STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EG09WB-63409

T[redacted] S[redacted],	)	
	)	
Complainant,	)	
	)	Administrative Action
v.	)	
	)	**FINDING OF PROBABLE CAUSE**
Tyce Transportation	)	
and Curtis Horn, Individually,	)	
	)	
Respondents.	)	

This is an employment discrimination matter. Essex County resident T[redacted] S[redacted] (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Tyce Transportation (Respondent), discriminated against her based on her national origin and retaliated against her for reporting sexual harassment, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination and retaliation in their entirety. The DCR investigation found as follows.

Summary of Investigation

Respondent is a business located at 102 Welland Avenue, Irvington, which provides transportation services to students in the Essex County area. It is owned by Curtis Horn who, at all relevant times, was responsible for all personnel decisions relating to the company's drivers and bus aides. In September 2010, Horn hired Complainant, whom he initially paid in cash. On November 15, 2010, Horn placed her on the payroll as a bus aide and assigned her to a route serving the Center for Autism. He never assigned her to work any other routes.

Complainant, who is from St. Lucia, initially alleged in part that she was differentially treated and discharged because of her national origin. Shortly after filing the complaint, Complainant clarified that she had intended to allege sexual harassment and retaliation for rejecting and complaining about sexual harassment, not national origin discrimination. Accordingly, the DCR investigation did not address the allegations of national origin discrimination and the verified complainant is hereby amended to add a claim of sexual harassment and to add Curtis Horn as an individual respondent, per N.J.A.C. 13:4-2.9.

a. Sexual Harassment

Complainant alleges that shortly after she was hired in September 2010, Horn began telling her that she was attractive and inviting her to go out with him. Complainant alleges that despite her refusals, Horn's invitations persisted and he began making sexually explicit comments. She alleged that in or around October 2010, Horn began telling her that she would look good in his bed and that he wanted to kiss her "bottom lips," referring to Complainant's genitals.

Complainant told DCR that the sexually harassing comments occurred multiple times per week, and she began recording her interactions with Horn on her cell phone. In an effort to get assistance in making Horn stop, she played the recordings for two of his friends, Greg Jones and Miles Anderson. Both men were acquainted with Horn. In fact, Jones was responsible for facilitating Complainant's employment with Respondent.

Jones told DCR that he recalled Complainant coming to him and complaining of Horn's behavior, but he did not recall the details or whether her complaints were due to sexual misconduct. He also did not recall whether Complainant ever played recordings of Horn for him.

Anderson told DCR that he remembered hearing the recordings and specifically recalled hearing Horn say he wanted to suck on Complainant's "bottom lips." Anderson told DCR that the recording was very disturbing. [1]

Complainant alleges that on November 19, 2010, Horn informed her that she needed to fill out paperwork. She alleged that as she was seated and waiting for Horn to provide the documents, he began rubbing her shoulders. Complainant said that she jumped up and Horn asked her to come into his office. She alleged that upon entering the room, she noticed a bed and attempted to back out of the room. Complainant alleges that Horn then grabbed her tightly, closed the door and began kissing and licking her neck and tried to remove her shirt. She alleged that Horn tried to put his tongue in her mouth as he pulled her towards the bed. Complainant alleges that she escaped his grasp and stated that she was going to call the police. She alleges that Horn laughed. Complainant alleges that she tried to open the door but discovered that it was locked. She alleges Horn laughed and refused to open the door until he heard someone outside. She alleged that after Horn unlocked the door, Complainant ran out and saw driver Emmanuel Jacques but did not discuss the incident with him at this time.

Complainant discussed the incident with Jacques on December 2, 2010. She also played the cell phone recordings of Horn making sexually explicit remarks. She told DCR that Jacques

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[1] Complainant produced the cell phone. However, it was not operational. For the purposes of this threshold determination, DCR has relied on the corroborating evidence from Anderson and other witnesses who claimed to have heard the recordings soon after Complainant made them.

cautioned her that it might be dangerous for her to report Horn's conduct to the police or anyone else.

Jacques confirmed to DCR that Complainant complained to him that Horn attempted to take her clothes off and that he heard recordings of Horn making explicit comments towards her.

On December 6, 2010, Complainant told Philip Fluker, who worked for Respondent as a driver, about Horn's behavior and played the recordings for him. Complainant told DCR that she went to Fluker because she knew he also worked as a constable. Fluker confirmed to DCR that he recalled hearing Horn's voice on the recordings played by Complainant and that his comments on the recording were sexual in nature. He also confirmed that he was and continues to serve as an Essex County constable. Fluker stated that after hearing the recordings, he confronted Horn and advised him to stop making sexual remarks towards Complainant. He stated that Horn claimed that he had only been "joking around."

DCR interviewed Horn, who denied making any sexually harassing comments or any sexual advances towards Complainant. He also denied that Fluker had confronted him about Complainant's allegations of sexual harassment, and denied knowing about any audio recordings that Complainant may have made of his comments. When DCR requested a copy of Respondent's sexual harassment policy, Horn replied that Respondent has no such written policies and that employees should report any such complaints to him. Horn told DCR that if an employee felt she was being harassed by him, she should file a complaint with DCR or the local police.

b. Retaliation

On or around December 7, 2010, Complainant went to the Irvington Police Department to file a police report regarding Horn's conduct. Complainant told DCR that while she was at the police station, Detective Davis contacted Horn.

DCR requested a copy of the police report from the Irvington Police Department. The Police Department was unable to produce a copy, stating that because any such report would have been filed prior to implementation of its current record-keeping system, it would be very difficult to locate.

Complainant alleges that after Horn was confronted by Fluker, and after she reported his conduct to the police, the sexual harassment diminished, but Horn began cutting her hours.

The school that Complainant served was closed for winter break from December 22, 2010 to January 5, 2011. She went out of town during this time period and attempted to return to work on January 7, 2011. Complainant told DCR that Horn refused to allow her to return to work and required her to complete new forms, get new fingerprints, and take a new drug test. Complainant told DCR that she completed those tasks within the week but Horn still refused to

allow her to return to work. Complainant alleges that Horn permitted her to return to work only after Jacques and Fluker advised Horn that Complainant had recordings of him making sexually harassing remarks. She returned to work on January 18, 2011.

Complainant told DCR that Horn later unnecessarily kept her out of work on multiple occasions including: April 26-30, 2011; May 1-11, 2011; July 1-10, 2011; three weeks in May 2012; and June 29-July 13, 2012. Complainant alleged that the other bus aide assigned to work the Center for Autism route, Jennie Leverett, continued to receive work assignments during these time periods. Horn told DCR that bus aide schedules are dictated by the school calendar and route availability, and during the summer when schools are out, he asked employees not to come in if there was not enough work. Horn stated he relied upon seniority in determining which aides received work, but he did not explain why Leverett, who was formally hired on the same day as Complainant, was selected to work during these slow periods while Complainant was not.

Horn fired Jacques and moved driver Derrick Williams into the Center for Autism route in July 2012. On October 19, 2012, Horn told Complainant that he was discharging her, effective immediately, because Respondent would no longer be servicing the Center for Autism. Complainant told DCR that later that day, she received a phone call from Horn during which he said something to the effect of, "You must know how bad you want your job. I'm not taking 'no' for an answer." Complainant understood this to mean Horn would allow her to return to work if she stopped rebuffing his sexual advances. Complainant declined his offer and ended the phone call. During DCR's investigation, Horn denied calling Complainant and offering her job back.

In the weeks following her termination, Complainant observed that two of Respondent's buses continued to service the Center for Autism route, despite Horn's representation that the route was ending. Driver Derek Williams and bus aide Sandra Berrian worked one bus, and driver Lady Underwood and bus aide Jennie Leverett worked a second route. When she was discharged, the route was being serviced by Complainant, Williams, Underwood, and Leverett. Based on payroll documents provided by Respondent, Berrian was hired on September 12, 2012, approximately five weeks prior to the termination of Complainant's employment.[2]

In November 2012, Complainant called Williams to determine whether the contract with the school had actually ended. During an interview with DCR, Williams recalled receiving a call from Complainant during this time period, and in a signed affidavit, he stated that the route continued after Complainant was discharged. Documentation obtained during the investigation also indicated that Respondent continued to service The Center for Autism until January 2013.[3]

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[2] Horn told DCR that Berrian worked for Respondent on multiple occasions since 2009.

[3] The delay in finalizing this matter is attributable to Respondent's lack of cooperation. Respondent never filed an answer to the verified complaint despite the fact that it was sent to Respondent

Analysis

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. The procedure is not an adjudication on the merits but merely an initial "culling-out process" in which 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., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The "clear public policy of this State is to eradicate invidious discrimination from the workplace." Alexander v. Seton Hall, 204 N.J. 219, 228 (2010). To that end, the LAD was enacted as remedial legislation to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996).

Sexual harassment in the workplace is a form of gender discrimination. See Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). To present a claim of hostile work environment due to sexual harassment, there must be evidence that the conduct occurred because of the employee's gender or was sexual in nature, and that a reasonable employee of the same gender would find the conduct severe or pervasive enough to alter the conditions of employment to make the working environment hostile or abusive. Id. at 603.

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

Here, Complainant alleges that Horn frequently made lewd comments about her appearance, often asked her to go out with him, and repeatedly told her he wanted to perform

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via certified mail, hand-delivered to Horn on July 17, 2013, and faxed to Respondent three times between September 11, 2013 and March 12, 2014. On March 12, 2014, Horn indicated that he would submit an answer the following day. DCR received a fax from Horn with some information relating to the Center for Autism on March 17, 2014, but he never filed an answer. The complaint was re-faxed to Respondent on March 26, 2014, and once again hand-delivered on September 12, 2017. Horn appeared for an interview with DCR only in response to a subpoena dated October 4, 2017. During that interview, Horn claimed that he had no knowledge of the verified complaint prior to receiving the subpoena.

oral sex on her. Complainant stated that she made recordings of Respondent making sexually explicit remarks, and shared them with others.

Horn does not dispute that such conduct would be sufficiently severe or pervasive to make a reasonable woman conclude that her work environment hostile or abusive. He simply denies that it ever occurred. However, the investigation found that Complainant's allegations were corroborated by the multiple witnesses including Philip Fluker, Emmanuel Jacques, and Miles Anderson, who confirmed hearing recordings of Horn—whose voice they recognized—making sexually explicit comments to Complainant. Fluker stated that he confronted Horn and asked him to stop making sexually explicit comments to Complainant. Based on the investigation, the Director finds that there is "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief," N.J.A.C. 13:4-10.2, that Complainant was subjected to sexual harassment for purposes of the LAD.

The LAD also makes it unlawful for employers to retaliate against employees for reporting workplace discrimination. N.J.S.A. 10:5-12(d). To establish a *prima facie* case of retaliation, 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).

The Director finds for purposes of this disposition only that Complainant engaged in protected activity when she complained to Fluker (who later confronted Respondent about his conduct) and Irvington Police Department, and that Respondent thereafter subjected her to an adverse employment action. Although the police department was unable to locate the report, there is reason to believe this was due to the age of the document and a change in recordkeeping procedures, and not because Complainant never made a complaint. Respondent claimed Complainant was placed on unpaid leave during slow periods based on a seniority system but he failed to explain why another bus aide, with the same seniority as Complainant, was offered routes during these same time periods. Respondent also failed to explain why a new bus aide was hired to replace Complainant and why the route continued for three months after Complainant's discharge. Under the circumstances, the Director is satisfied that there is "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that Respondent placed Complainant on unpaid leave multiple times because she reported his sexually harassing conduct and rejected his sexual advances. Similarly, there is a reasonable ground of suspicion to believe that Respondent's explanation for her firing was pretextual, particularly since she was

replaced by another employee and her assigned route continued after the termination of her employment.

In view of the above, the Director finds at this preliminary stage of the process that that probable cause exists to support the allegations of sexual harassment and retaliation. N.J.A.C. 13:4-10.2.

DATE: 1-30-18

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS