

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11JB-65479**

Samiyah Lane,)
)
 Complainant,)
)
 v.)
)
 PennReach Inc. and Pennrose)
 Management Co.,)
)
 Respondents.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On August 3, 2015, Samiyah Lane (Complainant), a Mercer County resident, filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Respondent PennReach, Inc. fired her in reprisal for acting as a witness in a prior DCR investigation and for complaining about race discrimination, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. On January 12, 2016, DCR amended the complaint to include Pennrose Management Company as a respondent and to add allegations that Pennrose subjected Complainant to unlawful reprisal and that Penn Reach aided and abetted Pennrose in retaliating against her. During the course of the investigation, it became evident that Complainant was also claiming that Respondents subjected her to a racially hostile work environment in violation of the LAD.¹ Respondents denied the allegations of discrimination in their entirety. DCR’s ensuing investigation found as follows.

Summary of the Investigation

The Pennrose companies develop and manage affordable housing and related real estate in a number of states. One of its affiliates, Pennrose Management Company (PMC), is a property management company that owns and operates Academy Place, a residential building on Olive Street in Trenton. On or around April 14, 2014, PMC hired Complainant to work at Academy Place as a residential counselor.

On January 1, 2015, PennReach, Inc. became Complainant’s employer of record. On its website, PennReach describes itself as “a non-profit organization founded in December 13, 2011 by housing industry leaders dedicated to the social mission of affordable housing.” PennReach describes its mission as “addressing the holistic needs of the individual by providing good quality affordable housing, employment opportunities, education, health services and training for all

¹ During the course of the investigation, DCR discussed with both Respondents the factual underpinnings of the retaliation claims and the hostile work environment claim. In so much as these claims relate back to the allegations set forth in the original complaint, the verified complaint is amended to include them. N.J.A.C. 13:4-2.9(b).

people in need--whether seniors, families facing challenges of low income and related problems or people with special needs.” Krystal O’Dell is currently PennReach’s Chief Executive Officer. O’Dell served as the director of support services for PMC until late 2015. Timothy Henkel, a principal and senior vice president of PMC, also serves on the PennReach Board of Directors. PMC and PennReach shared office space in the Academy Place building on Olive Street.

O’Dell told DCR that until PennReach became Complainant’s employer on January 1, 2015, PennReach “leased” Complainant from PMC. DCR’s investigation showed that PennReach provides services to Academy Place residents under a contract with PMC. See PMC Management Company Agreement for Contracted Services with PennReach at Academy Place (the Agreement). As part of the Agreement, PMC gave PennReach use of office space at Academy Place free of rent. Id. at Scope of Services, Deliverables, Paragraph 4. The Agreement also gave PMC the ability to monitor PennReach’s activities to ensure that they were “aligned with [PMC’s] goals,” and realign the priorities if PMC determined that PennReach’s staff was not fulfilling PMC’s goals. Id. at Scope of Services, Supervisory Standards. In addition, PMC reserved the right to “recommend and require changes in programming to ensure” that its performance standards were being met. Id. at Scope of Services, Performance Standards.

In an interview with DCR, PennReach office manager ██████████ stated that O’Dell received and followed instructions from PMC regarding how PennReach employees completed their duties or the way in which they undertook different tasks.

Complainant worked as a residential counselor at Academy Place until July 27, 2015, when she was notified that she would be transferred to a distant location with a reduction in pay. She declined to accept that transfer, resigned, and filed this complaint with DCR alleging that the transfer and pay cut were reprisal for acting as a witness in a prior DCR investigation and for complaining that PMC’s building manager, Dawn Mastrolia, made racist comments to her and other PennReach employees.

A. Racially Hostile Work Environment

In an interview with DCR, Complainant stated that she worked in an open office space with another residential counselor, ██████████,² and their supervisor, ██████████. Complainant, ██████████, and ██████████ are Black. She explained that Mastrolia worked in an adjacent office. Complainant told DCR that Mastrolia made numerous derogatory and racially offensive comments to her and ██████████. She recalled Mastrolia saying, “there is always weave hair in the bathroom,” “your people are on section 8,” “your people don’t like dogs,” “your people are on welfare,” and “your people are single mothers.”

Complainant told DCR that in June 2015, she met with O’Dell and ██████████ to discuss Mastrolia making comments about hair weaves in the bathroom, her clothing, and calling her and ██████████ “you people.” Complainant stated that O’Dell told her that PennReach needed the contract for the free office space, so Complainant needed to “suck it up” and try to ignore Mastrolia.

² ██████████ also filed a complaint with DCR making similar allegations; a decision in that matter is being issued today under DCR Docket No. EL11JB-65475.

In an interview with DCR, [REDACTED] agreed that Mastrolia made race-based offensive comments to her and Complainant. She recalled Mastrolia saying things like, “you people have no bathroom etiquette,” “there is always weave hair in the bathroom,” and generally referring to her and Complainant as “you people” while making derogatory generalizations about them. [REDACTED] said that when she and Complainant wanted to have a lunch party at the office, she remembered Mastrolia saying, “You can have a party as long as you ain’t got no grease all over the place because you cook fried chicken.” [REDACTED] said that she found these comments offensive. According to [REDACTED], she spoke with [REDACTED] numerous times about how she found the way that Mastrolia spoke to her insulting, but [REDACTED] would tell her that O’Dell said they had to tolerate it.

[REDACTED] told DCR that she met with O’Dell and [REDACTED] multiple times to discuss Mastrolia’s offensive comments. She remembered telling them that Mastrolia made comments about hair weaves in the bathroom, Complainant’s work attire, and made other offensive comments in which she referred to Black people as “you people.” [REDACTED] stated that O’Dell said that she knew how Mastrolia acted, but advised her and Complainant that they needed to ignore Mastrolia’s comments because PennReach needed the free office space provided by PMC.

[REDACTED] stated that she also told [REDACTED], PennReach’s Director of Mental Health and Clinical and Training Services, about some of the comments that Mastrolia made to her and Complainant. [REDACTED] stated that she complained to [REDACTED] about Mastrolia’s comments about how Black employees dressed. She also recalled calling [REDACTED] to complain after Mastrolia made a comment along the lines of “the Black girls go into the bathroom and leave their hair weaves on the floor.” [REDACTED] said that [REDACTED] was sympathetic and instructed her to either go home for the day or spend the rest of the day in the field to avoid Mastrolia.

[REDACTED], a former PennReach supervisor, told DCR that he heard Mastrolia make inappropriate race-based comments. He stated that when Mastrolia had a problem with Black clients, he would hear her on the phone making comments about “these people” causing her trouble. He also recalled hearing Mastrolia say “your people” at least two or three times to PennReach or PMC employees directly, but he could not recall to which employees she made the comments.

DCR first interviewed [REDACTED] while she was still working for PennReach, and interviewed her again after she was discharged. [REDACTED] recalled Mastrolia frequently referring to her, [REDACTED] and Complainant as “you people,” particularly in regards to hair weave in the bathroom sink. She noted that [REDACTED] was offended by Mastrolia’s comments. She also remembered Mastrolia bringing in her dog and saying, “You people are afraid of dogs.” [REDACTED] said that when Mastrolia would say things like, “I’m sick of you people,” [REDACTED] would tell [REDACTED] that she felt hurt. She said that Complainant seemed to handle Mastrolia’s bigoted comments less emotionally than [REDACTED] noted that Complainant also complained about them.

[REDACTED] said that she reported [REDACTED] complaints to [REDACTED] because [REDACTED] was supposed to be responsible for addressing Mastrolia’s race-based comments. [REDACTED] told DCR that Mastrolia continued making similar comments after she reported the problem [REDACTED] so she believed that neither [REDACTED] nor O’Dell ever discussed with Mastrolia the offensive nature of her statements.

In her follow up interview with DCR, ██████ said that she made O'Dell aware that she, ██████ and Complainant felt uncomfortable working with Mastrolia because of her racist comments. ██████ told DCR that O'Dell instructed her to be non-confrontational with Mastrolia. She stated that she asked O'Dell to do something about Mastrolia's comments, but O'Dell took no action because she was afraid that Mastrolia would have PMC cancel the Academy Place contract, which provided PennReach's funding and free office space. According to ██████, O'Dell said that she appreciated ██████ for tolerating Mastrolia's comments and behavior, and expected the staff to do the same.

O'Dell told DCR that ██████ never complained that Mastrolia was making racist comments. She recalled telling ██████ that it was in her best interest to have a good working relationship with Mastrolia because if PennReach lost the Academy Place contract, ██████, ██████ and Complainant would lose their jobs because the PMC contract paid for their salaries.

B. Separation from Employment

On July 30, 2015, O'Dell told Complainant and ██████ that they were being transferred out of Academy Place to another location that was over 45 minutes from Complainant's home, with a reduction in their pay rate. In response to the verified complaint, PennReach asserted that the transfers were prompted by their conduct during a July 25, 2015 incident with Mastrolia.

██████ told DCR that she returned from vacation on July 25, 2015, and overheard Mastrolia speaking with ██████ about the refrigerator. She said that Mastrolia then said to her, "Is this how you people live at home?" ██████ stated that she replied that the way Mastrolia spoke to her and Complainant was insulting, especially when Mastrolia referred to them as "you people." ██████ recalled Mastrolia saying that it was her building and she could speak in whatever way she pleased. ██████ said that ██████ was supportive and spoke with ██████ regarding her concerns about how Mastrolia spoke to her.

Complainant arrived at work later that afternoon, and attended a meeting with ██████, ██████ and an individual visiting from an outside agency. Complainant and ██████ both stated that during that meeting, Mastrolia entered the community room by slamming the door shut. According to Complainant and ██████, Mastrolia started shouting about the contents of the refrigerator.

They stated that Mastrolia said, "Fuck this, I'm throwing everything away," which she proceeded to do. ██████ said that she told Mastrolia that only one bag in the refrigerator was a PennReach bag, but Mastrolia ignored her and continued screaming at her and Complainant. Complainant and ██████ said that Mastrolia told them that it was her refrigerator and that they would no longer be allowed to use it. ██████ told DCR that at that time, she and Complainant left the room.

██████ told DCR that Mastrolia became angry and started accusing PennReach staff of leaving rotten food in the refrigerator. According to ██████, Mastrolia said, "I'm going to throw all of this stuff out." ██████ said that ██████ told Mastrolia that PennReach staff did not own most of the food in the refrigerator, but Mastrolia became angrier and kept repeating, "I'm going

to throw all this shit out.” ██████ said that Mastrolia proceeded to throw out many bags in the refrigerator, including one that had ██████ yogurt in it.

██████ told DCR that Complainant became very upset and told Mastrolia to “clean the shitty toilet.” She said that ██████ did not make any rude or inappropriate remarks to Mastrolia. ██████ opined that Complainant and ██████ became reactive and impolite because Mastrolia approached them first, yelling and being rude towards them.

██████ told DCR that ██████ reported to her what she witnessed of the refrigerator incident. She stated that ██████ told her that the confrontation became so unpleasant that she walked away. ██████ noted that prior to the refrigerator incident, Mastrolia had issues with Complainant and ██████ and that Mastrolia would try to create trouble with them. She explained that she told ██████ and Complainant to stay away from Mastrolia. ██████ recalled that ██████ told ██████ that she was offended when Mastrolia asked, “is this how you people live at home?” ██████ could not recall either Complainant or ██████ ever saying that they were upset by what they perceived as Mastrolia making racially inappropriate comments.

According to ██████, after the refrigerator incident, both ██████ and Complainant spoke with O’Dell and ██████ to complain about Mastrolia. ██████ told DCR that O’Dell told her to change her written report about the incident to reflect that Complainant had used inappropriate language, but ██████ refused to do so.

Following the incident, Mastrolia wrote a letter complaining to O’Dell about Complainant and ██████ letter read:

On Monday 7/13 or Tuesday 7/14 I went in the community room to use the microwave to heat up my breakfast. When I opened it, there was a container with sausage and fried fish inside covered with bugs that had clearly been sitting there for a few days. I questioned my staff if it was theirs and they all said it wasn’t. A few hours later I waited until ██████, Site Manager was in the office along with [Complainant], Support Staff to mention to them about the food that was left in the microwave. I overheard [Complainant] whisper to ██████ that it was hers and she already threw it out. I always wait until ██████ is present at all times whenever I speak with either [Complainant] or [██████] who is also support staff is present so that nothing is misinterpreted.

On Tuesday, July 21, 2015 I brought pizza in for my staff for lunch and when I brought it into the community room to put it in the refrigerator I noticed a lot of food that did not belong to Pennrose. I looked in one of the ShopRite bags and there was lunch meat from 3 weeks ago and a baggie with lettuce in it that was brown and slimy and I threw it out. I went into the PennReach office where ██████ and [██████] were and said to ██████ that I didn’t want to have to tell them that they couldn’t use the refrigerator anymore, and then explained to her what I found in the refrigerator and that “I would hope that your refrigerator doesn’t look like this at home, so I would expect my refrigerator not to look like that.” ██████ happened to be sitting in the office when I was talking to ██████ and [██████]se to take

personal offense to it. After I finished what I had to say I went about my day, not knowing that [REDACTED] took things to a whole other level. She contacted [REDACTED], Director of Clinical, Mental Health and Training Services for PennReach as well as [Complainant] her coworker to let her know what happened because she was not due into work until 11:00 am and was not present when above happened.

At about 10:00 [REDACTED] was in a meeting in the community room with a representative from an agency and after [Complainant] arrived at work at 11:00 am her and [REDACTED] joined [REDACTED] in the meeting. After the meeting was over around 12:15 pm, I was on my way into the community room to heat up my pizza and I overheard [Complainant] and [REDACTED] carrying on about the refrigerator incident from earlier. [REDACTED] (Maintenance Tech) was in the conference room with me listening to them talking about it with me and then the both of us went in the community room together where both [Complainant] and [REDACTED] were yelling to throw everything out in the refrigerator and they proceeded to do so. [REDACTED] then said she didn't need to use the refrigerator and I said that was a good thing so then we didn't have to worry about something like this ever happening again. Then they proceeded to their office where they carried on about it some more. Again I thought it was done and over with until I returned to the office on Wednesday, July 22nd at about 1:00 pm after a meeting I attended that morning. [REDACTED] informed me that [Complainant] called out for three days because I traumatized her and that both she and [REDACTED] contacted [REDACTED] (who filed a discrimination suit against me) to join her in her suit against me. [REDACTED] also informed me one of the reasons they were doing this was for money.

...

I have complained on a weekly basis about having PennReach in my office only because of these two employees of theirs. They are unprofessional. I continue to work in a very hostile environment when they are present. When it is just my staff and [REDACTED], the office is very peaceful and runs like an office should. Pennrose expects a certain standard from both my staff and I and we take that very seriously as representatives of both the owners and Management Company but we have two bad apples that are spoiling the bunch.

[Mastrolia email to O'Dell, undated and unaddressed].

The investigation did not reveal that Mastrolia or any other of Respondents' employees had complained about Complainant or [REDACTED] prior to refrigerator incident.

Mastrolia told DCR that she did not make any race-based offensive comments to anyone at work. Respondent pointed out that Mastrolia was dating a Black man, and therefore would never make any racially offensive statements.

In a recent interview with DCR, Mastrolia claimed that she did not have day-to-day interactions with PennReach employees because PennReach employees were out of the office on many days. She stated that she tried to run a professional office, and noted that Complainant frequently came dressed inappropriately for work. She said that [REDACTED]ed professionally.

Mastrolia recalled finding what she believed to be [REDACTED] and Complainant's hair all over the bathroom and asking O'Dell to tell [REDACTED] and Complainant to clean their hair out of the bathroom. She claimed that if there were issues with PennReach employees, she spoke with O'Dell, [REDACTED] or PennReach's Vice President Frances Curley. As another example, Mastrolia said that when Complainant continued to dress inappropriately at work, she complained to O'Dell about it.

With regard to the refrigerator incident, Mastrolia stated that she found the refrigerator dirty and filled with spoiled food. She recalled asking [REDACTED] and Complainant if they kept their refrigerator at home dirty, and noting that they should keep the work refrigerator clean because it is their home too. Specifically, Mastrolia told DCR that she asked Complainant and [REDACTED] if "you people" keep your refrigerators at home dirty. She explained that after she made that statement [REDACTED] and Complainant both began screaming at her and called their supervisor. Mastrolia stated that she could not understand why [REDACTED] and Complainant became so upset because she had simply told them to keep the refrigerator clean. She noted that after the incident she had no other contact with [REDACTED] complainant.

O'Dell told DCR that [REDACTED] informed her of the refrigerator incident on the day that it occurred. She stated that the President of PMC, Lee Felgar, also contacted her about the situation and told her that she needed to move Complainant and [REDACTED] to another work location or PMC was going to cancel its contract with PennReach and evict it from the free office space at Academy Place. O'Dell remembered that Felgar commented on [REDACTED] involvement in the E.R. DCR complaint against PMC, but she contended that Felgar focused on unprofessional conduct as the reason for mandating that Complainant and [REDACTED] could no longer work at the Trenton location. O'Dell told DCR that PennReach could not afford to lose the contract at Academy Place or the free office space, and was therefore compelled either to fire or to transfer Complainant and [REDACTED].

O'Dell said that a day after the incident she met with [REDACTED] Complainant and [REDACTED] and explained that PMC was requiring PennReach to relocate Complainant and [REDACTED] because of their unprofessional behavior. O'Dell said that Complainant and [REDACTED] denied all of the allegations that they behaved unprofessionally.

According to O'Dell, she offered Complainant and [REDACTED] open positions at the closest locations to the Trenton office. She said that the possible locations were Long Branch or Old Bridge. She noted that the pay rates would be lower at those locations because pay rates were based on contracts with companies to whom PennReach provided services and varied by location. O'Dell recalled that Complainant refused the offer out right because it was too far a commute. She said that [REDACTED] thought Old Bridge might work but afterwards told O'Dell that she could not commute that far.

O'Dell said that neither Complainant nor [REDACTED] ever complained about discrimination. She stated that [REDACTED] did complain about what Mastrolia said to her during the refrigerator incident.

³ In a follow up interview with DCR, O'Dell stated that she made the decision to move Complainant and [REDACTED] based on their part in the refrigerator incident and the women's past poor performance. She denied that PMC had any involvement in the decision to move Complainant and [REDACTED] and stated that PMC never threatened to terminate the Academy Place contract.

O'Dell admitted that she heard Mastrolia use the phrase, "you people" regularly, but she believed that it was a reference to PennReach employees as opposed to Complainant's and [REDACTED]'s race.

DCR spoke with Felgar about Complainant's allegations. Felgar did not recall the situation. He stated that he did not remember telling O'Dell that PMC would terminate the Academy Place contract with PennReach if O'Dell did not remove [REDACTED] Complainant.

Analysis

At the conclusion of an investigation, DCR 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).

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

Complainant brings claims against both her employer of record, PennReach, and the company that managed the property at which Complainant worked, PMC. During the course of the investigation, it became apparent that Complainant is alleging that PMC subjected her to a racially hostile work environment based on ongoing comments made by its supervisory level employee, Mastrolia. Complainant's interviews with DCR also made it evident that she is claiming that PennReach subjected her to a racially hostile work environment. Essentially, Complainant alleges that O'Dell knew that Mastrolia was creating a race-based hostile work environment and that O'Dell forced Complainant to accept the harassment under threat of losing her job. In this context, Complainant claims that O'Dell was a party to Mastrolia's harassment.

A. PMC's Liability

PMC asserts that it was not Complainant's employer of record. Although the retaliation provisions of the LAD apply to "any person," and are not limited to employers, N.J.S.A. 10:5-12(d), with relation to Complainant's hostile work environment claim, there is a threshold question of whether PMC can be considered Complainant's employer, or, in the alternative, whether PMC could have aided and abetted PennReach in discriminating against Complainant based on race.

1. Employer Liability

We start from the well-settled conclusion that the LAD is to be construed liberally so that it may best serve its ultimate goal of eradicating discrimination in New Jersey. Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 495 (1982); see also, Fuchilla v. Layman, 109 N.J. 319, 334 (1988). The Appellate Division has recognized that non-traditional employment relationships may be protected

by the LAD, and that in some circumstances an individual may be deemed to be jointly employed by two entities. Hoag v. Brown, 397 N.J. Super. 34, 47-48 (App. Div. 2007); Scafuri v. Sisley Cosmetics, 2009 Lexis 2913 (App. Div. November 25, 2009); Pukowsky v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998)(adopting twelve-part “totality of the circumstances” test to determine employee status); Kurdyla v. Pinkerton Security, 197 F.R.D. 128, 134 (D.N.J. 2000)(finding that an individual may be an employee of multiple employers for the purposes of applying a particular statute, including anti-discrimination enactments such as the LAD).

To determine whether an individual is an employee of a particular employer under the LAD, the courts review twelve factors:

(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 furnishes 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.

Pukowsky, supra, 373 N.J. Super. at 182-83.

As guidance, the courts have pointed out that the most pertinent of these factors is the first: the employer's ability to govern the way in which the worker performs his or her job duties. Franz v. Raymond Eisenhardt & Sons, Inc., 732 F. Supp. 521, 528 (D.N.J. 1990). However, courts consider all factors from the Pukowsky test when assessing whether an individual is an employee of a certain employer.

In the present case, the totality of the circumstances demonstrate that PMC acted as an employer as that term is defined in the LAD. First, based on the Agreement's provisions and [REDACTED] statements, it appears that PMC had overriding authority to control PennReach's employees. While PMC may not have completely controlled Complainant's day-to-day activities, it had the contractual authority to do so. Further, [REDACTED] told DCR that O'Dell would change PennReach's employees' duties or the way in which they completed tasks based on requests that O'Dell received from PMC. And given O'Dell's former role with PMC, and the fact that a principal and senior vice president of PMC serves on the PennReach Board of Directors, it appears that there may be some common management or oversight between the two companies.

PMC also controlled and owned the space in which Complainant worked. Finally, there is evidence that PMC influenced PennReach's decision to remove Complainant [REDACTED] from the Academy Place assignment. Based on the investigation, for the purposes of this probable cause determination only, PMC was an employer of Complainant as that term is defined in the LAD.

2. Aiding and Abetting

The New Jersey Supreme Court has held that liability for aiding and abetting under the LAD requires a third party to know that the employer's actions amount to the breach of a duty and

to engage in conduct that substantially assists or encourages the employer's unlawful conduct. Tarr v. Ciasulli, 181 N.J. 70, 84 (2004) (citing Restatement (Second) of Torts § 876(b) (1979)). A third party is liable as an aider or abettor only where "(1) the party whom the [third party] aids performs a wrongful act that results in an injury; (2) the third party is generally aware of its role as part of an illegal or tortious activity at the time that it provides the assistance; [and] (3) the third party knowingly and substantially assisted in the violation." Ibid (internal quotations omitted). The Court has held that "a supervisor's behavior, either through acts of omission or commission, may form the basis for a hostile work environment claim to be made against the employer." Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008) (emphasis added).⁴

Here, Complainants allege that PennReach subjected them to a racially hostile work environment when O'Dell failed to address the complaints about Mastrolia's racially discriminatory behavior. The investigation showed that PMC's CEO Felgar knew that Complainant and [REDACTED] as well as its prior employee E.R. – complained about Mastrolia creating a racially hostile work environment and took no action to address Mastrolia's conduct (and left Mastrolia in charge of the Academy Place location). To the contrary, O'Dell told DCR that Felgar demanded that she move Complainant at [REDACTED] another location while not contemplating taking any action against Mastrolia, the alleged harasser. Thus, there is evidence sufficient to support a theory that PMC aided and abetted PennReach in its creation of a racially hostile work environment.

B. Racially Hostile Work Environment

The LAD makes it illegal to discriminate against an employee in "compensation or in terms, conditions or privileges of employment" based on race. N.J.S.A. 10:5-12(a).

To establish a claim that a work environment is racially hostile, the evidence must show that the harassing conduct (1) would not have occurred but for the complainant's race and (2) was severe or pervasive enough (3) to make a reasonable person of the complainant's race perceive that work place is hostile or abusive. Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 25 (2002) (citing Lehmann v. Toys 'R' Us, 132 N.J. 587, 603-04 (1993)). In evaluating severity or pervasiveness, the courts consider the "nature of the conduct itself, 'rather than the effect of the conduct on any particular plaintiff.'" Barroso v. Lidestri Foods, Inc., 937 F. Supp. 2d 620, 632 n. 9 (D.N.J. 2013) (quoting El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 179 (App. Div. 2005)). A hostile work environment claim requires that the reviewer consider the totality of the

⁴To the extent that PMC is an employer under the LAD, if one were to conclude that PennReach is not liable for creating the hostile work environment, it is still liable for aiding and abetting PMC in its creation of a racially hostile work environment. Here, while O'Dell denied that Complainant told her that Mastrolia's comments were discriminatory in nature, she admitted that she heard Mastrolia make comments in which she referred to Complainant and [REDACTED] as "you people." [REDACTED] told DCR that she discussed Mastrolia's offensive comments with O'Dell and [REDACTED] multiple times. She said that O'Dell told her that PennReach employees needed to tolerate Mastrolia's comments because they needed the contract with PMC. While O'Dell said that she never told [REDACTED] that PennReach employees needed to tolerate discriminatory treatment, O'Dell noted that Mastrolia made offensive comments and agreed that she told [REDACTED] that PennReach employees needed to get along with Mastrolia because the contract with PMC – and their jobs – was dependent on how PennReach employees interfaced with PMC employees. In this instance, the investigation has uncovered sufficient evidence for purposes of a finding of probable cause that O'Dell was aware that Mastrolia's conduct was discriminatory and furthered the harassing behavior either by act or omission. Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008)

circumstances, “which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance.” Ibid.

The investigation revealed evidence that Mastrolia made numerous comments about “your people” or “you people” and other derogatory remarks about Black people, including: (1) “you people have no bathroom etiquette”; (2) “You can have a party as long as you ain’t got no grease all over the place because you cook fried chicken”; (3) “your people are on section 8”; (4) “your people don’t like dogs”; (5) “your people are on welfare”; (6) “your people are single mothers”; (7) “I’m sick of you people”; and comments about how Black employees dressed and about Black women going into the bathroom and leaving hair weaves on the floor.

Complainant [REDACTED], and [REDACTED] told DCR that they felt Mastrolia’s comments were racially charged and demeaning. O’Dell admitted to hearing Mastrolia use the phrase “you people,” but denied that it was racially offensive. [REDACTED] told DCR that he heard Mastrolia use racially inappropriate language to other employees and in her personal phone conversations.

While Mastrolia was not Complainant’s supervisor, she was the person who controlled the office in which Complainant worked, and the investigation showed that O’Dell had told both Complainant and [REDACTED] that they had to tolerate Mastrolia’s comments because Mastrolia could influence PMC to terminate its contract with PennReach, which could result in the loss of Complainant’s job. Given her position of authority, the law deems Mastrolia’s harassing comments to be chargeable to the employer. See Taylor v. Metzger, 152 N.J. 490, 503-04 (1998) (noting that where the harassing conduct is perpetrated by the employer or supervisor, it greatly enhances the severity of the harassment); Cicchetti v. Morris County Sheriff’s Office, 194 N.J. 563, 594 (2008) (holding that supervisor's acts of either omission or commission can form the basis for a hostile work environment claim against the employer). Moreover, even if Mastrolia were deemed to not be a supervisor, O’Dell’s failure to take measures to correct the hostile work environment, even though she was aware of Mastrolia’s comments, means that PennReach was negligent in failing to address the racially hostile work environment.

Based on the investigation, the Director is satisfied that there is “reasonable ground of suspicion . . . to warrant a cautious person” to believe that Mastrolia’s actions and statements were severe or pervasive enough to make a reasonable Black person believe that the workplace was racially hostile. N.J.A.C. 13:4-10.2(b). In addition, the investigation produced proof sufficient to make a “cautious person” think that O’Dell’s failure to take remedial action and correct the situation violated the LAD. Ibid.

C. Retaliation

Complainant also alleged that the Respondents retaliated against her for acting as a witness in a DCR investigation in which PMC was the respondent and for complaining about Mastrolia’s racially insensitive comments.

The LAD prohibits employers from retaliating against employees for opposing any act forbidden by the LAD. N.J.S.A. 10:5-12(d). To set forth a prima facie case of retaliation, a

complainant must show that: “(1) [he or she] engaged in a protected activity known by the employer; (2) thereafter their employer unlawfully retaliated against them; and (3) [his or her] participation in the protected activity caused the retaliation.” Craig v. Suburban Cablevision, 140 N.J. 623, 630-31 (2001) (citations omitted).

Complainant partook in a protected activity in that she acted as a witness in a DCR action against PMC. Additionally, she engaged in a protected activity when she complained to [REDACTED], O’Dell and [REDACTED] about Mastrolia’s discriminatory comments. There is evidence supporting a reasonable suspicion that both Respondents were involved in subjecting Complainant to an adverse employment action when Respondents forced her to choose between working from a distant location at a lower pay rate or losing her job. And the investigation supports a reasonable suspicion that the Respondents took the adverse employment action against Complainant because she refused to simply accept or ignore Mastrolia’s racially hostile comments.

Therefore, the investigation revealed evidence sufficient to support a finding that Respondents retaliated against Complainant for opposing conduct prohibited by the LAD.

D. Conclusion

Based on the above, the Director finds 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.” Frank, supra, 228 N.J. Super. at 56.

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Rachel Wainer Apter, Director
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