



STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. PG02RB-63275
OAL DOCKET NO. CRT 14013-13

Gregory Smith,

Complainant,

v.

Passaic Ventures, LLC, d/b/a
Aaron's Rental,

Respondent.

Administrative Action

FINAL DECISION & ORDER

APPEARANCES:

Gregory Smith, Complainant, *pro se*.

Russell Moserowitz, *pro se*.

BY THE DIRECTOR:

On August 23, 2012, an African-American Newark resident, Gregory Smith, filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Passaic Ventures, LLC, d/b/a Aaron's Rental (Aaron's) refused to deliver a television set to his home because of his race, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Aaron's denied the allegations of discrimination in their entirety.

During the course of DCR's ensuing investigation, Smith asked that the matter be transmitted to the Office of Administrative Law (OAL) for an administrative hearing, without a probable cause determination. Accordingly, DCR stopped investigating the matter and transmitted the case to the OAL on February 21, 2013, pursuant to N.J.A.C. 13:4-11.1.

a. OAL's Initial Decision

Administrative Law Judge (ALJ) Barry E. Moscowitz presided over a hearing on July 1, 2014. Smith and Aaron's owner, Russell Moserowitz, were the only witnesses to testify. The ALJ closed the record on July 1, 2014, and filed his initial decision on August 13, 2014, in which he found as follows.

During the relevant time period, Smith lived in an apartment complex at 195 First Street, Newark, known as the Garden Spires. Aaron's is a commercial entity that rents and sells electronics, furniture, and appliances. On August 10, 2012, Smith called Aaron's and asked about renting a 73" television set. Smith alleged that a customer service representative replied, "We don't deliver to that neighborhood; it's a bad area and our drivers have been robbed and held up by black people." (ID3.) The ALJ wrote that Smith "could not identify nor produce the customer service representative who allegedly told him that Aaron's does not deliver to black people." (Ibid.)

The ALJ wrote that Moserowitz testified that his company's refusal to deliver to Smith had "nothing to do with [Smith's] race and everything to do about the safety of his employees, who are also minorities." (Ibid.) Moserowitz testified that his company delivers to Smith's neighborhood, but no longer delivers to the Garden Spires apartment building because of a disturbing incident that occurred on December 23, 2009. The ALJ wrote:

Moserowitz explained that on December 23, 2009, his delivery men were approached by a group of young men who intimidated them, and fearing for their safety, the delivery men aborted the delivery. To underscore the seriousness of this incident, Moserowitz emphasized that his delivery men are "big, strong men, who are not easily intimidated"; yet they were still intimidated by the young men at Garden Spires and feared for their safety.

(Ibid.)

The ALJ wrote that Moserowitz testified that "virtually all of his employees are either African-American or Hispanic; that approximately sixty-percent of his customers are African-American; and that nearly half of his customers live in Newark." (Ibid.) Ultimately, the ALJ found:

Aaron's does deliver to Smith's neighborhood, but not to his address, because his delivery men—all of whom are African-American, all of whom are from the same neighborhood, and all of whom are not easily intimidated—are fearful of delivering merchandise to that address.

[ID8.]

The ALJ noted that the LAD makes it illegal for a place of public accommodation, such as a store, to refuse service--or to even discourage patrons from using its services--based on race, (ID5) (citing Turner v. Wong, 363 N.J. Super. 186 (App. Div. 2003) and Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206 (App. Div. 200)), and that the determinative issue was whether a place of public accommodation "acted with an actual or apparent design to discourage present or future use of its public accommodation . . . on account of his race." (ID7) (citing Turner, supra, 363 N.J. Super. at 213). Applying that standard, the ALJ found that Aaron's "did not act with an actual or apparent design to discourage present or future use of its public accommodation by Smith on account of his race" and, therefore, did not violate the LAD (ID8) ("Smith has not proven by a preponderance of the evidence that Aaron's refused, withheld, or denied Smith any accommodation, advantage, facility, or privilege on account of race in violation of the LAD.") In reaching that decision, the ALJ found Moserowitz to be a credible witness and, conversely, found Smith to not be credible. In particular, the ALJ noted:

I firmly believe that no customer service representative told Smith that Aaron's would not deliver the television set to him because he is African-American. I have no doubt that this is decidedly not Aaron's policy and that Smith simply misunderstood the customer service representative. And between the two witnesses—Smith and Moserowitz—Moserowitz proved to be the more reliable witness by far. More pointedly, Moserowitz was calm and measured throughout the hearing, even when Smith was erratic and unstable. In fact, Smith had difficulty following the lines of communication at times during the hearing and became emotionally overwrought at others, seemingly out of nowhere.

[ID3-4.]

Thus, the ALJ concluded, "I **FIND** that Smith has not proven by a preponderance of the evidence any of the allegations in his complaint relevant to his claim of discrimination based on race." (ID8.)

Smith filed exceptions to the ALJ's initial decision in which he challenged many of the ALJ's factual conclusions in summary fashion without providing any supporting evidence. For instance, he wrote:

The judge said he do not believe me. The lady did say, they do not deliver to the building because they got rob, by "Black" people . . . I think the judge was more for Russel Moserowitz, Arron's, If you look at the Judge letter, he said all the drivers are, black? Thats not true, they was "big guys"? And they live in the area, thats not true. . . . The Judge was very wrong, and I need to be done right, all this because he think all "Black" people will not pay?

[Letter from Smith to DCR, Aug. 25, 2014 (*sic* throughout).]

b. Analysis

An agency head, upon review of the record submitted by an ALJ, 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).

Such is true in this case. The Director did not hear the testimony and finds nothing in the record from which to conclude that the ALJ's credibility assessments are somehow arbitrary, capricious, unreasonable, or not supported by sufficient, competent, and credible evidence. Thus, the Director accepts the ALJ's factual findings that no representative of Aaron's ever told Smith that his race was a factor in its delivery decision, and that Aaron's was motivated by concerns for the safety of its delivery personnel. Moreover, Smith presented no persuasive evidence to refute Moserowitz's assertions that approximately 60% of his customers are African-American, that the

company delivered merchandise to the neighborhood, but just not to his specific building, that half of its customers lived in Newark, and that its drivers are all African-American and were “approached” and “intimidated” by a “group of young men” when they attempted to make a delivery to Garden Spire on December 23, 2009. Nor did Smith provide DCR with the portions of the hearing transcript that might be relevant to his exceptions. See Matter of Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987) (holding that whichever party is asserting exceptions has the burden to provide the reviewing agency with the relevant parts of the record). Thus, the ALJ’s conclusion that Smith failed to meet his burden of proof appears to be supported by competent evidence in the record.

As a general matter, a store cannot refuse to deliver goods to a customer based on safety concerns that are “more likely motivated by stereotypical assumptions about crime and race rather than by legitimate concern about driver safety.” See DP v. Harris, 99A-12-003, 2000 Del. Super. LEXIS 269, *19 (Del. Super., Jul. 31, 2000). For example, a neighborhood’s racial composition should never play a role in decisions to limit delivery service. Similarly, factors such as sexual orientation, religion, gender identity or expression, age, national origin, and any other characteristics protected by the LAD are never legitimate considerations in deciding whether or not to limit delivery service. N.J.S.A. 10:5-12(f). Only legitimate concerns can serve as a reason for appropriately deciding to limit delivery service. In this case, there was evidence that Respondent’s safety concerns were not based on “stereotypical assumptions about crime and race,” DP v. Harris, supra, at *19, but stemmed from an actual encounter that caused senior management to conclude that delivering to that specific building or complex may present an unreasonable risk of harm to employees making deliveries.

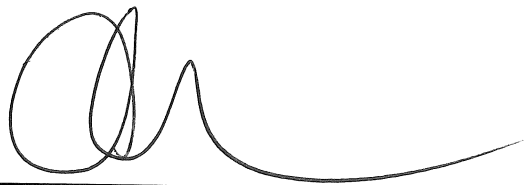
Although satisfied that Smith clearly did not meet his burden of proof--either at the hearing or during the exception process--the Director has serious concerns about the issues raised by this case and the real possibility of this sort of exclusionary practice continuing in perpetuity. Although

violent crime is a reality in various geographic areas, the operative reality is that circumstances can change. Crime rates can change. Things can improve. Even where a business elects to limit delivery to a certain address based on legitimate issues regarding criminal activity, such limitations on delivery service should be reviewed on an annual basis, or more frequently as circumstances may warrant, to determine if the threat to safety is still present or if the delivery limitation may be lifted or reduced. Regularly checking the validity of self-imposed delivery restrictions with an eye toward removing outdated or otherwise unnecessary policies that limit the growth of a customer base may help the business avoid liability under civil rights statutes such as the LAD while, at the same time, furthering the best interests of the business, its customers, and the residents of the community that the business serves. Failure to do so may result in a policy or practice that unjustly results in a disparate impact on one or more protected groups in violation of the LAD.

WHEREFORE, for the reasons discussed above, the Director affirms the ALJ's dismissal of the verified complaint in its entirety with prejudice, but cautions Respondent to not misconstrue this decision as a license to refuse *ad infinitum* to deliver goods to inhabitants of the Garden Spires apartment complex.

DATE:

11-10-14



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS