

CHAPTER 7

**EQUAL EMPLOYMENT OPPORTUNITY
AND AFFIRMATIVE ACTION**

Authority

N.J.S.A. 10:5-1 et seq., 11A:7-1, 11A:7-2, 11A:7-3, 11A:7-4, and 11A:7-5(a) and (b); P.L. 2006, c. 100 and 103; and 42 U.S.C. §2000e(a).

Source and Effective Date

R.2008 d.217, effective July 1, 2008.
See: 40 N.J.R. 1408(a), 40 N.J.R. 4521(b).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 7, Equal Employment Opportunity and Affirmative Action, expires on July 1, 2015. See: 43 N.J.R. 1203(a).

Chapter Historical Note

Chapter 7, Equal Employment Opportunity and Affirmative Action, was adopted as R.1987 d.403, effective October 5, 1987. See: 19 N.J.R. 1020(a), 19 N.J.R. 1827(a). See, also, Title Historical Note prior to N.J.A.C. 4A:1.

Pursuant to Executive Order No. 66(1978), Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.1992 d.420, effective September 22, 1992. See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Pursuant to Executive Order No. 66(1978), Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.1997 d.437, effective September 22, 1997. See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.2003 R.114, effective February 13, 2003. See: 34 N.J.R. 3573(a), 35 N.J.R. 1408(a).

Subchapter 3, Policy Prohibiting Discrimination, Harassment or Hostile Work Environments in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, by R.2007 d.244, effective August 20, 2007. See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Chapter 7, Equal Employment Opportunity and Affirmative Action, was readopted as R.2008 d.217, effective July 1, 2008. See: Source and Effective Date.

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SUBCHAPTER 1. EQUAL EMPLOYMENT OPPORTUNITY

4A:7-1.1 General provisions

(a) There shall be equal employment opportunity for all persons in, or applicants for, the career, unclassified and senior executive services, regardless of race, creed, color, national origin, nationality, ancestry, sex/gender (including pregnancy), affectional or sexual orientation, gender identity or expression, age, marital status, civil union status, domestic partnership status, familial status, religion, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability, except where a particular qualification is specifically permitted and is essential to successful job performance. See N.J.A.C. 4A:4-4.5 on bona fide occupational qualification.

(b) Equal employment opportunity includes, but is not limited to, recruitment, selection, hiring, training, promotion, transfer, work environment, layoff, return from layoff, compensation and fringe benefits. Equal employment opportunity further includes policies, procedures and programs for recruitment, employment, training, promotion, and retention of minorities, women and persons with disabilities. Equal employment opportunity but not affirmative action is required with respect to persons identified solely by their affectional or sexual orientation.

(c) Persons with disabilities shall include any person who has a physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection. See N.J.S.A. 10:5-5(q). See also N.J.A.C. 4A:4-2.14 for accommodation and waiver of examinations for persons with disabilities.

(d) The following race/ethnic categories shall be used by the Department of Personnel:

1. W: "White, not of Hispanic origin" means persons having origins in any of the original peoples of Europe, North Africa or the Middle East;

2. B: "Black, not of Hispanic origin" means persons having origins in any of the Black racial groups of Africa;

3. H: "Hispanic" means persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race;

4. I: "American Indian or Alaskan Native" means persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition; and

5. A: "Asian or Pacific Islander" means persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands and Samoa.

(e) Sexual harassment is a form of prohibited gender discrimination that will not be tolerated.

(f) This chapter prohibits all forms of discriminatory conduct against any State employee by any other State employee or person doing business with the State. In addition, this chapter prohibits any form of discriminatory conduct by a State employee against a person doing business with the State. A "person doing business with the State" means an independent vendor performing services or supplying goods pursuant to a contract with the State.

(g) In local service, an appointing authority may establish policies and procedures for processing discrimination complaints.

Administrative Correction to (a): Changed cross-reference cites from "4:1-12.7, 4:2-6.3 and 4:3-6.4" to "4A:4-4.5".

See: 22 N.J.R. 2266(a).

Amended by R.1992 d.420, effective October 19, 1992.

See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (a)-(c).

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Rewrote (a); in (d)3, substituted "Rican" for "Rico" and "American" for "America"; added (e) through (g).

Amended by R.2005 d.65, effective February 22, 2005.

See: 36 N.J.R. 4566(a), 37 N.J.R. 586(a).

In (a), inserted "domestic partnership status," following "age, marital status".

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (a), inserted "nationality," "gender (including pregnancy)," "gender identity or expression," and "civil union status,"; rewrote (c); in (e), substituted "prohibited" for "unlawful"; and in (f), deleted "unlawful" preceding "discriminatory conduct" two times, deleted "including sexual harassment," preceding the first occurrence of "against", and deleted "sexual harassment or" following "prohibits" and "other" following "any".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-2.2.

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

Hackensack Meadowlands Development Commission, disability discrimination grievance procedure, see N.J.A.C. 19:3A-3.3.

Case Notes

Review of selection process; use of written test as qualifying and ranking device requires testing only in areas where higher scores relate to better job performance; adverse impact of test on minorities demonstrated; violation of consent decree by State on firefighter promotion selection process; examination inadequate to select fire captain/lieutenant (citing N.J.A.C. 4:1). *Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Service*, 625 F.Supp. 527 (D.N.J.1985) affirmed 832 F.2d 811.

Temporary restraining order granted to prohibit the appointment of entry level firefighters based on statistical showing of race discrimination should hiring take place as planned (citing former N.J.A.C. 4:1). *U.S. v. State of New Jersey*, 23 F.E.P. Case 1717, 22 EPD # 30, 287, 473, 473 F.Supp. 1199 (D.N.J.1980).

Sex Discrimination. *Terry v. Mercer Cty. Freeholder Bd.*, 173 N.J.Super. 249, 414 A.2d 30 (App.Div.1980) modified 86 N.J. 141, 430 A.2d 194 (1981).

Sex discrimination claim. *Kiss v. Community Affairs Dep't*, 171 N.J.Super. 193, 408 A.2d 450 (App.Div.1979).

Sex discrimination in regard to veteran's preference. *Ballou v. State Department of Civil Service*, 75 N.J. 365, 382 A.2d 1118 (1978).

Where the nature and extent of a county clerk's mental condition and accompanying alarming behavior precluded her from successfully performing her job, the appointing authority was not precluded from pursuing termination (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 574). *In re Wilson*, OAL Dkt. No. CSV 9640-04, 2007 N.J. AGEN LEXIS 1180, Final Decision (October 10, 2007), aff'd per curiam, No. A-1291-07T1, 2009 N.J. Super. Unpub. LEXIS 1055 (App.Div. May 5, 2009).

Denial of appointment based on applicant's sexual discrimination complaint constituted retaliation. *Graham v. Kearny Board of Education*, 97 N.J.A.R.2d (CRT) 173.

Police department's failure to apply male hiring standards to female candidate justifies unlawful discrimination damages. *McEvoy v. Borough of Glassboro and Glassboro Police Department*, 97 N.J.A.R.2d (CRT) 136.

Employee lacking appropriate job skills under operations reorganization loses age discrimination claim. *Botterman v. Bergen County Community Action Program*, 97 N.J.A.R.2d (CRT) 129.

Race discrimination claims dismissed after individuals hired were determined to be more qualified for position than complainant. *Parker v. Glassboro State College*, 96 N.J.A.R.2d (CRT) 24.

4A:7-1.2 Discriminatory inquiries

(a) A preemployment application shall not require an applicant to provide information covering subject matters which may be discriminatory, except where related to a job requirement or required by law. See Division on Civil Rights rules at N.J.A.C. 13:7-1.1.

(b) Preemployment and employment information which is required by the State or Federal government for statistical purposes may be obtained by an appointing authority or the Department of Personnel.

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-1.3 (Reserved)

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Repealed by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Section was "Prohibition of sexual harassment in State government".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

Case Notes

Employee's inappropriate touching of another employee warrants removal. *West v. Trenton Psychiatric Hospital*, 97 N.J.A.R.2d (CSV) 297.

Employer and supervisor liable to employee for sexual discrimination base on vulgar conduct and language and post-filing retaliation and hostile work environment. *Peoples v. Gloria Limousine and Charter Bus Company and Willie White*, 97 N.J.A.R.2d (CRT) 115.

Dismissal of training recruit for improper physical contact and inappropriate comments affirmed. *Goodman v. Monmouth County Police Academy*, 97 N.J.A.R.2d (PTC) 17.

SUBCHAPTER 2. DIVISION OF EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

4A:7-2.1 Division responsibilities: State service

(a) The Department of Personnel, Division of Equal Employment Opportunity and Affirmative Action (Division of EEO/AA) shall develop, implement and administer an equal employment opportunity and affirmative action program for all State employees in the career, senior executive and unclassified services. Such program shall:

1. Ensure that each State agency's equal employment opportunity and affirmative action goals for minorities and women are in accordance with their availability (for recruitment, transfer, or promotion). Availability is defined as the percentage of minorities and women in the State agency or the relevant recruitment area who have the requisite skills for appointment in a specific job category or group, or who are capable of acquiring such skills;
2. Ensure that each State agency undertakes good faith efforts to make employment opportunities available to persons with disabilities at all levels within the State agency's organization;
3. Monitor each State agency to ensure compliance with all laws and rules relating to equal employment opportunity and affirmative action and to determine that the purposes of this subchapter are implemented through the State agency's Equal Employment Opportunity/Affirmative Action Officers;
4. Seek correction of discriminatory policies, practices and procedures;
5. Recommend appropriate sanctions for non-compliance to the Commissioner;
6. Review State personnel policies, practices and procedures, and where appropriate, eliminate artificial barriers to equal employment opportunity;

7. Act as liaison with Federal, State and local enforcement agencies;
8. Ensure that minorities, women and persons with disabilities are among the pool of applicants for all vacant positions in the career, unclassified and senior executive services;
9. Review its rules, selection devices and testing procedures in order to amend or eliminate those which are discriminatory;
10. Analyze job specifications to eliminate artificial barriers to employment;
11. Review all certification dispositions for compliance with this chapter;
12. Review all discrimination complaints under Title VII of the Civil Rights Act of 1964, the New Jersey Law Against Discrimination, and the New Jersey State Policy Prohibiting Discrimination in the Workplace; and evaluate trends and recommend appropriate policy changes;
13. Transmit to the Governor, at least semi-annually, progress reports on affirmative action in all State agencies; and
14. Perform such other duties as prescribed by law and these rules.

Amended by R.1992 d.420, effective October 19, 1992. See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (a)1. Amended by R.1994 d.72, effective February 7, 1994. See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b). Amended by R.2002 d.10, effective January 7, 2002. See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Rewrote the section. Recodified in part from N.J.A.C. 4A:7-2.2. Amended by R.2007 d.244, effective August 20, 2007. See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (a)1, inserted "State" preceding "agency"; in a(2) and a(3), inserted "State" preceding "agency's"; and in (a)12, substituted a comma for "and" following "1964", and inserted "and the New Jersey State Policy Prohibiting Discrimination in the Workplace; and".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-2.2 Equal Employment Opportunity Advisory Commission: State service

(a) An Equal Employment Opportunity Advisory Commission shall be established and shall consist of 11 members appointed by the Governor, at least six of whom shall be minorities, women and persons with disabilities, and shall meet at least quarterly.

(b) The Commission shall advise the Division of EEO/AA and make recommendations on improving the State's affirmative action efforts.

Amended by R.1994 d.72, effective February 7, 1994. See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Recodified from N.J.A.C. 4A:7-2.3 by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Former N.J.A.C. 4A:7-2.2, Department of Personnel responsibilities: State service, recodified in part to N.J.A.C. 4A:7-2.1.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (b), substituted "State's affirmative action efforts" for "State affirmative action plan".

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

4A:7-2.3 Appointing authority responsibilities

(a) In local service, an appointing authority may establish equal employment opportunity and affirmative action programs. Upon request, the Division of EEO/AA shall advise and assist local appointing authorities in the development of such programs.

(b) Each State agency shall:

1. Ensure equality of opportunity for all of its employees and applicants seeking employment;

2. Appoint at least one person as the Equal Employment Opportunity/Affirmative Action Officer who shall report to the State agency head or a designee within the office of the State agency head, and who shall serve on a full-time basis, unless otherwise requested by the State agency head and approved by the Commissioner of the Department of Personnel and the Director of the Division of EEO/AA;

3. Submit an affirmative action plan to the Director for approval, which shall include, but not be limited to, a policy statement, organization of the State agency, a description of how the plan is communicated to its employees, an analysis of the workforce and job categories, goals and timetables and specific recruitment/training programs to meet its goals;

4. Submit to the Director quarterly affirmative action reports and an annual update of its affirmative action plan which shall include an evaluation of the goals set for the prior year, the goals for the upcoming year and the number, subject matter, time for processing and disposition of all discrimination complaints filed with the State agency;

5. Make a good faith effort to meet the affirmative action goals and timetables set forth in its affirmative action plan and updates. Any State agency which fails either to achieve or make a good faith effort to achieve its goals may be subject to sanctions and penalties;

6. Ensure that minorities, women and persons with disabilities are considered for employment opportunities where the need for aggressive efforts have been identified;

7. Explore and, where appropriate, implement innovative personnel policies to enhance equal employment opportunity and affirmative action;

8. Adopt and implement the Model Procedures for Internal Complaints Alleging Discrimination in the Workplace, N.J.A.C. 4A:7-3.2; and

9. In accordance with procedures established by the Division of EEO/AA for handling internal discrimination complaints, issue final letters of determination signed by the State agency head or a designee who shall be a deputy or assistant commissioner or a chief of staff or equivalent.

Amended by R.1992 d.420, effective October 19, 1992.

See: 24 N.J.R. 2496(c), 24 N.J.R. 3721(a).

Revised (b)6; stylistic changes in (b).

Amended by R.1994 d.72, effective February 7, 1994.

See: 25 N.J.R. 4821(b), 26 N.J.R. 794(b).

Recodified from N.J.A.C. 4A:7-3.1 and amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

In (b), rewrote 2, substituted "recruitment/training programs" for "remedial action" in 3, and added 8. Former N.J.A.C. 4A:7-2.3, Equal Employment Opportunity Advisory Commission: State service, recodified to N.J.A.C. 4A:7-2.2.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

In (b)2 through (b)5, inserted "State" preceding "agency" throughout; in (b)2, inserted "the" preceding "Director"; in (b)7, deleted "and" from the end; in (b)8, deleted ", Harassment or Hostile Environments" following "Discrimination" and substituted "; and" for a period at the end; and added (b)9.

Case Notes

Jury's verdict in favor of a police detective in her suit claiming reverse discrimination in the denial of a promotion based on race was not against the weight of the evidence as the city's argument that it was permissible to use race as a plus factor was never asserted at trial in any respect. Further, race was held to be a usable plus factor only pursuant to an established affirmative action plan, which the city did not have. *Klawitter v. City of Trenton*, 395 N.J. Super. 302, 928 A.2d 900, 2007 N.J. Super. LEXIS 280 (App.Div. 2007).

Race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan. Without such a plan in place, an employer would be in violation of Title VII and the Law Against Discrimination, N.J.S.A. 10:5-1 through 10:5-49. *Klawitter v. City of Trenton*, 395 N.J. Super. 302, 928 A.2d 900, 2007 N.J. Super. LEXIS 280 (App.Div. 2007).

Cross References

Disability discrimination, employment related grievances, procedures as under this chapter, see N.J.A.C. 12:7-4.1.

SUBCHAPTER 3. POLICY PROHIBITING DISCRIMINATION IN THE WORKPLACE; COMPLAINT PROCEDURE, AND APPEALS

4A:7-3.1 Policy prohibiting discrimination in the workplace

(a) 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. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: 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. 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.

1. Prohibited discrimination/harassment undermines the integrity of the employment relationship, compromises equal employment opportunity, debilitates morale and interferes with work productivity. Thus, this policy applies to all employees and applicants for employment in State departments, commissions, State colleges or universities, agencies, and authorities (hereafter referred to in this section as "State agencies" or "State agency"). The State of New Jersey will not tolerate harassment or discrimination by anyone in the workplace including supervisors, co-workers, or persons doing business with the State. This policy also applies to both conduct that occurs in the workplace and conduct that occurs at any location which can be reasonably regarded as an extension of the workplace (any field location, any off-site business-related social function, or any facility where State business is being conducted and discussed).

2. This policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in (a) above 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 this policy.

3. It is a violation of this policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories referred to in (a) above. This policy pertains to all employment practices such as recruitment, selection, hiring, training, promotion, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, compensation, fringe benefits, working conditions and career development.

(b) It is a violation of this 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 set forth in (a) above. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

1. Examples of behaviors that may constitute a violation of this policy include, but are not limited to:

i. Discriminating against an individual with regard to terms and conditions of employment because of being in one or more of the protected categories referred to in (a) above;

ii. Treating an individual differently because of the individual's race, color, national origin or other protected category, or because an individual has the phys-

ical, cultural or linguistic characteristics of a racial, religious, or other protected category;

iii. Treating an individual differently because of marriage to, civil union to, domestic partnership with, or association with persons of a racial, religious or other protected category; or due to the individual's membership in or association with an organization identified with the interests of a certain racial, religious or other protected category; or because an individual's name, domestic partner's name, or spouse's name is associated with a certain racial, religious or other protected category;

iv. Calling an individual by an unwanted nickname that refers to one or more of the above protected categories, or telling jokes pertaining to one or more protected categories;

v. Using derogatory references with regard to any of the protected categories in any communication;

vi. Engaging in threatening, intimidating, or hostile acts toward another individual in the workplace because that individual belongs to, or is associated with, any of the protected categories; or

vii. Displaying or distributing material (including electronic communications) in the workplace that contains derogatory or demeaning language or images pertaining to any of the protected categories.

(c) It is a violation of this policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex harassment.

1. 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 when, for example:

i. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

ii. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

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.

2. Examples of prohibited behaviors that may constitute sexual harassment and are therefore a violation of this policy include, but are not limited to:

i. Generalized gender-based remarks and comments;

ii. Unwanted physical contact such as intentional touching, grabbing, pinching, brushing against another's body or impeding or blocking movement;

iii. Verbal, written or electronic sexually suggestive or obscene comments, jokes or propositions including letters, notes, e-mail, text messages, invitations, gestures or inappropriate comments about a person's clothing;

iv. Visual contact, such as leering or staring at another's body; gesturing; displaying sexually suggestive objects, cartoons, posters, magazines or pictures of scantily-clad individuals; or displaying sexually suggestive material on a bulletin board, on a locker room wall, or on a screen saver;

v. Explicit or implicit suggestions of sex by a supervisor or manager in return for a favorable employment action such as hiring, compensation, promotion, or retention;

vi. Suggesting or implying that failure to accept a request for a date or sex would result in an adverse employment consequence with respect to any employment practice such as performance evaluation or promotional opportunity; or

vii. Continuing to engage in certain behaviors of a sexual nature after an objection has been raised by the target of such inappropriate behavior.

(d) Any employee who believes that she or he has been subjected to any form of prohibited discrimination/harassment, or who witnesses others being subjected to such discrimination/harassment, is encouraged to promptly report the incident(s) to a supervisor or directly to the State agency's Equal Employment Opportunity/Affirmative Action Officer or to any other persons designated by the State agency to receive workplace discrimination complaints. All employees are expected to cooperate with investigations undertaken pursuant to (g) below. Failure to cooperate in an investigation may result in administrative and/or disciplinary action, up to and including termination of employment.

(e) Supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. Supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination of employment. For purposes of this section and N.J.A.C. 4A:7-3.2, a supervisor is defined broadly to include any manager or other individual who has authority to control the work environment of any other staff member (for example, a project leader).

(f) Each State agency shall annually distribute the policy described in this section, or a summarized notice of it, to all

of its employees, including part-time and seasonal employees. The policy, or summarized notice of it, shall also be posted in conspicuous locations throughout the buildings and grounds of each State agency (that is, on bulletin boards or on the State agency's intranet site). The Department of the Treasury shall distribute the policy to State-wide vendors/contractors, whereas each State agency shall distribute the policy to vendors/contractors with whom the State agency has a direct relationship.

(g) Each State agency shall follow the State of New Jersey Model Procedures for Processing Internal Complaints Alleging Discrimination in the Workplace with regard to reporting, investigating, and where appropriate, remediating claims of discrimination/harassment. See N.J.A.C. 4A:7-3.2. Each State agency is responsible for designating an individual or individuals to receive complaints of discrimination/harassment, investigating such complaints, and recommending appropriate remediation of such complaints. In addition to the Equal Employment Opportunity/Affirmative Action Officer, each State agency shall designate an alternate person to receive claims of discrimination/harassment.

1. All investigations of discrimination/harassment claims shall be conducted in a way that respects, to the extent possible, the privacy of all the persons involved. The investigations shall be conducted in a prompt, thorough and impartial manner. The results of the investigation shall be forwarded to the respective State agency head to make a final decision as to whether a violation of the policy has been substantiated.

2. Where a violation of this policy is found to have occurred, the State agency shall take prompt and appropriate remedial action to stop the behavior and deter its reoccurrence. The State agency shall also have the authority to take prompt and appropriate remedial action, such as moving two employees apart, before a final determination has been made regarding whether a violation of this policy has occurred.

3. The remedial action taken may include counseling, training, intervention, mediation, and/or the initiation of disciplinary action up to and including termination of employment.

4. Each State agency shall maintain a written record of the discrimination/harassment complaints received. Written records shall be maintained as confidential records to the extent practicable and appropriate.

(h) 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. Following are examples of prohibited actions taken against an employee because the employee has engaged in activity protected by this subsection:

1. Termination of an employee;
2. Failing to promote an employee;
3. Altering an employee's work assignment for reasons other than legitimate business reasons;
4. Imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons; or
5. Ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees).

(i) An employee who knowingly makes a false accusation of prohibited discrimination/harassment or knowingly provides false information in the course of an investigation of a complaint, may be subjected to administrative and/or disciplinary action, up to and including termination of employment. Complaints made in good faith, however, even if found to be unsubstantiated, shall not be considered a false accusation.

(j) All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigatory process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

(k) Any employee found to have violated any portion or portions of this policy may be subject to appropriate administrative and/or disciplinary action which may include, but which shall not be limited to: referral for training, referral for counseling, written or verbal reprimand, suspension, reassignment, demotion or termination of employment. Referral to another appropriate authority for review for possible violation of State and Federal statutes may also be appropriate.

(l) All State agencies shall provide all new employees with training on the policy and procedures set forth in this section within a reasonable period of time after each new employee's appointment date. Refresher training shall be provided to all employees, including supervisors, within a reasonable period of time. All State agencies shall also provide supervisors with training on a regular basis regarding their obligations and duties under the policy and regarding procedures set forth in this section.

New Rule, R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Former N.J.A.C. 4A:7-3.1, Appointing authority responsibilities, recodified to N.J.A.C. 4A:7-2.3.

Amended by R.2005 d.65, effective February 22, 2005.

See: 36 N.J.R. 4566(a), 37 N.J.R. 586(a).

Rewrote the section.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Section was "Policy prohibiting discrimination, harassment or hostile environments in the workplace". Rewrote the section.

Case Notes

Initial Decision (2009 N.J. AGEN LEXIS 159) adopted, which found that where a lieutenant at a state prison announced over the loudspeaker the proper name, "Wilma Dicfit," and not an obscene phrase, he did not make a gender-based remark, suggestive proposition, or obscene joke in violation of the State's policy prohibiting discrimination in the workplace; zero tolerance applied to actual violations of the State policy, not imagined ones. In re Alaimo, OAL Dkt. No. CSV 08072-07, 2009 N.J. AGEN LEXIS 965, Civil Service Comm'n Decision (June 24, 2009).

Where an ALJ found, on conflicting evidence, that a former correction sergeant had a conversation with officers under his supervision in which he made sexually explicit comments towards one of them, the sergeant clearly in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace; however, the sergeant had a 24-year career with the Department with only one minor discipline of an official reprimand in the 10 years prior to the incident, justifying a modification of the 10-day suspension imposed by the appointing authority to a 6-day suspension (adopting 2008 N.J. AGEN LEXIS 1258). In re Ross, OAL Dkt. No. CSV 8839-07, 2009 N.J. AGEN LEXIS 1001, Civil Service Comm'n Decision (April 15, 2009).

Prohibited conduct under the State Policy need not reach the level of "severe or pervasive" as under federal or state law to constitute a violation of the Policy because the goal of the Policy is to prevent and remediate all instances of discrimination/harassment to ensure a smoothly functioning and harmonious workplace. Correction sergeant's use of the term "fag" in an argument with a fellow employee violated the Policy as it was a demeaning term based on gender and sexual orientation, and a 10 working day suspension was appropriate. Moreover, although the sergeant argued that her statement was made in jest and not meant to cause harm, intent was irrelevant to a finding of a violation. In re Carter-Green, OAL Dkt. No. CSV 4272-07, 2008 N.J. AGEN LEXIS 1221, Final Decision (September 10, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 831) adopted, which concluded that African-American professor who had excluded a Cuban-American from a meeting to express concerns over the departure of the university's African-American president was properly removed for discriminating against the Cuban-American at least in part because of her race or color. In re Davis, OAL Dkt. No. CSV 12220-05, 2008 N.J. AGEN LEXIS 599, Final Decision (January 30, 2008).

Department of Education Manager, who supervised auditors in the Office of Compliance and Investigations, did not violate the New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1; finding the manager's testimony credible as to the non-discriminatory reasons for his actions, the ALJ had determined that although the witnesses believed the manager acted out of racial animus, the record did not support that his actions were motivated by race (adopting in part 2007 N.J. AGEN LEXIS 177). In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1, sets a lower threshold for finding a violation than that found in federal or State law; the goal of the State Policy is to prevent and remediate all instances of discrimination/harassment to ensure a smoothly functioning and harmonious workplace. In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

Although Department of Education Manager was found not to have violated the New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1, he was not entitled to back pay or counsel fees; pursuant to N.J.A.C. 4A:2-1.5, the employee did not show that the actions of the appointing authority in finding a violation of the State Policy and terminating his unclassified position were made in bad faith (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 177). In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

Female worker had shown sexual harassment due to comments from a male co-worker where she and others had testified at hearing and ALJ found their testimony to be credible, but male co-worker had not testified. Disciplinary letter was placed in co-worker's personnel file because he had already retired at the time of the hearing. In re Afanador, OAL Dkt. No. CSV 10086-05, 2006 N.J. AGEN LEXIS 1036, Initial Decision (December 20, 2006), adopted (Merit System Board Jan. 31, 2007).

Removal of correction officer trainee was warranted after charges were proven that she had opened her towel to reveal her nude body, that she had invited another officer to move her bed next to her own, and that she had made sexually explicit comments and gestures (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 408). In re Williams, OAL Dkt. No. CSV 12210-04, 2006 N.J. AGEN LEXIS 858, Final Decision (September 20, 2006), *aff'd per curiam*, No. A-2114-06T1, 2008 N.J. Super. Unpub. LEXIS 2136 (App.Div. April 25, 2008).

Initial Decision that corrections supervisor had used a racial slur toward an African-American employee was adopted, but because the supervisor had retired no punishment was levied. Instead a letter stating that the supervisor had violated State policy was placed in his file (adopting in part and rejecting in part 2005 N.J. AGEN LEXIS 654). In re Sharp, OAL Dkt. No. CSV 10540-04, 2006 N.J. AGEN LEXIS 1096, Final Decision (February 22, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 430) adopted, which concluded that a Department of Corrections employee did not present sufficient evidence that she had been discriminated against based on her race, color, or gender where a thorough investigation into her allegations was made and it was determined that the reason she was not promoted had nothing to do with the fact that she was an African American woman. In re Van Jones, OAL Dkt. No. CSV 8541-03, 2005 N.J. AGEN LEXIS 1219, Final Decision (September 21, 2005).

4A:7-3.2 Model procedures for internal complaints alleging discrimination in the workplace

Each State department, commission, State college or university, agency and authority (hereafter referred to in this section as "State agency") is responsible for implementing this model procedure, completing it to reflect the structure of the organization, and filing a copy of the completed procedure with the Department of Personnel, Division of EEO/AA.

"(a) All employees and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1.

(b) Complaints of prohibited discrimination/harassment can be reported to either (name of Officer), the EEO/AA Officer, or to any supervisory employee of the State agency. Complaints may also be reported to (Authorized Designee).

(c) Every effort should be made to report complaints promptly. Delays in reporting may not only hinder a proper

investigation, but may also unnecessarily subject the victim to continued prohibited conduct.

(d) Supervisory employees shall immediately report all alleged violations of the State of New Jersey Policy Prohibiting Discrimination in the Workplace to (Name of Officer), EEO/AA Officer. Such a report shall include both alleged violations reported to a supervisor, and those alleged violations directly observed by the supervisor.

(e) If reporting a complaint to any of the persons set forth in subsections (a) through (d) above presents a conflict of interest, the complaint may be filed directly with the Department of Personnel, Division of EEO/AA, PO Box 315, Trenton, NJ 08625. An example of such a conflict would be where the individual against whom the complaint is made is involved in the intake, investigative or decision making process.

(f) In order to facilitate a prompt, thorough and impartial investigation, all complainants are encouraged to submit a Discrimination Complaint Processing Form (DPF-481). An investigation may be conducted whether or not the form is completed.

(g) Each State agency shall maintain a written record of the discrimination/harassment complaints received. Written records shall be maintained as confidential records to the extent practicable and appropriate. A copy of all complaints (regardless of the format in which submitted) must be submitted to the Department of Personnel, Division of EEO/AA, by the State agency's EEO/AA Officer, along with a copy of the acknowledgement letter(s) sent to the person(s) who filed the complaint and, if applicable, the complaint notification letter sent to the person(s) against whom the complaint has been filed. If a written complaint has not been filed, the EEO/AA Officer must submit to the Division of EEO/AA a brief summary of the allegations that have been made. Copies of complaints filed with the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission, or in court also must be submitted to the Division of EEO/AA.

(h) During the initial intake of a complaint, the EEO/AA Officer or authorized designee will obtain information regarding the complaint, and determine if interim corrective measures are necessary to prevent continued violations of the State's Policy Prohibiting Discrimination in the Workplace.

(i) At the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

(j) An investigatory report will be prepared by the EEO/AA Officer or his or her designee when the investigation is completed. The report will include, at a minimum:

1. A summary of the complaint;
2. A summary of the parties' positions;

3. A summary of the facts developed through the investigation; and

4. An analysis of the allegations and the facts. The investigatory report will be submitted to (State agency head) who will issue a final letter of determination to the parties.

(k) The (State agency head or designee) will review the investigatory report issued by the EEO/AA Officer or authorized designee, and make a determination as to whether the allegation of a violation of the State's Policy Prohibiting Discrimination in the Workplace has been substantiated. If a violation has occurred, the (State agency head or designee) will determine the appropriate corrective measures necessary to immediately remedy the violation.

(l) The (State agency head or designee) will issue a final letter of determination to both the complainant(s) and the person(s) against whom the complaint was filed, setting forth the results of the investigation and the right of appeal to the Merit System Board as set forth in subsection (m) and (n) below. To the extent possible, the privacy of all parties involved in the process shall be maintained in the final letter of determination. The Division of EEO/AA, Department of Personnel shall be furnished with a copy of the final letter of determination.

