



STATE OF NEW JERSEY  
 OFFICE OF THE ATTORNEY GENERAL  
 DEPARTMENT OF LAW & PUBLIC SAFETY  
 DIVISION ON CIVIL RIGHTS  
 OAL DOCKET NO. CRT 2821-04  
 DCR DOCKET NO. EA19JB-49392-E  
 DATED: May 11, 2006

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VINCENT PALMIERI,	)	
	)	
Complainant,	)	
	)	
v.	)	ADMINISTRATIVE ACTION
	)	
FEDEX EXPRESS, INC.,	)	
	)	FINDINGS, DETERMINATION AND ORDER
	)	
Respondent.	)	
_____	)	

**APPEARANCES:**

For the complainant:

William G. Blaney, Esq. (*Gruccio, Pepper, DeSanto & Ruth, P.A.*, attorneys)

For the respondent:

Christopher J. Moran, Esq. (*Simon Moran, P.C.* attorneys),  
 Alan Dabdoub, Esq., *pro hac vice*, a member of the state bar of the State of Louisiana,  
 Edward J. Efke, Esq., *pro hac vice*, a member of the state bars of Virginia, Maryland,  
 District of Columbia and Tennessee.

**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 Vincent Palmieri (Complainant), alleging that FedEx Express, Inc. (Respondent), subjected him to unlawful reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On February 9, 2006, the Honorable Bruce M. Gorman, Administrative Law Judge (ALJ), issued an initial decision<sup>1</sup> dismissing the complaint.

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<sup>1</sup>Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "TR." shall refer to the transcript of the administrative hearing held on August 17 and 18, 2005, and November 7, 2005; "CE" shall refer to Complainant's exceptions to the initial decision; "RE" shall refer to Respondent's reply to Complainant's exceptions; and "CS" shall refer to Complainant's post-hearing written summation.

Having independently reviewed the record, the Director adopts the ALJ's decision, as modified herein.

### **PROCEDURAL HISTORY**

On June 25, 2003, Complainant filed a verified complaint with the Division alleging that Respondent terminated his employment in reprisal for Complainant's previous internal complaint alleging unlawful discrimination. Respondent filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. Prior to the completion of the Division's investigation, Complainant requested that this matter be transmitted to the Office of Administrative Law for a hearing pursuant to N.J.S.A. 10:5-13. The hearing was held on August 17 and 18, 2005 and November 7, 2005 before ALJ Gorman, and after counsel submitted post-hearing briefs, the record closed on January 20, 2006. The ALJ issued his initial decision on February 9, 2006. Complainant filed exceptions to the initial decision on or about March 1, 2006, and after requesting additional time, Respondent filed a reply on or about March 16, 2006. The Director was granted an extension of time to issue his final decision, which is now due on May 11, 2006.

### **THE ALJ'S DECISION**

#### **THE ALJ'S FACTUAL DETERMINATIONS**

The ALJ made few factual findings, but summarized the witness testimony at pages 2 through 15 of the initial decision. By way of background that appears to be undisputed, the ALJ noted that Complainant began work with Respondent as a courier in 1989, and was assigned to Respondent's Atlantic City station in 1991. At all times relevant to the complaint, his immediate supervisor was Operations Supervisor Mary Kish, who reported to Senior Operations Supervisor Elaine Turchi. Turchi reported to District Director David Dempsey. ID 2.

From the ALJ's summary of the witness testimony, it appears that the following facts are also undisputed. Respondent's policies specified that an employee who received three warning letters within twelve months would be subject to termination. ID 3. Complainant was terminated

based on warning letters issued on July 17, 2002, July 23, 2002 and March 13, 2003. ID 3-5. At some point before the July 17, 2002 warning letter was issued, Kish met with Complainant to inform him that another courier, Cathy Hamilton, had reported seeing him drive with his door open, and that such conduct was unacceptable. ID 3. In that meeting, Complainant expressed outrage that Kish and Turchi had accepted Hamilton's word over his. Ibid. Complainant met with Turchi, and complained that Hamilton was a person of bad character and bad morals. Complainant concluded that Turchi, who is an acknowledged lesbian, interpreted his criticism of the character and morals of Hamilton, who is also a lesbian, as a slur based on sexual orientation. ID 3.

Subsequently, Kish issued the first warning letter on July 17, 2002, the day after she personally observed Complainant drive with his door open. ID 3. When she attempted to present this letter to Complainant at the end of his shift, Complainant refused to sign the letter, informing Kish that he had already punched out and was late to pick up his son. When Kish insisted that Complainant wait, he became angry and stated that the warning letter was being issued because Turchi hated him because he is male. ID 4. He also made a statement, the precise wording of which is disputed, to the effect that the two lesbians were out to get him.<sup>2</sup> He then left her office, despite Kish's request that he wait. Based on this behavior, Kish issued the July 23, 2002 warning letter for unacceptable conduct, charging that Complainant "made comments that displayed blatant disrespect toward a co-worker as well as another manager," and refused to follow Kish's instructions to return to her office. ID 4.

