

B-28



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of M.M., Department of
Human Services

Discrimination Appeal

CSC Docket No. 2014-2065

ISSUED: **SEP 18 2014** (HS)

M.M., a Supervisor of Nursing Services with the Department of Human Services (DHS), appeals the attached determination of the Chief of Staff of the DHS, which found sufficient evidence that the appellant had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

A.W., a Caucasian Charge Nurse with Woodbine Developmental Center (WDC), verbally alleged race discrimination against R.R., an African-American Cottage Training Technician with WDC, on August 15, 2011. A.W. complained to the appellant that R.R. had called her a "cracker." The Office of Equal Employment Opportunity (EEO) received the complaint on September 22, 2011. The EEO's investigation revealed that A.W. and T.M., a Practical Nurse with WDC, reported the allegation to the appellant on August 15, 2011, but the appellant did not report it to a supervisor until September 22, 2011. The EEO determined that the appellant had violated the State Policy by failing to carry out her supervisory duty to promptly report A.W.'s concerns. As a result, the EEO referred the matter for appropriate administrative action.¹

On appeal to the Civil Service Commission (Commission), the appellant acknowledges that on August 15, 2011, A.W. mentioned to the appellant that R.R. had called A.W. a "cracker," but the appellant argues that she was unaware of that term's meaning at that time. T.M. was also present on August 15, 2011. The

¹ The appointing authority took corrective action but did not take any disciplinary action against the appellant.

appellant maintains that A.W. never expressed a desire "formally" to report an instance of discrimination and showed no sign of distress that day. The appellant further maintains that it seemed that A.W. either had already reported the incident or had no intention of reporting the incident. She emphasizes that it was not until September 20, 2011 that S.W., Charge Nurse, 12 Months, informed the appellant that R.R. had expressed concerns over calling A.W. a "cracker." The appellant then questioned S.W. as to the meaning of the word "cracker," and S.W. told the appellant that "cracker" is a derogatory racial term used against some Caucasians. Therefore, on September 21, 2011 at 3:00 a.m., the appellant discussed the incident with A.W., who stated that R.R. called her a "cracker" and that he suddenly used that term despite their friendship. On September 21, 2011 at 7:00 a.m., the appellant met with A.W. and S.W. to discuss the matter. The appellant asked A.W. if she wanted to file a complaint against R.R., but A.W. responded in the negative because she did not want to cause R.R. any trouble and only desired an apology. On September 21, 2011 at 8:00 a.m., the appellant reported what was discussed to P.L., Supervisor of Nursing Services. On September 22, 2011, the appellant discussed the matter with K.H., Assistant Director of Nursing Services 1 Developmental Disabilities, and K.H. stated that she would discuss the matter with A.W. and report the matter to management. A.W. filed her complaint on September 22, 2011, and K.H. subsequently sent the appellant a copy of that complaint. The appellant later received notice from the WDC Quality Assurance Coordinator (QAC) that A.W. had filed a complaint.

In addition, the appellant notes that WDC policy provides that employees may report incidents of discrimination to the Southern Region Equal Employment Opportunity/Affirmative Action (EEO/AA) Office, any supervisory employee, the Executive Assistant or the QAC and that employees should report promptly. The appellant further notes that an employee may also file a complaint directly with external agencies. In light of the foregoing, the appellant observes that A.W. did not file her complaint until September 22, 2011 and did not report the alleged discrimination to the Cottage Training Supervisor (CTS). Furthermore, the appellant argues that the term "cracker" has multiple meanings, including a derogatory one, and that she is unfamiliar with racial words of this nature due to cultural differences.

In closing, the appellant contends that any "confusion" could have been avoided if A.W. had taken one of the following actions: "formally" reported the alleged discrimination to the appellant on August 15, 2011; reported the incident to the CTS in charge; granted the appellant "consent" to file a discrimination complaint against R.R. on September 21, 2011; or reported the incident to an external agency. According to the appellant, A.W. made no effort to immediately report her complaint through other available channels if she did not want the appellant to report it. The appellant maintains that she, as a supervisor, did what she believed was correct in reporting the incident as events unfolded.

In response, the EEO reiterates that its investigation was thorough and complete and it had substantiated that the appellant violated the State Policy by failing to report an allegation of an EEO violation promptly. In this regard, the EEO notes that A.W. and T.M. stated that on August 15, 2011, they reported to the appellant the allegation that R.R. called A.W. a "cracker." Although the appellant did not then understand that the term is a racial slur, T.M. stated that she defined the term for the appellant. However, the appellant did not immediately report the matter. The allegation became known after R.R. complained to S.W. that he may lose his job due to a false accusation that he called A.W. a "cracker." S.W. met with A.W. and the appellant and clarified that this was an EEO violation. The appellant then reported the matter to K.H., her supervisor, on September 22, 2011. The EEO asserts that during her interview, the appellant claimed not to have any memory of the August 15, 2011 report. The EEO further asserts that all interviews were recorded as typewritten, signed statements, and the interviewees reviewed the statements and made any corrections deemed necessary. The EEO argues that the appellant, in her appeal, "regains her memory of August 15" and admits that A.W. informed her that R.R. called A.W. a "cracker." It contends that it is no defense that the appellant was allegedly ignorant of the meaning or implication of the term "cracker" and notes that T.M. contended that she defined the term for the appellant on August 15, 2011.

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(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, 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.

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)4 provides, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Commission has reviewed the matter and finds that the determination that the appellant violated the State Policy was proper. On August 15, 2011, A.W. and T.M. reported to the appellant, who is a supervisor, an allegation that R.R. called A.W. a "cracker." While the appellant did not understand that the term is a racial slur, T.M. defined the term for the appellant. Nevertheless, the appellant did not report the matter at that time. Even after S.W. clarified that an EEO violation occurred if R.R. had referred to A.W. as a "cracker," the appellant did not report the alleged discrimination to the EEO/AA Officer or other individual designated to receive such complaints. Rather, the appellant reported the matter to K.H., her supervisor.

The appellant argues that she acted appropriately in discussing the matter with her supervisor and that A.W. never granted the appellant "consent" to file a complaint. However, under the State Policy, supervisors have an affirmative duty to immediately refer allegations of prohibited discrimination/harassment to the EEO/AA 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. *See In the Matter of D.B. and T.J.* (CSC, decided May 21, 2014). The appellant further argues that she was unaware of the meaning of the term "cracker" on August 15, 2011, contrary to the EEO's finding that T.M. defined the term for the appellant at that time. Even assuming the appellant was unaware of the meaning of the term on August 15, 2011, she acknowledges that S.W. informed her of the racially derogatory nature of the term on September 20, 2011. The appellant notes that this prompted her to meet with A.W. on September 21, 2011, when A.W. stated that R.R. called her a "cracker." Given the information provided by S.W., the appellant's additional arguments relating to alternate meanings and cultural differences are not persuasive. The appellant was apprised of a potential violation that she was obligated to report in accordance with her duty as a supervisor under the State Policy.

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)*. This matter provides an illustration as to why the State Policy was designed to obligate each supervisor to report an allegation directly 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 was appropriate.

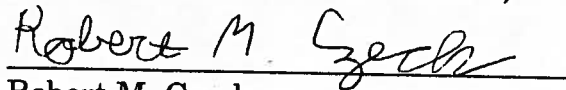
Accordingly, the appellant has not met her burden of proof, and the EEO's determination that she violated the State Policy is upheld.

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 17TH DAY OF SEPTEMBER, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

c. M.M.
Edward McCabe
Mamta Patel
Joseph Gambino



State of New Jersey
DEPARTMENT OF HUMAN SERVICES
PO Box 700
TRENTON NJ 08625-0700

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

JENNIFER VELEZ
Commissioner

February 6, 2014

M. M. [REDACTED]
[REDACTED]
[REDACTED]

Dear Ms. M. [REDACTED]

On August 15, 2011, A. W. [REDACTED] Charge Nurse, Woodbine Developmental Center (WDC), verbally alleged race discrimination against R. [REDACTED] R. [REDACTED] Cottage Training Technician (CTT), WDC. Specifically, Ms. W. [REDACTED] complained to you that Mr. R. [REDACTED] called her a "cracker." The Office of EEO received the complaint on September 22, 2011.

The Department of Human Services (DHS) neither condones nor tolerates any form of discriminatory behavior in the workplace. Therefore, the Department's Office of Equal Employment Opportunity (EEO) conducted an investigation of the complaint. The investigation revealed that Ms. W. [REDACTED] and T. M. [REDACTED] reported this allegation to you on August 15, 2011, and you did not report it to a supervisor until September 22, 2011. When Ms. W. [REDACTED] reported her concerns to you, you had a supervisory duty to promptly report them to a supervisor, Human Resources, or the EEO Office.

Based on the results of the investigation, it has been determined that you violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). Consequently, this matter is being referred to Robert Armstrong, CEO of Woodbine Developmental Center, for appropriate administrative and/or disciplinary action.

If you disagree with this determination, you have the right to file an appeal with the Civil Service Commission within twenty (20) days of your receipt of this letter. The appeal must be in writing, state the reason(s) for the appeal, and specify the relief requested. Please include all materials presented at the department level and a copy of this determination letter with your appeal. The appeal should be submitted to the Civil Service Commission, Division of Appeals and Regulatory Affairs, P.O. Box 312, Trenton, N.J. 08625-0312.

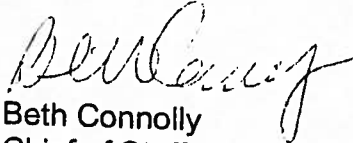
Please be advised that pursuant to P.L. 2010, c.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C.44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees.

However, if it is determined that disciplinary action will be taken, the procedures for the appeal of disciplinary action must be followed.

At this time, I would like to remind you that the State Policy prohibits retaliation against any employee who files a discrimination complaint or participates in a complaint investigation. Furthermore, this matter remains confidential and the results of the investigation should not be discussed with others.

Should you have any questions, please the DHS Office of EEO at (609) 292-2816 or 292-5807.

Sincerely,


Beth Connolly
Chief of Staff

BC: EM

C: Office of EEO
Robert Armstrong, CEO
Mamta Patel, CSC

CONFIDENTIALITY NOTICE: This letter is intended for the sole use of the intended recipient and may include confidential and /or privileged information. Any unauthorized review, use, disclosure or distribution is strictly prohibited. If you are not the intended recipient, please contact the sender by reply letter and destroy any copies of the original documents.

