STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NUMBER EL11WB-60908

MICHAEL O'SHEA,	)	**AMENDMENT TO VERIFIED COMPLAINT**
	)	
COMPLAINANT,	)	
	)	
-vs-	)	Department of Law and Public Safety
	)	Division on Civil Rights
VANTAGE COMMUNICATIONS,	)	
	)	
	)	
RESPONDENT.	)	

The Director of the New Jersey Division on Civil Rights hereby intervenes as a complainant in the above referenced matter pursuant to N.J.A.C. 13:4-2.2(e), and amends the caption of the verified complaint, received and filed on September 2, 2009, to read as follows:

MICHAEL O'SHEA and	)
THE DIRECTOR OF THE	)
NEW JERSEY DIVISION ON CIVIL RIGHTS,	)
	)
COMPLAINANTS,	)
	)
-vs-	)
	)
VANTAGE COMMUNICATIONS,	)
	)
RESPONDENT.	)

DATE: 4-25-13

Craig Sashihara, Director
New Jersey Division on Civil Rights

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11WB-60908
EEOC CHARGE NO. 17E-2009-00539

Michael O'Shea and the Director of the New Jersey Division on Civil Rights, Complainants, v. Vantage Communications, Respondent.	Administrative Action **FINDING OF PROBABLE CAUSE**

The Director of the New Jersey Division on Civil Rights (DCR), pursuant to N.J.S.A. 10:5-14 and attendant procedural regulations, hereby finds that probable cause exists to believe that an unlawful discriminatory practice has occurred in this matter.

Summary of Complaint & Response

On September 2, 2009, Michael O'Shea (Complainant) filed a verified complaint with DCR alleging that Vantage Communications (Respondent) discriminated against him based on disability and age, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by discharging him a day after he requested a disability leave.[1]

Respondent denied the allegations of discrimination in their entirety. It asserted that Complainant was fired because he failed to meet sales quotas and did not comply with recordkeeping requirements. Respondent claimed that the decision to fire Complainant was made before management learned of his request for disability leave. Respondent also noted that Complainant was almost the same age when he was hired fifteen months earlier.

Summary of Investigation

Respondent is an American company that sells communication products and services. By letter of April 1, 2008, it offered Complainant, 70-year old resident of Middletown, the position of Channel Account Manager (CAM) effective April 7, 2008, for a yearly base salary of $60,000 plus

---

[1] The Director of the Division on Civil Rights has intervened as a complainant in this matter in the public interest pursuant to N.J.A.C. 13:4-2.2 (e). However, for purposes of this finding, the term "Complainant" will refer only to O'Shea.

employer-subsidized health insurance, and additional compensation based on sales revenue.[2] On April 2, 2008, Complainant signed an employment agreement and a 2008 compensation plan that included the following performance expectations:

> QUOTA -
> $7500 in New Monthly Recurring Charges (MRC) totaling $90,000 annually
> 150 new full service Stations totaling 1,800 annually
> $30,000 in New Monthly Non Recurring Charges (NRC), totaling $360,000
> Support Vantage Solutions Providers (VSP) with 80 VSP Account Managers

Complainant told the DCR that his sales territory included areas of New York, Connecticut, and New Jersey. He stated that July 30, 2009, he requested a disability leave for hip replacement surgery and was terminated on July 31, 2009. Complainant alleged that the explanation given for his termination–poor performance–was a pretext designed to mask a discriminatory motive. He stated that he was never counseled by anyone at any time about his sales productivity. He stated Respondent retained a co-worker, Mark LaFranco, despite having similar sales numbers. He noted that LaFranco was younger than he and did not request disability leave.

Respondent maintained that Complainant was discharged because he failed to meet his quotas after being counseled about deficient performance. Respondent submitted an affidavit from the company's president, Robert F. Phelan, dated December 14, 2009. Phelan wrote that he reminded Complainant during a weekly sales call on January 26, 2009, that his continued employment depended on following up on particular sales opportunities, weekly contacts with partners, and selling 150 phones per month. He wrote that he spoke to Complainant about his performance deficiencies during a June 10, 2009 training session, and told Complainant on July 9, 2009 in Respondent's Newtown office that he would be discharged if he did not immediately meet his sales forecast, record all sales activity accurately, call upon his partners to report on his sales activity, and build his funnel of sales prospects. He wrote that on July 14, 2009, and during all weekly sales calls, he reiterated those same points to Complainant personally and later as part of the group conference call. Phelan wrote that he also counseled him about deficiencies and inaccuracies in recordkeeping on various unnamed dates between January and July 2009, sometimes at New York restaurants.

Phelan and Respondent's Vice President of Sales, Robert Andresen, appeared at the DCR's January 26, 2010 fact-finding conference. At the conference, Phelan stated that on July 2, 2009, he and Andresen decided that they would discharge Complainant on July 31, 2009, because his sales performance had not improved despite repeated counseling and warnings from both Andresen and himself. Phelan said that Complainant's sales were not covering his salary. Phelan noted that before they made the decision to discharge Complainant, Andresen had counseled Complainant more frequently than he had. At the fact-finding conference, Andresen agreed, and stated that he told Complainant on a weekly basis that his performance was not up to par. Phelan stated that although the decision was made on July 2, they did not notify Complainant that his

---

[2] Complainant's job title varies on different documents. Although the offer letter identifies his position as Channel Account Manager, his business card identifies him as Regional Channel Manager, and the compensation plan he signed upon hire is for Regional Channel Account Manager. It does not appear that his job duties changed in any way relevant to the complaint during his employment.

employment would be terminated until July 31, 2009, because it is industry practice to provide no advance notice of termination so that an employee does not have an opportunity to gather proprietary information that may help a competitor.

However, after Andresen left Respondent's employment, he provided the DCR with clarifying information.[3] Andresen stated that in preparation for the 2009 fact-finding conference, Respondent's attorney directed him to say as little as possible, and he complied. Andresen stated that although he stated at the conference that he counseled Complainant, he was referring to his regular coaching of all the sales staff to meet their sales goals. He clarified that he never individually counseled or warned Complainant about deficient performance, and never told him that his employment would be terminated for failure to meet sales goals. He noted that Phelan claimed he had counseled Complainant about his performance at restaurant meetings in New York, but he does not believe this is true, because these were dinner meetings with clients, and it is unlikely that this type of discussion would take place in the presence of a client. He added that Phelan sometimes participated by phone in their weekly Monday morning sales conference calls, where they discussed quotas, but neither he or Phelan ever counseled Complainant individually during those calls, or pointed out specific deficiencies in Complainant's performance.

Andresen said that none of the sales staff met their quotas, and that he found Respondent's standards for Channel Managers to be unrealistic and impossible to meet. Andresen asserted that he once sold 115 phones in a month, but his average was much lower, around 25 phone sales per month, and all other CAMs averaged around sixteen phone sales per month.

Andresen also took issue with Respondent's claim that a reason for Complainant's termination was his failure to properly enter his sales activity into the computerized Vantage Customer Relations Management (VCRM) system. Andresen stated that the information Phelan provided about sales performance came from the VCRM, but it was not an accurate accounting of Complainant's sales because both he and Complainant had significant problems connecting to the system remotely when they were working in the field. Andresen said that he told Complainant not to focus too much on inputting sales into that system when it was not working properly. He said that it was inappropriate to compare Complainant's VCRM sales figures to those of LaFranco, because LaFranco worked in the office where the server was located, and was not subject to the remote access problems he and Complainant faced. Andresen also noted that the VCRM system was not put in place until March 2009, and before that, Respondent used a different system called *sales.force.com.* He said that this is another reason why the VCRM did not provide an accurate account of Complainant's sales.

Despite Respondent's contention that Phelan and Andresen made a decision on July 2, 2009 to discharge Complainant, Respondent's documents show that during the month of July, Phelan was working out a reorganization plan that would have provided Complainant with a different position. Respondent provided an untitled document (Bates stamped 000192) that it identified as Phelan's weekly sales report of July 13, 2009, which stated in pertinent part, "Andresen will do better without O'Shea and Gracie." However, a later document entitled "Weekly Report Highlights 7/13 and 7/20 Combined," (which Respondent indicated was written by Phelan in July

---

[3] Andresen was demoted from Vice President of Sales to CAM in November 2010, placed on probation in November 2011, and discharged in December 2011.

2009) indicates that Phelan met with Andresen on July 2, and told him that he would be reassigned to Vice President for New York and Connecticut, but would also assume CAM duties for that area. Regarding his meeting with Andresen, Phelan added, "I told him O'Shea was out as CAM, he could keep him as TAM [Territorial Account Manager] at $30k if he wanted and only in Bob's [Andresen's] geographic territory and [Michael] Gracie was up to him to keep." Elsewhere in the same document, Phelan wrote, "Andresen appears to want O'Shea as one of his 5 TAM's or possibly a commission only, with Gracie out." The document ends with a section labeled "Thoughts," which states in pertinent part, "O'Shea either takes a $30k base or goes straight commission on a higher commission plan on one time only, with no partners, or he is out. He can't sell in NJ. All partners in NJ go to LaFranco, he loses his NY and PA partners...." This same text was also included in a separate document entitled "Andresen Evaluation." During DCR's investigation, Respondent indicated that the evaluation was dated July 7, 2009.

The July 13 weekly report shows that Phelan felt that Andresen would be better off without Complainant, and the subsequent "highlights" report shows that Phelan was dissatisfied with Complainant's performance in his CAM position. However, that "highlights" report contradicts Respondent's claim that a decision had already been made on July 2 to discharge Complainant, and shows that Phelan was considering several reorganization options that would have retained him in a lower-level position.[4] In an interview with DCR, Complainant stated that neither Phelan or Andresen ever offered him the opportunity to take a lower-paid or commission-only position with Respondent as an alternative to terminating his employment, and that no representative of Respondent ever discussed such a possibility with him. Respondent provided no documents or witnesses that would show that Respondent decided against the plan to offer Complainant a lower-paid or commission-only position before Phelan received notice on July 31 of Complainant's need for disability leave. Thus, the evidence supports the conclusion that Phelan intended to offer Complainant a lower-level position until he received notice of his need for disability leave, or at least Phelan was still considering doing so when he received that notice.

During his January 2013 interview with DCR, Andresen reviewed copies of the reports discussed above, and DCR asked him to explain what happened regarding the offer of alternative positions to Complainant. Andresen said that he had not seen the report before, and did not recall anything about Phelan's plan to give him the option of retaining Complainant or Gracie in TAM positions. In his interviews with DCR, Andresen said that Complainant first told him about his need for hip surgery on July 27, 2009, and he told Complainant to contact Mary Adams in HR to arrange for his medical leave. Complainant provided DCR with a copy of an email he sent to Andresen and Adams at 9:32 p.m. on July 30, 2009, stating that he would be admitted to Jersey Shore Medical Center for surgery on August 11, and would return to work on August 19. Andresen informed DCR that he did not tell Phelan about Complainant's hip replacement surgery until the morning of July 31, 2009, and Phelan called him that afternoon and told him to discharge Complainant and Michael Gracie immediately. Andresen said that this was the first time he learned that Complainant was to be discharged. Andresen said that it was not Respondent's normal practice to discharge employees under these circumstances, without advance warning.

---

[4] Respondent claimed that Complainant did not work in New Jersey. However, Phelan's report appears to show that Complainant had New Jersey accounts or territory that Phelan planned to re-assign to LaFranco.

The DCR reviewed Complainant's personnel file. It found no indication that Complainant was ever warned about poor performance or that he was in danger of losing his job. Respondent provided no such documentation during the investigation. Respondent's documents included emails from Andresen addressed to either Complainant and LaFranco, or to Complainant, LaFranco, and Gracie. A January 24, 2009 email addressing all three employees gave them general reporting and sales goals, and attached a tactical plan for their daily use. An April 2, 2009 email showed individual figures for each of the three, stated that they each met 60% of quota, and said that they "each need to be creating at least one new Proposal a week to maintain and reach your goals." This email showed that Complainant and LaFranco had the same sales quotas, while Gracie's was lower. Andresen explained that Gracie occupied a different position; Respondent's answer to the complaint identified Gracie as a 24-year old account executive. The only performance-related email addressed solely to Complainant was dated May 20, 2009, and stated "You need new partners and a lot of them. When you view the list become aware via the activity list of who you are calling on and who is generating business for you."

In contrast, the personnel files of CAMs LaFranco and Glenn Kimble, who were significantly younger than Complainant at 50 and 40 years old, respectively, showed that they each were put on probation before they were discharged, and they received very specific written warnings notifying them that failure to improve sales performance would lead to the termination of their employment. LaFranco's personnel file included a March 25, 2010 email from Phelan noting that he had been placed on probation on March 2, 2010 in a meeting documented in his permanent employee file, and that he had been told that if his performance did not improve, he could be discharged on or before March 31. The March 25 email gave specific information about LaFranco's failure to meet his quotas (which were the same as Complainant's), and directed him to provide specific information by the close of business the following day. Phelan added that if his performance did not improve immediately, his continued employment was in jeopardy. LaFranco's personnel records show that he was discharged on April 7, 2010.

Kimble's personnel file included an almost identical March 25, 2010 email from Phelan, noting that he also had been placed on probation on March 2, 2010 in a meeting documented in his employee file. Phelan asked for specific information by the close of business the following day, and notified him that if his performance did not improve, his continued employment was in jeopardy. Although the personnel file provided by Respondent does not show that Kimble was discharged, Andresen told DCR that Kimble was also discharged at some point after receiving the March 25, 2010 email.

Analysis

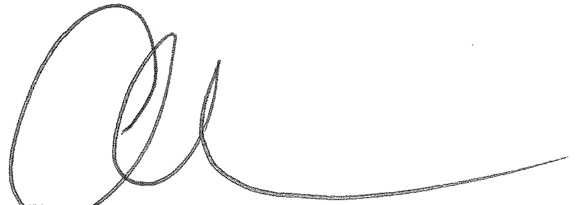
At the conclusion of an investigation, the DCR is required to determine whether probable cause exists to credit a complainant's allegation of discrimination. Probable cause has been described under the LAD as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div.1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S. Ct. 799; see also N.J.A.C. 13:4-10.2. A finding of probable cause is not an adjudication on the merits. Rather, it is an "initial culling-out process" whereby the DCR makes a preliminary determination of whether further action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978).

Here, the investigation found sufficient evidence to support a reasonable suspicion that Complainant's request for disability leave was a determinative factor in Respondent's decision to discharge him on July 31, 2009. Although Respondent contends that Phelan and Andresen made the decision to discharge Complainant on July 2, 2009 (i.e., before they learned of Complainant's need for disability leave), Andresen told the DCR that he knew nothing of a plan to discharge Complainant until Phelan instructed him to do so on July 31. Moreover, Phelan's weekly reports from mid-to-late July 2009 indicate that although he may have been dissatisfied with Complainant's performance as a CAM, Phelan had decided to retain Complainant in a lower-level TAM position, or was still considering doing so. This is sufficient to support a reasonable suspicion that Complainant's request for a brief disability leave motivated Respondent to make the decision to completely terminate his employment immediately, rather than offering him an alternative position.

Although Respondent discharged a significantly younger employee, Michael Gracie, the same day, Phelan's reports indicated that management was not as seriously considering offering Gracie an alternative position. Moreover, Gracie was not similarly situated to Complainant, as he held an account executive position. Personnel records showed that two other CAMs, Mark LaFranco and Glenn Kimble, were put on probation and received detailed written warnings that threatened termination before they were discharged. Although Respondent argues that its decision to hire Complainant at around age 69 weighs against Complainant's allegations of age discrimination, Respondent's use of different procedures for younger employees is sufficient to support a reasonable suspicion that age was a factor in Respondent's decision to terminate Complainant's employment.

It is therefore determined and found that PROBABLE CAUSE exists to credit the allegations of the complaint.

4-25-13
DATE



Craig Sashihara, Director
NJ Division on Civil Rights