

In the Matter of Mary Garrison, Thomas Edison State College
DOP Docket No. 2008-2491
(Merit System Board, decided June 11, 2008)

Mary Garrison, a Clerk Typist at Thomas Edison State College (College), appeals the attached determination of the President of the College stating that she had not been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

The appellant alleged that, on November 21, 2007, Saul Kremer, a Clerk Driver, approached her work station in order to retrieve daily deposits from the bottom drawer. After retrieving the deposits, the appellant claimed that Kremer placed his hands on her shoulders, bent over, and attempted to kiss her. When she turned her head to avoid contact with him, the appellant alleged that Kremer grabbed her head with both hands in order to turn her head back towards him. After the appellant responded “no” when Kremer stated “oh, come here,” he retreated and left the area. In her complaint, the appellant also noted that “[t]his was not the first incident.”

In response to the appellant’s complaint, the College’s Affirmative Action Office performed an investigation. The investigation found that the other incident referenced by the appellant allegedly occurred in the summer of 2007, when Kremer told the appellant that he loved her and kissed the top of her head. It was also found that Kremer admitted that the events at issue occurred “more or less” as described by the appellant. According to the President’s determination letter:

Given that there were only two widely isolated incidents of a fairly minor nature; that there seem to be grounds for believing they may have been the result of pure miscommunication or misunderstanding; that the offending behavior has now stopped; and that [Kremer] showed remorse upon being told of [the] complaint, I have determined that the actions that are the basis of the complaint do not rise to the level of unlawful discrimination.

On appeal to the Merit System Board, the appellant asserts that Kremer has not been held responsible for his actions, and he continues to purposefully walk by her work station, even though he no longer picks up the daily deposits from her. The appellant also notes that, when Kremer is on vacation, a different employee fills in for him and picks up the daily deposits. Thus, she emphasizes that there are other employees who can be reassigned

this duty on a permanent basis. The appellant requests that Kremer be reassigned so that he does not have occasion to visit her work area.

In response, the College, represented by Melissa E. Hager, Deputy Attorney General, emphasizes that the appellant did not allege that Kremer actually kissed her during the November 21, 2007 incident; rather, by her own description of the incident, he attempted to kiss her but left the work area when she said “no.” The College notes that, during his interview, Kremer expressed remorse that the appellant misunderstood his intent, which was to express his appreciation for her friendship. It argues that, although there is no dispute that Kremer attempted to kiss the appellant, his actions were not based on the appellant’s membership in any of the categories protected by the State Policy, such as race, religion, disability, or gender. The College also underscores that, although Kremer’s conduct did not violate the State Policy, it promptly took remedial action by altering Kremer’s route so as to avoid contact with the appellant and issuing a warning to Kremer that his actions were inconsistent with “proper workplace decorum.” Finally, with regard to the previous incident that the appellant alleged occurred in the summer of 2007, the College contends that her complaint is untimely as its Affirmative Action Policy and Procedures require complaints to be filed within 20 days of the offending conduct.

CONCLUSION

N.J.A.C. 4A:7-3.1(c) expressly prohibits sexual harassment of any kind, including hostile work environment harassment. Sexual harassment is defined in *N.J.A.C.* 4A:7-3.1(c)1 as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when, for example:

- iii. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

Additionally, *N.J.A.C.* 4A:7-3.1(c)2 provides a non-exhaustive list of conduct that constitutes sexual harassment in violation of the State Policy, including “unwanted physical contact such as intentional touching, grabbing, pinching, brushing against another’s body or impeding or blocking movement.” It is also emphasized that *N.J.A.C.* 4A:7-3.1(a) provides, in pertinent part:

To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the State and

its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

Finally, *N.J.A.C.* 4A:7-3.1(b) provides that “a violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.”

In the instant matter, the Board has conducted a review of the record and finds that the appellant has established that a violation of the State Policy occurred. The investigation found that the November 21, 2007 incident occurred as described by the appellant. In particular, Kremer placed his hands on the appellant’s shoulder and bent down in an attempt to kiss her. When she repositioned herself to avoid this contact, Kremer took her head in both of his hands and attempted to move her head back towards him so that he could kiss her. The conduct constitutes a clear violation of the State Policy. Moreover, the mitigating circumstances cited in the President’s determination letter do not alter the finding that a violation occurred. Rather, the fact that Kremer has not repeated this behavior since becoming aware that it made the appellant uncomfortable and his remorse that his intent was misunderstood are only properly considered when reaching a determination as to the appropriate remedial action to be taken. As noted above, Kremer’s intent is irrelevant to a determination as to whether a violation occurred, as is the fact that the conduct did not occur more than a couple of times. *See In the Matter of Joanne Cole* (MSB, decided November 4, 2004); *In the Matter of Alonzo Wade* (MSB, decided November 19, 2003). In addition, although some administrative action was taken against Kremer, a warning does not appear to adequately address the severity of his actions. In this regard, the Board notes that the warning was issued in response to conduct that was found to be inappropriate, but not violative of the State Policy. In light of the Board’s determination that Kremer’s actions violated the State Policy, it would be appropriate for the College to reevaluate its determination as to the remedy and determine whether Kremer’s reassignment is warranted given his continued presence in the appellant’s work area.

In addition, the Board notes that it is unclear from the record whether the first incident cited by the appellant, wherein Kremer declared his love for her and kissed the top of her head, was substantiated. In its response to the instant appeal, the College asserts that the appellant’s complaint in this regard was filed outside of the 20-day time period required by its Affirmative Action Policy and Procedures. However, the Board emphasizes that the

imposition of such a time restriction is at odds with the State Policy. In this regard, while *N.J.A.C. 4A:7-3.2(a)* encourages employees to immediately report suspected violations of the State Policy, there is no requirement that such complaints be filed within any particular time frame. Thus, on remand, the College is also instructed to fully investigate this claim, if it has not already done so. In the event that this prior incident is also found to be substantiated, the College must also take appropriate remedial action for this additional violation of the State Policy.

Accordingly, the Board is remanding this matter back to the College so that it may determine the appropriate remedial action for Kremer based on his violation of the State Policy, as well as any further remedies that may be appropriate under the circumstances. *See, e.g., In the Matter of Osvaldo Reyes* (MSB, decided January 12, 2005).

ORDER

Therefore, it is ordered that this appeal be granted and that this matter be remanded to the College to investigate the appellant's first complaint if it has not already done so and for a determination of the appropriate penalty for Kremer based on his violation of the State Policy, as well as any further remedies that may be appropriate.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.