

STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
DOCKET NO. ER02NB-65669

Deomar Alcantara,	)	
	)	<u>Administrative Action</u>
Complainant,	)	
	)	<b>FINDING OF PROBABLE CAUSE</b>
v.	)	
	)	
Alexus Clifton, Inc., d/b/a Alexis	)	
Steakhouse & Tavern,	)	
	)	
Respondent.	)	

On October 14, 2015, Hudson County resident Deomar Alcantara (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his employer, Alexis Clifton, Inc., d/b/a Alexis Steakhouse & Tavern (Respondent),<sup>1</sup> discriminated against him based on his national origin, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

Respondent is a restaurant and bar located at 955 Valley Road, Clifton, which offers dining, musical entertainment, catering, and a banquet hall. In or about June 1994, Respondent hired Complainant to work as a dishwasher/maintenance person.

In or around July 2015, Respondent hired John Magliaro to work as a manager. Respondent's owner, Kitae Kim, told DCR that Magliaro owned restaurants in the past, and that he had known Magliaro for about twenty years. He said that Magliaro had ideas for improving the restaurant such as changing chairs, changing the menu, and installing new TVs.

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<sup>1</sup> Complainant identified Respondent in his verified complaint as "Alexis Steakhouse & Tavern." The caption is hereby amended based on the representation from Respondent's counsel that his client's proper name is "Alexis Clifton, Inc., d/b/a Alexis Steakhouse & Tavern."

Complainant, who is Peruvian, alleges that Magliaro constantly referred to him and other employees as “fucking Hispanic garbage.” He said that Magliaro threatened to send people to beat up the kitchen staff. He said that in December 2015, one of the employees called the police on Magliaro. Complainant said that when he told the officer that Magliaro threatened the workers, Magliaro attempted to assault him and the officer had to pull him away. Complainant said that the officer did not view it as a police matter and suggested that he contact the labor department. Complainant said that he saw Magliaro slap a female employee on her buttocks as she was leaning over a table. He said that the woman turned around and yelled at Magliaro. Complainant said that on September 12, 2015, a Saturday morning, he and other employees told Mr. Kim that Magliaro constantly belittled them with offensive ethnic slurs and told Kim that they could not work under those circumstances. He said that Mr. Kim appeared frustrated, looked at his watch, and asked who was going to clean because they had to open the restaurant soon. Complainant alleges that on September 18, 2015, six days after complaining to Kim, Magliaro again told him that Hispanics are “stupid.”

A number of employees supported Complainant’s allegations.

One witness, Manuel Guzman,<sup>2</sup> who is from Mexico, told DCR that since his arrival, Magliaro has continually made offensive remarks in the workplace such as referring to Guzman and other Latino employees as “stupid Hispanics,” “fucking Hispanic garbage,” yelling that they “can’t speak English,” “don’t know how to work,” and threatening them with physical harm. As an example of the latter, Guzman stated that he heard Magliaro tell another Hispanic employee that he was going to take him outside and beat him to death. Guzman stated that on September 12, 2015, he and other employees complained about Magliaro’s discriminatory harassment to the owner, Kim, but the conduct continued. Guzman stated that Magliaro’s

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<sup>2</sup> Guzman filed a separate complaint with DCR alleging national origin discrimination arising from the same circumstances. See Guzman v. Alexis Clifton, Inc., DCR Docket No. ER02NB-65668 (Oct. 14, 2015).

constant harassment based on ethnicity and/or national origin and the owner's failure to take effective corrective action created a hostile work environment.

M.A.<sup>3</sup> told DCR that she is Cuban and began working for Respondent as a manager in January 2015. She said that Magliaro constantly made derogatory ethnic slurs about the Latino employees such as saying that Hispanics are "stupid," and that Mexicans are "shit." She stated that Magliaro also sexually harassed the female employees. She stated that in or about October 2015, Magliaro slapped her on the buttocks in the presence of a male subordinate. She stated that when she told him not to touch her that way, he laughed. She stated that on or about November 14, 2015, Magliaro pulled the elastic waistband of a female employee's pants and exposed the employee's buttocks. M.A. stated that when she told Magliaro that his conduct was inappropriate, he laughed. She stated that the next month, Magliaro referred to her as a "cunt." She stated that Magliaro referred to a female server as a "fat pig." She stated that she reported Magliaro's conduct to Kim on several occasions, but he would simply respond, "That's how Americans speak." M.A. said that by February 2016, Kim had made her the liaison "between Johnny [Magliaro] and the kitchen staff because of the problems he was having with the staff." She told DCR:

I was the middle person to whatever Johnny had to say to the staff. I tried being the middle person but Johnny would say, "Get the fuck out of my way, you are a burden to me, get the fuck out of the way. You're a piece of shit." Even though Mr. Kim had instructed Johnny to stay out of the kitchen, he didn't listen. He was always in and out.

M.A. said that on February 8, 2016, she told Kim that she was resigning because Magliaro's harassment had become intolerable.

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<sup>3</sup> M.A. filed a separate complaint with DCR alleging national origin and gender discrimination and constructive discharge based on Magliaro's conduct. See M.A. v. Alexis Clifton, Inc., DCR Docket No. ER02WB-65876 (Apr. 8, 2016).

A third witness<sup>4</sup> told DCR that he is Mexican and has worked as a cook for Respondent for about four years. He stated that Magliaro called him a “mother fucking Mexican,” and in August or September 2015, he heard Magliaro call another employee a “fucking Hispanic.” He said that when he told Kim that Magliaro demeaned employees with ethnic slurs, Kim replied, “That’s the way he speaks.” He stated that he and others told Kim that Magliaro was threatening them by saying that if they did not do as he said, he would send people with baseball bats to assault them. He said that on another occasion when he complained to Kim about Magliaro’s offensive ethnic slurs, Kim replied, “John is a good worker and the only problem is his mouth.” Witness 3 said that Complainant told him that he saw Magliaro slap M.A.’s buttocks.

Witness 4 told DCR that he is Mexican and has worked as a cook for Respondent for about 23 years. He said that he and others have been subjected to Magliaro’s ethnic slurs. For example, he said that Magliaro once told him to ask a Hispanic dishwasher if he could stay an extra thirty minutes to work. He said that when the dishwasher declined, Magliaro became angry and said, “Fucking Mexicans.” Witness 4 said that he and other employees complained about Magliaro’s frequent ethnic slurs to Kim but the owner replied, “That’s the way all Americans speak,” and did nothing to stop the conduct. Witness 4 said that in or around January 2016, a female server told him that Magliaro sexually harassed her.

Witness 5 told DCR that he has worked for Respondent as a dishwasher for about fourteen years. He said that he heard complaints about Magliaro’s offensive racial comments, but never witnessed such conduct first-hand. He added that Magliaro works mostly during the days, while he works from 5 p.m. to 11 p.m.

Witness 6 told DCR that he has worked for Respondent as a dishwasher for about 23 years. He stated that during their interactions, Magliaro would angrily say, “Fucking Hispanics.”

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<sup>4</sup> DCR has elected not to publicly identify the remaining witnesses by name at this preliminary stage in the process.

He said that Magliaro once yelled at him, "Clean. If you don't do it, I will fire you, you mother fucking Hispanic. You're no good." He said that in December 2015, Magliaro told him to carry tables from the third floor to the first floor. He said that when he said he was alone and needed help, Magliaro told him that he was fired and said, "Fucking Hispanics." Witness 6 said that he and other employees complained to Kim on more than one occasion, but the harassment continued. He said that Kim dismissed Magliaro's ethnic slurs by saying, "All Americans talk that way." Witness 6 said that he thinks highly of Kim and worked for him for many years without incident. However, he felt that Magliaro's arrival and Kim's unwillingness to intervene created a hostile work environment.

Witness 7 told DCR that she has worked as a server for Respondent for about five years. She stated that Magliaro constantly insults Hispanic staff by referring to them with ethnic slurs. Witness 7 said that Magliaro called her a "fucking pig" and "fucking piece of shit." She said that she complained to Kim that Magliaro was being verbally abusive by calling her a "pig," but Kim seemed disinterested. She said that she and other employees complained to Kim in the fall 2015 that Magliaro was being threatening and abusive by saying things such as, "I'm going to cut everyone with a knife . . . You're a bunch of illiterate and illegal Mexicans that probably don't have papers." She stated that Kim replied, "What do you guys want me to do? That's the way all Americans speak."

Witness 8 told DCR that since Magliaro became the new manager, he has treated Hispanic staff members horribly. For example, she stated that Magliaro stated, "They're all illegal pieces of shit," and that Respondent needed to get a "white kitchen because they'll listen." Witness 8 told DCR that Magliaro sexually harassed her. For example, she stated that on November 14, 2015, she was with M.A. when Magliaro came up behind her when her hands were full, stuck his hands into her pants and pulled back the waistband exposing her buttocks. She said that she reported the incident to Kim, who told her that he did not want to hear about it. She stated that on another occasion, when she asked Magliaro why he selected her friend over

her to work as a bartender, he replied, "She's got great tits, and you don't have tits like that. That's why." She stated that Magliaro asked, "So when are you gonna let me fuck you and your friend?" Witness 8 said that in September 2015, she walked into the women's restroom and saw an employee named Joe, who Magliaro had hired. She said that Joe had his pants around his ankles, his shirt pulled up, and was holding his penis and said, "I'll give you the longest yard right in your ass." She said that she reported the incident to Magliaro who took no action.<sup>5</sup> Witness 8 stated that Magliaro repeatedly said that he wanted to "fuck the shit out of" a female server identified by first name only.<sup>6</sup>

Witness 9 told DCR that she has worked as a server for a number of years. She stated that she has heard Magliaro refer to Hispanic employees staff as "stupid Mexicans."

Witness 10 is a server who told DCR that she has heard Magliaro refer to Hispanic employees as "stupid Mexicans" and "illegals."

Respondent denied the allegations of ethnicity and/or national origin discrimination in their entirety. It claimed that although employees complained to Kim about Magliaro, they did not specify that his comments were discriminatory in nature. Respondent stated:

[In] September 2015, Complainant and other employees complained to the owner, Kitae Kim, that John Magliaro was communicating instructions to the Complainant and others in a loud and vulgar tone. However, Complainant did not state that Magliaro harassed Complainant based on his ethnicity or national origin. Further, Complainant did not allege that John Magliaro used any racially derogatory terms.

[See Respondent's Answer to Verified Complaint, Dec. 16, 2015, p. 3.]

Respondent denied the allegation that Kim failed to take any action in response to the complaints. Respondent stated:

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<sup>5</sup> Kim did not recall Joe's last name. He stated that the wait staff "comes and goes."

<sup>6</sup> Kim did not provide the female server's last name or any other information about her other than to say that she was unreliable and no longer worked at the restaurant.



Following this meeting with Complainant, Mr. Kim met with Mr. Magliaro and warned him to cease issuing orders in a loud and vulgar tone. Mr. Magliaro explained to Mr. Kim that the [sic] some of the employees were being insubordinate in refusing to perform assignment which he has given. When Mr. Magliaro attempted to enforce the assignments, Complainant and other employees complained to Mr. Kim that Mr. Magliaro was being loud and vulgar. Following this meeting, Mr. Kim revised the chain of command to utilize the assistance of [M.A.], a bi-lingual manager, to interact with Complainant and other staff in an effort to avoid miscommunications in the issuance of work orders. Since that time, John Magliaro has had limited, if any, contact with Complainant.

[Ibid.]

Kim told DCR that the restaurant has five or six cooks, and about five dishwashers who also mop the floors and perform other cleaning functions. He said that the restaurant opens at 10 a.m., and closes around 12 a.m. Kim denied ever being told that Magliaro made anti-Hispanic slurs. He denied ever hearing that Magliaro slapped M.A.'s buttocks. He said that he has a number of long-term employees who are loyal to him, but who resented Magliaro because he was trying to implement changes. When asked what those changes were, Kim said the renovation of the TVs, the menu, and he wanted to bring in new cooks. He stated that M.A. worked from 11 a.m. to 5 p.m. as a manager for \$9/hr., and was responsible for scheduling and hiring. He said that at times, she worked as a server for \$3/hr. plus tips, from 5 p.m. until closing.

Magliaro told DCR that he had 25 years of experience working in the restaurant business. He said that his current duties include scheduling, ordering, marketing, and "hostessing." He said that none of the kitchen workers would follow his directions. When asked for specifics, he replied that when he asked a dishwasher named "Pedro" (he did not know the employee's last name) to bring up some beer, the latter refused and claim it was the bartender's responsibility. Magliaro said that he did not say anything in response. He said that on another occasion, he asked Pedro for cleaning product, but Pedro did not get it for him. He said that on another occasion, he told Pedro that the glasses were dirty and Pedro replied that Kim "wants it this way." When asked if there were any other incidents of insubordination, he replied that once

when Pedro and other workers were cleaning the bar, he told them to clean the dining room first and Pedro said, "No."

Magliaro denied ever using any ethnic slurs when speaking to the staff. He denied ever threatening any employees with physical harm. He denied ever making any inappropriate sexual comments or touching anyone at the restaurant. When asked if he was ever counseled by Kim, he stated that during the first four weeks, he was told that he was swearing and being too loud. He said that Kim placed M.A. in between him and the kitchen staff and, as a result, he had no further direct contact with them.

In response to a discovery demand asking for a copy of its "policy on harassment and [an explanation] in detail how this policy is/was disseminated to all of your employees," Respondent produced a copy of an employee manual, which stated in part:

Your constant awareness and ability to communicate with other members of the staff is an integral component of our "greatest asset" theory. The strength of our organization is built on a foundation of trust, teamwork, and communication. You cannot achieve the standards of service expected without it . . . Never lose control . . .

As for harassment, the employee manual contained only the following two-sentence passage: "Sexual harassment, be it verbal or physical, will not be tolerated. Report all unwelcome advances to management." The employee manual contained no discussion of topics such as discrimination/harassment complaint procedures, investigation procedures, management responsibilities, what constitutes inappropriate conduct, or the scope of the policy. Kim told DCR that he hands the manual to employees and tells them to study it and to follow up with him if they have questions.

Respondent noted that it "does not have a written policy which is utilized when cases of harassment have been established." See Respondent's Response to Complainant's Document and Information Requests, Dec. 16, 2015, p. 4. Respondent stated:

Respondent has utilized a warning based system where employees are warned regarding any inappropriate behavior, and if the behavior continued, the



employer may be terminated. There have been no previous cases where claims of harassment have been made.

[Ibid.]

Respondent stated that “[t]he owner of Alexis Steakhouse & Tavern, Kitae Kim is responsible for processing complaints of harassment.” Id. at p. 3. When asked if the restaurant provides anti-discrimination training to its employees, Kim replied, “I don’t focus on anti-discrimination.”<sup>7</sup>

### Analysis

It is settled that an employer cannot discriminate against an employee in the terms, conditions, or privileges of employment based on characteristics such as national origin, race, or gender. N.J.S.A. 10:5-12(a). It is equally settled that harassment is a form of discrimination when it is based on those characteristics and creates a hostile work environment. Taylor v. Metzger, 152 N.J. 490, 498 (1998). To establish a *prima facie* case of hostile work environment under the LAD, an employee must show that the harassment (1) would not have occurred but for his or her membership in a protected category, and (2) was “severe or pervasive” enough to make a (3) reasonable employee of the same protected category believe that (4) the conditions of employment have been altered and the working environment is hostile or abusive. Ibid.; Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 603-04 (1993)

Because the LAD is “not a fault or intent-based statute,” a complainant is not required to show that the employer “intentionally discriminated or harassed [the employee], or intended to create a hostile work environment.” Lehmann, supra, 132 N.J. at 604-05. The Supreme Court stated:

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<sup>7</sup> It appears that months after Complainant and another employee filed verified complaints with DCR alleging hostile work environment discrimination, and at least one other employee reported that Magliaro touched her inappropriately, Respondent issued a revised employee manual that expanded its anti-harassment policy from two sentences to four pages. See Alexis Steakhouse & Tavern, Employee Manual, Jan. 1, 2016, pp. 8-11.

The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional . . . it is at the effects of discrimination that the LAD is aimed. Therefore, the perpetrator's intent is simply not an element of the cause of action. Plaintiff need show only that the harassment would not have occurred but for her [membership in a protected class].

[Ibid. (emphasis in original)]

In Taylor, supra, the Supreme Court held that when the bad actor is a supervisor who is directing his/her remarks to a subordinate, even a single racial slur could be severe enough to create a hostile work environment. 152 N.J. at 506-07. The Court stated that a supervisor's "unique role in shaping the work environment," id. at 503, gives him or her ample power to contaminate the workplace and alter the terms and conditions of a subordinate's employment, and that racial epithets are "especially egregious" forms of harassment. Id. at 502. Thus, the Court reasoned, the severity of a racial epithet is "exacerbated" when it is "uttered by a supervisor." Id. at 503 ("That fact greatly magnifies the gravity of the comment."). The Taylor Court proclaimed, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet . . . by a supervisor in the presence of his subordinates." Id. at 506 (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir.1993)).

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799.

Thus, the “quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits.” Ibid.

Given the Supreme Court’s observations about the unique impact of a supervisor’s use of a racial epithet in the presence of subordinates, even a single utterance by Magliaro may have been sufficient to create a hostile work environment. See Taylor, supra, 152 N.J. 490. But it appears that it was not just a single utterance. Complainant’s allegation that Magliaro routinely made offensive and unwelcome anti-Hispanic remarks in the workplace was corroborated by ten current and former employees, including five members of the kitchen staff, four servers, and one manager.

The only witness who did not corroborate Complainant’s allegations against Magliaro told DCR that although he heard employees making similar complaints, he never personally witnessed Magliaro’s inappropriate conduct first-hand. However, he added that he did not often see Magliaro in the workplace because they worked different shifts.

Six witnesses corroborated Complainant’s allegation that employees complained about Magliaro’s unwelcome and offensive ethnic slurs to Kim, but no effective corrective measures were taken.

The investigation found no persuasive evidence, and none was produced by Respondent, that the employer had any effective policies or procedures for employees to use in response to such harassment during the relevant time period. The employee manual stated that sexual harassment would not be tolerated but made no mention of any other forms of discrimination. Employees were told to report harassment to the manager. In this case, following that procedure would have been futile, if not counterproductive, because the manager was the harasser. And multiple witnesses stated that even when they brought their concerns directly to ownership’s attention, no effective action was taken. Indeed, Kim’s statement to a DCR investigator that he does not “focus on anti-discrimination” would appear to “be at the core

of [Complainant's] hostile work environment harassment claims." See Griffin v. City of E. Orange, 2016 N.J. LEXIS 573 at \*27 (Jun. 22, 2016).

Accordingly, the Director is satisfied that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits" of Complainant's allegations that Respondent subjected him to workplace discrimination and harassment in violation of the LAD. Id. at 56.

DATE: 7-7-16



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Craig Sashihara, Director  
NJ DIVISION ON CIVIL RIGHTS