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October 27, 2015

Carlo Marna
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Steven E. Braun, Esq.
15 Van Wickle Rd.
East Brunswick, NJ 08816

Re: Carlo Marna v. Clifton Village Pizzeria
OAL Docket No. CRT 14111-14
DCR Docket No. ER02AB-64498

Dear Messrs. Marna and Braun:

For the reasons set forth below, the initial decision that Administrative Law Judge (ALJ) Leslie Z. Celentano issued on August 24, 2015, is hereby affirmed.

On March 11, 2014, Carlo Marna filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Clifton Village Pizzeria (Respondent) refused to hire him based on his age, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On June 18, 2014, Respondent filed an answer denying the allegations of discrimination in their entirety. During the course of DCR's ensuing investigation, Marna asked that the matter be transmitted to the Office of Administrative Law (OAL) for an administrative hearing without a probable cause determination. Accordingly, DCR ceased its investigation and transmitted the case to the OAL on October 30, 2014, pursuant to N.J.A.C. 13:4-11.1.

On August 6, 2015, ALJ Celentano presided over a plenary hearing. After taking testimony and weighing the evidence, ALJ Celentano issued an initial decision on August 24, 2015, in which she recommended that the verified complaint be dismissed in its entirety with prejudice. (ID6). The ALJ notified the parties that if they wanted to challenge any portion of her initial decision, they could file written exceptions with the DCR. (ID7). Neither party filed exceptions to the initial decision. The DCR Director reviewed the initial decision and an audio recording of the hearing and now finds as follows.

Marna told the ALJ that he is former pizzeria owner who, on January 29, 2014, went to Respondent to interview for a cook position. He testified that he interviewed with a man who identified himself as John. Marna understood John to be the owner. He testified that John's first question was, "How old are you?" Marna testified that although he was sixty-seven years old, he replied that he was sixty. He testified that John replied, "You are too old, too fat. Get out. You can't work here." Marna testified that when he asked for an opportunity to prove himself, John repeated, "No. You can't work here. You are too fat and too old." At one point during the hearing, Marna pointed to Fisnik Gecaj, who was seated next to defense counsel, and said that he was "ninety percent" sure that Gecaj was the person who identified himself as John. On cross-examination, Marna acknowledged that during the DCR investigation, he described John as middle-aged, approximately 5' 2" to 5' 5", balding, and having a beard.

Respondent presented two witnesses: Fisnik Gecaj and Megi Qoshja.

Gecaj testified that he is 28 years old, 6' 1", and operates the pizzeria with his 27 year-old brother (who was not identified). He testified that he works at the pizzeria seven days a week. Gecaj testified that he has never had a beard, never met Marna, and never told Marna or anyone else that they were too fat or too old to work in the pizzeria. Gecaj testified that after posting a want-ad for a cook, he hired his father to help out. Gecaj provided his father's name—it was not John. There was no testimony about the father's age or weight.

Qoshja testified that she owns the pizzeria but does not work there full-time. She testified that she is Gecaj's wife, and that her role includes interviewing all applicants. She testified that no one at the pizzeria would ever tell a job applicant that they were too old or too fat to work there.

During closing arguments, Respondent's counsel noted that Gecaj was tall, clean shaven, with a "full set of hair," not middle-aged, and not named John. Counsel argued that Marna failed to prove that Gecaj or anyone else associated with the pizzeria ever met him and/or made the discriminatory statements alleged by Marna.

Marna conceded that he might have misjudged Gecaj's age but argued that Gecaj could have lied about his name during their encounter and shaved his beard in the interim. Marna noted that another person was working behind the counter at the time, and argued that Respondent could have produced that person at the OAL hearing to resolve the disputed issues. Marna acknowledged that he never returned to the pizzeria to determine who worked there or otherwise identify the person who made the ageist remark.

Based on the above, the ALJ found that Marna failed to establish a prima facie case of age discrimination. (ID6). In so doing, the ALJ noted:

[Marna] described the individual he knows as John as middle-aged, balding and between 5'2" and 5'4" tall. There is no one fitting that description in the employ of

respondent, and it is entirely unclear who the individual was that petitioner indicates said these things to him.

There is no evidence in the record that petitioner has met any of the remaining prongs necessary to establish a *prima facie* case; indeed, no one was ever hired to fill the advertised position.

[Ibid.]

The ALJ noted, “The mere assertion of discrimination without any evidence to support the claim does not create a *prima facie* case. It is not sufficient for a petitioner merely to allege that he is a member of a protected group and was rejected for a position to support an inference of illegal discrimination. . . . He merely alleges that he was the victim of age discrimination; he offers nothing tangible to support the assertion.” (ID6).

The Director affirms the ALJ’s initial decision. The ALJ correctly noted that the LAD makes it illegal to refuse to hire someone or otherwise discriminate against a current or prospective employee in the terms or conditions of employment based on age. N.J.S.A.10:5-12(a); Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999).

Although the Marna did not file any exceptions, the Director seeks to clarify one technical aspect, which does not affect the final outcome. The initial decision relies on the burden-shifting analysis that was first enunciated in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). That analysis is a three-stage process. The first stage requires a plaintiff to prove by a preponderance of the evidence four elements: (1) that he/she belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after the rejection the position remained open and the employer continued to seek applications for person of plaintiff’s qualifications. Anderson v. Exxon Co., 157 N.J. 483, 492 (1982).

That burden-shifting analysis is used to “prove an employer’s discriminatory intent through circumstantial evidence.” Sisler, supra, 157 N.J. at 209-10 (“The McDonnell Douglas test was formulated to compensate for the fact that direct evidence of intentional discrimination is hard come by.”) (emphasis in original). In this case, no such analysis is required because the Marna is relying on direct—not circumstantial—evidence of age discrimination, i.e., the allegation that the owner said that he would not hire Marna based on his age.

A Marna’s testimony is evidence. Although a complainant is not required to produce additional corroborating evidence to establish a *prima facie* showing, the absence of same may lead a fact-finder to conclude that the preponderance of the evidence standard has not been met. In this case, when the ALJ notes that Marna has not met his *prima facie* case, the Director understands the ALJ to be finding that Gecaj and Qoshja’s testimony was more credible than Marna’s testimony

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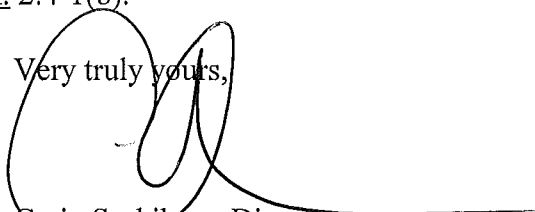
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based on the reasons set forth in the ALJ's initial decision. In short, the ALJ did not accept Marna's testimony.

In the course of evaluating the ALJ's findings and conclusions, the Director is guided by the New Jersey Administrative Procedure Act, which states that an agency head may not reject or modify an ALJ's findings of fact as to issues of credibility of lay witness testimony "unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c); S.D. v. Division of Med. Assist. and Health Services, 349 N.J. Super. 480, 485 (App. Div. 2002). That rule recognizes that it was the ALJ, and not the agency head, who heard the live testimony first-hand, and who was in a position to judge the witnesses' credibility. Clowes v. Terminix Int'l, 109 N.J. 575, 538 (1988). Such is true in this case. The Director did not observe the witnesses testify and finds nothing in the record from which to conclude that the ALJ's credibility assessments are somehow arbitrary, capricious, unreasonable, or unsupported by sufficient, competent, and credible evidence.

The LAD states that any person who is dissatisfied with a final order of an agency may appeal to the Appellate Division of the New Jersey Superior Court. N.J.S.A. 10:5-21. The New Jersey Court Rules provide that any such appeal must be filed within 45 days from the date of service of the decision or notice of the action taken. R. 2:4-1(b).

Very truly yours,



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

c: Hon. Leslie Z. Celentano
OAL Clerk