

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN37WB-66190**

Brandy Rodriguez,)
)
 Complainant,)
)
 v.)
)
 Metropolitan Healthcare)
 Billing,)
)
 Respondent.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On October 25, 2016, Brandy Rodriguez (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer Metropolitan Healthcare Billing (Respondent) discriminated against her based on sexual orientation and subjected her to reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied Complainant's allegations of discrimination and reprisal in their entirety. DCR's ensuing investigation found as follows.

Summary of Investigation

Respondent is a medical insurance billing company. Complainant, who is a lesbian, began working for Respondent on March 27, 2014, in the position of Account Representative. Respondent discharged her on October 14, 2016. Respondent asserted that Complainant was discharged for performance issues. Complainant alleged that Respondent subjected her to a hostile work environment based on sexual orientation, and terminated her employment in retaliation for her objecting to a comment from her supervisor, Director of Business Operations Marissa Malmstrom, about her sexual orientation.

Complainant's job duties included performing billing, collections, and customer service, and her primary client was PathFinder Labs, LLC. Complainant told DCR that she performed her job duties well, and that she was never written-up for poor work performance. She stated that she and Malmstrom had a good working relationship for the first year that she worked at Respondent, but their relationship became acrimonious after that.

Respondent told DCR that Complainant's behavior became disruptive in the workplace. It provided an email chain showing that Malmstrom and Complainant were having

disagreements about her behavior as of January 2016. In the emails, Malmstrom raised concern with Complainant's interactions with other employees, which she characterized as unprofessional. Malmstrom noted that while Complainant's work performance as an account representative was good, her interpersonal interactions were fueling conflict in the office in a way that concerned Malmstrom. On February 2, 2016, Malmstrom issued a "Record of Disciplinary Action" to Complainant for disrupting a team photo. Respondent did not provide any other documentary evidence showing that it warned or disciplined Complainant for disruptive behavior.

The investigation found that Complainant received an "Above Average" rating on her April 15, 2016 Performance Review Form and that Malmstrom did not include any substantive criticisms of her work performance in that review.

Complainant received what she perceived to be a negative performance evaluation from Malmstrom on October 4, 2016. In the evaluation, Malmstrom gave Complainant a 3 out of 4 rating, which is "Above Expectations." In her several negative comments, Malmstrom focused on Complainant's need to: (1) pay more attention to detail in her accounts; (2) stay focused at work; (3) dress appropriately on casual Fridays; and (4) be more thoughtful about the types of jokes and comments that she made about the company. The performance evaluation contained more positive than negative grades. Complainant told DCR that on multiple occasions between October 5 and October 13 she asked Malmstrom to discuss the evaluation with her. Complainant stated that Malmstrom refused to meet with her to review the performance evaluation, even though Respondent's policies called for such a meeting regarding employee reviews.

Complainant alleged that during an October 13, 2016 team meeting with Respondent's entire staff, Malmstrom told several of the employees that they should ask Complainant to use her "gaydar" to determine the sexual orientation of one of Respondent's clients, and she immediately responded by telling Malmstrom that it was inappropriate for her to use the term "gaydar." Complainant told DCR that she was upset and embarrassed by the comment. She believed that it was ludicrous to think that she would speak with one of their clients just to figure out the client's sexual orientation.

Complainant also noted that a new employee who did not know her sexual orientation was at the meeting, and she preferred to tell new employees about her sexual orientation on her own terms. Complainant stated that she was open about her sexual orientation, but she never told Malmstrom or any other employees that she was comfortable with other people speaking about her sexual orientation to individuals who might not know.

In an interview with DCR, Malmstrom gave her recollection of the October 13, 2016 incident. She said that Complainant and several other employees were having a conversation that was preventing her from starting the team meeting. After another employee, M.C., stated that one of their clients might be a lesbian, Malmstrom stepped in and said that Complainant could use her "gaydar" to see if M.C. was correct. Malmstrom said that she interjected this statement as a means of ending the side conversation and moving forward with the meeting.

Complainant provided DCR with a copy of an email that she sent to Malmstrom on the morning of October 14, 2016, addressing both her performance evaluation and Malmstrom's comment. The email read, in part:

During our team meeting yesterday I heard what I am assuming is the end result of a conversation about finding out if Dr. [] is a lesbian. You blurted out saying "Just send Brandy there to use her gaydar." Something like that being said is very unprofessional coming from a Director during a team meeting, especially with a new team member there for the first time. I felt uncomfortable and I do not know how people will react. I always like to let people know on my own terms that I am gay. Our HR was there for the team meeting and nothing was said about how it was inappropriate to bring something like that up.

I feel I cannot speak to our Human Resource Coordinator because I feel anything I say would not be unbiased or confidential due to the fact our Human Resource Coordinator is your sister. This is why I am emailing you directly.

[Email from Complainant to Malmstrom, October 14, 2016].

Complainant told DCR that Malmstrom came into the office late on October 14, 2016, after all of the other employees had gone home for the day, and called Complainant into her office. Complainant told DCR that she believed Malmstrom was responding to her earlier request that they discuss the negative ratings on her October 4 performance review, as well her email about the "gaydar" comment. According to Complainant, Malmstrom started the discussion by telling her that she looked and sounded unhappy with her job. Complainant replied that she was happy with her job, but wanted some clarification about her performance review.

Complainant told DCR that Malmstrom told her that she used the term "gaydar" because she overheard Complainant describe herself to another employee as "a homo-hating homo." Complainant told DCR that at that point in the conversation, she asked to speak to Respondent's owner Dr. Rajiv Uppal, M.D.¹ Complainant recalled that Malmstrom responded by saying, "I will do you one better, you are terminated effective immediately. Get your things and get out of here." Complainant stated that Malmstrom told her to pack her things and leave the office.

As to the use of the word "gaydar," Malmstrom told DCR that Complainant often boasted about the accuracy of her "gaydar," and introduced the term to the workplace. She stated that because Complainant had never told her that using the word "gaydar" offended her, Malmstrom thought that it was fine to use that term at the meeting. According to Malmstrom, that was the only time she used the term in the workplace.

Malmstrom wrote Respondent's position statement. In it, she asserted that because Complainant frequently used the term "gaydar" and other terms referring to sexual orientation, she believed that Complainant was comfortable with other employees using those same terms.

¹ Complainant told DCR that she had previously asked Malmstrom for permission to speak with Dr. Uppal, but Malmstrom said that she could not speak directly with him.

Malmstrom said that Complainant frequently used slang terms related to sexual orientation to be controversial and provocative. In the written answer to DCR's complaint, Malmstrom explained that during Complainant's initial job interview, she told Malmstrom that she was a Lesbian and stated that "faggot" was the only word relating to sexual orientation that offended her. Malmstrom asserted that Complainant said that she disliked homosexuals even though she was a lesbian.

Malmstrom also stated that Complainant discussed her sexual orientation openly in the office and frequently joked about it to other employees. Malmstrom said that she permitted this type of behavior to the extent that it did not offend other employees and did not distract others from their work.

Malmstrom told DCR that after receiving Complainant's October 14 email, she showed it to her sister, HR Coordinator Alyse Malmstrom (Alyse). According to Malmstrom, Alyse expressed surprise that Complainant objected to Malmstrom using the term "gaydar." Malmstrom acknowledged that Alyse did not discuss the incident with Complainant or otherwise address the incident as a complaint of workplace harassment. Malmstrom indicated that she does not believe that Complainant was actually offended by her use of the term "gaydar," and that her objections at the meeting and in her October 14, 2016 email were merely designed to direct attention away from her poor performance.

In an interview with DCR, Alyse explained that, in general, when an employee complained to HR, she and Malmstrom met with the employee to discuss the complaint, and Malmstrom conducted an investigation if the employee requested that she do so.² Alyse confirmed that she was surprised that Complainant objected to Malmstrom using the term "gaydar." Alyse said that based on Complainant's openness about her sexual orientation, Malmstrom's suggestion in a team meeting that Complainant should use her "gaydar" to determine whether a new client was a lesbian was "not a big deal," and did not warrant an investigation or any other action. During their October 14 discussion, she told Malmstrom that in her opinion, Complainant was taking issue with the "gaydar" comment so that she could initiate a legal action against Respondent for discrimination.

As to Complainant's termination, while she did not corroborate Complainant's specific account the October 14th meeting, Malmstrom agreed that she told Complainant that she could not discuss the "gaydar" comment with Dr. Uppal. Malmstrom told DCR that after she received Complainant's October 14 email but before she spoke with Complainant that evening, she asked Dr. Uppal whether he wanted to address the "gaydar" incident himself. Dr. Uppal responded that he did not. Malmstrom told DCR that she had previously spoken to Dr. Uppal about her dissatisfaction with Complainant's disruptive conduct, and he instructed her not to bother him with personnel issues of that kind. Malmstrom said that Dr. Uppal told her that he would not speak to employees about their complaints or problems with management.

² Under the LAD, the individual accused of discriminatory conduct cannot be the person investigating allegations into her or his own conduct.

In Respondent's answer to the verified complaint, Malmstrom asserted that she discharged Complainant for being unprofessional, negatively affecting team morale, and poor performance in managing her primary client account.

In an interview with DCR, Malmstrom stated that she made the decision to terminate Complainant's employment during their conversation on October 14, 2016, emphasizing that she had no intention of discharging Complainant when the meeting began. She stated that she discharged Complainant only after she concluded that Complainant was no longer "coachable," which rendered her less able to serve her clients properly. She also stated that Complainant's refusal to be coached was detrimental to Respondent's mission. Malmstrom noted that Complainant was Respondent's least experienced account representative, which made coaching very important.

Malmstrom stated that in the October 14, 2016 meeting she believed that Complainant was no longer coachable because Complainant refused to acknowledge that her behavior or performance contributed to the negative performance evaluation. She described Complainant as generally combative, but also as defensive about all of the criticisms in the performance review. Malmstrom stated that she concluded that, given Complainant's negative attitude towards Malmstrom and her unwillingness to admit that she needed to improve in some areas, Malmstrom had no way to help Complainant perform her job effectively. As a result, she discharged Complainant.

Malmstrom told DCR that aside from no longer being coachable, Complainant's poor performance merited her discharge. Among other things, Malmstrom asserted that Complainant: (1) mishandled her chief client's – Pathfinder Labs – account and other individual patient accounts³; (2) failed to charge patients' credit cards in a timely manner; (3) exhibited poor morale; (4) dressed inappropriately on casual Fridays; (5) taunted Malmstrom in front of the whole office staff on several occasions; and (6) made jokes that were generally disruptive and inappropriate. In addition, she alleged that Complainant made comments or imitated accents in ways that could have been offensive to employees of specific races or national origins.

DCR interviewed three other employees who worked in the office with Complainant – S.H., D.G. and D.M. They each stated that Complainant made jokes on a regular basis and that some of those jokes related to her sexual orientation. Only D.G. recalled Complainant using the term "gaydar" at work. S.H. and D.G. each stated that Complainant's jokes and behavior were not disruptive or offensive to them, and did not seem to disrupt the office. D.M. stated that she found some of Complainant's jokes to be offensive and that she felt disrupted by Complainant's behavior. But the investigation found that Complainant filed a work-place violence complaint against D.M. that resulted in D.M. receiving discipline and training. D.M. stated that she never complained to anyone about Complainant's jokes or other behavior. None of the employees

³ Respondent provided copies of 10 Patient Reports, only two of which contain notes from Malmstrom about errors that Complainant made on the account. She also provided Complainant's performance review dated October 4, 2016, in which she listed 4 accounts as examples of situations where Complainant had not been thorough or careful when "writing off" an account. Complainant refused to sign the October 4 performance review and wrote her objections to various portions of it in the October 14, 2016 email discussed above.

interviewed stated that Complainant made comments or jokes that were offensive based on race or national origin.

DCR spoke with the owner of Pathfinder Labs, Howard Portman. Portman told DCR that when Complainant first started working on his account, she was very slow. He said that Complainant learned her job very quickly and worked hard on his account. He noted that he never complained about her performance and that all of the employees at Pathfinder Labs enjoyed working with Complainant.

Analysis

At the conclusion of an investigation, 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). For purposes of that determination, “probable cause” is defined as a “reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe” that the LAD was violated. N.J.A.C. 13:4-10.2(b).

A finding of probable cause is not an adjudication on the merits. It is merely an initial “culling-out process” in which 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., 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.

A. Hostile Work Environment

To establish a hostile work environment claim, a complainant must show that the harassing conduct: (1) would not have occurred but for the complainant’s protected class and (2) was severe or pervasive enough (3) to make a reasonable employee of the complainant’s protected class believe that (4) the conditions of employment were altered and the working environment was hostile or abusive. Lehmann v. Toys ’R’ Us, 132 N.J. 587, 603-04 (1993). A hostile work environment claim requires that the reviewer consider the totality of the circumstances, “which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Ibid. The severity of the harassing conduct is enhanced when it is perpetrated by an employee’s supervisor. Taylor v. Metzger, 152 N.J. 490, 503-04 (1998).

Here, the parties agree that in a meeting with all of Respondent’s employees, Malmstrom stated that Complainant could use her “gaydar” to determine a new client’s sexual orientation. That comment was sufficiently severe that a reasonable employee in Complainant’s position could find her work environment hostile or abusive. In addition to commenting on Complainant’s sexual orientation, Malmstrom’s comment – made by a supervisor in a team meeting that included new employees who were not yet aware of Complainant’s sexual orientation – also indicated to staff that the sexual orientation of a client would be a relevant and

appropriate topic of inquiry and discussion in the workplace. In this context, the single comment made in front of staff was sufficiently severe to create a hostile work environment. Ibid. Although Malmstrom contends that Complainant indicated that she found no term other than “faggot” offensive, the standard for a hostile work environment is an objective one, based on what a reasonable employee would find offensive. By using a reasonable employee standard, our courts focus on the conduct itself—not its effect upon the victim or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). In other words, neither a victim’s “subjective response” to the harassment, nor the alleged harasser’s “subjective intent” is controlling as to whether a bias-based hostile work environment claim exists. Ibid. And while a supervisor’s use of a term that a subordinate might not find offensive in a private setting might weigh against its severity, using the term in a group meeting, where others might not be aware of Complainant’s sexual orientation, conveyed the message that any slang terms regarding sexual orientation were acceptable and outed Complainant to a colleague. See Taylor, 152 N.J. at 504 (noting a supervisor’s unique role in shaping the work environment).⁴

B. Reprisal

The LAD also prohibits employers from retaliating against employees for opposing any act forbidden by the LAD. N.J.S.A. 10:5-12(d). To set forth a prima facie case of retaliation in violation of the LAD, a complainant must show that: (1) she engaged in a protected activity known to the employer; (2) the employer thereafter subjected her to an adverse action; and (3) there is a causal nexus between the protected activity and the retaliation. Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995).

Complainant engaged in LAD-protected activity when she complained to Malmstrom that her use of the term “gaydar” in a team meeting offended Complainant. She was fired later that same day. The proximity in time between her complaint to Malmstrom and the termination of her employment is sufficient to demonstrate a causal connection between the protected activity and the adverse action. Abramson v. William Paterson Coll., 260 F.3d 265, 288 (3d Cir. 2001). And the evidence that Malmstrom, the individual who engaged in the discriminatory conduct, made the final decision to fire Complainant further supports the causal nexus between Complainant’s objection to Malmstrom’s discriminatory actions and the final adverse action. See Maddox v. City of Newark, 50 F.Supp.3d 606, 623 (D.N.J. 2014) (noting that causation exists where the individuals displaying discriminatory animus participate in or influence the decision to terminate). Finally, Complainant’s assertion that Malmstrom discharged her immediately after she asked to speak to Dr. Uppal about the “gaydar” incident suggests a direct causal link between Complainant’s protected actions and her discharge.

Where, as here, the investigation reveals evidence sufficient to prove the elements of the prima facie case, the employer must proffer a legitimate, non-discriminatory reason for discharging the employee. Romano, supra, 284 N.J. Super. at 549. Here, although Respondent

⁴ The New Jersey Supreme Court has determined that an employer may have an affirmative defense to liability for harassment by a supervisor but the affirmative defense may not be asserted “when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment.” State v. Aguas, 220 N.J. 494, 522 (2015). Since Malmstrom terminated Complainant’s employment, it does not appear that Respondent can assert an affirmative defense in this matter.

asserted that Complainant was discharged based on performance deficiencies noted in her October 4 performance evaluation and incidents that Malmstrom found inappropriate, Malmstrom told DCR that she did not make the decision to discharge Complainant until her October 14 meeting with Complainant, which was prompted by Complainant's email addressing the "gaydar" comment. During their meeting, Malmstrom told Complainant why she believed her "gaydar" comment was not inappropriate, and in response, Complainant asked to speak to Respondent's owner. At that point, Malmstrom terminated Complainant's employment. Moreover, Respondent's proffered explanation that Complainant was terminated because of her substandard job performance is belied by her "Above Expectations" performance review, and the client's report to DCR that he never complained about Complainant's job performance and enjoyed working with Complainant. Although Malmstrom contended that she made the decision to fire Complainant because their discussion at the meeting showed that Complainant was not "coachable," the timing of the firing is sufficient to support a reasonable suspicion that Complainant's objection to the "gaydar" comment, and her request to speak to Dr. Uppal about that comment were motivating factors in the decision to terminate her employment.

In such a situation, it is appropriate for this matter to proceed to a hearing, where a trier of fact will determine whether and to what extent the employee's LAD-protected activity factored into Respondent's decision to terminate Complainant's employment.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of hostile work environment and reprisal.



Rachel Wainer Apter, Director
NJ DIVISION ON CIVIL RIGHTS

Date: April 4, 2019