

Internal Investigations Don't Have To Be The Equivalent Of Pulling Teeth, by Iram Valentin and Allison Scott 7-27-2023

On June 22, the Appellate Division of the New Jersey Superior Court decided *Ezekiel v. Lawrenceville Oral Surgery, PC, et al.* (App. Div. June 22, 2023), which addresses an employee's claims against her employer and its principal for sexual discrimination and harassment under the New Jersey Law Against Discrimination ("NJLAD"). In confirming the Report & Recommendation adopted by the Director of the New Jersey Department of Civil Rights ("NJDCR"), which issued a finding of "No Probable Cause" in favor of the respondents, the *Ezekiel* decision underscores the importance of a prompt and appropriate investigation once an employee lodges a discrimination complaint.

DCR Complaint

In Ezekiel, the Complainant, a dental surgery assistant, filed her complaint with the NJDCR on August 25, 2015, alleging that her employer, Lawrenceville Oral Surgery, P.C., and its principal dental surgeon, Dr. Earl Cubbage, subjected her to sexual harassment and constructively discharged her in violation of the NJLAD. The Complainant specifically alleged, among other things, that Dr. Cubbage made inappropriate sexual comments about her and other employees; that he told inappropriate sexual jokes; that he discussed pictures of naked women in adult magazines; and that he made inappropriate comments about female patients. She further alleged that Dr. Cubbage consistently made inappropriate comments directed at her, that he massaged her without her consent, and that he purposefully brushed up against her while in the office. She alleged that she reported this conduct to the office manager on numerous occasions, to no avail. The Complainant further stated that she left work one day in June 2014 with the intention to quit because of an alleged fear that she developed of Dr. Cubbage, and that she was terminated the next day for "walking off the job."

NJDCR investigated Complainant's claims and, after speaking with numerous witnesses, issued a finding of No Probable Cause ("NPC") in November 2019. The case was reopened for a short period of time in August 2021 after the Complainant raised an issue with service of the original NPC, but was closed again in January 2022 after NJDCR issued a second NPC finding that reaffirmed its initial conclusion that probable cause did not exist to credit the Complainant's allegations. Dispositively, NJDCR concluded that the witnesses interviewed not only failed to support the Complainant's allegations, but affirmatively contradicted certain allegations that the Complainant indicated they witnessed. Indeed, all of the witnesses denied seeing Dr. Cubbage make inappropriate sexual comments or jokes, or otherwise inappropriately touch any employee or patient. Several of the witnesses, including Dr. Cubbage, also noted that the Complainant was insubordinate and was not completing her job duties effectively. As such, NJDCR "did not find sufficient evidence to support a reasonable suspicion that [the Complainant] was subjected to a hostile work environment, that she was sexually harassed, or that she was constructively discharged."

Appellate Court Affirmation

On appeal, the NJDCR's NPC finding was affirmed, *per curiam*. The Appellate Court noted that its review of the decisions of an administrative agency is limited, and that "an appellate court will reverse the administrative agency only if it is arbitrary, capricious[,] or unreasonable or is not supported by substantial credible evidence in the record as a whole." Here, the Complainant's appeal essentially sought to have the Appellate Division reevaluate the evidence and reach a conclusion contrary to that of the NJDCR, which the Court refused to do. Accordingly, the Appellate Court found that the Report and Recommendation adopted by the NJDCR Director was neither arbitrary nor unreasonable, as it fully reviewed and considered the complete record of the case, and the agency's decision was affirmed. Notably, since NJDCR issued a finding of no probable cause, which was upheld by the Appellate Division, the Complainant is barred from filing the same allegations in a new complaint in state court.

Best Practices for Employers

*While the investigation conducted by the NJDCR in *Ezekiel* yielded favorable results, employers should prospectively update and/or*

implement policies and procedures designed to promptly and appropriately address employee complaints. Doing so promotes a workplace free from discrimination or harassment, increases employee morale and productivity, and allows employers to uncover facts to take steps to remediate any issues or neutralize baseless claims. If a complaint is ultimately filed with NJDCR or in state or federal court, an employer may be able to rely on the findings of its internal investigation and any remedial measures taken. Indeed, an employer may face greater liability in administrative proceedings or civil suits if it fails to conduct a proper investigation after an employee files a complaint.

KAUFMAN DOLOWICH IS HERE TO HELP

It is important to consider all the factors that affect who should perform an internal investigation. The attorneys at Kaufman Dolowich have extensive experience advising employers, conducting internal investigations, and defending employers in administrative and court proceedings. Should you have a possible need, please contact us to discuss your concerns.

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