

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 9834-10
DCR DOCKET NO. ET08MB-60959
EEOC CHARGE NO. 17E 2010-00018

STEPHEN LORIG,

Complainant,

v.

GREEN HILL MANOR, LLC,

Respondent.

**ADMINISTRATIVE ACTION
FINDINGS, DETERMINATION
AND ORDER**

APPEARANCES:

John M. Mills, III, Esq., for the complainant (Mills and Mills, attorneys)

Peter W. Till, Esq., for the respondent

BY THE DIRECTOR:

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Stephen Lorig (Complainant), alleging that Green Hill Manor, LLC (Respondent) subjected him to unlawful discrimination based on disability when it terminated his employment, in violation of section 10:5-12(a) of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. On January 26, 2012, the Honorable Lisa James-Beavers, Administrative Law Judge (ALJ), issued an initial decision dismissing Complainant's complaint and concluding that Respondent did not engage in unlawful employment discrimination.¹ The Director independently reviewed the record and adopts the ALJ's decision, as modified herein.

¹ Citations throughout this order to "ID" refer to ALJ James-Beavers' initial decision.

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PROCEDURAL HISTORY

On June 8, 2009, Complainant filed a verified complaint against Respondent alleging employment discrimination based on disability in violation of the LAD. ID-2 Specifically, Complainant alleged that he was terminated as superintendent of Respondent's apartment complex when Respondent refused to reasonably accommodate his fiancée's disability by not allowing her to keep a dog in the apartment she shared with Complainant. The apartment had been provided to Complainant as compensation for his employment. On June 30, 2010, Respondent filed an answer denying all allegations of discrimination. On August 24, 2010, the Division transmitted this matter to the Office of Administrative Law (OAL) at Complainant's request, pursuant to N.J.S.A. 10:5-13. See ID-2.

On May 13, 2011, Respondent filed a motion for summary decision. Ibid. Complainant responded by letter brief on May 18, 2011, opposing the motion and setting forth a counterstatement of facts. On May 23, 2011, Respondent filed a reply brief. The record closed on the deadline for Complainant to submit a reply brief, and the ALJ issued her initial decision on January 26, 2012, granting Respondent's motion and dismissing the complaint. Ibid. Neither party filed exceptions to the ALJ's decision.

THE ALJ'S DECISION

The ALJ stated that when considering a motion for summary decision, the facts must be viewed in the light most favorable to the non-moving party which, in this case, was the Complainant. Ibid. Respondent submitted a Statement of Facts in support of its motion for summary decision. The ALJ noted that because Complainant "neither objected to those facts nor submitted an alternate Statement of Facts," there was no material dispute as to the following statements and, accordingly, found them to be fact:

1. On September 1, 2007, Complainant was hired by Green Hill Manor as a Superintendent of the Green Hill Manor complex.

2. On September 1, 2007, Complainant and Respondent executed a "Superintendent Apartment Lease" agreement, which allowed Complainant to reside in the "Superintendent's Apartment" as part of his employment.
3. On the lease, Complainant listed himself, and his minor son and daughter as the only residents.
4. On December 3, 2008, Respondent's Head Superintendent, Sal Bracero, could not locate Complainant and went to look for him at his apartment. As Mr. Bracero approached the apartment, he observed Complainant walk out with a medium sized puppy on a leash. Mr. Bracero heard a female voice from inside the apartment yell at Complainant to return to the apartment.
5. Mr. Bracero told Complainant that it was too late and that he had already seen the dog and further stated that there was a "no pet" policy at the apartment complex.
6. Complainant responded that he was only watching the dog for his mother for a few weeks.
7. On December 3, 2008, Mr. Bracero delivered a letter to Complainant demanding that the dog be removed from the apartment as soon as possible.
8. Later that day, Ms. Doherty, Complainant's alleged fiancé, proceeded to Respondent's management office and identified herself as a "tenant" of the complex.
9. At that time, Ms. Doherty submitted a letter from her physician, Indira Madapati, M.D., announcing that she benefited medically from having her pet dog.
10. Ms. Doherty filed a verified complaint against Respondent (DCR Docket No. HT08MW-60754), in which she also alleged violations of the LAD.
 - a. During the course of that investigation, Ms. Doherty admitted that the dog in question actually belonged to Complainant the entire time in question.
 - b. Ms. Doherty further indicated she was "uncomfortable" with the verified complaint she had filed against Respondent.
 - c. Ms. Doherty did not make a written request to withdraw her verified complaint, and she did not respond to any further correspondence or telephone messages from the DCR Investigator.
11. Respondent subsequently investigated and discovered that Ms.

Doherty had been residing with Complainant at his apartment for a few months.

12. At no time did Complainant advise Respondent that Ms. Doherty had moved into the apartment or take action to have her name added to the lease.
13. On December 10, 2008, Respondent terminated Complainant's employment and directed him to vacate the apartment by December 17, 2008.
14. Complainant vacated the apartment on or about January 30, 2009.

[ID-2-5].

The ALJ found the following set of facts submitted by Respondent to be "more argument than fact," and addressed the assertions accordingly.

15. Complainant's verified complaint charged Respondent with "unlawful employment discrimination" in violation of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.) and specifically within the meaning of N.J.S.A. 10:5-4 and 10:5-4.1, including but not limited to 10:5-12(a).
 - a. The charge is solely derivative of Ms. Doherty purportedly belonging to a protected class and the lack of reasonable accommodations provided to her in connection with her disability.
 - b. However, Ms. Doherty was not identified as a resident of the Green Hill Manor, by either Complainant or the lease agreement; and
 - c. Ms. Doherty has admitted and indicated, without dispute, that the pet dog was not hers but rather Complainant's pet dog.

[ID-5].

The ALJ noted that although Complainant did not expressly object to Respondent's statement of facts, he asserted the following counterstatements in his opposition to Respondent's motion for summary decision:

1. Complainant had the right to have Ms. Doherty reside with him.
2. Ms. Doherty did in fact reside with complainant for a number of months prior to the eviction.

3. Notwithstanding respondent's assertion, the record reflects that the dog in question was in fact a "service dog" prescribed for Ms. Doherty by Dr. Indira Madapati, M.D.
4. Ms. Doherty was a member of a protected class by virtue of having a mental illness or disability.
5. Complainant disputes Respondent's assertion that Ms. Doherty had disclaimed ownership of the therapy dog.

[Id-5-6].

The ALJ found that the record supported the second counterstatement and therefore found as fact that Ms. Doherty resided with Complainant for a number of months prior to the eviction. The ALJ found the fifth counterstatement to contradict with Respondent's Statement 15c. Accordingly, Her Honor declined to find as fact that Ms. Doherty had admitted that the dog was not hers. ID-6. The ALJ did not accept Complainant's remaining counterstatements (i.e., one, three, and four) as fact for purposes of the initial decision. ID-7-8.

The ALJ recognized that the rules governing motions for summary decision in an OAL matter are set forth at N.J.A.C. 1:1-12.5, which mirrors the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). ID-6. The determination of whether to grant summary decision should be based on the papers presented, along with any affidavits filed in support of the application. ID-6 (citing N.J.A.C.1:1-12.5(b)). For the non-moving party to prevail, responding affidavits must be filed that show there is a genuine issue of material fact. ID-6. A motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." ID-6-7 (quoting Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995)). To avoid summary judgment, the non-moving party must

produce legally competent facts essential to proving an element of its cause of action. ID-7 (citing Brill, supra, 42 N.J. at 536-37). Even if the non-moving party can produce some evidence, courts must grant summary judgment if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” ID-7 (quoting Brill, supra, 42 N.J. at 536).

The ALJ discussed the substantive legal standards governing Complainant’s claim of employment discrimination based on disability. Her Honor found that in order to establish the “basic elements of a prima facie case of discriminatory termination based on disability,” a complainant must establish that (1) he had a disability within the meaning of the law; (2) he was performing his job at a level that met the employer’s legitimate expectations; (3) he nevertheless was terminated; and that (4) the employer sought someone else to perform the same work. ID-9 (citing Maher v. NJ Transit Rail Operations, Inc., 125 N.J. 455, 480-81 (1991); Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 382 (1988); Clowes v. Terminix Int., Inc., 109 N.J. 575, 597 (1988)).

In this case, Respondent argued that Complainant failed to satisfy the first prong because Complainant did not have a disability and his charge of discrimination was solely derivative of his relationship with Ms. Doherty whom, according to Complainant, belonged to a protected class. ID-9-10. The ALJ found that argument to be persuasive. The ALJ found that the Complainant failed to demonstrate that he “qualifie[d] as an individual with a disability, or [was] perceived as having a disability, as that has been defined by statute.” ID-10 (quoting Victor v. State, 203 N.J. 383, 410 (2010)). In particular, the ALJ stated that it was “undisputed that Complainant [did] not have a disability,” and that any supposed derivative claim failed because “Ms. Doherty was not a legal resident of Green Hill Manor since he did not tell respondent that she was living there and she was not on the lease.” ID-10.

The ALJ reasoned that even if Ms. Doherty had been a legal resident, the Complainant failed to show that she possessed the requisite disability. The ALJ stated that Dr. Madapati's note was mere "hearsay" and did not support the claim that Ms. Doherty suffered from a mental illness, disability, or any other condition requiring a specially trained dog. The ALJ stated:

The prescription, as best as one can discern, sets forth, "This is to certify that Ms. Lauren Doherty is under my medical care and to the best of my knowledge, I feel that having the pet dog has (illegible) facilitating medical prescription." Complainant calls it a prescription, but the language "I feel" is not prescriptive and did not indicate medical necessity . . . There is no indication that Ms. Doherty even has a condition requiring a specially trained dog, much less a specification of what that condition is . . . There is no mention of her having a mental illness or a disability of any kind.

ID-8. Her Honor stated that despite Dr. Madapati's characterization of the note as a certification, a "valid certification is not properly made on a prescription form." Ibid. The ALJ found that the note was "neither a prescription nor a certification," and that even if it were a prescription, it would "be for an unspecified pet dog." Ibid. Accordingly, the ALJ did not find that the animal was a service dog or that Ms. Doherty had a disability covered by the LAD. Ibid.

The ALJ concluded that even viewing Complainant's submissions in the most favorable light, the Complainant failed to present sufficient evidence to permit a rational fact finder to resolve the disputed issue in his favor. ID-9. The ALJ found that Complainant failed to establish that he was a member of a protected class, and failed to establish a derivative action based on his fiancée belonging to a protected class and needing reasonable accommodations. ID-10-11. Accordingly, the ALJ concluded that Complainant did not meet the burden of creating a "genuine issue as to any material fact challenged," and ordered that Respondent's motion for summary decision motion granted pursuant to N.J.A.C. 1:1-12.5. ID-11.

THE DIRECTOR'S DECISION

It is well-settled that summary decision is appropriate where there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5 (b); Brill, supra, 142 N.J. at 540 (noting that when considering such a motion, competent evidential materials must be viewed in the light most favorable to the non-moving party); National Transfer, Inc. v. NJDEP, 347 N.J. Super. 401 (App. Div. 2001). The moving party has the burden of “produc[ing] evidence showing the absence of a genuine issue of material fact” or that there is an absence of evidence to support the nonmoving party’s case. Celotex Corp. v. Catrett, 477 U.S. 242, 248 (1986). If the moving party meets this burden, the nonmoving party must set out specific facts “sufficient to establish the existence of [every] element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Id. at 322. To accomplish this, the nonmoving party “may not rest upon mere allegations, but rather must identify those facts of record which would contradict the facts identified by the movant.” Corliss v. Varner, 247 F. App’x 353, 354 (3d Cir. 2004). A motion for summary decision will be granted when the evidence is so one-sided that there is only one reasonable outcome. Brill, supra, 142 N.J. at 540.

The LAD prohibits employment discrimination based on, among other things, disability. N.J.S.A. 10:5-12 (a). Courts have recognized two “distinct categories of disability claims” under the LAD, namely, failure to accommodate an employee’s disability, and disparate treatment. Tynan v. Vicinage 13 of Super. Court, 351 N.J. Super. 385 (App. Div. 2002). To establish a prima facie case of failure to accommodate, a complainant must prove that he or she (1) had a disability within the meaning of the LAD; (2) was qualified to perform the essential functions of the job, with or without accommodation; and (3) suffered an adverse employment action because of the

disability. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 91 (App. Div. 1991) (citing Seiden v. Marina Assoc., 315 N.J. Super. 451, 465-66 (Law Div. 1998)).

The New Jersey Supreme Court has not considered whether the LAD extends its protections to persons discriminated in the employment setting because of their association with disabled persons. However, New Jersey courts have recognized associational rights in other contexts.² One federal court, after construing New Jersey case law, stated, “[T]his Court concludes that the New Jersey Supreme Court would hold that NJLAD bars employment discrimination based upon a person’s association with a person with a disability.” See Downs v. U.S. Pipe & Foundry Company, 441 F. Supp. 2d 661, 663 (D.N.J. 2006). Nor is there firm guidance concerning whether an employer must provide reasonable accommodation to an employee who has an association with an individual with a disability. See Erdman v. Nationwide Insur. Co., 582 F.2d 500, 510 (3rd Cir. 2009) (stating that under the ADA, there is “a material distinction between firing an employee because of a relative’s disability and firing an employee because of the need to take time off to care for the relative.”).

In this case, Complainant did not claim to have a disability covered by the LAD. Instead, he claimed that he was fired because of his association with his allegedly disabled fiancée. It is unnecessary to reach the issue of whether the LAD precludes employment discrimination against employees based on their association with disabled persons because, as the ALJ found, Complainant failed to establish that Ms. Doherty was actually disabled. The ALJ found that the note from Ms. Doherty’s physician did not amount to competent evidence that Ms. Doherty had a disability covered by the LAD, or

² See, e.g., O’Lone v. NJ Dep’t of Corr., 313 N.J. Super. 249 (App. Div. 1998). In that case, plaintiff, who was Caucasian, alleged that he was fired because he refused to stop dating an African-American woman. The Appellate Division vacated the trial court’s dismissal of plaintiff’s LAD claims. In so doing, the Appellate Court stated that “where the plaintiff is wrongfully discharged for associating with a member of a protected group, that is the functional equivalent to being a member of the protected group.” Id. at 255.

that the dog was necessary for the treatment of any supposed condition.³ Complainant also failed to establish that he required an accommodation to continue his employment. The Director finds no grounds on which to disrupt the ALJ's findings. In view of the above, the Director finds that the Complainant failed to establish a prima facie case of discrimination and, accordingly, concludes that the ALJ properly granted Respondent's motion for summary decision dismissing the complaint.⁴

³ When initially confronted, the Complainant insisted that he was "only watching the dog for his mother for a few weeks." Complainant subsequently asserted that "the dog in question was in fact a 'service dog' prescribed for Ms. Doherty." Complainant's reliance on the term "service dog," is misplaced. The LAD defines the term as follows:

"Service dog" means any dog individually trained to the requirements of a person with a disability including, but not limited to minimal protection work, rescue work, pulling a wheelchair, or retrieving dropped items. The term shall include a "seizure dog" trained to alert or otherwise assist persons subject to epilepsy or other seizure disorders.


N.J.S.A. 10:5-5dd. There was no allegation or evidence that the animal was a trained service dog or that Complainant ever represented it to be a trained service dog.

⁴ There may be yet another basis for dismissing the complainant, albeit one not raised by the parties. When Complainant filed the employment discrimination complaint, he and his fiancée also filed housing discrimination complaints with the Division captioned, Stephen Lorig v. Green Hill Manor, LLC, DCR Docket No. HT08MW60754, and Lauren Doherty v. Green Hill Manor, LLC, DCR Docket No. HT08MW60753. All three matters arose from the identical set of facts. DCR investigated the housing complaints separately and, on or around December 8, 2009, advised the parties that it found insufficient cause to credit their allegations of disability discrimination. Complainant and his fiancée elected not to appeal those final agency determinations. Instead, Complainant transferred the employment discrimination matter to the OAL. Under the circumstances, the instant claim may be precluded under principles of collateral estoppel and/or res judicata.

CONCLUSION

After a thorough review of the evidence and careful consideration of the applicable legal standards, and given that Complainant filed no exceptions to the initial decision, the Director adopts ALJ James-Beavers' thoughtful opinion dismissing the complaint.

Date: 3-12-12


Craig Sashihara, Director