

STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
DCR DOCKET NO. EJ06WB-63271  
REF AGENCY NO. 17E-2012-00532

Aldora Martins,	)	
	)	<u>Administrative Action</u>
Complainant,	)	
	)	<b>FINDING OF PROBABLE CAUSE</b>
v.	)	
	)	
Keith O.D. Moses, P.C.,	)	
	)	
Respondent.	)	

Keith O.D. Moses, P.C. is a law practice owned and operated by an attorney, Keith Moses. Aldora Martins is a Jersey City resident who began working for Respondent as a legal assistant on October 6, 2011. The instant matter is a sexual harassment claim that arose from an incident that took place on July 5, 2012, when Moses and Martin and were alone together in the office.

The parties disagree as to what precisely occurred on that date. Complainant alleged that as she was getting ready to leave for the day, Moses grabbed her by the arms and kissed her on the lips. She alleged that she pushed him away and left the office. She stated that there had been no prior similar incidents. The next day, Friday, July 6, 2012, she came to work and wanted to discuss the incident with Moses. He did not come into the office that day, so she sent him an e-mail. Complainant did not have a copy of the e-mail but told DCR that it read as follows: "Mr. Moses, my first reaction was to press sexual harassment charges against you but I decided to find out what happened, see if you were willing to apologize. I am a woman of faith, we need God's strength, we are only human."

She alleged that the following Monday, July 9, 2012, she spoke to Moses in person at the office and demanded an apology. He refused. Complainant stated that she told Moses that she would file a police report for sexual harassment or assault, and that he replied that such a report

would be futile because there was “no penetration.” She stated that after Moses refused to apologize, she told him that she could no longer work for him and resigned. Moses told her she was not productive and to leave her office keys. Complainant left the office on July 9, 2012, and did not return to work. There was some dispute over whether Complainant resigned first, or whether Moses terminated her and she then agreed that she could no longer work for him. On August 22, 2012, Martins filed a verified complaint with DCR, alleging that Respondent subjected her to gender discrimination in the form of sexual harassment and reprisal in the form of termination, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

During the course of the ensuing DCR investigation, Complainant stated that she related the July 5, 2012 incident to three friends--Nicole Bennett, Virginia Sagrent, and Yvonne Hymes--and her sister, Barbara Hightower. DCR was unable to contact Bennet or Sagrent. Hymes confirmed that Complainant told her that her boss touched her inappropriately but did not recall details of the discussion. Hightower gave a detailed account to DCR that was consistent with the account given by Complainant. Hightower could not recall the date when Complainant told her, but stated that it could have been the day of the incident or within a few days because she was concerned how Complainant would pay her living expenses without the job and if she did not receive her next paycheck. DCR also interviewed two female employees of Moses, P.C., a former office intern, Ava Angell, and Complainant's replacement, Nereida Martins. Angell and Martins reported that Respondent was professional, courteous, and never subjected them to any unwelcome sexual conduct.

Moses denied the allegations of discrimination and retaliation in their entirety. He stated that on July 5, 2012, Complainant kissed him in the office, not the other way around, and that she resigned when he refused to apologize for the incident. Moses told DCR that Complainant's job was to work on collections for a series of vouchers that had not yet been paid, and that her salary

was dependent on the funds collected. Moses stated that in or around January 2012, he was financially unable to sustain his office and made a decision to fire Complainant and another office assistant, Traci Ratchford.<sup>1</sup> Moses said that he changed his mind and decided to retain Complainant out of sympathy for the death of her husband in December 2011. He alleged that Complainant was nonetheless unproductive in collecting on the vouchers.

As to the incident on July 5, 2012, Moses stated that Complainant also hugged him and told him that his problems would soon be over. He stated that on a prior occasion, via text messaging, Complainant mentioned to him the possibility of visiting museums together in New York City. Moses stated that in retrospect, he perceived certain conduct by Complainant before July 5, 2012, to be romantic advances toward him.

Moses acknowledged receiving an e-mail, or at least some form of a written communication from Complainant regarding the incident, but did not provide a copy of the communication in response to DCR's requests. DCR also asked Moses to produce screen shots of a text message exchange he offered in support of his assertion that Complainant made romantic advances toward him prior to the incident on July 5, 2012. Moses did not produce the screen shots or any other tangible evidence in support of his assertions regarding the July 5, 2012 incident or Complainant's employment with Moses, P.C. He did not dispute Complainant's characterization of the content of her July 6, 2012 message. He told DCR that he viewed the message as Complainant's attempt to keep her job or somehow blackmail him. Moses stated that during the July 9, 2012 discussion between him and Complainant, she stated that if he did not apologize, she would quit. Moses stated that he replied, "Why should I apologize? You kissed me." Moses stated that he told Complainant on July 9, 2012, that he would accept her resignation because she was not productive and had not produced payment on a single voucher since January 2012.

---

<sup>1</sup> DCR was unable to contact Ratchford using the information provided by Respondent.

Complainant followed through on her stated intention of filing a criminal complaint against Complainant based on the July 5, 2012 incident. Although specific details of the complaint are unknown, the criminal case was administratively dismissed from New Jersey Superior Court, Hudson County, on or about September 9, 2013. According to DCR's interview of Complainant on or about May 10, 2013, the matter was rescheduled for hearing three times because Respondent failed to appear or requested rescheduling. Complainant stated that the last time she appeared in court on the matter, she was told she did not have to appear for the next proceeding. Respondent stated to DCR that the rescheduling was due to clerical errors related to notice, issues associated with Super Storm Sandy, and his involvement in a car accident. The Hudson County Prosecutor's Office provided information to DCR indicating that the administrative dismissal was due to a technical error in how Moses was originally charged. It appears that Complainant pursued the matter for some time, with repeated delays in adjudication triggered by Respondent. There also seems to be a possibility that it was dismissed during a proceeding when Complainant was not present.

### **Analysis**

At the conclusion of the investigation, DCR is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. 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 LAD was violated. Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby DCR 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 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.

Sexual harassment is a form of gender discrimination. Lehmann v. Toys R Us, 132 N.J. 587 (1983). In Lehmann, the Supreme Court held:

To state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment.

Id. at 603. The Court explained that because women are disproportionately victims of sexual assault and “live in a world in which the possibility of sexual violence is ever-present,” women “may find sexual conduct in an inappropriate setting threatening” and have a “stronger incentive to be concerned with sexual behavior.” Id. at 615 (quoting Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)). The Lehmann Court also noted:

[I]n many areas of the workforce, women still represent a minority and are relatively recent entrants into the field. Because of their predominantly junior and minority status, for some women it is more difficult than it is for men to win credibility and respect from employers, coworkers, and clients or customers. That can make women’s position in the workplace marginal or precarious from the start. Sexual harassment operates to further discredit the female employee by treating her as a sexual object rather than as a credible coworker. That can both undermine the woman’s self-confidence and interfere with her ability to be perceived by others as a capable worker with the potential to advance and succeed.

Id. at 615 (quoting Kathryn Abrams, Gender Discrimination and the Transformation Workplace Norms, 42 Vand. L. Rev. 1183, 1208-09 (1989)).

Against that legal backdrop, the Director is not inclined to find that a female employee’s allegation that she was grabbed and forcibly kissed on the lips by her boss while alone in a deserted workplace is something less than “severe or pervasive.” The parties agree that there was an incident on July 5, 2012, involving a kiss. There is no dispute that over the course of the following two days, Complainant demanded an apology, both in writing and during an in-person discussion with Respondent. Moreover, there is no dispute that Complainant’s resignation or termination was triggered by Respondent’s refusal to apologize.

Respondent offered no persuasive explanation as to why Complainant would demand an apology if she initiated the kiss. Respondent's explanation that Complainant's demand for an apology was simply an attempt to keep her job is contradicted by his assertion that she promptly quit moments later. Moreover, Complainant provided details about her written and verbal communications with Respondent--e.g., Respondent telling her that any criminal charge would fail because there was "no penetration"--which lend credibility to her version of events and recollection of the incident.

