

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 11089-99
DCR DOCKET NO. HJ5NW-05341

VASSELIN DITTRICH,)
)
 Complainant,)
)
 v.)
)
 931 PARK AVENUE CONDOMINIUM)
 ASSOCIATION,)
)
 Respondent.)
_____)

ADMINISTRATIVE ACTION
FINDINGS, DETERMINATION
AND ORDER

APPEARANCES:

D'Andre Workman, Deputy Attorney General, for the complainant (David Samson, Attorney General of New Jersey, attorney)

Theresa J. Szathmary, President, for the respondent

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Vasselin Dittrich (Complainant), alleging that the respondent, 931 Park Avenue Condominium Association (Respondent), discriminated against him on the basis of his national origin (Bulgarian), in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On November 19, 2002, the Honorable Diana C. Sukovich, Administrative Law Judge (ALJ), issued an initial decision concluding that Complainant established by a preponderance of the evidence that Respondent subjected him to unlawful discrimination based on his national origin. Based on a thorough and independent review of the record, including the transcript of the hearing and exhibits admitted into evidence, the Director adopts the ALJ's initial decision.

II. PROCEDURAL HISTORY

On August 19, 1994, Complainant filed a verified complaint with the Division alleging that Respondent discriminated against him on the basis of his national origin (Bulgarian), in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49. Specifically, Complainant alleged that the President of the 931Park Avenue Condominium Association (hereinafter Association), Michael P. McManus, denied him access to certain Association records that he was entitled to examine, and that McManus made disparaging remarks about his national origin. On December 5, 1994, Respondent filed an answer to the verified complaint denying Complainant's allegations.

The Director issued an order dismissing this matter on November 28, 1995, and subsequently issued an order to reopen the investigation on March 14, 1996. On January 16, 1998, the Division issued a finding of probable cause crediting Complainant's allegation that Respondent unlawfully discriminated against him on the basis of his national origin. After attempts to conciliate this dispute failed, the Division transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. The ALJ scheduled a hearing for April 3, 2000. Respondent failed to appear at the hearing and the hearing was conducted ex parte.

On May 9, 2000, Respondent's counsel filed a motion to reopen the hearing. On November 16, 2000, the ALJ issued an order disqualifying Respondent's counsel because he did not establish that he maintained a bona fide office for the practice of law in New Jersey pursuant to R. 1:21-1(a).

On December 17, 2000, Theresa J. Szathmary notified the ALJ that she was the new President of the Association and wanted to move forward with a hearing. On January 30, 2000, the ALJ notified Szathmary that additional hearings were not contemplated unless a motion to reopen was granted. The ALJ granted Szathmary time to file additional arguments or documents in support of a motion to reopen. On May 1, 2002, the ALJ issued an order denying Respondent's motion to reopen the hearing. However, the ALJ permitted Respondent to file a reply to Complainant's post-

trial brief submitted subsequent to the April 3, 2000 hearing. Respondent filed a letter memorandum on June 18, 2002, and Complainant filed a reply on July 8, 2002 and the record was closed. On November 20, 2002, the ALJ issued an initial decision ¹ concluding that Complainant established by a preponderance of the evidence that Respondent subjected him to unlawful discrimination based on his national origin.

The Director obtained one extension of time to file his final determination in this matter, which is now due February 18, 2003.

III. THE ALJ'S DECISION

Findings of Fact

The ALJ set forth her findings of fact at pages four through nine of the initial decision. The testimony and findings are briefly summarized as follows. The ALJ found that Complainant lived in a condominium located at 931 Park Avenue in Hoboken, New Jersey, since May 1993, when he purchased the condominium from Thrift Association. Complainant became interested in purchasing the condominium based upon an advertisement in the Jersey Journal. Complainant learned that Thrift Association acquired the condominium from a previous owner in a foreclosure proceeding and that it wanted to sell the condominium quickly. Complainant contacted McManus, who was the President of the Association, and requested financial records so that he could obtain a loan for the purchase (ID 4). McManus asked Complainant, who is from Bulgaria, about his background including his immigration status, "work permit," and his "green card." McManus indicated in one of their conversations that because of Complainant's ethnic background, he was not a suitable individual and advised him that financial records were only available to Association members (ID 5). Complainant was not able to obtain a mortgage and purchased the condominium unit with cash on May 11, 1993.

The ALJ found that on June 15, 1993, the Condominium Association held a regular annual

¹ Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "T" shall refer to the transcript of the April 3, 2000 hearing; and "P" shall refer to Complainant's exhibits.

meeting at Complainant's residence. Present at the meeting were McManus, John Mulligan and Robert Sorge, all of whom owned condominiums at the location. At this meeting, Complainant asked McManus to provide him records detailing various Association expenditures. The records included bank statements, invoices paid, memoranda and other documents. McManus initially indicated that there was no need for Complainant to see the records because he had provided compilations of those records already. Complainant referred McManus to the Association's bylaws and renewed his request for the records. McManus became very angry and stated that he would not provide access to the documents because Complainant would not understand anything anyway because he didn't know enough English to understand the records (ID 5). Complainant did not respond to that remark, but insisted that he had a right to see the records. McManus continued to berate Complainant and used ethnic slurs and insults. He stated that Complainant was a "stupid immigrant" who did not speak or understand English and was a "stupid f - - - ing Bulgarian" (ID 5, 6). Although McManus had the documents with him, he never gave them to Complainant. At some point McManus left the apartment, continuing to insult Complainant and stating he would give the records to "anybody else" except Complainant (ID 6).

Subsequent to June 15, 1993, Complainant called McManus and sent him certified letters on various occasions requesting copies of the Association records. Complainant communicated with McManus by letter on June 30, July 11, and July 21, 1993 (ID 6). On July 29, 1993, Complainant spoke with McManus and sent him a letter memorializing that conversation. In the letter, Complainant verified McManus' receipt of a check for payment of common Association charges, and again confirmed that McManus refused to provide him with copies of the requested documents. Complainant further noted that he had offered to pay reasonable expenses for the copying and mailing of the documents (ID 7). Complainant also contacted an attorney, Lawrence Wolfberg, Esq., who communicated with McManus by letter, dated August 9, 1993, asking that McManus provide the various documents sought by Complainant. Ibid.

The ALJ found that Complainant did not gain access to Association records until after a

meeting conducted in March 1994. At that meeting, new Association officers were elected, and Complainant was elected the President of the Association. Complainant testified that he subsequently learned from Gordon Creighton, an Association member and owner of a condominium unit, that he, Creighton, did not have any problem in gaining access to documents while McManus was the Association President (ID 8). Although Complainant believed Creighton was born in the United States, he was unable to identify his ethnic background (ID 8). The bylaws of the Association provide in part that each unit owner and each mortgagee of a unit shall be permitted to examine the "book of account" of the Board of Directors at a reasonable time on business days (ID 9).

Conclusions of Law

In its response to Complainant's post-hearing brief, Respondent asserted that (1) it made an offer to settle this matter that was rejected by Complainant; (2) this dispute was partly the responsibility of a former Association President and also an attorney who briefly represented Respondent in this matter; and (3) the relief requested by Complainant will have a detrimental financial effect on Respondent. The ALJ indicated that these assertions were unsupported in the record and irrelevant to the substantive issues in the case (ID 4).

Citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the ALJ next determined that Complainant met the burden of proof required to prevail in a civil rights claim and that McManus' actions of denying him access to the Association's records, and making those records available to non-Bulgarian individuals, constituted unlawful discrimination based on national origin (ID 10). The ALJ ruled that the Association was liable for McManus' discriminatory conduct which occurred in his capacity as President of the Association. Ibid. Accordingly, the ALJ awarded Complainant \$500.00 as damages for emotional distress and assessed a statutory penalty to be paid to the Director in the amount of \$2,000.00.

Exceptions and Replies of the Parties

On January 9, 2003, the Director granted Complainant's request for an extension of time

in which to submit exceptions, however, Complainant did not submit exceptions to the initial decision. Respondent also did not file exceptions to the ALJ's initial decision.

IV. THE DIRECTOR'S DECISION

The Director's Findings of Fact

The Director adopts the ALJ's factual findings as summarized above. The ALJ based her findings of fact on her assessment of the witnesses' credibility (ID 4). Generally, the Director must give substantial weight to the ALJ's credibility determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses regarding these events and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 587 (1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Moreover, an agency head may not reject or modify any 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. N.J.S.A. 52:14B-10.

Applying these standards of review, the Director finds no basis for rejecting the ALJ's credibility determinations or her factual findings based on the evaluations of the witnesses and their testimony. Respondent did not file exceptions to the ALJ's initial decision and therefore has not identified grounds upon which the Director could properly reject or modify the ALJ's factual findings. Furthermore, the Director finds nothing in the record that militates against adopting the ALJ's factual findings. Accordingly, the Director adopts the ALJ's findings of fact set forth above.

The Director's Conclusions of Law

The LAD provides in pertinent part that it shall be an unlawful discrimination

For the owner . . . or managing agent of, or other person having the right of ownership or possession of . . . real property or part or portion thereof, or any agent or employee of any of these:

(2) To discriminate against any person or group of persons, because of the race, creed, color, national origin . . . of such person . . . in the terms, conditions or privileges of the sale, rental or lease of any facilities or services in connection therewith.

N.J.S.A. 10:5-12g.

Preliminarily, the Director concludes that any statute of limitations defense available to Respondent has been waived because Respondent has failed to assert the defense at any stage of the proceedings. A complaint filed with the Division under the LAD must be so filed within 180 days of the alleged act of discrimination. N.J.S.A. 10:5-18. The record in this case reflects that Complainant made requests for Association records and other documents throughout the summer of 1993, and that the last request was made by his attorney in a letter dated August 9, 1993 (ID 5-7). McManus failed to provide the documents to Complainant, and Complainant did not gain access to the documents until March 1994 when he succeeded McManus as Association President (ID 7). Complainant filed his verified complaint with the Division on August 19, 1994.

Compliance with the LAD's statute of limitations is not a jurisdictional prerequisite to the Division's deciding a claim. Addressing an analogous issue on the federal level, the United States Supreme Court has held that " filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).² Further, it is well settled in New Jersey that a defendant waives the statute of limitations defense when the defendant does not advert to the statute during any stage of the proceedings. Williams v. Bell Telephone Laboratories, Inc., 132 N.J. 9 (1993) (defendant waived the statute of limitations defense, even where it asserted it in its answer, when it failed to raise the defense during protracted litigation); See also Fees v. Trow, 105 N.J. 330, 335 (1987) (statute of limitations defense waived, even though it appeared on the face of the pleadings, because

²New Jersey courts have been guided by federal law in interpreting the statute of limitations under the LAD. See Decker v. Bd. of Education of City of Elizabeth, 153 N.J. Super. 470, 473 (App. Div. 1977).

affirmative defense was neither pleaded in defendant's answer nor adverted to by either party at any stage of the proceedings). Because Respondent has not raised the statute of limitations as an affirmative defense during this proceeding, Respondent has waived any available defense based on the statute of limitations.

Turning to the merits of this case, the record contains substantial credible evidence supporting the ALJ's conclusion that Michael P. McManus, as an agent for the Respondent Association, intentionally discriminated against Complainant by denying him certain privileges and services in connection with the ownership of a condominium located at 931 Park Avenue in Hoboken, New Jersey. Complainant credibly testified that McManus made derogatory comments about his nationality after he requested Association documents, to which he was entitled under Association by-laws, during an annual meeting held on June 15, 1993. McManus' response to Complainant's request was laced with profanity and disparaged Complainant's national origin (ID 5-6). At least two other residents who were in attendance witnessed McManus' conduct (P-11, 12). This is direct evidence of McManus' discriminatory animus in refusing to provide Complainant the documents he requested. Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 19 (App. Div. 1996), cert. denied 149 N.J. 141 (1997).

Complainant continued to request these documents from McManus during telephone conversations and by letter during the months following the 1993 annual meeting, but he was unable to obtain the documents until he himself was elected President of the Association in March 1994 (ID 6-7). Moreover, there is credible evidence that McManus provided similar documents to at least one other Association member who was not of Complainant's national origin (ID 8, T 27). This evidence further supports the ALJ's conclusion that Complainant was subjected to unlawful discrimination.

The statutory provisions of the LAD are to be read broadly and liberally. N.J.S.A. 10:5-3; Wilson v. Sixty-Six Melmore Gardens, 106 N.J. Super. 182 (App. Div. 1969). Thus, the "legislation is aimed at subtle and covert activities designed to defeat its policy as well as outright blatant violations." Id. at 185. The Wilson court noted that "[t]he deliberate use of tactics of

discouragement, whether by delay, credit investigations, withholding of material information, or by more subtly suggesting the applicant is unwelcome constitutes a violation of the statute if the practice is applied selectively to a particular race. . . .” Wilson, supra, 106 N.J. Super. at 185-186. Similarly, the practice of withholding information from individuals on the basis of national origin also constitutes a violation of the LAD.

It is undisputed that Complainant is from Bulgaria and, therefore, is a member of a protected class. The evidence sufficiently establishes that McManus refused to comply with Complainant’s request for records to which Complainant was entitled because of his national origin. Therefore, the Director concludes that Complainant established by a preponderance of the evidence that Respondent discriminated against him because of his national origin in violation of the LAD.

Conclusion

Based on the foregoing, the Director adopts the ALJ’s legal conclusion that Respondent discriminated against Complainant on the basis of national origin by denying him access to records and other documents to which he was entitled as a member of the Association. In addition, the Director adopts the ALJ’s ruling that the Association was liable for McManus’ discriminatory conduct which occurred in his capacity as President of the Association.

VI. REMEDIES

a. Damages For Pain and Humiliation

The ALJ found that Complainant credibly testified that he felt humiliated and upset when McManus denied him access to the Association’s records and made it clear that his decision was based upon Complainant’s national origin. Although the ALJ found that Complainant failed to present evidence to sustain his request for an award of \$1,000.00 for emotional damages, she nevertheless made a “moderate award” of \$500.00 for emotional distress (ID 12).

It is well established that a victim of unlawful discrimination under the LAD is entitled to be compensated for mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, 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 further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502. 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. After reviewing the applicable portions of the record, and recognizing that no exceptions were filed by Complainant with respect to this issue, the Director concludes that an award of \$500.00 for emotional distress damages is appropriate in this case.

b. Penalties

In addition to any other relief, 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. At the time of the hearing, the maximum penalty for a first violation of the LAD was \$2,000. Effective November 15, 2001, the statute was amended to provide that the Director may assess a penalty of up to \$10,000 against any person violating the LAD who has not been adjudged to have committed a prior violation within the previous five years. 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 has the power to impose upon Respondent a penalty of up to \$10,000 based on the Legislature's amendment to N.J.S.A. 10:5-14.1a. Nevertheless, after review of the record in the present case, the Director concludes that a penalty of \$2,000.00 is appropriate.

VII. ORDER

Based on the above, the Director concludes that Respondent subjected Complainant to unlawful 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 New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. Within 45 days of the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of \$500.00 as compensation for his pain and humiliation.

3. Within 45 days of the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of \$2,000.00 as a statutory penalty.

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

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 Division.

DATE: _____

J. FRANK VESPA-PAPALEO, ESQ.
NEW JERSEY DIVISION ON CIVIL RIGHTS