STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN25WM-63849

R. C.,	)	
	)	
Complainant,	)	
	)	Administrative Action
v.	)	
	)	**FINDING OF PROBABLE CAUSE**
Housing Authority of the City of Long Branch,	)	
	)	
Respondent	)	

On April 24, 2013, Long Branch resident R.C. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, the Housing Authority of the City of Long Branch (Respondent or LBHA), subjected her to race discrimination, sexual harassment and retaliation in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination and retaliation in their entirety. The DCR investigation found as follows.

Summary of Investigation

LBHA provides, among other things, housing and housing-related support services to low and moderate income residents of the City of Long Branch. In January 2011, LBHA hired Complainant to work as a security officer. During the relevant time period, she was assigned to work at one of the LBHA's residential apartment complexes, Kennedy Towers.

a. Race Discrimination

Complainant, who is African-American, alleges that her supervisor, Head of Security Cornelius "Neil" Walker, who is also African-American, subjected her to racial harassment. Complainant told DCR that in late January 2013, she contacted upper management to contest Walker's decision to suspend her for two days without pay.[1] She said that Walker called her into his office, and in the course of berating her for going to upper management, Walker said, "That is why I don't hire niggers anymore."

[1] On January 23, 2013, Walker issued a notice suspending her for January 26 and 27, 2013, for leaving her post without notifying her supervisor. Complainant told DCR that the LBHA's chief of staff later restored the pay she had lost as a result of that suspension.

At a fact-finding conference attended by the parties and presided over by DCR, Walker said that he could not recall whether he made that statement, but stated that fifteen of his seventeen subordinates were "niggers." When the DCR investigator asked Walker whether it was common for him to refer to African-American employees in such fashion, he did not respond.

During the course of the investigation, two witnesses told DCR that they heard Walker tell Complainant that he no longer hires "niggers." One is an LBHA tenant who told DCR that he was standing near enough to overhear their conversation. The other is Complainant's fiancé, who told DCR that he heard the statement via speakerphone. Complainant told DCR that before she entered Walker's office that day, she called her fiancé and placed her cell phone on speakerphone so she would have a witness to their conversation. She said that she was in the habit of doing so because of her strained relationship with Walker.

Complainant initially alleged that she reported Walker's racially hostile statement to the Kennedy Towers site manager, Lisa Normandia, on February 10, 2013. During the course of the investigation, Complainant modified that assertion somewhat. She said that she called Normandia to report the incident on the day it occurred. She said that Normandia replied that she would report the incident to Chief of Staff Daniel Gibson. Complainant said that on February 10, 2013, having heard nothing further, she spoke with Normandia in person. Complainant alleges that Normandia said something such as, "That's how Neil is," and told her that she should speak to Gibson.

At DCR's fact-finding conference, Normandia said that Complainant told her that she was having a problem with Walker but did not explain the nature of the problem or mention any racial slurs. Normandia said that she told Complainant that any complaints about Walker should go to Gibson.

b. Sexual Harassment

Complainant alleges that on February 15, 2013, Walker left a message on her cell phone repeating her name over and over in a sexually suggestive manner. Complainant told DCR that she played the phone message to another LBHA site manager, Brenda Anderson, on February 18, 2013. Complainant alleged that Walker asked her to go to Atlantic City with him on a day she was scheduled to work, and after she declined his invitation, he offered to find someone to cover her shifts so that she could go with him.

Walker denied calling Complainant and repeating her name in a suggestive manner. He said that he could not recall whether he asked Complainant to accompany him to Atlantic City, but if he did, it would have been to gamble.

Anderson, who has since resigned, told DCR that she remembered Complainant playing a voicemail message from Walker, but could not recall specifically what was said on the recording. Anderson told DCR that Complainant also complained to her that Walker verbally lashed out at her because she rejected his invitation for a date.

Gibson told DCR that Complainant reported that Walker left a message on her mobile phone that included heavy breathing, but he said that she did not provide any information corroborating her allegation.

Complainant told DCR that Walker also sexually harassed female tenants and visitors, and would sometimes ban female visitors from the premises if they rejected his sexual advances.

Complainant identified T.G. as a female tenant who was sexually harassed by Walker. DCR interviewed T.G. on January 29, 2015. T.G. told DCR that Walker said that if she would not give him oral sex, he would make things difficult for her. T.G. also told DCR that before she moved in, she rejected Walker's sexual advances, and he placed her on a "no trespass" list. T.G. said that after she moved in, Walker once used his keys to enter her apartment unannounced and against her wishes, and she was concerned because he continued to have the ability to enter her apartment whenever he choose to do so. At the fact-finding conference, Complainant said that T.G. told her that when Walker used his key to enter her apartment that day, Walker threatened her with harm if she continued providing information about allegations that he was sexually harassing women.

Gibson told DCR that after Complainant reported T.G.'s claim, he interviewed T.G., and she told him that the incident occurred 20 years ago. T.G. passed away shortly after her interview with DCR. As a result, DCR was unable to get further clarification from her in response to Gibson's statements. [2]

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[2] DCR also interviewed a male tenant of Kennedy Towers, who identified a female friend who would visit him from time to time. The tenant told DCR that Walker sexually harassed his visitor, and when she rejected Walker's sexual advances, Walker placed her name on a "no trespass list." DCR interviewed the female visitor, who said that Walker propositioned her for oral sex in 2013, and she refused. The next day she was denied entry and was told that she was on a "banned list." Respondent provided documents entitled "No Trespass List" or "Trespass List" for 2009, 2010, 2012, 2014 and 2015. This visitor's name was included on its no trespass lists for 2013, 2014 and 2015. Complainant claimed that Walker instructed her to place the woman's name on a "no trespass" list, and she complied before the woman came and told her what had happened. Anderson, the site manager, told DCR that she met with Complainant and the female visitor about this incident. According to Anderson, the woman said that Walker banned her from the premises after she refused his invitation into his car. Anderson said that she included the information she received in a memo to Gibson. DCR found no evidence that Respondent took any corrective action regarding this report. In response to DCR's request for all documents requesting or approving placing this visitor on a no trespass list, Respondent providing nothing showing a basis or justification for banning her from the property.

Gibson stated DCR that Walker did not control who was placed on "no trespass lists." Gibson stated that Walker made recommendations to the LBHA board based on arrests or "nefarious" actions that took place on LBHA grounds, but that the Executive Director made the final decision. However, Complainant claimed that LBHA would generate a typed "no trespass" list, but the security guards would add handwritten names to the list at Walker's direction. According to Complainant, all of the handwritten names added to the list at Walker's direction were female.

c. Retaliation

Complainant alleges that because she reported that Walker engaged in racial and sexual harassment, Walker placed her on probation for 90 days. She produced a March 18, 2013 written warning from Walker for excessive absenteeism, which put her on probation for 90 days. A list of absences was attached to the warning. Complainant pointed out that two of the cited absences were her January 26 and January 27, 2013 suspension days (which were later rescinded). She also asserted that a majority of the absences were a result of Superstorm Sandy, and that Gibson had excused those absences when she discussed them with him in response to the January 2013 suspension.

Respondent produced a March 18, 2013 email from Normandia to Gibson that recommended firing two male security monitors, and recommended giving Complainant a written warning with 90 days probation for nineteen absences in three months. The email identified the reasons for Complainant's absences as "mom is sick, I'm sick, etc."

However, Respondent's records show that another employee appears to have received only warnings with "strict monitoring," rather than probation, for similar absences. And while Complainant's warning threatens her with termination as the next stage of progressive discipline, the other employee was threatened only with suspension as the next stage of progressive discipline.

The verified complaint also alleges that as a reprisal, Respondent did not process Complainant's claim for workers compensation. In its answer to the complaint, LBHA asserted that it never received notice of any workers compensation claim filed by Complainant, and that it would have processed any such claim as required by law. During DCR's investigation, Complainant clarified that she asked LBHA to process a workers compensation claim because she was out of work for two days without pay for a work-related incident related to a bedbug infestation.

Complainant told DCR about another incident of alleged reprisal that took place after she filed her complaint with DCR. She reported to Anderson that an individual who is banned from Kennedy Towers because he is "a known drug dealer" was on the premises. Complainant believes that Anderson passed this information along to Walker, and that Walker told the "dealer" that Complainant had reported him. The individual approached Complainant and said that Walker told him that she had reported him. Complainant told DCR that, because she was concerned for her safety, she

requested a meeting with Anderson, Walker, and one of the LBHA's board members, Donald Covin.

Anderson scheduled the meeting in a July 24, 2013 letter, but later told Complainant that management would not meet with her because of her pending DCR complaint. In a July 30, 2013 email exchange between Gibson and the LBHA's Director of Management, Natalie Turner, Gibson wrote, "I am strongly urging you not to meet with [R.C.], unless, and until directed to do so by Tyrone. This is a matter of pending litigation." In reply, Turner wrote "Ok no problem. I was only meeting with her at the request of Mr. Covin because she keeps calling him to complain about Neil." LBHA's executive director, Tyrone Garrett, was copied on the email exchange, and there is no evidence that he intervened to permit the meeting to take place or took any other action to ensure that the LBHA addressed or even heard the substance of Complainant's safety concerns. Nor is there any evidence that he took any action to ensure that there would be no retaliation by the LBHA's management or board for Complainant's DCR filing.

d. Constructive Discharge

Complainant resigned from her position on or about July 31, 2013. During DCR's investigation, she indicated that she resigned because the LBHA did not meet with her to address her safety concerns or respond to her complaints of racial and sexual harassment. Complainant told DCR that she resigned without first getting another job because she was concerned for her safety and the safety of her family.

DCR requested copies of LBHA's policies on racial and sexual harassment several times during the investigation. On August 26, 2015, Respondent provided a copy of a recently adopted sexual harassment policy, which it identified as an amended policy. This policy makes no mention of discrimination or harassment based on other LAD-protected characteristics, and Respondent has provided no other policies regarding workplace discrimination, harassment or retaliation.

Analysis

At the conclusion of an investigation, the 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. "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." Ibid.

A finding of probable cause is not a final adjudication on the merits, but 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., 111 S.Ct. 799. 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 "clear public policy of this State is to eradicate invidious discrimination from the workplace." Alexander v. Seton Hall, 204 N.J. 219, 228 (2010). To that end, the LAD was enacted as remedial legislation to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). "The LAD was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." Lehmann v. Toys'R'Us, Inc., 132 N.J. 587, 600 (1993).

The LAD prohibits employment discrimination based on race. N.J.S.A. 10:5-12(a). The prohibition includes not just discrimination in hiring, firing, and promotions, but also creating a hostile work environment based on race. Lehmann, supra; Taylor v. Metzger, 152 N.J. 490 (1998). In a racial harassment case, an employee must demonstrate conduct that (1) would not have occurred but for the employee's race; and that the conduct was (2) severe or pervasive enough to make a (3) reasonable person of that race believe that (4) the conditions of employment are altered and the working environment hostile or abusive. Id. at 498 (citing Lehmann, supra, 132 N.J. at 603-04).

Courts have noted that "[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993). The New Jersey Supreme Court describes the word as "one of insult, abuse, and belittlement harking back to the slavery days." Taylor, supra, 152 N.J. at 510 (citation omitted). See also Brown v. East Miss. Electric Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993) (stating "the term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race"); McGinest v. GTW Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004) (stating "the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination"). It is "the most noxious racial epithet in the contemporary American lexicon" and "the all-American trump card, the nuclear bomb of racial epithets." Gregory S. Parks and Shayne E. Jones, "Nigger": A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law, 98 J. Crim. L. & Criminology 1305, 1317 (2008).

In this case, two witnesses corroborated Complainant's allegation that Walker, who was Respondent's Head of Security and Complainant's supervisor, told her that he no longer hires "niggers." One of the witnesses to Walker's use of this racial slur was a tenant. In addition to the impact on Complainant, a supervisor's use of this slur within earshot of tenants sends a message to tenants that management condones this type of racial harassment. It also sends a message to tenants that management discriminates based on race in its hiring decisions. And given Complainant's position as a security guard, Walker's racially demeaning conduct could undermine Complainant's authority with tenants and the public, and impair her ability to do her job. Walker again used the word "nigger" during the DCR fact-finding conference in describing his employees. Based on the above, the Director finds, for the purposes of this disposition only, that Walker's conduct was sufficiently severe or pervasive to constitute a hostile work environment based on race.

Sexual harassment in the workplace is a form of gender discrimination. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). To present a claim of hostile work environment sexual harassment, there must be evidence that the conduct occurred because of the employee's gender or was sexual in nature, and that a reasonable employee of the same gender would find the conduct severe or pervasive enough to alter the conditions of employment to make the working environment hostile or abusive. Id. at 603.

Here, Complainant alleges that Walker made a sexually suggestive phone call to her, asked her to go to Atlantic City with him, offered to change the work schedule to encourage her to go with him, and became hostile when she declined. In addition, there is evidence suggesting that Walker's sexual harassment of female visitors permeated Complainant's work environment. And at least once, Walker forced Complainant to unwittingly aid in the discrimination by directing her to ban from the premises a woman who had rejected his sexual advances. Although Gibson stated that he investigated the incident with T.G., who was then a tenant, there is no evidence that Respondent investigated or took any action regarding Complainant's report of Walker's treatment of female visitors.

At this threshold stage of the proceedings, based on the totality of the incidents directed at Complainant and others, the investigation showed that a reasonable woman would find Walker's sexual conduct severe or pervasive enough to render the workplace hostile or abusive.

In determining an employer's liability for harassment of its employees, courts have determined that employers who promulgate and support an active anti-harassment policy may be entitled to a form of safe haven from vicarious liability from an employee's harassing conduct of others. Cavuoti v. New Jersey Transit Corporation, 161 N.J. 107, 120-21(1999); Aguas v. State, 220 N.J. 494 (2015). To assert an affirmative defense, an employer must prove two prongs by a preponderance of the evidence: first, that the employer exercised reasonable care to prevent and to correct promptly harassing behavior; and second, that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. Id. at 524. In order to satisfy the first prong of the affirmative defense:

> [A]n employer's . . . harassment policy must be more than the mere words encapsulated in the policy; rather, the LAD requires an "unequivocal commitment from the top that [the employer's opposition to harassment] is not just words[,] but backed up by consistent practice." Lehmann, supra, 132 N.J. at 621, 626 A.2d 445. The "mere implementation and dissemination of anti-harassment procedures with a complaint procedure does not alone constitute evidence of due care--let alone resolve all genuine issues of material fact with regard to due care."
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> [Gaines v. Bellino, 173 N.J. 301, 319 (2002).]

Here, Respondent provided no evidence of an anti-discrimination or anti-harassment policy in effect during Complainant's employment. Although there is a factual dispute as to whether Complainant's reports to management about Walker's inappropriate conduct explicitly noted that his conduct was racially offensive, Anderson and Gibson acknowledged that Complainant reported the alleged sexual harassment. The Director finds, for purposes of this disposition only, that Respondent has not established the affirmative defense.

The LAD also makes it illegal for employers to retaliate against employees for reporting workplace discrimination. N.J.S.A. 10:5-12(d). A complainant's burden to establish a *prima facie* case of retaliation is "not an onerous one." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant must show that she engaged in LAD-protected activity known to her employer, that the employer thereafter subjected her to adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (1990). If a complainant can make that *prima facie* showing, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its adverse employment decision. If the employer can meet that burden of production, then the complainant, who retains the burden of persuasion, has the opportunity to show that the employer's explanation was merely a pretext designed to mask unlawful reprisal. Young v. Hobart West Group, 385 N.J. Super. 448, 465 (App. Div. 2005).

Here, the Director finds that Complainant engaged in protected activity when she complained to Respondent's site managers about Walker's racial slur and the sexual harassment, and again when she filed her complaint with DCR.

The Director finds, for purposes of this disposition only, that there is a reasonable ground of suspicion that Respondent placed Complainant on probation for attendance issues (when some similarly-situated employees received less severe treatment for similar attendance issues), and that Walker told a reputed drug dealer that Complainant had reported his illegal activity, and that management refused to meet with Complainant to address her safety and workplace harassment concerns, because she filed discrimination complaints.[3]

To establish a constructive discharge, an employee must show that the conduct was not merely severe or pervasive, but made the workplace so intolerable that a reasonable person would be compelled to resign. Shepherd v. Hunterdon Dev. Ctr.,

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[3] Complainant also alleges that in retaliation for her internal complaints, Respondent refused to process her application for workers compensation. The DCR investigation found that there may have been some miscommunication about the procedures for filing a workers compensation claim, but did not find sufficient evidence that Respondent intentionally refused to process any application for Complainant. In the absence of an intentional action or intentional refusal to act, the investigation did not support a claim of unlawful retaliation regarding Complainant's request for workers compensation.

174 N.J. 1, 28 (2002). However, "an employee has the obligation to do what is necessary and reasonable in order to remain employed rather than simply quit." Ibid. In applying the reasonable person test, factors to be considered include "the nature of the harassment, the closeness of the working relationship between the harasser and the victim, whether the employee resorted to internal grievance procedures, the responsiveness of the employer to the employee's complaints, and all other relevant circumstances." Ibid. (citing Woods-Pirozzi v. Nabisco, 290 N.J. Super. 252, 276 (App. Div. 1996)).

Here, there is sufficient evidence to support a preliminary finding that management's conduct and its refusal to meet with Complainant to address her safety concerns made the workplace so intolerable that a reasonable person would feel compelled to resign.

Conclusion

In view of the above, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that probable cause exists to support the allegations of hostile work environment discrimination, retaliation, and constructive discharge. N.J.A.C. 13:4-10.2.

DATE: 11-16-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS