

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN36AB-65835

Robbin McGeady,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINDING OF PROBABLE CAUSE
)	
Europa Domestics, Inc.,)	
)	
)	
Respondent.)	

On February 25, 2016, Somerset County resident Robbin McGeady (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that she was discriminated against in the workplace by Europa Domestics, Inc. (Respondent) based on her age, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-12 to -49. The DCR investigation found as follows.

Summary of Investigation

Respondent is a staffing agency with offices in Tinton Falls and New York City. Its website indicates that its services are limited to recruiting, screening, and referring applicants for domestic service positions, i.e., childcare, housekeeping and eldercare.

Complainant alleges that she has been performing domestic work, including in-home child care and eldercare, for thirty years. She alleges that she saw a *Craigslist* advertisement for a housekeeping position that did not specify where the position was located. She did not retain a copy of the advertisement. She responded to the classified ad via email and had the following email exchange with Respondent's owner, Eva Klenoff:

Complainant:	Hello. Is this opportunity still available? If so, how large is the home? Please advise. Thank you.
Klenoff:	Where do you live?
Complainant:	Near Hillsborough.
Klenoff:	Please call me. Eva - 732-[*****].

Complainant called Klenoff as requested. Klenoff interviewed Complainant. Klenoff asked Complainant's age. Complainant replied that she was 56. Complainant alleged that Klenoff stated that her client was seeking someone younger for the position, without specifying any age, and asked her to provide references.

Later that day, Complainant sent the following email to Klenoff: "hi eva. I've decided not to forward my references to you. what you did was illegal and I don't care if your client requested that. all in all you'll both be missing out."

Respondent denied the allegations of age discrimination in their entirety. In its answer to the verified complaint, Respondent admitted that it "conducted a telephone interview with Complainant on or about February 11, 2016 and that Complainant's age was requested." See Answer to Verified Complaint, Apr. 14, 2016, ¶4. Respondent also admitted that Klenoff "told Complainant that she would not be hired because her client is looking for someone younger." See id. at ¶5.

In an addendum to the answer, Respondent provided additional information. It asserted that Complainant responded to an advertisement it placed in *Craigslist* for a client—M.R. of Princeton—who wanted a fulltime housekeeper under 45 years old. Respondent stated that after speaking with Complainant, and despite the client's age restriction, Klenoff telephoned M.R., relayed Complainant's work experience, and asked if she would consider meeting with Complainant. Respondent claims that M.R. replied that she would let Klenoff know if she was interested in Complainant.

DCR interviewed Klenoff in the course of the investigation. Klenoff told DCR that about 90% of her clients are seeking domestic service persons in a certain age group, usually between 27 to 40 years old, or between 40 to 60 years old. Klenoff said that she recommends to clients that they broaden their age parameters, but if they refuse, she relays those preferences or restrictions to the job applicants. Klenoff stated that she always refers applicants to clients as prospective hires regardless of any stated age preference.

Klenoff stated that M.R. told her she wanted someone under 45 years old because she had four young children and a huge house with many stairs. Klenoff stated that when Complainant called about the job, she told Complainant that she believed that the client would not hire her because she preferred someone younger, but promised to call the client to see if she would interview Complainant anyway. Klenoff told DCR that she called M.R. and told her about Complainant's application, and M.R. said that she would think about it and get back to her. Klenoff said that she never heard back from M.R. about hiring anyone for the position.

Klenoff told DCR that Complainant began calling her every day, sometimes three to four times a day, inquiring about work opportunities and accusing her of age discrimination. Klenoff stated that she attempted to explain to Complainant that it was the client, not she, who had an age preference, and that she had no reason not to discriminate against an applicant. Klenoff stated that Complainant remained very belligerent and continued to call her. Klenoff said she contacted

M.R. again to ask her to reconsider, given Complainant's child care experience. Klenoff said that M.R. again told her that she would let her know if she was interested in Complainant.

DCR conducted a telephone interview of M.R. at the telephone number provided by Klenoff. M.R. told DCR that she contacted Klenoff when she was looking for someone to help around the house with cleaning and laundry. M.R. denied having young children. She denied needing childcare. She denied suggesting to Klenoff that she had any specific age preference. She stated that she did not hire anyone referred by Respondent and spoke with Klenoff only once or twice.

