STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR Docket No. EF01GB-66645

Taishan J. Smith,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
South Jersey Extended Care,	)	
	)	
Respondent.	)	

On September 13, 2017, Taishan J. Smith (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, South Jersey Extended Care (Respondent), discriminated against her based on her pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. DCR's ensuing investigation found as follows.

Summary of Investigation

Respondent is a skilled nursing facility located in Bridgeton, New Jersey, that offers rehabilitation services and long-term nursing care. In July 2017, Respondent's Activities Director C[redacted] A[redacted] hired Complainant to work as an Activity Aide.[1]

Complainant alleged that on July 25, 2017, on her second day of work, she told Activities Director A[redacted] that she was pregnant. She alleged that A[redacted] responded that it would be a liability for her to work at Respondent's facility. Complainant further alleged that later that same day, another Activity Aide, L[redacted] H[redacted], informed her that A[redacted] was discharging her due to her pregnancy. Complainant told DCR that in August 2017 Respondent discharged another activity aide, J.H., after only a few days of work when it found out she was pregnant.

Respondent denied the allegations of discrimination in their entirety. With its answer to the complaint, Respondent provided an October 30, 2017 letter from Respondent's former Administrator, J[redacted] R[redacted], addressed "To whom it may concern." R[redacted] wrote that Complainant was discharged because she was scheduled to work on July 25, 2017, and did not show up for work that day or call to explain her absence (referred to as a "no call/no show"). During DCR's fact finding conference, and after Complainant asserted that she worked two days

[1] Respondent's job description states that an activity aide assists the director in developing and coordinating therapeutic activity programs for residents. Among other job specifications, it indicates that some of the physical demands involve the performance of a medium level of physical work – pushing, pulling, standing, sitting, stooping, reaching, etc. Although the LAD requires employers to reasonably accommodate limitations arising from an employee's pregnancy, there is no allegation in this case that Complainant requested or needed any accommodations to perform the job.

(July 24th and 25th), R[redacted] indicated that he may have written down the wrong dates. DCR subpoenaed the relevant records, but Respondent failed to provide any work schedule. The payroll records Respondent did provide did not show the days on which Complainant worked.

DCR was unsuccessful in making contact with C[redacted] A[redacted] despite several attempts. Instead, R[redacted] provided DCR an unsigned typed statement he said was from A[redacted], which indicated in pertinent part:

> I am writing this statement in response to a complaint from a previous aide in my department. I did not state to anyone that being employed here would be a liability to our facility. Our policy states during your 90 day probationary period an employee can be terminated at any time. This activities aide did not attend work as requested, because of this action on her part, her position at our facility ended. . . .
>
> Thank you,
>
> C[redacted] A[redacted]

R[redacted] also said that A[redacted] had only worked for Respondent for about six months and resigned in late December 2017 or early January 2018.

Complainant denied being a no-call/no-show on July 25, July 26, or any day thereafter. She stated that on her second day of work, July 25, 2017, she informed A[redacted] of her pregnancy and A[redacted] told her it would be a liability for her to work there. Complainant said that A[redacted] then called Respondent's social services department to inquire if it had any available positions for Complainant, but it did not. A[redacted] then told her that it would be fine to just go home at the end of her shift. Complainant told DCR she had received her work schedule from Activity Aide L[redacted] H[redacted] only for her first two work days (July 24th and 25th). Therefore, after she left work on July 25, 2017, she asked H[redacted] over Snapchat for her upcoming schedule.[2] According to Complainant, H[redacted] wrote that A[redacted] had said Complainant should not come in to work, and that she was discharged because of her pregnancy. Complainant said she called Respondent's offices that day to speak to A[redacted], but she was not available. Complainant continued to call Respondent for several days until she was able to schedule a meeting with R[redacted] and A[redacted]. Complainant said that during this meeting, which took place about a week after her Snapchat with H[redacted], A[redacted] denied ever telling H[redacted] to tell Complainant not to come to work because of her pregnancy and told Complainant that it was her fault for not coming into work.

DCR subpoenaed Complainant's phone records. Review of Complainant's phone records from July 24, 2017 to August 4, 2017 showed that she called Respondent's facility (856-455-xxxx) from her phone (856-369-xxxx) twice on July 28, 2017, at 2:40:08 pm and 2:40:13 pm. Complainant told DCR that it was possible she also called Respondent's facility from her sister's phone during her remaining attempts to reach A[redacted].

[2] Snapchat is a multimedia messaging app. One of the principal features of Snapchat is that pictures and messages are usually only available for a short time before they become inaccessible to their recipients.

During an interview with DCR, L[redacted] H[redacted] denied ever telling Complainant that A[redacted] was discharging her due to her pregnancy or that she should not to come in to work. H[redacted] is currently Respondent's Activities Director.

DCR interviewed J.H. as part of the investigation. J.H. said that while she did not recall exact dates, she believed she may have only worked for about a week as an activity aide at Respondent's facility. She said that she had worked for Respondent previously in another position, beginning in 2015, and left for a better job. She could not recall exactly when she left, but believed it was in 2016.

J.H. said that when she returned as an activity aide in 2017, she was hired by A[redacted] and then discharged by Admissions Director L[redacted] M[redacted] and Administrator R[redacted]. She told DCR that her pregnancy was evident at that point, and one day M[redacted] came to observe the activities section, and pulled H[redacted] aside to speak with him. J.H. stated that prior to her discharge, H[redacted] told her she may be getting laid off due to her pregnancy, and that the same thing had happened to another employee. The next day, M[redacted] and R[redacted] told her that they no longer needed her services, without giving her a reason.

H[redacted] told DCR that J.H. was not supervised by A[redacted], and he was under the impression that she was a certified nursing aide rather than an activity aide. R[redacted] told DCR he did not remember J.H. M[redacted] did not respond to DCR's communications, and during the investigation, DCR learned that she no longer works for Respondent.

DCR requested Respondent's employee records for J.H. The records showed that Respondent initially hired her as a behavior monitor aide on or around November 6, 2015. The employee file provided by Respondent did not contain any records concerning her separation from employment in this position. Respondent's Activities Department's employment and payroll records then show that J.H. again began working there on August 17, 2017. Payroll records showed that J.H. worked a few hours in August and September 2017, and then did not work again until December 2017. The records show she worked from December 2017 until April 2018. J.H. told DCR she gave birth in November 2017. Respondent did not provide a reason for Holmes' termination in September 2017 despite multiple requests from DCR, and no reason was indicated in her employment file.

Complainant provided screenshots of a conversation she had with an individual who appears to be J.H. on August 17, 2017:

> **J.H.:** Did south jersey fire you because you're pregnant. Currently going through that now.
> **Complainant:** Yes they did about three weeks ago…& smh you were working there too? Or somewhere else.
> **J.H.:** smh I'm working there now in activities in everybody keeps telling me their gonna fire me bcuss I'm pregnant. Smh which I don't think is fair.
> **Complainant:** No they wouldn't do that twice in the same month because the

lady C[redacted] lied to the administrator making it seem as if I was no call no show when she really told L[redacted] to tell me not to come in cause I couldn't work their anymore because of me being pregnant but I doubt she do that again cause she had realized that that's against the law to fire pregnant workers after hire so she had to save her ass before she got fired that's why she lied on me but you should be good. Fuck C[redacted] & [L[redacted] cause [L[redacted] knew what C[redacted] told him but his ass didn't wanna be involved with the meeting that I had with C[redacted] and the administrators so he let them fire me instead of speaking up…you don't play with nobody money and then illegally fire someone ...

J.H.: Exactly smh you know what I shoulda recorded his ass when he just told me that C[redacted] gone try & get me fired bcuss I'm pregnant smh bcuss I'm getting a lawsuit if they do that to me.

Complainant: Girl I wish I would have screenshotted the snap chat messages [L[redacted] sent me telling me C[redacted] said I couldn't work there anymore because I was pregnant but even talking to the administrator telling him everything he still took that bitch word over mine.

[*sic* throughout].

Analysis

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. 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. Ibid.; Sprague v. Glassboro State College, 161 N.J. Super. 218, 224-25 (App. Div. 1978). If DCR finds there is no probable cause to credit the allegations of a complaint, that determination is a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.S.A. 10:5-21; N.J.A.C. 13:4-10.2(e).

However, if the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. See N.J.S.A. 10:5-16; N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on the grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate against an employee in the "terms, conditions or privileges of employment" because she is pregnant. N.J.S.A. 10:5-12(a).

Here, Complainant's allegations of pregnancy discrimination, together with her assertion that it was H[redacted] who informed her she was discharged due to her pregnancy, are supported by

her memorialized conversation with J.H. that took place shortly after Complainant's termination. J.H., who had also been pregnant at the time of the conversation, also told DCR that H[redacted] advised her she would be fired because of her pregnancy. Additionally, former administrator R[redacted] and Complainant agreed that, when they met approximately one week after Complainant's last day of work, Complainant raised the same allegations she makes here—namely, that she had been told by H[redacted] she was being discharged due to her pregnancy.

In addition, Respondent provided no evidence to support its claim that Complainant was fired for being a no call/no show. It provided no evidence that it scheduled Complainant to work on any day on which she failed to report, and no evidence that it contacted Complainant to ask about her whereabouts or to fire her on any day on which she allegedly failed to report to work.

The Director finds at this threshold stage in the process that there is sufficient basis to warrant "proceed[ing] 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). Therefore, probable cause is found to support Complainant's allegations of pregnancy discrimination.

Date: February 14, 2018

Rachel Wainer Apter, Director
NJ Division on Civil Rights