

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EB60WB-66371**

Patrick Okolie,)
)
Complainant,)
)
v.)
)
Hot & Spicy, Inc. d/b/a/ NYC Platters,)
)
Respondents.)
)

**Administrative Action
PARTIAL FINDING OF PROBABLE CAUSE**

On February 6, 2017, New Jersey resident Patrick Okolie (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Hot & Spicy, Inc. d/b/a NYC Platters (Respondent)¹ subjected him to a hostile work environment based on his age, and discharged him based on his age and in retaliation for engaging in LAD-protected activity, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

Summary of Investigation

Respondent is a New Jersey food service business incorporated by Director and Registered Agent Mohammed Azam and Corporate Director Nazir Shahid. During all times relevant to this complaint, Respondent operated “NYC Platters,” a quick-serve Mediterranean-American restaurant located in Teaneck.²

On or about August 11, 2016, Azam hired Complainant to work as a Kitchen Helper/Cook. Complainant’s responsibilities included overseeing the kitchen, preparing food for customers, and cleaning. Complainant worked full-time and was the only employee on Respondent’s official payroll at the time of his hire.

Complainant, who was 54 years old during the relevant time-period, alleged that throughout his tenure with Respondent, Azam frequently and repeatedly subjected him to ageist remarks, then fired him on or about November 9, 2016 after he repeatedly threatened to report his conduct to the U.S. Equal Employment Opportunity Commission (EEOC). Complainant asserted that Respondent replaced him with a significantly younger employee.

¹ On August 17, 2018, Complainant amended his Complaint to clarify Respondent’s proper business name and to add information regarding the April 5, 2018 transfer of Respondent’s lease agreement to a third party.

² By all accounts, Azam was the sole operator of NYC Platters. Shahid does not appear to have been involved with any of its day-to-day operations.

Respondent denied the allegations of hostile work environment, discriminatory discharge, and retaliatory discharge in their entirety. It denied that Azam - who was 56 years old during the relevant time-period - made the alleged ageist remarks attributed to him and stated that it discharged Complainant for legitimate, non-discriminatory reasons. Specifically, Respondent alleged that Complainant used drugs on the job, reported to work intoxicated, was consistently late, and was unprofessional towards customers.

a. Hostile Work Environment

Complainant alleged that Azam subjected him to a hostile work environment based on his age, citing two September 2016 incidents in his complaint as examples. Specifically, he alleged that in September 2016, when he requested that Azam purchase an anti-fatigue mat for the kitchen floor to alleviate leg soreness, Azam stated that the reason for Complainant's pain is that "he is getting old and older people have more pain." Complainant told DCR that Azam ultimately purchased the anti-fatigue mat per his request, but stated that shortly thereafter, Azam tripped over it and in a fit of rage, he rolled it up and declared that Complainant was not permitted to use it any longer.

Complainant also alleged that on September 18, 2016, Azam told him that a younger employee Azam had hired in September 2016 would assist them because both Azam and Complainant "are getting older."

Complainant estimated that Azam made age-based remarks "two to three times a week" and stated that they "got on his nerves." Complainant gave two additional examples of these remarks: (1) Azam remarked that he preferred to hire younger people because young people work faster; and (2) when Azam's wife went shopping, Azam would make him unload the truck, and when he asked Azam to have his children unload the truck instead, Azam would state, "You are too old. That is why you are complaining. Don't worry; I will hire younger people to help you."

Complainant identified D.M. as a witness who could support his allegations of an age-based hostile work environment.³ D.M. is a former employee of Respondent who left his position as a deliveryman with Respondent in November 2016. DCR briefly interviewed D.M., who stated that he recalled that Azam made certain comments with regard to Complainant's age. However, DCR was unable to locate D.M. for a subsequent interview to ascertain D.M.'s recollection of the substance and duration of the age-based comments or any other details of what he observed.

DCR asked Complainant if Azam's age-based comments ever included offensive names or references based on his age and Complainant stated they did not. DCR also asked Complainant if the age-based comments were ever accompanied by threats of violence against Complainant and Complainant stated they were not.

In an interview with DCR, Azam vehemently denied the hostile work environment allegations. He stated that he purchased the anti-fatigue mats for Complainant immediately after

³ Azam told DCR that D.M. was not on Respondent's official payroll because he was paid in cash. Azam did not deny that D.M. worked for Respondent at the same time as Complainant.

Complainant requested them and contended that he never made derogatory age-based comments toward Complainant. To support his position, he stated that since he is two years older than Complainant, he would have no reason to subject Complainant to age-based comments.

b. Discharge

In his verified complaint and in a subsequent interview with DCR, Complainant alleged that he engaged in an activity protected by the LAD when, on several occasions including September 18, 2016, he asked Azam to stop making derogatory remarks about his age, and that when Azam's conduct continued, he told Azam that he might contact the EEOC to file a complaint. In a DCR interview, Azam acknowledged that Complainant, at some point, "threatened to go to the EEOC." Azam stated that he did not know why Complainant wanted to contact EEOC.

Complainant alleged that Respondent and Azam terminated his employment on or about November 9, 2016 because of his age, and in retaliation for objecting to, and threatening to report, Azam's ageist comments. Complainant also alleged that Azam hired a much younger replacement, J.A., around the time he fired Complainant.

Payroll records indicate that J.A. was hired in early November 2016 – immediately prior to Complainant's discharge. According to Azam, J.A. was approximately 21 years old at the time of his hire.

Azam told DCR that he fired Complainant because he used drugs on the job, reported to work intoxicated, was chronically tardy, and was rude to customers. In its answer to the verified complaint, Respondent stated that Azam gave Complainant three "strict verbal warnings" between October 2016 and November 2016 in regard to the aforementioned performance/behavioral issues, but Respondent was not able to provide any documentary evidence to support this assertion.

Complainant denied all of Respondent's allegations regarding his drug, alcohol, or performance issues and stated that they were merely pretexts designed to mask a discriminatory and retaliatory motive. Complainant stated that throughout his employment, he was performing his job at a level that met Respondent's legitimate expectations.

D.M. told DCR that he never witnessed Complainant use drugs or alcohol on the job, nor did he ever witness Complainant arrive to work intoxicated. D.M. also confirmed that Azam hired a younger individual that ultimately replaced Complainant.

Respondent was unable to produce any evidence to support its claims that Complainant was using drugs and/or alcohol on the job or that he was habitually late to work. Nor was it able to produce any evidence to support its claim that Complainant was rude to customers.

In an effort to demonstrate that Complainant was unreliable, Azam told DCR that in September 2016, Complainant "disappeared for a few weeks and just stopped showing up." He added that he attempted to contact Complainant several times, but was never able to reach him. However, Azam stated that when Complainant returned, he allowed him to resume working.

Complainant denied this assertion, stating that he missed only two days of work after he received a call that his girlfriend's mother had a stroke. He stated that Azam was fully aware of the situation. Complainant provided DCR with text messages indicating that Complainant left to care for his girlfriend's mother on or about Saturday, September 24, 2016 and returned on or about September 28, 2016.⁴ The text messages also indicate that Azam was aware of the reason for Complainant's absence. DCR reviewed the text message evidence with Azam. In response, he stated, "It was two years ago. I don't remember."

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. "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 statute has been violated. Ibid.

If DCR determines that probable cause exists, then the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby 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., 111 S.Ct. 799. 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.

On the other hand, a finding of no probable cause is deemed a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. See N.J.A.C. 13:4-10(e); R. 2:2-3(a)(2).

Here, the investigation found insufficient evidence to support a reasonable suspicion that Respondent subjected Complainant to a hostile work environment based on his age. However, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discharged Complainant because of his age and in retaliation for Complainant's LAD-protected activity in stating that he would report Respondent's alleged age discrimination to the EEOC.

a. Hostile Work Environment

Hostile work environment is a form of discrimination. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). When evaluating a claim for a hostile work environment, the critical issue is whether a reasonable person in the complainant's protected class would find the conduct to be sufficiently "severe or pervasive" to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Id. at 603.

⁴ Complainant told DCR that the situation required him to drive to his girlfriend's mother's home in Pennsylvania.

Courts focus on the conduct itself, not its effect upon the employee or the workplace. Cutler v. Dorn, 196 N.J. 419, 432 (2008) (stating that in determining whether a party has created a hostile environment in violation of the LAD, a court must consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”). Neither the victim’s subjective response to the harassment, nor the defendant’s subjective intent is controlling as to whether a hostile work environment claim is viable. Ibid.

Here, Complainant alleged that he was subjected to age-based remarks in the workplace by Respondent’s co-owner, Azam, who also acted as Complainant’s direct supervisor. Complainant alleged that Azam made comments about Complainant’s age “two to three times per week” during the three months he worked there, including stating that he preferred to hire younger people because young people worked faster. D.M., a former employee of Respondent, corroborated Complainant’s allegations, telling DCR that he had heard Azam make age-based comments about Complainant, but was unavailable for a follow-up interview to determine the substance and duration of the age-based comments he had overheard.

The evidence uncovered during the investigation does not meet the “severe or pervasive” requirement to prove a hostile work environment under LAD. Complainant worked for Respondent for only three months, and while he alleged that Azam made age-related comments 2-3 times per week he was unable to provide much specificity about the comments except on a handful of occasions during his tenure. Complainant alleged that the conduct “got on his nerves” rather than altered his workplace conditions. Because the alleged remarks took place intermittently over a maximum three month period and lacked threatening, intimidating, humiliating, or degrading language, the evidence does not rise to the severe or pervasive level where a reasonable person in Complainant’s position would believe that his employment conditions had been altered and the working environment was hostile or abusive.

Therefore, based on the investigation, the Director finds that there is **NO PROBABLE CAUSE** to support Complainant’s allegation of an age-based hostile work environment. This finding of no probable cause is a final agency action, subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

b. Discharge

The LAD also makes it unlawful for an employer to discharge an employee based on age, N.J.S.A. 10:5-12(a), and to retaliate against an employee for complaining about workplace discrimination. N.J.S.A. 10:5-12(d). The DCR investigation found sufficient evidence to credit Complainant’s allegations that he was terminated as a result of his age and in retaliation for engaging in LAD-protected activity.

Here, Complainant demonstrated that he belongs to a protected class in that he was 54 years old at the time of his termination, he performed his job to a reasonably satisfactory level, he was fired on or about November 9, 2016, and he was replaced by someone 21 years of age.

Respondent then produced a legitimate, non-discriminatory reason for the discharge—that Complainant was discharged because he used drugs on the job, reported to work intoxicated, was consistently late, and was unprofessional towards customers.

But the investigation showed that there is at least a reasonable suspicion that this reason was a mere pretext for discrimination. Specifically, DCR’s investigation found that while they did not rise to a level that created an unlawful hostile work environment, the aged-based comments to which Complainant was subjected are sufficient to credit his allegation that Respondent’s discriminatory animus may have been a motivating factor in his discharge. In addition, the fact that Complainant was replaced by a much younger employee, J.A., after Azam on multiple occasions advised Complainant that he preferred younger employees, lends credence to Complainant’s allegation of discriminatory discharge. And Respondent was unable to produce any evidence to support its claims that it discharged Complainant because he was using drugs and alcohol on the job, was habitually late to work, disappeared for several weeks, or was rude to customers. On the contrary, D.M. told DCR that he never witnessed Complainant use drugs or alcohol on the job, nor did he ever witness Complainant arrive to work intoxicated. And while Respondent was unable to introduce any evidence to support its assertion that in September 2016, Complainant “disappeared for a few weeks and just stopped showing up,” Complainant produced documentary evidence that directly refuted this allegation: text messages indicated that Complainant left to care for his girlfriend’s mother on or about Saturday, September 24, 2016, returned on or about September 28, 2016, and kept Azam apprised of the situation the entire time.

As for retaliation, an employee must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him to an adverse employment action, and that there was a causal connection between the two. For purposes of this threshold determination, the Director is satisfied that (i) Complainant engaged in protected activity by informing Azam that he would file an age discrimination complaint if he did not cease his ageist comments; (ii) Complainant was subjected to adverse employment action when he was fired on or about November 9, 2016; and (iii) there was a causal connection between Complainant’s LAD-protected activity and his November 9, 2016 termination.

Again, Respondent has failed to produce any evidence to support its proffered legitimate, non-discriminatory reason for Complainant’s termination. Moreover, in a DCR interview, Azam acknowledged that Complainant, “threatened to go to the EEOC.” At this stage, all of the evidence listed above is sufficient to suggest that Respondent’s purported reasons were a mere pretext for discrimination and retaliation.

The Director is satisfied at this preliminary stage of the process that there is **PROBABLE CAUSE** to support Complainant’s allegation of discriminatory and retaliatory discharge, and 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.

Date: April 30, 2019



Rachel Wainer Apter, Director
NJ DIVISION ON CIVIL RIGHTS