



STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EG14HB-63765
OAL DOCKET NO. CRT 01938-14

J.H.,

Complainant,

v.

Samuel E. Bass, Esq.,

Respondent.

Administrative Action

FINAL DECISION & ORDER

APPEARANCES:

J.H., Complainant, *pro se*.

Samuel E. Bass, *pro se*.

BY THE DIRECTOR:

This matter comes before the Director of the New Jersey Division on Civil Rights (DCR) by way of an initial decision from an administrative law judge (ALJ) granting summary judgment in an employment discrimination case.¹

J.H. (Complainant) alleged that she was fired from her job as a legal secretary at the Newark law firm of Freeman & Bass because of her disabilities, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Samuel E. Bass, Esq. (Respondent) denied the allegations of discrimination in their entirety. He claimed that he was unaware of Complainant's disabilities, and that Complainant was discharged for legitimate, non-discriminatory performance reasons such as drinking alcohol during the workday, failing to complete assigned tasks, and taking

¹ The complaint was filed with the DCR on April 9, 2013. However, J.H. asked that the matter be transmitted to the Office of Administrative Law (OAL) for an administrative hearing without a probable cause determination. Accordingly, DCR transmitted the case to the OAL as a contested matter on or around February 18, 2014, pursuant to N.J.A.C. 13:4-11.1. (ID1-2)

unauthorized leave. (ID1-2)

It is settled that summary judgment must be granted when the “pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged” when the facts are viewed in the light most favorable to the non-moving party. R. 4:46-2; N.J.A.C. 1:1-12.5.

The non-moving party “in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b). An ALJ’s function is not to weigh the evidence and determine the truth of the matter but to “determine whether there is a genuine issue for trial.” Brill v. Guardian Life Ins. 142 N.J. 520, 540 (1995). An agency head is bound by that same standard. Cf. Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004) (noting that appellate and trial courts must employ the same standard of review when evaluating summary judgment matters).

As the ALJ correctly noted, to establish a *prima facie* case of illegal discharge based on disability discrimination, the plaintiff must come forward with evidence showing that he/she is a person with a disability—or perceived as having a disability—and was fired because of that disability or perception despite performing the essential functions of the job at a satisfactory level. (ID6) (citing Victor v. State, 203, N.J. 383, 410 (2010)). That burden has been described as “rather modest: it is to demonstrate . . . that plaintiff’s factual scenario is compatible with discriminatory intent—i.e., that discrimination could be a reason for the employer’s action.” Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005).

In this case, Respondent submitted signed statements characterized as affidavits from himself and three employees in support of the position that Complainant was discharged for non-discriminatory reasons including concerns about her stealing time, lack of production, and disruptiveness.

For example, Kamla Narine who purportedly served as the firm’s “bookkeeper/staff accountant” for approximately 31 years, stated that she reported Complainant for taking “long

leaves from the office on a daily morning basis without clocking out of the office.” Elsewhere, Narine noted that at one point, Complainant became “verbally abusive and physically threaten[ing]” to her and was placed on probation.

Managing Attorney Michael Bass wrote that he “observe[d] extensive absences of [Complainant] from the office when she did not have the time clock punched,” and that she was “admonished frequently” for her lack of productivity.

Attorney Joel Solow wrote that Complainant’s “erratic behavior generated ongoing complaints and admonishment” and that she was ultimately discharged for performance reasons.

Respondent recounted returning from court mid-morning and seeing Complainant enter the building with shopping bags and appearing to be intoxicated. He wrote that when he confronted Complainant, she “admitted that she was leaving the office” without clocking out, and further “admitted that she drank alcohol during the workday.” He described the incident between Complainant and Narine as a “serious episode of upset in the office.” He wrote:

[Complainant] is much heavier and larger and more physically aggressive than Kamla Narine who is of a slight thin physical build. [Complainant] had verbally attacked and threatened Kamla Narine in an effort to have Kamla Narine issue a check to [her] as an advance on her pay. . . . I called a meeting with [Complainant], Joel Solow, Kamla Narine and probably James Schmieder and Rui Bass. [Complainant] admitted that she had attempted to force an irregular advance of pay and that she had become loud, threatening, profane and abusive toward Kamla Narine who is located in a relatively small office and would be subject to physical attack.

In Complainant’s response to the motion for summary judgment, she offered nothing to rebut the allegations regarding her poor work performance, lack of productivity, leaving the office without clocking out, physically threatening a co-worker, or drinking alcohol during working hours. Instead, she produced a doctor’s note stating, “[J.H.] is a patient of mine with History of Obstructive Sleep Apnea on CPAP machine for Sleep. She is diagnosed since 2011.” See Samuel Banigo, M.D., Prescription Blank, Jan. 2, 2014. Complainant argued that she “personally gave Rui Bass the doctor’s note,” and that because Respondent “purports to have knowledge of everything that goes on within the office,” it would be “inconceivable that he should not have been aware of

[Complainant's] illness." See Complainant, Letter Memorandum in Opposition to Motion for Summary Judgment, Oct. 16, 2014, p. 2.

The ALJ was critical of Respondent's moving papers on the one hand, while openly affording "more lenience" to Complainant as a "non-attorney *pro se* party," on the other. (ID7) Nonetheless, the ALJ granted the motion. In so doing, the ALJ found that the note did not establish that Complainant was a person with a disability for purposes of the LAD. (ID8). Moreover, the ALJ observed that the note was "dated after she was terminated from employment," thereby questioning how Complainant could have presented it to Rui Bass during the course of her employment. (ID8) (emphasis in original). The ALJ also found that there was no evidence that Complainant "provided any notice to [Respondent] that she had a disability . . . [or ever] requested an accommodation for that disability," (ID 9) thereby questioning how Respondent would have any reason to know that she had a disability.

Complainant did not file any exceptions to the ALJ's motion decision.


The Director hereby affirms. Even accepting Complainant's argument that she has disabilities as defined by the LAD, and that Respondent was aware of her disabilities, dismissal is warranted because the Supreme Court has declared that to defeat a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits . . . setting forth specific facts showing that there is a genuine issue for trial." G.D. v. Kenny, 205 N.J. 275, 317 (2011) (quoting R. 4:46-5(a)); see also N.J.A.C. 1:1-12.5(b) (requiring non-moving party to submit a "responding affidavit" that "set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.") Here, Complainant failed to respond to Respondent's signed statements regarding her workplace conduct with any specific facts to create a genuine issue of material fact as to whether she was performing the essential functions of the job at an acceptable level. She offered nothing to

challenge those assertions in Respondent's moving papers, nor did she offer anything to support her allegation that she was treated less favorably than co-workers who do not have disabilities.

Because the Complainant has failed to meet her *prima facie* showing of disparate treatment based on disability, the Director affirms the ALJ's dismissal of the verified complaint in its entirety with prejudice.

DATE:

12-3-14



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS