

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
DIVISION ON CIVIL RIGHTS
DOCKET NO: EJ06WB-53110

**E.O., A MINOR, BY THE PARENT)
AND GUARDIAN, M.O., and)
CHINH Q. LE, DIRECTOR,)
DIVISION ON CIVIL RIGHTS,)**

COMPLAINANT,)

v.)

) **FINDING OF PROBABLE CAUSE**

**TFC PARTNERS, INC. dba)
NEWPORT SWIM FITNESS,)
ORLANDO PIZARRO,)
INDIVIDUALLY, JIM DELAUNAY,)
INDIVIDUALLY, GINA BUCCI,)
INDIVIDUALLY,)**

RESPONDENTS.)

Consistent with a Verified Complaint filed on April 2, 2007, the above-named respondents have been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.) and specifically within the meaning of N.J.S.A. 10:5-4, and 10:5-12 (a) and (d) because of sex and reprisal.

Chinh Q. Le is the 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 alleged that her supervisor, Respondent Orlando Pizarro, subjected her to hostile environment sexual harassment. Complainant alleged that Respondent Jim Delaunay, General Manager, suspended her in reprisal for reporting the sexual harassment. Complainant alleged that Respondent Gina Bucci, Vice President of Human Resources, subsequently terminated her in reprisal for reporting the sexual harassment. Complainant alleges that Respondent TFC Partners, Inc., dba Newport Swim Fitness (Respondent TFC) is responsible for the actions of the individually-named Respondents.

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SUMMARY OF RESPONSE:

Respondents denied discriminating against Complainant for any unlawful reason including sex and reprisal. Respondent Pizarro denied subjecting Complainant to hostile environment sexual harassment. Respondents Bucci, Delaunay, and TFC contended that Complainant's allegations of sexual harassment were promptly investigated and could not be corroborated. Respondents Delaunay and TFC contended that they suspended Complainant during the pendency of the internal investigation to maintain the integrity of the investigation. Respondents Bucci and TFC contended that Complainant was subsequently discharged because she refused to cooperate with the internal investigation.

BACKGROUND:

Respondent TFC is a health club located in Jersey City, Hudson County, New Jersey. Respondent Pizarro was employed as Department Head of the Pool and Lifeguards until January 2007, at which time he became the Manager on Duty. Respondent Delaunay was employed as General Manager. Respondent Bucci was employed as Vice President of Human Resources.

Complainant, Evangeline O'Neill, was 16 years old when this verified complaint was filed. As such, her mother, Marie O'Neill, filed on her behalf. Complainant was hired by Respondent TFC as a Lifeguard in July 2006. Respondent TFC discharged Complainant on February 28, 2007.

SUMMARY OF INVESTIGATION:

On April 2, 2007, Complaint and three other former employees of Respondent TFC filed complaints with the Division on Civil Rights alleging that Respondent Pizarro sexually harassed them, and that they were subsequently suspended and discharged in reprisal for complaining about the sexual harassment. In addition to Complainant, Evangeline O'Neill, the other three complainants are Fiona O'Neill (docket number EJ06WB-53119), Erica Ramos (docket number EJ06WB-53113), and Naomi O'Neill (docket number EJ06WB-53114).¹ Complainant, Fiona O'Neill, and Naomi O'Neill are sisters. Erica Ramos is not related to them. All four individuals were employed by Respondent TFC during the time period in question.

¹ The Division closed its investigations into the complaints of Erica Ramos and Naomi O'Neill on April 15, 2008 and September 29, 2008, respectively, issuing Findings of No Probable Cause in both matters. In connection with this Finding, the Director shall issue an Order to Show Cause why the Division should not reopen its investigation into these two matters for reconsideration, in light of the conclusions reached herein.

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The Division's investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to sexual harassment by Respondent Pizarro that was sufficiently severe or pervasive to create a hostile work environment, and that she was subsequently suspended and discharged in reprisal for engaging in an activity protected by the New Jersey Law Against Discrimination (LAD).

Complainant, who was a minor when employed by Respondent TFC, but is now over the age of 18, alleged in a verified complaint and during the course of the investigation that Respondent Pizarro would make comments to her, such as "oh, that member has nice titties." She stated that he also said, "You know who has nice titties? Erica (Ramos), I'd love to put my face between them." Complainant further stated that Respondent Pizarro would touch her leg and say "oh baby," and would grab her from behind and say, "I like girls with meat." She stated that he gave her a note which read, "normal equals six inches, hard equals twelve inches and it's four fingers wide," then said, "my measurements, if anyone is interested." Complainant stated that Respondent Pizarro told her, "you have a gap in your ass," and "I can make a girl squirm and squirt like a squirrel," and "I have the magic fingers." She stated that on one occasion Respondent Pizarro spread her legs apart and began winding his body and stated, "this is my favorite position."

The Division's investigation revealed that the Complainant's allegations were substantially corroborated by other female employees. For instance, Erica Ramos, who also filed a verified complaint, stated that Respondent Pizarro told her that her "breasts and ass overshadow" her. Ramos, who was employed by Respondent as a Front Desk Receptionist, stated that Respondent Pizarro talked to other employees about her breasts.

Fiona O'Neill alleged in a verified complaint that between August 2006 and January 26, 2007, Respondent Pizarro subjected her to sexually offensive comments. Fiona O'Neill stated that when he saw her reading Cosmopolitan magazine, Respondent Pizarro said, "I've done all those sexual positions in that magazine." She stated that Respondent Pizarro said, "my penis is so large that I have to tuck it between my butt cheeks." She stated that Respondent Pizarro told her of his sexual encounters with female members of Respondent TFC's facility.

Fiona O'Neill further alleged that she witnessed Respondent Pizarro spread Complainant's legs apart and make sexual gestures saying, "this is my favorite position."

Naomi O'Neill stated and also alleged in a verified complaint with the Division that Respondent Pizarro referred to a female co-worker as a "whore" and a "slut," boasted to other employees that he was sleeping with her, and made sexual remarks to her such as, "my penis is abnormally huge and I have to tuck it between my thighs." Naomi O'Neill further stated that Respondent Pizarro referred to his penis as "the snake."

During the Division's Fact Finding Conference, it was disclosed that on January 18, 2007,

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Erica Ramos told Respondent Jim Delaunay, General Manager, that Respondent Pizarro was subjecting her to unwelcome sexual comments and inappropriate behavior. Respondent Delaunay told Ramos to call the Vice President of Human Resources, Respondent Gina Bucci. On January 24, 2007, Ramos called Respondent Bucci and advised her of the sexual harassment. In its answer to the verified Complainant, Respondent TFC stated that Respondent Bucci "asked Ramos to write her allegations down and to provide any dates and witnesses that could corroborate her allegations regarding Pizarro." Respondent Bucci then made arrangements to meet with Ramos and any other employees who had similar complaints.

On January 26, 2007, Respondent Bucci met with Ramos. Complainant and her two sisters, Fiona O'Neill and Naomi O'Neill, also attended the meeting. There is no dispute that all four employees complained that Respondent Pizarro was subjecting them to sexual harassment. Complainant and Ramos gave Respondent Bucci written statements at that time. Respondent submitted those statements to the Division.

The written statement of Complainant stated in part:

"One day while we were working at the front desk, a lifeguard and I were givin (sic) a sheet of paper from Orlando Pizarro (sic) stating the measurements of his penis. The exact words on the paper were (normal = 6", hard = 12", and four fingers wide). He also told me on two different occasions while I was folding towels at the front desk that I had a gap in my ass. On the first occasion he said "but thats (sic) a good thing because that means you have hips: and on the second occasion he said "but thats (sic) a bad thing because that means you have no hips".

Also one day as I was working as a lifeguard in the pool area he started talking to my (sic) about sex positions he's done and then grabbed both my legs and put them in the air. I told him to stop immediately not just because it was very uncomfortable for me but also because it was right on the lifeguarding chair where members could see."

Also one of us has had to hear of his sexual encounters with members of Newport Gym and stories of how he has to hide his penis between is butt cheeks because he was born abnomally (sic) large. One story among many was how he got an erection during a swimming competition and it was so massive that the crowd went wild according to him. We've asked him to stop telling us these stories because it makes us uncomfortable but he continues."

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Ramos' written statement made similar allegations related to Respondent Pizarro's conduct toward her.

At the Division's Fact Finding Conference, Fiona O'Neill confirmed that she corroborated her co-workers' allegations of sexual harassment during the above-referenced meeting with Respondent Bucci. Among other things, she said she reported that Respondent Pizarro talked about the size of his penis and about having an erection during a swimming competition, and that she witnessed Respondent Pizarro pulling Complainant's legs apart, going between her legs and saying, "this is my favorite position."

Also at the Fact Finding Conference, Respondent Bucci explained that after listening to the complaints, she informed the four women that she had to investigate the matter. Respondent Bucci stated that the four women gave her a list of witnesses. Respondent Bucci stated that after this meeting, she met with Respondent Delaunay and discussed what she had heard. Respondents Bucci and Delaunay said that they promptly investigated the allegations.

Respondents Bucci and Delaunay stated that on January 30, 2007, they met with Respondent Pizarro. Respondent Pizarro allegedly denied all of the allegations, but stated that the previous day, Fiona O'Neill's boyfriend came to the facility and threatened him. Respondent Bucci and Delaunay also interviewed several witnesses. Respondent TFC asserted that the witnesses failed to support the allegations against Respondent Pizarro.

Respondent Bucci submitted copies of her internal interview notes and investigative report to the Division, and indeed according to those notes, some witnesses did not corroborate some of the allegations made against Respondent Pizarro. For instance, according to the interview notes, Hassan Veal—an individual whom Complainant said was present when Respondent Pizarro allegedly grabbed her legs and held them in the air—denied witnessing that or any other occasion when Respondent Pizarro inappropriately touched female employees. A few other employees who were interviewed disputed certain accounts of Respondent Pizarro's accusers on tangential issues, such as whether or how Fiona O'Neill's boyfriend threatened Respondent Pizarro, or whether Respondent Pizarro ever made veiled threats to the women whom he had alleged sexually harassed.

However, Respondent Delaunay's notes from his interview with another employee, Luz Buitrago, did corroborate some of the allegations against Respondent Pizarro. Those notes stated that Buitrago told Respondent Delaunay that Complainant asked Buitrago if she remembered witnessing Respondent Pizarro writing down "his measurements" and handing them to Complainant. Respondent Delaunay's notes indicate that Buitrago did recall Respondent Pizarro writing something on an index card that he gave to Complainant. She stated that Complainant then handed it to Buitrago, telling her, "It's Orlando's measurements." Buitrago said that the card had a couple of numbers with inch marks following the numbers. Respondent Pizarro then allegedly ripped up the card and threw it away. Respondent Delaunay's notes went on to state, "Although Luz does not remember what Orlando said, she does recall that he insinuated that it to be true."

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In addition to her typed report, Respondent Bucci submitted handwritten notes to the Division. One such note, dated February 13, 2007, involved an interview with employee, Erica Reyes. The notes indicated that Reyes stated in an interview that Complainant once showed her provocative pictures Respondent Pizarro had on his cell phone of her (Reyes) in her bathing suit. Respondent Bucci noted that Reyes "was upset that he had pictures of her." Respondent Bucci's notes on this issue conclude: "When we questioned Orlando he denied pictures."

In sum, the Division's investigation disclosed sufficient evidence to support a reasonable suspicion that the Complainant was subjected to hostile environment sexual harassment.² The evidence collected by Respondent TFC's own internal investigation show that four individuals complained of and corroborated each other's allegations of sexual harassment. Although interview notes from one witness, Hassan Veal, stated that he did not observe Respondent Pizarro improperly touch female staff, a second witness interviewed at that time, Luz Buitrago, supported at least some of the allegations, and a third, Erica Reyes, stated that she was disturbed by provocative photos of her in a bathing suit that Respondent Pizarro kept in his cell phone. Yet, despite this evidence, Respondent TFC determined that it was unable to obtain enough information to reach a conclusion regarding the allegations of sexual harassment. Although Respondent TFC eventually discharged Respondent Pizarro, it claims it did so for reasons unrelated to these allegations.

The Division's investigation also disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to reprisal within the meaning of the LAD. On February 1, 2007, Respondent Delaunay informed Complainant, Fiona O'Neill, Naomi O'Neill, and Erica Ramos that they were being suspended without pay pending the internal investigation. At the Fact Finding Conference, Respondents Delaney and Bucci stated they decided to suspend these four individuals because they did not want the investigation tainted by Complainant and the others speaking to witnesses, and because Fiona O'Neill's boyfriend threatened Respondent Pizarro. Respondent Pizarro was also suspended without pay.

The investigation disclosed that following their suspension, Complainant and the other women sought legal advice. They retained the firm of Drummond & Crawford, P.C. on February 12, 2007. Their attorney, Joann Squillace, subsequently contacted Respondent Bucci and stated that her clients would cooperate with the investigation by attending a meeting scheduled by Respondent

² The Division's investigation revealed that on January 30, 2007, Complainant, Fiona O'Neill, Naomi O'Neill, and Erica Ramos filed a police report with the Jersey City Police Department charging Respondent Pizarro with sexual contact. Respondents Bucci and Delaunay were made aware of the police report and were also aware that a detective came to the facility on January 31, 2007 looking for Respondent Pizarro. A representative of the Jersey City Police Department informed the Division that the Police Department ultimately concluded its investigation with a finding that the alleged conduct did not rise to an actionable level because there was no allegation of "criminal sexual conduct," and because none of the alleged victims were under 14 years of age.

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TFC to discuss the allegations, so long as she could be present. Respondent TFC refused to allow Squillace to be present. In a communication to Complainant, dated February 15, 2007, Respondent Bucci stated that "this is an internal investigation in which private attorneys may not participate."

Squillace issued a response letter to Respondent Bucci, dated February 24, 2007, in which she stated that she needed to be present during any meetings with her clients, one of whom was a minor at the time. Squillace also encouraged Respondent TFC to have its attorney present as well. The letter concluded with Squillace stating that her clients "are willing, ready and available to return to work immediately and desire to do so."

At the Fact Finding Conference, Respondent Bucci confirmed that she would not permit Squillace to accompany her clients to any meetings. Instead, on February 28, 2007, Respondent TFC discharged Complainant, Fiona O'Neill, Naomi O'Neill, and Erica Ramos, allegedly for refusing to cooperate with its investigation. Respondent Pizarro was also discharged. Respondent TFC stated that although it did not have enough information to conclude its investigation into the allegations of sexual harassment, Respondent Pizarro was discharged for failure to show good judgment as a manager, for reasons unrelated to this investigation.

The evidence cited above refutes Respondent TFC's reason for discharging Complainant and the other women who complained of sexual harassment—that they refused to cooperate in the investigation. Specifically, the evidence disclosed that all four women provided specific examples of instances where Respondent Pizarro sexually harassed them. Complainant and one of the other women gave written statements. Their attorney told Respondent Bucci that her clients would meet with Respondents, provided she be allowed to be present, but Respondent Bucci refused to allow her to be present. Based on these facts, there is sufficient evidence to support a reasonable suspicion that Respondent TFC's true reason for suspending and later discharging Complainant, Fiona O'Neill, Naomi O'Neill, and Erica Ramos was because they complained of sexual harassment.

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 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 standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

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Here, the investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to hostile environment sexual harassment by Respondent Pizarro. The investigation disclosed that the sexual harassment was sufficiently severe and pervasive that a reasonable person in Complainant's position would find that her work environment had been rendered hostile and abusive. As Respondent Pizarro was Complainant's supervisor, there is sufficient evidence to suggest that Respondent TFC should be liable for any damages that flow from Respondent Pizarro's unlawful conduct. Respondent appears to have delegated oversight of the pool area to Pizarro, and Pizarro used that authority to subject subordinate employees to his unlawful conduct. There is further evidence of Respondent's negligence in failing to have in place an effective system for preventing harassment of its employees. The investigation suggests Respondent lacked sufficient monitoring mechanisms to inform itself of Pizarro's conduct, much of which appears to have taken place in an open and boastful manner.

Additionally, there is sufficient evidence that Respondent Pizarro is liable for aiding and abetting Respondent TFC's violation of the LAD. As Complainant's supervisor, Pizarro was responsible for ensuring employees under his supervision were free from sexual harassment. By actively harassing his subordinates instead of protecting them from harassment, Pizarro has aided and abetted the hostile work environment of Complainant.

The investigation further disclosed that at least by January 18, 2007, Respondent TFC knew or should have known of Respondent Pizarro's alleged sexual harassment, in part because other women reported sexual harassment by Respondent Pizarro on that date, and because they later filed a police report regarding the sexual harassment. The investigation revealed sufficient evidence to support a reasonable suspicion that once it became aware of the alleged conduct, Respondent TFC failed to take appropriate actions to investigate the matter and protect its employees, including Complainant.

Finally, the investigation disclosed sufficient evidence to support a reasonable suspicion that once Complainant reported the sexual harassment, Respondents TFC, Delaunay, and Bucci subjected her to reprisal by suspending and then subsequently discharging her. Respondent TFC purportedly suspended Complainant without pay in order to avoid tainting its internal investigation, and because Fiona O'Neill's boyfriend allegedly threatened Respondent Pizarro. However, the practice of suspending, without pay, any employee who alleges sexual harassment has a serious chilling effect on, and constitutes a form of punishment for, those individuals who report such claims. Its appropriateness here is questionable.

Moreover, although Respondent TFC alleged that it discharged Complainant for failure to cooperate with its internal investigation, there is sufficient evidence to suggest otherwise. Complainant's attorney issued a letter to Respondent Bucci stating that her clients—Complainant, Fiona O'Neill, Naomi O'Neill, and Erica Ramos—were eager to cooperate with the investigation, and making a reasonable request that she be able to participate in any meeting that included her clients, one of whom was a minor at the time. Four days later, Respondent TFC terminated

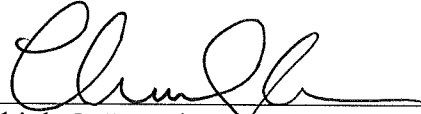
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Complainant's employment. It is also instructive that the suspension did not occur at the start of the investigation, but rather the day after Respondent was informed that Complainant and the other women complained to the police about Pizarro's harassment. In addition to Respondent TFC, Respondents Delaunay and Bucci, who took part in this decision, are individually liable for unlawful reprisals.

FINDING OF PROBABLE CAUSE:

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint. The Division previously issued, in error, Findings of No Probable cause in two of the three other related investigations, *Naomi O'Neill v. TFC Partners, Inc.*, et al. (docket number EJ06WB-53114) and *Erica Ramos v. TFC Partners, Inc.*, et al. (docket number EJ06WB-53113). In connection with this Finding of Probable Cause, the Director shall issue an Order to Show Cause why the Division should not reopen the investigation into those two matters for reconsideration, in light of this Finding.

04/28/10
Date


Chinh Q. Le, Director
Division on Civil Rights

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NUMBER: EJ06WB-53110

E.O., A MINOR, BY THE
PARENT AND GUARDIAN, M.O.,

COMPLAINANT,

-vs-

TFC PARTNERS, INC. dba
NEWPORT SWIM FITNESS;
ORLANDO PIZARRO,
INDIVIDUALLY; JIM DELAUNAY
INDIVIDUALLY; and GINA BUCCI,
INDIVIDUALLY,

RESPONDENTS.

AMENDED VERIFIED COMPLAINT

Received and Recorded

Date: 4/27/10

Department of Law and Public Safety

Division on Civil Rights

By: *[Signature]*

I, Chinh Q. Le, Esq., Director of the New Jersey Division on Civil Rights, hereby
intervene as a Complainant in the above referenced matter pursuant to N.J.A.C. 13:4-2.2 (e) and
hereby amend the caption of the Verified Complainant, received and filed on April 2, 2007, to
read as follows:

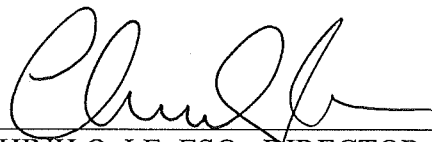
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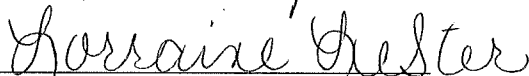
RESPONDENTS.



CHINH Q. LE, ESQ., DIRECTOR
DIVISION ON CIVIL RIGHTS

Sworn to and subscribed before me

on this 27th day of April, 2010.



NOTARY PUBLIC OF NEW JERSEY

LORRAINE F. LE SUEUR
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 2/25/2013

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
DIVISION ON CIVIL RIGHTS
DOCKET NO: EJ06WB-53119

**FIONA O'NEILL, and
CHINH Q. LE, DIRECTOR,
DIVISION ON CIVIL RIGHTS,**

COMPLAINANT

v.

**TFC PARTNERS, INC. dba
NEWPORT SWIM FITNESS;
ORLANDO PIZARRO,
INDIVIDUALLY; JIM DELAUNAY,
INDIVIDUALLY; and GINA BUCCI,
INDIVIDUALLY,**

RESPONDENTS.

FINDING OF PROBABLE CAUSE

Consistent with a Verified Complaint filed on April 2, 2007, the above-named respondents have been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.) and specifically within the meaning of N.J.S.A. 10:5-4, and 10:5-12 (a) and (d), because of sex and reprisal.

Chinh Q. Le is the 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 alleged that her supervisor, Respondent Orlando Pizarro, subjected her to hostile environment sexual harassment. Complainant alleged that Respondent Jim Delaunay, General Manager, suspended her in reprisal for reporting the sexual harassment. Complainant alleged that Respondent Gina Bucci, Vice President of Human Resources, subsequently terminated her in reprisal for reporting the sexual harassment. Complainant alleges that Respondent TFC Partners, Inc., dba Newport Swim Fitness (Respondent TFC) is responsible for the actions of the individually-named Respondents.

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SUMMARY OF RESPONSE:

Respondents denied discriminating against Complainant for any unlawful reason including sex and reprisal. Respondent Pizarro denied subjecting Complainant to hostile environment sexual harassment. Respondents Bucci, Delaunay, and TFC contended that Complainant's allegations of sexual harassment were promptly investigated and could not be corroborated. Respondents Delaunay and TFC contended that they suspended Complainant during the pendency of the internal investigation to maintain the integrity of the investigation. Respondents Bucci and TFC contended that Complainant was subsequently discharged because she refused to cooperate with the internal investigation.

BACKGROUND:

Respondent TFC is a health club located in Jersey City, Hudson County, New Jersey. Respondent Pizarro was employed as Department Head of the Pool and Lifeguards until January 2007, at which time he became the Manager on Duty. Respondent Delaunay was employed as General Manager. Respondent Bucci was employed as Vice President of Human Resources.

Complainant was hired by Respondent TFC as a Lifeguard in July 2006. Respondent TFC discharged complainant on February 28, 2007.

SUMMARY OF INVESTIGATION:

On April 2, 2007, Complainant and three other former employees of Respondent TFC filed related complaints with the Division on Civil Rights (Division) alleging that Respondent Pizarro sexually harassed them, and that they were suspended and subsequently discharged in reprisal for complaining about the sexual harassment. In addition to Complainant, the other three individual complainants are Evangeline (Eve) O'Neill (docket number EJ06WB-53110),¹ Erica Ramos (docket number EJ06WB-53113), and Naomi O'Neill (docket number EJ06WB-53114).² Complainant, Eve O'Neill, and Naomi O'Neill are sisters. Erica Ramos is not related to them. All four individuals were employed by Respondent TFC during the time period in question.

¹Eve O'Neill was a minor at the time of filing the verified complaint. Accordingly, her mother, Maria O'Neill, filed as her parent and guardian, and they were identified in the complaint as E.O., minor, by the parent and guardian M.O.

² The Division closed its investigations into the complaints of Erica Ramos and Naomi O'Neill on April 15, 2008 and September 29, 2008, respectively, issuing Findings of No Probable Cause in both matters. In connection with this Finding, the Director shall issue an Order to Show Cause why the Division should not reopen its investigation into these two matters for reconsideration, in light of the conclusions reached herein.

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In her verified complaint, Complainant alleged that between August 2006 and January 26, 2007, Respondent Pizarro subjected her and other female employees to hostile environment sexual harassment in the form of repeated, sexually inappropriate comments and actions. Among other examples of such conduct, she alleged: (1) that when Respondent Pizarro saw her reading Cosmopolitan magazine, he claimed to have "done all those sexual positions in that magazine"; (2) that Respondent Pizarro told her, "my penis is so large that I have to tuck it between my butt cheeks"; (3) that Respondent Pizarro subjected her to descriptions of his alleged sexual encounters with female members of Respondent TFC's facility; and (4) that she witnessed Respondent Pizarro spread a female co-worker's legs apart and make sexual gestures and comments to the effect of, "this is my favorite position." (It was disclosed during the Division's investigation that the female co-worker in question was Complainant's sister, Eve O'Neill, who at the time was 16 years old.)

The Division's investigation revealed that the Complainant's allegations were substantially corroborated by other female employees. For instance, Erica Ramos, who also filed a verified complaint, stated that Respondent Pizarro told her that her "breasts and ass overshadow" her. Ramos, who was employed by Respondent as a Front Desk Receptionist, stated that Respondent Pizarro talked to other employees about her breasts.

Naomi O'Neill stated and also alleged in a verified complaint with the Division that Respondent Pizarro referred to a female co-worker as a "whore" and a "slut," boasted to other employees that he was sleeping with her, and made sexual remarks to her such as, "my penis is abnormally huge and I have to tuck it between my thighs." Naomi O'Neill further stated that Respondent Pizarro referred to his penis as "the snake."

Eve O'Neill, who was a minor when employed by Respondent TFC, alleged in a verified complaint with the Division and stated during the course of the investigation that Respondent Pizarro would make comments to her such as, "oh, that member has nice titties." She stated that he also said, "You know who has nice titties? Erica (Ramos). I'd love to put my face between them." Eve O'Neill further stated that Respondent Pizarro would touch her leg and say, "oh baby," and grab her from behind and say, "I like girls with meat." She stated that he gave her a note which read, "normal equals six inches, hard equals twelve inches, and it's four fingers wide," then told her that the contents of the note contained "my measurements, if anyone is interested." Eve O'Neill stated that Respondent Pizarro told her, "you have a gap in your ass," and, "I can make a girl squirm and squirt like a squirrel," and, "I have the magic fingers." She stated that on one occasion Respondent Pizarro spread her legs apart and began winding his body and stated, "this is my favorite position."

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During the Division's Fact Finding Conference, it was disclosed that on January 18, 2007, Erica Ramos told Respondent Jim Delaunay, General Manager, that Respondent Pizarro was subjecting her to unwelcome sexual comments and inappropriate behavior. Respondent Delaunay told Ramos to call the Vice President of Human Resources, Respondent Gina Bucci. On January 24, 2007, Ramos called Respondent Bucci and advised her of the sexual harassment. In its answer to the verified Complainant, Respondent TFC stated that Respondent Bucci "asked Ramos to write her allegations down and to provide any dates and witnesses that could corroborate her allegations regarding Pizarro." Respondent Bucci then made arrangements to meet with Ramos and any other employees who had similar complaints.

On January 26, 2007, Respondent Bucci met with Ramos. Complainant and her two sisters, Naomi O'Neill and Eve O'Neill, also attended the meeting. There is no dispute that all four employees complained that Respondent Pizarro was subjecting them to sexual harassment. Ramos and Eve O'Neill gave Respondent Bucci written statements at that time. Respondent submitted those statements to the Division.

The written statement of Eve O'Neill stated in part:

"One day while we were working at the front desk, a lifeguard and I were givin [sic] a sheet of paper from Orlando Pizarro [sic] stating the measurements of his penis. The exact words on the paper were (normal = 6", hard = 12", and four fingers wide). He also told me on two different occasions while I was folding towels at the front desk that I had a gap in my ass. On the first occasion he said "but thats [sic] a good thing because that means you have hips: and on the second occasion he said "but thats [sic] a bad thing because that means you have no hips".

Also one day as I was working as a lifeguard in the pool area he started talking to my [sic] about sex positions he's done and then grabbed both my legs and put them in the air. I told him to stop immediately not just because it was very uncomfortable for me but also because it was right on the lifeguarding chair where members could see."

Also one of us has had to hear of his sexual encounters with members of Newport Gym and stories of how he has to hide his penis between is butt cheeks because he was born abnomally [sic] large. One story among many was how he got an erection during a swimming competition and it was so massive that the crowd went wild according to him. We've asked him to stop telling us these stories because it makes us uncomfortable but he continues."

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Ramos' written statement made similar allegations related to Respondent Pizarro's conduct toward her.

At the Division's Fact Finding Conference, the Complainant confirmed that she corroborated her co-workers' allegations of sexual harassment during the above-referenced meeting with Respondent Bucci. Among other things, Complainant said she reported that Respondent Pizarro talked about the size of his penis and about having an erection during a swimming competition, and that she witnessed Respondent Pizarro pulling her sister's legs apart, going between her legs and saying, "this is my favorite position."

Also at the Fact Finding Conference, Respondent Bucci explained that after listening to the complaints, she informed the four women that she had to investigate the matter. Respondent Bucci stated that the four women gave her a list of witnesses. Respondent Bucci stated that after this meeting, she met with Respondent Delaunay and discussed what she had heard. Respondents Bucci and Delaunay said that they promptly investigated the allegations.

Respondents Bucci and Delaunay stated that on January 30, 2007, they met with Respondent Pizarro. Respondent Pizarro allegedly denied all of the allegations, but stated that the previous day, Complainant's boyfriend came to the facility and threatened him. Respondent Bucci and Delaunay also interviewed several witnesses. Respondent TFC asserted that the witnesses failed to support the allegations against Respondent Pizarro.

Respondent Bucci submitted copies of her internal interview notes and investigative report to the Division, and indeed according to those notes, some witnesses did not corroborate some of the allegations made against Respondent Pizarro. For instance, according to the interview notes, Hassan Veal—an individual whom Eve O'Neill said was present when Respondent Pizarro allegedly grabbed her legs and held them in the air—denied witnessing that or any other occasion when Respondent Pizarro inappropriately touched female employees. A few other employees who were interviewed disputed certain accounts of Respondent Pizarro's accusers on tangential issues, such as whether or how Complainant's boyfriend threatened Respondent Pizarro, or whether Respondent Pizarro ever made veiled threats to the women whom he had alleged sexually harassed.

However, Respondent Delaunay's notes from his interview with another employee, Luz Buitrago, did corroborate some of the allegations against Respondent Pizarro. Those notes stated that Buitrago told Respondent Delaunay that Eve O'Neill asked Buitrago if she remembered witnessing Respondent Pizarro writing down "his measurements" and handing them to Eve. Respondent Delaunay's notes indicate that Buitrago did recall Respondent Pizarro writing something on an index card that he gave to Eve O'Neill. She stated that Eve then handed it to Buitrago, telling her, "It's Orlando's measurements." Buitrago said that the card had a couple of numbers with inch marks following the numbers. Respondent Pizarro then allegedly ripped up the card and threw it away. Respondent Delaunay's notes went on to state, "Although Luz does not remember what Orlando said, she does recall that he insinuated that it to be true."

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In addition to her typed report, Respondent Bucci submitted handwritten notes to the Division. One such note, dated February 13, 2007, involved an interview with employee, Erica Reyes. The notes indicated that Reyes stated in an interview that Eve O'Neill once showed her provocative pictures Respondent Pizarro had on his cell phone of her (Reyes) in her bathing suit. Respondent Bucci noted that Reyes "was upset that he had pictures of her." Respondent Bucci's notes on this issue conclude: "When we questioned Orlando he denied pictures."

In sum, the Division's investigation disclosed sufficient evidence to support a reasonable suspicion that the Complainant was subjected to hostile environment sexual harassment.³ The evidence collected by Respondent TFC's own internal investigation show that four individuals complained of and corroborated each other's allegations of sexual harassment. Although interview notes from one witness, Hassan Veal, stated that he did not observe Respondent Pizarro improperly touch female staff, a second witness interviewed at that time, Luz Buitrago, supported at least some of the allegations, and a third, Erica Reyes, stated that she was disturbed by provocative photos of her in a bathing suit that Respondent Pizarro kept in his cell phone. Yet, despite this evidence, Respondent TFC determined that it was unable to obtain enough information to reach a conclusion regarding the allegations of sexual harassment. Although Respondent TFC eventually discharged Respondent Pizarro, it claims it did so for reasons unrelated to these allegations.

The Division's investigation also disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to reprisal within the meaning of the LAD. On February 1, 2007, Respondent Delaunay informed Complainant, Eve O'Neill, Naomi O'Neill, and Erica Ramos that they were being suspended without pay pending the internal investigation. At the Fact Finding Conference, Respondents Delaney and Bucci stated they decided to suspend these four individuals because they did not want the investigation tainted by Complainant and the others speaking to witnesses, and because Complainant's boyfriend threatened Respondent Pizarro. Respondent Pizarro was also suspended without pay.

The investigation disclosed that following their suspension, Complainant and the other women sought legal advice. They retained the firm of Drummond & Crawford, P.C. on February 12, 2007. Their attorney, Joann Squillace, subsequently contacted Respondent Bucci and stated that her clients would cooperate with the investigation by attending a meeting scheduled by Respondent TFC to discuss the allegations, so long as she could be present. Respondent TFC refused to allow

³ The Division's investigation revealed that on January 30, 2007, Complainant, Eve O'Neill, Naomi O'Neill, and Erica Ramos filed a police report with the Jersey City Police Department charging Respondent Pizarro with sexual contact. Respondents Bucci and Delaunay were made aware of the police report and were also aware that a detective came to the facility on January 31, 2007 looking for Respondent Pizarro. A representative of the Jersey City Police Department informed the Division that the Police Department ultimately concluded its investigation with a finding that the alleged conduct did not rise to an actionable level because there was no allegation of "criminal sexual conduct," and because none of the alleged victims were under 14 years of age.

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Squillace to be present. In a communication to Complainant, dated February 15, 2007, Respondent Bucci stated that “this is an internal investigation in which private attorneys may not participate.”

Squillace issued a response letter to Respondent Bucci, dated February 24, 2007, in which she stated that she needed to be present during any meetings with her clients, one of whom was a minor at the time. Squillace also encouraged Respondent TFC to have its attorney present as well. The letter concluded with Squillace stating that her clients “are willing, ready and available to return to work immediately and desire to do so.”

At the Fact Finding Conference, Respondent Bucci confirmed that she would not permit Squillace to accompany her clients to any meetings. Instead, on February 28, 2007, Respondent TFC discharged Complainant, Eve O’Neill, Naomi O’Neill, and Erica Ramos, allegedly for refusing to cooperate with its investigation. Respondent Pizarro was also discharged. Respondent TFC stated that although it did not have enough information to conclude its investigation into the allegations of sexual harassment, Respondent Pizarro was discharged for failure to show good judgment as a manager, for reasons unrelated to this investigation.

The evidence cited above refutes Respondent TFC’s reason for discharging Complainant and the other women who complained of sexual harassment—that they refused to cooperate in the investigation. Specifically, the evidence disclosed that all four women provided specific examples of instances where Respondent Pizarro sexually harassed them. Two of the women gave written statements. Their attorney told Respondent Bucci that her clients would meet with Respondents, provided she be allowed to be present, but Respondent Bucci refused to allow her to be present. Based on these facts, there is sufficient evidence to support a reasonable suspicion that Respondent TFC’s true reason for suspending and later discharging Complainant, Eve O’Neill, Naomi O’Neill, and Erica Ramos was because they complained of sexual harassment.

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 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 standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

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Here, the investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant was subjected to hostile environment sexual harassment by Respondent Pizarro. The investigation disclosed that the sexual harassment was sufficiently severe and pervasive that a reasonable person in Complainant's position would find that her work environment had been rendered hostile and abusive. As Respondent Pizarro was Complainant's supervisor, there is sufficient evidence to suggest that Respondent TFC should be liable for any damages that flow from Respondent Pizarro's unlawful conduct. Respondent appears to have delegated oversight of the pool area to Pizarro, and Pizarro used that authority to subject subordinate employees to his unlawful conduct. There is further evidence of Respondent's negligence in failing to have in place an effective system for preventing harassment of its employees. The investigation suggests Respondent lacked sufficient monitoring mechanisms to inform itself of Pizarro's conduct, much of which appears to have taken place in an open and boastful manner.

Additionally, there is sufficient evidence that Respondent Pizarro is liable for aiding and abetting Respondent TFC's violation of the LAD. As Complainant's supervisor, Pizarro was responsible for ensuring employees under his supervision were free from sexual harassment. By actively harassing his subordinates instead of protecting them from harassment, Pizarro has aided and abetted the hostile work environment of Complainant.

The investigation further disclosed that at least by January 18, 2007, Respondent TFC knew or should have known of Respondent Pizarro alleged sexual harassment, in part because other women reported sexual harassment by Respondent Pizarro on that date, and because they later filed a police report regarding the sexual harassment. The investigation revealed sufficient evidence to support a reasonable suspicion that once it became aware of the alleged conduct, Respondent TFC failed to take appropriate actions to investigate the matter and protect its employees, including Complainant.

Finally, the investigation disclosed sufficient evidence to support a reasonable suspicion that once Complainant reported the sexual harassment, Respondents TFC, Delaunay, and Bucci subjected her to reprisal by suspending and then subsequently discharging her. Respondent TFC purportedly suspended Complainant without pay in order to avoid tainting its internal investigation, and because her boyfriend allegedly threatened Respondent Pizarro. However, the practice of suspending, without pay, any employee who alleges sexual harassment has a serious chilling effect on, and constitutes a form of punishment for, those individuals who report such claims. Its appropriateness here is questionable.

Moreover, although Respondent TFC alleged that it discharged Complainant for failure to cooperate with its internal investigation, there is sufficient evidence to suggest otherwise. Complainant's attorney issued a letter to Respondent Bucci stating that her clients—Complainant, Eve O'Neill, Naomi O'Neill, and Erica Ramos—were eager to cooperate with the investigation, and making a reasonable request that she be able to participate in any meeting that included her clients, one of whom was a minor at the time. Four days later, Respondent TFC terminated Complainant's employment. It is also instructive that the suspension did not occur at the start of the investigation,

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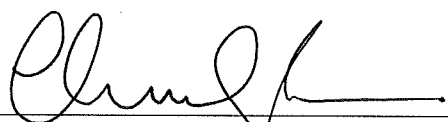
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but rather the day after Respondent was informed that Complainant and the other women complained to the police about Pizarro's harassment. In addition to Respondent TFC, Respondents Delaunay and Bucci, who took part in this decision, are individually liable for unlawful reprisals.

FINDING OF PROBABLE CAUSE:

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint. The Division previously issued, in error, Findings of No Probable cause in two of the three other related investigations, *Naomi O'Neill v. TFC Partners, Inc.*, et al. (docket number EJ06WB-53114) and *Erica Ramos v. TFC Partners, Inc.*, et al. (docket number EJ06WB-53113). In connection with this Finding of Probable Cause, the Director shall issue an Order to Show Cause why the Division should not reopen the investigation into those two matters for reconsideration, in light of this Finding.

04/28/10
Date


Chinh Q. Le, Director
Division on Civil Rights

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NUMBER: EJ06WB-53119

FIONA O'NEILL,

COMPLAINANT,

-vs-

TFC PARTNERS, INC. dba
NEWPORT SWIM FITNESS;
ORLANDO PIZARRO,
INDIVIDUALLY; JIM DELAUNAY
INDIVIDUALLY; and GINA BUCCI,
INDIVIDUALLY,

RESPONDENTS.

) **AMENDED VERIFIED COMPLAINT**

)

)

) Received and Recorded

) Date: 4/27/10

) Department of Law and Public Safety

) Division on Civil Rights

) By: *[Signature]*

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I, Chinh Q. Le, Esq., Director of the New Jersey Division on Civil Rights, hereby
intervene as a Complainant in the above referenced matter pursuant to N.J.A.C. 13:4-2.2 (c) and
hereby amend the caption of the Verified Complainant, received and filed on April 2, 2007, to
read as follows:

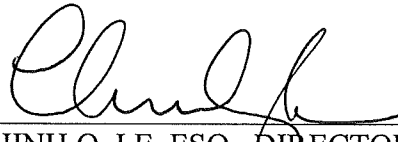
FIONA O'NEILL, AND
CHINH Q. LE, ESQ., DIRECTOR
DIVISION ON CIVIL RIGHTS,

COMPLAINANTS,

-vs-

TFC PARTNERS, INC. dba
NEWPORT SWIM FITNESS;
ORLANDO PIZARRO,
INDIVIDUALLY; JIM DELAUNAY,
INDIVIDUALLY; and GINA BUCCI,
INDIVIDUALLY,

RESPONDENTS.



CHINH Q. LE, ESQ., DIRECTOR
DIVISION ON CIVIL RIGHTS

Sworn to and subscribed before me

on this ~~27th~~ day of April, 2010.

Lorraine Lester
NOTARY PUBLIC OF NEW JERSEY

LORRAINE F. LE STER
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 2/26/2013