

STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
DOCKET NO. EL113WB-64770-A

|                               |   |                                  |
|-------------------------------|---|----------------------------------|
| S.D.,                         | ) |                                  |
|                               | ) |                                  |
| Complainant,                  | ) | <u>Administrative Action</u>     |
|                               | ) |                                  |
| v.                            | ) | <b>FINDING OF PROBABLE CAUSE</b> |
|                               | ) |                                  |
| PNC Bank and Carlos Yepez,    | ) |                                  |
| Branch Manager, Individually, | ) |                                  |
|                               | ) |                                  |
| Respondents.                  | ) |                                  |

This is an employment discrimination case. Mercer County resident S.D. (“Complainant”) filed a verified complaint with the New Jersey Division on Civil Rights (“DCR”) alleging that her former employer, PNC Bank, and former supervisor, Carlos Yepez, (collectively “Respondents”) discriminated against her based on gender and age, and then fired her for reporting sexual harassment, 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**

PNC is a financial institution headquartered in Pittsburgh, Pennsylvania, with hundreds of branches in New Jersey. In July 2009, it hired Complainant to work as a full-time Customer Service Representative/Branch Financial Sales Consultant at its Somerset branch for \$26,900/year.

In July 2010, it promoted her to assistant branch manager and assigned her to work at its West Windsor branch under Branch Manager Carlos Yepez. At the time, she was 61 years old and Yepez was 32. Complainant stated that they had a good relationship at first. She said they discussed personal issues, met each other’s families, and she considered him to be like a son. She told DCR that in 2010, Yepez called her approximately twenty times at home just to chat. She stated that he liked to gossip about other employees’ personal lives.

She stated that in July 2011, they were talking in her office when he closed the door and appeared to be crying. She said that when she asked what was wrong, he replied that he did not want to be married anymore, and that if it were not for the children, he would not be with his wife any longer.

She stated that their relationship changed in early to mid-2011 when Yepez began making inappropriate remarks to her when no one was within earshot, which progressed to sexual conduct. For example, she alleged that Yepez told her she was attractive at least a dozen times and on a couple of occasions commented that she had "nice legs." She alleged that on about five or six times, he stated that he wanted "to do" her.

Complainant alleged that in the fall of 2012, she was sitting at her desk in the branch lobby wearing a dress with zippers. She said that Yepez came up behind her, unzipped the back of her dress halfway down and laughed. She said that she said in effect, "Carlos, what are you doing?" and quickly ducked into a nearby office to pull up her zipper before returning to her desk. She said that a few minutes later, Yepez walked by again and unzipped her dress halfway down. She said that she quickly retreated back into the nearest office, pulled up her zipper, and returned to her desk.

Complainant alleged that on another occasion in late fall of 2012, Yepez approached her from behind in the branch lobby, squeezed the fabric on the back of her dress and intentionally unhooked her bra. She said that she shouted "Carlos!" to make him stop. She said that he laughed.

On December 19, 2013, Complainant attended a nighttime Christmas party for branch employees hosted by Yepez in his basement. The basement is L-shaped with a kitchen, pool table, and movie theater in the main area, and a guest bedroom around a corner. The party was held in the main area. The employees played games such as beer pong and charades, had a gift exchange, ate food, and drank alcohol.

Complainant alleged that during the party, an intoxicated Yepez placed his arm around her shoulder and gave her a tour of the basement. She alleged that he walked her into the guest bedroom and asked her if she wanted to "fuck around." Complainant said that she replied, "I'm going to leave now before you do or say anything that you are going to regret tomorrow," and left the party. She said that she felt particularly uncomfortable because Yepez's wife and children were upstairs. Complainant said that no one witnessed this incident.

Complainant alleged that the next day, she and Yepez were in the branch kitchen when she asked him if he remembered what he said to her at the party. She said that he replied that he was drunk but recalled what occurred, and told her that she was very attractive and that he was in love with her. She said that she replied, "You are not," and that he said, "Just kidding." She said that later that day, she asked him again if he remembered what he said, because it bothered her. She said that he replied, "Yes," and reiterated that he was drunk.

Complainant stated that she told her friend Jane Smith and her daughter, N.R.,<sup>1</sup> about those incidents shortly after they occurred.

Complainant told DCR that after she rebuffed his advances at the Christmas party and tried to confront him about it the next day, Yepez tried to “manage her out” of PNC “to save himself.” She stated that he created a “hostile work environment” and would intentionally exclude her from “management issues” by, for example, telling her that she did not need to know about conversations with customers, and that she should not “ask questions.” She alleged that Yepez cursed at her, randomly changed her schedule, and called her “senile,” which she understood to be a reference to her age.

Complainant said that in March 2014, she and Yepez decided to meet with Regional Manager Michael Corbett to tell him that they did not want to continue working together. Complainant said that just prior to the meeting, Yepez suggested that they tell Corbett that they had feelings for each other, which would force Corbett to transfer her. When Complainant agreed, Yepez said that he was just joking.

Complainant stated that during the meeting, she asked Corbett for a transfer and he told her that she and Carlos needed to “make it work,” but he would get back to her. Complainant told DCR that she did not tell Corbett about Yepez’s inappropriate touching and sexual overtures because she did not want to get him in trouble or jeopardize his job due to concerns about his family. Yepez told DCR that Corbett knew that Yepez had asked Regional Manager Carole Bursac<sup>2</sup> to transfer Complainant in October 2012.

Complainant told DCR that in March 2014, she told Sales & Service Support Manager Colleen Brannagan that she wanted to leave PNC because Yepez usurped her authority, belittled her in front of the staff, and instructed staff to not listen to her.

---

<sup>1</sup> N.R., who also worked as a PNC branch manager, told DCR that Yepez sexually harassed her as well. N.R. said that Yepez tried to kiss her several times in the summer of 2011. She said that one incident occurred during a branch manager party at his home. She said that Yepez tried to kiss her while showing her the movie theatre in his finished basement. She said that when she rejected his advance, he offered to show her his gun collection, and because she wanted to get out of the basement, she agreed. She said that she was surprised to find Yepez leading her to his bedroom where his guns were hanging in a closet. She said that he pushed her on the bed and tried to kiss her.

N.R. stated that Yepez also tried to kiss her at a work picnic at the home of another branch manager. She stated that on another occasion, when she was at his branch for a meeting, Yepez commented that he could not see any panty lines through her fitted dress, and asked if she was wearing panties. N.R. stated that she walked away. N.R. told DCR that she did not report those incidents because she planned on leaving the bank, and did not tell Complainant about them because she was embarrassed.

<sup>2</sup> In 2013, Bursac was replaced by Regional Manager Michael Corbett.

Complainant alleged that Yepez continued to make her the brunt of office jokes. She said that on May 13, 2014, he came up behind her while she was sitting at her service desk, put his hands on her back, and pushed her off her chair into the computer monitor causing her to break a fingernail. She said that Yepez asked, "Oh my, how were you sitting?"

On May 22, 2014, Complainant spent the morning working at another branch when she called Yepez from her car's Bluetooth speaker. Yepez answered on his car phone. He was travelling to another branch with Business Banking Relationship Manager Anwar Jones. Complainant told Yepez that she wanted to skip lunch and go home, and Yepez responded that she needed to return to the West Windsor branch for the rest of the day. Complainant initially resisted, but eventually said, "Fine, I will go." After Complainant thought that she disconnected the phone, she said, "Fuck you." Complainant said that she did not intend for Yepez to hear her, and did not know that Jones was in the car at the time.

That day, Yepez reported the incident to Employee Relations Specialist Jacqueline Ardito in Respondent's Employee Relations Unit. On May 28, 2014, Ardito contacted Complainant to discuss the incident. Ardito's notes of their discussion state in part:

[Complainant] admitted making the statement "fuck you" to her manager, Carlos Yepez and stated "I thought that I disconnected from the call, I didn't . . . I apologized but I said it." [Complainant] then stated that she had additional information to share regarding Carlos's behavior. . . . [H]e curses at her constantly, unzipped her dress and unsnapped her bra in the past . . . Carlos had asked her to fool around at a party he hosted at his home.

Ardito referred the sexual harassment allegation to Employee Relations Senior Investigator Janice Law. Respondent placed Complainant on paid administrative leave while Law investigated the matter. Complainant told Law about the zipper incident, bra-unhooking incident, Christmas party, and the computer incident, among other things. Complainant stated that Law instructed her to not contact any PNC employees during her investigation.

On June 23, 2014, PNC issued a "Final Written Warning for inappropriate workplace conduct" to Yepez. The warning noted in part:

[Y]ou acknowledged that you touched a female employee when you handled the zipper on her dress . . . You have also disrespected the "personal space" of a direct report, when pushing her in the back while she was sitting at her desk, causing her to lose her balance . . . You showed a lack of good judgment when holding a branch Holiday Party at your personal residence home and when, over time, you engaged in conversation of a personal nature with a subordinate.

The warning required Yepez to attend a "Managing with Respect in the Workplace training class within 30 days."

Based on PNC records, it appears that in response to that final warning, Yepez took an on-line management training class on August 7, 2014. It also appears that PNC issued three prior written warnings to Yepez on July 14, 2011, May 25, 2013, and March 31, 2014, for management, leadership, performance and conduct issues.

Complainant told DCR that on June 24, 2014, she received a telephone call from Law, Ardito, and Regional Manager Corbett, announcing that the investigation of her allegations against Yepez was complete, and that some of what she told them was confirmed, and other things were not. She said that they assured her that “appropriate action” was taken against Yepez but provided no specifics. She said that during that same call, Corbett informed her that she was being fired for using profanity towards Yepez. Complainant’s discharge was effective on June 25, 2014. She was replaced by C.K., who was 53 years old.

On February 2, 2015, Corbett rated Yepez as “meets all expectations” in his annual performance review for 2014. That was an improvement over his prior three years—he was evaluated as “meets some expectations” in 2011, 2012 and 2013.

In February 2016, PNC promoted Yepez to Business Banking Relationship Manager covering five branches.

Complainant, who was 65 when she was discharged, found it significant that Yepez, who was 36 at the time, was not similarly fired or even suspended for substantiated acts of wrongdoing, but she was discharged for one unintentional act of misconduct. She contends that she was the victim of gender and age discrimination, and retaliation.

Respondents denied the allegations of discrimination and retaliation in their entirety. They argued that they “promptly investigated and determined that Complainant's claims were unfounded.” See Verified Answer, Sept. 24, 2014, p. 5. They argued that Yepez did not unzip “Complainant’s dress during working hours.” Id. at 3. Instead, they argued, he merely “zipped up her dress in the lobby of the bank branch at some point in 2012 when he observed that the zipper on the back of her dress was down approximately three inches.” Ibid. They argued that Yepez was never alone in a room with her during the Christmas party and denied that he touched her inappropriately or ever made any profane or inappropriate remarks to her. Id. at 4. They stated, “[I]n 2013, Complainant told Yepez that she had feelings toward him. Yepez rebuffed her advances and Complainant subsequently stated she was joking about having feelings for him.” Ibid.

Respondents produced a copy of Law’s investigation report. Law wrote that Complainant told her that she and Yepez “were closer than co-workers should be, nothing more.” Law wrote in part:

[Complainant] said they were friends, she loved his family. She said it may be her Italian heritage, she loves people and tells them. Carlos and she would tell

each other about their families and she said looking back at it, that probably wasn't a good idea. She recalled another time when they were in Carlos' office and he got tears in his eyes and she asked what was wrong. He said "It's Brenda. I don't want to be married anymore" and [Complainant] told him that everyone goes through that and they talked about it. [Complainant] said these are the kinds of things they would talk about that was more than co-workers should talk about. I asked her if she ever shared with Carlos that she may divorce and she said no. She would discuss that she and her husband had their ups and downs and would talk about their arguments with Carlos . . . [Complainant] said she has never wanted anything physical with Carlos and she has never said anything inappropriate to him.

Law wrote: "[Complainant] said PNC let her down. I asked her how. She said if Mike Corbett had done more to find her another place to work. She and Carlos told Mike it wasn't working and Mike said they needed to make it work and he said he'd get back to her and he didn't." Corbett reportedly told Yopez that PNC "didn't have any place to move her." Law wrote, "[Complainant] said he relayed that through Carlos and didn't contact her personally."

Law memorialized her discussions with some current employees regarding Complainant's allegations of sexual harassment.

Branch employee Jeff Sabo purportedly told Law that in or around April 2014, Complainant told him that Yopez asked her to have sex with him at the Christmas party, but Sabo was not sure if he should believe her because Yopez's family was upstairs. Sabo purportedly told Law that he witnessed "small levels of inappropriateness, like closeness" between Yopez and Complainant including the two being "shoulder to shoulder" in Yopez's office. Law wrote that Sabo said that "there is a levity in the branch . . . [Sabo] said Carlos does joke around to make people more relaxed."

Branch employee Grethe Carmichael purportedly told Law that branch employees joked that Complainant had a crush on Yopez but stated that she never witnessed "anything overly flirty." Carmichael purportedly felt that Complainant "was always looking for Carlos' attention . . . [and] was in his office a lot."

Sales and Service Support Manager Colleen Brannagan purportedly told Law that in 2012 she spent every Friday at the West Windsor branch to help improve branch performance. Law wrote:

She said [Complainant] was unhappy and crying, but she didn't recall the specifics. . . . [Brannagan] said [Complainant] was unhappy and didn't feel valued and wanted [Brannagan] to listen. [Brannagan] asked [Complainant] if she had spoken to Carlos about it and how it makes her feel and [Complainant] had not. [Brannagan] coached [Complainant] to speak with Carlos first. He may not

realize how it makes her feel. [Complainant] never said there was a relationship between her and Carlos. There was a time Carlos said [Complainant] made him feel uncomfortable with her flirtiness, but he didn't tell [Brannagan] what [Complainant] did or said. [Brannagan] knows Carlos did speak with Carol[e] Bursac, the regional manager. Carol[e] is no longer with PNC.

Law wrote that Brannagan stated that Complainant sent her a text message in or around March 2014 asking if there were any open positions because "she was unhappy and wanted out of the branch."

Branch employee Liza Bonilla described the May 2014 computer incident to Law as Yepez "playing around." Law wrote that Bonilla "recalls seeing Carlos walk up behind [S.D.] while [S.D.] was at the Service Desk and push her in the back. She said they were playing around and kidding. She said Carlos and [S.D.] were always kidding around."

Branch employee Jolecia Ames stated that Yepez gave Complainant a "playful nudge" and that Complainant said she broke a nail but did not seem upset. Ames also told Law that Complainant would bend over a table in Yepez's office wearing low-cut shirts. Law wrote, "Carlos told Jolecia that [S.D.] has told him she had feelings for him." Law wrote, "Jolecia said Carlos occasionally joked around with [S.D.] and others . . . to keep the atmosphere light and relaxed."

Law wrote that Human Resources Business Partner Merrill Reilly stated that during the summer of 2013, Regional Manager Bursac went to the West Windsor branch to talk to Yepez and Complainant because Bursac believed that Complainant had a "crush" on Yepez, and Bursac was "reluctant to tell Jim Kim, the market manager." Reilly told Law that after the meeting, Bursac told Reilly that everything was "okay," without elaborating.

As to the decision to fire Complainant, PNC's records indicate that on the day of the car phone incident, Yepez called its Employee Relations Unit for guidance, and relayed his version of the incident. Employee Relations Specialist Ardito's "initial call summary" noted that Yepez stated that he planned to meet with Complainant to "discuss what [she] said further," and that he planned to fire her if she "admitted to saying the profanity." Ardito noted that she told Yepez that the incident would be assigned to an Employee Relations Specialist, and instructed him to not discuss the matter with Complainant in the interim. That document notes that on June 19, 2014, a person or persons (the identity is redacted) made a "recommendation . . . for termination for Tier 2 level profanity directed at manager. Will proceed once all administrative clearances have been granted."

PNC rejected the claim of age discrimination. It argued that it fired six retail bank employees for using profanity between July 1, 2009, and June 24, 2014. It noted that including Complainant, three were over 40 years old (i.e., ages 42, 43, and 65), and three were under 40, (i.e., ages 23, 26, and 28).

Yepez told DCR that he met Complainant in 2010 at a management training session and asked her to apply for the assistant branch manager position in West Windsor. He told DCR that she performed well. He rated her as “meets all expectations” in 2011 and 2013 performance reviews, and “meets some expectations” in her 2012 performance reviews.

He denied all allegations of sexual harassment. He said that Complainant was romantically interested in him, not the other way around. He acknowledged once adjusting the zipper on Complainant’s dress but insisted that it was an “innocent” singular occurrence. He told DCR that he was walking from the break room to his office when he passed behind Complainant and noticed that the gold toggle zipper tab on the back of her dress was four to five inches down. He said that without advance warning, he pulled it up and said, “Close that.” Yepez said that Complainant laughed and said, “Oh my god, I am sorry it was down.”<sup>3</sup> Yepez described it to DCR as “a friendly zip,” “playful,” and a “fix-that-and-go-back-into-my-office thing.” Yepez told DCR that it was the only time that he ever zipped an employee’s dress. He likened it to fixing an employee’s collar or tie. He said that at the time, he felt that his actions were appropriate, but realizes in retrospect that it was inappropriate.

Yepez stated that in mid-January 2013, Complainant entered his office looking “different,” “out of the norm,” smiling strangely and “googly-eyed.” He said that she would look at him and look away again. He said that he asked her what’s going on, and she replied, “Nothing, I am just being silly, it will never happen again.” Yepez stated that because her behavior led him to assume that she was attracted to him, he said, “You can’t be thinking or saying that you still have feelings for me.” He said that she replied in effect, “I know, but I can’t help it.” Yepez said that he told Complainant to please go back to work, and she told him not to be “so mean.” He said that Complainant asked, “What are we going to do?” He said that he suggested that she transfer, and she agreed.

Yepez told DCR that in January 2013, after Corbett became his new regional manager, he asked Corbett to transfer Complainant to another branch because she expressed feelings for him. He said that Corbett agreed to try to find another position for Complainant and asked if he could “hang in there” until they worked it out. Yepez said that he told Corbett that the environment was “not healthy,” but that he would.

Yepez reportedly told Law that he and Complainant jointly met with Corbett to request her transfer. It is unclear if this was the same meeting referenced above, or a separate meeting. Law wrote:

Carlos jokingly said, “what if I say to Mike I’m in love with you” and [Complainant] said “oh stop it” and she paused and gave Carlos a weird look and

---

<sup>3</sup> Yepez told the PNC investigator that when he pulled up Complainant’s zipper, she asked him what he was doing and he said, “I pulled it up.”



said, "OK." Carlos then said, "you know I'm just kidding." He said he shared this with Jolecia (Ames).

Yepez told DCR that in mid-February 2013, he told Employee Relations Investigator Carol Vereb that he was unable to properly manage Complainant because her "flirting" made him uncomfortable and he wanted her transferred to another branch. Yepez said that he told Vereb that he had previously asked Regional Manager Bursac back in 2012 to transfer Complainant, but Bursac, after consulting with HRBP Reilly, denied his request and told Yepez to focus on managing Complainant's behaviors and performance, and to let Bursac know if it recurred.

In her February 12, 2013 report, Vereb memorialized that she told Yepez that he now needs to set aside his perceptions and deal with Complainant's performance. She advised Yepez to talk to his regional manager if he feels that he cannot manage Complainant. On February 25, 2013, Yepez called Vereb to say that he gave Complainant a verbal warning and "had a candid conversation with [Complainant], placing all his cards out on the table – he told her that she must maintain professional behavior in the branch at all times."<sup>4</sup>

Yepez denied Complainant's account of the December 2013 Christmas party. He told DCR that he gave all employees a tour of his basement, including the guest bedroom. He said that his wife and children were upstairs and his wife periodically came down to the basement with food. He told DCR that in four hours, he had four beers and two shots of whiskey, but was not intoxicated. He denied asking Complainant to "fuck around" or having any one-on-one conversations with her that night. He stated that he was never alone with her, never touched her, and did not show her the bedroom.

Yepez stated that the next day, Complainant smiled and said, "You made my day at the party when you asked me to fuck around," and he assured her that he said no such thing and was not attracted to her. Yepez told Law that Complainant said, "That was the best sex my husband had that night," and for the rest of that day Complainant "was walking around with a smirk on her face and said 'I know what you said.'"<sup>5</sup>

Yepez stated that in April 2014, he and Complainant met with Corbett at the branch regarding an unrelated matter. Yepez purportedly told Law that during that meeting, he told Corbett that he could not manage Complainant because she took everything personally, and Complainant asked Corbett to transfer her. (Corbett told Law that Yepez and Complainant did not raise "relationship issues" during the meeting—they merely said that they had worked together for so long that a change would be good—and he told Complainant that he did not have

---

<sup>4</sup> Vereb's report does not include his request to transfer Complainant.

<sup>5</sup> Complainant denied making any of those comments.

an open assistant branch manager position, but she could post for another position in Mercer County.)

Yepez stated that the May 2014 computer incident “was blown out of proportion.” He stated that Complainant was leaning in to view her computer monitor, with Wendy Siou and Jolecia Ames on either side of her. Yepez said that he walked by and Ames asked him to look at something on the monitor. He said that as he leaned in to look at the screen, his shoulder inadvertently bumped Complainant’s left shoulder. He told Law that his “bump” was “harder than normal, harder than when you lightly bump into somebody.” Yepez claimed that he did not intentionally touch Complainant, but she lost her balance and fell forward into her keyboard. He stated that she did not break a nail, and when he asked if she was alright, Complainant jokingly replied, “Are you trying to kill me?” Yepez told DCR that he responded “I know. I didn’t even bump into you that hard.” Yepez stated that it was the “most innocent, funniest moment they had that day.” He said that the employees “all died laughing.”

Yepez denied ever calling Complainant “senile” or making any ageist remarks.

As to the incident that led to her discharge, Yepez said that as Complainant was hanging up the phone, he could hear that she was upset. She told him that she was not happy and wanted to go home because she had things that she needed to do. According to Yepez, he then heard her say, “Fuck you,” under her breath. Yepez said that he asked Complainant if she just said, “fuck you,” and she replied, “What if I did?” Yepez said that he told Complainant that if she said “fuck you” to him, he would fire her.

Taylor Bjorklund, who worked as a Financial Sales Consultant at the West Windsor branch, told DCR that he witnessed Yepez handling the zipper on Complainant’s clothing.<sup>6</sup> He said that he was standing in the lobby near a counter and observed Complainant sitting at her desk and Yepez standing near her. He said that Complainant was wearing a black or dark grey dress with ornamental zippers and a long zipper down the back. Bjorklund said that he saw Yepez repeatedly zipping and unzipping the ornamental zippers of Complainant’s dress and heard him mimic a “zip-unzip” noise. He said that Complainant clearly looked uncomfortable. He heard her say, “Carlos, stop, stop, stop it.” Bjorklund said that Yepez responded by unzipping the back of her dress down about six inches and walked away.

Bjorklund told DCR that Yepez diminished Complainant’s position in the branch, and would contradict her when she tried to solve customer problems. Bjorklund stated that on several occasions Complainant was in tears because of something that Yepez said or did to her.

---

<sup>6</sup> Bjorklund was dating Complainant’s daughter, N.R., in the fall of 2012 and they are currently married. Bjorklund told DCR that he resigned in March 2014. Complainant asked Law to interview Bjorklund as part of PNC’s internal investigation. Law declined.

Complainant's friend, Jane Smith, told DCR that she frequently saw Complainant socially during the latter's tenure with Respondent. Smith said that Complainant confided in her about Yepez's unwelcome conduct and was very upset about it. Smith stated that Complainant did not have a romantic or sexual interest in Yepez. Smith stated that in or around early January 2014, Complainant told her about the Christmas party incident and next day's aftermath. Smith stated that several times between early and mid-2014, Complainant complained to her that after the Christmas party, Yepez became very nasty and made things difficult for her by changing her hours, switching her days without reason, talking down to her, and yelling at her in front of staff.

In separate interviews with DCR, N.R. and Smith confirmed that Complainant told them about the "unzipping," "bra snapping" and computer incidents, and each said that Complainant was upset about them at the time. Both stated that Complainant told them about the Christmas party incident shortly after it happened. Bjorklund told DCR that he heard about the incident, but did not recall if Complainant or N.R. told him about it.

### **Analysis**

At the conclusion of the investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe" that the LAD was violated and that the matter should proceed to hearing. Ibid.

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" whereby the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd. on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

### **Sexual Harassment**

Hostile work environment sexual harassment is a form of gender discrimination. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). When evaluating claims of sexual harassment, the critical issue is whether a reasonable woman would find the conduct to be "severe or pervasive" enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Id. at 603. Courts focus on the conduct itself, not its effect upon the employee or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-41 (2008). Neither the victim's subjective response to the harassment, nor the defendant's subjective intent is controlling as to whether a hostile work environment claim is viable. Ibid.

Here, Complainant alleges that her supervisor repeatedly told her that she was attractive, engaged in various levels of inappropriate touching (including unzipping her dress, unhooking her bra, and placing his hands on her back) and made sexual overtures that ranged from complimenting her legs, to repeatedly saying that he wanted “to do” her, to leading her into a bedroom during a work function and suggesting that they “fuck around.”

The investigation did not identify eye-witnesses to the alleged sexual remarks or bra incident, and none were produced by Complainant. But that is not the end of the inquiry. Given the private and intimate nature of sexual harassment, it is not uncommon for there to be an absence of eye-witnesses to such matters. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus, DCR’s resolution of a sexual harassment claim for purposes of a threshold determination often boils down to comparing which party’s version of events has some corroboration or, conversely, is significantly called into question by other evidence.

In this case, the investigation supported Yopez’s claim that in as early as January 2013 he was telling his supervisors that Complainant was attracted to him. However, other claims he made to DCR were directly contradicted by witnesses.

For example, Yopez stated that he adjusted Complainant’s zipper only once, and did so because Complainant did not realize that her zipper was four or five inches open. He suggested that he was merely trying to make a subordinate’s attire look more professional, and likened it to straightening a colleague’s neck tie. He claimed that Complainant was embarrassed to learn that her zipper was open, and grateful that he fixed it. That version of events was directly contradicted by Bjorklund, who stated that he saw Yopez playfully unzipping and zipping Complainant’s dress over her objections.

Yopez stated that he accidentally bumped into Complainant, which caused her to hit her computer. That version of events was contradicted by Ames and Bonilla who described it as Yopez giving a “playful nudge” and “playing around,” which suggested that his contact was intentional.

The notion that Yopez playfully unzipped Complainant’s dress, pushed her in the back, and teased her with sexual remarks is supported somewhat by what Sabo and Ames purportedly told Law, i.e., that Yopez liked to joke around in the workplace.

Sabo stated that Complainant told him that Yopez asked her to have sex with him at the Christmas party. Although he was skeptical about whether to believe her, the fact that she reported the matter to him before the incident that led to her discharge weighs against the conclusion that she fabricated the incident in response to the threat of discipline.

Likewise, Smith and N.R. told DCR that Complainant reported several of the incidents, including the dress incident and sexual proposition at the Christmas party, to them shortly after they occurred.

Complainant's characterization of Yepez as someone who engages in unwelcome sexual contact is consistent with N.R.'s statement that he attempted to kiss her on a number of occasions when they were alone.

Employers that promulgate and support an effective anti-harassment policy may be entitled to a "safe haven" from liability for one of its supervisor's harassing conduct. Aguas v. State, 220 N.J. 494, 524 (2015). Specifically, an employer may assert an affirmative defense that it exercised reasonable care to prevent and correct harassing behavior, and that the employee unreasonably failed to take advantage of preventive or corrective opportunities. Ibid. However, that affirmative defense is available only in cases where no tangible employment action was taken against the employee. Ibid.

Here, the evidence leads to the conclusion that the affirmative defense does not apply because she was subjected to a tangible employment action—she was fired. Moreover, the investigation raises a reasonable ground of suspicion as to whether PNC exercised reasonable care to prevent and promptly correct Yepez's alleged conduct. PNC had a policy providing specific procedures for reporting sexual harassment, and included alternatives for situations when the supervisor is the alleged harasser. However, it is not clear that PNC's upper management and Employee Relations staff properly carried out this policy. Although they differ as to who was the pursuer and who was being pursued, both Complainant and Yepez described an uncomfortable level of sexual tension/unrequited sexual interest. As a result, both requested that Complainant be transferred out of the West Windsor branch.

Four members of PNC upper management (Reilly, Brannagan, Bursac, and Corbett) and at least one Employee Relations Investigator (Vereb) were informed on at least eight occasions, as early as October 2012 and as late as a few weeks prior to Complainant's termination, that there were sex-based issues between Yepez and Complainant and they both were asking that she be transferred because of "problems" working together, and Yepez indicated that he could not work with Complainant because she "had feelings for" him.<sup>7</sup> Moreover, it appears that during its

---

<sup>7</sup> In 2012, Complainant told Brannagan during her weekly branch visits that she was unhappy working with Yepez. In October 2012, Yepez asked Bursac to transfer Complainant and after consulting with Reilly told Yepez to focus on managing her performance. In January 2013, Yepez asked Corbett to transfer Complainant. In February 2013, Yepez reported to Vereb that he had trouble managing Complainant and asked that she be transferred. In the summer of 2013, Bursac reported to Reilly that she met with Complainant and Yepez at the branch because she was concerned that Complainant had a crush on Yepez. In March 2014, Complainant told Brannagan that she "wanted out of the branch" because Yepez belittled her. In March and April 2014, Complainant asked Corbett to transfer her.

internal investigation, PNC declined to interview at least one person whom Complainant identified as a corroborating witness. Thus, after hearing testimony and weighing the evidence, an administrative law judge might reasonably find that Yepez's statements were enough to put PNC on notice that there was a sex-based problem that needed attention, and that Respondents' response to the matter was insufficient.

For purposes of this preliminary disposition, the Director is satisfied that a reasonable woman working in a bank would find such conduct by her bank manager to be "severe or pervasive" enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Lehmann, supra, 132 N.J. at 603. To the extent that Yepez may have believed he was only joking and had no subjective intent to harass Complainant, it would not negate the sexually harassing nature of the conduct, see Cutler, supra, 196 N.J. at 430-41 (2008), but may be raised in opposition to Complainant's demand for damages. Ultimately, whether sexual harassment occurred turns on the credibility of Complainant and Yepez. Thus, the Director finds that there is a sufficient basis to refer this matter to a plenary hearing before an administrative law judge who can take testimony, make credibility determinations, and weigh evidence introduced by the parties.

The verified complaint alleged that in addition to PNC, Yepez individually violated the LAD. The LAD makes it unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e). As a "person," Yepez may be found individually liable for aiding and abetting his own discriminatory conduct. See Rowan v. Hartford Plaza Ltd, 2013 N.J. Super. Unpub. LEXIS 766 (App. Div. 2013) (recognizing supervisor liability under the LAD for aiding and abetting the supervisor's own conduct); O'Toole v. Tofutti Brands, Inc, 203 F. Supp. 3d 458, 468 (D.N.J. 2016) (noting "individual liability under the LAD for one's own discriminatory conduct is actionable").

### **Age Discrimination**

The LAD prohibits employers from discriminating based on age in disciplinary matters, including the decision to discharge an employee. N.J.S.A. 10:5-12(a). A complainant's burden to establish a *prima facie* case of disparate treatment is "not an onerous one." See Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Here, Complainant alleges that age was a determinative factor in the decision to terminate her employment, and points to the evidence that Yepez, a significantly younger male with a seemingly inferior past work history, received only a final written warning for several incidents of "inappropriate workplace conduct" towards her, while she was fired after a single incident towards him.

Respondent rejects the claim of age discrimination. It notes that it fired six retail bank employees for using profanity over a five-year period, including Complainant. It argued that because three of those fired were over 40 years old, and three were under 40, there was no statistical evidence supporting an inference of age discrimination against Complainant.

Still, for purposes of this threshold determination, the Director finds that the stark difference in disciplines meted out to the 36 year-old Yepez and 65 year-old Complainant, including but not limited to their respective performance evaluations and disciplinary histories, may reasonably be viewed as evidence of differential treatment. Yepez received three written warnings before the warning that resulted from Complainant's complaint of sexual harassment; whereas Complainant received one verbal warning during her tenure. And in Yepez's three prior evaluations, he was rated as only meeting "some expectations," while Complainant was rated as meeting "all expectations" in 2011 and 2013 and "some expectations" in 2012. Both were branch level managers, but Yepez was a higher level manager and, arguably, should have been held to a higher standard. Under the circumstances, one might expect Yepez to receive the harsher discipline. But that is not what occurred.

Yepez was given a written warning and required to attend training within 30 days for touching her, disrespecting her personal space, pushing her in the back and causing her to lose her balance, holding a branch party at his home, and over time, engaging in conversation of a personal nature with a subordinate. Despite the results of PNC's internal investigation, and although he did not fully comply with the terms of the written warning (i.e., he did not attend the training within 30 days), he was nonetheless rated as meeting all expectations for 2014 and later promoted. Complainant, on the other hand, uttered a single profanity (under her breath when she believed that she was alone) and was fired.

It would appear that Yepez received significantly favorable treatment under the circumstances—the question becomes why? A fact-finder might reasonably suspect that once upper management determined that Complainant and Yepez could not work together, they concluded that the 36-year-old Yepez had potential for longer service to the company, while the 65-year-old Complainant, who talked about the possibility of retiring and who Yepez allegedly disparaged as "senile," would be less likely to be a long-term contributor and was therefore disposable. Or a fact-finder might find that Respondents believed that a younger employee would be more adept at modifying his/her shortcomings than an older employee. In the absence of an explanation for this seemingly incongruous outcome, there is sufficient evidence to support a reasonable suspicion that age was a determinative factor in the decision to terminate Complainant's employment. Thus, the Director finds that at this threshold juncture, this should proceed to a hearing where the parties may present their evidence and defenses and an administrative law judge can make credibility determinations and recommend findings of fact.

## Retaliation

The LAD makes also it unlawful for “any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act.” N.J.S.A. 10:5-12(d).

To establish a *prima facie* case of retaliation, an employee must show that she engaged in LAD-protected activity known to her employer, that the employer thereafter subjected her 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 complainant can make that *prima facie* showing, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its adverse employment decision. If the employer 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).

In this case, the Director is satisfied, for purposes of this threshold determination only, that (i) Complainant engaged in protected activity, e.g., when she objected to Yepez unzipping her dress and unhooking her bra, and rebuffed his suggestion that they “fuck around” at the Christmas party and reported same to her employer, (ii) she was subjected to adverse employment action when she was fired based on Yepez’s request, and (iii) Respondent produced a legitimate non-retaliatory explanation for its personnel decision.

Thus, the remaining issue is whether a reasonable suspicion exists to warrant a “cautious person” to believe that Respondents’ explanation was a pretext. N.J.A.C. 13:4-10.2. Here, the same factors that support a preliminary finding of age discrimination support a preliminary finding of retaliation. Without rehashing those circumstances for a third time, the Director is satisfied that there was a sufficient dissimilarity in the way Yepez and Complainant were disciplined under the circumstances to reasonably allow a cautious person to suspect that Complainant was penalized for rejecting Yepez’s sexual overtures and/or reporting his conduct to senior management. N.J.A.C. 13:4-10.2.

If Complainant can demonstrate at the plenary hearing that as a result of her protected activity, Yepez subjected her to a hostile work environment and attempted to “manage her out” of the branch by, for example, directing subordinates to ignore her, publicly belittling her in front of employees and customers, and randomly changing her work schedule, an administrative law judge might also conclude that such conduct amounted to additional retaliation. At this point, the Director makes no determination as to whether such conduct would rise to the level of adverse employment actions for purposes of the LAD.



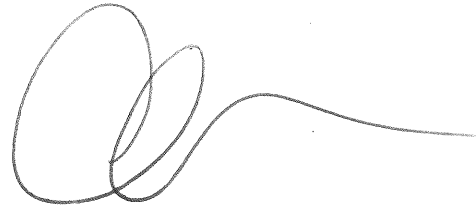
In view of the above, the Director finds that there is a “reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe” that Yepez subjected Complainant to adverse working conditions and set into motion the internal investigation into her use of profanity (and made clear that he considered it a terminable offense), which ultimately led to her discharge, because she objected to his sexual overtures and conduct. N.J.A.C. 13:4-10.2.

### Conclusion

At this preliminary stage of the process, the Director is satisfied that the circumstances of this case support a “reasonable ground of suspicion” to warrant a cautious person in the belief that Complainant’s allegations of gender and age discrimination and retaliation should “proceed to the next step on the road to an adjudication on the merits.” Frank, supra, 228 N.J. Super. at 56.

DATE:

12-8-17



---

Craig Sashihara, Director  
NJ DIVISION ON CIVIL RIGHTS