

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. ER02WB-65876

M.A.,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINDING OF PROBABLE CAUSE
)	
Alexus Clifton, Inc., d/b/a Alexis)	
Steakhouse & Tavern, and John)	
Magliaro, in his individual capacity,)	
)	
Respondents.)	

On April 8, 2016, Essex County resident M.A. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Respondents Alexis Clifton, Inc., d/b/a Alexis Steakhouse & Tavern (Alexus), and John Magliaro,¹ in his individual capacity, discriminated against her based on her race and/or national origin and gender, 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.

Alexus is a restaurant and bar located at 955 Valley Road, Clifton, which offers dining, musical entertainment, catering, and a banquet hall. It is owned by Kitae Kim. In or about January 2015, Mr. Kim hired Complainant. Kim told DCR that Complainant worked as a manager from 11 a.m. to 5 p.m. for \$9/hr. (and was responsible for scheduling and hiring) and at times worked as a server for \$3/hr. plus tips, from 5 p.m. until closing.

In or around July 2015, Kim hired Magliaro to work solely as a manager. Kim told DCR that Magliaro had owned restaurants in the past. Kim stated that he had known Magliaro for

¹ Magliaro did not file an answer to the verified complaint. Nor has a notice of appearance been filed on his behalf.

about twenty years, and that Magliaro had ideas for improving Alexis such as changing chairs, changing the menu, installing new TVs.

Complainant, who is Cuban, alleges that Magliaro constantly made derogatory ethnic slurs about the restaurant staff such as saying that Hispanics are “stupid,” and that Mexicans are “shit.” She alleged that Magliaro sexually harassed her and other female employees. She alleged that in or about October 2015, Magliaro slapped her on the buttocks in the presence of a male subordinate. She alleged that when she told him not to touch her that way, he laughed. She alleged that on or about November 14, 2015, Magliaro pulled the elastic waistband of a female employee’s pants and exposed the employee’s buttocks. Complainant alleged that when she told Magliaro that his conduct was inappropriate, he laughed. She alleged that the next month, Magliaro referred to her as a “cunt.” She alleged that Magliaro referred to one female server as a “fat pig.” Complainant alleged that she reported Magliaro’s inappropriate conduct to Kim on several occasions, but he would simply respond, “That’s how Americans speak.” Complainant said that by February 2016, Kim had made her the liaison “between Johnny [Magliaro] and the kitchen staff because of the problems he was having with the staff.” She told DCR:

I was the middle person to whatever Johnny had to say to the staff. I tried being the middle person but Johnny would say, “Get the fuck out of my way, you are a burden to me, get the fuck out of the way. You’re a piece of shit.” Even though Mr. Kim had instructed Johnny to stay out of the kitchen, he didn’t listen. He was always in and out.

Complainant stated that Magliaro would curse at her in front of Kim. She said that during one meeting, she began crying because Magliaro was being verbally abusive. She said that Magliaro turned to Kim and said, “You see, she’s weak.” She alleged that she asked, “How can I have a meeting like this? He’s belittling me.” She said that Kim did not respond. Complainant said that on February 8, 2016, she told Kim that she felt forced to resign because Magliaro’s harassment had become intolerable. A number of employees supported Complainant’s allegations.

Deomar Alcantara said that he saw Magliaro slap Complainant on her buttocks as she was leaning over a table. He said that Complainant turned around and yelled at Magliaro. Alcantara, who is Peruvian, alleges that Magliaro constantly referred to him and other employees as “fucking Hispanic garbage,” and threatened to send people to beat up the kitchen staff. He said that in December 2015, one of the employees called the police on Magliaro. Alcantara said that when he told the officer that Magliaro threatened the workers, Magliaro attempted to assault him and the officer had to pull him away. Alcantara said that the officer did not view it as a police matter and suggested that he contact the labor department. Alcantara said that on September 12, 2015, he, M.A., and other Hispanic employees told Kim that Magliaro constantly belittled them with offensive ethnic slurs and that they could not work under those circumstances. He said that Kim appeared frustrated, looked at his watch, and asked who was going to clean because they had to open the restaurant soon. Alcantara alleges that on September 18, 2015, six days after complaining to Kim, Magliaro again told him that “Hispanics are stupid.”²

Manuel Guzman, who is from Mexico, told DCR that Magliaro continually made offensive remarks in the workplace such as referring to Guzman and other Hispanic employees as “stupid Hispanics,” “fucking Hispanic garbage,” yelling that they “can’t speak English,” “don’t know how to work,” and threatening them with physical harm. As an example of the latter, Guzman stated that he heard Magliaro tell another Hispanic employee that he was going to take him outside and beat him to death. Guzman stated that on September 12, 2015, he and other employees complained about Magliaro’s discriminatory harassment to the owner, Kim, but the conduct continued. Guzman stated that Magliaro’s constant harassment and the owner’s failure to take

² Alcantara filed a separate complaint with DCR alleging national origin discrimination arising from the same circumstances. See Alcantara v. Alexis Steakhouse, DCR Docket No. ER02NB-65669 (Oct. 14, 2015).

effective corrective action created a hostile work environment.³

Witness 3⁴ told DCR that he is Mexican and has worked as a cook for Alexis for about four years. He stated that Magliaro called him a “mother fucking Mexican,” and in August or September 2015, he heard Magliaro call an employee a “fucking Hispanic.” He said that when he told Kim that Magliaro harassed the kitchen staff with ethnic slurs, Kim replied, “That’s the way he speaks.” He stated that he and others told Kim that Magliaro was threatening them by saying that if they did not do as he said, he would send people with baseball bats to assault them. He said that when he complained to Kim about Magliaro’s offensive ethnic slurs on another occasion, Kim replied, “John is a good worker and the only problem is his mouth.” Witness 3 said that Alcantara told him that he saw Magliaro slap Complainant’s buttocks.

Witness 4 told DCR that he is Mexican and has worked as a cook for Alexis for about 23 years. He said that he and others have been subjected to Magliaro’s ethnic slurs. For example, he said that Magliaro once told him to ask the dishwasher if he could stay an extra thirty minutes to work. He said that when the employee declined, Magliaro became angry and said, “Fucking Mexicans.” Witness 4 said that he and other kitchen workers complained about Magliaro’s frequent ethnic slurs to Kim but the owner replied, “That’s the way all Americans speak,” and did nothing to stop the conduct. Witness 4 said that in or around January 2016, a female server told him that Magliaro sexually harassed her.

Witness 5 told DCR that he has worked for Alexis as a dishwasher for about fourteen years. He said that he heard complaints about Magliaro’s offensive racial comments, but never witnessed such conduct first-hand. He added that Magliaro works mostly during the days, while he works from 5 p.m. to 11 p.m.

³ Guzman filed a separate complaint with DCR alleging national origin discrimination arising from the same circumstances. See Guzman v. Alexis Steakhouse, DCR Docket No. ER02NB-65668 (Oct. 14, 2015).

⁴ DCR has elected not to publicly identify the remaining witnesses by name at this preliminary stage in the process.

Witness 6 told DCR that he has worked for Alexis as a dishwasher for about 23 years. He stated that during their interactions, Magliaro would angrily say, "Fucking Hispanics." He said that Magliaro once yelled at him, "Clean. If you don't do it, I will fire you, you mother fucking Hispanic. You're no good." He said that in December 2015, Magliaro told him to carry tables from the third floor to the first floor. He said that when he said he was alone and needed help, Magliaro told him that he was fired and said, "Fucking Hispanics." Witness 6 said that he and other employees complained to Kim on more than one occasion, but the harassment continued. He said that Kim dismissed Magliaro's ethnic slurs by saying, "All Americans talk that way." Witness 6 said that he thinks highly of Kim and worked for him for many years without incident. However, he felt that Magliaro's arrival and Kim's inaction created a hostile work environment.

Witness 7 told DCR that she has worked as a server for Alexis since 2011. She stated that Magliaro constantly insulted Hispanic staff by referring to them with ethnic slurs. Witness 7 said that Magliaro called her a "fucking pig" and "fucking piece of shit." She said that she complained to Kim that Magliaro was being verbally abusive by calling her a "pig," but Kim seemed disinterested. She said that she and other employees complained to Kim in the fall 2015 that Magliaro was being threatening and abusive by saying things such as, "I'm going to cut everyone with a knife . . . You're a bunch of illiterate and illegal Mexicans that probably don't have papers." She stated that Kim replied, "What do you guys want me to do? That's the way all Americans speak."

Witness 8 told DCR that since Magliaro became the new manager, he has treated Hispanic staff members horribly. For example, she stated that Magliaro stated, "They're all illegal pieces of shit," and that Alexis needed to get a "white kitchen because they'll listen." Witness 8 told DCR that Magliaro sexually harassed her. Witness 8 corroborated Complainant's allegation regarding the November 14, 2015 incident, stating that Magliaro came up behind her when her hands were full, stuck his hands into her pants, and pulled back the

waistband exposing her buttocks. She said that she reported the incident to Kim, who told her that he did not want to hear about it. She stated that on another occasion, when she asked Magliaro why he selected her friend over her to work as a bartender, he replied, "She's got great tits, and you don't have tits like that. That's why." She stated that Magliaro asked, "So when are you gonna let me fuck you and your friend?" Witness 8 said that in September 2015, she walked into the women's restroom and saw an employee named Joe, who Magliaro had hired.⁵ She said that Joe had his pants around his ankles, his shirt pulled up, holding his penis, and said, "I'll give you the longest yard right in your ass." She said that she reported the incident to Magliaro who took no action. Witness 8 stated that Magliaro repeatedly said that he wanted to "fuck the shit out of" a female server identified by first name only.⁶

Witness 9 told DCR that she has worked as a server for a number of years. She stated that she has heard Magliaro refer to Hispanic employees as "stupid Mexicans."

Witness 10 is a server who told DCR that she has heard Magliaro refer to Hispanic employees as "stupid Mexicans" and "illegals."

Alexus denied the allegations of ethnicity and/or national origin discrimination in their entirety. It claimed that although employees complained to Kim about Magliaro, they did not specify that his comments were discriminatory in nature. In response to the verified complaint filed by Guzman,⁷ Alexis stated:

[In] September 2015, [Guzman] and other employees complained to the owner, Kitae Kim, that John Magliaro was communicating instructions to [Guzman] and others in a loud and vulgar tone. However, [Guzman] did not state that Magliaro harassed [Guzman] based on his ethnicity or national origin. Further, [Guzman] did not allege that John Magliaro used any racially derogatory terms.

⁵ Kim did not recall Joe's last name. He stated that the wait staff "comes and goes."

⁶ Kim acknowledged that the woman worked at the restaurant. He could not provide her last name or any other information other than to say that she no longer works there and was unreliable.

⁷ The Guzman, Alcantara, and M.A. cases were investigated together. The same attorneys represented Alexis in all three matters.

[See Respondent's Answer to Verified Complaint, Guzman v. Alexis Clifton d/b/a Alexis Steakhouse, Dec. 16, 2015, p. 3.]

Alexis denied the allegation that Kim failed to take any action in response to the complaints of national origin discrimination. Alexis stated:

Following this meeting with [Guzman], Mr. Kim met with Mr. Magliaro and warned him to cease issuing orders in a loud and vulgar tone. Mr. Magliaro explained to Mr. Kim that the [sic] some of the employees were being insubordinate in refusing to perform assignment which he has given. When Mr. Magliaro attempted to enforce the assignments, [Guzman] and other employees complained to Mr. Kim that Mr. Magliaro was being loud and vulgar. Following this meeting, Mr. Kim revised the chain of command to utilize the assistance of [M.A.], a bi-lingual manager, to interact with [Guzman] and other staff in an effort to avoid miscommunications in the issuance of work orders. Since that time, John Magliaro has had limited, if any, contact with [Guzman].

[ibid.]

Alexis acknowledged that M.A. "met with Mr. Kim to complain about Magliaro's conduct on many occasions," but stated that those complaints were that Magliaro had a "bad attitude, his tone in communicating was loud, and that Magliaro did not agree with Complainant's procedure in accomplishing work tasks." See Respondent's Answer to Verified Complaint, M.A. v. Alexis Clifton d/b/a Alexis Steakhouse, May. 18, 2016, p. 2. Alexis stated that Complainant once reported an incident of unwanted touching, but Kim determined that it was "just incidental physical contact." Id. at 3. In particular, Alexis noted:

On one occasion, Complainant advised Mr. Kim that Magliaro had made physical contact with her body which was unwanted. Mr. Kim addressed this issue by discussing the allegation with Magliaro. After his discussion, and based on the discussion with Complainant, Mr. Kim came to the determination that the unwanted touching which Complainant complained of was just incidental physical contact which is common in a workplace such as a restaurant, and that it was not done by Magliaro with the intent to harass. Nonetheless, Mr. Kim advised Magliaro to cease any and all physical contact with Complainant. Respondent has also adopted a new employee hand book which contains information regarding what constitutes harassment and procedures for making a complaint in an effort to educate the staff regarding same.

[Id. at 2-3.]

Kim told DCR that the restaurant has five or six cooks, and about five dishwashers who also mop the floors and perform other cleaning functions. He said that the restaurant opens at

10 a.m., and closes around 12 a.m. Kim denied ever being told that Magliaro made anti-Hispanic slurs. He denied ever hearing that Magliaro slapped Complainant's buttocks. He said that her last day of work was February 8, 2016. He said that she was a "no show." He said that he told her that he did not intend to fire her or Magliaro. He said that he has a number of long-term employees who are loyal to him, but who resented Magliaro because he was trying to implement change. When asked what those changes were, Kim said the renovation of the TVs, the menu, and he wanted to bring in new cooks. When asked if the restaurant provides anti-discrimination training to its employees, Kim replied, "I don't focus on anti-discrimination."

Magliaro told DCR that he had 25 years of experience working in the restaurant business. He said that his duties at Alexis included scheduling, ordering, marketing, and "hostessing." He said that none of the kitchen workers would follow his directions. When asked to elaborate on that assertion, Magliaro said that he asked a dishwasher named "Pedro" (he did not know the last name) to bring up some beer, but Pedro claimed it was the bartender's responsibility. He said that he did not say anything in response. He said that on another occasion, he asked Pedro for cleaning product, but Pedro did not get it for him. He said that on another occasion, he told Pedro that the glasses were dirty and Pedro replied that Kim "wants it this way." When asked if there were any other incidents of insubordination, he replied that once when Pedro and other workers were cleaning the bar, he told them to clean the dining room first and Pedro said, "No."

Magliaro denied ever using any ethnic slurs when speaking to the staff. He denied ever threatening any employees with physical harm. He denied ever making any inappropriate sexual comments in the workplace. He denied ever touching anyone at the restaurant. When asked if he was ever counseled by Kim, he replied that during the first four weeks, he was told that he was swearing and being too loud. He said that Kim placed Complainant in between him and the kitchen staff and that he had no further direct contact with them. Magliaro made no

mention of ever being questioned by Kim about a claim of unwanted touching, or being “advised to cease any and all physical contact with Complainant” as Alexis claims.⁸

Alexus’s employee manual for the first twelve months of Complainant’s employment contained the following anti-harassment policy: “Sexual harassment, be it verbal or physical, will not be tolerated. Report all unwelcome advances to management.” That employee manual, which was in effect in 2015, contained no discussion of topics such as discrimination/harassment complaint procedures, investigation procedures, management responsibilities, what constitutes inappropriate conduct, or the scope of the policy.

Elsewhere, the employee manual noted as follows:

Your constant awareness and ability to communicate with other members of the staff is an integral component of our “greatest asset” theory. The strength of our organization is built on a foundation of trust, teamwork, and communication. You cannot achieve the standards of service expected without it . . . Never lose control . . .

As noted in Respondent’s answer to the verified complaint, months after two employees filed verified complaints with DCR alleging hostile work environment discrimination, and months after Complainant reported that Magliaro touched her inappropriately, Respondent issued a revised employee manual that expanded its anti-harassment policy from two sentences to four pages. See Alexis Steakhouse & Tavern, Employee Manual, Jan. 1, 2016, pp. 8-11.

Analysis

It is settled that an employer cannot discriminate against an employee in the terms, conditions, or privileges of employment based on characteristics such as national origin, race, or gender. N.J.S.A. 10:5-12(a). It is equally settled that harassment is a form of discrimination when it is based on those characteristics and creates a hostile work environment. Taylor v. Metzger, 152 N.J. 490, 498 (1998). The LAD’s prohibitions extend to “any person, whether an

⁸ Counsel for Alexis told DCR that Magliaro’s employment at the restaurant came to an end during the course of the DCR investigation.

employer or an employee or not, to aid, abet, incite, compel or coerce the doing any of the acts forbidden under this act, or to attempt to do so.” N.J.S.A. 10:5-12(e).

To establish a *prima facie* case of hostile work environment under the LAD, an employee must show that the harassment (1) would not have occurred but for his or her membership in a protected category, and (2) was “severe or pervasive” enough to make a (3) reasonable employee of the same protected category believe that (4) the conditions of employment have been altered and the working environment is hostile or abusive. Id.; Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 603-04 (1993)

Because the LAD is “not a fault or intent-based statute,” a complainant is not required to show that the employer “intentionally discriminated or harassed [the employee], or intended to create a hostile work environment.” Id. at 604-05. The Supreme Court stated:

The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional . . . it is at the effects of discrimination that the LAD is aimed. Therefore, the perpetrator’s intent is simply not an element of the cause of action. Plaintiff need show only that the harassment would not have occurred but for her [membership in a protected class].

[Id. (emphasis in original)]

In Taylor, supra, the Supreme Court noted that the severity of a discriminatory remark is “exacerbated” when it is “uttered by a supervisor.” Id. at 503. For instance, the Court noted that “[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet . . . by a supervisor in the presence of his subordinates.” Id. at 506 (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir.1993)). Thus, the Court reasoned, even a single racial slur could be severe enough to create a hostile work environment when uttered by a supervisor in the presence of subordinates. 152 N.J. at 506-07.

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 the 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., 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.

Given the Supreme Court’s observations about the unique impact of a supervisor’s use of a racial epithet in the presence of subordinates, even a single utterance by Magliaro may have been sufficient to create a hostile work environment. See Taylor, supra, 152 N.J. 490. But it appears that it was not just a single utterance. Ten employees corroborated Complainant’s allegation that Magliaro routinely made offensive and unwelcome anti-Hispanic slurs in the presence of subordinates. Alcantara told DCR that he saw Magliaro give Complainant an unwelcome slap on the buttocks. Another witnesses recalled Alcantara telling him about the incident. Two female servers supported Complainant’s characterization of Magliaro as inappropriate in the workplace in terms of gender discrimination.

One witness told DCR that although he heard employees making similar complaints about Magliaro, he never personally witnessed the inappropriate conduct first-hand. However, he added that he did not often see Magliaro in the workplace because they worked different shifts. Thus, there is sufficient evidence to support a finding that M.A. was subjected to hostile work environment discrimination based on her race and/or nationality and gender.

There is also sufficient evidence to support a finding, for purposes of this disposition only, that Magliaro’s conduct and Kim’s refusal to intervene made the workplace so intolerable that a reasonable person would feel compelled to resign. Six witnesses corroborated

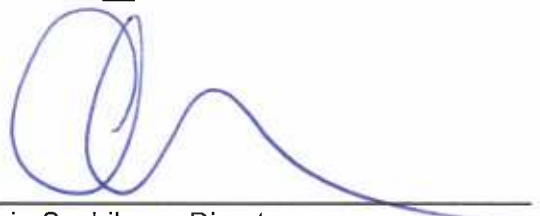
Complainant's allegation that employees complained about Magliaro's unwelcome and offensive conduct to Kim, but no effective corrective measures were taken.

The investigation found no persuasive evidence, and none was produced by Alexis, that the employer had any effective policies or procedures for employees to use in response to such harassment during the majority of the relevant time period. The original employee manual stated that sexual harassment would not be tolerated but made no mention of any other forms of discrimination. Employees were told to report harassment to the manager. In this case, following that procedure would have been futile—if not counterproductive—because the manager was the harasser. And although Respondent issued a revised employee manual dated January 1, 2016, which included a revamped anti-harassment policy, there was no persuasive evidence that those policies and procedures were diligently followed. Multiple witnesses stated that even when they brought their concerns directly to ownership's attention, no effective action was taken. Indeed, Kim's statement to a DCR investigator that he does not "focus on anti-discrimination" would appear to "be at the core of [Complainant's] hostile work environment harassment claims." See Griffin v. City of E. Orange, 2016 N.J. LEXIS 573 at *27 (Jun. 22, 2016).

Accordingly, 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 the matter should "proceed to the next step on the road to an adjudication on the merits" of Complainant's allegations that Alexis subjected her to workplace discrimination and harassment based on race and/or nationality and gender, constructive discharge, and that Magliaro aided and abetted in that discrimination and harassment, in violation of the LAD. Id. at 56.

DATE:

7-19-16



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS