



STATE OF NEW JERSEY
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW & PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 DCR DOCKET NO.: EJ09WB52897

PAUL NATHAN and CARLOS
 BELLIDO, ACTING DIRECTOR,
 NEW JERSEY DIVISION ON CIVIL
 RIGHTS,
 Complainants,
 -v-
 THE BANK OF NEW YORK,
 CHARLES FERRARI and WALTER
 GORSKI, INDIVIDUALLY,
 Respondents.

FINDING OF PROBABLE CAUSE

Pursuant to a Verified Complaint filed on December 22, 2006 and a subsequent amendment to the Verified Complaint, the above-named Respondents have been charged with unlawful discrimination on the basis of sexual orientation/homosexual and race/Black, in violation of N.J.S.A. 10:5-12 (a), and with taking unlawful reprisals in violation of N.J.S.A. 10:5-12(d) of the New Jersey Law Against Discrimination. In addition, Respondents Charles Ferrari and Walter Gorski were charged with aiding and abetting Respondent Bank of New York in its discriminatory practices in violation of N.J.S.A.10:5-12 (e).

Carlos Bellido is the Acting Director of the Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT:

Complainant Nathan alleged that he was differentially treated and subjected to hostile environment harassment because of his sexual orientation/homosexual and race/Black, and was subsequently retaliated against for objecting to acts forbidden by the New Jersey Law Against Discrimination. Complainant alleged that since 2004, and continuing until about August 2006, he

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was differentially treated as a machine operator by his supervisor, Walter Gorski. Specifically, it was alleged that Mr. Gorski would not provide Complainant help in running his machine which required heavy lifting. However, non-Black employees Pablo Valdez, John Nieves, and others, received assistance.

Complainant further alleged that since 2004 and continuing until the present, he was subjected to harassment because of his sexual orientation and race by Respondent's vice-president, Charles Ferrari, assistant manager Walter Gorski, and co-workers Juan A. Rolon, Victor Morales, Pablo Valdez, George Moreno, Millie Martinez, Miguel Peralta, Jairo Romero and Milton "Doe"(LNBF). The acts of alleged harassment included but were not limited to the following:

- In 2005 and 2006, Walter Gorski called Complainant a "fag."
- Mr. Rolon has referred to Complainant in Spanish as a "Black female" and called him a "faggot."
- George Moreno has told Complainant "you're such a girl."
- Millie Martinez told Complainant that he "needed to stop being a woman and learn how to be a man." She calls Complainant by the name of "Paula."
- Victor Morales continuously refers to Complainant in Spanish as a "faggot."
- In July 2006, Pablo Valdez referred to Complainant in Spanish as a "faggot."
- In December 2006, Milton called Complainant a "freak."
- Messieurs Ferrari, Peralta, Valdez and Romero have made derogatory comments about Complainant's sexual orientation.
- A picture of a naked Black male was posted with a sign on it that said "due to Aids, ass kissing has been suspended."
- In November 2006, Jairo Romero threatened to sodomize Complainant with a stick.

Complainant alleged that on several occasions, the last time being in July 2006, he complained to members of upper management, including Evelyn Miller, vice president of human resources, about the hostile environment to which he was subjected, but the harassment continued. Complainant further alleged that Respondent's vice president, Charles Ferrari, and its supervising assistant manager, Walter Gorski, aided and abetted Respondent The Bank of New York in its discriminatory practices against Complainant.

On October 24, 2007, Complainant amended his complaint to include retaliatory discharge. Complainant alleged that on August 8, 2007, he was told he was terminated by Respondent's vice president of human resources, Evelyn Miller, and its vice president of the EMO department (Enclosing Mail Operations), Carl Caminske. Complainant alleged that Ms. Miller told him he was being terminated because he was not happy working for Respondent and he should go somewhere else where he would be happy.

SUMMARY OF RESPONSE:

Respondent denied discriminating against Complainant for any unlawful reason, including race, sexual orientation or reprisal. Respondent asserted that Complainant complained of racial harassment in June 2006 when he met with its vice president of human resources, Evelyn Miller. Respondent contended it initiated an investigation following the complaint. Respondent denied that Complainant made any claims of sexual orientation harassment. Additionally, Respondent denied it retaliated against Complainant when it discharged him.

BACKGROUND:

Respondent The Bank of New York merged with Mellon Bank and is now know as Bank of New York Mellon. The facility that is the subject of this complaint is located in Hudson County. It is an asset management and securities services company. Complainant resides in Flushing, New York. Respondent hired Complainant on April 6, 2000 as a machine operator. Respondent discharged Complainant on August 8, 2007.

SUMMARY OF INVESTIGATION:

The investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was differentially treated and was subjected to a hostile work environment because of his race and sexual orientation. Further, there is a reasonable suspicion that Complainant was discharged because of his race and/or sexual orientation, and in retaliation for complaining about protected activity.

Issue: Disparate Treatment due to race and sexual orientation

The investigation found that Complainant was differentially treated with respect to work assignments and lack of help in fulfilling his assignments.

The investigation showed that in 2004, Complainant was reassigned to the morning shift in Respondent's EMO department under the supervision of Walter Gorski, who was general services assistant manager and was a supervisor in the EMO. At the fact-finding conference, Complainant stated that shortly thereafter, he was repeatedly assigned to work in the "green room" where the burs and master mailer machines were located. Complainant stated that during the majority of the time, he and Kelcie Brown (also Black) were assigned to work the more difficult, larger, and more burdensome machines, whereas non-Black employees were not. Complainant stated that when he arrived at work, he was assigned by either Walter Gorski or Tony Rolon, verifier, to the green room where the master mailer or bur machine was located.

Complainant stated that both machines required the assistance of a helper in lifting heavy materials and feeding the machine. Complainant asserted that neither he nor Kelcie Brown were afforded assistance, despite their repeated requests for help. According to Complainant, the green room was referred to as "the plantation," a term corroborated by two of Complainant's witnesses. One witness stated that she heard the green room also referred to as "fag room," and "pussy lip" room, attributing this to Complainant always being assigned there. Both Complainant and Kelcie Brown stated that, at the change of shifts, the evening supervisor Curtis Ifil(Black) or the verifier Gerard Ball(Black) observed that they had no help and immediately got someone to help them out. This assertion was corroborated by Mr. Ifil.

The investigation disclosed that Complainant and Kelcie Brown complained about the differential treatment and lack of help to Walter Gorski, Robert Moran, and Edward Hutchinson, who at that time was Respondent's EMO manager. During the investigation, Edward Hutchinson, who is a Black Jamaican, acknowledged the complaints and stated he spoke with Mr. Gorski about this and believed the issue was resolved. He referred Complainant back to Walter Gorski. Mr. Hutchinson stated that since Complainant did not come back to him he believed the matter was resolved. Nevertheless, other witnesses revealed the situation had not been corrected. Witnesses indicated that Complainant was regularly assigned to the green room and was not given assistance. These witnesses also stated that Respondent's other machine operators were rarely assigned to the green room, and when assigned were always given help. The following witnesses corroborated Complainant's claims regarding this issue: Kelcie Brown, machine operator; Curtis Ifil, assistant supervisor; Millie Martinez, machine operator; Karl Torres, machine operator; Carlos Infante, machine operator; and Rosa Burgess, mail handler.

Allegations pertaining to a hostile work environment based on race.

The investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to unlawful racial harassment and that Respondents maintained a race-based hostile work environment. During the pendency of the investigation, Complainant gave specific examples to support his allegation. Complainant alleged that Walter Gorski often referred to him as "nigger" and "boy." Additionally, Complainant stated that Mr. Gorski made racial comments that offended him. For example, Complainant stated that Walter Gorski told him "Black people are lazy;" "Asian people eat dogs;" and stated that "he would not allow his daughter to date a Black person and that if she did he would have nothing to do with her." Complainant stated that the comment about Asians offended him as he is half Asian. Complainant added that during one occasion when Mr. Gorski was speaking to a Black employee, Mr. Gorski told the employee "you all use to be in the back of the bus and now your in the front of the bus." Witnesses' statements confirmed that Mr. Gorski made these statements and referred to Complainant in this manner on a

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regular basis.

Carlos Infante, an Hispanic machine operator who worked under the supervision of Respondent Walter Gorski, stated that Mr. Gorski had a "dirty mouth," and specifically recalled him referring to Complainant as "you fucking nigger" in his presence. Mr. Infante stated that Mr. Gorski would often refer to Complainant as "boy" when he was annoyed at Complainant. Mr. Infante also stated that Mr. Gorski had no respect for female employees and often referred to the female employees as "bitches." Millie Martinez, an Hispanic machine operator who also worked under Gorski's supervision, corroborated these assertions. She stated that Gorski referred to Complainant as "nigger pussy lips" and other racially demeaning phrases "all the time." She recalled that this treatment upset Complainant and appeared to affect his appetite. Ms. Martinez recalled she once objected to a racially offensive comment made by another employee to Mr. Gorski, and Gorski responded by telling her to "get the fuck out and work," and later said "shut up if you don't like it, you old woman; we need a young chick here to have sex." Kelcie Brown, an African-American assistant supervisor, recalled hearing Mr. Gorski making a racist joke to the effect that "if a Black kid jumps on a bed, his head gets stuck to the roof" (referring to the hair like velcro).

Karl Torres, a Filipino machine operator also supervised by Gorski, recalled that he heard Walter Gorski refer to Complainant as "nigger," and "boy," and that he once stated to Complainant "you are my nigger." Mr. Torres also confirmed the comment about Asians, recalling that Mr. Gorski asked him if he ate dogs. Mr. Torres stated "I said nothing to him, I felt bad, I just let it go."

The investigation disclosed that Respondent Charles Ferrari, vice president of general services, was also overheard by several witnesses making racially offensive comments. Mr. Torres stated that he heard Mr. Ferrari chant over the intercom "we shall overcome" using an accent that was intended to mock Martin Luther King. During her interview, Millie Martinez stated she overheard Respondent Walter Gorski and Respondent Charles Ferrari making racially offensive comments in conversation. Specifically, she heard Mr. Ferrari refer to two newly hired Jamaican employees, Edward Hutchinson and Robert Hutton, and remark "those niggers, those Jamaicans, they are going to take us over but we are going to fuck them up". Ms. Martinez added that on another occasion she heard Mr. Ferrari tell someone on the floor "This is my house you slave. You stay there, I could talk whatever I want." Kelcie Brown overheard Mr. Ferrari speaking about golf to a Black employee and stating "you can be my caddy." Curtis Ifil reported that on one occasion he heard Mr. Ferrari speaking to a female Indian employee and referring to her as a "dot head." Mr. Ifil stated that the employee appeared to be upset by the comment. Additionally, Mr. Ifil stated that Mr. Ferrari mocked Jamaican employees, and constantly made comments about the food that Robert Hutton, a vice-president who is Jamaican, brought in to eat. According to Mr. Ifil, Mr. Ferrari stated "he's bringing that ox ass for everybody to eat".

Allegations pertaining to hostile environment harassment due to sexual orientation.

The investigation revealed sufficient evidence to support Complainant's allegations that he was subjected to a hostile work environment based on his sexual orientation. According to Complainant, the harassment began when Walter Gorski trained him on the morning shift. Complainant stated Mr. Gorski began calling him "faggot" and "pussy lips" on a regular basis in front of his co-workers, despite Complainant's objections. Complainant stated that as a result of this, co-workers Tony Rolon, Victor Morales, Pablo Velez, George Moreno, Millie Martinez, Miguel Peralta, Jairo Romero and Milton "Doe"(LNBF) began referring to him in the same manner.

Witnesses interviewed stated that Walter Gorski repeatedly referred to Complainant as "faggot," "homo.," and "pussy lips." Mr. Torres told the investigator that Gorski called complainant "fag" at least five times on some days, and often would laugh because he "thought it was a joke." The witness reported that he too was called a "fag" by Walter Gorski, which he initially laughed off until he learned the meaning of the term from co-workers. The witness stated he was then offended and told Mr. Gorski to stop. Thereafter, Mr. Gorski referred to him as "homo.," despite his objections. This witness informed the investigator that he was twice approached by Respondent Gorski during the course of the investigation in an effort to influence what he was going to tell the investigator. On one occasion, Mr. Gorski remarked to Torres "you're not going to hang me out to dry?" and warned him "don't forget who recommended you for the full time job here and maybe in a year Christmas is coming and there will be a bonus." The witness stated he interpreted this to mean that Mr. Gorski was trying to bribe him to lie.

Kelcie Brown stated that Complainant complained to him on more than one occasion that Mr. Gorski referred to him as a "fag." Mr. Brown stated that over a period of a few months, he observed that Complainant became very distressed about the work environment. Mr. Brown stated that Complainant complained that the employees were calling him "puta"(Spanish for whore). Mr. Infante stated Mr. Gorski sometimes ridiculed Complainant's clothing because Complainant dressed differently from others, once remarking to Complainant "you look like a faggot." Mr. Infante and Ms. Martinez reported that both Gorski and Ferrari constantly ridiculed Complainant's clothing. Ms. Martinez stated she heard Mr. Ferrari ridicule Complainant's clothing when he told him "don't you think those are woman's sneakers," and "those are women's clothes." Ferrari once remarked "Look at this fucking gay; look at the faggot, look how he dresses; Do you think those are women's sneakers". Several witnesses indicated that Ferrari frequently engaged in this kind of name calling.

At the fact-finding conference, Walter Gorski and Charles Ferrari were interviewed. Both Respondents denied making any of the comments that were attributed to them in the complaint.

Allegations pertaining to co-workers.

During the pendency of the investigation, co-workers Juan Rolon, Jorge Moreno, Victor Morales, Pablo Valdez, and Jairo Romero were interviewed. The investigation disclosed that Milton "Doe" (Inbf), named as a co-worker, did not work for Respondent. All of the remaining aforementioned co-workers, identified as contributing to Complainant's hostile environment harassment, denied the allegations attributed to them. However, other witnesses interviewed supported Complainant's allegations. Millie Martinez, Kelsey Brown, Curtis Ifil, Rosa Burgess, Karl Torres, and Carlos Infante all corroborated Complainant's allegations that these co-workers frequently directed disparaging and demeaning remarks at Complainant based on his sexual orientation. Additionally, the investigation revealed that the comments were made in the presence of both Walter Gorski and Charles Ferrari, who supported the discriminatory comments through their laughter and lack of action. There is substantial evidence that Complainant complained to Respondent's human resources department about sexual orientation discrimination in mid 2006, and raised these concerns again numerous times in the months that followed. One of the witnesses summed it up by stating "I don't know, you complained but they, management, did nothing."

Respondent asserted it conducted an investigation in response to a meeting Complainant had with human resource vice president Evelyn Miller on June 15, 2006 in which complainant complained about racial discrimination. Respondent denied that Complainant raised the issue of sexual orientation discrimination at this meeting. Respondent asserted that it found no evidence to support Complainant's specific allegations. Its investigation concluded that Mr. Ferrari and Mr. Gorski had "tolerated raw (but not racially tinged)" language among the employees. As a result, Respondent placed Corrective Action Notices in the personnel files of Ferrari and Gorski. In addition, Respondent delayed for six months Gorski's promotion to Assistant Vice President. The investigation revealed that Complainant had meetings and discussions with HR on November 27 and 30, 2006; December 19 and 28, 2006; and January 10 and 12, 2007. There is sufficient evidence that Complainant raised his concerns about sexual orientation discrimination at these subsequent meetings. Nevertheless, the race-based and sexual orientation-based hostile environment to which Complainant was subjected continued.

The Division's investigation found sufficient evidence that Complainant was subjected to a pervasive and ongoing hostile environment, often initiated and supported by Mr. Ferrari and Mr. Gorski. Several witnesses substantiated that Mr. Ferrari and Mr. Gorski participated in the continuous use of racially offensive language in the work environment as well as sexually offensive terms. Further, witness testimony confirmed that all the named co-workers, most of whom were not interviewed by Respondent, participated in the use of derogatory sexually offensive terms toward Complainant. Moreover, the investigation found that other employees were subjected to racially offensive comments that were not limited solely to Complainant's race.

Allegations pertaining to reprisal

The investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was discharged as a reprisal for complaining about acts protected by the LAD.

Specifically, Complainant stated that on August 8, 2007, Evelyn Miller, Respondent's vice president of human resources, and Carl Caminske, manager, told him that he was being discharged since Complainant was not happy working for Respondent and that he should go somewhere else where he would be happy. In its amended answer, Respondent denied retaliating against Complainant. Respondent confirmed that it discharged Complainant but provided no reason for its decision. Complainant asserted that his discharge resulted from his complaints of discriminatory conduct by Respondents.

The investigation revealed that aside from his previous complaints of discrimination, Complainant sent a letter of complaint to Geraldine Gallashaw, Respondent's Affirmative Action Officer, and Carl Caminske, on May 23, 2007. In the letter, Complainant informed that staff members from his department had sent him a video of a duck titled "Queer Duck: the not-very-straight facts," on Respondent's electronic system. Further, Complainant complained about his being groped by a female co-worker and being told "she was going to cut them off." Complainant complained to Carl Caminske about threats from a female employee, verbal threats made to an employee who cooperated in the investigation of Complainant's complaint, and utilization of Respondent's e-mail system to send Complainant an e-mail with derogatory language. Moreover, a witness stated he overheard Mr. Caminske saying to Complainant "I hear you went to Civil Rights what is this about?" According to the witness, Complainant did not say anything and Mr. Caminske told him "if you don't like it here, we'll give you a package and you can leave." The investigation showed that Respondent's failure to present any evidence that Complainant was terminated for a legitimate, non-discriminatory and non-retaliatory reason, when considered in light of the foregoing statements, is sufficient evidence to conclude that Respondents discharged Complainant for his continued complaints of discrimination.

ANALYSIS:

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. 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. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether

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further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218,226 (App.Div.1978). See also Frank v. Ivy Club, *supra*, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standards, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

In the instant case, the investigation disclosed that Complainant was subjected to hostile environment harassment due to his race and sexual orientation, and retaliated against for engaging in protected activity.

FINDING OF PROBABLE CAUSE:

It is, therefore, determined and found that **Probable Cause** exists to credit the allegations of the complaint.

7/23/09

Date



A handwritten signature in black ink, appearing to read 'Carlos Bellido', is written over a horizontal line.

CARLOS BELLIDO, ESQ.
ACTING DIRECTOR, DIVISION ON
CIVIL RIGHTS