

B-33



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of S.H., Department of  
Military and Veterans Affairs

Discrimination Appeal

CSC Docket No. 2016-4016

ISSUED: **FEB 10 2017** (ABR)

S.H., a Principal Staff Officer 3 with the Department of Military and Veterans Affairs (DMAVA), appeals the determination of the Administrator of Veterans' Affairs, DMAVA, which found that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

T.K., a former Teacher 2, Challenge Youth Program, with DMAVA filed a discrimination complaint against the appellant on December 9, 2015, alleging, in part, that the appellant made discriminatory statements to T.C., a former Teacher 3, on the basis of disability.<sup>1</sup> Specifically, T.K. alleged that on November 13, 2015 she heard the appellant tell T.C. "We don't accommodate the handicapped here. We'll just fire you" in response to T.C.'s request for a closer parking spot at the New Jersey Youth Challenge Academy (Academy) following T.C.'s ankle surgery. The complaint was referred to this agency's Division of Equal Employment Opportunity and Affirmative Action (EEO) for an investigation. In response, the EEO conducted an investigation which consisted of six witness interviews, including the appellant. During his interview, the appellant denied making the alleged statement, but admitted to making comments in jest and claimed that T.C. had laughed at them. However, several witnesses confirmed that the appellant made the alleged comments. T.C. also advised the EEO that she was upset by the comments because she was an hourly at-will employee without any union protection. The EEO also noted that the Academy administration, including the appellant, was seeking a handicap parking accommodation at the Academy and had allowed T.C. to park

<sup>1</sup> The EEO did not substantiate the remainder of T.K.'s allegations, which she did not appeal.



closer to the Academy building. Following its investigation, the EEO found that the appellant violated the State Policy by making a discriminatory statement on the basis of disability. DMAVA adopted the EEO's investigative report and adopted the findings. As a result, corrective action was taken.<sup>2</sup>

On appeal to the Civil Service Commission (Commission), the appellant argues that DMAVA's determination that he violated the State Policy should be reversed because DMAVA mischaracterized the conversation between him and T.C. In this regard, the appellant disputes DMAVA's finding that several witnesses corroborated T.K.'s characterization of his comments to T.C. The appellant claims that T.K. was a "third party to, and physically removed from" that conversation and thus did not perceive that his comments to T.C. were made in jest. With regard to the "we don't accommodate the handicapped here" comment that T.K. attributed to the appellant in her complaint, the appellant claims that T.K. took his statement to T.C. out of context. The appellant contends that he was referring to Joint Base McGuire-Dix-Lakehurst's (MDL) policies prohibiting tenants, including the Academy, from establishing handicapped parking spaces and other permanent parking assignments without MDL command approval. The appellant presents that what he actually told T.C. was that MDL facilitated the parking plan and the Academy was "not authorized to create reserved parking arbitrarily for handicap persons." The appellant submits that T.C. then asked about parking in his spot or taking someone else's spot. The appellant indicates that he advised her against doing so without authorization. The appellant claims that T.C. thereafter queried about what the Academy would do if she did not show up for work because she was not given a closer parking spot and the Academy ended up being short-staffed as a result. The appellant submits that he responded by reminding T.C. that she was an hourly at-will employee and would be terminated if she refused to come to work. The appellant states that T.C. reacted by laughing and smiling in response and indicates that the conversation ended at that point. The appellant claims that his statement to T.C. about termination of her employment was based on State policies for hourly employees. The appellant notes that T.C. received a policy statement which lists the potential actions that can be taken against an employee who does not appear at work and he submits a copy of a Notice to Hourly Temporary Employees signed by T.C., dated April 2, 2015.

The appellant also contends that both T.K.'s and T.C.'s allegations against him were improperly motivated. The appellant claims that T.K. filed discrimination complaints against him because she believed that he was responsible for the disciplinary actions against her and her ultimate removal. The appellant also suggests that T.C.'s account of the conversation to the EEO's investigator was influenced by her growing concern about her status as an at-will employee. In that regard, the appellant claims that T.C. engaged in "increased conversations of desperation," after being notified that she would be terminated from the Academy,

---

<sup>2</sup> The appellant was required to complete training.



effective June 30, 2016. The appellant stresses that T.C.'s laughing and smiling during their conversation demonstrates that she also viewed his comments in a lighthearted manner. Finally, the appellant notes that EEO acknowledges that after the conversation at issue, he worked with T.C. to secure a handicapped parking space for her.

In response, the EEO, on behalf of DMAVA, argues that it conducted a thorough investigation where several witness corroborated T.K.'s account of the comments at issue and that the appellant, through those comments, violated the State Policy on the basis of T.C.'s disability. It notes that the appellant acknowledged to its investigator that T.K. could have been nearby and may have been able to overhear his conversation with T.C. The EEO also observes that T.C. reported the incident to a supervisor shortly after it occurred. It submits that it interviewed that supervisor, who indicated that T.C. had stated that the appellant's comment was, in fact, "[w]e don't accommodate the handicapped here, we'll just fire you." It argues that the witness accounts of the incident support T.K.'s account of the incident and demonstrate that she did not fabricate her allegations. It notes that even if the appellant had furnished a written statement of his account of the underlying incident during its investigation, it would not have changed its ultimate findings because several witnesses corroborated T.K.'s statements.

### 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)*. 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. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another. *See N.J.A.C. 4A:7-3.1(b)*.

The Commission has conducted a review of the record in this matter and finds that an adequate investigation was conducted, that the relevant parties in this matter were interviewed and that the investigation established that the appellant violated the State Policy. The appellant argues that T.K.'s complaint and the statement by T.C. which underlie DMAVA's determination were both improperly motivated. Specifically, the appellant suggests that T.K. sought to retaliate against him because she believed he was responsible for disciplinary action taken against



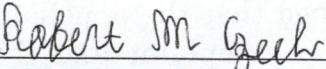
her and that T.C. became increasingly desperate to keep her position after she learned that her employment with the Academy was being terminated. The appellant also argues that DMAVA's determination should be reversed because T.K. gave an inaccurate account of the conversation between him and T.C. and took some of his statements out of context. In this regard, he contends that T.K. could not have properly perceived the nature of his conversation with T.C. because T.K. was a "third party to, and physically removed from" that conversation and consequently failed to recognize that some of his comments were made in a lighthearted manner. The appellant's arguments are unconvincing. T.C. indicated that she was upset by the appellant's comments and reported the incident to a supervisor. That supervisor indicated that T.C. reported that the appellant had said "[w]e don't accommodate the handicapped here. We'll just fire you." Thus, T.C.'s statements corroborate T.K.'s account of the nature and substance of the appellant's remarks. T.C.'s contemporaneous and consistent reporting of the incident offer a reasonable basis to conclude that she was genuinely upset by the appellant's statements, which discriminated against disabled individuals. Furthermore, none of the other witnesses interviewed by the EEO supported the appellant's account of the incident and the appellant does not provide any contradictory evidence, apart from his own statement about the incident. Finally, it is noted that an individual's conduct, rather than his intent, is controlling when determining whether the State Policy was violated. *See N.J.A.C. 4A:7-3.1(b)*. As such, even if the appellant intended to make his statement to T.C. in a joking manner, the fact that he made an inappropriate comment based upon a disability is sufficient to find that he violated the State Policy. Accordingly, the foregoing demonstrates that the investigation was thorough and impartial, and there is no basis to disturb DMAVA's determination.

### 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 8<sup>TH</sup> DAY OF FEBRUARY, 2017

  
\_\_\_\_\_  
Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
Written Record Appeals Unit  
P.O. Box 312  
Trenton, New Jersey 08625-0312

c: S.H.  
Susan Sautner  
Mamta Patel  
Records Center

---



Director  
Division of Technical and Scientific Affairs  
Civil Service Commission  
Federal Bureau of Investigation  
P.O. Box 400  
Washington, D.C. 20535

Mr. J. Edgar Hoover  
Director  
Federal Bureau of Investigation  
Washington, D.C.