1. The letter shall include, at a minimum:
 - i. A brief summary of the parties' positions;
 - ii. A brief summary of the facts developed during the investigation; and
 - iii. An explanation of the determination, which shall include whether:
 - (1) The allegations were either substantiated or not substantiated; and
 - (2) A violation of the Policy Prohibiting Discrimination in the Workplace did or did not occur.
2. The investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint referred to in (h) above is completed.
3. The time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of EEO/AA and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension.

(m) A complainant who is in the career, unclassified or senior executive service, or who is an applicant for employment, who disagrees with the determination of the (State agency head or designee), may submit a written appeal, within twenty days of the receipt of the final letter of

determination from the (State agency head or designee), to the Merit System Board, PO Box 312, Trenton, NJ 08625. The appeal shall be in writing and include all materials presented by the complainant at the State agency level, the final letter of determination, the reason for the appeal and the specific relief requested.

1. Employees filing appeals which raise issues for which there is another specific appeal procedure must utilize those procedures. The Commissioner may require any appeal, which raises issues of alleged discrimination and other issues, such as examination appeals, to be processed using the procedures set forth in this section or a combination of procedures as the Commissioner deems appropriate. See N.J.A.C. 4A:2-1.7.

2. The Merit System Board shall decide the appeal on a review of the written record or such other proceeding as it deems appropriate. See N.J.A.C. 4A:2-1.1(d).

3. The appellant shall have the burden of proof in all discrimination appeals brought before the Merit System Board.

(n) In a case where a violation has been substantiated, and no disciplinary action recommended, the party(ies) against whom the complaint was filed may appeal the determination to the Merit System Board at the address indicated in (m) above within 20 days of receipt of the final letter of determination by the State agency head or designee.

1. The burden of proof shall be on the appellant.
2. The appeal shall be in writing and include the final letter of determination, the reason for the appeal, and the specific relief requested.
3. If disciplinary action has been recommended in the final letter of determination, the party(ies) charged may appeal using the procedures set forth in N.J.A.C. 4A:2-2 and 3.

(o) The Director of the Division of EEO/AA shall be placed on notice of, and given the opportunity to submit comment on, appeals filed with the Merit System Board of decisions on discrimination complaints, regardless of whether or not the complaint was initially filed directly with the Director of EEO/AA.

(p) Any employee or applicant for employment can file a complaint directly with external agencies that investigate discrimination/harassment charges in addition to utilizing this internal procedure. The time frames for filing complaints with external agencies indicated below are provided for informational purposes only. An individual should contact the specific agency to obtain exact time frames for filing a complaint. The deadlines run from the date of the last incident of alleged discrimination/harassment, not from the date that the final letter of determination is issued by the State agency head or designee.

1. Complaints may be filed with the following external agencies:

i. Division on Civil Rights

N.J. Department of Law & Public Safety

(Within 180 days of the discriminatory act)

ii. US Equal Employment Opportunity Commission (EEOC)

(Within 300 days of the discriminatory act)"

New Rule, R.2002 d.10, effective January 7, 2001.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Former N.J.A.C. 4A:7-3.2, Discrimination appeals: State service, was repealed.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Section was "Model procedures for internal complaints alleging discrimination, harassment or hostile environments in the workplace". Rewrote the section.

Case Notes

Where disciplinary action had been recommended against an employee for committing an act of criminal sexual contact and was, in fact, the subject of the employee's pending departmental hearing, the employee did not have the right to file an appeal of the finding of discrimination against him with the then Merit Service Board. In re Lemieux, OAL Dkt. No. CSV 12285-07, 2008 N.J. AGEN LEXIS 603, Final Decision (February 13, 2008).

Retired State Police lieutenant met his burden of proving by the preponderance of the evidence that he did not violate the New Jersey State Policy Prohibiting Discrimination, Harassment or Hostile Environment, where the investigation was not thorough; only a limited number of witnesses were interviewed by telephone and there was no attempt to try to discern motives or to interview other members of the lieutenant's unit. In re Chierchia, OAL Dkt. No. CSV 618-04, 2006 N.J. AGEN LEXIS 401, Initial Decision (June 9, 2006), adopted (Merit System Board November 1, 2006).

4A:7-3.3 (Reserved)

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Amended by R.1997 d.437, effective October 20, 1997.

See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

Deleted (a)4, (b), (b)1 and (b)2; recodified existing (b)3 as (a)4; added (a)5; and substituted "Merit System Board" for "Division of EEO/AA" throughout the section.

Recodified from N.J.A.C. 4A:7-3.4 and amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Rewrote the section. Former N.J.A.C. 4A:7-3.3, Departmental review: State service, was repealed.

Repealed by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Section was "Department of Personnel proceedings: State service".

4A:7-3.4 (Reserved)

Recodified to N.J.A.C. 4A:7-3.3 by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Section was "Department of Personnel proceedings: State service".