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LR
LECLAIR RYAN

June 23, 2011

VIA HAND DELIVERY

Donato J. Battista, Esq.
County of Hudson
Office of the County Counsel
Department of Law
567 Pavonia Avenue
Jersey City, New Jersey 07306

Elinor Gibney
Director of Personnel
Department of Personnel
567 Pavonia Avenue
Jersey City, New Jersey 07306

Re: INVESTIGATION INTO COMPLAINTS OF ~~REDACTED~~

Dear Don and Elinor:

Enclosed is this Firm's report regarding the investigation into the complaints of ~~REDACTED~~

Thank you for your attention to this matter.

Very truly yours,
Joseph P. Parancak, Jr. ~~REDACTED~~

Joseph P. Parancak, Jr.

E-mail: joseph.parancak@leclairryan.com
Direct Phone: 973.491.3570
Direct Fax: 973.491.3555

One Riverfront Plaza, 1037 Raymond Boulevard, Sixteenth Floor
Newark, New Jersey 07102
Phone: 973.491.3603 | Fax: 973.491.3555

CALIFORNIA | CONNECTICUT | MASSACHUSETTS | MICHIGAN | NEW JERSEY | NEW YORK | PENNSYLVANIA | VIRGINIA | WASHINGTON, D.C.

Paul D. Dobbin | Attorney in charge. Newark office | LeClairRyan is a Virginia professional corporation

ATTORNEYS AT LAW | WWW.LECLAIRRYAN.COM | ~~LECLAIR RYAN 000142~~

IV. FINDINGS

A. We Find, Based Upon a Preponderance of the Evidence, that it is More Likely Than Not that Aviles Sexually Groped and Kissed [REDACTED] on May 25, 2010, and as a Result, Created a Sexually Hostile Environment for [REDACTED]

Based upon our investigation, we find that the preponderance of the evidence supports the conclusion that Aviles sexually groped and kissed [REDACTED] on May 25, 2010 and, that as a result of his actions, he created a sexually hostile environment for Mutone.

1. The Preponderance of the Evidence Supports that Aviles Sexually Groped and Kissed [REDACTED] on May 25, 2010.

The preponderance of the evidence standard requires a fact finder to conclude that a contested fact is more probable than its nonexistence. See Liberty Mut. Ins. Co. v. Land, 186 N.J. 163 (N.J. 2006). Here, applying the preponderance of the evidence standard, we find that based upon our investigation, it is more probable than not that Aviles sexually groped and kissed [REDACTED] on May 25, 2010. Initially, [REDACTED] gave an extremely detailed account of the alleged incident. She stated that on May 25, 2010, she went to Aviles' office, along with Investigator Frank Rivera, and that Aviles asked Rivera to step out of the room to retrieve a cell phone. [REDACTED] reported that when Rivera left the room, Aviles tried to hug her and then put his hands on her buttocks, kissed her neck with his tongue, touched her breasts, and pulled her shirt down to kiss her breasts. We interviewed [REDACTED] on three occasions and her account of the alleged incident remained consistent.

In addition, [REDACTED] made "fresh complaints" of the incident to both [REDACTED] [REDACTED] a Clerk in the Juvenile Detention Center, and to [REDACTED] In New Jersey, "fresh

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complaint" evidence is a recognized exception to the hearsay rule, which "permits evidence that a victim complained of a proscribed act within a reasonable time after it occurred to someone whom he would normally turn to for sympathy, protection or advice." New Jersey Div. of Youth & Family Services v. S., 185 N.J. Super. 3, 8 (App. Div. 1982) (citations omitted). Here, [redacted] and [redacted] both reported that shortly after the alleged incident, [redacted] complained to them that Aviles sexually groped and kissed her while she was alone with him in his office. The complaints [redacted] made to [redacted] and [redacted] are entirely consistent with the recount of the incident she shared with us. Specifically, [redacted] reported that at the end of May, [redacted] came to her and "looked upset". [redacted] further reported that [redacted] told her that Aviles sexually groped her while she was alone with him in his office. Moreover, [redacted] reported that on June 15, 2010, (only a few weeks after the alleged incident), [redacted] told her that while alone with Aviles in his office, Aviles asked her for a hug and then grabbed her in various parts of her body as she tried to push him away.

In addition, [redacted] version of the events is supported by the documents that we reviewed. Specifically, [redacted] reported that prior to the incident she and Aviles exchanged text messages, many of which were of a sexual and flirtatious nature. [redacted] explained that after the alleged incident, Aviles sent her a flurry of text messages begging her not to report the incident. The phone records we examined support that Aviles and [redacted] exchanged text messages prior to the alleged incident and that Aviles sent a flurry of text messages to [redacted] immediately following the alleged incident.

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In addition to [redacted]'s consistent recount of the alleged incident, her "fresh complaints" to [redacted] and [redacted] and the phone records, [redacted] also had no incentive to lie. Indeed, [redacted] is not an employee of the County. Moreover, [redacted] reported that [redacted] did not want to report the incident to anyone in the County.

In contrast, Aviles denied the incident occurred. However, unlike [redacted] who had no incentive to lie, Aviles, whose job and reputation are on the line, has every incentive to deny the alleged incident. In addition, weighing against Aviles' credibility is the fact that he initially denied sending [redacted] text messages of a sexual nature and also stated that he did not text [redacted] often. In fact, it wasn't until Aviles was advised that we were in possession of phone records, that Aviles admitted that he sent [redacted] a lot of text messages and that some of those text messages consisted of sexual advances and "that it was possible" that his relationship with [redacted] "eventually evolved into a romantic one."

Accordingly, based upon a preponderance of the evidence, we conclude that it was more probable than not, that Aviles sexually groped and kissed [redacted] on May 25th.

2. Aviles' Actions Created a Sexually Hostile Environment.

We also conclude that Aviles' actions created a sexually hostile environment for [redacted]. It is well-settled that employers have a duty to maintain a harassment free workplace, which extends to both its employees as well as non-employees who enter the workplace. While hostile work environment claims under the New Jersey Law Against Discrimination most often occurs in the context of an employment relationship, courts have increasingly applied the LAD's

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prohibition of a hostile work environment to non-employment scenarios as well. See, e.g., J.T.'s Tire Service, Inc. v. United Rentals North America, Inc., 2010 N.J. Super. LEXIS 2 (App. Div. Jan. 6, 2010) (observing that sexual harassment is covered under the LAD's prohibition of discrimination in business transactions). Accordingly, a third-party employee who is subjected to workplace harassment could expose an employer to liability under the LAD.

In order to establish a claim of hostile work environment under the New Jersey Law Against Discrimination, a plaintiff must demonstrate the alleged conduct would not have occurred but for her gender and it was severe or pervasive enough to cause her to objectively believe that her working conditions were so altered that her work environment became hostile or abusive. Lehrmann v. Toys R' Us, Inc., 132 N.J. 587, 603-04 (1993). The controlling factors "include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance." Heitzman v. Monmouth County, 321 N.J. Super. 133, 147 (App. Div. 1999). New Jersey courts have consistently recognized that it is not within the meaning of the law to allow harm to go unremitted merely because it was brought about by a single, severe incident of harassment rather than by multiple incidents of harassment. Lehman, 132 N.J. at 607.

Here, Aviles' actions in groping and kissing [REDACTED] would certainly give rise to the severe and pervasive conduct required to establish a hostile environment. Accordingly, we conclude that Aviles' actions created a hostile environment for [REDACTED].

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VI. RECOMMENDATIONS

Because we conclude that Aviles created a sexually hostile work environment for [REDACTED] we recommend that Aviles be subject to immediate disciplinary action up to and including termination. Should Aviles' discipline not include his termination, we recommend that in addition to any discipline, Aviles also be required to attend anti-harassment training.

In addition, we note that [REDACTED] reported that in late May [REDACTED] told her that Aviles sexually groped her while she was alone with him in his office. While [REDACTED] reported that she advised [REDACTED] to report the incident to [REDACTED], [REDACTED] never reported the incident to anyone in the County. In that regard, we recommend that [REDACTED] be trained on the County's policies which require that when employees witness or become aware of incidents of alleged harassment, they report those incidents to a supervisor or the Department of Personnel.