

he made the statement during an afternoon tour in a conference room where roughly 50 percent of the people who were present were female, and would he really invite this scrutiny in the current "Me Too" environment.

S.F. indicates that he was never alone with J.B. and he only introduced himself to her prior to the morning tour as they had never met before in person. He states that he did not address her during either the morning or afternoon tours as she said that she was too busy networking with those she perceived as being able to assist her and he can only assume that he was not one of those people. S.F. presents that he can only remember waving good-bye to her while departing the parking lot. He states that he is being accused of allegedly harassing her with a kiss request prior to leaving the building for the day. S.F. recalls that light-hearted comments were made by more than just himself and not one of the tour participants directed any comments towards J.B. S.F. states that prior to the tour, J.B. and he only were familiar with each other through lengthy phone calls, all of which she initiated. He presents that he always assisted her and even invited her to take a tour of the facility. S.F. indicates that it is his understanding that only J.B.'s e-mails were investigated, and he suggests that phone call duration and who initiated the phone calls should be considered when assessing his credibility. He states that after the tours, he noticed that J.B.'s contact methodology changed as she sent persistent and numerous e-mails to him. S.F. remembers wondering whether she was trying to trip him up into making a mistake. He also questioned why she would want to embarrass the person who assisted her. S.F. asserts that on numerous occasions, that she unnecessarily copied others on her e-mails to him. Thereafter, her e-mails stopped as she was reassigned out of the Security Unit and he speculates that she was told to stop contacting him. He notes that J.B.'s supervisor informed him that she was reassigned and then her supervisor was reassigned. Therefore, S.F. wonders if the persistent and numerous e-mails directed toward him was a strategic, pre-planned agenda-like move.

Additionally, S.F. indicates that the investigator told him that J.B. had second thoughts about finishing her accusation, but the investigator stated that once a complaint was initiated, it had to be completed. Therefore, S.F. believes that J.B. embellished the facts, such as stating that they were alone or in a small group which is why no one heard the alleged comment, so that the determination would be in her favor. He states that it would not be unreasonable to find that her claims were meritless since they cannot be confirmed. Finally, S.F. presents that J.B.'s demeanor at the end of the work day was stern and unlike all the others in the room. He states that all but her were welcoming the idea of enjoying the weekend during the five minutes or so end-of-day levity. He believes that J.B. may have taken any room laughter as distasteful or even offensive and may have contributed to her fabricating a story.

In response, the appointing authority states that the operative fact was at the end of a tour of the facility, S.F. asked J.B. for a kiss and this is a violation of the State Policy. Further, as the State Policy has a zero-tolerance standard, there is no

such thing as a “lighthearted or joking comment” that is exempt. Additionally, it indicates that S.F.’s references to “Harvey Weinstein” and the “Me Too” environment have no relevance. Also, his feeling discriminated against reflects his ignorance on the State Policy and underscores the need for him to receive refresher training. Moreover, the appellant’s statements regarding J.B. and the investigator are not relevant.

Moreover, the appointing authority emphasizes that J.B.’s story never changed. She indicated that she delayed in reporting the incident because it took her time to process what happened. This, combined with her focus on the audit process, resulted in the delay. After reading the policy, J.B. indicated that she knew, as a supervisor, she had an obligation to report the matter. Additionally, she stated that she did not want anyone else to be a victim of a comment from S.F. or herself in the future if she had to be alone with him. When asked why she sent an e-mail stating that she was no longer interested in pursuing the complaint, she indicated that she believed that the investigation would be useless because it was probably going to end up “he said/she said” and she was extremely stressed out based on two recent contractual grievances she filed against her supervisor.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that the State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. This is a zero tolerance policy. This means that the State and its agencies receive the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violated this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

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

N.J.A.C. 4A:7-3.1(c)1 provides, in pertinent part, that it is a violation of the State Policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment, quid pro quo harassment, or same-sex-harassment. For the purposes of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

N.J.A.C. 4A:7-3.1(e) provides, in pertinent part, that a supervisor shall immediately refer allegations of prohibited discrimination to the EEO. A supervisor’s failure to comply may result in administrative and/or disciplinary action.

N.J.A.C. 4A:7.3-2(i) provides, in pertinent part, that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

N.J.A.C. 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

In this matter, a review of the investigator's interview with S.F. indicates the following relevant questions and answers:

Q. During our interview on Tuesday, December 3, 2019, I asked you about when [J.B.] was getting ready to thank you for scheduling the tour and I asked you if you said to her "Do I get a kiss now?" You told me you could not recall if you made the kiss comment; you told me it would not be out of character to make a kiss comment; and you said everyone at OARS was "yucking it up" because everyone was happy the tour was over, it was Friday, and the attendees were going home. You described the atmosphere as "much light-hearted joking." Is this accurate and you have anything more to add?

A. No. The correct comment was a "joking comment" and not a "kiss comment." Everything else is accurate.

Q. Do you recall [J.B.] saying goodbye and thanking you for the tour invitation?

A. No, but I'm sure she did. I can't swear to it.

Q. Before [J.B.] was about to thank you did you say to her either jokingly or seriously, "Do I get a kiss now?"

A. No – I don't recall saying that.

Q. Why do you think [J.B.] would file an EEO complaint alleging you asked to kiss her?

A. I think she wants to come over here and take my job.

Q. If you recall [J.B.] saying goodbye and thanking you for the tour invitation, do you remember who else was present at that time?

A. I don't recall this.

Q. Is there anything else you would like to share with me about this matter?

A. There were many women present in the room and it would be highly unlikely I way say something off color like that in a business setting.

The relevant facts are that J.B. accused S.F. of asking for a kiss at the end of a facility tour. In response to this accusation, instead of simply denying that he made the comment, S.F. indicated that he does not recall making a “joking comment,” but stated that it would not be out of his character if he made a “joking comment.” The Commission finds that it is highly unlikely that S.F. would not remember making such a comment, joking or not, especially when he admits in his interview that the “kiss comment” would be “off-color.” Therefore, while there may not have been a third-party witness to corroborate the allegation, S.F.’s own statement that he could have made a “joking comment” in response to being accused of violating the State Policy, corroborates that he was capable of making a comment that violated the State Policy. Therefore, given J.B.’s clear accusation that S.F. asked her for kiss at the end of the tour and S.F.’s response that he could have made a “joking comment” to that accusation in the interview, it was reasonable for the EEO to determine that it was more likely than not that S.F. made the alleged statement and violated the State Policy. Also, the Commission finds that it is highly suspicious and defensive for S.F. to essentially “blame the victim,” when in response to his being asked why the complainant would make such a claim, he stated, “I think she wants to come over here and take my job,” which only further bolsters the EEO’s finding that he was more likely than not to have made the “kiss comment.” Further, even if S.F. had no intent to harass J.B., the State Policy 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 definitions under State or federal statutes of discrimination or harassment. *See In the Matter of George Mladenetz* (MSB, decided February 27, 2008). Moreover, as the State Policy is meant to be instructive, it was appropriate for the appointing authority to take administrative action and provide S.F. refresher training on the State Policy.

Regarding S.F.’s comments about Harvey Weinstein and the “Me Too” movement, while one would think that the publicity around sexual harassment would deter others for engaging in such conduct, unfortunately, sexually harassment continues in the workplace and elsewhere. Therefore, these comments do not in any way support his credibility. If anything, these comments support S.F.’s need to be trained on the State Policy, as despite him being aware that sexual harassment is a serious issue, he still believes that asking a co-worker for a kiss at the end of a tour of a facility is an acceptable “joke.” Additionally, the fact that J.B. may have initiated work-related phone calls to him and those calls were lengthy does not in any way diminish J.B.’s credibility or bolster S.F.’s credibility, as there is no evidence that such phone calls were not for any improper reasons. Further, J.B.’s changing her communication method with S.F. after the incident does not diminish her credibility,

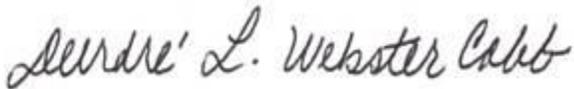
as it is completely reasonable that one who is a victim of sexual harassment would want to limit such communication to e-mail and copy a third-party to ensure such communication was appropriate. Moreover, S.F.'s speculation that J.B. and her supervisor conspired against him is highly inappropriate without evidence. Finally, J.B.'s desire to stop the investigation is not evidence that S.F. did not engage in the harassing behavior as many victims of sexual harassment choose not to pursue their allegations for a variety of reasons.

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 2020



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