Respondent's version of events, by contrast, lacked similar detail and changed slightly during the course of the investigation. In his answer to the verified complaint, Moses wrote, "Complainant kissed the respondent at the door as she was leaving the office . . . Respondent did not touch or hold any part of complainant's body." However, when describing the July 5, 2012 incident to the DCR investigator, Moses said that after Complainant hugged and kissed him on the cheek, he "kissed her on the cheek back," but he noted that the kiss was not a romantic or sexual gesture. Although the investigation revealed no evidence of prior, inappropriate sexual conduct by Moses, the absence of similar incidents was insufficient to discredit Complainant's allegations of what occurred on July 5, 2012.

On balance, Complainant's version of events appears to be more credible. The Director also notes that Respondent failed to respond to an October 17, 2013 investigative subpoena requesting any written communications related to Complainant's employment at Moses, P.C.; any e-mail or other written communications between himself and Complainant regarding the July 5, 2012 incident; written communications between himself and Complainant of a personal nature since she began employment with Moses, P.C.; any documentation in Respondent's possession related to criminal or other charges arising from the July 5, 2012 incident; and any documentation of a sexual harassment and/or employment discrimination policy of Moses, P.C. Several of the requests made through the October 17, 2013 subpoena were repeats of prior, less formal requests

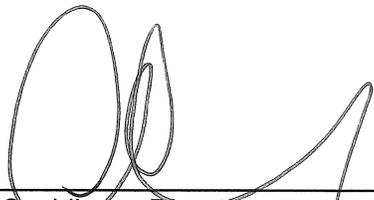
to Respondent for information in furtherance of the investigation. Respondent acknowledged receipt of the subpoena, but simply did not respond in any manner, thus allowing negative inferences to be drawn in favor of Complainant's allegations. Although materials responsive to the subpoena may have supported Respondent's version of events or been otherwise exculpatory, the assumption drawn from his failure to respond is that the materials requested would have supported Complainant's allegations or been otherwise damaging to Respondent's position.

The Director is satisfied that the requisite facts and circumstances are met and that this matter should "proceed to the next step," Frank, supra, 228 N.J. Super. at 56, so that an administrative law judge can observe the parties and other witnesses testify, assess their respective credibility, and reach a conclusion as to the truth of what occurred in the office at Moses, P.C. between Aldora Martins and Keith Moses on July 5, 2012.

As to Complainant's allegation of reprisal, the investigation did not reveal sufficient supporting evidence. Complainant admittedly resigned, although Respondent may have simultaneously or immediately thereafter expressed a desire for her to leave. However, the Director finds that if Complainant was subjected to unwelcome and inappropriate physical contact, and Respondent refused to acknowledge the incident or take any remedial action that may have allowed Complainant to overcome the incident and continue in her employment at Moses, P.C., she has a claim for constructive discharge. The alleged physical act of sexual harassment and Moses' alleged reaction to Complainant's demand for an apology could cause a reasonable person to find the circumstances of employment no longer tolerable and resign. In writing to Moses the day after the incident and confronting him in person several days later, Complainant took reasonable steps toward resolving the situation and keeping her job. As both the alleged perpetrator of the incident and owner/operator of the business, Moses was the only person with the capacity to remedy the incident, and he apparently made it known immediately after that he would not address any consequent effects or concerns.

In sum, there is probable cause to suspect that Respondent violated the LAD through an act of sexual harassment against Complainant. Based on Complainant's allegations of what took place between herself and Respondent between July 5, 2012 and July 9, 2012, there is also probable cause to suspect that Respondent violated the LAD through constructively discharging Complainant.

WHEREFORE, it is on this 9<sup>th</sup> day of JULY, 2014, determined and found that PROBABLE CAUSE exists to credit the allegation of sexual harassment and further, there is reasonable ground for suspicion that Complainant was subjectively discharged.



---

Craig Sashihara, Director  
NJ DIVISION ON CIVIL RIGHTS