STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL02WB-65291

L. B.,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Veterans of Foreign Wars,	)	
	)	
Respondent	)	

On May 7, 2015, L.B. (Complainant), a Mercer County resident, filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that her former employer, Veterans of Foreign Wars (Respondent), subjected her to sexual harassment and retaliation in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of wrongdoing in their entirety. DCR's ensuing investigation found as follows.

Summary of Investigation

Veterans of Foreign Wars is a nonprofit veterans' service organization with several facilities in New Jersey, including Post 7298 in Ewing (the "Post"). Among other things, the Post operates a social club that serves beverages in areas known as the "Hall" and the "Canteen" to members and their guests.

At all times relevant to this complaint, the Post Commander was Arthur Muckerson. He appointed members to volunteer positions to help manage the Hall and Canteen. He also assumed some managerial responsibilities including hiring bartenders, acting as the chief administrator of Post activities, and managing the Hall.

Joseph Thorpe scheduled bartenders and managed the Canteen with support from Rick Smith. Smith and Carl Oliver directly supervised bartenders, and in that capacity, they were referred to as overseers.

Complainant told DCR that she worked as a bartender at the Post from 1998 until around 2012 or 2013, when she quit because the Commander promulgated a rule disallowing bartenders from working any more than one other job while working at the Post. Complainant stated that she returned to the Post in 2014 when Muckerson abolished that rule and invited her to resume her position as a bartender.

On April 1, 2015, she was fired based on allegations that low cash register totals for her shift were the result of her improper handling of payments received from customers. V.S., another female bartender, was discharged the same day, based on the same allegations.[1] Before discharging Complainant and V.S., the Post employed eight females and two males in paid bartender positions.

a. Sexual Harassment

In interviews with DCR, Complainant said that Smith, who supervised her during Saturday shifts, began sexually harassing her when she was re-hired in 2014, and continued to harass her on a weekly basis until she was fired on April 1, 2015. Complainant stated that among other things, Smith told her after she had lost some weight, "You lost your legs," "You lost your breasts," "You just don't look the same," and "I wonder if your nipples still get hard."

Complainant told DCR that when Smith made those comments, she felt angry, increasingly self-conscious about her body, and uncomfortable going to work knowing that Smith was going to say something negative about her appearance. Complainant told DCR that she complained to Muckerson multiple times about Smith's conduct and continued to complain until her discharge. She said Muckerson told her, "Don't worry, I'll handle it," but did not act on any of her complaints. Complainant stated that after Muckerson became the Commander, male officers and patrons felt free to treat women inappropriately.

Complainant told DCR that the Post was generally a sexually hostile work environment for female employees. Complainant alleged that Muckerson and his officers were not only aware of the sexually hostile nature of the work environment, they fostered it actively through overt actions, and passively by failing to take remedial action or even investigate reports of sexual harassment.

Complainant stated that she heard Smith and Muckerson make inappropriate comments about several female bartenders' bodies. She said that both men commented that G.R. had a nice, round rear end. She also heard Smith say that the

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[1] V.S. filed a complaint with DCR on May 7, 2015, alleging that while she worked at Respondent she was subjected to sexual harassment and retaliation. See V.S. v. Veterans of Foreign Wars, DCR Docket No. EL02WB-65262.

Post hired S.B. because she had a big rear end and large thighs. Complainant told DCR that men made sexually explicit comments during almost every shift she worked at the Post.

Complainant told DCR that she was subjected to sexual harassment under two separate Post administrations, and when she complained to the different commanders, there were markedly different responses. Complainant stated that during Luddie Austin's administration – the Post administration immediately before Muckerson's – Post member Ronald Hallbeck touched her inappropriately on the inside of her thighs. When she complained to Austin, he banned Hallbeck from visiting the Post Canteen. In contrast, Complainant told DCR that when she complained to Muckerson about Smith's sexually harassing comments, Muckerson took no action.

Austin told DCR that when he was Commander, he addressed Hallbeck's harassment of Complainant and several other women. He said that there was a system of counseling, reporting, and documenting harassment, and female bartenders could report incidents to Overseers, the Bar Chair, or the Commander. Austin, who is currently a trustee of the Post, does not believe that the system transitioned to the Muckerson administration. [2]

Austin also confirmed that Smith made and continues to make harassing comments to female bartenders about their appearance, clothing, and bodies. This included asking a bartender in front of patrons if she was "on her rag." Austin said that Muckerson has taken no action against Smith because Muckerson views this inappropriate behavior "as the norm" and "sees nothing wrong with it."

Other Post members and employees characterized the climate at the Post as a sexually hostile work environment. K.D., who was formerly employed as a bartender at the Post, told DCR that members of the Post and some officers, including Smith, made comments about female bartenders' bodies. She added that Muckerson said to her, "Look at those hips. You know what I can do with those hips?" and "Come over here, there's no cameras over here." K.D. stated that Oliver would sometimes brush up against the female bartenders and grab their waists. K.D. said that some female bartenders accept the harassing advances because they are rewarded through a system of favoritism. She said that female bartender T.W. told her, "You have to go along with it," and suggested that K.D. "tickle [Muckerson's] private parts." K.D. also told DCR that bartenders G.R. and T.W. had been promised hours in return for sexual favors.

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[2] Muckerson told DCR that he reinstated Hallbeck's Post privileges because he believed Hallbeck had been falsely accused of sexual harassment. Muckerson told DCR that Hallbeck was not reinstated until after Complainant and V.S. worked her last shifts at the Post.

K.D. said that she complained about the harassment to her stepfather, who is an officer of the Post. He told her to address her complaint to Muckerson, as Commander of the Post. K.D. told DCR that when she reported the harassment to Muckerson, he did not act on her complaint, and warned her that if she did not accept the situation, she would end up "like [L] and [V]." K.D. believed Muckerson meant that she would be discharged like Complainant and V.S.

Muckerson fired K.D. in December 2015. K.D. asserted that he did so because she rejected his sexual advances.[3] K.D. said that Muckerson loaned her sixty dollars shortly before he fired her. On the day Muckerson asked her to repay the loan, K.D. was unable to come up with the money. According to K.D., Muckerson told her that she could give him something else, implying a solicitation for sex, an offer that she rejected.

Muckerson told DCR that he fired K.D. because her register was short thirty dollars at the end of her shift, and she refused to pay the difference. He said that Post policy requires bartenders to balance the register with their own funds if there is a discrepancy. Muckerson said he gave K.D. an opportunity to make up the money and she said no, cursed at him, and said she was "out of here."

V.S., who was discharged the same day as Complainant based on the same allegations, told DCR that on March 5, 2015, Muckerson called her and said that he was treating all the bartenders who missed hours when the Post was closed due to a snow storm to lunch at Red Lobster the next day, to make up for their lost shifts. V.S. told DCR that she accepted his invitation, as well as his offer to give her a ride to the restaurant, because she believed other bartenders would be there. When they arrived, she found that none of the other bartenders were there, and that she was alone with Muckerson.

V.S. told DCR that during the lunch, Muckerson began grazing his hand against her hand, and said, "I am aware of your situation and wonder if you can use a friend." In referring to her "situation," V.S. understood that Muckerson meant that she is a single mother of three children, and had recently been laid off from her fulltime job. And she understood his reference to "friend" to mean a sexual relationship. When Muckerson said, "I wonder if food works on a woman's heart the same way it works on a man's heart," she replied, "I don't know what you're implying, but no." V.S. said that she rebuffed his advances by saying, "I don't know what's going on, but I don't want any part of it." She said that he retreated a bit and said, "Nothing is going on here. We are just comrades." V.S. told DCR that Muckerson's conduct during the lunch made her extremely uncomfortable.

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[3] Thorpe told DCR that K.D. was the only bartender Respondent fired, other than Complainant and V.S.

V.S. told the DCR investigator that she witnessed other employees being sexually harassed at the Post. V.S. recalled witnessing male patrons, volunteers and officers at the Post make inappropriate sex-based comments to G.R., a current bartender at the Post. These included men making inappropriate comments about G.R.'s body and clothing, including saying that she had a "camel toe" from her tight-fitting pants. She also stated that some of the male patrons would withhold their payment for drinks, and ask G.R. to do "a little more" before they turned over the money. For example, V.S. told DCR that she witnessed male patrons ask G.R. to turn around so that they could see her rear end before giving her a tip.

