

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE
ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of T.J., Department of
Human Services

CSC Docket Nos. 2016-4153

Discrimination Appeal

ISSUED: **DEC 14 2016** (SLK)

T.J., a Practical Nurse with New Lisbon Developmental Center, Department of Human Services, appeals the decision of the Assistant Commissioner, Human Resources, which found that the appellant did not present sufficient evidence 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).

By way of background, T.J. filed a discrimination complaint on October 13, 2009, alleging that E.M., Assistant Director of Nurses, called her gay and touched her thigh without her consent. In its January 7, 2015 determination, the Office of Equal Employment Opportunity (EEO) corroborated that E.M. called her gay, but found no violation of the State Policy. In the present matter, on November 13, 2015, appellant filed complaint against E.M. and R.B., Director of Nursing. Specifically, she alleged that E.M. assigned her to work overtime in Quince Cottage while other nurses were permitted to work in their regularly assigned cottages, that E.M. required her to bring medical documentation when she requested to cancel overtime, that R.B. told the appellant that E.M. was no longer her direct supervisor only to reassign E.M. as her supervisor, that E.M. reassigned her to a "float" nurse position while she was out on medical leave as an act of retaliation for filing an October 13, 2009 EEO complaint, and that R.B. told her that she would be returned back to a 7 a.m. to 3:30 p.m. shift if she was tardy or if she called out in conjunction with her day off.

The EEO conducted an investigation and found that there was insufficient evidence that E.M. and R.B. initiated the transfer of the appellant's overtime shift assignment due to her prior discrimination complaint. The investigation disclosed that nurses are expected to "work where assigned" when requesting overtime and

that the appellant was counseled on this policy. The investigation also revealed that a State of Emergency was declared on January 26, 2105 and, as an essential employee, the policy was that essential employees needed to provide documentation if they were unable to report to work during a State of Emergency on a scheduled work day. The investigation found that there was insufficient evidence that R.B. reassigned E.M. as her supervisor as an act of retaliation for her prior EEO complaint. Further, the investigation indicated that, while E.M. had supervisory capacity over all nurses in the department, C.L., Supervisor of Nursing Services, was her direct supervisor. The investigation revealed that although E.M.'s name was on the letter that reassigned appellant as a "float" nurse while on leave, it was R.B. who made the decision and he provided letters that were sent to other nurses who were also reassigned to be "float" nurses for the same reason. Further, the EEO obtained letters sent to other nurses who were told that they would be returned back to the 7 a.m. to 3:30 p.m. shift if they were tardy or called out. Accordingly, the investigation was unable to substantiate the appellant's claims.

On appeal, appellant states that she signed up for overtime because there was a need in her unit and she would have declined overtime that required her to work in a different a unit. She presents that other nurses were allowed to work overtime in their assigned unit. Therefore, she believes that if other nurses who are routinely assigned overtime were interviewed, this would show that the only reason that she was not assigned overtime in her unit was retaliation. With respect to the State of Emergency and medical verification issue, the appellant indicates that she called to cancel her scheduled overtime at 3:30 a.m., which was before a State of Emergency was declared and she explained at that time that she was cancelling because of the weather and a risk of an accident. She contends that once a State of Emergency is declared, even essential employees can call out and it is only those who are calling out sick who need to provide medical documentation. The appellant represents that she was allowed to leave at 9:30 a.m. after giving 8:00 a.m. medication and she was free to leave at that time because she was an overtime employee and a State of Emergency had not yet been declared. Therefore, she asserts that the only reason E.M. required her to bring in medical documentation and threaten her with discipline was to intimidate, humiliate, and retaliate against her for her prior EEO claim.

In relation to her allegation that R.B. reassigned E.M. as her supervisor as an act of retaliation, she claims that the reason R.B. retaliated against her was due to his taking exception with her contacting the human resources department when she was passed over for a promotion. Therefore, she indicates that on the day before she was scheduled to take medical leave, R.B. decided that she would no longer be supervised by him and, instead, E.M. would supervise all nurse staffing and requests for time off. While she acknowledges that C.L. was her direct supervisor for daily assignments, it was E.M. who was responsible for approving her vacations, reassigning her to a "float" position, and the change in her shift hours.

When appellant returned from her medical leave, R.B. said that E.M. would not be her supervisor and that it was E.M. who changed her shift. She states that R.B. assured her that, as a "float," she would not have to work any place where she was not comfortable. She claims that although E.M. said she could not accommodate her request to have her shift start at 6:00 a.m., E.M. asked other nurses if they would consider working the 6:00 a.m. shift. Appellant represents that just reviewing letters from other nurses who were reassigned to the 7:30 a.m. shift was insufficient and these other nurses needed to be interviewed. She believes that it was wrong for E.M. and R.B. to have taken away her 6:00 a.m. shift and therefore, when her desired shift was restored, they placed conditions on it in retaliation. Appellant argues that there was no justification to relegate someone who has worked for the State since 1990 to be reassigned as a "float" nurse when this could have been assigned to newer nurses.

In response, the EEO highlights that it conducted 3 interviews and reviewed 18 relevant documents but could not support T.J.'s allegations. It states that the investigation revealed that there was insufficient evidence to support her claim that her reassignment to work overtime at Quince Cottage was in retaliation for her prior EEO complaint as E.M. and R.B. denied the allegations. In regard to her claim that E.M. discriminated against her by requesting medical verification if she was unable to report for scheduled overtime during a State of Emergency, the investigation revealed that Executive Policy #29, subsection F, "Reporting to Work During Emergencies," states that "documentation may be required as the reason for not reporting to work. Failure to provide notice and/or documentation may result in the absence being unauthorized and may result in a loss of wages." Accordingly, it found that E.M.'s request for medical documentation from appellant was not in retaliation for a her 2009 EEO complaint. Additionally, the investigation found insufficient evidence to support T.J.'s claim that R.B. reassigned E.M. as her supervisor in retaliation for her prior 2009 EEO complaint. It contends that appellant contradicted herself by stating that the reason R.B. reassigned E.M. as her supervisor in August 2015 was in retaliation for her contacting the human resources department in May 2015 when she was passed over for a promotion when she had also stated that the reason for the reassignment was in retaliation for her 2009 EEO complaint. Moreover, the investigation revealed that even though E.M.'s name was on the letter that assigned her as a float, it was R.B. who made the decision to assign appellant and other nurses as float nurses. Additionally, the investigation revealed that appellant was not the only nurse who received a letter stating that their shift was being restored to 6:00 a.m. to 2:30 p.m. with the condition that, if they were tardy or if they called out sick in conjunction with their day off, their shift would be returned to 7:00 a.m. to 3:30 p.m. As such, it argues that its investigation was thorough and its determination should be upheld.

In reply, T.J. states that she is only appealing her May 2016 determination, but included her 2009 complaint to show that it took over five years for the

determination letter to be issued in that matter. As such, she argues that it is only fair that her appeal be considered.

CONCLUSION

N.J.A.C. 4A:7-3.2(m) states that a complainant may submit a written appeal within 20 days of the receipt of the final letter of determination.

N.J.A.C. 4A:7-3.2(l)2 and 3 states that issue of a final letter of determination shall be issued no later than 180 days after the initial intake of the complaint.

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that the State is committed to providing every State employee a work environment free from prohibited discrimination based on sexual orientation.

N.J.A.C. 4A:7-3.1(b) states that it is a violation of this policy to use derogatory or demeaning reference regarding a person's sexual orientation ... A violation of this policy can occur even if there is no intent on the part of an individual to harass or demean another.

N.J.A.C. 4A:7-3.2(i) provides, in pertinent part, a prompt, thorough, and impartial investigation into the alleged discrimination will take place.

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.

With respect to the May 12, 2016 determination, the Civil Service Commission (Commission) has conducted a review of the record and finds that the appellant has not established that E.M. or R.B. violated the State Policy. While T.J. believes that E.M.'s and R.B.'s actions toward her were unfair and the only reasonable explanation for these actions were retaliation for her prior EEO complaint, the investigation revealed that E.M. and R.B. denied the charges, stated that their reasons for changing E.M.'s working conditions or other actions towards her were for operational needs, and provided documentation that their actions were either in accordance with policy or others received the same treatment. It is noted that 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). Moreover, T.J.'s mere speculation that E.M.'s and R.B.'s actions were based on retaliation for her prior EEO complaint, without evidence, is insufficient to substantiate a violation of the State Policy. Additionally, while the appellant suggests that the investigation was not complete since other witnesses were not interviewed, she has not provided any specific witnesses who could confirm that the reason that certain actions were taken by E.M. or R.B. towards her were based on retaliation for her prior EEO complaint.

Accordingly, the Commission finds that the EEO's investigation in regard to the allegations that were outlined in the May 12, 2016 determination letter were thorough and impartial. Therefore, the Commission finds that appellant failed to support her burden of proof and no basis exists to find a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace with respect to these allegations.

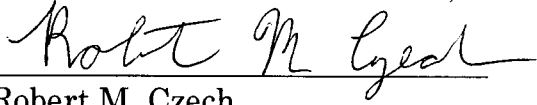
Some other issues need to be address. Although the appellant is not appealing the January 2015 determination, the Commission notes that the use of the term "gay," given the specific context of the situation, could be construed as a derogatory or demeaning reference to one's sexual orientation. Thus, even though all of the facts of that matter are not before the Commission, the EEO is reminded that it must fully detail and analyze the facts developed through the investigation in its investigative report in order to support a determination of the State agency head or designee. Additionally, the Commission notes that the complaint for this issue was filed in October 2009 and the determination was not issued until January 2015. As such, the five years it took for the appointing authority to issue a determination letter was well after the maximum 180-day timeframe as prescribed in *N.J.A.C. 4A:7-3.2(l)2* and 3. The Commission reminds the appointing authority of the importance of completing investigations and issuing determination letters in a timely fashion. In fact, the Commission has fined this appointing authority in the past for failing to comply with the required timeframes. The Commission will not fine the appointing authority in this matter as the 2009 complaint was not appealed. However, the Commission warns the appointing authority that its continued failure to issue timely determinations may result in fines of up to \$10,000. *See In the Matter of S.J.* (CSC, decided April 9, 2014) (Seven year delay in investigation compromised the thoroughness of the investigation and, after repeated warnings in prior matters regarding timeliness, the appointing authority was fined for non-compliance with time frames specified in State Policy).

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 DECEMBER, 2016



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