



STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO: EC06WB-60442
REFERRAL NO: 17E-2009-00261

GUIRLENE EXAVIER, AND)
C. CARLOS BELLIDO, ACTING DIRECTOR,)
)
Complainants,)
)
v.)
)
STERLING JEWELERS d/b/a KAY)
JEWELERS, AND MERCELL BERRY, STORE)
MANAGER, INDIVIDUALLY,)
)
Respondents.)
_____)

FINDING OF PROBABLE CAUSE

Consistent with a verified complaint filed on February 9, 2009, the above-named respondents have been charged with unlawful employment discrimination within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.) and specifically within the meaning of N.J.S.A. 10:5-4, and 10:5-12 because of sex and reprisal.

C. Carlos Bellido, Esq. is the Acting Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT:

Complainant alleged that Respondent Mercell Berry, Store Manager, sexually harassed her. Complainant alleged that incidents of sexual harassment included, but were not limited to Respondent Berry asking her out on dates, rubbing up against her, and making remarks such as "you're so sexy" and "can I kiss you?" Complainant alleged that on August 17, 2008, Respondent Berry discharged her because she rejected his sexual advances.

SUMMARY OF RESPONSE:

Respondent Sterling Jewelers, d/b/a Kay Jewelers (hereinafter referred to as Respondent) denied that Complainant was unlawfully discriminated against within the meaning of the LAD. Respondent denied that Complainant was sexually harassed or that she was discharged. Respondent stated that Complainant voluntarily resigned and several days later, she reported that Respondent Berry "asked her out" and asked "if he could go to her house." Respondent stated that it promptly conducted an investigation, but did not corroborate Complainant's allegations of sexual harassment.

BACKGROUND:

Respondent Sterling Jewelers d/b/a Kay Jewelers, operates a number of retail stores, including store number 1343, located in Burlington, Burlington County, New Jersey.

Respondent Merzell Berry was employed by Respondent from August 18, 2003 to October 30, 2008. At all times relevant to the within complaint, Respondent Berry was manager of store number 1343 where Complainant worked.

Complainant, a resident of Florence, New Jersey, was employed by Respondent as a part-time sales associate from July 9, 2008 until August 17, 2008.

SUMMARY OF INVESTIGATION:

The investigation revealed sufficient evidence to support a reasonable suspicion that Respondents subjected Complainant to sexual harassment and discharged her in reprisal for rejecting Respondent Berry's sexual advances, in violation of N.J.S.A. 10:5-12 of the New Jersey Law Against Discrimination (LAD).

The investigation disclosed that Complainant began working at Respondent's Burlington, New Jersey store on or about July 9, 2008, and was supervised by Respondent Berry. During the Division's investigation, Complainant asserted that Respondent Berry sexually harassed her on many occasions, beginning shortly after she was hired. Complainant provided the following as examples.

- On or about July 18, 2008, she asked Respondent Berry to assist her in selling a piece of jewelry. Complainant alleged that when he came to her side, Respondent Berry pressed his right thigh against the left side of her thigh. Complainant stated that she felt uncomfortable and shifted her body away from his, but she did not say anything to him at that point, hoping it was accidental.
- On July 23, 2008, while at work, Respondent Berry told her that he was upset with his wife and asked Complainant to have an affair with him. Complainant stated that she told him that was "a disgusting idea." Complainant stated that Berry continued talking, and she ignored him, but his proposition confirmed in her mind that the July 18 incident had not been accidental.
- On July 26, 2008, Respondent Berry asked to kiss her. Complainant stated that she turned her back on him and said "No!"
- On July 30, 2008, as she was getting ready to leave work, Respondent Berry asked quietly, so that no one else would hear him, "Can you go out to dinner with me?" Complainant stated that she ignored him and left the premises.
- On August 1, 2008, Complainant was straightening the men's jewelry case before the end

of her shift. Respondent Berry came up behind her, put his hands on both sides of her hips, and pulled her towards him. Complainant stated that she reflexively hit Respondent Berry with her elbows, while saying "Stop!" He quickly returned to the back office.

During the Division's investigation, Complainant acknowledged that, other than making it clear to Berry that his conduct was inappropriate and unwelcome, she did not complain about Berry's sexual harassment to anyone else in Respondent's management until after Berry discharged her. Complainant explained that she was confused as to what she should do about the sexual harassment. She explained that employees did not get along well, there was a lot of gossiping, and employees were always giving Berry information about other employees. Complainant stated that she talked to her family and friends about the sexual harassment as it was happening, and when the harassment continued despite her protests to Berry, she began keeping written notes of the incidents.

During the Division's investigation, Complainant explained that after she rejected Berry's unwelcome sexual advances, it became increasingly difficult to communicate with him about work matters. She stated that on August 17, 2008, she attempted to talk to Respondent Berry about what she believed was an unfair work schedule. Complainant stated that Respondent Berry became irate, and she then told him, "I know why you are doing this. It's because I didn't give you what you want and you are trying to get me where it hurts." Complainant stated that, at that point, Respondent Berry discharged her, screaming at her, "Get out of my store. I don't want you in here."

Although Respondent denied that Complainant was discharged, and instead asserted that she resigned, the direct observations of co-worker Kristen Sleister corroborated Complainant's allegation that Berry discharged her. During an interview with the Division, Ms. Sleister stated that she was at work on August 17, 2008, and heard Respondent Berry say to Complainant, "You're not going to work for me. You're going to get out. Get out of my store. I don't want you working here."

Complainant's allegation that Respondent Berry sexually harassed her was also supported by Kristen Sleister. Ms. Sleister was interviewed during the Division's investigation, and subsequently confirmed the information in her interview in a signed certification. The investigation disclosed that Respondent hired Ms. Sleister as a sales associate in November 2007. In or around July 2008, she was transferred to Respondent's Burlington, New Jersey store. Ms. Sleister stated that on her first day working in that store, she went to shake Respondent Berry's hand and he took her hand and kissed it. She stated that she voiced her objection, telling Respondent Berry that she is a professional woman and that kissing her hand is not necessary. Ms. Sleister stated that on many occasions, Respondent Berry would rub his body against her. She stated that she saw Respondent Berry rub his body against other female employees including Complainant. Ms. Sleister stated that, on one occasion, she saw Respondent Berry pull a young female employee, Dhara Patel, onto his lap and kiss her in an attempt to convince her to work on her scheduled day off.

In its answer to the verified complaint, Respondent stated that on August 21, 2008, Complainant complained about Berry to District Manager Jennifer Bailey, but stated only that Respondent Berry asked her out and asked if he could come to her house. Respondent stated that Bailey notified Respondent's Human Resources office, and Regional Human Resources Specialist Thomas Parks conducted an investigation, but that investigation failed to corroborate

Complainant's allegations.

The investigation confirmed that Complainant spoke with both Bailey and Parks after she was discharged. Complainant told the investigator that she reported additional evidence of sexual harassment and reprisal to Bailey, and unsuccessfully attempted to give more information to Parks. Complainant stated that after Respondent Berry discharged her, she called Bailey and left a message on her voice mail saying, "Something happened. I was fired. I have to talk to you." Complainant stated that several days later, Bailey called her back. Complainant stated that she told Bailey that Respondent Berry kept "coming on" to her, sexually harassed her and asked her out. Complainant then told Bailey that, after she refused his requests and responded negatively to his behavior, Berry fired her. In her interview with the Division, Complainant added that Bailey asked where she lived, and she thought perhaps Bailey was going to attempt to remedy the situation by offering her a job in another location, but she never heard from Bailey again.

During the Division's investigation, Complainant stated that two or three days after she spoke with Bailey, Thomas Parks called her in response to her complaint to Bailey. Complainant stated that Parks asked her about the incident in which Berry asked her to go out with him. Complainant stated that, after she told Parks about that incident, she started to tell Parks about other incidents in which Berry had sexually harassed her, but Parks cut her off and said, "No, I'm not interested in that." Complainant said that he did not give her a chance to tell him anything else that happened. Complainant stated that her telephone conversation with Parks lasted only five or six minutes and ended with Parks saying he would call her back. Complainant stated that Parks never called her back, and she never heard anything more from any representative of Respondent.

In its answer to the complaint, Respondent stated that it promptly investigated Complainant's claims, but was unable to corroborate her allegations. Respondent stated that Thomas Parks interviewed Respondent Berry and four employees: Jeannette Cobb, Ryan Johnson, Dhara Patel and Kristen Sleister. Respondent stated that Ms. Sleister reported additional allegations regarding Berry, including that Berry grabbed Dhara Patel, put her on his lap, and kissed her repeatedly, and that Respondent Berry ran his fingers through Sleister's hair.

The Division asked Respondent for all notes and reports of its investigation into Complainant's complaint about sexual harassment. Respondent submitted handwritten notes of Bailey's and Parks' telephone conversations with Complainant, as well as handwritten notes of his interviews with Berry and the four employees noted above.

The notes of Respondent's interviews with Complainant show an August 21 conversation with Bailey, which stated only "Merzell asking her out & asked to go to her house." On the same page are handwritten notes of Parks' August 25 conversation with Complainant, indicating that when Complainant mentioned that her daughter was to be away for vacation, Berry replied "You should have me over." The notes then briefly outlined a separate conversation between Complainant and Berry, in which Berry asked her to dinner. Based on the length of that report – one sentence regarding Bailey's conversation with Complainant, and a brief paragraph regarding Parks' conversation with Complainant – the investigation confirms Complainant's contention that the phone calls lasted only a few minutes.

The notes of Respondent's interview with Assistant Store Manager Ryan Johnson provide additional support for Complainant's allegations of sexual harassment in the workplace, and provide additional evidence that Respondent knew or should have known that Berry, as a manager,

was subjecting subordinate employees to inappropriate conduct of a sexual nature. The notes of Parks' interview with Johnson show that, on one occasion, Johnson observed Berry grab Dhara Patel by the waist and pull her to his lap, kissing her several times. Johnson also observed Berry kiss Jeanette Cobb on the cheek.

The handwritten notes of Parks' interview with Jeanette Cobb indicate that Berry gave her a hug and kiss on at least one occasion. Although Cobb indicated that she did not find Berry's behavior inappropriate, she reported to Parks that Berry hugs and kisses all employees.

Respondent stated that Ms. Patel denied that Respondent Berry pulled her on his lap, but did state that he "grabbed her hand in a playful manner and kissed her on the cheek on one occasion." Respondent asserted that Ms. Patel told Parks that she did not perceive Berry's actions to be sexual in nature. The handwritten notes of Respondent's interview with Patel comport with Respondent's contention that Patel told Parks that she did not find Berry's conduct inappropriate, and show that Patel denied that Berry pulled her into his lap. The notes indicate, however, that Patel admitted that Berry did touch her waist and, on another occasion, kiss her on the cheek.

During the Division's investigation, Kristen Sleister stated that she also reported Berry's sexual harassment to Bailey and Parks, as well as other supervisory personnel. Ms. Sleister stated that in July 2008 she reported to both Assistant Manager Ryan Johnson and Katherine Magga, who was manager of another of Respondent's stores, that Berry was sexually harassing her and other female employees, and they merely told her to report it to Jennifer Bailey. Sleister stated that in or around the beginning of August 2008, she told Bailey about the sexual harassment and Bailey told her to report it to Thomas Parks. Ms. Sleister stated that in the beginning of August 2008, she called Parks and he stated that Respondent takes her complaint seriously, but that the Burlington store was under investigation for an incident involving loss prevention, and he could not address her sexual harassment report until the loss prevention investigation was completed. Sleister's initial sexual harassment reports to Johnson, Magga, Bailey and Parks took place before Complainant was discharged. During the Division's investigation, Sleister stated that Bailey also directed her to type up a list of the sexual harassment incidents; she did so and submitted her list to Bailey on or about August 25, 2008.

Ms. Sleister stated that Respondent Berry was not at work for the month of September 2008, and while he was out, Bailey asked her if she felt comfortable working with Berry again. Ms. Sleister stated that Bailey told her she was going to talk to Berry about the sexual harassment and said, "I feel really bad. I can't fire Merzell because he has six children and his wife works for us also."

Ms. Sleister stated that on or about October 5, 2008, when Respondent Berry returned to work, he told her, "I feel very uncomfortable working with you. You put me in an awkward position. I love my employees and no one can tell me what I can or can't do with them." Ms. Sleister stated that Berry told her that he was going to make it as difficult for her as she made it for him. Ms. Sleister stated that based on Respondent Berry's conduct and statement, she resigned on that date.

During the Division's investigation, Respondent stated that Parks confronted Berry regarding the alleged sexual comments and behaviors, but he denied making any unprofessional comments. Respondent stated that Respondent Berry "admitted to occasional physical contact

with team members” and said that if an employee did a good job he would “hug that employee.” The notes provided by Respondent show that Parks interviewed Berry on October 9, 2008, and that he admitted to hugging employees and kissing them on the cheek, but denied all other allegations of sexual harassment. After completing its internal investigation, Respondent concluded that Complainant’s allegations of sexual harassment could not be substantiated.

Based on the above, the investigation disclosed sufficient evidence to support a reasonable suspicion that Respondent Berry, as Complainant’s supervisor, made her submission to his sexual demands an implicit condition of employment, and/or subjected her to unwelcome conduct of a sexual nature that was sufficiently severe or pervasive that it would lead a reasonable woman to conclude that her work environment had become hostile or abusive. The investigation further disclosed sufficient evidence to support a reasonable suspicion that there was a causal connection between Complainant’s rejection of Berry’s sexual advances, and her discharge.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether “probable cause” exists to credit a complainant’s allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (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 the 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 further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218,226 (App. Div.1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

In Lehmann v. Toys 'R' Us, 132 N.J. 587, 601 (N.J. 1993), the New Jersey Supreme Court set forth standards for evaluating sexual harassment claims under the LAD. Noting that there are two types of sexual harassment, the Court explained,

Quid pro quo sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences. Hostile work environment sexual harassment, by contrast, occurs when an employer or fellow employees harass an employee because of his or her sex to the point at which the working environment becomes hostile.

Here, the investigation disclosed sufficient evidence to support a reasonable suspicion that Berry subjected complainant to conduct that meets the standards for both *quid pro quo* and hostile environment sexual harassment. The investigation revealed that Complainant was subjected to repeated unwelcome sexual advances by Respondent Berry. Berry was her store manager and direct supervisor, and those unwelcome sexual advances, which were both verbal and physical in nature, altered the conditions of Complainant's employment and created an intimidating, hostile, and

offensive working environment. There was a causal connection between Complainant's discharge from Respondent's employment and her rejection of Berry's sexual advances, including her complaints to him about his own harassing conduct.

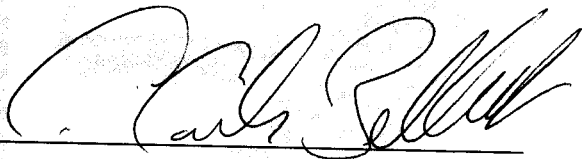
The investigation disclosed that Respondent knew or should have known of Berry's sexually harassing conduct, but Respondent failed to take prompt, effective remedial action to end Berry's sexual harassment of Complainant. The investigation also disclosed that Respondent failed to employ effective policies and practices to prevent and eliminate sexual harassment in the workplace, failed to ensure that employees have an effective method of reporting sexual harassment and are aware of the procedures for reporting sexual harassment, and failed to take appropriate action to ensure that all reports of sexual harassment to any managerial personnel are fully investigated and addressed appropriately. Thus, the investigation disclosed sufficient evidence to support a reasonable suspicion that Respondent is liable for all damages flowing from Complainant's sexual harassment and discharge.

The investigation further disclosed sufficient evidence to support a reasonable suspicion that Respondent Berry can be held individually liable for his own conduct in sexually harassing Complainant, and in discharging her for rejecting his sexual advances.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint against both Respondent Sterling Jewelers, d/b/a Kay Jewelers, and Respondent Berry.

6/11/09
Date


C. Carlos Bellido Esq., Acting Director
New Jersey Division on Civil Rights