STATE OF NEW JERSEY

In the Matter of J.B., Department of Community Affairs	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2020-1861	Discrimination Appeal

ISSUED: JUNE 25, 2022 (SLD)

J.B., a temporary employee, Sandy Recovery Division, appeals the determination of the Commissioner, Department of Community Affairs, stating that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

On October 30, 2019, the Division Director, S.V., a Caucasian male Government Representative 2, referred a matter to the Equal Employment Office/Affirmative Action (EEO/AA) alleging that the appellant, an African-American female, made a discriminatory statement concerning nationality following a staff meeting. Specifically, an employee related a local story concerning an Asian Indian male urinating on two African-American teenage girls at a high school football game. The appellant's supervisor, N.D., a Caucasian female Program Specialist 4, reported that the appellant responded that "I can't stand them. They don't even know their immigrants. They look down on us." N.D. reported that although the appellant was sensitive to racial bias, she didn't necessarily recognize that she made a racially biased statement, and she hoped that this could become a teaching moment. In response to the complaint, the EEO/AA conducted an investigation and substantiated that the appellant violated the State Policy. As a result, it noted that the appellant received a written reprimand.

On appeal, the appellant acknowledges that she stated, "I don't care for these people," but maintains that it was a single comment and it was not derogatory, and therefore, she did not act in a discriminatory manner. In this regard, she maintains that she never "qualified" the statement and therefore, it cannot have detracted from anyone's character or standing. Moreover, she asserts that she "was triggered by the

office [sic] inappropriate subject matter that was derogatory to young black girls" and she reacted. Further, she asserts that she does not "care for these people who are pissing on African American people period." The appellant argues that she is particular about when she absorbs news as she is very passionate and thinks "about the underlying motives and what truly drives this racist white supremacist society we live in and why it persists." Moreover, although she acknowledges that the discussion took place after the meeting, she asserts that she has been uncomfortable in "these meetings" where religion, politics, sexual abuse and health condition of a co-worker's spouse have been discussed. Additionally, the appellant argues that N.D. should have been found to have violated the State Policy for "having inappropriate subject matter at meetings," and that if a supervisor can include "provocative subject matter" than provocative responses should be expected.

The appellant also claims that the process was only initiated against her as retaliation for her complaint against N.D. and she maintains that S.V. did not treat her complaint equally. The appellant asserts that she was subject to hostile work conditions that resulted in depression and anxiety and affected her judgement. In support, she submits a doctor's note which states that her issue was "triggered by her work environment." The appellant maintains that her lapse in judgement was due to the months of being in a toxic work environment due to the treatment of N.D. which, despite her complaint to S.V. in October 2019, was ignored. The appellant asserts that S.V. did not address her complaint until November 2019, when, during a meeting, he made clear that he was supporting N.D.; affirmed that it was okay to misrepresent a job during a hiring process and offer said job to two different people; that there would be no accountability for providing the misleading information; and threatening to fire staff if they did not get along. The appellant also asserts that S.V. indicated that he would not move her to another position, as she was hired for the position she was working in. The appellant also maintains that she told S.V. he was subjecting her to microaggressions, and when he told her that he would report it, she said no as she would consider it a new start. However, since she has learned that S.V. submitted the instant complaint, she has changed her position. Furthermore, the appellant argues that S.V. has demonstrated his objective to terminate her on arbitrary and capricious grounds. In support, she submits S.V.'s January 15, 2020 memorandum to her, regarding the finding that she had violated the State Policy which states in pertinent part:

> This behavior and or any other misconduct will not be tolerated by the Department. Further violation of the State Policy, or any other misconduct on your behalf, will subject you to disciplinary action up to and including termination.

Finally, the appellant argues that the confidentiality of the process violates her right to review the file pursuant to *N.J.A.C.* 4A:2-1.1(d).

In response, the EEO/AA reiterates that its investigation substantiated that the appellant had violated the State Policy. It noted that it interviewed the appellant, N.D., and three co-workers who were present at the meeting, including one witness who had related the story about the incident at the local high school. In support, it submits the investigative report and the witness statements. Witness one acknowledged that he related the story at the end of the meeting, but he said that after he said it, there was tension in the room and he "tuned out" so he did not hear anything said after that. Witness two stated they were almost done with their daily meeting, when witness one related the story. Witness two maintained that the appellant said in response something along the lines of, "I can't stand those Indians. They are always doing stuff like this to Black people. It's like they don't know that they are immigrants." Witness three stated that she wasn't sure what anyone said, but that what the appellant said, "wasn't malicious" and that it was "based on how she was treated in the past by Indians and/or by Black people." Witness three also asserted that she had had issues with the appellant, until she realized that N.D. was the problem. Witness three also maintained that the appellant should not be disciplined "because everyone was talking about this event and not just [the appellant]." The appellant admitted that she said, "I don't care for those people," after which N.D. cut her off, everyone left, and the appellant said, "don't bring stuff like that up." The appellant further stated that she "immediately felt like that shouldn't have come out of [her] mouth and that [she] didn't clarify the statement." N.D. related that at the end of a meeting, witness one related the story, to which the appellant stated, "I can't stand them. They don't even know their [sic] immigrants. They look down on us." N.D. maintained that that the appellant "is very sensitive to racial bias," but that she "doesn't necessarily recognize that she made a racially bias [sic] statement." Finally, N.D. stated that the appellant should not be terminated, but that it should "turn into a teaching moment." Based on its investigation, the EEO/AA maintains that the appellant's statement violated the State Policy. In this regard, it argues that the State Policy specifically notes that an example of prohibited behavior is "treating an individual differently because of the individual's . . . nationality." *See N.J.A.C.* 4A:7-3.1(b)1ii. Moreover, *N.J.A.C.* 4A:7-3.1(b) provides, in pertinent part, that a violation of the State Policy can occur, even if there was no intent on the part of an individual to demean or harass another.

The EEO/AA maintains that although the appellant is a temporary employee, the State Policy applies to her, and her admitted statements violated the State Policy as noted above. Therefore, it was appropriate that some sort of corrective action be initiated against the appellant. Additionally, the EEO/AA argues that the written reprimand that was received by the appellant does not violate the policy of progressive discipline.

In response, the appellant reiterates her arguments and maintains that N.D. and witness two are obviously lying and colluding to retaliate against her. In this regard, the appellant maintains that she reported N.D.'s behavior of misrepresenting

the position that the appellant was hired for and creating conflict[1] between the appellant and witness three. The appellant asserts that N.D., during this time, also attempted to turn witness two against the appellant by sharing her version of the events with witness two. Additionally, the appellant maintains that N.D. berates her and attempts to make her look bad in front of other individuals, and she told S.V. that she did not want to work with N.D. The appellant maintains that N.D. treats her poorly because she is "not willing to be led around and affirm her" like witness two and the rest of N.D.'s clique group.

The appellant argues that there is no evidence of her treating anyone differently, and the statement she made did not identify anyone's nationality as she was reacting to an egregious act. The appellant reiterates that the statements attributed to her by N.D. and witness two are demonstrably false. In this regard, she maintains that she could not have said all of the statements attributed to her as N.D. cut her off and she did not have time to make those statements. Moreover, she notes that witness three, who was sitting closest to her did not "[affirm] any particular statement." The appellant also notes that N.D. and witness two obviously are lying since their statements are not exactly the same, which they did purposefully. The appellant argues that she believes that if they were honestly repeating what she said they would be "more similar with regards to flow." The appellant argues that she also believes that S.V. knows that N.D. and witness two are lying. The appellant also notes that although the incident occurred on October 22, 2019, S.V. did not report the incident until October 30, 2019. She also notes that N.D., who is her supervisor, did not report the incident within 24 hours as required by the State Policy. The appellant argues that as she has proved that N.D. and witness two are not credible sources, the appointing authority has not met its burden of proof in this matter, and the reprimand should be rescinded.

CONCLUSION

N.J.A.C. 4A:7-3.l(a)l provides in pertinent part, that the State Policy applies to *all employees* and applicants for employment in State departments, commissions, State colleges or Universities, agencies, and authorities. *N.J.A.C.* 4A:7-3.2(a) provides that *all employees* and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy. Consequently, all employees, including those employees not covered by Title 1lA may file a complaint alleging discrimination under the State Policy. However, the ability to appeal the resulting determination to the Commission is limited to specific classes of employees. Specifically, *N.J.A.C.* 4A:7-3.2(m) states that a complainant who is in the *career, unclassified or senior executive service,* or who is an applicant for employment, who disagrees with the determination of the State agency head or

[1] The appellant does not assert that the alleged actions by N.D. were the due to the appellant's inclusion in a protected category, nor is there any indication in the record that the appellant filed a complaint with the EEO/AA regarding these issues.

designee, may submit an appeal to the Commission. Moreover, *N.J.A.C.* 4A:7-3.2(n) provides that in a case where a violation has been substantiated, and no disciplinary action recommended, the party against whom the complaint was filed may appeal the determination to the Commission. Although *N.J.A.C.* 4A:7-3.2(n) does not specify that the "party against whom the complaint was filed" must be in the career, unclassified or senior executive service or an applicant for employment, it is clear from a full reading of *N.J.A.C.* 4A:7-3.2 that *the ability to appeal* a determination is to be limited to only applicants for Civil Service employment, or employees already serving in the career, unclassified or senior executive service, *i.e.,* individuals who are in the Civil Service or who are attempting to enter the Civil Service. To conclude otherwise is neither logical nor reasonable. In this regard, since *N.J.A.C.* 4A:7-3.2(m) specifically limits appeals from complainants only to employees or candidates subject to Civil Service law and rules, the same conditions must apply to *N.J.A.C.* 4A:7-3.2(n). To not conclude so would give parties against whom a complaint is filed who are not subject to Civil Service law and rules greater appeal rights than similarly situated complainants under *N.J.A.C.* 4A:7-3.2(m). No such intent can be found in the legislative or regulatory history.

Temporary service is not one of the specific classes of employees to which appeal rights to the Commission are provided in *N.J.A.C.* 4A:7-3.2(m). In this regard, temporary positions have no underlying Civil Service status, are "at-will" employees and are "*per diem,*" which means those employees only serve "by the day." Appointing authorities utilize temporary employees to complete special projects, respond to workload fluctuations, and fill in when employees are on leave. A key feature of temporary service is the ability of an individual to decline an offer of work for a particular day or time with no adverse repercussion, such as potential disciplinary action, as could be the case if a career, unclassified, or senior executive service employee did not report for work when scheduled. Moreover, even if a temporary employee has a regular, part-time schedule, it does not convert their employment status, since either the temporary employee, or the appointing authority, can change the schedule at any time or discontinue the temporary service. In this case, as the appellant served as a TES employee, the Commission lacks jurisdiction to adjudicate his appeal. Therefore, the Commission dismisses this appeal solely on the basis of lack of jurisdiction.

While the Commission has dismissed this appeal due to lack of jurisdiction, the following is provided for informational purposes only. In this case, even assuming *arguendo* that the appellant served in one of the specific classes of employees entitled to file an appeal under *N.J.A.C.* 4A:7-3.2(n), which she does not, the record establishes that she violated of the State Policy. As previously noted, the appellant was issued an official written reprimand based on the findings of the State Policy investigation. In accordance with *N.J.A.C.* 4A:2-3.1(a), a formal written reprimand is considered minor discipline. In a case where a violation of the State Policy is substantiated, if disciplinary action has been recommended in the final letter of

determination, any party charged who is *in the career service* may appeal using the procedures set forth, in pertinent part, *N.J.A.C.* 4A:2-3. Thus, had the appellant served in one of the specific classes of employees permitted to file an appeal in accordance with *N.J.A.C.* 4A:7:3-2(n)3, had she pursued a minor disciplinary appeal to the appointing authority and disagreed with that determination, any appeal to the Commission of that determination would be reviewed under the provisions of *N.J.A.C.* 4A:2-3.7(a).

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission. The rule further provides:

1. The Commission shall review the appeal upon a written record or such other proceeding as the Commission directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the Commission's decision will be a final administrative decision.

2. Where such issues or evidence under (a)1 above are presented, the Commission will render a final administrative decision upon a written record or such other proceeding as the Commission directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level.

In considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the administrative management of the Commission. The Commission will also not disturb minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010). While the appellant does not have standing to file an appeal of her minor disciplinary action since she is a temporary employee, the following is provided for informational purposes only.

N.J.A.C. 4A:7-3.1(b) provides, in pertinent part that it is a violation of the State Policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in (a) above. 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(b)1ii provides that an example of behavior that may constitute a

violation of this policy include, but are not limited to: treating an individual differently because of the individual's race, color, national origin or other protected category, or because an individual has the physical, cultural, or linguistic characteristics of a racial, religious, or other protected category. *N.J.A.C.* 4A:7-3.1(h) prohibits 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. *N.J.A.C.* 4A:7-3.2(m)4 provides that an appellant has the burden of proof in discrimination appeals.

The Commission has conducted a review of the record in this matter and finds that an adequate investigation was conducted, and that the investigation established that the appellant's statement violated the State Policy. The appellant acknowledges that although she said that she didn't like "those people," she did not make any of the other statements attributed to her. Moreover, the appellant argues that her statement was not derogatory and therefore, could not have violated the State Policy. The Commission notes that the State Policy does not only prohibit derogatory statements based upon an individual's inclusion in a protected category, but it also prohibits treating individual's differently due to their national origin. In the instant matter, the appellant's acknowledged statement was based upon an individual's national origin and, in fact, referred to all individuals of that national origin. Additionally, regarding the appellant's claims that N.D. and witness two conspired and lied about the other statements that she is alleged to have said, other than her allegations, the appellant has presented no evidence in support. The appellant argues that because the statements she is alleged to have said are not the same, N.D. and witness two are lying. However, the Commission notes that the statements N.D. and witness two claim the appellant made are similar. Moreover, witness two indicates that the statements she attributed to the appellant were "something along those lines." The appellant also claims that it is obvious that N.D. and witness two are lying since witness three did not "affirm" that the appellant made any particular statement. However, in her statement, witness three indicated that she did not remember what anyone said, but that the appellant "didn't say anything malicious" and that her statement was based on "how she was treated in the past by Indians and/or Black people." Although the appellant claims her statements were not in a derogatory manner, an individual can violate the State Policy regardless of intent. Further, as indicated above, the appellant's admitted statement regarding "those people" is, by itself, a violation of the State Policy.

Moreover, the Commission does not agree with the appellant that the delay of approximately one week is evidence that S.V. colluded with N.D. and witness three. Additionally, despite the appellant assertion that the State Policy requires matters to be reported within 24 hours, there is no such requirement within the State Policy. Rather, *N.J.A.C.* 4A:7-3.1(d) and 4A:7.3.2(a) provide that employees are encouraged to immediately report suspected violations of the State Policy and *N.J.A.C.* 4A:7-

3.1(e) mandates that supervisors immediately refer allegations of violations of the State Policy. Excessive delays in reporting suspected violations of the State Policy can cause delays in the investigation as witnesses and other evidence may no longer be as easily available. However, there is no specific time frame articulated. Moreover, the appellant has not presented any evidence, other than her mere allegations, that the delay was due to an invidious motivation or that the delay somehow invalidates the results of the investigation. Regardless, all parties in this matter are reminded to strictly adhere to the regulations and procedures to be followed regarding allegations that may implicate the State Policy.

Finally, with regard to the appellant's claim that the instant complaint was in retaliation for a complaint she made to S.V. regarding N.D., under the State Policy a retaliation complaint *must* be based upon one of the protected classes listed in the State Policy *and* be in reference to a previously filed discrimination complaint or participation in an investigation. However, there is nothing in the record, nor does the appellant allege, that the behavior she complained of regarding N.D. was due to the appellant's inclusion in a protected category. Moreover, there is no indication in the record that the appellant filed an EEO/AA complaint regarding the issue. Accordingly, that investigation was thorough and impartial and there is no basis to disturb the appointing authority's finding that the appellant engaged in conduct in violation of the State Policy.

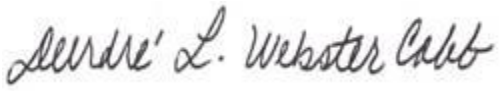
With respect to the written reprimand, the appellant has not presented issues of general applicability in the interpretation of law, rule or policy, has not alleged, nor has she provided any evidence that the reason for his minor discipline was motivated by invidious discrimination considerations such as age, race or gender bias. The appellant asserts that the written reprimand she received was evidence that S.V. was seeking a way to remove her as the reprimand noted that any further issues could warrant additional discipline up to and including removal. However, the Commission notes that this is common language to remind employees that additional violations may warrant additional and/or more severe discipline, up to and including removal. Therefore, the inclusion of such language does not evidence an intent on the part of S.V. to remove the appellant.

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 20TH DAY OF JULY 2022



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