STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO.: EM25WB50871

GISELLE RAMSINGH and CHINH Q. LE, DIRECTOR, NEW JERSEY DIVISION ON CIVIL RIGHTS,	)	
Complainants,	)	
-v-	)	**FINDING OF PROBABLE CAUSE**
WENDEL FAMILY WELLNESS CENTER,	)	
Respondent.	)	

Pursuant to a Verified Complaint and an Amendment to the Verified Complaint filed with the Division on Civil Rights, the above-named Respondent has been charged with unlawful discrimination on the basis of sex and unlawful reprisal, in violation of N.J.S.A.10:5-12(a) and (d) of the New Jersey Law Against Discrimination.

Chinh Q. Le (Director) is the Director of the Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT:

Complainant alleged that she was subjected to hostile environment sexual harassment because of her sex (female) and retaliated against for objecting to acts forbidden by the New Jersey Law Against Discrimination. Specifically, Complainant alleged that from January 2004 through August 2, 2004, she was subjected to sexual harassment by one of Respondent's male patients. Complainant alleged that the patient made numerous unwelcome verbal advances toward her, including telling her, "You're a very beautiful person, very sexy, you don't know all the fun I can have with you if we go out," and "I need to get you in my family some way or another." Complainant alleged that the patient also made physical advances. For example,

while on the chiropractic table during a massage administered by Complainant, the patient allegedly grabbed her ankle, groaned and said "Oh, that's the Giselle I know." Complainant also alleged that on August 2, 2004, while the patient was walking to one of the treatment rooms, he smacked Complainant on the behind with a clipboard.

Complainant alleged that on several occasions between March 2004 and August 2004, she complained about the sexual harassment to Respondent's director, Dr. David Wendel, and its office manager, Tara Montalvo, but they failed to take corrective action. Complainant contends that after she complained about the alleged sexual harassment, she was subjected to reprisal when she was discharged on September 1, 2004.

SUMMARY OF RESPONSE:

Respondent denied discriminating against Complainant for any unlawful reason, including subjecting her to hostile environment sexual harassment or reprisal. Respondent stated that when Complainant had complained about inappropriate conduct by other patients in the past, Respondent immediately addressed Complainant's concerns. Respondent denied that Complainant framed any of the conduct alleged here terms of discriminatory treatment.

Respondent acknowledged that in June 2004, Complainant complained that a male patient was grabbing her ankles during treatment. Respondent maintained that it offered to handle the situation, but that Complainant stated that she could handle it on her own. Respondent asserted that on or about August 3, 2004, Complainant complained that the same male patient was still grabbing her ankles and moaning her name, and that he had struck her on the behind with a clipboard. Respondent claimed that during the patient's next appointment, it addressed Complainant's complaint. According to Respondent, the patient apologized to Complainant for the behavior. Respondent asserted that it subsequently agreed to Complainant's request that she be relieved from having to treat that male patient in the future.

With regard to Complainant's claim of reprisal, Respondent asserted that it discharged Complainant for violating certain Health Insurance Portability and Accountability Act (HIPAA) regulations by disclosing information regarding a patient to a third party.

BACKGROUND:

Respondent Wendel Family Wellness Center is a chiropractic office located in Middlesex County, New Jersey.

Complainant, Giselle Ramsingh, resides in Parlin, Middlesex County, New Jersey. Respondent hired Complainant as a chiropractic assistant on October 28, 2002. Respondent discharged Complainant on September 1, 2004.

SUMMARY OF INVESTIGATION:

The investigation disclosed sufficient evidence to support a reasonable suspicion that

Complainant was subjected to hostile environment sexual harassment and was retaliated against for complaining about protected activity.

Allegations pertaining to sexual harassment

There was no dispute that Complainant complained to Respondent about two male patients who acted inappropriately toward Complainant prior to the events that gave rise to this complaint. It is also undisputed that the harassing conduct with regard to those two patients ceased subsequent to Complainant's complaints to Respondent. Complainant's verified complaint alleges more serious harassment by a third patient about which she complained on several occasions.

During the Division's fact-finding conference, Complainant stated that she provided treatment to this patient beginning in January 2004. According to Complainant, in February 2004, the patient began asking her out and telling her that she was beautiful, that she had a great body, that she turned him on, and that he thought of her at night. Complainant stated that she refused the patient's advances and asked him to stop, but the patient continued to sexually harass her during every subsequent visit. Complainant asserted that in March 2004, the patient's conduct became physical when, while lying face down on the treatment table, the patient grabbed her ankle, moaned and groaned her name and said "That's the Giselle I know, there she goes." Complainant stated that at this point she complained about the incidents to Respondent's office manager, Tara Montalvo, and its owner and director, Dr. David Wendel. According to Complainant, neither of the two individuals responded to her concerns.

Complainant further alleged that on August 2, 2004, the patient smacked her behind with a clipboard. Complainant stated that she immediately complained to Dr. Wendel about the clipboard incident, the touching of her ankles and the moaning and groaning of her name. The investigation uncovered an internal memorandum known as a CSW, dated August 4, 2004 and signed by Complainant, in which Complainant advised Dr. Wendel that she has been uncomfortable around a certain patient who has made inappropriate remarks and physical contact with her. In this memo, Complainant also advised that this patient smacked her on her "butt" with his clipboard on August 2, 2004. She stated in the memo that she had sent Dr. Wendel a CSW about this patient's conduct earlier that year.

During his interview, Dr. Wendel acknowledged that Complainant told him that a patient was touching her ankles, but he estimated that she told him in late April 2004. He conceded that he took no action in response to her complaint at the time. Dr. Wendel indicated that Complainant did not complain about that patient again until the clipboard incident in August. Dr. Wendel contended that he offered to speak to the patient, but that Complainant declined and told him she could handle it on her own. This assertion was denied by Complainant, who insisted that she continued to inform Respondent of the incidents, but no corrective action was taken.

The investigation revealed that at the next treatment session in August, Dr. Wendel met with the patient and addressed the clipboard incident. During his interview, Dr. Wendel stated that the patient recognized he was wrong and asked to apologize to Complainant. The

investigation revealed that the patient did apologize. However, Complainant asserted that she told Dr. Wendel and the patient that she did not accept the apology. There was no evidence presented by Respondent that it addressed the patient's alleged moaning and groaning of Complainant's name and the grabbing of her ankles. It is significant that Complainant insists that when she complained about the clipboard incident, she also complained to Respondent about the other acts of harassment, and this is borne out by the CSW dated August 4, 2004. Dr. Wendel contended that he spoke to the patient about the clipboard incident and his "other mannerisms."

Dr. Wendel asserted that following this incident, he told Complainant she did not have to continue to treat the patient because he would assume full treatment. This assertion was disputed by Complainant, who stated that Dr. Wendel at first offered to provide the treatment but then told Complainant, "you have to work on him, that's your job." A CSW form dated August 23, 2004 from Complainant to Dr. Wendel suggests that Complainant did not want to continue treating the patient. In the memo, Complainant stated: "I will not be putting or taking off therapy on the pt, teach any exercises, nor be alone with him anytime, or anywhere in the office. If there are any problems with my request, please let me know before tomorrow's meeting." Complainant asserted that during a meeting that took place on August 24, 2004, and that included Dr. Wendel, Ms. Montalvo, and Complainant, she told Dr. Wendel that the patient continued to sexually harass her. She asserted that she told Respondent she believed the situation with the patient was not handled appropriately and that she contemplated contacting the police. Complainant stated during the investigation that she continued to treat the patient until her discharge.

During the pendency of the investigation, the investigator interviewed Tara Montalvo, who had been Respondent's office manager during the period in question. During her interview, Ms. Montalvo corroborated Complainant's assertion that Montalvo was told about the patient's inappropriate conduct. Ms. Montalvo stated that Complainant confided in her and told her what was going on in the office. Although Ms. Montalvo characterized Complainant's statements to her as "not formal complaints," Ms. Montalvo nonetheless acknowledged that Complainant told her of the patient's inappropriate remarks and conduct around June 2004. Specifically, Ms. Montalvo stated that Complainant had told her about the patient's grabbing of Complainant's ankles, referring to Complainant as a "pretty girl, a beautiful girl," and grabbing and twirling Complainant's hair. Ms. Montalvo also recalled that Complainant reported these incidents to Dr. Wendel between June 2004 and the time of the clipboard incident.

Ms. Montalvo stated that in early June 2004, she filled in for Complainant one day when Complainant could not report to work. She performed treatment on the patient accused by Complainant of harassment. The patient had not observed Ms. Montalvo's entry into the treatment room. Ms. Montalvo stated that the patient began to moan and groan Complainant's name, saying "Oh, Giselle." Ms. Montalvo stated that "it was very gross." Ms. Montalvo stated that she then understood the patient's advances toward Complainant. Ms. Montalvo stated that she later asked Complainant if she wanted her to say something to the patient and Complainant told her "I have it under control." Nevertheless, the investigation revealed that despite being apprised of the sexual harassment of Complainant, and experiencing it herself, Ms. Montalvo neither reported the incidents to Respondent nor took corrective action as a manager. As noted

above, the investigation also revealed that on several occasions, Dr. Wendel was made aware of the sexual harassment to which Complainant was exposed.

Thus, the investigation established that Complainant was subjected to hostile work environment sexual harassment in that she was subjected to unwelcome sexual conduct by a patient which caused her work environment to become hostile or abusive. The investigation established that Respondent was made aware of this conduct. The investigation also demonstrated that the conduct created an environment that a reasonable woman would find objectionable as evidenced by Ms. Montalvo's account that she was also subjected to the patient's moaning and groaning and found it to be "gross." Moreover, the investigation revealed that Ms. Montalvo had been put on notice about the patient's harassing behavior, but failed to correct the behavior even after she experienced it herself. Indeed, although Dr. Wendel contended that he provided the patient's total treatment after Complainant submitted her August 4, 2004 CSW and told Complainant she no longer had to treat that patient, the investigation revealed sufficient evidence to support a reasonable suspicion that she was in fact asked to continue treating the patient on at least a few occasions, and that during those contacts she continued to be subjected to sexual harassment

Allegations pertaining to reprisal

Complainant alleged that after she complained about hostile working environment sexual harassment, she was subjected to an adverse employment action when Respondent discharged her on September 1, 2004. Respondent claimed it terminated Complainant because she violated HIPAA provisions that protect patient confidentiality when she disclosed information about one patient to another. The investigation produced sufficient evidence to conclude that Complainant was retaliated against for objecting to acts forbidden by the New Jersey Law Against Discrimination.

As explained above, the investigation revealed that Complainant complained she was subjected to sexual harassment by a patient, and Dr. Wendel was aware of these complaints. According to Complainant, on the day she was terminated Dr. Wendel stated that he would not tolerate an employee who told him how to run his business. During the investigation, Dr. Wendel admitted making this remark at the time of Complainant's termination, but he also insisted that Complainant was terminated because "three or four patients" informed him that Complainant said negative comments to them about another patient and, therefore, Complainant had made disclosures that violated HIPAA which compelled her termination.

The investigation, however, did not support Respondent's claim that three or four patients approached Dr. Wendel to report that Complainant had complained to them about another patient. Three patients identified by Respondent were contacted during the investigation. Only one patient recalled communicating with Dr. Wendel about Complainant talking about another patient. That witness, D.B., recalled someone at Respondent's office approaching her during a session after seeing some sort of odd expression on D. B.'s face. When questioned by that employee as to what was wrong, the patient stated that Complainant had discussed some incident that took place between Complainant and another patient, and recalled

that Complainant identified the patient by name. At the time of her interview with the investigator, however, the witness could not recall any specific details about the nature of the incident or the identity of the patient.

P.M., a second patient identified by Respondent as having complained about Complainant, stated that she had no contact with Dr. Wendel regarding Complainant, and that she "[did not] understand why he gave you my name." A third patient, S.K., stated that she had on occasion complained to Respondent about Complainant's demeanor and what she characterized as rude behavior, but said she did not recall Complainant complaining about any particular patient or alerting Dr. Wendel about such a complaint.

The investigation disclosed that Respondent's employment policy, a copy of which was signed by Complainant, contains a section which expressly addresses patient confidentiality. That section prohibits any staff member from "discuss[ing] any information regarding a patient and/or his or her condition outside the professional setting of Wendel Chiropractic Center. Engagement in this activity is contrary to Federal HIPAA Guidelines and regulations . . . and will result in immediate termination of employment."

For its part, HIPPA provides that "[a] covered entity may not use or disclose protected health information," except as permitted in other sections of the statute which do not apply to this matter, 45 C.F.R. 164.502 (a), and defines a "covered entity" to include health care providers such as Respondent. 45 C.F.R. 160.103. The Act also defines "health information" to mean

> [A]ny information, whether oral or recorded in any form or medium, that:
> (1) Is created or received by a health care provider . . and
> (2) Relates to the past, present, or future physical or mental health condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. 160.103. Thus, the Act protects "individually identifiable health information that relates to the individual's mental or physical health condition, the provision of health care to the individual, or the payment for the provision of health care to the individual."

The investigation produced evidence that casts doubt about whether Complainant was terminated for violating the confidentiality provisions of HIPAA. Dr. Wendel's remarks to Complainant at the time she was terminated are not consistent with Respondent's contention that she was fired for making prohibited disclosures about a patient. Additionally, only one of the three witnesses interviewed by the Division was able to corroborate Respondent's assertion that Dr. Wendel received a complaint about Complainant around the time of her termination. That witness recalled only that Complainant discussed with her an "incident" that took place between Complainant and another patient. There was no evidence that Complainant disclosed the health condition or health care information of another patient, or any other information protected by HIPAA. Therefore, it appears that Complainant violated neither the letter nor the spirit of Respondent's internal policy or any HIPAA provision relied upon by Respondent.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. 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. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

In the instant case, the investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to hostile environment sexual harassment and was retaliated against for having objected to acts forbidden by the Law Against Discrimination. The investigation showed that despite Respondent's knowledge that Complainant was and continued to be subjected to hostile environment sexual harassment, it failed to take effective, corrective action, and indeed did not even grant Complainant's request that she be relieved from having to treat the patient in question. The evidence also revealed sufficient evidence that Complainant was discharged as a reprisal for having complained about sexual harassment.

FINDING OF PROBABLE CAUSE:

It is, therefore, determined and found that **Probable Cause** exists to credit the allegations of the complaint.

_____ _____

Date CHINH. Q. LE, ESQ.
DIRECTOR, DIVISION ON CIVIL RIGHTS