STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 02698-2005S
DCR DOCKET NO. EH18WM-48969-E

THOMAS RUIZ,	)	
Complainant,	)	ADMINISTRATIVE ACTION
v.	)	FINDINGS, DETERMINATION
WASHINGTON TOWNSHIP PUBLIC WORKS,	)	AND ORDER
Respondent.	)	

APPEARANCES:

Mark Cimino, Esq., for the complainant.

Allan E. Richardson, Esq., for the respondent.

James R. Michael, Deputy Attorney General (Stuart Rabner, Attorney General of New Jersey, attorney), for the Division on Civil Rights

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 Thomas Ruiz (Complainant), alleging that the Washington Township Public Works (Respondent) subjected him to unlawful discrimination and reprisal, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On November 6, 2006, the Honorable Beatrice S. Tylutki, Administrative Law Judge (ALJ), issued an initial decision concluding that Respondent engaged in unlawful age discrimination and reprisal against Complainant. Having independently reviewed the record, the Director adopts the ALJ's decision, as modified herein.

PROCEDURAL HISTORY

On January 16, 2003, Complainant filed a verified complaint with the Division alleging that Respondent engaged in unlawful employment discrimination against him in violation of the LAD. Specifically, Complainant alleged that Respondent denied him a promotion for which he was qualified, based upon his age (59) and national origin (Cuban). Respondent was served with the verified complaint on March 17, 2003.

Respondent filed an answer on April 6, 2003 in which the Washington Township Public Works contended that Complainant refused to work extra hours or overtime, that Complainant was not denied a promotion, and that Complainant was not discriminated against. On July 29, 2003, Complainant filed an amended verified complaint in which he alleged that he had been subjected to unlawful reprisal. Specifically, Complainant alleged that he was assigned to a job that did not exist and was also subjected to unreasonable and unwarranted monitoring and criticism of his work, and that these acts were in reprisal for filing his prior discrimination complaint.

Respondent filed an answer to the amended verified complaint on November 12, 2003, in which it again denied discriminating against Complainant. On November 8, 2004**,** before the Division's investigation was completed, the Director transmitted this matter to the Office of Administrative Law (OAL) as a contested case at the request of Complainant pursuant to N.J.S.A.10:5-13.

A hearing was conducted on February 28, 2006 before the Hon. Beatrice S. Tylutki, ALJ. At the close of Complainant's case, Complainant filed a closing brief on or about March 31, 2006. After receipt of briefs and exhibits, the record was closed on or about September 22, 2006. The ALJ issued her ID on November 6, 2006, in which she dismissed the allegation of discrimination based on Complainant's national origin, but found for Complainant on the

allegations of age discrimination and reprisal. Complainant submitted an application for attorney's fees on November 22, 2006. Respondent filed its exceptions to the ID on November 27, 2006. On November 30, 2006, Complainant filed his reply to Respondent's exceptions.

THE ALJ'S DECISION

THE ALJ's FINDINGS OF FACT

The ALJ recounted the following undisputed facts. Complainant was employed by the Washington Township Public Works in June of 2001 as a part-time laborer in its municipal golf course pro shop. ID-2[1]. He was 59 years old at that time. His pay rate was $7.50 per hour, he did not receive any benefits, and he worked between 20 to 50 hours per week. In October 2001, Complainant was transferred to the public works section, where his initial responsibilities included the picking up of leaves. Ibid.

During all times relevant to Complainant's amended verified complaint, Ken Patrone was the Director of Municipal Services in charge of the public works department. Francis J. Campbell, Jr. was Complainant's direct supervisor, reporting to Patrone during this period. ID-2-3.

Complainant stated that he liked his job because he enjoys working with his hands, and it is undisputed that he performed in a satisfactory manner. Complainant was laid off for a short period in 2002. ID-3.

Sometime during November of 2002, Complainant noticed a crumpled piece of paper on the floor near Patrone's office. He picked it up and read that it was a job posting for a full-time laborer position that paid $13.54 an hour plus benefits, including vacation, sick and personal days. The job description required applicants to have a high school degree and a commercial driver's license. Complainant approached Patrone about the job posting, and said Patrone was

[1]Hereinafter, "ID" refers to the initial decision issued on November 6, 2006; "P" refers to Complainant's exhibits introduced at the February 28, 2006 hearing; "R" refers to Respondent's exhibits introduced at the February 28, 2006 hearing; "Re" refers to Respondent's exceptions to the initial decision; and "Ce" refers to Complainant's reply to Respondent's exceptions.

upset and uncomfortable discussing the position. Complainant then spoke about the position with Jean DiGennaro, Respondent's business administrator, who gave him what he referred to as a perfunctory interview for the job. ID-3. Complainant also tried to speak with the mayor about the position, who informed him that he would get the next position as laborer (P-2).

Complainant stated that Patrone later asked him why someone his age was seeking a full-time position, and that it was a young man's job. Complainant reiterated his interest in the position. Complainant stated that later Patrone asked him if he would be interested in a position with the Municipal Utilities Authority, a separate entity. Complainant answered yes, provided it was also a full-time position. Complainant stated that Patrone said he would get back to him but he never heard anything else about that position. ID-3.

Thereafter, Complainant was told by Campbell that John Bonner, Jr. had been given the laborer position with the public works department. At the time, Bonner was 37 years old and did not have a commercial driver's license. Bonner also had less experience, as he had previously worked in a fish market. (P-7, P-8).

Complainant felt that he was better qualified for the full-time position and was upset that he did not get the job. Some of his co-workers laughed at him and stated that someone else had gotten "his" job. ID-4.

In January 2003, Complainant filed his original complaint with the Division alleging discrimination based on national origin and age (R-1). The complaint was served on Respondent on March 17, 2003. Thereafter, Complainant felt that Patrone was spying on him. Complainant would see Patrone watching him while he worked. ID-4. On or about March 20, 2003, Patrone asked Complainant who he thought were the two laziest employees in the public works department. Complainant did not respond, and felt that the question was intended to cause divisiveness between him and the other employees. ID-4.

On April 15, 2003, another full-time laborer position was posted. Complainant applied and

did not get the job. Instead, the position was given to Jeff Morgan, who was 37 years old, did not have a commercial driver's license, and had been working as a janitor. According to Complainant, Morgan had not applied for the job but was asked by Patrone to take it. ID-4.

By memo dated April 30, 2003, Patrone advised Complainant that due to a lack of work in the public works section, Complainant was being transferred as of May 5, 2003 to the municipal golf course (P-1). When Complainant reported to the golf course, Wendell Beckly, the groundskeeper, informed him that there was not enough work for both him and the other person already assigned to the golf course (P-3). Shortly thereafter, Complainant was laid off and told that he might be able to work in the pro shop at the golf course on Sundays. ID-4.

The following week, Complainant attended a township council meeting and heard the mayor say that there would be two new laborer positions in the public works department. The week after this meeting, Complainant was called back to work by Campbell, who was in charge of the public works department as Patrone was ill. Complainant stated that when Patrone returned, he felt that Patrone continued to watch him. ID-4.

Complainant stated that on one occasion while at work, he saw Assemblyman Bob Smith exiting the municipal court building. As he knows Smith because their sons had attended school together, Complainant stated that he spoke with Smith for a moment or two. Campbell later told Complainant that Patrone had complained Complainant had spent about 15 minutes talking with Smith. The next day, Patrone had Complainant come to his office where he read him a memo about talking with Smith, which Complainant felt was a reprimand. Complainant asked for a copy of this memo but never received one. ID-5.

Shortly thereafter, Complainant and a co-worker brought some brush in a truck to the municipal yard. Complainant got out of the cab of the truck, and jumped into the bed of the truck in order to guide the driver to back into the spot where the brush was to be dumped. Later, Patrone had Complainant come to his office where he read him a memo saying that it

was unsafe for him to be in the back of the truck while it was moving. Complainant stated that this procedure was frequently followed by his co-workers, and that he also felt this memo was a reprimand. ID-5.

In June or July of 2003, two laborer positions were posted. Complainant applied for and was given one of the positions on July 23, 2003. ID-5.

Complainant stated that he was humiliated and embarrassed upon being passed over on two occasions for a permanent laborer position with the positions being given to younger, less qualified people. As a result of not getting the first laborer position, Complainant stated that his wage loss was $12,642.50, (P-6), plus loss of seniority and benefits. ID-5.

On cross-examination, Complainant admitted that on a few occasions he had refused to work overtime. His personnel record shows that he did occasionally work overtime (P-5). Complainant stated that his occasional refusal was based on the different way that overtime was calculated for part-time employees as compared to full-time employees pursuant to the union contract (P-4). A part-time employee had to actually work 40 hours in a week before being eligible for time-and-a-half for overtime, while a permanent employee would receive overtime after 40 hours of creditable time including time off for vacations, holidays, and sick or personal time. ID-5-6. Complainant thought this was unfair. Additionally, overtime is not mandatory, under the union contract (P-4).

Patrone testified that he was satisfied with Complainant's work, except for his unwillingness to work overtime. Patrone stated that overtime work is necessary, particularly during leaf pickup and snow removal periods. Patrone also stated that Complainant's son is his brother-in-law. ID-6.

Regarding the first laborer position open in December 2002, Patrone stated that both Complainant and Bonner were eligible for the position and that he recommended Bonner due to Complainant's negative position regarding overtime and Bonner's willingness to work overtime.

Patrone stated it was not unusual to hire a person who did not have a commercial driver's license for the laborer position, and to give that person one year to obtain such a license. Patrone stated that he only made a recommendation as to the person to be hired, and that the actual decision was made by the mayor and council. Patrone denied that he had ever asked Complainant why he wanted the full-time job, or that he had ever said Complainant was too old. Patrone stated that he did not recommend Complainant for the second position or the later two positions because of Complainant's position as to overtime. Patrone stated that he did mention the MUA position to Complainant and that he would help him get it, but that Complainant did not apply for that position. ID-6.

Regarding Complainant's conversation with Assemblyman Smith, Patrone recalled the incident and stated that Complainant had talked with Smith for 30 to 45 minutes. Patrone wrote a memo regarding the incident but was not sure what he did with the memo. As to the back-of-the-truck incident, Patrone stated that it was unsafe for Complainant to ride in the back of the truck but did not recall whether he wrote a memo regarding this incident. Apparently, there were no written memos in Complainant's personnel file. ID-6.

On cross-examination, Patrone stated that he had been demoted and now works as a mechanic. He stated that he was never given a reason for the demotion. ID-6.

The ALJ did not find Patrone to be a credible witness. This finding was based in large part on Patrone's testimony that, after he was demoted, he did not inquire as to the reason. The ALJ found Complainant's testimony to be more credible, particularly that Patrone had asked him why a man his age was seeking a full-time position, and that he favored a younger man for the position. The ALJ also believed Complainant's testimony that after he filed his original complaint Patrone watched him more closely, called him into his office to complain about Complainant's conversation with Assemblyman Smith and his riding in the back of the truck, and transferred Complainant to the municipal golf course where he knew there was not enough

work. ID-7.

Campbell testified that Patrone asked him about who did or did not want to work overtime before Bonner was given the full-time position. Campbell confirmed that both Bonner and Morgan were under 40 years of age when hired as full-time laborers. ID-7.

Jennica Bileci, the current clerk for Washington Township, was not employed by Respondent during the period at issue. She stated that now and during the period at issue the hiring is done by the mayor. The director of the involved department only makes a recommendation (P-10).

Neither the mayor nor the business administrator testified at the hearing.

THE ALJ'S LEGAL CONCLUSIONS

Complainant alleged that Respondent unlawfully discriminated against him based upon his age and national origin, and also committed acts of unlawful reprisal against him by watching him more closely after the original complaint was filed. The ALJ found that, in order to establish a prima facie case of discrimination, a complainant must meet the burden of showing that (1) he belongs to a protected class, (2) he applied and was qualified for the position, (3) he was rejected despite his adequate qualifications, and (4) the employer hired a person outside of his protected class. ID-7, citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Once a prima facie case has been established by the complainant, it is presumed that discrimination has in fact occurred. According to the ALJ, the burden of persuasion then shifts to the employer who must then articulate a legitimate, non-discriminatory basis for its action. ID-7-8, citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Anderson v. Exxon Co., 89 N.J. 483 (1982); Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005). When the employer produces such evidence, the presumption of discrimination disappears. The burden shifts back to the complainant, who must then establish that the articulated reason was merely a pretext for discrimination and not the true reason for the employment decision. ID-8, citing St.

Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

The ALJ found that Complainant failed to establish a prima facie case of discrimination based on national origin, as there was no testimony given as to the national origin of either Bonner or Morgan, nor was any evidence produced of any discrimination by Patrone or Campbell against Complainant because of his Hispanic origin. The ALJ accordingly dismissed Complainant's allegation of discrimination based on national origin. ID-8.

The ALJ next found, however, that Complainant presented a prima facie case of discrimination based on age. On two occasions the permanent position of full-time laborer was given to men who were significantly younger than Complainant, both of whom had less experience. The facts show that Complainant was an experienced employee who had done a good job and held a commercial driver's license. Respondent did not dispute that Complainant had presented a prima facie case of age discrimination, but argued that Respondent had shown Complainant objected to working overtime and that this constituted a legitimate non-discriminatory reason for its action. The ALJ disagreed, finding that Respondent had not presented any legitimate non-discriminatory basis for not hiring Complainant for either of the two permanent positions. ID-8-9. The ALJ found that Complainant possessed the necessary qualifications for the job and had performed his job satisfactorily. ID-8. In her discussion, the ALJ recognized Complainant's contention that an adverse inference may be drawn from Respondent's failure to call Mayor Davidson as a witness in that, according to Patrone, it was the Mayor who made the hiring decisions for Respondent. ID-9.

The ALJ also found that Complainant established that Respondent retaliated against him for having filed his original complaint. A prima facie case of reprisal under the LAD is established if an employee can show that (1) he availed himself of a protected right; (2) he was thereafter subjected to an adverse employment action; and (3) there was a causal link between the two. ID-10, citing Parker v. Hahnemann Hospital, 234 F. Supp.2d 478, 488 (D.N.J. 2002).

Based on the facts in the record, the ALJ concluded that Complainant was adversely affected after he filed his civil complaint. Specifically, Complainant was transferred to the golf course where there was no work for him and shortly thereafter laid off, even though the mayor stated publicly that additional laborers would soon be hired due to a staffing shortage. The ALJ also found that Patrone's actions of calling Complainant to his office to complain about his performance showed a pattern of retaliatory animus. ID-10. Based on the foregoing, the ALJ concluded that Complainant demonstrated unlawful discrimination and reprisal in violation of the LAD.

RESPONDENT'S EXCEPTIONS

In its exceptions, Respondent urges the Director to reject the ALJ's recommended order because she misstated and misapplied the relevant substantive law, and therefore incorrectly concluded that Complainant suffered unlawful discrimination and retaliation (Re-12). In its first exception, Respondent contends that, by requiring Respondent to prove that Complainant's refusal to work overtime was the reason it denied him a fulltime position, the ALJ improperly put the burden of proof on Respondent after Complainant established his prima facie case (Re-3-6). Once Complainant has satisfied his prima facie burden, Respondent need only articulate some legitimate, non-discriminatory reason for the employee's rejection (Re-5, citing Andersen v. Exxon Co., 89 N.J. 483, 493 (1982)). Complainant then has the burden to persuade the trier of fact that Respondent's articulated reason was not the true reason for the employment decision, but was merely a pretext for intentional discrimination. Accordingly, Respondent argues that the ALJ improperly placed the burden of proof on Respondent and, therefore, her decision must be rejected (Re-6).

In its second exception, Respondent contends that Complainant failed to prove that the ultimate decision maker, then-Washington Township mayor Randee Davidson, discriminated against him based on his age (Re-7). Respondent argues that Complainant must do more than

prove the employer's proffered reason was false; he must also show that the employment decision was motivated by discriminatory intent (Re-7, citing Erickson v. Marsh & McLennan Co., 117 N.J. 561 (1990)). Respondent asserts that Complainant failed to put forward any evidence that Mayor Davidson's decision was based on his age, and that this is fatal to Complainant's claim since Mayor Davidson made ultimate hiring decisions involving fulltime positions (Re-8).

In its third exception, Respondent asserts that the ALJ's decision must be rejected because she misstated and improperly applied the missing witness rule and wrongfully imposed an adverse inference on Respondent (Re-8). Respondent first argues that, under the applicable model jury charge provision, no adverse inference charge can properly be made against either party in this case because Mayor Davidson was available to both parties (Re-10). Secondly, Respondent contends that if an adverse inference is to be drawn, it should be against Complainant since Mayor Davidson's testimony is crucial to Complainant's burden to prove discriminatory intent, and it was Complainant who failed to call her as a witness (Re-8-9).

In its final exception, Respondent urges the Director to reject the ALJ's conclusion concerning reprisal because Complainant failed to produce sufficient evidence to meet the legal standard for this claim under the LAD (Re-10). In support of this position, Respondent contends that Complainant has not shown he was subjected to an adverse action sufficiently severe, as a matter of law, to be considered retaliation (Re-11). Further, Respondent argues that Complainant has failed to show that any harm he suffered was caused by the fact that he filed a discrimination complaint (Re-10).

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

Upon careful review of the record, the Director concludes that the ALJ's factual findings as recited herein are supported by sufficient evidence in the record, and he adopts them as his

own. Crucial to this conclusion are the ALJ's determinations concerning the credibility of the parties. Specifically, the ALJ found that Patrone, the key witness for Respondent, was not a credible witness based upon, inter alia, his statement that he did not inquire as to the reason for his own demotion. Conversely, the ALJ specifically found Complainant to be truthful in his testimony about age-based remarks made by Patrone and about Patrone's intensified scrutiny of Complainant after the filing of his Division complaint. ID-7. It is well settled that an agency head must give due deference to the ALJ's factual determinations because the ALJ had the opportunity to hear the live testimony of witnesses, observe their demeanor, and judge their credibility. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-88 (1988). Thus, an agency head may not reject or modify any finding of fact based on the credibility of a lay witness unless it first determines from a review of the record that the finding is arbitrary, capricious, or unreasonable, or is not supported by sufficient, competent, and credible evidence in the record. N.J.A.C. 1:1-18.6(c). Applying these legal standards, the Director adopts the ALJ's findings of fact as recited herein.

THE DIRECTOR'S LEGAL ANALYSIS AND CONCLUSIONS

The LAD prohibits employment discrimination based on a variety of factors including national origin and age. N.J.S.A. 10:5-12(a). In addition, the LAD makes it unlawful for any person to take reprisals against any other person because that person has filed a discrimination complaint under the LAD. N.J. S.A. 10:5-12(d). Preliminarily, the Director concurs with the ALJ's conclusion that Complainant failed to establish a claim of discrimination based on national origin, as there was no testimony or other evidence to establish any discrimination by Patrone or Campbell against Complainant because of his Hispanic origin. Accordingly, the Director adopts the ALJ's dismissal of Complainant's allegation of discrimination based on national origin.

In order for an employer's personnel actions to be considered unlawful, courts have found that intent is a critical component. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446

(2005), citing Marzano v. Computer Sci. Corp., 91 F.3d 497, 507 (3d Cir. 1996) [2]. Providing direct physical evidence of such intent, however - either through testimony or the production of written records - has often been recognized as "difficult" at best. Marzano, supra, citing U.S. Postal Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983). See also, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987). "Even an employer who knowingly discriminates on the basis of [a protected status] may leave no written records revealing the forbidden motive and may communicate it orally to no one." Chipollini, supra, citing LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984). Accordingly, it is well settled that an employee may prove an employer's discriminatory intent through circumstantial evidence using the burden-shifting methodology described by the U.S. Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Bergen Commercial Bank v. Sissler, 157 N.J. 188, 209-210. [3]

Applying that methodology, a complainant may establish a prima facie case of age-based failure to hire under the LAD by proving that he or she 1) is a member of a protected class; 2) applied and was qualified for the position for which the employer was seeking applicants; 3) was rejected despite adequate qualifications; and 4) the employer hired a candidate sufficiently younger to permit an inference of age discrimination. Bergen Commercial Bank v. Sissler, supra at 213.[4] Moreover, the burden of presenting a prima facie case is not

[2]The New Jersey Supreme Court has "in a variety of contexts involving allegations of unlawful discrimination...looked to federal law as a key source of interpretive authority" in applying Title VII analysis to LAD claims. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97-98 (1990). Accordingly, while New Jersey state courts are not bound by federal precedent, it can be relied on for guidance.

[3] Although not raised by the parties, a discrimination claim may be proven by direct evidence that demonstrates hostility toward a protected class and a causal connection between that hostility and the challenged employment decision. Bergen Commercial Bank, supra at 208. Here, Complainant provided direct evidence through Patrone's statement that the laborer position is "a young man's job," and his question about why "would a guy your age want that job." ID-7. Once such a prima facie case is presented, Respondent must prove that it would have made the same decision absent the unlawful consideration. Id.at 209. The Director concludes that Respondent failed to satisfy this burden and, therefore, failed to rebut any prima facie case of discrimination based on direct evidence.

[4] Subsequent Appellate Division decisions have held that a prima facie case may be established even if the

onerous, but merely serves to eliminate the most common non-discriminatory reasons for adverse action. Zive, supra at 447, citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). It has thus repeatedly been held that the evidentiary burden at the prima facie stage is simply "to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent -- i.e., that discrimination could be a reason for the employer's action." Marzana, supra, at 508.

After reviewing the record, the Director adopts the ALJ's conclusion that Complainant established a prima facie case of age-based discrimination under the LAD. Complainant belonged to a protected class in that he was 59 years old at the time of the incidents which gave rise to his complaint. Complainant twice applied for fulltime laborer positions for which he was qualified. Both times Complainant was rejected in favor of 37 year old applicants who were sufficiently younger than Complainant to raise an inference of age discrimination.

The establishment of the prima facie case creates an inference of discrimination, and under the McDonnell Douglas analysis the burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for the employer's action. Zive v. Stanely Roberts, Inc., supra at 449. The Respondent correctly pointed out that the ALJ applied the wrong standard of proof at this stage of the analysis of a case based on circumstantial evidence by requiring Respondent to prove that it denied Complainant the fulltime laborer positions for a legitimate reason. ID-7-9. Instead, Respondent need only articulate a legitimate, non-discriminatory reason for its action. Zive, supra at 449; Clowes v. Treminix Int'l, Inc., 109 N.J. 575, 596 (1988). Hence, the Director concludes that Respondent successfully rebutted Complainant's prima facie case by offering Patrone's testimony that Complainant was not hired to the fulltime positions because Complainant had expressed an unwillingness to work overtime. ID-6.

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successful candidate is in the same protected class as the complainant. Williams v. Pemberton Twp. Public Schools, 323 N.J. Super. 490, 503 (App. Div. 1999); Reynolds v. Palnut, 330 N.J. Super 162, 168 (App. Div. 2000).

In the third stage of the McDonnell Douglas burden-shifting scheme, the burden shifts back to Complainant to prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision. The burden to prove discrimination remains with the employee at all times. Zive, supra at 449-450, citing Clowes, supra at 596. Applying these standards, the Director concludes that Respondent's reason for failing to hire Complainant is unworthy of credence and is a pretext for unlawful age discrimination. Complainant was clearly more qualified than the two successful younger applicants in that he had the required commercial driver's license and the other two did not. ID-3-4. Complainant also had more relative experience for the position since he had worked for Respondent as a part time laborer for approximately a year and a half, and had a good work record. ID2-3. By contrast, John Bonner, Jr. had worked at a fish market and Jeff Morgan had worked as a janitor before being hired by Respondent. ID-3-4. Moreover, as the ALJ perceptively noted, Complainant's disinclination to work overtime could not have disqualified him from consideration since he was eventually hired by Respondent to a fulltime laborer's position in July 2003. ID-5. Also, Complainant was not required to work overtime under the union contract, and the record reflects that he in fact worked overtime on occasion. ID-6, (P-4). Finally, the Director is persuaded by the ALJ's finding that Ruiz credibly testified Patrone said he favored a younger man for the position, and that Patrone asked him why a man of Complainant's age would want a fulltime job. ID-7. Again, an agency head must give due deference to findings that are based on an ALJ's credibility assessments. Clowes, supra at 587-588. After a careful review of the record, including the ID, Respondent's exceptions, and Complainant's reply, the Director concludes that Respondent's articulated reason for not selecting Complainant for the fulltime laborer positions is a pretext for unlawful age discrimination.

In its exceptions, Respondent objects to the ALJ's finding of an adverse inference drawn from Respondent's failure to call Mayor Davidson as a witness. Respondent

argues that, as a matter of law, no adverse charge can properly be made against either party because former Mayor Davidson was available to testify for any party (Re-9). The Director agrees, but nevertheless concludes there is sufficient evidence that Respondent's proffered reason for rejecting Complainant was a pretext for discrimination.[5] Initially, the Director notes that although the ALJ references the adverse inference rule, she did not expressly rely on it in her analysis. ID-9-10. Here, both Complainant and Respondent had an interest in obtaining the Mayor's testimony - Complainant to arguably bolster his position that the hiring decisions were based on discriminatory motives, and Respondent to disprove Complainant's establishment of pretext. Nevertheless, there is no evidence that Mayor Davidson could not have been produced by either party if so requested; Respondent even acknowledges in this exception that "(E)ither side could have subpoenaed her." Therefore, Respondent is correct in its assertion that an adverse inference should not apply here against Respondent for failing to produce the Mayor.

This notwithstanding, there was ample circumstantial evidence to establish discriminatory intent, without the Mayor's testimony. While Respondent asserts that Mayor Davidson had ultimate decision-making authority, it is undisputed that Petrone did not recommend Complainant and instead recommended two younger applicants. ID-6. The record contains substantial evidence, both direct and circumstantial, that Patrone's recommendation was tainted by age bias. Even assuming Mayor Davidson had the authority to make the selection and exercised that authority in this instance, there is nothing in the record to suggest she based her decision on anything beyond Patrone's recommendation. Regardless of who had the ultimate authority to select Mr. Bonner and Mr. Morgan instead of Complainant, the

[5] The adverse inference rule is a jury instruction which should be given only if there is evidence from which a jury could find (1) that the missing witness was physically available only to the party against whom the inference would be drawn, or (2) that the missing witness has a relationship with that party that practically renders the testimony unavailable to that party's adversary. Oxman v. WLS-TV, 12 F.3d 652, 661 (7th Cir. 1993); Chicago College of Osteopathic Med. V. George A. Fuller Co., 719 F.2d 1335, 1353 (7th Cir. 1983). An adverse inference may be applied to a missing witness "who has knowledge about the facts in issue, and who is reasonably available to the party, and who is *not equally available to the other party*". Oxman, supra, at 652 (emphasis added). See also; Model Jury Charge 1.19.

record as a whole establishes that Respondent's articulated reason for rejecting Complainant was a pretext for unlawful age discrimination, and the Director so concludes.

In order to establish a prima facie case of unlawful reprisal, Complainant must show that he engaged in a protected activity known to Respondent, Respondent thereafter subjected him to adverse employment action, and 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). There are no bright-line rules under the LAD to determine whether there has been sufficient "adverse employment action" to support a prima facie case of reprisal, and the determination must be made based on the specific facts of the case. Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002). Courts have found that assignment to different or less desirable tasks may constitute adverse employment action, Mancini, supra at 564-565, and a number of less drastic employment actions combined can also constitute sufficient adverse action for a prima facie case. Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 434-435 (App. Div. 2005). Still, "not everything that makes an employee unhappy is an actionable adverse action." Cokus v. Bristol-Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002). The employment action must be "sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner." El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145, 176 (App. Div. 2005).

The determination of whether there was a causal connection between the protected activity and the adverse action rests on a broad array of factors, 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 (3rd Cir. 2000). The Appellate Division has noted that although temporal proximity may be evidence of causation, proximity is not the only circumstance that justifies an inference of causal connection. Romano, supra, 284 N.J. Super. at 549-550. Nevertheless, courts have recognized that an inference of retaliatory motive is often justified when an employer's protected

activity is closely followed by an adverse employment action. McBride v. Princeton University, 67 Fair Empl. Prac. Cas. (BNA) 340 (D.N.J. 1991), citing Burrus v. United Tel. Co., 683 F.2d 339, 343 (10th Cir. 1982).

Applying these legal standards, the Director concludes that Complainant has presented a prima facie case of unlawful reprisal under the LAD. It is undisputed that Complainant engaged in a protected activity by filing a complaint against Respondent charging discrimination based on his age and national origin in January 2003. That complaint was served on Respondent on March 17, 2003. ID-4. Subsequently, on April 15, 2003, the second fulltime laborer position was posted. Although Complainant applied, Jeff Morgan was selected for the position even though he did not have a commercial driver's license which was a requirement for the job. Ibid. Further, on April 30, 2003, Ken Patrone issued a memo to Complainant informing him that he was being transferred to a job at the municipal golf course effective May 5, 2003. Shortly thereafter, the golf course groundskeeper told Complainant that there was not enough work for him there, and he was laid off. After Complainant was called back to work at the public works department a few weeks later, Complainant was reprimanded twice by Patrone for incidents Complainant believed did not warrant discipline. ID-4-5. It is clear that the adverse actions to which Complainant was subjected after filing his discrimination complaint were sufficiently severe or pervasive to meet the prima facie threshold for unlawful reprisal. Moreover, the fact that these adverse actions were taken so soon after Respondent was served with Complainant's complaint establish the requisite causation to establish a prima facie case of reprisal under the LAD.

Once a prima facie case of reprisal is presented, the burden shifts to Respondent to articulate a legitimate, non-retaliatory reason for its action. Romano, supra at 549. Patrone testified that Complainant was not selected for the second fulltime laborer position because he had refused to work overtime, and that he had reprimanded Complainant for riding in the back

of a truck because the practice was unsafe. ID-6. Respondent also presented evidence that Complainant's transfer to the municipal golf course was due to a lack of work at the department of public works (P-1). The Director concludes that this evidence satisfies Respondent's burden to articulate legitimate reasons for these actions. [6]

Complainant then bears the burden of showing that these reasons were not Respondent's true motivations, and that Respondent was actually motivated by retaliatory intent. If Complainant succeeds, Respondent then must prove it would have taken these actions even without retaliatory motive. Jamison v. Rockaway Twp. Board of Education, 242 N.J. Super. 436, 477 (App. Div. 1990). Based on his careful review of the record, the Director concludes that Complainant has demonstrated that Respondent's explanation for each of these actions was a pretext for unlawful reprisal. Respondent's contention that Complainant was rejected for the second laborer position because he had refused overtime in the past is contradicted by the record. Respondent's hiring of Complainant to a fulltime laborer position in July 2003 demonstrates that the overtime issue was not considered critical to the hiring decision by Respondent. Moreover, as discussed previously, Complainant was clearly more qualified than Jeff Morgan for the second fulltime laborer position in that he had the required commercial driver's license and more relative experience. Similarly, Respondent's position concerning Complainant's transfer to a job at the municipal golf course is not consistent with the record. Complainant was recalled to work in the department of public works by Supervisor Frances Campbell within weeks of being transferred out of the department on May 5, 2003. ID-4. Two fulltime laborer positions were posted in June or July 2003. ID-4-5. Thus, the record demonstrates that the department of public works had a need for laborers when Complainant was transferred, and supports Complainant's claim that he was transferred and subsequently laid off in retaliation for filing his discrimination complaint. The Director also concludes that

[6] Respondent offered no legitimate reason for reprimanding Complainant for having a conversation with Assemblyman Smith. ID-6. Therefore, Respondent has not rebutted Complainant's prima facie case of reprisal respecting that reprimand.

Patrone's reprimand of Complainant for riding in the back of a truck was motivated by retaliatory animus, based on Complainant's credible testimony that Patrone more closely scrutinized Complainant and issued him reprimands only after he filed his discrimination complaint. ID-7. Based on the foregoing, the Director finds that Respondent engaged in unlawful reprisal against Complainant in violation of the LAD.

REMEDIES

A victim of unlawful discrimination under the LAD is entitled to recover actual economic losses, as well as non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, 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). The basic purpose of awarding back pay is to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 35 (1981). Pre-judgment interest may also be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of the wages which rightfully belonged to the employee. Decker v. Bd. of Education of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). In this case, it is undisputed that because he was denied hire to a fulltime position, Complainant lost wages in the amount of $12, 642.45. After calculating pre-judgment interest in accordance with the Rules Governing the Courts of New Jersey, Complainant is entitled to $14,159.56.

A victim of discrimination is also 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. Nor is expert testimony needed. See, e.g., Rendine v. Pantzer, 276 N.J. Super. 398, 440 (App. Div. 1994), affirmed as modified, 141 N.J. 292 (1995).

Here, Complainant's own testimony demonstrates that he suffered emotional distress as a result of Respondent's refusal to promote him to the full-time laborer position on two separate occasions, while awarding each position to individuals less qualified than Complainant. Complainant testified that after he was not selected for the first job, he felt embarrassed and humiliated. ID-5. Complainant also stated that some of his co-workers laughed at him and stated that someone else had gotten "his" job. ID-4. Complainant also testified that, after the filing of his original complaint, he felt that he was regularly being watched and spied on by Patrone, as well as reprimanded for alleged acts that other employees routinely practiced. ID-4-5. These acts took place over the course of several months. After reviewing the record in its entirety, and considering emotional distress damage awards made to other prevailing complainants, the Director concludes that, based upon Complainant's emotional suffering, an award of $15,000 is appropriate to fully compensate Complainant for the emotional distress he suffered as a result of Respondent's unlawful actions.

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any employer who violates this statute. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is $10,000. Ibid. The assessment of such a penalty against a municipality requires the agency head to balance the public interest in the matter against the fact that a public entity may have limited funds available for such payments. H.I.P. v. Hovnanian, 291 N.J. Super. 144 (Law Div. 1996). The Director concludes that a penalty of $5,000 is appropriate for Respondent's LAD violations.

THE FEE APPLICATION

Counsel for Complainant submitted an application for $33,827.63 in counsel fees and $90.70 in costs. His application was supported by his certification, an invoice showing specific services rendered from May 12, 2003 through November 17, 2006, and an affidavit of S. Robert Freidel, Esq., regarding the prevailing rates in the relevant community.

The LAD permits the award of reasonable attorney's fees to a prevailing party. N.J.S.A. 10:5-27.1; see also, Rendine v. Pantzer, 141 N.J. 292 (1995). Fees should ordinarily be awarded unless special circumstances would make a fee award unjust. Hunter v. Trenton Housing Authority, 304 N.J. Super. 70, 74-75 (App. Div. 1997).

The New Jersey Supreme Court has determined that the starting point for calculating a reasonable attorney's fee is computation of the "lodestar," which is derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Rendine v. Pantzer, supra, 141 N.J. at 334-35. Counsel requests $325 per hour for his work in prosecuting this matter. The Director finds this hourly rate to be reasonable, as it is comparable to the prevailing rates in the relevant community for attorneys of comparable skill and experience. Id. at 337. To compensate for the delay in payment, it is appropriate to determine the hourly fee based on current rates rather than the prevailing rates at the time the services were performed. Ibid.

If the hours expended exceed the time that competent counsel reasonably would have expended to achieve a comparable result, excessive hours should be excluded from the lodestar calculation. Rendine v. Pantzer, supra, 141 N.J. at 336. In evaluating the results achieved, the decisionmaker should consider not only the monetary relief sought as compared to the monetary award, but also the interests vindicated and the statutory objectives. Ibid; Szczepanski v. Newcomb Medical Center, 141 N.J. 346, 366-367 (1995).

In furtherance of the LAD's public interest objectives, counsel fees need not be proportional to the amount of monetary relief awarded to the prevailing party. Szczepanski v. Newcomb Medical Center, supra, 141 N.J. at 366-367. Nevertheless, determining the appropriate fee award generally requires careful examination of counsel's submissions to verify that the attorney's hours were reasonably expended, and the decisionmaker's responsibility to do so is heightened in cases in which the fee requested is disproportionate to the monetary relief awarded. Ibid.

To be compensable, a certification of services must be sufficiently detailed to allow meaningful review and scrutiny. Rendine v. Pantzer, 141 N.J. at 335. In this case, counsel has submitted fairly detailed billing summaries showing the hours expended and services rendered, commencing with the initial meeting with Complainant. The Director finds that the invoice submitted by counsel provides sufficient detail to meet the Rendine standards.

After careful review, the Director finds that, with the exception discussed below, the hours expended are reasonable and necessary in light of both the nature of the litigation and the results achieved. The invoice shows 20.8 hours expended on March 1, March 22-24, and March 29, 2006 for research and preparation of the closing brief. The Director concludes that the time expended on this task is excessive for an attorney of counsel's specialization and experience. This case did not raise any novel or unusual issues of law, and the brief, while thorough and well-supported, does not reflect the need for extensive research for an attorney proficient in employment discrimination law. Counsel has certified that he devotes a large part of his practice to employment and civil rights litigation, and has recently litigated several other employment discrimination cases. His relatively high hourly rate is a function of this level of experience, and his repertoire of previous work should permit standard issues such as those articulated in the closing brief to be addressed with a minimum of research. For this reason, the

20.8 hours expended on the closing brief shall be reduced by half, and Respondent shall be liable for fees for 10.4 hours for this task.

The remainder of counsel's billing entries are reasonable and necessary.[7] In concluding that the remainder of the hours counsel expended were reasonable in relation to the results achieved, the Director notes that, although the lost wages in this case were limited, counsel's representation required him to present evidence and argument on both a differential treatment claim and an unlawful reprisal claim, each involving distinct factual allegations. Complainant prevailed on both of these claims. Thus, after considering the size of Complainant's back pay and emotional distress damage awards in relation to the counsel fees requested, the Director concludes that the amount of time spent and the specific legal work performed were not excessive and were necessary to redress the LAD violations in this case, as well as to secure the level of monetary relief Complainant received. After deleting the 10.4 hours discussed above, the lodestar of fees for the 66.7 hours expended at $325 per hour total $21,677.50.

Fee Enhancement

The Supreme Court of New Jersey has held that, where an attorney's compensation is entirely or substantially contingent on a successful outcome, it may be appropriate to enhance the lodestar to ensure that the attorney is compensated both for the value of the services rendered, and for assuming the risk of receiving no payment. Rendine, supra, 141 N.J. at 337-338. The decision to enhance fees, as well as the amount of an enhancement, should be determined based on the actual risks or burdens that are borne by the attorney, the extent to which counsel has been able to mitigate the risk of nonpayment, and the extent to which other factors may have aggravated the risk of nonpayment in a particular case. Rendine, supra, 141 N.J. at 339-40.

[7] Respondent has filed no opposition to the attorney fee request, and has thus not objected to any specific billing entries or services rendered.

Fee enhancements ordinarily should range from 5% to 50% of the lodestar, and in the typical contingency case a twenty to thirty-five percent enhancement should be added. Rendine, supra, 141 N.J. at 343. Here, counsel seeks a 35% enhancement, noting that he provided representation in this case on a completely contingent-fee basis, and would have received no payment at all had Complainant not prevailed. After considering the circumstances of this case, including the fact that this case raised no novel or complex issues of law, the Director concludes that a 25% fee enhancement will adequately compensate counsel for the risks of non-payment.

Applying a 25% multiplier to the lodestar of $21,677.50, the Director awards an enhancement of $5419.37, for a total counsel fee of $27,096.87. The Director also finds it appropriate to award Complainant the $90.70 in costs, as they were reasonable and necessary to the litigation of this case. Thus, the attorney's fees and costs awarded total $27,187.57.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful discrimination and reprisal 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, et seq.

2. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $29,159.56 as compensation for lost wages, pre-judgment interest on the lost wages, and for pain and humiliation. Respondent shall also credit Complainant with any loss in seniority or benefits caused by Respondent's failure to hire him to the fulltime laborer position in 2002.

3. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $5,000 as a statutory penalty.

4. Within 45 days from the issuance of the final order in this matter, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $27,187.57 for attorneys fees and costs.

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

6. 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.

February 2, 2007
DATE

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