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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of L.H., Department of
the Treasury

Discrimination Appeal

CSC Docket No. 2015-2715

ISSUED: **OCT 12 2015** (HS)

L.H., a Taxpayer Service Representative 2 with the Department of the Treasury, appeals the attached determination of the Office of Equal Employment Opportunity/Affirmative Action and Diversity Programs (EEO), which found sufficient evidence that the appellant had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

M.H., a Taxpayer Service Representative 2, filed a complaint with the EEO alleging that the appellant and T.M., a Taxpayer Service Representative 1,¹ had discriminated against her on the bases of race and color. Specifically, M.H., an African-American, alleged that the appellant, a Caucasian, posted a picture of a “monkey baby doll” outside the cubicle of T.M., also a Caucasian. M.H. also alleged that the appellant stated, “[M.H.], I am going to get you one for your birthday.” In response to M.H.’s complaint, the EEO conducted an investigation and substantiated the allegations against the appellant. As a result, the EEO referred the matter for appropriate administrative action.²

On appeal to the Civil Service Commission (Commission), the appellant explains that T.M. pulled a newspaper advertisement for a porcelain doll, which

¹ The EEO found sufficient evidence that T.M. had also violated the State Policy. T.M. appealed that determination to the Civil Service Commission, which denied T.M.’s appeal. *See In the Matter of T.M.* (CSC, decided October 7, 2015).

² The appointing authority required the appellant to attend training based on the results of the EEO’s investigation but took no disciplinary action.

was a rendition of a baby monkey by a particular artist sold through a gallery. According to the appellant, she, T.M. and M.H. were all critiquing a piece of art. The caption below the picture read, “[The artist’s] artist-original dolls sell well into the thousands,” and the piece sells for \$100. When M.H. asked, “Who would buy something like this?” the appellant teasingly replied, “Us! We’re going to get it for you for your birthday.” The appellant claims that she was responding to the quotation below the picture, was referencing a piece of art, and meant nothing more. At no time was she serious. At no time did she realize that M.H. was offended because M.H. did not indicate that there was a problem and the appellant did not know that anything racial could be construed from an art piece advertised in a public newspaper. The appellant argues that she did not know that an animal could hold a racial connotation or be interpreted as a protected category and claims that she would have made the same joke to M.H. had the subject instead been an “ugly painting of a lighthouse.” The appellant also states that she posted the picture on a wall that contained other pictures of odd-looking animals. As to why she answered, “I don’t know” when asked for the reason the picture was posted, the appellant claims her answer referred to why *any* of the pictures were posted. According to the appellant, none of them had a business purpose, and none were posted to offend anyone. Rather, the pictures simply took up space on a wall. Additionally, the appellant submits that she considered M.H. to be a close friend and that friends joke with each other. The appellant further takes issue with the EEO’s reference in its determination to a 2009 psychological study stating that the researchers “believe” the association between blacks and apes is held in place through “implicit knowledge,” and the appellant argues that beliefs are very different from facts. Finally, the appellant argues that she should not have been required to attend training.

In response, the EEO, represented by Anthony DiLello, Deputy Attorney General, states that M.H., T.M. and the appellant all were interviewed during the investigation and none corroborated the appellant’s version of events that the three had a conversation in which they critiqued the picture. Nevertheless, the EEO argues that even if the appellant’s version of events were to be credited, M.H.’s silence in the face of the perceived offense does nothing to mitigate its discriminatory impact on her. According to the EEO, whether or not the appellant and M.H. were friends, the State Policy provides no exceptions in cases where the discriminator/harasser and the target are friends but rather employs zero tolerance. The EEO notes that the State Policy prohibits the display or distribution of material in the workplace that contains derogatory or demeaning language or images pertaining to any protected category. While the appellant claimed during her interview that she did not know why the reference to a monkey was offensive to M.H. and that she did not intend to offend M.H., the EEO notes that the State Policy may be violated despite a lack of intent to harass or demean. The EEO contends that the appellant demonstrates her ongoing misunderstanding of the offense in asserting that she did not know that an animal could be interpreted as a

protected category. Rather, central to the discrimination complaint is not that a monkey is a protected category but the hateful association between blacks and monkeys explained in the 2009 psychological study. The EEO argues that the appellant has also misunderstood the purpose of the citation to the 2009 study. The EEO explains that it employed a “reasonable person” test to determine whether the picture was discriminatory in its context and looked to whether there was something more than just M.H.’s subjective feelings. While the EEO concedes that conflicting viewpoints may exist on these matters, it maintains that it included the 2009 study in the investigation in order to establish that M.H.’s sensitivities and objections to the posted image of the monkey baby doll were *reasonable* given the historical derogatory comparisons among blacks/African-Americans, apes and monkeys. The EEO disagrees with the appellant’s suggestion that because an image is an advertisement or art, it is *per se* non-discriminatory. The EEO points to the lack of a legitimate business or other reason for posting the picture and the demeaning effect the image and comment that the appellant would give M.H. the doll for her birthday had upon M.H. Thus, despite the intended purpose of the image, the EEO maintains that the appellant violated the State Policy.

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)*. Examples of behaviors that may constitute a violation of this policy include telling jokes pertaining to a protected category and displaying or distributing material in the workplace that contains derogatory or demeaning language or images pertaining to any protected category. *See N.J.A.C. 4A:7-3.1(b)1iv and N.J.A.C. 4A:7-3.1(b)1vii*. The State Policy is a zero tolerance policy. *See N.J.A.C. 4A:7-3.1(a)*. Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)4*.

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 EEO appropriately analyzed the available documents

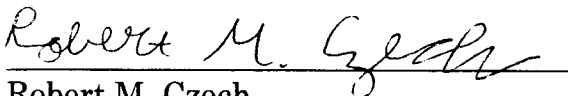
and conducted interviews of M.H., T.M. and the appellant in investigating M.H.'s complaint and concluded that the appellant violated the State Policy on the bases of race and color. The EEO correctly identifies the existence of a history of employing derogatory comparisons between African-Americans and monkeys. When viewed in light of that history, M.H.'s reaction to the posting of an image of an odd-looking monkey baby doll in the workplace without any legitimate business justification plus the comment that she would be given such a doll for her birthday was reasonable. Thus, in context, the appellant's actions had a discriminatory effect upon M.H. While the appellant stresses that the image was of a piece of art, that fact does not automatically render M.H.'s response unreasonable. The appellant's arguments regarding her lack of awareness that anything racial could be inferred from the image and lack of intent to offend are also unpersuasive as the State Policy may be violated despite a lack of intent to harass or demean. *See N.J.A.C. 4A:7-3.1(b)*. Similarly, the appellant's argument that she considered M.H. to be a close friend is unavailing as the State Policy does not provide for an exception where complainant and respondent happened also to have been friends. Accordingly, the investigation was thorough and impartial, and there is no basis to disturb the EEO's determination. Finally, since the purpose of the State Policy is to be instructive and remedial in nature, the corrective action taken by the appointing authority was appropriate.

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 7TH DAY OF OCTOBER, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
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Attachment

- c. L.H.
Deirdre Webster Cobb
Mamta Patel
Joseph Gambino



State of New Jersey

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

DEPARTMENT OF THE TREASURY
DIVISION OF ADMINISTRATION
OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY,
AFFIRMATIVE ACTION AND DIVERSITY PROGRAMS
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TRENTON, NJ 08625-0210

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

March 13, 2015

Ms. L. [REDACTED] H. [REDACTED]
[REDACTED]

Re: Discrimination Complaint

Dear Ms. H. [REDACTED]

This is in further reference to the complaint filed against you by M. [REDACTED] H. [REDACTED] dated January 16, 2015. Ms. H. [REDACTED], a brown skinned African-American, alleges that you and your supervisor, T. [REDACTED] M. [REDACTED] discriminated against her on the basis of race and color by posting a picture of a monkey baby doll in the workplace. With respect to the specific allegations against you, Ms. H. [REDACTED] states that she was offended that you posted the monkey baby doll picture outside of Ms. M. [REDACTED] cubicle and stated, 'M. [REDACTED] I am going to get you one for your birthday.' Ms. H. [REDACTED] specifically complains that "The statement by a coworker that a brown monkey baby would be given as a birthday gift to the only brown worker in the unit is more than a poor, distasteful choice of a joke, as jokes often reflect a certain level of truth and also a passive, deeper meaning of expression."

The Office of EEO/AA and Diversity Programs conducted an investigation during which the complainant, you and Ms. M. [REDACTED] were interviewed. 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) which includes "the use of derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category" as prohibited conduct. One example of a violation of this provision of the State Policy is "displaying or distributing material (including electronic communications) in the workplace that contains derogatory or demeaning language or images pertaining to any of the protected categories."

In making this determination, it is important to note the historical derogatory comparisons between Blacks/African Americans, apes and monkeys. Research reveals a hateful association between Blacks and monkeys or apes was one way that the antebellum South justified slavery. Blacks were considered by some Whites to be more simian than human, and therefore had no self-evident rights, including freedom. The depiction of Blacks as apes & monkeys found expression in mainstreamed

popular culture around the turn of the century, especially in postcards. Often it was the zip or urban coon that was being caricatured, for the amusement of White consumers. Throughout much of the 20th century, a depiction of Blacks as apes and monkeys was only slightly more subtle. All too often, the White perpetrators of these incidents claim to be ignorant of the history. Studies show that only about 8% of White Americans claim to be aware of the history of the association between Blacks and apes. Whether or not this is true, some disturbing research released in 2009 clearly shows a high level of subconscious engagement with this association. The research was conducted by Jennifer Eberhardt, a Stanford associate professor of psychology, Pennsylvania State University psychologist Phillip Atiba Goff (the lead author and a former student of Eberhardt's) and Matthew C. Jackson and Melissa J. Williams, graduate students at Penn State and Berkeley, respectively. The researchers believe this association is held in place through "implicit knowledge," the result of a lifetime of conditioning via the long history of stereotyped anti-Black imagery that depicts Blacks as less than human.

It is noted that not every picture of a monkey or an ape brought into the workplace, in and of itself, would be discriminating or cause a hostile work environment. Such issues must be looked at on a case by case basis. In this case, several factors combined lead to the conclusion that there was a violation of the State Policy. Specifically, both you and Ms. M [REDACTED] were questioned about why you posted the picture of the monkey baby doll. Neither of you were able to explain why you posted the picture and no legitimate business or other reason was given. You both stated, "I don't know." However, you acknowledged that the picture of the monkey baby doll was disturbing, noting that its arms bothered you the most. Still, you chose to post it and later told Ms. H [REDACTED] that you were going to buy her a monkey baby doll for her birthday after she commented about the picture's peculiarity. It is noted that you admitted that you would not have posted the picture or made the comment if you knew it would offend Ms. H [REDACTED]. In addition, you stated that you had no idea that the image had a derogatory racial implication. Even so, your display of disturbing material in the workplace and commenting that you would give Ms. H [REDACTED] a monkey baby doll for her birthday had the effect of demeaning her. As a result, a violation of State Policy on the basis of race and color is substantiated against you.

Ms. H [REDACTED] complaint also states that the posting of the monkey baby doll picture was the last straw as she believes there have been other incidents of discrimination in the workplace. Ms. H [REDACTED] specifically states that you and Ms. M [REDACTED] told her that you did not want her to be assigned to the unit. You denied making this statement. However, you did acknowledge telling Ms. H [REDACTED] that there wasn't much work circulating through the Publications Unit and opined that another person wasn't needed. It appears that your opinion was formed based on the unit's workflow. Also, Ms. H [REDACTED] has not presented any witnesses or evidence to corroborate that the statement was not for this reason but rather was made because of her race or color. As a result, a violation of the State Policy cannot be substantiated against you with regards to this incident.

Since a violation of the State Policy has been substantiated with respect to the posting of the monkey doll picture, administrative action in the form of individualized training with the Department's EEO/AA office is mandated. Please contact me at [REDACTED] to schedule a mutually convenient time for the training no later than March 31, 2015.

Please be advised that you have the right to appeal this determination to the Civil Service Commission, Division of Appeals and Regulatory Affairs, P.O. Box 312, Trenton, NJ 08625-0312

within 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. All materials presented at the department level and a copy of this determination letter must be included. However, if it is determined that disciplinary action will be taken, the procedures for the appeal of disciplinary action must be followed. Any 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 alleges that she or he was the victim of discrimination or harassment, provides information in the course of an investigation into claims of discrimination or harassment, or opposes a discriminatory practice. In addition, all aspects of EEO complaints, investigations and determinations are considered confidential. You should not discuss this matter, including the outcome, with anyone else who does not have a business reason to know the matter.

Sincerely,

Deirdre L. Webster Cobb
Deirdre L. Webster Cobb, Esq.
EEO/AA Officer

Cc: Dennis Schilling, Acting Director, Division of Taxation
Mamta Patel, Director, Division of EEO/AA