STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL03SB-66490

Victoria Muller,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Advanced Business Systems LLC,	)	
	)	
	)	
Respondent.	)	

On June 5, 2017, Pennsylvania resident Victoria Muller (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Advanced Business Systems LLC (Respondent), fired her because of her pregnancy, 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.

Summary of Investigation

Respondent, with its principal offices in Hamilton, New Jersey, provides printer, computer, and networking services to customers in the NJ/NY/PA area. On September 13, 2016, it hired Complainant to work as its full-time office administrator for $15/hour. Complainant was responsible for answering the telephone, scheduling job assignments, and entering invoices into accounting software called QuickBooks. She reported to owner/computer technician Michael Ravalli and manager/computer technician Alexander Magby.

On March 23, 2017, Complainant announced to Ravalli that she was pregnant. Complainant alleges after that announcement, he began to criticize her work.

On April 24, 2017, Ravalli told Complainant that she was being let go due to a slow-down in business. The next day, Complainant saw an online job posting by Respondent for her office administrator position. Complainant alleges that she was replaced by a non-pregnant woman, Jessica W., at a higher rate ($17/hour), and concluded that she was fired because of her pregnancy.

Respondent denied the allegations of pregnancy discrimination in their entirety. It told DCR that Complainant was simply the unfortunate victim of a business slowdown. Respondent produced documentation that its April sales totaled $17,339.26, representing a 23% drop from the previous month's sales of $22,440.77.

Owner Ravalli told DCR that given the business's fiscal realities, he found himself in April 2017 faced with the option of either discharging Complainant or Magby. He suggested that both were valued employees but he ultimately decided to keep Magby based on the practical calculation that Magby could perform computer technician work as well as office duties, whereas Complainant could only perform the latter. Ravalli insisted that the decision had nothing to do with her pregnancy.

Ravalli denied that Jessica W. served as a replacement for Complainant. He argued that she was hired only to perform receptionist duties, not Complainant's broader office administration duties, which had been delegated to Magby.

During the course of the investigation, Respondent introduced an alternative rationale for its personnel decision. It argued that Complainant was fired for poor performance. Ravalli told DCR that he did not mention those performance issues to her because he "did not want her to feel bad." When DCR requested evidence of her poor performance, Respondent produced a vendor email from January 2017, which suggested that Complainant had allowed an account to fall into collections. Respondent agreed to provide additional vendor emails but never did so. When DCR followed up on the outstanding documentation, Magby stated that Respondent's servers crashed in late summer 2017, causing all relevant emails, except the one previously provided, to be lost. Ravalli stated Respondent's servers crashed in mid-November 2017. Respondent acknowledged that it never issued Complainant any written complaints, write-ups or reprimands.

Magby told DCR that he was not involved in the decision to discharge Complainant. He stated that Ravalli came to him approximately fifteen minutes before firing Complainant and stated that he could not afford to keep her. Magby prepared Respondent's Answer to the Verified Complaint. There, he wrote that Complainant was let go due to a "slow-down in business" and because it was "no longer profitable to keep her on board." However, during the course of the investigation, Magby echoed Ravalli's statement that Complainant was fired for poor performance. When asked why he did not cite performance as a reason for termination in Respondent's Answer, he replied that he just wrote what was he was told.

Magby stated that after Complainant's departure, he posted an online advertisement for a full-time office administrator at Ravalli's direction. He stated that the office administrator posting was later removed and replaced with a posting for a full-time receptionist, again at Ravalli's direction.

Magby initially stated he was unsure of why Jessica W. was paid at a higher rate. During a subsequent discussion, he stated that her higher pay rate was justified because she had web development experience, and he and Ravalli were hopeful that she could assist with the company's website. Magby acknowledged that Wilson never assumed any duties related to the website.

Jessica W. told DCR that she was responsible for answering the telephone, scheduling work assignments, and entering invoices into the accounting software. She confirmed that she worked full-time and was paid $17/hour. She stated that she resigned after a few months.

Analysis

The LAD prohibits employers from discharging employees based on pregnancy. N.J.S.A. 10:5-12(a). Our courts have described the evidentiary burden to establish a *prima facie* case of employment discrimination case as being "rather modest." See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir 1996)). A complainant must merely show that she was (a) a member of a designated protected class; (b) qualified for and performing the essential functions of the job; (c) discharged; and that (d) the employer proceeded to seek out other individuals to fill the position. Victor v. State, 203 N.J. 383, 409 (2010).

If a complainant makes that modest *prima facie* showing, the employer may respond by producing a legitimate, nondiscriminatory reason for its personnel decision. Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 368 (App. Div. 2015). If the employer meets that burden of production, the issue becomes whether the proffered explanation was genuine or "merely a pretext for discrimination." Id. at 368-69.

For purposes of this disposition only, DCR is satisfied that the *prima facie* elements are met. Complainant was pregnant, performing the essential functions of her job, and fired after announcing her pregnancy. Respondent argues that Jessica W. did not replace Complainant, but was instead hired in a more limited role. However, Magby acknowledged posting an online advertisement for an office administrator after Complainant was discharged. And although Respondent argues that Jessica W. was merely a receptionist as opposed to an office administrator, DCR's interviews with Ravalli, Magby, and Jessica W. support the claim that she performed similar—if not identical—duties as Complainant and at a higher hourly rate.

DCR is also satisfied that Respondent produced a legitimate non-discriminatory explanation for its personnel decision. In its initial pleading, Respondent stated that Complainant's discharge was necessitated by a significant decline in overall revenue. In support of that position, Ravalli told DCR that given a downward turn in sales, he was faced with the unfortunate option of either firing Complainant or Magby and that he ultimately chose to keep Magby because he had a broader skill set. Respondent produced profit and loss statements to support Ravalli's claim that April 2017 sales fell by 23% from the previous month.

Given that purportedly bleak fiscal situation, DCR asked Respondent to justify its decisions to post an advertisement for an administrator position the day after Complainant was fired and subsequently hire Jessica W. to perform Complainant's job at a higher hourly rate. At that point, Respondent appeared to modify its rationale for the personnel decision. Ravalli alleged that Complainant had actually been fired due to poor work performance.

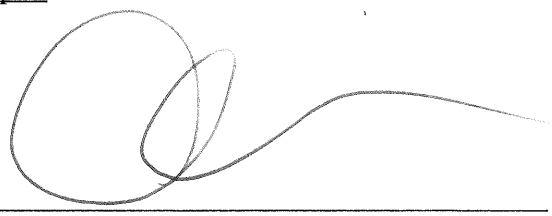
DCR asked Ravalli to provide any evidence to support that claim that she was fired for performance issues. Respondent acknowledged that it never issued any written complaints, write-ups or reprimands to Complainant memorializing her poor performance. Respondent produced one vendor email from January 2017, which suggested Complainant had allowed an account to fall into collections. At that time, Respondent told DCR that it would provide additional vendor emails demonstrating how Complainant's performance had negatively impacted Respondent's accounts and professional reputation. It never did so. When DCR followed up on the outstanding documentation, Magby stated that a server crash occurred in summer 2017, prior to DCR's site visit on November 3, 2017. Yet he made no mention of the crash when the investigator requested that Respondent produce additional emails during the November 3, 2017 visit—i.e., at a time when one would reasonably be expected to raise the issue. Ravalli, on the other hand, claimed that the server crash occurred in mid-November 2017, i.e., *after* DCR's site visit. Both Magby and Ravalli claimed that the server crash left Respondent unable to provide additional evidence to support its claim that Complainant was terminated for poor performance.

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. It is merely an initial "culling-out process" in which 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.

Here, in view of the prevailing legal standards and circumstances of this case, including but not limited to the fact that within days after firing Complainant because the payroll could not support her salary, Respondent posted an online advertisement for her vacated position, and subsequently hired a non-pregnant employee to perform her same duties at a higher hourly rate, and the seemingly evolving explanation for the personnel decision at issue, inconsistencies in the witnesses' statements, and absence of support for Respondent's positions, DCR finds that probable cause exist to credit the allegations of pregnancy discrimination.

Should this matter not be resolved during the required conciliation process, N.J.S.A. 10:5-14, it will proceed to the Office of Administrative Law for an evidentiary hearing where the parties will have an opportunity to present evidence in support of their positions and respective versions of events before an administrative law judge, who will take testimony and evaluate the credibility of the witnesses, among other things. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988); N.J.A.C. 13:4-11.1(b). But at this threshold stage of the process, DCR 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." Frank, supra, 228 N.J. Super. at 56.



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Craig Sashihara, Director
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