

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 11689-04
DCR DOCKET NO.: EJ06JK-49036-E

EDWARD M. MESA,)
)
 Complainant,) ADMINISTRATIVE ACTION
)
 v.) FINDINGS, DETERMINATION AND ORDER
)
 HUDSON COUNTY SHERIFF'S)
 DEPARTMENT,)
)
 Respondent.)
)

APPEARANCES:

D. Gayle Loftis, Esq., for the complainant.

Sean D. Dias, Esq. and Mitchell H. Levine, Esq. (Scarinci and Hollenbeck, attorneys),
for the respondent.

Brian O. Lipman, Deputy Attorney General (Zulima V. Farber, Attorney General of New
Jersey, attorney), for the Division on Civil Rights

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Edward M. Mesa (Complainant), alleging that the Hudson County Sheriff's Department (Respondent) subjected him to unlawful reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On February 9, 2006, the Honorable Jeffrey A. Gerson, Administrative Law Judge (ALJ), issued an initial decision dismissing Complainant's complaint. Having independently reviewed the record, the Director adopts the ALJ's decision, as modified herein.

PROCEDURAL HISTORY

On February 24, 2003, Complainant filed a verified complaint with the Division alleging that Respondent engaged in an unlawful reprisal against him in violation of the LAD. Specifically, Complainant alleged that Respondent denied him a retired officer's identification card to replace a card that had been lost or stolen, and that this denial was in reprisal for filing a prior discrimination complaint.

An answer was filed by Respondent on March 24, 2003, in which the Hudson County Sheriff contended that identification cards were issued only to active employees and that Complainant was not being treated differently from other retirees. After an investigation by the Division, a finding of probable cause was issued on July 29, 2004. Thereafter, the Director transmitted this matter to the Office of Administrative Law ("OAL") as a contested case on November 8, 2004.

Hearings were conducted before the ALJ on July 19 and 20, 2005. At the close of Complainant's case, Complainant filed a closing brief on or about September 2, 2005. Respondent filed its closing brief on or about September 9, 2005, and the record closed on or about September 13, 2005. After three extensions of time for issuing an initial decision, the ALJ issued his ID on February 10, 2006 dismissing the complaint. The ALJ's ruling was based in large part on the credibility of testimony given at the July 19 and 20 hearings, which he held did not indicate any intention to deprive Complainant of any right or to otherwise take reprisals against him.

On or about February 24, 2006, Complainant filed with the Division a letter requesting a two-week extension of time to file exceptions to the initial decision. On that same date, Respondent filed a letter opposing Complainant's request for an extension. On February 27, 2006, the Division granted Complainant's request for an extension of time to file exceptions until March 10, 2006. Complainant submitted exceptions to the initial decision on March 10, 2006. Respondent filed a reply to Complainant's exceptions on March 20, 2006. On March 21, 2006, Complainant filed a letter brief in response to Respondent's opposition. As there is no authority or allowance for such

submission, the contents of this letter brief will not be considered in this order. The Director was granted three extensions of time to issue his final order, and the final order is now due on August 10, 2006.

THE ALJ'S DECISION

THE ALJ'S FINDINGS OF FACT

The ALJ recounted the following undisputed facts. Complainant was employed by the Hudson County Sheriff's Office as a Sheriff's Officer in 1969. ID-2¹. In 1971, Complainant filed a charge of discrimination against Respondent alleging that he had been discriminated against on the basis of his national origin, Cuban, in violation of the LAD. ID-3. This charge was resolved by a Consent Order dated April 16, 1973, which contained the following language:

Complainant shall henceforth enjoy the rights, privileges and benefits pertaining to the title Sheriff [sic] Officer on the same terms and conditions applicable to all Sheriff [sic] Officers in the employment of the respondent. ID-3.

In 1986, Complainant suffered serious injuries after being assaulted by several municipal law enforcement officers. Accommodations were provided to Complainant as a result of these injuries. However, after a new Sheriff was sworn into office, these accommodations were eliminated and Complainant was compelled to retire on a disability pension. A second discrimination charge was filed by Complainant and resolved by a settlement agreement allowing his disability retirement in 1993. ID-3. At the time of his retirement, Complainant was issued a badge and identification card identifying him as a retired Sheriff's Officer. ID-2.

¹Hereinafter, "ID" refers to the initial decision issued on February 9, 2006; "Ce" refers to Complainant's exceptions to the initial decision; "Re" refers to Respondent's reply to Complainant's exceptions; "Tr1" refers to the transcript of the administrative hearing held July 19, 2005; and "Tr2" refers to the transcript of the administrative hearing held July 20, 2005.

At some time during 2002, Complainant appeared at the Hudson County Sheriff's Office and advised that his badge and identification card had been either lost or stolen from him and needed to be replaced. He spoke with Sheriff Joseph Cassidy, who had been sworn in subsequent to Complainant's retirement, and who after a short informal casual conversation told Complainant to come back to discuss the replacement of the badge and card. ID-3. At this time Sheriff Cassidy was not aware of the 1973 Consent Order. ID-5.

Complainant subsequently made several attempts to obtain a replacement badge and card with the Hudson County Sheriff's Office but was unsuccessful. On or about July 11, 2002, Complainant sent a letter to Sheriff Cassidy reiterating his version of the conversation and giving the Sheriff five days to respond to the letter and inform him as to whether a replacement badge and card would be issued. In this letter, Complainant indicated that he would be contacting the Division to activate the Consent Order and Decree previously entered into. ID-3.

Complainant did, in fact, contact the Division because on or about January 21, 2003, a letter was sent to Complainant by the Assistant Director of the Division, in which it was indicated that the State would not initiate proceedings in connection with the Consent Order referenced by Complainant in this matter. On or about June 21, 2004,² Complainant again wrote the Division and stated he was allowing ten days from the date of his letter for it to enforce the laws of the State of New Jersey. This letter was followed by another letter from Complainant to the Assistant Director on July 11, 2004, in which he again asked that the

²Despite some apparent confusion regarding dates as appear in the ID, the verified complaint that is the subject of this contested case was filed on February 24, 2003, while the above-mentioned letters were written on January 21, 2003, June 21, 2004 and July 11, 2004, respectively. Thus, the two letters sent to the DCR in June and July 2004 were both written after the filing of the Complainant's reprisal complaint that is the subject of this order, and the Director so finds.

Division enforce the Consent Order. ID-4.

During the investigation of Complainant's reprisal complaint, Respondent stated in a March 24, 2003 letter to the Division that the Sheriff "has not issued any retired officer any type of identification." P-12. The Sheriff certified to this explanation on March 27, 2003. P-15. Respondent modified its explanation in a subsequent letter to state that, since the events of September 11, 2001, such identification has not been issued even to those who have retired during the term of the current Sheriff. ID-6, citing R-7.

Sheriff Cassidy testified that he was unaware that identification cards were being issued to retired officers, and he stated that he had not signed them. Upon learning that identification cards had been issued to retired officers, he assigned Captain Nolan to investigate. At the end of 2004, Nolan wrote a letter to retired members of the Sheriff's Office in which they were advised that an upgrade of security procedures was being undertaken resulting in the issuance of new identification cards. The letter also indicated new identification cards would comport with a new federal law, "The Law Enforcement Officers Safety Act of 2004," that required the law enforcement agency from which an individual retired to issue an identification card in order for that person to obtain a firearm carry permit. ID-4.

In response to this letter, three retired Sheriff's Officers, Donald Montefusco, Angelo Mantone and Frank Polera, all of whom retired in 2002, appeared at the Sheriff's Office and were issued new identification cards upon surrendering their old identification cards. ID-4-5.

The three retirees testified that they received new identification cards from Respondent's Bureau of Criminal Identification. The cards were not signed by Sheriff Cassidy. ID-4. These cards were issued as a result of Sheriff Cassidy's interpretation of the new federal

law, and only after he waited two weeks for a response to his request for a more formal interpretation of the law from the County Counsel's Office. Subsequently, he was notified by the County Counsel's Office that no more new retiree identification cards should be issued. Sheriff Cassidy testified that he had not authorized the issuance of identification cards to retirees other than the three that were issued during this two week period pursuant to his interpretation of the new federal law. ID-5.

THE ALJ'S LEGAL CONCLUSIONS

Complainant alleged that Sheriff Cassidy's denial of a replacement identification constituted an unlawful reprisal. The ALJ found that a prima facie case of reprisal under the LAD is established if an employee can show that (1) he engaged in a protected activity known to the employer; (2) he was thereafter subjected to an adverse employment action; and (3) there was a causal link between the two. ID-6, citing Shepherd v. Hunterdon Development Center, 336 N.J. Super. 395, 418 (App. Div.) aff'd in part, rev'd in part 174 N.J. 1 (2002). When an employer presents evidence of a non-discriminatory motive, the employee must establish that the explanation was pretextual by either persuading the trier of fact directly that a discriminatory reason motivated the employer, or indirectly by showing the employer's proffered explanation is not worthy of belief. Id., citing Bergen Commercial Bank v. Sisler, 157 N.J. 188, 211 (1999).

Based on the facts in the record, the ALJ concluded that there was no credible evidence that any reprisals were taken against Complainant because he had engaged in protected activity by filing a discrimination complaint against Respondent 30 years ago. The ALJ found that, conceding *arguendo* that this remote event can be considered protected activity, there was no evidence that Sheriff Cassidy was aware of it or that his

denial of the requested identification card was causally related to it. The ALJ found that Cassidy's testimony that he had no knowledge of the 1973 decree, and further that he had no intention to deprive Complainant of anything to which he was entitled, was completely credible. Moreover, the ALJ concluded that the testimony of Montefusco, Mantone, and Polera confirmed that their identification cards were issued to comply with the Sheriff's interpretation of the "Law Enforcement Officers Safety Act of 2004," and that the original retirement ID's they received were not authorized by the Sheriff and were issued without his knowledge. Acknowledging that Respondent's policies with respect to issuing retirement identification were "not well articulated or smoothly executed," the ALJ nevertheless found no credible evidence that Complainant was subjected to unlawful reprisal under the LAD. ID-7.

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

The Director concludes that the ALJ's factual findings as recited herein are supported by sufficient evidence in the record, and he adopts them as his own. In his exceptions, Complainant challenges the ALJ's finding that Sheriff Cassidy had no knowledge of Complainant's prior complaint when he made the decision to deny Complainant a replacement credential. Ce3. Complainant argues that Sheriff Cassidy was specifically placed on notice of the existence of the 1973 Consent Order and the docket number of Complainant's prior complaint by a July 11, 2002 letter that Complainant sent to Sheriff Cassidy referencing the consent order that was generated by his previous complaint. Ce3, citing P-5 and P-11. In the letter, Complainant explained his contention that he is entitled to a replacement identification card, and specifically stated that, "(i)f I

don't hear fro [sic] you, I will go to the Division of [sic] Civil Rights and activate a consent order and decree Docket #EJ06NK-6223 AND EJ06-6381 which is in the State Department of Law and Public Safety Division of [sic] Civil Rights." P-5. At the hearing, Cassidy testified that he did not remember ever seeing or reviewing the terms of the consent order that was referenced in that letter. Tr2-61-62.

Under the Uniform Administrative Procedure Rules, the Director may reject or modify the ALJ's findings of fact, but must clearly state the reason for doing so. N.J.A.C. 1:1-18.6(b). Moreover, it is well settled that an agency head must give due deference to the ALJ's factual determinations because the ALJ had the opportunity to hear the live testimony of witnesses, observe their demeanor, and judge their credibility. Clowes v. Terrminix International, Inc., 109 N.J. 575, 587-88 (1988). Thus, an agency head may not reject or modify any finding of fact based on the credibility of a lay witness unless it first determines from a review of the record that the finding is arbitrary, capricious or unreasonable, or is not supported by sufficient, competent, and credible evidence in the record. N.J.A.C. 1:1-18.6(c).

In his initial decision, the ALJ found that "there was no evidence that Sheriff Cassidy was aware of [Complainant's prior complaint] or that his denial of the requested identification material was causally related to it." ID-7. Further, the ALJ concluded that Cassidy's testimony "that he had no knowledge of the 1973 decree...was completely credible." Ibid. Applying the foregoing legal standards, the Director finds insufficient evidence to overturn the ALJ's determination that Cassidy did not have knowledge of Complainant's discrimination complaint filed some 30 years ago when he refused to replace Complainant's identification card. First, there is no evidence that Cassidy was aware of

Complainant's prior complaint during his February 2002 conversation with Complainant when he initially discussed the request for a new credential. ID-7, Tr2-39-40. The Sheriff denied Complainant's request but agreed to further discuss the issue at a later time. ID-3, Tr2-38. Moreover, although the July 11, 2002 letter relied upon by Complainant threatens to "activate" a consent order with the Division on Civil Rights, it is not at all clear from the language of the letter that Complainant had previously charged Respondent with discrimination, or that the consent order was related to a discrimination complaint filed against Respondent by Complainant. The letter does not explain the nature of the proceeding that generated the consent order or otherwise reference any discrimination claim lodged by Complainant. Without more, the contents of this letter are insufficient to reverse the ALJ's finding on this issue and charge Cassidy with knowledge of Complainant's 1973 Division complaint. Therefore, based on his independent review of the record, the Director adopts the ALJ's finding, based on an assessment of Cassidy's credibility, that Sheriff Cassidy had no knowledge of Complainant's prior discrimination complaint.

THE DIRECTOR'S LEGAL ANALYSIS AND CONCLUSIONS

Preliminarily, it should be noted that this decision is based solely on Complainant's claim in his verified complaint that he was denied a replacement retirement identification card as a reprisal for having engaged in a protected activity. P-6. Complainant in his exceptions addresses the allegedly disparate manner in which he as an Hispanic was treated in being refused a replacement identification, as compared to how the three non-Hispanic retired Sheriff's Officers were treated who were issued "new" cards. Ce4-5. The national origin of the individuals to whom Complainant compares himself will not be

considered in this order since the sole basis for Complainant's claim was unlawful reprisal, and not national origin discrimination, and the issue of national origin discrimination was not addressed at the hearing. Complainant in his exceptions also argues at some length that Respondent was chargeable with actual knowledge of the 1973 Consent Order and that Respondent's refusal to provide Complainant a retired law enforcement officer identification card violates the Consent Order. Ce1-4. Again, Complainant's verified complaint that gave rise to this action alleged that Respondent denied Complainant a replacement identification card as a reprisal for Complainant's engaging in protected activity, in violation of the LAD. This is not an action to enforce the 1973 Consent Order, and issues pertaining to the enforcement of its provisions will not be addressed in this decision.³

Addressing the claim before the Director, the ALJ correctly noted that the LAD makes it unlawful for any person to take reprisals against any other person because that person has filed a discrimination complaint under the LAD. N.J. S.A. 10:5-12(d). In order to establish a prima facie case of unlawful reprisal, Complainant must show that he engaged in a protected activity known to Respondent, that Respondent thereafter subjected him to adverse employment action, and there is a causal connection between his protected activity and the adverse action. Romano v. Brown and Williamson Tobacco, 284 N.J. Super. 543, 548-49 (App. Div. 1995).

Under the LAD, there are no bright-line rules to determine whether there has been sufficient "adverse employment action" to support a prima facie case of reprisal, and the

³The issue of whether Respondent, and more particularly Sheriff Cassidy, had knowledge of Complainant's asserted protected activity that resulted in the issuance of the Consent Order has been addressed as part of the Director's factual findings.

determination must be made based on the specific facts of the case. Mancini v. Twp of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002). The New Jersey courts have not limited adverse actions to ultimate decisions such as hiring, firing, demotion, or change in compensation, and have acknowledged that less drastic employment actions such as providing negative references to prospective employers or attempting to revoke a former employee's teaching license may constitute retaliatory adverse actions. Cokus v. Bristol Myers Squibb, 362 N.J. Super. 366, 378 (Law Div. 2002) aff'd 362 N.J. Super. 245 (App. Div. 2003).⁴ Courts have found that assignment to different or less desirable tasks may constitute adverse employment action, Mancini, supra at 564-565, and a number of less drastic employment actions combined can also constitute sufficient adverse action for a prima facie case. Nardello v. Township of Voorhees, 377 N.J. Super. 428, 434-435 (App. Div. 2005)(In CEPA case, court found a combination of actions including denial of training, change in duties and removal of supervisory duties to constitute adverse action). Still, "not everything that makes an employee unhappy is an actionable adverse action." Cokus v. Bristol-Myers Squibb Co., supra, 362 N.J. Super. at 378. The employment action must be "sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner." El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145,176 (App. Div. 2005), citing Cokus, supra, 362 N.J. Super. at 246. See also, Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. ____ (2006).

Turning to the legal standards governing whether there was a causal connection between the protected activity and the adverse action, the Appellate Division has noted that although temporal proximity may be evidence of causation, proximity is not the only

⁴Although Cokus was a CEPA case, the court noted that the standards for LAD and federal anti-discrimination claims apply to such cases.

circumstance that justifies an inference of causal connection. Romano, supra, 284 N.J. Super. at 549-550 (holding that a lengthy time gap of 10 years does not necessarily lead to the conclusion that there is no causal connection). A broad array of factors may be used to show this causal connection, including temporal proximity, intervening antagonism, inconsistent reasons for the adverse action, or other circumstantial evidence supporting an inference of causation. Farrell v. Planters Lifesavers Co., 206 F. 3d 271, 280-281 (3rd Cir. 2000).⁵ Nevertheless, a causal connection is often demonstrated “by evidence of circumstances that justify an inference of retaliatory motive, such as protected activity closely followed by the adverse action.” McBride v. Princeton University, 67 Fair Empl. Prac. Cas. (BNA) 340 (D.N.J. 1991), quoting Burrus v. United Tel. Co., 683 F.2d 339, 343 (10th Cir. 1982).

Applying these legal standards, the Director concludes that, under the facts of this case, Complainant has failed to established a prima facie case of unlawful reprisal under the LAD. Although it is undisputed that Complainant engaged in a protected activity by filing his initial complaint against Respondent for discrimination based on his national origin in 1973 (ID-3), the Director has adopted the ALJ’s finding that Cassidy was unaware of this protected activity when he denied Complainant a replacement retirement identification card. Further, Complainant has failed to demonstrate that he was subjected to an adverse action of sufficient severity to state a claim of reprisal under the LAD. There is nothing in the record that suggests any tangible benefit that accrues to one who possesses the

⁵The New Jersey Supreme Court has “in a variety of contexts involving allegations of unlawful discrimination...looked to federal law as a key source of interpretive authority” in applying Title VII analysis to LAD claims. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97-98 (1990). Accordingly, while New Jersey state courts are not bound by federal precedent, it can be relied on for guidance.

retirement ID Complainant seeks to replace⁶, and it is undisputed that Complainant was initially issued such a credential and now seeks only to replace one that was lost or stolen.⁷ Complainant's proofs fail to show that his conditions of employment were altered in any important way when Cassidy refused to replace his lost or stolen identification card nine years after Complainant's retirement. See El-Sioufi, supra. Thus, Complainant has not presented sufficient evidence of adverse action that can form the basis of an unlawful reprisal claim under the LAD.

Complainant has also failed to establish a sufficient causal connection between the protected activity - his 1973 complaint - and the purported adverse action. Even allowing for the "rather modest" evidentiary burden for establishing a prima facie case under the LAD recently articulated by the New Jersey Supreme Court in Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005), the fact that the alleged adverse action here took place almost thirty years after the filing of the original complaint compels the conclusion that the adverse action lacks sufficient temporal proximity to the underlying protected activity to establish a causal connection. Further, Complainant has failed to present evidence of intervening antagonism or other circumstantial evidence sufficient to otherwise support an inference of causation. Accordingly, the Director concludes that Complainant has not met his burden of establishing a prima facie case of unlawful reprisal under the LAD.

⁶Although there was some testimony that the white identification cards issued to the three retirees pursuant to the new federal law would allow recipients to carry a weapon in any state, Re-5, Tr1-11, 21-25, there was no evidence that possession of the blue card typically issued at retirement conferred any tangible benefit on the recipient.

⁷Complainant claims to have suffered "humiliation" as a result of his not having been issued a replacement ID card based upon: (1) another retired officer's refusal to shake his hand, Tr1-70; (2) Complainant's supposition that his failure to produce such ID if asked would be misconstrued as his having been "dismissed" from the (Sheriff's) Department "without honor," Tr1-69; and (3) Complainant's heightened fear of being subjected to racial profiling based upon his skin color, Tr1-70.

The Director further concludes that Complainant's reprisal claim fails even if it is assumed that Complainant had established a prima facie case. Once such a case is presented, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. Brown and Williamson, supra at 549. The Director concludes that Respondent met this burden by articulating several reasons for its decision: (1) "that under the current Sheriff (Cassidy) there are no such sheriff cards issued", P-11 and P-12; (2) identification cards are only issued to actual employees, P-12 and P-14; (3) a security threat to public facilities is posed by a misuse of identification cards, P-12; (4) "retired" cards were issued in compliance with the federal Law Enforcement Officers Safety Act of 2004, R-7; and (5) the three retired cards cited earlier by Complainant were issued without Sheriff Cassidy's knowledge. R-8.

Complainant then bears the burden of showing that Respondent's articulated reasons were not its true motivation, and that Respondent was actually motivated by retaliatory intent. If Complainant succeeds in proving that Respondent's articulated reasons were pretext for retaliatory intent, Respondent then bears the burden of proving that Complainant would not have been issued a card even without its retaliatory or discriminatory motives. Jamison v. Rockaway Township BOE, 242 N.J. Super. 436, 447(App. Div. 1990).

In his exceptions, Complainant argues that the record establishes that Respondent's asserted reasons for denying Complainant a retirement card are pretext for unlawful reprisal. Complainant contends that the multiple explanations offered by Respondent are inconsistent and not credible, and support a finding of pretext. Ce-6. Complainant also asserts that the testimony of Montefusco, Mantone, and Polera, the three retiree witnesses

who were issued replacement identification cards, demonstrates that similarly situated retired officers were treated more favorably than Complainant, and that this is additional evidence of unlawful reprisal. Ibid. Complainant further argues that the testimony of the three undermine Respondent's justifications for denying Complainant a credential, namely, that Respondent did not issue retiree identification cards and badges since identification cards were issued and re-issued to these retirees, Ce-4,7; that Respondent issued the three replacement identification cards in response to the 'Law Enforcement Officers Safety Act," since none of the three reference the Act in their testimony, Ce-5-6; and that Cassidy did not authorize retirement cards since the three cards of these retirees had to have been officially authorized even though they lacked Cassidy's signature, Ce-8-9. Finally, Complainant argues that Respondent's reliance on security issues as a basis for its denial of Complainant's credential is pretextual since neither Nolan nor Cassidy attempted to contact retirees who did not respond to Nolan's September 30, 2004 letter requiring retired officers to exchange their identification cards for new ones. Ce-9, 11.

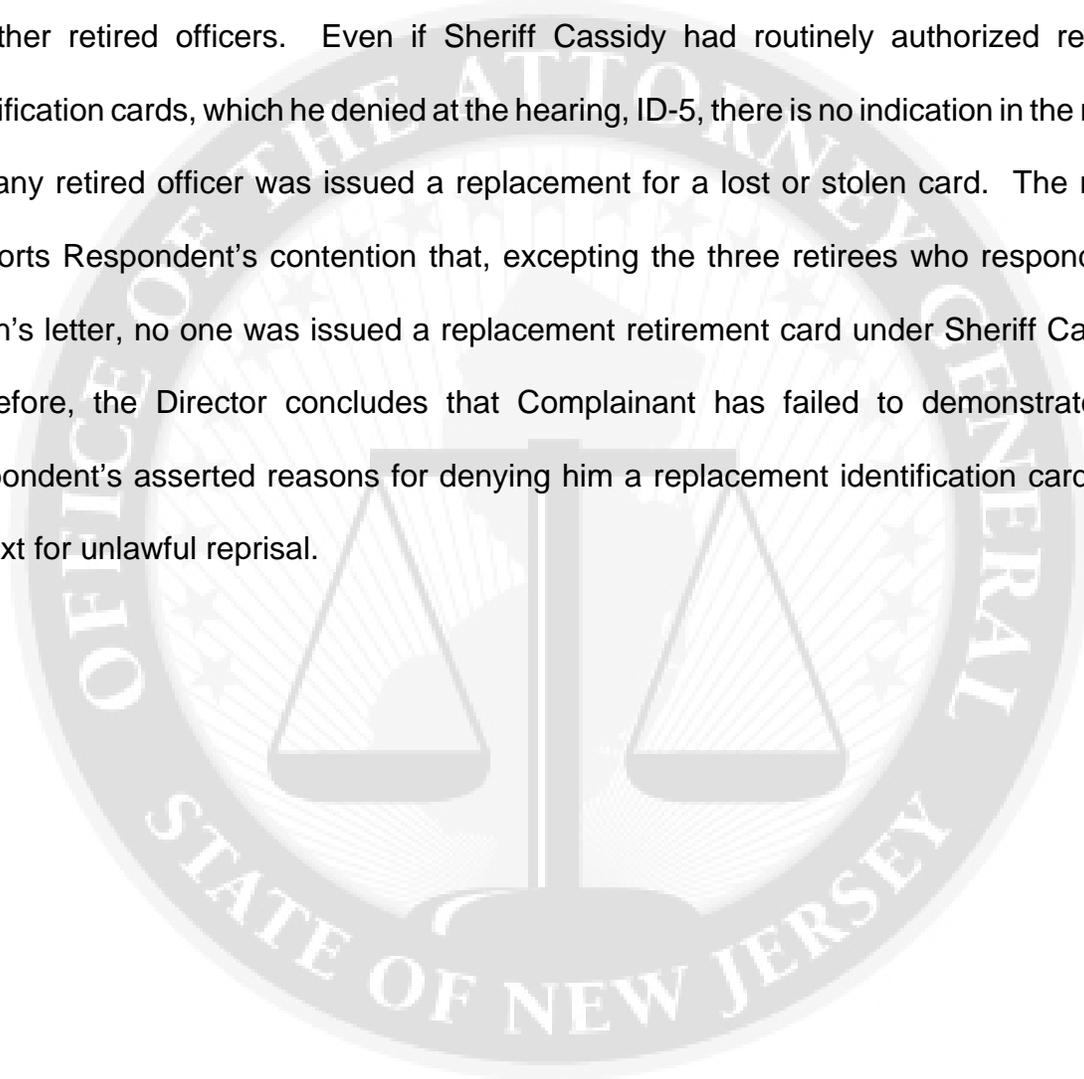
After a careful review of the record, including Complainant's exceptions, the Director concludes that Complainant has failed to establish that Respondent's reasons for denying him a replacement identification credential were pretext for unlawful reprisal. Complainant correctly asserts that pretext can be demonstrated by showing that similarly situated individuals who are not of the protected category have been treated more favorably than the individual charging unlawful discrimination or reprisal. Burdine v. Texas, supra at 258; see also, Maull v. Division of State Police, 39 Fed. Appx. 769, 774 (3rd Cir. 2002). Thus, one may show pretext by proving that preferential treatment is given to those similarly situated. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). Here, the record clearly

establishes that the three individuals to whom Complainant compares himself, officers Montefusco, Mantone and Polera, were not similarly situated to Complainant, and that there were legitimate non-discriminatory reasons why they received replacement identification cards and Complainant did not. The evidence establishes that the three retirees received replacement identification cards after responding to Captain Nolan's September 30, 2004 letter, which was clearly addressed to Sheriff's Officers who "have retired since approximately September, 2001." R-7, ID-5, Tr1-20, 31, 132-136. The letter states the Sheriff's Office's intention to issue retired members new identification cards in part to comply with the federal "Law Enforcement Officers Safety Act of 2004," which, according to Nolan's letter, sets out criteria for the carrying of firearms by retired law enforcement officers. R-7. The letter further indicates that any retired officer who was already issued an identification card will be required to return it in exchange for a new card.

It is uncontroverted that Complainant retired in 1993 and, therefore, was not included in the group to which this letter was directed. The three cards were issued during the two week period in which Sheriff Cassidy thought he was required to issue the cards under the new federal law. ID-5. The Sheriff discontinued issuing replacement cards once he was told to do so by County Counsel. Ibid. There is no evidence that any retired officer received a replacement identification card other than the three retirees who responded to Nolan's September 30, 2004 letter.

Moreover, it is undisputed that all three produced old identification cards to exchange for new ones. This buttresses Respondent's contention that the issue of security was a consideration in its decision to refuse Complainant a replacement card. Respondent had a legitimate interest in accounting for and limiting the number of identification cards in

circulation, an interest that would be undermined had it issued replacement cards to officers who lost their original cards. Accordingly, Complainant has failed to demonstrate that he was denied a benefit to which other similarly situated retired officers were entitled. To the contrary, Complainant was issued a retirement identification card when he retired, the same as other retired officers. Even if Sheriff Cassidy had routinely authorized retirees' identification cards, which he denied at the hearing, ID-5, there is no indication in the record that any retired officer was issued a replacement for a lost or stolen card. The record supports Respondent's contention that, excepting the three retirees who responded to Nolan's letter, no one was issued a replacement retirement card under Sheriff Cassidy. Therefore, the Director concludes that Complainant has failed to demonstrate that Respondent's asserted reasons for denying him a replacement identification card were pretext for unlawful reprisal.



CONCLUSION AND ORDER

Based on the foregoing, the Director concludes that Complainant has failed to meet his burden to establish a prima facie case of unlawful reprisal under the LAD. Furthermore, the Director concludes that, even if Complainant had established a prima facie claim, his proofs were nevertheless insufficient to show that Respondent's asserted reasons for the adverse action alleged by Complainant were pretext for unlawful reprisal. Accordingly, the Director adopts the ALJ's initial decision dismissing Complainant's complaint.

Date

J. Frank Vespa-Papleo, Esq.
Director, Division on Civil Rights

