that a box was missing from B.M.'s office. Upon learning this, S.H. ordered that B.M.'s office door lock be changed. Therefore, the investigation concluded that S.H. had B.M.'s office door changed for a legitimate business reason to secure information that was subject to litigation while B.M. was on leave.

Concerning the allegation that S.H. and M.H. breached the confidentiality of the investigation, B.M. stated that C.H. said that her boyfriend, D.T., who works in the maintenance department, told her that S.H. ordered that B.M.'s office door lock be changed because B.M. had filed an EEO complaint. Further, although C.H. denied this during the investigation, B.M. asserts that C.H. has been caught multiple times as being untruthful.

In response, the EEO states that the investigation revealed that C.H. did not corroborate B.M.'s statements and she denied knowing that B.M. filed State Policy complaints with the EEO against M.H. and S.H. Further, her boyfriend denied knowing about B.M.'s EEO complaints or why the locks were changed. Additionally, all of the maintenance staff denied knowing about B.M.'s EEO complaints. Therefore, the EEO was unable to substantiate this allegation.

Regarding, B.M.'s allegation that M.H. called her a "bitch," B.M. argued that L.K. was not mentioned in the determination letter and she is the one who heard M.H. call her the gender pejorative term.

In response, the EEO states that the investigation revealed M.H. denied making the comment. Further, while L.K., D.T.'s secretary, was the only person who heard the alleged comment, D.T. was also on the call and did not hear comment. Therefore, the allegation could not be substantiated.

With respect to B.M.'s allegation that certain staff members failed to report her allegations of sexual harassment, B.M. asserts that the managers that report directly to M.H. do not want to corroborate things.

In response, the EEO indicates that as the managers denied the allegation and there were no corroborating witnesses, the investigation was unable to substantiate the allegation.

Referring to B.M.'s allegation that S.H. discriminated against her based on her affectional/sexual orientation, B.M. names two female employees who she asserts are close with S.H. and live as gay women. She indicates that one of the women supervises the other one and she states that maybe this needs to be investigated.

In response, the EEO indicates that the investigation revealed that B.M. stated she was not sure why she was making this allegation and only that she was told by others that bisexuals got favorable treatment. She states that she was not sure if she received disfavored treatment due to this reason. Accordingly, the allegation was unsubstantiated as there was no evidence to support it.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that the State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. This is a zero tolerance policy. This means that the State and its agencies receive the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violated this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

N.J.A.C. 4A:7-3.1(a) also provides, in pertinent part, that employment discrimination or harassment based upon a protected category, such as affectional or sexual orientation, is prohibited.

N.J.A.C. 4A:7-3.1(b) provides, in pertinent part, 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)1 provides, in pertinent part, that it is a violation of the State Policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment, quid pro quo harassment, or same-sex-harassment. For the purposes of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

N.J.A.C. 4A:7-3.1(e) provides, in pertinent part, that a supervisor shall immediately refer allegations of prohibited discrimination to the EEO. A supervisor's failure to comply may result in administrative and/or disciplinary action.

N.J.A.C. 4A:7-3.1(h) states, in pertinent part, that 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 this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. Under *N.J.A.C.* 4A:7-3.1(h)4, an example of prohibited retaliation includes imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons

N.J.A.C. 4A:7-3.1(j) provides, in pertinent part, that in order to protect the integrity of the investigation, minimize the risk of retaliation against the individuals participating in the investigative process, and protect the important privacy interests of all concerned, the EEO/AA Officer/investigator shall request that all persons interviewed, including witnesses, not discuss any aspect of the investigation with others, unless there is a legitimate business reason to disclose such information.

N.J.A.C. 4A:7.3-2(i) provides, in pertinent part, that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

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.

In this matter, the Civil Service Commission (Commission) is unable to determine whether M.H.'s conduct is considered sexual harassment in the context of the situation based on the record. Initially, it is noted that B.M. and M.H. had some type of relationship that was beyond a strictly supervisor-employee relationship. The record indicates that they attended the same church, B.M. and her spouse and M.H. and his spouse had at least one dinner together, and B.M. and her spouse attended several outside of work celebratory events for M.H.'s daughter's wedding. Additionally, B.M. acknowledged that she sent M.H. birthday/bosses cards although she denied that she sent one specific card which M.H. presented as a card that B.M. sent her that said, "I think you are special." The record indicates that in a text conversation on February 14, 2018, in response to a text where B.M. indicated she needed to take some time off, M.H. replied, "No problems, Happy Valentine Day" which included a red lips emoji. An internet search indicates that this emoji represents a kiss. It is most commonly used for sending kisses to someone. This emoji can have romantic connotations as well as simple manner of greeting or saying goodbye to someone. It can also mean "Sending kisses to you!"⁵

The record also indicates that on September 21, 2018, M.H.'s car was behind B.M.'s car in an out-of-work setting. Since B.M. and M.H. attend the same church and had other out-of-work social gatherings with their spouses, it appears likely that B.M. and M.H. live in the same community. Therefore, it is unclear if M.H. was driving behind B.M. due to happenstance or if he was intentionally following her.

⁵ Hotemoji.com

This circumstance led to a text conversation between B.M. and M.H. In the text conversation, B.M. states to M.H., “You should have called me, we could of stopped and had a drink.” Later, in the text conversation, while M.H. is explaining why he did not let B.M. know earlier that his car was behind her, he replied, “You turned into the shopping and I turned around to come over to you and you drove off again so I said to myself this lady doesn’t want to bother.” Additionally, there is a subsequent text conversation on M.H.’s birthday where he says to her, “Remember you spoiled me already,” “From you I will eat anything,” “Thanks you are my best partner” and “No don’t spend no money your presence is my cake.” B.M. asserts that these are text messages with unwanted sexual innuendo. M.H. responds that these were innocent messages referring to the food that B.M. brings into work. B.M. also accuses M.H. of showing her a photograph of a cake of woman’s vagina. She claims that M.H.’s secretary also witnessed this, but will not corroborate this due to fear of her and her husband’s employment. The Commission finds that this series of events and communications are, at minimum, unusual for a supervisor and a subordinate. In light of these unusual circumstances and the unclear record, the Commission orders that the issue as to whether M.H. sexually harassed B.M. under the State Policy shall be transmitted to the Office of Administrative Law (OAL) where an Administrative Law Judge can assess the credibility of the witnesses and provide greater context for these circumstances. Similarly, regarding the allegation that M.H. called B.M. a “bitch” on a phone call, there is conflicting evidence. Although one of the two witnessed denied hearing the comment, based on the aforementioned background and that there is one confirming witness, the Commission is unable to make a determination and this issue shall also be transmitted to the OAL for a hearing.

Concerning the other allegations, the Commission finds that there is no evidence that M.H. and S.H. retaliated against B.M. for her involvement in a prior EEO complaint. The record indicates that B.M. was accused of physical abuse of a client while the direct care employees were accused of verbal client abuse. As such, these allegations were properly treated differently under VDC procedures. Further, both B.M. and the direct care employees were put under “no client contact” while these allegations were investigated and neither B.M. nor the direct care employees were found to have committed abuse. Additionally, the Commission finds that S.H. and/or M.H.’s did not retaliate against B.M. when they ordered the lock on her office door changed while B.M. was on administrative leave. Instead, the record indicates that there was information in B.M.’s office concerning a matter that was being litigated. Further, S.H. had been advised that there was a box missing from B.M.’s office. Therefore, S.H. had a legitimate business reason to change the lock to help secure this information. Additionally, there is no evidence that S.H. and M.H. breached the confidentiality of the investigation as the maintenance staff who were involved in the changing B.M.’s office door lock indicated that they were unaware of B.M.’s EEO complaint and they were not advised as to why B.M.’s office door lock was changed. Finally, concerning the allegations that certain management staff were aware of B.M.’s sexual harassment allegations against M.H., but failed to report it to

the EEO, and that B.M. was treated less favorable because she was not bisexual, she has presented no evidence to support such claims. Mere speculation, without evidence, is insufficient to support a State Policy violation. *See In the Matter of T.J.* (CSC, decided December 7, 2016).

ORDER

Therefore, it is ordered that the allegations concerning whether M.H. sexually harassed B.M. and/or called her a gender pejorative term shall be transmitted to the Office of Administrative Law for a hearing. The remainder of B.M.'s appeal of the other allegations is denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF JULY, 2020

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