Complainant denied calling Klenoff multiple times after the February 12, 2016 telephone interview. She stated that the telephone interview was their last communication. At DCR's request, she produced telephone records for the period of February 11, 2016 through March 10, 2016. Those records show a single seven-minute call to Klenoff's business number at 11:46 a.m. on February 12, 2016, and no other calls to Klenoff's telephone number. There were also no calls to the personal cellphone number that Klenoff provided in the initial email exchange or to the number listed on Respondent's website 800-***-****.

Analysis

"Courts have repeatedly held employers responsible for discrimination against their employees, even when the employer itself claimed to be free of bias." See Williams v. G4S Secure Solutions, Inc., 2012 U.S. Dist. LEXIS 66249 (D. Md. May 11, 2012). In other words, client or customer preference does not excuse discrimination. Id. (citing Hyland v. Xerox Corp., 380 F. Supp.2d 705, 713 (D. Md. 2005); Diaz v. Pan American American World Airways, 442 F.2d 385, 389 (5th Cir.), cert. denied 404 U.S. 950 (1971) (hiring decision should not be based on the discriminatory "preferences of co-workers, the employer, clients or customers."). For example, a nursing home cannot accede to a resident's demand for a "white-only" certified nursing assistant. See Chaney v. Plainfield Healthcare Center, 612 F.3d 908 (7th Cir. 2010) ("It is now widely accepted that a company's desire to cater to the perceived . . . preferences of its customers is not a defense . . . for treating employees differently.").

It follows that an employment agency cannot publicize a discriminatory preference in its job advertisement or ask applicants about, for example, their age, race, religion, or sexual orientation, in a manner that "expresses, directly or indirectly, any limitation, specification or discrimination" as to their age, race, religion, sexual orientation or some other protected characteristic, "unless based upon a bona fide occupational qualification." N.J.S.A. 10:5-12(c). In particular, the LAD states:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national

origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex or liability of any applicant for employment for service in the Armed Forces of the United States, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

[See N.J.S.A. 10:5-12(c).]¹

Here, Respondent does not deny that it is an employment agency or that during the interview, its owner asked Complainant about her age and, learning that Complainant was in her 50s, stated that Complainant would not be hired because the client was looking for someone younger. Based on M.R.'s statement that she placed no age restriction at all, there is no persuasive evidence that Klenoff was merely complying with an age restriction or preference expressed by Respondent's client.

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.

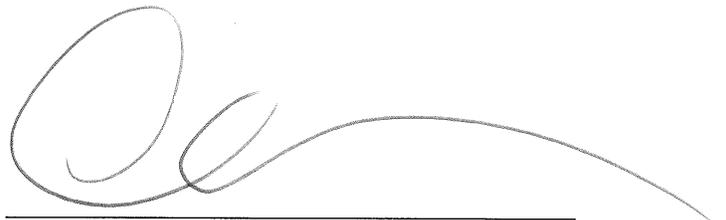
A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 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. 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.

Here, there is no dispute that Respondent's owner inquired about Complainant's age during her interview and told Complainant that she would not be selected for the position based solely on her age. Indeed, Klenoff acknowledged that she always relays her clients' age preferences to applicants. In this case, there was no evidence that age would constitute a bona fide occupational qualification pursuant to N.J.S.A. 10:5-2.1 and N.J.A.C. 13:11-1.4. Under the circumstances, the Director is compelled to find, for purposes of this threshold determination only,

¹ In New Jersey, a homeowner is free to consider an applicant's age, race, religion, sexual orientation, etc., when hiring a domestic worker such as a housekeeper or nanny for his/her home. N.J.S.A. 10:5-5(f). However, an employment agency cannot advertise or express any intent regarding those personal hiring preferences to prospective applicants. N.J.S.A. 10:5-12(c). New Jersey is not alone in distinguishing between homeowners and employment agencies in discrimination cases regarding domestic help. See Matter of Pavillion Agency Inc. v. Spitzer, 9 Misc.3d 626, 632 (NY S.Ct. 2005); Smith v. Blavatnik, 29 Misc.3d 424, 427-28 (NY Sup. Ct. 2011).

that there is a “reasonable ground of suspicion . . . to warrant a cautious person in the belief” that the LAD was violated. N.J.A.C. 13:4-10.2.

DATE: 1-30-18



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS