CSC

B-33

STATE OF NEW JERSEY

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| In the Matter of D.H., Department of Human Services | FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION |
| | Discrimination Appeal |
| CSC Docket No. 2015-753 | |
| | ISSUED: AUG 21 2015 (HS) |

D.H., a Carpenter with Woodbine Developmental Center (WDC), Department of Human Services (DHS), appeals the attached determination of the Office of Equal Employment Opportunity (EEO), which found sufficient evidence that the appellant had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

J.F., a Repairer, filed a complaint with the EEO alleging that the appellant had discriminated against him based on his race. Specifically, J.F., an African-American, alleged that the appellant, a Caucasian, made monkey sounds at him. In response to J.F.'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.[1]

On appeal to the Civil Service Commission (Commission), the appellant states that he was making noises in the parking lot and continued to make the noises upon entering the building. He states that the sounds he made were not directed at J.F. and that he was unaware of J.F.'s presence in the building. The appellant further contends that the noises were in no way racially motivated and were without malicious intent. He views this matter as a case of reverse discrimination and believes that the issue has been blown out of proportion based

[1] The appointing authority issued the appellant a written warning and required him to attend training based on the results of the EEO's investigation but did not take any disciplinary action against the appellant.

on J.F.'s interpretation of the events. According to the appellant, J.F. has told other co-workers that "he didn't think it would go this far." Additionally, the appellant states that in his 21 years of employment with WDC, he has never had any issues with any of his co-workers, regardless of race.

In response, the EEO states that it interviewed four employees and reviewed three documents in the course of its investigation. It states that the appellant admitted during the investigation that he was making monkey noises as he entered the building unaware that J.F. was there. The EEO maintains that its determination was correct given that making monkey noises was historically a way to discriminate against black people. Moreover, the State Policy is a zero-tolerance policy, and thus, the appellant's intent in making the noises is irrelevant. Additionally, as to the appellant's argument that the sounds he made were not directed at J.F., the EEO counters that the appellant engaged in inappropriate behavior involving race in the workplace and that J.F. made it known to the appellant that the conduct was unwelcome. The EEO maintains that the State Policy prohibits such conduct as third party harassment.

## 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). Further, the State Policy also applies to third party harassment, defined as unwelcome behavior involving any of the protected categories that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do his or her job. Third party harassment based upon any of the aforementioned protected categories is prohibited by the State Policy. *See N.J.A.C.* 4A:7-3.1(a)2. It is also 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 the State 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). 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 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 four interviews in investigating J.F.'s complaint and concluded that the appellant violated the State Policy on the basis of race. The EEO correctly notes that making monkey noises has historically been a method to discriminate against black individuals. The appellant admitted during the investigation that he was making monkey noises as he entered the building and does not deny having made such noises on appeal. J.F. indicated that such conduct was unwelcome. As such, the appellant's conduct implicated J.F.'s race, a protected category under the State Policy. The appellant's contentions that the noises were not directed at J.F. and that he was unaware of J.F.'s presence in the building are unavailing. In this regard, the State Policy covers third party harassment, which is defined therein as unwelcome behavior involving any of the protected categories that is *not directed at an individual but exists in the workplace* and interferes with an individual's ability to do his or her job. *See N.J.A.C.* 4A:7-3.1(a)2. As unwelcome behavior touching upon J.F.'s race that existed in the workplace, the appellant's conduct constituted third party harassment as defined in the State Policy. The appellant's arguments that he had no racial motive or malicious intent are similarly unpersuasive. In this regard, 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). Regardless, on appeal, the appellant does not offer a clear explanation as to the circumstances surrounding his actions, stating only that he was making noises in the parking lot and continued making the noises upon entering the building. The appellant's appeal instead stresses his lack of intent and lack of awareness of J.F.'s presence in the building, arguments that, as already noted, do not provide an excuse. 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 19TH DAY OF AUGUST, 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
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Attachment

c. D.H.
Edward McCabe
Mamta Patel
Joseph Gambino

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

**State of New Jersey**
DEPARTMENT OF HUMAN SERVICES
PO BOX 700
TRENTON NJ 08625-0700

JENNIFER VELEZ
*Commissioner*

August 20, 2014

D[redacted] H[redacted]
[redacted]

Dear Mr. H[redacted]

On June 4, 2014, J[redacted] F[redacted], a Repairer at Woodbine Developmental Center (WDC) filed a Letter of Complaint against you alleging discrimination based upon race. Specifically, Mr. F[redacted] alleged that you made monkey sounds at him.

On June 9, 2014, you filed a Letter of Complaint alleging discrimination based upon sexual orientation against J[redacted] F[redacted]. Specifically, you alleged that he made a sexual remark about your eating a banana.

The Department of Human Services (DHS) neither condones nor tolerates any form of discriminatory behavior in the workplace. Therefore, the Office of Equal Employment Opportunity (EEO) assigned B[redacted] E[redacted] from our office to conduct an investigation of the complaint. Based on her investigation, the Office of EEO substantiated the allegation against you and substantiated the allegation against Mr. F[redacted]

Based on the results of the investigation, it has been determined that you and Mr. F[redacted] violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). Consequently, the appropriate administrative and/or disciplinary action will be taken.

If you disagree with this determination, you have the right to file an appeal with the Civil Service Commission within twenty (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. Please include all materials presented at the department level and a copy of this determination letter with your appeal. The appeal should be submitted to the Division of Appeals and Regulatory Affairs, P.O. Box 312, Trenton, N.J. 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 only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or 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.

**However, if it is determined that disciplinary action will be taken, the procedures for the appeal of disciplinary action must be followed.**

At this time, I would like to remind you that the State Policy prohibits retaliation against any employee who files a discrimination complaint or participates in a complaint investigation. Furthermore, this matter remains confidential and the results of the investigation should not be discussed with others.

Should you have any questions, please contact the DHS Office of EEO at (609) 292-2816 or 292-5807.

Sincerely,

Edward M. McCabe
EEO Director

EMM

C: Chris Mongon, Assistant Commissioner
Robert Armstrong, CEO
Mamta Patel, CSC
John Coffman, QAC