

B-27



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of D.M., Office of
Information Technology

CSC Docket No. 2015-1898

Discrimination Appeal

ISSUED: JUN - 4 2015 (CSM)

D.M., a Coordinator Emergency Telecommunications Systems with the Office of Information Technology (OIT), appeals the attached determination of the Chief of Staff, that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

D.C. a Technical Assistant 3, a female, filed a complaint with the Equal Employment Opportunity/Affirmative Action Office (EEO/AA) alleging that the appellant discriminated against her on the basis of affectional/sexual orientation and sexual harassment. Specifically, D.C. claimed that the appellant made comments to her about being naked, wearing "leggings," asked her for a hug on his birthday, and made comments about her weight and what she eats. The EEO/AA investigated the matter and determined that the appellant's inquiry about how D.C. felt being naked, how she looked wearing "leggings", and asking her for a hug on his birthday violated the State Policy. However, the investigation was unable to substantiate D.C.'s other claims. The EEO/AA recommended that appellant be counseled and receive training regarding the State Policy.

On appeal, the appellant asserts that he was advised not to discuss this matter with anyone. With this limitation, he was unable to talk to his director who was familiar with the events for which he is accused. He also states that he was never informed from whom the complaints were coming so he could respond to the EEO/AA's questions. Additionally, the appellant contends that he was never interviewed regarding asking D.C. for a hug and that he was never informed who the 12 people were that the EEO/AA interviewed as part of the investigation. Further, he states that the investigator told him that "he had never lost a case" and

the appellant feels that there was no reason for him to mention that as it had no relevance to the complaint. Finally, the appellant states that the recommended training is not necessary for this matter and that he would be willing to participate in an online training program.

In response, the EEO/AA states that all parties interviewed in connection with this matter were directed not to discuss any aspect of the investigation in order to protect the integrity of the investigative process. In this regard, the EEO/AA emphasizes that all complaints and investigations are handled to the extent possible in a manner that will protect the privacy interest of all persons involved. Additionally, the investigation found that the appellant asked D.C. for a hug on his birthday, which is an unwelcomed touching in violation of the State Policy and that 12 people were interviewed during the investigation. Finally, the EEO/AA states that the investigator's statement that he "never lost a case" was made in the context of his overall professional competence but had no impact on the investigative process or report. Finally, the EEO/AA states that the appellant's appeal is untimely as it was not filed within 20 days of issuance of its determination.

In reply, the appellant states that he could not understand why he was asked certain questions during the investigation about comments he may have made and asserts that the investigator's questions were misleading. For example, the investigator never mentioned the word "shingles" to him while he was being interviewed, but he had mentioned that when his mother-in-law had shingles, her doctor advised her to remove her clothing in the area of the shingles to relieve the pain. Thus, the appellant states that he mentioned this to D.C. as doing the same thing might help ease her pain. The appellant also states that D.C. made it very clear to their work group about her problems and mentioned it was difficult to find proper fitting clothes because of her size. Thus, the appellant claims that he mentioned "leggings" in the overall conversation because D.C. knew that he shops for his wife's clothing and shoes. Finally, the appellant states that the EEO/AA's determination was mailed and the envelope was postmarked December 5, 2014 and that he received the certified letter on December 8, 2014. Thus, his appeal was timely.

CONCLUSION

N.J.A.C. 4A:7:7-3.2(n) states that in cases where a violation has been substantiated and no disciplinary action recommended, the party against whom the complaint was filed may appeal the determination to the Commission within 20 days of receipt of the final letter of determination. In this case, although the determination letter is dated November 12, 2014, the EEO/AA has not rebutted the appellant's assertion that he did not receive the determination until December 8,

2014. Therefore, since December 28, 2014 was a Sunday, the appellant's appeal postmarked December 29, 2014 is timely.

N.J.A.C. 4A:7-3.1(a) provides that under the State Policy, discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: 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. Further, *N.J.A.C. 4A:7-3.1(c)* provides that it is a violation of the State Policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex harassment. Additionally, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)(3)*.

N.J.A.C. 4A:7-3.1(j) establishes that all discrimination complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigatory process. In the course of the investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

The Commission has conducted a review of the record and finds that the EEO/AA has substantiated its determination that the appellant violated the State Policy. The record shows that the EEO/AA interviewed the 12 witnesses named by D.C. who corroborated that the appellant made the statement about how she felt being naked as well as the statement about how she looked wearing leggings. Additionally, regardless if he was asked the question during the investigation or not, there was independent corroboration that the appellant asked D.C. for a hug on his birthday. Although the appellant may not have intended the references to be derogatory or demeaning, statements regarding how D.C. felt being naked and how she looked wearing leggings are clearly verbal comments about her clothing that constitute sexual harassment under the State Policy. *See N.J.A.C. 4A:7-3.1(c)2*. In this regard, a violation of the State Policy can occur if an individual uses derogatory or demeaning references regarding a person's gender even if there is no intent on the part of an individual to harass or demean another. *See N.J.A.C. 4A:7-3.2(b)*. As

such, the investigation properly determined that these were violations of the State Policy.

With respect to not discussing the matter with anyone, not being informed who the complaint was coming from, and not knowing who the 12 witnesses were, *N.J.A.C. 4A:7-3.1(j)* requires that all discrimination complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. One of the purposes of maintaining strict privacy during an investigation is to ensure that all witnesses and potential witnesses will freely discuss their observations with the investigator without any potential threat of retaliation for participating in the process. In other words, confidentiality must be maintained so that there is no chilling effect in the application of the State Policy or during the investigation of suspected violations. Regardless, while the appellant speculates that some of the 12 individuals may or may not have ever been present during his conversations with D.C., he has not provided the names of any individuals who could rebut the witnesses who independently corroborated that he made statements about how D.C. felt being naked, how she looked wearing leggings, or that he asked her for a hug on his birthday.

One additional matter warrants comment. The EEO/AA Officer concedes that he made the statement to the appellant that he never lost a case on the merits. While this may or may not be true, the appellant is correct in observing that this was not an appropriate statement to be made during the course of an investigation. Thus, while there is no evidence that this comment detrimentally impacted the investigation, the EEO/AA Officer should refrain from making similar comments to this effect in the future.

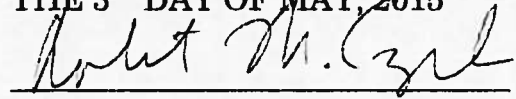
Accordingly, the Commission finds that the EEO/AA's investigation was thorough and impartial, and the record supports a finding of a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

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 3RD DAY OF MAY, 2015**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
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.
Ronald W. Brown
Sharon Pagano
Mamta Patel
Joseph Gambino**