

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 1212-01
DCR DOCKET NO. ET18WB-42159E
DECIDED: AUGUST 2, 2002

ASTON FOSTER,)
)
 Complainant,)
)
 v.)
)
 SOMERSET MEDICAL CENTER,)
)
 Respondents.)
_____)

ADMINISTRATIVE ACTION
FINDINGS, DETERMINATION
AND ORDER

APPEARANCES:

Aston Foster, pro se

Stephen R. Long, Esq., for the respondent (Drinker, Biddle & Shanley, LLP, attorneys)

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division), pursuant to a verified complaint filed by the complainant, Aston Foster (Complainant), alleging that the respondent, Somerset Medical Center (Respondent), discharged him from his position of housekeeping aide because of his national origin (Jamaica) and disability (shoulder & back injuries), in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

After conducting a plenary hearing on October 10, 2001, the Honorable Diana C. Sukovich, Administrative Law Judge (ALJ) issued an initial decision¹ on March 15, 2002, concluding that Complainant failed to establish with a preponderance of the evidence that Respondent subjected him to unlawful employment discrimination based on his national origin or disability. Having conducted a thorough and independent review of the record, the Director adopts the ALJ's initial decision and dismisses the complaint.

II. PROCEDURAL HISTORY

This matter arose on July 1, 1997, when Complainant filed a verified complaint with the Division alleging that Respondent discharged him from his position of housekeeping aide because of his national origin (Jamaica) and disability (shoulder & back injuries) in violation of the LAD. Specifically, Complainant alleged that he performed his duties at a level that met Respondent's legitimate expectations but was nevertheless discharged because he allegedly left cardboard boxes in the elevator area and complained too much about his shoulder injury. Complainant further claimed that similarly situated non-Jamaican employees and employees who did not have disabilities committed the same or more serious infractions, but were not discharged. On November 10, 1997, Respondent submitted an answer denying Complainant's allegations. Before the Division completed its investigation, and without arriving at a determination on the complaint, Complainant requested that the matter be transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 10:5-13, N.J.S.A. 52:14B-1 to -15, and N.J.S.A.

¹ Hereinafter "ID" shall refer to the initial decision of the ALJ issued March 15, 2002.

52:14f-1 to -13. Accordingly, the Division transmitted the case to the OAL on January 17, 2001.

The ALJ conducted a full hearing on October 10, 2001, denying Respondent's motion for dismissal at the close of Complainant's case. Following the hearing, and after considering the post-hearing submissions of the parties, the ALJ issued an initial decision dismissing the verified complaint on March 15, 2002. Neither party filed exceptions to the initial decision. The Director sought and was granted three extensions of time for issuing his findings, determination and order in this matter, moving the deadline for this final order to September 16, 2002.

III. THE ALJ'S FINDINGS AND CONCLUSIONS

A. The ALJ's Factual Findings

The ALJ set forth her findings of fact on pages 2-8 of the initial decision. A brief summary follows. Complainant commenced his employment with Respondent on November 10, 1986, in the title of Housekeeping Aid in the Environmental Services Department. His responsibilities included cleaning and waxing floors in certain areas of the Center (ID 3). In 1995, Respondent hired Service Master, an outside firm that provides management services in the healthcare industry including housekeeping and maintenance services, laundry and patient transfer.

In October or November 1996, Respondent assigned Complainant to perform garbage duties exclusively. In this position, he was responsible for collecting garbage and carts in certain areas of the hospital. The ALJ also found that as part of his duties Complainant removed buckets in the "Med Room" containing chemotherapy waste for

disposal according to Respondent's procedures. Although Complainant viewed his reassignment as a demotion, the ALJ found that except for an alleged loss of overtime hours, which Complainant did not establish or quantify, neither his hours or salary changed. (ID 5). The ALJ noted that Respondent maintains a progressive disciplinary policy that subjects employees to verbal warnings, written warnings, three-day suspensions without pay and discharge for violations of rules and regulations (ID 4 - 6).

In January 1996, Complainant injured his shoulder when he slipped on ice while performing his job. When he returned to work approximately two weeks later, he was placed on "light duty" pursuant to his physician's directive which included the requirement that he not lift in excess of 25 pounds. While on light duty he was only required to transfer patients on stretchers. (ID 5).

On August 1, 1996, Richard Weber, Housekeeping Services Manager, issued Complainant a Notice of Corrective Action for failing to keep a trash closet in the hospital's One South area clear at the end of his shift. Respondent maintained a written schedule regarding the emptying of trash in that area, and during the time in question it was Complainant's responsibility to empty the trash containers. Although Complainant was given the opportunity to review the Notice and provide comments, he refused to sign the document or make any comments (ID 6; Exhibit R-2).

On September 3, 1996, the Med Room staff notified Mr. Weber that Complainant failed to empty the buckets as required. After investigating the matter, Mr. Weber issued Complainant a second Notice of Corrective Action on September 6, 1996, for failing to empty the Med Room buckets. Mr. Weber gave Complainant the opportunity to review the Notice and provide comments, but he refused to sign the document (ID 6 - 7; Exhibit

R-3).

On November 26, 1996, Mr. Weber prepared a performance evaluation rating Complainant at a satisfactory level in terms of fairness and quantity. Complainant also received a satisfactory in patient transportation and waste disposing duties. Complainant received his highest rating in meeting the trash schedule. However, Mr. Weber recorded on the evaluation that Complainant needed improvement in cleaning walls and corners. Mr. Weber testified that Complainant for the most part was in “the middle” acceptable range and explained that he gave Complainant this rating because he was a long-term employee and four months had passed since his last corrective action (ID 7).

The ALJ found that in December 1996, Complainant was not on “light duty” assignment when Mr. Weber made his rounds in the Intensive Care Unit utility room area on January 22, 1997 at 6:00 p.m. Mr. Weber observed a substantial amount of trash that was required to be collected between 3:30 p.m. and 7:00 p.m., which was Complainant’s responsibility. The ALJ found that Mr. Weber had discussed a similar situation with Complainant the previous day. Accordingly, Mr. Weber issued Complainant a Notice of Corrective Action for the January 22, 1997, infraction. Complainant reviewed the Notice, but did not sign nor make any comments on it. As a result of receiving a third Notice, Complainant received a three-day suspension without pay (ID 7 - 8).

The ALJ further found that on April 1, 1997, Mr. Weber observed excessive amounts of trash, including regulated medical waste and cardboard in the hospital’s Intensive Care Units, a utility room, a labor and delivery area and a minor surgical area. These areas were assigned to Complainant. Mr. Weber and two other administrators met with Complainant and decided to recommend Complainant’s discharge. Mr. Weber then

issued Complainant a fourth Notice of Corrective Action the following day for the April 1, 1997 infraction, and gave him the opportunity to review the Notice, but he refused to sign it and did not write any comments on it (ID 8; Exhibit R-6).

The ALJ determined that when Respondent issued Complainant disciplinary action he never indicated to management that he believed the discipline was due to his disagreement with Service Master's floor waxing policies and procedures or that his disability limited his ability to perform his job duties. Finally, the ALJ found that Respondent did not discipline Complainant while he was on light duty assignment or subject to any medical restriction (ID 8).

The ALJ set forth credibility determinations and concluded that Messrs. Weber and Halper were credible witnesses. The ALJ further found that Mr. Weber's testimony regarding the incidents involving Complainant were accurate, and that Mr. Weber's testimony regarding his reason for issuing Complainant a satisfactory performance evaluation was valid.

B. The ALJ's Legal Conclusions

The ALJ then concluded that Complainant established a prima facie case with regard to discipline and the termination of his employment; noting that Complainant was a member of a two protected groups in that he was Jamaican and suffered from a medical condition that required medical treatment that limited his physical activities. In addition, Respondent acknowledged and accommodated the medical condition. The ALJ also held that Complainant's performance evaluation established satisfactory job performance for the purpose of establishing a prima facie case, and that Respondent subjected him to

disciplinary action and termination. The ALJ then concluded that Respondent rebutted the prima facie evidence by articulating legitimate non-discriminatory reasons for terminating Complainant's employment. Specifically, Respondent produced documentary evidence and testimony that Complainant was discharged in response to poor performance in accordance with Respondent's progressive discipline policy.

The ALJ then concluded that Complainant failed to prove that Respondent's proffered reason was a pretext for unlawful discrimination. The ALJ noted that Complainant produced no evidence to support his claim that Respondent acted with discriminatory motive other than his testimony that Respondent's reasons for disciplining and discharging him were unworthy of belief and that his supervisor took action against him because he disagreed with Respondent's change in floor waxing practices. Moreover, the ALJ did not recount any testimony and the record does not reveal any documentary evidence regarding Complainant's allegations that Respondent disciplined and terminated his employment because he complained about his shoulder. For example, the ALJ found that after Complainant returned from "light duty" he never mentioned that his disability interfered with his ability to perform his job duties in response to being disciplined for poor performance and there is nothing in the record that suggests his disability prevented him from removing trash as directed. In sum, the ALJ concluded that Complainant's evidence failed to establish that his national origin or disability was a determinative factor in Respondent's decisions regarding his discipline and termination.

The ALJ further reasoned that even if Respondent was motivated by Complainant's objection to its new floor waxing procedures, discharge based on such disagreement is not prohibited under the LAD. In addition, the ALJ rejected Complainant's testimony that

Herbert Halper, Director of Patient Support, made disparaging comments about Jamaicans. Accordingly, the ALJ dismissed the complaint based on Complainant's failure to establish that Respondent's articulated reasons for its actions were pretexts for unlawful discrimination based on national origin or disability.

III. THE DIRECTOR'S FINDINGS AND DETERMINATION

A. The Director's Factual Findings

The Director adopts the ALJ's factual finding as summarized above. Generally, the Director must give substantial weight to the ALJ's credibility determinations, and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses regarding these events and to assess their demeanor. See, Clowes v. Terminix International, Inc., 109 N.J. 587 (1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Moreover, since neither party filed exceptions to the ALJ's initial decision in this instance, neither party has identified grounds upon which the Director could properly reject or modify the ALJ's factual findings. In order for an agency head to reach alternate factual findings based on testimony, a specific portion of the transcript relating to the specific disputed fact must be identified as a basis for rendering additional or alternate fact findings, which Complainant has utterly failed to do here. Matter of Morrison, 216 N.J. Super. 143, 157-58 (App. Div. 1987) (it is meaningless for a party to assert that an initial decision contains factual errors without providing the reviewing agency the means to assess the merits of such assertions). Finally, "the agency head may not reject or modify any findings of fact as to issues of

credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.” N.J.S.A. 52:14B-10.

Applying these standards of review, the Director finds no basis for rejecting the ALJ’s credibility determinations or the factual findings based on the evaluations of the witnesses and their testimony. Complainant did not file exceptions to the ALJ’s initial decision and therefore has not identified grounds upon which the Director could properly reject or modify the ALJ’s factual findings. Furthermore, the Director finds nothing in the record that militates against adopting the ALJ’s factual findings. Accordingly, the Director adopt the ALJ’s findings of fact set forth above.

B. The Director’s Legal Conclusions

a. Direct Evidence

Direct evidence means evidence of conduct or statements of decision-makers that directly reflects their alleged discriminatory attitudes and is sufficient to establish unlawful intent. Jackson v. Georgia-Pacific Corp., 296, N.J. Super. 1, 19 (App. Div. 1996), cert. denied 149 N.J. 141 (1997). Direct evidence contemplates a case in which “the defendant condemns himself of invidious discrimination out of his own mouth.” Hook v. Ernst & Young, 28 F.3d 366, 374 n. 3 (3d Cir. 1994). Differential treatment, stray remarks of coworkers, and statistical evidence are not generally regarded as direct evidence of discrimination. ² Ibid.

² In a direct evidence case, the McDonnell Douglas analysis is inapplicable. In such cases, instead of proving the case through circumstantial evidence, the complainant presents direct evidence that the employer acted with unlawful intent. Starceski v.

In this instance, Complainant testified that Mr. Halper, Director of Patient Support made derogatory comments about Jamaicans. The ALJ resolved this matter in Respondent's favor, accepting Mr. Halper's testimony that he never made such comments, and the Director has adopted these credibility determinations and findings of fact. Moreover, even if the statements alleged by Complainant were uttered, Complainant did not demonstrate that they were the type of direct, unequivocal expression of discriminatory intent that would establish liability under direct evidence standards.

b. Indirect or Circumstantial Evidence of Discriminatory Intent

In the absence of direct evidence, a prima facie case of intentional discrimination in the terms and conditions of employment is generally established with proof that a similarly situated individual who is not a member of the protected class is treated more favorably than the complainant. Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 84 (1978); see also, Baxter v. AT&T, 712 F. Supp. 1166, 1173 (D.N.J. 1989) ("Some evidence must be proffered from which [it can be inferred] that ... disparate treatment occurred because of illegal discrimination").

In this instance, the ALJ concluded that Respondent subjected Complainant to discipline and termination in accordance with its disciplinary policy that it applied without regard to Complainant's national origin or disability. Accordingly, the Director finds good cause to adopt the ALJ's determination that Complainant did not establish that Respondent subjected him to differential treatment in the terms and conditions of his employment based on his national origin or disability.

With respect to unlawful termination of employment, the Supreme Court of New

Westinghouse Electric Corp., 54 F.3d 1089, 1097 (3rd Cir. 1995).

Jersey has established that a prima facie case is demonstrated upon proof that: (1) Complainant is a member of a protected class; (2) Complainant performed his or her job at a level which met the employer's legitimate expectations; (3) Complainant's employment was terminated despite meeting these expectations; and (4) the employer thereafter sought some other person to perform the same work. Clowes, 109 N.J. at 597 (citations omitted).

Once a complainant establishes a prima facie case of unlawful discrimination, he or she creates 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, 450 U.S. 248, 253-54 (1981); Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). If the respondent meets this burden of production, the presumption of discrimination raised by the complainant's prima facie case is rebutted. However, the complainant must be afforded a fair "opportunity to prove by a preponderance of the evidence" that the respondent's articulated reasons for its actions were a pretext and that the employer's true motivation and intent were discriminatory. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981).

Pretext may be established either directly 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; Churchill v. IBM, 759 F. Supp. 1089, 1100 (D.N.J. 1991). The complainant must do more than posit simple accusations and speculations concerning

the facts surrounding the employment discrimination; he or she must present sufficient evidence to allow the trier of fact to determine that the articulated reasons were pretextual. Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864-65 (3d Cir. 1986). In order to prevail, a complainant must demonstrate that “discrimination more likely than not motivated the employer’s actions,” Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978), and was a determinative factor in the employer’s decision. Slohoda v. United Parcel Services, Inc., 207 N.J. Super. 145, 155 (App. Div.) (citations omitted), certif. denied, 104 N.J. 400 (1986).

A complainant’s proofs of pretext are usually testimonial. Jackson v. Univ. of Pittsburgh, 826 F.2d 230, 234 (3d Cir. 1987), cert. denied 484 U.S. 1020 (1988). Therefore, the issue of pretext often turns on the credibility of the parties and the parties’ witnesses, which is determined by the trier of fact. Ibid. See also Weldon v. Kraft, Inc., 896 F.2d 793, 800 (3d Cir. 1990). In the instant case, the ALJ did not credit Complainant’s allegations that any of Respondent’s management staff had any animosity toward Jamaican individuals. Furthermore, Complainant produced no witnesses to corroborate his charges and his own testimony failed to persuade the ALJ.

Applying these standards to the present case, the Director concurs with the ALJ’s conclusion that Complainant established a prima facie case of unlawful discrimination. It was undisputed that Complainant is a member of two protected classes because he is Jamaican and was a person with a disability during his employment with Respondent as that term is defined by the LAD. N.J.S.A. 10:5-5. The Director also adopts the ALJ’s finding that Complainant performed his job at a level which met the employer’s legitimate

expectations, as evidenced by his satisfactory job evaluation. Similarly, it is undisputed that Respondent terminated Complainant's employment and thereafter sought some other person to perform the same work. Clowes, 109 N.J. at 597 (citations omitted).

The Director also adopts the ALJ's finding that Respondent articulated a legitimate nondiscriminatory reason for its decision to terminate Complainant's employment in that he committed five work related infractions between August 1996 and April 1997, and was subjected to progressive discipline and termination in accordance with Respondent's policies.

Finally, the Director concurs with the ALJ that Complainant failed to prove that Respondent's articulated reason for terminating him is a pretext for discrimination. The ALJ accepted Respondent's witnesses' testimony that Complainant failed on numerous occasions to meet performance standards, received verbal and written warnings for the infractions and was subsequently terminated in accordance with Respondent's policy that provides that employees disciplined on four occasions may be discharged. Significantly, Complainant did not produce any evidence that would support a finding that Respondent acted with discriminatory intent. Instead, the ALJ rejected his testimony that disparaging comments were made about his national origin and found no other evidence of differential treatment based on national origin. Moreover, Complainant himself testified that he believed Respondent's true motivation was retaliation for his refusal to accept new floor waxing policies instituted when Respondent contracted with Service Master for certain

maintenance functions. This testimony does not establish unlawful intent on a basis protected by the LAD.

Finally, with respect to Complainant's charges of unlawful discrimination based on disability, the LAD prohibits an employer from discharging a person because of their disability unless the employer reasonably concludes that the disability precludes the individual's performance of essential job functions with or without reasonable accommodation. In this instance, in addition to determining that there was no evidence that Respondent acted with discriminatory animus toward Complainant because he is a person with a disability, the ALJ determined that Respondent did not take any adverse employment action toward Complainant during his periods of light duty and did not make any adverse decisions based on his disability. Accordingly, this matter is not a case where Complainant has alleged that Respondent failed to provide a reasonable accommodation or unreasonably determined that Complainant's disability precluded his job performance. See Viscik v. Fowler Equipment Co., 173 N.J. 1, 20 (2002).

Based on all of the above, the Director finds that the record provides good cause to adopt the ALJ's dismissal of the verified complainant based on Complainant's failure to establish, with the preponderance of the credible evidence, that Respondent subjected him to unlawful employment discrimination based on his national origin or disability.

V. ORDER

Having given careful and independent consideration to the record and the appropriate legal standards, the Director adopts the initial decision dismissing the verified complaint.

Date: _____

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

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