

B-34



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of J.C., Greystone Park
Psychiatric Hospital

Discrimination Appeal

CSC Docket No. 2013-3283

ISSUED: APR 10 2017 (ABR)

J.C., a former Manager 2, Human Resources, with the Greystone Park Psychiatric Hospital (Greystone) appeals the determination of the Assistant Commissioner of the Department of Human Services (DHS), that the appellant did not present sufficient evidence to support a finding that she had been subjected to violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, on March 15, 2013, the appellant, a Caucasian, filed a complaint with the DHS' Office of Equal Employment Opportunity (EEO), alleging that J.M., a Caucasian, former Chief Executive Officer, Care Facility (CEO), discriminated against her on the basis of her race in January 2013. On April 18, 2013, she filed a second complaint with the EEO, alleging that J.M. retaliated against her for filing the earlier discrimination complaint. In response, the EEO conducted an investigation, during which it reviewed pertinent documents and interviewed J.M. and the appellant. The EEO did not substantiate a State Policy violation against J.M. for the reasons described below.

The appellant alleged that J.M.'s differential treatment in responding to the EEO complaints against the appellant constituted discrimination based upon her race. On January 3, 2013, J.M. held a meeting with the appellant's subordinates in Greystone's Human Resources Department (HR Department) after they had filed

EEO and non-EEO complaints against the appellant.¹ The appellant indicated that on or about January 14, 2013, J.M., in response to the complaints against the appellant, limited her duties as HR Director to attending meetings and working on a competency policy. The appellant maintained that both actions constituted disparate treatment compared to non-Caucasian managers who faced similar or more serious allegations in the past. The appellant also alleged that J.M.'s meeting with her subordinates violated the confidentiality of the EEO investigation.

In her April 18, 2013 EEO complaint, the appellant alleged that J.M. retaliated against her by lowering her score on an interim Performance Assessment Review (PAR) and by conditioning the granting of the appellant's request for one week of leave under the Federal Family and Medical Leave Act (FMLA) upon her furnishing additional documentation shortly after an intermittent FMLA leave request had already been approved. The appellant maintained that J.M. was notified of the appellant's initial EEO complaint on or about March 18, 2013, as Greystone's policy was to "immediately notify the alleged violator that there is a complaint against them" and warn the accused against retaliation. As such, the appellant claimed that J.M. knew of her EEO complaint and lowered her score in three areas² on her interim PAR for the period from July 1, 2012 to December 31, 2012, which was issued on April 4, 2013. The appellant argued that a reference in the interim PAR to "[r]ecent issues in the [HR] Department," and the timing of its issuance, demonstrated that J.M. lowered her rating in retaliation for her EEO complaint. The appellant also alleged that J.M. required her to submit further documentation in April 2013 for her April 19, 2013 to April 30, 2013 FMLA leave, that such a requirement was also retaliatory and amounted to harassment by J.M. In that regard, she maintained that Greystone did not require staff to recertify FMLA leave requests within six months of a prior approval and noted that she had already been approved for an intermittent FMLA leave request for an hour of treatment one to two times per week.³

The EEO investigation did not substantiate the appellant's claims of racial discrimination or retaliation. With regard to the appellant's discrimination claims, the EEO found that J.M.'s action in meeting with the appellant's subordinates was

¹ On or about January 2, 2013, M.B., an African American, Personnel Assistant 2, filed a complaint with the EEO alleging that the appellant engaged in employment discrimination on the basis of race. During the subsequent EEO investigation, three other employees alleged that the appellant violated the State Policy by discriminating on the basis of race and gender. The EEO found evidence to corroborate four of those allegations and the DHS, based upon those findings, issued a three-day suspension to the appellant.

² The appellant received an interim rating of "commendable." She alleges that J.M. lowered her score by rating her as "failed to achieve essential criteria" with respect to leadership skills, setting expectations/providing feedback and exercising teamwork.

³ The appellant claimed that J.M. personally requested the additional documentation on April 12, 2013 via text message and by email on April 15, 2013 and directed J.F., an Administrative Analyst 4 (formerly Administrative Analyst 1), to request the said documentation via letter on April 18, 2013.

consistent with the response expected of a CEO dealing with morale and management issues and did not violate the confidentiality of the EEO investigation, as the investigation revealed that the meeting only covered non-EEO complaints. The EEO also determined that J.M.'s actions in meeting with the appellant's subordinates and altering her duties following their complaints did not constitute differential treatment. The EEO explained that to find differential treatment, it would have to conclude that J.M. treated the appellant differently from similarly situated employees on the basis of her race. Although the appellant compared her treatment to J.M.'s treatment of non-Caucasian employees, the EEO found that they were not similarly situated because, unlike the appellant, the other employees did not directly report to J.M. Accordingly, the EEO could not find that J.M. treated the appellant differently than similarly situated employees who were not Caucasian. Additionally, the EEO noted that J.M. had returned the duty of signing off on in-house postings to the appellant prior to the date of the EEO's determination. The EEO also concluded that J.M. did not retaliate against the appellant because she did not have notice of the appellant's EEO discrimination complaint until after both the issuance of the interim PAR and the request for the appellant to recertify her FMLA leave request. The EEO added that the request for additional documentation was made for a legitimate business reason, as the appellant requested one week of FMLA leave, which differed significantly from the prior approval for one hour of leave for treatment, one to two times per week. It also noted that there was no evidence that the appellant was harmed by having to furnish additional documentation, as her leave request was ultimately approved.

On appeal, the appellant argues that there is adequate evidence to substantiate her allegations that J.M. discriminated against her on the basis of race and retaliated against her, that the EEO did not conduct a thorough and impartial investigation, and that the DHS' determination contains several important factual errors. With regard to her discrimination claims, the appellant argues that the EEO should have found that the non-Caucasian managers she compared her treatment to were similarly situated because J.M. made all reassignment decisions for Greystone staff accused of discrimination, regardless of their reporting relationship. The appellant also contends that the DHS's May 2013 determination incorrectly stated that her duty of signing off on in-house postings had been resolved at a meeting, since those duties had not been returned to the appellant as of the date of the EEO's determination.

The appellant also claims that a proper analysis of the evidence and sequence of events demonstrates that the rating on her interim PAR issued on April 3, 2013 and the request for additional paperwork for her FMLA leave request in April 2013 were clearly retaliatory. The appellant complains that the investigation of her retaliation claims was inadequate because the EEO investigator only questioned her about them by email on April 19, 2013, rather than through an in-person interview and he failed to answer questions about "additional concerns" that she

provided in her response. The appellant also argues that the EEO investigator improperly relied upon J.M.'s assertion that she did not learn of the appellant's EEO complaint until April 18, 2013. Instead, she claims that J.M., in accordance with Greystone policy, was notified of the appellant's discrimination complaint on or about March 18, 2013. She also contends that J.M. made statements about the "filing of charges" during two conversations they had prior to April 18, 2013, which evidences her discriminatory intent, including asking "why is it people have to file charges rather than just work things out on their own?" She also maintains that on April 2, 2013, J.M. stated that the current roles and organizational structure in the HR Department would remain in place until staff ceased "filing papers." The appellant submits copies of the interim PAR, PARs for 2011 and 2012, a copy of the request for additional documentation in connection with her FMLA leave request, and her copy of her email correspondence with the EEO investigator in support of her claims concerning the retaliation investigation. The appellant claims that she was harmed by J.M.'s State Policy violations and the failures of the investigation, where she continued to face retaliation and humiliation until she resigned from her position in March 2014.

In response, the EEO argues that it conducted a thorough investigation and that its findings support its conclusion there was insufficient evidence to find that J.M. discriminated against the appellant on the basis of race or retaliated against her for filing an EEO complaint. The EEO submits that J.M. knew of the non-EEO complaints by the appellant's subordinates about the appellant's conduct, but was not informed of their EEO complaints. It notes that its investigation found that J.M.'s decision to conduct such a meeting was a legitimate exercise of her authority as Greystone's CEO and that J.M. never discussed EEO issues at that meeting. Moreover, the EEO explains that there was not a basis to conclude that J.M. treated the appellant differently from non-Caucasian employees because the individuals the appellant compares herself to were not similarly situated, as the other employees she named were not direct reports and did not face similar circumstances.

With regard to the appellant's retaliation claims, the EEO contends that there is no basis to find that the subject interim PAR, or the request for additional documentation for her FMLA leave approval, evidenced retaliation by J.M. The EEO argues that the appellant errs in assuming that J.M. was immediately notified of the appellant's EEO complaint, because the EEO's actual policy, as well as that of Greystone, is to evaluate each complaint and determine what immediate corrective action, if any, is necessary. It states that in the case of the appellant's EEO complaint, it did not communicate with J.M. and there is no evidence that anyone else notified her of the appellant's EEO complaint prior to April 18, 2013. With respect to the subject FMLA leave request, the EEO stresses that such a request was reasonable, as the appellant's request for a one-week absence in April 2013 was inconsistent with the original request and approval for intermittent one-hour absences. Additionally, the EEO states that it found no evidence to contradict

J.M.'s claim that she had no knowledge of the appellant's EEO complaint when she requested additional documentation from the appellant. The EEO adds that J.M. was not responsible for evaluating the appellant's FMLA requests and it contends that there was no harm to the appellant, as the subject request was granted.

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)*. Additionally, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a discriminatory practice, is prohibited by this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. See *N.J.A.C. 4A:7-3.1(h)*. 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 failed to establish that the appellant was discriminated against or subjected to retaliation in violation of the State Policy. The appellant claims that J.M. subjected her to differential treatment compared to similarly situated non-Caucasian managers by meeting with her subordinates at Greystone HR and changing her duties after her subordinates filed EEO and non-EEO complaints against her. The appellant further contends that the EEO erred in concluding that those other managers were not similarly situated because they were not direct reports. However, the Commission disagrees. It was sufficient for the EEO to conclude that the different reporting relationships precluded it from considering the appellant similarly situated to those other employees, because the presence of one or more intermediate supervisors who might influence any immediate corrective action taken in response to EEO or non-EEO complaints is a significant distinction.

The appellant also argues that J.M. retaliated against her by lowering her performance rating on the subject interim PAR and by requesting additional

documentation for her one-week FMLA leave request in April 2013. She claims that J.M. had notice of her March 13, 2013 discrimination complaint because Greystone's policy is to "immediately notify the alleged violator" and claims that J.M. subsequently made about employees "filing papers" which evidences that J.M. had notice of her EEO complaint. Nevertheless, the record demonstrates a reasonable basis for the EEO's determination that J.M. was notified of appellant's EEO complaint on April 18, 2013 and did not retaliate against the appellant. The EEO has made it clear that neither it nor Greystone has a policy of immediately notifying an accused individual and states that it did not notify J.M. about the appellant's discrimination complaint until April 18, 2013. The appellant provides no support for her assertion about Greystone's policies and, accordingly, it is insufficient evidence to cast doubt upon the EEO's conclusion.

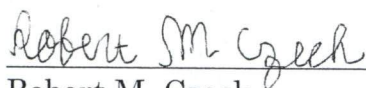
Further, the three criteria J.M. rated the appellant as "fail[ing] to achieve essential criteria" on the subject interim PAR relate to the appellant's supervisory duties as the Director of Greystone HR. The subject interim PAR covered the period from July 1, 2012 to December 31, 2012. An EEO complaint was filed against the appellant on or about January 2, 2013 and J.M. met with the appellant's subordinates at Greystone HR on January 3, 2013. The timing of those events and the EEO's findings regarding complaints against the appellant demonstrate that at least some of the issues with her management occurred during the interim PAR rating period. As such, the EEO, after determining that J.M. was unaware of the appellant's complaint when she issued the interim PAR on April 3, 2013, could reasonably conclude that J.M.'s rating of the appellant on her interim PAR and its statement about "recent issues" referred to the appellant's management issues prior to January 2013. Moreover, a reasonable interpretation of J.M.'s alleged remarks on April 2, 2013 about staff "filing papers," as framed by the appellant on appeal, would be that she was leaving changes to the reporting relationships in Greystone's HR Department in place until the tension with the appellant's subordinates subsided. Similarly, there is adequate support in the record for the EEO's finding that the requests for the appellant to provide a recertification for the subject FMLA leave did not constitute retaliation. The appellant claims that Greystone did not require employees to provide a recertification within six months of a prior FMLA leave approval. However, she provides no supporting evidence to corroborate her claim and the EEO has cited a legitimate business reason for the subject request, namely that the appellant's request for a full week of FMLA leave differed from the intermittent leave that had previously been approved. In that regard, it is noted that the FMLA permits employers to require subsequent recertifications on a reasonable basis. *See* 29 U.S.C. § 2613(e). Notably, a change in the duration or frequency is considered a reasonable basis for an employer to request recertification from an employee less than 30 days after a prior leave certification. *See* 29 C.F.R. § 825.308(c)(2).

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 5TH DAY OF APRIL, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: J.C.
Edward McCabe
Brenda Calhoun
Mamta Patel
Records Center