

the investigators with a document titled, “Observers Acknowledgement,” which identified A.N.S. Advertising as the operator of that office.²

DCR thereafter conducted several corporate searches for A.N.S. Advertising, and ultimately determined that its headquarters were located in Hicksville, New York. DCR then contacted Complainant, who stated that A.N.S. controls Encore Business Group and Clark. As a result, DCR determined that A.N.S. should be added to the complaint as a Respondent. Prior to Clark or EBG filing an answer, the verified complaint was amended to include A.N.S. as a respondent, and it was served on A.N.S. at its corporate address on December 30, 2014.

On January 30, 2015, DCR received A.N.S.’s verified answer and position statement dated January 28, 2015. DCR’s investigation subsequently commenced. During the investigation, Christopher Polke, a representative of A.N.S., identified EBG as a trade name used by Bruce Clark for his own business enterprise, and stated that Clark and Complainant were independent contractors of A.N.S.

Summary of Investigation

A.N.S. described itself as a “direct marketing business” established in 2011. It hired sales representatives to market products on behalf of its clients. A.N.S. reported to DCR that it operated with a staff of 100-150 sales representatives.

During the relevant time period, A.N.S. maintained a corporate address³ of 25 Newbridge Rd; Suite 202; Hicksville, NY and leased New Jersey office spaces to provide its sales representatives a “home base.” At various times between 2010 and 2015, it operated offices in Paterson, West New York, Union City, Jersey City, and Atlantic City.

In or around July 2012, A.N.S. hired Complainant to work as a sales representative. Her responsibilities included recruiting other sales representatives and enrolling New Jersey homeowners in services provided by IDT Energy, Inc. (IDT) – an A.N.S. client.⁴ This was accomplished primarily by door-to-door solicitation.

² While ██████ denied any knowledge of Clark or Encore Business Group when service was attempted, DCR later learned during the investigation that ██████ and Clark are in a long-standing personal relationship and have a child together.

³ As of 2016, A.N.S. maintained a website at www.ansadvertisinginc.com which listed an office at 81-08 37th Ave – Suite 2B; Jackson Heights, NY 11372.

⁴ It is unclear whether A.N.S. contracted with IDT Energy directly or if it contracted with a third party that in turn contracted with IDT Energy. In its initial answer, A.N.S.’s attorney represented that “A.N.S. contracts with various corporations to market its services” and that in the State of New Jersey, “A.N.S contracts with IDT Energy to assist it in selling its services to homeowners.” See Respondent’s Letter dated January 28, 2015. However, in its subsequent response to a supplemental document and information request, A.N.S. stated, “A.N.S. Advertising, Inc. (“A.N.S.”) has no direct contractual relationship with IDT,” and “A.N.S. contracts with third parties who contract with IDT.”

Complainant alleged that Clark was her “manager,” and that he subjected her to a sexually hostile work environment throughout her employment with Respondents. She further alleged that Clark fired her in September 2013 because of her gender and that he should be held personally responsible under an “aiding and abetting” theory of liability.

Respondents denied the allegations in their entirety. Viewing its staff as independent contractors, A.N.S. contended that they maintained no employer-employee relationship with their sales representatives and as such, they cannot be held responsible for any misconduct that occurs among them. A.N.S. further stated that it did not delegate any supervisory authority to Clark. Supporting A.N.S.’s representation that he was an independent contractor, Clark also denied that he controlled other sales representative’s day to day job functions or that he had the ability to fire sales representatives.

a. Business relationship between Complainant and Respondents

Complainant told DCR that she first learned about A.N.S. through sales representative L.A., who visited Complainant’s home to sell her IDT products and recruited Complainant to work for A.N.S. Complainant stated that L.A. later called her and asked her to go to A.N.S.’s Paterson office to interview with Clark, which she did. She stated that at the beginning of the interview, Clark introduced himself as a “manager.”

Complainant stated that her sales training consisted of shadowing L.A. for a day or two. She explained that her typical workday included checking-in at an A.N.S. office from 9 a.m. – 1 p.m. and then spending the remainder of the day in the field. She initially reported to the Paterson office and once that location closed, she began reporting to A.N.S. locations in West New York and Union City. She stated that sales representatives reported to A.N.S. locations for team meetings, which were often led by Clark. She stated that she would give completed customer contracts to Clark when at the A.N.S. offices, and that she was paid based on commission when a customer signed up for an IDT product.

Complainant stated that she received her commissions on a pay card provided by Clark and used an automated telephone number to determine the card balance. She said that if she disputed the amount she received in commissions, she would contact Clark.

Respondents explained that sales representatives received a commission for every customer who enrolled in IDT products. They likewise received a commission each time they recruited a new sales representative and earned additional commissions for sales made by those new recruits, otherwise referred to by Respondents as an “override.”

A.N.S. stated that sales representatives did not have set schedules or set sales territories. They did not receive wages other than earned commission and were not eligible for benefits such as health insurance, vacation, or sick leave. At the end of each calendar year, sales representatives received a 1099 form based solely on their accrued commissions. A.N.S. provided DCR with a contract signed by Complainant, indicating that she was contracting with A.N.S. as an independent contractor.

After one month of working for A.N.S., Complainant believed she had received a promotion to “Assistant Manager” because of her successful recruitment of individuals to work as sales representatives. She said she received a document titled, “Recognition Paper” that identified her as an “Assistant Manager.”

A.N.S. provided records that referred to individuals as “senior advisors” and “advisors.” A.N.S. stated that advisors are “individuals who recruited other individuals to work as independent contractors for A.N.S.,” and that, “one would become an advisor by achieving a sufficient sales level and not having any client complaints.” A.N.S. further stated that “senior advisors” were persons who “receive commission on sales as well as overrides on the sales made by members of their team.”

During the DCR fact-finding conference, Polke described all sales representatives as independent contractors who policed themselves. He stated that there were no managers or assistant managers, and that no individual was put in charge of a team of sales representatives. He added that certain individuals might mentor or teach their recruits depending on his or her level of experience. Polke stated that what Complainant believed to have been a promotion to “Assistant Manager” was merely recognition that she was eligible for an override. Moreover, Clark denied ever representing himself to Complainant as a manager or promoting Complainant to assistant manager.

Records produced by A.N.S. demonstrate that senior advisors and advisors benefited from the sales made by their respective recruits. For example, Clark was listed in both capacities as the senior advisor and advisor for several sales representatives, including, for example, F.R. Likewise, Complainant was listed as an “advisor” for several sales representatives. F.R. was listed as Complainant’s senior advisor and L.A. was listed as her advisor. Because Complainant’s senior advisor was F.R., and Clark was F.R.’s advisor *and* senior advisor, Complainant’s recruitment of sales representatives or enrollment of individuals in IDT products appear to have benefited Clark, according to A.N.S.’s own description of its compensation method. L.A. told DCR that she was a manager, and Clark was *her* manager.

DCR also interviewed D.M., a person who Complainant recruited and trained in the summer of 2013, but who ultimately decided not to work as a sales representative for A.N.S. She stated that she was interviewed at the West New York office by Clark and that Clark advised her that he was “the boss” and that Complainant was a manager. She stated that “everybody knew” Clark was in charge and that Complainant was a manager. D.M. told DCR that Clark told her that if she did well, she could have her own office within a year.

Additionally, sales representative B.F. told DCR that she was interviewed by Clark and L.A., and during that interview, Clark identified himself as “the boss of the bosses.” She stated that Clark led her to believe that she would be working for Encore Business Group.

B.F. further stated that Clark promoted Complainant to assistant manager and gave her a certificate recognizing her promotion. She stated the promotion announcement took place in an A.N.S. office and was witnessed by several other individuals.

DCR reviewed a Facebook page for Encore Business Group which posted video-recorded presentations by Clark describing the type of work he conducted for A.N.S. Clark said:

I want you to understand the opportunity that we have here. This is not about knocking on doors. A lot of people get the misconception that I got to come here in the morning. Wake up early to go knock on some body's door. I got to mess with somebody at their home . . . That is not what this business is about. It is about building relationships. It is about you learning the business and bringing her in, teaching her the business. You learning the business bring her in, and teaching her the business . . . Then, you start making money off everyone who starts working.

In this video, Clark references advisors and senior advisors, and lays out the trajectory for promotion. He stated:

I'm looking for you, you and you. *All you guys to step up so I can put you guys in your own location where you are running your own office.* [Emphasis added] You have your own admin. Your own parking space. It's your office. You profit over the whole office. Think about it. You are the manager standing in front of the room making money over everybody in this room. Just imagine. You making \$2,000 off of this whole room and still making \$500-\$600 off of yourself going into the field. The opportunities don't stop there. Then you get to an organizational position where you are profiting off of the whole company. A company. Making anywhere between \$6-8,000/week . . . Who doesn't want to make that type of money? Then you can get to a regional position...You can make anywhere from \$10-15,000/week. Just imagine. That [*sic*] you get the super regions like myself.

He further stated:

You guys are directly under me. [Emphasis added]. You have to take pride in that. I want you guys to be more aggressive, be more competitive. Talk more shit. Right now, you guys could be the number one office in our organization. That's what I pride myself in—being number one. I don't want to be number two. I don't want to be number three, number four.

During this presentation, Clark asked the crowd to identify who the first to be promoted to advisor or senior advisor would be, and later reiterated to his audience, "I can put you guys in your own location."

Clark's message that he was the boss and had control over new recruits is how Complainant and her co-workers viewed their A.N.S. workplace in 2012 and 2013. He described his ability to place sales representatives in their own offices and that their success could lead them to be promoted to higher positions---such as a regional position or "super" regional position.

Moreover, Clark crafted and developed a workplace culture at A.N.S. New Jersey offices on behalf of A.N.S. He attempted to motivate the sales representatives by posting the name of the high earners. A posting dated November 7, 2012, reported that “[A]” with “87 deals” is the “TOP REP ON EP FOR THIS PAY PERIOD” [Emphasis in original].⁵ He sponsored team social gatherings, such as pizza parties and after-work community building events. One posting on the EBG Facebook page dated April 18, 2011 stated, “Encore NJ pizza party tomorrow!!! For the guys in the Jersey office...” Another posting dated October 26, 2012 stated, “Paintball or Go kart racing you guys decide the next ENCORE event.”

b. Hostile Work Environment – Sexual Harassment

Complainant alleges that beginning in or around December 2012, Clark began subjecting her to continuous, unwelcomed, sexually-explicit propositions and conduct. Specifically, Complainant alleges that Clark said to her, “Go suck my dick,” “Let me ride your pussy,” “You’re a whore,” “I want to fuck you right now,” “You’re making me horny,” and “I want to see your pussy.” Additionally, Complainant alleges that Clark once touched her breasts and hit her on the buttocks. Complainant stated that the alleged harassment occurred face to face and via text message.⁶ She asserted that Clark made these comments in the West New York and Union City offices, and indicated that other sales representatives – including, but not limited to, L.A. and F.R. (male) – witnessed it. Complainant also alleges that Clark saved her telephone number in his phone as “Slutty A” (“A” representing the first letter of Complainant’s first name) and showed it to her and other sales representatives.

During a DCR fact-finding conference, Complainant stated that she did not report the harassment to A.N.S. She stated that she did not know who to contact and that each time she asked Clark to provide her with the telephone number for A.N.S.’s Human Resources or complaint department, he refused to give it to her.

Clark denied the allegations of sexual harassment. He acknowledged that he interacted socially with Complainant and other A.N.S. sales representatives on a regular basis, but denied ever subjecting Complainant to unwanted, sexually-charged rhetoric either in person or via text message. He further denied that he saved Complainant’s telephone number as “Slutty A,” or that he ever touched Complainant inappropriately.

To support his position, Clark stated that after Complainant left A.N.S., another sales representative, L.A., told him that Complainant would be reaching out to him to borrow money. He also asserted that he once lent Complainant \$100 to cover her son’s day care. He argued that if he had treated Complainant in the manner she alleges, she would not have sought financial assistance from him.

Clark also stated that L.A. and another sales representative, E.V., told him in late 2012 that Complainant was spreading rumors that she and Clark had been involved in a sexual relationship.

⁵ “[A]” is presumably a reference to Complainant.

⁶ Complainant told DCR that she did not retain the text messages.

DCR interviewed L.A. She did not support Clark's version of events. L.A. denied telling Clark that Complainant was going to seek financial assistance from him. She also denied telling him that Complainant was spreading rumors that she and Clark were involved in a sexual relationship.

Instead, L.A. supported Complainant's version of events. L.A. stated that she saw Complainant's telephone number saved on Clark's phone as "Slutty A," and that Complainant told her about Clark's sexually-charged comments and text messages. She stated that she specifically remembers Complainant telling her that Clark said he "wanted to fuck her." However, L.A. said that Complainant never told her that Clark touched Complainant inappropriately.

L.A. also stated that Clark would disrespect, insult, and curse at women, including herself and Complainant. She told DCR that she left her position with A.N.S. in December 2014 due to Clark's behavior. A.N.S. records confirmed that L.A. ceased working on December 24, 2014.

DCR also interviewed E.V. She denied informing Clark that Complainant was spreading rumors that she and Clark were engaged in a sexual relationship.

E.V. stated that Complainant came to her crying about the treatment she'd been receiving from Clark. Specifically, Complainant told E.V. that Clark was verbally abusive, would call Complainant stupid, tell her to "shut the fuck up," and say, "Let me see that body," "I want to fuck you," and "You're a whore." E.V. also stated that she witnessed Clark stating, "I fucked [Complainant]," and "[Complainant] is such a whore."

E.V. told DCR that Complainant's telephone number was saved in Clark's phone as "Whore," and that on multiple occasions, she witnessed Clark staring at Complainant's breasts and buttocks. E.V. characterized Clark as "extremely unprofessional," and stated that he "treats women like shit." E.V. added that Clark also attempted to inappropriately touch her (E.V.), and that he constantly asked her on dates.

B.F. told DCR that Clark was disrespectful towards women, and treated them like "nobodies." She further stated that it seemed as though Clark targeted Complainant specifically. For example, B.F. stated that on more than one occasion, she heard Clark tell Complainant to "shut the fuck up." B.F. told DCR that she did not witness Clark subject Complainant or anybody else to inappropriate sexual conduct in the workplace; however, she stated that Complainant showed her text messages that she received from Clark, which were of an inappropriate, sexually-charged nature. B.F. also stated that Complainant informed her that Clark touched her breasts and attempted to squeeze them.

DCR interviewed sales representative J.S. He stated that he never witnessed Clark subject Complainant or anybody else to sexually inappropriate conduct.

DCR attempted to contact and interview several other current or former A.N.S. sales representatives, including W.J., J.L., F.R., and N.B. However, those attempts were unsuccessful.

During the fact-finding conference, Christopher Polke, A.N.S.'s registered agent, stated that A.N.S.'s sales representative contract included a list of telephone numbers to call if a sales representative had any questions, concerns, or complaints. Complainant told DCR that she never received such a list.

DCR asked A.N.S. to provide it with its written antidiscrimination and/or anti-harassment policies. In response, A.N.S. provided DCR with a document entitled, "Important Phone Numbers," which identified telephone numbers for "TPV;" "QC Department;" and "Payroll and Human Resources." DCR reviewed this document with Complainant. She denied having ever seen it.

c. Discharge

Complainant alleges that Clark fired her on or about September 10, 2013, when he told her to "Get the fuck out," "You don't work here anymore," and "Never come back here." She alleges that Clark discharged her because of her gender.

A.N.S. denied that Complainant was fired, stating that Clark lacked the requisite authority to terminate sales representatives. Clark agreed with A.N.S.

Clark acknowledged that an incident occurred with Complainant on that date; however, he disagreed that he fired her. He told DCR that on that date, he caught Complainant video recording a conversation he was having about a male co-worker. He stated, "She was recording me because her and [the male employee] are close and she was gonna try and catch me talking about him . . . So I told her to get the fuck out. This was in September 2013. This is probably why she thinks she was fired that day but she wasn't." He denied advising Complainant that she no longer had a job or that he told her never to come back. Clark further stated that he told Complainant that he would call the police if she did not leave.

Clark's girlfriend, [REDACTED], who performed work for A.N.S. as a sales representative and administrator, stated that she witnessed the incident and supported Clark's version of the events.

Clark argued that Complainant mistakenly interpreted his directive for her to leave the office to mean that she could no longer work for A.N.S. Complainant countered that Clark clearly fired her that day and told her that she did not work there anymore. She agreed that she was attempting to record Clark's discussion, but contended that Clark would not have fired her under these circumstances if she were not a woman.

d. Clark's connection to Polke-affiliated entities

A.N.S. stated that Clark left A.N.S. on March 15, 2015, to form and incorporate his own business, which he named "Encore Business Group." EBG's corporate address is listed as the address for A.N.S. Union City office.

As the registered agent of A.N.S., Christopher Polke has maintained and operated other entities that provide marketing services in addition to A.N.S.: Midtown Promotions, Inc.⁷ and Prodigy Consulting Group. Clark has worked for these companies and has received accolades for being a successful manager. Clark's awards are documented on the EBG Facebook page.

Even though it is described as being founded in 2010, EBG's first posting is from April 2011, and contains photographs of awards given to Bruce Clark in 2009 and 2010. The award stated, "Midtown Promotions Most Improved." Additionally, a video clip was posted that appears to show Polke presenting this award to Clark for "Most Improved" manager. The video clip included a caption, "2010 Christmas Party." While presenting the award to Clark, Polke emphasizes Clark as a manager. He states, "Every time I see a person *get promoted to manager*, they thank *their manager* and you see tears come to their eyes." During the clip, Polke referred to *Clark's own promotion of "two assistant managers" from Clark's team.* [Emphasis added].

The video clip shows what appears to be a long-standing relationship between Clark and Polke. In presenting the award to Clark, Polke emphasized that the success of the business is predicated on managing a team. He stated, "What this business is about is learn[ing] how to manage and motivate a team of individuals." He stated, "It's about sitting in one spot. It's about working with a team of guys and about getting to know the people that are working with you." The clip also showed Clark thanking Polke for his "hands-on" approach.

DCR's investigation also found that while A.N.S. stated that Clark left in March 2015, he continued to conduct business for Polke through another Polke-operated entity - Prodigy Consultant Group. Facebook posts demonstrate that in 2015, Clark was praised for his work as a "Regional Consultant" and a "Senior Advisor of the Year." The award contained a Prodigy Consultant logo and an Encore Business Group logo. Clark was also presented with a ring commemorating his reaching \$300,000 in sales.

Analysis

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. For purposes of that determination, "probable cause" is defined as 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 was violated. Ibid. If the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if the Director finds there is no probable cause, then the finding is deemed a final agency order subject to review by the Appellate Division of the Supreme Court of New Jersey. N.J.A.C. 13:4-10(e); R. 2:2-3(a)(2).

⁷ DCR conducted a search and located information for a "Midtown Promotions Inc." with a prior address of 115 30th Street; NY, NY. Search results showed a connection to Christopher Polke. A New York State Department Division of Corporate search revealed that a company named "Midtown Promotions, Inc." was founded on or around January 18, 2002, and was dissolved as inactive on January 26, 2016.

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial “culling-out process” in which 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., 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.

a. Business relationship between Complainant and Respondents

A.N.S. and Clark deny any liability concerning Complainant’s allegations of sexual harassment and discrimination by arguing that no employment relationship existed since Complainant and Clark were independent contractors rather than employees. They point to the agreement signed by sales representatives that identifies their status as independent contractors. In Pukowsky v. Caruso, 312 N.J. Super 171, 180 (App. Div. 1998), the Court held that an independent contractor cannot be considered an “employee” under N.J.S.A. 10:5-12(a) of the LAD. In that case, the Court articulated twelve-factors to consider in determining whether a plaintiff qualified as an employee:

- 1) the employer’s right to control the means and manner of the worker’s performance;
- 2) the kind of occupation--supervised or unsupervised;
- 3) skill;
- 4) who furnished the equipment and workplace;
- 5) the length of time in which the individual has worked;
- 6) the method of payment;
- 7) the manner of termination of the work relationship;
- 8) whether there is annual leave;
- 9) whether the work is an integral part of the business of the “employer;”
- 10) whether the worker accrues retirement benefits;
- 11) whether the “employer” pays social security taxes; and
- 12) the intention of the parties.

Considering these factors, the Director finds that there is probable cause to believe that an employer-employee relationship existed between the Respondents and Complainant and the issue should be resolved at plenary hearing.

A.N.S. sales representatives, including Complainant, believed that Clark was a manager who possessed authority over other sales representatives. Complainant stated that during her initial interview with Clark in 2012, Clark stated that he was the manager and that he described the ability of sales representatives to become managers and manage their own team of sales representatives. Additionally, other A.N.S. sales representatives (L.A., E.V., D.M., and B.F.) who worked during this time period also viewed Clark as a manager, also based on Clark’s statements.

Further, Complainant stated that she was treated as an employee in that she was required to attend team meetings and participate in team functions at A.N.S. office locations. These meetings are depicted in Facebook video postings wherein Clark represented himself as “the C.E.O.” Further, during the relevant time period, Clark appears to have organized social events for the New Jersey A.N.S.-leased offices. He encouraged and praised “his” sales representatives, including Complainant, with accolades of being a “top earner.”

DCR's investigation revealed that A.N.S. recruited its sales representatives by highlighting its promotional opportunities. Clark recruited individuals to join his operation by highlighting and praising the promotional opportunities available. On numerous occasions, he referred to himself as the boss and emphasized his ability to promote other sales representatives and place them in their own office locations. In a video posted on EBG's Facebook page, he explicitly stated to his audience of new recruits that "you guys are directly under me." He said, "I can put you in your own location," and "It's your office . . . You are the manager standing in front of the room making money over all the everybody in this room." Thus, Clark boasted about his success by stressing his authority over other sales representatives. Clark benefited from individuals believing that there was room for career growth. He relied upon the other sales representatives believing that he was their manager. Someone merely working in a true independent contractor role as a sales representative would have no reason to describe the operations of the business in this manner.

The DCR investigation revealed that Polke trained Clark to be a sales representative and that Clark had worked for Polke-affiliated marketing companies for several years. Clark had received various management awards from these entities at holiday parties organized by Polke. At these events, Polke celebrated sales representatives, including Clark, for their management and leadership. These sales representatives were then awarded "management" certificates and plaques and gifted expensive items such as designer pens, watches, and commemorative rings.

DCR's investigation also found that while A.N.S. stated that Clark left in March 2015, Clark continued to conduct business for Polke through another one of his other entities - Prodigy Consultant Group. Social media posts indicate that Clark was praised for his work as a "Regional Consultant" and a "Senior Advisor of the Year" in 2015. The award contained a Prodigy Consultant logo and an Encore Business Group logo.

It appears that A.N.S., as a Polke-operated entity, benefited and thrived on Clark's representation that he was a manager and that other sales representatives could also be managers under Clark. Like other Polke-operated entities, A.N.S. encouraged and rewarded sales representatives to take leadership roles. A.N.S. was either aware or should have been aware that at least some of its sales representatives encouraged control over other sales representatives joining A.N.S. with express reference to being promoted to be a "manager." A.N.S. provided sales representatives with office space and held regular sales meetings at the offices. The actual workplace and how sales representatives viewed and treated the workplace reflect one where sales representatives, like Complainant, were expected to view and follow Clark as their supervisor.

There is sufficient evidence that Complainant was an employee of A.N.S. and/or EBG or Clark. However, even if Complainant was an independent contractor and not an employee, that fact would not relieve A.N.S., EBG or Clark from liability under the LAD. The LAD prohibits any person from refusing to contract with or do business with another person on the basis of gender. N.J.S.A. 10:5-12(1). This provision is violated when a person who is an independent contractor is subjected to sexual harassment as a condition of a business relationship. See J.T.'s Tire Service v. United Rentals, 411 N.J. Super. 236 (App. Div.), certif. denied 201 N.J. 441 (2010).

Consequently, Complainant could establish a violation of the LAD under either N.J.S.A. 10:5-12(a) or 10:5-12(l).

b. Hostile Work Environment – Sexual Harassment

Hostile work environment sexual harassment is a form of sex discrimination. See Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 607 (1993). In such cases, the issue is whether the conduct occurred because of gender, and whether a reasonable woman would find the conduct to be “severe or pervasive” enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. *Id.* at 603. When the harasser is the owner or direct supervisor, his conduct “carries with it the power and authority of the office,” and the employee’s dilemma is “acute and insoluble” because she has “nowhere to turn.” See Taylor v. Metzger, 152 N.J. 490, 505 (1998).

Here, Complainant alleges that she was subjected to severe and pervasive sexual harassment by Respondent Clark. DCR found that Complainant’s sexual harassment allegations were supported and corroborated by not only her own statements, but by three other A.N.S. sales representatives.

In contrast, Clark’s version of events was not corroborated. During the fact-finding conference, Clark pointed to L.A. as an individual who could corroborate his version of events. However, L.A. did no such thing, instead stating that she saw Complainant’s telephone number saved on Clark’s phone as “Slutty A,” and that Complainant told her about Clark’s sexually-charged comments and text messages. She stated that she specifically remembers Complainant telling her that Clark said he “wanted to fuck her.” L.A. also stated that Clark would disrespect, insult, and curse at women, including herself and Complainant. She told DCR that she left her position with A.N.S. in December 2014 due to Clark’s behavior.

The statements of the three sales representatives more than suffice to support a reasonable suspicion that Clark subjected Complainant to sexually explicit remarks and incidents in a way that was severe and pervasive, and would have made a reasonable woman in Complainant’s position view the working environment as hostile.

The question then becomes whether A.N.S. is liable for Clark’s unlawful acts. As stated previously, the record of evidence reflects the existence of an employer-employee relationship between A.N.S. and Clark, and between A.N.S. and Complainant. Employers are generally responsible for a supervisor’s harassing conduct unless the employer can show that it promulgated and supported an effective anti-harassment policy that the complainant refused to avail herself of. Aguas v. State, 220 N.J. 494, 524 (2015). Specifically, an employer may assert an affirmative defense that it exercised reasonable care to prevent and correct harassing behavior, and that the employee unreasonably failed to take advantage of the preventive or corrective opportunities. *Ibid.*

Here, there was absolutely no evidence that A.N.S. promulgated an effective anti-harassment policy. A.N.S. produced no such policy in writing. And although A.N.S. argued that it provided its sales representatives with a list of telephone numbers to call with concerns, a list of

phone numbers does not itself constitute an effective anti-sexual harassment policy. Moreover, the investigation did not reveal that the list even existed. DCR reviewed the contract that supposedly contained the list of phone numbers and found that it did not. And Complainant testified that she had never seen the list of phone numbers, and when she asked Clark for the telephone number of A.N.S.'s human resources department to complain about the sexual harassment, Clark refused to provide it.

DCR asked A.N.S. to produce its written anti-discrimination and/or anti-harassment policies. In response, A.N.S. produced only the list of telephone numbers discussed above. Therefore the Director finds that A.N.S. is not entitled to any safe harbor under Aguas.

c. Discharge

The LAD also makes it unlawful for an employer to fire or otherwise discriminate against an employee in the “terms, conditions or privileges of employment” based on gender. N.J.S.A. 10:5-12(a). Here, Complainant and Clark agree that an incident occurred in September 2013 that resulted in Complainant no longer working for A.N.S.; however, they disagree on whether Clark fired Complainant.

Complainant alleges that after being subjected to repeated sexual harassment throughout her tenure working as a sales representative for A.N.S., she was fired in September 2013 when Respondent Clark told her to “Get the fuck out,” and “You don’t work here anymore.”

Respondent Clark acknowledged that this incident took place but disagreed with Complainant’s characterization of it. He also stated that he told Complainant he would call the police if she did not leave.

The Director finds that the above evidence supporting how Clark treated women, how A.N.S. sales representatives viewed the workplace, and Clark’s statement that he would call the police if Complainant did not leave the office, support a “reasonable ground of suspicion” that Clark fired Complainant based in part on her gender.

d. Aiding and Abetting

Here, Complainant alleges that Clark should be held liable for his conduct based on aiding and abetting theory under the LAD.

The LAD holds employers responsible for employment discrimination, including sexual harassment. Additionally, the LAD makes it unlawful for “any *person*, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the LAD, or to attempt to do so.” N.J.S.A. 10:5-12(e) (emphasis added). The New Jersey Supreme Court determined that the words “aid” and “abet” require active and purposeful conduct. See Tarr v. Ciasulli, 181 N.J. 70, 83 (2004); see also Cicchetti v. Morris County Sheriff’s Office, 194 N.J. 563, 594 (2008). An individual aids and abets a violation of the LAD when he or she knowingly gives substantial assistance or encouragement to the unlawful conduct of the employer.

Tarr, 181 N.J. at 84. To hold an employee liable as an “aider and abetter,” a plaintiff must show that the individual (i) performed a wrongful act that caused an injury; (ii) was generally aware of his or her role as part of an overall illegal activity at the time he or she provided the assistance; and (iii) knowingly and substantially assisted in the principal violation. Ibid.

As discussed above, the Director has found that the evidence supports a reasonable ground of suspicion that A.N.S., either as Complainant’s employer or as a contractor, delegated supervisory authority to Clark and with that authority, Clark subjected Complainant to unlawful sexual harassment and fired her. As such, Clark’s conduct is a prime factor contributing to the liability of A.N.S.

New Jersey courts have accepted that a supervisor can be held liable for aiding and abetting his or her employer’s wrongful conduct, even where the only bad conduct at issue is the supervisor’s own conduct. Specifically, in Yobe v. Renaissance Electric, Inc., 2016 WL 614425 (D.N.J.) the court concluded that, “[w]hile it is concededly an ‘awkward theory’ to hold an individual liable for aiding and abetting his own conduct, it would thwart the NJLAD’s broad and remedial purpose, and make little sense, to construe it as permitting ‘individual liability for a supervisor who encourages or facilitates another employee’s harassing conduct, while precluding individual liability for the supervisor based on his or her own discriminatory or harassing conduct.’” See also Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 129 (3d Cir. 1999) (a “supervisormay be liable as an aider and abettor for active harassment *or* knowing and willful inaction, because in either case the supervisor violates his or her duty as a supervisor to prevent and halt harassment”) (emphasis added).

Here, Complainant asserts her aiding and abetting claim against Clark for subjecting her to continuous, unwelcomed, sexually-explicit propositions and conduct when he supervised her activity for A.N.S. To the extent A.N.S. is Complainant’s employer, Clark as an individual may thus be held liable for aiding and abetting the discriminatory conduct that created a hostile work environment for Complainant. Therefore, the Director finds that the evidence gathered during DCR’s investigation of this matter supports a “reasonable ground of suspicion” that Clark, in his supervisory capacity, may be held personally liable for aiding and abetting A.N.S.’s wrongful conduct. Further, even if A.N.S. is not found to be Complainant’s employer under N.J.S.A. 10:5-12(a), Clark may be held liable for aiding and abetting the discrimination that took place as part of the contractual relationship under N.J.S.A. 10:5-12(1).

* * *

Because the Director has found **PROBABLE CAUSE** to support Complainant’s allegations, the matter will “proceed to the next step on the road to an adjudication on the merits.” Frank, supra, 228 N.J. Super. at 56.



Rachel Wainer Apter, Director
NJ DIVISION ON CIVIL RIGHTS

DATE: June 5, 2019