B-112

STATE OF NEW JERSEY

In the Matter of M.E.,
Department of Children and Families

CSC Docket No. 2016-1339

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Discrimination Appeal

ISSUED: NOV 30 2016 (JET)

M.E., a Family Service Specialist 2 with the Department of Children and Families, appeals the determination by the Director, Office of Administration, Department of Children and Families, which found that the appellant failed to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant filed an EEO complaint on December 1, 2014 against T.D., a Supervising Family Service Specialist 2, and E.G., a Local Office Manager and a member of the Senior Executive Service, alleging that that she was subjected to discrimination on the basis of sexual orientation, marital/civil union status, and disability. Specifically, the appellant alleged that she was discriminated against when she was denied the opportunity to share information with office staff regarding same-sex marriage laws as a part of her duties as a Safe Space Liaison (SSL) in the Safe Space Program (SSP).[1] The appellant also alleged that she was returned to her prior held title of Family Service Specialist 2 at the end of her working test period (WTP) from Family Service Specialist 1 due to her sexual

[1] It is noted that the SSP was established pursuant to the appointing authority's Lesbian, Gay, Bisexual, Transgender, Questioning, and Intersex (LGBTQI) policy, CP&P-I-A-1-500, effective September 4, 2015. The SPP ensures the safety, well-being, and health of the LGBTQI youth and families. SSLs help to identify local resources that are specific to LGBTQI needs, such as support groups, therapists, congregations, and medical practitioners. SSLs also serve as consultants for LGBTQI case practice. Such work is performed on a voluntary basis in addition to regular casework assignments.

orientation.[2] The appellant alleged that E.G. appointed her as a liaison due to her sexual orientation, and E.G. stated, "Don't you think you should be working with this population" [and] "you can't relate to everybody." Additionally, the appellant alleged that T.D. made an inappropriate comment pertaining to marital/civil union status. In this regard, the appellant alleged that T.D. stated, "Oh, that's a shame nobody ever had a luncheon for the many times that you got married." The appellant also alleged that her supervisor harassed her on the basis of a perceived disability and that she reported in 2011 that she was subjected to sexual harassment by management and nothing was done about her concerns.

After an investigation was conducted, which included interviewing witnesses and reviewing the available documentation, the Office of Equal Employment Opportunity/Affirmative Action (EEO/AA) was unable to substantiate a violation of the State Policy. Specifically, the EEO/AA found that E.G. informed the appellant that her presentation as the SSL needed to come from data and information obtained from quarterly SSP meetings, and not based on her personal research. There was no evidence that E.G. denied the appellant's request to pursue an advanced degree or a promotion or that she made the statements the appellant attributed to her. Further, there was no evidence that the appellant was appointed as an SSL due to her sexual orientation. The investigation corroborated that the appellant informed her supervisor, T.D., on September 8, 2014 that she was unable to drive in Philadelphia, because she experienced anxiety while driving in the city.[3] The investigation revealed that the appellant admitted that she experienced a personal issue that prevented her from driving in the city which prohibited her from performing her duties. As such, T.D. advised the appellant to request an accommodation. There was no evidence or corroboration that T.D. stated, "Oh, that's right it's a shame that nobody ever held a luncheon for you for any of the times you got married." The investigation determined that, as a result of her documented work performance and PARS, the appellant was returned to her previously held permanent title of Family Service Specialist 2 at the end of the WTP. Moreover, the investigation found that the appellant did not file a separate sexual harassment complaint in 2011.

On appeal, the appellant asserts that E.G. denied her request to distribute research regarding updated same-sex marriage laws in the workplace. The appellant maintains that E.G. stated, "You cannot promote your personal agenda in the workplace." The appellant adds that the denial of her request to distribute material violates the Modified Settlement Agreement (*MSA*). *See Charlie H. v. Corzine, Modified Settlement Agreement,* No. 99-3678 (SRC) (July 18, 2006). Further, the appellant names several witnesses on appeal, including R.C., a Family Service Specialist 1, S.C., a Family Service Specialist 1, N.T., a Family Service

[2] It is noted that the appellant withdrew her WTP appeal in March 2016.

[3] It is noted that the record does not reflect any medical documentation to show that the appellant experiences anxiety.

Specialist 2, N.M-J., a County Services Specialist, and D.R., a Clerk, who can confirm that her presentations were not authorized for distribution at SSP meetings. The appellant adds that the witnesses can confirm that E.G. used inflammatory language and stated the words "personal agenda" on more than one occasion when talking about sexual orientation. The appellant maintains that T.D. stated, "Oh, that's a shame nobody ever had a luncheon for any of the times you got married."[4] Moreover, the appellant contends that she was demoted as a Family Service Specialist 1 due to T.D.'s and E.G.'s prejudice against her.

Additionally, the appellant states that she advised T.D. on September 8, 2014 that she did not feel comfortable driving to an out-of-state assignment in Philadelphia and she requested permission for a "buddy" to accompany her.[5] The appellant explains that T.D. denied her request for a buddy and asserts that she is being punished for following safety protocol.[6] Further, the appellant asserts that T.D. threatened to take disciplinary action against her in an "exploratory meeting" a few days after the assignment in Philadelphia was completed. Moreover, the appellant contends that her receipt of the EEO/AA determination was delayed because it was sent to the wrong address, and she received the determination sometime after the Post Office located her correct address.

In response, the EEO/AA maintains that there was no violation of the State Policy. Specifically, the EEO/AA asserts that the investigation revealed that SSL workers are responsible for sharing information with office staff from valid sources, including quarterly SSP meetings. The EEO/AA explains that the appellant's personal research was not authorized by her supervisors as a valid source. The EEO/AA adds that the appellant's sexual orientation was not referenced when E.G. directed the appellant to avoid distributing the information. Further, the EEO/AA explains that the appellant was not removed from the Family Service Specialist 1 position based on her sexual orientation. Rather, she was returned to her previously held permanent title as a Family Service Specialist 2 based on her PARS and documented work performance. In addition, the EEO/AA avers that the appellant did not mention the *MSA* in her EEO complaint, and even if she did, that argument does not establish a violation of the State Policy. In addition, the EEO/AA contends that the information the appellant claims that her witnesses can

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[4] The appellant indicates that every other employee in the office who was married or had a baby had an office wide shower, and the fact that she did not have a shower should be enough to demonstrate an atmosphere of discrimination. The appellant adds that, although the specific statements may not have been corroborated by the EEO/AA, the constant undercurrent of micro-aggressions in the office can be corroborated.

[5] It is noted that the team field response or "buddy system" was established pursuant to the appointing authority's Team Field Response policy, CP&P IX-A-1-150, effective March 24, 2015. The policy notes that supervisors are responsible for determining the need for a teamed field response.

[6] The appellant indicates that the "buddy system" procedure provides that "Absent compelling reason to do otherwise, deference should be given to the expressed safety concerns of the requesting worker."

provide is not sufficient to substantiate a violation of the State Policy. Moreover, the appointing authority asserts that it was not corroborated that T.D. stated, "Oh that's a shame that nobody ever had a luncheon for the many times that you got married."

Additionally, the EEO/AA states that the investigation substantiated that the appellant appeared to show signs of anxiety at the time she stated that she did not want to drive to the city for her assignment in Philadelphia. As such, the EEO/AA explains that T.D. properly advised the appellant to request an accommodation in the future if she was unable to drive to the city, but accommodated her request for that specific assignment.[7] The EEO/AA adds that there was no evidence that the appellant filed a sexual harassment complaint in 2011. Moreover, the EEO/AA acknowledges that, although it sent the determination to the wrong address in error, the investigation was properly conducted.

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 heredity 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). *N.J.A.C.* 4A:7-3.1(b) provides that it is a violation of this policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, or ethnic background or any other protected category set forth in (a) above which have the effect of harassing an employee or creating a hostile work environment. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

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. Further, *N.J.A.C.* 4A:7-3.1(c)1 provides that sexual harassment is defined as unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Examples of prohibited behaviors that may constitute sexual harassment and are therefore a violation of this policy include, but are not limited to, inappropriate touching, generalized gender-based remarks and comments and verbal, written or electronic sexually suggestive or obscene

[7] The EEO/AA confirms that the appellant's supervisor accommodated the appellant for that assignment.

comments, jokes or propositions including letters, notes, e-mail, text messages, invitations, gestures or inappropriate comments about a person's clothing. *See N.J.A.C.* 4A:7-3.1(c)2i and ii. Moreover, *N.J.A.C.* 4A:7-3.1(e) indicates that supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment.

Initially, the appellant alleges that she previously reported an incident of sexual harassment in 2011 and her concerns were not addressed by management. In response, the EEO/AA found that there was no evidence that the appellant filed a sexual harassment complaint in 2011. The appellant does not provide any substantive documentation, such as a copy of a complaint, to show that the incident was reported in 2011. Other than the appellant's allegations in this matter, there is no substantive evidence to show that she filed a sexual harassment complaint in 2011. However, if the appellant has not already done so, she may file a complaint of the alleged incident of sexual harassment so that the EEO/AA can conduct an investigation. *See N.J.A.C.* 4A:7-3.1.

Additionally, the appellant argues that she was removed as a Family Service Specialist 1 due to her supervisors' prejudice against her. The record reflects that the appellant previously filed a separate appeal with this agency regarding her return to her previous title as a Family Service Specialist 2 at the end of her WTP, and it was subsequently withdrawn. However, *N.J.A.C.* 4A:7-3.2(m)1 requires employees filing appeals for which there is another specific appeal procedure must utilize those procedures. Since the appellant withdrew her separate appeal, she cannot have that matter now addressed in this appeal.

The Commission has conducted a review of the record in this matter and finds that the appellant has not established that T.D. or E.G. engaged in conduct in violation of the State Policy. The record shows that the EEO/AA conducted an adequate investigation. It interviewed the relevant parties in this matter and appropriately analyzed the available documents in investigating the appellant's complaint. Specifically, the EEO/AA could not corroborate the appellant's various allegations. The appellant did not submit any substantive documentation or evidence in support of her contentions, and she did not point to any specific deficiencies in the investigation which would change the outcome of the case. In this case, the investigation revealed that E.G. required the appellant to distribute information from **valid** sources only, such as information from SSP quarterly meetings (emphasis added). In this regard, E.G., as the Local Office Manager, clearly had the authority to deny the appellant's distribution of materials that were not approved as a valid source. In other words, management has the discretionary authority to approve or deny the distribution of information based on the processes it has established for dissemination of such information. In this matter, the appellant does not refute that her research was not authorized by management as a valid source. The fact that the subject matter of her research pertained to same-sex

marriage laws does not, in and of itself, constitute a violation of the State Policy or change the outcome of the case.

The EEO/AA determined that E.G. did not reference the appellant's sexual orientation at the time she denied the appellant's request to distribute the materials. Rather, it is clear that E.G.'s directive was based on the legitimate business needs of the appointing authority. Accordingly, the Commission is satisfied that E.G.'s directive was proper and does not constitute a violation of the State Policy. Although the appellant states that E.G. allegedly stated that "you cannot promote your personal agenda in the workplace," even presuming the validity of that statement, it does not, on its face, constitute a violation of the State Policy. There is no nexus to show that the statement was related to the appellant's sexual orientation.

With respect to the appellant's argument that she was discriminated against on the basis of a perceived disability, the investigation did not corroborate those allegations. Initially, there is no evidence to confirm that the appellant requested an accommodation and there is no medical documentation to show that she experiences anxiety while driving in the city. Nonetheless, the investigation found that the appellant stated to T.D. that she did not want to drive in Philadelphia for an assignment because driving in the city caused her to experience anxiety. The appellant disputes on appeal that she experiences anxiety. However, she indicated to her supervisor that she did not like driving in the city. Further, the EEO/AA did not substantiate that T.D. had a discriminatory reason when she asked the appellant to request an accommodation. Based on the information noted above, the Commission is satisfied that T.D.'s action of instructing the appellant to request an accommodation was for legitimate business reasons so the appellant could complete her assignment in Philadelphia. Although the appellant argues that she was not advised to seek an accommodation for any of her previous assignments, T.D. addressed a specific situation when it was first raised by the appellant. As a Family Service Specialist 2, a significant part of the appellant's duties includes field work, which includes driving to various locations in order to complete certain assignments. Therefore, if the appellant is, in fact, experiencing anxiety which prevents her from performing her duties, an accommodation is one way in which the matter could be addressed.

Regarding the appellant's argument that she should not be punished for following safety protocol and requesting a "buddy" to accompany her for the assignment in Philadelphia, that argument is not persuasive. The appointing authority's policy for Team Field Responses clearly indicates that supervisors have the discretion to determine the need for teamed field responses. As such, it was within T.D.'s supervisory discretion to deny the appellant's request for a "buddy." Further, the policy indicates that team responses are utilized in situations including, but not limited to, cases where there are threats of assaults or violence;

ongoing domestic violence situations; and when a worker is transporting a child with behavioral problems. As noted above, the appellant indicated that she did not want to drive in Philadelphia. The appointing authority's procedure for Team Field Responses does not indicate that being unable to drive in the city is an appropriate reason to authorize a "buddy" for an assignment. As such, there is not a scintilla evidence that T.D. had any discriminatory motivation for denying the appellant's request for a "buddy." Therefore, the Commission finds that the denial of the appellant's request for a "buddy" did not implicate the State Policy.

With respect to the appellant's argument that her supervisor improperly threatened to take disciplinary action against her during an "exploratory meeting" just days after the assignment in Philadelphia was completed, there is no substantive evidence to show that T.D. threatened or took any disciplinary action against her after that assignment was completed in violation of the State Policy. As noted above, a significant part of the appellant's duties as a Family Service Specialist 2 includes field work, which includes driving to various locations in order to complete certain assignments. If the appellant was unable to complete her assignments, it would not be inappropriate for the appointing authority to consider disciplinary action. Accordingly, the Commission finds that the appellant did not establish her contention that she was discriminated against on the basis of a perceived disability.

With regard to the appellant's argument that T.D. stated, "Oh that's a shame that nobody ever had a luncheon for any of the times that you got married," the EEO/AA did not substantiate that T.D. made the statement. Moreover, the statement, on its face, does not constitute a violation of the State Policy on the basis of marital status and sexual orientation. In this regard, conversations regarding celebrations in the workplace, in and of themselves, are not sufficient to establish a violation of the State Policy. It appears that the appellant had a personality conflict with T.D., which is not sufficient to show that she was discriminated against. The Commission notes that unprofessional behavior and disagreements between co-workers, in and of themselves, cannot sustain a violation of the State Policy. *See In the Matter of A. M.* (MSB, decided June 8, 2005) and *In the Matter of B. H.* (MSB, decided February 26, 2003). Moreover, the information the appellant claims on appeal that her witnesses can provide is not sufficient to change the outcome of the case. Other than the appellant's tenuous allegations, there is no evidence to show that she was discriminated against.

One final mater warrants comment. The appellant argues that her receipt of the EEO/AA determination was delayed as a result of the appointing authority's failure to send it to the correct address. In this matter, the appointing authority admittedly did not send the EEO/AA determination to the correct address, which apparently caused the delay. However, the EEO/AA apologizes for the delay and explains that it did not intend to send the determination to the wrong address. This

mere clerical oversight does not evidence that the investigation was not impartial or thorough.

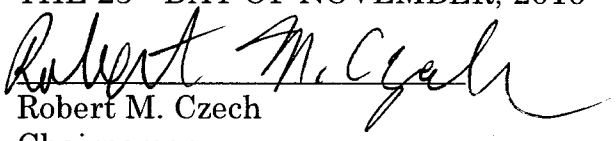
Accordingly, the record establishes that the EEO/AA's investigation was thorough and impartial, and therefore, no basis exists to find a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

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 23rd DAY OF NOVEMBER, 2016



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