



STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DOCKET NO. EB32WB-62035  
REFERRAL AGENCY NO. 17E-2011-00194

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Mirta Irving and the Director of the  
New Jersey Division on Civil Rights,

Complainants,

v.

Barneys New York,

Respondent.

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Administrative Action

**FINDING OF PROBABLE CAUSE**

The Director of the New Jersey Division on Civil Rights (DCR), pursuant to N.J.S.A. 1:5-14 and attendant procedural regulations, hereby finds that probable cause exists to believe that an unlawful discriminatory practice has occurred in this matter.

On February 7, 2011, fifty year-old Mirta Irving filed a verified complaint with the DCR alleging that her employer, Barneys New York, unfairly passed her over for a promotion to a supervisory position in favor of a less qualified, thirty-two year old male employee, Manuel Pujols, because of her age and gender, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Complainant alleged that she performed those supervisory functions from August 2010 to February 2011, and was even asked to train Pujols upon his promotion.<sup>1</sup>

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<sup>1</sup> The Director of the Division on Civil Rights has joined as a complainant in this matter in the public interest pursuant to N.J.A.C. 13:4-2.2 (e). However, for purposes of this finding, the term "Complainant" will refer only to Ms. Irving.

Respondent denied the allegations of discrimination in their entirety. DCR investigated the allegations. The parties had an opportunity to submit evidence. Based on the final investigative report and governing legal standards, the Director now finds the following.

Complainant is a resident of Passaic, New Jersey, who began working for Respondent through a staffing agency on March 13, 1993, as the Lead Person in the Hanging Department. On July 20, 2004, Respondent hired Complainant directly to work in the same function and title.

Respondent is a national retailer of clothing whose facilities include a warehouse and distribution center located at 1201 Valley Brook Ave., Lyndhurst, New Jersey, where Complainant is employed.

In October 2010, a rumor began circulating that the Supervisor of the Hanging Department, a forty-five year old woman who had been on leave since August 30, 2010, would not be returning to work and, therefore, her supervisory position would be vacated. Complainant told Allocations Manager Jimmy Sotomayor that she would like to be considered for the position if it became available.

On or about November 9, 2010, Complainant met with Vice President of Human Resources Lynn Bennett and conveyed her interest in the position if it became open. Bennett told Complainant, among other things, to make sure that Sotomayor knew about her interest in the position. After the meeting, Bennett mentioned the discussion to Sotomayor and Vice President of Distribution Michael Bilyk. Bilyk was Sotomayor's supervisor. Bennett would later tell DCR that she thought Sotomayor and Bilyk were "supposed to give [Complainant] an interview."

Later that month, Sotomayor received information confirming that the supervisor would not be returning and that the position would be available as of December 2010. He met with Complainant. She reiterated her interest in the position. He assured her that she would be considered and said that no application was necessary since she was already an employee.

Sotomayor stated that from November 2010 through January 2011, Complainant assumed the responsibilities of the Hanging Department Supervisor, which included, among other things, maintaining verbal and written communication with buyers. Sotomayor stated that he increased Complainant's daily duties because of her interest in the position and to give her the opportunity to improve her communication skills.

Meanwhile, Pujols had been working as the Lead Person in the Warehouse Sales Department since June 2, 2009. In the summer of 2010, Respondent announced that it would be relocating Pujol's department to New York in January 2011. Upon hearing the news, Pujols told Bilyk that he hoped to remain at the Lyndhurst facility. Pujols stated that Bilyk approached him in November 2011 and said, "I know you don't want to move to New York and there is a position here available, I don't know exactly where. Give me your resume and later on we can find where we can put you on." Pujols stated he did not apply for any particular position, but merely asked to be considered for "whatever was available" at the Lyndhurst facility.

Sotomayor stated that in December 2010, Bilyk "indirectly" ordered him to promote Pujols into the supervisory position at issue. He summoned Pujols for an interview. Sotomayor felt that Complainant was the stronger candidate because she had experience in the Hanging Department, was performing in the role of the *de facto* supervisor, demonstrated good communication with buyers, and had a positive rapport with him and her co-employees in the department. However, he felt that Bilyk would have vetoed the decision to hire her. In fact, Sotomayor stated that he did not even invite Complainant to interview for the position because Bilyk was so emphatic in his support of Pujols.

Bilyk denied stating to Pujols in November 2011, "I know you don't want to move to New York and there is a position here available, I don't know exactly where. Give me your resume and later on we can find where we can put you on." Bilyk recalled telling Sotomayor sometime between December 2010 and January 2011 that Pujols would be available for reassignment in the Lyndhurst

facility as of January 2011. He stated that Pujols' position would likely have been terminated as a result of the relocation due to the small size of the Warehouse Sales Department (i.e., it consisted of only Pujols and a department supervisor). He rejected the notion that Pujols' promotion had been preordained. He stated that he specifically instructed Sotomayor to hire the most qualified candidate, and denied having any further discussion with Sotomayor about the relative qualifications of any other candidates. Still, he told DCR that Pujols was the most qualified candidate because he possessed superior communication skills and prior managerial experience.

On January 24, 2011, Sotomayor informed Complainant that Pujols had been selected for the position. Complainant became upset and sent an email to Bennett reiterating her desire for the position. Bennett replied that she understood that Sotomayor had already told her that the position was no longer available. On January 31, 2011, Pujols was formally named as the new Hanging Department Supervisor.

Sotomayor stated that he subsequently asked Complainant to train Pujols on "how to deal with trouble merchandise, how we send emails, who we ask for help, how to break the work among the staff, what to prioritize, how to prioritize orders," and to "help him with running the paperwork, receiving memos . . . this lasted for a bout a month or two." Pujols was eventually removed from the position for performance reasons.

The LAD makes it illegal to discriminate against an employee on the basis of age in compensation or in terms, conditions or privileges of employment. N.J.S.A. 10:5-12(a). To prove a cause of action for age discrimination, a plaintiff must demonstrate by a preponderance of the evidence that she belongs to a protected class; (2) she performed her job at a level that satisfied her employer's legitimate expectations; (3) she was discharged; and (4) she was replaced by "a candidate sufficiently younger to permit an inference of age discrimination." Young v. Hobart, 385 N.J. Super. 448, 458 (App. Div. 2005) (citing Bergen Comm. Bank v. Sisler, 157 N.J. 188, 210-13 (1999)). In gender discrimination claims, the first three prongs are the same. The forth prong is that a plaintiff must show that she was subjected to an adverse employment consequence under

circumstances that give rise to an inference of unlawful discrimination. Young, supra, 385 N.J. Super. at 463.

At the conclusion of an investigation, the DCR is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the LAD as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an initial "culling-out process" whereby the Division makes a preliminary determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56; Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978).

Here, the undisputed facts are that Complainant, who had over fifteen years of experience in the Department and a good rapport with buyers, Department leadership, and fellow Department employees, was not even offered an interview. She was passed over for a younger male from an outside department who was less tenured, less experienced, and who did not even seek out the position at issue.

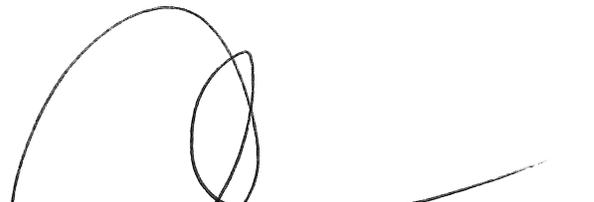
Respondent provided non-discriminatory explanations for selecting Pujols over the Complainant. It asserted that Complainant failed to express any interest in the position until after the position was already filled, and that she lacked the requisite verbal and written communication skills to effectively perform the supervisory duties. Respondent denied that Complainant ever acted in a supervisory role and, as an example of Complainant's alleged unsuitability for the promotion, Respondent cited her faulty or incomplete submission of attendance records.

Although those explanations appear to be legitimate and non-discriminatory on their face, none was supported by the evidence. Instead, the evidence showed that Complainant expressed her strong interest in the position to her supervisors on a number of occasions before it was filled.

The investigation did not support Respondent's assertion that Complainant would not have been able to effectively perform the requisite job duties. Instead, the evidence was that she had been already performing those duties as *de facto* supervisor from November 2010 through January 2011, to Sotomayor's satisfaction, and taught Pujols how to perform a number of the tasks after he was promoted. With regard to the allegedly poor attendance records, Respondent failed to produce any such records despite DCR's repeated requests. Perhaps the most compelling evidence is that Sotomayor--who was very familiar with Complainant's abilities and work habits, and who interviewed Pujols for the position--determined that Complainant was the better qualified candidate.

Because the business explanations offered by Respondent are contradicted by its own managers, there are unresolved factual questions that warrant a hearing. Stated differently, the internal contradictions raises a reasonable ground for suspicion strong enough to warrant a cautious person to believe that the law was violated.

WHEREFORE, it is on this 30<sup>th</sup> day of APRIL, 2013, determined and found that PROBABLE CAUSE exists to credit the allegations of the complaint.



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CRAIG SASHIHARA, DIRECTOR  
NJ DIVISION ON CIVIL RIGHTS