

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
DCR DOCKET NO. EL12SB-66571

G.G.,	)	
	)	
Complainant,	)	<u>Administrative Action</u>
	)	
v.	)	<b>FINDING OF PROBABLE CAUSE</b>
	)	
McKesson Corporation,	)	
	)	
	)	
Respondent.	)	

On July 18, 2017, Mercer County resident G.G. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, McKesson Corporation (Respondent), subjected her to sexual harassment and a constructive discharge, 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 Fortune 500 company based in San Francisco that claims to “deliver one-third of all medications used daily in North America with operations in more than 16 countries.” On or about January 16, 2015, it hired Complainant as a warehouse worker for its distribution center in Robbinsville, New Jersey. On or about February 7, 2016, it changed her title to lead warehouse worker.

Complainant alleged that in April 2017, after she returned to work from breast enhancement surgery, her direct supervisor, L.T. (whose title was Operations Manager 2), began sexually harassing her.

In separate interviews with Respondent’s Employee Relations (ER) department and DCR, Complainant provided examples of L.T.’s alleged harassment, including:

- Referring to her as “Boom Boom.” Complainant initially believed that this was a reference to her breasts. She stated that an employee told her that L.T. said that the moniker was a reference to Complainant’s “fat ass.” Complainant told DCR that she repeatedly asked L.T. to stop calling her by that name, but he persisted. Complainant told Respondent’s ER personnel that L.T. would yell, “Boom Boom!” across the warehouse, and that she asked him more than once to stop.

- She alleged that in April 2017, L.T. whispered in her ear, "I want to eat your ass," and when she stopped smiling, he said, "You know you want it. I can do it real good." Complainant stated that she was shocked, and walked away shaking her head.
- She alleged that when L.T. was planning his wedding, he said something like, "Let me fuck you before I get married. Just one time, that's all I ask. But then you will be hooked, and you will want more, but I won't be able to fuck you anymore because I will be married." Complainant told L.T. that she would not have sex with him, called him "disgusting," and walked away.
- She alleged that in May 2017, she was in the outside smoking area, waiting to clock in, and L.T. came up behind her and slapped her rear end. She said that when she asked, "What the fuck are you doing?" he laughed and walked away.
- She alleged that later in the same shift, L.T. said to Complainant, "If I give you my big black dick, you'll be giving me lunch every day," and that when she indicated that she was not interested, he said, "You can't handle my big black dick anyway."
- She alleged that on or about May 19, 2017, she returned to work a day after her mother had a heart attack. She said that L.T. asked her if she was ok and then said, "If you need a shoulder to cry on, you can put your face in my lap." She said that he put his arms around her, and she pushed him away.
- She alleged that one day, she was in the parking lot talking to her fiancé on her cellular phone when L.T. came up to her and said something like, "You probably have nude photographs of yourself on that phone. When are you going to show them to me?" Complainant told DCR and Respondent's ER personnel that her fiancé heard L.T.'s comments, became upset, and hung up on her.

Complainant told DCR that she was hesitant to report the sexual harassment because she was afraid that she would be fired. She said that she discussed her workplace situation with her fiancé and they argued about what action, if any, she should take. She said that he eventually convinced her to report it.

On June 13, 2017, Complainant reported the sexual harassment to L.T.'s supervisor, Senior Operations Manager Lon Mietka. On June 15, 2017, Respondent's ER Department began an investigation. Senior Employee Relations Consultant Connie Ciak served as the lead investigator.

Ciak and ER Consultant Chrissy James interviewed Complainant by telephone on or about June 15, 2017, and again on June 26, 2017. Complainant told DCR that while Respondent's investigation was ongoing, Ciak arranged for L.T. to be taken off her shifts. In an interview with DCR, Ciak clarified that L.T. was placed on a leave of absence while ER investigated the matter.

Ciak and James interviewed L.T., who acknowledged calling Complainant, "Boom Boom," but said that she gave that name to herself. L.T. denied that ever being asked by Complainant to stop using the nickname. He denied Complainant's other allegations of wrongdoing. L.T. told Ciak and James that Complainant occasionally called him and others, "Honey."

Witness 1 told Ciak that she once heard L.T. call Complainant "Boom Boom" in passing, but did not discuss the matter with her. She told Ciak that Complainant told her that she felt uncomfortable at work since her surgery, but did not elaborate. Witness 1 told Ciak that she noticed L.T. looking at Complainant more since her surgery, and saw him talking to her more. Witness 1 denied ever being sexually harassed by L.T. She noted that L.T. was a little too flirtatious with younger female employees.

Witness 2 told Ciak that she did not notice L.T. being overly friendly with Complainant. She denied ever being sexually harassed by L.T. She told Ciak that people were talking about a female co-worker bringing dinner to L.T., but said it only occurred once. She told Ciak that she never heard L.T. refer to Complainant as Boom Boom, but said that Complainant complained to her about him doing so.

James interviewed a Lead/Trainer and asked whether he ever witnessed L.T. making inappropriate or sexual comments to associates. James summarized his response as follows: "[L.T.] is a flirt. He got another associate pregnant, but haven't witness him saying anything inappropriate things to associates." [*sic* throughout.] The witness reportedly denied ever receiving any complaints about L.T.'s behavior.

Complainant told DCR that during Respondent's investigation, three employees who were friends with L.T. chastised her for filing a complaint against him. Respondent produced notes of a June 27, 2017 follow-up telephone call from L.T. to Ciak, asking about the status of the investigation. In that call, Ciak asked L.T. whether he discussed the investigation with anyone at work. He denied doing so. He reportedly told Ciak that he had instructed his wife not to discuss the investigation with anyone, including her brother, who also worked at McKesson.

Respondent produced a copy of Ciak and James's investigation report. They substantiated that L.T. called Complainant "Boom Boom" but found "no indication that [L.T.] intended a reference to [Complainant's] body in using the nickname that she called herself." They wrote, "L.T. stated that [Complainant] has never asked him to stop calling her any nickname." Ciak and James found the remainder of Complainant's allegations to be

unsubstantiated and concluded that L.T. was more credible than Complainant. They wrote that L.T.'s "tone of voice was loud and his choice of words were strong when he denied it," and noted that he claimed that he was very careful about his conduct because his fiancée's brother and the brother's fiancée were working for McKesson. They wrote that Complainant "never expressed any strong or emotional reaction when providing the examples during her interview and one time she even chuckled when providing feedback" but became more "emotional and angry" when she reported that people were discussing her complaint in the workplace. They noted that Complainant was rarely able to provide dates, times, or witnesses for her allegations, and that L.T. was on vacation or worked a different shift on the dates Complainant gave for some of the incidents. They also noted that Complainant's report of sexual harassment came a day after she received a final written warning, and that the timing seemed "too coincidental." They noted that Complainant had previously asked L.T. to intervene so that she would not receive the warning, but he had refused.

Ciak told DCR that the ER Department received no other reports of sexual harassment against L.T. She said that because L.T. was found to have referred to Complainant by an inappropriate nickname, he was given "coaching" on that issue, and she reviewed the company's sexual harassment policy with him. She said that coaching is different than a verbal or written warning.

On June 28, 2017, Ciak notified Complainant via telephone that the investigation did not support her allegations of sexual harassment. On June 30, 2017, Ciak sent a letter to Complainant confirming that the internal investigation did not corroborate her allegations of "inappropriate sexual comments and touching." Neither the phone conversation nor letter informed Complainant that Respondent corroborated her allegation that L.T. referred to her as "Boom Boom," or that Respondent counseled him that it was inappropriate to do so. The letter gave Complainant two phone numbers that she could call with "further questions," i.e., the HR Support Center and the Integrity Line. It did not indicate that she could appeal or request review of the decision.

Complainant told DCR that during the June 28 telephone conversation, Ciak told her that L.T. would be returning to his regular shifts. Complainant asked Ciak to transfer her to a different shift, because she felt uncomfortable working with L.T. She stated that Ciak refused.

Complainant told DCR that she decided to resign because her transfer request was denied, and she believed that L.T. would resume the harassment. She was scheduled to begin medical leave for a knee problem on July 1, 2017, and on June 30, 2017, she told two supervisors, "Pat" and "Cindy," that she would not be returning to work.

On August 8, 2017, Complainant received a call from "Inna" in HR, asking when she would be returning to work, and she replied that she had resigned on June 30 because of L.T.'s sexual harassment. Complainant said that Inna did not want her to quit, and she told Inna that

she did not feel comfortable working with L.T., and that her request to transfer to a different shift had been denied. Complainant stated that she heard nothing further from Respondent regarding her transfer request. Ciak told DCR that she did not recall Complainant asking to transfer to a different shift.

During the relevant time, Complainant worked on the night shift. Complainant told DCR that even when L.T. worked the day shift, he would “hang around” for a while after his shift was over, so he was often there during part of her shift. L.T. told the ER investigator that because he no longer smoked in his car, he always stayed after his shift to have a smoke before leaving for the day.

In an interview with DCR, L.T. acknowledged calling Complainant, “Boom Boom,” on two occasions. However, he stated that he only did so because Complainant gave herself that nickname. He stated that she never seemed upset when he referred to her by that name, and she appeared to find it “hilarious.” He denied slapping Complainant’s rear end, putting his arms around her, suggesting that she put her face in his lap, or asking her to have sex with him, either when referring to his wedding or in any other context. L.T. told DCR that he was surprised that Complainant accused him of any inappropriate conduct. He speculated that she did so because he refused to intervene when Senior Operations Manager Lon Mietka issued her a written discipline for a work error. L.T. asserted that Complainant wanted to move to a day-shift position, and that the write-up would have interfered with her request for a shift-change.

Witness 1 told DCR that she heard L.T. refer to Complainant as Boom Boom. Witness 1 said that Complainant told her and others that she did not like L.T. referring to her in this way, and it was clear that the moniker bothered Complainant. Witness 1 told DCR that she recalled Complainant telling her that L.T. put his arms around her, and that she did not like it and pushed him away. Witness 1 recalled that Complainant appeared upset when she spoke about the incident.

Witness 2 told DCR that Complainant was offended by the name, “Boom Boom,” and was concerned that the name would catch on and others would start using it when referring to her.

Witness 3, who still works for Respondent, told DCR that she heard L.T. refer to Complainant as Boom Boom, and that Complainant appeared uncomfortable when he did so. Witness 3 said that L.T. was also inappropriate to her and other females. She said that he once called her “Care Bear,” but when she told him to stop, he complied. She told DCR that she saw L.T. touching and hugging other female employees, and once intervened when she heard L.T. tell a female employee that she could not “handle” him, while pointing at his crotch. Witness 3 said that she walked over and asked L.T. how he knew that the woman could not handle him, and he replied that he would do “something” with both of them and could “handle” both of them at

the same time. Witness 3 told DCR that L.T. was always bragging about his genitals, and she wanted to assist her female co-worker.

In a February 12, 2018 email to the DCR investigator, Witness 4 confirmed that he saw L.T. slap Complainant's buttocks and saw Complainant walk away looking upset. Ciak told DCR that she did not interview Witness 4.

Complainant told DCR that Witness 5, who is male, also saw the incident when L.T. slapped her buttocks. According to Ciak's investigation report, Witness 5 told Ciak that he did not recall seeing it. Complainant told Ciak and DCR that the incident would probably have been recorded on Respondent's video surveillance camera. DCR asked Ciak whether she reviewed the video surveillance recording. Ciak stated said that she did not review it. But she noted that she was not sure whether Complainant gave her the date and time of the incident or a specific location, and that without such information, it could be difficult to locate the recording. Ciak did not indicate that she actually looked for it. Ciak also said that some locations only retain recordings for a certain time period. When DCR requested a copy of the video recording, counsel for Respondent stated that the recording was erased after thirty days.

Witness 6, who previously worked under L.T.'s supervision at McKesson, told DCR that L.T. once came up to her and said, "You have so many men that like you here at work, you must be good in bed." She stated that on another occasion, L.T. was walking behind her with a male co-worker, and L.T. said to him, "You should go smack her ass," referring to Witness 6. The co-worker did nothing and appeared to ignore L.T. Witness 6 told DCR that she was afraid to respond or report those incidents because she did not want her husband to know that those types of things occurred at work. She said that in or around May 2017, she found another job and resigned.

Witness 7 told DCR that she was aware that L.T. made sexual comments to other female employees, but he never said anything inappropriate to her.

According to Complainant, she told Ciak that L.T. had once kissed Witness 8 on the forehead, but Ciak did not interview Witness 8. During DCR's investigation, Ciak said that she did not attempt to interview Witness 8 because the incident was alleged to have happened over a year earlier and was not reported at that time, and her focus was on Complainant's allegations.

DCR interviewed E.G., who said that in the spring of 2017 he was engaged to marry Complainant. He acknowledged speaking with Complainant while she was in Respondent's parking lot and overhearing someone ask her if she had nude photographs of herself on her phone. He told DCR that he became infuriated and hung up on Complainant. He said that she called him back and explained that her manager was "fresh" with her and said things that made her feel uncomfortable. He said he warned her that if she did not report L.T.'s conduct, he would confront L.T. He told DCR that it was the only time he heard a man speak to his then-fiancé in a

sexualized manner, and he was so angry that he could not think straight. Complainant told DCR that they later broke off their engagement but have since reconciled and are now married.

Complainant told Ciak that she spoke to Witness 9 about L.T.'s comments and had exchanged text messages with him about it, and that Witness 9 told Complainant that L.T. had subjected other women to similar conduct. Complainant told DCR that she no longer has the text messages because that phone became inoperable. Ciak told DCR that she did not interview Witness 9 because he worked the day-shift, and was a friend of Complainant.

During the course of the DCR investigation, L.T. was fired. Counsel for Respondent told DCR that L.T. was fired for engaging in a physical and verbal altercation with a male employee, which it characterized as conduct unbecoming a manager.

### **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." See 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.

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which 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. den., 498 U.S. 1073 (1991). 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.

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 establish a claim of 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 woman would find the conduct to be severe or pervasive enough to alter the conditions of employment to make the working environment hostile or abusive. Id. at 603.

Here, Complainant alleges that L.T. repeatedly made sexual overtures and lewd comments to her in the workplace, called her by an welcomed nickname that was a reference to her body, and subjected her to unwelcomed touching on at least two occasions. The fact that L.T. was her supervisor is significant. The New Jersey Supreme Court has declared that discriminatory harassment is "exacerbated" when it is "uttered by a supervisor." Taylor v. Metzger, 152 N.J. 490, 503-505 (1998) (reasoning that when the harasser is a supervisor, the misconduct "carries with it the power and authority of the office.")

L.T. denied the allegations of wrongdoing in their entirety. But witnesses corroborated that L.T. made unwelcomed sexual comments to Complainant. One former co-worker told DCR that he saw L.T. slap Complainant's buttocks. Witnesses said that they heard L.T. subjecting other female employees to similar unwelcome sexualized discussions in the workplace. And witnesses supported Complainant's assertion that she did not welcome being called, "Boom Boom," by her supervisor in the workplace.

For purposes of this threshold determination, the Director is satisfied that there is a reasonable ground of suspicion supported by facts and circumstances to warrant a cautious person to believe that L.T. engaged in the conduct and comments as Complainant alleged, and that the conduct was sufficiently severe or pervasive to create a hostile working environment.

The issue becomes defining Respondent's role in the conduct. When an employer knows or should have known of sexual harassment "and fails to take effective measure to stop it, the employer has joined with the harasser in making the working environment hostile." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 536 (1997).

In determining an employer's liability for harassment of its employees, courts have determined that employers who promulgate and support an active anti-harassment policy may be entitled to an affirmative defense—a form of safe haven from vicarious liability from an employee's harassing conduct. Cavuoti v. New Jersey Transit Corporation, 161 N.J. 107, 120-21(1999); Aguas v. State, 220 N.J. 494 (2015). But to successfully assert the affirmative defense, the employer must establish by a preponderance of the evidence that: (i) it exercised reasonable care to prevent and to promptly correct harassing behavior; and that (ii) the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. Aguas, 220 N.J. at 524.<sup>1</sup>

Here, it is undisputed that Complainant reported the sexual harassment and that Respondent investigated and found most of her allegations to be unsubstantiated. Respondent pointed to the loud and forceful tone of L.T.'s denials and perceived lack of emotion when Complainant relayed her allegations to support its findings that L.T. was more credible than Complainant, and that Complainant was not as offended by the alleged conduct as she claimed. However, Respondent reached those credibility determinations without interviewing key witnesses who corroborated some of Complainant's allegations (and provided additional evidence that L.T. sexually harassed other female employees). Moreover, the LAD does not consider the victim's personal reaction or the harasser's attitude or intent. Instead, the LAD requires a factfinder to determine whether a "reasonable woman" would find the conduct hostile

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<sup>1</sup> To satisfy the first prong, the LAD requires evidence of an "unequivocal commitment from the top that [the employer's opposition to harassment] is not just words[,] but backed up by consistent practice." Lehmann, 132 N.J. at 621. The "mere implementation and dissemination of anti-harassment procedures with a complaint procedure does not alone constitute evidence of due care—let alone resolve all genuine issues of material fact with regard to due care." Gaines v. Bellino, 173 N.J. 301, 319 (2002).

or abusive. By using a reasonable woman standard, courts focus on the conduct itself—not its effect upon the victim or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). In other words, neither a victim’s “subjective response” to the harassment, nor the alleged harasser’s “subjective intent” is controlling as to whether a hostile work environment claim exists. Ibid.

In view of the above, the Director cannot find at this stage in the process that Respondent’s investigation, conclusion, and remedial action taken in response to Complainant’s internal complaint were sufficient to meet its obligations under the LAD. And there is no allegation or evidence that Complainant unreasonably failed to take advantage of preventive opportunities provided by the employer or otherwise avoid the harm. Thus, it appears that neither of the two prongs of the affirmative defense have been established.

The affirmative defense may be inapplicable for another reason. The affirmative defense is not available if the employee was subjected to a tangible employment action. Here, Complainant alleges that she was constructive discharged. See, e.g., Pa. State Police v. Suders, 542 U.S. 129, 134 (2004) (finding the affirmative defense is not available where an employee “quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.”).

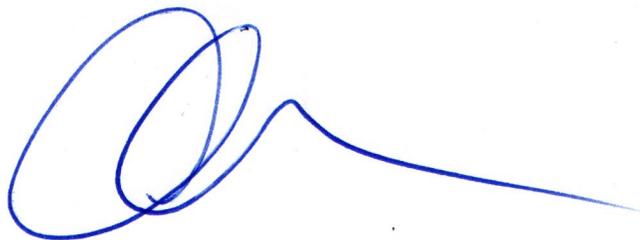
A constructive discharge occurs when an “employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.” Shepherd v. Hunterdon Develop. Ctr., 174 N.J. 1, 28 (2002). However, an “employee has the obligation to do what is necessary and reasonable in order to remain employed rather than simply quit.” Ibid. Factors to be considered include the “nature of the harassment, the closeness of the working relationship between the harasser and the victim, whether the employee resorted to internal grievance procedures, the responsiveness of the employer to the employee’s complaints, and all other relevant circumstances.” Ibid. And as set forth above, those factors appear to weigh in Complainant’s favor. Moreover, Complainant alleges that she asked Ciak for a transfer because she felt uncomfortable working with L.T., after earlier reporting to Ciak that co-workers were chastising her for filing a complaint against him. She subsequently told Inna that she was not returning to work because her request to transfer away from L.T.’s supervision had been denied. She considered it to be a renewal of her transfer request. She received no response, referral, or follow-up regarding her renewed transfer request. If after a hearing, the trier of the facts determines that the evidence supports Complainant’s claim of constructive discharge, then the affirmative defense would not be available to Respondent.

### **Conclusion**

Based on the investigation, the Director is satisfied that this matter should “proceed to the next step on the road to an adjudication on the merits,” Frank, 228 N.J. Super. at 56, on the allegations that Respondent permitted a hostile work environment that allowed Complainant to

be sexually harassed in the workplace, and constructively discharged her in violation of the LAD.

DATE: 07-11-18



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Craig Sashihara, Director  
NJ DIVISION ON CIVIL RIGHTS