**STATE OF NEW JERSEY**

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| In the Matter of L.P., Woodbine Developmental Center | : | **DECISION OF THE CIVIL SERVICE COMMISSION** |
| | : | Discrimination Appeal |
| CSC Docket No. 2018-2774 | : | |

**ISSUED: FEBRUARY 25, 2019** (ABR)

L.P., an Institutional Transportation Supervisor with the Woodbine Developmental Center (Woodbine), appeals the determination of the Assistant Commissioner, Legal Affairs, Department of Human Services (DHS), which found that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

On November 13, 2017, the DHS' Office of Equal Employment Opportunity (EEO) received a copy of a civil complaint in which J.F., an African-American Motor Vehicle Operator 1, contended that the appellant, a Caucasian, and the State created a work environment which was hostile to minorities, including African-Americans, and where discrimination was viewed as acceptable. Specifically, it was alleged that W.G. and K.H., both Caucasian Motor Vehicle Operator 1s, had been allowed to make inappropriate remarks about race over an extended period of time. The appellant was the supervisor of J.F., W.G. and K.H. In response to the complaint, the EEO conducted an investigation, wherein it conducted 14 interviews and reviewed 21 documents, regarding the following allegations: (1) K.H. or W.G. commented with respect to the Black Lives Matter movement, "I'm sick of hearing this shit. They need to get a job. Stop selling drugs. My life matters;" (2) K.H. or W.G. stated, in reference to President Trump, "[H]e's my type of president. He will stop 'these people' from crossing the border, coming here and getting on welfare and having all these kids;" (3) K.H. or W.G. stated that their Colombian co-worker had the "good stuff" (*i.e.,* cocaine) and requested in a joking manner that he bring some in; (4) K.H. or W.G. stated, in reference to Latinos on television "they need to go back to where they came from;" (5) during a lunchtime conversation in the

breakroom K.H. and/or W.G. made no fewer than five sexual comments, including "they stick it inside her butthole to make a mold—they also do chocolate cocks—you can get a box of chocolate shaped like an asshole—did you see that [appellant]?" J.F. maintained that the appellant did not respond to this question; (6) J.F. asked the appellant if there was any other work that needed to be done, K.H. responded by making a kissing noise, W.G. asked "[d]o you have on your kneepads?" and K.H. stated "[w]ipe the man goo off your mouth;" (7) W.G. told J.F. that he had gotten in trouble for calling an African-American woman a "n*****," but that it was "taken care of out of court;" (8) K.H. or W.G. stated that "[i]f it wasn't for the Mexicans, we wouldn't have welfare and food stamps and all these kids wouldn't be getting Medicaid;" (9) K.H. or W.G. commented, "Look at her fat ass. What I can do with that. I bet I could go all night long with her;" (10) "Big tits. Look at her mouth;" (11) K.G. or W.H. stated "[w]e would not be in this shape if all the Mexicans wouldn't come over. We're supplying them with food and medical and loans, college loans, and they're driving around in fancy-ass cars, collecting welfare;" (12) K.H. and W.G. remarked that they did not know why a Caucasian woman would be with an African-American man and that African-Americans were "no good;" (13) In January 2017, W.G. poured out a freshly brewed pot of coffee prepared by J.F.,[1] which frightened him and that J.F. stopped eating or drinking at work because he grew concerned that he would be harmed; and (14) The appellant failed to prevent K.H. and W.G. from harassing employees in the garage based upon their race, including J.F. and T.S. The EEO found that allegations 1, 2, 3, 6, 11 12, 13 and 14 were corroborated by multiple witnesses. Consequently, the EEO found that the appellant's failure as a supervisor to report offensive comments related to race by W.G. and K.H. violated the State Policy. As a result, corrective action was taken.[2]

On appeal to the Civil Service Commission (Commission), the appellant argues, in relevant part, that during the time he supervised W.G. and K.H., he learned of one incident involving them and reported it "to the maintenance office," but the "maintenance office" did not pursue the matter because the complainant refused to file a written statement. Further, he states that in 2017, the Assistant Commissioner, Legal Affairs informed all supervisors that "the rules and laws . . . changed," meaning that complainants no longer needed to provide a written statement in order for a complaint to be reported. He denies that W.G. or K.H. made any of the discriminatory statements alleged by J.F. in the appellant's presence and he maintains that W.G., K.H. and other Woodbine garage employees knew the appellant would have reported them if he heard them.

In the instant matter, the EEO has furnished transcripts of its interviews with the appellant, J.F. and 12 other witnesses. The EEO found that eight of 13

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[1] The appellant's supervisor, M.D., an Engineer-in-Charge-of-Maintenance 3, told the EEO that the appellant reported this incident to him and, as a result, M.D. sought a 20 day suspension for W.G. on charges of creating a disturbance on State property and interfering with employees.

[2] The appellant was issued a written warning.

allegations against W.G. and/or K.H. were corroborated by multiple witnesses and that since 2014, the appellant failed to prevent K.H. and W.G. from harassing employees based on their race. The EEO relied principally on the appellant's admission, concerning allegation 6, that he heard W.G. "say something about having on kneepads" and that when it asked the appellant if J.F. ever complained to him about K.H. and W.G., he answered "[n]ot a complaint complaint. It was guys talking, and everyone else was talking too. They would joke around back and forth. It wasn't anything reportable in front of me." The appellant maintained that if J.F. had come to him about the allegations raised in his EEO complaint, he would have reported them, just as he did when W.G. dumped out a pot of coffee that J.F. had freshly brewed in January 2017.

The EEO also asserts that J.F.; T.S., a female African-American former garage employee at Woodbine; and O.Z., a Caucasian Motor Vehicle Operator 1, provided credible testimony that the appellant failed to prevent K.H. and W.G. from harassing garage employees on the basis of their race. Specifically, J.F. maintained that the appellant did not take any action to address K.H. or W.G.'s comments except to tell all garage employees during a December 16, 2017 meeting to "cut out the comments"[3] and to "let the EEO do what they've got to do." J.F. also indicated that he had declined an offer to work a Monday through Friday workweek because he did not want to deal with the appellant and W.G. more than three days per week. T.S. told the EEO that she never saw W.G. or K.H. harass J.F., but she maintained that the appellant "heard things and did nothing" and at times, "he would jump in the conversation from a distance." She indicated that the appellant told her that "he didn't know why W.G. was racist." T.S. also stated that staff outside of the garage at Woodbine knew that there were problems in the garage and that W.G. was a racist. T.S. maintained that she left the garage at Woodbine after working there for six months because of stress and her belief that something bad was going to happen. Further, she submits that she was troubled by a rumor that W.G. told K.H., in reference to the coffee pot, that "[w]hat happened to the last one was going to happen to this one" and she told the EEO that other employees advised her to lock up her coffee pot. O.Z. stated that he "never witnessed [the appellant] witnessing anything, but [he was] sure [the appellant] had to" have because the appellant's desk was "only a few feet away from the breakroom" and the areas were not separated by a door. The EEO investigator in this matter indicates that she visited the breakroom after speaking to O.Z. and that she found O.Z.'s description of the proximity of the appellant's desk to be "completely accurate." The EEO states that the breakroom "is a very small room, and the desk where [the appellant] sat was located right next to the open space leading in to the breakroom." The EEO maintains that, as a supervisor, the appellant was required to report any State Policy violations that he observed, yet he turned a blind eye to K.H.'s and W.G.'s behavior in the garage. It argued that:

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[3] The EEO does not detail what incident(s) precipitated the meeting or the appellant's instruction to his staff to "cut out the comments."

> Unless [the appellant] is deaf or dumb—and he appears to be neither—he must have known that K.H. and W.G. created a hostile work environment for African-Americans.

By way of background, the EEO notes that J.F. had previously filed a discrimination complaint against W.G. and K.H. with it in August 2016. In an August 2016 interview, the appellant admitted that he heard K.H. and W.G. use the term "faggot" in the workplace in 2006 and he did not report it to the EEO. However, the Commission, in *In the Matter of L.P.* (CSC, decided May 23, 2018) found that the appellant's failure, as a supervisor, to report K.H. and W.G. did not violate the State Policy in effect at that time.

B.R., R.L., a Caucasian Motor Vehicle Operator 1, and J.K., an African-American Motor Vehicle Operator 1, told the EEO that they did not know if the appellant heard any of the remarks alleged in J.F.'s 2017 civil complaint, but thought that if he had heard them, he would have properly addressed them. The EEO maintains that the statements of these three witnesses were not dispositive because they were "opinions" and not "affirmative statements that something happened." Conversely, it states that it found T.S., O.Z. and J.F. credible because they "stated that they believed something happened and that they witnessed something happen."

It is noted that the appellant, when acknowledging that he heard W.G. "say something about kneepads" in connection with allegation 6, stated that he thought W.G.'s comment was a joke about the kneepads the appellant used when working on vehicles. Additionally, it is observed that W.G. claimed that the appellant did not "respond to much" when he was at his desk because noise from the air conditioner made it difficult to hear conversations taking place in the breakroom.

## CONCLUSION

Discrimination appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted in those limited circumstances where the Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing. *See N.J.A.C.* 4A:2-1.1(d).

In the instant matter, material disputes of fact exist which warrant granting a hearing at the Office of Administrative Law (OAL). The EEO cites the extent and duration of K.H. and W.G.'s conduct and the appellant's acknowledgement with allegation 6 that he heard W.G. "say something about having on kneepads" as evidence that the appellant failed to report State Policy violations he was aware of. It is noted that the appellant stated during his EEO interview that he heard "kneepads" comment, but thought it was a joke about the kneepads the appellant

used when working on vehicles. Given this context and the ambiguity as to whether the appellant heard K.H. say "[w]ipe the man goo off your mouth" during this exchange, the Commission is unable to ascertain whether allegation 6 constituted a State Policy violation that the appellant was required to report.

As to the other alleged comments by W.G. and/or K.H., the EEO cites the statements of J.F., T.S. and O.Z., and the proximity of the appellant's desk to the breakroom as evidence that the appellant failed to prevent K.H. and W.G. from harassing garage employees on the basis of their race. However, the written record does not detail the EEO's basis for according greater weight to T.S., O.Z. and J.F.'s testimony relative to B.R., R.L. and J.K.'s statements that they did not know if the appellant heard any of the remarks alleged in J.F.'s 2017 civil complaint, but thought that if he had heard them, he would have properly addressed them. Notably, the written record does not indicate that T.S. or O.Z. identified a specific instance where the appellant failed to report a State Policy violation. The Commission notes that even if these remarks were *uttered* in the breakroom while the appellant was located at his nearby desk, that alone does not establish that the appellant *heard* them, particularly if W.G.'s claim that the appellant could not hear much when he was at his desk because of noise from the air conditioner was accurate. Under these circumstances, the Commission finds that disputed issues of material fact exist which cannot be determined on the written record, thereby requiring a hearing in the matter where an Administrative Law Judge may evaluate evidence and assess the credibility of the witnesses. Therefore, the Commission grants a hearing at the OAL.

Finally, one other matter needs to be addressed. Specifically, the Commission finds that the EEO's statement on appeal that unless the appellant was "deaf and dumb" he had to have heard the alleged statements to be particularly troubling. The EEO, as the body responsible for investigating State Policy violation complaints within the DHS, has a heightened duty not to use language which demeans members of protected classes. As noted by the National Association of the Deaf, the phrase "deaf and dumb" is considered archaic and offensive to deaf and hard of hearing people for a number of reasons, including the fact that it implies that deaf people who have difficulty speaking are stupid and unable to communicate. *See Community and Culture—Frequently Asked Questions,* NAT'L ASSOC. FOR THE DEAF, https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/ (last visited Nov. 8, 2018). The EEO is reminded that its employees are subject to the State Policy and those who violate it are subject to appropriate remedial action.

## ORDER

Therefore, it is ordered that this matter be referred to the Office of Administrative Law for a hearing as a contested case.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF FEBRUARY, 2019

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