



STATE OF NEW JERSEY
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW & PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 OAL DOCKET NO. CRT 7965-04
 DCR DOCKET NO. EV18AB-46781

MARGIE HALL,)
)
 Complainant,)
)
 v.)
)
THE REEVES FOUNDATION,)
)
 Respondent.)

ADMINISTRATIVE ACTION
FINDINGS, DETERMINATION
AND ORDER

APPEARANCES:

Thomas N. Ryan, Esq. (Laddey, Clark & Ryan, attorneys), for the complainant.

William H. Healey, Esq. (Mandelbaum, Salsburg, Gold, Lazris, Discenza & Steinberg, attorneys), for the respondent.

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 Margie Hall (Complainant), alleging that The Reeves Foundation (Respondent) subjected her to unlawful age discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On November 4, 2005, the Honorable Maria Mancini La Fiandra, Administrative Law Judge (ALJ), issued an initial decision¹ dismissing the complaint. Having independently reviewed the record, the Director adopts the ALJ's

¹Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "CS" shall refer to Complainant's September 2, 2005 post-hearing summation; "RS" shall refer to Respondent's September 6, 2005 post-hearing summation; "CE" shall refer to Complainant's exceptions to the ALJ's initial decision and "RE" shall refer to Respondent's reply to Complainant's exceptions.

decision, as modified herein.

PROCEDURAL HISTORY

On March 23, 2001, Complainant filed a verified complaint with the Division alleging that Respondent harassed her in an effort to force her to retire, and terminated her employment based on her age. Respondent filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. On April 3, 2003, the Division issued a Finding of Probable Cause crediting the allegations of the complaint. On August 11, 2004, after attempts to settle this matter failed, the Division transmitted this case to the Office of Administrative Law for a hearing. The hearing was held on August 17 and 23, 2005 before ALJ Mancini La Fiandra, and the record closed on September 20, 2005. The ALJ issued her initial decision on November 4, 2005. The Director granted the parties extensions of time for submission of exceptions and replies. Complainant submitted exceptions to the ALJ's initial decision on December 5, 2005, and Respondent submitted a reply on December 9, 2005. The Director's final determination in this matter is due on December 19, 2005.

THE ALJ'S DECISION

THE ALJ'S FACTUAL DETERMINATIONS

The ALJ set forth detailed factual findings at pages 2 through 4 of the initial decision, which she described as "essentially undisputed." These are summarized briefly as follows:

Complainant worked for Respondent for 13 years, during which time she was one of only three employees. ID 2. When the office manager, Maryann Corzione, became terminally ill, Respondent's president, John Reeves, Jr.,(Reeves) interviewed Margaret Carney and Barbara Sommer for Corzione's position, and hired Margaret Carney as Corzione's replacement. ID 2-3. In 1998, Reeves heard Complainant say that she would move to California or Virginia in a couple of years, and in June or July of that year he asked Complainant what her retirement plans were.

Complainant stated that she wanted to work through the 1999 tax season. ID 2. When Reeves learned that Complainant expected to leave after the 1999 tax season, Reeves offered Complainant's position to Barbara Sommer, who he had previously interviewed for Corzione's position. Ibid. Sommer was working as a substitute teacher and she agreed to accept the position when it became vacant. ID 3.

At the beginning of 1999, Complainant advised Respondent that she wished to continue working until the beginning of 2000, and Respondent agreed. ID 3. As it got closer to the beginning of 2000, Complainant advised Respondent that she wished to work longer, and Respondent agreed to extend her employment until September 2000. Ibid.

Respondent offered Complainant 60 percent of her salary, plus benefits, to train Sommer until the end of the year 2000, and then to continue the 60 percent plus benefits until the end of June 2001, with virtually no duties. Ibid. On September 13, 2000, Complainant inquired about the annual cost of living increase, and Reeves informed her that she would not get the normal increase because she would be leaving. ID 3-4. When Complainant expressed dissatisfaction with not receiving the pay increase, Reeves changed his mind and advised Complainant that she would receive the increase. ID 4. Complainant then rejected the pay increase and told Reeves that she thought it would be best for her to give two weeks notice. Ibid. After September 13, 2000, Complainant refused to show Carney and Respondent's accountant certain aspects of her job. On September 26, 2000, Reeves met with Complainant and gave her a letter confirming her September 13, 2000 resignation. Complainant left the letter on her desk, and did not return to work after that date. ID 4. Complainant was 65 years of age when her employment with Respondent ended. Ibid. The relationship between Reeves and Complainant was pleasant and comfortable from the time she started in 1987 through September 13, 2000. Ibid.

THE ALJ'S ANALYSIS AND CONCLUSIONS

The ALJ concluded that Complainant failed to meet her burden of establishing a prima facie case of age discrimination. Specifically, the ALJ found that although the evidence established that Complainant is a member of a protected class, was performing her job to Respondent's expectations, and was replaced by Barbara Sommer, Complainant failed to prove that Respondent terminated her employment. ID 3-7. The ALJ further concluded that, even if the evidence were sufficient to meet Complainant's prima facie burden, Complainant presented insufficient evidence to prove that Respondent's articulated reason was a discriminatory pretext for her termination. ID 8. Based on those conclusions, the ALJ dismissed the complaint.

COMPLAINANT'S EXCEPTIONS AND RESPONDENT'S REPLIES

In her exceptions, Complainant argues that, in concluding that Mr. Reeves was more credible than Complainant, the ALJ failed to address certain hearing testimony. Specifically, Complainant asserts that Margaret Carney testified that, before Reeves ever discussed retirement with Complainant, he told Carney that Complainant would be retiring. CE 3. Respondent disputes that the testimony supports this assertion. RE 7. Complainant also asserts that Carney testified that she never told Reeves of her own discussions with Complainant about retirement until after Complainant left. CE 3. In addition, Complainant cites her own "persistent" testimony that she would not retire until after age 65 because she wanted to keep her medical coverage until she became eligible for Medicare. Ibid.

Complainant also takes exception to the ALJ's characterization of her testimony as evasive and unresponsive. Specifically, Complainant asserts that when she failed to give a yes or no answer to a cross-exam question about whether she was always talking about retirement, she intended her response, "I am still talking about retirement," to explain that she always talked about retirement in the future. CE 5, ID 6.

Complainant further takes exception to the ALJ's finding that her testimony was contradictory. ID 6-7. Complainant argues that her testimony that she had a good relationship with

Reeves can be reconciled with her testimony that she felt humiliated and embarrassed by his inquiries and insistence about retirement. Complainant argues that this testimony, as well as the testimony about her request for a pay raise, shows that she did not wish to retire. CE 5-6.

Complainant also challenges the ALJ's positive characterization of Respondent's offer to pay her 60% of her salary and full benefits for a period of part-time work and a subsequent period of virtually no duties. Complainant argues that, rather than evidence of a non-discriminatory motive, Respondent's offer was adverse action and evidence of age-based constructive discharge. CE 6, ID 7. Complainant also takes exception to the ALJ's finding that Respondent did not terminate her employment, arguing that Reeves discharged Complainant when he informed her that September 26, 2000 would be her last day. CE 9.

Complainant asserts that Respondent's articulated non-discriminatory reason for its actions was that Complainant kept setting and delaying retirement dates. CE 9. Complainant argues that the testimony supports the conclusion that this was not Respondent's true reason, but was pretext for age discrimination. Specifically, Complainant asserts that Reeves told Carney that Complainant would be retiring even before he discussed retirement with Complainant, and that Reeves forced Complainant to set retirement dates and retire only because of her age. CE 9-10. Complainant contends that Reeves selected Barbara Sommer to replace Complainant because Sommer was in her 30s. ID 10.

In reply to Complainant's exceptions, Respondent urges the Director to disregard the exceptions in their entirety because Complainant has not provided hearing transcripts. RE 2. In addition, Respondent argues that the Director must defer to the ALJ's credibility determinations, and contends that Complainant has not provided a sufficient basis for the Director to reject the ALJ's finding that Mr. Reeves was credible. RE 3-4. Respondent also argues that, because Complainant's exceptions do not challenge the ALJ's finding that she gave two weeks notice on September 13, 2000, she has provided no basis for the Director to reject the ALJ's conclusion that

she failed to present a prima facie case of discriminatory discharge. RE 5-6. Respondent contends that Complainant's recounting of certain portions of the hearing testimony is inaccurate and misleading; Respondent recounts other testimony to dispute Complainant's contentions. RE 7-10. Finally, Respondent argues that its actions did not constitute age discrimination. RE 11-12.

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

The Director concludes that the ALJ's factual findings are supported by the record, and adopts them as his own. To supplement the ALJ's findings, the Director finds as fact that Margaret Carney was in her 50s when Respondent hired her, and Barbara Sommer was in her 30s when Respondent offered her Complainant's position. CS 2; RS 1.

THE DIRECTOR'S ANALYSIS AND LEGAL CONCLUSIONS

In the absence of direct evidence of age discrimination, a complainant will establish a prima facie case of discriminatory termination by proving that she is a member of a protected class, she was performing her job, she was terminated, and the employer replaced her with someone who was sufficiently younger to permit an inference of age discrimination. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457-58 (2005); Bergen Commercial Bank v. Sisler, 157 N.J. 188, 213(1999). The Director agrees with the ALJ that Complainant met the first, second and fourth prongs of her prima facie case.²

Regarding the third prong, the ALJ found that Complainant decided to quit her job with Respondent on September 13, 2005, "because of a perceived slight in being passed over for a

² The ALJ noted that Complainant met the first prong because she was over 40 years old when her employment ended. ID 4. Unlike the federal Age Discrimination in Employment Age (ADEA), 29 U.S.C.A. §631(a), the LAD's age discrimination provisions are not limited to people at least 40 years of age, and prohibit discrimination based on youth as well as advanced age. Bergen Commercial Bank v. Sisler, *supra*, 157 N.J. at 214. That notwithstanding, older workers are the presumptive class protected against age discrimination under the LAD, and Complainant meets the first prong of the prima facie case without the additional evidence of age discrimination required for younger workers. Id. at 217-218.

raise....” ID 7. Based on that finding, the ALJ concluded that Complainant failed to prove that she was terminated, and therefore failed to establish a prima facie case of discriminatory discharge. After reviewing the record, the Director agrees with the ALJ’s conclusion that Respondent did not terminate Complainant’s employment. The ALJ found as fact that, on September 13, 2000, Complainant informed Reeves that “she thought it best that she give her two weeks notice,” and on September 26, 2000, Reeves presented Complainant with a letter confirming that resignation. ID 4. In her exceptions, Complainant argues that Reeves discharged her by informing her on September 26, 2000 that it would be her last day of work. CE 9. The Director disagrees. In the absence of any evidence showing that Complainant rescinded her September 13, 2000 resignation, the Director concludes that Respondent merely acted on Complainant’s own resignation, which does not constitute a termination.

In her post-hearing written summation and her exceptions, Complainant asserts that she was terminated or constructively discharged. CS 4, CE 6. The LAD prohibits employers from forcing employees to retire, unless justified by lawful considerations other than age. N.J.S.A. 10:5-12; N.J.S.A. 10:5-21.1. To prove a claim of forced retirement, courts have required aggrieved parties to meet the standards for constructive discharge. See, e.g., Gray v. York Newspapers, Inc., 957 F. 2d 1070, 1079 (3rd Cir. 1992); Henn v. National Geographic Society, 819 F. 2d 824, 826 (7th Cir. 1987) cert. denied, 484 U.S. 964.³ Under the LAD, an employee alleging constructive discharge must prove that he or she was subjected to conduct that was not merely severe or pervasive, but was “so intolerable that a reasonable person would be forced to resign rather than continue to endure it.” Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 52-53 (2002).

In support of her argument that she was constructively discharged, Complainant contends

³Although 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).

that Mr. Reeves continuously pressured her to retire, and cites his actions in hiring someone to replace her, reducing her hours from full time to part time, changing her work responsibilities, and withholding her raise. CS 4. She argues that but for her age, Respondent would not have pressured her to retire. CS 5, CE 10.

The ALJ found as fact that Complainant talked about moving out of state to open a business, and in response to Reeves' inquiries, informed him that she intended to retire at the end of the 1999 tax season and subsequently asked to extend her employment for specified periods. ID 2-3. The ALJ also found that, although Complainant alleged "that Reeves had embarrassed and harassed her over the course of several years," Complainant presented no evidence of specific incidents, other than occasional inquiries as to her retirement plans. ID 5-6. In addition, the ALJ found as fact that the relationship between Complainant and Reeves was pleasant and comfortable until September 13, 2000. ID 4.

In the absence of substantial, competent evidence to the contrary, the Director must defer to the ALJ's factual determinations. Because she had the opportunity to hear the live testimony of witnesses and observe their demeanor, it is the ALJ who is best able to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988). The ALJ specifically determined that Reeves was more credible than Complainant. ID 7. Complainant contends that Reeves was contradicted by her own testimony and that of Margaret Carney, and argues that the ALJ erred in failing to consider this contradictory evidence in assessing Reeves' credibility. CE 3. Complainant has not provided the Director with any portion of the hearing transcripts to support her exceptions, and the Director cannot assess the content, relevance or materiality of the referenced testimony without at least the portions of the transcripts including such testimony. Matter of Morrison, 216 N.J. Super. 143, 157-158 (App. Div. 1987). Moreover, it does not appear that such testimony would be sufficient to enable the Director to meet the stringent standards for rejecting an ALJ's factual finding based on credibility of lay witnesses,

i.e. that the ALJ's findings are arbitrary, capricious or unreasonable, or are not supported by competent, credible evidence in the record. N.J.A.C. 1:1-18.6(c). The Director concludes that Complainant has not provided competent evidence which would justify rejecting the ALJ's factual findings regarding either the nature of the work environment, or the findings that Complainant talked about moving out of state to open a business and advised Respondent of specific retirement plans. Ibid.

Thus, accepting that Complainant did talk about moving out of state and tell Respondent of her specific retirement plans, and in the absence of specific evidence of undue pressure or other forms of harassment, Respondent's actions in hiring a replacement to assume Complainant's duties at the time of her expected retirement and offering Complainant a part-time work plan to train her replacement are not unreasonable or discriminatory. In this context, the Director finds no merit in Complainant's argument that the ALJ erred in failing to conclude that these job changes were evidence of discriminatory intent.

The initial withholding of Complainant's raise might be seen as harassing.⁴ However, it would not prompt a reasonable person in Complainant's situation to resign, since once Complainant protested, Respondent relented and agreed to give her the requested raise. ID 4. An employee has an obligation to take necessary and reasonable actions to remain employed; simply quitting without taking such actions will not constitute a constructive discharge. Shepherd v. Hunterdon Developmental Center, supra, 174 N.J. at 52, citations omitted. Moreover, a subjective belief that continued employment will be uncomfortable is not enough to support a claim of constructive discharge. Gray v. York Newspapers, supra, 957 F. 2d at 1083.

In her exceptions, Complainant repeatedly asserts that if she had not been in her 60s,

⁴Although Complainant's exceptions state that she asked Reeves about her raise in July 2000, her exceptions do not specifically challenge the ALJ's finding that she asked about the raise on September 13, 2000. CE 6. Since Complainant's post-hearing summation stated that the discussion about the raise occurred on September 13, 2000, CS 3, the Director finds it essentially undisputed that the discussion about the raise occurred on that date.

Respondent would not have inquired about her retirement plans, asked her for specific retirement dates or implemented the transition plan that initially reduced her hours and ultimately replaced her with someone in her 30s. CE 3, 4, 7, 10. The fact that an employer's inquiry into retirement plans is prompted by an employee's age does not make it unlawful discrimination. EEOC v. MCI International, Inc., 829 F. Supp. 1438, 1465 (D.N.J. 1993). The employee's answer and the employer's subsequent actions must be evaluated on a case by case basis to determine whether the employer's actions constitute harassment or constructive discharge. Here, Complainant contends that she testified that she would retire "sometime after 65," CE 3, and urges the Director to reject the ALJ's finding that she set specific retirement dates and subsequent extensions. As noted above, without a hearing transcript showing evidence meeting the stringent standards for rejecting the ALJ's factual findings based on credibility of lay witnesses, the Director cannot reject these findings. N.J.A.C. 1:1-18.6. Moreover, without such evidence, although it might be logical that someone in Complainant's situation would not wish to retire until she became eligible for Medicare coverage, such an inference is not enough to reject the ALJ's finding that Complainant told Respondent that she would retire at the end of the 1999 tax season.

Complainant has presented no specific evidence of harassment or duress that would render her answers to Respondent's retirement inquiries involuntary. The fact that the initial inquiry may have been prompted in part by her age does not, without evidence of harassment, make Respondent's followup inquiries or actions discriminatory. Moreover, there is sufficient evidence in the record to find that Reeves' inquiries were in response to Complainant's statements to him and others that she was considering retirement. After considering the record, the Director concludes that Complainant has failed to meet her burden of proving that conditions were so intolerable that a reasonable person in her situation would feel compelled to resign.

As Complainant has not established that she was discharged, either actually or constructively, she has not established a prima facie case of age-based termination. After

concluding that Complainant failed to establish a prima facie case, the ALJ went on to determine, *arguendo*, whether Complainant's proofs would establish unlawful age discrimination if she had met that burden. Although it is not necessary to do so, the Director will also complete this analysis to completely address the record.

Once a complainant presents a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); see Andersen v. Exxon Co., 89 N.J. 483, 493 (1982). In the context of the ALJ's factual findings, it appears that since there was no termination, the specific adverse actions Respondent seeks to explain by its articulated reason are: asking Complainant about her retirement plans after she spoke about plans to move out of state in a couple of years and start a business, hiring a replacement to take over Complainant's duties, and presenting her with a letter confirming her resignation. ID 2-4. The ALJ found that Respondent met this burden by testimony that after the death of its office manager, Respondent was concerned with the continuity of its business (in light of Complainant's remarks about leaving), which was a small family foundation with only three employees. ID 2, 8. The Director concludes that Respondent met its burden of articulating a legitimate non-discriminatory reason for these actions. In so concluding, the Director recognizes that although Complainant's age may have been a factor prompting Respondent to inquire about her retirement plans, such inquiries are not necessarily age discrimination. See, e.g., EEOC v. MCI International, Inc., *supra*, 829 F. Supp. at 1449 and 1465, concluding that management's inquiries about an employee's retirement plans were not direct or circumstantial evidence of age discrimination.

The burden then shifts to Complainant to establish that Respondent's articulated reason was not its true reason, and was pretext for age discrimination. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 32 (1981). After reviewing the ALJ's factual findings and credibility determinations, the Director concludes that Complainant failed to prove that Respondent's actions in response to

her stated intention to retire were motivated by age discrimination rather than the non-discriminatory goal of ensuring that the business continued to function well despite Complainant's announced retirement.

In her exceptions, Complainant asserts that Respondent articulated a different non-discriminatory reason for its actions - - that Complainant kept setting and extending deadlines for her retirement. CE 9. Complainant argues that this explanation is not worthy of credence, because Mr. Reeves told Margaret Carney that Complainant would be retiring even before asking Complainant her retirement plans, and Reeves subsequently forced Complainant to retire. CE 9-10. In the absence of specific incidents of harassment that would support the conclusion that Respondent forced Complainant to set retirement dates, the Director finds insufficient evidence to conclude that Respondent did not act in response to Complainant's self-set retirement plans. Thus, addressing either articulated reason, the Director concludes that, even if Complainant had presented a prima facie case of discriminatory termination, she failed to prove that Respondent terminated her employment or constructively discharged her because of her age.

CONCLUSION

For all of the above reasons, the Director adopts the ALJ's initial decision dismissing the complaint.

Date

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