

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN18NB-64901**

Yolanda Espinosa,)
)
 Complainant,)
)
 v.)
)
 LA Fitness,)
)
 Respondent.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On April 2, 2014, Yolanda Espinosa (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that her former employer, LA Fitness (Respondent), discriminated against her based on her national origin (Dominican), 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 in their entirety. DCR’s investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a health and fitness business with a facility located in Holmdel, New Jersey. On October 10, 2011, Respondent hired Complainant as a part-time Kid’s Klub Attendant working four hours per day, three days per week. The Kid’s Klub is essentially a babysitting service for those exercising at the facility. Complainant was responsible for ensuring the safety and well-being of gym members’ children left in her care while creating a fun and interactive environment for the children. Gym members were advised that they could utilize the Kid’s Klub for a maximum of two hours per day and were required to remain on Respondent’s premises while their children were in the Kid’s Klub. Complainant maintained that throughout her employment from October 10, 2011 to February 27, 2014, management allowed her to bring her young child to work. On February 27, 2014, Complainant stopped working for Respondent.¹

In the verified complaint, Complainant alleged that on February 27, 2014, Operations Manager Mark Stancati told her without advance notice that she could no longer bring her minor-age child to work with her. At that time, Complainant asked Stancati to give her time to make alternate childcare arrangements, but Stancati refused. Complainant alleges she subsequently left

¹ Complainant filed a claim for unemployment benefits on March 2, 2014, which was initially denied. Complainant filed an appeal on May 2, 2014, and in a written decision the Appeal Tribunal found that “in the absence of the employer’s testimony, the claimant’s undisputed, sworn testimony was accepted as credible. The claimant had no intention of leaving the job. The Employer decided to change the terms of employment by not allowing her to continue to bring her child to work as she did for more than two years.” In considering Complainant’s unlawful discrimination claim, DCR is not bound by the determination of the unemployment tribunal. See Hahn v. Arbat Systems, 200 N.J. Super. 266 (1985).

and did not return to work because she did not have anyone to watch her child. Complainant maintained that non-Dominican Kid's Klub employees were allowed to continue to bring their children to work.

In an interview with DCR, Complainant stated that at the time of hire, she was informed by then-management that she could bring her child to work every day. According to Complainant, she did so for more than two years, until February 27, 2014.

In its response to the complaint, Respondent denied that Complainant's national origin played any part in its decision, and asserted that Complainant was instructed to not bring her child to work as per company policies. It also denied that it ever discharged Complainant, or that it allowed non-Dominican Attendants to bring their children to work. According to Respondent, Complainant simply left work on February 27, 2014 and never came back. Respondent's Position Statement stated: "even if [Complainant's] coworkers did attempt to bring their children into work, they would simply have been told that this is not allowed (just like what happened with Ms. Espinosa) – attempting to bring children into work (alone) is simply not a terminable offense." The Position Statement did not address the issue of whether Respondent had knowledge prior to February 27, 2014 that Complainant had been bringing her child to work.

DCR conducted an interview with Brooke Curley, Respondent's District Manager until March 2014. Curley stated that only aerobics instructors were allowed to bring their children to work during scheduled shifts, but other employees were not permitted to do so. Curley stated she had no personal knowledge of managers waiving that rule at any location. When asked if an Attendant could be disciplined or terminated for bringing their child to work, Curley stated that repeated incidents could lead to termination. DCR presented Curley and Respondent's attorney with information showing that other non-Dominican employees were bringing their children to work on a regular basis at Complainant's location. Curley denied having any personal knowledge of non-Dominican employees bringing their children to work on a regular basis.

DCR also conducted an interview with former Operations Manager Mark Stancati. He stated that then-District Manager Brooke Curley found out that Complainant was bringing her child to work, and that she instructed him to either fire Complainant or tell her that she could not bring her child to work. According to Stancati, he was not aware that any other Kid's Klub Attendants were bringing their children to work. He also stated that Complainant's child had hit a member's child in the Kid's Klub and that member had reported the incident. Stancati reiterated that Kid's Klub Attendants were not permitted to bring their children to work with them. Stancati stated that he told Complainant to leave and not bring her child to work with her, or else she would not be placed on the schedule. Stancati said that he could not recall whether he had any follow-up conversations with Complainant about her returning to work. When asked, Stancati also could not recall Complainant telling him that other Kid's Klub Attendants were bringing their children to work with them. He also denied knowing that Complainant had been bringing her child to work with her since she began her employment with Respondent.

DCR interviewed former Kid's Klub Attendant [REDACTED], who is not Dominican. [REDACTED] informed DCR that when she was hired on January 8, 2010, two former managers advised her that Kid's Klub Attendants could bring their children to work. [REDACTED] could not identify the managers

by name. She stated that it was common for all of the Kid's Klub Attendants to bring their children to work while working at the club. [REDACTED] stated that while employed, she never had an issue bringing her child to work and was never instructed not to do so. She was not present when Complainant was instructed to go home because of her child on February 27, 2014. However, [REDACTED] stated that she and another former Kid's Klub Attendant by the name of [REDACTED],² who is also not Dominican, continued to bring their children to work after that date without issue. [REDACTED] Employee Maintenance Report, provided by Respondent, indicates that she left Respondent's employ on August 12, 2014, six months after Complainant's separation from employment. [REDACTED] Employee Maintenance Report indicates that she was employed by Respondent from August 21, 2012 through March 17, 2015.

DCR interviewed former Kid's Club Attendant [REDACTED], who is also not Dominican. [REDACTED] informed DCR that she worked for Respondent approximately five years ago and worked with Complainant during her employment. [REDACTED] recalled [REDACTED] bringing her child to work on a daily basis and other employees doing the same. According to [REDACTED], a white female high school student by the name of [REDACTED] replaced Complainant.

DCR reviewed relevant documents submitted by Respondent. The Kid's Klub Employment Manual states under "Rules Specific to You": "Kid's Klub attendants are not permitted to bring children (their own or someone else's) into the Kid's Club during their scheduled shift. The only employees who may bring their children to Kid's Club during their shift are Aerobics Employees."³ Respondent also provided a copy of Complainant's signed Employee Membership Agreement that states, "I understand that if I would like to use the babysitting facilities while I am working out that those facilities are available only for my own children and that I must pay for the babysitting services provided therein and remain on the club premises at all time while my child is there." Complainant signed the Employee Membership Agreement on October 10, 2011.

In response to this evidence, Complainant told DCR that that on February 27, 2014, after Stancati told her she could only come back if she did not bring her son to work, she informed him that two other attendants also brought their children to work. Stancati told her he would address it with those employees as well. Complainant denied prior knowledge of being prohibited by company policy from bringing her child to work. Because Complainant was unable to find childcare, she did not return to work. Complainant also denied that her son hit any other child, stating that incident reports were always created in such cases when something happened to a child and that there was no such incident report for this alleged instance. Complainant also stated that Stancati told her there was someone else who did not want her there.

² The DCR Investigator was unsuccessful in locating [REDACTED] for an interview.

³ Documents provided by Respondent show that both [REDACTED] and [REDACTED] like Complainant, were employed by Respondent as Kid's Klub Attendants and not as Aerobics Employees.

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 fire, refuse to hire, or otherwise discriminate in the “terms, conditions or privileges of employment” based on national origin. N.J.S.A. 10:5-12(a)

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based on her national origin. Complainant established that she was prohibited from continuing to bring her child to work, which forced her to resign; while others who were similarly situated and not members of her protected class were treated differently. Such differential treatment is sufficient to establish a prima facie case of unlawful discrimination. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 84-85 (1978). Respondent offered two different legitimate, non-discriminatory reasons for the adverse action: that its policy prohibited Attendants from bringing their children to work, and that Complainant’s child hit another child.

However, the investigation revealed evidence to suggest that both of these proffered reasons were pretextual. As to the policy, Respondent produced two separate documents, one of which was signed by Complainant, stating that she was prohibited from bringing her child to work. But the investigation revealed that Respondent either did not enforce the policy or did not enforce it consistently, as testimony from Kid’s Kare Attendants interviewed by DCR supported Complainant’s contention that several attendants regularly brought their children to work without issue. Complainant and former employee [REDACTED] both maintain that former managers permitted them to bring their children to work, as corroborated by former employee [REDACTED]. Moreover, after Complainant’s separation from Respondent, [REDACTED] a non-Dominican Kid’s Klub Attendant, continued to bring her child to work without incident until she left Respondent’s employ approximately six months later. Former employee [REDACTED] continued bringing her child to work without incident for more than one year, until she herself left Respondent’s employ.

While both Stancati and Curley denied any knowledge that other employees were bringing their children to work with them, such denials are inconsistent with the testimony from the Kid's Klub Attendants DCR interviewed. These attendants told DCR that they openly brought their children to work, with permission from management. Complainant said that she informed Respondent when approached about bringing her child to work that others did the same. Even if Complainant did not, as she claims, advise Stancati or Curley that other employees were bringing their children to work, it is difficult to accept that once Respondent became aware of the presence of Complainant's child in the workplace, it would not look into whether other employees – regardless of national origin - were violating the same rule. Despite Respondent's claim that there was no evidence of differential treatment, DCR's investigation found that Respondent did subject Complainant to differential treatment when it only instructed her to not bring her child to work, and not Kid's Klub Attendants of other national origins.

Stancati's assertion that Complainant's child hit another child in the Kid's Klub may also be pretextual. Respondent provided no incident report or other documentation to support this allegation. Moreover, Respondent did not even mention it in its Position Statement, where it provided a detailed narrative of the reasons why it prohibited Complainant from bringing her child to work.

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 discrimination.

Date: August 1, 2019



Rachel Wainer Apter, Director
NJ Division on Civil Rights