

STATE OF NEW JERSEY
DEPT. OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL02WB-66614

██████,)
)
Complainant,)
)
v.)
)
Ray's Sub Food Corp., dba)
Ray's Sub Shop,)
)
Respondent.)

Administrative Action
FINDING OF PROBABLE CAUSE

On August 21, 2017, ██████¹ (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Ray's Sub Food Corp., dba Ray's Sub Shop² (Respondent), subjected her to harassment based on her sex (female), and took reprisals against her for reporting the harassment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination and reprisal in their entirety. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a sandwich shop located in Ewing, New Jersey. On December 2, 2016, Respondent hired Complainant as a food preparer. In this position, she was responsible for answering the phone, taking orders and preparing sandwiches. On August 15, 2017, Complainant was discharged.

In the verified complaint, Complainant alleged that throughout her employment she was subjected to sexual harassment from Mikhail Gerges, the father of Respondent's owner. She alleged that Gerges would show her pornographic videos on his cell phone, ask Complainant to play with his "balls," rub her back and touch her breasts. Complainant alleges she told owner Ramsis (Ray) Azab about his father's sexual harassment of her and, rather than take prompt, remedial action to end the harassment, terminated her employment.

In its response to the complaint, Respondent denied that Complainant was subjected to sexual harassment and asserted that Complainant was terminated for poor job performance.

In an interview with DCR, Complainant said that shortly into her employment, Respondent's father, Gerges, started sexually harassing her. At first, it started as Gerges hugging her, but then he started also trying to kiss her when they hugged. Complainant would pull away

¹ Complainant's name was misspelled as "██████" in the verified complaint.

² Respondent was identified in the verified complaint by its trade name "Ray's Sub Shop." The verified complaint is hereby amended to reflect the proper corporate name of Respondent.

and ask Gerges to stop, but he kept doing it, so she stopped hugging him. Gerges then began to come up behind Complainant and grope her buttocks or breasts. Gerges would also show Complainant pornography on his phone and say, “Hey [REDACTED], do you want to do this with me?”

On August 13, 2017, Respondent received an order for food that included a delivery of meatball sandwiches. Gerges went to put a handful of ketchup packets in the bag. Complainant told him to stop, saying, “No, Papi, you don’t need ketchup, its meatball sandwiches.” Gerges responded, “Oh [REDACTED], you like balls? I’ll let you play with my balls!”

Complainant told DCR that she called Azab and informed him of the incident. Azab told Complainant to go home and take the day to relax and to call him the next week. Complainant went home and the following Tuesday called Azab. Azab told Complainant that he did not think Gerges and Complainant should be in the same building together. Complainant told Azab that he was wrong and that Gerges was the one who “did wrong” to her. Complainant ended the call by saying she was going to call a lawyer. Complainant alleged that she was terminated as reprisal for reporting Gerges’s behavior.

DCR interviewed [REDACTED], a female co-worker of Complainant’s and 5-year employee of Respondent, who said that she witnessed the sexual harassment of Complainant by Gerges. Gerges had also tried to show [REDACTED] a video of girls dancing together in bathing suits on his phone, but she “cursed him out” and he did not speak to her after that.

[REDACTED] recalled that Gerges would often touch Complainant, either on the arm or rub up against her. [REDACTED] saw that Gerges would always find a way to touch Complainant as he walked by her. [REDACTED] told Gerges on a number of occasions to stop touching Complainant, even writing to Gerges on a piece of paper that Complainant was “hers” (implying they were a lesbian couple) and telling Gerges to not touch Complainant.

[REDACTED] explained that on August 13, 2017 she heard Gerges make the “meatball” comment. Complainant seemed upset by the comment and after observing Complainant call Azab, [REDACTED] saw that Complainant went home. [REDACTED] is no longer employed by Respondent.

DCR interviewed Ray Azab, owner of Respondent. He said that Complainant was hired when his wife was pregnant and they needed an extra hand. Azab said he decided to terminate Complainant after a number of issues came up with her performance. Azab explained that he would get complaints from customers, or would see customers walk into his business with the intention of ordering food but would leave without ordering when they saw that Complainant was working. According to Azab, Complainant would either not wear gloves to make the food, or when she did, she would touch her face and then touch the food. Azab said customers also complained about Complainant’s attitude towards them. Azab said that Complainant was a heavy smoker and had a lottery problem: she would frequently leave the shop to either smoke or buy lottery tickets at another shop nearby. Azab stated that this behavior would be visible on the store’s video security system, but the video was no longer available as it was retained only for 15-20 days before being recorded over.

