STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. ED27WB-65249

Aaron Berry, and Craig Sashihara, Director of the New Jersey Division on Civil Rights,	)	Administrative Action
Complainants,	)	**FINDING OF PROBABLE CAUSE**
v.	)	
Rent-A-Center, Inc.,	)	
Respondent.	)	

On April 29, 2015, Sicklerville resident Aaron Berry (Complainant)[1] filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that his employer, Rent-A-Center Inc. (Respondent), subjected him to a hostile working environment based on race, and retaliated against him for complaining about discrimination, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination and retaliation in their entirety. DCR's ensuing investigation found as follows.

Respondent is based in Plano, Texas, and operates a nationwide chain of rent-to-own stores, with approximately 2,800 retail locations. Respondent describes its stores as offering durable products such as consumer electronics, appliances, computers, furniture, and accessories under rental purchase agreements that typically allow customers to obtain ownership of the merchandise at the conclusion of the rental period.

Each store generally operates with four to six employees, and is run by a store manager, with two or more assistant managers. Some stores have a lead assistant store manager. Other employees who assist customers are referred to as customer account representatives. Each store manager reports to a district manager, who oversees approximately twelve stores. The district manager reports to a regional director.

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[1] The verified complaint is hereby amended to add the Director of the Division on Civil Rights as an additional complainant pursuant to N.J.A.C. 13:4-2.2(e). However, for purposes of this disposition, the term, "Complainant," will refer only to Mr. Berry.

In April 2007, Complainant began working as a Customer Account Representative at one of Respondent's stores in Camden. In 2009, he was promoted to Assistant Manager at a facility in Pennsauken, which Respondent refers to as Store 1853. In 2012, he was promoted to Lead Assistant Manager. At all times relevant to this complaint, Bill Ierley served as Store Manager of Store 1853, and Kim Singleton served as the District Manager for the Pennsauken area. Complainant is African-American. Ierley and Singleton are Caucasian.

a. Hostile Work Environment Allegations

Complainant told DCR that Store 1853 Assistant Manager Christina Martinez, routinely used the word "nigger" in the workplace. He estimates that Martinez used the word in his presence twenty to twenty-five times, or possibly more. He said that she used the word in front of Store Manager Ierley but no remedial action was taken, even when Complainant complained to Ierley.

On Friday, December 5, 2014, Complainant noticed that Martinez was setting up a contract with a customer who had a past due balance on a previous contract, which was against company policy. Complainant notified Ierley, who halted the transaction. Complainant alleges that Martinez said to Ierley, "Tell that black muthafucka to get you sales. I'm tired of that black bitch. You let that black nigger get you sales." Complainant said that Martinez made the statement in his presence and was presumably referring to him. Martinez left the store and did not return that day.

When District Manager Singleton and Ierley spoke later that day, the store manager mentioned that Martinez and Complainant had a workplace altercation. Complainant was concerned that Ierley had not sufficiently informed Singleton about the severity of Martinez's conduct, so he called Singleton and provided details about the incident. Complainant says that Singleton was dismissive and told him to focus on "getting sales."

The next day, Complainant told Ierley that he did not want to come to work and be around Martinez given what occurred the previous day. Complainant said that Ierley initially said that he could stay home, but later instructed him to report to work because Martinez was not working that day.

Complainant said that Singleton was in Store 1853 on Monday, December 8, 2014, and told him that the previous Friday's incident with Martinez was an "HR matter" and that she would fax statements from Complainant, Martinez, and Ierley to HR. She said someone "above" her would make a decision as to how it would be addressed. Complainant said that Singleton asked him if he could "get past this," and he said he could.

Complainant told DCR that after he saw Singleton and Martinez laughing together in the office that day, he questioned if Singleton would address the matter appropriately, so he contacted the corporate headquarters in Texas, and reported the incident to David Carmichael who works in Respondent's Coworker Relations Department (CWR). He told Carmichael that although he told Singleton that he could "get over it," he was not comfortable working with Martinez. He said that he told Carmichael that it was not the first time Martinez acted this way, and that she treated another African-American employee in the store in the same manner.

Respondent's CWR records indicate that Singleton told Complainant on December 8, 2014, that Martinez would receive "corrective coaching" and told "if she does something like this again she will not be working here." Respondent produced a memo entitled, "Performance Discussion Summary," dated December 8, 2014, from Singleton to Martinez. Under "Summary of problem discussed," Singleton wrote, "There was an altercation on 12/5/14 where derogatory remarks were made to the LAM including cursing." Under "Agreed solution," the memo states, "Christine agrees that was unprofessional and there will not be another altercation in the store. This is a final warning this cannot happen again. If it does it will result in immediate termination." The memo is signed by both Singleton and Martinez.

Respondent produced copies of handwritten statements, presumably obtained by Singleton, from Martinez, Ierley, and four other employees of Store 1853. Employee 1 wrote that he had not seen signs of prejudice in the store. He wrote that employees have arguments and say things that they should not say, but "we feel it's OK because we are like family." He wrote that when an employee becomes angry at something someone says, "we handle it and we apologize." Employee 2 wrote that he had not seen any altercations between employees. Employee 3 wrote that Martinez said the "F Word" and "N Word" to Complainant. He recounted a complaint that Martinez had against Complainant for not working his full schedule and an incident he had with Complainant several months earlier where Complainant reportedly said to Employee 3, "[W]e can step outside if [you] have a problem." Employee 4 wrote that he had not seen an altercation similar to the one between Complainant and Martinez on December 5 during the time he worked at Store 1853. He said that employees have arguments but resolve them quickly and professionally. All four of the statements are dated December 9, 2014, i.e., the day after Singleton issued the Performance Discussion Summary to Martinez.[2]

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[2] As part of the investigative process, DCR scheduled a fact-finding conference pursuant to N.J.A.C. 13:4-4.7, and asked Respondent to produce Singleton, Ierley, and Carmichael so that DCR could ascertain their version of events. Respondent refused and, at its request, the conference was cancelled.

In an undated statement, Ierley wrote, "On Friday December 5th at about 11:30 a.m., Christine Martinez had an altercation involving Aaron Berry. During this altercation Christine used derogatory words and curses directed towards Aaron. Aaron gave no retaliation towards Christine. Christine left the job on her own accord and did not return."

There were two written statements by Martinez. In a statement dated December 9, 2014, Martinez wrote about an incident the prior summer when Complainant reportedly referred to her as a "broke bitch" and a "spic." She also wrote about a prior incident between Complainant and Employee 3, and how with respect to that incident, Complainant "never called no one on him [Employee 3], but was ready to knock him out." The December 9 statement did not mention the December 5 incident. Martinez's second statement is dated December 15, 2014, and references the incident with Complainant. She wrote that she was writing up a customer when Complainant intervened and asked the customer why she was not paying her bill. Martinez wrote:

> I told Aaron [Complainant] that sometimes he should handle things nicely not rude, and the lady [customer] asked who is he, the Manager, and I said yes. So I walked away and he [Complainant] made a remark so we argued. I told Bill [Ierley] and everyone else, tell them niggas to do your sales. Never meant it any other way. Everyone in the store says that to each other. He started laughing from his office, so Bill came into the office and said calm down. I even called him [Bill Ireley] a nigga. I left the store, I texted Aaron [Complainant] and said I was sorry, I never meant to disrespect him in any way. I never meant to hurt anyone's feelings.

A few days after Complainant's call to Carmichael, Respondent transferred Martinez to its Store 344, which is also located in Pennsauken and also overseen by Singleton. Complainant alleged that after he called Carmichael, Singleton said to him, "I don't appreciate you going over my head."

Complainant said that employees at the two Pennsauken stores need to work together because they share stock and need to communicate. He alleged that this has been difficult because when he calls Store 344 and Martinez answers, she hangs up on him.

Respondent produced its Equal Employment Opportunity policy from its Coworker Handbook, as well as a one-page memo to all employees dated April 1, 2014, entitled, "Equal Employment Opportunity Statement." Following the transfer of Martinez to Store 344, Singleton conducted what was referred to as "Workplace Behavior Training" at both stores. Complainant and another employee told DCR that it was the

first time they received any such training from Respondent. Respondent told DCR that it suspended Martinez for her conduct on December 5, 2014.

DCR interviewed Employee 1, who has worked for Respondent for twelve years. Employee 1 said that he heard Martinez use the word "nigger" in the workplace on more than one occasion. He said that several employees at Store 1853 use the word routinely in the workplace. He noted that Complainant, however, did not engage in this behavior.

DCR received a verified complaint from an employee at Store 344, H.G., alleging that Martinez regularly used the word "nigger" towards him at Store 344 once she was transferred there. H.G. alleged that after he complained about Martinez's behavior to the store manager, he was fired. He alleged that Respondent's response amounted to illegal retaliation for engaging in protected activity. Respondent denied that H.G. complained about Martinez's conduct, and told DCR that he was fired for nondiscriminatory, non-retaliatory reasons.[3]

Respondent told DCR that it conducted an internal investigation of H.G.'s complaint after it received a copy of the complaint that H.G. filed with DCR. During its internal investigation, the Store Manager denied that H.G. complained to him about Martinez. Other employees denied any knowledge of Martinez using the word, except for Employee 6. Employee 6 told Respondent's EEO investigator that he witnessed Martinez use the term earlier that year, and it may have been directed to H.G.

As part of the investigation of H.G.'s complaint, DCR interviewed Employee 5 at Store 344. Employee 5, who is Hispanic, told DCR that he shared office space with H.G. Employee 5 told DCR that he heard Martinez use the word "nigger" at Store 344 on at least two occasions: once directed at H.G., and once when referring to African-American employees while their backs were turned away from her. Employee 5 stated that he witnessed H.G. go to the Store Manager's office and complain that Martinez was using the word "nigger" toward him. He said that he did not know what, if anything, the Store Manager did regarding H.G.'s report. Martinez continued to work at Store 344 for Respondent.

b. Retaliation Allegations

Complainant alleged that in or around January 2015, Respondent announced that it was seeking someone to serve as the Store Manager for Store 344. Complainant alleged that when he told Singleton that he was interested in the position, she promised

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[3] See H.G. v. Rent-A-Center, DCR Docket No. ED11SB29125. During the course of DCR's investigation into H.G.'s allegations, the parties reached a private resolution and H.G. withdrew his verified complaint. DCR closed the H.G. complaint on that basis.

that he would be interviewed. Complainant was one of four people who applied for the position.

Respondent appointed Elmer Jackson, who is African-American, for the position. Complainant was not interviewed. Complainant alleges that Respondent did not consider him for the promotion because of his complaint about Martinez.

Respondent told DCR that Jackson was the Assistant Manager at Store 344 when the store manager went out on a disability leave. Respondent said that during that leave, Jackson served as Acting Store Manager. It stated that it selected Jackson because he performed well in the acting role and had experience with the employees and customers at Store 344.

Analysis

At the conclusion of an investigation, the 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.

The procedure is not an adjudication on the merits but merely an initial "culling-out process" in which the DCR 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.

The "clear public policy of this State is to eradicate invidious discrimination from the workplace." Alexander v. Seton Hall, 204 N.J. 219, 228 (2010). To that end, the LAD was enacted as remedial legislation to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). "The LAD was enacted to protect not only the civil rights individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." Lehmann v. Toys'R'Us, Inc., 132 N.J. 587, 600 (1993).

The LAD prohibits discrimination in employment on the basis of race. N.J.S.A. 10:5-12(a). The prohibition includes not just discrimination in hiring, firing, and promotions, but also creating a hostile work environment based on race. Lehmann, supra; Taylor v. Metzger, 152 N.J. 490 (1998). In a racial harassment case, a plaintiff must demonstrate conduct that (1) would not have occurred but for the employee's

race; and the conduct was (2) severe or pervasive enough to make a (3) reasonable person of that race believe that (4) the conditions of employment are altered and the working environment hostile or abusive. Id. at 498 (citing Lehmann, supra, 132 N.J. at 603-04).

Court have noted that "[p]erhaps 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 such as 'nigger' by a supervisor in the presence of his subordinates." Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993). The New Jersey Supreme Court describes the word as "one of insult, abuse, and belittlement harking back to the slavery days." Taylor, supra, 152 N.J. at 510 (citation omitted). See also Brown v. East Miss. Electric Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993) (stating "the term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race"); McGinest v. GTW Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004) (stating "the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination"). It is "the most noxious racial epithet in the contemporary American lexicon" and "the all-American trump card, the nuclear bomb of racial epithets." Gregory S. Parks and Shayne E. Jones, "Nigger": A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law, 98 J. Crim. L. & Criminology 1305, 1317 (2008).

In this case, it is undisputed that Martinez referred to Complainant in the workplace as a "nigger." Martinez openly acknowledges using the term during December 5, 2014 incident. Complainant says that it happened routinely. Employees who were questioned during the DCR and Respondent investigations, corroborated that Martinez and others used racial slurs in the workplace. Based on the above, including the unrebutted allegations that a member of the management team was making racial epithets in the presence of subordinates and that Store Manager Ierley appeared to condone the conduct by taking no action, and given the nature of the remark and witness statements that support the claim that the term was used freely in the workplace, the Director finds for purposes of this disposition only that the conduct was sufficiently severe or pervasive to constitute a hostile racial working environment.

In determining an employer's liability for harassment of its employees, courts have determined that employers who promulgate and support an active anti-harassment policy may be entitled to a form of safe haven from vicarious liability from an employee's harassing conduct of others. Cavuoti v. New Jersey Transit Corporation, 161 N.J. 107, 120-21(1999); Aguas v. State, 220 N.J. 494 (2015). To assert an affirmative defense, an employer must prove two prongs by a preponderance of the evidence: first, that the employer exercised reasonable care to prevent and to correct promptly harassing behavior; and second, that the plaintiff employee unreasonably failed to take advantage

of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. Id. at 524. In order to satisfy the first prong of the affirmative defense:

> [A]n employer's [ ] harassment policy must be more than the mere words encapsulated in the policy; rather, the LAD requires an "unequivocal commitment from the top that [the employer's opposition to harassment] is not just words[,] but backed up by consistent practice." Lehmann, supra, 132 N.J. at 621, 626 A.2d 445. The "mere implementation and dissemination of anti-harassment procedures with a complaint procedure does not alone constitute evidence of due care--let alone resolve all genuine issues of material fact with regard to due care."
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> [Gaines v. Bellino, 173 N.J. 301, 319 (2002).]

Guided by those standards, the Director finds, for purposes of this disposition only, that Respondent has not established the affirmative defense based on several factors: (1) the alleged conduct occurred routinely and sometimes in front of management; (2) both the Store Manager of Store 1853 and the District Manager appeared to downplay the nature of the conduct, referring to the use of racial slurs by Martinez as merely "unprofessional" cursing; (3) Respondent's representation that Martinez was "suspended" and "sent home" after making the comments, when it appears that Martinez left the store on her own accord and was never suspended; (4) the absence of any workplace training on Respondent's EEO policy until after Martinez was transferred to Store 344; (5) the fact that Martinez remained employed at Store 344 despite reports that she continued to use racial slurs in the workplace; and (6) the absence of any persuasive evidence that Complainant unreasonably failed to report the conduct or otherwise avoid harm. Indeed, any suggestion that Respondent took effective action to stop the offending conduct is rebutted by the statements of employees that Martinez continued to use precisely the same racial epithet in the presence of subordinates. Because the investigation did not support an affirmative defense for Respondent to the hostile environment, the matter should proceed to a plenary hearing.

The LAD also makes it illegal for employers to retaliate against employees for reporting workplace discrimination. N.J.S.A. 10:5-12(d). A complainant's burden to establish a *prima facie* case of retaliation is "not an onerous one." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him to adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (1990). If a plaintiff can make that *prima facie* showing, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its adverse employment

decision. If the defendant can meet that burden of production, then the complainant, who retains the burden of persuasion, has the opportunity to show that the employer's explanation was merely a pretext designed to mask unlawful reprisal. Young v. Hobart West Group, 385 N.J. Super. 448, 465 (App. Div. 2005).

Here, the Director finds that Complainant engaged in protected activity when he complained to his managers and the CWR Department about Martinez's use of racial slurs, and was subjected to an adverse employment action when he was denied the available promotion a few weeks later. Complainant alleged that Singleton held great sway in who would get the manager's position in her district and was unhappy that he reported Martinez's conduct to corporate headquarters. He alleged that Singleton promised that he would be interviewed for the position, but did not follow through after he complained. Although Respondent has provided a legitimate, non-retaliatory explanation for selecting Jackson over Complainant—i.e., that Jackson performed well as acting manager—there is sufficient evidence that Singleton may have harbored a retaliatory animus toward Complainant that may have affected her evaluation of Complainant's candidacy such that the issue of pretext should be resolved at a plenary hearing.

In view of the above, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that probable cause exists to support the allegations of hostile work environment discrimination and retaliation. N.J.A.C. 13:4-10.2.

DATE: 4-29-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS