STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 2322-10
DCR DOCKET NO. EC24WB-60143

Carl Carpenter and the Director of the New Jersey Division on Civil Rights, Complainants, v. C.B.M., Inc., Respondent.	Administrative Action **FINDINGS, DETERMINATION, AND ORDER**

Carl Carpenter, Complainant, *pro se*

Megan J. Harris, Deputy Attorney General (Jeffrey S. Chiesa, Attorney General of New Jersey) for the New Jersey Division on Civil Rights

C.B.M. Inc., Respondent, *pro se*

BY THE DIRECTOR:

This matter comes before the Director of the New Jersey Division on Civil Rights (DCR) from a verified complaint filed by Carl Carpenter, alleging that respondent C.B.M., Inc. (CBM) subjected him to racial harassment and terminated his employment in reprisal for complaining about the harassment, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On April 17, 2012, the Honorable Patricia Kerins, Administrative Law Judge (ALJ), issued an initial decision concluding that CBM violated the LAD.[1] After independently evaluating the evidence and the ALJ's decision, the Director adopts the ALJ's decision, as modified below.

[1] Hereinafter, "ID" will refer to the ALJ's initial decision, and "Exh. P-" will refer to Complainant's exhibits admitted into evidence at the proof hearing.

PROCEDURAL HISTORY

On September 15, 2008, Carpenter filed a verified complaint with the DCR alleging that CBM subjected him to racial harassment and discharged him in reprisal for complaining about that harassment.[2] CBM filed an answer denying the allegations of unlawful conduct. The DCR investigated the matter. After completing its investigation, the DCR issued a finding of probable cause on September 25, 2009, and added the DCR Director as an additional complainant.[3] The DCR's attempts to conciliate the matter were unsuccessful. On February 19, 2010, the matter was transmitted to the Office of Administrative Law for a hearing on the merits.

On June 1, 2010, CBM failed to appear at a pre-hearing conference. The ALJ scheduled another conference for January 11, 2011. The ALJ later canceled that conference after receiving a letter from CBM's principal indicating that he would be unable to attend. On June 1, 2011, the ALJ issued an order suppressing CBM's answer and defenses without prejudice for failing to comply with discovery requests. DCR duly served that order on CBM. On September 27, 2011, the ALJ issued an order suppressing CBM's answer and defenses with prejudice, based on CBM's continued failure to comply with the discovery requests. On November 9, 2011, the ALJ held a proof hearing. Carpenter testified and presented evidence. Despite having notice of the hearing, CBM failed to appear. The ALJ left the record open for post-hearing submissions. On December 5, 2011, the DCR submitted proposed findings of fact and conclusions of law and a certification of attorney fees.

On April 17, 2012, the ALJ issued her initial decision. Neither party submitted exceptions to the ALJ's decision. The Director's final order is due to be issued on June 1, 2012.

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[2] The verified complaint also charged Vincent Milio, individually, with LAD violations. Those claims were settled in a December 11, 2010 consent order.

[3] The DCR Director remains a named party. However, for purposes of this determination and order, "Complainant" will refer only to Carpenter.

THE ALJ'S DECISION

The ALJ's Findings and Conclusions

In view of the order suppressing CBM's answer and defenses, the facts alleged in the verified complaint were deemed admitted and incorporated into the ALJ's decision. (ID 2.) However, the ALJ's findings were also based on her credibility assessments. In particular, after taking testimony and considering the evidence, the ALJ found that "Carpenter's testimony was credible and consistent with the facts alleged in the Verified Complaint." (ID 3.) The ALJ's factual findings can be summarized as follows.

Carpenter, who is African-American, worked for CBM, a construction and facilities service entity, from December 10, 2007, to August 14, 2008. Carpenter's supervisor, Vincent Milio, made racially derogatory comments to and about Carpenter on several occasions, such as calling him a "nigger" and stating that Carpenter should remove the brown color from his face. (ID 3.) On one occasion, Milio joked to employees that they should hide any items of value as Carpenter approached. (Ibid.) Carpenter stated that a co-worker, Rob Simmons, told him that Milio admitted calling Carpenter a "nigger" to his face. (Ibid.)

In July 2008, Carpenter complained about Milio's conduct to CBM's General Manager, Vincent Gianfrancesco. (Ibid.) CBM's employee handbook addressed sexual harassment, but CBM had no formal procedure for reporting or investigating racial harassment. (Ibid.) Management met with Carpenter and Milio. Milio apologized to Carpenter. CBM took no disciplinary action against Milio or remedial measures to address the racial hostility in the workplace. (Ibid.) After the meeting, the relationship between Carpenter and Milio remained tense. At one point, Carpenter asked why he was receiving fewer hours than Caucasian workers with less seniority. Milio replied that Carpenter was not receiving certain job assignments because he did not have his own set of tools. Carpenter disagreed and showed Milio his set of tools. (Ibid.)

On August 14, 2008, CBM discharged Carpenter at Milio's direction. (ID 4.) The ALJ noted

that the termination occurred "within a month of Carpenter's complaint to CBM management regarding Milo." (Ibid.) CBM asserted that Carpenter was discharged for grouting a wall incorrectly. However, the ALJ noted, "other employees were responsible for the grouting work and were not reprimanded or discharged." (Ibid.) Carpenter's May 18, 2008, performance evaluation indicated that his work was "above average," and up until his discharge, he had not received any negative performance reviews. (Ibid.)

The ALJ found that Milio "used racist language to degrade Carpenter and create a racially hostile work environment" (ID 4) and that Carpenter was "given fewer work hours and less desirable assignments than his white co-workers with less seniority." (Ibid.) The ALJ also found that Carpenter was discharged in retaliation for complaining about racial harassment and discrimination, that CBM delegated authority to Milio, and that CBM relied on Milio's recommendation in terminating Carpenter's employment. (Ibid.) The ALJ concluded that because Milio was a supervisor and responsible for many of the hostile acts, CBM was liable for Milio's discriminatory conduct. (Ibid.) She also concluded that CBM was liable for the DCR's attorney's fees and costs incurred in prosecuting this matter. (ID 5.) She found the certification of counsel fees and costs submitted by the deputy attorney general to be reasonable and appropriate, and ordered CBM to pay $47,476.50, to the DCR in attorney fees and costs. (ID 5-6.)

The ALJ found, "After he was discharged, Carpenter was unable to find full time work despite his best efforts. He took odd jobs . . . but his income for the years after his termination was minimal, only in the area of $5,000.00." (Ibid.) The ALJ found that while working for CBM, Carpenter earned $18 per hour and his gross pay for a forty hour week was $720. (Ibid.) After deducting the $5,000 that Carpenter earned doing odd jobs, the ALJ concluded that Carpenter was entitled to $109,480 in back pay as well as interest on that back pay. (ID 4.)

The ALJ cited Carpenter's testimony about the humiliation he endured on the job, and that he "cried like a baby" upon being discharged. (ID 5.) She found that he testified credibly as to the

pain and depression he experienced because of the termination of his employment and his inability to find other work, and awarded him $60,000 in damages for pain, suffering, and humiliation. (ID 5.) The ALJ also imposed a $10,000 statutory penalty, citing the egregious nature of the racial slurs designed to humiliate Carpenter, CBM's favored treatment of white coworkers, and CBM's decision to discharge Carpenter in retaliation for complaining about discrimination. (Ibid.)

THE DIRECTOR'S DECISION

Except as noted in the discussion below, the Director concludes that the relevant and material facts relied on by the ALJ are supported by the record, and adopts them as his own.

a. Hostile Work Environment

The LAD prohibits race discrimination in employment. N.J.S.A. 10:5-12. Hostile work environment racial harassment is a form of race discrimination prohibited by the LAD. Taylor v. Metzger, 152 N.J. 490, 498 (1998). A plaintiff seeking to establish a prima facie case of hostile work environment racial harassment under the LAD must demonstrate that the harassment would not have occurred but for his or her race, and was severe or pervasive enough to make a reasonable employee of the same race believe that the conditions of employment have been altered and the working environment is hostile or abusive. Id. at 498 (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)).

In Taylor, the Supreme Court held that a single racial slur ("jungle bunny") by a county sheriff directed to a subordinate could be severe enough to create a hostile work environment. Id. at 506-07. The Court stated that racial epithets are "especially egregious" forms of harassment. Id. at 502. Although there was no allegation that the sheriff used the word "nigger," the Court referenced that word as a point of comparison when evaluating the impact of the term, "jungle bunny," noting that both are unambiguously racist. Ibid. The Court stated, "The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se . . . " Id. at 502 (quoting Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill.

1984)). The Court added that the experience of being called a "nigger . . . is like receiving a slap in the face. The injury is instantaneous." Id. at 503 (quoting Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 452 (1990)). The Supreme Court stated that the severity of even a single racial epithet is "exacerbated" when it is "uttered by a supervisor" because of a supervisor's "unique role in shaping the work environment." 152 N.J. 490, 503.

Under those standards, Milio's conduct may have been severe enough to create a racially hostile work environment even if based on a single utterance of the word "nigger." But it was not just a single incident. The ALJ found that Milio repeatedly made racially derogatory comments in reference to Carpenter, including calling him a "nigger," commenting negatively on Carpenter's skin color, and insinuating that he was a criminal. To borrow from Taylor, the supervisor, Milio, "did more than merely allow racial harassment to occur at the workplace, he perpetrated it. That circumstance, coupled with the stark racist meaning of the remark[s], immeasurably increased [their] severity." Id. at 504.

The ALJ found that Milio made the offensive remarks in the presence of Carpenter's co-workers. (ID 3.) The record reflects that in interviews with the DCR investigator, other employees corroborated that Milio repeatedly made racially derogatory remarks in the workplace. Foreman Bob Simmons corroborated that Milio admitted calling Carpenter a "nigger" to his face. (Exh. P–9 & P-10.) And as the Supreme Court has stated, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." 152 N.J. 490, 506 (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir.1993)). The fact that the remarks were undeniably opprobrious racist slurs directed at Carpenter and uttered by his immediate supervisor in the presence of co-workers, is sufficient to establish the severity of the harassment and to conclude that same altered the conditions of

Carpenter's work environment.

b. Retaliation

The LAD prohibits employers from retaliating against employees for reporting or complaining about race discrimination. N.J.S.A. 10:5-12(d). To establish a prima facie case of retaliation, a complainant must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him to adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 NJ Super. 436, 445 (1990). If that prima facie case is made, the employer bears the burden of articulating a non-retaliatory reason for the adverse action. If the employer can meet that burden of production, then the burden shifts back to the employee to show that the employer's articulated reason was a pretext to mask a retaliatory motive. Jamison, supra, 242 N.J. Super. at 445-46.

In this case, the ALJ found that after reporting the harassment to CBM's general manager in July 2008, Carpenter was scheduled for fewer hours than employees with less seniority and then discharged–at Milio's direction–in August 2008. (ID 3-4.) The close proximity between the protected activity and the adverse employment action is sufficient circumstantial evidence of the required causal connection. Rogers v. Alternative Res. Corp., 440 F. Supp. 2d 366, 376 (D.N.J. 2006); Romano v. Brown & Williamson, 284 N.J. Super. 543, 550 (App. Div. 1995). CBM produced a non-retaliatory explanation for discharging Carpenter, i.e., it claimed that Carpenter had incorrectly grouted a wall. However, the ALJ found that Carpenter presented sufficient evidence to refute that explanation. The ALJ found that other employees responsible for grouting the wall were not discharged or even reprimanded, and that Carpenter never received negative reviews regarding his work prior to complaining about racial harassment. Indeed, his May 2008 evaluation rated his work was "above average." (ID 4.) Based on the close proximity between reporting the harassment and his discharge, as well as the evidence discrediting CBM's proferred reason for the termination, the record supports Carpenter's allegation that he was discharged in reprisal for

complaining about race discrimination.

c. Liability

The discharge of an employee is an employer's deliberate act and, therefore, the employer is liable for damages flowing from any termination found to be wrongful. See Entrot v. BASF Corp., 359 N.J. Super. 162, 192 (App. Div. 2003). In determining whether an employer is vicariously liable for racial harassment by a supervising employee, courts consider "whether the employer contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship." Id. at 186 (citing Lehman, supra, 132 N.J. at 624). The latter of those scenarios--i.e., *aided by agency relationship*--may be satisfied if (a) the employer delegated authority to the supervisor to control that aspect of the work environment that proved to be hostile, (b) the supervisor's exercise of that authority violated the LAD, and that (c) such delegated authority aided the supervisor in injuring the employee. Shepherd v. Hunterdon Develop. Ctr., 336 N.J. Super. 395, 422 (App. Div. 2001), aff'd in relevant part, rev'd in part, 174 N.J. 1 (2002); Herman v. The Coastal Corp., 348 N.J. Super. 1, 25 (App. Div. 2002) (citing Lehman, supra, 132 N.J. at 620).

In this case, the record reflects that Milio was Carpenter's supervisor, CBM delegated to Milio the oversight of its day to day operations, and that Milio exercised that authority in scheduling and assigning work to employees and in ultimately recommending the termination of Carpenter's employment. (ID 3-4.) The authority delegated to Milio empowered him to permeate the workplace with racial slurs, which created a work environment that was hostile to African-American employees, in violation of the LAD. Liability can also be imposed here based on negligence, as CBM had no formal procedure for reporting or investigating racial harassment, and once Carpenter did report the harassment, CBM took no disciplinary action against Milio or action to address the racially hostile work environment, other than bringing Carpenter and Milio together to discuss the situation. (ID 3.) Accordingly, the Director concludes that CBM is liable for the retaliatory discharge, racially

hostile work environment, and all equitable and compensatory relief awarded arising therefrom.

Remedies

a. Emotional Distress

It is settled that a victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-03 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980). Such a plaintiff is entitled to receive, at a minimum, a threshold pain and humiliation award for enduring the "indignity" that may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970), see also Tarr v. Ciasulli, 181 N.J. 70, 82 (2004). Pain and humiliation awards are not limited to instances where the plaintiff sought medical treatment or exhibited severe manifestations. Id. at 318. Nor is expert testimony required. Rendine v. Pantzer, 276 N.J. Super. 398, 440 (App. Div. 1994), aff'd as modified, 141 N.J. 292 (1995).

It is also settled that an agency head cannot reject or modify "an ALJ's factual finding based upon the credibility of a lay witness without demonstrating that the ALJ's findings were arbitrary, capricious or unreasonable or . . . not supported by sufficient, competent, and credible evidence in the record." Cavalieri v. Bd. of Trustees, 368 N.J. Super. 527, 533-34 (App. Div. 2004) (citing N.J.S.A. 52:14B-10 (c)) (ellipse in original); N.J.A.C. 1:1-18.6(c). Here, the ALJ found Carpenter's testimony as to the humiliation he endured during his roughly eight months on the job, as well as the pain and depression he suffered when he was discharged without warning and unable to find full time work, to be credible. The ALJ noted Carpenter's reaction upon being fired and the repeated and public nature of Carpenter's harassment, as well as his supervisor's use of overtly racist terms, and found that the claim for $60,000 in emotional distress damages was sufficiently supported by the record. In the absence of evidence that any factual findings were arbitrary,

capricious, unreasonable, or not supported by sufficient competent and credible evidence, the Director has no basis for rejecting that determination. N.J.A.C. 1:1-18.6.

b. Backpay

The ALJ awarded backpay to Carpenter in the amount of $109,480. The record reflects that while working for CBM, Carpenter earned $18 per hour, and that a typical work week was 40 hours, for a typical gross weekly paycheck of $720. (ID 4.) The lost wages cover the period from the termination of his employment until he secured full time work in the first full week of September 2011, with a deduction for the $5,000 he earned doing odd jobs while looking for full time employment. (ID 4, Proposed Findings of Fact and Conclusions of Law, ¶55.) Here again, in the absence of evidence that any factual findings were arbitrary, capricious, unreasonable, or not supported by sufficient competent and credible evidence, the Director has no basis for rejecting that determination.

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who is able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). See also Potente v. County of Hudson, 378 N.J. Super. 40, 49 (App. Div. 2005). Applying the interest rates set forth in R. 4:42-11, the Director awards Carpenter prejudgment interest on the back pay award through June 1, 2012, in the amount of $9,287. Based on the 2012 interest rates, a per diem of $7.49 shall be applied until payment is received.

c. Statutory Penalty

The LAD states that any person who violates any of its provisions "shall" be liable, in addition to any other remedies, for certain statutory penalties payable to the State Treasury. N.J.S.A. 10:5-14.1a. The ALJ assessed a $10,000 penalty, which is the maximum penalty for a first

violation of the LAD. Ibid.

After a review of the record, the Director concludes that the penalty is appropriate under the circumstances. Because punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the civil penalty serves an admonitory or deterrent purpose in this case. The egregious nature of the harassment, the employer's failure to take corrective action, and the retaliatory discharge warrant a substantial penalty to vindicate the public interest.

d. Counsel Fees

A prevailing party in a LAD action may be awarded reasonable attorney fees. N.J.S.A. 10:5-27.1. Fees should ordinarily be awarded unless special circumstances would make a fee award unjust. Hunter v. Trenton Housing Auth., 304 N.J. Super. 70, 74-75 (App. Div. 1997). The Supreme Court has held that to be compensable, the time expended must be supported by a certification of services that is sufficiently detailed to allow meaningful review and scrutiny, and must include more than a raw compilation of hours. Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995). The Court contemplated that fee applications would generally be supported by contemporaneously recorded time records, and where such records are not available, reconstructed time records should be scrutinized with meticulous care to ensure that the hours expended are reasonable. Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 367-68 (1995).

Here, the ALJ awarded $47,476.50 in attorney fees based on a December 2, 2011, certification of the prosecuting deputy attorney general, attesting that she devoted a total of 306.3 hours on this matter, and that the Division of Law's hourly rate for an attorney with her level of experience is $155.

The Director finds that an award of attorney fees for prosecuting this case serves the public interest. Counsel's certification is sufficient to support her hourly rate. However, the certification provides insufficient information to permit the required assessment of the reasonableness of the

provides insufficient information to permit the required assessment of the reasonableness of the time expended in prosecuting this case. Accordingly, the record will be held open for 30 days for supplemental submissions regarding counsel fees. Within 20 days, the DAG shall file with the DCR and serve on CBM a certification with time records attached, or a certification providing similar information in sufficient detail to permit review of the time expended. CBM shall have 10 days to file and serve a reply.

ORDER

For the reasons discussed above, the Director concludes that Respondent C.B.M., Inc., subjected Complainant Carl Carpenter to unlawful discrimination and reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Therefore, the Director orders as follows:

1. Respondent and its agents, employees, and assigns shall cease and desist from doing any act prohibited by the LAD.

2. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the DCR a certified check payable to Complainant in the amount of $178,767, as compensation for his backpay with pre-judgment interest and compensatory damages.

3. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the DCR a certified check payable to "Treasurer, State of New Jersey," in the amount of $10,000 as a statutory penalty.

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

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

calculating amounts due for counsel fees. Complainant shall file with the DCR and serve on Respondent, within 20 days of this order, a detailed certification of time expended. Respondent shall have 10 days to file and serve a reply.

DATE: 6-1-12

CRAIG SASHIHARA, DIRECTOR
NJ DIVISION ON CIVIL RIGHTS