Azab told DCR that around August 15, 2017, he sat down with Complainant to tell her that she could not continue to work for Respondent because he was losing money due to her unhygienic practices and attitude with customers. Azab said that in response to her termination, Complainant told him that Gerges “did something to her” and then told him about a comment Gerges made about a meatball sandwich on August 13, 2017. Azab felt that Complainant misunderstood Gerges as he has a heavy accent and turned it into something sexual. He felt that Complainant’s only reason for telling him this was so that he would not fire her.

Azab alleged that Complainant never complained to him about sexual harassment from Gerges prior to the August 15th termination meeting. Azab considered Gerges and Complainant to be on good terms. In support of this belief, he noted that Complainant had asked to borrow money from Gerges on many occasions, which Gerges supplied.

DCR interviewed Mikhail Gerges, the alleged sexual harasser, who is also an employee of Respondent and father to Azab. He said that he never touched, showed videos or spoke to Complainant in a sexually harassing manner. Gerges stated that he has a daughter that Complainant reminded him of, and he treated her as he would treat his daughter. In support of this statement, Gerges stated that he had either given or loaned money to Complainant on many occasions for things like groceries and bills because he was concerned for her and her children. He supplied DCR with copies of text messages, which show Complainant asking Gerges for money. Gerges stated that because of his concern for Complainant and her children’s well-being, he even asked his son Azab to re-hire Complainant, despite her performance issues.

DCR requested that Respondent provide its anti-harassment policy and procedures, and Complainant’s personnel file. Respondent asserted that it had no policies or procedures and had not maintained a personnel file or disciplinary records for Complainant. Respondent said it did not maintain such files on any employee given the small family-run nature of its business.

In response to the evidence presented by Respondent regarding her termination, Complainant told DCR that Azab was lying. Complainant stated that Azab never spoke to her regarding her performance. Complainant said that she complained multiple times to Azab about Gerges, and the last time she complained to him about the meatball comment, he fired her shortly thereafter. According to Complainant, Azab told her that he “really hated to let her go” because she was a “reliable” employee, but he could not have Complainant and his father in the same room and so he was compelled to fire her.

Complainant acknowledged that she did ask Gerges for money and that he gave some to her. Complainant stated that she tried to, and in some instances did, pay Gerges back the money. Neither party appeared to have kept written records relating to this informal exchange of money.

Complainant challenged Azab’s comments on her work performance by pointing out the length of her employment, the lack of any complaints to her by customers, and the fact that Azab personally picked up and dropped off Complainant for work with his own car since she did not own a car. Complainant provided DCR with letters from two customers stating that Complainant provided quality service when she worked for Respondent. Complainant also stated that she was allowed only one 15-minute break during her 10-12 work shift and thus was not outside taking

frequent smoking breaks or running to buy lottery tickets during her work hours. Complainant stated that she had Facebook postings from Gerges to support her allegations, but none were provided during the investigation.

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(a). “Probable cause” for purposes of this analysis means a “reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated.” N.J.A.C. 13:4-10.2(b). If DCR 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 DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

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.

The LAD makes it unlawful to harass, fire, refuse to hire, or otherwise discriminate in the “terms, conditions or privileges of employment” based on sex. N.J.S.A. 10:5-12(a). Sexual harassment, or a hostile work environment based on gender, is a form of sex discrimination. See Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 607 (1993). Where a hostile work environment based on gender is alleged, the question is whether the conduct occurred because of the person’s gender, and whether a reasonable person of the person’s gender 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, while the alleged harasser was not the owner or Complainant’s direct supervisor, he was the father of the owner, who appeared to spend significant time in the workplace.

The investigation found sufficient evidence to support a reasonable suspicion that that Complainant was subjected to a hostile work environment based on sex. Complainant identified a witness to the harassing behavior who corroborated her version of events both in substance and in timing. Complainant asserted that throughout her employment, she was subjected to sexual harassment from Mikhail Gerges, the father of Respondent’s owner. Gerges would show her pornographic videos on his cell phone, rub her back and touch her breasts. He would come up behind Complainant and grope her buttocks or breasts. Gerges also stated, “Oh [REDACTED], you like balls? I’ll let you play with my balls!” [REDACTED], a female co-worker of Complainant’s and 5-year employee of Respondent, said that she witnessed the sexual harassment of Complainant by Gerges. [REDACTED] also reported that Gerges made inappropriate comments to her in the workplace.

Azab's assertion that Gerges did not sexually harass Complainant, and she simply misunderstood him because he "has a heavy accent" is belied by Complainant and [REDACTED] statement that Azab told Complainant to take the rest of the day off after the August 13th incident occurred. Neither Complainant nor [REDACTED] indicated any difficulty in understanding what Gerges was saying, whether or not he had an accent.

In addition, although Gerges may have exhibited generosity towards Complainant in either lending or giving her money when she asked for his assistance, it is not proof that the sexual harassment, alleged by Complainant and witnessed by another worker, did not occur.

Finally, even if Gerges was not complainant's direct supervisor, the investigation found sufficient evidence that Respondent is liable for the harassment. An employer is not strictly liable for the sexual harassment committed by a non-supervisor, Lehmann, 132 N.J. at 620, but may be liable under agency principles if a complainant can show the employer acted with negligence in failing to address or stop harassment about which it knew or should have known. Here, Respondent introduced no evidence that it took any steps to prevent sexual harassment in the workplace³ or took any action to remedy it once Complainant informed Azab of Gerges' conduct. Indeed, instead of investigating or stopping the harassment, Respondent fired Complainant.⁴

The LAD also prohibits employers from retaliating against employees for reporting or complaining about discrimination or sexual harassment. N.J.S.A. 10:5-12(d). A complainant must show that he or she engaged in LAD-protected activity known to his employer, that the employer thereafter subjected her to an adverse employment action or retaliation, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (1990). If a plaintiff can make that prima facie showing, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its adverse employment decision. If the defendant does so, then the Complainant, who retains the burden of persuasion, has the opportunity to show that the employer's explanation was merely a pretext designed to mask unlawful reprisal. Young v. Hobart West Groin, 385 N.J. Super. 448, 465 (App. Div. 2005).

Azab claimed that Complainant never complained to him about sexual harassment until he was in the process of firing her on August 15th, and his decision to fire her was therefore unrelated to the complaint. But [REDACTED] corroborated Complainant's statement that she called Azab to complain immediately after the August 13th incident, and Azab told her to take the rest of the day off. Thus,

³ An employer can raise an affirmative defense to liability for harassment if it has in place effective policies and procedures to prevent harassment in the workplace and Complainant refused to avail herself of those procedures. Factors to be considered include whether the employer has in place (1) formal policies prohibiting harassment in the workplace; (2) complaint structures for employees' use, both formal and informal in nature; (3) anti-harassment training, mandatory for supervisors and managers, and available to all employees of the organization; (4) effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated, and demonstration of that policy commitment by consistent practice. Gaines v. Bellino, 173 N.J. 301, 313 (2002). No such affirmative defense was raised here because Respondent submitted no evidence that it had any anti-harassment policy at all.

⁴ To the extent Gerges status as Azab's father allowed him to act with actual or apparent authority in the workplace, Complainant is not precluded from asserting that Respondent is vicariously liable for the sexual harassment. See Lehmann, 132 N.J. at 619-620.

there is sufficient evidence that Complainant was fired after complaining about Gerges' conduct. Moreover, Complainant was fired only two days after she and [REDACTED] stated she complained about sexual harassment on August 13th. Such close proximity in time is highly probative of a causal connection between her complaint and her discharge. See, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989) (holding causal link established where "discharge followed rapidly, only two days later, upon Avdel's receipt of notice of Jalil's EEOC claim").

In addition, the investigation found no persuasive evidence to support Azab's assertion that Complainant was fired because of poor performance as a Food Preparer. Azab produced no documentary or other verifiable evidence to support his assertions. For example, while Azab stated that he got many complaints from customers about Complainant's performance, he did not provide evidence of any such complaints or name any such customers who DCR could interview. In addition, any hygienic concerns Azab had about Complainant not using gloves or touching her face while preparing food would presumably have been addressed at the time they occurred, and before Respondent would sell possibly contaminated food products to customers, not only eight months afterward the fact. Likewise with Azab's claim that customers chose not to enter his store when they saw Complainant at the counter working. Azab did not state that any customer told him they decided not to order food because Complainant was working. And even Gerges supported Complainant's assertion that she was a reliable worker, and that he suggested that his son rehire her.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of sex discrimination.



Rachel Wainer Apter, Director

Date: September 4, 2019