

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 00470-16
DCR DOCKET NO. PL11RB-64454

Felix Osorio,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINAL DECISION
)	
Lucas Maximum Auto Sales, LLC,)	
)	
Respondent.)	

APPEARANCES:

Felix Osorio, Complainant, *pro se*

Megan J. Harris, Deputy Attorney General, for the New Jersey Division on Civil Rights
(Christopher S. Porrino, Attorney General of New Jersey, attorney)

Joy Lucas, *pro se*, for the Respondent

BY THE DIRECTOR:

This matter arises from a discrimination complaint filed by a customer against a New Jersey car dealership. On March 7, 2017, Administrative Law Judge (ALJ) Patricia Kerins issued an initial decision concluding that the dealership violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and recommended remedies.¹ After a thorough and independent evaluation of the ALJ's initial decision and the documents comprising the record, the Director adopts the ALJ's decision, as set forth below.

¹ Hereinafter, "ID" will refer to the ALJ's initial decision. "Ex. P" will refer to Complainant's exhibits admitted into evidence at the hearing.

Procedural History

On March 17, 2014, Mercer County resident Felix Osorio (Complainant), who is African-American, filed a verified complaint with DCR, alleging that Lucas Maximum Auto Sales, LLC (Lucas or Respondent), located in Ewing, New Jersey, subjected him to racial slurs and refused to service his vehicle because of his race, in violation of the LAD.

On May 22, 2014, Respondent filed an answer denying all allegations of wrongdoing.

On August 13, 2015, after completing its investigation, the DCR issued a finding of probable cause as to Complainant's allegations of racial harassment. DCR's attempts to resolve this matter through conciliation were unsuccessful, and on January 4, 2016, DCR transmitted this case to the Office of Administrative Law (OAL) for a plenary hearing pursuant to N.J.A.C. 13:4-11.1(b).

By written notice dated January 25, 2016, the OAL informed the parties that a prehearing conference would be held on March 22, 2106. Respondent did not appear at the prehearing conference. By written notice dated March 30, 2016, the OAL informed the parties that a hearing would be held on June 24, 2016. Respondent did not appear at the hearing. Deputy Attorney General Megan J. Harris (DAG) appeared on behalf of DCR, and Complainant testified and presented evidence. The ALJ left the record open for post-hearing submissions.

On July 28, 2016, the DAG submitted the State's Proposed Findings of Fact, Conclusions of Law and Remedies, and on February 13, 2017, the DAG submitted a certification of attorney fees. The record closed on February 21, 2017.

The ALJ filed her initial decision on March 7, 2017. In both the ALJ's initial decision and a March 15, 2017 letter, the parties were notified that they could file exceptions with DCR within thirteen days of the mailing date noted on the decision. Neither party submitted exceptions to the ALJ's decision. The Director's final order is due to be issued on April 21, 2017.

The ALJ'S Decision

Noting that Lucas did not appear at the hearing, ALJ Kerins found the allegations of the verified complaint undisputed, and incorporated them into her initial decision. ID2. However, the ALJ's factual findings were also based on her conclusion that "Osorio's testimony was credible and consistent with the facts alleged in the Verified Complaint." Ibid. Judge Kerins' factual findings can be briefly summarized as follows.

In September 2013, Osorio purchased a 2004 Infiniti from Lucas for \$10,000, along with a limited warranty/service contract for \$699. ID2. On March 11, 2014, he returned to Respondent's Spruce Street facility and requested certain repairs under the warranty. ID3. Respondent's manager, Pat Chiacchio, referred him to Respondent's repair facility on Troy Avenue. There, Respondent's owner, Joy Lucas, disputed that the requested repairs were covered by the warranty, and turned him away. Ibid. Osorio then returned to the Spruce Street facility, where he and one of Respondent's sales employees, Orlando "Earl" Chiacchio, engaged in a "heated altercation" about the repairs. ID3. During that altercation, Earl Chiacchio said to Osorio, "Get out of here nigger." Ibid. One of Respondent's employees, Grady Blue, corroborated Complainant's account of Earl Chiacchio using that racial slur. Ibid.² The altercation escalated and police were called to the Spruce Street facility. Complainant left the premises and has had no contact with Respondent since that date. Ibid. Osorio and Earl Chiacchio filed criminal complaints against each other alleging "pushing and physical contact during the dispute," but they were voluntarily dismissed. ID4.

As a result of the March 11, 2014 incident, Complainant paid \$300 to have the repairs done elsewhere. Ibid. The ALJ found that following the March 11, 2014 incident and continuing to the hearing date, Complainant suffered "anger, stress, and distrust that he would be subjected to racial animus." Ibid.

² Although Grady Blue did not testify at the hearing, his corroboration was entered into evidence. See Ex. P-3 (DCRs investigative report memorializing a DCR investigator's March 13, 2015 interview with Blue).

The ALJ found that “respondent’s use of the word ‘nigger,’ along with telling Osorio to leave was an apparent design to discourage [Osorio’s] use of respondent’s business,” and constituted a violation of the LAD. ID5. She awarded \$300 to Complainant in compensation for his out-of-pocket car repair expenses, and \$2,500 in damages for emotional distress. The ALJ found that the fees and costs itemized in the DAG’s fee certification, totaling \$11,968, were reasonable and appropriate. Ibid. The ALJ also imposed a \$10,000 statutory penalty. ID6.

The Director’s Decision

After reviewing the record submitted by an ALJ, an agency head can adopt, reject, or modify the initial decision. N.J.S.A. 52:14B-10(c). If the agency head rejects or modifies findings of fact, conclusions of law, or interpretations of agency policy, he or she must state clearly the reasons for doing so. Ibid. An agency head cannot reject or modify 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.” Ibid.; 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 is therefore in a position to judge the witnesses’ credibility. Clowes v. Terminix Int’l, 109 N.J. 575, 538 (1988). In this case, the Director concludes that the relevant and material facts relied on by the ALJ are supported by the record and adopts them as his own.

The LAD prohibits race discrimination in places of public accommodation. N.J.S.A. 10:5-12(f)(1). This prohibition applies to retail stores and other businesses open to the public, such as the car dealership operated by Respondent. See Sellers v. Philip’s Barber Shop, 46 N.J. 340 (1966); Cottrell v. Good Wheels, 458 Fed. Appx. 98 (N.J. 2012).

Where a business subjects a patron to a hostile and offensive racial insult during a commercial transaction or commercial dispute, use of such language may constitute discrimination “in the furnishing of” goods or services. See N.J.S.A. 10:5-12(f). A place of

public accommodation may violate the LAD by acting “with an actual or apparent design to discourage present or future use” based on race, or based on any other LAD-protected characteristic. See Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 216 (App. Div. 2000), certif. denied 166 N.J. 606 (2000).

Not every offensive, crude, or inappropriate comment constitutes a violation of the LAD. However, there are obviously circumstances where racial harassment can be severe enough to constitute unlawful discrimination. See Taylor v. Metzger, 152 N.J. 490, 498 (1998). In Taylor, the Supreme Court stated that racial epithets are “especially egregious” forms of harassment, id. at 502 (“The use of the word “nigger” automatically separates the person addressed from every non-black person; this is discrimination per se”), and that the “experience of being called a ‘nigger’ . . . is like receiving a slap in the face. The injury is instantaneous.” Id. at 503 (quoting Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 452 (1990)); Turner v. Wong, 363 N.J. Super. 186, 213 (App. Div. 2003). Thus, the Court held that even a single racial slur by a county sheriff directed to a subordinate could be severe enough to create a hostile work environment. Id. at 506-507.

Under those standards, Chiacchio’s use of the word “nigger” alone may have been sufficient to establish unlawful race discrimination in violation of the LAD. In this case, however, the racially biased conduct went further, as the slur was directed at Complainant in the context of demanding that he leave Lucas’s place of business. In that context, the ALJ’s factual findings demonstrate that Respondent acted “with actual or apparent design to discourage present or future use” of the business, based on race. Accordingly, Respondent’s conduct on March 11, 2014 constituted unlawful race discrimination in violation of the LAD.

a. Compensatory Damages

Compensatory damages may be awarded to a complainant as the prevailing party pursuant to the LAD. N.J.S.A. 10:5-3. Because Respondent acted with racial animus in subjecting him to racial harassment and demanding that he leave its premises, it deprived him

of repairs that he believed were covered by the warranty purchased through Lucas. As a result, he incurred \$300 in out-of-pocket costs to have the car repaired at another facility. ID4.

The ALJ found that the claim for \$300 in compensatory damages was sufficiently supported by the record. ID5. Without evidence that any factual findings were arbitrary, capricious, unreasonable, or not supported by sufficient competent and credible evidence, the Director has no basis for rejecting that determination. N.J.A.C. 1:1-18.6. It is appropriate to compensate Osorio for these out-of-pocket costs to effectuate the “make-whole” policy of the LAD. See Terry v. Mercer County Bd. of Chosen Freeholders, 86 N.J. 141, 157 (1981).

b. Emotional Distress

A victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-03 (1982). A victim is entitled to receive, at a minimum, a threshold pain and humiliation award for enduring the “indignity” that may be presumed to be the “natural and proximate” result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970); see also Tarr v. Ciasulli, 181 N.J. 70, 82 (2004). Pain and humiliation awards are not limited to instances where the plaintiff sought medical treatment or exhibited severe manifestations. Id. at 318. Nor is expert testimony required. Rendine v. Pantzer, 276 N.J. Super. 398, 440 (App. Div. 1994), aff’d as modified, 141 N.J. 292 (1995).

In this case, ALJ Kerins had the opportunity to observe Osorio’s testimony at the hearing, and found his testimony as to the distress and indignity he endured during the incident to be credible. Her Honor found that the claim for \$2,500 in emotional distress damages was sufficiently supported by the record. ID5. In the absence of evidence that any factual findings were arbitrary, capricious, unreasonable, or not supported by sufficient competent and credible evidence, the Director has no basis for rejecting that determination. N.J.A.C. 1:1-18.6.3.

c. Counsel Fees

A prevailing party in a LAD action may be awarded reasonable attorney fees. N.J.S.A. 10:5-27.1. Fees should ordinarily be awarded unless special circumstances would make a fee award unjust. Hunter v. Trenton Housing Auth., 304 N.J. Super. 70, 74-75 (App. Div. 1997). When a complainant's case is prosecuted by an attorney for the DCR, reasonable fees for such representation may be assessed against the respondent. N.J.S.A. 10:5-27.1. The Supreme Court has held that to be compensable, the time expended must be supported by a certification of services that is sufficiently detailed to allow meaningful review and scrutiny, and must include more than a raw compilation of hours. Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995).

Here the ALJ awarded \$11,968 in attorney fees based on a February 13, 2017 certification of the DAG, attesting that she devoted a total of 46.1 hours on this matter, and that the Division of Law's hourly rate for an attorney with her level of experience is \$260. After reviewing the certification, the Director finds that an award of attorney fees for prosecuting this case serves the public interest, and that the DAG's certification supports her hourly rate and the reasonableness of the time expended in prosecuting this case.

d. Statutory Penalty

The LAD states that any person who violates any of its provisions "shall be liable," in addition to any other remedies, for certain statutory penalties payable to the State Treasury. N.J.S.A. 10:5-14.1a. The ALJ assessed a \$10,000 penalty, which is the maximum penalty for a first violation of the LAD. Ibid.

After a review of the record, the Director concludes that the penalty is appropriate under the circumstances. Because punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the civil penalty serves an admonitory or deterrent purpose in this case. The nature of the harassment and the removal of Osorio from the business premises warrant a substantial penalty to vindicate the public interest.

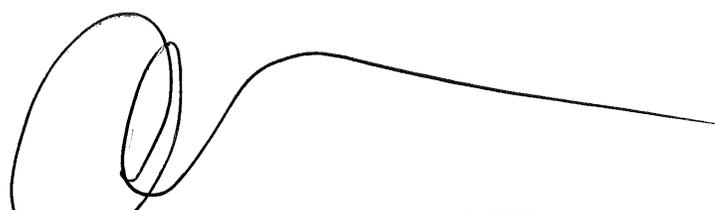
ORDER

After a thorough and independent evaluation of the initial decision and the documents comprising the OAL record, the Director finds no basis to reject any of the ALJ's factual findings or conclusions of law. Accordingly, the Director adopts and incorporates same by reference and concludes that Respondent subjected Complainant to unlawful racial discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the LAD;
2. Within 45 days from the date of this order, Respondent shall forward to DCR a certified check payable to Complainant in the amount of \$2,800, comprised of \$300 as compensation for his vehicle repair costs, and \$2,500 as compensation for his emotional distress;
3. Within 45 days from the date of this order, Respondent shall forward to the DCR a certified check payable to "Treasurer, State of New Jersey" in the amount of \$21,968, comprised of \$10,000 as a statutory penalty, and \$11,968 as payment for DCR's attorney's fees and costs incurred in this matter;
4. The penalty and all payments to be made by Respondent under this order shall be forwarded to Carlos Bellido, New Jersey Division on Civil Rights, P.O. Box 46001, Newark, New Jersey 07102; and
5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the DCR.

DATE:

4-20-17



Craig Sachihara, Director
NJ DIVISION ON CIVIL RIGHTS