Complainant and V.S. told DCR that on or around the Saturday after they were fired (April 4, 2015), Oliver made comments over the Post speaker system about the buttocks of two female bartenders, T.W. and S.B., and concluded his comments by stating: "Nobody had better file sexual harassment against me." Although Complainant and V.S. were not at the Post when this occurred, Austin told DCR that he was at the Post and witnessed the incident first-hand; he corroborated Complainant's account. Oliver denied making any such statements, and denied sexually harassing any employee or Post member.

Another member of the Post, John, told DCR that there is a quid pro quo environment between officers and female bartenders.[4] He heard Smith tell an Overseer that V.S. doesn't "play like the other girls play," and that Complainant "is not the type of bartender who will tolerate what [G.R.] will tolerate." John stated that G.R.—who did not complain about sexually harassing comments—received extra hours at the expense of other female bartenders. John stated that he could sum up the treatment of female bartenders by saying that "the ladies who were not messing around are not there anymore."

S.S., a veteran and member of the Post, told DCR that she was in the Canteen several years ago, when Hallbeck came up behind her and rubbed himself against her. She asked what he thought he was doing, and he backed off. She reported the incident to an officer, who reported it to Austin, who was commander at the time. S.S. contended that male members of the Post felt uninhibited in their treatment of women, and often made comments about the fit of their clothing. She said that the prevailing attitude among women was to try to ignore the harassment. S.S. said that she stopped going to the Post about two years ago, because the members and command exuded an "old boys' club mentality."

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[4] "John" is a pseudonym for a witness who requested that he not be publicly identified when interviewed by DCR.

During his interview, Muckerson denied all claims of sexual harassment, saying it was the sort of thing people make up after they are fired. He told DCR that no one did anything inappropriate to Complainant and that there is nothing in her file about harassment of any type. Muckerson also claimed that no one, including Complainant, complained to him about Rick Smith. Muckerson denied going to Red Lobster with V.S. on March 6. He further denied receiving any reports of sexual harassment from any employees or Post members. Muckerson stated that sexual harassment should be reported to the Commander, and that the Commander is responsible for addressing such complaints. He concluded by stating that if there was sexual harassment at the Post, he would know about it, and since he did not receive any complaints about sexual harassment, there could be no sexual harassment at the Post.

Complainant told DCR that she was originally scheduled to work a large party at the Post on Sunday, March 8. Several days before the party, Complainant was tending bar, and heard a number of patrons discussing a recent incident between Muckerson and a female bartender, S.B. From the discussion, Complainant learned that while Muckerson and S.B. were behind the bar, two male patrons saw S.B. rubbing Muckerson between his legs. At some point before March 8, Muckerson reassigned the March 8 party to S.B. When Complainant found out that S.B. would be tending bar for the March 8 party instead of her, she approached Muckerson and complained that it was unfair of him to replace her with S.B. Complainant said that Muckerson told her that he did not remember ever scheduling her to work on March 8. He did not change the schedule, and S.B. tended bar for the March 8 party, instead of Complainant.

b. Retaliation

Complainant alleged that she was discharged in reprisal for complaining about sexual harassment. Respondent denies that Complainant reported any alleged sexual harassment at the Post or by Post employees or members, and denies retaliating against Complainant. In its Answer, Respondent contends that Complainant was discharged for "stealing." Specifically, Respondent claims that on March 19, 2015, Complainant and V.S. diverted payments received for drinks to their tip jars instead of depositing them in the cash register. Complainant told DCR that she never diverted funds from the cash register to her tip jar or in any other way stole funds from the Post.

In interviews with DCR, Complainant said that V.S. was working a 6–11 p.m. shift on Thursday, March 19, 2015, in the Hall area. V.S. was the only bartender in the Hall at the start of the shift, with Oliver supervising. V.S. called Complainant and asked her to come to work because there was a small rush of customers, and V.S. needed a break. Complainant started assisting V.S. in the Hall around 9 p.m., and both of them shared a register. Complainant told DCR that at first she left the few tips that she had received on the bar. After a little while, Quartermaster Robert McNeil approached her

with a tip jar for her tips and noted that she had not made much money in tips. Oliver closed the Hall an hour early and moved the register to the Post's office area for money counting.

Respondent provided DCR with a "signature slip" showing the amount of money in the register at the close of their shift that night; it was initialed only by Oliver and not by Complainant or V.S. In an interview with DCR, V.S said that when either Oliver or Muckerson supervised her shift, they routinely removed the cash drawer at the end of the shift and counted the money without the bartender present. Thus, neither Complainant nor V.S. was ever able to verify how much money was in her register at the end of her shift. V.S. said that after counting the register, Oliver normally returned with the signature slip for the bartenders to sign, but on March 19, 2015, Oliver did not show her or V.S. the signature slips. During his interview with DCR, Oliver acknowledged that Complainant was not given the opportunity to review or confirm the amount in the register that night.

Complainant and V.S. both worked one more assigned shift before they each received the same text message from Thorpe on March 24, telling each of them not to come to work on March 26. The message stated:

> An audit of the register tape, inventory sheet and bottles from this past Thursday were [*sic*] done and the findings concluded that and [*sic*] or all were conducted on the register:
>
> Miss rings
> Under rings
> No rings
>
> As a result of this you will not be working this coming Thursday but will be able to return to work your next scheduled day.

On March 26, 2015, Thorpe sent the following text message to Complainant, "Per the Commander today we will not need you to work this coming Saturday. The Commander will let me know when you will return."

Complainant told DCR that on April 1, 2015, Muckerson called her and told her that her employment was terminated because bartender T.W. had rung $1,800 in sales on her register on March 19, and Complainant and V.S. had totaled only $900 in sales on their register. Complainant said that Muckerson did not mention "miss rings, under rings, or no rings" in this conversation, or give her any other information about evidence Respondent had relied upon or conclusions Respondent had drawn from the alleged sales totals. DCR's review of Thorpe's audit documents and the register tapes for

March and April 2015 showed that T.W. was not bartending on March 19 and that her totals for other Thursday nights were never close to $1,800.

During DCR's investigation, Muckerson explained that he wrote the Answer to the complaint on behalf of Respondent, and in doing so, tried to summarize the evidence Respondent relied on to conclude that Complainant and V.S. had stolen Post funds. In the Answer, he asserted that on March 19, Oliver noticed Complainant and V.S. placing more money into their tip jars than into their register. Second, Muckerson wrote that Thursday night totals for the two weeks before and two weeks after that night ranged from $1,500 to $1,800, while Complainant's and V.S.'s combined total was $900.[5] Third, he wrote that an audit of their register revealed double the usual number of "no sale" and "soda" rings and half the usual number of alcohol rings.

DCR's investigation found that Muckerson was not at the Post during Complainant's and V.S.'s shift on March 19. During an interview with DCR, Oliver said that on the evening of March 19 he noticed that Complainant and V.S. were not going to the cash register very often. He said that when he moved closer to the register area, they began putting money in the register. When DCR first asked Oliver where Complainant and V.S. placed money that they received from customers, Oliver stated that he did not know where they put the money, but he knew that they did not put it in the cash register. Oliver at a later point said that he saw them put money in their tip jars.

During his DCR interview, Thorpe could not remember whether Oliver told him what Complainant and V.S. did with the money once it was in their hands on March 19. Thorpe added that no one at the Post knew how much money Complainant or V.S. made in tips that night (or during any shift) because the tip jars are never checked or totaled by Post officers. Oliver was also unable to state whether the two tip jars held a disproportionate amount of money, because he never looked at or totaled the amounts in Complainant's or V.S.'s tip jar.

During DCR's investigation, neither Complainant nor V.S. could recall the exact amount of tips they received on March 19. However, both women remembered that sales and tips were low on March 19 because it was a slow night with few patrons at the Post. Complainant remembered Quartermaster McNeil commenting that she had not received many tips. During his interview, Thorpe said that it was common for bartenders to have higher sales totals on one night than another. DCR's review of

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[5] The Answer did not specify that Muckerson compared Thursday nights in particular, but this was clarified during DCR's investigation. Although the Answer alleged that Complainant and V.S. took in $900, the total on their shared register tape was $982.75.

Respondent's records shows that the sales in both the Hall and Canteen for March 19 were substantially lower than other Thursday nights in March and April.

Thorpe told DCR that, at the end of the shift on March 19, Oliver told him that he suspected Complainant and V.S. of "over pouring" (pouring extra liquor into drinks without charge) and not ringing sales on their register. Thorpe said that Muckerson ordered him to "audit" their shared register. Thorpe claimed that his audit included a compilation of register totals for each bartender and the combined totals of each day for the months of March and April 2015. However, since Complainant and V.S. were discharged on April 1, 2015, Respondent would not have had information about sales after that date as part of any audit actually relied on to discharge them.

In the Answer to the complaint, Muckerson wrote that Thursday night register totals for the two weeks before and the two weeks after March 19, 2015 were $1,500, $1,600, $1,700, and $1,800. In response to DCR's request for information during this investigation, Thorpe provided register totals that contradict those figures. Muckerson's last two figures approximate the highest figure taken in on a register in the Canteen on March 26 ($1,649.75) and April 2 ($1,713.25). Respondent could not have relied on the April 2 sales to discharge Complainant on April 1, but it could be relevant as circumstantial evidence regarding Respondent's claim that the March 19 sales in the Hall were inordinately low.

Based on the register tapes that Respondent provided, DCR created charts showing total sales in the Hall and the Canteen for the Thursdays between March 12 and April 2, 2015. The Thursday night totals for the Hall were as follows:

Chart 1 – the Hall

Date	Alcoholic Drinks	Soda	"No-Sale" rings	Total Sales
March 12	316	27	21	$1,331.25
March 19	226	24	12	$982.75
March 26	425	25	17-26[6]	$1,792.00
April 2	376	24	10	$1,600.25

[6] A receipt submitted by Thorpe was not completely legible. The "no sale" figure for S.B. on March 26, 2015 was a two-digit number beginning with "1," indicating an amount between 10 and 19.

The Thursday night totals for the Canteen were as follows:

Chart 2 – the Canteen

Date	Alcoholic Drinks	Soda	"No-Sale" rings	Total Sales
March 12	518	6	0	$2,207.50
March 19	378	2	0	$1,558.75
March 26	619	10	0	$2,669.25
April 2	641	4	0	$2,659.50

Muckerson cited Complainant and V.S.'s $982.75 March 19 total as unusually low for a Thursday night. Complainant and V.S. each told DCR that March 19 was a slow night, with fewer patrons than normal at the Post.[7] Complainant and V.S.'s total sales in the Hall from March 19 were 26.2% lower than the March 12 sales in the Hall, and 45.2% lower than the March 26 sales in the Hall. The Canteen sales corroborate Complainant's and V.S.'s assertion that March 19 was a slow night, as the March 19 Canteen sales were 29.4% lower than the Canteen sales for the prior Thursday night (March 12), and 41.6% lower than the following Thursday night (March 26). The investigation showed no evidence that Respondent audited the bartenders who worked in the Canteen on March 19.

The register tapes show that in their March 19 shift, Complainant and V.S. produced 38.7% of the Post's total sales for that night. This percentage is consistent with sales in the Hall on other Thursday nights. On the night of March 12, the Hall produced 37.2% of the total sales. On the night of March 26, the Hall produced 40.2% of the total sales. On the night of April 2, the Hall produced 37.6% of the total sales, and on the night of April 9, the Hall produced 37.0% of the total sales.

Respondent also contends that the register tape for March 19 showed that Complainant and V.S. had twice the normal number of "soda" and "no sale" rings, and half the normal number of alcohol rings.[8] Respondent argues that this is evidence that Complainant and V.S. were serving patrons alcoholic beverages, ringing the sales as a lower-priced soda, and keeping the difference. The Thursday night register tapes indicated that Complainant and V.S.'s "soda" and "no sale" rings were not irregular.

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[7] Complainant attributed the low sales to the lack of patrons in the Hall that night. The fact that Oliver decided to close the Hall an hour earlier than scheduled supports Complainant's claim that it was a slow night with fewer patrons than normal.

[8] V.S. stated that "no sale" rings occur whenever bartenders access the register for anything other than a drink transaction. A "no sale" would appear if a bartender made change for customers or the Overseer, or put a credit card receipt in the register drawer.

Soda sales equaled or exceeded their March 19 total of 24 rings on March 12 (27), March 26 (25), and April 2 (24).[9] Their "no sales" total of 12 rings on March 19 was similar to the total on March 26 (at least 17) and April 2 (10). Bartenders S.B. and G.R. each had comparable "soda" and "no sale rings" while working the Hall on different Thursdays. S.B. had between 10 and 19 "no sale" rings and 25 "soda" rings on March 26. G.R. had 10 "no sale" rings and 24 "soda" rings on April 2. When compared to the sales in surrounding weeks in the Hall and the sales in the Canteen on March 19, the register totals do not suggest that Complainant and V.S. had inordinately high soda and no sale rings or excessively low sales of alcoholic beverages.

With regard to Respondent's audit of Complainant and V.S. for their March 19 shift, Thorpe indicated that all of the liquor that went to the Hall on March 19 was in full, 1-liter bottles. He told DCR that he calculated the approximate number of 1.25-ounce servings for each empty bottle and added in the amount of liquor remaining in other bottles using *Partender* inventory software. This is a visual aid program for mobile devices that approximates the number of servings that remain in a liquor bottle. The program does not scan the actual bottle to determine the amount of liquor remaining, but merely relies on the user's visual appraisal of the contents. The user types in the brand name of the liquor, and an image of the correct bottle appears on the screen. The user then moves a slider bar on the device to match the level he or she sees in the actual bottle, and the software calculates the number of servings used or remaining. Thorpe said that he had never used *Partender* before his March 19 audit of Complainant and V.S., and the Post never used it again. He stated that the Post has not purchased the software, and he used a trial subscription that night, after seeing it featured on the TV show *Bar Rescue.* Thorpe indicated that because the bar sells only single-serving bottles of beer and wine, they were not included in the bottle audit.

When DCR asked Thorpe for information about "bottle audits" for other bartenders, Thorpe replied that Respondent has not conducted another audit of this kind on any other bartenders. He said that while Respondent does not routinely calculate the amount of liquor remaining in bottles at the end of a night, he was able to perform the audit because he knew which bottles of liquor went out to the Hall that night and that all of those bottles were full when V.S.'s shift started. Thorpe did not provide DCR with any evidence confirming that he had a list of all of the bottles that were used

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[9] During his DCR interview, Muckerson asserted that it would be "impossible" for any bartenders to sell 24 sodas in the Hall in one night. He stated that for each shift, the Commander purchases three 1-liter bottles of soda for the Hall. This amount of soda would provide about nine 12-ounce servings, and Muckerson claimed that there was no soda available after this supply ran out. Thorpe disagreed, and told DCR that soda sales are not limited in the Hall, because pitchers of soda can be brought from taps in the Canteen if the Hall runs out of bottled soda.

in the Hall on March 19, that the bottles were all full when V.S.'s shift started, or that bottles were not shared between the Hall and Canteen that night.

V.S., who began work earlier than Complainant that night, told DCR that the bar was already stocked when she arrived to work on March 19. She recalled that some of the bottles were full and some of the bottles were about half empty, which she stated was normal in both the Hall and Canteen. V.S. also told DCR that bartenders routinely share bottles of liquor and that it is common practice for bottles to move back and forth between the Hall and the Canteen.

Thorpe made an audit list for Complainant and V.S. by comparing the amount of each type of liquor he calculated that they used and the department keystrokes (for drink type and pricing level) recorded on their register tape.[10] He believed that on March 19 Complainant and V.S. were pressing the department keys representing cheaper sales while charging patrons for more expensive drinks and placing the difference in their tip jars. He stated that he used the *Partender* software to confirm this suspicion.

Thorpe told DCR that he stressed the importance of using the correct department keystrokes to all bartenders. Complainant and V.S. both told DCR that they and other bartenders pressed any key on the register as long as the bartender entered the correct amount in the register. She explained that if a patron ordered 2 drinks of Ciroc and 3 drinks of Hennessy Cognac (which are priced the same), she might press the key for Ciroc 5 times to ring up the transaction. Regardless of whether they entered the correct department keystrokes, Complainant and V.S. each stated that they entered the correct price in the register for each drink sold, by considering both the type of drink and the authorized price based on membership and rank.

c. Respondent's Written Policies Against Discrimination and Harassment

Complainant and V.S. told DCR that they never received or saw any Post policies about sexual harassment. Muckerson told the investigator that he would provide a copy of the Post's policies about sexual harassment in the workplace. Despite multiple requests, Respondent has not sent DCR copies of any policies or reporting procedures regarding workplace discrimination or sexual harassment. Muckerson also told DCR that the Post does not have all of its policies in writing, and has been trying to rewrite them since receiving the DCR complaint.

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[10] Thorpe said that drinks are divided into a predetermined list of twelve "departments" based on the type of wine, beer, liquor or soda, and that list is further broken down into pricing departments, with different pricing based on various levels of Post membership and rank.

Thorpe told DCR that the Post used a collection of policies promulgated under former Commander Austin's administration, with some minor alterations made by Muckerson. However, Thorpe stated that the Post may have started disseminating the materials after Complainant and V.S. were discharged. He was not sure whether the policies include any instructions about how to file complaints or the potential remedies for violating the policies.

A State-level VFW official told DCR that a request has been made to the National-level VFW to revoke the Post's charter because of on-going concerns about its leadership and fiscal irregularities.

Analysis

At the conclusion of an investigation, DCR 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 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., 498 U.S. 1073. 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). Gender-based discriminatory treatment is "particularly repugnant in a society which prides itself on judging each individual by his or her merits." Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 96 (1990).

Sexual harassment that is "severe or pervasive" is a form of gender discrimination. See Lehmann v. Toys 'R' Us, 132 N.J. 587, 603 (1993). The New Jersey Supreme Court has stated that to establish a *prima facie* claim of sexual harassment, a complainant must show that the harassing conduct (1) would not have occurred but for the complainant's gender and (2) was severe or pervasive enough (3) to make a reasonable woman perceive that the conditions of employment are or the work place is hostile or abusive. Id. at 603-04.

Moreover, our Supreme Court has noted that when assessing how a reasonable woman would view her working conditions, factfinders should be mindful that an employee's "work environment is affected not only by conduct directed at herself but also by the treatment of others . . . Evidence of sexual harassment directed at other women is relevant to both the character of the work environment and its effects on the complainant." Id. at 611.

With regard to Complainant's harassment claim, there is sufficient evidence that the harassment was severe and/or pervasive enough to create a reasonable suspicion that Complainant was subjected to a sexually hostile work environment. Complainant stated that Smith frequently harangued her about her body and physical appearance in a demeaning manner. She expressed that Smith's comments made her feel sad and frustrated and that she dreaded working at the Post because she knew Smith would make insulting comments of a sexual nature about her appearance. She told DCR that her multiple complaints to Muckerson about Smith's sexually harassing behavior were never addressed and that Smith continued to make inappropriate and unsettling comments to her throughout her tenure as a bartender at the Post. The severity of Smith's conduct is enhanced by his position as Complainant's supervisor. See Taylor v. Metzger, 152 N.J. 490, 503-04 (1998) (noting that where the harassing conduct is perpetrated by the employer or supervisor, it greatly enhances the severity of the harassment).

Complainant also told DCR that she was present on multiple occasions when Muckerson and Smith made demeaning comments about other female bartenders' bodies. Further, multiple witnesses, several of whom are patrons and/or former officers of the Post, corroborate Complainant's contention that the bartenders are subjected to both verbal and physical harassment based on their gender. Former Commander Austin confirmed that a number of female employees and members complained to him that the environment at the Post was hostile and abusive to women under Muckerson's command. The statements provided by Complainant and these witnesses are sufficient to make a cautious person believe that the harassment is pervasive, and the forms of harassment that they describe could make a reasonable woman think that the conditions at the Post are hostile or abusive. The DCR investigation also found evidence supporting Complainant's statements that the Post command did nothing to change the work environment despite knowing that it was sexually hostile in nature.[11]

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[11] While Complainant's allegations were framed as a hostile working environment, the underlying factual allegations, if proven, may also make out a case of sex discrimination under a quid pro quo theory. "Quid pro quo sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual

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 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. 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).]

Here, Respondent provided no evidence that it disseminated to employees or enforced an anti-discrimination or anti-harassment policy during Complainant's employment. In addition, the investigation showed that when Respondent's prior administration took action in response to reports of sexual harassment, its method (putting the decision to a vote by members) was neither consistent with the LAD nor an effective remedy. The Director finds, for purposes of this disposition only, that Respondent has not established the affirmative defense.

The LAD also prohibits employers from retaliating against employees for opposing any act forbidden by the LAD. N.J.S.A. 10:5-12(d). To set forth a prima facie case of discriminatory retaliation, a complainant must show that: "(1) [he or she] engaged in a protected activity known by the employer; (2) thereafter their employer unlawfully retaliated against them; and (3) [his or her] participation in the protected activity caused the retaliation." Craig v. Suburban Cablevision, 140 N.J. 623, 630-31 (2001) (citations omitted).

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demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences." Lehmann, supra, 132 N.J. at 601. Complainant is not precluded at any subsequent hearing from relying on a quid pro quo theory to establish sex discrimination.

Complainant engaged in LAD-protected activity when she complained to Muckerson about Smith's sexual harassment, and again when she complained to Muckerson that his choice to give her Sunday shift to S.B. (a bartender who had allegedly given in to Muckerson's sexual advances) was unfair. The proximity in time between her complaint to Muckerson and the termination of her employment is sufficient to demonstrate a causal connection between the protected activity and the adverse action. Abramson v. William Paterson Coll., 260 F.3d 265, 288 (3d Cir. 2001). Additionally, the fact that Muckerson, the individual who engaged in some of the discriminatory conduct, made the final decision to discharge Complainant militates in favor of finding a causal nexus between Complainant's objection to Muckerson's discriminatory actions and the final adverse action. See Maddox v. City of Newark, 50 F.Supp.3d 606, 623 (D.N.J. 2014) (noting that causation exists where the individuals displaying discriminatory animus partake in or influence the decision to terminate).

Further, Complainant, V.S., and K.D. were the only employees who reported being sexually harassed during Muckerson's administration and they were the only ones fired. In addition, despite evidence that the total sales in both the Canteen and the Hall were low on March 19, Muckerson ordered Thorpe to audit only Complainant and V.S., the two bartenders who had engaged in activities protected by the LAD. During the investigation, K.D. told DCR that Muckerson threatened to treat her in the same manner as V.S. and Complainant (i.e., terminate her employment) if she complained about the sexually hostile work environment at the Post; in doing so, Muckerson insinuated that Complainant and V.S.'s discharge was directly related to their decision to stand up against the sexual harassment that pervaded the Post.

When considered in tandem with the brief time interval between Complainant's allegation to Muckerson that he treated her unfairly and the termination of her employment, these factors further solidify the foundation of the bridge connecting Complainant's discharge to her engagement in a protected activity. See Farrell v. Planter's Lifesavers Co., 206 F.3d 271, 283-84 (3d Cir. 2001) (stating that employee may offer a broad array of evidence to establish a causal link for purposes of the prima facie retaliation claim).

Respondent articulated a legitimate, non-discriminatory reason for its action; namely, it contended that Complainant was discharged for theft. However, the investigation did not fully support that explanation. Although Respondent contends that Complainant placed more money in her tip jar than in her register on March 19, in their interviews with DCR, neither Oliver nor Thorpe stated that they personally witnessed Complainant placing more money into her tip jar than into the register. The cash register data that Respondent provided did not support its claim that Complainant's and V.S.'s sales for March 19 were disproportionately low. The Canteen's sales for that night were similarly low when compared to other Thursday nights, and despite those low

sales, Respondent did not audit, discipline or fire the bartenders working in the Canteen that night. The investigation also showed that bartenders S.B. and G.R. accrued similar totals of "soda" and "no sale" rings while working the Hall on other Thursday evenings. Respondent did not audit, discipline or fire either of those bartenders. Complainant and V.S. are the only bartenders that Respondent has ever audited using *Partender* software. Thus, the investigation uncovered evidence sufficient to create a reasonable suspicion that Respondent's proffered non-discriminatory reason for terminating Complainant's employment was a pretext, and that Respondent instead terminated Complainant's employment in retaliation for her complaints about Smith's sexually harassing behavior, and about losing a shift to a bartender who responded favorably to Muckerson's sexual conduct. See Young v. Hobart West Group, 385 N.J. Super. 448, 465 (App. Div. 2005).

Based on the above, the Director finds 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 the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56.

DATED: 6-6-17

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS