

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
OAL DOCKET NO.: CRT 7149-03  
DCR DOCKET NO.: EG13CB-45919  
DATED: MAY 31, 2005

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TRACY SWINT, )  
 )  
Complainant, )  
 )  
v. )  
 )  
DISTINCTIVE MARKETING, INC., )  
and DIANE SPENCER, )  
 )  
Respondents. )  
\_\_\_\_\_ )

ADMINISTRATIVE ACTION

FINDINGS, DETERMINATION AND ORDER  
FOR REMAND

**APPEARANCES:**

Brian O. Lipman, Deputy Attorney General, prosecuting this matter on behalf of the New Jersey Division on Civil Rights (Peter C. Harvey, Attorney General of New Jersey, attorney), for the complainant.

Stuart S. Ball, Esq. (Ball and Livingston, attorneys), for the respondents.

**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 Tracy Swint (Complainant), alleging that Distinctive Marketing, Inc., and Diane Spencer (Respondents), subjected her to unlawful employment practices in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On March 3, 2005, the Honorable Ken R. Springer, Administrative Law Judge (ALJ), issued an initial decision<sup>1</sup>

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<sup>1</sup>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 1, 2004; "Ex. C" and "Ex. R" shall refer to Complainant's and Respondents' exhibits admitted into evidence at the administrative hearing, respectively; "FPC" shall refer to the Division's Finding of Probable Cause; and "CE" shall refer to Complainant's exceptions to the initial decision and "RE" shall refer to Respondent's reply to Complainant's exceptions.

dismissing the complaint. Having independently reviewed the record, the Director is constrained to remand this matter to the ALJ to resolve material factual disputes which were not addressed in the initial decision.

### **PROCEDURAL HISTORY**

On June 28, 2000, Complainant filed a verified complaint with the Division alleging that Respondents discriminated against her and terminated her employment based on her creed (Muslim) in violation of the LAD. Specifically, the complaint alleged that Respondent Spencer informed Complainant that she would be terminated if she wore Muslim attire to work, and that before discharging Complainant, Ms. Spencer stated that she could not deal with everyone's religion. Respondents filed an answer denying that they subjected Complainant to any unlawful employment practices. The Division conducted an investigation and issued a finding of probable cause on September 30, 2002. On July 17, 2003, 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 1, 2004 and issued an initial decision on March 3, 2005. Complainant filed exceptions to the initial decision on March 28, 2005 and Respondents filed a reply on April 4, 2005. The Director was granted an extension of time to file his final determination in this matter, which is now due on June 2, 2005.

### **THE ALJ'S DECISION**

#### **FACTUAL DETERMINATIONS**

The ALJ set forth his factual findings at pages 2 through 8 of the initial decision. He also summarized the disputed facts, and as to some of these factual disputes, the ALJ made no factual findings. The ALJ's factual findings relevant to the ultimate rulings in this case are briefly summarized as follows.

Respondents hired Complainant in or around July 1998 as a data entry clerk, and discharged her approximately 2 years later (ID 3-4). Respondents originally hired Complainant as

a family favor because she was a relative, and at the time she was hired Complainant did not possess the necessary qualifications or experience for the job. Complainant's work remained substandard in the areas of computer skills, communication with clients, and customer service. "She was disinterested in her job, which she demonstrated by being chronically absent or late." (ID 7). "Despite extensive counseling by Spencer and Beckett," Complainant failed to improve the quality or quantity of her work, and her job performance was below the reasonable expectations of her employer. Ibid.

A downturn in Respondents' business led to widespread staff reductions. In or about early 2000, Respondents terminated several employees, including April Harris, Sherrice Price, Denise Walker, Valerie Emmanuel and Margaret Smith. Respondent Spencer herself undertook outside employment in April 2000, and thereafter only worked part-time for the corporate Respondent. Respondent Spencer also began depleting her personal funds to support the corporate Respondent (ID 7). As a result of the substantial downturn in business in 2000, Respondents lacked sufficient earnings to support its existing staff, including Complainant (ID 8).

#### **LEGAL CONCLUSIONS**

Applying the burden-shifting framework for circumstantial evidence cases articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the ALJ concluded that Complainant met her initial burden of establishing a prima facie case of religious discrimination. Specifically, the ALJ concluded that Complainant's Muslim faith placed her in a protected class, she was performing the duties of her data entry position, she was terminated, and an employee with a similar attendance record was retained (ID 9-10). Shifting the burden of production to Respondents, the ALJ concluded that Respondents articulated a legitimate non-discriminatory reason for terminating Complainant's employment. Specifically, the ALJ relied on Respondents' evidence that Complainant's termination was justified by unsatisfactory job performance and chronic absenteeism, as well as the decline in Respondents' business (ID 10).

Shifting the ultimate burden of proof back to Complainant, the ALJ concluded that Complainant failed to present sufficient credible evidence to establish that Respondents' articulated reasons were false, or that she was terminated for discriminatory reasons (ID 10).

### **EXCEPTIONS AND REPLIES OF THE PARTIES**

Complainant filed exceptions addressing both the ALJ's factual findings and his legal conclusions.

#### **A. Complainant's Exceptions to the ALJ's Factual Findings**

Complainant takes exception to the ALJ's finding that her job performance was below Respondents' reasonable expectations, and asserts that Respondents' witness testimony on this issue was inconsistent, and therefore not credible. Regarding her job performance, Complainant also challenges the authenticity of the only documentary evidence of Complainant's performance presented by Respondents, a September 1999 Employee Appraisal (Ex. C-4).

Complainant also takes exception to the ALJ's failure to address or resolve the following factual disputes and inconsistencies in the evidence presented, and contends that these inconsistencies impair the credibility of Respondents' witnesses:

1. The ALJ failed to address the significance of Respondents' delay in asserting that they employed others who wore Muslim attire.
2. The ALJ failed to give appropriate weight to the undisputed evidence that Respondents retained as consultants many of the employees it asserted were terminated due to a decline in business, and failed to address Respondents' lack of candor in failing to volunteer the information about their ongoing consultant status until confronted with the information on cross-examination.
3. The ALJ failed to properly address Complainant's allegation that Respondents moved her out of public view when she wore Muslim attire to work, and erroneously relied on irrelevant evidence related to Respondents' office layout.
4. The ALJ failed to address the factual dispute regarding the date Respondents terminated

Complainant's employment. Specifically, Complainant asserts that until the hearing, Respondents never disputed that Complainant was terminated on June 21, 2000, which was after she notified Respondents of her conversion to Islam. Complainant contends that, for the first time at the hearing, Respondents claimed to have terminated Complainant before learning of her religious conversion.

5. The ALJ failed to address inconsistencies between Respondents' testimony and their prior statements regarding Complainant's hire date.

6. The ALJ failed to discredit Respondents' testimony that Complainant and her husband used methadone, and that Complainant's husband frequently visited Complainant during her workday. Complainant asserts that, because this testimony was contradicted by other credible evidence, it impairs the credibility of Respondents' witnesses.

B. Complainant's Exceptions to the ALJ's Legal Conclusions

Complainant takes exception to the ALJ's conclusion that Complainant failed to rebut Respondents' articulated non-discriminatory reasons for terminating her employment. Specifically, Complainant argues that the ALJ failed to address or give appropriate weight to both the timing of her discharge in relation to her announcement that she would be wearing Muslim attire to work, and the fact that her substandard job performance and the deterioration of Respondents' business were ongoing during her employment.

Complainant also asserts that the ALJ erred in excluding from evidence the court complaint filed by Worldlink against Respondents, and erred in relying on the loss of Worldlink's account as evidence that Complainant's work performance was unsatisfactory.

C. Respondents' Reply

In their reply, Respondents take exception to the ALJ's conclusion that Complainant established a prima facie case of employment discrimination, arguing that Complainant failed to prove that she was performing her job or that Respondents sought someone else to perform her

duties after she left. Addressing Complainant's exceptions, Respondents argue that the ALJ properly concluded that Complainant failed to rebut Respondents' articulated non-discriminatory reasons for terminating her employment -- poor work performance and a downturn in Respondents' business. In response to Complainant's exception to the ALJ's conclusion that her job performance was inadequate, Respondents argue that Complainant fails to address her tardiness and absenteeism. In response to Complainant's claim that the ALJ failed to address the timing of her termination in relation to her conversion to Islam, Respondents claim that the ALJ did address the timing, citing page 4 of the initial decision, where the ALJ notes that the parties disagree on Complainant's last date of work (ID 4 and footnote 3).<sup>2</sup> Respondents also argue that the ALJ appropriately addressed and rejected Complainant's contention that Spencer moved her out of the public view when she reported to work in Muslim dress, citing the ALJ's reliance on testimony that a glass door made Respondents' "back room" visible to the public (ID 4), and also asserting that Spencer testified that Complainant was not even moved after her conversion, but remained in the same room across the hall before and after her conversion.

Regarding the ALJ's exclusion of the Worldlink complaint from evidence, Respondents argue that the ALJ was correct in excluding this document because Complainant failed to give Respondents' counsel prior notice that it would be presented at trial, and also contend that the document would have undermined, rather than strengthened, Complainant's contention that she was not terminated for poor job performance.

## **THE DIRECTOR'S DECISION**

### **THE DIRECTOR'S FINDINGS OF FACT**

The Director adopts the ALJ's factual findings with the following clarifications. Regarding

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<sup>2</sup>In its exceptions, Respondents cited footnote 4, which appears to be an error, as that footnote deals with the layout of Respondents' office rather than the termination date.

Respondents' downsizing, the Director clarifies that although Valerie Emmanuel and Margaret Smith were terminated as employees, they and several other employees were retained by Respondents on a consultant basis, and appear on Respondents' public webpage as part of their "Account Management Team" (Tr. 178-179, Ex. C-16).

The ALJ failed to make findings to resolve several material factual disputes. After a complete review of the record, including the hearing transcript, the Director concludes that he cannot make supplemental findings to resolve these issues, as they require credibility determinations which must be made by the ALJ, who had the opportunity to observe the witness testimony. For this reason, the Director will remand this matter for supplemental findings on specific disputed factual allegations, as they are needed to apply the proper legal standards to the evidence in this case. The specific facts to be addressed on remand are discussed below.

### **THE LEGAL STANDARDS**

The LAD prohibits an employer from discharging an employee based on creed. N.J.S.A. 10:5-12(a). 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 New Jersey Supreme Court has also recognized that statements may meet the direct evidence standard where they were made by the ultimate decisionmaker while executing an adverse employment action, and those statements communicated discriminatory animus and bore directly on that employment action. McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 528 (2003). Where a complainant presents such evidence, the burden shifts to the respondent to persuade the decisionmaker that it would have made the same decision even if it had not considered the impermissible factor. Sisler, supra, at 209. As discussed below, Complainant's

allegations, if true, comprise direct evidence.

In the more common situation, direct evidence is unavailable and a complainant will present circumstantial evidence of unlawful discrimination. In such cases, the New Jersey courts have adopted the 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),<sup>3</sup> as a starting point for analyzing cases brought under the LAD. See Clowes v. Terminix International, Inc., 109 N.J. 575, 595 (1988). This methodology, which was applied by the ALJ in the present case, 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.

The elements of a prima facie case are flexible, and will vary in differing factual circumstances. Texas Department of Community Affairs v. Burdine, supra, 450 U.S. at 254. In a termination case, the prima facie case requires a showing that a complainant is a member of a protected class, was performing his or her job, was terminated, and the employer thereafter had others perform his or her job duties. Clowes v. Terminix, supra, 109 N.J. at 597; Zive v. Stanley Roberts, 182 N.J. 436, 455 (2005). Where an employer is downsizing, the final prong of the prima facie case will be met by a showing that the employer retained other employees. Marzano v. Computer Science Corp., 91 F. 3d 497, 508 (3<sup>rd</sup> Cir. 1996).

Once a complainant has established a prima facie 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 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).

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<sup>3</sup>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 meeting this burden of production, the respondent rebuts the presumption of discrimination raised by the complainant's prima facie case. In order to prevail, the complainant must then 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).

## **THE DIRECTOR'S ANALYSIS**

### **A. Direct Evidence**

The crux of Complainant's complaint, which she has consistently alleged throughout these proceedings, is that Diane Spencer initially told her that she could not come to work in Muslim attire, and when Spencer subsequently acquiesced in permitting her to do so, Spencer moved Complainant out of public view, and at the end of the workday told Complainant that she could not tolerate everyone's religion and terminated her employment (Tr. 18-19). If these allegations are true, no inference would be needed to conclude that Spencer's expressed bias against Complainant's religion and Muslim attire was a motivating factor in her decision to terminate Complainant's employment, and the evidence would trigger a direct evidence analysis. Moreover, if Complainant's direct evidence allegations are true, the fact that poor performance and a business decline could have been good reasons to fire Complainant would not necessarily negate the conclusion that religious discrimination was a motivating factor in Spencer's employment decisions. Instead, the direct evidence would shift the burden to Respondents to prove that Spencer would have taken the same actions against Complainant even if she had not considered factors related to Complainant's religion. Bergen Commercial Bank v. Sisler, supra, 157 N.J. at 209.

Complainant testified to these allegations at the hearing.<sup>4</sup> Although Respondents denied

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<sup>4</sup>When questioned about whether, when she first converted to Islam, Complainant contacted Diane Spencer before going to work in Muslim attire, Complainant answered that she spoke to Ms. Spencer on a Sunday and that Ms. Spencer "told me that I couldn't come to work like that, I wasn't following her dress code so I didn't go to work Monday." Tr. 18. Complainant further testified that when she subsequently spoke with

making these statements (Tr. 210-212, 233), their denial does not change the direct evidence nature of Complainant's allegations. Instead, it presents factual disputes, requiring the finder of fact to determine whether the alleged statements and actions were or were not made.

It is essential to apply the correct tests for direct evidence, because once a complainant has met his or her burden of proving direct evidence of unlawful discrimination, the respondent bears a weightier burden than in a circumstantial evidence case. Instead of merely meeting a burden of producing some evidence of non-discriminatory reasons for its action, in a direct evidence case a respondent must prove that it would have made the same decision even if it had not considered the discriminatory factor. McDevitt v. Bill Good Builders, supra, 175 N.J. at 527.

A fact finder must address the pivotal issues in dispute. See, e.g., Bailey v. Board of Review, 339 N.J. Super. 29, 33 (App. Div. 2001) (Fact finder's failure to discuss or make factual findings regarding unemployment applicant's claim of duress, which was "centerpiece" of his claim, mandated remand.) The Administrative Procedure Act contemplates that the ALJ shall, in carrying out his or her role as a trained fact-finder, indicate in the decision any evidence rejected, as well as the evidence relied upon to support the result. N.J. Dept. of Health v. Tegnazian, 194 N.J. Super. 435, 449-450 (App. Div. 1984). "In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored." Id. at 450, quoting Stewart v. Sec. of Health, Educ. & Welfare of U.S., 714 F.2d 287, 290 (3<sup>rd</sup> Cir. 1983) and Cotter v. Harris, 642 F. 2d 700, 705 (3<sup>rd</sup> Cir. 1981). It is the ALJ who, having heard the live testimony of witnesses and observed their demeanor, is in a position to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988). See also, S.D. v. Division of Medical Assistance and Health Services, 349 N.J. Super. 480, 484 (App. Div. 2002).

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Ms. Spencer to get a slip for unemployment, Spencer told her to return to work the next day, and Complainant complied. Complainant testified that at the end of that workday Spencer "...told me that she couldn't tolerate everybody's religion and that was it, I left." (Tr. 18-19). See also testimony cited in n. 6 of the within decision, infra.

Complainant has specifically taken exception to the ALJ's treatment of the evidence regarding her allegation that Respondent moved her out of public view for the only day she was permitted to wear Muslim attire to work. The ALJ found that because the front and back rooms of Respondents' offices are separated by transparent glass, Complainant would still be visible in what she referred to as the "back" room (ID 4, n. 4). Complainant cites Spencer's own hearing testimony as proof that the room Complainant last worked in was not visible to the public, as she was not assigned to the glass partitioned "back" room, but was instead assigned to a room across the hall (CE 18, citing Tr. 198). In that same segment of testimony, Spencer went on to state that Complainant had been in the same room across the hall for months, and her work station did not change at all after she converted to Islam (Tr. 198). Thus, it appears to be undisputed that the glass partition is irrelevant to the question of whether Respondents moved Complainant out of public view because of her Muslim attire. The real issue is whether Complainant had already been working in the room across the hall before her conversion (as Spencer contends), or was reassigned to that room when she wore Muslim attire, as Complainant contends.<sup>5</sup> Resolving this factual dispute requires a credibility determination, which the ALJ failed to make. As this question is material to determining whether Complainant was subjected to adverse employment actions based on her religion, it must be resolved by the ALJ on remand.

Based on the allegations of the complaint, the Division's Finding of Probable Cause and the evidence presented at the hearing, the ALJ was charged with determining whether Spencer made the statements alleged by Complainant, and whether there was a causal connection between the statements and the adverse employment decisions. The ALJ failed to do so, and this void leaves the Director without the essential facts needed to address Complainant's specific allegations of

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<sup>5</sup>Complainant testified: "...but when I came back to work, she moved me to another room and told Carol Beckett to tell me if I needed anything faxed or copied, to let Carol know and she'll fax it for me." She further testified that in that room, "you couldn't see who was walking by." (Tr. 19).

employment discrimination.<sup>6</sup>

To apply the direct evidence standards, the ALJ must make factual findings on remand to resolve the following issues in dispute:

1. Did Diane Spencer tell Complainant that she could not come to work in Muslim attire?
2. When Complainant did report to work in Muslim attire, did Diane Spencer move Complainant's assigned work station? If so, was Complainant's newly assigned workstation out of public view?
3. Did Diane Spencer make a statement to the effect that she could not tolerate everyone's religion?

#### **B. Circumstantial Evidence Analysis**

Applying a circumstantial evidence analysis, the ALJ concluded that Complainant failed to prove that Respondents' articulated reasons for firing her - - poor performance and a decline in business - - were pretext for religious discrimination. The Director finds that the record includes circumstantial evidence as well as direct evidence, which should be evaluated using the burden-shifting analysis discussed above to determine whether Complainant met her burden of proving pretext.

Regardless of whether Ms. Spencer made the direct evidence statements about Complainant's religion as Complainant alleged, Complainant's evidence regarding the timing of her termination in relation to her conversion to Islam is circumstantial evidence of religious discrimination. Although the ALJ articulated the appropriate legal standards for evaluating circumstantial evidence,<sup>7</sup> his application of those standards to the evidence was flawed by his failure

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<sup>6</sup>Nor did the ALJ make any more general finding that Spencer was credible or Complainant was not credible.

<sup>7</sup>The Director finds no merit in Respondents' exception to the ALJ's conclusion that Complainant established a prima facie case of religious discrimination. The evidence in the record supports the conclusion that Complainant was performing her position when she was terminated. To the extent that it may be unclear whether Respondents sought someone else to perform Complainant's job duties after her termination, the ALJ found that Respondents were downsizing their operations due to a downturn in business (ID 8). For this reason, it is appropriate to apply a modified prima facie standard for reductions in force; in such cases the last prong is satisfied by a showing that other employees were retained. Marzano v. Computer Science, *supra*, 91 F. 3d at 508. The evidence in the record supports the conclusion that Respondents retained other

to make a factual determination on the crucial issue of whether Respondents terminated Complainant's employment before or after she announced her conversion to Islam, which depends on credibility.

Ms. Spencer's own hearing testimony does not dispute that Complainant's last day of work was shortly after Complainant informed Spencer that she had converted to Islam (Tr. 214). The record also reflects that Spencer had been dissatisfied with Complainant's work since at least September of 1999 (Ex. C-4). In addition, the evidence presented shows that Respondents' business had deteriorated to the extent that Spencer began working elsewhere several months before Complainant was discharged (Tr. 160). Thus, because the problems with Complainant's job performance and Respondents' business had been ongoing for some time, terminating Complainant almost immediately after she announced that she had converted to Islam and would be wearing Muslim attire to work could be material evidence that Respondents' articulated reasons for firing her were pretext for religious discrimination. Again, the outcome depends on credibility, which is the ALJ's domain.

In her exceptions, Complainant contends that, until the hearing, Respondents never disputed that Complainant was discharged on June 21, 2000, and argues that such a radical change in position at the hearing on this material issue impairs Spencer's credibility (CE 18-20). Although it may be accurate to state that Respondents did not initially dispute June 21, 2000 as the specific date of termination, the Division's Finding of Probable Cause acknowledges that during the investigation,

Ms. Spencer stated that she did not learn of Complainant's conversion to the Muslim faith until she (Ms. Spencer) informed Complainant that she was being terminated. Ms. Spencer was unable to recall the exact date this occurred....Ms. Spencer stated that "when I told her that she was being discharged for poor performance, Complainant said it was okay because she had changed her religion and would prefer to have a job in a counseling center."

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employees at the time of Complainant's termination (Tr. 169, 210).

Thus, although Respondents may not have addressed the calendar date per se in their early defenses to the complaint, they did dispute Complainant's allegation that Spencer discharged her after she announced her conversion to Islam. For this reason, the Director concludes that Spencer's late challenge to the date itself may not be particularly significant.

Complainant's exceptions do, however, highlight the more significant question of whether Complainant was discharged before or after Spencer learned of her conversion to Islam. This was squarely presented as a material factual dispute to be resolved at the hearing. As the hearing transcript presents conflicting testimony, a finding on this issue must rely on credibility determinations. Although Respondents contend that the ALJ made a finding on this issue, the initial decision shows no such finding, but merely notes the parties' conflicting allegations (ID 4, n. 3).

As noted above, in a circumstantial evidence case Respondents bear only the burden of articulating, rather than proving, a legitimate non-discriminatory reason for terminating Complainant. However, in evaluating whether Complainant has met her burden of proving that Respondents' articulated reasons for terminating her are pretextual, the finder of fact must specifically evaluate Complainant's factual allegations. Although the ALJ clearly credited Respondents' evidence about Complainant's performance and the deterioration of Respondents' business, his conclusion that those were good reasons to discharge Complainant completely ignores the crucial questions of why Spencer chose that particular time to discharge Complainant, and whether the timing of Complainant's discharge is evidence that Spencer was motivated by Complainant's creed.

Even if deficient performance and a business downturn might have been good reasons to terminate Complainant's employment, the ruling in this case must address Complainant's evidence that an intervening event (Complainant's conversion to Islam) actually triggered her termination. As noted above, the finder of fact must address all material evidence presented, and make credibility determinations to accept or reject the material evidence in dispute. On remand, the ALJ must make

a factual finding to resolve the question of whether Diane Spencer terminated Complainant's employment before or after she announced her conversion to Islam and her intention to wear Muslim attire to work.

On the issue of pretext, Complainant also takes exception to the ALJ's conclusion that her job performance was deficient (CE 10-14). The Director finds merit in Complainant's contention that the testimony of Respondent Spencer and Carol Beckett regarding the quality of Complainant's work was somewhat inconsistent with the statements each made during the investigation. However, the ALJ's finding that Complainant's work was substandard turns on the credibility of lay witnesses. The Director finds that the inconsistencies noted are insufficient to conclude that the ALJ's findings of substandard work product are "arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence the record." N.J.A.C. 1:1-18.6 (c).

Moreover, the Director finds that, aside from evidence regarding specific deficiencies in Complainant's work, Complainant's absences and tardiness support the ALJ's finding that Complainant's job performance was deficient. The evidence regarding Complainant's attendance record is undisputed (Ex. C-13). Although Complainant contends that a retained co-worker's similarly poor attendance record is evidence of pretext, the ALJ concluded that this co-worker, Gwen Smith, was not similarly situated because she worked only part time and had a disabled child (ID 6, n. 6).<sup>8</sup> The Director finds insufficient evidence in the record to reject this conclusion. Thus, after considering Complainant's exceptions on this issue, including the inconsistencies in Respondents' witness testimony and Complainant's assertion that she never received a performance evaluation, the Director finds insufficient evidence in the record to reject the ALJ's finding that Complainant's work performance was deficient.

Complainant's exception related to the Worldlink complaint should be addressed at this

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<sup>8</sup>The ALJ notes in the same footnote that Gwen Smith was also terminated towards the end of 2000. Because there is no indication in the record that Smith's attendance record had any bearing on her termination, Smith's termination does not weigh against Complainant's proofs on pretext.

junction because it relates to the finding regarding Complainant's job performance. The ALJ sustained Respondents' objection to introducing into evidence a court complaint filed by Worldlink against the corporate Respondent (Tr. 186). The ALJ excluded the document because Complainant had not provided Respondents with a copy of it in response to Respondents' interrogatory asking for all documents related to the within action (Tr. 185). The Uniform Administrative Procedure Rules, in pertinent part, give an ALJ discretion to exclude any evidence if its probative value is substantially outweighed by the risk that it will create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1(c). The record reflects that the attorney representing Respondents in the within matter did not represent them in the Worldlink matter, and their current counsel asserted that he had not seen the document prior to the hearing (Tr. 184). Complainant argues that the Worldlink complaint should have been admitted because Respondent Spencer was familiar with the document, and it was Respondents who raised the Worldlink litigation as part of their defense.

Despite Spencer's familiarity with the document, Respondents' counsel had no opportunity to discuss the document with her to determine how it might relate to the issues presented in the within matter, or to prepare to present any appropriate documents in rebuttal. For this reason, the Director cannot conclude that the ALJ abused his discretion in excluding the document from evidence. Moreover, the record reflects that the ALJ permitted counsel to fully question witnesses using this document, thus providing Complainant the opportunity to address the issues raised by that complaint. For these reasons, the Director will not overturn the ALJ's evidentiary ruling on this issue.<sup>9</sup>

Also related to the issue of pretext, Complainant takes exception to the ALJ's treatment of the evidence regarding Spencer's initial failure to disclose the fact that several of the employees she identified as "terminated" were in fact retained as consultants, and asserts that this impacts on

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<sup>9</sup>As discussed below, the Director anticipates that the limited remand in this matter will not require additional testimony or expansion of the documentary record. If, however, the ALJ does see fit to permit additional testimony or expand the documentary record, there would no longer be any reason to exclude the Worldlink complaint, as Respondents now have advance notice of Complainant's intent to introduce the document, and can offer rebuttal evidence.



Spencer's credibility. It is true that Spencer failed to volunteer this information until cross-examination. There is also merit to Complainant's contention that there is no evidence in the record to support the ALJ's statement that "Consultants are paid only when their services are needed, whereas employees constitute a constant drag on the company's bottom line." (ID 7 n.9). Although that statement may be a logical conclusion, review of the transcript disclosed no testimony regarding the manner in which Respondents compensated their consultants. For that reason, it would be inappropriate to rely on the purported cost savings of using consultants versus employees to reach any findings or conclusions in this case. On remand, the ALJ should consider the evidence that Respondent retained many of the "terminated" employees as consultants, and whether that evidence undermines Respondents' contention that Complainant was terminated due to a decline in business.

On remand, the ALJ should also consider Spencer's contradictory explanations of her reason for discharging Complainant. In her August 21, 2000 letter answering the complaint, Spencer stated that other employees were terminated due to low sales volume, but that Complainant was discharged because of poor performance (Ex. C-15). In her July 28, 2001 letter to the Division's investigator, Spencer mentioned nothing about poor performance, but instead asserted that Complainant was discharged, along with others, because of low sales volume (Ex. C-17). The ALJ relied on Respondents' proofs of poor job performance and a business downturn to conclude that Complainant was discharged for legitimate non-discriminatory reasons, but he failed to address the shift in Respondents' reason for terminating her. As noted above, it is up to the ALJ to draw his own conclusion as to Spencer's credibility, but he should explicitly address these inconsistencies in reaching his credibility determinations and in reaching his conclusion as to whether Complainant met her burden of proving pretext.

Complainant also takes exception to some of the ALJ's factual findings which raise inconsistencies relating to factual disputes that are not material to the outcome of this case, but may be relevant in assessing the overall credibility of witnesses, applying either a direct evidence or circumstantial evidence analysis. Such inconsistencies may also be evidence that Respondents'

articulated reasons are unworthy of credence, and are pretextual. See, e.g., Fuentes v. Perskie, 32 F. 3d 759, 765 (3<sup>rd</sup> Cir. 1994).

Specifically, Complainant challenges the veracity of Spencer's testimony that Respondents had other employees who wore Muslim attire to work, and argues that Respondents' failure to raise this defense until after this matter was transmitted for hearing impairs Spencer's credibility. The ALJ did not make a specific finding regarding other Muslim employees or specifically rely on this testimony in his conclusion that Complainant failed to prove pretext. He appears to have credited Spencer's testimony on this issue, however, as he specifically discounted Complainant's argument that Respondents failed to present this defense to the Division (ID 4 -5, n, 5). The ALJ relied on Respondents' interrogatory answer, provided more than three years after the filing of the complaint and well after the Division completed its investigation and issued its Finding of Probable Cause. Ibid. In doing so, the ALJ failed to address the conspicuous absence of any reference to other Muslim employees in Spencer's answer to the complaint or any subsequent written submission to the Division during the investigation.

In her answer to the complaint, Spencer made no mention of other Muslim employees, but stated that she discharged Complainant due to her performance and absenteeism (Ex. C-15). In a subsequent letter to the Division's investigator dated July 28, 2001, Spencer again made no mention of other Muslim employees, but asserted that Complainant was terminated "along with numerous other employees because of low sales volume." (Ex. C-17). When cross-examined at the hearing about why this defense was not raised earlier, Spencer testified that she told the Division's investigator that she had other Muslim employees, but she did not remember when she gave that information to the Division's investigator, and did not remember whether it was in person or by phone (Tr. 206-207). However, no record of this appears in the Division's file. (Tr. 125-126.) In light of the entire record, the ALJ should make a finding as to Spencer's credibility on this issue, and determine whether Respondent did employ others who wore Muslim attire.

As additional evidence of inconsistent or disputed testimony that should impair the credibility

of Respondents' witnesses, Complainant cites Spencer's eleventh hour dispute of Complainant's hire date, as well as testimony that Complainant used methadone and that her husband frequently visited the office during the workday. Respondents' failure to challenge the hire date earlier in these proceedings does not seem particularly relevant, as it was not crucial to Respondents' defense in this matter, and for that reason could be easily overlooked.

In contrast, Respondents' statements accusing Complainant of using methadone and frequently visiting with her husband on the job, if accepted as credible, could impair Complainant's reputation and be relevant to her job performance. The testimony of Complainant and her husband contradicts the testimony of Spencer and Carol Beckett on these issues (Tr. 14-15, 76, 78, 174, 190-192, 238, 255). Accordingly, it is up to the ALJ to consider the conflicting testimony, and make credibility determinations. On remand, the ALJ should consider the conflicting testimony on these allegations and determine the appropriate weight to be given in assessing the general credibility of the witnesses.

### **THE REMAND**

Because of the lack of factual findings on material issues, the Director remands this matter for supplemental fact finding on the following issues:

1. Did Diane Spencer tell Complainant that she could not come to work in Muslim attire?
2. When Complainant did report to work in Muslim attire, did Diane Spencer move Complainant's assigned work station? If so, was Complainant's newly assigned workstation out of public view?
3. Did Diane Spencer make a statement to the effect that she could not tolerate everyone's religion?
4. Did Diane Spencer terminate Complainant's employment before or after she announced her conversion to Islam and her intention to wear Muslim attire to work?

In making his credibility determinations to resolve these issues, the ALJ shall consider the inconsistencies in the witness statements discussed above. Although the manner in which the record is developed is the ALJ's prerogative, it does not appear that additional testimony or presentation

of additional evidence should be necessary. The conflicting evidence on each of these issues is already in the record. The hearing transcripts can be consulted to review the testimony on these issues, as well as the testimony and documentary evidence of inconsistent statements relating to credibility.

Based on his supplemental factual determinations, the ALJ shall apply the appropriate legal standards to determine whether Complainant's conversion to Islam and donning of Muslim attire was a motivating factor in Respondents' decision to discharge Complainant, or to move her workstation out of public view.

**CONCLUSION**

For the reasons discussed above, this matter is remanded to the ALJ for limited supplemental factual findings and for analysis of the expanded factual determinations using the legal standards discussed above.

DATE: \_\_\_\_\_

\_\_\_\_\_  
J. FRANK VESPA-PAPALEO, ESQ.  
DIRECTOR