

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EA02SB-67059**

Daniel S. Ruane,)
)
Complainant,)
)
v.)
)
Gourmet Restaurant and)
Sweets, LLC,)
)
Respondent.)

FINDING OF PROBABLE CAUSE

On July 24, 2018, Daniel S. Ruane filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Gourmet Restaurant and Sweets, LLC (Respondent) discriminated against him on the basis of his gender in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49.¹ Respondent denied the allegations of discrimination. DCR’s investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent operates a family-owned restaurant located in Atlantic City. According to Respondent’s owner, Shamshad Ahmad Kahn, more than 90% of the customer base is South Asian. The establishment specializes in Indian, Bangladesh and Pakistani cuisine. On May 4, 2018, Complainant responded to an ad about an available food server position.

In the verified complaint, Complainant, who is male, alleged he saw an advertisement for an available food server position for Respondent’s restaurant posted on a storefront window at 2703 Atlantic Avenue in Atlantic City. Complainant decided he would go directly to the restaurant, located at 1608 Atlantic Avenue, and apply for the job. Complainant alleges that prior to entering Respondent’s facility he noticed a posting on the restaurant’s glass storefront, which read (in capital letters) “HELP WANTED FOOD SERVER”.

In an interview with DCR, Complainant said that once inside the restaurant he was met by a woman who identified herself as the manager. Complainant stated he wished to apply for the food server position and asked for an application. He was informed that the owner was not on the premises. The manager told Complainant that only the owner could make a decision regarding hiring. Complainant stated that he was told the owner would return within an hour. Complainant alleged he returned to the restaurant about ninety minutes later. Complainant was greeted by the manager and informed that the owner was not expected to return until the following day.

¹ The verified complaint identified Respondent as “Gourmet Restaurant.” During the course of the investigation, the proper corporate name of Respondent was identified as “Gourmet Restaurant and Sweets, LLC.” The complaint is hereby amended to reflect Respondent’s proper corporate name.

Complainant informed DCR that he returned to the restaurant two more times, the last date being May 14, 2018, and that the posting remained in the window. Complainant alleged that the manager refused to provide him with an application and, without providing any explanation, refused to allow him to speak to the owner. Complainant alleged he then examined the posting more closely and realized in small print the sign read, “(Female) full time/part time.”

During an interview with DCR, Complainant said that he used his cell phone to take a picture of the posting on May 14, 2018. DCR is in receipt of the photo as well as a picture of the larger store front where the posting can clearly be seen. Complainant claimed Respondent’s manager told him on his fourth and final attempt to seek employment, “He (owner) only wants female servers.” Complainant informed Respondent’s manager that he needed to report back to New Jersey Unemployment. He asked the manager if she would kindly give him something in writing to explain why he was unable to find employment. On a piece of paper, Respondent’s manager wrote the following: “Gourmet Restaurant in Atlantic City is only hiring Female Food Servers for that position they have posted.” The statement was signed, “Shamshad, Manager.” DCR is in possession of a copy of said note.

In its response to the complaint, Respondent denied that Complainant was subjected to unlawful discrimination based on his gender. Respondent’s owner, Shamshad Ahmad Kahn, stated that as a rule he needed three or four food servers. Kahn explained to DCR that as the summer season was about to begin, he needed one more person to work as a food server. Kahn stated that he was seeking a female waitress because he was already employing two male servers.

In an interview with DCR, Kahn emphasized that prior to owning the restaurant he had worked for a major business in New York City for 23 years. He explained that while in that position, he was the sole individual with the authority to hire and he hired and worked with people of all ages, races, religions and genders.

Kahn stated the sole reason for wanting to hire a female waitress was to keep a gender balance at the restaurannt. Kahn said there was no application process for the position. Kahn stated that he hired a walk-in female, [REDACTED], at the end of May 2018. Her first day of work was June 3, 2018. At the end of June, Kahn said he hired [REDACTED] (no relation), a male server, in order to maintain the staff’s gender balance.

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 refuse to hire, or otherwise discriminate in the “terms, conditions or privileges of employment” based on gender. N.J.S.A. 10:5-12(a). It also makes it unlawful to “print or circulate...any statement, advertisement or publication...which expresses, directly or indirectly, any limitation, specification or discrimination as to...sex...of any applicant for employment...unless based upon a bona fide occupational qualification.” N.J.S.A. 10:5-12(c).

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent refused to hire Complainant because of his gender and made discriminatory statements in connection with the position. Respondent’s manager specifically told Complainant that the owner was only looking to hire a female server, and wrote by hand on a piece of paper: “Gourmet Restaurant in Atlantic City is only hiring Female Food Servers for that position they have posted. Shamshad, Manager.” In addition, the posted advertisement specifically said, in small print, “(Female) full time/part time.”

While Respondent’s owner raised as a defense that in a past position he had hired and managed hundreds of individuals of all ages, races, religions and genders, and that he in fact hired a male server in June of 2018, that does not immunize him from the discriminatory act of posting an advertisement for one specific gender and seeking only one specific gender for this particular position. While diversity among staff may be an admirable goal, there is no exception in the LAD to allow business owners to post certain positions for “males only” or “females only” in order to maintain a desired gender balance. And Respondent has presented no evidence that the desire to maintain a particular gender balance qualified as a bona fide occupational qualification for the server position. See In re Juvenile Detention Officer Union County, 364 N.J. Super. 608, 616 (App. Div. 2003) (BFOQ exception is “meant to be an extremely narrow exception” where an employer has a heavy burden to show “all or substantially all [men] would be unable to perform safely and efficiently the duties of the job involved.”)

At this threshold stage in the process, there is sufficient basis to warrant “proceeding 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: November 25, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights

