STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN36WB-65654

Darren Wigfall, Complainant, v. Dan's Tree Surgeon, LLC, Respondent.	)	Administrative Action **PARTIAL FINDING OF PROBABLE CAUSE**

On October 21, 2015, Monmouth County resident Darren Wigfall (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Dan's Tree Surgeon, LLC (Respondent), discriminated against him based on race 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. The DCR investigation found as follows.

Summary of Investigation

Respondent is a tree trimming and removal service located in Tinton Falls, owned by Daniel Trost. Trost told DCR that he is responsible for hiring, scheduling, and discharging employees, and for all "climbing," i.e., using a bucket lift to cut high branches and limbs from trees. He stated that his employees work as grounds technicians. They are responsible for picking up the tree limbs or branches he cuts, feeding them into a wood chipper, or using a chain saw to cut them into small enough pieces to load them onto a truck for removal. Grounds technicians also operate Respondent's trucks and heavy equipment. Due to the seasonal nature of the business, grounds technicians are laid off each winter.

On September 23, 2013, Trost hired Complainant to work as a grounds technician for $12/hour. Trost rehired Complainant at the start of the next two seasons. Respondent typically worked with a three-person crew: Trost, Complainant, and another grounds technician. During 2014 and 2015, five of the grounds technicians were African-American. One was Hispanic.

Complainant, who is African-American, alleges that Trost, who is Caucasian, used offensive racial slurs including "nigger," "spic," and "wetback," when referring to African-American and Hispanic employees despite repeated objections from him and his co-workers.

Complainant stated that on Monday, October 5, 2015, he accidentally damaged a customer's fence while operating a machine. He told DCR that it was the end of the workday and he was rushing because he needed to pick up his child. Complainant stated that he apologized to the customer before he left, and repaired the fence the next day. Complainant said that the next day, a co-worker, J.V., told him that after he had left, Trost repeatedly criticized him using a racial slur

Complainant stated that the next day, rather than confront Trost about his comments at the customer's property, he waited until they returned to Respondent's facility. Complainant produced an audio/video recording of his ensuing discussion with Trost. On the recording, Complainant is heard telling Trost that his language was inappropriate. Trost can be heard on the recording replying that damaging the customer's fence was a "fucking nigger move."

Complainant alleged that he was fired the next week. He described the incident that led up to his discharge as follows. He stated that when he left work on Friday, October 9, 2015, he told Trost that he would see him on Monday. However, he told DCR that when he later realized that Monday, October 12, 2015, was Columbus Day, he did not report to work because Trost's employees never worked on holidays.

Complainant stated that the day after Columbus Day, he dropped his son off at school at 7:45 a.m., arrived at Respondent's Tinton Falls facility after 8 a.m., and discovered that Trost and J.V. had departed. He stated that he tried unsuccessfully to reach them by phone, and then sent a text message to J.V., who responded with the customer's address. Complainant stated that when he arrived at the worksite, Trost told him that they would be finishing up the season without him. Complainant stated that when he asked for clarification, Trost replied that he was fired. Complainant told DCR that Trost claimed that he had been a "no-call, no-show" the prior day. Complainant contends that the above conduct amounts to race discrimination and retaliation.[1]

Respondent denied the allegations of discrimination in their entirety. Trost told DCR that he never used racial slurs in the workplace. He specifically denied ever saying "nigger" in the workplace. He stated, "No. Never. Never. I'm not one of those types of people. I'm not prejudiced in any way." And he stated that Complainant never reported being offended by any language in the workplace.

Trost denied firing Complainant for complaining about racist language. Respondent stated that Complainant was fired for misconduct, failing to follow directions, and attendance issues.

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[1] The verified complaint alleges employment discrimination based on race. It is hereby amended to make clear that this includes disparate treatment and hostile work environment discrimination. N.J.A.C. 13:4-2.9; N.J.S.A. 10:5-12(a).

Trost told DCR that on Monday, October 12, 2015, Complainant did not show up to work and provided no explanation for failing to appear. Trost said that he had to cancel the job that day. He said that the next day, Complainant did not arrive at the Tinton Falls facility at 8 a.m. as required. Instead, he showed up at the customer's property at approximately 9:30 or 10 a.m., dressed in sneakers and shorts, rather than the boots and long pants as required. Trost told DCR that when Complainant arrived, he told him, "Look, you have a lot of things on your mind and problems going on. Take some time off. Go take care of it." Trost told DCR that it was his "polite" way of saying that Complainant should fix his problems or not come back. He believed that Complainant was often distracted during the workday by childcare and other personal issues, which adversely affected his timeliness and work performance. Respondent produced a timesheet that includes a handwritten notation for Monday, October 12 ". . . Did not show up or call - causing work to be called off when he arrived on Tuesday he was let go."

When asked to describe other performance issues, Trost stated that on May 5, 2015, an OSHA inspector made an unannounced inspection, and pointed out that Complainant was using a cell phone while operating a wood chipping machine. Trost stated that Complainant modified his behavior for a short time but resumed using earbuds while operating equipment a few weeks later.

Trost stated that on July 6 or 7, 2015, while driving Respondent's vehicle, Complainant drove into a customer's fence and knocked it down. Trost stated that he saw Complainant wearing headphones while driving the vehicle.

Trost stated that on August 12 or 13, 2015, he instructed Complainant to not move a company vehicle because it was attached to the wood chipping machine. He said that Complainant ignored his instruction, attempted to drive the vehicle off the property, and destroyed the tires as he rolled over several tree stumps.

Trost stated that on an unspecified date, Complainant rear-ended a company vehicle as he was operating his cell phone while driving.

Trost stated that on an unspecified date, Complainant damaged the brakes of a company truck when he failed to disengage the handbrake while driving.

Trost stated that on a number of dates, Complainant arrived to work late and/or left work early due to child care issues and his wife's pregnancy.

In rebuttal, Complainant admitted that he was often late for work, but said that Trost knew that he needed to drop his son off at school. Complainant argued that other employees were late and absent, but not disciplined. Complainant also stated that his absences were excusable because he made a good faith effort to notify Trost when he was unable to report to work. Complainant produced copies of text messages showing that on some occasions he notified Trost in advance that he would be late or absent.

Complainant acknowledged that he accidentally damaged company equipment on occasion and drove into a customer's fence, but maintained that he was not wearing headphones or using his cellphone when those incidents occurred. Complainant said that other employees damaged equipment but were not fired. Complainant said that when he damaged the tires on Respondent's truck, he offered to pay for the damage, but Trost refused.

Complainant denied being told that he could return to work after he addressed his personal problems. He also denied reporting to work the day after Columbus Day in inappropriate work attire.

DCR spoke with other grounds technicians who corroborated that Trost subjected employees to offensive racial slurs.

D.J., who is African-American, told DCR that Trost often said "ni***r" to him, Complainant, and others. D.J. said that he repeatedly complained to Trost about the slurs, and that sometimes Trost's use of racial slurs would decrease for a few days after he complained, but then would resume with regularity. D.J. stated that Trost defended his workplace language by arguing that if he were truly a racist, he would not hire African-Americans. D.J. said that he quit working for Respondent because of the hostile work environment.

S.R., who is African-American, told DCR that Trost would "pick on" employees he did not like, which included addressing them with racially offensive comments. He said that although he was never the target of those comments, he warned Trost that his conduct made the workplace uncomfortable for employees. S.R. said that he quit without seeing any improvement.

D.G., who is African-American, told DCR that he quit after Trost called him a ni***r.

T.P., who is African-American, said that he did not recall hearing Trost use that specific slur, but heard him make other derogatory references to African-Americans, such as referring to them as monkeys.

R.C. told DCR that he worked for Respondent for only one day in July 2015. He said that when he announced he was quitting, Trost made a snide comment about slavery and welfare, which R.C. interpreted to be a reference to race.

J.V., who is Hispanic, stated that he worked for Respondent from July to October 2015, and heard Trost use anti-black slurs on a daily basis. He said that it particularly bothered him because his wife is African-American and they have a bi-racial child. J.V. stated that he heard Complainant complain to Trost about using the n-word approximately ten times. J.V. said that Trost would often respond that he did not mean it "in a racial way." J.V. also recalled an incident in July or August of 2015. Complainant arrived late to the jobsite and did not park the company vehicle in the correct spot, and J.V. saw Trost tell Complainant that he was doing some "stupid nigger maneuvers." J.V. also remembered Trost becoming enraged when Complainant

damaged a customer's fence. J.V. stated that after Complainant was fired, he heard Trost say that he would never hire a black man again. About a week after Complainant was fired, J.V. resigned to return to his family in Alabama.

Complainant subsequently filed a claim for unemployment benefits with the New Jersey Department of Labor & Workforce Development (DOL). On November 18, 2015, DOL denied the claim. On November 25, 2015, Complainant appealed the decision to DOL's Appeal Tribunal. On December 23, 2015, Complainant and Respondent participated in a telephone hearing.

Based on the testimony from the hearing, the DOL Appeals Examiner reversed the initial decision. In so doing, the Appeals Examiner noted that the governing statute disqualifies persons from receiving unemployment benefits when they are discharged for "severe" or "gross misconduct," and listed some examples including "falsification of records, physical assault or threats . . . abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises," among other offenses. See In the Matter of Darren Q. Wigfall, Docket No. DKT00075400, Mailing Date Dec. 23, 2015, p. 2 (citing N.J.S.A. 43:21-5). The Appeals Examiner appeared to reason that although Complainant had documented performance issues, such failures were not unreasonable under the circumstances. The Appeals Examiner wrote in part:

> While it does appear the claimant was distracted by recent personal circumstances involving his wife's hospitalization, her impending due date, and his one son's recent illness, these distractions would seem like a reasonable reaction to a very hectic and anxious period in the claimant's life.

Id. at 2-3. Finding that there was no "evidence of a willful, or deliberate, disregard of the employer's interests," the Appeals Examiner concluded, "The matter of the claimant's eligibility for benefits during reported weeks of unemployment is remanded to the Deputy for an initial determination." Id. at 3.

Analysis

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 created to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996); see also Lehmann v. Toys'R'Us, Inc., 132 N.J. 587, 600 (1993) ("The LAD was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace.").

At the conclusion of a DCR 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. For purposes of that determination, "probable cause" is defined as a "reasonable

ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe" that the LAD has been violated. Ibid. If the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1 (b). However, if the Director finds there is no probable cause, then the finding is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10(e); R. 2:2-3(a)(2).

A finding of probable cause 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., 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

The LAD prohibits employment discrimination based on race, N.J.S.A. 10:5-12(a), which includes race-based harassment that creates a hostile work environment. See Taylor v. Metzger, 152 N.J. 490 (1998). In a racial harassment case, an employee must demonstrate conduct that (1) would not have occurred but for the employee's race; and that the conduct was (2) severe or pervasive enough to make a (3) reasonable person of that race believe that (4) the conditions of employment are altered and the working environment hostile or abusive. Id. at 498. When evaluating claim of hostile work environment, courts focus on the conduct itself, not its effect upon the employee or the workplace. See 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.

In this case, Complainant told DCR that Trost regularly used offensive racial slurs in the workplace, and continued to do so despite repeated objections from Complainant and other employees. Six employees corroborated Complainant's allegation that Trost routinely used racial slurs in the workplace. And at least one such incident was captured in an audio/video recording. In addition, witnesses stated that Complainant and others complained to Trost about his racially hostile conduct, but to no avail.

For purposes of this preliminary disposition, the Director is satisfied that a reasonable African-American working for Respondent would find such conduct to be "severe or pervasive" enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Lehmann, supra, 132 N.J. at 603. Even if Trost did not intend for his remarks to have a racial connotation, it would not negate the harassing nature of the conduct. See Cutler, supra, 196 N.J. at 430-41 (2008).

The situation was exacerbated by the fact that Trost was Complainant's supervisor (to say nothing of being the company owner). The New Jersey Supreme Court has declared that a supervisor's "unique role in shaping the work environment," gives it ample power to contaminate the workplace and alter the terms and conditions of a subordinate's employment, and that racial epithets are "especially egregious" forms of harassment. Taylor, supra, 152 N.J. at 502 & 503. And the Supreme Court noted, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Id. at 506 (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993)). It is "the most noxious racial epithet in the contemporary American lexicon" and "the all-American trump card, the nuclear bomb of racial epithets." See Gregory S. Parks and Shayne E. Jones, "Nigger: A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law," 98 J. Crim. L. & Criminology 1305, 1317 (2008).

Accordingly, the Director finds that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits" of Complainant's allegations of race discrimination. Frank, supra, 228 N.J. Super. at 56.

b. Retaliation

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 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).

In this case, the Director is satisfied that (i) Complainant engaged in protected activity when he objected to Trost's use of racial slurs in the workplace, (ii) he was subjected to adverse employment action when he was fired on October 12, 2015, and (iii) Respondent produced a legitimate non-retaliatory explanation for its personnel decision, i.e., Complainant's on-going performance problems. The remaining issue is whether Complainant provided sufficient persuasive evidence to show that Respondent's explanation was a pretext. N.J.A.C. 13:4-10.2.

It is undisputed that the day before Complainant was fired, he did not report to work despite his prior indication that he planned to show up, did not call to report his absence, and that as a result, Respondent had to cancel its job for the day. Complainant argues that he genuinely believed that he had the day off for the holiday. Thus, he suggests that it was unfair to discipline him for making an innocent mistake.

Similarly, Complainant acknowledges the majority of other workplace incidents cited by Respondent, e.g., late arrivals, early departures, damaging machinery, damaging customer property, but argues that they were non-fireable offenses and the unintended results attributable to unavoidable dilemmas such as childcare issues.

Respondent suggests that it decided to discharge Complainant because Trost believed that Complainant would continue to be distracted by personal issues and, therefore, his pattern of performance/attendance issues would continue as well. The investigation found sufficient evidence to support that this was a legitimate concern. It is consistent with the DOL Appeals Examiner's suggestion that Complainant's workplace distractions were almost unavoidable under the circumstances. See IMO Wigfall, supra, at 3 ("[T]hese distractions would seem like a reasonable reaction to a very hectic and anxious period in the [Complainant]'s life."). And although firing Complainant at that unsettled moment in his life may be evidence of a lack of sympathy, it is not, without more, evidence of retaliation.

Moreover, the notion that Trost would fire Complainant for complaining about racist comments necessarily presupposes that Trost was significantly bothered by such internal complaints. The evidence suggests otherwise. It appears that over the years, Trost received multiple complaints from Complainant and other workers about his racial slurs. There is no evidence or allegation that he ever fired anyone for complaining about his inappropriate language, or even admonished anyone for lodging such a complaint. It appears that at most, he would simply explain that he did not mean the remarks in a racial way. The Director finds the undisputed evidence about Trost's seeming indifference to past complaints coupled with a reasonable concern that Complainant's performance issues would continue because he remained in the midst of a "very hectic and anxious period" in his life, outweigh the latter's suspicions of a retaliatory animus.[2]

Complainant finds it significant that on October 12, 2015, a week after the fence incident where he confronted Trost about his racist language, he was discharged. However, Trost told DCR that the fence incident occurred during the first week of July 2015, not October 5, 2015 as alleged. And Complainant wrote in his verified complaint—which he attested to be true to the best of his knowledge, information and belief—that the incident occurred on July 7, 2015. If more than three months passed between the confrontation and the discharge, the absence of a

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[2] Complainant's claim that Trost was unduly stringent with him for making mistakes is somewhat belied by Complainant's statement that he was not required to pay for the tires he damaged despite operating the truck contrary to Trost's instructions.

temporal proximity would be even more reason to question whether there was a causal relationship between the two events. See e.g., Tasadfoy v. Ruggiero, 365 F.Supp.2d 542, 551 (S.D.N.Y. 2005) ("Three months is on the outer edge of what courts in this circuit recognize as sufficiently proximate to admit of an inference of causation."); see also Levins v. Braccia, N.J. Super. LEXIS 1473 No. A-4290-07T2 (App. Div., Jun. 16, 2009) ("Although our courts do not apply any bright-line test that cuts off causation after a specific lapse of time, some federal courts have concluded that a lapse of such duration supports an inference that a retaliatory motive was absent."). In this case, to the extent that a lapse of over three months intervened between the early-July confrontation and the end of Complainant's employment in October, it would not support an inference that Trost was motivated by a retaliatory animus.

On the other hand, if the firing occurred within days after Complainant drove into a customer's fence, and the day after Complainant failed to show up at work, then it would further support Respondent's claim that the personnel decision was motivated by performance concerns.

In view of the above, the Director finds that the investigation does not support the allegation that Complainant's complaints to Trost about using racial slurs, was a substantial motivating factor in his firing. N.J.A.C. 13:4-10.2.

Conclusion

Based on the above, the Director is satisfied that the circumstances of this case support a finding of **PROBABLE CAUSE** as to the allegations of race discrimination.

Conversely, the Director finds that there is insufficient evidence to support a finding of retaliation and hereby dismisses that portion of the verified complaint based on a finding of **NO PROBABLE CAUSE**.

DATE: 12-14-17

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS