STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 11214-06
DCR DOCKET NO. EJ09WB52051E

ZENAIDA JACKSON,	)	
	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	
	)	**FINDINGS, DETERMINATION**
A&M SPECIALISTS, INC.	)	**AND ORDER**
(erroneously named as	)	
Automotive And Media Specialists),	)	
and SIXTO FERNANDEZ, INDIVIDUALLY,	)	
	)	
Respondents.	)	
	)	

APPEARANCES:

Zenaida Jackson, *pro se*, complainant.

Steven Adler, Esq., (Cole, Schotz, Meisel, Forman & Leonard, P.A., attorneys) for the respondents.

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 Zenaida Jackson (Complainant), alleging that her former employer, A & M Specialists, Inc. (erroneously named as "Automotive and Media Specialists"), and its general manager, Sixto Fernandez (Respondents), unlawfully discriminated against her based on her sexual orientation and race in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On August 13, 2007, the Honorable Leslie Z. Celentano, Administrative Law Judge (ALJ), issued an initial decision[1] dismissing the complaint. After independently reviewing the

[1]Hereinafter, "ID" shall refer to the initial decision of the ALJ; Ex-R and Ex- P shall refer to Respondents' and Complainant's exhibits admitted into evidence at the hearing, respectively, "Tape 1 or 2" shall refer to the tape recording of the May 17, 2007 administrative hearing, and CE shall refer to Complaint's

evidence, the parties' submissions and the ALJ's decision, the Director adopts the ALJ's decision as modified herein.

PROCEDURAL HISTORY

On January 10, 2006, Complainant filed a verified complaint with the Division alleging that Respondents unlawfully discriminated against her based on her race (Black) and sexual orientation (lesbian). Specifically, Complainant alleged that she was subjected to harassing workplace comments about her race and sexual orientation, and that Respondents treated her less favorably and ultimately discharged her because of her race and sexual orientation.

Respondents filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. Prior to the completion of the Division's investigation, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing at Complainant's request pursuant to N.J.S.A. 10:5-13.

The ALJ conducted a hearing on May 17, 2007 and issued her initial decision on August 13, 2007. The Director's final decision on this matter is due on September 27, 2007.

THE ALJ'S DECISION

The ALJ's Factual Findings

The ALJ made findings of fact at pages 2-3 of the initial decision, which are briefly summarized as follows. In September 2005, Respondent Sixto Fernandez hired Complainant to work for Respondent A&M Specialists as a driver. Her duties consisted of picking up and delivering new model vehicles to journalists and other media representatives for test-drives. ID 2. Respondents received complaints about Complainant's behavior from co-workers assigned to pick up and deliver cars with her. The complaints included a report that a journalist named Leo Levine became upset when Complainant backed a Bentley into his driveway, and a report that

---

exceptions to the initial decision.

Complainant engaged in a road rage incident in which she was pumping her middle finger in and out of the car's sunroof at a tractor trailer driver, while driving at a high speed on the Pennsylvania Turnpike. ID 3-4.

After finding Yankees' playoff tickets in a cab, Complainant arranged to sell them to co-worker Steve Olsen, but he was unable to use the tickets because they had been voided after the owner reported them lost. When Olsen refused to pay Complainant for the tickets, she became infuriated and told Olsen, "If you don't pay me I'm gonna get my crack boys after you." Complainant's mother telephoned Respondent Fernandez at home and asked him to intervene, but Fernandez declined to get involved. ID 3.

Soon after being hired, Respondent instructed Complainant not to use the company telephone for personal calls, and Complainant purchased her own cell phone. ID 2. Respondents received many complaints from their other drivers about Complainant screaming and using elevated levels of profanity while using her cell phone, including driver Marty Smith's report that, on a drive back from Morristown to Secaucus with Complainant, she screamed at someone on her cell phone for the entire trip. ID 3. After punching out for the day on Monday, October 24, 2005, Complainant was heard screaming into her cell phone in Respondents' garage. Respondent Fernandez terminated her after this incident. ID 3.

After summarizing the testimony of the witnesses, the ALJ assessed their credibility. The ALJ found Complainant's testimony unconvincing, noting generally that Complainant presented no evidence to support her claim that Respondents' witnesses who presented contradictory versions of events were lying, and noting specifically that Complainant's testimony that she never screamed at anyone on her cell phone and has never "given anyone the finger" strains credulity. ID 13-14. The ALJ found the testimony of each of Respondents' witnesses persuasive and more credible than Complainant's testimony. Based on the testimony of Respondents' witnesses, the ALJ concluded that Complainant "was exhibiting bizarre, aggressive behavior and was frequently involved in

profane screaming arguments over her cell phone while on the job, such that none of the other drivers would work with her any longer." ID15. The ALJ also noted that, by Complainant's own testimony, Respondents did not learn of her sexual orientation until after she punched out on October 24, 2005. ID 15.

The ALJ's Analysis and Conclusions

The ALJ concluded that Respondents discharged Complainant because she consistently failed to perform the duties of her position, and because other drivers refused to work with her anymore because of her "bizarre, aggressive behavior" and frequent "profane screaming arguments over her cell phone." ID 15. The ALJ further concluded that Complainant was not discriminated against in any manner, and was not subjected to any adverse employment action as a result of any violation of applicable discrimination laws. Ibid. Based on these conclusions, the ALJ dismissed Complainant's LAD complaint. Ibid.

EXCEPTIONS AND REPLIES OF THE PARTIES

Complainant filed exceptions to the initial decision on September 12, 2007. In her exceptions, Complainant makes factual allegations, some of which reiterate her hearing testimony. Complainant reiterates her version of events regarding her personal phone calls at work, the baseball ticket incident, and Respondent Fernandez's demand, at the time of her termination, that she return the company shirt she was wearing, as well as her company jacket and hat. CE 2. In addition, Complainant asserts that co-workers asked her "personal questions," asked her out, asked her whether she had a man and whether she likes women. Complainant notes that she declined to answer these questions because her preferences were none of their business. CE 1-2. Complainant states that Linda Degenhardt (Respondents' dispatcher) admitted that Complainant was being asked about her sexuality a couple of weeks into her employment. CE 3. Complainant also asserts that she was called "nigger" by Respondent Fernandez, Linda Degenhardt and several other employees. CE 2. Complainant states that when she began to have problems with

Respondents, she called their headquarters to complain, but nothing was done. CE 3.

Complainant asserts that she designated her race as "Native American" on her initial application for the job with Respondents, and notes that although she has dark pigmentation, her mother is a Black Foot Indian and her father is Native American. Complainant asserts that the ALJ's use of the terms "Black" and "gay" was racist, prejudiced and "very insulting." CE 2. Complainant asks that the ALJ be reprimanded for discrimination. CE 3.

Complainant contends that she was not given a fair hearing, and that the ALJ did not allow her to speak or to present third party evidence, but permitted Respondents to present such evidence. She notes that because Respondents' witnesses are current employees, their testimony could be rehearsed in advance. Complainant also contends that a second hearing was to be held on May 18, 2007 for her claims against Respondent A&M Specialists, but she was told that she did not need to attend that day because that claim would be settled "out of court." CE 2.

Complainant states that the Division had a conference with Respondents without her present, and contends that such a meeting violated her rights. CE 3.

THE DIRECTOR'S DECISION

PROCEDURAL ISSUES

Prior to addressing the substance of the Order, the Director will address Complainant's exceptions regarding the investigation and hearing process. First, Complainant argues that the Division violated her rights by meeting with Respondents without her present. CE 3. There is no merit to this argument. When a complaint is filed with the Division, the Division is charged with conducting an investigation, which may include field visits and interviews of witnesses, as well as fact-finding conferences. N.J.S.A. 10:5-14; N.J.A.C. 13:4-4.2. There is no requirement that a complainant be present for all of the Division's meetings with witnesses or representatives of the employer.

Complainant contends that she was not present for a second day of hearing, scheduled for

May 18, 2007, because she was under the impression that a settlement would be worked out and finalized before the ALJ. The record reflects that when the Division transmitted this case to OAL at Complainant's request, it was estimated that two days would be needed for the hearing. For this reason, the hearing notice scheduled the case for May 17, 2007 and May 18, 2007. Review of the tape recording of the hearing disclosed, however, that the testimony was concluded in one day, and the second reserved hearing date was not needed. The ALJ asked Complainant on the record whether she had any other witnesses to present, and she answered that she did not. At the end of the hearing on May 17, 2007, both Complainant and Respondents' attorney presented oral summations, and the hearing was concluded. Complainant states in her exceptions that she understood that the May 17 hearing addressed only her claims against Respondent Fernandez, and that another hearing would be held for her claims against Respondent A&M Specialists. However, Complainant's claims against both respondents were filed in one complaint, with one docket number, and absent an order bifurcating the claims for good cause pursuant to N.J.A.C. 1:1-14.6, such claims are addressed in the same hearing, whether the testimony takes one day or several days. Here, the record reflects no indication that Complainant requested that the claims be bifurcated for separate hearings, or for separate settlement negotiations.

Complainant notes that, because Respondents' witnesses were current employees, their testimony could be rehearsed. CE 2. Witnesses, whether employees or not, commonly prepare for hearings by reviewing their potential testimony with a party or attorney. Hearing procedures permit the opposing parties to cross-examine each witness, so that they can ferret out inconsistencies, confront the witness with contradictory evidence or otherwise impeach their credibility. The tape recording of the hearing disclosed that Complainant was given the opportunity to cross-examine every witness. Based on the testimony and cross-examination, as well as observations of witness demeanor, the ALJ must determine whether specific testimony is credible. Here, the Director finds no basis to set aside the ALJ's credibility determinations based on

Complainant's assertion that the testimony could have been rehearsed.

Complainant also asserts that the ALJ barred her from presenting "third party" evidence, but permitted Respondent to do so. The tape recording of the hearing disclosed that Respondent's attorney made objections several times during Complainant's direct testimony, sometimes citing "hearsay" as the basis of his objection. Hearsay is admissible in administrative hearings, but the ALJ is to determine the weight to be given such evidence, and the ALJ may exclude evidence where its probative value is outweighed by the risk that the evidence will consume an undue amount of time or will create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1; N.J.A.C. 1:1-15.5. Factual determinations, however, may not be based on hearsay alone, but must be supported by sufficient legally competent evidence to assure reliability and avoid arbitrariness. N.J.A.C. 1:1-15.5(b). Thus, although hearsay objections may be appropriate to merely note hearsay for the record, testimony should not be excluded based on its hearsay nature alone, but only where there are also grounds to exclude it based on undue prejudice, confusion or consumption of time.

The hearing tape disclosed that the ALJ did define hearsay in response to one of Respondent's objections, noting that if someone's statement is presented to show that the statement is true, Respondents' "lawyer has to be able to cross-examine him." However, when Complainant subsequently prefaced a line of testimony by stating that the ALJ told her she could not use hearsay, the ALJ interrupted to tell Complainant that she could use hearsay in her testimony. In general, the ALJ's responses to Respondents' "hearsay" objections focused on attempting to direct Complainant's testimony to address the allegations of the complaint, and to avoid spending undue time on background events that had insufficient bearing on Complainant's discrimination claims. After review of the hearing tapes, the Director concludes that, when Complainant's testimony was interrupted by objections, the ALJ did not deprive Complainant of the opportunity to present relevant and material evidence regarding the allegations of her complaint.

Finally, Complainant alleges that the ALJ insulted her by using the terms "Black" and "gay," and that the ALJ was racist and homophobic and should be reprimanded for discrimination. CE 2-3. Initially, even if grounds existed to do so, the Director of the Division on Civil Rights would have no authority to reprimand an ALJ; any such complaints should be filed with the Director of the Office of Administrative Law. N.J.A.C. 1:31-3.1 to 31.11. Moreover, the hearing tapes disclosed no statements of the ALJ that exhibited a bias based on race or sexual orientation. The tapes also disclosed that Complainant herself used the terms "Black" and "gay" at the hearing in a non-derogatory context, and these terms are generally accepted as appropriate descriptions in their respective communities. Therefore, Complainant's claims that the ALJ was racist and homophobic are without merit.

THE DIRECTOR'S FINDINGS OF FACT

The Director concludes that the ALJ's factual findings are supported by the record, and adopts them as his own. In the absence of evidence that the ALJ's factual findings were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence, the Director has no basis for rejecting the ALJ's credibility determinations or her factual findings based on those determinations. N.J.A.C. 1:1-18.6. Because she had the opportunity to hear the live testimony of witnesses and observe their demeanor, it is the ALJ who is best able to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988).

Based on the ALJ's credibility determinations and her summary of the witness testimony, as well as a review of the tape recording of the hearing, the Director makes the following supplemental factual findings. Respondent Sixto Fernandez is general manager of Respondent A&M Specialists, Inc. ID 9. On October 24, 2005, Complainant punched out for the day at 2:05 p.m. Ex. R-1. After Complainant had punched out that day, Fernandez heard her on her cell phone and asked her to come into his office when she was finished with her conversation. Fernandez

then terminated Complainant's employment. ID 11. Complainant never told Fernandez her sexual orientation, and the first time Respondents learned of her sexual orientation was at 2:30 p.m. on October 24, 2005. ID 6. Before her termination, Complainant never complained to Fernandez or to anyone else in Respondents' company about her feeling that she was being subjected to employment discrimination. ID 6. The Director notes that, although Complainant states in her exceptions that when she "began to have problems with the company," she called Respondents' headquarters to complain about how she was being treated, CE 3, Complainant testified at the hearing that, because she liked the job, she did not complain to headquarters or anyone else until after she had been terminated. Tape 1. Thus, the ALJ's summary of the evidence on this issue is supported by the record.

THE LEGAL STANDARDS AND ANALYSIS

The LAD prohibits employment discrimination based on race and sexual orientation, N.J.S.A 10:5-12(a). In her complaint, Complainant alleged that because she is Black and Lesbian, Respondents constantly watched her and eventually discharged her, and that Respondents also subjected her to harassing comments about her sexual orientation and race.

A. Hostile Work Environment

In her initial decision, the ALJ failed to address the hostile work environment claim alleged in the complaint. To present an actionable hostile work environment claim under the LAD, Complainant must demonstrate that she was subjected to comments or actions, which would not have occurred but for her race or sexual orientation, and that were severe or pervasive enough to make a reasonable person who shared Complainant's protected characteristics conclude that the work environment had been altered and had become hostile or abusive. Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 24 (2002).

Here, Complainant's verified complaint sets forth specific derogatory comments allegedly made to her by Fernandez and two other employees during her employment, which specifically

refer to her sexual orientation and race. The ALJ's summary of the hearing testimony, including Complainant's testimony, makes no reference to any race-based comments or other harassment based on Complainant's race, and the tape recording of the hearing disclosed no testimony from Complainant or any other witness regarding any such race-based comments or harassment. In her exceptions, Complainant asserts that Respondent Fernandez and other employees called her "nigger." CE 2. However, Complainant did not testify to any such racial slurs, and she presented no other evidence of such statements at the hearing. Despite being specifically questioned on cross-examination about whether she was alleging race discrimination, Complainant did not mention any racial slurs; her only testimony regarding racial hostility was that she was the only Black lesbian female working there, and she was quite sure Respondents would not hire another. Tape 1. Thus, a thorough review of the record disclosed no competent evidence to support the conclusion that Complainant was subjected to hostile comments, actions or other harassment based on her race.

Regarding her sexual orientation, Complainant testified that she was "questioned inappropriately," that male drivers asked her questions about whether she had a boyfriend, Tape 1, and that she was questioned about her sexuality by various people in the office, but she "set it aside" because she liked her job. Tape 2. In her exceptions, Complainant adds that she was asked out and asked if she liked women. CE 2. In the context of the evidence in the record, these questions do not constitute harassment based on sexual orientation. It is not per se inappropriate for an employee to ask a co-worker out, and asking personal questions may or may not be appropriate, depending on the circumstances. Even if specific questions about a co-worker's sexual orientation may be rude or inconsiderate, such questions between co-workers do not necessarily constitute bias-based harassment. Here, Complainant has not testified that her co-workers badgered her with inappropriate questions, or asked the questions in a manner that a reasonable homosexual employee would find harassing.

More on point is Complainant's hearing testimony that Respondent's dispatcher, Linda Degenhardt, referred to her as "a dyke and all those other things" when speaking to Respondents' payroll employee. Tape 1. Although the term "dyke" is a bias-based slur, Complainant's testimony fails to provide any details about this comment or "those other things" Degenhardt allegedly said that would demonstrate that any such comments were severe or pervasive.[2]

Moreover, because Complainant testified that the comments were made by Degendardt, who was a co-worker rather than a supervisor, Respondents would be liable only if management-level employees knew, or in the exercise of reasonable care should have known, about the harassing comments. Herman v. Coastal Corp., 348 N.J. Super. 1, 25 (App. Div. 2002).

Here, Complainant acknowledged that she never reported any bias-based comments or other harassment to Respondent Fernandez, to any other managerial employee, or to anyone else in Respondents' company prior to being discharged. Complainant testified that although she did not remember receiving a copy of Respondents' full employee manual, she did receive a copy of the section entitled "Equal Employment Opportunity and Discrimination Policy" (Ex. R-2), and she volunteered that it was also posted on a wall. Tape 1. That policy specifically prohibits discrimination based on race and sexual orientation, including discrimination by co-workers. (Ex R-2, p. 1-2).

[2]The Director acknowledges, as discussed above, that Complainant's testimony was at times interrupted by objections from Respondents' attorney, including objections asserting hearsay. Review of the hearing tapes disclosed that those objections, and the ALJ's responses to them, at times led Complainant to recast her testimony to eliminate some references to her conversations with other employees. The Director notes that testimony which is offered to demonstrate that statements had a harassing impact, rather than as evidence of the truth of those statements, would not necessarily be inadmissible hearsay. Nevertheless, the hearing tapes demonstrate that the objections were made during Complainant's testimony about questions from co-workers that would not constitute a hostile work environment, and during her testimony about information she received from a co-worker named Ernesto, which she stated was relevant to the reason Respondent discharged her. Complainant's testimony about Degenhardt's alleged bias-based comments was not interrupted by objections or by anything else, and Complainant was not deprived of the opportunity to elaborate on those comments.

Thus, despite her knowledge that Respondents had a policy prohibiting bias-based discrimination, and that there were procedures in place for reporting such discrimination, Complainant admitted that she never complained about what she considered discriminatory conduct, because she liked her job. Based on Complainant's awareness of Respondent's anti-discrimination policy, and the absence of other evidence that Respondents knew or should have known of any bias-based comments, the Director concludes that, even if Degenhardt did make the comments as Complainant alleged, and even if such comments could be deemed severe or pervasive, Respondents could not be held liable for such harassment because they cannot be charged with actual or constructive knowledge of any alleged harassing conduct. Based on all of the above, the Director concludes that Respondents did not subject Complainant to a hostile work environment because of her race or sexual orientation.

B. Differential Treatment

The LAD's prohibitions against employment discrimination also prohibit employers from treating employees less favorably based on race or sexual orientation, or using race or sexual orientation as a factor in deciding to discharge an employee. N.J.S.A. 10:5-12(a). An employee may attempt to prove such differential treatment by direct evidence or by circumstantial evidence. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). To prevail in a direct evidence case, the complainant must present evidence such as statements of a decision-maker, which, if true, demonstrate "...not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid.

In her verified complaint, Complainant alleged that Respondent Fernandez told her "that she was being discharged because she is gay." If Fernandez actually said this, it would be direct evidence of discrimination based on sexual orientation. At the hearing, however, Complainant did not testify that Fernandez told her she was being discharged because she is gay, but she instead

testified that Fernandez told her she was being discharged because other drivers complained that they were uncomfortable driving with her, and that he knew she was gay. Tape 1.

The Director concludes that, even if those standards are applied, the evidence in the record is insufficient for a prima facie showing of employment discrimination. Initially, as noted above, Fernandez's testimony contradicted Complainant's testimony on this issue, as he testified that he did not learn of Complainant's sexual orientation until he received the verified complaint in this matter, which was after Complainant's termination. ID 10. Since the ALJ found Respondents' witness testimony more credible than Complainant's, ID 14, and credibility determinations are the ALJ's domain, the record does not provide sufficient competent, credible evidence for the Director to reject Fernandez's testimony and instead find as fact that he told Complainant that he knew her sexual orientation. Without a finding that Fernandez made this statement to Complainant, there is no direct evidence to be evaluated.

Moreover, the record reflects that when Fernandez told Complainant that the other drivers were complaining about her and refused to drive with her, he was referring to complaints about behaviors she exhibited while picking up and delivering cars, ID 2-3, rather than complaints about her sexual orientation. Thus, even if Fernandez told Complainant that he knew her sexual orientation, the record fails show a causal connection between Fernandez awareness of her sexual orientation and the reason for her termination - - driver complaints about her conduct when out on driving assignments.

Addressing the circumstantial evidence in this case, the New Jersey courts have adopted the burden-shifting 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.

[3]Although 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).

Burdine, 450 U.S. 248 (1981). Clowes v. Terminix, supra, 109 N.J. at 595. An employee first bears the burden of establishing a prima facie case, which generally requires proof that she is a member of a protected class, she was performing her job, she was terminated, and others performed her work after her termination. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457-459 (2005). Here, there is no dispute that Complainant is a lesbian woman who is a member of a racial minority, that she was performing her job, and that Respondents terminated her employment. Respondent Fernandez testified that he did not replace Complainant right away because Respondents' workload and drivers' schedules fluctuate, and drivers were hired as needed. ID 12. This is sufficient to satisfy the fourth prong of Complainant's prima facie case.

By establishing a prima facie case of unlawful discrimination, a complainant creates a presumption that discrimination has occurred. The burden of production, but not the burden of persuasion, then shifts to the employer to articulate some legitimate nondiscriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, supra, 450 U.S. at 253-54; see Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). Here, Fernandez testified that he discharged Complainant because of inappropriate conduct on the job, specifically her involvement in a road rage incident and repeated loud profane outbursts on her cell phone. ID 11-12. This is sufficient to satisfy Respondent's burden of production.

By meeting this burden, the employer rebuts the presumption of discrimination raised by the complainant's prima facie case. The complainant must then prove by a preponderance of the evidence that the employer's articulated reasons for its action were pretextual and that the true motivation and intent were to discriminate based on protected characteristics. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981). Pretext may be established either directly, by showing that the employer was more likely than not motivated by a discriminatory reason, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Texas Dep't. of

Community Affairs v. Burdine, supra at 256.

Initially, although the verified complaint alleged that Respondents constantly watched Complainant, she made no mention of this allegation at the hearing, and presented no testimony or other evidence of differential treatment other than the incidents relating to her discharge. For this reason, the Director's analysis will be limited to the allegations relating to discriminatory discharge.

After reviewing the record, the Director concludes that Complainant has not met her burden of proving that Respondents discharged her because of her sexual orientation or race. Respondent asserts that Fernandez decided to discharge Complainant when his own observation of Complainant shouting on her cell phone led him to understand the extent of the behavior that other drivers had previously complained to him about, specifically loud profane cell phone conversations and aggressive driving. Complainant testified that Fernandez told her she was being terminated because other "drivers were uncomfortable around her and did not want to work around her." ID 6. Thus, Complainant agrees that Fernandez discharged her at least in part because of other drivers' complaints about her, but she contends that the other drivers complained because they were uncomfortable working with a lesbian. After review of the record and the ALJ's credibility determinations, the Director finds no basis to conclude that Respondent's articulated reasons for discharging Complainant were not its true reasons.

Although Complainant's testimony contradicted Respondent's contention that she engaged in the road rage incident or engaged in long, loud, profane cell phone conversations on the job, the ALJ specifically found that Complainant's testimony was not convincing, and that Respondents' witnesses were more credible than Complainant. ID 14. The driver who complained about the road rage incident, Craig Sienkiewicz, testified about it in detail at the hearing, and his testimony contradicted Complainant's. ID 5, 7-8. Regarding the cell phone incidents, Respondent Fernandez

testified about the complaints he received from other drivers, and his own observation of Complainant screaming into her cell phone on October 24, 2005. ID 5, 10-11. On the issues relating to the disruptive cell phone calls and the road rage incident, review of the hearing tapes disclosed no testimony that would support rejecting the ALJ's credibility determinations or her factual findings based on those determinations. As noted above, in the absence of substantial, competent evidence to the contrary, the Director must defer to the ALJ's credibility determinations and her factual findings based on those determinations. Because she had the opportunity to hear the live testimony of witnesses and observe their demeanor, it is the ALJ who is best able to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988). Thus, the Director finds insufficient evidence in the record to conclude that Respondents' articulated reasons were unworthy of credence.

Moreover, review of the record disclosed insufficient evidence to support the conclusion that Respondent was more likely than not motivated by race or sexual orientation discrimination in discharging Complainant. First addressing Complainant's allegation of race discrimination, review of the record shows no testimony from Complainant or other evidence to support her allegation that Respondent discriminated against her based on her race. The tape recording of the hearing disclosed that, on cross-examination, Respondent's attorney pointed out to Complainant that she had made no reference to race discrimination in her direct testimony, and asked whether she was alleging that she was terminated because of her race. Complainant answered that her race was a factor because she "was the only Black lesbian female that worked there" and she was quite sure Respondent Fernandez would not hire another. Tape 1. This alone is insufficient to support the conclusion that Respondent's true motivation was race discrimination.

Further, Complainant was hired after an in-person interview with Respondent Fernandez, in which her race would have been evident. The fact that the same person hired Complainant in

September 2005, and discharged her roughly a month later, ID 2-3, weighs against any inference that she was discharged or differentially treated because of her race. Young v. Hobart West Group, 385 N.J. Super. 448, 461(App. Div. 2005), citing Proud v. Stone, 945 F.2d 796, 797 (4th Cir.1991) ("[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.").

In her exceptions, Complainant asserts that although her skin is dark, her parentage is actually Native American, and she characterizes the ALJ's use of the term "Black" as racist and prejudiced. CE 2-3. The Director notes that "Black" is generally accepted as an appropriate description of race, and review of the tape recording of the hearing disclosed that Complainant herself used the term "Black" to describe herself in testimony. Tape 1. Moreover, regardless of whether Respondent Fernandez had an accurate understanding of Complainant's race or heritage, he was still the same actor who hired and fired her, and there is no evidence in the record that his understanding or assumptions about Complainant's race changed in the brief period between her hiring and firing.

As noted above, Complainant also asserts in her exceptions that Fernandez and other employees called her "nigger." However, the tape recording of the hearing disclosed no testimony from Complainant or any other witness regarding use of that word, or any other racially derogatory remarks by Fernandez or anyone else. Based on the evidence in the record and the tape of the hearing testimony, there is no basis on which the Director could find as fact that anyone made racially derogatory comments to Complainant during her work for Respondents. Based on all of the above, the Director finds no evidence in the record to support the conclusion that Complainant's race was a factor in Respondent's decision to discharge her, or that Respondent otherwise discriminated against Complainant because of her race.

Regarding Complainant's sexual orientation, Respondent Fernandez testified that he had no knowledge of Complainant's sexual orientation until after Complainant's termination, when he received the complaint she filed in this matter. ID 10. Complainant agrees that she never told Fernandez about her sexual orientation, ID 6, but her other testimony reflects that she believes he learned from other sources. Specifically, Complainant testified that at the time of her discharge, Fernandez said that "he knew that I was gay." Tape 1. Complainant testified that, although she declined to tell anyone else in the workplace about her sexual orientation, she told Respondents' dispatcher, Linda, about her sexual orientation shortly before she was discharged, ID 6, and Complainant states in her exceptions that Linda admitted that Complainant's sexual orientation was being discussed in the workplace a couple of weeks after she began working for Respondents. CE 3. However, Complainant has not presented evidence or even alleged that Fernandez was present when any such discussions took place. Review of the record disclosed no other testimony or evidence to contradict Fernandez's testimony that he did not know of Complainant's sexual orientation at the time of her discharge. As noted above, the ALJ specifically found that the testimony of Respondents' witnesses was more credible than Complainant's testimony. ID14. Because the ALJ has the opportunity to observe their demeanor, it is the ALJ's purview to assess the credibility of witnesses, and in the absence of sufficient, competent evidence in the record to the contrary, the Director may not reject such determinations. N.J.A.C. 1:1-18.6. Based on the evidence in the record, including the ALJ's credibility determinations, the Director finds insufficient evidence to conclude that Respondent Fernandez knew Complainant's sexual orientation at the time of her discharge, or that Complainant's sexual orientation was a factor in Respondents' decision to discharge her.

CONCLUSION

Based on all of the above, the Director concludes that Complainant was not subjected to a hostile work environment based on her sexual orientation or race, and that Complainant was not discharged because of her sexual orientation or race. For these reasons, the Director adopts the ALJ's dismissal of the complaint.

September 25, 2007
Date

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