



**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of D.P., Department of  
Law and Public Safety

Discrimination Appeal

CSC Docket No. 2019-2858

**ISSUED: MARCH 26, 2021 (ABR)**

D.P., a Radiological Field Service Representative with the Department of Law and Public Safety (LPS), appeals the determination of the Director of the Office of Equal Employment Opportunity (EEO), LPS, which found that the appellant 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, on December 3, 2018, the appellant filed a complaint with the EEO, alleging that his supervisor, B.M., a Supervisor of Radiological Maintenance; and R.E., a Radiological Field Service Representative, violated the State Policy by discriminating against him on the basis of his disability. Specifically, he alleged that B.M. violated his rights under the State Policy and the federal Americans with Disabilities Act (ADA) by allowing R.E. to smoke at the back door of their office building, despite the appellant’s respiratory issues. He also maintained that R.E. harassed him by smoking behind the building where they worked and intimidating him by making “kung fu” moves with a broomstick because of his disability. The appellant further alleged that disciplinary action taken against him for a series of events in June 2018 constituted discrimination against him on the basis of a disability. Specifically, the appellant asserted that he was disciplined for speaking loudly with B.M., even though his loud talking was attributable to his hearing loss disability.

In response, the EEO reviewed the appellant’s complaint but declined to open a “formal investigation” into the matter because it found no evidence that B.M. or R.E. harassed or discriminated against the appellant based upon his membership in

a protected class. The EEO noted that after the appellant complained about similar issues in 2017, B.M. prohibited smoking within 10 feet of the building after consulting with the Division of State Police (State Police) and the Office of the Attorney General. The EEO indicated that the appellant did not allege that R.E. smoked within 10 feet of the building and it also found that the information he supplied did not establish that R.E. smoked cigarettes behind the building or made “kung fu” moves with a broomstick as a means of harassing the appellant or because of a discriminatory animus. The EEO also concluded that there was insufficient information to find that B.M. discriminated against the appellant on the basis of his disabilities. The EEO further noted that the appellant was offered an ADA accommodation which would allow him to park in front of the building and use an alternate entrance to enable him to avoid cigarette smoke at the back entrance. It indicated that the appellant declined the accommodation because he was still required to go to the back door to receive instruments from customers. The EEO recommended that he clarify the accommodation with the ADA Coordinator and it notified the ADA Coordinator about his request to be exempted from having to receive instruments from customers at the back of the building.

On appeal, the appellant argues that under the federal ADA, R.E. should not be permitted to smoke near the building. The appellant further contends that R.E. used a broomstick to create a hostile work environment. In support, he submits, in relevant part, a photo that he maintains shows R.E. smoking within 10 feet of the back door of their workplace. Specifically, the photo shows a man seated in the rear cargo area of a vehicle with a fence and trees visible in the background. The man’s mouth is closed and there is no object visible inside of it. His right hand is seen resting on a black rectangular object in the vehicle’s cargo area, while his left hand is curled up and resting on his left leg. The appellant further argues that he should not have been disciplined for talking loudly to B.M. because of his hearing disability. The appellant submits notes from two physicians regarding his respiratory and hearing conditions. The appellant also furnishes documentation related to a complaint he filed with the United States Equal Employment Opportunity Commission (EEOC) against the State Police.<sup>1</sup>

In response, the EEO asserts that the appellant’s appeal should be denied. With regard to the appellant’s request for a smoke-free environment inside and

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<sup>1</sup> The appellant filed an EEOC complaint against the State Police in March 2019. The EEO indicates that LPS attempted to file a response to EEOC, but that the EEOC never received it. On June 28, 2020, the EEOC issued its determination, indicating that because it did not receive a response from LPS, it drew an adverse instance against the State Police and found that it engaged in employment discrimination in violation of the ADA. Thereafter the parties failed to conciliate and the United States Department of Justice (DOJ) issued a Notice of Right to Sue Within 90 Days (Notice of Right to Sue), dated November 20, 2019, to the appellant. The EEO states that it has no knowledge of the appellant pursuing litigation against it following the issuance of the DOJ’s November 20, 2019 Notice of Right to Sue.

outside of his workplace, the EEO submits that the appointing authority offered the appellant an accommodation which would have permitted him to use the parking area in front of his workplace and thereby avoid the smoking area in the back of the building, but that he declined the accommodation. The EEO further indicates that in March 2020, the ADA Coordinator “informally requested” that the appellant’s supervisors refrain from having him retrieve materials from the back door of his workplace. As to the appellant’s claims regarding R.E., it states that it found that R.E. used a broomstick to perform exercises, which sometimes included imitated martial arts movements, on the advice of his chiropractor and with the permission of management. The EEO submits that there were not any witnesses who corroborated the appellant’s claims. Moreover, the EEO further states that a witness who saw R.E. perform his exercise routine stated that they did not perceive it as a means of harassing the appellant. The EEO avers that the photograph the appellant submits of R.E. sitting in the back of his own truck does not establish that R.E. was smoking in a prohibited area, as there is nothing in the photograph that establishes that it was located within 10 feet of the building or that his actions otherwise violated the State Policy. As to the appellant’s claims that he should not have been disciplined for talking loudly to B.M., the EEO proffers that the appellant was not disciplined for generally speaking loudly to her. Rather, he was disciplined for yelling at her in a confrontational manner when he was being counseled for performance issues. Therefore, the EEO maintains that there is insufficient evidence to find that R.E. or B.M. discriminated against the appellant on the basis of his disability.

### 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*.

Initially, the Commission finds that the appellant’s claim that B.M.’s pursuit of disciplinary action against him violated the State Policy is moot. The appointing authority has advised this agency that this disciplinary action is currently pending at the departmental level. *N.J.A.C. 4A:7-3.2(m)1* states, in pertinent part, that “[a]ppeals which raise issues for which there is another specific appeal procedure must utilize those procedures.” Accordingly, since this claim of discrimination by the appellant’s supervisor is in response to the proposed minor disciplinary action against him, the Commission will not review the appellant’s current claim against his

supervisor. However, the appellant may raise any claims regarding the disciplinary action during the disciplinary process.

As to the appellant's claims against R.E., the Commission has reviewed the record in this matter and it finds that an adequate investigation was conducted and that the investigation failed to establish that R.E. discriminated against the appellant on the basis of his disability. Moreover, the record does not demonstrate that the EEO improperly concluded that there was insufficient evidence that R.E. violated the State Policy. In this regard, it is noted that the burden of proof is on the appellant in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)4*. Here, the record demonstrates that the appellant's December 2018 complaint involved many of the same allegations that the EEO investigated in 2017. The EEO's 2017 investigation revealed that LPS management gave R.E. permission to perform exercises with a broomstick because of a medical condition and it found no evidence he used that object or his exercises as a means of intimidating the appellant. Furthermore, the photograph the appellant furnishes with the instant appeal does not establish that R.E. violated LPS's policy against smoking within 10 feet of the back entrance at their workplace or otherwise used his cigarette smoking as a means of discriminating against the appellant in violation of the State Policy. In fact, there is no indication in the image that R.E. was in possession of a cigarette. In addition, the image does not give any indication as to how close R.E. and the vehicle were to his and the appellant's workplace, as the only reference points visible in the shot are nondescript trees and fencing. Accordingly, the appellant has failed to sustain his burden of proof and there is no basis to disturb the determination of the Director of the Office of EEO, LPS.

Finally, as to the issue of the accommodations offered to the appellant, the Commission observes that the ADA is a federal statute designed to eliminate discrimination against individuals with disabilities. 42 *U.S.C.A.* § 12101; *See also, Jones v. Illinois Cent. R. Co.*, 859 *F. Supp.* 1144 (N.D. Ill. 1994)). State courts have concurrent jurisdiction with federal courts over ADA claims; however, existence of such concurrent jurisdiction does not alter the fact that ADA actions are federal question cases. *Jones v. Illinois Cent. R. Co.*, *supra*. The Commission may review ADA issues collaterally when they are implicated in an appeal properly before it, such as in a disciplinary action or in a discrimination appeal. *See Matter of Allen*, 262 *N.J. Super.* 438, 444 (App. Div. 1993); *In the Matter of John Soden* (MSB, decided September 10, 2002) (noting that jurisdiction was proper when the ADA was implicated as a defense to a disciplinary removal properly before the Merit System Board (Board)); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000) (Board may apply the ADA in deciding an issue concerning removal from an eligible list). *Compare, In the Matter of Michael Tidswell* (MSB, decided August 9, 2006) (Board remanded the appellant's request for a reasonable accommodation to the appointing authority for further investigation regarding possible violations of the State Policy).

Under the ADA, the term “reasonable accommodation” means (i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; (ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. A reasonable accommodation may include, but is not limited to: (i) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (ii) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training, materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. *See 29 CFR §2730.2(o)*. Further, the ADA requires that, where an individual’s functional limitation impedes job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose undue hardship on the employer. *See 29 CFR § 1630.2(p)*. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself. This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with the disability. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job’s essential function. The ADA does not provide the “correct” answer for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and to take into account, the disabling condition involved. *See 29 CFR § 1630.2(o) and 29 CFR § 1630.9*.

As evident from the above summary, the ADA contemplates an interactive process between the employee and employer whenever an employee’s disability may impact his or her ability to perform the essential functions of the position. It must be emphasized that the ADA does not necessarily give the employee the right to demand and receive a specific accommodation if he or she can still perform the essential functions of the position. *See In the Matter of Karen Kritz* (MSB, decided January 25, 2006). In the instant matter, the record reflects that the appellant requested and was offered numerous accommodations to assist him in the performance of his duties. The appellant was offered an accommodation which would have allowed him to park in front of his workplace and to utilize the front entrance to enable him to avoid the smoking area in the back of the building. Moreover, in March 2020 the ADA

Coordinator requested that the appellant's supervisors refrain from having him retrieve materials from the back door, to allow him to avoid the smoking area near that location. It should be noted that an employee does not necessarily have the right to demand and receive specific accommodations if they can perform the essential functions of their position. *See e.g., In the Matter of Mary V. Powell (MSB, decided February 20, 2002)*. In this matter, there is no evidence that the appellant could not perform the essential functions of his Radiological Field Service Representative position. As stated above, the ADA does not provide the correct answer for each employment decision concerning an individual with a disability. Rather, it establishes parameters to guide employers how to consider, and to take into account, the disabling condition involved. In this case, the appellant has not convinced the Commission that the appointing authority's actions were outside of the established parameters.

### 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 24<sup>TH</sup> DAY OF MARCH, 2021

*Deirdre' L. Webster Cobb*

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