Delores Ann DeLucca,
Petitioner,

v.

Lakeside Kennel & Cattery,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

OAL DKT. NO LID 14707-16
AGENCY DKT. NO. DS-680
(ON REMAND LID 15526-15)

Issued: January 28, 2019

Petitioner, Delores Ann DeLucca (DeLucca or petitioner), filed a complaint with the Department of Labor and Workforce Development alleging that respondent, Lakeside Kennel & Cattery (Lakeside or respondent), had discriminated against her with regard to her employment as a part-time groomer in violation of N.J.S.A. 34:15-39.1. Specifically, petitioner alleged that after having received medical treatment at a hospital for an injury suffered at work – a dog bite, which occurred while petitioner was grooming a dog – she was told by both the owner of Lakeside, Sharon Newcomb, and the business' manager, Sandra Pesina, that she should not have informed the hospital that the injury had occurred in the course of her employment, because that would result in an increase in Lakeside's workers' compensation premiums. Petitioner alleged that when she sought to return to work after a two-day absence immediately following the work-related injury she was initially told that she would be required to present a doctor's note before being permitted to return and then, in response to a follow-up inquiry, was informed the next day that no note was necessary; that there was no need for petitioner to return, since there was no work for her. Petitioner stated that for several weeks following this exchange, she contacted Lakeside to inquire as to whether there was any work for her and was told that there was not. Petitioner then alleged that approximately one month later, while driving past Lakeside's establishment, she saw a "Help Wanted Groomer" sign posted out front, at which point she concluded definitively that she had been "pushed out of [her] job," in retaliation for having reported her injury to the hospital as a work-related injury. The

matter was transferred to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Following a hearing, Administrative Law Judge John S. Kennedy (ALJ) concluded that petitioner's termination had not violated N.J.S.A. 34:15-39.1, "because it was for reasons unrelated to her disabling condition or to her seeking workers' compensation benefits." The ALJ explained:

> In this case, there arises a question of the seriousness of the incident of June 11, 2015, when petitioner was bitten by a dog. It does not appear to be serious enough to justify discipline. However, it is clear that petitioner did not file a claim against respondent for Workers' Compensation and there is no evidence that she was terminated as a result of a disabling condition.

Based on the foregoing, the ALJ issued an initial decision recommending that petitioner's discrimination complaint be dismissed. Upon *de novo* review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by petitioner, the Commissioner remanded the matter to the OAL for issuance by the ALJ of a supplemental decision setting forth the following:

1. A factual discussion of the events of June 11, 2015, addressing the conflict between the recollections of petitioner and Ms. Pesina,

2. A determination of the credibility of petitioner and Ms. Pesina relative to their conflicting accounts of the events of June 11, 2015,

3. Findings of fact and conclusions of law relevant to the following central issues:

    a. Whether petitioner has established that she either filed a workers' compensation claim or attempted to claim workers' compensation benefits,
    b. Whether petitioner has established that she was discharged or in any other manner discriminated against as to her employment with Lakeside because she either filed a workers' compensation claim or attempted to claim workers' compensation benefits,
    c. In the event that petitioner has established both a. and b., whether Lakeside has articulated a legitimate, nondiscriminatory reason for its decision not to continue petitioner's employment following the events of June 11, 2015, and
    d. In the event that Lakeside has established c., whether petitioner has established that the articulated, legitimate, nondiscriminatory reason for Lakeside's decision not to continue her employment following the events of June 11, 2015 was a pretext for discrimination on the basis that she had either filed a workers' compensation claim or had attempted to claim workers' compensation benefits.

4. The reasoning underlying the ALJ's conclusions and disposition in this matter.

In so ordering, the Commissioner explained that there is a standard for the establishment of *prima facie* case for unlawful retaliatory discharge arising from a workers' compensation claim, namely, that petitioner must show: (1) that she made *or attempted to make* a claim for workers' compensation; and (2) that she was discharged in retaliation for making that claim. See Galante v. Sandoz, Inc., 192 N.J. Super. 403, 407 (Law Div. 1983), aff'd 196 N.J. Super 568 (App. Div. 1984), appeal dismissed, 103 N.J. 492 (1986). As to what constitutes an attempt to claim workers' compensation benefits, the Commissioner added that the court's reasoning in Carracchio v. Alden Leeds, 223 N.J. Super. 435 (App. Div. 1988), is instructive. In relevant part, that court explained that when an employee sets into motion the filing of a workers' compensation claim by "notifying his employer of his injury and inquiring as to the procedure to be followed to have his hospital bills paid," those actions constitute a claim or attempt to make a claim for workers' compensation benefits within the meaning of N.J.S.A. 34:15-39.1. Carrachio, supra, at 443. Also instructive, explained the Commissioner, is the reasoning of a Texas court of appeals, which construed the meaning of a statute similar to N.J.S.A. 34:15-39.1, in Palmer v. Miller Brewing Company, 852 S.W.2d 57 (1993). In that case, the relevant statute stated that, "[n]o person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim [for workers' compensation], hired a lawyer to represent him in a claim, instituted, or cause to be instituted in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding." The court explained that because the purpose of this statute is to protect persons who are entitled to benefits under the Workers' Compensation Law and to prevent them from being discharged by reason of taking steps to collect such benefits, the article within the Texas law cited above could be violated even when the employee was fired before filing a claim for compensation, so long as the evidence shows that the employee took steps toward instituting a compensation proceeding. In this regard, the court instructed that, "[t]he act of informing the employer of the injury sufficiently institutes a compensation proceeding and when this action is shown there is a fact question as to whether there is a causal connection between the compensation proceeding and termination." Palmer, supra, at 61. The court in Palmer also explained that the employee has the burden of establishing this causal link, then the employer must rebut the allegations by showing a legitimate reason for the discharge. Id. Finally, the Commissioner instructed that the burden-shifting approach famously announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which is traditionally utilized to evaluate a claim for unlawful discrimination, allows an articulated legitimate, nondiscriminatory reason for discharge to be rebutted by a showing that the employer's articulated nondiscriminatory reason was not the true reason for the employment decision, but was merely pretext for the prohibited discrimination.

Based on the foregoing, the Commissioner concluded in his remand decision that the ALJ had been incorrect when he based his dismissal of petitioner's complaint on his

conclusion that, "petitioner did not file a claim against respondent for workers' compensation *and there is no evidence that she was terminated as a result of a disabling condition*" (emphasis added). That is to say, added the Commissioner, N.J.S.A. 34:15-39.1 says nothing of requiring an employee to establish as an element of her discrimination claim that she was terminated as a result of a disabling condition. Rather, again, the law states that it is unlawful for an employer to discharge or in any other manner discriminate against an employee because the employee has claimed *or attempted to claim* workers' compensation benefits.

On remand, the ALJ conducted an additional day of hearing and issued a new initial decision. In the post-remand initial decision, the ALJ found that petitioner had established a *prima facie* case of discrimination, because she had proved that she "did notify her employer of her injury and inquire as to the procedure to be followed to have her hospital bills paid," and therefore, had attempted to file a claim; she had proved that she was performing the job of part-time groomer at a level that met the employer's legitimate expectations, was removed from the position, and the employer sought another to perform the same work after she was removed. Regarding the next step in the discrimination analysis, namely, whether respondent had established a legitimate, non-discriminatory reason for petitioner's discharge, the ALJ found the following:

> Petitioner's assertion that she was terminated from her employment in retaliation, however, is understandable but is not supported by the findings of facts [sic] in this case. Lakeside offered her (petitioner) continued employment after the incident albeit in a different position.[1] After considering the additional testimony from Newcomb regarding the manner in which petitioner attempted to groom the Chow (un-muzzled and on the floor, as opposed to muzzled and on a grooming table), which was known to be difficult and prone to biting, the employer's explanation for why petitioner was not assigned additional grooming appointment [sic] is reasonable. Therefore, I CONCLUDE that there exists a legitimate, non-discriminatory reason for the adverse action.

Finally, the ALJ rejected any notion that respondent's stated non-discriminatory reason for the adverse employment action was, in fact, pretext for prohibited discrimination, concluding that the true reason for petitioner's discharge from the position of part-time groomer was the manner in which petitioner had attempted to groom the dog that bit her on June 11, 2015 and was not due to her having filed a claim or having attempted to file a claim for workers' compensation. Consequently, the ALJ issued a post-remand initial decision recommending that petitioner's discrimination complaint be dismissed. No exceptions to the post-remand initial decision have been filed.

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[1] This finding is based on testimony offered during the hearing on remand to the effect that following the June 11, 2015 incident petitioner was offered front desk work by respondent, but no additional work as a groomer.

While an agency head need not defer automatically to the findings of an ALJ, one cannot ignore the ALJ's supported conclusions. P.F. v. N.J. Division of Disability, 139 N.J. 522, 538 (1995). Indeed, due deference must be afforded to the opportunity of the trier of fact to observe the parties and the witnesses whom they present on their respective behalves. See, e.g., Matter of Tenure of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), cert. den., 121 N.J. 615 (1990). In the instant matter, although the ALJ found that petitioner had successfully established a *prima facie* case of discrimination, he ultimately concluded, based on his observation of the parties and the witnesses presented by the parties, that any actions taken by management which had adversely affected petitioner were motivated by management's dissatisfaction with petitioner's work performance, not by discrimination.

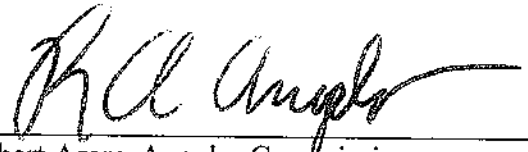
Upon *de novo* review of the record, and after consideration of the ALJ's post-remand initial decision, I hereby accept and adopt the findings of fact and conclusions contained in the ALJ's post-remand initial decision and the recommendation that the petitioner's complaint of discrimination be dismissed.

ORDER

Therefore, it is ordered that the discrimination complaint of Delores Ann DeLucca be dismissed.

This is the final administrative decision in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE COMMISSIONER,
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT



Robert Asaro-Angelo, Commissioner
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