



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of D.W., Woodbine
Developmental Center

Discrimination Appeal

CSC Docket No. 2017-2360

ISSUED: APRIL 2, 2018 (ABR)

D.W., a Senior Practical Nurse at Woodbine Developmental Center (WDC), appeals the determination of the Assistant Commissioner of Human Resources, Department of Human Services (DHS), which found that she failed to 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, on April 19, 2016, the appellant, an African-American, and A.B., an African-American Practical Nurse,¹ filed a complaint with the DHS' Office of Equal Employment Opportunity (EEO) alleging racial discrimination by K.H., a provisional Director of Nursing Services 1, Developmental Disabilities,² a Caucasian. Specifically, they asserted that K.H.'s decision to place them "off duty" with pay, following work incidents, constituted racial discrimination. In response, the EEO conducted an investigation, during which it reviewed pertinent documents and interviewed four witnesses, including the appellant, A.B., K.H., and one other witness. The EEO's investigation found that on September 21, 2014, the appellant, then a Practical Nurse,³ was placed "off duty" with pay, pending an investigation into a pill found on the floor in the unit she was assigned to work. B.C., a Caucasian Cottage Training Supervisor, had found the pill on the floor of the unit on the morning of September 21, 2014 and gave it to M.W., a Caucasian temporary

¹ A.B. was subsequently appointed to the title of Senior Practical Nurse, effective September 2, 2017.

² K.H. was provisionally appointed to the title, effective July 11, 2016 and received a regular appointment, effective December 11, 2016.

³ The appellant was appointed to the title of Senior Practical Nurse, effective November 11, 2014.

Medical CWA (Registered Nurse), who was on duty at the time. The appellant claimed that she learned from E.H., her union representative, that she was the only nurse placed “off duty” after the incident, despite the fact that several other nurses had served on shifts between 3:30 pm on September 20, 2014, the time she departed the facility after her day shift ended, and the morning of September 21, 2014, when the pill was found. The appellant indicated that on September 20, 2014, she had been relieved by M.R., a Caucasian temporary Practical Nurse, who worked the 3:00 pm to 11:00 pm shift on that date. The appellant stated that another nurse would have been on duty for the 11:00 pm to 7:00 am shift, which would end on September 21, 2014, but she could not identify who that nurse was. She submitted that M.W.’s shift began at 7:00 am on September 21, 2014. The appellant stated that she was “off duty” for approximately three weeks and that no disciplinary action followed the investigation, as the investigators could not determine who was at fault.

The investigation further revealed that disciplinary charges were filed against A.B. for a narcotic count discrepancy on April 2, 2016, as he had signed for 13 pills of Lorazepam with another nurse, but was subsequently unable to account for one of them. As a result, A.B. was placed “off duty” with pay, pending the outcome of an investigation.⁴

In her complaint to the EEO, the appellant also cited two examples of disparate treatment in disciplinary actions. The appellant claimed that J.B., a Caucasian Practical Nurse at WDC, was not disciplined for an October 2014 incident where she dispensed a prescription to a consumer who placed the medication in his pocket and then attempted to sell it to another consumer. The appellant also alleged that K.H. failed to discipline L.D., a Caucasian Senior Practical Nurse, who failed to sign a medication administration record (MAR) on three occasions in 2012 and 2013. The appellant contrasted K.H.’s decision not to discipline L.D. with that of J.J.B., an African-American Practical Nurse, who was disciplined after leaving his MAR blank and T.H., an African-American temporary Medical AFSCME, who was terminated after failing to sign a MAR. The appellant claimed that E.H. had provided her with information about those matters. E.H., in her interview with the EEO, denied that she had shared information about other nurses’ disciplinary matters with the appellant.

Additionally, during the course of the EEO investigation, A.B. and an African-American co-worker alleged that M.R. was not disciplined for a medical error involving a consumer because of her race. Specifically, A.B. alleged that M.R.

⁴ On April 26, 2016, the appointing authority served A.B. with a Final Notice of Disciplinary Action, removing him, effective April 26, 2016. Subsequently, the parties entered into a settlement agreement, which modified the removal to a six-month suspension.

signed out pills for a consumer in error and then crossed out her name without a witness, which violated a policy requiring a witness to such action.⁵

Based on the foregoing, the EEO did not substantiate the appellant's allegation that K.H. had treated her differently to due to her race in violation of the State Policy. Specifically, the EEO noted that the appellant did not witness any of the incidents she cited and instead learned of them through her shop steward. It found that the disciplinary action taken against A.B. was a legitimate nondiscriminatory action, as his loss of a medication was a serious mistake and A.B. had previously been disciplined for a medication error. It also noted that L.D. had been disciplined for her failure to properly sign the MAR. The EEO found no evidence of disparate treatment in disciplinary actions taken against Caucasian and African-American employees for similar offenses.

On appeal to the Civil Service Commission (Commission), the appellant argues that K.H.'s conduct demonstrates a pattern of discrimination and reiterates her allegations. The appellant also maintains that the EEO failed to adequately investigate the incident that preceded her being placed "off duty" and that it failed to question her about the incidents noted in her complaint. She requests a hearing on the matter, along with additional mandatory diversity training and the creation of a review board at the facility.

In response, the EEO proffers that it conducted a thorough investigation, which consisted of four employee interviews and the review of over 20 relevant documents. It submits that it fully investigated the incidents the appellant cited as examples of disparate treatment, but that it did not question the appellant about those incidents because she was not a witness to them. The EEO states that the October 2014 incident involving J.B. was distinguishable, as it involved a consumer who had permission to remove medication from the clinic. It indicates that J.B. and the two other nurses on duty, all of whom were Caucasian, were counseled and the incident was noted in their January 2015 performance evaluations. The EEO also states that L.D. was disciplined for her failure to sign MARs for 25 clients and received a three-day suspension pursuant to a settlement agreement. It submits that a falsified MAR was only one basis for the disciplinary action brought against J.J.B. It states that J.J.B. administered a prescribed 10:00 a.m. nebulizer treatment to a consumer instead at 2:30 p.m. without a physician's order changing the time. It maintains that J.J.B. falsified the MAR by indicating that he administered the treatment at 10 a.m. Therefore, J.J.B. was disciplined for the falsified MAR, failing to monitor the consumer receiving the nebulizer treatment, failing to remove the nebulizer tube and mask from the consumer after treatment was complete, and failing to turn off the nebulizer after the treatment was

⁵ The EEO states that it reported A.B.'s allegation against M.R. to the DHS' Office of Program Integrity and Accountability, which initiated an investigation into the matter.

complete. It indicates that T.H. could not be subjected to disciplinary action⁶ because her status as a temporary employee meant that the appointing authority followed different procedures.⁷ Specifically, temporary employees were not placed “off duty” when a medical error occurred. Instead, they would be subject to corrective action, in the form of in-service training, unless the violation was a part of a demonstrated pattern of sloppiness or neglect, in which case the employee’s service would be discontinued. The EEO states that K.H. denied the allegation of discrimination and maintained that she treated all nurses equally. With regard to the action taken against A.B., K.H. explained that A.B. was placed “off duty” and subsequently disciplined for the April 2, 2016 incident because he made a serious medical error by failing to account for medication at the end of that shift and because he had been previously disciplined for a medication error. The EEO found no evidence to corroborate A.B.’s claim that M.R. crossed out her erroneous signature in a record without a witness. Instead, it found that M.R. had reported the error to her supervisor.

In a supplemental submission, the EEO details the appellant’s statements during her two interviews, as well as the statements of E.H., her union representative. The appellant claimed that she learned from E.H. that no other nurses were placed “off duty” for the stray pill found on September 21, 2014. Additionally, the appellant stated that E.H. informed her about the other incidents which she cited as examples of differential treatment. The EEO indicates that E.H. denied supplying the appellant with information about whether other staff members were placed “off duty” for specific incidents. However, the EEO does not address the appellant’s claim that she was the only nurse placed “off duty” for the September 21, 2014 incident. It submits that its investigator found no specific evidence of a violation of the State Policy, as its investigator “comprehensively investigated [the appellant’s] theory, and after reviewing all of the facts and evidence, determined there was no disparity based on race in the way that [WDC] imposed discipline.”

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,

⁶ The EEO indicates that on May 3, 2011, DHS’ Office of Human Resources sent T.H. a letter advising her that she was removed, effective May 3, 2011. However, the EEO does not have any information regarding the reason for her termination.

⁷ Civil Service rules regarding disciplinary action apply to permanent employees in the career service or persons serving a working test period. *See N.J.A.C. 4A:2-2.1(a)* and *N.J.A.C. 4A:3-3.1(e)1*. However, appointing authorities may establish discipline procedures for other employees. *See ibid.*

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)*. 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 is unable to determine if K.H. violated the State Policy. Specifically, although the EEO argues that there is no evidence that nurses were disciplined differently based upon their race, it is unclear from the record whether there was differential treatment regarding the decision to place nurses “off duty.” Critically, the EEO does not address whether the appellant was the only nurse placed “off duty” for the stray pill found on September 21, 2014 and, if so, why she was the only one placed “off duty” despite the fact that two other nurses had completed shifts before the pill was brought to the attention of a third nurse (M.W.) on the morning of September 21, 2014. Moreover, the EEO does not make it clear whether J.B. and two other Caucasian nurses were placed “off duty” after a similar incident on October 5, 2014 and, if not, what factors justified a different response. As such, it is unclear from the record whether K.H. demonstrated a pattern of racial discrimination when placing nurses “off duty” that should have led to the conclusion that she violated the State Policy. Therefore, the Commission remands this matter to the EEO to further investigate the appellant’s claim that K.H. violated the State Policy.

ORDER

Therefore, it is ordered that this matter be remanded to the EEO for further investigation.

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 27TH DAY OF MARCH, 2018



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