

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC  
SAFETY  
DIVISION ON CIVIL RIGHTS  
DCR DOCKET NO. ED08WB-66843**

<b>██████████,</b>	)	
<b>COMPLAINANT,</b>	)	
<b>v.</b>	)	<b>Administrative Action</b>
<b>B&amp;H International Associates,</b>	)	<b>FINDING OF PROBABLE CAUSE</b>
<b>RESPONDENT.</b>	)	

On February 2, 2018, ██████████ (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that B&H International Associates, (Respondent), discriminated against her based on sex, subjected her to sexual harassment, and retaliated by discharging her, 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, harassment and retaliation in their entirety. DCR’s investigation found as follows.

**SUMMARY OF INVESTIGATION**

Respondent is an auto body shop in Camden, New Jersey. Respondent hired Complainant as an Office Manager in or around 2016. In that position, Complainant handled office administration and processed paperwork. Complainant alleged that she did not earn a regular salary but that she was on payroll and that Respondent paid her on an irregular schedule.

Complainant alleged that she was sexually harassed by Respondent’s owner, Faustino Batista, from August 2017 through January 2018. Complainant alleged that Batista continuously asked her out on dates and would make sexually offensive remarks regarding her vagina. Complainant alleged that in January of 2018, Batista reached over her shoulder and grabbed her breast stating, “I finally touched your boob.” Complainant alleged that she complained to Batista about his behavior on several occasions, with the last being in January 2018. Complainant alleged that Batista retaliated against her for rejecting his advances and for her complaint, by terminating her employment in front of co-workers on January 20, 2018.

Respondent denied Complainant's allegations of sex discrimination, sexual harassment, and retaliation. Respondent denied Batista ever asked Complainant out on a date, denied Batista made sexually offensive remarks to Complainant regarding her vagina, and denied that Batista grabbed Complainant's breast or any other part of her body. Respondent stated that it had employed numerous women, and none had ever complained of sexual harassment.<sup>1</sup> Respondent stated that Batista terminated Complainant for lateness and poor performance.

In an interview with DCR, Complainant stated that she began working for Respondent in or around 2016 and she was the only female employee. Complainant stated that Batista began making inappropriate, sexual comments to her in or around August 2017. Complainant told DCR that Batista would sit behind her desk and make sexually offensive remarks. Complainant stated that on one occasion, Batista went to the restroom and while his hands were still wet, he touched the back of her neck and made a comment about his bodily fluids. Complainant stated that on another occasion he asked her if she would hold his penis while he urinated. Complainant stated that on another occasion Batista asked her, "Who would be the lucky one that you would perform orally on with that lipstick?" Complainant stated on another occasion, in or around August 2017, Batista told her that if she would hold his penis and kiss the tip, he would help pay for her daughter's sweet sixteen party.

Complainant told DCR that on another occasion, Batista leaned over while she was working and proceeded to slide his hand down her thigh, and on another occasion, he touched her rear end with the phone. Complainant stated that on another occasion, while she was showing him emails on the computer, he reached over her desk, grabbed her breast and said, "I can finally say I touched your boob." Complainant alleged that her daughter was on the phone when Batista touched her breast and heard her complain about the unwanted touching as it was occurring.

Complainant stated that Batista constantly tried to find out about her private life and upon discovering that she had a "female related medical condition," he would make fun of her and say that she could not perform sexually. Complainant stated that on her final day of work, Batista commented, "As a woman you can't function, I can't do this anymore. You never had sex with me and you make me look like a sucker. You have been here a long time and you never gave anything up." Complainant stated that there were no witnesses to Batista's behavior.

In an interview with DCR, Batista denied all charges of sexual harassment, and stated that Complainant was discharged for poor work performance and because she was always late. Batista specifically denied asking Complainant out on a date, making sexually suggestive remarks, and grabbing Complainant's breast. Batista also denied that Complainant ever complained to him about any sexual comments and denied asking Complainant to hold his penis. Batista stated that the area where Complainant worked was very open and if he had said or done any of what she claimed, someone would have seen it. Batista also stated that he believed Complainant fabricated the allegations because she was attracted to him, and he did not feel the same way about her.

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<sup>1</sup>Respondent produced names of two former female employees, but DCR was unable to reach them for interviews based on the contact information provided.

DCR interviewed ██████████, the woman who reportedly took over Complainant's duties after she was terminated. ██████████ reported that she "helps out" but is not formally employed by Respondent. ██████████ stated that Batista has never sexually harassed her nor has she observed him sexually harass anyone else, though ██████████ told DCR that Respondent did not employ any other women.

DCR spoke with ██████████, a female delivery driver, who worked for a company that delivered auto parts to Respondent on a regular basis. ██████████ stated that during the relevant time, she "liked females" and Batista "joked" that she was not welcome because she would steal Complainant away from him. ██████████ stated that she felt strongly that Batista's comments were not in jest, as her employer changed her route so that she no longer delivered to Respondent.

During an interview with DCR, Complainant's daughter, ██████████ corroborated Complainant's assertions that she was sexually harassed by Batista. ██████████, who was 16 years old at the time, told DCR that her mother was very uncomfortable working for Respondent and wouldn't allow ██████████ to visit her at work. She also recounted an occasion when she called her mother at work and Batista answered the phone. According to ██████████ Batista told her that her mother had just finished "eating him" and that he would "be her new daddy." ██████████ told DCR that the situation was uncomfortable for her and that she told Batista to stop. ██████████ told DCR that, on another occasion, she was on the phone with her mother, who was at work, and, in the middle of their conversation, she heard her mother say, "Don't touch me there – move your hand away!" and then the phone was disconnected. That evening she asked her mother about the incident and her mother told her that Batista had tried to touch her breast and was "telling her bad things and making her feel bad at work." ██████████ told DCR "It made me feel bad. Stuff I knew should not be happening at the workplace."

In response to the complaint, Respondent stated that it would produce documents demonstrating that Complainant's mistakes had resulted in financial losses, thus supporting its claim that she was terminated for a non-discriminatory reason. However, Respondent's attorney later stated that Respondent was unable to produce such documents.

## ANALYSIS

At the conclusion of an investigation, the 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). "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 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 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 prohibits discrimination on the basis of membership in a protected class, including sex. It is well recognized in New Jersey jurisprudence that “[d]iscrimination based on gender is ‘particularly repugnant in a society which prides itself on judging each individual by his or her merits.’” Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 601 (1993), quoting, Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 96 (1990)(citation omitted). Sexual harassment is a form of sex discrimination that is prohibited by the LAD. See Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 607 (1993). Gender-based hostile environment is shown where, among other things, the harassing conduct is “severe or pervasive” such that it creates an intimidating, hostile, or offensive working environment. Id. at 603. The standard contemplates “the cumulative effect of the various incidents, bearing in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate and that the work environment created may exceed the sum of the individual episodes.” Id. at 607. “Quid pro quo sexual harassment” occurs where a job benefit is conditioned on submission to a sexual demand or an employee is threatened with an adverse job action if they refuse to submit to a sexual demand. Lehmann at 601.

To present a claim of hostile work environment due to 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. Lehman at 603. When the harasser is the owner of the business, his or her conduct “carries with it the power and authority of the office.” See, Taylor v. Metzger, 152 N.J. 490, 505 (1998). In cases where the harasser is the owner or ultimate supervisor, the employee’s dilemma is “acute and insoluble” because she has “nowhere to turn.” Id.

Here, the investigation found sufficient evidence to support Complainant allegations that she was discriminated against on the basis of sex and subjected to a hostile work environment by Respondent’s owner, including claims of sexually explicit comments and physical touching, sufficient to meet the “severe or pervasive” standard. Although Respondent denied the claims Complainant provided detailed accounts of sexually harassing behavior, lending to her credibility. In re Seaman, 133 N.J. 67, 87 (1993)(level of detail is given consideration in evaluating the credibility of the complaining witness). Additionally, Complainant’s daughter corroborated Complainant’s allegation, telling DCR that her mother told her that Batista tried to touch her breasts, and had said bad things to her at work. Complainant’s daughter also told DCR that Batista made crude and inappropriate remarks to her, a 16 year old girl at the time, and that she overheard her mother telling someone “don’t touch me there – move your hand away” and later learned from her mother that that was when Batista was trying to touch her mother’s breast.

With regard to Complainant’s retaliation claim, consistent with the broad remedial purpose of the LAD, the law prohibits retaliation against persons who engage in protected activity including, those who assert an LAD violation and their supporters, as well as those who refuse to engage in or condone discriminatory conduct. N.J.S.A. 10:5-12(d). The LAD's anti-retaliation

provision is “essential aspect of the LAD” ““is broad and pervasive, and must be seen as necessarily designed to promote the integrity of the underlying anti-discrimination policies of the [LAD] by protecting against reprisals “any person” who has sought to protect his or her own rights not to be discriminated against....” “ Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 259 (2010) (quoting Craig v. Suburban Cablevision, Inc., 274 N.J. Super. 303, 310 (App.Div.1994), aff’d, 140 N.J. 623 (1995)). The LAD prohibits retaliation against an individual because they filed a discrimination or harassment complaint under the LAD, internally, with an agency, or in court. N.J.S.A. 10:5-12(d); N.J.A.C. 13:4-12.1. See, Jamison v. Rockaway Bd. of Educ., 242 N.J. Super. 436 (App. Div. 1990).

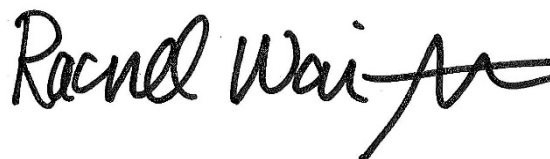
To establish a *prima facie* case of retaliation, a complainant must show that she engaged in LAD-protected activity known to her employer, that the employer thereafter subjected her to adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. Of Ed., 242 N.J. Super. 436, 445 (1990). Once a complainant makes 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 investigation found sufficient evidence to support Complainant allegations that she was terminated because she rebuffed Batista’s sexual advances. Respondent failed to produce any evidence to support its assertion that Complainant was terminated because of her poor performance. Though Respondent told DCR that it had documents demonstrating that Complainant’s poor performance had caused financial losses, Respondent ultimately stated that it was unable to produce any such evidence. Respondent’s failure to provide any evidence to support its asserted legitimate reason for Complainant’s termination suggests that its rationale may well be a pretext for discrimination.

Therefore, 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 sex discrimination, sexual harassment, and reprisal.

December 28, 2020

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DATE



Rachel Wainer Apter, Director  
New Jersey Division on Civil Rights