

In the Matter of D.B. and T.J., Department of Health
CSC Docket Nos. 2014-1558 and 2014-1564
(Civil Service Commission, decided May 21, 2011)

D.B., a member of the Senior Executive Service, and T.J., a Contract Administrator 3, both with the Department of Health (DOH), appeal the decisions of the Chief of Staff of the DOH which substantiated that they violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). These appeals have been consolidated due to common issues presented.

By way of background, C.S-C., a Technical Assistant 2, alleged that on April 10, 2013, during a supervisory staff meeting, W.J., a Supervising Contract Administrator 3 stated, "I see all the people I supervise are now black; I couldn't get a 'token white.'" In attendance at the meeting were E.A., Division Director, W.V., a member of the Senior Executive Service, W.J., and appellants D.B. and T.J. For administrative reasons, the complaint was transferred from the DOH to this agency's Division of Equal Employment Opportunity/Affirmative Action (EEO/AA) to conduct an investigation. The investigation confirmed that witnesses heard W.J. make the comment in response to certain employees being reassigned to his supervision. The investigation found that D.B. admitted to attempting to file a complaint about the matter but was talked out of it by an unnamed colleague. With respect to T.J., the investigation found that on April 11, 2013, he sent an e-mail to E.A. about the incident, expressing his distress about W.J.'s comment. However, since both of the appellants serve in supervisory capacities, it was determined that they had an affirmative duty to report the matter to the Office of Diversity and Equity Services (EEO). Therefore, since the appellants did not report W.J.'s comments, the investigation substantiated a violation of the State Policy.

On appeal, D.B. maintains that she acted in accordance with her responsibilities regarding the inappropriate comment. Specifically, on April 10, 2013, she attempted to contact the Affirmative Action Officer, but was advised that she was on maternity leave. D.B. claims that when she asked who was serving in the Affirmative Action Officer's absence, the secretary with whom she spoke said that there was no Acting Affirmative Action Officer and that there was no one to take complaints. Therefore, D.B. asserts that there was no technical expert available to confidentially advise her or take the complaint. In this regard, D.B. emphasizes that the State Policy indicates that each State agency is to designate someone to receive discrimination complaints and also have an alternative person to receive complaints. Consequently, she states that, in consultation with T.J., an email was sent to E.A., who was their supervisor, as well as W.J.'s supervisor, expressing their discomfort with the comment. E.A. replied to this e-mail that he was disturbed as well. Therefore, D.B. maintains that since E.A. acknowledged the inappropriate comment and expressed that he was also distressed by it, both D.B.

and T.J. assumed E.A., as the Division Director, would take the necessary action to address the issue. D.B. also argues that even though she witnessed an inappropriate comment, since no one referred an allegation of a violation of State Policy to her, she did not have obligation to report the comment.

T.J. presents that there were four supervisors in the room when the inappropriate comment was made and that he was the lowest ranked supervisor. Further, he highlights that there were no African Americans or any of the affected employees in the room when the comment was made. T.J. also states that this situation is unique, as everyone in the room at the meeting was a supervisor. Therefore, he was unsure how the situation should be handled. In this case, he questions if the ranking supervisor, E.A., who was at the meeting and is the Director of Management and Administration for DOH, should be responsible for addressing this matter. T.J. states that given that the Affirmative Action Officer was unavailable, E.A. was in a position to act on and receive any complaints. He also asserts that it would be chaotic and illogical if the four supervisors at the meeting were responsible for informing the EEO of W.J.'s remarks. Consequently, T.J. reached out to E.A. by e-mail and when E.A. responded that he was "disturbed as well" regarding W.J.'s comments, he assumed that E.A., who was W.J.'s superior, would take care of the matter.

In response, the EEO states that the plan while the Affirmative Action Officer was on leave was to have this agency's Division of Equal Employment Opportunity and Affirmative Action handle discrimination matters. Further, her secretarial assistant distributed a coverage plan to various human resources liaisons throughout DOH. As part of the plan, the secretarial assistant was the initial point of contact for anyone who called the EEO. Further, when D.B. was initially interviewed by the investigator, she indicated that the secretarial assistant told her that she was filling in for the Affirmative Action Officer by gathering complaints and forwarding them for investigation. However, in her appeal, D.B. provides a conflicting account by stating that the secretarial assistant advised that there was no one taking complaints or providing advice in her absence. The EEO argues that D.B.'s assertions are questionable, since 12 matters were referred to this agency's EEO/AA. Further, the EEO highlights that since both D.B. and T.J. had an organizational chart, they could have contacted the Affirmative Action Officer's supervisor if they were unsure with whom to communicate. Additionally, the EEO presents that D.B. and T.J. attended training sessions regarding the responsibilities of supervisors and reporting allegations of prohibited discrimination under the State Policy. Thus, even though D.B. and T.J. are not the supervisors of the person who made the inappropriate comment, they had a duty to report the discrimination. With regard to T.J. sending an e-mail to their superior, E.A., after consulting with D.B., who was also the superior of the offending party, the EEO asserts that while this was a good "first step," there is no chain of command for reporting incidents that may implicate the State Policy. Therefore, this action did

not relieve them of their reporting responsibilities. Also, the EEO explains that D.B. only received a written warning and T.J. received an advisory memo, neither of which were placed in their personnel files. In relation to D.B.'s statement that she did not have a responsibility to report a violation as no discrimination allegation was brought to her, as a supervisor, under the State Policy, D.B. has an obligation to report not only allegations of violations of State Policy that are brought to her, but also violations that she directly witnessed. Consequently, the EEO argues that its decisions that D.B. and T.J. violated State Policy should be upheld and they received appropriate corrective action.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides, in pertinent part, that employment discrimination or harassment based upon race and color are prohibited. This is a zero tolerance policy.

N.J.A.C. 4A:7-3.1(e) provides, in pertinent part, that supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination. For purposes of this section and *N.J.A.C.* 4A:7-3.2, a supervisor is defined broadly to include any manager or other individual who has authority to control the work environment of any other staff member.

N.J.A.C. 4A:7-3.1(g) provides, in pertinent part, that each State agency is responsible for designating an individual or individuals to receive complaints of discrimination/harassment, investigating such complaints, and recommending appropriate remediation of such complaints. In addition to the Equal Employment Opportunity/Affirmative Action Officer, each State agency shall designate an alternate person to receive claims of discrimination/harassment.

N.J.A.C. 4A:7.3-2(m)3 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Civil Service Commission (Commission) has reviewed the matter and finds that the determinations that D.B. and T.J. violated the State Policy were proper. D.B. and T.J., who are supervisors, attended a meeting with other supervisors, where one of the other supervisors made an inappropriate comment that implicated the State Policy. As D.B. and T.J. both were disturbed by the comment, they each separately attempted to contact the EEO, but the Affirmative Action Officer was unavailable as she was on leave. Prior to taking leave, the Affirmative Action Officer set up a plan where her secretary was the designated

individual to receive State Policy complaints. The plan called for the secretary to refer complaints she received to the EEO/AA, who was handling these matters while the Affirmative Action Officer was on leave. It is unclear as to the exact communication that the secretary had with D.B. and T.J. when advising them of the procedure for filing complaints while the Affirmative Action Officer was on leave. Regardless, D.B. and T.J. both chose not to file a complaint with the Affirmative Action Officer's designee. Instead, T.J., in consultation with D.B., e-mailed E.A., the Division Director, who was also in attendance at the meeting when the comment was made. E.A. was D.B.'s, T.J.'s, W.J.'s and W.V.'s¹ supervisor. T.J.'s e-mail stated that he was disturbed by W.J.'s inappropriate comment and E.A. replied that he was disturbed as well. Although D.B. and T.J. assumed that E.A. would move the matter forward, E.A. did not report the matter to the EEO.

D.B. and T.J. contend that since the Affirmative Action Officer was on leave, they acted appropriately by contacting their supervisor, E.A., who was also W.J.'s supervisor, who they thought would handle the matter. While the Commission commends D.B. and T.J. for initially reaching out to the EEO, understands that there may have been some confusion or discomfort with the procedure on how to report the complaint after learning that the Affirmative Action Officer was on leave, and can appreciate that they thought they were fulfilling their obligation when they contacted their supervisor who was also the supervisor of the individual who made the offending comment, under the State Policy, supervisors have an affirmative duty to immediately refer allegations of prohibited discrimination/harassment to the EEO or Affirmative Action Officer, or any other individual designated to receive complaints of workplace discrimination/harassment. There are no provisions in the State Policy which enable an individual in a supervisory title or position to take an alternative approach, such as referring the matter to his or her superior or the offending individual's supervisor, instead of the witnessing supervisor immediately reporting the allegation or the violation to the EEO him or herself. Additionally, it cannot be ignored that D.B. and T.J. had training on their obligation as supervisors under the State Policy prior to the incident. Further, the Affirmative Action Officer did have a designated individual in place to receive complaints while she was on leave. This is evidenced by the fact that 12 State Policy allegations were forwarded to the EEO/AA for investigation while the Affirmative Action Officer was on leave.

¹ The EEO determined that W.J., W.V., D.B., T.J., and E.A. each violated the State Policy. The EEO took the following corrective actions: W.V. received a written warning and attended Executive Training on May 21, 2012. W.J., T.J., and D.B. completed manager/supervisor training conducted by the Office of Diversity and Equity Services in February 2013. D.B. and W.J. also received a written warning, and T.J. received an advisory memo. E.A. was hired in October 2012 and had not completed training on the State Policy by the date the comment was made. Therefore, E.A. was individually trained on the State Policy and focused on the comment that was made, why it should have been reported, and consequences of the failure to report.

As the State Policy is a zero tolerance policy, no exceptions to the supervisory obligation to immediately report suspected violations can be made. Indeed, the model procedures for internal complaints alleging discrimination requires supervisors to immediately report all alleged violations and that the report shall include both the alleged violations reported to a supervisor and those alleged violations directly observed by the supervisor. *See N.J.A.C. 4A:7:3.2(d)*. Thus, it is clear that a supervisor who directly hears a comment that is in violation of the State Policy has a duty to report the matter to the EEO. The matter involving these appellants provides an excellent illustration as to why the State Policy was designed to obligate each supervisor to report an allegation directly to the EEO. In this case, while the Division Director may have seemed like the logical person to take the lead on reporting this matter, E.A., as well as all of the supervisors in the meeting, failed to report the violation to the EEO. The failure to report these types of allegations by supervisory personnel who are in a position to control the work environment of employees seriously undermines this State's commitment to ensure that every State employee and prospective State employee is provided with a work environment free from prohibited discrimination or harassment. Thus, since the purpose of the State Policy is to be instructive and remedial in nature, the corrective action taken by the EEO with respect to D.B. and T.J. was appropriate.

Accordingly, D.B. and T.J. have not met their burden of proof and the appointing authority's determinations that they violated the State Policy are upheld.

ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.