STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL02GB-65705

Bolice Van Hise,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
dd's Discounts,	)	
	)	
Respondent.	)	

On December 3, 2015, Mercer County resident Bolice Van Hise (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that she was fired from dd's Discounts (Respondent) 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 describes itself as a subdivision of Ross Stores, Inc., and states that there are over 170 such stores in fifteen states.

On October 31, 2015, Complainant began working as a retail associate in a store located at 1536 North Olden Avenue, Ewing, New Jersey.

On her second day of work, November 3, 2015, Complainant told Vernon Kenyatta Jones (Store Manager) and Elizabeth Hernandez (Area Supervisor) that she was feeling ill due to pregnancy-related symptoms. There are different accounts as to what occurred next. Mr. Jones and Ms. Hernandez told DCR that Complainant was given the choice to stay at work or leave early, and that she chose to leave early. Complainant, on the other hand, said that she asked to stay but Jones told her to go home, consult her doctor, and report back with her medical status.

Complainant told DCR that after leaving work, she called her midwife who told her that she could return to work as long as her symptoms did not worsen.

Complainant claimed that the next day at 8:30 a.m., she called the store to tell Jones that she had been cleared to work. Complainant said that she spoke with Assistant Manager Keyana James, who said that Jones was unavailable, and that Complainant should try to call back at 10:30 a.m. Complainant said that at 10:35 a.m., she called the store again, and again spoke with James, who told her that Jones said that "he no longer wishes to work with you." Complainant concluded that she had been fired because of her pregnancy.

Respondent denied the allegations of discrimination in their entirety. It claimed that Complainant left work early on November 3, 2015, and simply never returned. It argued that after not hearing from Complainant for four weeks, it "had no choice" but to terminate her employment on November 29, 2015, for job abandonment. See Respondent's Position Statement, Feb. 15, 2016, p. 3-4. Under a subsection entitled, "**Van Hise Trains for Less Than Five Hours, Voluntarily Leaves, and Then Never Returns, Without Any Explanation**," id. at 3 (boldface in original), Respondent wrote:

> Van Hise did not show up for her scheduled shift the following day, November 4, 2015. Indeed, she never again returned to work. Van Hise never called, never contacted anyone at the Company, and did not explain why she failed to return to work on November 4, 2015 and why she failed to call. . . . When Van Hise never called, dd's had no choice but to terminate her for job abandonment.
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> [Id. at 3-5.]

During the course of the investigation, DCR obtained telephone records from Verizon that showed that Complainant called the Ewing store twice on November 4, 2015—at 8:03 a.m. and 10:26 a.m.—and that each phone call lasted for approximately two minutes.

DCR interviewed Keyana James, the assistant manager who Complainant claims to have spoken with on November 4, 2015. James acknowledged receiving Complainant's phone call a day or two after Complainant's early departure from work. James confirmed that Complainant reported that she was medically cleared to return to work. James said that as instructed by the store manager, Jones, she told Complainant that she should not report to work because she had been "let go." James stated that Jones made the decision to fire Complainant either the day Complainant left early or the next day. James added that she told Complainant that she could call back and speak with Jones if she wished.

On March 14, 2016, DCR interviewed Jones with Respondent's attorney present. Jones stated that he did not know that Complainant was pregnant when he hired her. He acknowledged that Complainant called the Ewing store on November 4, but claimed that it was to "call[] out" sick. Jones said that he was unsure who fielded the call, but said that he could "check in the system." Jones said that he was not aware of any further communications with Complainant after that date. He denied instructing James to tell Complainant that she was fired. In response to a question from Respondent's attorney, Jones noted that assistant managers do not have the authority to fire employees.

Assistant Manager Elizabeth Hernandez told DCR that when an employee calls out, the information is entered into a computer system. DCR asked Respondent to submit the callout details (including the time and who took the call) for Complainant's absence on November 4, 2016. In response, Respondent produced a "Daily Associate & Task Form," which has Complainant's name crossed with approximately eight "X" marks and "C/O" written next to her name. DCR's review of these forms for this and other dates show that other employees who appear to have called out either have their names crossed out with a solid line and/or have the "C/O" written next to their name.

Analysis

At the conclusion of an 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. "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" 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), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The LAD makes it illegal for an employer to fire, refuse to hire, or otherwise discriminate against someone in the "terms, conditions or privileges of employment" based on gender or pregnancy. N.J.S.A. 10:5-12(a). The LAD also states:

> [A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as . . . assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer. The employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation.
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> [N.J.S.A. 10:5-12(s).]

Here, the store's manager, Jones, stated that when he hired Complainant on October 31, 2015, he was unaware that she was pregnant. On her second day of work, Complainant told Jones and the area supervisor that she felt ill due to her pregnancy. She was either permitted or ordered to leave early.[1]

Respondent argued that Complainant never returned to work and never called with an explanation for her absence, and that after four weeks, it was left with "no choice but to terminate her for job abandonment." See Respondent's Position Statement, supra, at 4 ("no call, no show, job abandonment".) Such reasoning, if accurate, would amount to a legitimate, non-discriminatory explanation for Respondent's personnel decision. However, the weight of the evidence supports Complainant's claim that she attempted to follow Jones's instruction to update him on her medical status on November 4, 2016, and that when she called to convey that information, she was told that her employment had been terminated. Under these circumstances, where "the employer's proffered explanation is unworthy of credence," it is not unreasonable to infer that it "was merely a pretext for discrimination." See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 211 (1999). And Respondent has provided no other explanation for terminating her employment.

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[1] If proven at a hearing that management ordered Complainant to leave work early and obtain medical clearance before returning to work, it could be evidence of discrimination based on gender and pregnancy.

Based on the above, the Director is satisfied at this preliminary stage of the process that there is a "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that Complainant was subjected pregnancy and gender discrimination.

DATE: 8-10-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS