STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN11WB-65126

L.S.,	)	
	)	
Complainant,	)	
	)	Administrative Action
v.	)	
	)	**FINDING OF PROBABLE CAUSE**
American Medical Products, LLC,	)	
and Sean McKeown, Individually,	)	
	)	
	)	
Respondents.	)	

On December 5, 2014, Monmouth County resident L.S. ("Complainant") filed a verified complaint with the Division on Civil Rights ("DCR") alleging that her former employer, American Medical Products, LLC ("AMP"), and its co-owner Sean McKeown (collectively "Respondents") subjected her to sexual harassment and then fired her for rejecting his advances and/or for complaining about the misconduct, 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.

AMP is a distributor of orthopedic devices, such as spinal and knee braces, and is located at 151 Industrial Way E, Eatontown. The front of its building contains offices and a conference room. The back of the building has a closed room that AMP employees refer to as "the warehouse." The warehouse is used in part for storing, assembling, and shipping braces and other orthopedic devices. AMP is owned by William Michalski and Sean McKeown.

On or about July 1, 2011, AMP hired Complainant to work as a clerical/customer service person. For the majority of her employment, she worked in the warehouse.

Complainant alleges that McKeown began sexually harassing her a few months after she was hired. By way of example, she said that McKeown asked her to unbutton her shirt, touched her in a sexual manner, and made unwelcome sexual remarks such as proposing that she have a "threesome" with him and another woman.

She stated that late one morning during the summer of 2013, she was working with Warehouse Manager Peter Lazzaro and a co-worker, Sean Bower, when McKeown came up behind her and kissed her on the back of the neck. She stated that she pulled away and told him to stop, and he left without responding.

She said that on another occasion that summer, again in late morning, she was helping out in the warehouse wearing shorts and a t-shirt when McKeown came up behind her, reached around and touched her breasts. She said that when she objected, McKeown replied, "I can't help myself. What do you expect when you wear something like that?"

Complainant claims that late one afternoon in May or June of 2014, she was standing at the warehouse computer when McKeown walked up to her and whispered in her ear, "One day, I'm going to do all the things I want to do to you and you are going to say, 'No'." Complainant said that she replied, "That is called rape."

Complainant said that she consistently let McKeown know that his advances were unwelcome.

She said that she complained to Michalski as well. She said that at first, she did so each time an incident occurred, and he would assure her that he would take action to stop the harassment. Complainant stated that at some point, Michalski began telling her that there was nothing he could do because McKeown was his business partner, not merely an employee. Complainant told DCR that there was no human resources department (HR) or anywhere else for

her to direct her complaints, so she stopped reporting every single incident to Michalski. She said that she would still report the more egregious incidents, like the "rape comment" and physical encounters.

Complainant told DCR that Lazzaro, Bower, and Tim O'Brien worked in the warehouse, and were often nearby when McKeown sexually harassed her. She claimed that she would ask them how they would feel if something like this happened to their sister or girlfriend, but they seemed reluctant to intervene because they were afraid of losing their jobs.

Complainant said that around the week of July 4, 2014, McKeown told her to "shut the fuck up" and go home. Complainant said that while she was packing up her things, McKeown kept yelling at her and telling her to get out. Complainant said that she said, "I'm going to take legal action," and he replied, "Do what you want." She said that he called her fifteen minutes later and said, "I didn't mean it, I have work that I need you to do." Complainant returned and completed the work.

The next day, she met with Michalski and McKeown. She told DCR that they discussed what occurred the previous day and throughout her employment, including her allegations of sexual harassment. She said that McKeown was silent and then left. She said that when she was alone with Michalski, he told her that because McKeown was a partner, there was nothing he could do. She claims that Michalski said that as her friend, he was going to have to "let [her] go." Complainant claims that Michalski told her that she was being "laid off" because it was unhealthy for her to remain working in that "environment." He gave her two weeks' notice. She said that she worked at AMP for an additional two weeks and never saw McKeown during that time. She assumes that he stayed away from the workplace. Complainant contends that she was fired for rejecting McKeown's sexual advances and/or reporting the harassment to Michalski.

Respondents denied the allegations of sexual harassment, discriminatory discharge, and retaliation in their entirety.

Respondents argued that Complainant's allegations of sexual harassment are not credible and do not reflect the true nature of her relationship with McKeown. Respondents argued that the notion of a hostile work environment is belied by the fact that she left her school-age daughter with McKeown for the July 4 weekend, and cared for McKeown's dogs while he was on vacation. Respondents argued in part:

> [H]er relationship and dealings with McKeown are incompatible with her claims. [Complainant], for example, as recently as the entire July 4th weekend of 2013, left her young daughter in McKowen's [*sic*] care while she went to North Carolina to be with a guy she met online. She also, as recently as May 10-14, 2014, watched McKeown's dogs while he was on vacation. These are just some examples of the real relationship between [Complainant] and McKowen, [*sic*] all of which contradict her allegations against him. Clearly, if [Complainant] was truly experiencing the sexual harassing conduct by McKeown that she is now asserting, she never would have interacted with him outside of work to the degree she repeatedly did, and she certainly would have not placed her daughter in his care.
>
> [See Letter from W. Healey, Esq., to A. Baron, Esq., Sept. 22, 2014, p.2.]

Respondents denied that Complainant ever reported sexual harassment during the course of her employment. Respondents argued that they first learned of Complainant's claims when it received a September 5, 2014 letter from an attorney who was representing Complainant at the time, which provided examples of the sexual harassment, claimed that Complainant reported McKeown's sexual harassment to Michalski "on repeated occasions," and claimed that Complainant was fired in retaliation for complaining about sexual harassment. Respondents contend that after receiving the letter, their attorney investigated the matter and found no support for any of those allegations.[1]

---

[1] DCR asked Respondents for a copy of the investigation report but was told that no formal written report existed.

Respondents argued that Complainant was fired because she refused to increase her work schedule from four days a week to five, and exhibited a poor attitude when asked to consider expanding her work schedule. Respondents noted in part:

> Complainant was not laid off. Complainant was terminated because she did not accept AMP's request to increase her workload from four days a week to five days a week. In addition, Complainant, in response to AMP's request for her to increase her workload, stated, "Why bother, I'm not going anywhere here," (or words to that effect). Complainant's attitude toward MP's request to increase her work load also factored into her termination.
>
> [See Respondent's Response to Document & Information Request, ¶8, May 6, 2015.]

McKeown denied ever sexually harassing Complainant. He said that he had "very, very little" direct contact with Complainant. He stated that he would go into the warehouse two or three time a day to "check on things and that was about it." He stated that Michalski hired Complainant after working with her at another company called FLA Orthopedics ("FLA").

McKeown stated that he was not in the room when Complainant was discharged, but he and Michalski had been discussing Complainant's "diminished positive attitude." He said that Michalski led him to believe that Complainant was unwilling to perform her job, especially the hours that were required of her. McKeown understood that Michalski suggested to Complainant that because she had an education, she should pursue other opportunities. They felt that she had gone as far as she could with the company and thought that she could do better elsewhere. McKeown said that it was ultimately Complainant's decision to leave, due to an unwillingness to do what was required in her position.

McKeown said that during Complainant's employment, he was involved in every aspect of the business, managing personalities and people, sales, even cleaning out garbage cans. McKeown said that he and Michalski were originally 50/50 partners, but he began winding down his role in the company in 2014, around the time of Complainant's departure. He stated that he

currently owns 25% of the business and manages its largest account. McKeown said that in 2014, his wife was expecting a baby, so he decided to reduce his role in the company so that he could spend more time with his newborn. He said that around the first quarter of 2015, they hired a person named Rod Cocuzza to work as Director of Operations.

Michalski told DCR that he initially hired Complainant to work with him at FLA, where McKeown was also employed.[2] He stated that FLA was bought by another company, and about two years later, he and McKeown started AMP. Michalski and McKeown were each 50% owners of AMP during Complainant's employment, but around the time Complainant left AMP, he and McKeown agreed to a different ownership arrangement so that McKeown could spend more time at home with his family. He stated McKeown's ownership share is now 25%, and he has not been working in the office for about two years. He stated that McKeown manages the company's largest account from his home.

Michalski stated that at first, Complainant worked three days a week. As AMP grew, they added her for a fourth day. He stated that the other employees worked five days a week from 8:30 a.m. to 5 p.m., and that the only person who works three days a week is his 72 year-old father. Michalski said some employees resented the fact that Complainant would come in at 9 a.m., and leave at 4 p.m.

Michalski told DCR that he considered Complainant to be a good friend. He said that she sought his advice about dating, family issues, kids, friends, work, and money, but never complained about sexual harassment. When asked if he ever witnessed McKeown attempting to fondle Complainant, Michalski replied, "Absolutely not."

---

[2] Complainant told DCR that she did not have much contact with McKeown at FLA because he handled "outside sales."

Michalski said that the events leading to the termination of Complainant's employment began when he asked her to work five days a week after another employee left,[3] so that he would not need to hire another person. According to Michalski, in response, Complainant said "I'm not going anywhere with this company anyway, so why should I do it?" Michalski said that Complainant was correct, as the warehouse manager was not leaving anytime soon, and there were no other opportunities for her to grow within the company. Michalski said that he felt that Complainant was too talented to work there. He told DCR that after she told him she would not work five days a week, he went home, prayed about it, thought about it and decided it was time to let her go. Michalski stated he gave Complainant two weeks' pay and $800.

Respondents provided certified statements from Office Manager Jill LaSacco and another current employee, Michelle Burns. Both wrote that they never experienced or observed "any sexually harassing or inappropriate conduct or comments" in the workplace. Both wrote that Complainant never seemed to be "upset" at work. Burns noted that Complainant "was always in good spirits" and that Complainant and McKeown "were cordial to one another."

DCR interviewed both women. LaSacco reiterated that she never observed any sexual harassment or sexually inappropriate conduct in the workplace. She said that she worked in the office, not the warehouse, and so did not work directly with Complainant.

Burns described her duties as handling accounts receivables, customer service, and answering the phone. She said that she never witnessed any sexual harassment in the workplace, and never saw McKeown acting inappropriately to Complainant. Like LaSacco, she noted that she did not work directly with Complainant because she worked in the office and Complainant worked in the warehouse.

---

[3] Michalski did not identify the employee who left. Complainant told DCR that Michalski asked her to increase her work schedule because Bower left. She said that Bower left on a Thursday, and the following Monday, Michalski told her that she was being "laid off."

Both women told DCR that before Rod Cocuzza was hired as Operations Director, they were to go to Michalski with any workplace problems.

DCR interviewed Lazzaro, who is Respondent's warehouse manager. At the time of the interview, Lazzaro had been working at AMP for six years. Lazzaro told DCR that he worked directly with Complainant in the warehouse area and never saw McKeown behave inappropriately toward her. Lazzaro described the work environment at AMP as "great." He said that four people work in the warehouse area, and they are close. When asked who he would go to with a workplace problem, Lazzaro said that he would discuss any workplace problems with Michalski, because he is AMP's president.

DCR interviewed Bower, one of the employees who Complainant alleged witnessed the sexual harassment first-hand. Bower told DCR that he worked for AMP as assistant warehouse manager for about four years, beginning in September 2010. Bower said that he worked directly with Complainant when she was in the warehouse, which he said was the majority of her time.

When asked whether he ever witnessed McKeown acting in a sexually inappropriate manner toward Complainant, Bower replied, "Many times." Bower told DCR that he would sometimes laugh because he was embarrassed by what was happening. He said that he was only 18 years-old when he started working at AMP and was afraid to "stick up" for Complainant because he did not want to suffer any repercussions.

Bower told DCR that he and Complainant often worked together assembling back braces, and McKeown would come up behind Complainant, wrap his arms around her waist and move his hips. He said that when Complainant told him to stop, McKeown would act like he was joking. Bower said that McKeown did it too many times for it to be a joke. Bower said he saw McKeown touch her inappropriately more than a dozen times. Bower stated that McKeown

would also look at Complainant's breasts, and then look at Bower and raise his eyes. Bower said on at least one occasion, he heard McKeown say to Complainant, "One day I am going to do all the things I want to you and you will like it." Bower stated he was dating Complainant's daughter at the time. He said that McKeown would ask Bower if he had ever seen Complainant naked or if he had ever snuck into her bedroom. Bower also said that McKeown once asked him if he wanted to watch a video of him and a woman having sex.

Bower told DCR that he witnessed Complainant telling McKeown to "knock it off" many times, and she would also complain to Michalski about the incidents. Bower stated that Lazzaro also saw the sexual harassment, but would not acknowledge it because "they were all in AA together." Complainant also noted that Lazzaro was out on disability leave due to an injury for a period in 2012.

Bower was asked to describe the events that led to his separation from AMP. He said that McKeown accused him of taking excessive breaks and "giving [him] attitude," and sent him home for the rest of the day. The next day, Michalski and McKeown met with him and asked if he was enjoying working at AMP. Bower said, "No," and referred to McKeown as "a piece of shit and a liar." Bower told DCR that at that point, he also complained about McKeown's sexual harassment of Complainant. Bower said that he walked out of the meeting and that McKeown followed so closely behind him that McKeown's nose was touching Bower's neck. That was Bower's last day; a few days later Complainant was fired.

DCR interviewed Tim O'Brien, who worked for Respondents from around July 2011 until October 2012. He worked in the warehouse for the first nine months or so of his employment, and then moved to a sales position. He said that he worked directly with Complainant when he worked in the warehouse, and continued to work with her at times after he

moved into sales, because everyone helped out in the warehouse as needed. When asked whether he ever witnessed McKeown acting inappropriately toward Complainant, O'Brien replied, "Yea, for sure." O'Brien said that McKeown made sexual comments that were unprofessional and put his arm around Complainant and touched her in a manner that seemed inappropriate.

DCR asked O'Brien how his employment with Respondent ended. O'Brien said that Hurricane Sandy took place on a Monday, and he called McKeown at 7:30 a.m. the next morning to find out how the office fared in the storm. He said that McKeown started yelling that O'Brien should have gone to the office to check on it. He said that the call ended when McKeown told O'Brien that he was "useless" and should "hang [him]self." O'Brien said he went to the office, cleaned out his belongings and left. DCR asked O'Brien whether Respondent had procedures for reporting workplace problems. O'Brien said that Michalski always told them to come to him with any issues.

DCR asked Complainant about Respondent's claim that she was fired for refusing to increase her work schedule from four to five days, and exhibiting a poor attitude in response to the request. Complainant said that after Bower left, Michalski told her that they needed someone to work five days a week, and asked if she could help them out. She told him that she was not sure she could do it because of her children and other commitments. She said that Michalski replied that it was no big deal, and hired a nephew or son of one of AMP's customers. Complainant said that when Michalski told her that she was being laid off, he never mentioned his request to work five days a week.

DCR asked Complainant about Respondent's claim that she entrusted McKeown to watch her young daughter on the 4th of July weekend in 2013. Complainant said that one day

when her young school-aged daughter was at the AMP facility, McKeown invited her to his house to see fireworks and his horses, and the child became excited and wanted to go. Complainant said that she agreed only because she knew that McKeown's fiancé and Michalski would be there also.

DCR asked Complainant about Respondent's claim that the friendly nature of their relationship is revealed by the fact that she cared for McKeown's dog while he was on vacation in May 2014. Complainant said that McKeown asked her to care for his dogs while he was away on vacation, and she felt that she could not refuse. O'Brien and Bower told DCR that McKeown also asked them to walk his dogs when they were at the AMP facility, and they felt that they could not refuse.

Analysis

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. Probable cause for purposes of this analysis means a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person in the belief that the [LAD] has been violated." Ibid.

A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), 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.

a. Sexual Harassment

The LAD prohibits gender discrimination in the workplace. N.J.S.A. 10:5-12(a). Sexual harassment is a form of gender discrimination. Lehmann v. Toys'R'Us, Inc., 132 N.J. 587, 607 (1993). In such cases, 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. In reaching that determination, neither a plaintiff's subjective response to the harassment nor the defendant's subjective intent is controlling as to whether a hostile work environment claim is viable. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008).

When the harasser is the owner of the business, his conduct "carries with it the power and authority of the office," see Taylor v. Metzger, 152 N.J. 490, 505 (1998), and the employee's dilemma is "acute and insoluble" because she has "nowhere to turn." Ibid.

Here, Complainant alleges that one of the company's owners subjected her to unwelcome verbal and physical conduct which, if proven at a hearing, would amount to "severe or pervasive" harassment for purposes of the LAD. The investigation found no evidence of a written anti-discrimination or anti-harassment policy in effect during Complainant's employment. Witnesses told DCR that they understood that they were to report any workplace problems to Michalski. Complainant alleges that she followed that practice but the harassment continued.

Complainant's version of events was largely corroborated by former employees Bower and O'Brien, who told DCR that they observed McKeown speaking inappropriately to Complainant and touching her in a sexual manner, and heard Complainant make clear to McKeown that the conduct was unwelcome.

Respondents denied the allegations of sexual harassment in their entirety. Their position was supported by current employees Lazzaro, LaSacco, and Burns.

The Director finds that the level of detail provided by Complainant and the corroboration from two former employees who would have been in a position to witness the conduct first-hand is sufficient to support a reasonable suspicion that the harassment occurred. The two former employees may ultimately be found to harbor a bias or prejudice against Respondents. Likewise, the objectivity of Respondent's witnesses may similarly be called into question as they are all current employees and thus may have their own implicit biases or external pressures. Accordingly, the Director believes that at this threshold stage in the process, the matter should proceed to a plenary hearing where a trier of the fact can observe the parties and witnesses testify, assess their respective credibility, and reach a conclusion as to which party is telling the truth as to the claim of sexual harassment.

b. Retaliation

The LAD makes it unlawful for employers to retaliate against employees for reporting workplace discrimination. N.J.S.A. 10:5-12(d). A complainant's burden to establish a *prima facie* case of retaliation is "not an onerous one." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant 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).

Here, the Director finds—for purposes of this disposition only—that Complainant complained about sexual harassment to Michalski and McKeown. The Director also finds, again for purposes of this disposition only, that the evidence supports a reasonable ground of suspicion that Complainant's reports of sexual harassment were a determinative factor in the decision to terminate her employment. At a plenary hearing, a trier of the fact will determine if Complainant was fired for complaining about sexual harassment as she alleges, or for refusing to expand her work schedule and displaying a poor attitude in responses to the request, as Respondents allege.

Conclusion

In view of the above, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that probable cause exists to support the allegations of sexual harassment and retaliation. N.J.A.C. 13:4-10.2.

DATE: 8-28-17

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS