

**NEW JERSEY DIVISION ON CIVIL RIGHTS
FINDING OF INVESTIGATION**

**P.F. v. Continental Casualty Company
DCR Docket No. EQ06SB-65523**

Ocean County resident P.F. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her employer, Continental Casualty Company (Respondent),¹ subjected to her differential pay based on her gender, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. DCR’s ensuing investigation found as follows.

Summary of Investigation

Complainant alleges that on or about November 3, 2003, Northeast Regional Marketing Supervisor Christina Bergeron hired her to work at Western Surety Company (Western) d/b/a CNA Surety, as a marketing representative.

In 2011, Western was acquired by Respondent. Respondent describes itself as a provider of a “full range of surety and fidelity bonds in all 50 states, Canada and Puerto Rico . . . [t]hrough a combined network of approximately 40,000 appointed agencies . . . from the smallest commercial bonds to multi-million dollar contract bonds.” See <https://www.cnasurety.com/cna/guest/cnasurety/aboutus>. Respondent’s written job description states that the function of the surety marketing representative is to “[s]ell all CNA Surety products and services.” See CNA Surety Marketing Rep, Job Code 173001. The job description also states, among other things, “Responsible for selling, installation, and training agents in the use of agent automation services . . . personally contacting all agents and prospects . . . to create increased production . . . [f]ield and handle agents’ complaints.” Ibid. Marketing representatives worked from their homes. On occasion, Christina Bergeron would accompany a marketing representative on a visit to an agent.

On January 1, 2012, Complainant, Bergeron, and four other Northeast Region marketing representatives—Ronald B., Ashley C., Richard C., and Jonathan D.—became employees of Respondent. They retained the same approximate job functions, titles, and base salaries. At the time, Complainant’s salary was marginally higher than two of the three male comparators.

Marketing Representative	Gender	Western 2011 base salary
Ronald B.	M	\$61,095
Ashley C.	F	\$45,833
COMPLAINANT	F	\$40,160
Richard C.	M	\$40,000
Jonathan D.	M	\$40,013

¹ In the verified complaint, Respondent was identified as, “CNA Surety.” Respondent’s counsel told DCR that the entity’s proper name is “Continental Casualty Company.” The caption is hereby amended to reflect counsel’s representation.

In April 2012, Respondent's Northeast Region marketing representatives became eligible for annual salary increases. Complainant received four such increases. Complainant's annual salary increases and resulting base salaries were as follows.

Date	Base Salary	Increase Percentage
1/1/12	\$40,160	Initial salary
4/1/12	\$41,766	4%
4/1/13	\$42,768	2.4%
4/1/14	\$44,479	4%
4/1/15	\$46,258	4%

Complainant alleges that in February 2013, Greg Siewert, Assistant Vice President, Business Development, told her that she "earns twenty percent less than what she should be making." See Verified Complaint, Sept. 11, 2015, p. 2. Complainant claims that Siewert said that he was looking into the issue but would be unable to give her a 20% raise.

Complainant alleges that in January 2015, she asked Human Resources Associate Gavin Daly if her salary was comparable to others on her team, and that Daly replied that she was "not the only one who makes less than they should." Ibid. Complainant alleges that when she asked Daly if she was earning the same base salary as male marketing representatives, he "never confirmed nor denied." Ibid.

On September 11, 2015, Complainant initiated the instant matter with DCR alleging gender discrimination with respect to the base salaries.²

On January 4, 2016, approximately four months after initiating the instant matter with DCR, Complainant retired.

Respondent denied the allegations of gender discrimination in their entirety. It denied that Siewert or Daly made the statements attributed to them. It claimed that its salaries are not lockstep or based on gender, but rather based on a number of factors such as the level of knowledge, particular skills, performance, geographic location, and length of service. It noted that salaries offered to new hires can also vary depending on whether there is a competitive environment for good applicants. It stated that its marketing representatives' salaries were based on performance and that "there were certain aspects of Complainant's performance that needed improvement." See Respondent Position Statement, Oct. 30, 2015, p. 4.

² In addition to base salaries, marketing representatives are eligible for monthly commissions, bonuses, and cash awards based on sales production and generation of new business. Complainant did not allege gender discrimination as to those latter income sources.

For example, it noted that Complainant had “the next-to-lowest production” of any marketing representative under Bergeron’s supervision in terms of what Respondent refers to *Core Business Production Goals*. Id. at 28. To support that assertion, it produced the following statistics.

Marketing Rep.	2014 Core Business Production Goal Achieved
Michael Parisi	116.8%
James B.	98.6%
Eric B.	95.5%
Richard C.	91.7%
Jonathan D.	91.3%
Ronald B.	91.1%
COMPLAINANT	88.8%
Ashley C.	83.7%

Marketing Rep.	2015 Core Business Production Goal Achieved
Jonathan D.	112.3%
James B.	103.5%
Ashley C.	101.6%
Michael P.	97.2%
Eric B.	96%
Ronald B.	93.9%
COMPLAINANT	90.6%

Respondent also noted, for example, that there was a perception that Complainant resisted constructive criticism. To support that assertion, it produced, among other things, an email noting in part, “[P.F.] always seems to be in Fight mode . . . she knows she needs to not take issues so personally and she must work on this constantly.” See Email from Bergeron to Siewert, Oct. 10, 2013, 7:59 a.m.

Respondent also noted, for example, that in January 2014, an agent reported that Complainant behaved unprofessionally and asked that Respondent assign a different marketing representative to the account. Id. at 10-11. DCR reviewed an email from Bergeron to Siewert discussing the incident. Bergeron wrote in part:

I am going to call the agency and hopefully speak to Shawn and Lisa apologizing for [P.F.]’s unprofessional behavior . . . At this point in her career, [P.F.] should have been able to deal with this situation much differently . . . [P.F.] should have been more professional and immediately said that she would call in the near future to make an appointment but instead did not handle the properly and ended up looking bad in the face of the agent.

Greg I am also going to be discussing this with [P.F.] this afternoon and make sure she is aware that this will not be acceptable going forward. I would at this point also like to have a meeting with Tracy in HR or another representative because in the past when I have had these uncomfortable situations with [P.F.] she has taken them to HR and I just want to make sure I am handling this properly and with the correct documentation.

[See Email from Bergeron to Siewert, Jan. 17, 2014, 8:50 a.m.]

Respondent also noted, for example, a series of emails from the fall 2015, where the underwriting department complained to Siewart and others about what it perceived as Complainant's inaction. At one point, an underwriting manager wrote:

I really don't like to do this but here is an example of complete lack of cooperation from the MR [marketing representative] side. I sent this note to [P.F.] in July and as you can see, she simple [*sic*] hasn't done one bit of research on it. I wonder if Christine [Bergeron] ever followed up with her on the assignment. This is why stuff never gets completed. UGH!"

[See Email from P. Kolbeck to L. Kasten, FW: NJ Competitor Probate Rates, Sept. 9, 2015, 8: 11 a.m.]

Respondent also produced a report that Bergeron prepared based on a trip she took with Complainant to visit agents. Bergeron wrote in part:

I traveled with [P.F.] this week. We called on a variety of agents conducted training on our portal, gathered agency intelligence, and spent time reviewing the intranet and the policies and procedures that [P.F.] needed some extra assistance on. . . . I encourage [P.F.] to continue the progress we made this week especially in regards to learning more about the bonds in her territory, the importance of more preparation for the agency call, and maintaining a higher level of professional on all of her correspondence and reports and especially working on getting the agents giving her more detail.

[See Marketing Rep Evaluation Report, Feb. 12, 2015.]

The evaluation form had ten categories in which one could be rated: excellent, good, average, fair, poor, or n/a. Bergeron rated Complainant as "fair" in six categories and "average" in the remaining four. Ibid.

DCR reviewed Complainant's performance reviews. In 2012, she was rated as "exceeds expectations" in one category, "meets expectations" in six categories and "partially meets

expectations” in the remaining four categories, with an overall rating of “partially meets expectations.” In 2013, she was rated as “meets expectations” in seven categories and “partially meets expectations” in the remaining four categories, with an overall rating of “meets expectations.” In 2014, she was rated as “meets expectations” in six categories and “partially meets expectations” in the remaining four categories, with an overall rating of “meets expectations.”

Bergeron’s team of marketing representatives was composed of two females (including Complainant) and six males. DCR reviewed their starting salaries, dates of hire and annual pay increases since Western was acquired by Respondent in 2012, and found as follows:

Marketing Representative	Gender	Current base salary	Raise percentage from 2012-2015	Approximate years of service³	Location
Ronald B.	M	\$65,999	2%, 1.8 %, 2.5%, 1.5%	30	PA
Ashley C.	F	\$52,385	0%, 4.2%, 3%, 4%	8	NY
Michael P.	M	\$51,750	0%, 0%, 0%, 3.5%	10	CT
Richard C.	M	\$47,474	3%, 5.5%, 4%, 5%	4	NY
Jonathan D.	M	\$46,404	3.5%, 4.1%, 4%, 3.5%	7	OH
Complainant	F	\$46,258	4%, 2.4%, 4%, 4%	11	NJ
Eric B.	M	\$44,815	0, 2.6%, 4%, 5%	4	RI
James B.	M	\$43,680	n/a, 0, 4%, 5%	3	PA

The highest paid marketing representative (Ronald B.) was a male with approximately thirty years of service with Respondent. The second highest paid marketing representative (Ashley C.) was a female whose base salary is higher than five male employees (Michael P., Richard C., Jonathan D., Eric B. and James B.). Complainant’s base salary was higher than two male employees (Eric B. and James B.). The difference between Complainant’s salary and the male directly ahead of her (Jonathan D.) was approximately .3%. The difference between Complainant’s salary and the male ahead of Jonathan D. (Richard C.) is approximately 3%. In other words, Complainant was paid more than, or within .3%, of three of the six male comparators, and more than, or within 3%, of four of the six male comparators.

Complainant received on average the third highest annual salary percentage increases of the eight marketing representatives.

Bergeron told DCR that she did not set Michael P.’s initial salary. She noted that Michael P. worked in New York City and Long Island territories, which she believed were more difficult.

³ The years of service also includes the years of service with the acquired company for all the employees besides Eric B. and James B.

Employee Relations Director Erin Hitchcock told DCR that starting salaries are determined based on a number of factors such as geographic location due to variance in the costs of living and labor markets. She stated that gender was not a factor.

Hitchcock and Bergeron stated that they were aware of Complainant’s allegations of differential pay because she either told them personally or via their company hotline. Hitchcock stated that she learned in or about September 2015 that Complainant was complaining about her pay, and looked into her concerns. She spoke with Bergeron, Assistant VP Siewert, and Human Resources Business Partner Tracy Hagen, and they discussed Complainant’s salary in relation to market data. They also talked about the reason for increases and concerns about her communication and collaboration. She recalled Bergeron saying that she had coached Complainant a number of times. Although Complainant’s ratings for evaluations were “meets expectation,” Hitchcock explained that there could be lower and higher “meets expectations.” Hitchcock told DCR she looked at their compensation policy and pay information for the team, merit increase guidelines, and where Complainant’s salary fell. According to her review, Complainant’s pay fell within Respondent’s guidelines.⁴

b. Allegations of Retaliation

Although not pled in her verified complaint, Complainant alleged during the course of the investigation that she was subjected to workplace retaliation for filing the instant complaint.

In particular, she alleged that when she and Bergeron would visit an agent’s office, the latter would embarrass her by doing all the talking. Complainant alleged that Bergeron always

⁴ Respondent’s guidelines for merit increases state that the higher an employee is in the salary band, the lower the potential for increments. Conversely, the lower an employee is in the salary band, the higher potential for higher increases.

Merit Increases	Employee’s Salary Relative to Market Data (Current Job)			
	Below 25 th percentile	Between 25 th and 50 th percentile	Between 50 th and 75 th percentile	Above the 75 th Percentile
Far Exceeds Expectations	6%-7%	4.5%-5.5%	4%-5%	2.5%-3.5%
Exceeds Expectations	5%-6%	3.5%-4.5%	3%-4%	1.5%-2.5%
Meets Expectations	4%-5%	2.5%-3.5%	0%-3%	0%-1.5%
Partially Meets Expectations	0%-2%	0%-15%	0%	0%
Does not Meet Expectations	0%	0%	0%	0%

claimed to be receptive to questions but when she asked Bergeron a question, the latter would reply, "You should know that." Complainant alleged that although Bergeron told her that she turns off her phone after 5 p.m., Complainant once saw her answer the phone around 7:30 p.m. to answer a question from James B. Complainant alleged that once, when she and Bergeron were visiting an agent's office, Complainant asked for Melissa. The agent replied that Melissa was no longer employed there. Complainant alleged that once outside, Bergeron told her that Melissa had been fired and that Complainant showed a lack of preparedness and unprofessionalism by asking about Melissa's whereabouts. She alleged that Bergeron was ignorant and rude, and that her boorish behavior worsened after Complainant began complaining about her salary.

Bergeron generally denied the allegations attributed to her but acknowledged that she may have replied, "You should know that," in response to a question from Complainant. She denied every telling Complainant that she turns off her phone at 5 p.m.—she claimed that she is always available to her representatives.

c. Allegation of Age Discrimination

Although not pled in her verified complaint, Complainant alleged during the course of the investigation that she was in her mid-60s, and that another employee, W.M., who was approximately the same age as her was fired. She speculated that her age may have played a role in her differential pay. However, she acknowledged that the highest paid marketing representative, Ronald B., is also in his mid 60's.

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

Analysis

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit a complainant's allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe" that the LAD was violated. Ibid. If the Director 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 the Director finds there is no probable cause, then the finding is deemed 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(e); R. 2:2-3(a)(2).

The LAD makes it illegal to refuse to hire, fire, or otherwise discriminate against an employee in the terms or conditions of employment based on gender. N.J.S.A. 10:5-12(a). Here, Complainant alleged that she was paid a lower base salary than male marketing representatives

because of her gender. At the time Complainant initiated this matter, her base salary was \$46,258.28. Respondent denied that gender was a consideration in setting base salaries.

DCR reviewed the work histories and salaries of the eight marketing representatives under Christina Bergeron's supervision. The investigation found no persuasive evidence—and none was produced by Complainant—to corroborate her allegation that Respondent was setting its base salaries based on gender. Although it is true that a male (Ronald B.) had the highest base salary of the eight marketing representatives, it is also true that he had significantly more years of service than any of the other marketing representatives (30 years). Moreover, a female (Ashley C.) held the second highest base salary. Indeed, Ashley C. had a higher base salary than Michael P. despite having fewer years of service. And Complainant was paid more than, or within 3%, of four of the six male comparators.

The investigation found that since Respondent acquired Western in 2012, Complainant received the third highest annual salary percentage increase of the eight marketing representatives. Moreover, the average of Complainant's percentage salary increase (3.6%) was not significantly less than the highest percentage salary increase (Richard C. 3.9%), but notably higher than the employees with the three lowest percentage increases—all males (Ronald B. 1.95%, Michael P. 0.87%, and Eric B. 2.9%). In sum, the comparison of male and female base salaries and annual increases did not support Complainant's allegation that she was singled out for disparate treatment based on her gender.

Complainant alleges that Siewert told her that she "earns twenty percent less than what she should be making" and that Daly told her that she was "not the only one who makes less than they should." Respondent insists that neither employee made any such statement. But even if Siewert and Daly made those comments, they would not be admissions of gender discrimination, but rather acknowledgments that numerous employees are perceived as being underpaid.

During the course of the investigation, Complainant alleged that Bergeron once forced her to work all night while allowing Ashley C. to leave at a reasonable time. Bergeron denied the allegation. But here again, even assuming that the incident occurred as alleged, it would not be evidence that Complainant was treated unfavorably based on her gender.

Similarly, Complainant argued that her base salary should be higher than Ashley C.'s because the latter lives in what Complainant described as a "hick town" in New York, as opposed to Complainant's hometown of Brick, New Jersey. DCR takes no position with regard to the merits of that argument other than to note that even if true, it would not be evidence of gender discrimination.

Respondent offered evidence to support its assertion that it had concerns about Complainant's performance. Complainant denied that she had any performance issues. Ultimately, DCR finds it unnecessary to reach a determination on the issue because there is no

allegation that Complainant was outperforming her male co-workers but being paid less. Nor is there an allegation that she was being paid less than male co-workers due to underperformance. Her performance reviews indicated that she was meeting expectations and, as noted above, her annual increases were among the highest in terms of percentage of her team—males and females. For instance, Respondent claims that in 2015, Jonathan D. achieved a region-best 112.3% of his core production goals as compared to Complainant who reportedly achieved a region-worst 90.6% of her core production goals. Despite that reported disparity in performance, both received roughly same percentage annual salary increase (i.e., Jonathan D. received a 3.5% increase and Complainant received a 4% increase), and both received the same approximate salary (Jonathan D.'s salary of \$46,404 was approximately .3% more than Complainant's salary of \$46,258).

The LAD also makes it illegal to retaliate against an employee for engaging in protected activity. 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 he or she engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him 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). Moreover, a plaintiff "need not prove the merits of the underlying discrimination complaint, but only that [she] was acting under a good faith, reasonable belief that a violation existed." Carmona v. Resorts Intern'l, 189 N.J. 354, 373 (2007).

Proofs necessary to demonstrate an "adverse employment" action include "actions that affect wages [or] benefits, or result in direct economic harm . . . So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice." Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008), aff'd in part, mod'd in part, 203 N.J. 383 (2010). "[E]motional factors alone cannot constitute adverse employment action." Shepherd v. Hunterdon Devel. Ctr., 336 N.J. Super. 395, 420 (App. Div. 2001), aff'd in part, rev'd in part 174 N.J. 1 (2002). In other words, the employer's action "must rise above something that makes an employee unhappy, resentful or otherwise cause[s] an incidental workplace dissatisfaction." 401 N.J. Super. at 616. "[T]rivial harms," "petty slights, minor annoyances, and simple lack of good manners" are insufficient. Roa v. Roa, 200 N.J. 555, 575 (2010) (citing Burlington N. & Santa Fe Ry. Co. v White, 548 U.S. 53, 68 (2006)).

For example, conduct that has been found to amount to "adverse employment actions" include firings, demotions, cancellation of an employee's health insurance, id. at 575, a thirty-seven-day suspension without pay, and reassignment to more arduous and less desirable duties, Burlington N., supra, 548 U.S. at 70-74. On the other end of the spectrum, "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." Canale v. State, 2013 N.J. Super. Unpub. LEXIS 1801 (Jul. 19, 2013, App. Div.) (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)). "A transfer involving no reduction in pay and no more than a minor

change in working conditions will not do, either.” Ibid. “[U]nfavorable evaluation[s], unaccompanied by a demotion or similar action or a job reassignment with no corresponding reduction in wages or status is insufficient.” 401 N.J. Super. at 615 (quoting El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 170 (App. Div. 2005)). The above is by no means an exhaustive list of actionable adverse employment actions but merely sets forth some guidelines when evaluating retaliation claims.

Here, the Director is satisfied that Complainant engaged in LAD-protected activity known to her employer. She complained about what she perceived as wage discrimination to Bergeron and Hitchcock. However, the Director finds that the incidents complained of by Complainant fall short of adverse employment actions. She was not denied a promotion. She did not receive a loss of remuneration of benefits or suffer a significant, non-temporary adverse change in employment status or the terms and conditions of employment. She was not disciplined. Allegations that Bergeron behaved rudely or insensitively, or would embarrass her when visiting an agent, or responding rudely to her questions, or suggesting that Complainant should not call her after 5 p.m., or berating Complainant for being unprepared or unprofessional, even if true, do not amount to “adverse employment actions” for purposes of the LAD.

Alternatively, Complainant speculated during the course of the investigation that she may have been paid less than some of her co-workers because she was in her mid-60’s, in violation of N.J.S.A. 10:5-12(a). However, she also acknowledged that the highest paid marketing representative, Ronald B., was also in his mid-60’s.

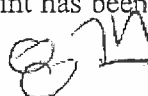
Based on the investigation, and in the absence of any persuasive evidence of a discriminatory or retaliatory animus, it is recommended that this case be closed **NO PROBABLE CAUSE.**

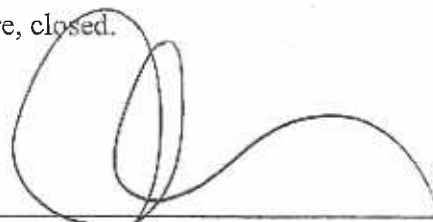
STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. EQ06SB-65523

P [REDACTED] F [REDACTED])
Complainant,)
v.)
Continental Casualty Company,)
Respondent.)

Administrative Action

FINDING OF NO PROBABLE CAUSE

On September 11, 2015, a verified complaint was filed in the above matter. An investigation of the allegations set forth in the complaint has been conducted. The results of that investigation having been evaluated, it is on this  day of June 2016, determined pursuant to N.J.S.A. 10:5-14 and N.J.A.C. 13:4-10.2(c) that there is no probable cause to credit the allegations of the complaint, and the file is, therefore, closed.



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS