

**STATE OF NEW JERSEY
DEPT. OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL07WB-67784**

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Thinisha Register,)	
)	
COMPLAINANT,)	
)	
v.)	Administrative Action
)	
Capital Health Services,)	PARTIAL FINDING OF PROBABLE CAUSE
)	
RESPONDENT.)	
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On November 5, 2020, Thinisha Register (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Capital Health Services (Respondent) discriminated against her based on her race (Black) and retaliated against her for raising complaints in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the discrimination and retaliation allegations in their entirety. DCR’s investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent Capital Health Services is a health services provider with approximately 4,300 employees based in two hospitals and twenty-two outpatient facilities in New Jersey. Complainant was hired in March of 2016 as a patient accounts electronic billing representative at Respondent’s Lawrenceville location.

In her verified complaint, Complainant, who is Black, alleged that she was subjected to a hostile work environment based on race and was terminated in retaliation for complaining about discriminatory and racist language used by her coworkers in the workplace, including the use of the word, “n*gger”. Complainant alleged that she previously raised concerns to her direct supervisor in late June 2019 about her coworker’s frequent use of “n*gger” in conversation, and in August 2019, she again raised her concerns to Respondent’s President of Human Resources. She was thereafter discharged from her employment approximately one month later, on September 13, 2019, for being eight minutes late to work. Complainant alleged that she was subjected to a racially hostile work environment and fired in reprisal for complaining about it.

A. Racial Discrimination

DCR's investigation found that Complainant complained verbally in or around late June 2019 to Collection Manager Rebecca Wescott, that a coworker, [REDACTED], was using "n*gger" in conversation with her regarding [REDACTED]'s bi-racial son, who was being bullied in school by such name-calling. In an interview with DCR, Wescott said that when Complainant approached her, Complainant said she just wanted "her opinion" on how to handle the conversation. Wescott said she told Complainant that she should speak frankly with [REDACTED] and let her know that it made her feel uncomfortable. Wescott told DCR that she did inform Supervisor, Layne Gambol, and Director of Finance, D. Visconti, about the conversation and that Complainant did not want to make a formal complaint. Wescott said approximately two months later, in August 2019, Complainant was passing Wescott in the hallway and told her that an offensive conversation with [REDACTED] happened again and to check her email.

Complainant provided DCR with a copy of the August 21, 2019 email that she sent to Vice President Scott Clemmensen and forwarded to Wescott. She wrote:

I have been experiencing racial undertone conversations and it makes me very uncomfortable for the past six months. About a month ago I reported to collections manager Rebecca Westcott about the very racist {week} long conversation my coworker had with myself about the use (N) word. Being of African American and native American Indian decent[sic] it makes me very upset that I have to explain to an adult why that word is inappropriate. With the history and origin of the word.

In the climate of today's culture awareness and the 'just culture training,' I feel this should not be tolerated on any level. It is very disturbing to come to work and have to endure these type of discriminatory and racist/bias comments. The most recent incident was today around 2pm when my coworker made a comment about 'you people' when [] referring to African American people and I had to correct them again. If there is some light you can shed on this situation please contact me immediately.

In an interview with DCR, Director of Patient Accounts, Layne Gambol, confirmed that Complainant emailed Respondent on August 21, 2019, stating she had experienced "racially charged conversations" including the n word and references to "you people" for the past 6 months and that she had reported her concerns to Wescott. Gambol said that she, Visconti and Wescott met with Complainant and [REDACTED] separately on August 22, 2019. Gambol claimed that Complainant said she did not want to pursue a formal complaint against [REDACTED], but also did not want to talk to [REDACTED] about it herself. Gambol said when they spoke to [REDACTED], she did not deny the conversation, but explained that she never directed the word "n*gger" to Complainant but only used the term "N word" in a single conversation. According to Gambol, [REDACTED] stated that the term was only used in the context of her bi-racial son being bullied at school by other children using that word and that she sought advice from Complainant on how to handle the issue. Gambol said that [REDACTED] was crying and repeatedly stating, "I thought [Complainant] was my friend, we were having a friend conversation, I did not know I insulted her." Gambol said that [REDACTED] was reminded that she cannot have personal conversations during work hours and her seat was moved away from Complainant. Respondent took no further disciplinary action against [REDACTED]

Gambol said they notified and informed Human Resources and Employee Relation Manager, John Lubitsky, after they concluded their meeting with Complainant and [REDACTED]. Gambol said she was told by Lubitsky that no further action needed to be taken. Gambol also stated that Respondent provides mandatory training for discrimination that is part of their education process. All staff must be a part of the mandatory training sessions. Gambol said that after the August 21 email she did not receive any other emails regarding harassment or discrimination from Complainant.

DCR interviewed Human Resources' Employee Relations Manager, John Lubitsky, who said that he was notified about the complaint via email on August 21, 2019. Lubitsky said that he did not have any conversations with Complainant or [REDACTED] because when he spoke with Gambol about the complaint, Gambol informed him that it was already taken care of and provided him with information as to what was discussed during her meeting with both Complainant and [REDACTED]. Lubitsky said he believed the meeting was handled properly and no further action needed to be taken, that [REDACTED]'s seat was moved away from Complainant to avoid any further incidents, and no further incidents took place. Lubitsky said the first complaint he ever received from Complainant was on August 21, 2019 and did not receive any subsequent complaints.

During the investigation, Complainant clarified with DCR that in addition to [REDACTED]'s use of "n*gger" in conversation, [REDACTED] had made additional offensive comments in other conversations. Complainant provided DCR with the following statements she attributed to [REDACTED] and identified four coworkers that she believed may have witnessed [REDACTED]'s racially-charged comments. DCR interviewed these coworkers and asked if they heard [REDACTED] make any of the following statements:

- "why her husband would never marry a black woman, stating all they care about is purses and hair weaves";
- "you people" and "you people love pit bulls";
- "did I get my baby daddy a Father's Day card";
- "why are we so loud" and "why do we get very ashy."

Additionally, the witnesses were asked if they heard a discussion between Complainant and [REDACTED] about [REDACTED]'s child having issues at school and if the "N word" was ever used during that conversation or ever used at all in the office.

None of witnesses identified by Complainant had heard these types of comments made by [REDACTED] or anyone else in the department but some acknowledged wearing headphones to block out office noise. One coworker, [REDACTED], told DCR that a friend of his who works in a different department made a "baby daddy" comment to him but that he was not offended by it.

DCR reviewed documents submitted by Respondent. Specifically, Respondent produced its Policy Against Discrimination which states in part:

Capital Health will not tolerate discrimination on the basis of any characteristic or trait protected by law in recruiting, hiring, promotion, termination or any of the terms and conditions of employment. Any employee who has witnessed or feels that he/she has been subjected to

discrimination should immediately report the matter to his/her supervisor, manager or to any other member of management. All reports of perceived discrimination will be thoroughly and discreetly investigated by members of management who are not involved in the alleged discrimination. In addition, we will not allow any form of retaliation against individuals who report unwelcome conduct to management or who cooperate in the investigation of such reports in accordance with this policy.

B. Retaliatory Discharge

In the verified complaint, Complainant alleged that she was discharged for being eight minutes late to work in reprisal for her complaints about her racially hostile work environment. In response, Respondent alleged that Complainant had a history of violating the attendance policy and in 2019, received multiple warnings that continued violation of the policy may amount to discipline.

During the investigation, Respondent submitted its Attendance Policy and Disciplinary Action Policy, which provides, among other things, for progressive discipline, including an informal coaching session, first written warning, final written warning, suspension and termination for an employee's violation of the attendance policy. Respondent said that there is a three-month rolling period from the time an incident occurs for determining the next level of discipline for a subsequent event and that managers have the authority to bypass steps for certain severe conduct. The Attendance and Punctuality Policy states that an employee is required to report for work at their scheduled time and that employees who start their work day after their scheduled time are considered late. If an employee is non-exempt, they are provided a seven-minute grace period for which they are paid but they still are marked as late. If a non-exempt employee reports to work more than seven minutes after their scheduled time, then the total amount of time late will not be paid, and the lateness is recorded. Two or more incidents of lateness are considered excessive and can subject an employee to discipline.

In an interview with DCR, Respondent's Vice President of Finance, D. Visconti, explained that employees are required to minimize unscheduled time off. Respondent provides its employees with a bank of Paid Time Off ("PTO") that accrues per pay period. A full-time employee's PTO time also includes up to forty hours of paid sick time. If a full-time employee is absent from work, they are required to deduct from their bank of accrued PTO. Any unscheduled absence of two days or more (which are not considered sick time or protected time) is considered excessive and subject to the above progressive discipline policy.

Visconti told DCR that employee time is earned on worked hours and an employee may only carry up to 296 hours as of an anniversary date. A full-time employee would work a 40-hour week. Visconti said the PTO system is up to 96 hours per year, but there is a sliding scale based on an employee's title. PTO includes, sick, vacation, and 6 federal holidays. Vacation time must be approved by an employee's immediate supervisor or, if necessary, any management team member can sign off on the vacation time. Visconti said Respondent asks that employees give 24-hour notice for vacation time and requires the employee to have sufficient accrued time to cover the period of vacation they are taking. Visconti also stated that overtime is not granted unless management assigned a special project and that it is approved by management, which is very rare.

If an employee needs to call out sick, the employee must contact Visconti, Gambol or Wescott. If the employee is unable to speak to one of these three, the employee should leave a voice message notifying them of their call out.

Complainant's shift was from 7 a.m. to 3:30 p.m.

Respondent pointed to Complainant's prior violation of the attendance policy. On May 16, 2017, Complainant was issued a first written warning for excessive tardiness. The notice referenced an April 14 meeting between Complainant, Supervisor Pat Chaykin and Gambol discussing Complainant's excessive tardiness and providing a copy of the attendance policy. In an interview with DCR, Gambol stated that following the April 14 meeting, Complainant violated the Attendance Policy six more times from April 14, 2017 and May 16, 2017. Complainant received another written warning for being late on October 13, 2017. This warning was recorded as a first written warning.

The following year, on March 9, 2018, Complainant was issued another written warning for violation of the Attendance Policy. Complainant was an hour late on March 6, 2018, and took two unscheduled and unauthorized PTO days. At that time, and prior to those call outs, Complainant had already exhausted her accrued PTO allotment. On June 13, 2018, Complainant received her final written warning for being tardy on three days within one week's time.

Additionally, in 2018, Respondent charged Complainant with violating the mobile phone policy and taking vacation even when her vacation request was denied. On April 27, 2018, Complainant received a warning for violating the employee mobile phone policy on three documented occasions and she was also reminded of the mobile phone policy. On December 20, 2018, Complainant received a one-day suspension for taking vacation even after her vacation request was denied due to her negative PTO balance twice. Complainant explained that the reason she took the vacation even after being denied the leave time was because she had already planned the vacation a year in advance. Complainant submitted her PTO request on December 13, 2018.

In 2019, Respondent reminded Complainant of its Attendance Policy. Respondent advised Complainant of the policy on June 18, 2019 and provided her with a copy of Employee's Expectations. Additionally, on June 27, 2019, Respondent held a staff meeting where the Attendance Policy was discussed and employees, including Complainant, were advised that employee attendance would be reviewed by management daily. Gambol also stated that any employee who signs in more than seven minutes prior to their assigned work schedule would be paid for overtime, which would need to be approved in advance by management. Gambol said Complainant was never assigned to arrive to work any earlier than her 7 a.m. shift. In an interview with DCR, Visconti explained that Complainant would normally clock in using the phone system while she was at her desk.

On July 10, 2019, Complainant again received a first written warning for taking July 1, 2019 off without enough hours in her PTO Bank to cover the hours. Complainant also had an unscheduled call-out for one hour on July 10, 2019.

On July 16, 2019, Complainant received her final written warning for an unscheduled PTO day with not enough hours to cover the time she took off that day.

On July 24, 2019, Complainant was suspended without pay for one day due to another tardiness. Complainant was warned that one more occurrence would lead to termination of her employment.

Gambol told DCR that on September 13, 2019, Complainant arrived to work eight minutes late. Gambol contacted Employee Relations Manager, John Lubitsky, who informed her of Complainant's prior attendance violations in July of 2019. Lubitsky told Gambol to proceed with Complainant's termination. Gambol said Complainant's continued violation of the Attendance Policy was the reason for her discharge.

Lubitsky told DCR that the Attendance Policy and Disciplinary procedures apply to all employees across the campus. Lubitsky has to be notified first regarding termination and then reviews the employee's history and current disciplinary notices. Lubitsky said it is his duty to make sure all disciplinary progression is applied and that no one is treated differently. Lubitsky said he reviewed Complainant's warnings and suspension and, because of her history of tardiness and absences, Complainant was discharged.

DCR requested and Respondent provided all write-ups for attendance for the five employees who were assigned to work under Supervisor Pat Chaykin in Complainant's department. A review of those records showed that no one exhausted and then took unauthorized leave except for Complainant in 2018 and 2019. In 2018, the only other employee besides Complainant to receive an attendance disciplinary notice was [REDACTED] [REDACTED] was given a first written warning on July 20, 2018 and given a final written warning on September 14, 2018, for tardy/attendance issues on four days during that period. Respondent did not issue any attendance disciplinary notices to any employee for 2019 except for Complainant. As for the department employees who were marked tardy during the 2018-2019 period, Complainant was late to work 69 times in 2018 and 14 times in 2019. No other employee in the department had a similar record.

Information obtained during the investigation was shared with Complainant, and, prior to the conclusion of the investigation, she was given an opportunity to submit additional evidence.

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(a). “Probable cause” for purposes of this analysis means a “reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the LAD has been violated.” N.J.A.C. 13:4-10.2(b). If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

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

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate against someone in the “terms, conditions or privileges of employment” based on race or in retaliation for making a complaint of race discrimination. N.J.S.A. 10:5-12(a).

A. Race Discrimination

Complainant alleges that she was subjected to a racially hostile working environment by Respondent. The New Jersey Supreme Court in Rios v. Meda Pharmaceutical, Inc, et al., 247 N.J. 1 (2021), considered whether a supervisor’s use of two offensive racial slurs were sufficiently severe or pervasive to create a hostile work environment in violation of the LAD. In Rios, the plaintiff alleged that his supervisor used a derogatory word on two separate conversations with him in the workplace. The Court reversed the lower trial court and Appellate Division’s grant of summary judgment in favor of the defendant employer and found that these two comments, as alleged, could amount to conduct that was sufficiently severe or pervasive to create a hostile work environment. Id. at 18. The Court focused on the history of the slur used; the circumstances of the comments; the fact that one was directed towards plaintiff and the other one was conveyed indirectly but still directed at him; the position of the person making the comments; and the fact that plaintiff filed a complaint in accordance with his employer’s antidiscrimination policy. Id. 15-16. Additionally, the Court stated that Taylor v. Metzger, 152 N.J. 490 (1998), which held that a single racial epithet by a chief ranking supervisor and head of the office could be sufficiently severe to amount to a hostile work environment, should not be viewed as “a floor or set[ting] the minimal factual requirements for a hostile work environment.” Id. at 19.

Here, the investigation found sufficient evidence to support a reasonable suspicion that Complainant experienced and complained about a racially hostile work environment to Respondent. Complainant informed her supervisor Wescott in June 2019 that the word “n*gger” was being uttered in the workplace and that in August 2019, she elevated her concerns of a broader hostile work environment to Respondent’s Vice President of Human Resources in August 2019.

Respondent did not take any action in June 2019 to address Complainant’s concerns. Respondent’s contention that because Complainant was only asking for an “informal” opinion of an offensive conversation, management did not need to file a complaint or investigate on Complainant’s behalf may be flawed. See, e.g., Gaines v. Bellino, 173 N.J. 301, 313 (2002) (existence of anti-discrimination policy alone is not sufficient to shield employer from liability without meaningful enforcement by trained supervisors regardless of whether complaint was “formal or not); Payton v. N.J. Turnpike Auth., 148 N.J. 524, 537 (1997) (efficacy of employer’s anti-discrimination policy is “highly pertinent” to its use as an affirmative defense). Respondent’s non-discrimination policy provides that “any” complaint “will be . . . investigated.” Although Complainant’s supervisor Wescott indicated that she informed management-level staff of Complainant’s concerns, no complaint or investigation was taken about the use of the “n*gger” word in the workplace until Complainant’s second complaint.

It was not until August 2019, when Complainant elevated her concerns to the Vice President of Human Resources Scott Clemmensen, that Respondent investigated some of Complainant's concerns. In response to Complainant's August 2019 email, Respondent interviewed Complainant and the involved coworker, [REDACTED]. Respondent concluded that the use of "n*gger" word was limited to [REDACTED] telling Complainant about how her biracial son was being bullied with that language. As a result of its investigation, Respondent moved [REDACTED]'s work station away from Complainant.

Respondent appears to have ignored Complainant's reference to the "racial undertone conversations" in her workplace for the last six months or from March through August 2019. Complainant also referenced an incident on that day where a coworker said "you people" to refer to African American people and Complainant had to correct that individual. DCR's investigation did not reveal that Respondent attempted to identify, investigate, or address that specific August 21, 2019 incident or gain a better understanding of the allegations that Complainant was making about the past six months. In that respect, Respondent ignored Complainant's larger complaint of a hostile work environment which includes both the use of the "n*gger" word and racially-charged terms of expression, including "you people," that she allegedly experienced for the prior six months. Complainant stated in her August 2019 email that "it is very disturbing to come to work and have to ensure these types of discriminatory and racist/bias comments."

The Rios opinion provides guidance in assessing whether alleged conduct, which includes the use of derogatory or racist language or terms of expression, may be sufficiently severe or pervasive to create a hostile work environment. In evaluating the comments before it, the Rios Court laid out certain factors, such as the history of the slur or expressions used; the context and circumstances of the comments; the position of the person making the comments; and whether a complaint was filed with the employer. While a factfinder may find that the use of the racial slurs were limited to a distinct conversation Complainant had with [REDACTED] concerning [REDACTED]'s son being bullied, she may also find that those slurs in the context of other racially-charged terms of expression or reference to generalizations about African Americans would amount to conduct sufficiently pervasive to create a hostile work environment. And while [REDACTED] was not Complainant's supervisor, the failure of Respondent to address the full extent of the associated conduct may have adversely affected the ongoing work environment.

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, DCR finds PROBABLE CAUSE to support Complainant's allegations of race discrimination or hostile work environment based on race.

B. Retaliatory Discharge

Here, the investigation did not support Complainant's allegations of retaliatory discharge. Instead, the investigation found that Complainant was written up in July 2019 for attendance and was previously warned that anyone who violates the policy will be disciplined, which can lead to discharge. Complainant was given two written warnings on July 10th and 16th of 2019 and received a suspension on July 24, 2019. As part of that discipline, Complainant was warned that any further attendance issue would lead to discharge. Complainant then arrived late to work on September 13, 2019 and that tardiness, coupled with her past history of attendance-related

disciplines, was the reason for her discharge. The evidence submitted by Respondent supports its position that it had a legitimate, non-discriminatory business reason for discharging Complainant. Complainant's discipline was consistent with Respondent's Attendance and Disciplinary Action Policy. Complainant was provided an opportunity to present additional information and evidence. No evidence was submitted that showed the application or enforcement of the Attendance Policy as applied to Complainant was a pretext for discrimination or retaliation.

In sum, the investigation did not support Complainant's allegations of retaliatory discharge based on Complainant's internal complaints of race discrimination. Therefore, the portion of that complaint will be closed with a finding of **NO PROBABLE CAUSE**.

December 20, 2021

DATE



Rosemary DiSavino, Deputy Director
New Jersey Division on Civil Rights