

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN39SB-63008

Zuleyka M. Velazquez,)	
)	
Complainant,)	<u>Administrative Action</u>
v.)	
)	FINDING OF PROBABLE CAUSE
AM2PM Childcare Learning Center,)	
)	
)	
Respondent.)	

This is an employment discrimination case. Monmouth County resident Zuleyka M. Velazquez (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, AM2PM Childcare Learning Center (Respondent), fired her because of her pregnancy, 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 daycare center with a licensed capacity of 112, located at 1000 State Highway 36, Hazlet, New Jersey, purportedly founded by Ms. Rekha Khanna. It appears to be operated by Mr. Raj Khanna (Khanna), who identifies himself as the “Head Teacher” but told DCR that he has no ownership interest in the business.

Complainant alleges that Khanna hired her to work for Respondent as a full-time teacher’s assistant. She stated that she was given an employee handbook to review, and asked to sign a document acknowledging her receipt of same, and began working on February 27, 2012, which was a Monday.

She told DCR that Khanna scheduled her to work Mondays through Fridays from 9:30 a.m. to 6:30 p.m. (with a break from noon to 2 p.m.), and that she was paid \$520 in cash every two weeks. She said that upon receiving the cash, she would sign an acknowledgement form, which Respondent kept. She said that she was never fingerprinted or placed on the computer system despite Khanna’s assurances that he would. She said that her only relevant work experience was prior babysitting.

She stated that the facility had five rooms—i.e., a baby room, toddler room, 1 to 2 year-old room, and 3 to 4 year-old room—and that each room was supposed to have one teacher and

two assistants. She told DCR that she worked in the baby room, and her days were spent changing diapers, feeding and playing with the infants, and putting them to bed.

She said that some mornings she would also open up the toddler room and help out by giving breakfast to the toddlers, playing with them, and taking them to the bathroom. She said that sometimes, employees were sent to another daycare center operated by the same owner—Totsville Childcare Learning Center in Union Beach, New Jersey—but she was never asked to do so. Complainant identified three other women who worked at the daycare center at the time: Rose O’Neil, Grace, and Naomi. She believed that Grace and Naomi were also paid in cash, but could not recall their last names.

Complainant alleges that on or about March 29, 2012, when she was approximately five months pregnant, Khanna told her sister, Bridget Velazquez, who was also employed by Respondent, that he was firing Complainant because she was missing too many days of work due to her pregnancy. She said that she was replaced with a woman whose name she could not recall. She said that Khanna assured her sister that Complainant could return to work after she gave birth. Complainant contends that above amounts to unlawful pregnancy discrimination.

Respondent denied the allegations of discrimination in their entirety. It argued that Complainant was never an employee. It argues that she simply participated in, and completed, a one-month unpaid internship. Khanna stated that the daycare center had interns at different times of the year depending on the interns’ needs or schedules. He described their professional relationship as follows:

Bridget Velazquez . . . approached me in February, 2012 to indicate that her sister, Zuleyka, will be moving into the area and would like to intern at the daycare center for a few weeks to gain some knowledge . . . Since Bridget was already an employee at the daycare center, I decided to let Zuleyka come to the center for a month . . . at her convenience. The intention was to let Zuleyka benefit from cognizable daycare skills that can easily be adapted to additional employment settings such as babysitting, adult day care setting, teacher-aide positions and different educational environment, or opening her own daycare center where both sisters can work together . . . Zuleyka mentioned that she has many doctor appointments scheduled due to pregnancy that makes it difficult to attend a formal school for education. She indicated that . . . she would prefer the flexibility of schedule . . . Since this was an unpaid internship that only benefited Zuleyka, I agreed to her flexible schedule . . . [T]here were times when I took extra time out of the normal busy schedule to assist her in learning at the daycare center, but all so as to provide maximum benefit to Zuleyka. In the role of an intern, Zuleyka was never involved in conducting any productive or operational work that would qualify her as an employee of the daycare center.

[See Letter from R. Khanna to DCR, Jul. 4, 2012, pp.1-2.]

Respondent identified three employees who “were permitted to work during pregnancy, take temporary disability leave and return to work”—Dawn Margeotes, Danielle Solomeno, and Sara Castellanos. It stated that all three women were teachers. Id. at 3.

Khanna denied firing Complainant. He said that after her internship was completed, she asked for a paid position and he replied that none was currently available. He stated:

After spending a month as an intern, on March 27, 2012, Zuleyka asked me if she can be considered for any full-time or part-time employment at the center. I mentioned to her that currently we have no openings that met her experience and background. Next day she texted me stating that she will not be coming to the daycare center since she is not feeling well. Since Zuleyka was not at the center on March 28th 2012 and unreachable by phone, I communicated with her sister . . . that since the month is over, please inform Zuleyka that she does not have to come to the center anymore. Next morning . . . Zuleyka came to the center and mentioned to me that she wanted to hear personally from myself that she's not going to be employed at the center in the future.

[Id. at 3.]

Respondent told DCR that at the time Complainant left, there were no open positions.

Respondent produced a single-page document entitled, “ONE-MONTH INTERNSHIP (Rough Draft Schedule),” which lists a series of activities over a four week period. For example, the topics listed for Week Three were “Personal Hygiene Requirements,” “Keeping Your Cool,” “Healthy Learning Environments,” and “Language and Literacy Development.”

Respondent also produced a typed single-page document entitled, “Employee Time Card,” which lists the day, date, department, position, times of arrival and departure, and total hours. For example, the last line was as follows: “Tue[,] 3/27/2012[,] Classroom Training[,] Non-Paid 4-Wk Intern[,] 2:00 pm[,] 5:45 pm[,] 3.75.” According to the document, Complainant worked from February 29, 2012 to March 27, 2012 (i.e., 33 days) for a total of 113.25 hours (which averages to approximately 3.4 hours a day). The signature line is blank.

Respondent also produced eight Certificates of Training for Complainant. Those documents certified that Complainant completed the following courses:

Creating Opportunities to Expand Fine & Gross Motor Skills	Mar. 2, 2012
Giving Medications Safely and Effectively	Mar. 2, 2012
Promoting Cultural & Racial Diversity	Mar. 2, 2012
Music & Movement	Mar. 2, 2012
Rest Time and Naptime	Mar. 9, 2012
Surviving the Infant & Toddler Years	Mar. 9, 2012
Keeping Your Cool: Dealing with Tantrums and Aggression	Mar. 9, 2012
Effective Play & Activities are ‘Key’	Mar. 26, 2012

Respondent did not identify anyone else who worked as an intern for the daycare center from January 2012 to January 2015 (or any other time). When asked for information about the three witnesses whom Complainant identified, Khanna replied that there was an employee named Grace, but he had no contact information, and did not provide a last name. (DCR later identified her as Grace Cunningham.) He stated that there was a current employee named Naomi Bowden, but he was uncertain whether it was the same Naomi who was working when Complainant was there. Upon a subsequent written demand, he provided contact information for Cunningham and Bowden. DCR was unable to reach either woman using the contact information supplied by Respondent. However, Respondent provided DCR with a typed note from Bowden that said:

I was informed that you wanted to talk to me about someone by the name of Zuleyka V.

During my years at AM2PM, I have never come across anyone with that name (either as a parent, or family member, or any center helper) and hence will not be able to provide any information.

If you need any further information, please discuss with management at AM2PM.

[See N. Bowden, "Ref. Zuleyka V. 7/9/15." Jul. 9, 2015.]

Complainant denied ever seeing the document entitled, "ONE-MONTH INTERNSHIP (Rough Draft Schedule)," or the employee time card. Moreover, she said that the starting date and hours reflected on the time card were inaccurate. She said that she began working on February 27, 2012, not February 29, 2012, and that she was scheduled to work 35 hours a week, not a few hours each a day. She denied ever receiving any training, and specifically denied receiving the training listed on the eight certificates produced by Respondent.

Bridget Velazquez told DCR that she worked for Respondent as a full-time teacher's assistant in the two-year-old room from December 2, 2011, to October 4, 2014. She said that for a period of time, she was paid in cash "under the table" and she would have to sign some sort of receipt. However, she said that she was subsequently moved onto the computerized system, sent to get a physical and TB shot. She stated that Complainant worked as a full-time teacher's assistant in the infant room. She said there was never any mention of an unpaid internship for her sister or anyone else. She said that Respondent's staffing often did not meet the State-mandated teacher/student ratio. For example, she said that in her classroom there were two adults for 25 kids.¹

¹ Her observation that the facility was sometimes understaffed appears to be borne out by New Jersey Department of Children and Families (DCF) records. DCF inspected the facility on April 9, 2012 (i.e., roughly two weeks after Complainant separated from Respondent) and found staffing violations.

Cassandra Percy told DCR that she worked as a full-time daycare worker from February 2012 to April 2012, from Monday through Friday, from 7 a.m. to 3 p.m., for \$7.25/hour. Percy stated that her grandmother worked for Respondent at the time (and continues to do so) and got her a job there. Percy said that she was fingerprinted and had to undergo a background check before she began working. She said there were no interns. She confirmed that Complainant worked as a full-time assistant and was assigned to the baby room. She said that Khanna did not have Complainant fingerprinted or undergo a background check because Complainant was visibly pregnant and Khanna knew that he was not going to retain her for long. Percy stated that she believed Complainant was fired based on her pregnancy.

A woman who is currently employed by Respondent told DCR that she has worked there since 2014 and was unaware of any internship program.

Another woman who is currently employed by Respondent told DCR that she has worked for Respondent for over ten years. When asked if she had ever heard of any sort of internship program, she replied simply, "I mind my own business."

Meaghan Buchan, who identified herself as the co-director and pre-k teacher, denied being aware of any sort of internship program. She stated that there were a number of employees who did not work out, but no interns that she could recall.

No other current or former employees confirmed the existence of any sort of internship arrangement.

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 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" 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. den., 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.

The DCF inspection report noted, "Inadequate staff/child ratios: There were 23 to 28 children 3 years of age with 2 staff. Additionally, in the infant room, adequate staff/child ratios are not maintained . . . Incomplete staff records: All staff may not have the required CHRI and CARI background checks."

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate against an employee in the “terms, conditions or privileges of employment” based on gender or pregnancy. N.J.S.A. 10:5-12(a). The LAD also states:

[A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as . . . assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer. The employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation.

[N.J.S.A. 10:5-12(s).²]

Here, Respondent appears to acknowledge that it is unlawful to discharge an employee based on her pregnancy. However, it argues that Complainant was never an employee. Instead, it argues that Complainant was an unpaid intern, who was not offered a position after her internship expired. In support of that position, it produced a draft internship schedule and a list of days and hours purportedly worked by Complainant. The Director finds both documents to be somewhat questionable on their face. The internship schedule conspicuously states “Rough Draft,” and the “Employee Time Card” is unsigned.

The claim that Complainant was simply part of an unpaid internship program was also called into question because (i) none of the former or current employees whom DCR interviewed—including Co-Director Meaghan Buchan—recalled Respondent ever having interns; (ii) Bridget Velazquez and Cassandra Percy supported Complainant’s claim that she was a paid employee who worked a full-time schedule; (iii) Respondent failed to identify any other interns or produce time cards for any interns who worked at any time from January 2012 to January 2015 despite DCR’s requests; and (iv) Complainant denied ever seeing the internship schedule and Employee Time Card and challenged the substance of both.

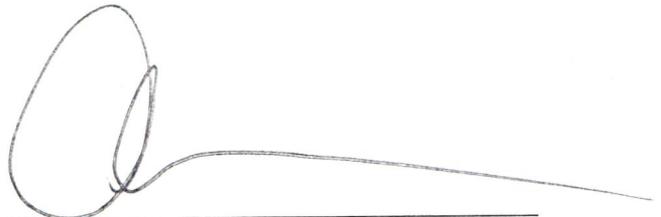
² Although this section of the LAD and the provision adding “pregnancy” as an explicit protected characteristic were not enacted until after Respondent fired Complainant, those amendments largely codified existing law. For example, for decades courts have interpreted gender discrimination under the LAD to include discrimination based on pregnancy, See, e.g., Castellano v. Linden Bd. of Ed., 158 N.J. Super. 350 (App. Div. 1978), mod. on other grounds, 79 N.J. 407 (1979); McConnell v. State Farm Mut. Ins. Co., 61 F. Supp.2d 356 (1999); Leahey v. Singer Sewing Co., 302 N.J. Super. 68 (Law Div. 1996). The federal Pregnancy Discrimination Act, 42 U.S.C.S. 2000e (k), explicitly required employers to treat women affected by pregnancy “the same . . . as other persons not so affected but similar in their ability or inability to work,” and the LAD required employers to provide reasonable accommodations for an employee’s disability, including a pregnancy-related disability. N.J.A.C. 13:13-2.5.

With regard to the three employees who Respondent claims “were permitted to work during pregnancy, take temporary disability leave and return to work,” the Director finds that the fact that Respondent may have allowed certified teachers to work during their pregnancy, does not necessarily mean that it would extend the same practice to a lesser skilled/valued teacher’s assistant like Complainant. And Khanna’s claim that there were no open positions when Complainant left appears to be contradicted by the DCF inspection report, which found insufficient staffing in the infant and 3-year-old rooms.

On balance, the Director finds that Complainant’s characterization of her position as a full-time employee in a daycare facility required to adhere to a certain State-imposed staff/student ratio appears to be more plausible than Respondent’s insistence that she was merely an unpaid intern whom he was “assist[ing] . . . in learning at the daycare center” for her “maximum benefit.” See Letter from R. Khanna, supra at 2. Thus, Respondent could not lawfully fire her simply based on her pregnancy. To the extent that Respondent believed that Complainant was missing too many days due to her condition, then it could have engaged in an interactive process to see if there was some reasonable accommodation such as a “job restructuring or modified work schedules.” N.J.S.A. 10:5-12(s).

In view of the above, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a “reasonable ground of suspicion . . . to warrant a cautious person in the belief” that probable cause exists to support the allegations of pregnancy discrimination. N.J.A.C. 13:4-10.2.³

DATE: 11-14-17



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

³ Nothing in this finding should be construed to mean that the LAD allows a New Jersey employer to discriminate against an intern or prospective employee based on pregnancy.