

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 5648-05
DCR DOCKET NO. EB-21WB-49983
EEOC NO. 17EA400320

BARBARA BORNSTEIN,

Complainant,

v.

SPENCER SAVINGS BANK,

Respondent.

)
)
) ADMINISTRATIVE ACTION

)
) FINDINGS, DETERMINATION

)
) AND ORDER

APPEARANCES:

James. P. Madden, Esq., for the complainant

Donia Sawwan, Esq. and Dominick Bratti, Esq., for the respondent (Grotta, Glassman and Hoffman, attorneys.)

Brian O. Lipman, Deputy Attorney General, for Division on Civil Rights (Anne Milgram, Attorney General of New Jersey, attorney)

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 Barbara Bornstein (“Complainant”), charging Spencer Savings Bank (“Respondent”) with discrimination under the New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-1 to -49. Complainant alleged that her employment was terminated as a result of disability and age discrimination. On June 27,

2007, the Honorable Mumtaz Bari-Brown, Administrative Law Judge (“ALJ”), issued an initial decision dismissing Complainant’s complaint. Having independently reviewed the record, the Director adopts the ALJ’s decision, as modified herein.

PROCEDURAL HISTORY

On December 26, 2003, Complainant filed a Verified Complaint with the Division alleging that Respondent terminated her employment unlawfully under the LAD. Specifically, Complainant alleged that Respondent terminated her as a result of disability and age discrimination.

On March 15, 2004, Respondent filed an answer contending Complainant’s claim was without merit. Respondent alleged that Complainant was discharged because her work performance failed to improve despite repeated warnings. On May 26, 2005, at the request of Complainant and before a final determination by the Division, the Director transmitted this matter to the Office of Administrative Law (“OAL”) as a contested case.

On September 27, 2005, a prehearing conference was held during which the parties engaged in extensive discovery and settlement discussions. On May 11, 2006, the Respondent moved for summary judgment. The ALJ denied Respondent’s motion. Hearings were held on September 27 and 28, 2006. In lieu of post-hearing briefs, the parties relied on arguments submitted in the motions and the record developed at hearing. A telephone conference on or about May 14, 2007 confirmed that the parties did not order transcripts of the proceedings and the record was closed.

On June 27, 2007, the ALJ issued an initial decision¹ dismissing Complainant's complaint. The Director's decision is due to be issued by August 13, 2007.

THE ALJ 'S DECISION

THE ALJ'S FINDINGS OF FACT

The ALJ recounted the following facts. Complainant was hired by Spencer Savings Bank on January 12, 1999. Her supervisor was Katy Jordan, branch manager. On March 4, 1998, Complainant's probation period was extended for an additional 90 days due to banking errors, despite performing her other duties in a responsible manner. On August 11, 2000, Complainant's performance evaluation noted positive performances in productivity, communication skills and professional behavior, but indicated a continuing problem with transaction mistakes. Her overall job performance rating was "needs improvement." ID-3. In a cash drawer audit on September 28, 2000, the assistant branch manager found an "overage of \$90.00 listed in [Complainant]'s quarter count and \$10.00 shortage in her dollar coins." ID-4. On October 11, 2000, Jordan issued Complainant a "Letter of Warning," which stated in part, "To date this year, your difference record is \$448.00. This is entirely unsatisfactory for an employee with your length of service in the industry and with Spencer Savings Bank." Another performance evaluation on January 31, 2001 listed positive performances in productivity, communication skills and professional behavior, "[h]owever, her cross-selling skills need improving." ID-4. Complainant received a "Final Warning" memo on February 28, 2003 regarding her poor performance in "Over and Short" policy (cash shortage). On March 10, 2003, Complainant's performance

¹Hereinafter, "ID" refers to the initial decision issued by the ALJ on June 27, 2007; "C" refers to Complainant's exhibits; and "R" refers to Respondent's exhibits.

evaluation was again positive in productivity, communication skills and professional behavior, but the reviewer added, "As stated earlier, Barbara needs to immediately improve her overall efficiency when handling and processing customer transactions. Better organization skills of her work and work area and additional training will help her in this area." ID-4. Complainant received additional training on March 14, 2003. ID-5. After Complainant left \$2,000 on the counter on June 6, 2003, Jordan recommended that Complainant be terminated immediately. Jordan's June 11, 2003 memo recommended termination and noted several "operational errors that could result in losses to the bank" such as being abrupt with customers, opening a vacation account with incorrect account numbers, and dispersing \$4,000 without immediately processing the transaction, which resulted in a "hold" on the customer's account and a net balance. ID-5. On July 2, 2003, Complainant made a deposit of \$200 to the wrong account and her employment was terminated on that day. Ibid.

During her employment, Complainant was diagnosed with Crohn's Disease and also experienced migraine headaches. ID-5. In June 2001, Respondent met with Complainant to discuss her chronic incontinence and Jordan offered, "If there is any reasonable accommodation that may apply to your situation, please do not hesitate to bring it to our attention." ID-4, R-16. Sometime in June 2003, Complainant informed Respondent that she would undergo hip surgery. ID-5. Complainant was 59 years of age when she was terminated. ID-14.

THE ALJ'S LEGAL CONCLUSIONS

Complainant alleged that Respondent wrongfully discharged her due to her age and various disabilities. The ALJ found that a prima facie case of disability discrimination is

established if an employee can prove that: (1) she had a disability; (2) she was performing her job at a level that met the employer's legitimate expectations; (3) she nevertheless was fired; and (4) the employer sought someone else to perform the work. ID-6, citing Clowes v. Terminix International, Inc., 109 N.J. 575, 596 (1998) (modifying the analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to address disability discrimination.) Based on the facts in the record, the ALJ concluded that Complainant established a prima facie disability discrimination claim.

With regard to the first element, the ALJ noted that under the LAD courts have broadly interpreted the term "disability" to include "people who do not have substantial or permanent impairment at the time of the alleged discrimination." ID-7, citing Soule v. Mount Holiness Mem'l Park, 354 N.J. Super. 569, 575 (App. Div. 2002). She found that Crohn's Disease is a disability within the meaning of the LAD because it is "an inflammatory bowel disorder that produces a thickening of the intestinal wall, a narrowing of the bowel channel, and a variety of symptoms including abdominal pain, fever, diarrhea, flatulence, fatigue, extreme pain, and dehydration." ID-8, quoting Nesser v. Trans World Airlines, 160 F.3d 442, 444 (8th Cir. 1998). Additionally, the ALJ determined that migraines contained symptoms of a recognized disorder that could be reasonably perceived as a physical disability, and that Complainant's arthritic condition which required a hip replacement also qualified as a protected disability under the LAD. ID-9.

The ALJ found that Complainant also met the second element of the prima facie case, which requires that the employee's performance in the position meet the employer's expectations. If an employee "has been performing in the position from which [s]he has been terminated, the second prong [of the prima facie case analysis] is fulfilled." ID-9,

quoting Zive v. Stanley Roberts, Inc., 182 N.J. 436, 441 (2005). Because “the quality of the employee’s performance does not come into play on the plaintiff’s prima facie case,” the ALJ found that Complainant’s five years of uninterrupted service was sufficient to establish that Complainant had been performing in the position from which she was terminated. Ibid.

The ALJ also concluded that Complainant met both the third and the fourth elements of the prima facie case of disability discrimination. Complainant was terminated on July 2, 2003. ID-5. Complainant was told that she was terminated for poor performance and not because her job was being eliminated; thus, it is reasonable to conclude that the employer hired another employee to replace her. ID-10.

Once a prima facie case is established, the burden shifts to the employer to show a legitimate, non-discriminatory reason for terminating the employee. ID-6, citing Anderson v. Exxon Co., 89 N.J. 483, 493 (1982). The ALJ was persuaded that Respondent established legitimate reasons for terminating complainant based on evidence that Complainant received repeated counseling and discipline, and was provided training opportunities as a result of poor work performance. ID-9 to -12. Because Respondent established legitimate reasons for termination, the burden shifts to the employee to show that the reason given was a pretext for discrimination. ID-6, citing Andersen, supra at 493. Complainant failed to provide any evidence, direct or circumstantial, to persuade the ALJ to doubt Respondent’s proffered legitimate reasons or to find that a discriminatory motive was more likely than not a motivating cause of the termination. ID-12, citing Zive, supra, 182 N.J. at 455-56.

The ALJ reviewed Complainant’s long history of negative evaluations and transactional errors. ID-10 to -12. Although Complainant’s performance evaluations from

January 1998 to January 2000 received a general rating of “fully meeting expectations,” Complainant was rated “significantly below expectations” in the “quality of work” category both years. Moreover, for the period January 2000 to July 2000, as well as January 2002 to January 2003, she was given an overall performance rating of “needs improvement.” ID-11. There was also evidence that despite warnings and additional training, Complainant failed to follow proper procedures, resulting in a series of warnings and reprimands. In October 2000, she received a letter of warning about a \$448 cash drawer difference and in February 2003, she received a final letter of warning for a \$310 cash drawer difference. ID-10 to-11. Earlier in 2003, Complainant double-processed a customer’s deposit. On May 9, 2003, Complainant opened an account with an incorrect number. Then a series of mistakes led to Complainant’s termination: on May 16, 2003, she failed to properly process a \$4,000 transaction; on June 2, 2003, Complainant again opened an account with an incorrect number; on June 6, 2003, she left \$2,000 on the counter while she took a lunch break; and on June 10, 2003, Complainant failed to check a customer’s signature and dispersed \$650 on a forged check. Finally, in June 2003, Katy Jordan recommended that Complainant be terminated for the following: (1) being abrupt with customers in March 2003; (2) opening an account with the incorrect number in May 2003; (3) not properly completing a transaction and leaving a hold on the account in June 2003; (4) opening a savings account with an incorrect account number; (5) leaving \$2,000 in cash on the counter; and (6) accepting a forged check. ID-11.

The ALJ was persuaded by the evidence that Complainant was terminated because of poor performance. Complainant failed to prove that Respondent’s concerns were minor issues or that her performance could not affect Respondent financially. ID-12. Therefore,

the ALJ concluded that Respondent is not liable for disability discrimination. ID-12.

With regard to the age discrimination claim, the ALJ found that the prima facie requirement is similar to the disability discrimination claim in that Complainant is required to prove that: (1) she is a member of a protected class; (2) she was performing her job at a level that objectively met her employer's expectations; (3) she was discharged; and (4) she was replaced by "a candidate sufficiently younger to permit an inference of age discrimination." ID-13, citing Young v. Hobart West Group, 385 N.J. Super 448, 459 (App. Div. 2005) (quoting Bergen Commercial Bank v. Sisler, 157 N.J. Super. 77, 82 (App. Div. 2001)). According to the ALJ, the fourth element can be satisfied by "proof of either replacement by someone outside the protected class or by someone younger or by other proof that the discharge was because of age." ID-13, citing Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3d Cir. 1985).

The ALJ found that at age 59, Complainant was a member of the protected class. However, the ALJ concluded that Complainant failed to prove that she was replaced by a younger person or present any other proof that her discharge was based on age. ID-13 to -14. Therefore, the ALJ concluded that Complainant failed to demonstrate a prima facie case of age discrimination.

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

The Director concludes that the ALJ's factual findings recited herein are supported by sufficient evidence in the record, and he adopts them as his own. Under the Uniform Administrative Procedure Rules, the Director may reject or modify the ALJ's findings of fact, but must clearly state the reason for doing so. N.J.A.C. 1:1-18.6(b). Moreover, it is well

settled that an agency head must give due deference to the ALJ's factual determinations because the ALJ had the opportunity to hear the live testimony of witnesses, observe their demeanor, and judge their credibility. Clowes v. Terminix, *supra*, at 587-88. Thus, an agency head may not reject or modify any finding of fact based on the credibility of a lay witness unless it first determines from a review of the record that the finding is arbitrary, capricious or unreasonable, or is not supported by sufficient, competent, and credible evidence in the record. N.J.A.C. 1:1-18.6(c). Complainant has filed no exceptions and an independent review of the record finds sufficient evidence to support the ALJ's factual findings.

THE DIRECTOR'S LEGAL ANALYSIS AND CONCLUSIONS

The ALJ correctly stated that the LAD makes it unlawful for an employer to discriminate based on disability or age. N.J.S.A. 10:5-1 to -49. In order to establish a prima facie case of discriminatory discharge based on disability, an employee must prove that (1) she had a disability covered by the LAD; (2) she was performing her job at a level that met the employer's legitimate expectations; (3) she nevertheless was fired; and (4) the employer sought someone else to perform the work. Viscik v. Fowler Equipment Co., 173 N.J. 1, 25, citing Clowes v. Terminix International, 109 N.J. 575, 596 (1998) (modifying the analysis set forth in McDonnell Douglas, *supra*, 411 U.S. 792 (1973) to address the issue of disability discrimination). The evidential burden at the prima facie stage is "rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent—that discrimination could be a reason for the employer's action." Zive v. Stanely Roberts, Inc., 182 N.J. 436, 447 (2005), quoting Marzano v. Computer Science Corp., 91 F.3d 497, 508 (3d Cir. 1996). Moreover, it is well-settled that the prima facie

case is to be evaluated solely on the evidence presented by the plaintiff, irrespective of the defendant's efforts to dispute that evidence. Zive, supra at 448.

The Director agrees with the ALJ that Complainant satisfied all four elements. Complainant satisfied the first element since she suffered from Crohn's Disease and chronic migraines, and needed a hip replacement as a result of arthritis, all of which are covered disabilities under the LAD. Complainant's five-year tenure of employment met the second element, despite evidence in the record that Complainant's job performance was deficient in several respects. To satisfy the second element of the prima facie test, a plaintiff need only produce evidence showing that she was actually performing the job prior to termination. Id. at 454. Performance markers like poor evaluations are more properly debated in the second and third stages of the burden-shifting analysis applied in employment discrimination cases, and do not come into play as part of the second prong of the prima facie case. Id. at 455. Complainant was terminated from her job, and the ALJ correctly inferred that because the position was not eliminated Respondent intended to or did hire someone else to perform her job. Thus, Complainant established her prima facie case of unlawful termination based on disability.

The analysis is similar for an age-based termination claim. In order to establish a prima facie case of age discrimination, a complainant must prove that: (1) she is a member of a protected class; (2) she was performing her job at a level that objectively met her employer's expectations; (3) she was discharged; and (4) she was replaced by a "candidate sufficiently younger to permit an inference of age discrimination." Young v. Hobart West Group, 385 N.J. Super 448, 459 (App. Div. 2005), quoting Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210-13 (1999).

Complainant met the first element, as she is 59 years old and thus a member of the protected class. ID-13. The second element was also satisfied because Complainant held her position for five years and, again, the quality of Complainant's work is not properly considered at this stage of the analysis. It is undisputed that Complainant was ultimately discharged, satisfying the third element. It is less clear from the record, however, whether Complainant has established that she was replaced by a younger person, or has presented any other proof that the discharge was due to her age. Having concluded that Complainant has established a prima facie case of disability discrimination, the Director will assume for the purposes of this analysis that she has also presented a prima facie case of age discrimination.²

The establishment of a prima facie case creates an inference of discrimination, and then the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for terminating the employee. Zive, supra at 449, citing Clowes, supra at 596. Respondent has met this burden by presenting evidence of numerous instances in which Complainant failed to follow proper procedures and otherwise exhibited unsatisfactory job performance. R-2, R-5, R-9, R-10, R-12. The burden of production then shifts back to the complainant to prove by a preponderance of the evidence that the employer's proffered reason is merely a pretext for discrimination and not the true reason for the employment decision. Zive, supra at 449. To prove pretext, however, the complainant must do more than simply show that the employer's reason was false; she

²It is undisputed that Complainant was terminated and, from this the ALJ infers that Complainant was replaced. ID-10. Complainant alleged in her verified complaint that she was replaced by a significantly younger employee. R-16.

must also demonstrate that the employer was motivated by discriminatory intent. Vicsik, supra at 14. This merges with the complainant's ultimate burden to prove she was subjected to intentional discrimination. Zive, supra at 449.

After a careful review of the record in this matter, the Director concludes that Complainant has failed to demonstrate that Respondent's proffered reasons for terminating her were a pretext for either disability or age discrimination. Respondent has provided extensive documentation of Complainant's unsatisfactory performance over a period of five years. As indicated in the ALJ's statement of facts, Complainant received numerous "needs improvement" evaluations, as well as several letters of reprimand relating to her failure to meet the "Over and Short" policy at the bank. Most notably, Complainant made several mistakes which led to her supervisor recommending termination, including leaving \$2,000 on a counter, ID-5, cashing a forged check, ID-11, failing to process large transactions in a timely manner, ID-5, and opening accounts with the wrong account numbers. ID-5. These incidents considered collectively, along with several years of negative performance evaluations, support Respondent's contention that it terminated Complainant because of poor work performance. Complainant has presented no evidence to demonstrate that the reasons proffered by Respondent for her termination were untrue or a pretext for unlawful discrimination.

CONCLUSION AND ORDER

Based on the foregoing, the Director concludes that Complainant has failed to establish that the Respondent's reasons for terminating her was a pretext for discrimination and, therefore, has failed to prove Respondent unlawfully discriminated against her

because of age or disability. Accordingly, the Director adopts the ALJ's initial decision and hereby dismisses Complainant's complaint.



August 10, 2007

Date

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR, DIVISION ON CIVIL RIGHTS

