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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of W.C. and L.L.,
Department of Human Services

CSC Docket Nos. 2015-966 and 2015-
1089

Discrimination Appeals

ISSUED: **APR 16 2015** (SLK)

W.C., an Assistant Division Director with the Department of Human Services (DHS), appeals the decision of the Equal Employment Opportunity (EEO) Director of the DHS which substantiated that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). L.L., a Technical Assistant 3 with the DHS, appeals the decision of the EEO Director which substantiated one allegation that she had been subjected to a violation of the State Policy but found that she did not present sufficient evidence for other allegations to support a finding that she had been subjected to a violation of the State Policy. These appeals have been consolidated due to common issues presented.

By way of background, L.L. filed multiple complaints against several individuals alleging discrimination based on race, age, and retaliation. Specifically, L.L. alleged that T.N., Program Manager Health/Human Services: (1) failed to report an allegation that M.V., Technical Assistant 2 Community Affairs, was subjecting her to sexual harassment; (2) denied her access to the Alzheimer's Adult Day Program Share Drive; (3) denied her request for a title reclassification; (4) called her "sassy" on numerous occasions; (5) repeatedly docked her time for not notifying T.N. that she was calling out sick or coming in late; (6) ordered her to indicate on her timesheet what times she takes for lunch and meetings; (7) scheduled to meet with her and T.W., Program Specialist 4, Social Human Services, individually instead of with the entire Office of Area Agencies on Aging Administration unit; (8) assigned her to a "work plan" unlike other employees; and (9) denied her a reasonable accommodation for a disability. Additionally, L.L.

alleged that S.C.,¹ Director of Human Resources: (1) gave M.V. preferential treatment because she is white; (2) issued her a list of directives which she was to follow in order to avoid M.V. while at work, including restricting her to the restrooms, parking lot, and entrance in the back of the building; (3) refused to take her off the Medical Certification List; and (4) inappropriately categorized sick leave as unauthorized leave without pay. L.L. also alleged that D.G., Assistant Division Director, prohibited her from attending a meeting attended by T.Z., B.S., Contract Administrator 3, and T.W. Further, L.L. alleged that N.D., Division Director, refused to meet with her regarding concerns about M.V. Moreover, L.L. alleged that W.M., Employee Relations Coordinator, and A.P., Director of Employee Relations, denied her request to view her medical and disciplinary folders and failed to terminate M.V. for a previous offense. Additionally, L.L. alleged that D.M., Manager 1 Human Resources, reissued the directive separating her and M.V., threatened her with discipline if she did not comply, and counseled her about donating office equipment to the exclusion of others. Further, L.L. alleged that W.C. failed to report allegations implicating the State Policy against M.V. that were brought to his attention by other employees. Moreover, L.L. alleged that C.L., Senior Management Assistant, inappropriately told her to exhaust all of her sick time before taking a leave of absence from July 2012 to September 2012. As part of the investigation, the EEO Investigator (Investigator) interviewed 11 employees and reviewed 53 documents. The investigation substantiated the one allegation against W.C. as he admitted to not reporting State Policy concerns brought to his attention by another employee, C.M., Technical Support Specialist 2. However, the investigation could not substantiate any of L.L.'s other allegations.

On appeal, W.C. states that he has no involvement in L.L.'s employment status and asserts that he has not discriminated or retaliated against her on the basis of her race or age. W.C. acknowledges that he was present in court when L.L. sued M.V. for sexual harassment and that he did verbally agree to assist in the effort to minimize contact between L.L. and M.V. at work; however, there was never any court order that required him to keep L.L. and M.V. apart. Therefore, W.C. explains that while he did take appropriate steps to minimize contact between L.L. and M.V., he advised L.L. that it was her and M.V.'s responsibility to minimize contact with each other. W.C. presents that the EEO Office informed him that it was investigating allegations of sexual harassment made by L.L. against M.V. and at no point was he advised that there were allegations that he failed to protect L.L. from M.V. W.C. maintains that if he had been informed that there were allegations against him, he would have invoked his *Weingarten* rights. W.C. indicates that C.M. is an employee under his supervision who told him that M.V. lifted up her shirt in order to show C.M. some injury or problem on her upper body. While W.C. admits that C.M. told him that she believed this to be inappropriate, he contends that C.M. also let him know that she did not believe that M.V. was trying to make any sexual advances. W.C. maintains that C.M. was describing this episode to him

¹ S.C.'s personnel record could not be located.

to give an example of M.V.'s personality and there was no indication that C.M. was describing the event because she was seeking relief. W.C. represents that he had no knowledge or thought at the time that this episode was described to him that he should have reported it and that he volunteered this single episode to the Investigator to give insight into M.V.'s personality. W.C. states that he does not remember receiving any training prior to this incident instructing him that such a conversation should have been reported as an allegation implicating the State Policy. W.C. asserts that since he provided the Investigator with the information regarding his conversation with C.M. and that he was not informed of the allegations against him, he does not understand how this allegation against him can be substantiated. W.C. presents that he does not know if L.L. was aware of the information that C.M. provided him and this information had no direct impact on L.L. Further, W.C. provides that this incident occurred in 2009 which is before he had any knowledge of the allegations that L.L. brought against M.V. As such, W.C. concludes that the EEO's determination is incorrect that he violated the State Policy by not reporting the incident to the EEO office. Consequently, W.C. requests all of the materials related to the investigation.

L.L. submits 19 exhibits in support of her appeal. L.L. presents that T.N. treated her differently than other employees regarding the phone protocol for employees running late. Specifically, she asked if she could send an email when running late but was not allowed to do and asserts that other employees were and she claims that T.N. retaliated against her for complaining. L.L. provides that C.L. prorated her time incorrectly and she gave her false information that she had to use all of her sick time before she could go out on leave for being ill due to on-going sexual harassment. Further, L.L. contends that T.N. and S.C. docked her time for bringing up complaints against the department and M.V. L.L. maintains that S.C. retained her on the Medical Certification list because of retaliation. She indicates that a mistake was made regarding her sick time which resulted in her exceeding her allotment. Additionally, her requests to have her time corrected by T.N. and S.C. were ignored. Also, she contends that S.C. labeled previously approved sick leave as "unauthorized leave without pay" to retaliate for her filing a State Policy complaint. L.L. states that she tried to cooperate with management's directive to avoid contact with M.V. but that T.N. and the management team failed to cooperate with her and its order that she use the back parking lot and restrooms in the back was in retaliation for filing a State Policy complaint. L.L. asserts that M.V. has been harassing her for years and that T.N., her supervisor, refused to report her allegations against M.V. L.L. claims that she was denied access to Alzheimer's Adult Day Program Share Drive and other duties were taken away from her. Additionally, after a claim that she was not performing was unsubstantiated, she did not get her job duties back. L.L. presents that a former supervisor had agreed that her position should be reclassified. However, instead, she provides that human resources moved her to a different unit, hired a temporary worker in retaliation, and then moved her back to her former unit and gave her more responsibility

without reclassifying her position. L.L. states that N.D. refused to meet with her regarding M.V.'s harassment and N.D. and S.C. never reported her allegations to the EEO. L.L. represents that D.G. excluded her from a meeting where all other State employees who attended an Alzheimer's event were asked to meet after the meeting. L.L. asserts that about a dozen State employees, including herself, complained about M.V.'s behavior to W.C., but he never reported it. This even included an incident where M.V. was using inappropriate language and behavior with W.C., such as cursing and yelling. L.L. explains that after asking if she could use items that were being thrown out, she and others took items that were being thrown out and she donated them to a school. L.L. indicates that she was reprimanded by D.G., D.M., and S.C. for taking the supplies as retaliation for her complaints. L.L. provides that M.V. had been found to violate the State Policy several times and that she should have been removed. She maintains that, between 2003 and 2006, W.C. was told of multiple infractions by M.V.; however, he did not report them. L.L. states A.P. ignored her emails regarding M.V.'s behavior. Further, W.M and others refused her requests to review her files. In summary, L.L. argues that the department and management gave M.V. preferential treatment because she is white and moved her to another division after she was convicted and fined for harassment when M.V. should have been removed.

In the EEO's response regarding W.C., L.L.'s claim that W.C. failed to report allegations arose during the investigation of L.L.'s claim of discrimination against other respondents. Further, W.C. has acknowledged that in 2009 C.M. told him in a conversation that M.V. pulled up her shirt to show her a bruise which C.M. found inappropriate. Additionally, W.C. admitted in a signed statement that he did not report C.M.'s comments because she "was not reporting this to me as an allegation. This was just in passing conversation." However, under the State Policy, any individual who has the ability to control the work environment of another staff member is a supervisor and a supervisor has the obligation to report allegations that violate the State Policy. As such, the EEO asserts that W.C. was a supervisor under the State Policy and therefore he had a duty to report the allegations presented by C.M. Further, the EEO presents that the State Policy is a zero tolerance policy and therefore it argues that the fact that W.C. was not aware that he should have reported the allegations is not a defense.

In the EEO's response concerning L.L., it highlights that the Investigator interviewed 11 employees and reviewed 53 documents in this matter and reiterates its findings as outlined in its determination letter which revealed that the only allegation that could be substantiated is the one referenced regarding W.C.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides that the State of New Jersey is committed to providing every State employee with a work environment free from prohibited discrimination or harassment. Under this policy, employment discrimination or harassment based upon race and age are prohibited. This is a zero tolerance policy.

N.J.A.C. 4A:7-3.1(c) provides that it is a violation the State Policy to engage in sexual harassment of any kind.

N.J.A.C. 4A:7-3.1(g)(1) provides that the EEO shall conduct an investigation of discrimination/harassment claims in a prompt, thorough, and impartial matter and forward the results to the respective State agency head to make a final decision as to whether a violation of the policy has been substantiated.

N.J.A.C. 4A:7-3.1(h) provides that retaliation against any employee who alleges that she or he was the victim of discrimination/harassment is prohibited by the State 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:7.3-2(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 determination that W.C. violated the State Policy was proper and finds that L.L. has not established in her other allegations that she was discriminated against on the base of her race or age or retaliated against for filing discrimination/harassment complaints. With respect to W.C., as a supervisor, under *N.J.A.C. 4A:7-3.1(e)*, he had an obligation to immediately refer allegations of prohibited discrimination/harassment to the EEO. In W.C.'s appeal, he acknowledges that an employee, C.M., told him that "M.V. had lifted up the shirt she was wearing in order to show C.M. some injury or problem M.V. had on her upper body." Further, "C.M. told me she believed this to be inappropriate." At this moment, W.C., as a supervisor, had an obligation to report this incident to the EEO to investigate as he had been advised of inappropriate behavior. The mere fact that

C.M. did not believe that M.V. was trying to make any sexual advances to her, that C.M. was not asking W.C. to report the incident to the EEO, that C.M. was only mentioning the incident to describe M.V.'s personality, or that C.M. was not seeking relief are not relevant as the EEO, not W.C. nor C.M., has the responsibility to determine whether the described behavior was in fact an actual violation of the State Policy. It is noted that under the State Policy, sexual harassment is not limited to unwanted sexual advances. The fact that W.C. does not control L.L.'s employment status or that the incident did not directly involve L.L. is not relevant as W.C., a supervisor, had an obligation to report any allegations of violations of the State Policy regardless of who brought those allegations to his attention or which employees were impacted by that allegation.

Moreover, the matter involving C.M. and W.C. provides an excellent illustration as to why the State Policy was designed to obligate a supervisor to report an allegation to the EEO. In this case, in 2009, W.C. heard an allegation that potentially could be described as sexual harassment in the workplace. In 2012, L.L. and other employees accused M.V. of engaging in sexual harassment and it was actually determined that M.V. engaged in sexual harassment that violated the State Policy. 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. See *In the Matter of D.B. and T.J.* (CSC, decided May 21, 2014).

The purpose of the State Policy is to be instructive and remedial in nature. If the 2009 incident had been reported, the EEO could have performed an investigation. If it had determined that a violation had occurred, appropriate administrative action or discipline could have been taken which may have prevented further incidents. Additionally, as the State Policy is a zero tolerance policy, the fact that W.C. did not know that he should have reported the incident or that he does not recall receiving training that would have alerted him to report this incident does not relieve him from his obligation under the State Policy. In reference to W.C.'s request for the EEO's investigation notes and other material related to this matter, as the Commission is making its determination based on W.C.'s statements in his appeal, it does not find it necessary to compel production of the investigation report in this matter. See *In the Matter of Juliann LoStocco, Department of Law and Public Safety*, Docket No. A-0702-03T5 (App. Div. October 17, 2005); *In the Matter of Salvatore Maggio* (MSB, decided March 24, 2004). The Commission would like to emphasize that W.C. was not found to have discriminated against L.L. based on race, age, or retaliation as W.C. suggests in his appeal. Instead, the finding was that W.C. failed to report an allegation implicating the State Policy. Thus, since the purpose of the State Policy is to be instructive and

remedial in nature, the determination by the EEO with respect to W.C. was appropriate.

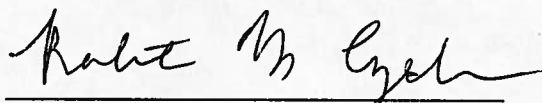
In reference to L.L., she describes certain actions that were taken against her and claims that these actions were discriminatory based on her race and age and in retaliation for filing discrimination/harassment complaints. However, L.L. has not provided any evidence, including the exhibits that the L.L. submits on appeal, that show that the actions taken against her were based on race, age, and/or retaliation. Instead, in relation to most of the allegations, the EEO's investigation revealed that actions were taken against L.L. for non-discriminatory reasons and the fact that L.L. disagrees on how those matters should have been handled cannot sustain a violation of the State Policy. *See In the Matter of Aundrea Mason* (MSB, decided June 8, 2005) and *In the Matter of Bobbie Hodges* (MSB, decided February 26, 2003). Further, in regard to other allegations, the investigation revealed either the situations were not as L.L. describes or that there was no evidence to substantiate L.L.'s allegations. Additionally, as the investigation consisted of 11 interviews and a review of 53 documents, the Commission finds that the investigation was thorough and impartial and therefore there is no reason to disturb the EEO's findings. Accordingly, the Commission finds that L.L. failed to support her burden of proof and no basis exists to find a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace other than the one violation against W.C. as described above.

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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15th DAY OF APRIL, 2015



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