STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 5188-04
DCR DOCKET NO. EV09HB-43181

LOTTIE WILLIAMS,	)	
	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
STATE SHUTTLE/TOP TEN LEASING, Inc.,	)	
	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

Brian Lipman, Deputy Attorney General (Zulima V. Farber, Attorney General of New Jersey, attorney) for the complainant

Michael L. Kingman, Esq. for the respondent

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Melvin Williams, alleging that his former employer, State Shuttle/Top Ten Leasing (Respondent), unlawfully discriminated against him because of his disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On March 27, 2006, the Honorable Irene Jones, Administrative Law Judge (ALJ), issued an initial decision dismissing the complaint. Having independently reviewed the record and the ALJ's decision, the Director rejects the ALJ's initial decision and finds that Respondent discriminated against Williams based on his disability.

PROCEDURAL HISTORY

On December 18, 1997, Melvin Williams filed a verified complaint with the Division on Civil Rights (Division) alleging that Respondent discriminated against him because he had a physical disability, Acquired Immune Deficiency Syndrome, (AIDS). Mr. Williams also alleged that Respondent refused to accommodate his disability in violation of the LAD. On January 20, 1998, Respondent filed an Answer denying the allegations of unlawful discrimination. Melvin Williams died on March 24, 1998, and Mr. Williams' widow, Lottie Williams, filed a motion to amend the complaint to substitute herself as complainant and add a failure to re-hire claim. The Director granted the motion, and on August 15, 2000, an amended complaint was filed. On December 12, 2001, after completing its investigation, the Division issued a finding of probable cause supporting Complainant's allegations of disability discrimination. In February 2003, after attempts to conciliate this matter failed, the Division referred the case to the Division of Law to be evaluated for prosecution by a Deputy Attorney General.

On April 2, 2004, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the merits, and a pre-hearing conference was held on September 9, 2004. On November 22, 2004, Complainant moved for an Order to compel discovery or in the alternative, to strike Respondent's defenses due to failure to comply with Complainant's first set of interrogatories and document request. On December 14, 2004, the ALJ Ordered Respondent to produce answers to discovery requests by January 12, 2005, or in the alternative, Respondent's defenses would be stricken. On January 27, 2005, Complainant filed a second motion to strike Respondent's answers and defenses due to a failure to comply with the ALJ's December 14, 2004 Order. By Order dated March 17, 2005, the ALJ denied that motion. On April 5, 2005, Complainant filed a motion to estop Respondent from asserting lack of knowledge that Mr. Williams had AIDS at the time that he attempted to return to work. That motion was addressed and denied within the

Initial Decision dated March 27, 2006. The matter was heard on July 8, and 14, 2005, post hearing briefs were filed on September 27, 2005, and the record closed on that day. By Order dated November 15, 2005, the ALJ was granted an extension of time to complete the ID by December 26, 2005. A second Order dated February 14, 2006, extended the date for completing the Initial Decision until March 27, 2006. The Initial Decision was issued on March 27, 2006.[1] After being granted additional time, including an additional seven days pursuant to Governor Corzine's Executive Order 17, the Director's final decision is due to be issued on August 17, 2006. [2]

THE ALJ'S DECISION

In her ID, the ALJ dismissed Complainant's claim, finding that Complainant failed to show that Mr. Williams was denied rehire or reinstatement, the third prong of the prima facie test articulated under the McDonnell Douglas paradigm. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The ALJ's Factual Determinations

First, the ALJ found several undisputed facts, summarized as follows: Mr. Williams was married to Lottie Williams, the within Complainant, and was hired by Respondent in February 1996 as a driver of limousines, vans and buses. Mr. Williams submitted medical certification attesting to his fitness to perform such work, and he performed his duties satisfactorily for three months, until he became ill in May 1996. In June 1996, Mr. Williams provided a note from his physician to Respondent stating that there was no present diagnosis, however, the illness was consistent with mononucleosis or hepatitis. (ID 3). The ALJ further found that Mr. Williams

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[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Ex.C" and "Ex.R" shall refer to Complainant's and Respondent's exhibits, respectively, admitted into evidence at the administrative hearing; "RB shall refer to Respondent's post-hearing brief; and "CE" shall refer to Complainant's exceptions to the initial decision. Respondent did not file a reply to Complainant's exceptions.

[2]The Director acknowledges that this matter has been pending for longer than is desirable, however, the unusual circumstances of this case, including the untimely death of the original complainant, prolonged many stages of the proceedings.

spoke to his manager, Kenneth Claro, in February, March, and April 1997 about returning to work. In June 1997, Mr. Williams submitted a note from his doctor stating that he could return to work on a limited, part-time basis, four to five times a week. (ID3-4). In June 1997, Mr. Williams and his sister-in-law, Louise Champion, twice went to State Shuttle and spoke with Mr. Claro and Mr. John Hurley, the owner of State Shuttle, who both times told Williams that he could have his job back. Mr. Williams did not return to work for Respondent, instead he went to work as a driver for T&S Bus Tours, where he worked sporadically from June 1997 until December 1997. During that time, Respondent advertised for and hired thirteen drivers. Mr. Williams died in March 1998 from AIDS. (ID 4).

The ALJ made additional findings based on the evidence presented. The ALJ found that Williams' driver's medical certificate was valid from February 5, 1996 to February 5, 1998, and therefore was valid during the time that Williams sought re-instatement. (ID 15).

The ALJ's Analysis

The ALJ found that claims under the LAD are analyzed using the shifting burdens of proof established by the U.S. Supreme Court in McDonnell Douglas v. Green, supra. (ID 11-12, citing Andersen v. Exon, 89 N.J. 483, 492, (1982). Under this analytical framework, a plaintiff must establish a prima facie case by demonstrating that he or she (1) belongs to protected class; (2) applied and was qualified for a position for which the employer was seeking applicants; (3) was rejected despite adequate qualifications; and (4) after rejection the position remained open and the employer continued to seek applications for a position of plaintiff's qualifications (ID 12). The ALJ noted that the evidentiary burden at the prima facie stage requires only that the plaintiff demonstrate that discrimination could be a reason for the employer's action (ID 12, citing Zive v. Stanely Roberts, Inc., 182 N.J. 436 (2005)

The ALJ concluded that since Mr. Williams suffered from AIDS during the relevant period, he was a member of a protected class under N.J.S.A. 10:5-5(q) and therefore satisfied the first

prong of a prima facie case. The ALJ also concluded that Complainant met the second prong of the prima facie test, finding that Williams applied for and was qualified for the position of motor coach driver in June 1997, specifically finding that Williams had a valid medical certificate required by federal regulations. However, the ALJ concluded that Complainant failed to meet the third prong of the prima facie case, finding that Complainant failed to show that Respondent rejected or terminated Mr. Williams' employment. The ALJ stated that the proofs submitted are that Mr. Williams spoke to his manager, Claro, on three occasions: February 7, March 11, and April 16, 1997 about returning to work. The ALJ stated that each time he was told to report to work on the following Monday, and each time he failed to do so. In June 1997, Williams and his sister-in-law, Champion, came to Respondent's office with medical clearance that allowed Williams to work, part-time, four or five days per week. Both Champion and Claro testified that Williams was told he could return to work (ID 15). Nevertheless, the ALJ found that Williams was required by Respondent's policy to contact the office to get his schedule for the following day, and he failed to do so (ID 16-17).

The ALJ stated that the following evidence was seminal to her conclusion. Complainant testified that Respondent's past practice was to call her husband each night and give him his daily schedule or report time. While Complainant was not a party to these telephone conversations, she was present in the room with her husband, and overheard the conversations. Sometimes her husband wrote something down, and other times if he worked the night before, he would get his assignment from a board or something at the office. Complainant did not know if the schedule applied to buses or limousines. (ID 15 - 16).

Claro's testimony was that assignments were based on seniority and Williams would only get a motor coach job if senior personnel had a conflict. The ALJ stated that in lieu of this procedure, Williams was required to contact the office and get his schedule for the following day. At that point he would be told if he was driving a motor coach, and if not, " he was instructed to call

the livery dispatcher at 10:00 a.m. the next morning for assignment time to pick up a car and perform livery work". (ID 16). The ALJ stated that neither party called witnesses to support their respective testimony on this issue. However, because Complainant bears the burden of proof, the ALJ found that Complainant failed to meet the required burden. The ALJ stated that there was insufficient evidence to sustain a finding that, as Complainant contends, Respondent's past practice was to call Williams each night and give him a schedule. The ALJ indicated that Complainant's testimony was hearsay, and that all she knew was that on some occasions Williams spoke to Claro on the phone to get his schedule, and on other occasions he got assignments from a board in the office. Relying on the absence of persuasive evidence that Respondent deviated from its normal scheduling procedures, and her conclusion that Claro's testimony about his scheduling procedures was not irrational or incredible, the ALJ declined to impute discriminatory animus to Respondent. Finding that the burden was on Williams to call the next morning to get his schedule, and he failed to do so, the ALJ concluded that Complainant had not been terminated or rejected for reinstatement. As Complainant failed to meet the third prong of the prima facie test, the ALJ declined to further determine whether Complainant met the fourth prong under the McDonnell Douglas framework, and dismissed Complainant's claim (ID 16 -17).

EXCEPTIONS

First, Complainant argues that the ALJ erred in concluding that she failed to establish a prima facie case. Complainant argues that the ALJ erred in relying on Respondent's evidence in evaluating her prima facie case. Complainant takes exception to the ALJ's conclusion that she failed to establish the third prong, citing testimony and evidence to support a finding that Respondent rejected Williams' attempts to return to work. (CE 7-8). Noting that the ALJ never reached the question of whether Complainant met the fourth prong of the prima facie case, Complainant cites undisputed evidence that Respondent sought and hired additional drivers after rejecting Williams. (CE 9).

Next, Complainant argues that, although the ALJ never reached the question of whether Respondent met its burden of articulating a legitimate non-discriminatory reason for refusing to rehire Mr. Williams, Respondent's articulated reasons are irrelevant and not credible. (CE 10-14). Finally, Complainant argues that the ALJ erred in failing to strike Respondent's answers and defenses for failure to provide proper answers to Complainant's requested discovery. (CE 15-16).

THE DIRECTOR'S DECISION

The Direcor's Factual Findings

The Director finds that there is sufficient evidence in the record to support the ALJ's findings of fact, and he adopts the factual findings of the ALJ as supplemented and modified below. An order modifying the findings of fact in an initial decision shall be based upon substantial evidence in the record and shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent and credible evidence in the record. N.J.A.C. 1:1-18.6(d).

Legal Standards and Analysis

As a starting point for analyzing LAD cases of unlawful employment discrimination relying on circumstantial evidence, the New Jersey courts have adopted a methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green,[3] 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, supra, 450 U.S. 248, at 251-56. Clowes v. Terminix International, Inc., supra, 109 N.J. 575, 595 (1988). Under McDonnell Douglas, a plaintiff in a failure to hire case must first prove a prima facie case of discrimination: that plaintiff (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the

[3]Though the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

position remained open and the employer continued to seek applications for persons of plaintiff's qualifications. Zive, supra, 182 N.J. at 447.

The Director adopts the ALJ's conclusion that Complainant satisfied the first prong of the prima facie test because Complainant proved that Williams suffered from a serious illness during the relevant period, and therefore was a person with a disability, (ID 3), and further concludes that Respondent knew Williams had a disability during the relevant time.

The statutory definition of "disability" under N.J.S.A. 10:5-5(q) is very broad in its scope, and specifically includes AIDS and HIV infection. While Respondent maintains that it had no knowledge that Williams suffered from AIDS, the Director finds that contention unsupported by the record. (See Respondent's Brief pg. 5). First, Complainant testified that she personally delivered two medical notes to Claro. The first medical documentation preliminarily diagnosed Williams with a serious illness, and indicated that exact diagnosis would be forthcoming, as well as a return to work date (C-4, 1T:8:21-25, 1T9:1-14). The second doctor's note, which was not submitted into the record by either party, allegedly indicated that Williams was afflicted with AIDS, (1T9:15-25, 1T10:1) and is corroborated by the letter Williams' attorney wrote directly to Hurley in August of 1997, (C-6), wherein he referenced medical documentation previously submitted to Respondent which specifically attributed his lengthy absence to PCP pneumonia, a condition commonly associated with HIV infection. Third, Complainant was away from Respondent's employ from May 1996 until he was medically cleared to return to work in June 1997, and during that time Respondent knew he collected disability-based benefits. Based on such a lengthy absence, the collection of disability benefits, medical documentation stating that Williams had a serious illness and the promise of an exact diagnosis, as well as the letter from Williams' attorney referencing that medical document with the diagnosis, Respondent's assertion that it was unaware that Williams was afflicted with AIDS until the filing of the complaint with the Division is not credible. Moreover, the Director finds it inconsequential to the prima facie test whether Respondent knew specifically

that the disability was AIDS, hepatitis, or mononucleosis and finds it sufficient that Respondent knew Complainant suffered from a serious illness covered by the LAD in light of his lengthy absence as well as his doctor's notes. (See C-4, C-5, C-6)

The Director also adopts the ALJ's conclusion that Complainant satisfied the second prong of the prima facie test because Williams applied for and was qualified for a position for which the employer was seeking applicants. In June 1997 Williams presented Respondent with a doctor's note stating that he could return to work, on a limited part-time basis, (Ex. C-5, Ex. R-5) and Hurley told Williams he could have his job back. Regarding Williams' qualification to drive a bus under the federal motor carrier regulations, the Director adopts the ALJ's conclusion, supported by evidence in the record, that his driver's medical certificate, issued for a two year period in February 1996, was still valid when he re-applied in June of 1997.

Although the ALJ reached a contrary conclusion, the Director concludes that Complainant met the third prong of the prima facie test by presenting sufficient evidence that Respondent refused to rehire or reinstate Complainant. To meet the threshold showing necessary for a prima facie case, it is enough that Complainant never received a job assignment after presenting his medical clearance to return to work. The burden of presenting a prima facie case is not onerous, but merely serves to eliminate the most common non-discriminatory reasons for adverse action. Zive, supra, 182 N.J. at 447, citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The purpose of the prima facie case is to preliminarily determine if the circumstances surrounding the claim indicate that discrimination is plausible; that it *may* have occurred. Zive, supra, 182 N.J. at 447, 454. An employer's evidence and arguments challenging the employee's prima facie proofs are appropriately evaluated, not at the threshold prima facie stage, but at the later stages of the McDonnell Douglas analysis. Zive, supra at 447-48, 455.

Here, in evaluating Complainant's prima facie case, the ALJ relied on evidence that Respondent's normal scheduling procedures required drivers to call in daily for assignments, and

Williams failed to follow those procedures. (ID 15-16). She cited Claro's testimony about Respondent's scheduling procedures, stating that she could not conclude that his testimony regarding those procedures was not rational or was incredible. (ID 17). The Director concludes that, although Claro's testimony regarding Respondent's procedure for assigning work to its drivers should be considered in the later evaluation of Complainant's proofs, it is not to be considered in evaluating Complainant's prima facie showing that Williams was not rehired. For this prong of the prima facie case it is sufficient that Complainant presented evidence that, after Williams presented his medical clearance and Respondent told him he could have his job back, Respondent never assigned him any driving jobs; that Williams twice visited Respondent's facility to request re-hire but was never given an assignment nor told why he had not been called back, (ID 6); that Williams sought the assistance of an attorney to secure his job back; and that Claro testified that he would not have taken Williams back without additional medical documentation. (2T31:12-23).[4]

The Director finds that Complainant also met the fourth prong to establish a prima facie case because, after Respondent rejected or failed to rehire Williams, Respondent continued to seek applicants from persons of Williams' qualifications, and in fact hired thirteen new drivers during the relevant period. (ID 4) (Ex. C-7). Thus, Complainant has successfully laid out a prima facie case under the McDonnell Douglas paradigm.

The establishment of the prima facie case creates an inference of discrimination. At that point, the matter moves to the second stage of McDonnell Douglas, when the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action. Zive, supra, 182 N.J. at 449. Respondent has asserted a number of reasons why Williams' employment with Respondent never resumed. First, Respondent asserts that while his

[4] The New Jersey Supreme Court has noted that a prima facie case of discrimination is to be evaluated solely on the basis of the evidence presented by a plaintiff, irrespective of a defendant's efforts to dispute that evidence. Zive, supra, 182 N.J. 436, 448 (2005).

employment was active, Mr. Williams was given the opportunity to drive a limousine, but he stated a preference to drive a bus. Second, Respondent asserts that Williams abandoned his job for over a year, and further, was legally prohibited to drive a motor coach due to the expiration of his driver's medical certification. Third, Respondent asserts that Claro and Hurley both told Williams he could have his job back, but Williams failed to contact Respondent to resume employment. Fourth, Respondent asserts that Williams collected disability, therefore he was rendered legally unable to take any employment. (Respondent's Post-Hearing Brief, Pg. 14-15).

The Director finds that Respondent met its burden of production by articulating legitimate and non-discriminatory reasons for its actions. Respondent's production of evidence of nondiscriminatory reasons, whether ultimately persuasive or not, satisfied its burden of production and rebutted the presumption of intentional discrimination. This stage of the analysis involves no credibility assessment, because the burden of production necessarily precedes the credibility assessment stage. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993).

In the third stage of the burden-shifting scheme, the burden of production shifts back to the complainant to prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision. Zive, supra, 182 N.J. at 449. To prove pretext, a plaintiff may not simply show that the employer's reason was false but must also demonstrate that a discriminatory reason more likely motivated the employer's actions than the employer's proffered legitimate reason. Texas Dep't of Community Affairs v. Burdine, supra, 450 U.S. at 256. That burden merges with the plaintiff's ultimate burden of persuading the court that she or he was subjected to intentional discrimination. The burden of proof of discrimination does not shift; it remains with the employee at all times. Zive, supra, 182 N.J. at 449.

After a thorough review of the record, the Director concludes that Respondent's articulated reasons for failing to re-hire Williams are unworthy of credence and are pretext for disability

discrimination. Initially, the sheer number and contradictory nature of the explanations Respondent offered at each stage of the proceedings to explain why Williams was not returned to work demand a finding that Respondent was more likely than not motivated by discriminatory animus. To discredit an employer's proffered reason for an unfavorable employment decision, a plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them "unworthy of credence," and hence infer that the employer did not act for the asserted non-discriminatory reasons. Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994).

Here, Respondent's articulated reasons are rife with contradictions. Initially, before the filing of the complaint, in response to a letter Williams' attorney wrote to Respondent seeking reinstatement, Respondent's current counsel wrote that Respondent had replaced Williams, that Williams was not able to resume the full duties his job required, and that Respondent would not be able to reinstate him without discharging his replacement. (C-9).[5] In its answer to the verified complaint, (C-8), Respondent asserted that it extended an offer to Williams to return to work under the same conditions and terms of his original employment, which included the operation of motor buses and limousines, but *Williams* rejected that offer because he wanted to drive buses exclusively and was unwilling to drive limousines. During the investigation of the verified complaint, Respondent indicated that *Respondent* did not re-hire Williams because he was unwilling to drive a limousine, and reiterated its earlier statement that "it would be necessary to discharge someone in order to create a position for Melvin" (See Finding of Probable Cause, Pg.1). In its answer to the amended verified complaint, and response to document request (R-4), Respondent asserted that as of September 30, 1997, it employed no persons solely as bus driver, and all employees

[5]Although the letter from Respondent's counsel is hearsay, such evidence is admissible in administrative hearings, subject to the residuum rule, and was in fact admitted into evidence by the ALJ. N.J.A.C. 1:1-15.1.

were limousine operators with some employees performing additional services on a secondary basis as bus drivers. At trial, Claro testified that he believed that Williams was ineligible to drive a motor coach due to the expiration of his medical certification. He also testified that if Williams had reported for work, he would have asked him to secure an amended medical clearance to specifically say Williams could perform duties as a limousine driver. (2T31:12-23). Finally, in its post-hearing brief, Respondent's counsel argued that Respondent actually had re-hired Williams, but he failed to call in to get his assignments. (Respondent's Post Hearing Brief pg. 14).

Thus, Respondent alternately claimed that it offered Williams a position, but he rejected it; that it did not re-hire Williams because it had replaced him and had no appropriate position for him; that Williams did not have appropriate medical clearance or certifications to return to work, and was unable to perform the full range of duties as a driver; and, finally, that it actually did re-hire Williams, but he failed to call in for assignments. The Director finds that Respondent's multiplicity of reasons to justify its actions are inconsistent and contradictory and compel the conclusion that Respondent's articulated reasons are unworthy of credence. See Jolly v. Northern Telecom, Inc. 766 F. Supp. 480, 494 (DC of VA, 1991).

The articulated reason on which the ALJ based her dismissal is Respondent's claim that Hurley told Williams he could have his job back, but Williams was not returned to work because he failed to contact Respondent for an assignment. Because the ALJ prematurely dismissed this case for failure to present a prima facie case, she never reached the question of whether Complainant presented sufficient evidence to prove that Respondent's articulated reasons were pretextual. Although the ALJ found as fact that Hurley verbally informed Williams that he could have his job back, (ID 4), the Director finds that Respondent's failure to assign any jobs to Williams and Claro's testimony that he believed Williams needed to provide additional documentation before he would consider him eligible to drive either a bus or a limousine, demonstrate that Respondent did not follow through on Hurley's statement to actually re-hire Williams.

The ALJ focused her analysis on Respondent's standard system for assigning work to drivers, and found that Respondent's drivers were expected to call in for assignments, rather than Respondent calling the drivers with assignments. Respondent makes this argument in its post-hearing brief (Pg. 14). To reach her conclusion that Respondent had re-hired Williams, the ALJ specifically found that Williams was supposed to call the dispatcher for his schedule at 10:00 the morning after he was told he could have his job back, but Williams failed to call. (ID17). However, the record contradicts this.

First, at no point in the hearing testimony did Claro or any other witness testify that Williams' failure to call in for an assignment was the reason that he did not resume work for Respondent. Even when Respondent's counsel specifically asked Claro: "...according to your testimony, all he would have had to do was call you on Monday at 10:00 a.m. to say he's ready for work?," Claro demurred, and responded that he would have asked Williams to bring in a doctor's note. (2T23:19-22). Although Respondent's counsel argued in his post-hearing brief that the reason Williams never returned to work was because he failed to call in for an assignment, and in that brief, counsel asserted that Claro testified that all Williams needed to do was call in for an assignment (RB 14), the transcript section cited refers to no such testimony, and a review of the transcripts disclosed no other testimony that could be construed to assert this reason. The record is clear that neither Claro nor any other witness testified that Williams' failure to call in was the reason. Instead, as discussed below, Claro's testimony about the reasons Williams never resumed work focused on his medical clearance to work as a driver.

Second, there is no evidence in the record that, at any point after Hurley stated that Williams could have his job back, Respondent informed him that he would now be scheduled for assignments if he called in using its normal scheduling system. Claro testified that he had no conversation with Williams after Hurley stated that Williams should be rehired. Their only phone conversations were the three conversations during Williams' disability leave. (2T28:9-11). At no

time in any interactions with Williams after receiving his medical clearance to return to work, on either of Williams' personal visits to Respondent's facility, or after Williams' attorney contacted Respondent about the failure to re-hire, did Claro in any way communicate to Williams that he would be scheduled for work if he called in for an assignment. Claro did not convey this to Williams even after the owner, Hurley, ordered him to re-hire Williams. Moreover, there is no testimony or other evidence in the record that Respondent had actually scheduled Williams for driving assignments, for which he failed to call in. Had Williams' failure to call for an assignment been the only impediment to Williams' rehire after Williams' clear expression that he wanted to return, this would have been communicated to him during his June visits to Respondent's facility, particularly when Hurley commanded Claro to call him back to work.

In relying on Respondent's normal scheduling procedures to conclude that Williams' failure to call in was the reason he never resumed work, the ALJ noted the absence of persuasive evidence that Respondent deviated from those procedures. (ID 17). However, even without evidence that Respondent had deviated from its normal call-in system with Williams when he was actively working, automatic reliance on that system seems illogical when applied to a driver who has been out on disability for nine months, was unavailable to observe postings of jobs, and is medically restricted to bus driving work.[6] Through his submission of medical clearance to return to work, his visits to Respondent's facility to request re-hire, and ultimately retaining an attorney, Williams expressed a clear desire that he wanted to return to work. It is illogical that Williams would

[6]Although the hearing testimony did not address this, an August 20, 1997 letter from Kyle Francis, Esq.,who represented Williams in his attempts to get reinstatement in the summer of 1997, was admitted into evidence. (C-9). Ms. Francis wrote that, in June 1997, when Williams presented Respondent with his clearance to return to work, Ken [Claro] told Williams "that there were no jobs for him and that he would have to be a "standby" driver." She further noted that, since that time, Williams had not been offered employment or called in as a standby driver. Although the letter alone may not rise to the level of persuasive evidence, the "standby" status is elucidating as a possible explanation that would reconcile Respondent's standard scheduling system with Complainant's claim that Williams waited in vain for Respondent to call him with an assignment.

take all those affirmative steps to return to work for Respondent, but would fail to simply call in for an assignment.

Thus, the complete absence of testimony identifying Williams' failure to call in as the reason he was never returned, and the complete absence of evidence that Respondent told Complainant he should call in, weigh against Respondent's argument that Complainant's failure to call for an assignment was the reason he never resumed work for Respondent.

Moreover, Respondent's argument is undercut by Claro's consistent testimony that he considered Williams medically ineligible to drive either a bus or a limousine for Respondent, and would not have given Williams any assignments if he had called in. Claro testified that he believed Williams' bus driving medical certification had expired, and for that reason he was ineligible to drive a bus.[7] When asked about Williams' qualifications to drive a motor coach, Claro testified as follows:

Counsel: "Mr. Williams never brought back after he was out sick a physical examination form attesting to compliance with federal motor safety requirements as set forth in R-1. Correct?

Claro: "To my knowledge, no. This is dated 2/2/96. He would have been required to update that a year later and that would have been one of the items I asked him to present to me when he brought his doctor's release."

Counsel: "And he never did that?"

Claro: "No, he did not."

Counsel: "So legally he could not, as far as you are concerned, operate a motor coach?"

Claro: "Not unless he presented an updated medical certificate and a proper doctor release form." (2T22:25 to 23:10-13).

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[7] The ALJ disagreed with Claro's contention and concluded that Williams' medical certificate was still valid and he was thus qualified to be employed as a motor coach driver.(ID 15). The Director agrees with the ALJ's conclusion; however, the fact remains that Claro testified that he believed Williams was not qualified to drive a bus.

This testimony demonstrates that Claro never had any intention of giving Williams any bus assignments. The Director agrees with the ALJ that Williams' medical certificate was valid at the time he applied to Respondent's facility for re-hire (ID 15). Claro's testimony regarding Williams' certification undermines Respondent's and the ALJ's reliance on the call-in system, and supports the conclusion that Claro used the expiration date of the medical certification as an after the fact excuse for failing to return him to work.

Regarding Williams' eligibility to drive a limousine, on cross-examination Claro testified as follows:

Counsel: ....–you had stated earlier that Mr. Williams would have been able to drive a limousine based on that doctor's note, the one that's coming back to work, the June 17th one?

Claro: On that doctor's note, he would not have. Had he reported as he was supposed to on Monday, I would have informed him that I need a doctor's note to specifically say that he could perform certain duties....I would have asked Mr. Williams to have that note amended or re-done and specifically say perform the duties as a driver–as a limousine driver or livery driver."(2T31:8-23).

Thus, Claro testified that Williams needed broader medical clearance to perform the specific duties of a limousine driver.[8] Together with the Claro's testimony that he considered Williams ineligible to drive a bus, the uncontradicted evidence demonstrates that Respondent did not consider Williams eligible to use Respondent's normal scheduling system, and had not actually followed through on Hurley's statement to re-hire him.

Respondent's arguments are further undermined by Respondent's failure to notify Williams of these impediments to driving any of its vehicles. Although Claro testified that deficiencies in

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[8] This testimony is quite telling as clearance to drive limousines is not a prerequisite to employment at Respondent's facility, and the only impact of Williams' or any other driver's decision (whether by choice or by medical restriction) to drive only buses and not limousines would be that the driver would get fewer assignments and bring home less money. 2T11:10-21.

Williams' medical documentation rendered him ineligible for any driving assignments, he never asked Williams for the additional medical documentation he deemed necessary before Williams could resume work. Claro never called Williams to tell him about the perceived deficiencies, and never spoke to him about them on either of Williams' two visits to Respondent's facility, despite the fact that he may have been obligated to do so under disability discrimination law and the Motor Carrier Act. [9] Claro's failure to ask Williams for additional medical documentation, or even inform Williams that he felt further medical clearance was needed before he could be given driving assignments, undermines any claim that Williams did not return to work because of medical clearance issues, and also undercuts the legitimacy of the call in argument.

In addition, although Claro testified that he considered Williams ineligible to drive any of Respondent's vehicles, he testified that he only intended to ask Williams to remedy the deficiencies that barred him from driving limousines, even though he knew Williams preferred not to drive them, and his medical clearance limited him to driving buses. This is irreconcilable with the conclusion that Respondent had an intent to bring Williams back on board as a driver, especially in light of Claro's testimony that Respondent felt it was advantageous to hire drivers with bus driver credentials. Claro testified as follows:

"Ideally an applicant would be most valuable to our company at the time if they had credentials to drive a motor coach, as well as–normally, if you have credentials to drive a motor coach, you also qualify for sedan, stretch limousine, or van. Obviously, someone with those credentials could be valuable to the company because I could put them in any vehicle." (2T11:22- 12:3)

He further testified that, although Respondent had higher standards than the "mirror test" (i.e., an applicant is eligible for hire if a mirror placed under his nose fogs up), at times he was so

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[9]Although Respondent never raised this issue, to the extent that the federal motor carrier safety regulations may have permitted Respondent to require Williams to undergo another physical exam based on a claim that illness impaired his ability to perform his normal bus driver duties, 49 C.F.R. 391.45, Respondent had an obligation to tell Williams that a re-examination would be required.

desperate to find motor coach drivers, that he felt that was the only option. (2T26:22-25, 27:1-9).

Despite this value to Respondent, and despite Claro's claim that, although his physician had cleared him for bus driver work, Williams' bus driver credentials had lapsed, by Claro's testimony it appears that he never intended to ask Williams for an updated bus driver's medical certificate.[10] Rather than instruct Williams to update the certification to drive buses, Claro testified that he intended to ask Williams to secure different medical documentation that would have qualified him to only drive one type of vehicle in Respondent's fleet - - limousines. (2T31:17-23). Since at the time of William's re-application, Claro had over twelve years of experience in Respondent's business, (2T8:6) it is illogical that, if he really intended to bring Williams back to work, Claro would disregard Williams' bus driving capabilities, and instead seek a driver restricted to driving only limousines instead of a universal driver.

The ALJ's conclusion that Respondent re-hired Williams, but he was not returned to work because he failed to call in and get an assignment is unsupported by the record. Without disturbing the ALJ's credibility determinations about Respondent's scheduling system, there is insufficient evidence in the record to support the conclusion that Williams' failure to call in was the reason that prevented his return, that Respondent was waiting for Williams to use that system to call for assignments, or that, but for Williams' failure to call Respondent's dispatcher, Respondent would have assigned him work. Instead, Claro's testimony demonstrates that Respondent never advised Williams to produce documentation it considered pre-requisite to resuming work as a driver, never told Williams to begin using its standard scheduling system to call for assignments, and that even if Williams had called in, Respondent would not have given him driving assignments.

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[10]A review of the record indicates that Williams' treating physician, Dr. Zambrowski, signed his initial bus driver's medical certification (R-1). In light of the fact that Williams had already secured medical clearance from Dr. Zambrowski to return to work as a motor coach driver, (C-5), it is reasonable to conclude that it would not have been burdensome for Williams to secure an updated medical certification from the same doctor qualifying him to drive a motor coach.

The Director's review of the record supports the conclusion that Respondent did not re-hire or intend to re-hire Williams to drive either a motor coach or limousine, and his failure to call in for an assignment is a post-litigation excuse for failing to re-hire.

The Director further finds that upon reviewing the record as a whole, given the fact that Williams secured three separate doctor's notes for employment purposes, called Respondent on at least three occasions regarding his return to work, presented Respondent with a doctor's note attesting to his ability to return to work part time driving buses, physically showed up at Respondent's facility on two occasions, and finally sought the assistance of an attorney to secure his job back (C-6), it strains credulity that he would fail to make one phone call to get his job back.

Based on all of the above, the Director finds that there are sufficient inconsistencies, implausibilities and contradictions in the record to compel a conclusion that there was no resumption of the employment relationship, and that Respondent's contention that Williams did not resume work because he failed to call in for an assignment is pretext for failing to re-hire him because of his disability.

Moreover, the record reflects that, to properly address the disability-related limitations for Williams' return to work, Respondent had a duty to reasonably accommodate Williams' disability. According to N.J.A.C. 13:13-2.5(b), an employer must make a reasonable accommodation to the limitations of an employee or applicant with disabilities, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis, and may include job restructuring, part-time or modified work schedules, N.J.A.C. 13:13-2.5(b)(1)(ii), as well as job reassignment and other similar actions. N.J.A.C. 13:13-2.5(b)(1)(iv). See also, Svarnas v. AT&T Communications, 326 N.J. Super. 59, 74-75, (App. Div. 1999).

Williams presented Respondent with a note from his treating physician stating that he could return to work part time as a bus driver. (C-5). The record reflects no evidence that Respondent considered modifying its scheduling procedures to provide Williams with bus driving assignments, or otherwise explored alternative assignments that would address the limitations presented by Williams' disabilities. Instead, Respondent determined that it would only bring Williams back to work if he presented an amended note from his physician clearing him to perform the of duties as a limousine driver. (2T31:8-23). By conditioning Williams' return to work on being able to perform functions his physician's note did not clear him to perform illustrates that Respondent denied, or at best, ignored Williams' medical limitations, instead of attempting to accommodate them.

A reasonable accommodation for a disabled employee requires an "interactive process," in which both employer and employee bear responsibility for communicating with one another to identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations, Jones v. Aluminum Shapes Inc, 339 N.J. Super. 412, 422, 2001, and must involve pro-active participation on the part of the employer. Id. at 423. The Director finds that Williams' presentation of his medical note to Respondent, which imposed limits on his job duties and assignments, triggered the interactive process, but Respondent failed to pro-actively participate in the process.

Claro testified that he felt Williams' medical documentation was insufficient, yet he failed to disclose the perceived defects to Williams. In fact, the record reveals that no discussion occurred between Williams and Claro after June 1997, when Williams re-applied for a position as a motor coach driver.

To demonstrate that an employer failed to participate in the interactive process, an employee must demonstrate: (1) the employer knew about the employee's disability, (2) the employee requested accommodation or assistance for his or her disability, (3) the employer did not make a good faith effort to assist the employee in seeking accommodation, and (4) the employee

could have been reasonably accommodated but for the employer's lack of good faith. Id. at 423. As discussed above, Respondent knew of Williams' disability and Williams asked for an accommodation when he presented his doctor's note indicating limitations. However, Respondent failed to offer any evidence which illustrates a good faith attempt to accommodate Williams' request. The record is void of any indicia that Respondent considered Williams' request to drive buses on a part-time basis, or that there was any attempt to re-structure the job or reassign Williams, or that any such schedule or assignment modification would present an undue hardship to Respondent, or was even considered by Respondent. Respondent's ads seeking full and part-time bus drivers indicate that Williams could have been accommodated but for Respondent's lack of good faith.

The Director finds that Respondent's assertion that it had no positions to solely drive buses does not demonstrate that creating such a position for Complainant as a reasonable accommodation for a disability would have been an undue hardship for Respondent's business. The record reveals that during his initial employment, Williams was assigned to driving motor coaches 75% of the time, and he drove limousines only 25% of the time. (See Answers to Interrogatories #32). Additionally, Claro testified that when he initially hired Williams as well as other drivers, he gave them the opportunity to drive busses, but allowed them to drive livery so that they could make-up full time status and earn a reasonable wage. 2T11:13-21. Moreover, the record reflects that Respondent published ads in the Star Ledger on October 17, 1997, (C-7), indicating a need for part-time and full-time bus drivers, that Respondent considered drivers with bus driver credentials to be valuable employees, (2T11:10-25, 2T12 1-3), and that Respondent started out with one bus, increased to three at the time of Williams' hire, and subsequently purchased additional buses. (2T17:2-8). This is at least some evidence that hiring Complainant part time to drive only buses would not have been an undue hardship. It is the employer's burden to prove undue hardship. N.J.A.C. 13:13-2.5(b). Here, Respondent has not presented sufficient evidence

to support the conclusion that it would have been an undue hardship to accommodate Complainant's disabilities.

Under N.J.A. C.13:13-2.5(b)(2), an employer shall consider the possibility of reasonable accommodation before refusing to hire an applicant on the grounds that his or her disability precludes job performance. Respondent's assertion that there were no bus driver positions available, plus its failure to inform Williams that it considered his medical clearance deficient, support the conclusion that Respondent did not consider any reasonable accommodation before deciding to deny re-employment to Williams due to his disability.

It should be noted that, contrary to Respondent's argument in its post-hearing brief, the collection of disability compensation by an employee does not necessarily render his disability-based discrimination claim invalid. Where an employer asserts that an employee's prior statements on an application for disability benefits should estop the employee from claiming that he or she was able to work, the employee must be given the opportunity to explain the inconsistency and show that he or she could perform the essential functions of the job, with or without reasonable accommodations. See Ramer v. New Jersey Transit, 335 N.J. Super. 304, 318-319 (App. Div. 2000) (concluding that plaintiff's statement that she was disabled for the purposes of recovering credit disability insurance proceeds was not irreconcilably inconsistent with her LAD claim that she could perform her job with reasonable accommodation); see also Cleveland v. Policy Management Systems, 119 S. Ct. 1597, 1602 (1999) (An ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it.) The nature of an individual's disability may change over time, so a statement about that disability at the time of an individual's application for disability benefits may not reflect an individual's capacities at the time of the relevant employment decision. Id. at 1603. Here, Williams applied for disability in May of 1996. (C-9). The June 1997 medical clearance from his treating physician is evidence that his

medical condition improved to the extent that he was able to return to work despite his disability, and satisfactorily explains any inconsistent statements Williams may have made on his disability application. The Director finds that Williams' application for disability benefits presents no bar to his failure to hire/denial of reasonable accommodation claim.

CONCLUSION

Because Complainant has demonstrated that during the relevant time, i.e. around June 1997, Williams applied for a position as a driver with Respondent, Williams was qualified to return to work with some limitations, management failed to re-hire him though Respondent admitted that they were always in need of drivers, and management advertised for and hired thirteen new drivers during that time period, the Director finds that there are sufficient inconsistencies and contradictions in the record regarding the employer's proffered reasons to support a finding that Respondent discriminated against Williams and failed to reasonably accommodate his disabilities, in violation of the LAD.

DAMAGES

Backpay

The Law Against Discrimination authorizes the Director of the Division on Civil Rights to award damages, including back pay, if in his judgment it will effectuate the purposes of the act. N.J.S.A. 10:5-17. The basic purpose of awarding back pay is to make the discriminatee whole by reimbursement of the economic loss suffered. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 35 (1981).[11]

[11]Mitigation is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case the employer. See Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N.J. Super. 437, 455 (App.Div.1976), certif. den. 71 N.J. 503 (1976). The Director has reviewed the record specifically for evidence relating to this issue, and has considered all evidence presented by the parties. As Respondent has presented no evidence that Williams failed to mitigate damages, and Williams did seek comparable work and secured another part-time bus driving job, the Director concludes that it is appropriate to award the full amount of lost earnings.

The Director finds that there is sufficient undisputed evidence in the record to calculate a back pay award. In June of 1997, Williams received medical clearance to work on a part-time basis, 4 to 5 times per week. (C-5). Based on the evidence that Respondent advertised for full and part-time bus drivers, (C-7), and Claro's testimony that Respondent often had an ad for employment in the paper, (2T50:19), the Director finds that Respondent had sufficient work to re-hire Complainant as a part-time bus driver beginning in June 1997. Claro testified that a bus driver is typically assigned one job per day and would earn up to $70 daily. (2T39:5-7). Complainant testified that Mr. Williams worked for T & S Bus, another bus company, two days per week. (1T33:25, 1T34: 1-20). She also testified that Williams was able to drive a bus through December of 1997. (1T14:16-19). Accordingly, the Director concludes that Complainant was available to work for Respondent 3 days per week, and would have earned $70 per day for a six month period. The Director will therefore award back pay earnings of $210 per week for 26 weeks, amounting to $5,460.00.

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who was able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). Applying the interest rates set forth in New Jersey Court Rule 4:42-11, the Director awards Complainant $2,047.95 in prejudgment interest on the back pay award, through August 17, 2006.

Emotional Distress

Emotional distress damages are available in LAD actions filed with the Division to the same extent as in common law tort actions. N.J.S.A. 10:5-17. A victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503

(1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman v. London Metals Exch., Inc., 86 N.J. 19, 35 (1981). Complainant testified that Mr. Williams suffered emotional distress because he was depressed and emotional as a result of Respondent's refusal to hire him back. 1T2113-24. She also testified that being diagnosed with and being treated for AIDS may have also caused Mr. Williams to become depressed and moody, thus somewhat limiting the impact of Respondent's actions on Complainant's emotional distress. 1T44:3-6. As such, the Director concludes that an award of $5,000.00 is appropriate to compensate for the emotional distress that Williams suffered as a direct and proximate result of Respondent's discriminatory actions.

Penalty

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates this statute. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is $10,000. Ibid. After review of the record, the Director concludes that the penalty of $5,000 is appropriate for Respondent's LAD violation. As punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the civil penalty is the only remedy available to serve an admonitory or deterrent purpose in this case.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $12,507.95 as compensation for lost wages, pre-judgment interest on the lost wages, and for emotional distress.

3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $5,000 as a statutory penalty.

4. The penalty and all payments to be made by Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

6. Within 15 days of the issuance of this order, the parties shall attempt to stipulate to the amount of reasonable attorney's fees and costs accruing to the attorney for the Division pursuant to N.J.S.A.10:5-27.1. If the parties are unable to stipulate to such an amount, the attorney for the Division shall submit an application and certification for attorney's fees within 15 days thereafter.

8/17/06
Date

J. Frank Vespa-Papaleo, Esq., *Director*
New Jersey Division on Civil Rights