



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matters of C.T., Department of
Transportation

CSC Docket No. 2021-43

Discrimination Appeal

ISSUED: OCTOBER 2, 2020 (SLK)

C.T., a Technical Assistant 2 with the Department of Transportation (Transportation), appeals the decision of the Director, Division of Civil Rights and Affirmative Action (Division), which was unable to substantiate allegations that she was subjected to retaliation in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, C.T. had been a Claims Examiner, Unemployment and Disability Insurance (Claims Examiner) with the Department of Labor and Workforce Development (Labor). Thereafter, on November 11, 2017, C.T. accepted a promotional transfer for a provisional appointment as a Management Assistant with the Department of Transportation. Subsequently, she was permanently appointed as a Management Assistant. During her working test period as a Management Assistant, she received an unsatisfactory rating for the period ending August 29, 2018.

On September 28, 2018, she filed a complaint alleging that K.S., a former Administrative Analyst 4¹ discriminated against her based on age, which was the reason for her unsatisfactory rating. She alleged that K.S. had expressed concern to a colleague about C.T.'s ability to perform the work due to her age. Additionally, she alleged that K.S. made other derogatory comments to C.T. about her age and that

¹ Personnel records indicate that K.S. retired effective June 30, 2020.

K.S. mentioned she was posting for a Trainee position because she felt she needed someone younger.

Subsequently, C.T. received an unsatisfactory rating for the period ending October 29, 2018. In December 2018, C.T. took a leave of absence due to alleged harassment from K.S. and returned on April 1, 2019. On April 4, 2019, there was a meeting with C.T., A.T., an Assistant Commissioner, and K.S., where the Assistant Commissioner indicated that he was aware that C.T. filed a grievance with her union and she was advised that her working test period was extended for two months. On May 30, 2019, there was a meeting with C.T., M.S., Director of Human Resources, and C.T.'s union representative where they discussed C.T.'s expected failure of her working test period. As Transportation did not use C.T.'s permanent title and her failure of her working test period would have initiated layoff proceedings, C.T. took a voluntary demotion to Technical Assistant 2, effective May 25, 2019. This title's salary was \$3,000 less per year than a Management Assistant.

Thereafter, C.T. filed the subject complaint on July 24, 2019. C.T. indicated that K.S. accused her of not following up on a return to work drug test, which C.T. said she did, even though C.T. was no longer in her unit and she copied her new supervisor, S.C., Senior Executive Service, to portray her in a negative light. C.T. alleged that this was an example of K.S. retaliating against her for her age discrimination complaint that was pending at the time.

On February 18, 2020, the Division issued a determination for the September 28, 2018 complaint, indicating that it was unable to substantiate C.T.'s allegation that her failing her working test period was based on K.S. discriminating against her based on age. Specifically, K.S. provided documentation corroborating the unsatisfactory rating and her decision to extend her working test period. The documents verified several occurrences related to her unsatisfactory performance. Further, K.S. and C.T. confirmed that they met and discussed the issues on several occasions. Additionally, C.T. did not show any progress when her working test period was extended. While most of the alleged comments by K.S. regarding C.T.'s age were not substantiated, the investigation substantiated that K.S. commented on whether or not C.T. would be able to keep up with the work because she was old. The investigation found this comment to be inappropriate and made recommendations to management.

On June 2, 2020, the Division issued its determination for the subject complaint. The investigation confirmed that K.S.'s action of copying S.C. on her e-mail was with the intent to keep him informed as to what was happening regarding C.T.'s prior assignment was not related to the prior age discrimination complaint. The determination stated that copying a new manager on an e-mail is not an act of retaliation in itself and K.S.'s action did not result in any "materially adverse" action taken against C.T., and as such, the allegation was not substantiated.

On appeal, C.T. asserts that her age discrimination and retaliation complaint is based on K.S. being coached during her extended working test period by her friend, M.S., to ensure that K.S.'s justifications for failing her at the end of her extended working test period would be acceptable. C.T. claims that K.S. shared that information with her. C.T. indicates that K.S. stated during their daily meetings that there was vast improvement in her work and she could not find any typos. C.T. states that when she returned to work from her leave, which she alleges was caused by K.S.'s harassment, she was under the impression that she was starting with a clean state. However, K.S. advised her that this was not the case. C.T. asserts that she made no mistakes during her extended working test period that would justify her failing her working test period and the purpose of the extended time is to see a marked and steady improvement in the employee's performance. Thereafter, C.T. presents that a meeting took place with C.T., her union representative and M.S. where she was advised that finishing her extended working test period was not an option. C.T. indicated to M.S. that there was no basis for her failing her working test period, but M.S. disagreed. C.T. states that she was not offered the opportunity to review the substantiating documentation and was given two or three days to accept the offer of a voluntary demotion to a lesser title or risk being "laid off," even though the position offered would still have been available if she did fail her working test period.

C.T. indicates that there were many younger employees, in a relatively short period of time, previously assigned as Management Assistants, prior to her accepting the position. She states that none of the employees failed their working test periods and all were reassigned to other locations retaining the title. However, C.T. claims that K.S. characterized these former employees as simply not able to do the work. C.T. asserts that K.S. told her that while she was working in Personnel, she had the opportunity to hire an additional person for the office. She could either hire an older, more experienced person as a Management Assistant or a younger Analyst Trainee with no experience. C.T. claims that K.S. indicated that she was going to probably hire for the trainee position because she felt that she needed younger people in the office and she did, in fact, hire two much younger Analyst Trainees.

C.T. states that her being coerced into accepting a voluntary demotion at a lower range based on age discrimination was not addressed in the investigation as the determination only addressed the e-mail to her supervisor, S.C., which was found not to be retaliation. She argues that the investigation was not thorough as she does not believe that she was given the opportunity to provide a witness list, she was not interviewed, and her documentation was not requested from her. She states that during her initial interview with "L.J." of the Division on November 20, 2019, she offered to provide documentation; however, she claims that she was advised that this was not necessary at the time and she would be contacted sometime during the investigation to provide her documentation. Additionally, C.T. complains that she

was informed during the initial interview that she would receive a copy of her complaint within 30 days of the interview, but she did not receive a copy until April 30, 2020. She also complains that she was not given the opportunity to rebut any findings during the investigation. C.T. requests that she be reinstated as a Management Assistant and receive retroactive pay.

In response, the Division indicates that it did not interview C.T. for the subject complaint because she provided a three-page written statement as well as her e-mail exchange with K.S. that explained her position in this matter. Additionally, after being contacted by C.T. regarding A.T.'s statement in the April 4, 2019 meeting that he was aware that she filed a grievance with the union, it explained to her that the Assistant Commissioner's mentioning of the grievance was not considered retaliatory. The Division explains that the investigation was unable to find a nexus between her prior age discrimination complaint and her pending failure of her working test period as a Management Assistant, which led to her accepting a voluntary demotion to a Technical Assistant 2 position. Further, K.S. copying her new supervisor, S.C., on an e-mail was with the intent to keep him informed as to what was happening regarding C.T.'s prior assignment was not related to the prior complaint no material adverse action was taken because of it.

The Division presents that C.T. alleges new issues on appeal that were not part of her complaint when she alleges that there were younger employees who K.S. characterized as simply not able to do the work who did not fail their working test periods, but were reassigned to other locations retaining their title. Lastly, C.T. references a November 20, 2019 interview regarding not being allowed to provide documentation and not receiving a copy of her complaint in a timely manner. However, as there is no "L.J." within the Division, it believes C.T. is referencing an interview conducted by L.J., Investigator 2, Department of Law and Public Safety, Division on Civil Rights.

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. Under this policy, employment discrimination or harassment based upon age is prohibited.

N.J.A.C. 4A:7-3.1(h) states, in pertinent part, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment is prohibited by this policy. No employee bringing a complain shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. Failing to promote an employee or select an employee for an advancement for filing a discrimination/harassment complaint is an example of a prohibited action.

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, a review of the record indicates that in the Division's February 18, 2020 determination, it determined that although K.S. made some inappropriate comments about C.T.'s age, there was nothing in the record to indicate that C.T.'s unsatisfactory rating during her working test period as a Management Assistant was based on her age. In fact, its investigation revealed that K.S. provided documentation corroborating C.T.'s unsatisfactory rating. Additionally, the investigation revealed that K.S. met with C.T. to explain the issues and there was no evidence of improvement during the extension of her working test period. It is noted that C.T. did not appeal that determination. As such, the Commission will not review that issue. In this appeal, C.T. is now alleging her unsatisfactory working test period and subsequent voluntary demotion were based on retaliation for her filing the prior age discrimination complaint. However, she has presented no evidence to support such claims. Mere allegations, without evidence, are insufficient to support a State Policy violation. *See In the matter of T.J.* (CSC, decided December 7, 2016). Further, there is no evidence that K.S.'s e-mail to C.T.'s new supervisor, S.C., indicating that she failed to follow-up on a return to work drug test, even if that was not accurate, was sent for retaliatory reasons. Moreover, even if it was, the only corrective action that would be taken would be against K.S., who is now retired. Additionally, there is no evidence in the record that C.T. suffered an adverse employment action based on that e-mail.

Regarding C.T.'s allegation that she was coerced into taking a voluntary demotion because she was going to fail her working test period as a Management Assistant, as there has been no evidence presented that C.T.'s unsatisfactory ratings during her working test period and her pending failure of her working test period were discriminatory, retaliatory or based on any other invidious motivation, it was within Transportation's right to fail C.T. for her working test period. Further, as Transportation did not use C.T.'s permanent title of Claims Examiner, which was her title at Labor, C.T.'s choice to accept a voluntary demotion to Technical Assistant 2, rather than risk failing her working test period, which would initiate layoff proceedings, was a voluntary choice. C.T. could have chosen to complete her working test period and appealed her subsequent failed. However, given the potential options and risks, C.T. decision to accept a voluntary demotion was not retaliatory or based on duress or coercion.

Referencing C.T.'s claim that the investigation was not thorough because she was not given the opportunity to provide a witness list, she was not interviewed, and her was documentation was not requested from her, on appeal, C.T. has not provided any named witness who was not interviewed, any document that was not reviewed, or any other evidence that was not considered that could potentially indicate that her pending failure of her working test period as a Management Assistant was based on age discrimination, retaliation or any other invidious motivation. As such, the Commission finds that the Division's investigation was sufficiently thorough.

Concerning the new claim on appeal that there were younger employees who K.S. allegedly stated that could not do the work but did not fail their working test periods and were reassigned, C.T. has provided no evidence. Regardless, as K.S. is no longer an employee, and the Commission has found that there was no retaliation in this matter, those claims need not be further investigated.

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 30TH DAY OF SEPTEMBER, 2020

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