

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. ED10WB-66809**

██████████,)
)
Complainant,)
)
v.) **Administrative Action**
) **PARTIAL FINDING OF PROBABLE**
) **CAUSE**
Gambale Concrete L.L.C.,)
)
Respondent.)

On January 23, 2018, ██████████ (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Gambale Concrete L.L.C. (Respondent), subjected her to sexual harassment and discharged her due to sex, 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 construction company located in Clementon, New Jersey. On November 21, 2016, Respondent hired Complainant as an Office Manager. In this position, she was responsible for maintaining office services by organizing office operations and procedures, preparing payroll, controlling correspondence, and monitoring clerical functions. Complainant was discharged on December 15, 2017.

a. Sexual Harassment

In the verified complaint, Complainant, who is female, alleged that Respondent’s Owner, Joseph Gambale, sexually harassed her by continuously asking that she find someone to give him a “hand job or a blow job” or “fuck” him. Complainant alleged that Gambale stated that he was making these requests because his wife “didn’t give up any ass at home.” Complainant alleged that she objected to Gambale’s use of these offensive remarks, but they continued.

In its response to the complaint, Respondent admitted that inappropriate language was used at times. Respondent denied that Complainant objected to this language and stated that she used, and frequently initiated, similar conversations in the workplace. As evidence, Respondent produced a text message sent by Complainant to Gambale in which she stated, “You better have lots of pink lollipops or I’m gonna shove these drawings up your ass.”¹

¹Respondent asserted that the term “pink lollipops” referred to a sexual act but DCR was unable to confirm this.

In an interview with DCR, Complainant denied that she ever participated in or initiated any sexual conversations in the workplace. She asserted that she may have used a curse word on occasion, but nothing more.

DCR interviewed mechanic/driver [REDACTED], who stated that he previously worked for Gambale's father for over 20 years, and was rehired by Respondent on February 17, 2017. [REDACTED] stated that he heard Gambale make sexual comments to Complainant on a daily basis, and he observed that the comments upset her. [REDACTED] stated that he never witnessed Complainant making any sexual remarks to Gambale or anyone else. [REDACTED] stated that he cautioned Gambale that Complainant could file a sexual harassment complaint against him, with the hope that this would make Gambale stop, but the comments continued.

b. Discharge

In the verified complaint, Complainant alleged that Gambale terminated her employment because of her sex. Respondent denied the allegation, stating that Complainant was discharged for committing criminal acts against Respondent such as paying herself double salary and taking documents that belonged to Respondent.

During an interview with DCR, Complainant denied committing any criminal acts and stated that Gambale discharged her for turning over payroll records to the New Jersey Department of Labor (DOL). Complainant stated that after Gambale learned she sent records to DOL, he filed false criminal charges against her in court.

Information obtained during the investigation was shared with Complainant, and prior to the conclusion of the investigation, she was given an opportunity to submit additional information.

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.

Sexual harassment in the workplace is a form of gender discrimination. See Lehman v. Toys ‘R’ Us, Inc., 132 N.J. 587, 607 (1993). To present a claim of hostile work environment due to sexual harassment, there must be evidence that the conduct occurred because of the employee’s gender or was sexual in nature, and that a reasonable employee of the same gender would find the conduct severe or pervasive enough to alter the conditions of employment to make the working environment hostile or abusive. Id. at 603. In evaluating severity or pervasiveness, the courts consider the “nature of the conduct itself,” and whether it would cause a reasonable woman to believe the working environment was hostile, “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)).

Additionally, when the harasser is the owner of the business, 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.” Taylor v. Metzger, 152 N.J. 490, 505 (1998).

Here, the investigation found sufficient evidence to raise a reasonable suspicion that Gambale subjected Complainant to sexual harassment. Respondent admitted that Gambale used “inappropriate language at times” and ██████ stated that Gambale made sexual remarks to Complainant on a daily basis. Respondent asserted that Complainant also made comments of a sexual nature, suggesting that she was not offended by these remarks. However, ██████ denied ever hearing Complainant make any such sexual remarks, and stated that he observed that the sexual comments from Gambale made her upset. Additionally, the standard for hostile work environment requires an examination of whether “the conduct itself” would make a reasonable person in Complainant’s position believe the working environment was hostile—not its impact on the particular Complainant in question. The evidence suggests that the comments made by Gambale were sufficiently severe and pervasive to make a reasonable woman in Complainant’s position believe the working environment was hostile.

Complainant also alleged that she was terminated due to her sex. However during her interview with DCR, Complainant did not provide any evidence to support this allegation, and expressed that she felt Gambale wrongfully terminated her for turning over payroll records to DOL. Therefore, the evidence did not demonstrate that Complainant was terminated because of her sex.

Based on the investigation, DCR finds that **NO PROBABLE CAUSE** exists as to the allegations of discharge due to sex.

However, DCR finds that there is a sufficient basis to support the allegations that Respondent violated the LAD by subjecting Complainant to a hostile work environment based on sex. 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 228 N.J. Super. at 56. Therefore, the Director finds **PROBABLE CAUSE** to support Complainant’s allegations of sexual harassment.

Date: August 22, 2019

A handwritten signature in blue ink that reads "Rachel Wainer Apter". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rachel Wainer Apter, Director
NJ Division on Civil Rights