

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR Docket No. EF01GB-66645

Taishan J. Smith,)	
)	<u>Administrative Action</u>
Complainant,)	
)	FINDING OF PROBABLE CAUSE
v.)	
)	
South Jersey Extended Care,)	
)	
Respondent.)	

This is an employment discrimination matter. Millville resident Taishan J. Smith (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, South Jersey Extended Care (Respondent), discriminated against her based on her pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. DCR’s ensuing investigation found as follows.

Summary of Investigation

Respondent is a skilled nursing facility located in Bridgeton, New Jersey, that offers rehabilitation services and long-term nursing care. In July, 2017, Respondent’s Activities Director Carmen Adams hired Complainant to work as an Activities Aide.¹

Complainant alleged that on July 25, 2017, on her second day of work, she told Activities Director Adams that she was pregnant. She alleged that Adams responded that it would be a liability for her to work at Respondent’s facility. Complainant further alleged that later that same day, another Activities Aide, Lamar Hogan, informed her that Adams was discharging her due to her pregnancy. Complainant also told DCR that in August 2017 Respondent discharged another activities aide, J.H., after only a few days of work when it found out she was pregnant.

Respondent denied the allegations of discrimination in their entirety. According to a letter provided by Respondent’s former Administrator, Josh Rosenberg, Complainant was discharged because she did not call or show up for work (no-call/no-show) on July 25, 2017. During DCR’s fact finding conference, and after Complainant asserted that she worked two days (July 24th and

¹ Respondent’s job description states that an activity aide assists the director in developing and coordinating therapeutic activity programs for residents. Among other job specifications, it indicates that some of the physical demands involve the performance of a medium level of physical work – pushing, pulling, standing, sitting, stooping, reaching, etc. Although the LAD requires employers to reasonably accommodate limitations arising from an employee’s pregnancy, there is no allegation in this case that Complainant requested or needed any accommodations to perform the job.

25th), Rosenberg indicated that he may have written down the wrong dates. DCR subpoenaed the relevant records, but Respondent failed to provide any work schedule. The payroll records Respondent did provide did not show the days on which Complainant worked.

DCR was unsuccessful in making contact with Carmen Adams despite several attempts. Instead, Rosenberg provided DCR a letter he said that Adams had written, which indicated in pertinent part:

I am writing this statement in response to a complaint from a previous aide in my department. I did not state to anyone that being employed here would be a liability to our facility. Our policy states during your 90 day probationary period an employee can be terminated at any time. This activities aide did not attend work as requested, because of this action on her part, her position at our facility ended.

Rosenberg also said that Adams had only worked for Respondent for about six months and resigned in late December 2017 or early January 2018.

Complainant denied being a no-call/no-show on July 25th, 26th or any day thereafter. She stated that on her second day of work, July 25, 2017, she informed Adams of her pregnancy and Adams told her it would be a liability for Complainant to work there. Complainant said that Adams then called Respondent's social services department to inquire if it had any available positions for Complainant, which it did not. Adams then told her that it would be fine to just go home at the end of her shift. Complainant told DCR she had received her work schedule from Activities Aide Lamar Hogan only for her first two work days (July 24th and 25th). Therefore, after she left work on July 25, 2017, she asked Hogan over Snapchat for her upcoming schedule.² According to Complainant, Hogan wrote that Adams had said Complainant should not come in to work, and that she was discharged because of her pregnancy. Complainant said she called Respondent's offices that day to speak to Adams, but she was not available. Complainant continued to call Respondent for several days until she was able to schedule a meeting with Rosenberg and Adams. Complainant said that during this meeting, which took place about a week after her Snapchat with Hogan, Adams denied ever telling Hogan to tell Complainant not to come to work because of her pregnancy and told Complainant that it was her fault for not coming into work.

DCR subpoenaed Complainant's phone records. Review of Complainant's phone records from July 24, 2017 to August 4, 2017 showed that she called Respondent's facility (856-455-xxxx) from her phone (856-369-xxxx) twice on July 28, 2017, at 2:40:08 pm and 2:40:13 pm. Complainant told DCR that it was possible she also called Respondent's facility from her sister's phone during her remaining attempts to reach Adams.

During an interview with DCR, Lamar Hogan denied ever telling Complainant that Adams was discharging her due to her pregnancy or that she should not to come in to work.

² Snapchat is a multimedia messaging app. One of the principal features of Snapchat is that pictures and messages are usually only available for a short time before they become inaccessible to their recipients.

Hogan is now Respondent's Activities Director.

DCR interviewed J.H. as part of the investigation. J.H. said that while she did not recall exact dates, she believed she may have only worked for about a week as an Activities Aide at Respondent's facility. She said she was hired by Adams and then discharged by Admissions Director [REDACTED] and Administrator Rosenberg. J.H. stated that prior to her discharge, Hogan told her she may be getting laid off due to her pregnancy. Hogan told DCR that J.H. was not hired or supervised by Adams and he was under the impression she was a certified nursing aide and not an activities aide. Rosenberg told DCR he did not remember J.H. DCR attempted to contact [REDACTED] multiple times without success.

DCR requested Respondent's employee records for J.H. The records showed that J.H. was hired on two separate occasions by Respondent. The records show that J.H. was initially hired as a behavior monitor aide on or around November 6, 2015. The employee file provided by Respondent did not contain any records concerning her separation from employment in this position. Review of Respondent's Activities Department's employment and payroll records show J.H. began working on August 17, 2017, and stopped working on April 6, 2018. Respondent did not provide a reason for J.H.'s termination despite multiple requests from DCR, and no reason was indicated in her employment file. J.H. told DCR she gave birth to a baby in November 2017. Payroll records showed that J.H. worked a few hours in August and September 2017, and then did not work again until December 2017. The records show she worked from December 2017 until April 2018.

Complainant provided screenshots of a conversation she had with an individual who appears to be J.H. on August 17, 2017. The conversation went as follows:

J.H.: Did south jersey fire you because you're pregnant. Currently going through that now.

Complainant: Yes they did about three weeks ago...& smh you were working there too? Or somewhere else.

J.H.: smh I'm working there now in activities in everybody keeps telling me their gonna fire me bcuss I'm pregnant. Smh which I don't think is fair.

Complainant: No they wouldn't do that twice in the same month because the lady Carmen lied to the administrator making it seem as if I was no call no show when she really told Lamar to tell me not to come in cause I couldn't work their anymore because of me being pregnant but I doubt she do that again cause she had realized that that's against the law to fire pregnant workers after hire so she had to save her a [REDACTED] before she got fired that's why she lied on me but you should be good. Fu [REDACTED] Carmen & [La]mar cause [La]mar knew what Carmen told him but his a [REDACTED] didn't wanna be involved with the meeting that I had with Carmen and the administrators so he let them fire me instead of speaking up...you don't play with nobody money and then illegally fire someone...

J.H.: Exactly smh you know what I shoulda recorded his a [REDACTED] when he just told me that Carmen gone try & get me fired bcuss I'm pregnant smh bcuss I'm getting a lawsuit if they do that to me.

Complainant: Girl I wish I would have screenshotted the snap chat messages [La]Mar sent me telling me Carmen said I couldn't work there anymore because I was pregnant but even talking to the administrator telling him everything he still took that bit word over mine.

Analysis

At the conclusion of an investigation, DCR is required to determine whether “probable cause exists to credit a complainant’s 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 for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe” that the LAD was violated. Ibid.; Sprague v. Glassboro State College, 161 N.J. Super. 218, 224-25 (App. Div. 1978). If DCR finds there is no probable cause to credit the allegations of a complaint, 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.S.A. 10:5-21; N.J.A.C. 13:4-10(e).

However, if the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. See N.J.S.A. 10:5-16; N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits. 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 the 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 fire, refuse to hire, or otherwise discriminate in the “terms, conditions or privileges of employment” based on pregnancy, among other protected characteristics. N.J.S.A. 10:5-12(a).

Here, Complainant’s allegations of pregnancy discrimination, together with her assertion that it was Hogan who informed her she was discharged due to her pregnancy, are supported by her memorialized conversation with co-worker J.H. that took place shortly after Complainant’s termination. J.H., who had also been pregnant during her employment as an activities aide, also told DCR that Hogan advised her she would be fired because of her pregnancy. Additionally, former administrator Rosenberg and Complainant agreed that, when they met approximately one week after Complainant’s last day of work, Complainant raised the same allegations she makes here—namely, that she had been told by Hogan she was being discharged due to her pregnancy.

In addition, Respondent provided no evidence to support its claim that Complainant was fired for being a no call/no show. It provided no evidence that it scheduled Complainant to work on any day on which she failed to report, and no evidence that it contacted Complainant to ask about her whereabouts or to fire her on any day on which she allegedly failed to report to work.

The Director finds at this threshold stage in the process that there is sufficient basis to

warrant “proceed[ing] 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). Therefore, probable cause is found to support Complainant’s allegations of pregnancy discrimination.

DATE: January 17, 2019


Rachel Wainer Apter, Director
NJ Division on Civil Rights