STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. ED15RB-64854

Jennifer Lewis,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Divers Academy International,	)	
	)	
Respondent.	)	

On October 17, 2014, Camden resident Jennifer Lewis (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Divers Academy International (Respondent), discriminated against her based on race 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 in their entirety. DCR's ensuing investigation found as follows:

Respondent, which is located at 1500 Liberty Place, Erial, Gloucester County, describes itself as "one of the nation's leading commercial diving schools, providing an excellent education in inland and offshore dive disciplines, including underwater welder training, non-destructive testing (NDT), ROVs, and more."

On August 15, 2014, Complainant applied for the position of Financial Aid Advisor and interviewed with Respondent's owner/director, Tamara Brown.

On August 18, 2014, Brown sent an email to Complainant offering her the position of Financial Aid Director with an annual salary of $52,000. This was a higher-level position with a higher salary than the position Complainant sought in her application.

On August 25, 2014, Complainant began working for Respondent. The next week, Brown fired her. The parties disagree as to the reason for the discharge.

Complainant alleges that she was fired because Brown saw a photocopy of her driver's license and realized that she lived in Camden, not Collingswood (as listed on her résumé). She alleges that Brown fired her saying, "I don't trust people from Camden. They are below my standards. They are a bunch of criminals. When was the last time you had a criminal background check?"

Respondent told DCR that Complainant was fired for failing the pre-employment drug test[1] and for violating the "company's policy on cell phone use" despite being "repeatedly reminded that she should not text during work hours." See Respondent's Responses to Document and Information Requests, Jan. 23, 2015, p.1.

In the course of the investigation, DCR determined that Respondent fired Complainant before it received the results of her drug test. When DCR apprised Brown of the discrepancy, she acknowledged that it was not an accurate explanation for the separation. She stated that she referenced the drug test in response to Complainant's application for unemployment benefits "to keep it simple."[2]

Brown maintained, however, that Complainant was fired because she was continually using her cell phone instead of working. Brown also stated that Complainant yelled at people on her cell phone, which Brown found to be disruptive. Brown stated that she summoned Complainant to her office and said, "This isn't going to work out," and that Complainant replied,

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[1] The result of the test was, "Invalid Result: Oxidant Activity." Quest Diagnostics, which performed the drug test, told DCR that the result occurs "when a positive, negative, adulterated, or substituted result cannot be established for a specific drug or specimen validity test." See Letter from D. Faye Caldwell, Esq. to Investigator Bland, Mar. 19, 2015. Quest stated that the Complainant's nitrite levels were elevated in her urine specimen, which "may result from intentional adulteration of the urine specimen, certain prescription medications, or an unknown endogenous substance in the donor's urine that prevents the testing laboratory from obtaining a valid drug test result." Ibid.

[2] On a New Jersey Department of Labor & Workplace Development, "Request for Separation Information," Respondent was asked to provide the "reason for separation." Brown replied, "Terminated: Failure to meet pre-employment testing requirement." See NJ Dept. Labor, Claimant Jennifer Lewis, Form BC-28 (undated).

"Is it because I'm from Camden?" Brown denied making any disparaging remarks about Camden residents.

DCR asked Respondent for a copy of its policy on cell phone use. No such policy was produced.

According to recent U.S. Census data, the overwhelming majority of Camden residents are minorities. Brown succeeded her parents as the owner/operator of the business. There is no indication that Brown ever hired anyone from Camden during her tenure as director.

Analysis

The LAD recognizes that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State." N.J.S.A. 10:5-3; see also Fuchilla v. Layman, 109 N.J. 319, 334 (1988) (noting that the "overarching goal of the [LAD] is nothing less than the eradication of the cancer of discrimination"); L.W. v. Toms River, 189 N.J. 381, 399 (2007) (noting that "[f]reedom from discrimination is one of the fundamental principles of our society"); cf. Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (noting that anti-discrimination laws "plainly serve compelling state interests of the highest order").

The New Jersey Supreme Court recognizes two distinct theories of discrimination under the LAD: "disparate treatment" and "disparate impact." See Gerety v. Hilton Casino Resort, 184 N.J. 391, 398 (2005) (citing Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81-82 (1978)).[3]

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[3] The verified complaint alleged disparate impact discrimination, and for that reason, the investigation did not fully investigate any possible race-based differential treatment. To the extent that evidence presented at a hearing on the merits may show that Respondent held Complainant to a higher standard than employees of other races, or otherwise treated her less favorably than similarly-situated employees, the verified complaint may be amended to conform to the evidence. N.J.A.C. 13:4-2.9 (d).

"Disparate treatment" in the employment context means that an employer treats some workers or job applicants less favorably than others because of their race, sexual orientation, or some other protected characteristic. In such cases, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere facts of differences in treatment." Ibid..

"Disparate impact" refers to "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." See Hedges v. Board of Ed., Manchester, 399 N.J. Super. 279, 287 (App. Div. 2007) (citing International Bd. of Teamsters v. United States, 431 U.S. 324, 355 n.15 (1977)). To prevail in a disparate impact case, the plaintiff is not required to prove that the employer was motivated by a discriminatory animus. Gerety, supra, 184 N.J. at 399. Instead, a plaintiff must show that a facially neutral policy "resulted in a significantly disproportionate or adverse impact on members of the affected class." Ibid. (quoting United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 47 (App. Div.) certif. den, 170 N.J. 390 (2001)). For example, a company that requires all job applicants to be over six feet tall may not be intentionally discriminating against females. However, such a height requirement might disproportionately impact females who are shorter on average than males. In that case, to survive a claim of disparate impact discrimination the employer would have to show that the height requirement was "related to the position and consistent with a business necessity." See Hedges, supra, 399 N.J. Super. 279, 287-88.

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. Probable cause for purposes of this analysis means a "reasonable ground for suspicion supported by facts and circumstances strong enough 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" in which 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), certif. 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.

In this case, Complainant alleges that Brown offered her a higher position and salary than that for which she applied, but fired her a week later after realizing that she lived in Camden, not Collingswood. Complainant alleges that Brown made clear that she would not hire or retain people from Camden because she viewed them as untrustworthy and criminals.

Respondent denied making any such assertion and initially claimed that Complainant was fired for failing a drug test and violating its "policy on cell phone use." During the course of the investigation, Respondent admitted that the drug test explanation was untrue. Respondent failed to produce a copy of its cell phone policy. Its failure to do so, despite requests, allows the Director to draw an adverse inference that no such policy exists. Cf. Scanlon v. General Motors, 65 N.J. 582, 599 n.7 (1974) (citing McCormick, Evidence § 272, p. 656 (2d ed. 1972)).

To be clear, DCR is not finding that Brown harbors a general bias against African-Americans. There is no dispute that Brown was fully aware that Complainant was African-American when she hired her at a higher title and salary than Complainant requested, and entrusted Complainant to head the financial aid operations of her family business. Those do not appear to be the actions of someone with a discriminatory motive. However, a "disparate impact claim" can exist even where—as here—there is no evidence of employer's discriminatory motive. Our Appellate Division recently declared that the LAD "forbids the use of any employment criterion, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group

entitled to equal opportunity." Schiavo v. Marina Dist. Devel. Co., 442 N.J. Super. 346, 369 (App. Div. 2015); see also Rosario v. Cacace, 337 N.J. Super. 578, 587 (App. Div. 2001) (noting that the "disparate impact test has been applied to hiring criteria").

Guided by those principals, the Director finds—for purposes of this disposition only—as follows: Where a Gloucester County employer has a policy of automatically disqualifying tens of thousands of Camden residents from consideration for potential employment based solely on their address, it has a disparate impact on minorities who make up the overwhelming majority of Camden residents. Given that Respondent: (1) has recanted one of its explanations for the personnel decision at issue (i.e., failed drug test); (2) has not produced any persuasive evidence to support its other explanation (i.e., violation of cell phone policy); (3) does not appear to have ever hired anyone from Camden during Brown's tenure as director; and (4) does not assert that a refusal to employ Camden residents is justified by a business necessity, the Director is satisfied at this threshold stage of the process that there is enough to 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. Accordingly, it is found that PROBABLE CAUSE exists to credit the allegations of disparate impact discrimination.[4]

DATE: 12-24-15

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

[4] Perhaps a different conclusion would have been reached if Respondent had stated that it fired Complainant for knowingly putting false information on her résumé. But Respondent never asserted any such explanation.