

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EB16WB-65712

Christopher Spencer,)	
)	<u>Administrative Action</u>
Complainant,)	
)	FINDING OF PROBABLE CAUSE
v.)	
)	
Allen Maxwell & Silver, Inc., and Controller)	
David Piedmonte, Individually,)	
)	
Respondents.)	

On September 9, 2015, Bergen County resident Christopher Spencer (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Allen Maxwell & Silver, Inc. (AMS) and its controller, David Piedmonte, discriminated against him because of his race, perceived sexual orientation, and retaliated against him for engaging in protected activity, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondents denied the allegations of discrimination and retaliation in their entirety. The DCR investigation found as follows.

Summary of Investigation

AMS is a commercial debt collection company located in Fair Lawn, New Jersey.¹ The company is owned by Lisa Friedman. Its Chief Operations Officer/Vice President is Jim McConville.

On or around April 9, 2012, it hired Complainant to work as a collector. He was responsible for recovering debts owed to AMS clients. He reported directly to AMS Collections Manager Audra Haskoor.

At the time, Piedmonte held a wide range of responsibilities including but not limited to accounting, information technology, sales, and administrative work.² In addition, he stated that he was performing all of the company's human resources (HR) duties and referred to himself as the "HR Director." He told DCR that he had approximately eight direct reports. He did not

¹ During the relevant time, Respondent was located in Englewood Cliffs, New Jersey.

² In the verified complaint, Complainant identified Piedmonte's title as Chief Financial Officer. Respondents' counsel states that Piedmonte's actual title was Controller. The caption has been modified to reflect Counsel's representation.

directly supervise the collectors; however he stated he provided guidance to Friedman and McConville regarding disciplining and firing collectors.³

a. Hostile Work Environment

In the verified complaint, Complainant, who is African-American and heterosexual, alleged that he was harassed based on the perception that he was gay. During the ensuing investigation, Complainant clarified that he did not believe that Respondents perceived him to be gay or that they discriminated against him due to their perception of his sexual orientation. Instead, he alleged that Piedmonte, who is gay, regularly made offensive and unwelcome comments in the workplace such as, “Do you like to take sex from a man up the butt?” He alleged that Piedmonte “would come out and make nasty comments to people. It could range from homosexual remarks, like, ‘My knees hurt from staying up all night sucking,’ or fucking, whatever it was. Just nasty comments that were not appropriate for the office.”

Complainant also alleged that Piedmonte, who is Caucasian, made offensive race-based remarks such as, “You sound too black. Just like a New Jersey nigger,” “What black person does not lift weights? A dumb bell,” and referred to African-American female employees, T.M. and T.W., as “black bitches.” Complainant alleged that employees told him that Piedmonte referred to him as a “thug” behind his back.

Complainant stated that the first time Piedmonte made offensive racial remarks in his presence was in or around June 2014 at a restaurant called the Bike Club where members of the staff would gather after work. He claimed that Piedmonte asked him, “Why do you guys wear your hats like that?” Complainant understood “you guys” to mean African-Americans. He said that Piedmonte asked if he could try on Complainant’s hat. Complainant stated that Piedmonte donned the hat and started making faux gang signs. Complainant felt it was an attempt to mock African-Americans. Complainant provided DCR with a photograph of what purports to be Piedmonte wearing Complainant’s hat while making hand gestures. Complainant stated he reported Piedmonte’s conduct to Collections Manager Haskoor.

Complainant alleged that Piedmonte became irate on or about May 22, 2015, when he learned that Complainant was helping T.M. clean the office. Complainant stated that T.M. had a broken foot at the time. He claims that Piedmonte came out of his office, followed Complainant to his cubicle, and began shouting, “No one can help your black ass!”

Witnesses corroborated that Piedmonte routinely made offensive sex and race-based remarks in the workplace. For example, one AMS employee told DCR that Piedmonte made comments such as, “Hey fags,” and, “Hey bitches.” The witness stated that Piedmonte used the

³ Piedmonte made the assertions about functioning as the HR Director, supervising eight employees, and providing guidance on discipline for collectors, at the fact-finding conference in front of Friedman and McConville. They did not dispute his characterization of the scope of his duties.

term “black bitch” in reference to female employees on multiple occasions, and stated that Complainant “sounds too ghetto,” and “looks too ghetto.”

Another told DCR that Piedmonte once pulled his pants down and urinated in front of her in a storage closet and spoke about “getting banged up the butt” on a daily basis.

Another told DCR that Piedmonte fired an employee over the phone and then announced, “I don’t care if she tells someone that I came up there and butt-fucked her.” That witness claimed to have heard Piedmonte state that Complainant was “thuggy,” and refer to T.W., T.M., and M.G. as “black bitches.”

T.M. told DCR that Piedmonte referred to her as a “black bitch,” and referred to Complainant as “too ghetto.” She stated that at the Bike Club, Piedmonte asked Complainant and other African-American employees, “Why do you people wear your hats like that?” and, “Why do you people talk like that?” She stated that it was clear that Piedmonte was referring to African-Americans, and when she objected to the way Piedmonte was speaking, he stated, “Oh this black bitch over here.” She told DCR that she recalled the cleaning incident but could not recall Piedmonte stating, “No one can help your black ass.”

A current AMS employee told DCR that Piedmonte would refer to African-American women as “black bitch” on a daily basis. The witness stated that T.W. resigned from AMS because Piedmonte repeatedly referred to her as a “black bitch.” The witness stated that Piedmonte would refer to Complainant as a “thug,” and treated minorities poorly.

During a fact-finding conference held by DCR pursuant to N.J.A.C. 13:4-4.7, Collections Manager Haskoor confirmed that Piedmonte made sexually charged comments in the workplace. She stated:

David was very loud and very crude most of the time. I have heard him make other insensitive remarks. I can’t quote the remarks but I can say that he spoke inappropriately on a regular basis. He would reference body parts. He was just very crude. He made inappropriate jokes. He was insensitive. The very first time he introduced me to the company accountant, he referred to my breasts. He would talk about pussies, dicks, asses, on a regular basis.

Haskoor acknowledged that Complainant complained to her about Piedmonte’s comments at the Bike Club. She told DCR that she relayed the information to McConville. She stated that she witnessed Piedmonte referring to T.W. as a “black bitch.”

During the fact-finding conference, Piedmonte acknowledged making some of the remarks but suggested that he never intended to offend anyone. For example, he said, “Did I make a comment about [Haskoor’s] breasts at one point? I probably did. I was joking around

with her.” He also acknowledged that he regularly referred to employees as “bitches.” DCR asked Piedmonte if he ever referred to any African-American employees as a “thug.” He replied:

I have not directly referred to African-American employees as “thug.” There’s context here. There were those big riots in Detroit, and a cop shot someone there were all kinds of riots. Whatever happened there, [African-American employee J.C.] came into the office with a hat on and I told him to remove it. He started screaming about something and inciting something in the middle of the office. I don’t remember what it was. I asked him to take the hat off. He kind of got in my face and called me a racist. And I said, “Stop acting like a thug.” And that was it. That was the only time I ever said that to anybody.

Piedmonte stated, “[T.W. and I] joked all the time and if I called her a black bitch, it was out of love. I always called her a bitch. I just don’t remember if I called her a black bitch.”

Piedmonte denied ever referring to Complainant or any other employee as a “New Jersey Nigger.” No witnesses confirmed that Piedmonte ever used the term “New Jersey Nigger.” During the fact-finding conference, Complainant stated that he did not hear Piedmonte refer to him as a “New Jersey Nigger,” rather he had heard from other co-workers that Piedmonte was referring to him as a “thug.”

Piedmonte stated that he recalled the cleaning incident, and acknowledged shouting at Complainant, but denied stating, “No one can help your black ass!”

Piedmonte denied making the joke, “What black person does not lift weights? A dumb bell.”

During the fact-finding conference, Piedmonte described the work environment as “very catty.” He stated, “People would start screaming. The ‘N’ word would fly out. I mean it was terrible. There was a lot of tension in the office. People calling each other terrible names. Things I heard were the ‘N’ word, slut, whore. Because it was such a tight environment, people got on each other’s nerves. Things would be said, arguments would happen. I realized it was a product of the environment and the type of employees we were hiring.” He stated that McConville and Friedman “knew this stuff was going on.”⁴

Chief Operations Officer/Vice President McConville acknowledged receiving information from Haskoor that there had been an “altercation” between Complainant and Piedmonte. However, he stated that since the alleged actions occurred outside the workplace at a non-sponsored function, “there was no dealing with it from that point.” He stated he “noted it mentally” but did not document the incident in writing nor did he conduct an investigation. He

⁴ McConville and Friedman were present at the fact-finding conference when Piedmonte claimed that they were aware of the pervasive name-calling in the workplace, e.g., “the ‘N’ word, slut, whore.” They did not dispute that claim.

stated, "People have different ways of out-letting the pressure and tension of the job. David's manner was different than most." He stated, "Our business tends to have a lot of eccentric people. Non-conforming behavior in any form seems to be the norm. And there's a lot of high stress and a lot of high strung people. So what happens in that particular environment, it's pressure releases. David had his own way of releasing his pressure. I personally would shake it off my back. I wouldn't think it's that big a deal."

AMS owner Friedman stated, "David would joke around all the time and say inappropriate things all the time. We would always get those things. He was inappropriate." She stated, "I've taken David's wrath. He would yell at me. He would be inappropriate with me. But I kept weighing out the good and what he brought to the table. But he did fly off the handle. He was not respectful of me . . . I did my best to keep him in check because it's a workplace and we all want respect." She stated, "Was I afraid of David's wrath? Yes. He flew off the handle many times about many things. And that was David. That's what we'd say, 'That was David.' That's who he was."

b. Professional Employer Organizations

Piedmonte stated that because the company was growing and did not have an official in-house HR presence, he recommended that AMS outsource its HR functions to a professional employer organization (PEO).

In or around November 2012, AMS contracted with a PEO called Insperty HR Solutions (Insperty). Insperty was responsible for AMS's payroll, administration of employee benefits, advising AMS of any compliance issues, and advising on policy handbook standards. It was also responsible for notifying AMS of any complaints made by AMS employees.

AMS produced its employee handbook, which went into effect upon the commencement of its contract with Insperty. The handbook states that any employee who feels harassed or discriminated against is "encouraged to immediately inform the alleged harasser that the behavior is unwelcome," and/or "immediately report the conduct to your immediate supervisor, manager, or owner of AMS and the Insperty Anti-Harassment hotline number." See Employee Handbook for Allen Maxwell & Silver, Nov. 2012, p. 15. The handbook describes the investigative process:

Once a complaint of alleged harassment or sexual harassment or discrimination is received, the Company will begin a prompt and thorough investigation. The investigation may include interviews with all involved employees, including the alleged harasser, and any employees who are aware of facts or incidents alleged to have occurred.

Following an investigation, the Company will promptly take any necessary and appropriate disciplinary action. Disciplinary action will be taken if the

investigation reveals that an employee has acted in a manner that is not in alignment with the goal of this policy, even when the actions may be lawful. In fact, the Company may address any workplace issue discovered during an investigation . . . If you have made a complaint but feel that the action taken in response has not remedied the situation, you should make a complaint following the complaint procedure outlined in this policy.

Ibid. The handbook also states that all managers and supervisors are responsible for “doing all they can to prevent and discourage harassment, sexual harassment and discrimination from occurring.” Id. at 3. The handbook states that upon learning of a discrimination complaint, the “supervisor, manager, owner of AMS . . . should act promptly to notify the Insuperity Anti-Harassment hotline number of the complaint so that Human Resources may proceed with an investigation. If such individual fails to follow this policy, he or she will be disciplined. Such discipline may include termination.” Ibid.

During the fact-finding conference, McConville interpreted the policy’s reporting procedure as follows: “The employee had the right to contact [the PEO] and make any complaint they felt was necessary. And then we should be notified of that upon their receipt.”

In or around January 2015, AMS changed PEOs. It contracted with TriNet HR Solutions (TriNet). AMS did not distribute a new employee handbook. The policies included in the Insuperity handbook remained in effect. Complainant and AMS told DCR that TriNet provided AMS employees with its anti-harassment hotline number and email addresses for TriNet Human Capital Director Rosemary Bryant and TriNet Human Capital Consultant Cecilia Jenkins.

On or about April 30, 2015, an African-American employee, J.C., complained about Piedmonte to TriNet. TriNet memorialized the complaint as follows:

[J.C.] said work environment is affecting his health

[Piedmonte] often makes racial comments to [J.C.] and other employees in private and publicly on the floor in front of everyone.

[Piedmonte] Calls employees black bitches, bitches, and thugs

[Piedmonte stated] You know the difference between you and [Complainant], you know how to speak and he speaks like a thug (this happened at [Piedmonte]’s house)

The reason AMS left Insuperity is because of numerous claims against [Piedmonte] and AMS did not want Insuperity doing an investigation

[J.C.] spoke with an attorney when AMS was with Insuperity – November 2014

[J.C.] fears [Piedmonte]

[Piedmonte stated] Sit your black ass down or there's the fucking door.

May 2015, [J.C.] walked by [Piedmonte] and [Piedmonte] said to another employee (loud enough for [J.C.] to hear "what's black and doesn't lift weights." [J.C.] weighs 157 pounds and is very skinny so [J.C.] felt [Piedmonte]'s comment was directed towards him.

Complainant told DCR that he complained multiple times about Piedmonte to Haskoor and McConville, but that no action was taken. On or around May 26, 2015, he called TriNet's anti-harassment hotline and reported that Piedmonte subjected him and others to racial harassment. TriNet's notes memorializing the report are as follows:

As per the employee he is the top Collector at AMS

[Piedmonte] often makes racist jokes on the open floor and everyone can hear them

Treated differently by [Piedmonte] for example he calls him a thug

[Piedmonte] has called him a thug; Lisa said [Complainant] talks like a thug and talks street

May 22, 2015, there was an incident in the office involving [Piedmonte] and [Complainant].

[Piedmonte] took off his glasses and rose from his seat towards [Complainant]

[Piedmonte] told [Complainant] no one could help him

[Piedmonte] followed [Complainant] from his desk and was making threatening comments

[Complainant] kept repeating to [Piedmonte], "I don't appreciate how you are talking to me" about 10 times

According to TriNet records, another employee, T.M., complained that Piedmonte made racist jokes in the workplace and other inappropriate comments

On or about May 27, 2015, TriNet Human Capital Director Rosemary Bryant and TriNet Human Capital Consultant Cecilia Jenkins notified McConville and Friedman that they received complaints from AMS employees that Piedmonte subjected them to racial harassment. TriNet did not identify the complaining employees at this time. Bryant and Jenkins memorialized the conference call as follows:

Jim [McConville] said he is aware of why they are receiving these claims and he is 99% sure of who made them

Jim admitted that bitch is used very often in the office; He also said bitch is used as street slang; it's used in a two way fashion

Jim said bitch is not used as a derogatory term

Jim has told David not to use the word bitch

Jim said bitch is used due to the ethnicity of the staff

When Jim was asked if David made the comment "Sit your black ass down or there's the fucking door," Jim said David may have made the comment because it sounds like something David would say.

Between June 8, 2015 and June 10, 2015, McConville and AMS Director of Operations Mary Curtin interviewed Complainant, J.C., T.M., D.J., P.C., Haskoor, and Friedman. They did not interview Piedmonte. Curtin memorialized Complainant's interview as follows:

Jim explained that we were notified by TriNet of a complaint he filed against Dave Piedmonte and that everything said in the meeting was to be kept in confidence. Chris came in and initially went off on a tangent when Jim asked about the specific nature of the complaint. He said that he has been swallowing everything David has done since he has been here and he has had enough. He went to TriNet because he "knows" management will never address David's actions as complaints have been filed in the past and there have never been any resulting consequences. When Jim asked again for the specific nature of the complaint, Chris said, "I feel threatened, harassed and disrespected about the incident." He was referring to the incident that took place at about 3:00 on the Friday before Memorial Day on May 22. Chris also stated that, during the incident, he felt like he was being "stalked." Jim asked if David had used any defamatory or racist language during the incident. Chris said "No." Chris said that he started cleaning 15 minutes before his shift ended on that Friday. He was emptying the garbage pails in David's office at about 3:15. David checked the system and saw that Chris had not punched out early to start cleaning and asked why he was cleaning on company time. Chris stated that David stood up and had a threatening demeanor. Per Chris – he (Chris) kept repeating to David "I do not feel comfortable with how you are talking to me." He said [D.J.] and [P.K.] witnessed the exchange. Chris left David's office and David followed him back to his cubicle. Chris again felt threatened and harassed because David was yelling and he was standing in an aggressive way. Once Dave left Chris's cubicle, Chris went outside. Chris came back to work on Tuesday and he filed the complaint

with TriNet because “he did not hear anything from management in the morning when he came in.” Jim brought up page 12 in the handbook where it references how to handle Human Resource complaints. He asked if he ever went to a manager to file a formal complaint before going to TriNet about this incident. Chris said “No.” Jim said that if something happens in the future he should make a “formal complaint” to his manager and specify the seriousness of same. Chris also stated that he made the verbal complaint on Tuesday after Memorial Day and the written version will be sent tomorrow (6/9/2015). Chris said the written complaint will reference everything David has said and done since Chris has been there. Chris also stated he will reference the names of the AMS employees who are willing to act as witnesses to the incidents. When Jim asked “What is the expected result/outcome to filing this complaint?” Chris said “Dave is not his manager so there is no reason to have to deal with him because “we” cannot control him (Dave).” Chris feels that “we” condone Dave’s actions. Chris wants no communication with David P. and that is his desired outcome of filing this complaint.

Complainant produced an audio recording of what purports to be McConville’s interview with J.C. The interview lasted for approximately thirty minutes. On the recording, McConville states that it was brought to AMS’s attention that J.C. made a complaint of hostile work environment to TriNet and that McConville has the responsibility to investigate the allegations. McConville asks J.C. to describe the nature of the complaint. J.C. states:

[Piedmonte] comes across as very discriminating, racial wise and he’s made comments before to where as far as black this and black that. Nothing was done. I advised management of it. Nothing was done. Back in November . . . I was sitting at my desk and he tells me “sit my black ass down or there’s the door.” To the point where I actually sat down and felt like a dog.

* * *

Then it kept happening again and again with his little comments – black this black that . . . [T.W.] and I were very, very close . . . so when she came over to my desk and told me that David called her a black bitch, and she was crying I said to her, I said, you need to make a complaint . . . He doesn’t just do it to me. He does it to almost every African-American in here.

* * *

Now a couple weeks ago, it was 5:30. I clocked out. I was standing by Alan’s desk with my hat on. I’ll admit to you that I did have my hat on. Juan walked right by Dave with his hat on. Dave goes to me, take your God damn hat off, who

do you think you are . . . I said nothing. He follows me outside, walks down the steps and goes why are you acting like such a fucking thug lately?

J.C. described various incidents that he characterized as Piedmonte's racial discrimination. Curtin's notes appear to accurately reflect the contents of the audio recording.

McConville told DCR that he could not recall what he did with the information he received from J.C. He stated, "What I should have done is that I would have went to David to get his side of the story and then make some kind of determination based on that. I don't recall if I did that." He added that if he did not confront Piedmonte about J.C.'s allegations, it was because the information was "useless" or because it was unnecessary to do so.

When asked how he could have concluded that the information was useless without speaking to Piedmonte or other witnesses such as T.W. (whom J.C. identified as another victim of Piedmonte's racial remarks), McConville replied, "That would have been a unilateral decision that I made." He stated, "That is one isolated conversation that we don't know where it falls in a timeline. Was it the first time he talked to me? Third time? Had I investigated it before and found that the claims were baseless? I can't pinpoint that. It could have been a cry wolf situation I was looking at."

AMS did not produce any evidence indicating that McConville or anybody else investigated any previous claims made by J.C.

On June 11, 2015, Complainant sent a document to Bryant that listed incidents where Piedmonte subjected him and other employees to racial harassment and included a list of potential witnesses who could corroborate his allegations.

On June 25, 2015, Complainant sent an email to Bryant reporting additional racial discrimination, and reiterating prior allegations. On July 8, 2015, TriNet forwarded the email to AMS.

TriNet offered to investigate Complainant's June 11 and 25, 2015 allegations, but AMS declined the offer. Friedman told DCR that she did not believe AMS needed TriNet to conduct an investigation because AMS had already conducted the June 8, 2015 investigation where Complainant stated that his desired outcome was to have no communication with Piedmonte.⁵

Piedmonte stated that he urged his superiors to not let TriNet investigate the discrimination complaints. He said:

TriNet came in and wanted to do an investigation. But the fear was that they would have to talk to Lisa. If they come in and do a third party investigation on

⁵ It is unclear if Piedmonte had any contact with Complainant after the June 8, 2015 interview.

us and they end up talking to Lisa, God knows what they're gonna open up. That is why I didn't let it happen. I fought it. But it was not my final decision.

AMS did not conduct its own investigation into Complainant's June 11 and 25, 2015 allegations. McConville stated, "The investigation I conducted [on June 8, 2015] was about that one isolated incident from Memorial Day." There is no evidence that AMS ever asked Piedmonte to respond to the allegations made against him of racial harassment, or ever counseled or disciplined Piedmonte for same.

On July 2, 2015, TriNet sent a letter to AMS stating that it was ending their business relationship effective July 31, 2015. Bryant told DCR that the decision was based on the fact that Friedman, McConville, and Piedmonte "were not taking our advice or even entertaining it. They hired us to provide them with recommendations and HR compliance reviews. So if they're not going to let us do that, and they were refusing to let us investigate potential illegal acts, we had to terminate the contract. Part of the service agreement is that if we see potential illegal activity, we will terminate the contract."

Bryant stated, "We wanted an investigation. The allegations being made were very serious. They said they would handle it on their own and that's fine but I have no idea if they did or not. There was no reason for them to not allow us to do an investigation in my opinion. They weren't paying us any more or less if they let us do the investigation." Bryant noted, "Since I've been in the PEO industry, no I haven't seen a company handle this type of issue in this way and it is surprising."

c. AMS Disciplines Complainant

On July 8, 2015, Complainant asked Friedman if she was planning to meet with him, McConville, and Piedmonte to discuss his allegations against Piedmonte. Friedman replied that she was unaware of any such meeting. Friedman stated that Complainant stated, in effect, "If you don't do something, I will."

Friedman relayed the incident to McConville, who warned Complainant that making veiled threats to the owner was insubordination, and that he would be fired for any further acts of insubordination. Complainant again asked that they meet with Piedmonte to address the situation. McConville denied the request. He later stated that he "saw no positive coming out of such a meeting." See Email McConville to Piedmonte and Kerri Andren, Re: Chris Spencer, Jul. 8, 2015, 12:56 p.m.

Later that day, AMS issued a final warning to Complainant for excessive tardiness. See "Employee Counseling Statement," Counseling Type: Final Warning, Jul. 8, 2015. There is no mention of insubordination in the document. Complainant would subsequently tell DCR that similarly situated employees R.N., D.A., and R.K., were late to work more times than he but were not disciplined. The investigation found that from December 29, 2014 through

Complainant's date of discharge, Complainant was late to work fifty-three times. R.N. was late fifty-two times and counselled for excessive tardiness via email but not issued any formal disciplinary action. D.A. was late twenty-nine times and not issued any disciplinary action for excessive tardiness. R.K. was late twelve times but was out of work on a medical leave for eight weeks during the relevant time period. He was not issued any formal disciplinary action.

On July 30, 2015, Complainant was fired for job abandonment. Respondent stated that day, Complainant "entered the office and created a scene, clapping his hands and saying in a loud-enough voice for everyone to hear how happy he was that Tri-Net cancelled our PEO contract and making it known that he was taking responsibility for the cancellation." Complainant told Haskoor that he was leaving the office. When Haskoor asked Complainant why he was leaving, Complainant gave no reason. Complainant left the office and returned minutes later. Respondent stated that Complainant said "with TriNet no longer in the picture he had no ally to fight for him against the alleged mistreatment he felt was aimed at him." Haskoor said that she told Complainant "to do what he had to do, but understand that there will be consequences." Complainant stated he needed to leave for the day and did so.

That evening, McConville sent an email to Complainant stating that he was fired effective immediately for job abandonment.

Complainant acknowledged that he walked off the job on July 30, 2015, but argued that TriNet's cancellation of its contract with AMS created an untenable situation where he believed he had nowhere to turn and that no one was willing to help him deal with the harassment. He stated, "I felt the workplace was an untenable situation for me . . . When I or someone else would make a complaint about racial discrimination, David would go in the back and get M&Ms and throw them at the employees and say 'I love chocolate.' Instead of being focused on work, I'm focused on other things I shouldn't have to deal with. He's very intimidating. He made it uncomfortable."

Complainant told DCR that his intention was not to abandon his job and that he anticipated returning to work until he received McConville's email. In August 2015, he asked Friedman, McConville, and Piedmonte to reinstate him.

When asked during the fact-finding conference how he felt about the discrimination complaints made by Complainant and other employees, McConville replied that they were "an unnecessary annoyance" that he had to "put to bed."

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 statute 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 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. Hostile Work Environment

Hostile work environment harassment is a form of discrimination. See Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 607 (1993). When evaluating claims of harassment, the critical issue is whether a reasonable person in the complainant’s protected class 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.

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, Complainant alleges that he was subject to a barrage of sexually and racially inappropriate remarks in the AMS workplace. Witnesses, including members of AMS’s management, acknowledged that Piedmonte regularly used sexually and racially offensive language in the workplace. One manager stated that Piedmonte made a reference to her breasts during a meeting and would “talk about pussies, dicks, [and] asses on a regular basis.” Another witness testified that Piedmonte urinated in front of her in a storage closet. The same witness stated that Piedmonte regularly made lewd, sexual comments such as “getting banged up the butt.” Multiple witnesses stated that Piedmonte regularly referred to African-American female employees as “black bitches,” and referred to Complainant as a “thug” and “too ghetto.” Indeed, the company’s owner stated that Piedmonte said “inappropriate things all the time.”

Piedmonte suggested that his language was not intended to be offensive, and was in keeping with the workplace environment. He stated, “People would start screaming. The ‘N’

word would fly out. I mean it was terrible. There was a lot of tension in the office. People calling each other terrible names. Things I heard were the ‘N’ word, slut, whore.” Similarly, McConville appeared to suggest that a caustic workplace environment was unavoidable because bill collection was an inherently stressful profession. He stated:

Our business tends to have a lot of eccentric people. Non-conforming behavior in any form seems to be the norm. And there’s a lot of high stress and a lot of high strung people. So what happens in that particular environment, it’s pressure releases. David had his own way of releasing his pressure. I personally would shake it off my back. I wouldn’t think it’s that big a deal.

In light of the above, the Director is satisfied that Complainant was subjected to offensive race and sex based remarks that a reasonable person would find sufficiently “severe or pervasive” so as to create a hostile work environment for purposes of the LAD. The fact that AMS may not have subjectively intended to harass is of no moment. Cutler, supra, 196 N.J. 430-31. Nor does the Director place any stock in the argument that such conduct was somehow acceptable given the stressful nature of the profession. Cf. Lehmann, supra, 132 N.J. 587, 626 (noting purpose of anti-discrimination legislation is to produce “changes in workplace norms”).

The issue becomes whether AMS exercised reasonable care to prevent and correct harassing behavior, and whether Complainant unreasonably failed to take advantage of preventive or corrective opportunities. Aguas, supra, 220 N.J. at 524. Because the Complainant repeatedly reported the harassment beginning in June 2014, and most recently on June 25, 2015, and attempted to speak with members of management and made multiple complaints to TriNet, the Director cannot conclude that Complainant unreasonably failed to report the allegations. Conversely, the Director finds that AMS has not shown that it exercised reasonable care to prevent and promptly correct Piedmonte’s conduct. The company’s owner, Chief Operating Officer/Vice President, and Collections Manager were aware of Piedmonte’s behavior but took no effective remedial action. AMS declined TriNet’s offer to conduct a third-party investigation into Complainant’s allegations due to concerns of what such an investigation may bring to light. And McConville’s partial and incomplete investigation into a limited portion of the allegations falls short of a prompt and thorough investigation reasonably designed to effectively address the harassment.

b. Retaliation

The LAD also makes it unlawful to retaliate against an employee for complaining about workplace discrimination. N.J.S.A. 10:5-12(d). To establish a *prima facie* case of retaliation, an employee must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him 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).

For purposes of this threshold determination, the Director is satisfied that (i) Complainant engaged in protected activity by repeatedly complaining about Piedmonte's inappropriate racial and sexual language, (ii) he was subjected to adverse employment action when he was fired on July 30, 2015, and (iii) Respondent produced a legitimate business explanation for its personnel decision, i.e., performance issues including excessive tardiness.

Thus, the issue boils down to whether the circumstances suggest that Respondents' explanation was merely a pretext designed to mask a retaliatory animus. The Director finds that the totality of circumstances—e.g., Complainant was fired hours after urging the company's two most senior officials to address his on-going discrimination complaints; his complaints were levied against a highly-valued and seemingly influential supervisor; McConville's statement that he wanted the discrimination complaints to be "put to bed;" Complainant's comparator, R.N., was late to work fifty-two times and not fired or even issued a formal written warning; McConville's suggestion that the discrimination complaints were creating an "unnecessary annoyance"—are sufficient to support a "reasonable ground of suspicion" to warrant a "cautious person" to believe that Complainant's insistence that workplace discrimination be addressed was a factor that led to his discharge. N.J.A.C. 13:4-10.2.

c. Piedmonte's Individual Liability

The verified complaint alleged that in addition to AMS, Piedmonte individually violated the LAD. Because Piedmonte was not Complainant's employer, he would not be subject to liability pursuant to N.J.S.A. 10:5-12(a). However, Piedmonte could be liable for aiding and abetting the alleged discriminatory actions of AMS. The LAD states that it is 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).

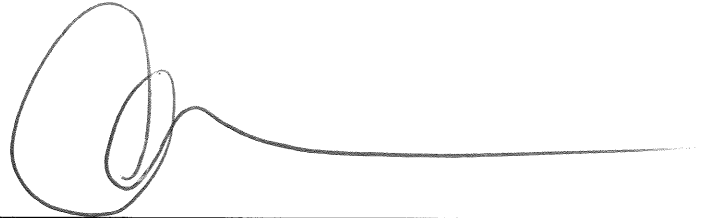
To establish that a person is liable under N.J.S.A. 10:5-12(e) for an employer's violation of the LAD, a plaintiff must show that the person: (1) aided the employer in performing a wrongful act that caused an injury; (2) was generally aware of his role as part of an illegal or tortious activity at the time he provided assistance; and (3) knowingly and substantially assisted the employer in the principal violation of the LAD. See Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). In this case, Piedmonte referred to himself as the HR Manager and was responsible for performing AMS's HR duties. Such duties would presumably include ensuring that AMS maintained a work environment free from discriminatory or harassing behavior. By failing to maintain such a work environment, and instead creating a hostile environment by his own

actions, Piedmonte may be liable under N.J.S.A. 10:5-12(e). See Hurley v. Atlantic City Police Dept., 174 F.3d 95 (3d Cir. 1999) (a supervisor who has a duty to prevent harassment subjects himself and his employer to liability when he flouts that duty by deliberate indifference or by committing harassing acts).

Conclusion

Based on the investigative findings, the Director is satisfied at this preliminary stage of the process that the matter should “proceed to the next step on the road to an adjudication on the merits,” Frank, supra, 228 N.J. Super. at 56, as to Complainant’s allegations against AMS and Piedmonte.

DATED: 12-1-17



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS