



STATE OF NEW JERSEY  
 OFFICE OF THE ATTORNEY GENERAL  
 DEPARTMENT OF LAW & PUBLIC SAFETY  
 DIVISION ON CIVIL RIGHTS  
 OAL DOCKET NO.: CRT 6322-06  
 DCR DOCKET NO.: EP11WB-47626-E

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 CARL E. MOEBIS, Sr., )  
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 Complainant, )  
 )  
 v. )  
 )  
 HARTFORD LIFE PRIVATE )  
 PLACEMENT and PAT FOX, )  
 )  
 Respondents. )  
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ADMINISTRATIVE ACTION  
 FINDINGS, DETERMINATION  
 AND ORDER

**APPEARANCES:**

Carl E. Moebis, Sr., pro se, complainant.  
 David I. Rosen, Esq., for the respondents (Littler Mendelson, attorneys).

**BY THE DIRECTOR:**

**INTRODUCTION**

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to an amended verified complaint filed by Carl E. Moebis, Sr. (Complainant), alleging that Hartford Life Private Placement (formerly known as International Corporate Marketing Group), Michael Jandoli and Pat Fox (formerly known as Pat Ryan) (Respondents) unlawfully discriminated against him based on his age (59), ancestry (German) and disability (carpal tunnel syndrome) in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On December 10, 2007, the Honorable Solomon A. Metzger, Administrative Law Judge (ALJ), issued

an initial decision<sup>1</sup> dismissing the complaint. After independently evaluating the evidence, the parties' submissions and the ALJ's decision, the Director adopts the ALJ's dismissal of the complaint.

### **PROCEDURAL HISTORY**

On September 20, 2001, Complainant filed a verified complaint with the Division alleging that Respondents unlawfully discriminated against him based on his age and national origin, and refused to accommodate his disability in violation of the LAD. Respondents filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. On September 22, 2003, prior to the completion of the Division's investigation, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing at Complainant's request pursuant to N.J.S.A. 10:5-13.

On July 15, 2005, Respondents filed a motion with the ALJ, seeking to enforce a settlement agreement. On August 17, 2005, the ALJ issued an initial decision granting Respondents' motion and ordering that the terms of the settlement be given full force and effect. On October 18, 2005, after considering exceptions filed by Complainant and Respondents' reply, the Director issued an order reversing the ALJ's initial decision and remanding this matter for a hearing regarding the enforceability of the purported settlement agreement.

On February 22, 2007, after conducting a hearing, the ALJ issued an order concluding that the parties did not enter into an enforceable settlement agreement. The parties engaged in discovery and the ALJ ruled on several motions regarding discovery. By order dated June 27, 2007, the ALJ granted Respondents' motion to dismiss the complaint against Michael Jandoli,

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<sup>1</sup>Hereinafter, "ID" shall refer to the initial decision of the ALJ; Ex. R- and Ex. P- shall refer to Respondents' and Complainant's exhibits, respectively, admitted into evidence at the hearing, CE shall refer to Complainant's exceptions to the initial decision, and RE shall refer to Respondents' reply to Complainant's exceptions.

individually, who was named as a respondent in the original complaint.<sup>2</sup> On July 10, 2007, the ALJ issued an order denying Complainant's motion to amend the complaint to add additional parties, but permitting Complainant to amend the complaint to change "national origin" to "ancestry," to amend the caption to reflect the current name of the corporate Respondent, and to add details regarding his allegations of discrimination.

The ALJ conducted a four-day hearing, which concluded on October 30, 2007; after receiving post-hearing submissions, the record closed on November 30, 2007. The ALJ issued his initial decision on December 10, 2007. Complainant filed exceptions on December 24, 2007, and Respondents filed a reply on January 7, 2008. After receiving an extension of the original deadline, the Director's final order is now due on March 9, 2008.

### **THE ALJ'S DECISION**

#### **The ALJ's Factual Findings**

The ALJ found the following to be undisputed (ID 2-3). Complainant was born in 1941. In 1997, Mike Jandoli, who managed Respondent's<sup>3</sup> information technology unit, hired Complainant as a systems support analyst at a salary of \$50,000. In 1998, Complainant was promoted to local area network (LAN) administrator, supervising Thomas Washington, Douglas Hedge and Steven Olshevski, and eventually earning \$65,700. In early 2000, Respondent hired John Scott, who previously served as a computer consultant for Respondent, in the newly-created position of Senior LAN Management Analyst. Scott became Complainant's immediate supervisor, and it was at this point that Complainant began to feel that his future with Respondent was in jeopardy and that his colleagues were conspiring against him.

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<sup>2</sup>The ALJ granted that motion pursuant to N.J.S.A. 10:5-18, finding that Jandoli had ceased to work for the corporate Respondent more than 180 days prior to the filing of the complaint, and concluding that he could not have committed any LAD violation within the statutory limitations period.

<sup>3</sup>Hereinafter, "Respondent" shall refer to the corporate respondent, Respondent Pat Fox shall be identified by name, and the respondents jointly shall be referred to as "Respondents."

On September 17, 2001, Complainant sent an email to Ramani Ayer, the CEO of Respondent's parent company in Connecticut, with copies to many of Respondent's employees, commiserating over recent attacks at the World Trade Center, and linking those injustices with his own plight at the company. Ex. R8. Complainant began disability leave the next day; when his leave time was exhausted, he was unable to resume his duties and was released. During his leave, Complainant began treatment with psychologist Anthony Todero. Dr. Todero determined that, among other things, Complainant suffered from paranoia and delusions.

In addition to the facts he identified as undisputed, the following factual findings can be gleaned from the undisputed aspects of the ALJ's summary of witness testimony and his analysis. In late 1999 and/or early 2000, Pat Fox, who worked in product management for Respondent, on one occasion referred to Complainant as a "space nazi." This was an analogy to a character on the Seinfeld television program who was called the "soup nazi" because he imposed rigid rules on customers ordering soup. ID 3, 6, 9, 11. Jandoli laughed when he heard Fox's remark, but did not recall referring to Complainant as "network nazi" or "printer nazi," as Complainant contended Jandoli had done on a few occasions. ID 3, 5-6. Complainant began surreptitiously taping some conversations with co-workers. ID 3. In February 2000, Complainant reported the "nazi" comments to Respondent's parent company. Jennifer Geisler, Senior Vice President for Human Resources, investigated and concluded that the comments were inconsiderate but not discrimination; she had Fox and Jandoli apologize and desist. ID 9.

Complainant felt that Thomas Washington interacted with him in a highly disrespectful manner. ID 3. When Complainant asked Washington to schedule a farewell luncheon for an intern, Washington declined to do so, responding, "what am I, your secretary?" ID 3, 8. During a period in which they shared a cubicle, Complainant found it insulting that Washington placed his name plate higher than Complainant's name plate. Ibid. Complainant was also troubled that, although employees at Washington's pay grade normally did not have business cards, Respondent gave

Washington this privilege. ID 3.

While working on Sunday, December 10, 2000, Complainant discovered that some computer discs were missing. He contacted Mr. Scott and others who came to the office, and employee Katarzyna Bochenski located the discs. Complainant believed Washington hid the discs and should have been disciplined, but Bochenski testified that she had stored the discs in a locked cabinet after consulting with Mr. Scott, because she felt they needed a secure location. ID 3, 6.

Complainant felt that Mr. Scott treated him inappropriately. Complainant noted that on December 14, 2000, Scott called him at home to report that work would begin at 10 due to icy roads. When Complainant arrived at 9 he saw Scott and other information technology staff gathered in the cafeteria area, where there is also a meeting room, and Complainant suspects that Scott's phone call was designed to facilitate the group meeting without him. Complainant also felt that Scott's March 7, 2000 email congratulating Douglas Hedge on his promotion was an unstated criticism that Complainant was not promoted. ID 4.

As evidence that employees were mocking him due to his age, Complainant noted that in the summer of 2001, he instructed staff to label certain equipment in the computer room; instead, someone placed large labels with the word "door" on the door, "cabinet" on the cabinet, and similarly labeled other objects. Complainant reported this to Mr. Scott, who had the labels removed the same day. ID 3, 6.

In the summer of 2001, Complainant requested a reverse tilt keyboard as an accommodation for carpal tunnel syndrome; it was ordered the same day. When it arrived in late September or early October 2001, it was installed on Complainant's computer. ID 6, 12.

After summarizing the testimony, the ALJ assessed the credibility of the witnesses. The ALJ considered Complainant's testimony and demeanor throughout the proceedings to conclude that his interpretation of events was unreliable. ID 10. The ALJ found Michael DeAngelo's corroborative testimony unpersuasive. Ibid. The ALJ concluded that Michael Jandoli, John Scott

and Joseph Mahoney testified credibly. Ibid.

### **The ALJ's Analysis and Conclusions**

The ALJ concluded that Complainant presented a prima facie case of employment discrimination, and that Respondents met their burden of articulating legitimate non-discriminatory reasons for its conduct. ID 9-10. The ALJ concluded that Complainant failed to demonstrate that Respondents' articulated reasons were pretextual. ID 10. The ALJ concluded that Complainant was not subjected to differential treatment in promotions, salary or evaluations, and that Respondents reasonably accommodated Complainant's carpal tunnel condition by providing the equipment he requested. ID 11-12. The ALJ further concluded that the incidents Complainant presented as evidence of workplace harassment were not based on Complainant's age or ancestry, and did not rise to the level of an actionable hostile work environment. ID 11.

### **EXCEPTIONS AND REPLIES OF THE PARTIES**

Complainant filed exceptions to the initial decision on December 24, 2007, and Respondents filed a reply on January 4, 2008.<sup>4</sup> Complainant's exceptions to the procedural aspects of this matter are summarized as follows. Complainant takes exception to the ALJ's denial of certain discovery requests; in response, Respondents assert that the interrogatories and documents Complainant requested were unduly burdensome, and were not calculated to lead to the discovery of admissible evidence. CE 2-3, RE 3. Complainant takes exception to the ALJ's evidentiary rulings, including the exclusion of certain audio disks, and asserts that he testified during re-direct that one disk in particular (a recording of Respondent's investigators' visit to his home) should be admitted into evidence because it was "very clear." CE 3-6. In response,

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<sup>4</sup>In his exceptions, Complainant cites a number of documents that were not admitted into evidence. Unless otherwise noted in this decision, the Director has not considered such documents and has limited his review to the record before the ALJ. N.J.A.C. 1:1-18.6(d). Complainant also takes exception to the omission of some documents from the exhibit list appended to the ID. The Director notes that Exhibits P296 and R19a are included in the record; R6, R15 and R18 are not. Without a transcript, the Director cannot conclude that the latter three documents were admitted into evidence, or that the ALJ erred in not admitting them.

Respondents argue that the ALJ's evidentiary rulings were free of prejudicial error, and his exclusion of the audio disks was appropriate, as their poor sound quality would have created a substantial danger of undue prejudice or confusion, which outweighed any probative value. RE 3-4. Complainant takes exception to the ALJ's manner of conducting the hearing, noting that the ALJ appeared impatient with Complainant's inexperience with administrative hearing procedures, prevented him from fully exploring evidence, and made a remark Complainant interpreted as inappropriately sarcastic. CE 3. Complainant takes exception to the ALJ's conclusion that he "suffers from a thought disorder," and argues that in so concluding the ALJ took portions of medical reports out of context, made an unqualified medical diagnosis, and prejudiced Complainant's case. CE 3-5, 11. In response, Respondent asserts that the ALJ did not take the language of the medical report out of context, nor did he render his own medical characterizations. RE 4. Complainant takes exception to the ALJ's determination that Jandoli, Scott, and Mahoney testified credibly, and that Mr. DeAngelo's testimony was unpersuasive. CE 7, 12. Respondent replies that the ALJ's credibility determinations are supported by substantial evidence. RE 4.

Addressing the substance of the initial decision, Complainant explains, elaborates on and responds to some of the factual findings, testimony and evidence. Complainant's exceptions regarding his claim of differential treatment based on age can be summarized as follows. Complainant takes exception to the ALJ's conclusion that he was not subjected to differential treatment regarding pay or promotions; Complainant asserts that he was not promoted with a raise during the 2 years he worked under Mahoney, and that younger, less qualified employees were promoted. CE 8-9,12,14. Complainant notes that management ignored his inquiries regarding his "future" with the company, as well as his requests for information, which created numerous equipment problems for Complainant and impaired his ability to do his job. He notes as an example the incident when he was working on a Sunday and had to call staff in to locate computer disks that had been locked away without notice to him. CE 6, 8, 10, 13. Complainant takes exception to the

ALJ's interpretation of his observation regarding Douglas Hedge's promotion, and states that his intention was to note that Hedge was promoted to a higher job grade than Complainant's. CE 6. Citing Exhibit P-97, Complainant notes that management failed to comply with a company policy when they issued business cards to Mr. Washington, and notes that Respondent made no such exception for Complainant. CE 6. Complainant notes that he recorded in his calendar the December 2000 incident in which he arrived to find the rest of the unit congregating early, after Mr. Scott told him he could come in late due to weather. CE 14.

Complainant takes exceptions to the ALJ's findings or conclusions regarding the quality of his work, noting that management never expressed any dissatisfaction with his use of accrued vacation time in December 1999; that he appropriately dealt with an employee's request for specialized equipment to accommodate a wrist problem; that Mr. Jandoli addressed a request in a similar manner; and that Jandoli sent a defamatory email after the issue was already resolved. CE 7-8. Complainant also disputes that he objected to Spanish labeling on certain boxes, noting "that he testified that he didn't know the identification of the language on the sticker..." and that the incident occurred before he was promoted to LAN Administrator. ID 7.

Complainant's exceptions regarding his claim of harassment based on ancestry and age can be summarized as follows. Complainant takes exception to the ALJ's conclusion that the incidents in question were juvenile or insensitive jokes rather than discrimination; he asserts that comments were repeated, jokes continued for two years, and the large signs were deliberate, intentional and unwarranted. CE 13. Taking exception to the ALJ's reference to testimony that Fox and Jandoli did not know his ancestry, Complainant notes that his first name, "Carl," is of German origin. CE 10-11. To dispute Mr. Jandoli's testimony that it would have been out of character for him to refer to Complainant as a "space nazi," Complainant asserts that there was a previous incident in which Jandoli's remarks about a female employee got him into legal trouble, citing a document that does not appear to have been admitted into evidence. CE 8. Complainant notes



that Mr. Washington's testimony that he took it as a Seinfeld-related joke when he heard Complainant called "space nazi" corroborates that the phrase was used, and shows the ineffectiveness of Respondent's internal investigations and remedial measures. CE 9.

Complainant notes that Mr. Mahoney's testimony that he never called Complainant an "old fool" or heard anyone refer to Complainant in a derogatory manner is contrary to Mr. DeAngelo's testimony and a recording of Jandoli. CE 8. Complainant asserts that, as his subordinate, Mr. Washington's remark that he was not Complainant's secretary was disrespectful, insubordinate and humiliating, and that it was inappropriate for Washington to install his own nameplate. CE 9. He notes that Respondent's failure to determine which employee labeled everyday objects in lieu of the equipment labels Complainant requested is evidence that Respondent's investigations were ineffective. CE 9. Complainant notes that his purpose in surreptitiously recording conversations was to "impartially validate testimony," and argues that state law supercedes any policy of Respondent prohibiting such recordings. CE 6.

Complainant takes exception to the ALJ's conclusion that Respondent reasonably accommodated his disability. Complainant asserts that he made six requests to Mr. Morsell requesting delivery of a reverse tilt keyboard, that it was delivered after an unreasonable delay when it would do him no good, and that Mr. Washington did not know which of the keyboards delivered was for Complainant. CE 8-9, 14. Complainant also argues that the ALJ erred in failing to address a claim for reasonable accommodation of his depression. CE 6.

## **THE DIRECTOR'S DECISION**

### **Preliminary Ruling**

The Director finds that the ALJ's February 22, 2007 order concluding that the parties did not enter into an enforceable settlement agreement is supported by the record, and affirms that ruling.

### **Preliminary Issues Raised by Complainant's Exceptions**

The Director has considered Complainant's exceptions regarding the ALJ's conclusions that Complainant's testimony and demeanor at the hearing made it evident that Complainant suffers from "a thought disorder," and that he appears to lack insight into conditions referred to in his treating psychologist's report. ID 10. Initially, the Director notes that our hearing system vests the ALJ with the responsibility of evaluating and assessing the demeanor and testimony of witnesses at a hearing. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988). Whether it was appropriate for the ALJ to distill his assessment of Complainant's demeanor into the categories or labels he chose is immaterial, as the Director's independent review of the amended complaint, the initial decision and Complainant's exceptions disclosed that the ALJ made no findings regarding relevant material facts which were contrary to Complainant's factual allegations and testimony.<sup>5</sup> The outcome of this matter turns on the legal conclusions drawn from the relevant material facts, and the within decision is based on the Director's independent application of the law to those facts. Thus, the ALJ's conclusion that Complainant's reading of events was unreliable will have no impact on the Director's decision.

Regarding discovery, after review of the record, including Complainant's exceptions and the pre-trial motion papers, the Director finds no basis to set aside the ALJ's pre-trial rulings on Complainant's discovery requests.

To address Complainant's contention that the ALJ erred in refusing to admit his audio disks into evidence, the Rules of Administrative Procedure afford the ALJ discretion to exclude evidence if its probative value is substantially outweighed by the risk that it will either result in undue consumption of time, or create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-

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<sup>5</sup>As Complainant has not provided the Director with a transcript of any portion of his hearing testimony, the Director's review is based on the summary of Complainant's testimony in the initial decision, Complainant's exceptions to the initial decision, and Complainant's statements in documents admitted into evidence at the hearing.

15.1(c). The Director concludes that Complainant has not demonstrated that the ALJ abused his discretion in excluding the audio disks.

Similarly, Complainant has not demonstrated that the ALJ abused his discretion in any other aspects of the hearing process. Complainant's exceptions describe certain actions of the ALJ he considers inappropriate, without providing specific rulings or transcripts of any portions of the hearing for the Director to review. The ALJ has the power to control the presentation of evidence, the development of the record and the admissibility of evidence, and consistent with the disclosure of all relevant testimony and information, may make necessary rulings to prevent repetitive or irrelevant questioning, and to expedite cross-examination. N.J.A.C. 1:1-14.6(i) and (m). Complainant has not demonstrated that the ALJ's conduct of the hearing deprived him of the opportunity to present any relevant and material evidence regarding the allegations of his complaint.

#### **The Director's Factual Findings**

Except as noted in the discussion below, the Director concludes that the ALJ's factual findings are supported by the record, and adopts them as his own. In the absence of evidence that the ALJ's factual findings were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence, the Director has no basis for rejecting the ALJ's credibility determinations or his factual findings based on those determinations. N.J.A.C. 1:1-18.6. Because he had the opportunity to hear the live testimony of witnesses and observe their demeanor, it is the ALJ who is best able to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988). Moreover, although Complainant's exceptions refer to witness testimony he deems contradictory to testimony cited by the ALJ, Complainant has not provided the Director with a transcript of relevant portions of the hearing testimony. See Matter of Morrison, 216 NJ Super 143 (App. Div. 1987). Without transcripts and citations to specific sections of contradictory testimony, the Director finds no basis to reject any

of the ALJ's findings regarding relevant material facts. N.J.A.C. 1:1-18.6.

### **Legal Standards And Analysis**

The LAD prohibits employment discrimination based on age and ancestry, and requires employers to reasonably accommodate employees' disabilities. N.J.S.A. 10:5-12(a), N.J.A.C. 13:13-2.5. Complainant alleges that Respondent treated him less favorably than younger employees, subjected him to a hostile work environment based on his age and ancestry, and failed to provide reasonable accommodations for his carpal tunnel condition.

#### **A. Differential Treatment**

The LAD prohibits an employer from discriminating against an employee in the terms, conditions or privileges of employment based on age or ancestry. N.J.S.A. 10:5-12(a). An employee may attempt to prove employment discrimination by direct evidence or by circumstantial evidence. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). To prevail in a direct evidence case, the complainant must present evidence which, if true, demonstrates without inference or presumption "...not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid. The Director concludes that there is no direct evidence of age-based differential treatment in the record.

For circumstantial evidence of unlawful discrimination, the New Jersey courts have adopted the methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981),<sup>6</sup> as a starting point for analyzing cases brought under the LAD. See Clowes v. Terminix International, Inc., 109 N.J. 575, 595 (1988). This methodology, which was applied by the ALJ in

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<sup>6</sup>Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

this case, involves a burden-shifting analysis, with a complainant first bearing the burden of establishing a prima facie case. McDonnell Douglas v. Green, *supra*, 411 U.S. at 802.

To establish a prima facie case of differential treatment, a complainant must establish that: (1) he belongs to a protected class; (2) he was performing his job; (3) he suffered adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment action. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 167, 887 A.2d 1170 (App. Div. 2005); Zive v. Stanley Roberts, 182 N.J. 436, 455 (2005).

Here, it is undisputed that Complainant's age and ancestry are protected by the LAD, and he was performing his job. It is less clear that Complainant's allegations of differential treatment constitute actionable adverse employment action. However, as making a prima facie showing is not intended to be onerous, the Director concludes that Complainant has presented sufficient evidence regarding promotions to satisfy the third and fourth prongs of the prima facie case.

Once a complainant has established a prima facie case of unlawful discrimination, he has created a presumption that discrimination has occurred. The burden of production, but not the burden of persuasion, then shifts to the employer to articulate some legitimate nondiscriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, *supra*, 450 U.S. at 253-54; *see* Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). Respondent's witnesses testified that Complainant's salary continued to exceed his subordinates who were promoted, and that he was a good worker, but better as a technician than a supervisor. ID 5-6, 10-12. The record also reflects that Respondent notified Complainant of areas he would need to improve before he would be considered for promotion. Ex. R2. This is sufficient to meet Respondent's burden.

By meeting this burden of production, the employer rebuts the presumption of discrimination raised by the complainant's prima facie case. In order to prevail, the complainant must then prove by a preponderance of the evidence that the employer's articulated reasons for its action were

pretextual and that the employer's true motivation and intent were to discriminate based on the protected characteristic. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981).

After review of the record, the Director concludes that Complainant has not met his burden of proving that Respondent's true motive for any adverse action was age discrimination. Initially, the Director concludes that the only actionable adverse action Complainant has cited is the failure to promote. Complainant does not contend that he was denied the regular raises given to all employees, but contends that, because he was not promoted for over two years, he was denied the additional salary increases that come with promotions. Ce- 8. The incidents such as the denial of business cards before he was promoted, congregating early after telling him there was a weather-delayed opening, failure to provide him with information about the location of computer disks and failure to respond to his requests for information do not rise to the level of adverse action under the LAD. El-Sioufi v. St. Peters University Hospital, 382 N.J. Super. 145, 169-170 (App. Div. 2005).

Some of those incidents are also time-barred. Complaints filed with the Division may only address alleged adverse actions that took place within 180 days of the complaint filing date. N.J.S.A. 10:5-18. Although the continuing violation theory may be applied to extend the limitations period to include earlier allegations of a bias-based hostile work environment (discussed below), claims of bias-based differential treatment, which evaluate discrete acts, cannot be based on incidents that occurred more than 180 days before the complaint was filed. See, Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 21 (2002).

Regarding the failure to promote, Complainant compares himself to Washington and Hedge, who were subordinates promoted during his tenure as LAN Administrator, and John Scott, who was hired at a higher level than Complainant. John Scott was hired on or about January 28, 2000, Ex. P196, and Complainant contends that he was denied the opportunity to be considered for Scott's position. Ex. R44. As Scott was hired more than 180 days before the complaint was filed, that

“denial” is beyond the statutory limitations period to be addressed in this matter. N.J.S.A. 10:5-18. Moreover, the record reflects that Respondent created a new position for Scott because he was a long-term consultant to Respondent, he had actually constructed the computer systems they were using, and they felt his specific experience in setting up the systems would benefit their operations. ID 5-6. This is a legitimate non-discriminatory reason for hiring Scott. They did not consider promoting Complainant or anyone else to the new position, because they were creating it solely for the purpose of hiring Scott. Complainant has presented no evidence to dispute Respondent’s contention that the position was created specifically for Scott, nor has he presented any evidence to support the conclusion that Respondent’s motive in creating a new position for Scott was age discrimination. In addition, the Director finds no evidence that the creation of the new position for Scott had any bearing on Respondent’s failure to promote Complainant. As evidence that Respondent denied him promotions based on his age, Complainant notes that his academic degrees, certifications, job ratings and recognitions in the workplace exceeded those of the younger employees who were promoted, specifically Hedge and Washington. The record reflects that when Complainant was hired in 1997 at age 55, he started at a significantly higher salary than Hedge or Washington received when they were hired in 1999 and 1998, respectively, and he continued to earn more than them despite their promotions. P322a , R46, ID 6,7.

Although there is little in the record about Respondent’s promotional procedures, it does not appear that Complainant was competing with Hedge, Washington or any other younger employee to be promoted to a specific vacancy. Instead, it appears that Complainant is arguing that he should have been given one or more additional promotional title upgrades based on his education and performance. Complainant argues that the performance deficiencies Respondent cited were fabricated to deny him promotions, that younger employees with less education and accomplishments were promoted, and that Respondent’s true reason for denying him a promotion was age discrimination.

Regarding his education, it is reasonable to conclude that Complainant's academic degrees and certifications factored into Complainant's enhanced hiring salary, and Complainant has presented no evidence to show that those same degrees and certifications should continue to qualify him for subsequent periodic title upgrades. Complainant was hired in 1997 and promoted in September 1998. He expressed disappointment with Jandoli's failure to promote him in 1999, when Jandoli cited specific areas he needed to improve before he would be considered for promotion. Ex. R2. As a denial of a specific request for promotion, the 1999 failure to promote is a discrete act that occurred beyond the 180 day statutory limitations period for Complainant's September 2001 complaint, and cannot be considered pursuant to a differential treatment claim. N.J.S.A. 10:5-18.

The limitations period for this complaint reaches back to on or about March 20, 2001. At that point, John Scott was evaluating Complainant's performance. His 1<sup>st</sup> quarter 2001 review was favorable, with a rating of 1.6. His 2<sup>nd</sup> quarter review was generally favorable, but was reduced to a rating of 1.4. Scott noted as "troubling" the fact that the network would have been "down for an evening" if Scott had not returned to work on a particular day. Ex. R20. Scott gave more information in a September 26, 2001 statement, noting that when a server crashed in June 2001, Complainant left work at 3 because it was his normal quitting time, leaving others unable to complete their end-of-the-day business. Scott had to leave a New York seminar to return to the office to address the problem, which took him only 45 minutes to fix, and he felt that Complainant should have stayed late to resolve the problem. Ex. P453-54. Complainant has presented no evidence to dispute this cited deficiency in his performance, nor has he presented evidence that younger employees were promoted despite similar incidents. After review of the record, the Director finds no evidence to discredit Complainant's 2001 performance reviews, and cannot conclude that they were fabricated as a pretext for age discrimination.



Moreover, even if Complainant's performance reviews had been flawless, Complainant has presented no evidence to demonstrate that Respondent would normally promote employees of his grade level yearly or with any specific regularity. Hedges and Washington were at lower titles and grade levels when they received promotions, and in this regard they were not similarly situated to Complainant. Absent evidence of a clear policy or practice that would give all employees similarly situated to Complainant a legitimate expectation that they would be promoted yearly or every two years, the Director cannot conclude that Respondent's promotion of Hedge and Washington without promoting Complainant is evidence of age discrimination. After considering Complainant's evidence regarding timely and actionable incidents of differential treatment, the Director concludes that Complainant has not demonstrated that Respondent took any adverse action against him with the intent to discriminate against him based on his age.

**B. Hostile Work Environment**

To present an actionable hostile work environment claim under the LAD, Complainant must demonstrate that he was subjected to comments or actions, which would not have occurred but for his ancestry or age, and that were severe or pervasive enough to make a reasonable person who shared Complainant's protected characteristics conclude that the work environment had been altered and had become hostile or abusive. Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 24 (2002). Incidents of bias-based harassment which occurred more than 180 days from the filing date, and are part of a pattern or series of acts which would cumulatively constitute a hostile work environment, may be timely under the continuing violation theory. Id. at 21.

Complainant's argument that he was subjected to a hostile work environment based on his German ancestry are based on his allegation that Respondent Patricia Fox once referred to him as "space nazi," and Michael Jandoli on several occasions called him "printer nazi" and/or "network nazi." ID 3. The Director concludes that these comments were plays on the well-known Seinfeld

“soup nazi” character,<sup>7</sup> and were references to Complainant’s attempts to modify employees’ use of computers and related equipment. The Director concludes that these comments were not references to Complainant’s German ancestry, thus the Director cannot conclude that the comments would not have been made “but for” Complainant’s ancestry. In addition, the Director has evaluated Complainant’s contentions as to the frequency and circumstances of the comments, as well as the evidence that after Complainant complained about the comments, both Jandoli and Fox apologized to him and the comments ceased. ID 9. Based on this evidence, the Director concludes that, even if the comments had been made because of Complainant’s ancestry, they were not sufficiently severe or pervasive that a reasonable person of German ancestry would find that the work environment had been rendered hostile or abusive because of his ancestry. Thus, the Director concludes that Complainant’s allegations regarding ancestry-based harassment do not rise to the level of an actionable hostile work environment under the LAD.

Complainant’s argument that he was subjected to a hostile work environment based on his age are based on his allegations that Thomas Washington positioned his name plate higher than Complainant’s to insult him and responded in a highly disrespectful manner when he refused Complainant’s request to schedule a farewell luncheon; that Washington generally subjected him to hostile attitudes, insubordinate remarks and demeaning pranks; that someone placed large signs on everyday objects in lieu of carrying out his request to label certain equipment; and that Respondent’s president, Joseph Mahoney, referred to him as “old fool” in the presence of Mr. DeAngelo. Complainant also alleges that he was generally deprived of information he needed to do his job.

After review of the record, the Director concludes that Complainant has not demonstrated

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<sup>7</sup>Although there is no evidence referencing this in the record, on information and belief the “soup nazi” television character was of non-German ancestry, based on an Iranian-American who operated a take-out soup business in Manhattan.

that he was subjected to harassment that would not have occurred but for his age and was sufficiently severe or pervasive to constitute an actionable hostile work environment. The only incident Complainant cites which makes any reference to age is the “old fool” comment. Initially, the only non-hearsay evidence of this comment was testimony of Michael DeAngelo, which the ALJ found unpersuasive. The Director finds no basis in the record to reject the ALJ’s credibility determination regarding this evidence. N.J.A.C. 1:1-18.6(c). Moreover, even if Mr. Mahoney had made such a comment, that one comment, which was not made in Complainant’s presence, Ex. R41, is not sufficiently severe or pervasive that a reasonable person of Complainant’s age would find that the work environment had been altered and had become hostile or abusive.

Although Complainant argues the large signs placed on everyday objects were intended to imply that, due to his age, his eyesight was failing and/or his mind was not sharp, the Director finds no evidence in the record to support that conclusion. Although the prank may have been disrespectful of Complainant’s authority, the Director finds no evidence to support the conclusion that it was harassment based on his age. Similarly, there is no evidence in the record that any sarcasm or disrespect exhibited by Mr. Washington was based on Complainant’s age. Neither the placement of his nameplate nor the curt response to Complainant’s request to schedule a luncheon made any reference to Complainant’s age. Complainant has not alleged that Washington made any comments or references to his age, nor has Complainant presented any other evidence to support the conclusion that Washington’s unwelcome actions or comments would not have occurred “but for” Complainant’s age. Nor is there any evidence that any failure or delay in providing Complainant with information was based on his age. After review of the record, the Director concludes Complainant was not subjected to harassment based on his age and/or ancestry that was sufficiently severe or pervasive to constitute a hostile work environment under the LAD.

### **C. Denial of Reasonable Accommodation for Disability**

The LAD prohibits disability discrimination in employment, and although it does not explicitly address reasonable accommodation, New Jersey courts have uniformly held that the law requires employers to reasonably accommodate employees' disabilities. See, e.g., Potente v. County of Hudson, 187 N.J. 103, 110 (2006); Viscik v. Fowler Equipment Co., 173 N.J. 1, 11 (2002); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 396 (App. Div. 2002). Employers are required to accommodate employees' disabilities unless they can prove that needed accommodations would impose an undue hardship on the employers' operations. See N.J.S.A. 10:5-29.1; N.J.A.C. 13:13-2.5. As it appears to be undisputed that Complainant was diagnosed with a carpal tunnel condition, the Director concludes that Complainant had a disability as defined by the LAD. It also appears to be undisputed that he requested an ergonomic keyboard, a wrist rest and a negative tilt keyboard tray. The record reflects that, on July 9, 2001, Complainant sent an email to John Scott, Katarzyna Bochenski and several of his subordinates asking that a natural keyboard and a gel wrist rest for mouse be included "the next time an order goes into CDW." Ms. Bochenski responded the same day, stating that she ordered the items. Ex. P-121. Complainant received the items Ms. Bochenski ordered and began using them, but found them useless for proper wrist positioning. Ex. P26-27. Complainant states that after he asked Ms. Bochenski to order the above items, he was speaking with Mr. Morsell about his carpal tunnel condition, and Morsell mentioned that negative tilt keyboard trays had been ordered for Mr. Hedge and some other employees; Morsell suggested that Complainant try Hedge's tray to see whether he could use one. Complainant states that he tried it within a week, found that it properly aligned his wrists, and asked Morsell to order one for him. Ex. P26. Complainant states that "after a period of time" Morsell informed him that the vendor would be in on a particular date with the negative tilt keyboard trays, and that one would be installed on Complainant's computer, but when the vendor arrived he did not have the keyboard trays. Ex. P26. Complainant repeated his request for the negative tilt

keyboard tray. Complainant states that the vendor was not informed to bring the keyboard trays. Ex. P26-27. In his exceptions, Complainant asserts that he asked for the equipment six times. CE 8.

Although the ALJ found that a reverse tilt keyboard was ordered for Complainant the same day he requested it, ID12, the Director modifies this finding based on his review of the record. Although the ergonomic keyboard was ordered the same day Complainant requested it, a December 28, 2001 facsimile transmittal from Thomas Washington, who worked in the LAN unit with Complainant, to Angela Greaves of Respondent's Office of Equal Opportunity Development, confirms that the item Complainant was waiting for was a reverse tilt keyboard tray rather than a keyboard. Ex. R51. That document states that Washington could not attest to which tray was purchased for Complainant, and attaches a number of orders/invoices for equipment dated June through October 2001. Ibid. Based on this evidence, the Director modifies the ALJ's finding to delete the reference to the date the keyboard tray was ordered. The Director finds as fact that the requested tray was installed on Complainant's computer in late September/early October 2001, while Complainant was out on disability leave, and that Complainant never had the opportunity to use it.

After reviewing the record, the Director concludes that Respondent's response to Complainant's requests for equipment to accommodate his disability did not violate the LAD. Complainant's own recitation of the events demonstrates that Respondent promptly provided the first set of equipment Complainant requested. Although the ergonomic keyboard and wrist rest proved to be an ineffective accommodation, Respondent provided precisely the equipment Complainant believed would solve the problem. The delay in providing the subsequently requested keyboard tray is unfortunate, however, the record reflects that Respondent made sufficient efforts to provide the accommodation to meet its obligations under the LAD. Although Complainant

contends that he asked Mr. Morsell for the tray six times, the record reflects no bad faith or inaction on the part of Morsell or Respondent. It was at Morsell's own suggestion that Complainant tried and requested the negative tilt keyboard tray, as Complainant had previously been unfamiliar with that type of equipment. Complainant's statement that Morsell notified him that the vendor was scheduled to deliver the trays on a particular date is evidence that Respondent believed the order had been properly processed and would be delivered to Complainant on that date. The record does not reflect specific dates for the sequence of events Complainant recited. However, given that the first set of equipment was ordered on July 9, 2001, Ex. P121, and Complainant learned of the negative tilt keyboard tray at some point after that, tried the tray "within a week" of learning about it, and that Respondent was expecting the vendor to deliver it on a specific date, it seems that a number of weeks would have passed even if every action had taken place in the most expedient manner possible. Since Complainant's last day of work was September 17, 2001, only about nine weeks after his first equipment request, the delay of a number of weeks, which appears to have been caused by some error or inadvertent mis-communication between the vendor and Respondent, does not rise to the level of a denial of reasonable accommodation.

In his exceptions, Complainant asserts that the ALJ failed to address a separate claim that Respondent denied him reasonable accommodations for his depression that would have permitted him to return from disability leave. CE 6. The amended complaint lists depression as an element of personal harm caused by Respondents' actions, Ex. P2, but neither the amended nor original complaint alleges any request for, or denial of, reasonable accommodation for depression. The ALJ's July 10, 2007 order permitting the amendments makes no reference to adding a claim of reasonable accommodation for depression. Thus, the Director concludes that the ALJ did not err in failing to address this new claim, and the Director has no jurisdiction to address it.

**CONCLUSION**

Based on all of the above, the Director concludes that Complainant was not subjected to differential treatment based on his age, was not subjected to a hostile work environment based on his age or ancestry, and that Respondent did not violate the disability-based reasonable accommodation standards established under the LAD. For these reasons, the Director adopts the ALJ's dismissal of the complaint.

**February 6, 2008**

**Date**

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**J. Frank Vespa-Papaleo, Esq., *Director***  
**New Jersey Division on Civil Rights**

