STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR OCKET NO. EJ12WB-64599
EEOC CHARGE NO. 17E-2014-00356

Alyssa Walsh,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Diamond Staffing Services, Inc.,	)	
	)	
Respondent.	)	

On April 16, 2014, North Bergen resident Alyssa Walsh filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Diamond Staffing Services, Inc. (DSS), violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by discriminating against her on the basis of pregnancy. DSS denied the allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

DSS, a division of Corporate Resource Services, Inc., is a temporary staffing agency located in West New York, New Jersey.[1] On March 19, 2014, DSS hired Walsh and assigned her to work as a packer in a facility in Secaucus operated by Port Logistics Group.

Walsh alleged that she told DSS's Recruiter/Dispatcher David Tejada that she was pregnant and that her doctor told her to not lift more than twenty pounds. She stated that DSS did not ask her to present a doctor's note. She stated that her first day of work was uneventful and she was able to perform all functions of the job. She told DCR that she was not required to lift anything heavy. She said that there were boxes of clothes that were not too heavy and the male workers would pick up the boxes after she pushed them on to tracks. She stated that the second day was similarly uneventful except that DSS's on-site manager, Luis Salomon, approached her and asked if she was pregnant. She stated that Salomon told her that he was going to call her supervisor because he did not think she should be working there in her condition. Walsh said that Salomon told her to continue working but to be careful. She claims that he said he would find her light duty work such as changing tags but never did. Walsh alleged that the next day, Tejada

[1] During the investigation, counsel for DSS told DCR that DSS is "out of business," without providing any documentation indicating that the business has wound down operations. DCR notes that DSS is listed on the website of Corporate Resource Services, Inc., as a "company" of Corporate Resource Services that is currently in operation and using the same business address as Corporate Resource Services. As this matter proceeds, DCR will gather additional information to determine if Corporate Resource Services should be added and/or substituted as a respondent in this matter.

apologized and told her that there was no work for her, but that she was welcome to return when she was no longer pregnant.

DSS asserted in its position statement that it discharged Walsh "because of her refusal and/or inability to perform the essential functions of the Packer job." See Letter from Christine, R. Essique, Esq., to DCR, Oct. 2, 2014, p.1. DSS noted that the packers worked for one of Port Logistics' clients, Hennes and Mauritz, LP (H&M), and were required to "constantly lift between 25-30 pounds for 8 hours," among other duties. Id. at 2. DSS described the events that led up to Walsh's discharge as follows:

> On March 19, 2014, Walsh performed the duties of Packer without incident . . . However, on March 21, 2014, Walsh refused to perform the job duties of Packer, specifically, she advised DSS' on site manager, Luis Salamon, that she could not perform the lift requirements of her job because she was pregnant . . . Accordingly, at such time, Mr. Salamon assigned Walsh the duties of sweeping the warehouse and cafeteria for the remainder of the day. . . . Due to Walsh's inability to perform the essential job functions for an H&M Packer and the lack of other available work for her to perform, on March 21, 2014, DSS' Dispatcher/Recruiter, David Tejada, terminated Walsh's assignment at H&M.
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> [Ibid. (citations omitted)].

Carlos Aguilar holds a supervisory position at DSS's client, Port Logistics Group. Aguilar told DCR that the only person he dealt with at DSS was Salamon. He recalled someone, whom he could not recall, telling him that there was a pregnant "temp" working on the "picking line." Aguilar said that he asked Salamon if he was aware that his employee was pregnant because they could assign lighter work for her to perform. He said that when employees were pregnant, they found light work duties such as setting up boxes or working the quality control section. He could not recall whether Walsh was given a light duty assignment. He stated that the policy to keep pregnant workers off the picking line was DSS's rule, it was not his company's rule. But he agreed that pregnant women should not work on the picking line because it required lifting and pushing boxes that weigh between 25 and 50 pounds. He denied ever telling Salomon that he did not want Walsh working there because of her pregnancy.

Salomon, who no longer works for DSS, denied that Walsh ever refused to lift boxes. He said that it was his decision to assign her to light duty after discovering that she was pregnant. He told DCR that he and others, including female employees, were worried that Walsh would injure herself by lifting heavy boxes. Salomon told DCR that a picker must bend over and pick up boxes from the ground as soon as they are filled. He said that pickers must also lift totes that that may weigh between 25 and 50 pounds. He said that it was a physically demanding job that pregnant women should not perform. He recalled Aguilar asking him if he was aware that Walsh was pregnant. He said that Aguilar said, "I don't want her to lift heavy things because it may cause her to miscarriage." Salamon said that he asked Tejada if Walsh was pregnant, but Tejada

said he did not know. So he asked Walsh if she was pregnant. He stated that when he learned that she was, he put her on light duty cutting boxes and putting clothing into boxes.

Tejada, who no longer works for DSS, stated that he hired Walsh but denied knowing of her pregnancy at the time. He said that she did not mention her pregnancy and was wearing large sweatpants so she did not appear pregnant to him. Tejada told DCR that he received a telephone call from an on-site supervisor—he could not recall who—reporting that Walsh told a supervisor that she could not lift the boxes because they were too heavy. He said that after speaking with the on-site supervisor, he received a telephone call from his boss, James Molina, who asked if he was the person who assigned Walsh to Port Logistics and if he realized that she was pregnant. Tejada said that he and Molina agreed that Walsh should perform light duty such as cleaning the cafeteria, bathroom, and sweeping.[2] He said that she was reassigned to those duties that same day. Tejada told DCR that he told Walsh to call him on a daily basis while he tried to find a new position for her, but he never heard from her again.

Walsh's fiancé, Andrew Valencia, told DCR that he overheard Tejada on speakerphone telling Walsh that there was no work available but that she should feel free to call him back after she gave birth. Valencia said that Walsh gave birth on July 4, 2014.

The LAD makes it illegal to discharge or otherwise discriminate against an employee in the "terms, conditions or privileges of employment" based on pregnancy. NJ.S.A. 10:5-12(a). The LAD also states:

> [A] 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.
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> [N.J.S.A. 10:5-12(s).]

At the conclusion of an investigation, the 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.

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[2] DCR left telephone messages for Molina at the number provided by Respondent. He did not return those calls.

A finding of probable cause is not an adjudication on the merits but merely an initial "culling-out process" whereby the DCR 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.

Here, a New Jersey resident alleges that she was fired from her position on an assembly line because of other people's concerns (none of whom were medical professionals) that she would injure herself because she was pregnant.

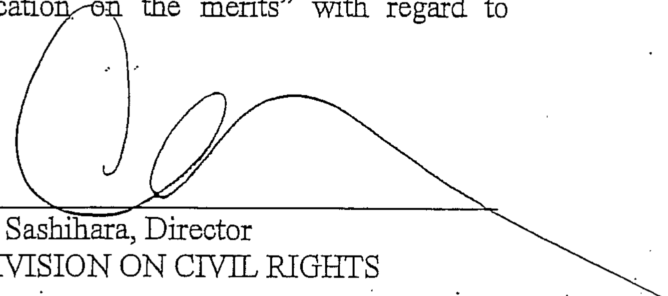
The employer asserted that the complainant was fired because she told a supervisor that she could not perform the essential job functions based on her pregnancy and then refused to work. The supervisor did not support that version of events. He told DCR that the woman never refused to work and never raised her pregnancy as an issue. Rather, he said that a client representative brought the issue to his attention and it was ultimately the supervisor's decision that Walsh should not perform the duties—even though she voiced no objection to doing so—because they were too physically demanding given her pregnancy. The client representative supported the supervisor's claim that Walsh never refused to work or asked for an accommodation but that it was the men who unilaterally agreed that she should be moved to a different assignment.

Respondent and Salomon stated that Walsh was moved to a light duty assignment. Walsh claims that although there was talk of moving her, it never occurred. Instead, she claims that after two days of working on the picking line, she was told not to return and not offered any other employment opportunities. She further states that DSS told her it would only place her in other jobs after she gave birth. Walsh's version was corroborated by her fiancé, who said he heard the conversation while on speakerphone.

Under settled law, an employer—no matter how well-intentioned—cannot exclude women from employment based on paternalistic assumptions and stereotypes about a pregnant woman's ability to work or the harm that might flow from her working. See, e.g., International Union v. Johnson Controls, Inc., 400 U.S. 187 (1991)(finding employer's fetal protection policy to discriminate against women even though employer did not have a "malevolent motive"); Troy v. Bay State Computer Group, 141 F.3d 387 (1st Cir. 1998)(upholding finding of gender discrimination that was based on stereotypes about pregnancy and not actual job performance). Walsh stated that she had a twenty pound lifting restriction but her job did not require her to lift anything over twenty pounds. Respondent's employees told DCR that Walsh never mentioned a twenty pound lifting restriction. They said that they were nevertheless concerned about her ability to perform the job without some sort of accommodation, i.e., light duty. They claimed that the picker position entailed lifting items weighing more than twenty pounds. If Respondent believed that an accommodation was necessary, it could have restructured her job. Respondent asserted in its position statement that there was no "other available work for her to perform." However, Salomon and Aguilar appeared to concur that light duty positions were available. Tejada claims that he told Walsh that he would try to find her another position but that she never

called him back. Walsh, on the other hand, claims that Tejada simply told her to call back after she gave birth.

Given the statements of Walsh, Salomon, and Aguilar, the Director finds no basis for DSS's assertion that Complainant was fired for "refus[ing] to perform the job duties of Packer." See Letter from Essique, supra, at 2. The Director also finds—for purposes of this disposition only—that Walsh's claim that she was willing to accept a light duty position but one was never offered is more plausible than Tejada's version of events. 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 the matter should "proceed to the next step on the road to an adjudication on the merits" with regard to Complainant's allegations of pregnancy discrimination.



DATE: 7-14-15

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS