STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 05142-14
DCR DOCKET NO. EP24WB-63908

Mohamed Ali,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
Don's BFF, LLC, d/b/a Don's Burgers, and Ghassan Sara, Individually,	)	
	)	
Respondents.	)	

APPEARANCES:

Mohamed Ali, *pro se*

Don's BFF, LLC, d/b/a Don's Burger, *pro se*

Gus Sara, Esq., White and Williams LLP, for Ghassan Sara

BY THE DIRECTOR:

On June 7, 2013, Morristown resident Mohamed Ali ("Ali" or "Complainant") filed a complaint with the New Jersey Division on Civil Rights (DCR), alleging that his former employer and its manager violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by subjecting him to sexual harassment and religious discrimination and discharging him in retaliation for reporting the conduct. More specifically, Complainant alleged that his manager grabbed and squeezed his buttocks and harassed him because he is Muslim, including telling him to shave the beard that he wears as part of his culture and his religious beliefs even though permitting his beard would not have imposed an undue hardship on the business.

The employer, Don's BFF, LLC, d/b/a Don's Burgers ("Don's" or "Respondent"), and manager, Ghassan (a/k/a Gus) Sara ("Sara"), filed separate answers denying the allegations of unlawful conduct in their entirety. During DCR's ensuing investigation, Complainant asked that the matter be transmitted to the Office of Administrative Law (OAL) for a hearing without a probable cause determination, pursuant to N.J.A.C. 13:4-11.1(c). On April 29, 2014, DCR ceased its investigation and transmitted the matter to OAL.

Administrative Law Judge (ALJ) Kimberly Moss held a telephone pre-hearing conference on August 25, 2014, issued a pre-hearing order on August 27, 2014, and held a hearing on April 15, 2015. Complainant testified at the hearing and presented the testimony of two former employees of Don's--Jeffrey DiBlasi and Jaoud Mesbahi. Neither of the Respondents appeared

at the hearing, and no one appeared on their behalf.[1] The record closed on April 22, 2015, and ALJ Moss filed her initial decision on April 24, 2015.

Complainant filed exceptions to the initial decision on May 8, 2015. Because there was no indication that Complainant had served Respondents with his exceptions, DCR mailed copies of Complainant's exceptions to Respondents on May 11, 2015. Don's filed a reply on May 16, 2015. After receiving an extension of time, Sara filed a reply on June 12, 2015. Complainant responded on June 22, 2015. DCR received an extension of time to issue this final decision, which is now due on July 23, 2015.

The ALJ's Decision

The ALJ summarized the testimony of Complainant and his witnesses on pages 2-3 of her decision, and then made the following factual findings:

> Ali is a Muslim. He was born in Egypt and came to the United States when he was eighteen years old. He worked as a kitchen manager at Don's in 2012. The owner of Don's was Chutko. Although there was testimony regarding conduct of a manager of Don's other than Sara prior to December 2012, there was no claim in the petition with regard to that conduct.
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> Sara, a male, was the manager of Don's in December 2012. On approximately December 9, 2012, and December 11, 2012, Sara inappropriately touched Ali on the rear end. Mesbahi was present on one of the occasions when Sara inappropriately touched Ali. Sara cursed at Ali in Arabic, the English translation of the curses are "pussy of your mother" and "pussy of your sister." Ali told Chutko of these incidences. Chutko told him to speak to Sara. Ali told Chutko that he was going to look for another job on December 11, 2012. Ali's, as well as other employees', hours were reduced. On December 16, 2012, Sara told Ali to cut off his beard. Ali testified that it is not required for Muslim men to have beards. Sara told Ali "You are not a Muslim, you eat pork." Ali left his job at Don's at that time. He had secured another job. There was no testimony that Ali lost any wages. A male having a beard is not mandated by the Muslim religion.

ID3-4.[2]

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[1] At the beginning of the hearing, the ALJ stated, "Mr. Sara was here the last date. He was noticed of this court date and he is not present." Tr. 2. p.18-20. The ALJ noted in her initial decision that when Michael Chutko appeared at a pre-hearing conference on behalf of Don's, she informed him that based on his representation that Don's was a non-closely held corporation, Don's must be represented by an attorney at OAL. Chutko stated that he would refer the matter to his insurance company. The insurance company declined representation, and Don's did not retain an attorney. ID2. The OAL record reflects that OAL continued to send copies of all notices for Don's BFF, LLC, to Chutko. Don's BFF, LLC, submitted no exceptions to the initial decision and did not address its corporate status in its reply to exceptions.

[2] For purposes of this decision, "ID" refers to the ALJ's initial decision; "Tr." refers to the transcript of the April 15, 2015 hearing; "Ex. P" refers to the exhibits admitted into evidence at the hearing; "CE" refers to Complainant's exceptions; "GS Reply" refers to Ghassan Sara's reply to exceptions; and "Don's Reply" refers to the reply to exceptions filed by Don's BFF, LLC.

The ALJ concluded that Ali was subjected to a sexually hostile work environment, and that because there were two incidents of inappropriate touching followed by "sexually explicit cursing," the sexual harassment was severe. ID5-6. The ALJ found that when Ali reported the sexual harassment to Chutko, he told Ali to address it himself with Sara. ID5.

The ALJ concluded that Complainant was not subjected to a hostile work environment based on religion. She wrote that Complainant "testified that having a beard was not part of his religion." ID6. She found that although Sara cursed at Ali in Arabic, the slurs were not religious in nature. Ibid. She concluded that Sara's only act of religious harassment was telling Ali that he eats pork and is not a Muslim. Ibid. She concluded that those remarks were not sufficiently severe or pervasive to create a hostile work environment based on religion. Ibid.

Because Complainant testified that after Sara told him to shave his beard, he left his job at Don's for a new job, the ALJ concluded that he was not discharged in retaliation for complaining about the harassment. ID6.

The ALJ did not award back pay. She cited Complainant's testimony that he continued to work at Don's until he had another job. She noted that Complainant did not claim any loss in pay as a result of his change in employment. The ALJ found that Complainant testified credibly about the emotional distress and humiliation he suffered as a result of Respondents' actions and, on that basis, awarded him $1,000 as "a reasonable amount" to compensate for his pain and humiliation. ID7-8. She also imposed a $1,000 statutory penalty. ID8.

The Parties' Exceptions & Replies

Complainant takes exception to the amount of pain and humiliation damages awarded by the ALJ, and requests $2 mil. in damages. He states that Sara made harmful comments in the presence of co-workers, customers, and friends, and that he lost dignity and the ability to help his family. He notes that Sara's comments in the presence of others disrespected his mother and sister. CE p. 1-2.[3]

Michael Chutko, who identifies himself as "Former Member of Don's BFF, LLC," filed a reply to exceptions on behalf of Don's.[4] He states that Jeffrey DiBlasi was discharged based on his performance, and that Sara was hired on November 11, 2012, to take over DiBlasi's job. Chutko wrote that Sara had a lifelong career in fast-food management, "was very focused on improving the operations," changed the "culture of the store," and "was the most knowledgably [*sic*], experienced and professional manager that had ever worked for any company I had been a Member of." He states that Complainant walked out in the middle of a shift on December 10, 2012. Chutko described himself as possessing "a demonstrated track record of zero tolerance

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[3] In his exceptions, Complainant also alleges that Don's owner required him to perform tasks unrelated to the restaurant without paying him properly, and mentions injuries from an accident at the owner's house. CE p.1-2. Even if those allegations were true, they would be beyond DCR's jurisdiction because they are not evidence of religious discrimination or sexual harassment under the LAD, and do not otherwise implicate the LAD or the NJ Family Leave Act.

[4] The OAL mailed the initial decision to the parties on April 28, 2013, with the instruction that exceptions were due 13 days from that date, or May 11, 2015. Complainant's exceptions were timely. Mr. Chutko does not indicate whether his submission was intended to serve as exceptions to the ALJ's decision or a reply to Complainant's exceptions, but because it was filed after May 11, it was deemed to be a reply to exceptions. Mr. Sara requested and was granted an extension of time to file a reply to exceptions, and filed his reply to exceptions within the extended time limit.

for racial discrimination," and recounted two incidents where he fired an employee based on reports of race discrimination. Chutko also asserts that Complainant was denied unemployment benefits because he quit his job.

In his reply to exceptions, Sara takes exception to the ALJ's finding that he inappropriately touched Complainant on two occasions. He contends that any touching was accidental, and that there was no evidence that any contact was sexual or hostile or that any other male employees complained about sexual harassment. Thus, he argues, the evidence does not show that a reasonable man would find that the conduct altered the work environment to make it hostile to men. He states that Complainant was not fired, quickly found another job, and takes exception to the ALJ's finding that Complainant suffered emotional distress as a result of alleged discrimination.

In his response, Complainant notes that the Respondents did not attend the hearing, and that he presented sufficient evidence at the hearing to support his claims and can provide additional evidence about the extent of his damages.

Discussion

An agency head, upon review of the record submitted by an ALJ, can adopt, reject, or modify the initial decision. N.J.S.A. 52:14B-10(c). An agency head cannot reject or modify findings of fact as to issues of credibility of lay witness testimony "unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Ibid.; S.D. v. Division of Med. Assist. and Health Services, 349 N.J. Super. 480, 485 (App. Div. 2002). That rule recognizes that it was the ALJ, and not the agency head, who heard the live testimony first-hand and is therefore in a position to judge the witnesses' credibility. Clowes v. Terminix Int'l, 109 N.J. 575, 538 (1988).

Except as noted below, the Director concludes that the relevant and material facts relied on by the ALJ are supported by the record, and adopts them as his own.

A. Sexual Harassment

The ALJ concluded that Complainant was subjected to sexual harassment that was severe enough to create a hostile work environment. ID6. Chutko's reply to exceptions did not address sexual harassment or point to any evidence in the record that would provide a basis for rejecting or modifying the ALJ's conclusion that Complainant was subjected to severe sexual harassment. In his reply to exceptions, Sara disputes that there was any intentional touching or touching of a sexual nature, and argues that Mesbahi's testimony is insufficient to establish that any touching was intentional, sexual or hostile.

Complainant's testimony shows that the touching was unwelcome, as he testified that he did not like Sara touching his "butt," and added that "if he was joking, I don't like that joke." Tr. p. 20. This is sufficient evidence to support the ALJ's conclusion that the touching was sexual harassment. See, e.g., Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."). In Oncale, the Court also noted that social context will assist in distinguishing between general incivility or good-natured teasing and sexual harassment. Ibid. The Court gave the example of a coach smacking a professional football player on the buttocks as he enters a game, and stated that while this is probably not harassing

to the football player, the same conduct would likely be sexual harassment if it were directed to the coach's secretary, male or female, back at the office. Id. at 81. The standard is whether a reasonable person in the employee's situation would find the conduct abusive. Ibid. After review of the record, the Director finds no basis to reject or modify the ALJ's conclusion that the touching in this case was sexual harassment.

Additionally, the police report in evidence described the incident as a "squeeze and lift." Officer Robert Edwards wrote in his February 5, 2013 report that Complainant provided the following description: "[H]e was touched twice on his buttocks by Sara in the kitchen of the restaurant. The touch was described as a "squeeze and lift" by the victim." Ex. P-1, Morristown Police Department Investigation Report.

In his reply to exceptions, Sara also argues, "[T]he facts do not support that Mr. Sara 'inappropriately touched Ali's rear end' on 'two separate occasions.'" He contends that Mesbahi testified that he saw Sara touch Complainant inappropriately only once. GS Reply, p.1. Mesbahi testified, "I see when he touch his butt and when he curse at him, and when he told him to cut his beard . . ." [*sic*][5] Tr. p.24.

Although Mesbahi's testimony did not clearly indicate whether he saw Sara touch Complainant once or more than once, Complainant testified that it happened twice, Tr. p.5, and his December 11, 2012 text message to Chutko in evidence said that it happened twice. Ex. P-3, p.4 ("[T]he manager touch my ass twice by spanking it first time a happen past Sunday second time happen Past Saturday. . ."). Additionally, in handwritten notes on a February 3, 2013 "Statement Sheet" submitted to the Morristown Police Department, Complainant wrote, in part, "Then one day He touch my butt I thought it was a Jok Then a happened again cuple day after." [*sic*] Ex. P-2, p.1.

Based on the above, the Director concludes that there is no basis in the record, exceptions, or replies, to reject or modify the ALJ's factual findings regarding sexual harassment or her conclusion that the harassment was severe enough to create a hostile work environment in violation of the LAD.

B. Religious Discrimination

The complaint alleges that Sara told Complainant to shave his beard, and that when Complainant responded that his beard is part of his culture and his religious right, Sara replied, "You're not Muslim, you eat pork." The complaint also alleges that it would not have been an undue hardship for Respondent to accommodate Complainant's request to wear a beard based on his religious beliefs.

The ALJ found that Complainant was not subjected to unlawful discrimination based on his religion. ID6. Complainant has not taken exception to the ALJ's legal conclusions or related factual findings on these issues. For that reason, the Director will not disturb the ALJ's decision

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5 As noted above, Complainant was born in Egypt, came to the U.S. at age 18, ID3, and speaks Arabic. Tr. p.7. The audio recording of the hearing shows that both Complainant and Mesbahi speak English with an accent. It is assumed that any grammatical errors in the hearing transcripts and grammar and spelling errors in written exhibits were made because English is not their first language. Use of the term "*sic*" to identify apparent errors is not intended to highlight such errors, but merely to show that the references accurately reflect the transcripts and evidence.

on Complainant's religious discrimination claims, but will note the following comments concerning the applicable legal standards.

The LAD makes it unlawful for an employer to require an employee to "forego a sincerely held religious practice or religious observance" unless the employer demonstrates that providing the religious accommodation would impose an undue hardship on the employer's business. N.J.S.A. 10:5-12s. An employer's religious accommodation obligation is not limited to mandatory religious practices or religious observances. See, e.g., Telfair v. Fed. Express Corp., 934 F. Supp.2d 1368, 1382 (S.D. Fla. 2013), aff'd, 567 Fed. Appx. 681 (2014) (noting that where employee subjectively believes that a religious practice is a necessary expression of his or her religion, it is improper to question whether formal religious doctrine actually requires the practice, as opposed to merely encouraging it); see also, Reyes v. N.Y. State Office of Children & Family Servs., 2003 U.S. Dist. LEXIS 12644 (S.D.N.Y. July 22, 2003) (noting that Title VII protects more than the religious practices specifically mandated by an employee's religion). The fact that an individual may choose to follow some religious practices and reject other practices associated with his or her religion is irrelevant to an employer's obligation to reasonably accommodate a religious practice or observance. See, e.g. Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("[T]he fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.")

In this case, Complainant testified that "having a beard is part of my culture." Tr. p.9. It should be noted that Complainant did not indicate in his testimony that his request to have a beard was based on a personal, sincerely held religious practice or observance. Additionally, the ALJ found that the only evidence of harassment based on religion was Sara telling Complainant that he eats pork and is not Muslim. ID6. Such a statement is inappropriate in any workplace, especially for a supervisor. However, this statement alone is insufficient to constitute unlawful discrimination based on Complainant's Muslim faith. The ALJ concluded, "This act is not severe or pervasive enough for a reasonable Muslim to believe that the conditions of employment were altered." Based on this record, the Director adopts the ALJ's conclusion that Complainant was not subjected to unlawful discrimination based on his religion.

C. Retaliation

The complaint alleges that Complainant was discharged because he complained about the sexual harassment and because he objected to Sara's directive to shave his beard. The ALJ found as fact that Complainant resigned after getting another job, ID4. This is consistent with Complainant's testimony. Tr. p. 12. Accordingly, the Director adopts the ALJ's conclusion that Complainant was not discharged in retaliation for engaging in activity protected by the LAD. ID6.

D. Liability

1. The Employer's Liability

In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), the Court established that under the LAD an employer will be liable for compensatory damages for a hostile work environment in three circumstances: (1) when the employer grants a supervisor authority to control the workplace and the supervisor abuses that authority to create a hostile environment; (2) when the employer negligently manages the workplace by failing to enact anti-harassment policies and mechanisms; or (3) when the employer has actual or constructive knowledge of the harassment and fails to take effective measures to end the discrimination. 132 N.J. at 622-23.

Regarding the first basis for liability, the text messages in evidence show that Chutko, on behalf of Don's, had delegated full authority to Sara to control Complainant's workplace. On Monday, December 10, 2012, Complainant wrote to Chutko, "I hope you just listen what can I say you are the boss," and Chutko replied, "We r friends but u work for Gus. I am behind him 100percent. I think he is found an excellent job." [*sic*] After some additional exchange, Complainant wrote, "I want to have a meeting with you outside of business," and Chutko replied, "no absolutely not. No business between us." [*sic*] Complainant wrote, "not even a phone call" and then wrote, "how come there is no business between us and I work for you." [*sic*] Chutko replied "Ali. I told u that u work for Gus and we are to hv no contact. Do u remember that conversation". [*sic*] Complainant replied, "yeah I remember. Each conversation you told me with each manager". [*sic*] Ex. P-3, p. 2-3.

In Aguas v. State of New Jersey, 220 N.J. 494 (2015), the Court held that an employer will be vicariously liable for a supervisory employee's conduct if the supervisor was authorized to make tangible employment decisions affecting the victim, or was authorized to direct the victim's daily work activities. Id. at 528-29. Chutko's text messages show that Sara's authority met both of those standards. The evidence of two incidents of sexual touching and comments of a sexual nature show that Sara abused the authority granted to him by Don's, and in doing so created a sexually hostile work environment for Don's employee.

Regarding the second basis for liability, there is no evidence in the record that Don's had in place any anti-harassment policies or mechanisms addressing sexual harassment during the term of Complainant's employment. In his reply to exceptions, Chutko asserts that he has a "demonstrated track record of zero tolerance for racial discrimination" and provides some details about two incidents in which he fired an employee after investigating reports of race discrimination. To the extent that this is being offered as evidence of an effective anti-harassment policy, it cannot be considered here, as it does not point to evidence in the record, and Chutko's post-hearing written statement is not competent evidence.[6] "A final decision . . . shall be based only upon the evidence of record at the hearing." N.J.S.A. 52:14B-10; N.J.A.C. 1:1-18.6.

The Lehmann Court stated that liability may be appropriate "if the employer had actual knowledge of the harassment and did not promptly and effectively act to stop it." Id. at 622. The Court reasoned:

> When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser. "Effective" remedial measures are those reasonably calculated to end the harassment. The "reasonableness of

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6 In his reply to exceptions, Chutko asserts that in one such incident, he fired co-manager Matthew Palla for sending racially discriminatory text messages to Complainant, and disputes the hearing testimony that Palla was instead fired for job performance. Don's Reply, p. 2; Tr. 15-17. As Chutko's statement is new evidence that is not part of the hearing record, it cannot be considered in this decision. N.J.S.A. 52:14B-10. In any event, the ALJ noted that the allegations regarding a prior manager were not part of this complaint, and she did not make a factual finding regarding the reason he was fired. Because the ALJ did not rely on the testimony regarding prior race discrimination in her ruling, it is not necessary to make any factual findings on that issue in this decision.

an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment."

Id. at 622 (quoting Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991)).

Here, the text messages in evidence corroborate Complainant's testimony that he reported the sexual harassment to Chutko, and that Chutko did not investigate or take any remedial action. At 7:30 a.m. on December 11, 2012, Complainant sent a text message to Chutko reporting the sexual harassment that had taken place the previous week, and added that he would be looking for another job. Chutko did not reply until the following afternoon, after Complainant sent him another text thanking him for the opportunity to work with him and saying he would keep in touch. Chutko replied by telling Complainant that he hoped they would "keep in touch as friends," and saying, "Sorry, it did not work out with Gus." Ex. P-3, p. 2-4. There is no evidence in the record that after Complainant reported the offensive touching and slurs of a sexual nature on December 11, 2012, Don's took any action to stop the harassment.

Thus, applying any of the three bases of liability articulated in Lehmann, the record supports the conclusion that Don's is liable for Sara's sexual harassment of Complainant.

2. Sara's Individual Liability

A supervisor is not an employer as defined by the LAD; instead a supervisor may be held individually liable for an employer's violation of the LAD only based on a finding that the supervisor aided and abetted the employer's discrimination or harassment. Tarr v. Ciasulli, 181 N.J. 70, 83 (2004). The LAD makes it illegal "[f]or 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. 10:5-12e. The words "aiding and abetting" require active and purposeful conduct. Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008), citing Tarr, supra, 181 N.J. at 83.

Here, the record shows that Sara—who was a supervisor—inappropriately grabbed Complainant's buttocks twice and made insulting sexual comments about Complainant's mother and sister. The ALJ found that Sara's conduct amounted to actionable sexual harassment. Based on a plain reading of the statute and relevant case law, it follows that Sara's active role in the sexual harassment makes him individually liable under the "aiding and abetting" provisions of the LAD. See N.J.S.A. 10:5-12e; Cicchetti, supra, 109 N.J. at 595.

E. Remedies

1. Back Pay

There is no evidence in the record of any lost wages, and the Director finds that the record supports the ALJ's finding that Complainant left Don's only after he secured another job. ID4. Tr. 12. Accordingly, the Director adopts the ALJ's conclusion that an award of back pay is not warranted in this case.

2. Emotional Distress Damages

A prevailing complainant is entitled to recover non-economic losses such as mental anguish or emotional distress. Anderson v. Exxon Co., 89 N.J. 483, 502-03 (1982). At a minimum, a complainant is entitled to recover a threshold pain and humiliation award for