STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 03924-08
DCR DOCKET NO. EG14NB-48882

DINORAH LUZARDO and	)	
C. CARLOS BELLIDO, Acting Director,	)	
Division on Civil Rights,	)	
Complainants,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	**FINDINGS, DETERMINATION**
	)	**AND ORDER**
LIBERTY OPTICAL,	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

C. Gregory Stewart, Esq., for complainant Dinorah Luzardo.

William H. Healey, Esq., for the respondent (Mandelbaum, Salsburg, Gold, Lazris & Discenza, P.C., attorneys).

Leland S. McGee, Deputy Attorney General, monitoring this matter on behalf of the New Jersey Division on Civil Rights (Anne Milgram, Attorney General of New Jersey, attorney)

BY THE DIRECTOR:[1]

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Dinorah Luzardo (Complainant), alleging that Liberty Optical (Respondent) unlawfully discriminated against her based on national origin in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On May 14, 2009, the

[1]"Director" shall refer to the Acting Director of the New Jersey Division on Civil Rights, C. Carlos Bellido, Esq.

Honorable Walter M. Braswell, Administrative Law Judge (ALJ), issued an initial decision[2] concluding that Respondent violated the LAD, and ordering that Respondent pay emotional distress damages, a statutory penalty and reasonable attorney's fees. After independently evaluating the evidence, the parties' submissions and the ALJ's decision, the Director adopts the ALJ's decision, as modified below.

PROCEDURAL HISTORY

On November 26, 2002, Complainant filed a verified complaint with the Division alleging that Respondent unlawfully discriminated against her based on her national origin (Cuban). Respondent filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. On July 31, 2006, based on the results of that investigation, the Director issued a finding of probable cause supporting the allegations of unlawful employment discrimination, and amended the complaint to add the Director as an additional complainant. On April 2, 2008, after attempts to conciliate this matter failed, the Division transmitted this matter to the Office of Administrative Law (OAL) for a hearing on the merits.

The ALJ conducted a pre-hearing conference on September 10, 2008, and the hearing took place on February 5, 2009. After receipt of post-hearing submissions, the ALJ issued his initial decision on May 14, 2009. Respondent filed exceptions to the initial decision on May 27, 2009; Complainant filed no exceptions or replies. The Director's final order in this matter is due on June 29, 2009.

[2]Hereinafter, "ID" shall refer to the initial decision of the ALJ; TR- shall refer to the transcript of the February 5, 2009 administrative hearing; Ex. D- and Ex. P- shall refer to Respondent's and Complainants' exhibits, respectively, admitted into evidence at the hearing; and RE shall refer to Respondent's exceptions to the initial decision.

THE ALJ'S DECISION

The ALJ's Factual Findings

The ALJ summarized the witness testimony, and then adopted the parties' stipulated facts. ID14-18. To briefly summarize those stipulated facts, Respondent, owned by the DiChiara family, operated an eyeglass frame manufacturing facility in Newark, New Jersey; it ceased manufacturing in 1999 and is currently a distributer. Respondent's CEO is Anthony DiChiara. All managers report to DiChiara, and he made all final decisions. Complainant, who was born in Cuba, worked for Respondent from 1970 until November 2002, as an at-will employee in its Newark facility. For many years she was an assistant to the supervisor of the shipping department and was eventually promoted to shipping supervisor. In September 2002, Respondent assigned Maria Smeltzer (Caucasian), who also supervised Respondent's inventory control function, to help supervise the shipping department. In October 2002, Smeltzer assumed Complainant's shipping department responsibilities. After Smeltzer took over Complainant's duties, Respondent transferred Complainant to the refurbishing department, reduced her wages, and discharged her about six weeks after her transfer. No one replaced Complainant in the refurbishing department. Smeltzer was terminated about six months after Complainant's termination, and her supervisory responsibilities in the shipping department, as well as her inventory control duties, were assumed by Julio Shishido, who is half Asian and half Latino.

Respondent had approximately 120-150 employees in 1999. It began downsizing that year, reducing its staff to 88 employees at the beginning of 2000, 77 employees at the beginning of 2001, 58 employees at the beginning of 2002, 30 employees at the beginning of 2003, and 23 employees at the beginning of 2004. Since 2004, Respondent has had 25-30 employees. Respondent lost money every year from 1992 to 2002, and incurred net losses of $1.9 million in 2002.

Respondent's Employee Manual, which was in effect at the time of Complainant's discharge, states, "In the event of a reduction in workforce, employees will be laid off based on skills and

abilities as well as less seniority." Although Complainant received bonuses and awards, many good workers who received such recognition, as well as members of the DiChiara family and Caucasians, African-Americans, Latinos and Asians, were terminated due to Respondent's downsizing. Respondent never called employees in for formal write-ups or performance evaluations when they had performance problems, and during the downsizing, none of the terminated employees received written warnings or evaluations of their job performance.

The following additional factual findings can be gleaned from the ALJ's initial decision. Complainant worked in several of Respondent's departments (polishing, metal, return and shipping) and was assistant to many supervisors before she assumed her supervisory position. ID26. Respondent never asked Complainant whether she had the skills Respondent expected in order for her to remain employed. Ibid. Respondent chose Complainant to train Smeltzer to take over Complainant's shipping department duties. Ibid.

The ALJ's Analysis and Conclusions

The ALJ applied the burden-shifting methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and concluded that Complainant established a prima facie case of national origin discrimination. To reach that conclusion, the ALJ stated that as a Hispanic female, Complainant was a member of a protected class; she met the minimum objective qualifications for the job from the late 1990's to September 2002; her removal from the shipping department after training her replacement constituted an adverse employment action; and Respondent replaced her with a less senior, less qualified Caucasian employee. ID21.

The ALJ concluded that Respondent met its burden of articulating a non-discriminatory reason for the adverse employment action. ID23. However, the ALJ found Respondent's articulated reason–performance problems–was unworthy of credence, ID22,24 and was pretextual. ID23. The ALJ noted that Respondent provided differing reasons for Complainant's transfer/demotion, Respondent never discussed any performance problems with Complainant,

never conducted a performance review with Complainant when she was transferred, despite a provision in its employee manual providing for such reviews as often as necessary, and did not communicate any skill, ability or performance standards to employees or even establish such written standards. The ALJ noted that although Respondent argued that it did not provide formal or written performance evaluations for any employees, in the absence of such formal written evaluations, Respondent would be more likely, rather than less likely, to speak to Complainant if there were concerns about her performance. The ALJ also noted that Respondent thought enough of Complainant's performance to give her recognition plaques. ID25.

The ALJ also noted that although Respondent's witnesses testified that Complainant had problems multi-tasking, they never informed her of the need to multi-task and never provided her with an opportunity to multi-task. ID 24. Moreover, the ALJ found that, based on her varied experience with Respondent, Complainant was capable of multi-tasking. ID 26. In addition, although Respondent asserted that, as compared to Smeltzer, Complainant lacked computer skills, Respondent never gave Complainant the opportunity to learn computer skills, ID24, and the ALJ found that despite her lack of training, Complainant was able to use the computer to carry out her duties. ID26.

The ALJ also concluded that Respondent's decision to demote and eventually discharge Complainant was made in bad faith. ID26. Based on all of the above, the ALJ concluded that Complainant proved, by a preponderance of the credible evidence, that Respondent discriminated against her based on her national origin.

Addressing remedies, although the ALJ did not explicitly award backpay, he noted that if Complainant had not been demoted and had worked for the additional six months that her replacement remained employed, she would have earned an additional $9,903. The ALJ took into account the severance pay and unemployment compensation Complainant received to award

$5,000 in emotional distress damages.[3] Finding that Respondent had no prior LAD violations and its actions were not egregious, the ALJ imposed a statutory penalty of $2,500. ID27. The ALJ noted that counsel fees should be awarded to Complainant if reasonable and necessary, and directed Complainant's attorney to submit a certification of services for the Director's review. ID 28.

EXCEPTIONS TO THE INITIAL DECISION

On May 27, 2009, Respondent filed exceptions to the ALJ's initial decision, which are summarized as follows. Respondent takes exception to the ALJ's conclusion that Complainant was a victim of national origin discrimination, noting that the record contains no evidence of any anti-Cuban comment, behavior or practice; that employees of many different backgrounds were terminated before and after Complainant; that Complainant was not terminated until 2002; and that the evidence shows that all employees were treated the same, regardless of protected class. RE1-2.

Respondent takes exception to the ALJ's reliance on Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 147 (2000), to conclude that a discriminatory motive can be inferred when the employer's articulated reasons are found to be untrue. Respondent argues that this and other cited cases can be distinguished because they included at least some evidence of discrimination, while there was no evidence of anti-Cuban animus in this case. RE2.

Respondent takes exception to the ALJ's failure to address its Reduction in Force (RIF) as a legitimate non-discriminatory reason for the adverse employment action. Respondent notes that the ALJ made no finding that the RIF was unworthy of credence as a reason for the adverse action. Respondent also notes that the ALJ found pretext without addressing evidence that would be incompatible with pretext, such as the diverse backgrounds of the employees discharged in the RIF,

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[3]There is a discrepancy between the narrative portion of the ALJ's initial decision and the Order portion of his initial decision, where the ALJ awarded $10,000 in emotional distress damages. A final order as to emotional distress damages is addressed in the Director's order below.

Respondent's retention of Complainant through many waves of lay-offs, and that Cuban and other Latino employees remained employed. RE3.

Respondent also takes exception to the ALJ's reliance on evidence that Respondent never reviewed Complainant's job performance or discussed its performance concerns with her, in the absence of any evidence that Respondent treated non-Cuban employees differently. RE4. Respondent cites stipulated facts demonstrating that Respondent never formally evaluated, warned or wrote up any employees for performance issues during the layoffs or at other times. RE4-5.

Respondent takes exception to the ALJ's conclusion that Respondent's decision to demote and eventually discharge Complainant "was done in bad faith and was not appropriate," arguing that the ALJ inappropriately substituted his own business judgment for Respondent's. RE5-6. Respondent cites caselaw supporting the proposition that employers are entitled to consider employees' future and long-term job potential in making employment decisions, and contends that it was inappropriate for the ALJ to second-guess Respondent's business judgment by finding that Complainant was capable of multi-tasking and had the requisite computer skills. RE5-6.

Respondent also takes exception to the ALJ's damage award, noting that the ALJ erred in ordering Respondent to pay $10,000 in emotional distress damages, after finding that a $5000 emotional distress damage award is warranted. RE6-7.

STATE OF NEW JERSEY OFFICE OF THE ATTORNEY GENERAL

THE DIRECTOR'S DECISION

The Director's Factual Findings

Except as noted in the analysis below, the Director concludes that the ALJ's factual findings are supported by the record, and adopts them as his own. In large part, the ALJ relied on the parties' extensive stipulation of facts. As to any non-stipulated facts, 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 his factual findings based on those determinations. N.J.A.C. 1:1-18.6. Because he 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).

Legal Standards And Analysis

An employee may attempt to prove employment discrimination 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 which, if true, demonstrates without inference or presumption "...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. The Director concludes that there is no direct evidence of differential treatment based on national origin in the record.

As a starting point for analyzing LAD cases relying on circumstantial evidence, the New Jersey courts have adopted the burden-shifting methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department

of Community Affairs v. Burdine, 450 U.S. 248 (1981).[4] Clowes v. Terminix, supra, 109 N.J. at 595. A complainant first bears the burden of establishing a prima facie case, which requires proof that the complainant is a member of a protected class, that she was performing her job, that she suffered an adverse employment action, and that others outside the protected class did not suffer similar adverse employment action. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 167, (App. Div. 2005); Zive v. Stanley Roberts, 182 N.J. 436, 455 (2005). In the context of a downsizing, the fourth prong is modified to require a showing that the employer retained others not in the protected class. Marzano v. Computer Science Corp., 91 F. 3d 497, 503 (3rd Cir. 1996); Leahey v. Singer Sewing Co., 302 N.J. Super. 68, 77 (Law Div. 1996); Baker v. National State Bank, 161 N.J. 220, 232 (1999). The Director agrees with the ALJ's conclusion that Complainant established a prima facie case of unlawful discrimination.

Once a complainant has established a prima facie case of unlawful discrimination, she has created a presumption that discrimination has occurred. The burden of production, but not the burden of persuasion, then shifts to the respondent 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). Respondent asserts that it was downsizing its staff due to a financial downturn and sale of part of its operations, and that Complainant was demoted and ultimately discharged because of performance deficiencies. TR186, 190. The Director agrees with the ALJ's conclusion that Respondent met its burden of articulating a legitimate non-discriminatory reason for terminating Complainant's employment. ID23.

In order to prevail, Complainant must then prove by a preponderance of the evidence that the respondent's articulated reasons for its action were pretextual. She may do this either directly

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[4]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).

by showing that the employer was more likely than not motivated by a discriminatory reason, or indirectly by showing that the employer's articulated reason is unworthy of credence. Bergen Commercial Bank v. Sisler, supra, 157 N.J. at 211. It is not enough to merely show that the employer's decision was wrong or mistaken; instead, the employee must show "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proferred legitimate reasons" that lead the factfinder to conclude that the employer did not really act for the asserted non-discriminatory reasons. Fuentes v. Perskie, 32 F. 3d 759, 765 (3d Cir. 1994). In order to prevail, a complainant is not required to prove that the respondent was motivated solely by a discriminatory purpose. Slohoda v. United Parcel Services, Inc., 207 N.J. Super. 145, 155 (App. Div. 1986)(citations omitted). "It is sufficient if, taken with other possibly meritorious reasons, the discriminatory purpose was 'a determinative factor'" in the employer's decision. Ibid.

In its exceptions, Respondent cites evidence that its layoffs impacted employees of all races and national origins, and argues that in the absence of any evidence of comments, behavior or practices that suggest an anti-Cuban animus, the ALJ erred in concluding that Respondent unlawfully discriminated against Complainant based on her national origin. Respondent argues that the appropriate legal standard requires some evidence of animus against the applicable protected class. RE1-2. There is no merit to this argument. Because direct evidence of an employer's discriminatory intent is seldom available, the courts have recognized the need to rely on circumstantial evidence of discrimination. See, e.g., Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). Although some types of circumstantial evidence may directly show that an employer had a discriminatory motive, an indirect showing that the employer's articulated reason is unworthy of credence may also suffice. See, e.g., Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 348 (App. Div. 1997), citing Burdine, supra, 450 U.S. at 256.

Although Respondent contends that Reeves v. Sanderson Plumbing Products, Inc., 530

U.S. 133 (2000), and other cases cited by the ALJ contained some evidence of bias-based discrimination, Reeves does not require specific evidence of a discriminatory animus to prevail on a discrimination claim. Instead, Reeves holds that proof of a prima facie case, plus the factfinder's rejection of the employer's articulated reason, may suffice to support the factfinder's conclusion that the employer discriminated against the employee based on protected status. 530 U.S. at 148. In Reeves, the Court specifically rejected the proposition that an employee "must always introduce independent evidence of discrimination." Id. at 146. The Appellate Division has adopted this standard for proofs in LAD cases. Blume v. Denville Township Board of Education, 334 N.J. Super. 13, 32-34 (App. Div. 2000).

Respondent cites evidence regarding the demographics of its retained and discharged employees. Although such statistical evidence may be relevant to determining whether an employer was motivated by discriminatory intent, such evidence is not necessarily dispositive. Instead, based on the specific evidence presented, it is the factfinder's role to decide whether the employer's articulated reason is worthy of credence. If it is not worthy of credence, the ultimate question is whether the record supports the conclusion that the employer's true reason was unlawful discrimination. The Reeves Court noted that proof that the employer's explanation is unworthy of credence may be quite persuasive to the factfinder, since the employer is in the best position to present evidence of the reasons for its actions, and once those reasons have been eliminated, discrimination may well be the most likely alternative explanation. 530 U.S. at 147-148. Thus, contrary to Respondent's contention, the ALJ's failure to require specific evidence of anti-Cuban or anti-Hispanic animus to prove that Respondent's articulated reason is a pretext for national origin discrimination is neither irrational nor a departure from existing law.

Respondent also takes exception to the ALJ's failure to separately address its RIF as a legitimate non-discriminatory reason for the adverse employment action. Although Respondent

accurately notes that the ALJ made no finding that the RIF was pretextual or unworthy of credence, the existence of the RIF was not in dispute, and the parties stipulated that it impacted each of Respondent's departments. ID15-17. Complainant stipulates that Respondent implemented a widespread RIF for business reasons, but contends that the manner in which Respondent selected her for transfer/demotion and layoff was discriminatory. Thus, the legitimacy of the RIF alone cannot adequately address the allegations of the complaint in this matter. See, e.g., Myers v. AT&T, 380 N.J. Super. 443, 454 (App. Div. 2005). Instead, because we are dealing with a RIF situation, the fourth prong of the prima facie case is modified as it relates to Complainant's discharge, to require a showing that, even if Complainant was not replaced, Respondent retained others outside her protected class. After Respondent has articulated non-discriminatory reasons for demoting/discharging Complainant as part of that RIF, she bears the burden of proving that the articulated reasons are untrue, and that Respondent's true reasons for selecting her for demotion and discharge were discriminatory. Thus, the ALJ did not err in failing to make separate determinations as to whether the RIF was credible or pretextual.

The question, then, is whether the evidence demonstrates that Respondent's articulated reasons for selecting Complainant for demotion and discharge as part of its RIF are worthy of credence, and if not, whether they are a pretext for discrimination based on Complainant's Cuban origin. After review of the record, the Director concludes that, based on inconsistencies in Respondent's articulated reasons, as well as contradictions between Respondent's articulated reasons and Respondent's behavior, Respondent's articulated reasons are unworthy of credence.

Based on Respondent's failure to ever notify Complainant of any concerns with her performance, the ALJ rejected as unworthy of credence Respondent's assertion that Complainant was selected for transfer/demotion based on performance deficiencies. ID22. As this finding was based on lay witness testimony, the Director cannot reject it unless the record reflects that it is

arbitrary, capricious or unreasonable, or not supported by sufficient, competent and credible evidence. N.J.A.C. 1:1-18.6(c). To reject or modify that finding, the Director must give specific reasons for doing so, based on substantial evidence in the record, and make new or modified findings based on sufficient, competent and credible evidence. N.J.A.C. 1:1-18(d).

In its exceptions to the initial decision, Respondent points to no specific testimony or evidence that the Director could rely on to reject or modify that finding, and the Director's own review of the record discloses no evidence to support a finding that Complainant's performance was deficient, or that Respondent ever notified Complainant of purported deficiencies, whether formally or informally. The Director concludes that the ALJ's credibility determination on this issue provides compelling support for Complainant's assertion that performance deficiencies were not the true reason for her demotion and discharge. Moreover, for the following specific reasons, the Director adopts the ALJ's finding that Respondent did not select Complainant for demotion or discharge based on performance deficiencies.

First, the record reflects that Respondent's articulated reasons have changed during the pendency of this matter. In its answer and its position statement in response to the verified complaint, Respondent explained that Complainant was transferred and discharged in the course of layoffs for financial reasons, but did not explain how Complainant was selected for transfer or layoff among other employees. [cites] During the Division 's investigation, Respondent explained that Complainant was transferred and replaced by Maria Smeltzer because Complainant did not adequately supervise her staff, and failed to offer help, criticism or direction to her subordinates. Ex. P17, P15, P17.

At the hearing, Anthony DiChiara, Respondent's CEO, testified that he decided to transfer and ultimately discharge Complainant, TR215, and testified that he made those decisions because Complainant was not as good as Smeltzer on the computer, and he needed people who could

perform multiple tasks. ID21-22; TR216, TR219. DiChiara made no mention of deficits in Complainant's supervisory skills or functioning. Respondent's Chief Financial Officer, Franco Tommasino, corroborated DiChiara's statement that Respondent could not afford to keep people who could do only one function, TR183, but made no mention of the computer deficits that DiChiara identified as the main problem. See, e.g., TR229. Tommasino did make one unspecific reference to supervision: "So, I think what came out of that time was that there was a limitation on what she could or could not do....so, when it came time to have people multitask or...be self-sufficient and leading people or supervising other people, rather than just doing it themselves, I think things came out... that there was a problem there." TR183-184. However, after questioning Mr. Tommasino about his use of the term "I think," the ALJ noted that this testimony was hearsay.[5] TR184-185.

Thus, Respondent never mentioned computer skills or multitasking during the investigation, but instead explicitly asserted that the decision was based on purported deficiencies in Complainant's supervisory skills. Ex. P13, P15, P17. At the hearing, Respondent's decisionmaker testified that he relied solely on a purported lack of computer skills and inability to perform multiple functions, and made no mention of any deficiencies in supervisory skills. This was the only non-hearsay evidence Respondent presented at the hearing regarding the reasons for its decision, and it contradicted the reason Respondent articulated during the Division's investigation. Such contradictions support the ALJ's rejection of Respondent's articulated reason.

Moreover, Respondent's articulated reason--that Complainant was selected for demotion and discharge because of performance deficiencies--is also inconsistent with Respondent's behavior during Complainant's tenure as a supervisory employee. The ALJ noted that, despite Respondent's contention that Complainant's performance was deficient, Respondent never brought any performance deficiencies to Complainant's attention. ID22-23, 25. CEO DiChiara testified that he

[5]Although hearsay is admissible in administrative hearings, some competent evidence must support each ultimate factual finding. N.J.A.C. 1:1-15.5.

never informed Complainant that her performance was a problem, and Complainant testified that she never had a performance evaluation and no one ever informed her that her performance was unsatisfactory. ID22. TR226-227, TR32-33.

The ALJ noted that, although its employee manual provides that Respondent will conduct performance evaluations as often as necessary, Respondent did not review Complainant's performance when she was transferred/demoted to the refurbishing department, but simply told her that she was being removed from her position. ID22-23. The ALJ also questioned why Respondent failed to communicate any performance concerns or standards to Complainant, and noted that Respondent failed generally to establish any standards for evaluating employee performance, skills or abilities. ID23.

In its exceptions, Respondent argues that the ALJ erred in relying on Respondent's failure to conduct performance evaluations to find Respondent's performance concerns unworthy of credence. Respondent notes that the parties stipulated that Respondent never conducted performance evaluations of any employees, and argues that because all employees were treated equally regarding the lack of performance reviews, the failure to comply with the performance review provision of its employee manual is not evidence of discrimination. RE4-5.

While Respondent is correct that an employer's disregard of its own policies does not conclusively establish that an articulated reason is pretextual, citing EEOC v. Texas Instruments, 100 F. 3d 1173, 1182 (5th Cir. 1996), evidence of the employer's failure to do so may still be relevant to the proofs. Roebuck v. Drexel University, 852 F.2d 715, 723 (3d Cir. Pa. 1988). It is true that, because Respondent uniformly abandoned its policy of providing formal written performance reviews for all employees, its failure to give Complainant a performance review would not be evidence that Respondent discriminated against Complainant *in the implementation of its performance review policy*. That is not the issue here. Where, as here, an employer defends a discriminatory demotion or discharge claim by asserting that the employee was selected for adverse action based on

performance deficiencies, the absence of documentation of performance problems or established performance standards may be considered evidence that can weaken the employer's articulated defense. Cf., El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145, 165 (App. Div. 2005). Moreover, where an employer does not routinely provide written evaluations or warnings, it would be reasonable to expect an employer to provide verbal or other informal notice to the employee of perceived performance problems or deficiencies, in an attempt to elicit improved performance. As the ALJ noted, Respondent's failure to do so here weighs against the conclusion that Respondent truly harbored concerns about Complainant's performance. ID25.

Respondent also takes exception to the ALJ's conclusion that Respondent's decision to demote and discharge Complainant "was done in bad faith and was not appropriate," arguing that it is unsupported by the record, and also that the ALJ erred in substituting his own opinion for the employer's subjective business judgment. RE5-6. Initially, it is unnecessary to make any finding or conclusion regarding bad faith, since such a finding is immaterial to the burden-shifting methodology or other appropriate legal standards under the LAD.

As to the contention that the ALJ erred in determining that Complainant was able to multi-task and had the requisite computer skills, Respondent argues that these are areas of subjective business judgment, which should not be disturbed or second-guessed by a trier of fact. Although it is true that a trier of fact should not substitute his or her own opinion for the business judgment of an employer, it not clear that Respondent's witnesses adequately explained that these were areas in which they applied their business judgment in a non-discriminatory manner. Merely stating "I used my judgment" is insufficient to insulate the issue from the ALJ's credibility determination. Despite being directly questioned by the ALJ, Respondent's witnesses failed to give any specific explanation of how or why they determined that Complainant was less skilled or capable than Smeltzer.

Respondent also cites caselaw for the proposition that employers can consider long-term and future potential in discharging employees who, under better financial circumstances, would be

retained. While this may be accurate, Respondent's witnesses did not state that this was their reason for choosing Complainant for demotion and discharge. While an employer may well defend a RIF discrimination claim by asserting that it retained the best all-around employees based on future potential, and reluctantly discharged other competently functioning employees, Respondent did not articulate that defense. Instead, Respondent asserted that Complainant was not competent, and asserted that she was selected for discharge based on specific deficiencies in her performance. Respondent directly challenged Complainant's assertion that her performance was satisfactory, by disputing her assertion that the awards she received were for good performance, and criticizing several specific aspects of her work and attitude. TR178-183, 186, 190. Respondent continued to assert this argument in its post-hearing memorandum of law, and noted supervision problems even though its decisionmaker failed to testify that Complainant did not properly supervise her staff. 4/2/09 memo, p.4. Once an employer asserts that the employee was discharged for performance deficiencies, that articulated reason must be examined based on its own strengths and weaknesses in relation to the evidence. Here, the record shows contradictions and inconsistencies in Respondent's claim of performance deficiencies, and those challenges to credibility cannot be remedied after the fact by substituting yet another alternative reason for the decision.

Based on all of the above, the Director finds no basis in the record to reject the ALJ's finding that Respondent's articulated reason–performance deficiencies–was unworthy of credence. The ALJ also concluded that Respondent's articulated reason was a pretext for discrimination based on Complainant's Cuban origin. ID23. After review of the record, including Respondent's exceptions, the Director finds no evidence that would support an alternative non-discriminatory reason for Respondent's decision. Because "people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.... when all legitimate reasons ... have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible

consideration such as race." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). Thus, based on the lack of credibility regarding Respondent's claim that Complainant was demoted and discharged for performance reasons, the evidence supporting Complainant's prima facie case of discrimination based on Cuban origin, and the absence of evidence in the record that would support any other non-discriminatory reason for Respondent's decision, the Director concludes Complainant's Cuban origin was a determinative factor in Respondent's decision to select Complainant for demotion, and ultimately termination, as part of its downsizing.

REMEDIES

A. Back Pay

The ALJ calculated that Complainant would have earned an additional $9,903 if she had retained her shipping department supervisor position until her replacement was discharged, but he did not explicitly award any back pay. ID27.

The LAD provides that, upon a finding that a respondent has engaged in an unlawful employment practice, the Director may provide appropriate affirmative relief, including an award of back pay. N.J.S.A. 10:5-17. The measure of an employee's lost wages is usually the amount the employee would have earned if not for the unlawful discharge, less any wages the employee actually earned, or would have earned with appropriate mitigation of damages. Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 34 (1981).

The ALJ's calculations as to the additional wages Complainant would have earned are supported by the record, and the Director agrees that it is appropriate to stop the back pay award at the point that Complainant's replacement was discharged. Complainant testified that she unsuccessfully looked for another job for almost a year. Thus, although she eventually stopped looking because of back problems, she continued to seek work through the six month back pay period. TR47-49. As failure to mitigate damages is an affirmative defense, and Respondent has not presented evidence that appropriate employment opportunities were available to Complainant,

Goodman v. London Metals Exchange, 86 N.J. 19, 40-41 (1981), the Director awards Complainant the full $9,903 in back pay.

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who is able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). See also, Potente v. County of Hudson, 378 N.J. Super. 40, 49 (App. Div. 2005). Applying the interest rates set forth in New Jersey Court Rule 4:42-11, the Director awards Complainants prejudgment interest on the back pay award through June 29, 2009, in the amount of $1927.42. Based on the 2009 interest rates, a per diem of $1.08 shall be applied until payment is received.

B. Emotional Distress Damages

A victim of unlawful discrimination under the LAD is also entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970), see also, Tarr v. Ciasulli, 181 N.J. 70, 82 (2004)("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.") Thus, pain and humiliation awards are

not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318. Nor is expert testimony needed. See, e.g., Rendine v. Pantzer, 276 N.J. Super. 398, 440(App. Div. 1994), affirmed as modified, 141 N.J. 292 (1995). The Director generally seeks to ensure that pain and humiliation damage awards are consistent with awards granted to other prevailing complainants who have come before the Division, based on the extent and duration of emotional suffering experienced by each complainant.

In awarding $5,000 in emotional distress damages, the ALJ stated that he was "taking into account the severance pay and unemployment payments that Complainant received." ID27. The record reflects that Complainant collected unemployment benefits for six months, TR48, and received a total of 15 weeks of severance or separation pay after her discharge: four weeks of pay, plus an additional eleven weeks of pay for her union service. TR80, TR192. It is not clear how the ALJ factored these payments into his decisionmaking process. Unemployment compensation and severance pay would normally be available to the employee regardless of whether the employer engaged in unlawful discrimination or suffered emotional distress. Such payments serve completely different functions than an emotional distress damage award, which is specifically designed to compensate a discrimination victim for the impact of the employer's unlawful conduct. For that reason, it would be inappropriate to determine the appropriate emotional distress damage award based on the emotional and physical impact of the discrimination, and then deduct, dollar for dollar, the amount of such payments. That said, it would not necessarily be inappropriate for the ALJ to consider that the receipt of these payments may have cushioned or softened the impact of Complainant's discharge. In any event, the Director has made his own determination as to the appropriate emotional distress damage award on the evidence in the record.

Here, Complainant testified to the financial hardships experienced as a result of her discharge, noting that she had to rely on her parents and sister for financial support. TR48. Regarding her demotion, she testified to a loss of prestige within Respondent's business, stating that, when she lost her supervisory position and was transferred to refurbishing, she was relegated

to working alone, her relationship with her coworkers changed, and they considered the move to mean that "she's nobody." TR46. She testified that the demotion from shipping manager to the refurbishing position "was the worst, disgusting job that they can give to anybody." TR68.

After reviewing the applicable portions of the record, and considering emotional distress damage awards made to other prevailing complainants, the Director agrees with the ALJ's determination that an award of $5,000 in emotional distress damages is appropriate in this case.

C. Statutory Penalty

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates these statutes. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is $10,000. Ibid. The ALJ imposed a $2,500 penalty in this case, and after review of the record, the Director finds that a $5,000 penalty is appropriate for Respondent's LAD violation.

D. Counsel Fees

A prevailing party in a LAD action may be awarded reasonable attorneys' fees. N.J.S.A. 10:5-27.1. It is a fee-shifting statute, subject to the holding of Rendine v. Pantzer, 141 N.J. 292 (1995). The Director concludes that it is appropriate to make an award of attorney fees in this case.

The Director will leave the record open for a total of 30 days to permit the parties to attempt to reach an amicable resolution of the issues relating to counsel fees, or if that is not possible, to submit briefs and/or certifications addressing the fee award. Complainant shall file with the Division and serve on Respondent any submissions within 20 days, and Respondent shall have 10 days to file and serve a reply.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the LAD, N.J.S.A. 10:5-1 to -49.

2. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $16,830.42 as compensation for her backpay with pre-judgment interest and compensatory damages;

3. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $5,000 as a statutory penalty;

4. The penalty and all payments to be made by Respondent under this order shall be forwarded to Robert Siconolfi, NJ Division on Civil Rights, P.O. Box 46001, Newark, New Jersey, 07102.

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until payment is received by the Division.

6. The record in this matter shall remain open for 30 days for the limited purpose of calculating the amount due for counsel fees. The parties shall attempt to amicably resolve the amount of counsel fees due, and if they are unsuccessful, Complainant shall file with the Division and serve on Respondent, within 20 days of this order, a certification of services and related certifications as to the reasonable hourly rate for counsel's work, and a brief if desired. Respondent shall have 10 days to file and serve a reply.

DATE: 6/25/09

C. CARLOS BELLIDO, ESQ., ACTING DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS