

STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS  
OAL DOCKET NO. CRT 17496-16  
DCR DOCKET NO. PL11NB-65315

Tatiana Hanz, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 Dental Health Associates, )  
 )  
 Respondent. )

Administrative Action

**FINDINGS, DETERMINATION  
AND ORDER**

Jeanne Hainz Levin, Esq., for Complainant

Harry J. Levin, Esq. (*Levin Cyphers*, attorneys) for Respondent

BY THE DIRECTOR:

This matter is before the Director of the New Jersey Division on Civil Rights (DCR) following an application for attorney's fees and costs.

On May 19, 2015, Mercer County resident Tatiana Hanz (Complainant) filed a verified complaint with DCR alleging that during a dental appointment at Dental Health Associates (Respondent) in Hamilton, she and her daughter were harassed because one of the practice's employees perceived them to be Russian. Her complaint alleged that Respondent violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, which prohibits places of public accommodations from discriminating against patrons based on their actual or perceived national origin. N.J.S.A. 10:5-12(f).

Respondent denied the allegations of discrimination in their entirety. During DCR's ensuing investigation, Complainant asked that the matter be transmitted to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 10:5-13 and N.J.A.C. 13:4-11.1(c). Accordingly, the case was filed with OAL on December 14, 2015, and assigned to an administrative law judge (ALJ) on January 8, 2016.

On August 18, 2016, the ALJ issued an initial decision recommending that the complaint be dismissed without a hearing.<sup>1</sup> After reviewing the initial decision and the record, including Complainant's exceptions and Respondent's reply, the DCR Director "remand[ed] this case for a hearing on Complainant's LAD claims, subject to any procedural orders or sanctions that may be imposed by the OAL Director." See Hanz v. Dental Health Assoc., Findings, Determination & Order, Nov. 14, 2016, p. 6.

The OAL scheduled a hearing for May 5, 2017. On that date, Complainant's attorney told the ALJ that her client filed a related complaint in the Superior Court of New Jersey, Special Civil Part. After a discussion between the parties' attorneys and the ALJ in chambers, Complainant withdrew her DCR complaint. Respondent requested counsel fees. The ALJ kept the record open for a fee application.

On June 2, 2017, Respondent filed an application seeking attorney's fees and costs of \$24,834.75.<sup>2</sup>

On June 16, 2017, Complainant filed opposition to the fee application.

On June 23, 2017, the ALJ issued an initial decision accepting the withdrawal of the complaint. The ALJ wrote in part:

Complainant, if she had been successful, would have been entitled to counsel fees on application to the [DCR]. Correspondingly, if the respondent had been successful, he would be considered the prevailing party. Accordingly, the complainant's withdrawal after opening her case compels this tribunal to view respondent's application as a determination to be considered the prevailing party. I FIND THIS AS FACT.

See Hon. Joseph A. Ascione, ALJ, Initial Decision, Jun. 23, 2017, p. 3. The ALJ concluded, "The [DCR] may review the application for attorney's fees and . . . determine how much, if any, should be granted." Ibid.

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<sup>1</sup> Complainant appeared on the August 10, 2016 hearing date, informed the ALJ that her attorney was unable to attend because her child was ill, and asked to proceed without counsel. The ALJ did not allow Complainant to testify that day, and did not reschedule the hearing. On August 16, 2016, the ALJ received a letter from Complainant's attorney explaining the emergency. Citing Complainant's attorney's failure to comply with a pre-hearing order and failure to contact the ALJ or her adversary on the hearing date, the ALJ closed the record on August 17, 2016.

<sup>2</sup> The fee application appears to include time that counsel devoted to addressing a matter filed with the State Board of Dentistry. Fees awarded to under the LAD are limited to LAD matters.

## The Parties' Exceptions & Replies

Complainant's attorney told DCR that Complainant filed the Special Civil Part action without her input. The attorney claimed that she made clear during her conference with the ALJ and Respondent's counsel that she wanted to ensure that any decision in this matter would not have a preclusive effect on the Special Civil Part action, which included non-LAD claims. (Complainant's Exceptions, Jul. 17, 2017, p. 3.)

Complainant takes exception to the ALJ's finding that Respondent is a prevailing party in this case. She argues that once she withdrew her complaint, the ALJ lost jurisdiction to address the issues in the case and, therefore, did not have the ability to declare Respondent to be the prevailing party. Complainant also argues that the ALJ's ruling violated due process because the parties were told only that the ALJ would "keep the matter open to accept an application for legal fees." She argues that if she had known that the ALJ planned to rule on prevailing party status, she might have decided to continue her case at OAL, rather than withdraw.

Complainant also argues that Respondent has not shown that her complaint was brought in bad faith, and that the requested fees are unreasonable given Complainant's limited income, the health problems of her and her daughter, and the disparity in income between Complainant and Respondent.

Respondent filed a reply on July 25, 2017. It argues that during the conference in chambers on the hearing date, the ALJ "stated that if [Complainant] withdrew the Claim, he would make a determination that the Respondent was the prevailing party" and that Complainant's counsel "acknowledged that the Respondent would be deemed prevailing." (Certification of Harry Jay Levin, Esq., Jul. 24, 2017, ¶19.)<sup>3</sup> Respondent argues that the ALJ had jurisdiction to decide prevailing party status because the Uniform Administrative Procedure Rules permit an ALJ to "state the circumstances of the withdrawal on the record" in an initial decision. N.J.A.C. 1:1-19.2.

Respondent argues that Complainant acted in bad faith, and that the requested fees are reasonable. Respondent argues that evidence of Complainant's financial hardship should not preclude a fee award in this case, even if it might warrant a reduction in the amount, and also argues that Complainant's attorney should be personally liable for the fee award.

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<sup>3</sup> Neither party provided DCR with a transcript of the ALJ's ruling or his statements on the hearing date.

Complainant filed *pro se* submissions dated June 30, 2017 and July 28, 2017. While Complainant's dispute of specific charges listed in Respondent's fee application would be relevant if DCR were to award fees to Respondent, the remainder of the *pro se* submissions do not constitute valid exceptions pursuant to N.J.A.C. 1:1-18.4(b), and have not been considered in this decision.

By order dated August 9, 2017, the time for DCR to issue a final decision was extended to September 21, 2017.

### **The Director's Decision**

The LAD provides that "the prevailing party may be awarded reasonable attorney's fee as part of the cost, provided however that no attorney's fee shall be awarded to the respondent unless there is a determination that the complainant brought the charge in bad faith." N.J.S.A. 10:5-27.1.

"Bad faith," in the context of fee awards under the LAD, is "a reckless disregard or purposeful obliviousness of known facts." Michael v. Robert Wood Johnson Univer. Hosp., 398 N.J. Super. 159, 165-66 (App Div. 2008), certif. den'd, 195 N.J. 420 (2008) (citing New Jersey Title Ins. Co. v. Caputo, 163 N.J. 143, 155 (2000)). It requires more than a mere showing that a party has not been able to marshal sufficient evidence to proceed to trial. Id. at 166.

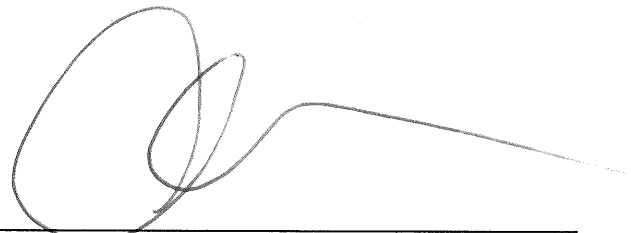
Here, Complainant filed her complaint with DCR *pro se*, alleging that an employee of the dental practice referred to her and her daughter with the slur, "stupid Russian." In some circumstances, a single slur can be sufficient to violate the LAD. See, e.g., Taylor v. Metzger, 152 N.J. 490, 501-502 (1998); Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 217 (App. Div. 2000). And a place of public accommodation—such as a dental practice—need not explicitly deny service to a patron to violate the LAD. Courts have found that a business owner or employee who humiliates a patron or discourages a patron from returning based on a protected characteristic, whether accurate or perceived, is also in violation of the LAD. See, e.g., Turner v. Wong, 363 N.J. Super. 186, 212 (App. Div. 2003); Franek, supra, at 216-217.

Respondent disputes that its employees made any derogatory comment regarding actual or perceived national origin. Thus, the case presents a factual dispute, and it would be the ALJ's role to make credibility determinations based on live testimony taken under oath at a hearing. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). It is undisputed that Complainant withdrew her complaint after the attorneys presented their opening statements, but before Complainant or any other witnesses testified.

Respondent has not provided DCR with any evidence, from her attorney's opening statement or otherwise, demonstrating that Complainant knowingly or recklessly made false allegations in filing her complaint. In other words, the complaint states a viable claim of discrimination under the LAD, and after a careful review of the record, the Director finds no evidence that Complainant filed this complaint in bad faith.

Accordingly, there is no basis to award attorney's fees to Respondent under the LAD. N.J.S.A. 10:5-27.1. In view of the above, the Director does not need to determine (i) whether the ALJ had jurisdiction to determine prevailing party status, or (ii) the reasonableness of the requested fees.

DATE: 9-20-17



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Craig Sashihara, Director  
NJ DIVISION ON CIVIL RIGHTS