

STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
OAL DOCKET NO. CRT 20409-15  
DCR DOCKET NO. PL11NB-65315

Tatiana Hanz, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 Dental Health Associates, )  
 )  
 Respondent. )

Administrative Action  
**FINDINGS, DETERMINATION  
AND ORDER**

Jeanne Hainz Levin, Esq., for Complainant

Harry J. Levin, Esq. (*Levin Cyphers*, attorneys) for Respondent

**BY THE DIRECTOR:**

On May 19, 2015, Mercer County resident Tatiana Hanz (“Complainant”) filed a verified complaint with the Division on Civil Rights (“DCR”) alleging that she and her daughter were harassed during a dental visit because one of the practice’s employees perceived them to be Russian.

She alleged that Dental Health Associates (“Respondent” or “DHA”), located at 957 Route 33, Hamilton, NJ 08690, is a place of public accommodation as defined by the New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-1 to -49, and is therefore prohibited from discriminating against patrons based on their actual or perceived national origin. N.J.S.A. 10:5-12(f).

DHA denied the allegations of wrongdoing in their entirety. During the course of DCR’s ensuing investigation, Complainant asked that the matter be transmitted to the Office of Administrative Law (“OAL”) for a hearing pursuant to N.J.S.A. 10:5-13 and N.J.A.C. 13:4-11.1(c). Accordingly, the case was filed with OAL on December 14, 2015, and assigned to an administrative law judge (ALJ) on January 8, 2016.

OAL scheduled a pre-hearing telephone conferences for March 22 and April 18, 2016.

On April 20, 2016, the ALJ entered a pre-hearing order that required the parties to submit their exhibit and witness lists, among other things, by August 3, 2016. (Exh. C1.) The order stated, “Failure to include the names of the witnesses will preclude that witness from testifying unless good cause is shown for the failure to include.” (Id. at 5.)

On August 4, 2016, the parties' attorneys jointly petitioned the ALJ to adjourn the August 10, 2016 hearing date. They claimed that each had recently discovered that he/she had a witness who would not be available on the hearing date.

On August 8, 2016, the ALJ denied the adjournment requests.

On August 10, 2016, Complainant appeared for the hearing without counsel. Respondent appeared with counsel.<sup>1</sup>

### The ALJ's Initial Decision

On August 18, 2016, the ALJ issued an initial decision recommending that the verified complaint be dismissed. In so doing, the ALJ provided details about the procedural history that were not apparent from the documents in the OAL file. He wrote:

On August 3, 2016, petitioner's counsel did not submit any documentation as required by the prehearing order and first raised the issue of a subpoena to the unnamed employee. The undersigned advised petitioner's counsel that petitioner made no submissions pursuant to the prehearing order, and that would preclude any witnesses. [2]

(ID2.) The ALJ noted that Complainant announced at the hearing that her attorney would not be appearing, and that she wished to proceed without counsel. Ibid.

The ALJ found that by failing to provide documents required by the prehearing order, Complainant's counsel had violated N.J.A.C. 1:1-14.14, and by failing to appear at the hearing, Complainant's counsel had violated N.J.A.C. 1:1-14.15. The initial decision noted that an additional hearing was required to impose sanctions for those violations. The ALJ wrote:

This tribunal preserves its ability to proceed to sanction the petitioner's counsel for violations of N.J.A.C. 1:1-14.14 and N.J.A.C. 1:1-14.15, and to award respondent's legal fees, in the event the Director of the Division on Civil Rights determines to remand this matter for a plenary hearing.

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<sup>1</sup> A few days after the hearing date, Complainant's counsel wrote a letter to the ALJ stating that she was absent from the hearing because her young son was ill, and that her client had elected to proceed *pro se*. See Letter from J. Levin to ALJ Ascione, Aug. 14, 2016. In response, Respondent's counsel noted that his adversary failed to notify him or the Court that she would be absent at the hearing date. He wrote, "[Counsel]'s failure to appear does not lie at the core of why the case deserved to be dismissed. As mentioned the claims are not cognizable by NJLAD." See Letter from H. Levin to ALJ Ascione, Aug. 15, 2016,

<sup>2</sup> Complainant noted in her exceptions that neither party complied with the pre-hearing order. (Cp. Exceptions, p.3.) Respondent did not dispute that statement. There are no documents or other evidence in the OAL file showing that Respondent made any submission to comply with the pre-hearing order.

(ID 4-5.) The ALJ noted, “This tribunal recorded no testimony.”

In addition to criticizing counsel’s conduct, the ALJ rejected the substance of Complainant’s LAD claim. He reasoned that even if the allegation were true—i.e., that an “employee sprayed disinfectant” at Complainant and her daughter “for no explained reason” and when asked for an explanation, the DHA employee replied, “You stupid Russian” (ID 1-2.)—such conduct would not amount to a LAD violation because the statute applies only to discrimination that occurs in the employment and housing settings. (ID 4.) Moreover, the ALJ found it significant that Complainant presented no evidence of damages. (*Ibid.*) The ALJ wrote:

The complaint filed facially does not state a cause of action. The New Jersey Law Against Discrimination (LAD) is designed to prevent discrimination in two areas, the employment area or the housing area. The petitioner may have had rights against the unnamed employee but it is not a right recognized the New Jersey LAD. This makes the complaint frivolous and subject to the award of attorney’s fees in favor of respondent’s counsel.

The petitioner provided no evidence pursuant to the prehearing order to this tribunal in support of her damages, accordingly, even if her civil rights were violated, petitioner failed to present damages.

(ID 3.)

### **The Parties’ Exceptions & Replies**

On August 31, 2016, Complainant’s counsel filed exceptions. Aside from presenting details not in evidence regarding the factual allegations of the complaint, the exceptions and “Motion for Reconsideration” filed by Complainant’s counsel addressed only the provisions in the initial decision regarding sanctions and attorney fees pursuant to N.J.A.C. 1:1-14.14 and 1:1-14.15.

In its reply, Respondent argued that the ALJ correctly found that the verified complaint did not state a cause of action under the LAD. It also argued that the ALJ correctly imposed counsel fees and costs based on Complainant’s attorney’s failure to identify witnesses or documentary evidence, failure to appear on the hearing date or to notify the ALJ or opposing counsel that she would not be appearing, and failure to provide, after the hearing date, a prompt or sufficient explanation for her absence.

On September 12, 2016, Complainant filed *pro se* exceptions. In so doing, she produced documents that were not submitted into evidence at the OAL. By letter dated September 12, 2016, DCR notified the parties that any documentary evidence that was not submitted to the OAL would not be considered by DCR. The remainder of Complainant’s *pro se* submission consists of factual allegations regarding her LAD claims. Those factual

allegations do not constitute valid exceptions pursuant to N.J.A.C. 1:1-18.4(b), and have not been considered in this decision.

In response to the *pro se* exceptions, DHA reiterated that the verified complaint failed to state a valid claim under the LAD.

By order dated September 29, 2016, the time for DCR to issue a final decision was extended to November 17, 2016.

### **The Director's Decision**

The LAD makes it unlawful for places of public accommodation to discriminate against patrons. See, e.g., Sellers v. Philip's Barber Shop, 46 N.J. 340 (1966) (prohibiting barbershop from discriminating against customers based on race); National Organization for Women, Essex County Chapter v. Little League Baseball, 127 N.J. Super. 522 (App. Div. 1974) *aff'd* 67 N.J. 320 (1974) (prohibiting organization from discriminating against players based on gender); Ellison v. Creative Learning Center, 383 N.J. Super. 581, 586-97 (App. Div. 2006) (prohibiting privately owned pre-school from discriminating against students based on disability).

A place of public accommodation does not need to explicitly deny service to violate the LAD. Courts have found that a business owner or employee who humiliates a patron or discourages a patron from returning based on a protected characteristic is also in violation of the LAD. See, e.g., Turner v. Wong, 363 N.J. Super. 186, 212 (App. Div. 2003); Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 216-217 (App. Div. 2000).

Our courts have specifically applied the LAD to dental practices. See, e.g., D.B. v. Bloom, 896 F. Supp. 166, 170-71 (D.N.J.1995); see also N.J.S.A. 10:5-5(l) (defining "place of public accommodation" to include "any dispensary, clinic or hospital.").

Since its passage in 1945, the LAD has prohibited discrimination in public accommodations based on "national origin" or "ancestry." N.J.S.A. 10:5-12(f). In 1979, it was amended to prohibit discrimination based on "nationality." Ibid. This protection extends to people who are incorrectly believed to be of a certain nationality, ancestry, or national origin. Cowher v. Carson & Roberts, 425 N.J. Super. 285, 297 (App. Div. 2012) (applying the same standards for discrimination based on incorrectly perceived characteristics as for actual characteristics).

Here, the verified complaint alleges that a DHA employee mistreated a customer solely because of the latter's perceived national origin, nationality, or ancestry. Thus, the pleading presents a cognizable claim under the LAD. If those factual allegations are proven at a hearing, then the ALJ would have to determine whether such conduct was sufficient to violate the LAD. At this stage, the pleadings appear to present a factual dispute about whether such conduct actually occurred. That factual dispute may come down to the credibility of Complainant and any witnesses presented by Complainant and Respondent. Credibility determinations are

appropriately resolved by an ALJ, based on testimony taken under oath at a hearing. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). But Complainant did not have an opportunity to testify or present the testimony of witnesses or other evidence. It is unclear whether the ALJ prohibited Complainant from testifying because her attorney did not provide a list of witnesses prior to the hearing, or because her attorney did not appear at the hearing, or because the ALJ felt such testimony would be fruitless in light of his perception that public accommodation discrimination is not covered by the LAD.

OAL regulations allow an agency head to remand a case for a hearing after receiving an explanation for the failure to appear. N.J.A.C. 1:1-3.3. Complainant appeared at the hearing and was ready to proceed without her attorney. The Director appreciates the frustration that such conduct likely imposed on a court already encumbered with a backlog of cases. However, on balance—and particularly in view of the court's miscalculation as to the breadth of the governing statute—the Director finds that the interests of justice support allowing Complainant to present her case which, at a minimum, requires permitting Complainant to present her case through her own testimony.<sup>3</sup>

In finding the claim to be “frivolous,” the ALJ appeared to also rely on the fact that Complainant submitted no exhibits or documents regarding damages. But a victim of unlawful discrimination is not required to present expert testimony, medical evidence, or independent corroborative evidence regarding emotional distress damages under the LAD. See Rendine v. Panzer, 149 N.J. 292, 312 (1995). Indeed, nominal damages are presumed—even in the absence of proof of actual damages—from a violation of the LAD. See Gray v. Serruto Builders, Inc., 110 N.J. Super. 297 (Ch. 1970). In discrimination cases, which by definition involve willful conduct, the victim may recover “all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries.” See Tarr v. Ciasulli, 181 N.J. 70, 82 (2004). Thus, Complainant's failure to submit evidence of damages prior to the hearing does not automatically preclude her from testifying about any emotional distress she may have suffered.

Lastly, the Director turns to the issue of attorney's fees. The initial decision appears to find that attorney's fees are warranted on substantive grounds. See ID 3 (“This makes the complaint frivolous and subject to the award of attorney's fees in favor of respondent's counsel.”). The respondent in a LAD case cannot be awarded attorney's fees “unless there is a determination that the complainant brought the charge in bad faith.” N.J.S.A. 10:5-27.1. In this case, the complaint states a claim of discrimination under the LAD and appears to present a factual dispute. Complainant was not permitted to present evidence to support her allegations. In the absence of such evidence, the Director concludes that there is currently no basis to award attorney's fees based on a finding of bad faith.

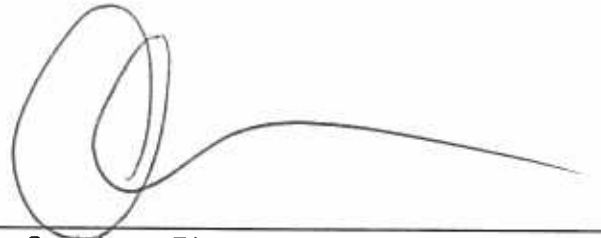
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<sup>3</sup> To the extent that it applies to witnesses other than Complainant herself, the Director takes no position as to whether the parties should continue to be limited by the April 20, 2016, pre-hearing order that excluded testimony from anyone not identified by the August 3, 2016 deadline.

The initial decision also finds that attorney's fees are warranted under the OAL regulations (i.e., for failing to comply with an OAL order or requirement). Those matters are not within the DCR Director's jurisdiction, and must instead be reviewed by the OAL Director. N.J.A.C. 1:1-3.2(c)4. Accordingly, with regard to those aspects of the initial decision, DCR will return this matter to the OAL for review by the OAL Director.

In sum, DCR rejects the ALJ's conclusions of law regarding the scope of the LAD and any finding that sanctions are warranted based on statutory grounds, and remands this case for a hearing on Complainant's LAD claims, subject to any procedural orders or sanctions that may be imposed by the OAL Director.

DATE: 11-14-16



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Craig Sashihara, Director  
NEW JERSEY DIVISION ON CIVIL RIGHTS