After receiving the July 23, 2002 warning letter, Complainant filed internal complaints with Respondent alleging that he was being discriminated against based on his sex. ID 4-5. The complaints were decided against Complainant. ID 5. On four subsequent occasions before March 21, 2003, Kish admonished Complainant without issuing a warning letter. Ibid.

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<sup>2</sup>While Complainant contends he said the two lesbians hated him and were out to get him, Respondent contends that Complainant said the two man-hating lesbians were out to get him. ID 4.

On March 21, 2003, Kish issued a warning letter which charged Complainant with violating Respondent's policies. Specifically, Complainant was charged with leaving a COD package without getting the customer's signature, and signing his own name to the mechanical invoice. This repeat customer left a check at her door in the full amount due, and requested that the driver leave the package in her absence. ID 5. Complainant left the package and delivered the check to Respondent. Ibid. Two days later, after the transaction came to light in a random review, Kish called Complainant in and advised him that he should not have left the package without first getting the customer's signature, as required by Respondent's procedures. ID 5-6. The customer later acknowledged having received the delivery. ID 6. On March 21, 2003, Kish issued the warning letter based on this incident, and since it was the third warning letter within twelve months, the letter also terminated Complainant's employment. Ibid. Complainant filed another internal complaint, but his warning and termination were upheld. Ibid.

In addition to these undisputed facts gleaned from the testimony, the ALJ made the following factual findings. During the July 17, 2002 meeting with Kish, Complainant behaved "in a belligerent and obnoxious fashion" and was openly insubordinate. ID 19. Complainant defied Kish's authority when he walked off Respondent's premises against her instruction. Ibid.

In summarizing the testimony, the ALJ noted several instances in which Complainant's statements conflicted with those of one or another witness. The ALJ also assessed the credibility of certain witnesses, finding that Complainant hedged on certain issues when he appeared to be at fault, but that he and Turchi were generally credible in recounting their versions of the events. He also found that Kish tailored her trial testimony to support Respondent's case, and was less than credible regarding her interactions with Turchi. ID 7, 10, 16.

### **THE ALJ'S LEGAL CONCLUSIONS**

The ALJ concluded that Complainant's July 25, 2002 internal discrimination complaint constituted activity protected by the LAD, and that his March 2003 warning letter and termination

constituted adverse action. The ALJ concluded that Complainant failed to present sufficient evidence of a causal connection between his internal sex discrimination complaint and the final warning/termination. The ALJ reasoned that, to show such a causal connection, Complainant must “show a nexus between Kish’s decision and Turchi’s sexual orientation.” ID 19. The ALJ found no such nexus, concluding that there was insufficient evidence that Turchi influenced Kish’s decision to terminate Complainant. Ibid.

The ALJ concluded that Kish may have retaliated against Complainant for his angry, belligerent, obnoxious and insubordinate behavior in the July 17, 2002 meeting, which “likely planted in Kish’s mind an antipathy that manifested in itself in her issuance of the third warning letter.” ID 19. The ALJ concluded that Kish’s antipathy was based on Complainant’s behavior during the July 17, 2002 meeting in which she attempted to present him with the first warning letter, and not in reaction to his subsequent filing of an internal sex discrimination complaint.

#### **THE PARTIES’ EXCEPTIONS AND REPLIES**

Complainant’s exceptions to the initial decision and Respondent’s replies are summarized as follows:

1. Complainant argues that the ALJ erred in failing to conclude that Respondent’s second warning letter was itself unlawful retaliation under the LAD, as it was issued in part for conduct that Complainant contends was a LAD-protected complaint of sex discrimination. Complainant argues that the alleged retaliatory aspect of this letter makes his termination retaliatory. CE 2-5. Complainant further argues that the ALJ erred in failing to place the burden on Respondent to prove that it would have terminated him regardless of the retaliatory motive, as required in a mixed motive case. CE 6.

In response, Respondent argues that the second warning letter was issued for non-retaliatory reasons, and since it merely notified Complainant that he might be subjected to termination for future warnings, it did not constitute an adverse employment action. RE1-3. Citing

Complainant's hearing testimony, Respondent contends that Complainant concedes that he filed the within complaint based on a claim that Respondent issued the third warning letter and terminated him in reprisal for filing the internal EEO complaint, and not for his statements in Kish's office. RE 3. Respondent further argues that, so long as it was not retaliation for Complainant's protected activity, the fairness or wisdom of Respondent's decision to terminate complainant based on the COD incident is irrelevant. RE4-5.

2. Complainant takes exception to the ALJ's finding that Complainant failed to present evidence that Elaine Turchi asked Mary Kish to follow him in her car to look for rule violations, ID 3, and cites Exhibit P-19 and hearing testimony (Tr. 11/7/05 Tape 1, p. 23-24 and 69-72) as evidence that Kish followed Complainant at Turchi's instruction. CE 7.

In response, Respondent contends that Exhibit P-19 shows that Turchi asked Kish to go out to Complainant's area "very soon," but does not support a finding that Turchi sent Kish out on the day in question. RE 5. In addition, Respondent argues that even if Turchi had instructed Kish to stake Complainant out on that specific date, it would not be unlawful retaliation because Complainant had previously been caught driving with his door open. RE 5-6.

3. Complainant argues that the ALJ failed to consider and give appropriate weight to Complainant's allegations and evidence that Kish unlawfully retaliated against him, and erred in limiting his analysis to allegations that Turchi retaliated against him. CE 7-9. Complainant contends that, since the ALJ concluded that Kish had a retaliatory motive for issuing the third warning letter (ID18), he erred in failing to conclude that Kish was retaliating for Complainant's protected activity. CE 12.

In response, Respondent contends that Complainant never alleged that Kish independently retaliated against him. Respondent argues that the ALJ was correct in requiring Complainant to prove that Turchi instructed Kish to discipline Complainant as a result of protected activity. RE 6. Respondent contends that Complaint failed to show such causal connection, citing the time lapse

between the protected activity and the adverse action, intervening incidents in which Kish counseled Complainant without issuing formal warnings, as well as evidence that Kish neither made any decision based on retaliatory motive, or acted on Turchi's orders. RE 6-7.

4. Complainant argues that the ALJ erred in framing the issue as whether there was a nexus between Kish's decision and Turchi's sexual orientation, ID 19, and argues that the correct question is whether Kish's animus was based on Complainant's complaints against either Kish or Turchi. Complainant contends that there was no evidence that Kish's animus was a result of anything other than his LAD-protected activity. CE 13-14.

In response, Respondent argues that the ALJ was correct in requiring Complainant to show a nexus between Kish's decision and Turchi's sexual orientation. RE 6. Respondent further argues that Complainant failed to establish a causal connection between his protected activity and his termination. RE 7. Respondent contends that the warning letters were issued based on Complainant's defiant behavior rather than a retaliatory motive, and asserts that Complainant admitted to the behavior underlying each warning letter. RE 7.

5. Complainant takes exception to the ALJ's finding that Complainant admitted to becoming angry during the meeting in which Kish issued the first warning letter, ID 19, and contends that he never admitted to becoming angry, belligerent, obnoxious or insubordinate during that meeting. CE 14-15. Complainant argues that any evidence that he exhibited such characteristics during the meeting came from Kish's testimony, which should be given little weight since the ALJ questioned her credibility with regard to substantial parts of her testimony. CE 15.

## **THE DIRECTOR'S DECISION**

### **THE DIRECTOR'S FACTUAL FINDINGS**

The Director adopts the ALJ's factual findings with the following clarification. After

considering Complainant's exceptions (CE 14-15) and reviewing the hearing transcripts, the Director finds that Complainant never specifically testified that he became angry during the July 17, 2002 meeting with Kish. For this reason, the Director rejects the ALJ's finding that Complainant admitted to becoming angry. ID 19.

### **THE DIRECTOR'S ANALYSIS AND LEGAL CONCLUSIONS**

To establish a prima facie case of unlawful reprisal, Complainant must show that he engaged in LAD-protected activity known to Respondent, that Respondent thereafter subjected him to adverse employment action, and that there is a causal connection between his protected activity and the adverse action. Romano v. Brown and Williamson Tobacco, 284 N.J. Super. 543, 548-49 (App. Div. 1995). Complainant alleges two incidents of unlawful reprisal: the third warning letter/termination based on the COD incident, and the second warning letter for Complainant's behavior in the July 17, 2002 meeting with Mary Kish.

#### **A. The Third Warning Letter/Termination**

It is undisputed that Complainant engaged in LAD-protected activity known to Respondent when he filed his internal EEO complaint on July 25, 2002 (Exhibit P-3), and that the March 17, 2003 warning letter and termination constituted adverse employment action. To establish a prima facie case of retaliatory discharge, Complainant must show a causal connection between the EEO complaint and the third warning/termination. A broad array of factors may be used to show this causal connection, including temporal proximity, intervening antagonism, inconsistent reasons for the adverse action, or other circumstantial evidence supporting an inference of causation. Farrell v. Planters Lifesavers Co., 206 F. 3d 271, 280-281 (3<sup>rd</sup> Cir. 2000).<sup>3</sup>

The ALJ concluded that Complainant failed to meet this burden, stating that he must show

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<sup>3</sup>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).

a nexus between Kish's decision and Turchi's sexual orientation, or that Turchi influenced Kish's decision. ID 19-20. The Director rejects this conclusion, because for a prima facie case, Complainant is only required to show evidence that could support the conclusion that his EEO complaint was a motivating factor in Kish's decision to discipline him.<sup>4</sup>

Complainant contends that he has shown a causal connection based on evidence that the COD incident was a minor technical violation which caused no harm to Respondent and aided the customer, that he did not lie or falsify any signatures, that no other employee had been disciplined for this type of violation, and that Kish or Turchi could have decided not to issue a warning for this incident. CS 26. The Director concludes that Complainant has presented sufficient evidence of a causal connection to make a prima facie showing of reprisal. The burden of presenting a prima facie case under a pretext analysis is not onerous, but serves to eliminate the most common non-discriminatory reasons for adverse action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Having established a prima facie case, the burden then shifts to Respondent to articulate a legitimate, non-retaliatory reason for terminating Complainant. Romano v. Brown and Williamson, supra, 284 N.J. Super. at 549. Respondent asserts that Complainant was terminated because he received three warning letters within 12 months, and that the third warning letter was issued because Complainant violated its policies by leaving a COD package at a customer's door in her absence, without getting the customer's signature. The Director concludes that these are non-discriminatory reasons that satisfy Respondent's burden of production.

The burden then shifts back to Complainant to prove that Respondent's articulated reasons were not its true reasons, and that Respondent's true motive was to retaliate against Complainant for his LAD-protected discrimination complaint. Ibid. The Director concludes that Complainant

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<sup>4</sup> Kish's actions could constitute unlawful retaliation regardless of whether she was personally harmed by Complainant's protected activity, and regardless of whether she acted at Turchi's behest.

failed to prove that Respondent's articulated reasons were pretext for retaliation under the LAD.

The ALJ characterized the third warning letter as "retaliatory," but concluded that Kish issued it out of "active dislike" in response to Complainant's behavior during the July 17, 2002 meeting, rather than in response to his EEO complaint. ID 18-19. In describing the third warning as retaliatory, the ALJ concluded that Respondent had no basis for disciplining Complainant based on the COD incident. ID 18. The Director rejects this conclusion.

In concluding that the warning letter was "without foundation," the ALJ characterized the COD incident as a mere technical violation of Respondent's policies, which could not serve as the basis for discipline because it had positive results. ID 18. The Director finds no evidence in the record to support a characterization of the violation as "technical," or to support a conclusion of pretext. Mary Kish testified that any employee would have been similarly disciplined for the same action. TR. 8/18/05, Tape 4, p. 64. Kish's decision was supported by higher management, as she checked with the personnel department and the district director to ensure that terminating Complainant for this type of violation was consistent with the manner in which Respondent's disciplinary policies were carried out within the district, and throughout the corporation. TR. 8/17/05, Tape 3, p. 28-29; TR. 8/18/05, Tape 4, p. 78. Additionally, employers must be permitted to use any and all of its workplace rules—technical or not—to conduct their business efficiently and fairly. So long as employees are made aware of the rules to which they submit, and the rules have a legitimate business purpose, employees simply must be prepared to submit to discipline if they violate the rules. Unless the workforce is subject to a collective bargaining agreement or other contract differentiating between "major" and "technical" violations, at-will employees cannot escape discipline, including termination, for violating legitimate business workplace rules so long as such discipline is not motivated by unlawful discrimination or reprisal.

In this case, the rule which Complainant believes was a mere "technical" violation served a legitimate business need. Kish's testimony demonstrates that Respondent faces a real risk of

loss when a courier fails to follow the COD policy. As Kish explained, the shipper could bring court action against Respondent if a recipient claimed he or she didn't receive a COD package left in his or her absence, and the courier's signature would provide Respondent with no protection. TR. 8/18/05, Tape 4, p. 84. Thus, even if Complainant's violation caused no loss to either the customer or Respondent for that particular delivery, Complainant's decision to fashion his own rules for deliveries is more than a failure to follow the technical letter of Respondent's policies. According to Kish, Respondent's requirement that COD packages be delivered directly to the customer, with the delivery documented by the customer's signature, is designed to prevent loss of the package and potentially substantial financial loss to Respondent. Without the customer's signature, the fact that Respondent received the necessary payment would not absolve it of responsibility if the package were damaged or stolen. In this context, Respondent had a logical basis for concluding that a warning was necessary to dissuade Complainant from continuing to make his own rules rather than following the procedures Respondent established to avoid financial loss. Based on the evidence that Respondent's warning was based on objective, consistent application of its COD policy, the Director rejects the ALJ's conclusion that there was no explanation for the warning other than retaliation.

In addition, the record reflects that Complainant was reported for policy violations at least three times between the EEO complaint and the third warning letter, but in each case Respondent investigated the allegations against Complainant and concluded that there was no cause to issue warnings. ID 5; TR. 8/17/05, Tape 3, p. 27-28; TR. 8/17/05, Tape 1, p. 62-63. Respondent's forbearance from taking adverse action against Complainant on those intervening occasions, when it was presented with ready opportunities to issue retaliatory warnings, weighs against the conclusion that it issued the COD-related warning for retaliatory reasons.

Finally, even if Complainant's previous actions had some influence on Kish's decision to issue the third warning letter, as the ALJ concluded, Complainant has not shown that it was

retaliation for protected activity. In describing the third warning letter as “retaliatory,” ID 18, the ALJ uses the word in a colloquial sense and not in a legal sense or as a legal conclusion that the conduct violated the LAD. To determine whether Respondent engaged in retaliation for LAD-protected activity, the issue is whether the nature and severity of Complainant’s policy violations, and the circumstances in which Respondent issued the disciplinary warnings, are sufficient to support the conclusion that Respondent’s articulated reasons for disciplining Complainant were not its true reasons, but were pretext for retaliation based on Complainant’s sex discrimination complaint.

The Director agrees with the ALJ’s conclusion that Kish may have harbored antipathy against Complainant for his “belligerent and obnoxious” behavior during the July 17 meeting. ID 19. However, as will be discussed in more detail below, that behavior was not LAD-protected activity, and the Director agrees with the ALJ’s conclusion that Kish did not issue the third warning letter because Complainant expressed or filed a sex discrimination complaint. *Ibid.* Thus, to the extent that Complainant’s conduct at the July 17 meeting may have influenced Kish’s decision to issue the third warning, it was not based on LAD-protected activity, and that antipathy or influence does not discredit Respondent’s articulated reasons for disciplining Complainant. The Director concludes that Complainant has not proven that Respondent’s reasons for issuing the third warning and terminating him were pretext for retaliation for his sex discrimination complaint.

**B. The Second Warning Letter**

Complainant argues that he made an earlier claim of sex discrimination during his July 17, 2002 meeting with Mary Kish, and contends that the July 23, 2002 warning letter was retaliation for that verbal sex discrimination claim. CE 3. Before addressing the extent to which Complainant’s actions constitute LAD-protected activity, the Director finds that, contrary to Respondent’s contention, the discipline Respondent imposed constitutes adverse action. Respondent cites federal caselaw holding that mere reprimands are not adverse employment action, even if they are

part of a progressive disciplinary system leading to termination. RE 2-3. Here, however, Respondent suspended Complainant pending an investigation even before issuing the July 23, 2002 warning letter, as is documented in a July 18, 2002 memorandum (Exhibit P-11). New Jersey courts have not ruled on the issue of whether disciplinary letters are adverse action under the LAD,<sup>5</sup> but even if a warning letter alone were insufficient, the suspension constitutes a tangible detrimental action. The Director believes that a warning or disciplinary letter alone is *not* an adverse action under the LAD. If every time an employer merely issues a disciplinary letter to an employee for violating clear work rules (such as late arrival, insubordination, failure to abide by safety standards, prohibition on sexually-explicit jokes, or other rules) the employer would be subjected to retaliation lawsuits, then employers would have no incentive to actually develop necessary workplace rules or enforce them. This would create an unjust workplace where those employees who do not follow the rules are treated the same as those who carefully follow all the rules. That being stated, nevertheless, in this case, the suspension *combined with* the second warning letter constitutes adverse action.

The record does not support Complainant's contention, however, that his July 17, 2002 actions are immunized from disciplinary action. Initially, Complainant's insubordinate behavior and the manner in which he voiced his charge of sex discrimination take his actions out of the realm of LAD-protected activity. Where an employee is disciplined for inappropriate conduct associated with a claim of unlawful discrimination, the extent to which the activity is "protected" is a fact-sensitive, case by case determination. Porta v. Rollins Environmental Services, 654 F. Supp. 1275, 1284 (D.N.J. 1987). To determine what is protected, courts have applied a balancing test, weighing the interest in protecting employees reasonably engaged in anti-discrimination activities against the

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<sup>5</sup>In El-Sioufi v. St. Peter's University, 382 N.J. Super. 145, 176 (App. Div. 2005), the Appellate Division held that a less favorable rating on a performance evaluation, unaccompanied by a tangible detriment, was not itself an adverse action which could constitute retaliation under the LAD.

interest in not unduly restricting the employer's need to objectively select and control its staff. Hochstadt v. Worcester Foundation for Experimental Biology , 545 F. 2d 222, 231 (1<sup>st</sup> Cir. 1976). Where an employee invokes the protection of anti-discrimination laws for ulterior motives, or merely uses excessively inappropriate means to advance good faith discrimination claims, the conduct may lose its protection. Ibid.

Here, the ALJ found that Complainant behaved in a belligerent and obnoxious manner toward Kish, and defied her authority as his supervisor. ID 19. To maintain control of the workplace, Respondent had an interest in formally warning Complainant that such insubordinate behavior would not be tolerated. This is entirely reasonable and appropriate, and it is a rule with which Complainant agreed to abide by accepting the job with Respondent.

Moreover, in addition to Kish viewing Complainant as being insubordinate, it is clear that she viewed his statements regarding Turchi's and Hamilton's lesbian status and their motives with respect to Complainant as disrespectful and inappropriate. Even if Complainant did not use the more inflammatory phrase "man-hating lesbians" when referring to Turchi and Hamilton, it is apparent that Kish viewed Complainant as making a biased-based slur against a supervisor and another employee, which she found to be a disrespectful offense. It is also apparent that it was Kish's perception of Complainant's comments as a disrespectful offense that led to her issuing the warning letter. While employers cannot in a wholesale manner prevent their employees from expressing their feelings regarding possible discriminatory treatment on the job, they may impose and enforce rules regarding the respectful treatment of coworkers in the workplace. As Kish viewed the aggressive manner and context of Complainant's comments as a matter of "blatant disrespect," Complainant was subject to discipline for the comments.

Complainant states that he did not identify Hamilton and Turchi as lesbians for inappropriate reasons, but merely tried to make "a complaint that their sexual preference motivated their gender discrimination." CE 5. Although Complainant contends that this made his motives appropriate, the

Director concludes to the contrary, that Respondent had a legitimate interest in keeping the workplace free of bias-based outbursts.<sup>6</sup> In light of this finding and the finding that Complainant behaved in an obnoxious and belligerent manner, the Director concludes that Respondent had a reasonable basis to discipline Complainant for non-protected activity.

To the extent that Complainant charged Turchi and Hamilton with sex discrimination, he had a right to have his allegations investigated by Respondent and not ignored. However, the issue here is not whether Respondent properly addressed Complainant's sex discrimination claim. The issue is whether, given Respondent's perception of the insubordinate and disrespectful manner in which Complainant made his charge, his utterance of a sex discrimination claim immunized him from discipline for all of his actions associated with his claim. The Director concludes that it does not. After weighing the interests of the parties, and especially since Respondent did nothing to dissuade Complainant from pursuing his internal sex discrimination claim, the Director concludes that Respondent's interest in preventing insubordination and eliminating hostile, bias-based statements from the workplace permitted discipline in this case.

Complainant argues that he was not disciplined for insubordination or disrespectful comments, but was really disciplined for the sex discrimination claim itself.<sup>7</sup> Applying the prima

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<sup>6</sup> Complainant's exceptions identify Hamilton's and Turchi's sexual orientation as a "sexual preference." The Director notes that the LAD prohibits discrimination based on "sexual orientation" and not "sexual preference." N.J.S.A. 10:5-12a.

<sup>7</sup> At least one ruling of the federal district court for this district has required a plaintiff in a LAD reprisal claim to establish that the underlying discrimination claim was made in good faith. Porta v. Rollins Environmental Services, 654 F. Supp. 1275, 1284 (D.N.J. 1987), citing Monteiro v. Poole Silver Co., 615 F. 2d 4, 10 (1st Cir. 1980). In a recent unpublished decision, the Appellate Division rejected requiring a plaintiff to prove that his or her underlying discrimination claim was made in good faith, and this issue is currently before the New Jersey Supreme Court. Carmona v. Resorts International, certif. granted, 2006 N.J. Lexis 35 (Jan. 19, 2006). To the extent that the New Jersey Supreme Court may impose such a requirement, it might be questioned whether Complainant had a good faith belief that he was being discriminated against because of his sex. His testimony gave a lucid explanation of why he believed Turchi was targeting him for discipline, explaining that it was based on Complainant's comments that Hamilton was a person of bad character and morals, which Turchi took as a slur against lesbians. Along these lines, Complainant's explanation for why he

facie standard for retaliation discussed above, Complainant must establish a causal connection between his sex discrimination claim and the disciplinary action. The Director concludes that the undisputed fact that the warning was issued in direct response to Complainant's behavior at the July 17, 2002 meeting in which he purports to make a claim of sex discrimination is sufficient evidence of a causal connection between that purported protected activity and the second warning to meet the threshold burden at the prima facie stage of the case.

Respondent issued the second warning for “blatant disrespect toward a co-worker as well as another manager,” and refusal to return to Kish’s office as she instructed, both of which were violations of Respondent’s written policies. Exhibit P-2. Even assuming a prima facie case has been established, this meets Respondent’s burden of articulating non-retaliatory reasons for disciplining Complainant, and shifts the burden to Complainant to prove that those reasons were pretext for unlawful reprisal. Pretext may be established either directly, by showing that the employer was more likely than not motivated by a discriminatory reason, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Texas Dep't. of Community Affairs v. Burdine, *supra* at 256.

To prove pretext, Complainant alleges that neither his comments about Hamilton and Turchi nor his demeanor in making them were inappropriate, and that Respondent would not have issued the second warning letter based solely on his refusal to comply with Kish’s instruction to return to her office. CE 3-6. As discussed above, the ALJ found that Complainant “conducted himself in a belligerent and obnoxious fashion” and “was openly insubordinate” at his July 17, 2002 meeting with Kish. ID 19. In the absence of substantial, competent evidence to the contrary, the Director must defer to the ALJ’s factual determinations. Because he had the opportunity to hear the live

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believed the discipline was driven by sex discrimination merely resorts to the negative stereotype that lesbians are unfair to men, and speculates “maybe I was a little too macho for Elaine.” TR. 8/17/05 Tape 2, p.55; TR. 8/17/05 Tape 1, p. 48. These stereotypes might not be enough to meet a good faith standard, especially in a male dominated position such as Complainant’s.

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).

In an attempt to discredit Kish's reasons for disciplining him, Complainant challenges Kish's credibility. He argues that Kish's hearing testimony should be rejected because it contradicted her deposition testimony, and the ALJ did not find her completely credible. CE 4. The Director finds no merit in this argument. Although the ALJ found Kish to be less than credible regarding her interactions with Turchi, he found her testimony to be "clear on the details of her meetings with [Complainant]." ID 10.

Complainant makes much of the discrepancy between Kish's deposition testimony that Complainant got a little upset, as compared to her hearing testimony that he was very upset. The Director finds the relative distinction insignificant, and concludes that it is insufficient to reject the ALJ's finding that Kish's testimony was clear on the details of her meetings with Complainant. ID 10. Complainant has not presented sufficient evidence to refute Respondent's claim that he was disciplined for his insubordinate behavior, including his walking out of Kish's office in defiance of her order to wait, and his subsequent defiance of her order to return to her office.

Nor has Complainant presented sufficient evidence to discredit Respondent's warning based on his blatantly disrespectful comments about Turchi and Hamilton. As discussed above, Complainant's expression of a bias-based stereotype based on their lesbian status is disrespectful, and is an independent reason for discipline, even if it was made in the context of a claim of sex discrimination.

In his attempts to discredit Respondent's articulated reasons for disciplining him, Complainant blurs the lines between his own bias-based statement and his sex discrimination claim. Complainant contends that any discipline issued for his comments about Hamilton and Turchi must necessarily be discipline for his sex discrimination claim. The Director disagrees, and finds

that the sex discrimination claim and Complainant's bias-based statement about Hamilton and Turchi are distinct.

The Director finds insufficient evidence in the record to contradict Respondent's claim that the warning was issued for the disrespectful comment, and not for his sex discrimination claim. Thus, even if, as Complainant argues, Respondent would not have issued the warning for insubordination alone, it had two non-discriminatory reasons for issuing the warning. As Complainant has failed to discredit Respondent's reasons for issuing the second warning letter - - insubordination and disrespectful comments - - the Director concludes that Complainant has failed to prove that Respondent's articulated reasons for issuing that warning were pretext for unlawful reprisal.

Complainant argues that a "mixed motive" analysis, rather than the pretext analysis applied above, should be used in this case. A mixed motive analysis is applied in two situations: where the employer admits that there were both discriminatory and non-discriminatory reasons for the adverse action, and where the complainant meets a more rigorous prima facie standard than in a pretext case, demonstrating that the decisionmaker placed substantial reliance on a discriminatory factor in deciding to take the adverse action. See, e.g. McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 527(2003). As Respondent has not admitted that Complainant was disciplined for asserting a sex discrimination complaint, Complainant must make the heightened prima facie showing to warrant a mixed motive analysis.

If a complainant can meet this more rigorous prima facie showing, the burden shifts to the employer to prove that it would have taken the same action if it had not considered the discriminatory factor. McDevitt v. Bill Good Builders, supra, 175 N.J. at 527. Thus, an employee who can meet the heightened prima facie showing for a mixed motive case reaps a significant benefit, as the burden of proof shifts to the employer, who must then do much more than merely present evidence of a non-discriminatory reason for its action, as would be required in a pretext

case. Ibid.

The New Jersey Supreme Court has not yet addressed the question of whether direct evidence is required to establish a prima facie case of mixed motives.<sup>8</sup> Even if the LAD does not require direct evidence to trigger a mixed motive analysis, the evidence supporting a prima facie case must be more substantial than that required for a prima facie case under a pretext analysis. Statistical evidence is not sufficient to meet this standard, nor are stray remarks unrelated to the decision at issue. Jackson v. Georgia-Pacific, supra, 296 N.J. Super. at 25.

Here, Complainant argues that he has presented sufficient direct evidence of unlawful retaliation to support a mixed motives analysis. CE 6. To meet his heightened prima facie burden, Complainant must demonstrate that Respondent placed substantial reliance on his verbal sex discrimination claim in deciding to issue the second warning letter. As evidence to support a mixed motives analysis, Complainant cites Kish's testimony that, after he told her that man-hating lesbians were out to get him, she told him she did not want to hear him talk like that about anyone. CE 4-5, citing TR. 8/17/05, Tape 3, p. 64-65. Complainant also draws support from the ALJ's finding that Kish was not completely credible. CE 6.

The Director concludes that Complainant has presented insufficient evidence, either direct

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<sup>8</sup>Applying the mixed motive analysis to federal employment discrimination claims, the United States Supreme Court's standard was initially interpreted to require direct evidence for a prima facie case, Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (O'Connor, J. concurring), but the Court subsequently held that either direct or circumstantial evidence can be used to meet the heightened prima facie standard for a mixed motives case. Desert Palace, Inc., v. Costa, 539 U.S. 90, 100-101 (2003). In Desert Palace, the Court relied in large part on specific language of a 1991 amendment to Title VII, which sets standards for proving a case and presenting an affirmative defense to limit remedies. Id. at 98-101. Since no such explicit standards are found in the LAD, the Desert Palace ruling would not necessarily apply to the LAD. The Appellate Division, however, has recently noted in dicta that the analytical framework of Desert Palace may have broader application than the statutory language of Title VII, and surmised that the direct evidence requirement may no longer be viable in LAD cases. Myers v. AT&T Corp., 380 N.J. Super. 443, 461 (2005) certif. denied, 2006 N.J. LEXIS 163 (Jan 24, 2006). Moreover, even before Desert Palace, the Appellate Division noted that an employee may use circumstantial evidence to meet the heightened prima facie standard for a mixed motive case. Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 24-25 (App. Div. 1996) ("At a bare minimum, a plaintiff seeking to advance a mixed-motive case will have to adduce circumstantial evidence 'of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.'" (citations omitted).)

or circumstantial, to support a mixed motives analysis. The cited testimony, in which Kish admonished Complainant not to “talk like that about anyone” can be readily interpreted to refer to his use of hostile bias-based stereotypes about lesbians, and is not necessarily evidence that Kish was reproaching him for voicing a sex discrimination complaint. In light of the Director’s finding that Complainant’s bias-based statement is a distinct action subject to discipline, and is not inseparable from his sex discrimination claim, Complainant must show more than this and similar testimony to warrant a mixed motive analysis.

Complainant also points to Kish’s testimony that she was not sure whether a warning letter would have been issued solely for Complainant’s refusal to return to her office. CE 4; TR. 8/18/05 Tape 4, p. 26-27. This fails to support Complainant’s prima facie case, as it ignores the bias-based and hostile aspect of Complainant’s comments in Kish’s office as another non-retaliatory reason for the discipline. Even if the warning would not have been issued for the refusal alone, the refusal coupled with Complainant’s bias-based statements were both legitimate non-discriminatory reasons for Respondent’s action. Kish’s testimony that she was unsure of whether disciplinary action would have been taken for the refusal alone, combined with her admission that she admonished Complainant for his disrespectful comments about Hamilton and Turchi, are insufficient to establish that Complainant’s claim of sex discrimination was a substantial factor in Respondent’s decision to discipline him. As Complainant failed to meet the prima facie standard for a mixed motive analysis, and also failed to show that Respondent’s articulated reasons were pretext for reprisal under the LAD, the Director concludes that Respondent’s disciplinary action was not reprisal for Complainant’s sex discrimination claim.

### **CONCLUSION**

Based on the foregoing, the Director concludes that Complainant has failed to establish that his second warning was an unlawful reprisal for complaining about sex discrimination, and further concludes that Complainant has failed to establish that his termination was an unlawful reprisal for

filing an internal sex discrimination complaint. For all of the above reasons, the Director adopts the ALJ's initial decision dismissing the complaint.

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Date

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

