

B-39



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of T.M., Department of
the Treasury

Discrimination Appeal

CSC Docket No. 2015-2726

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

T.M., a Taxpayer Service Representative 1 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 L.H., a Taxpayer Service Representative 2,¹ had discriminated against her on the bases of race and color by posting a picture of a "monkey baby doll" in the workplace. Specifically, M.H., an African-American, stated that she was offended that the appellant, a Caucasian, allowed L.H., also a Caucasian, to post the picture of the monkey baby doll outside the appellant's cubicle. In response to M.H.'s complaint, the EEO conducted an investigation and substantiated the allegation 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 emphasizes that the picture was a newspaper advertisement for a collectible doll of

¹ The EEO found sufficient evidence that L.H. had also violated the State Policy. L.H. appealed that determination to the Civil Service Commission, which denied L.H.'s appeal. See *In the Matter of L.H.* (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.

a baby monkey created by an award-winning artist and sold through a gallery. She notes that the doll was not of a human and argues that it had no relation to a protected category. The appellant next argues that the EEO inappropriately relied on what appeared to be a single 2009 psychological study showing a high level of subconscious engagement with the association between blacks and apes or monkeys and indicating the researchers' "belief" that the association is held in place through "implicit knowledge." The appellant contends that the study generalizes whites and does not allow for the existence of non-racially biased whites. She submits that there is no evidence that the results of the study apply specifically to her and claims that she had no knowledge of the history of derogatory comparisons among blacks/African-Americans, apes and monkeys. The appellant argues that the determination ultimately rested on a generalization implying that she was aware of the historical association by virtue of the fact that she is white. Without knowledge of the historical background, she had no way of knowing that the advertisement could be perceived as relating to a protected category. Although she did find the image of the doll to be disturbing, she argues that "disturbing" is not the same as "discriminatory." Since she did not put the advertisement on the wall, she cannot answer with any certainty why it was put up. However, she surmises that it was posted because there were already two pictures of odd-looking animals on the wall. Finally, the appellant submits that she was not L.H.'s supervisor, was not in L.H.'s "chain of command" and lacked the authority to direct L.H.'s actions. According to the appellant, if L.H. puts something on a wall, the appellant would not have the authority to remove it absent direction from the appellant's supervisor.

In response, the EEO, represented by Anthony DiLello, Deputy Attorney General, states that M.H., L.H. and the appellant all were interviewed during the investigation. The EEO argues that the appellant does not dispute that she brought the offending picture to the workplace and allowed L.H. to post it on the appellant's cubicle wall and does not dispute the absence of a business reason to post the picture. The appellant acknowledged that the picture was "disturbing to see" but still allowed her subordinate L.H. to post it outside her cubicle. The EEO contends that the appellant's arguments that she was not L.H.'s supervisor, was not in L.H.'s chain of command and thus lacked the authority to direct L.H.'s actions ignore the fact that she is the supervisor of her unit and, as such, has a responsibility to assist in maintaining a work environment that is free from prohibited discrimination and harassment. Moreover, the State Policy defines "supervisor" broadly to include any individual with authority to control the work environment of any other staff member. Given that she found the picture disturbing and was a supervisor, the appellant should have erred on the side of caution. Instead, the appellant did not remove the picture until instructed by her supervisor to do so. The appellant's claim that she could not direct L.H.'s actions also "rings hollow" given that it was the appellant who provided the picture to L.H. in the first place. While the appellant claims she had no knowledge of the historical derogatory comparisons among blacks/African-Americans, apes and monkeys, the

EEO maintains that a violation of the State Policy can occur even if there was no intent to harass or demean another. 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. This was the purpose of the citation to the 2009 psychological study. While the EEO concedes that conflicting viewpoints may exist on the merits of that study, it maintains that it included the 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, it is *per se* non-discriminatory. Thus, despite the intended purpose of the image, the EEO maintains that the appellant violated the State Policy.

It is noted that the Taxpayer Service Representative 1 title is a class code 24, while the Taxpayer Service Representative 2 title is a class code 21.

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 displaying or distributing material in the workplace that contains derogatory or demeaning language or images pertaining to any protected category. *N.J.A.C. 4A:7-3.1(b)vii*. The State Policy is a zero tolerance policy. *See N.J.A.C. 4A:7-3.1(a)*.

N.J.A.C. 4A:7-3.1(e) provides that supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. 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 of employment. 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 (for example, a project leader).

N.J.A.C. 4A:7-3.2(m)4 provides that the appellant shall have the burden of proof in all discrimination appeals.

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., L.H. 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 appellant does not dispute that she brought the picture of an odd-looking monkey baby doll into the workplace or that the picture was posted on her cubicle wall. Moreover, 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 the picture in the workplace without any legitimate business justification was reasonable. That the image was found in a newspaper advertisement for a collectible doll does not automatically render M.H.'s response unreasonable. Thus, in context, the appellant's actions had a discriminatory effect upon M.H. While the appellant argues that she lacked knowledge of the history of derogatory comparisons between African-Americans and monkeys, this claim is 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)*.

The appellant also disputes her own authority to direct L.H.'s actions, arguing that she was not L.H.'s direct supervisor and was not in her chain of command. However, supervisors like the appellant are held to a higher standard under the State Policy. A supervisor's role under the State Policy is to make every effort to maintain a work environment that is free from any form of prohibited discrimination and harassment. See *In the Matter of Paul Grayson* (CSC, decided October 6, 2010); *In the Matter of Richard A. Sheppard* (MSB, decided December 17, 2003). Moreover, a supervisor is defined broadly under the State Policy to include any manager or other individual who has authority to control the work environment of any other staff member. See *N.J.A.C. 4A:7-3.1(e)*. Thus, the appellant's contention that she, a supervisory-level Taxpayer Service Representative, had no authority to remove a picture that she had herself brought into the workplace; that was posted on her own cubicle wall by a lower-level Taxpayer Service Representative; and that had no legitimate business reason to be posted in the workplace in the first place is not plausible. By allowing the picture to be posted, the appellant did not meet her supervisory obligation under the State Policy.

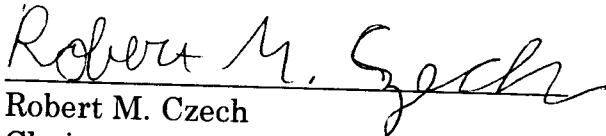
Accordingly, the investigation was thorough and impartial, and there is no basis to disturb the EEO's determination.

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
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312

Attachment

- c. T.M.
Deirdre Webster Cobb
Mamta Patel
Joseph Gambino



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF ADMINISTRATION
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

March 13, 2015

Ms. [REDACTED]
[REDACTED]
[REDACTED]

Re: Discrimination Complaint

Dear Ms. M [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 subordinate employee, L [REDACTED] H [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 Ms. H [REDACTED] specific complaint against you, Ms. H [REDACTED] states that she was offended you allowed Ms. H [REDACTED] to post the monkey baby doll picture.

The Office of EEO/AA and Diversity Programs conducted an investigation during which the complainant, you and Ms. H [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. H [REDACTED] were questioned about why you posted the picture of the monkey. Neither of you were able to explain why the picture was posted and no legitimate business or other reason was given. You stated, "I don't know." However, you acknowledged that the picture of the monkey baby was "odd looking", "bizarre looking" and "disturbing to see". Still, you allowed Ms. H [REDACTED] who is your subordinate employee to post it outside your cubicle. Although you stated you had no idea of the derogatory racial implications of the image and apologized to the complainant for your role in it being posted, the fact that you found the picture disturbing is telling and as a supervisor you should have erred on the side of caution. Moreover, you did not remove the picture until you were instructed by your supervisor to remove it. By allowing the monkey baby doll picture to be posted, and failing to remove it until you were instructed to do so by your supervisor, you failed to maintain a work environment that was free from prohibited discrimination and harassment as mandated in the State Policy's provisions pertaining to supervisory responsibility. As a result, a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace on the basis of race and color is substantiated against you with regards to the posting of the monkey baby doll picture.

Ms. H [REDACTED] complaint also stated 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. She specifically stated that you and Ms. H [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 that the statement was not made 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 baby 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