STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
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DATED: AUGUST 28, 2002

RODNEY B. DAWSON, Complainant, v. R.W. VOGEL, INC., HOLGATE PROPERTY ASSOCIATION, ENVIRONMENTALLY CLEAN NATURALLY, INC. AND JEFF VOGEL, Respondents.	ADMINISTRATIVE ACTION FINDINGS, DETERMINATION AND ORDER

APPEARANCES:

D'Andre Workman, Deputy Attorney General, prosecuting this matter on behalf of the New Jersey Division on Civil Rights (David Samson, Attorney General of New Jersey, attorney), for the complainant.

Timothy G. Hiskey, Esq.(Malsbury and Armenante, P.A., attorneys) for respondents R.W. Vogel, Inc., Holgate Property Assoc., and Jeff Vogel.

Roger William Vogel, pro se, principal of respondent Environmentally Clean Naturally, Inc., appearing pursuant to N.J.A.C. 1:1-5.4(a)5.

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 the complainant, Rodney B. Dawson (Complainant), alleging that the respondents, R.W. Vogel, Inc., Holgate Property Association, Environmentally Clean Naturally, Inc. and Jeff Vogel (Respondents), subjected him to a racially hostile work environment and constructively discharged him based on his race (Black) in violation of the New

Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On April 15, 2002, the Honorable Joseph F. Fidler, Administrative Law Judge (ALJ), issued an initial decision[1] concluding that Respondents violated the LAD, awarding damages to Complainant and assessing statutory penalties. Having independently reviewed the record and the ALJ's decision, the Director adopts the ALJ's initial decision as modified herein.

PROCEDURAL HISTORY

On October 21, 1996, Complainant filed a verified complaint with the Division alleging that R.W. Vogel subjected him to a hostile work environment and constructive discharge because of his race. Respondent Vogel filed an answer on February 10, 1997, denying the allegations of unlawful discrimination. On July 2, 1997, R.W. Vogel filed a motion to dismiss the complaint, asserting that it was not Complainant's employer at the time the alleged discrimination occurred. The Director denied the motion, but amended the complaint to add Holgate Property Association, Environmentally Clean Naturally, Inc. and Jeff Vogel as additional Respondents. On August 11, 1999, the Division issued a finding of probable cause supporting the allegations of the complaint. On June 14, 2000, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. The ALJ conducted a telephone prehearing conference on March 21, 2001, and conducted a hearing on the merits on June 11, 21 and 22, 2001. At the close of the hearing, the ALJ directed the parties to submit written argument and proposed findings of fact and conclusions of law, and left the record open for those submissions.

[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ;"CE" shall refer to Complainant's exceptions to the ID; "RE1" shall refer to Respondent Environmentally Clean Naturally 's exceptions to the ID; "RE2" shall refer to Respondents R.W. Vogel, Inc., Holgate Property Assoc., and Jeff Vogel's exceptions to the ID; "RR" shall refer to Respondents R.W. Vogel, Inc., Holgate Property Assoc., and Jeff Vogel's reply to Complainant's exceptions; TR 1 shall refer to the transcript of the June 11, 2001proceedings; TR 2 shall refer to the transcript of the June 21, 2001 proceedings and TR 3 shall refer to the transcript of the June 22, 2001 proceedings .

On or about September 6, 2001, Respondents R.W. Vogel, Inc., Holgate Property Association (Holgate) and Jeff Vogel wrote to the ALJ on notice to all parties, requesting permission to submit additional evidence -- specifically, an affidavit of a witness who was included on Complainant's witness list but had not appeared at the hearing. By letter dated October 23, 2001, the ALJ denied these Respondents' request. These Respondents filed a request for interlocutory review with the Division, and on or about November 7, 2001,[2] Acting Director Jeffrey Burstein denied their request for review of the ALJ's October 23, 2001 ruling on an interlocutory basis. The ALJ issued an initial decision on all issues on April 15, 2002.

On April 26, 2002, Respondent Environmentally Clean Naturally (ECN) filed exceptions to the initial decision, and the remaining Respondents filed exceptions on April 30, 2002. Complainant filed exceptions on May 24, 2002, and on May 31, 2002, Respondents R.W. Vogel, Inc., Holgate, and Jeff Vogel filed a response to Complainant's exceptions. The Director obtained two extensions of time to file his final determination in this matter, which is now due on August 29, 2002.

THE ALJ'S DECISION

Findings of Fact

The ALJ set forth his findings of fact at pages 2-3 and 16-18 of the initial decision. Those findings are briefly summarized as follows. Complainant applied for work at R. W. Vogel, Inc., on June 13, 1996. At that time, Respondent Jeff Vogel handled hiring for R.W. Vogel. Inc., Holgate and ECN, and was also president and one-third owner of ECN (ID 2). Jeff Vogel hired Complainant to work for R.W. Vogel Inc., as a laborer on an asphalt crew, and after the asphalt job was completed, on or about July 3, 1996, Jeff Vogel assigned Complainant to a driver position

[2]Due to an administrative error, the first page of the Acting Director's denial of interlocutory review bore the incorrect date of October 19, 2000.

with Holgate. On or about July 11, 1996, Complainant was transferred to ECN, where he was assigned a truck identified as #110, which he drove for the duration of his employment with ECN. Complainant knew he was responsible for driving truck #110 with reasonable care (ID 3).

Although he did not subject all employees to such treatment, it was not unusual for Jeff Vogel to argue with, demean and curse at employees, and he frequently used the word "nigger" in the workplace (ID 17). Jeff Vogel subjected Complainant to several instances of harsh treatment, including some incidents which were overtly racial. Some of Jeff Vogel's racially hostile remarks were directed at Complainant, while other remarks were directed at others in Complainant's presence (ID 17-18).

Among other examples, the ALJ specifically found as fact that the following incidents occurred:

- When Complainant asked Jeff Vogel if there were any nice places in Jackson to find an apartment, Vogel responded that he should stay in Freehold because there were no Blacks in Jackson.
- Complainant was shocked when he heard Jeff Vogel call bi-racial driver Mike Fruccione[3] a "half-breed mutt" and was extremely offended when Jeff Vogel declined to see his own niece and referred to her child as a "nigger baby."
- Jeff Vogel more than once asked Complainant who was the "white girl" driving his car, and when Complainant finally answered, Jeff Vogel referred to the woman as a "nigger lover."
- After asking Complainant where he went to school, Jeff Vogel responded that Freehold Borough High School was "a Black School; fucking dummies."

[3]Although the transcript refers to this employee as "Mike Fruccione," from Respondents' post-hearing submissions and request for interlocutory review, it appears that his last name is actually "Fuschini."

- When Complainant asked Jeff Vogel why he was stapling the toll money Respondents provided to drivers, Jeff Vogel state that Blacks have "hot hands."
- When Jeff Vogel made a derogatory statement about Blacks to Complainant in the presence

  of Roger Watson Vogel (Jeff Vogel's father and president of R.W. Vogel, Inc., and Holgate Property Associates, Tr. 2, p. 50), Complainant asked Roger Watson Vogel if he was going to let Jeff Vogel talk to him like that, and Roger Watson Vogel indicated that he would do nothing about it (ID 17-18).
- The ALJ also found that on one occasion Jeff Vogel threatened Complainant with termination if he did not shovel sewer sludge out of his truck by hand, although a backhoe was available to help with this task (ID 22).

The ALJ found that, after truck #110 had to be towed due to transmission problems, Jeff Vogel told Complainant that he would no longer have a job until he found out whether driver error caused the damage, and that he would be fired if driver error turned out to be the cause. The ALJ found that Complainant called Respondents several times afterwards to determine whether he still had a job, and also contacted the repair shop to inquire as to whether the damage was due to mechanical error. Complainant finally spoke with Jeff Vogel, who said, "Who the fuck are you to call up about my truck?" The ALJ found that Complainant was told he did not have a job and understood he was being terminated (ID 18). The ALJ found that on occasion Caucasian drivers were not terminated when their trucks had broken axles or other damage. Ibid.

Conclusions of Law

The ALJ concluded that Jeff Vogel made overtly racial comments and engaged in conduct that would not have occurred but for Complainant's race, noting that the "but-for" element of the New Jersey Supreme Court's hostile work environment standard is automatically satisfied where

the conduct is overtly racial or racist in nature. The ALJ further concluded that those comments and actions were both severe and pervasive enough to make a reasonable African-American believe that his working conditions were altered and his work environment was hostile or abusive (ID 22).

The ALJ next determined that, despite Complainant's contention that he was constructively discharged, the testimony and proofs in the record warrant evaluating this aspect of Complainant's claim as an actual, rather than constructive, discharge (ID 23). The ALJ concluded that using either the standards for discriminatory discharge or the standards for discriminatory discipline, Complainant established a prima facie case that he was discharged based on his race (ID 25-26). Specifically, the ALJ concluded that, as an African-American, Complainant is a member of a protected class, he was performing his job at a level that met Respondents' legitimate expectations, and he was terminated. Applying the standard for discriminatory discharge, Respondents assigned others to perform the same work after terminating Complainant; applying the alternative test for discriminatory discipline, Respondents retained non-Black employees who were also charged with damaging their trucks (ID 25-26).

The ALJ concluded that Respondents met their burden of articulating a legitimate non-discriminatory reason for terminating Complainant, based on a R.W. Vogel, Inc., written disciplinary policy that listed discharge as a potential penalty for "careless operation of equipment resulting in vehicle damage," and evidence that several other employees were fired for equipment abuse or other performance problems (ID 26).

The ALJ next evaluated whether Complainant met his ultimate burden of proving that Respondents' articulated reason was pretext for a racially discriminatory motive. The ALJ found that Complainant's testimony was compelling and worthy of belief, and that other credible evidence in the record established a racially hostile work environment. Ibid. Relying on caselaw

holding that racial slurs and racially derogatory joking are probative of an employer's intent to discriminate based on race in promotions or discharges, the ALJ found the racially hostile work environment in this case to be "highly probative" of Respondents' discriminatory motive for terminating Complainant's employment (ID 27). Citing a prior decision of the Director and federal caselaw, the ALJ noted that a work environment permeated by racial hostility, or even a single racial slur, can be evidence of a discriminatory motive in a discharge or promotion case (ID 26). Based on the evidence of racial hostility in Respondents' workplace, the ALJ concluded that even if Complainant caused damage to one of Respondents' vehicles, the evidence established that race was a significant factor in Respondents' decision to discharge Complainant. Ibid.

Regarding liability, the ALJ concluded that because Jeff Vogel had supervisory duties at R.W. Vogel, Inc. and Holgate, and was part owner of ECN and handled its day to day business, each of the corporate Respondents was vicariously liable for Jeff Vogel's hostile work environment racial harassment and discriminatory termination (ID 27-28). The ALJ further concluded that because of his role as chief operating officer for the three family-owned businesses as well as his ownership interest in ECN, Jeff Vogel was functionally an employer under the LAD. Accordingly, the ALJ concluded that Jeff Vogel was individually liable for his own LAD violations (ID 28).

Remedies

The ALJ determined that Complainant's earnings with Respondents averaged $722.64 weekly or $14.35 hourly. After losing his job with Respondents, Complainant earned $750 for one week's work at Kraft's Landscaping (ID 28-29). When he was discharged from Kraft's, Complainant elected to have surgery to correct a pre-existing problem that was unrelated to his employment with Respondents (ID 29). Complainant recuperated for about six months, and then took a job with Fiore and Sons earning $15 per hour, which was soon increased to $17 per hour. Ibid. The ALJ concluded that Complainant was not entitled to back pay for the period he was out

of work due to his surgery, and that he suffered no loss of wages for the remaining periods, since he earned a higher wage in his subsequent employment than he had earned with Respondents. Accordingly, the ALJ awarded no back pay to Complainant.

The ALJ concluded that Complainant suffered emotional distress and humiliation from Respondents' racially hostile work environment, which caused him to fear for his job security and damaged his personal relationships. After considering damages awarded in other LAD cases, the ALJ awarded Complainant $15,000 as compensation for the pain and humiliation he endured. Ibid. Noting that the LAD provides for a maximum penalty of $2,000 for a respondent's first violation of the LAD, the ALJ assessed a statutory penalty of $2,000 against each of the Respondents.

EXCEPTIONS AND REPLIES OF THE PARTIES

Roger William Vogel, Sr., appearing as principal of Respondent ECN, submitted exceptions on behalf of ECN. ECN takes exception to the imposition of liability against it, arguing that because Jeff Vogel is no longer involved with ECN, it should not be liable for any LAD violations Jeff Vogel committed while he was ECN's president and majority stockholder. Respondent ECN asserts that it is no longer in business and that Roger William Vogel would be personally liable for any payments due from ECN. ECN contends that it would be unfair to impose such monetary liability on Roger William Vogel because he personally had no notice that Jeff Vogel was subjecting Complainant to a racially hostile work environment or racial discrimination when those events occurred.

Respondents R.W. Vogel, Inc., Holgate and Jeff Vogel filed exceptions on April 30, 2002. These Respondents take exception to the enforcement of deadlines against them, asserting that the ALJ issued his April 18,2002 initial decision out of time in violation of N.J.S.A. 52:14B-10(c)

and N.J.A.C. 1:1-18.8, while the ALJ denied their motion to submit new evidence after the hearing but before the record closed, and the Division declined to review that denial on an interlocutory basis. (RE 1-2).

These Respondents take further exception to the ALJ's determination that Complainant's testimony was credible, and assert that Respondents presented competent, credible evidence that Respondent Jeff Vogel is not a racist, judges people on their work rather than their race, and appropriately handled allegations that another supervisor used racially derogatory language in Respondents' workplace (RE 2). These Respondents take exception to the ALJ's determination that repeated truck damage was not Respondents' true reason for terminating Complainant, citing Respondents' written policy specifying vehicle damage as a reason for termination, evidence documenting the repairs needed on Complainant's truck, and a letter from an auto mechanic stating that the transmission problem could be the result of driver abuse. Respondents also assert that they discharged two Caucasian drivers in 1996 for negligent truck damage, and take exception to the ALJ's reliance on witness Richard Sulfrian's testimony that unnamed Caucasian employees who damaged trucks were not terminated, arguing that Sulfrian's testimony was neither specific nor credible.

These Respondents further challenge the ALJ's credibility determinations, pointing out specific instances in which they allege Complainant contradicted himself or altered his allegations. They additionally take exception to the ALJ's reliance on the Division's investigation of this matter, asserting that the Division failed to interview appropriate witnesses, corroborate witness testimony or consider the biases of those interviewed. In general, these Respondents question whether the ALJ made findings in favor of Complainant based on "the relationship between the OAL and the Division."

These Respondents also take exception to the amount of emotional distress damages the ALJ awarded, contending that Complainant intentionally misrepresented his lost wages, and that the damage award was excessive in light of such misrepresentation. In reply to the exceptions filed by Respondent ECN, these Respondents assert that Respondent ECN's claim that it is not liable for Complainant's claims in this matter is contrary to the terms of the settlement agreement in the matter of Roger Vogel and ECN, Inc. v. Roger Vogel, Jeffrey Vogel et al., Docket No. OCN C-33-99, in which the plaintiffs in that case agreed to hold Jeff Vogel harmless for any corporate liabilities of ECN. (Exhibit P-23.)

Complainant filed exceptions on May 23, 2002. Complainant takes exception to the ALJ's denial of back pay, arguing that Respondents interfered with his ability to mitigate damages by inducing his subsequent employer, Kraft's Landscaping, to discharge him. Complainant asserts that once he learned of Respondents' interference, it was reasonable for him to decide to suspend his work search to undergo surgery, and that Respondents should be liable for his lost wages for the six month surgery/recovery period. Complainant argues that he should not be penalized for suspending his job search once he learned of Respondents' continued malfeasance, and that Respondents should not be rewarded for "retaliating" against him. Complainant also takes exception to the ALJ's failure to award the full $20,000 in emotional distress damages he requested, arguing that he suffered more egregious discrimination, including retaliatory actions, than complainants in other LAD cases who were awarded $20,000 or more. Complainant further takes exception to the assessment of $2,000 civil penalties against each of the Respondents, arguing that $10,000 penalties are appropriate because the LAD amendment increasing the maximum penalty was in effect at the time the ALJ rendered his initial decision.

Respondents R.W. Vogel, Inc., Holgate and Jeff Vogel filed a reply to Complainant's exceptions, asserting that Respondents did not interfere with Complainant's employment at Kraft's

Landscaping. Respondents argue that Complainant's testimony on this point should be rejected as not credible, as he made this allegation for the first time in his hearing testimony, never having raised this allegation at his deposition or otherwise prior to the hearing. These Respondents argue that there is no basis for increased pain and humiliation damages, because Respondents did not violate the LAD. Respondents further contend that the Director should not impose increased statutory penalties, arguing that there is no basis in law for retroactively applying the recently increased maximum penalties, and even if there were such a basis, the facts of this case do not warrant increased penalties.

THE DIRECTOR'S DECISION

The Director's Factual Findings

The Director adopts the ALJ's factual findings as set forth in the initial decision and as summarized above. Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). An agency head may reject or modify factual findings based on credibility of lay witnesses only upon a showing that the specific findings of the ALJ were arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record. N.J.A.C. 1:1-18.6(c); N.J.S.A. 52:14B-10. After reviewing the record, including Respondents' exceptions, the Director finds no basis in the record for rejecting the ALJ's credibility determinations or the factual findings based on those determinations.

The Director has considered Respondents' examples of inconsistencies in Complainant's testimony, but concludes that the discrepancies noted are not significant and are insufficient to

warrant rejecting the ALJ's factual findings based on that testimony as arbitrary, capricious or unreasonable.

Based on review of the record, and in light of the ALJ's finding that Complainant's testimony was credible, the Director additionally finds that Complainant heard Jeff Vogel make racially derogatory statements to employees Paul Vandeveer and Mike Fuschini (TR 1, p. 142-143). The Director has considered Respondents' contention that, after the hearing, the ALJ should have permitted them to supplement the record with an affidavit of Mike Fuschini. By letter dated September 6, 2001, Respondents requested permission to submit an affidavit of "a witness listed prior to the June 11, 2001 hearing," arguing that the proposed affidavit would meet the requirements of newly discovered evidence pursuant to R. 4:50-1. The ALJ denied Respondents' request, concluding that Respondents had not shown extraordinary circumstances for reopening the record required by N.J.A.C. 1:1-18.5(c).

The Director agrees that Respondents did not show extraordinary circumstances, and further concludes that Respondents did not show good cause for admitting the affidavit as newly discovered evidence pursuant to R. 4:50-1. Respondents' September 6, 2001 submission gave absolutely no information regarding Respondents' attempts to locate this witness in time to produce him at the hearing, nor did it give any other explanation of why the evidence could not have been obtained by the hearing date with reasonable diligence. The Director finds that it was not reasonably diligent for Respondents to rely on Complainant to produce this witness at the hearing, especially since Respondents knew at least as early as June 6, 2001 that Complainant had not located this witness and the hearing did not conclude until June 22, 2001. The Director is mindful of Respondents' obligation to avoid tainting the hearing process by presenting potentially inadmissible evidence to the ALJ, and observes that such legitimate concerns might well limit the information Respondents could provide about the substance of the affidavit or

witness testimony. However, Respondents have provided no explanation of how or why they were unable to locate this witness on a timely basis despite diligent efforts, nor have Respondents demonstrated that providing the ALJ with information regarding their attempts to locate this witness would compromise the hearing process. Accordingly, the Director concludes that Respondents have not established good cause to supplement the record with an affidavit of Mike Fuschini as additional evidence.

The Legal Standards

Hostile work environment racial harassment is a form of race discrimination prohibited by the LAD. Taylor v. Metzger, 152 N.J. 490, 498 (1998). In Taylor, supra, the New Jersey Supreme Court articulated the basic standard for establishing hostile work environment racial harassment - - the complainant was subjected to conduct that would not have occurred but for his or her race, and the conduct was severe or pervasive enough to make a reasonable person of his or her race believe that the conditions of employment are altered and the working environment is hostile or abusive. Ibid.

The LAD's prohibitions against race discrimination also prohibit employers from using race as a factor in applying discipline or discharging employees. N.J.S.A. 10:5-12(a). An employee may attempt to prove such differential treatment 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 such as statements of a decision-maker, which, if true, demonstrate "...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.

As a starting point for analyzing LAD cases relying on circumstantial evidence, the New Jersey courts have adopted the burden-shifting methodology established by the United States

Supreme Court in McDonnell Douglas Corp. v. Green[4], 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Clowes v. Terminix, supra, 109 N.J. at 595. A complainant first bears the burden of establishing a prima facie case, which in the context of a termination, generally requires proof that the complainant is a member of a protected class, that he or she was performing his job at a level which met the employer's legitimate expectations, that he or she was terminated, and that the employer thereafter sought others to perform the same work. Id. at 597. Where a discharge is based on violation of work rules, a complainant can establish the fourth prong of the prima facie case by showing that the employer retained a person outside the protected class who engaged in similar conduct. Moti v. Fritzsche Dodge & Olcott, 95 N.J.A.R. 2d (CRT) 153, 160.

By establishing a prima facie case of unlawful discrimination, the complainant has created a presumption that discrimination has occurred. The burden of production, but not the burden of persuasion, then shifts to the respondent 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).

By meeting this burden of production, the respondent rebuts the presumption of discrimination raised by the complainant's prima facie case. The complainant must then prove by a preponderance of the evidence that the respondent's articulated reasons for its action were pretextual and that the employer's true motivation and intent were discriminatory. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981).

Analysis

[4]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).

Hostile Work Environment

After independent review of the record, including consideration of the exceptions filed by Respondents, the Director concludes that Jeff Vogel subjected Complainant to a number of racially derogatory statements and actions described in the ALJ's factual findings above and that these statements spanned Complainant's tenure with each of the Respondent companies. The Director concludes that these words and actions were overtly racial, and for that reason the harassment would not have occurred "but for" Complainant's race. The Director further concludes that Jeff Vogel's racially charged words and actions were severe or pervasive enough for a reasonable employee of Complainant's race to believe that his work environment had become hostile or abusive. The Director also notes that Jeff Vogel's high-level position as superintendent or manager of all three Respondent companies, with the power to hire and fire at all three companies, rendered his racially biased words and actions more egregious. Accordingly, the Director concludes that Complainant has established by a preponderance of the credible evidence that Respondents subjected him to a racially hostile work environment in violation of the LAD., and that the Respondent companies are vicariously liable for Jeff Vogel's conduct.

Racially Motivated Termination

Initially, the Director agrees with the ALJ's determination that this matter should be analyzed as a claim of racially discriminatory termination, because Complainant testified at the hearing that he was terminated.[5] An employee's resignation or retirement is an essential element of a constructive discharge. Shepherd v. Hunterdon Developmental Center, 2002 WL

[5]The Director notes that it is not uncommon for the Division's staff to allege constructive (rather than actual) discharge in complaints where there is no clear written or oral statement from an employer notifying the employee of the termination. A pro se complainant is not generally charged with knowledge of the distinctions between constructive and actual discharge, and in some cases evidence disclosed in the investigation and/or hearing process clarifies the issues. For this reason, the Director does not construe the discrepancy between Complainant's testimony that he was terminated and his signature on the complaint alleging constructive discharge as contradictory, inconsistent or evidence of lack of credibility.

1801194 at *15 (NJ). Although there is some dispute about precisely how and when Respondents relayed this information to Complainant, Respondents do not dispute that they terminated Complainant (Tr. 1, p. 196; Tr. 2, p. 115). It is undisputed that, even if Jeff Vogel never clearly and directly told Complainant that he was fired, both Complainant and Respondent understood that Jeff Vogel, rather than Complainant, made the decision that Complainant would not return to his job. Complainant's repeated telephone calls to Respondents after Jeff Vogel advised him not to return to work until he determined the cause of damage to Complainant's truck support the conclusion that Complainant sought to retain his job despite the racially hostile work environment. For these reasons, it is appropriate to evaluate this claim as a racially motivated termination rather than a constructive discharge.

The Director notes that this case should be analyzed using the McDonnell Douglas standards for proving discriminatory motive with circumstantial evidence rather than the distinct standards for direct evidence cases. Although the Director found as fact that Jeff Vogel made overtly derogatory racial statements to Complainant, those statements were not sufficiently connected to Respondents' decision to discharge Complainant to constitute direct evidence of a racially motivated discharge. See, e.g., Bergen Comm. Bank v. Sisler, supra, 157 N.J. at 208, citing Castle v. Sangamo Weston, Inc., 837 F. 2d 1550, 1558 (11th Cir. 1988) (Courts have characterized stray comments such as "everyone over age 35 should be sacked" as circumstantial evidence, as contrasted with evidence targeting adverse action against a specific employee, such as a note stating "Fire Rollins - she is too old," which is direct evidence.)

Applying the prima facie standards for discriminatory discharge and discriminatory discipline, the Director agrees with the ALJ's conclusions that Complainant established a prima facie case and that Respondents met their burden of articulating a legitimate non-discriminatory reason for terminating Complainant's employment (ID 25-26). The Director further agrees with the

ALJ's conclusion that Complainant met his burden of proving that Respondents' articulated reason for terminating him was a pretext for race discrimination.

The ALJ relied on the racially hostile work environment to reach the conclusion that race played a significant part in Respondents' decision to terminate Complainant's employment (ID 27). Implicit in this conclusion are the ALJ's determinations regarding the credibility of the witnesses regarding incidents of racial insults and animus. The ALJ specifically found Complainant's testimony to be compelling and worthy of belief, and also found testimony of Complainant's witness, Richard Sulfrian to be credible (ID 16 -17). The ALJ accepted Sulfrian's testimony that on several occasions White drivers caused truck damage but were not terminated (TR 1, p. 44-45; Exhibit P-11; ID 18).

The Director concludes that the testimony regarding more favorable treatment of certain non-Black drivers, and the ALJ's specific determinations regarding the credibility and persuasiveness of Complainant's and Sulfrian's testimony, support the conclusion that the transmission damage to Complainant's truck was not Respondents' true or only reason for terminating Complainant. This differential treatment, combined with the evidence of Respondents' ongoing hostility to and differential treatment of Complainant based on his race throughout his employment, persuasively lead to the conclusion that Complainant's race was a motivating factor in Respondent's decision to terminate his employment. As the ALJ noted, Complainant need not prove that race was the only reason for Respondents' decision to terminate him, but it is sufficient if, taken with other possibly meritorious reasons, Complainant's race was a determinative factor in Respondent's decision.

Without explicitly making an overall determination regarding Jeff Vogel's credibility as a witness, the ALJ noted that Vogel's respectable work ethic was insufficient to establish that his version of events was true (ID 16). As noted above, the Director must give substantial weight to

the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. After consideration of the record, including Respondents' exceptions, the Director finds no basis to conclude that the ALJ's findings or conclusions were arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence.

In reaching this conclusion, the Director has considered Respondents' exceptions challenging the ALJ's finding that Complainant and Sulfrian were credible witnesses, and asserting that Respondents terminated two non-Black drivers for truck damage in 1996. The Director has reviewed Jeff Vogel's hearing testimony regarding other drivers terminated for truck damage, and notes that the examples generally involved collisions in which the employee was at fault, incidents in which the employee drove off the road and damaged property of third parties and/or drivers were impaired by illegal drugs (Tr. 2 , p. 124 -130). Based on this testimony, the Director finds unpersuasive Respondents' contention that because a repair mechanic characterized the transmission damage to Complainant's truck as "driver abuse," while Respondents characterized the damage caused by other terminated drivers as merely "negligent," it was inappropriate for the ALJ to conclude that Respondents were more lenient with White drivers (RE2, p. 4). Moreover, Complainant need not establish that his employer *never* applied the work rule to white employees, or that Respondent applied the work rule *only* to Blacks. Evidence that in one or more instances the employer treated similarly situated non-Black employees more favorably than Complainant may be sufficient to persuade the decisionmaker that the employer was motivated at least in part by Complainant's race in meting out discipline. This is especially true in these circumstances, where

Complainant was subjected to differential treatment when Jeff Vogel ordered him to shovel sewer sludge on threat of termination and then subsequently terminated his employment for an infraction

that did not give rise to termination when committed by non-Blacks. Moreover, in this instance the differential treatment occurred in an environment tainted by open and pervasive racially derogatory remarks.

Based on the ALJ's determinations regarding the credibility and persuasiveness of Complainant, Sulfrian and Jeff Vogel, the Director concludes that Complainant has established by a preponderance of the credible evidence that Respondents ECN and Jeff Vogel terminated his employment because of his race in violation of the LAD.

LIABILITY

The act of terminating an employee is an act of the employer, and there is no question that an employer is liable for all damages flowing from a termination that violates the LAD. In contrast, an employer is not automatically liable for hostile work environment created by its employees. An employer is directly and strictly liable for equitable relief flowing from a supervisor's racial harassment, and is liable for compensatory damages where the employer delegated authority to the supervisor to control that aspect of the work environment which proved to be hostile, the supervisor's exercise of that authority violated the LAD, and the delegated authority aided the supervisor in injuring the employee. Shepherd v. Hunterdon Developmental Center, 336 N.J. Super. 395, 422 (App. Div. 2001) aff'd in relevant part, rev'd in part, 2002 WL 1801194 (N.J.); Herman v. The Coastal Corporation, 348 N.J. Super. 1, 25 (App. Div. 2002), citing Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 620 (1993).

Applying these standards, the record reflects that Jeff Vogel had a supervisory relationship with Complainant throughout Complainant's employment with each of the Respondent companies, and that racially hostile comments and actions occurred during Complainant's tenure at each company. Specifically, the ALJ found as fact that during his first week of work Jeff Vogel told Complainant to remain living in Freehold because there were no Blacks in Jackson (ID 3); and

during the first week Complainant worked for Respondents as a driver, Complainant heard Jeff Vogel call bi-racial employee Mike Fuschini a "half-breed mutt." Ibid. Although the timing of the remaining incidents is unclear, the ALJ specifically found as fact that in August of 1996, Jeff Vogel referred to Complainant's girlfriend as a "nigger lover" (ID 4). It is undisputed that Complainant was assigned to Respondent R.W.Vogel, Inc., during the first week of his tenure with Respondents, was working for Respondent Holgate for the first week as a driver with Respondents, and had been transferred to Respondent ECN by August of 1996 (June 11, 2001 Stipulation of Parties, #1-3). Accordingly, based on the ALJ's factual findings, the Director concludes that the racially hostile work environment permeated Complainant's employment with Respondents R.W. Vogel, Inc., Holgate, and ECN. [6]

In addition, the record reflects that each company delegated oversight of its day to day operations to Jeff Vogel, and he exercised that authority in making decisions to hire, fire, and transfer employees between the Respondent companies, as well as in his direct supervision of employees, including dealing with employee complaints (TR 3, p. 16). The authority delegated by each Respondent company enabled Jeff Vogel to create a work environment which was hostile to Blacks in violation of the LAD. Accordingly, the Director concludes that R.W. Vogel, Inc., Holgate, and ECN are each vicariously liable for Jeff Vogel's violations of the LAD.

The LAD prohibits employers from discriminating based on race, but an individual supervisor is not defined as an "employer" under the LAD. Herman v. The Coastal Corporation,

[6]The Director notes that in post-hearing submissions Complainant has alternatively argued that Respondents R.W. Vogel, Inc, Holgate and ECN should be considered a single employer for liability purposes, and Respondents R.W. Vogel, Inc., Jeff Vogel and Holgate have argued that the Respondent companies do not meet the test for a "single employer" under the applicable caselaw. See, Pearson v. Component Technology Corp., 247 F. 3d 471, 484-491 (3rd Cir. 2001), cert. denied 122 S.Ct. 345, and cases cited therein, for discussion of "single employer" standards. The ALJ did not address this issue in the initial decision. As the ALJ and the Director have found sufficient evidence to impose liability on each company based on the timing of the racial harassment, the Director need not now address the question of whether the Respondent companies meet the test for a single employer.

supra, 348 N.J. Super. at 24. However, any person, whether an employer or not, may be held individually liable for aiding and abetting an employer's unlawful discrimination. N.J.S.A. 10:5-12e. A supervisory employee can be held liable for aiding and abetting the employer's LAD violations if the supervisor "actively engaged in discriminatory conduct, gave substantial assistance to or encouragement in maintaining a hostile work environment, or was deliberately indifferent to the complaints of plaintiff." Herman v. Coastal, supra, 348 N.J. Super. at 28. As every racially hostile statement or action which is the subject of Complainant's hostile work environment claim was attributed to Jeff Vogel, and it is undisputed that he also made the decision to terminate Complainant, the Director concludes that Jeff Vogel is individually liable under the aiding and abetting provisions of the LAD.

The Director finds no merit in ECN's contention that because Jeff Vogel is no longer involved with ECN, it should not be liable for his actions which violated the LAD. At all relevant times, ECN delegated authority to Jeff Vogel, which enabled him to racially harass and ultimately terminate Complainant. As discussed above, these circumstances meet the standard for imposing vicarious liability on the employer for his actions. The fact that the ownership of ECN changed after the unlawful acts were completed does not automatically absolve ECN from liability. The Director notes that although Roger William (Billy) Vogel asserts in his exceptions that he will be personally liable for ECN's debts, he is not named as an individual respondent in the within matter, and the extent to which his assets may be reached pursuant to corporate law or the settlement of prior litigation between Respondents need not be addressed here.

REMEDIES

After review of the record and the parties' exceptions, the Director agrees with the ALJ's conclusion that Complainant is not entitled to back pay. It is well settled that a complainant has an ongoing obligation to mitigate damages. In the employment context, a complainant is obliged to exercise reasonable diligence in seeking other suitable employment, and as time passes and

circumstances dictate, reasonable diligence may require a complainant to accept lower pay or a different type of work. Goodman v. London Metals Exchange, 86 N.J. 19, 34-39 (1981). Mitigation of damages does not excuse the wrong committed by the employer, but simply limits the judgment to the amount that will make the complainant whole. Id. at 34-35.

Although the Director agrees with Complainant's argument that Respondents should not benefit from any actions they may have taken to thwart Complainant's attempts to find new employment, such bad faith actions and their impact on Complainant would not override Complainant's independent obligation to mitigate damages.[7] Instead, it is appropriate to consider Respondent's actions in assessing statutory penalties and pain and humiliation damages . By taking himself out of the labor market for six months to have surgery, Complainant made a decision to forego earned income during that period. Although this may have been a reasonable decision based on his health, there is no evidence that Complainant would have had continued income during his surgery/recovery period if he had not been unlawfully discharged. Accordingly, the Director concludes that Complainant has not established that he lost earned income as a result of Respondents' unlawful actions, and for that reason the Director awards no back pay.

The Director also agrees with the ALJ's determination that Complainant is entitled to compensation for the emotional pain and humiliation he suffered as a result of Respondents' unlawful actions. It is well established that 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, 502-503 (1982); Director,

[7]This is not to say that Respondents' actions would be irrelevant if Complainant had continued to seek comparable employment but was unsuccessful because of Respondents' continued interference. In such circumstances, Respondents' actions would be evidence that Complainant's ongoing attempts to find comparable employment were diligent, despite his failure to actually secure and retain a comparable job. The Director also notes that although Complainant refers to Respondents' interference as "retaliation," it would not constitute reprisal or retaliation in violation of subsection 12(d) of the LAD, as there is no allegation that Complainant engaged in LAD-protected activity before he lost his job with Kraft's.

Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which 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). Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318.

Here, the Director adopts the ALJ's findings that Complainant was extremely offended by Jeff Vogel's racially hostile comments and suffered humiliation and emotional distress as a proximate result of the racially hostile and abusive work environment and racially discriminatory termination. The Director generally seeks to ensure that pain and humiliation damage awards are consistent with awards granted to other prevailing complainants who have come before the Division, based on the extent and duration of emotional suffering experienced by each complainant.

After reviewing the applicable portions of the record, and considering emotional distress damage awards made to other prevailing complainants, the Director adopts the ALJ's award of $15,000 in pain and humiliation damages. The Director recently awarded $15,000 in pain and humiliation damages to a complainant who was subjected to racial slurs and sexual harassment which culminated in a constructive discharge, where the complainant worked for the respondents for only a brief period, and developed physical as well as non-physical symptoms of emotional distress. Wiley v. Victoria's Café, et al., OAL Docket No. CRT 5058-98; DCR Docket No. EB-60WB40094 (February 26, 2002). The Director concludes that a comparable damage award is appropriate in this case.

Moreover, the Director is mindful that, before fashioning an award of emotional distress damages, the ALJ had an opportunity to observe Complainant's demeanor as he testified in detail about his reactions to being subjected to racial harassment and discrimination. Having weighed all of the foregoing considerations, including amounts awarded to prevailing parties in comparable matters and Complainant's testimony regarding his pain and humiliation, the Director concludes that the ALJ's award of $15,000 in pain and humiliation damages is appropriate in this case, and finds Respondents jointly and severably liable for these damages.

Penalties

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates the LAD. N.J.S.A. 10:5-14.1a. The ALJ imposed a $2,000 penalty against each of the Respondents, which at the time of the hearing was the maximum penalty for a first violation of the LAD. (ID 30).

Effective November 15, 2001, the LAD was amended to provide that the Director may assess a statutory penalty of not more than $10,000 for a respondent's first violation of the LAD. Ibid. Generally, absent language to the contrary, legislation imposing enhanced civil penalties may be applied retroactively. Administrative proceedings imposing penalties have been recognized as civil in nature and, therefore, the imposition of an administrative penalty does not infringe on any constitutional rights or vested interests of the assessed party. In the Matter of Robert Kaplan, D.O., 178 N.J. Super. 487, 495 (App. Div. 1985)(retroactive application of statute governing civil penalties for medical fraud does not violate federal and state constitutional provisions prohibiting ex post facto laws, provided amount of penalty is not inequitable). See also State, Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div.1981)(remedial statute may be given retroactive effect without unconstitutionally infringing on vested rights, provided that new statutory remedy is for redress of preexisting actionable wrong rather than for actions that were not unlawful when the legislation was passed); In re D'Aconti,

316 N.J. Super. 1(App. Div. 1998). Accordingly, the Director concludes that, based on the legislature's amendment of N.J.S.A. 10:5-14.1a to increase the maximum statutory penalty effective November 15, 2001, the Director has the power to impose up to $10,000 in penalties for each Respondent's LAD violations in this case.

Although the ALJ expressed the intent to impose the maximum permissible penalties based on the then current state of the law, the Director finds that the new $10,000 maximum affords more room for the decisionmaker to exercise discretion in assessing penalties based on the specific nature and severity of the LAD violation forming the basis of the penalty. The Director notes that because penalties serve an admonitory rather than a reparative function under the LAD, it is appropriate to individually evaluate and assess each Respondent's liability for a statutory penalty. Cf. Fischer v. Johns-Manville Corp., 103 N.J. 643, 656-657 (1986). Accordingly, after consideration of the nature, gravity and duration of each Respondent's unlawful actions, the Director modifies the ALJ's recommended penalties and assesses the following statutory penalties: a $500 penalty is imposed on Respondent R.W. Vogel, Inc.; a $1,000 penalty is imposed on Respondent Holgate; a $5,000 penalty is imposed on Respondent ECN; and a $5,000 penalty is imposed on Respondent Jeff Vogel.

CONCLUSION

For all of the reasons discussed above, the Director adopts the ALJ's recommended decision finding each of the Respondents liable for subjecting Complainant to hostile work environment racial harassment and for discriminatory termination in violation of the LAD. The Director modifies the ALJ's assessment of statutory penalties in light of the legislature's increase of the maximum penalties and the nature of each Respondent's LAD violation.

ORDER

Based on all of the above, the Director finds that Respondents R.W. Vogel, Inc., Holgate Property Association, Environmentally Clean Naturally, Inc., and Jeff Vogel unlawfully discriminated

against Complainant because of his race in violation of the LAD. **THEREFORE**, the Director orders and directs as follows:

1. Respondents, their agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. Within 45 days from the date of this order, Respondents shall forward to the Division a check payable to the Complainant in the amount of $15,000 as compensation for his pain and humiliation.

3. Within 45 days from the date of this order, each Respondent shall forward to the Division a check payable to "Treasurer, State of New Jersey" for statutory penalties in the following amounts: R.W.Vogel, Inc. shall pay $500; Holgate shall pay $1,000; ECN shall pay $5,000 and Jeff Vogel shall pay $5,000.

4. The penalty and all payments to be made by the Respondents under this order shall be forwarded to the Division on Civil Rights, Bureau of Policy, P.O. Box 089, Trenton, New Jersey 08625.

5. Any late payments will be subject to post-judgment interest at such amount as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time as received by the Division.

DATE:_____

_____

J. FRANK VESPA-PAPALEO, ESQ.,
DIRECTOR

JFVP:SSG:EB: