STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 10369-99
DCR DOCKET NO.: EB62NB-36301-E
DATED: October 14, 2003

BRANISLAVKA LUKIC,	)	
	)	
Complainant,	)	
	)	
v.	)	**ADMINISTRATIVE ACTION**
	)	
KRIVAJA BEECHBROOK CORP.,	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
Respondent.	)	
	)	

APPEARANCES:

Stuart R. Wolk, Esq., (Wolk & Maziarz, attorneys) for the complainant.

Mirsad Suljic, appearing pursuant to N.J.A.C. 1:1-5.4(a)(5), for the respondent.

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 the complainant, Branislavka Lukic (Complainant), alleging that the respondent, Krivaja Beechbrook Corporation (Respondent), subjected her to unlawful discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On August 25, 2003, the Honorable Diana Sukovich, Administrative Law Judge (ALJ), issued an initial decision[1] dismissing the complaint. Having independently reviewed the record, the

[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Tr." shall refer to the transcript of the administrative hearing held on September 4,5 and 6, 2002; "Exhibit P" and "Exhibit R" shall refer to Complainant's and Respondent's exhibits admitted into evidence at the administrative hearing, respectively; and "CE" shall refer to Complainant's exceptions to the initial decision.

Director adopts the ALJ's initial decision as modified herein.

PROCEDURAL HISTORY

On August 2, 1993, Complainant filed a verified complaint with the Division alleging that Respondent discriminated against her and terminated her employment based on her national origin (Serbian) in violation of the LAD. Respondent filed an answer denying the allegations of unlawful discrimination. The Division conducted an investigation, and on June 21, 1996, issued a finding of no probable cause. Complainant filed a motion for reconsideration, and on March 16, 1997, the Director vacated the finding of no probable cause and reopened the investigation. After supplemental investigation, the Director issued a finding of probable cause on March 30, 1998. Respondent filed a motion for reconsideration of the probable cause finding, which the Director denied on July 2, 1999. On December 1, 1999, after attempts to conciliate this case failed, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case.

The ALJ conducted a hearing on the merits on September 4, 5 and 6, 2002. At the close of the hearing, the ALJ directed the parties to submit closing arguments in writing, and after receipt of those submissions, the record closed on April 11, 2003. The ALJ was granted two 45 day extensions to file her initial decision, which was issued on August 25, 2003.

Complainant[2] filed exceptions to the initial decision on September 8, 2003. The Director's final determination in this matter is due on October 14, 2003.

THE ALJ'S DECISION

Factual Determinations

The ALJ made detailed factual findings, which are set forth at pages 2 - 17 of the initial decision. Those findings are briefly summarized as follows.

[2]Complainant filed her exceptions with the Division pro se, notifying the Division that she has discharged the attorney who represented her at the administrative hearing.

Respondent, a manufacturer incorporated in the U.S., is a wholly owned subsidiary of Ipkrivaja Zavidovici (hereinafter, "the parent company"), which is located in the city of the same name[3] (ID 2). Some of Respondent's employees were delegated to Respondent by the parent company, and those employees required visas to work in the U.S. (ID 3). The delegated employees usually came for four-year terms, but stayed longer if necessary. Ibid. Only the Board of Directors of the parent company could decide to extend or shorten a delegated employee's term with Respondent (ID 4,12).

Complainant was born in the former Yugoslavia, and identifies her national origin as Serbian. She emigrated to the U.S. as an adult and has permanent resident status (ID 5). Complainant, who was not a delegated employee, began working for Respondent in March 1989 as an office manager/administrative assistant. Complainant's duties included compiling and submitting to government agencies certain documents for immigration and visa matters, typing, translating documents from Serbo-Croatian to English, and ordering supplies (ID 5-6).

Complainant was hired by Drago Stankovic, who was Respondent's vice president of finance (ID 5). Stankovic was a delegated employee, and his term ended on March 31, 1990 (ID 4). Stankovic was replaced by another delegated employee, Smail Djonlic, who officially assumed the responsibilities of vice president of finance on November 1, 1990. Ibid. Djonlic subsequently served as president of Respondent from September 1992 through December 31, 1995, and remained with Respondent until July 3, 1996 (ID 9). Djonlic's term lasted longer than the standard four years for delegated employees. Ibid.

By memorandum dated November 30, 1991, Respondent disseminated a policy stating that seniority would dictate how employees would be laid off in the event of lack of work; i.e., the last hired would be the first "fired" (ID 9). In 1992, because war had begun in the former Yugoslavia,

[3]Although not specifically stated in the ALJ's factual findings, the Director takes official notice that the city of Zavidovici is located in the region of the former Yugoslavia which is now Bosnia and Herzegovina.

shipments from the parent company decreased, and Respondent's sales declined (ID 12). As Respondent's sales decreased, Respondent reduced the size of its workforce and attempted to decrease expenses in other ways (ID 13). On June 2, 1992, after the onset of the civil war, the Presidency of the Commune Assembly Zavidovici issued a written decision transmitting the rights of the parent company's president and board of directors to a "crisis council" (ID 7-8).

Complainant became aware of subtle changes in Respondent's workplace beginning around 1992. Gradually, some of Complainant's responsibilities were transferred to other employees, and newly-arrived employees from Bosnia took over some tasks for Respondent's president which had been Complainant's responsibility (ID10). Among other things, Complainant no longer had authorization to check Respondent's bank balances or to sign correspondence on behalf of other employees, and Respondent's president reviewed and "questioned" the letters she typed (ID 10). Effective November 11,1992, Djonlic advised Complainant that he would personally sign all correspondence to American and former Yugoslav authorities relating to employee immigration status (ID 9). By memorandum to Djonlic dated November 25, 1992, Complainant asked for a written description of her duties as office manager, but received no response (ID 10-11).

In July 1993, Djonlic, who was at that time Respondent's president, first discussed with Complainant the possibility of reducing her job to part-time, and subsequently offered her a part-time position from 1:00 to 5:00 p.m. daily (ID 14). On or about July 13, 1993, Djonlic saw Complainant reading newspapers in her office, and asked her "thoughts" on working part-time. Complainant stated that she was aware that there was less work for people to do (ID 15). On or about July 16, 1993, Complainant and Djonlic again discussed Complainant working part-time. Complainant asked why other employees, specifically bookkeepers, could not be assigned to part-time positions. Complainant stated that she would lose benefits if she worked part-time, and that Djonlic was only concerned with his and Respondent's interests, rather than hers. Djonlic gave no response. Ibid. On Friday, July 23, 1993, Djonlic informed Complainant that she should begin

working part-time the following Monday, and that she must also use her vacation time. In response, Complainant stated that Djonlic should give her four weeks written notice to use her vacation time, and should provide her with written notice regarding part-time employment. Ibid. On July 28, 1993, Djonlic terminated Complainant's employment, verbally advising her that she was being discharged because she refused to follow his prior instructions to work part-time. Ibid. Despite her request, Respondent gave Complainant nothing in writing documenting her termination (ID 15).

Djonlic asserted that Complainant was selected for part-time work, and subsequently for discharge from employment, because of a decreased workload and because she was the last employee hired in Respondent's corporate office (ID 15). At the time of Complainant's discharge, Djonlic did not offer other employees part-time work because Respondent's bookkeeper (Domdovic) announced that she would retire in the new year (ID 16). Although there was not enough data entry work for two data entry clerks, Djonlic decided not to discharge either of those employees, but instead assigned them non-data entry responsibilities which became available because of reductions in other parts of the company (ID 17).

Milorad Todorovic, of Serbian national origin, initially worked for the parent company and was delegated to Respondent in 1988 (ID 3-4). After a 1992 meeting attended by the president of the parent company's crisis council, Todorovic's employment with Respondent was terminated (ID 11). Todorovic told the crisis council president that he believed his termination was "ethnic cleansing." Ibid. Todorovic left Respondent's employ in November 1992, after his four year term expired, and was replaced by a delegated employee whose term had not yet expired. Ibid.

Conclusions of Law

The ALJ concluded that Complainant established a prima facie case of national origin discrimination, as she presented evidence demonstrating that she was a member of a protected class (Serbian), she generally performed her job at a level to meet Respondent's legitimate expectations, she was terminated, and Respondent thereafter sought others to perform her duties (ID 19). The ALJ then concluded that Respondent met its burden of articulating a legitimate non-discriminatory reason for terminating Complainant, based on testimony that Complainant was terminated because of decreasing sales and revenues and her refusal to work part-time. Ibid.

Shifting the burden to Complainant, the ALJ concluded that Complainant failed to present persuasive credible evidence to support the conclusion that Respondent's articulated reasons were pretexts for unlawful discrimination. Specifically, the ALJ concluded that although Complainant testified that she knew by their names, actions and traditions that certain employees were Serbian, Croatian or Muslim, she failed to present persuasive credible evidence of the national origins of the employees who assumed her duties after her termination, or of others retained by Respondent (ID 19-21). Further, the ALJ noted that Complainant acknowledged that Respondent's sales and revenues decreased after the war began, and that less visa-related work was necessary because fewer employees were delegated from the parent company (ID 22). The ALJ found the evidence regarding Respondent's economic downturn and its offer of part-time work to Complainant to be credible, and concluded that Complainant did not present sufficient persuasive evidence to establish that Respondent's true reason for terminating her employment was her national origin, rather than economic factors and the fact that she was the last hired (ID 23-24). Based on Complainant's failure to establish that Respondent's articulated reasons for terminating her were pretexts for discrimination, the ALJ dismissed the complaint.

THE EXCEPTIONS AND REPLIES OF THE PARTIES

Complainant filed exceptions to the initial decision on September 8, 2003. Respondent filed no exceptions or replies. In her exceptions, Complainant notes that she has never disputed that Respondent experienced a decline in business due to the war in former Yugoslavia, but argues that this fact merely coincided with successive acts of discrimination in Respondent's termination of all but one Serbian employee (CE 2). Complainant asserts that Respondent began discharging its Serbian employees shortly after the parent company's crisis council appointed a Bosnian Muslim, Smail Djonlic, to serve as acting president in place of Borojevic, who was Serbian (CE 2-3). Complainant contends that only Serbian employees were terminated, all Serbian employees except one were terminated, and all replacement employees were non-Serbians (CE 3).

Complainant takes exception to the ALJ's conclusion that Complainant failed to provide sufficient credible evidence of the national origins of the employees Respondent retained and discharged, or the individuals who made the decision to terminate her. To support this exception, Complainant provides detailed information about the three main ethnic groups of the former Yugoslavia and states that each of these ethnic groups generally subscribes to a specific religion (Eastern Orthodox Christian for Serbians, Roman Catholic for Croats and Muslim for Bosnian Muslims). Complainant explains that people from the former Yugoslavia generally consider Bosnian Muslims an ethnic group and often refer to people of that ethnicity using the "shorthand" term "Muslims" (CE 6). Complainant further provides information about how first and last names of people from the former Yugoslavia are typically indicators of the bearer's ethnicity. Ibid. Complainant contends that all of the Serbian employees Respondent terminated, all of the Croatian and Bosnian Muslim employees who replaced them and all three of the parent company's representatives who came to the U.S. in August 1992 had names which corresponded with their respective ethnic groups (CE 8).

Complainant also takes exception to any evidentiary value the ALJ gave to the Serbian origin of Mira Cupic, who was retained by Respondent. Complainant asserts that Ms. Cupic should

not be considered Serbian because she married a Croat and adopted the Roman Catholic faith typically held by Croats (CE 8).

Complainant further takes exception to any evidentiary value the ALJ gave to Complainant's statement, on cross examination, that she had not been in recent contact with the other Serbian employees Respondent terminated. Complainant argues that her lack of communication with these former employees is not relevant, since there has been no suggestion that any of the former employees were rehired by Respondent (CE 8).

THE DIRECTOR'S DECISION

The Director's Findings of Fact

Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on those determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Where the Director finds it necessary to reject or modify a factual finding of the ALJ, the Director must state with particularity the substantial, credible, competent evidence in the record on which the Director relies in making new or modified findings. N.J.A.C. 1:1-18.6(d). After thorough review of the record, applying the legal standards set forth above, the Director adopts the ALJ's factual findings as set forth in the initial decision, with the following modification.

The Director rejects the ALJ's summarization of Milorad Todorovic's testimony implying that all but one of the crisis council members were Serbian (ID 23). Citing Todorovic's hearing testimony regarding attendees at a plant managers' meeting that took place while crisis council representatives were in the U.S. (Tr. 9/5/02, p.54), the ALJ stated that only one individual from the crisis council attended the meeting, and that individual was the only one who wasn't Serbian (ID

23). This construction of the hearing testimony would lead to the conclusion that all members of the crisis council except one were Serbian. The Director finds that this is not accurate.

According to the hearing transcript, Todorovic testified that Krumo Jukanovic of the crisis council attended the meeting, and that Jozo Martonovc[4] was the only plant manager who did not attend the meeting. Todorovic testified that plant manager Martonovc "was the only one who wasn't a Serbian" (Tr. 9.5/02, p. 54), suggesting that Martonovc was the only plant manager who was not Serbian, but gave no information about the ethnic or national origin of the crisis council member, Jukanovic. Thus, the ALJ apparently drew the mistaken conclusion that Todorovic was referring to Jukanovic. Review of the record disclosed no other hearing testimony or other evidence which could support the conclusion that Jukanovic was the only non-Serbian on the crisis council. Instead, the transcript reflects that Complainant testified that there were no Serbs on the crisis council (Tr. 9/4/02, p. 38), while Djonlic testified that the crisis council was comprised of all three nationalities (Tr. 9/5/02, p. 64). Under either version, the crisis council would include more than one non-Serbian. Accordingly, the Director rejects the ALJ's summary of Todorovic's hearing testimony and the implied conclusion that all but one of the crisis council members were Serbian.

The Legal Standards and Analysis

An employee may attempt to prove employment discrimination by direct evidence, or more commonly, by circumstantial evidence. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). The ALJ evaluated Complainant's proofs using the standards for circumstantial evidence. The Director agrees that these standards should be applied, as Complainant relied on circumstantial rather than direct evidence to support her claim.

As a starting point for analyzing LAD cases relying on circumstantial evidence, the New

[4]It appears that the same individual is identified elsewhere in the transcript as "Josa Martinovich" (Tr. 9/5/02, p. 52-53).

Jersey courts have adopted the burden-shifting methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green[5], 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Clowes v. Terminix, supra, 109 N.J. at 595. A complainant first bears the burden of establishing a prima facie case, which in the context of a layoff or downsizing requires proof that the complainant is a member of a protected class, that she was performing her job at a level which met the employer's legitimate expectations, that she was terminated, and that the employer retained others not in the protected class. Marzano v. Computer Science Corp., 91 F. 3d 497, 503 (3rd Cir. 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, when it experienced a decrease in sales and revenues which resulted in less work for its employees (Tr. 9/5/02, p. 85-87, 89), its president asked Complainant to work part time because she did not have enough work to fill a full time schedule (Tr. 9/5/02, p. 92). Respondent asserts that it discharged Complainant because she was the last hired in the corporate office and she refused to accept the part time schedule (Tr. 9/5/02, p.106). The Director also agrees with the ALJ's conclusion that Respondent met its burden of articulating a legitimate non-discriminatory reason for terminating Complainant's employment (ID 19, 24).

[5]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).

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 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.

Preliminarily, it is necessary to clarify certain terms contained in the witness testimony upon which Complainant relies to support her claim of discrimination. Although Complainant alleged she was subjected to unlawful discrimination based on her national origin, the hearing testimony reflects that the concepts of national origin, nationality, and religion are not clearly distinguished among groups from the former Yugoslavia (Tr. 9/4/02 p. 38-39; Tr. 9/5/02 p. 33). Moreover, the LAD prohibits employment discrimination based on all three-national origin, nationality, and creed. N.J.S.A.10:5-12(a). Accordingly, the Director concludes that the testimony referring to "Muslims" in the context of Complainant's LAD claim refers to people outside Complainant's protected group, and evidence of differential treatment between Muslims and Serbs is relevant to Complainant's claim that she was subjected to national origin discrimination in violation of the LAD. Moreover, the Director rejects any suggestion by the ALJ that Complainant's references to the religion, rather than the national origin, of Respondent's decisionmakers and retained employees weakened her proofs of differential treatment based on her Serbian origin (ID 19-20).

In this case, Complainant agrees that Respondent experienced a financial decline, but contends that Respondent's financial problems "merely coincided" with her termination and the systematic termination of all but one of Respondent's Serbian employees (CE 2). Complainant further asserts that only Serbian employees were terminated (CE 3). In addition, Complainant testified that Respondent did not specifically direct her to begin working part time, but only informed her generally that Respondent would be reducing some employees to a part time schedule (Tr. 9/4/02 p. 81-82). Complainant also testified that the only reason she did not have enough work to

fill her full time hours was because Respondent previously reassigned some of her tasks to other employees (Tr. 9/4/02 p. 85).

As to Complainant's failure to accept a part-time schedule, Complainant testified that Respondent only informed her generally that it might in the future reduce some employees to part-time (Tr. 9/4/02 p. 81-82). In contradiction, Djonlic testified that, after suggesting in prior conversations that Complainant think about working part time, he instructed her to begin working part time on a specific Monday (Tr. 9/5/02, p. 95-96, 98). The ALJ found Djonlic credible on this issue, noting that Djonlic's testimony was more specific than Complainant's and was corroborated by detailed notes he wrote at the time the conversations took place(ID 23; Ex. R-3). Additional evidence supports this finding. For example, Damir Vlahinic testified that Djonlic asked him to come to Complainant's workplace, where he heard Djonlic request that Complainant start working part time, and advise her that she would not need to report to work if she did not wish to work part-time (Tr. 9/6/02, p. 40-41).

As noted above, the Director must give substantial weight to the ALJ's credibility determinations, since she had an opportunity to observe the witnesses and assess their demeanor. The Director may not reject an ALJ's factual finding based on such credibility determinations unless the Director finds from his review of the record that the finding is arbitrary, capricious or unreasonable, or is not supported by competent and credible evidence in the record. N.J.A.C. 1:1-8.6(c); See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). The Director finds the record insufficient to overturn the ALJ's credibility determination or her conclusion based on credibility that Respondent specifically directed Complainant to begin working part-time, and that Complainant disobeyed that instruction.

Complainant also contends that she would have continued to have enough work to justify a full time position if Respondent had not reassigned some of her tasks to other employees.

However, this contention is only material if the competent evidence presented leads to the conclusion that Respondent took Complainant's duties away from her because of her Serbian origin.

Complainant failed to demonstrate that Respondent was motivated by her national origin in reassigning her duties. Complainant testified that when she was first hired, Drago Stankovic, then Respondent's vice president of finance, informed her that she would replace the bookkeepers in a few years when they retired (Tr. 9/4/02, p. 29-30). Complainant further testified that beginning in August 1992, her responsibilities were removed from her "little by little" (Tr. 9/4/02, p. 58). As examples, Complainant testified that she no longer made travel arrangements for people from the parent company; she no longer typed "decisions inquiring bank managers of Serbian origin" or documents regarding the firing of plant managers; she no longer checked bank balances or corresponded with Yugobank; and she was no longer permitted to sign letters to immigration authorities regarding employees (Tr. 9/4/02, p. 49-52). Complainant testified that some of her former duties were taken over by Lucy Domdovic and Damir Vlahinic, who she asserts were both of Croatian origin, and Jeanette, who she asserts was American (Tr. 9/4/02, p.56-57). Complainant also testified that she asked for additional duties and responsibilities because she realized that many tasks had been taken away from her (Tr. 9/4/03 p. 60).

The ALJ concluded that the "fact that Respondent did not allocate duties differently among its corporate employees, upon downsizing, does not establish prohibited discrimination" (ID 24). The Director notes that an employer's reallocation of duties during downsizing could constitute unlawful discrimination if the reallocation were based on the national origin of its employees. However, Complainant has not presented competent evidence to support her assertion that Respondent reallocated her duties to others because of her Serbian origin.

Initially, a prior vice president's plan to have Complainant take over the duties of the bookkeepers as they retire does not necessarily lead to the conclusion that new management's

decision to allocate work differently was based on Complainant's Serbian origin. Further, although Respondent's own actions in reassigning some of Complainant's duties to others may have contributed to her reduced workload, Complainant has not demonstrated by competent evidence that Respondent took away those duties because she was Serbian, nor has she otherwise shown by competent evidence that she was treated less favorably than similarly situated non-Serbian employees. Respondent presented evidence of non-discriminatory reasons for the reduction of Complainant's workload, which Complainant did not rebut by competent evidence.

Specifically, the ALJ found that Djonlic "normally" did not entrust visa matters to Complainant after he concluded that she filed a visa extension request with the U.S. State Department for Stankovic after he no longer worked for Respondent (ID 7; Tr. 9/5/02, p. 111-112). In addition, Complainant acknowledged that the visa-related work decreased in 1993 because employees stopped coming from Bosnia (Tr. 9/4/02, p. 112), and Respondent disputed that Complainant ever was responsible for some of those duties, such as checking bank balances and otherwise communicating with banks (Tr. 9/5/02, p. 112-113). In addition, Respondent's written policy of laying off the last hired employee first, and Complainant's status as the last hired employee in the corporate office lends support to the conclusion that Respondent had nondiscriminatory reasons for reassigning Complainant's duties rather than the duties of other employees. Accordingly, after review of the record, the Director concludes that Complainant has not presented sufficient competent evidence to support the conclusion that Respondent reassigned her duties to other employees because of her Serbian origin.

Complainant further contends that Respondent systematically terminated almost all, and exclusively, Serbian employees (CE 3). The ALJ concluded that Complainant did not establish the national origin of pertinent employees by a preponderance of credible evidence, and that her assertions regarding the national origins of employees were unsupported by competent evidence (ID 19-20, 23). After thorough review of the record, the Director concurs with the ALJ that

Complainant failed to present sufficient competent evidence to establish the national origins of the employees Respondent terminated or those Respondent retained.

Complainant testified that she, and all people from the former Yugoslavia, could generally identify a person as Serb, Croat or Muslim based on his or her name (Tr. 9/4/02, p. 61-62). In her exceptions, Complainant gives examples of how names in most cases reflect the national origins of Serbs, Croats, and Bosnian Muslims, but acknowledges that there are exceptions to this general rule (CE 5-8). The Director acknowledges that a person's name will often reflect his or her ancestry, religion, national origin or nationality, and that people from the former Yugoslavia may generally be more aware than non-Yugoslavians of the manner in which specific names tend to reflect Serbian, Croatian or Bosnian Muslim heritage. However, as Complainant acknowledges, this is not always the case, and in some cases a name will not accurately identify the bearer's religion, national origin or nationality (CE 7). For example, Complainant testified that a person's surname would identify the national origin of his or her father, but that the surname would not necessarily reflect the nationality of people born of mixed marriages, as they could choose to "declare" their nationality (Tr. 9/4/02, p. 139-141). Accordingly, while the names of the terminated and retained employees may have fueled Complainant's suspicion that Respondent was making employment decisions based on national origin, to prevail, Complainant must go beyond mere suspicion and present competent evidence to prove that the employees in question were in fact of Serbian, Croatian or Bosnian Muslim origin.

Although Complainant asserts in her exceptions that all of Respondent's Serbian employees who were terminated had names which corresponded to Serbian national origin, and all of the employees who replaced them had names which reflected that they were Croatian and Bosnian Muslim, Complainant did not present any competent evidence at the hearing to support these conclusions. In fact, thorough review of the record disclosed only minimal additional evidence regarding the national origins of Respondent's employees. Milorad Todorovic testified as to his

own Serbian national origin (Tr. 9/5/02, p. 17), and that he had personal knowledge that the person who replaced him had a Muslim mother and Serbian father (Tr. 9/5/02, p. 33).[6] Todorovic also testified that, at the time of a specific plant managers' meeting, Jozo Martinovic was the only plant manager who was not a Serbian (Tr. 9/5/02, p. 54).

Damir Vlahinic testified that none of the forms he had access to as Respondent's data entry manager indicated employees' national origins, and that he was not familiar with national origins of other employees. He further testified that he would only know an employee's national origin if he or she told him, and that he would not be able to testify as to how many of Respondent's employees today are Croatian (Tr. 9/6 p. 47-48). Neither Vlahinic nor Djonlic testified as to their own national origins.

After review of the evidence in the record regarding the national origins of Respondent's employees, the Director concludes that Complainant has not presented sufficient competent evidence to establish the national origins of the employees Respondent terminated and retained during the relevant period.

Moreover, even if Complainant had proven that the terminated employees she identified as Serbian were in fact Serbian, Complainant has not presented sufficient competent evidence to support her assertion that Respondent systematically targeted its Serbian employees for termination. Complainant asserts that Respondent terminated all or most of its Serbian employees at its various facilities nationwide, but has presented no comparative evidence regarding the number of non-Serbian employees nationwide who may have been terminated during the relevant period. While Complainant asserts that "only" Serbian employees were terminated, she has neither

[6] The partial Serbian heritage of the replacement employee also appears to negate Complainant's contention that Respondent was replacing Serbians with non-Serbians. Although Complainant contends that another employee of Serbian heritage who married a Croat (Mira Cupic) should not be considered Serbian because she adopted her husband's religion and ethnicity, Complainant has presented no testimony or other evidence to indicate that Todorovic's replacement did not hold himself out as Serbian.

presented competent evidence to establish that no non-Serbians were terminated during the same period, nor has she presented evidence to demonstrate that she would necessarily know of all employees terminated at any of Respondent's facilities besides the New Jersey corporate office.

Statistical evidence demonstrating that an employer had a policy, pattern or practice of treating employees of a complainant's protected class less favorably than other employees may be relevant to a showing that an employer's articulated reasons for terminating an employee are pretextual. See, e.g., McDonnell Douglas v. Green, supra, 411 U.S. at 804-805. However, to be probative, such evidence must, at a minimum, show not just the number of employees within Complainant's protected group who were subjected to adverse action, but must compare those employees to Respondent's employees outside the protected group. See, e.g., Greenberg v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 206-207 (App. Div. 1998) (comparing the number of teachers in the plaintiff's age group who were denied tenure with the number of significantly younger teachers denied tenure). Complainant failed to present competent statistical evidence to support the conclusion that Respondent disproportionately terminated Serbians as compared to non-Serbians. Accordingly the Director concludes that Complainant's evidence regarding the other employees terminated by Respondent during the relevant period is insufficient to prove that Respondent was motivated by unlawful discrimination in discharging Complainant.

CONCLUSION

Based on all of the above, the Director concludes that Complainant has not met her burden of proving by a preponderance of the evidence either that Respondent's articulated reasons for terminating her employment were not its true reasons, or that Respondent terminated her employment based on her Serbian origin. Accordingly, the Director adopts the ALJ's dismissal of the complaint.

DATE:_____ _____

J. FRANK VESPA-PAPALEO, ESQ.,
DIRECTOR

JFVP:GL:EB: