

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 10260-00
DCR DOCKET NO. EB54WB-44790-E
DECIDED: July 29, 2002

_____)	
EGBERT REID,)	
)	ADMINISTRATIVE ACTION
Complainant,)	
)	FINDINGS, DETERMINATION
v.)	AND ORDER
)	
SHOPRITE,)	
)	
Respondent.)	
_____)	

APPEARANCES:

Egbert Reid, pro se

Michael Dunn, Esq., for the respondent (Murphy & O'Connor, 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, Egbert Reid (Complainant), alleging that the respondent, ShopRite, (Respondent), subjected him to unlawful employment discrimination on the basis of his race (Black) and national origin (Jamaican), in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

On January 29, 2002, the Honorable Stephen G. Weiss, Administrative Law Judge (ALJ), issued an initial decision dismissing the verified complaint after concluding that

Complainant failed to prove that Respondent acted with discriminatory intent. Having conducted an independent review of the record, the Director finds good cause to adopt the ALJ's initial decision.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter arose on March 30, 1999, when Complainant filed a verified complaint with the Division alleging that Respondent refused to hire him for an available position in violation of the LAD's prohibitions against employment discrimination based on race and national origin. On May 24, 1999, Respondent filed an answer denying that it discriminated against Complainant. On December 13, 2000, the Division transferred this matter to the Office of Administrative Law (OAL) at Complainant's request prior to the completion of its investigation, in accordance with N.J.S.A. 10:5-13.

The ALJ conducted a plenary hearing on January 16, 2002, and issued an initial decision dismissing the complaint on January 29, 2002. Neither party filed exceptions to the initial decision with the Division. The Director sought and was granted three extensions of time for issuing his findings, determination and order in this matter, moving the deadline for issuing his final order to **August 1, 2002**.

III. THE ALJ'S FINDINGS AND CONCLUSIONS

The ALJ recounted in detail the testimony presented at hearing (ID 2-8). It was undisputed that Complainant applied for a position as a night crew packer in response to Respondent's posted sign that read: "now hiring." It was also undisputed that Respondent accepted his application and interviewed him at that time. The ALJ found that the position was not immediately available and that Respondent did not hire anyone for the position

for approximately four months (ID 9). The ALJ also determined that Respondent offered Complainant the position in June 1999, when it first became available. Ibid.

The ALJ then determined that Respondent's witnesses testified credibly that their decisions regarding Complainant's application were not based on his race or national origin. This included testimony by two witnesses that Respondent's policy is to accept all applications whether or not there is an available position, and to keep said applications on file for future reference (ID 7). The ALJ concluded that Complainant offered no proof that Respondent denied him employment on the basis of his race or national origin. Specifically, the ALJ noted that, "[t]he only evidence of discrimination was [Complainant's] own belief that he was not offered a job because, in part, he was black." (ID at 8-9). The ALJ also found that Respondent's evidence of the racial designation of its employees demonstrated that it maintains a racially diverse workforce (ID 8).

Similarly, the ALJ concluded that Complainant's allegations of national origin discrimination were not supported by any evidence of unlawful intent. The ALJ noted that Respondent did not consider or discuss Complainant's national origin and that the only reference to Complainant's national origin was by his own notation on his application that he graduated from a high school in Jamaica (ID 9).

The ALJ concluded that the "competent, credible evidence convincingly demonstrated not only that [Complainant] failed to prove discrimination; indeed, it revealed that the actions of the respondent were perfectly consistent with its legal obligations." (ID at 8-9). For these reasons, the ALJ issued an initial decision on January 29, 2002, dismissing the verified complaint.

IV. THE DIRECTOR'S FACTUAL FINDINGS AND CONCLUSIONS

Finding of Facts

The Director adopts the ALJ's factual findings 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, "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 adopts the ALJ's findings that Respondent's witnesses testified credibly that at the time Complainant applied for work there were no available positions. The Director further adopts the ALJ's determination that Complainant offered no evidence that Respondent was motivated by any form of discrimination. As noted by the ALJ, even though Respondent maintained a sign that read "now hiring" and listed the position sought by Complainant,

and although Complainant testified that Respondent's managers told him they were hiring, these facts, without more, do not establish that Respondent refused to hire Complainant or sought other applicants because of his race and national origin. Respondent produced evidence, which the ALJ accepted as true, that it had a practice of accepting applications when it had no current vacancies and that it did not hire anyone for the position from the time Complainant applied to the time Respondent offered the job to him.

Legal Standards

The LAD prohibits an employer from discriminating in the hiring, discharge or terms and conditions of employment based on race and national origin. N.J.S.A. 10:5-4; 10:5-12(a). An employee may attempt to prove discrimination by either direct evidence or 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 "not only a hostility towards members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid.

Because direct evidence of intentional discrimination is rarely available to victims of discrimination, the courts have developed an alternative test for evaluating circumstantial evidence of discrimination claims. As a starting point for analyzing LAD cases relying on circumstantial evidence, the New Jersey courts have adopted a methodology established by the United States Supreme Court in McDonnell Douglas Corp.

v. Green¹, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), Clowes v. Terminix International, Inc., 109 N.J. 575, 595 (1988). This methodology involves a burden-shifting analysis, with a complainant first bearing the burden of establishing a prima facie case. McDonnell Douglas v. Green, supra, 411 U.S. at 802.

To establish a prima facie case of discriminatory failure to hire, a complainant must demonstrate that he is a member of a protected class, that he was qualified for the position sought, that he was rejected despite his qualifications, and the employer continued to seek applicants of similar qualifications for the vacancy after rejecting him. Anderson v. Exxon, 89 N.J. 483, 492 (1982). Once a complainant has established a prima case of unlawful discrimination, he or 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, non-discriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); see, Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). The respondent need not persuade the court that he or she was actually motivated by the proffered reasons; it is sufficient if the respondent raises a genuine issue of fact as to whether he or she discriminated against the complainant. Texas Dep't of Community Affairs v. Burdine, supra, 450 U.S. at 255. To accomplish this, the respondent must introduce admissible evidence of a non-discriminatory reason for the

¹Although 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).

adverse action. Ibid.

If the respondent meets this burden of production, the presumption of discrimination raised by the complainant's prima facie case is rebutted. Upon rebuttal of a prima facie case, the complainant is afforded a fair "opportunity to prove by a preponderance of the evidence" that the respondent's articulated reasons for its action were pretextual 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, by showing that the employer was more likely than not motivated by a discriminatory reason, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Texas Dep't of Community Affairs v. Burdine, supra, 450 U.S. at 256. 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.

A complainant's proofs of discriminatory intent are usually testimonial. Jackson v. Univ. of Pittsburgh, 826 F. 2d 230, 234 (3d Cir. 1987), cert. den. 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.

Analysis

Initially, the Director notes that this case should be analyzed using the McDonnell Douglas standards for proving discriminatory motive with circumstantial evidence rather than the distinct standards for direct evidence cases. Applying the McDonnell Douglas

test to determine whether Complainant established a prima facie case of race and national origin discrimination, the Director concludes that it is undisputed that Complainant was a member of two protected classes in that he is Black and of Jamaican origin. Complainant applied for a position based on a sign posted in the store which indicated that Respondent was hiring for the position sought by Complainant. There is no dispute that the Complainant met the minimum qualifications, particularly since the position was ultimately offered to Complainant. Moreover, Respondent continued to post its “now hiring” sign, and thus continued to seek applicants for the position.

In this instance, Respondent established that it did not hire anyone for four months after Complainant applied and therefore, arguably did not have an available position. However, the burden of establishing a prima facie case is generally not onerous and serves only to eliminate the most common non-discriminatory reasons for adverse action. See Texas Department of Community Affairs v. Burdine, supra, 450 U.S. at 253. Therefore, notwithstanding the fact that Respondent did not hire anyone after Complainant applied, the fact that it continued to advertise for applicants and to accept applications is sufficient evidence that it sought others for the position after rejecting Complainant for the limited purpose of establishing a prima facie case of unlawful refusal to hire.

In response to the prima facie case, Respondent asserts that at the time Complainant sought employment it had no available position; no one was hired for approximately four months after Complainant sought employment; and ultimately, when the position became available it offered the job to Complainant. Accordingly, the Director adopts the ALJ’s determination that Respondent articulated non-discriminatory reasons for refusing to hire Complainant.

The Director also adopts the ALJ's conclusion that Complainant has not produced evidence that Respondent's articulated reasons for not hiring him are unworthy of belief or that Respondent was motivated by discriminatory animus. Specifically, the ALJ accepted Respondent's evidence that it did not, in fact, hire anyone for the position for four months after Complainant applied, and offered the first available position to Complainant.² Moreover, the ALJ found persuasive Respondent's evidence regarding the racial diversity of its workforce and the testimony of Respondent's witnesses that they did not consider Complainant's race or national origin in making their decisions. Instead, Respondent's witnesses testified credibly that they continued to accept applications in accordance with a store policy to keep a steady flow of current applicants who could be immediately available in the event of staffing needs. Having conducted a thorough and independent review of the record, the Director adopts the ALJ's conclusion that Complainant failed to establish that Respondent's articulated reasons were pretext for unlawful discrimination.

V. ORDER

Based on all of the above, the Director concludes that Complainant has failed to prove with a preponderance of the credible evidence that Respondent's refusal to hire him violated the LAD. Accordingly, the Director adopts the ALJ's initial decision dismissing the verified complaint.

² Complainant did not accept the position because he had previously accepted other employment .

DATED: _____

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

FVP:SSG:AMK: