

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 10136-15
DCR DOCKET NO. EL11WG-64820

Kathleen Hruszko,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINDINGS, DETERMINATION AND
)	ORDER REMANDING FOR A HEARING
New Jersey Department of Labor)	
and Workforce Development,)	
)	
Respondent.)	

Nancy Mahony, Esq., for the Complainant

Christopher Weber, Deputy Attorney General (*Christopher S. Porrino, Attorney General of New Jersey*) for the Respondent.

Procedural History

On September 3, 2014, Kathleen Hruszko (Complainant) filed a verified complaint with the Division on Civil Rights (DCR) alleging that the New Jersey Department of Labor and Workforce Development's Division of Vocational Rehabilitation Services (Respondent or DVRS) declined to promote her because of her disability and/or age, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. She alleged that the "youthful, physically fit and slender appearance of the successful candidates factored into Respondent's promotion decisions." See Verified Complaint, Sept. 3, 2014, ¶6.1.

Respondent filed an answer denying the allegations of discrimination in their entirety.

On July 10, 2015, at Complainant's request, DCR transmitted the matter to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 10:5-13.

On April 14, 2016, Complainant amended the complaint to include allegations of perceived disability discrimination and perceived age discrimination.¹ On April 26, 2016, Respondent filed an answer to the amended complaint.

On April 27, 2016, Respondent moved for summary decision. Complainant filed opposition, and Respondent filed a reply brief.

On February 28, 2017, an administrative law judge (ALJ) issued an initial decision granting summary decision in favor of Respondent. Complainant filed exceptions to the ALJ's decision, to which Respondent responded.² The order granting summary judgment is the subject of this disposition.

Factual Background

Complainant is 5 feet 8 inches tall and weighs approximately 300 pounds. (Ocean County Internal Medicine "vitals flowsheet," attached to C-Aff).³ She has been

¹ Complainant filed a motion to amend the complaint on August 6, 2015, Respondent filed an opposition on August 21, 2015, and then-assigned administrative law judge (ALJ) granted the motion to amend on April 13, 2016.

² DCR obtained additional time to issue a final order so that the parties could engage in DCR's mediation program. However, the matter did not settle in mediation.

³ "ID" refers to the ALJ's February 28, 2017 initial decision. "Exh. R" refers to Respondent's exhibits attached to the Certification of DAG Steven Hahn, in support of its motion for summary decision. "C-Aff" refers to Complainant's May 21, 2016 affidavit. "Exh. C" refers to Complainant's exhibits attached to her opposing papers. "CE" refers to Complainant's March 6, 2017 exceptions to the ID. "RE" refers to Respondent's March 24, 2017 reply to Complainant's Exceptions.

diagnosed with morbid obesity and several ancillary medical conditions. (Medical Report of Allen Lempel, MD, attached to C-Aff).

In 2013, Complainant and other prospective candidates took a civil service test for promotion to Chief – Rehabilitation Services. At the time, Complainant was 61, held the position of Program Planning and Development Specialist, and had been working for Respondent for 33 years. (ID2-3.)

On September 25, 2013, the Civil Service Commission (CSC) published a list of nine candidates who had passed the test and were certified for the position. The CSC ranked the candidates in order of test scores. Complainant was the top ranked candidate on the CSC list. (ID2-3.)

One of the eligible candidates withdrew from consideration. The remaining eight candidates were interviewed for three open chief positions. (ID2-3; Exh. R-13.) The interviews were conducted by a three-person panel: DVRS Director Alice Hunnicutt, Brian Fitzgibbons, who was Assistant Director of DVRS's field team, and David Free, who was Assistant Director of DVRS's central office. (ID3.) The panel asked each interviewee the same nine questions. Each interviewer graded the answers on a scale of 1 to 5, and created his or her own ranking list. (ibid.)

The interviewers differed in their rankings of the eight interviewees, but all three ranked Complainant (DOB 3/29/52) as the seventh out of the eight candidates. (ID 3-4.) The panel initially chose Edward Green (DOB 1/31/53), who was ranked fifth by Director Hunnicutt, third by Assistant Director Fitzgibbons, and sixth by Assistant Director Free; Cheryl Casciano (DOB 1/16/60), who was ranked sixth by Hunnicutt and Fitzgibbons and eighth (last) by Free; and Karen Carroll (DOB 8/14/57) who was ranked second by

Hunnicut, fourth by Fitzgibbons, and third by Free. (ID3-4.) Those candidates ranked second, third, and fourth, respectively, on the CSC list. (ID4.) After Green and Casciano declined the offers (ID4), the panel offered the open positions to Melvin Crawford (DOB 10/21/49; seventh on the CSC list), who was ranked third by Hunnicutt, fifth by Fitzgibbons, first by Free, and Teresa Owens (DOB 1/25/61; eighth on the CSC list), who was ranked first by Hunnicutt and Fitzgibbons, and second by Free. Both accepted the positions. Ibid.

Other than Complainant, the two candidates not offered a position were Myrna Pinkney (DOB 10/14/45), who ranked fifth on the CSC list, and Keith McDermott (DOB 6/1/58), who ranked last on the CSC list. Pinkney was rated last by Hunnicutt and Fitzgibbons, and rated fifth by Free. McDermott was rated fourth by Hunnicutt, second by Fitzgibbons, and fourth by Free.

Respondent notified Complainant that she had not been selected (Exh. R-28), but that her name would remain on the certification list. (Exh. R- 29.)

Complainant contends that Respondent selected three younger, less-qualified candidates for promotion, and that “the youthful, physically fit and slender appearance of the successful candidates factored into Respondent’s promotion decisions.” See Verified Complaint, Sept. 3, 2014. She alleges, “My morbid obesity, and the fact that I looked my age . . . did not conform to the stereotype or image that . . . DVRS desired.” (C-Aff., ¶ 19.). She dual-filed a verified complaint with DCR and the Equal Employment Opportunity Commission (EEOC) alleging violations of the LAD and two federal

statutes, namely, the Age Discrimination in Employment Act (ADEA), and Americans with Disabilities Act (ADA).⁴

Respondent moved for summary decision on all counts. Its arguments as to the LAD claims are summarized below.

a. Disability Discrimination

It is settled that when LAD claims are based on circumstantial—as opposed to direct—evidence of discrimination, courts have adopted the burden shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), under which: (1) a complainant must set forth a prima facie case of discrimination; (2) the respondent must produce a legitimate non-discriminatory reason for its decision; and (3) the complainant bears the burden of persuasion that the respondent’s proffered reason is a pretext for unlawful discrimination. Viscik v. Fowler Equip. Co., 173 N.J. 1, 13-14 (2002).

Here, Respondent argued that Complainant failed to present a prima facie case of disability discrimination because she did not produce medical expert evidence to establish that she has a disability. It argued that because “appearance” is not a protected characteristic under the LAD, Complainant’s evidence of comments favoring “slender,” “attractive,” and “beautiful” women was insufficient to present a prima facie case of discrimination based on disability or perceived disability.

⁴ While this matter was pending in OAL, Complainant was promoted to Chief Rehabilitation Services, effective October 17, 2015, and remains in that title. She filed another complaint with DCR alleging that in retaliation for filing her original complaint with DCR, Respondent is paying her less than similarly-situated employees in the same job title. At Complainant’s request, that retaliation complaint is now being transmitted to OAL for a hearing.

Respondent argued that even if Complainant could be deemed to have presented a prima facie claim of discrimination based on disability/perceived disability, she did not present evidence to refute Respondent's explanation for its personnel decision, i.e., that all three interviewers rated her as seventh out of eight candidates.

b. Age Discrimination

Respondent argued that Complainant failed to present a prima facie case of age discrimination because she did not present evidence showing that the successful candidates were sufficiently younger to permit an inference of age discrimination. Respondent argued that even if she had presented a prima facie case, she did not present sufficient evidence to refute Respondent's articulated reason for not promoting her. Respondent argued that the ageist comments allegedly made by Assistant Director Fitzgibbons were insufficient to show that age was a determinative factor in the selection process because the other two interviewers also rated Complainant as seventh. As to Complainant's allegation of discrimination based on *perceived age*, Respondent argued that no such cause of action exists.

Complainant's Opposition

Complainant argued that this matter was not ripe for summary decision because there are material factual disputes regarding whether Respondent's articulated reasons for favoring other candidates were merely a pretext to mask actual or perceived age and disability discrimination.

She presented affidavits from herself and a former co-worker, Nancy Yarosh, who retired in 2015, asserting that Assistant Director Fitzgibbons repeatedly made comments in the workplace that revealed his preference for young, "cute" employees,

and that he engaged in a practice of hiring and promoting youthful-appearing and attractive female candidates.

Complainant stated that some female employees began to wear high heels in the office to appease the Assistant Director, but noted that she was unable to wear high heels. (C-Aff., ¶15.) Complainant claimed that the Assistant Director once asked Yarosh, "Why did you hire an old deaf man. . . we want young people." (Exh. R32, #4.) Complainant claimed that Fitzgibbons would refer to her as an "old timer." Ibid. Complainant claimed that the candidates selected for promotion "were youthful appearing, and not morbidly obese." (C-Aff., ¶12.) Complainant noted that although the Civil Service rankings were based on an objective test, the interviewers' ratings were subjective and simply a reflection of an office culture that preferred younger, more physically fit employees. (Id. at ¶19.)

Yarosh corroborated Complainant's claims that Assistant Director Fitzgibbons preferred young, slender women in the workplace. Yarosh wrote, "On multiple occasions, Mr. Fitzgibbons would openly remark: 'we need young, beautiful people in this office.'" (Yarosh Aff., ¶8.) She wrote that his "remarks left no doubt as to his preference for youthful appearing and attractive females when hiring and promoting job applicants." (Id. at ¶10.) Yarosh corroborated Complainant's claim that because Fitzgibbons expressed a preference for women wearing high heels, some female employees began to wear them to conform to his preference. (Id. at ¶9.) She also corroborated Complainant's claim that Fitzgibbons once asked her, "Why did you hire an old deaf man." (Id. at ¶12.)

Complainant identified five other witnesses—i.e., a current employee and four retired employees—who, she claimed, would testify regarding management's preference for youthful-appearing, slender female employees. (Exh. R32, #2.)

The ALJ'S Decision

The ALJ did not address the allegations of disability discrimination. The ALJ found that Complainant presented a prima facie case of age discrimination, (ID7), and that Respondent met its burden of articulating a non-discriminatory reason for passing her over for promotion. (ID7-8.) The ALJ noted that the "Rule of Three" permits government employers discretion in hiring by allowing them to by-pass candidates who scored highest on the civil service examination "for any legitimate reason based upon the candidate's merit." (ID 7, n. 1.)

The ALJ concluded that Respondent "has shown that [Complainant] was passed over in favor of candidates who performed better than she did during the post-exam interviews." (ID7.) The ALJ noted that "each of the three interviewers rated [Complainant] second-to-last." (ID8.) The ALJ summarized Fitzgibbons' interview notes, where he wrote that Complainant possessed notable education and experience, but that "there is a passivity that sets a negative tone" and that "[i]n my experience she is neither quality nor deadline driven." (Ibid.)

The ALJ weighed Complainant's evidence and found it insufficient to demonstrate that Respondent's proffered reason for denying her the promotion was a pretext for a discriminatory motive. (ID8.) The ALJ cited the affidavits of Complainant and Yarosh, each asserting that Respondent "selected individuals who were youthful appearing," and that Assistant Director Fitzgibbons "openly remarked" that "we need

young beautiful people in this office.” The ALJ acknowledged that Complainant asserted in her answers to interrogatories that Assistant Director Fitzgibbons had referred to her as “an old timer.”

The ALJ found it significant that apart from Assistant Director Fitzgibbons, the other two on the panel ranked Complainant seventh out of eight candidates, and found that Complainant did not point to any direct or circumstantial evidence that the other two panel members acted with discriminatory intent. The ALJ dismissed the complaint in its entirety.

Complainant filed exceptions to the ALJ’s initial decision. She argued that the court did not consider the totality of the circumstances, and instead selectively considered only certain pieces of evidence. (CE10.) She argued that the ALJ’s conclusion that the promotional decisions were based only on the interviews (ID7), was contradicted by Fitzgibbons’ acknowledgement that he “based the rankings on the interview and [his] impressions of the individuals from [his] observations of their work.” (CE, Exh. C.) Complainant also argued that negative inferences could be drawn from Fitzgibbons’ use of the word “passivity” to describe her in his candidate ranking notes. She argued that passivity is a stereotypical trait attributed to people with morbid obesity, and that his use of the stereotype reflected a bias against her based on her disability. (CE11.)

The Director’s Decision

The bar to defeat a summary judgment motion is not set high. The tribunal deciding the motion is required to view the competent evidential materials in the light most favorable to the non-moving party to determine if “there are genuine issues of

material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law.” Bhagat v. Bhagat, 217 N.J. 22, 38 92014) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

The non-moving party needs only to “point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.” Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994).

Indeed, the Supreme Court has noted that the evidentiary burden required to withstand summary judgment in LAD cases is “rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent, i.e., that discrimination could be a reason for the employer's action.” Zive v. Stanley Roberts, 182 N.J. 436, 447 (2005) (emphasis in original).

a. Disability Discrimination

The initial decision did not evaluate Complainant's claims of disability discrimination. We therefore remand with some guidelines. The LAD prohibits employment discrimination based on disability, N.J.S.A. 10:5-12a, and perceived disability. See, e.g., Anderson v. Exxon Co. 89 N.J. 483, 495 fn 2 (1982). Morbid obesity can be a disability. Viscik v. Fowler, 173 N.J. 1, 16 (2002); Sheridan v. Egg Harbor Twp. Bd. of Educ., 2016 N.J. Super. Unpub. LEXIS 10 (App. Div. Jan. 7, 2016) (citing Gimello v. Agency Rent-a-Car Systems, Inc., 250 N.J. Super. 338, 362, (App. Div. 1991)).

Respondent argues that Complainant failed to produce medical evidence supporting her claim of disability. (RE22-23.) However, such evidence is required only “where the existence of a handicap is not readily apparent.” Viscik, supra, 173 N.J. at 16. Morbid obesity is, almost by definition, “readily apparent.” And in any event, Complainant presented a note from her treating physician diagnosing her with morbid obesity and five other medical conditions. To the extent that there may be a material factual dispute regarding whether the nature or extent of Complainant’s diagnosed medical conditions meet the definition of disability within the meaning of the LAD, Complainant should be permitted to present expert evidence at a hearing. But for purposes of this threshold disposition only, the Director is satisfied that her doctor’s note is sufficient to withstand summary decision. See Myers v. AT & T, 380 N.J. Super. 443, 453 (App. Div. 2005) (noting that evidentiary burden for prima facie case is “not onerous” and is “relatively simple” to carry), certif. den’d, 186 N.J. 244 (2006).

It is undisputed that the affidavits of Complainant and Yarosh set forth evidence that Respondent’s management favored a physically fit, younger workforce. Respondent argues that any comments by Respondent’s management, to the extent they occurred, should be dismissed as “benign ‘office banter’ or ‘conversational jabs,’” which are not direct evidence of discrimination. (RE17.) The Director takes no position as to the accuracy of the assertions in the affidavits. He merely notes that when evaluating an employer’s motion for summary judgment and drawing all reasonable inferences in favor of the employee, bias-based comments of a decision-maker, even if insufficient to show a severe or pervasive hostile work environment, can provide support for a claim of discriminatory animus. See, e.g., DeWees v. RCN Corp., 380 N.J. Super.

511, 531 (App. Div. 2005) (a decision-maker's "somewhat sexist comment," although not directly related to the termination of employment, is relevant evidence of a discriminatory animus.)

For example, in Waldron v. SL Indus., 56 F.3d 491, 502 (3d Cir.1995), the employee presented evidence that five months before he was fired, the company president said to him, "I want you to lose weight . . . it'll make you feel better. It'll make you look younger." The district court found the comment to be "a stray remark entitled to little if any weight." The Third Circuit disagreed. It found the comment to be "not irrelevant," especially when combined with other evidence, and determined that a reasonable jury could conclude that the evidence proved that age discrimination was more likely than not a determinative factor in the termination of his employment. Id. at 502.

Respondent argues that appearance is not a protected class, and that the LAD does not prohibit an employee from giving promotional preferences to "slender," "attractive," or "beautiful" candidates. (RE17-18.) To be clear, Complainant alleges that she was passed over for promotion—despite receiving the highest score on the CSC examination—not simply for being less slender or less attractive than another candidates, but because she is morbidly obese. Complainant does not appear to be attempting to expand the LAD to add more protected classes. Instead, she points to evidence that management preferred slender attractive candidates simply to support her contention that her morbid obesity—which can be a disability—was a factor in the decision process. Stated differently, physical appearance *per se* is not protected by the LAD. But if the aspects of an employee's physical appearance that bar promotional

opportunities arise directly from a diagnosed disability, then it clearly implicates the LAD.

Respondent argues that Fitzgibbons was only one of three decision-makers, and that the other two decision-makers also rated Complainant second-to-last. (RE17.) However, Cheryl Casciano, who was eight years younger than Complainant and the second-youngest candidate interviewed, was rated last by Free, and Hunnicutt rated her only one slot higher than Complainant. If Fitzgibbons had been excluded from the process, it appears that Complainant and Casciano would have had an equal shot at being a first-round selection. From that perspective, evaluating the candidate ratings in a light most favorable to Complainant, a rational factfinder could conclude that Fitzgibbons had a determinative impact on the first-round hiring selections.

The Director finds that Complainant has produced sufficient evidence in support of her claim that physical attributes arising from her disability factored into the promotional decision to present a material factual dispute, which should be explored at a hearing and not dismissed on summary decision. Accordingly, the allegations of disability discrimination are hereby remanded.

b. Age Discrimination

Complainant's allegations of age discrimination are more complex. Two of the successful candidates—Melvin Crawford and Edward Green—were older than Complainant. And a third successful candidate, Karen Carroll, was only three younger than Complainant. Those facts would appear to effectively rebut the contention that Respondent viewed age as a bar to promotional opportunities.

In response, Complainant argues that she *appears* to be older than those candidates. She also alleges that Fitzgibbons referred to her as “old timer.” (Exh. R32, #4.) Respondent counters that discrimination based on perceived age is not a cause of action under the LAD. (RE18).

The Director takes no position as to whether Complainant appears to be older than the other candidates. He notes merely that Respondent’s assertion is incorrect. Our courts have recognized a cause of action for discrimination based on the perception of membership in a class protected by the LAD—even if the plaintiff is not actually a member of that protected class. For instance, in Cowher v. Carson & Roberts, 425 N.J. Super. 285 (App. Div. 2011), the Court declared:

[T]here is no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the [LAD] and does not protect those who are perceived to be members of a different class, as to which the LAD offers its protections in equal measure.

[Id. at 297.]

In view of the fact that the ALJ found that Complainant established a prima facie claim of age discrimination under the LAD (ID7), and that there will already be a hearing on the disability claims with presumably the same facts and evidence (e.g., testimony by the panel members as to the basis of their decisions), the Director will remand the age discrimination issue as well.

c. Federal Claims

In its motion for summary decision, Respondent also included arguments for dismissal with prejudice of the counts of the complaint alleging violations of the ADEA and ADA based on sovereign immunity. The ALJ dismissed those claims, but did not

expressly state that the dismissal was with prejudice. (ID9.) Respondent and the ALJ rely on Royster v. New Jersey State Police, 227 N.J. 482 (2017), where the Supreme Court held that the plaintiff employee was barred from bringing ADA claims against the State Police in the Superior Court of New Jersey based on sovereign immunity.⁵

Although a court might reach the same decision regarding Ms. Hruszko's ADA and ADEA claims, the Director clarifies that neither DCR nor the OAL has jurisdiction to issue any ruling on the federal law claims. When a complainant files LAD claims with DCR, he or she can opt to have DCR also file a complaint with the EEOC alleging violations of the federal anti-discrimination laws, including the ADA and the ADEA. Based on a work-sharing agreement between DCR and the EEOC, DCR will investigate those federal law claims and transmit the results of that investigation to EEOC for whatever action it deems appropriate, but DCR has no jurisdiction to issue a final ruling on any federal law claims. Because DCR's jurisdiction is limited to enforcing the LAD, the OAL's jurisdiction is similarly limited to enforcing the LAD. The format used in the complaint in this case included a DCR docket number and an EEOC charge number, and the form transmitting the matter to EEOC for hearing indicated that EEOC also has jurisdiction over the transmitted dispute.

Although her Honor applied different reasoning, the ALJ correctly concluded that the ADA and ADEA claims cannot be addressed in the current administrative proceedings based on lack of jurisdiction. To the extent that it is necessary to clarify the limited jurisdiction of the ruling in this matter, the Director rejects the ALJ's dismissal of

⁵ The Court held that since Royster's LAD and ADA claims were identical, he was entitled to the full amount of damages awarded by the jury despite the dismissal of his ADA claims. Royster, supra, 227 N.J. at 501.

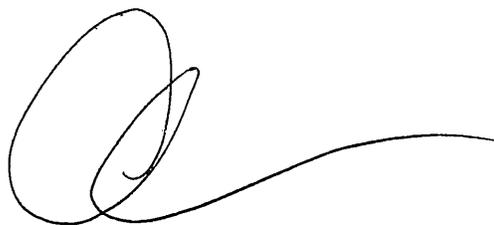
the ADA and ADEA claims based on sovereign immunity. Any ruling on that issue would be within the jurisdiction of the EEOC or a court of competent jurisdiction.

Conclusion

The Director makes no determination as to the ultimate merits of Complainant's claims of disability and age discrimination. He finds merely that when Complainant has met her "rather modest" burden of demonstrating "that discrimination could be a reason for the employer's action," Zive, supra, 182 N.J. at 447 (emphasis in original), the matter should survive Respondent's motion for summary decision. Accordingly, this matter is remanded to OAL for an administrative hearing.

DATE:

7-17-17



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS