STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EC13WB-66205

Gina Cerone,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Apollo Search Partners, LLC,	)	
	)	
	)	
Respondent.	)	

On November 9, 2016, Camden County resident Gina Cerone (Complainant) filed a verified complaint with New Jersey Division on Civil Rights (DCR) alleging that her former employer, Apollo Search Partners, LLC (Respondent) located at 525 Route 73 North, Marlton, New Jersey, violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by subjecting her to sexual harassment and then firing her after she complained. Respondent denied the allegations of discrimination and retaliation in their entirety. The DCR investigation found as follows.

Summary of Investigation

Respondent is an employment agency owned and operated by Jeremy D. Hare. It seeks to place accounting, finance, tax, legal, and banking professionals in temporary or permanent positions. Respondent markets itself as having a team of specialized recruiters that can "leverage[] business contacts" and "identify[] quality job opportunities that match [] personal and professional goals." On its website, Respondent identifies Hare as its President and Managing Member and states that he "manages all recruiting and sales efforts." See "About," Apollo Search Partners, http://apollosp.com/home/about/ (last visited Nov. 9. 2016). Respondent's "Certification of Formation" lists its registered office as 935 Oriental Avenue in Collingswood, New Jersey.

Complainant worked for Respondent as a Senior Executive Recruiter/Business Development Manager from January to July 2016. She told DCR that she responded to an online posting for the position, and was interviewed by Hare, who offered her the position. She stated that she and the other employees worked out of the Marlton office twice a week. She stated that the Collingswood address associated with Respondent was Hare's parents' residence.

Respondent provided Complainant with business cards, which identified her as its "Director of Business Development and Recruiting/Chief Operating Officer" and listed the Marlton office address. The cards contained Respondent's logo, phone numbers, and an email address issued by Respondent (gcerone@apollosp.com). She stated that Hare initially paid her by commission but later changed her compensation to salary plus commission. She produced a copy of a check made out to "Gina Cerone" from Respondent for commission earned on an account.

Complainant alleged that throughout her employment, Hare made offensive comments in the workplace such as describing his visits to sex clubs in the Philadelphia area, and sharing details about his sexual partners, sexual experiences, and sexual interests. She stated he would access dating websites in the workplace and openly discuss the dating potential and rate the women on the website. She alleged that he would select a woman's profile and state that he "fucked her" or "banged her." She stated that she saw him rub the shoulders of other female employees. Complainant stated that when Hare would start discussing those topics, she would tell him to stop and that his comments were offensive and inappropriate. She alleged that Hare would reply that she was "too uptight." Complainant stated that sometime in July 2016, she and Hare were arguing about salary issues when he fired her by saying, "Fuck you," and "Get the fuck out of here."

DCR served the verified complaint and a document and information request on Respondent. In response, Hare submitted a written response on behalf of Respondent and provided no documents. He denied that Complainant was an employee and instead identified her as an independent contractor who "worked a few hours a week as a sub[-]contractor through her own company." He wrote that he was Respondent's only employee and controlled "100% interest of the shares." In response to questions regarding Complainant's allegations of sexual harassment hostile work environment, Hare replied, "Never – [Complainant] wasn't an employee." Hare denied that Complainant complained and stated that no investigation of the allegations was conducted. He also stated he issued an IRS form to Complainant's company for work performed for Respondent.

DCR reviewed Respondent's website. It listed six individuals, including Complainant, as part of its team. See "About," Apollo Search Partners, http://apollosp.com/home/about/ (last visited Nov. 9, 2016). Each person was identified with a business title, picture, and biographical information. In the "Press" section, the website contained a link to a February 29, 2016 Philadelphia Business Journal article annoucing Respondent's hiring of Complainant as the Director of Business Development and Recruiting/Chief Operating Officer.

Complainant identified two female employees whom, she claimed, witnessed Hare's sexually harassing behavior in the workplace: R.M. and M.C.

R.M. told DCR that she worked for Respondent as a recruiting coordinator from March to August 2016. R.M. stated that she was paid by commission and resigned as a result of Hare's refusal to compensate her. She viewed herself as an employee and stated that she was never referred to as an independent contractor. She said that Hare often engaged in sexually explicit conversations with her and others in the office. She stated that Hare made remarks about her breasts and buttocks. She said that Hare discussed his penis size, and described one-night sexual encounters, and described his visits to sex clubs in Philadelphia. R.M. stated that she and Complainant did not participate in those conversations. R.M. observed Complainant tell Hare to "stop it" when Hare would initiate those conversations.

M.C. told DCR that she worked for Respondent from January 2016 to February 2017 as a Managing Recruiter/Senior Executive Recruiter. She stated that she had a consensual personal relationship with Hare prior to her employment with Respondent, and eventually resigned due to Respondent's failure to pay her. She stated that in the workplace, Hare would show her and other female employees naked pictures of women on his cell phone. She stated that Hare would talk about his penis size and show her and other employees profiles of women on dating websites and announce which of the women he would have sex with. She stated that on "a handful of times," Hare pulled her hair in the office and said, "You know you like it." She stated that although she was uncomfortable with his sexual discussions in the workplace, she would laugh it off. She noted that Complainant, on the other hand, was visibly uncomfortable with such conduct.

DCR gave Hare the opportunity to address the information and documents provided to DCR during its investigation. In a telephone conversation, Hare stated that he "150% denies" Complainant's allegations and accused Complainant of stealing money from Respondent. The DCR investigator invited Hare to speak in person but Hare stated that he would be out of town for approximately a month. Hare then stated that he would "likely retain counsel." DCR never received any notice of appearance by an attorney on behalf of Respondent. DCR attempted to contact Hare to schedule a follow-up interview. Those efforts were unsuccessful.

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. If the Director finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

If, on the other hand, if the Director finds that probable cause exists, then the matter will proceed to a conciliation and, if unable to be amicably resolved, will proceed to a plenary

hearing. A finding of probable cause is not an adjudication on the merits. It is 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. denied, 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. Sexual Harassment

The LAD prohibits gender discrimination. N.J.S.A. 10:5-12(a); 10:5-12(b); 10:5-12(c) &10:5-12(l). Sexual harassment hostile work environment is a form of gender discrimination. See Lehmann v. Toys 'R' Us, Inc. 132 N.J. 587, 607 (1993). In such cases, the dispositive issue is whether a "reasonable woman" 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.

By using a "reasonable woman" standard, our courts focus on the conduct itself—not its effect upon the plaintiff or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). In other words, neither a plaintiff's "subjective response" to the harassment, nor the defendant's "subjective intent" is controlling as to whether a hostile work environment claim exists. Ibid. Our Supreme Court has noted that discriminatory harassment is "exacerbated" when it is "uttered by a supervisor." Taylor v. Metzger, 152 N.J. 490, 503 (1998). And the Taylor Court reasoned that when the owner or ultimate boss subjects an employee to a hostile work environment, the employee's "dilemma [is] acute and insoluble" because he or she has "nowhere to turn." Id. at 505.

Here, Complainant alleged that throughout the course of her employment, Hare routinely made unsolicited sexually explicit remarks that she found unwelcome, and to which she voiced her objections. Although Hare vigorously denied the allegations, Complainant's version of events was corroborated by two witnesses and not contradicted by anyone other than Hare. Thus, for purposes of this threshold determination only, the Director finds that the comments were made as alleged. Moreover, the Director is satisfied that the alleged conduct was sufficiently severe or pervasive to create a hostile working environment. In so doing, the Director finds that because Hare is the head of the company, his conduct "carries with it the power and authority of the office." Ibid. Thus, the severity of his conduct is exacerbated because an employee who found the behavior to be offensive and unwelcome had "nowhere to turn." Ibid. Accordingly, the Director finds that the weight of the evidence supports a reasonable suspicion that Complainant was subjected to a hostile work environment based on gender.

b. Retaliation

The LAD makes it unlawful "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act." N.J.S.A. 10:5-12(d). In this case, Complainant alleges that the fact that she objected to workplace sexual harassment was a factor in Hare's decision to fire her. In particular, she alleged that when she asked Hare to cease making unwelcome sexually explicit remarks, he replied that she was "too uptight" and that he "had enough of her" and, after a July 2016 dispute, told her to "get the fuck out." Respondent was given an opportunity to articulate a legitimate, non-retaliatory reason for the personnel decision, but did not do so. Indeed, Respondent has not provided any information whatsoever as to Complainant's separation from employment.

Under the circumstances, the Director is satisfied—for purposes of this preliminary disposition only—that Complainant engaged in protected activity when she voiced her objections to Hare's unsolicited discussions about his sexual activity, and that those objections factored into Hare's decision to discharge her.

c. Employee v. Independent Contractor

Respondent argues that a LAD claim cannot stand because Complainant was not an employee, but an independent contractor. DCR asked Respondent/Hare for any information to support that position. None was provided.

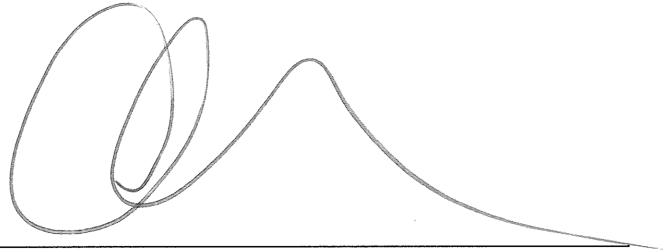
The Director finds that the claim that Complainant was never an employee was contradicted by information obtain during the investigation. For example, Respondent marketed itself as a team of individuals with expertise in recruiting and placement. It identified six individuals with company titles and biographical information. Respondent publicized hiring Complainant as its Director of Business Development and Recruiting/Chief Operating Officer. Respondent provided her with office space and business cards. Complainant produced a copy of a check that was made payable to her personally (in contrast to Hare's assertion that he paid Complainant's "company"). Complainant and other witnesses told DCR that they considered themselves to be employees, not independent contractors. Thus, the investigation found sufficient indicia of an employer-employee relationship. See generally Pukowsky v. Caruso, 312 N.J. Super 171, 182-84 (App. Div. 1998) (articulating twelve-factor test for determining whether someone is an employee or independent contractor); D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 121-22 (2007).

But even assuming for the moment that Complainant was an independent contractor, Respondent could still be liable for creating a sexual harassment hostile work environment and terminating their business relationship after she objected to his offensive conduct. See, e.g., N.J.S.A. 10:5-12(d) & (l); J.T.'s Tire Service Inc. v. United Rentals N. Amer., Inc., 411 N.J. Super. 236 (App. Div. 2010), cert. denied, 201 N.J. 441 (2010) (finding N.J.S.A. 10:5-12(l)

prohibits a business owner from engaging in sexual harassment against an individual engaged in a business relationship with the perpetrator of the harassment).

Conclusion

In view of that above, the Director is satisfied 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, and that this matter should "proceed to the next step on the road to adjudication on the merits." Frank, 228 N.J. Super. at 56.



DATE: 6-8-18

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS