

B-23

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of D.M., Department of  
Labor and Workforce Development

CSC Docket Nos. 2015-1403

Discrimination Appeal

ISSUED: ~~MAY~~ 21 2015 (SLK)

D.M., an Unemployment Insurance Clerk with the Department of Labor and Workforce Development (LWD), appeals the attached decision of the Commissioner of the LWD, which found that the appellant did not present sufficient evidence to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the appellant, an African-American male, filed a complaint alleging discrimination based on his race (African-American), gender, national origin (Jamaican), religion (Rastafarian), and retaliation. Specifically, the appellant alleged that: (1) he was called the "N word" by D.H., a now retired Unemployment Insurance Clerk and that D.H. stated, as she walked past him while attending a retirement luncheon, "I see the N----r is still here"<sup>1</sup>; (2) L.J., an Unemployment Insurance Clerk, called him the "N word" and during a meeting stated that "He should go back to his stupid country"; (3) in a meeting with I.M., a now retired Disability Insurance Supervisor, and a union representative, regarding the alleged derogatory comments made by D.H. and L.J., that the union representative referenced his own religion, Judaism, and told him that the case would be handled by another representative; (4) C.M., a Confidential Secretary, stated "That's how I keep a leash on you" in response to the appellant's complaint that he was always assigned to cover the phone which limited his opportunity for promotion; (5) I.M. made the statement to him "Don't celebrate too much; you will never be promoted in this office" after the appellant passed the promotional exam for Senior Unemployment Insurance Clerk; (6) he was improperly written up/disciplined for leaving the telephone unattended when he left to take his breaks

<sup>1</sup> D.M. did not report the alleged incident at the time it allegedly occurred.

and lunch; (7) I.M. monitors his movements, deducts time from his accrued time when he is late in retaliation for filing prior complaints of discrimination, but does not monitor other employees or deduct their time; and (8) I.M. allows a white, male co-worker whose lunch hour starts at 12:00 PM to come back around 2:30 PM or 3:00 PM on a regular basis. This agency's Division of Equal Employment Opportunity and Affirmative Action<sup>2</sup> (EEO/AA) conducted an investigation into the matter which included interviews with witnesses and a review of documents and found no evidence to support the allegations.

On appeal, the appellant states that although the EEO Officer advised him that she could not provide him with any assistance due to a conflict of interest; she did not provide him with any information on any alternative ways he could seek relief. The appellant indicates that he brought his concerns to the appointing authority's management; however, he was never directed to the New Jersey Division on Civil Rights (DCR) or the United States Equal Employment Opportunity Commission (USEEOC) and at the time he filed his complaint he was not aware of these external options to seek relief. The appellant asserts that the EEO Officer was not questioned as to the nature of any conflict of interest or her conversation with him by the EEO/AA. Additionally, he provides that while all the witnesses interviewed by the investigator reported that they had not seen D.H. since her retirement in June 2013, S.C., an Unemployment Insurance Clerk, advised the appellant that D.H. came to the building for another co-worker's retirement. While the appellant acknowledges that a supervisor needs to monitor employees for time and attendance, he maintains that the process is being unfairly applied to him as his supervisors are aware that there is an issue in providing him relief coverage. The appellant claims that other employees take extended breaks without consequences and that if all employees were held to the same standard as him, there would not be an issue with coverage.

In reply, the EEO/AA states that the appellant received a letter explaining that since the EEO Officer knew the appellant personally, she had a conflict and the matter was transferred to it to perform the investigation. However, the EEO/AA did in fact question the EEO Officer about her conversation with the appellant. Further, it is the EEO Officer's position that she had advised the appellant, as a personal friend of the appellant's wife, of his options to file an internal EEO complaint, or file with the DCR or USEEOC. In reference to the appellant's statement that LWD's management did not inform him of his options to file a complaint with DCR or USEEOC, this allegation was never raised during the investigation and supervisors are only required to report allegations of discrimination or harassment to the department's EEO Officer. Regardless, the EEO/AA presents an e-mail that indicates in July 2011 a manager sent the appellant a link to the USEEOC's website. With respect to the appellant's

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<sup>2</sup> The matter was forwarded to the EEO/AA to conduct the investigation as the EEO Officer had a conflict since she personally knew the appellant and his wife.

argument that his time and attendance are unfairly monitored, the investigation revealed that employees in the appellant's unit were provided the lateness policy and that several employees were asked to submit leave slips for attendance violations. Additionally, it submits emails showing that the appellant has significant time and attendance issues; however, instead of instituting disciplinary proceedings against him, per the policy, time from his accrued vacation or administrative leave time is deducted. The investigation did reveal that at times the appellant is left to cover phones alone without sufficient coverage to take breaks or lunch. However, the investigation also revealed that he was repeatedly advised to notify supervisors when there was insufficient coverage to allow him to take breaks and that he has failed to show any evidence of discriminatory animus or retaliation. Additionally, the EEO/AA submits an e-mail that shows that the appellant did not provide S.C. as a potential witness. Further, even if S.C. had seen D.H. in the building since her retirement, the appellant still has not provided any witness to the alleged acts of discrimination.

### CONCLUSION

*N.J.A.C. 4A:7-3.1* states, in pertinent part, that employment discrimination or harassment based upon a protected category, such as race and gender, is prohibited and will not be tolerated.

*N.J.A.C. 4A:7-3.1(h)* states, in pertinent part, that retaliation against any employee who alleges that he or she was the victim of discrimination/harassment, is prohibited by the State Policy.

*N.J.A.C. 4A:7-3.2(e)* provides that if there is a conflict of interest, the complaint may be directly filed with the EEO/AA.

*N.J.A.C. 4A:7-3.2(i)* provides that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

*N.J.A.C. 4A:7-3.2(p)* provides that any employee can file a complaint directly with external agencies that investigate discrimination/harassment charges in addition to utilizing this internal procedure.

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

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that the appellant has not established that D.H., L.J., I.M., C.M. or the appointing authority's management has violated the State

Policy. During the course of the investigation, the EEO/AA interviewed witnesses<sup>3</sup> and reviewed documents and found no evidence to support that any action taken against the appellant was based on his race, gender, national origin, religion, or retaliation.

With regard to the specific allegations, the investigation did not substantiate that D.H. made any derogatory racially comments against the appellant. Further, the issue as to whether or not D.H. was in the building after her retirement is not relevant, as the appellant has not provided any witnesses who could corroborate that D.H. made the alleged racial comments against the appellant at the retirement luncheon or at any other time. In relation to the appellant's accusations that L.J. called him the "N word" and stated that "He should go back to his stupid country," the investigation revealed that L.J. stated to him "If you do not want to answer the phone you should go back to where you came from" implying where he previously worked. As such, while it was appropriate for L.J. to have been counseled on her unprofessional remarks, the investigation, in the context of the situation, properly determined that the remarks were not a violation of the State Policy.

With respect to a meeting with I.M. and a union representative, the investigation was unable to substantiate that the meeting took place. In reference to the allegation that C.M. stated, "That's how I keep you on a leash," C.M. denied using the term "leash" and explained that she advised the appellant that his primary assignment of covering phones would enable his supervisor to keep better track of his movements. The investigation also revealed that the appellant had been counseled several times for leaving the phones unattended without permission. In regard to the appellant's claim that I.M. told the appellant "Don't celebrate too much; you will never be promoted in this office;" the investigation did reveal that I.M. did make comments about his promotional opportunities. However, while I.M.'s comments may have been inappropriate, the comments as the appellant alleged are not on their face in violation of the State Policy as they do not reference a protected category and there is no evidence that the comments were made due the appellant's inclusion in a protected category. Further, the investigation revealed that I.M. did not have any impact on the appellant's promotional opportunities as the positions that he applied for were not in I.M.'s unit. With respect to the appellant's claim that he was improperly written up/disciplined for leaving the phones unattended while he took breaks and lunch when there was no one to relieve him, that I.M. monitors his time and deducts time from his accrued vacation and administrative leave time when he is late returning from breaks or lunch, but does not monitor others or deduct their time, that his supervisors are aware of the lack of coverage issue, and there would not be an issue if others were held to the same standard as him, the investigation revealed that employees were advised of the unit's lateness policy which includes monitoring employees' time and deducting

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<sup>3</sup> The interviewed witnesses included the EEO Officer who referred the matter to the EEO/AA due to a conflict of interest.

vacation and administrative leave time when employees are late, that the appellant had been warned several times for not answering the phones, that others in the appellant's unit were also disciplined for the same reason, and that there was no evidence that actions were taken against him were in violation of the State Policy. Further, even if the appellant disagrees with how his supervisors are handling the lack of phone coverage issue, disagreements between co-workers 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). With regard to the appellant's claim that I.M. provided a white, male co-worker with favorable treatment by letting him return late from lunch, the investigation revealed that there was an employee who returned late from lunch and this employee was required to submit a leave slip to make up the times he was late.

Accordingly, the Commission finds that the EEO/AA investigation was thorough and impartial. Therefore, the Commission finds that appellant failed to support his burden of proof and no basis exists to find a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

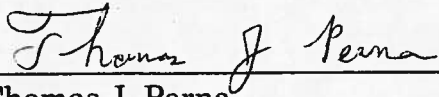
One other matter needs to be addressed concerning the appellant's comments that the EEO Officer and the appointing authority's management did not advise the appellant that he could also seek alternative relief with the DCR or USEEOC. Although *N.J.A.C. 4A:7-3.2(p)* provides that any employee can file a complaint directly with external agencies that investigate discrimination/harassment charges in addition to utilizing this internal procedure, there is no obligation for the EEO Officer or the appointing authority's management to advise the appellant that he has these options. However, the investigation did reveal that a manager did send the appellant a link to the USEEOC's website and that the EEO Officer maintains that she had advised the appellant of these options during her years of friendship with the appellant's wife.

#### 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 20<sup>th</sup> DAY OF MAY, 2015



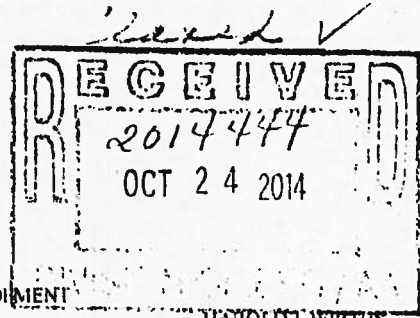
Thomas J. Perna  
Member  
Civil Service Commission

Inquiries  
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Correspondence

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

Attachment

c: D.M.  
Mamta Patel  
Joseph Gambino



State of New Jersey

DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT  
PO BOX 110  
TRENTON, NEW JERSEY 08625-0110

THAROLD D. WIRTHS  
Commissioner

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lieutenant Governor

**CONFIDENTIAL**

October 24, 2014

VIA REGULAR AND CERTIFIED MAIL

Mr. D. [REDACTED] M. [REDACTED]  
[REDACTED]  
[REDACTED]

Re: Discrimination Complaint of D. [REDACTED] M. [REDACTED]  
Division of EEO/AA File No. 2014-444

Dear Mr. M. [REDACTED]

The Division of Equal Employment Opportunity and Affirmative Action ("Division of EEO/AA") has concluded its investigation of your 2014 Charge (524-2014-00440) filed with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination based on your Race (Black), Gender, National Origin (Jamaican) and Religion (Rastafarian) and Retaliation against your supervisors, Ms. C. [REDACTED] M. [REDACTED] Acting Director, Temporary Disability Insurance Service, [REDACTED] M. [REDACTED], Disability Insurance Supervisor and the Department of Labor & Workforce Development. The complaint was referred to the Division of EEO/AA by the DOL as a result of a conflict.

The Division of EEO/AA conducted a thorough investigation pursuant to the *New Jersey State Policy Prohibiting Discrimination in the Workplace* ("State Policy"), during which individuals were interviewed and relevant information was reviewed.

I have reviewed the Division of EEO/AA's investigative report and adopt the findings as discussed below.

New Jersey Is An Equal Opportunity Employer

OFFICE OF DIVERSITY AND COMPLIANCE  
(609) 633-6500 or FAX (609) 984-0045

LWD

Specifically, you allege that you were called the "N word" by D. H. In addition, after she retired, Ms. H. attended a retirement luncheon in the building and as she walked past you she said to you "I see the N---r is still here."

The investigation could not corroborate that you had complained to previous supervisors about being called the "N word" prior to you informing Ms. D. M., Assistant Disability Insurance Supervisor, shortly after she was transferred into the Unit in approximately October of 2013. The investigation revealed that Ms. H. retired from the DOL in June of 2013. In addition, your allegation that Ms. H. stated "I see the N---r is still here" failed to be corroborated by the EEO investigation. Witnesses stated that Ms. H. had not been seen in the building since her retirement.

You also allege that L. J. also called you the "N word." You also allege that during a meeting she stated that "He should go back to his stupid country."

The EEO investigation did not substantiate Ms. J. called you the "N word." In addition, witnesses stated that Ms. J. stated "If you do not want to answer the phone you should go back to where you came from" implying where you previously worked. Ms. J.'s comment was inappropriate and she was counseled by her supervisor at the time of the incident. The EEO investigation failed to substantiate her comment as a violation of the State Policy.

You allege that during a meeting with Ms. M. and a Union Representative ("Dave"), regarding the derogatory comments made by Ms. H. and Ms. J., the Union Representative referenced his own religion (Jewish) and told you that your case would be handled by another representative. In addition, during the meeting you allege you were told by Ms. M. that you "intimidated" Ms. H. and Ms. J. "was on medication" as reasons for their actions.

Ms. M. denied being present at a meeting with you and a union representative named "Dave" where they discussed the alleged comments made by Ms. H. and Ms. J. Ms. M. further denied telling you Ms. H. was "intimidated" by you or that Ms. J. "was on medication" as the reasons for their derogatory statements.

You allege Ms. M. stated "That's how she keeps a leash on you" after you complained to her that you were always assigned to cover the telephones which limited your opportunity for promotion.

Ms. M. denied using the word "leash," however, she stated that during a meeting with you, she advised you that your primary assignment to cover the telephones did enable your supervisor to keep better track of your movements. The EEO investigation revealed you had been counseled several times for leaving the phones without permission and unattended.

You also allege that Ms. M. made the statement to you "Don't celebrate too much; you will never be promoted in this office."

The EEO investigation did substantiate your allegation that Ms. M. made a comment about your promotional opportunities. However, the investigation failed to find her comment was in violation of the State Policy or had any impact on your ability to be promoted to the Unemployment Insurance Clerk Reemployment Call Center position. The EEO investigation revealed that you took an exam and was



certified to a list for Unemployment Insurance Clerk Reemployment Call Center (PS4824N). Ms. M [REDACTED] does not have the authority to deny a promotion in that position because it is not within the Disability During Unemployment Unit. ("DDU") A review of DDU's organizational chart found that employees in DDU would have to transfer to another unit within the Division of Temporary Disability Insurance Service for a promotion to Unemployment Insurance Clerk, Reemployment Call Center (UIC-RCC) and Senior Unemployment Insurance Clerk (SUIC). The investigation revealed that you reluctantly interviewed for the Unemployment Insurance Clerk Reemployment Call Center position with the supervisor of that unit but were not selected. Two employees who ranked significantly higher than you during the interview were appointed to the position.

In addition, you allege you were improperly written up/disciplined for leaving the telephones unattended when you left to take your breaks and lunch and no one had been assigned to relieve you.

The EEO investigation revealed that you had been issued several warnings for leaving the phones with no coverage. Specifically: Not answering the telephones – dated 7/12/2011; Leaving the office during non-break hours – dated 7/15/2011; Calling Out – dated 7/18/2011; Returning late from break – dated 8/5/2015. The investigation further revealed other employees in the DDU Unit have also been disciplined for similar violations. The evidence failed to show that any disciplinary action taken against you was in violation of the State Policy.

You also allege that Ms. M [REDACTED] monitors your movements, deducts time when you were late from your accrued time for filing prior complaints of discrimination, but does not monitor other employees or deduct their time.

The investigation found that the DDU Unit implemented a lateness policy that was distributed to employees on 6/18/2011 and redistributed on 6/10/2013, requiring all employees to sign timesheets, submit leave slips to make up time due to lateness; rules that covers call outs; half-hour and one-hour lunch periods of employees. The investigations revealed that several employees who appear to be habitually tardy in the DDU Unit have also been asked to submit leave slips.

Lastly, you allege that Ms. M [REDACTED] allows a co-worker (Caucasian Male) whose lunch hour starts at 12:00PM to come back around 2:30PM or 3:00PM on a regular basis.

The investigation failed to substantiate your allegation of favorable treatment. The investigation found that there was an employee who on occasion came back from lunch late, however, he was asked to submit a leave slip, to make up the times he was late. The employee later transferred to another unit.

Lastly, the investigation failed to reveal you had filed any prior complaints of discrimination. In your email to the Union on September 28, 2014, you indicated your belief you were being retaliated for filing a union grievance. The EEO investigation failed to find a nexus between any action taken against you and retaliation in violation of the State Policy.

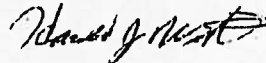
For the reasons set forth above, your allegations of discrimination were not substantiated by the Division of EEO/AA's investigation.

If you disagree with this determination, you have the right to file an appeal with the New Jersey Civil Service Commission within 20 days of your receipt of this letter. The burden of proof is on the

**Appellant.** The appeal must be in writing, state the reason(s) for the appeal and specify the relief requested. All materials presented at the department level and a copy of this determination letter must be included. The appeal should be submitted to the NJ Civil Service Commission, Director of the Division of Appeals and Regulatory Affairs, P.O. Box 312, Trenton, NJ 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, payable to the "NJ CSC." Persons receiving public assistance pursuant to 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.

At this time, I would like to remind you that the State Policy prohibits retaliation against any employee who files a discrimination complaint, participates in a complaint investigation or opposes a discriminatory practice. In addition, all aspects of the EEO complaints, investigations and determinations are considered highly sensitive and must be kept confidential. You should not discuss this matter, including its outcome, with anyone who does not have a legitimate business reason to know of it. If you have any questions please contact Caroline Clarke, EEO Officer at (609)633-6500.

Sincerely,



Harold J. Wirths  
Commissioner

C: Mamta Patel, Esq. Director  
Division of EEO/AA, Civil Service Commission

Caroline Clarke, EEO Officer  
Office of Diversity and Compliance  
Department of Labor and Workforce Development