

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 830-01
DCR DOCKET NO.: ED08NK-45415
DECIDED: JULY 11, 2002

KAMLESH H. DAVE)
)
Complainant,)
)
v.)
)
CAMDEN COUNTY MUNICIPAL)
UTILITIES AUTHORITY,)
)
Respondent.)

**ADMINISTRATIVE ACTION
FINDINGS,
DETERMINATION AND ORDER**

APPEARANCES:

Kamlesh Dave, pro se.

Richard L. Goldstein, Esq., for the respondent (Marshall, Dennehey, Warner, Coleman & Goggin, PC, attorneys).

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant , Kamlesh H. Dave(Complainant), alleging that the respondent, Camden County Municipal Utilities Authority (Respondent), unlawfully terminated him based on his national origin in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to-49.

On March 1, 2002, the Honorable Joseph Lavery, Administrative Law Judge (ALJ), issued

an initial decision¹ dismissing the complaint. Having independently reviewed the record and the ALJ's decision, the Director adopts the ALJ's initial decision dismissing the complaint as modified herein.

PROCEDURAL HISTORY

On December 16, 1999, Complainant filed a verified complaint with the Division alleging that Respondent unlawfully discriminated against him based on his national origin (Indian). Specifically, Complainant alleged that Respondent laid him off from his position as an inventory control clerk while retaining less senior non-Indian employees. 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 the Division transmit this matter to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 10:5-13.

Complainant also appealed his layoff through the Merit System Board (MSB), and his MSB appeal was transmitted to the OAL for hearing on March 14, 2001. The ALJ issued a recommended Order of Consolidation and Predominant Interest on October 1, 2001, ruling that the MSB had the predominant interest in these cases.² A hearing took place on November 19, 2001, and the ALJ issued an initial decision dismissing the complaint on March 1, 2002. Neither party filed exceptions to the ALJ's initial decision. On April 24, 2002, the MSB issued a final order

¹Hereinafter, "ID" shall refer to the initial decision of the ALJ; "CB" shall refer to Complainant's Closing Argument dated December 2, 2001; "RB" shall refer to Respondent's Closing Argument dated December 3, 2001 and "VC" shall refer to the December 16, 1999 verified complaint.

²The Order of Consolidation and Predominant Interest also consolidated the within matter with the Merit System Board Appeal of Mira Dutta v. Camden County Municipal Utilities Authority, OAL Docket No. CSV 478-01, and the ALJ issued a single initial decision covering that matter and Complainant Dave's MSB and LAD matters. Since Mira Dutta did not have a complaint pending with the Division, only Complainant Dave's complaint is before the Director for review of the ALJ's initial decision, and only those portions of the ID pertaining to Complainant Dave's LAD claims will be addressed in this decision.

summarily adopting the factual findings and recommended decision of the ALJ. The MSB then requested a 45-day extension in order to allow the Director time to consider the record and to file his final determination regarding Complainant's LAD claims and transferred this matter to the Division. The Director was subsequently granted an additional extension of time to file a final determination and order in this matter, which is now due on July 18, 2002.

THE ALJ'S DECISION

Findings of Fact

The ALJ's findings of fact are set forth on pages 3, 11 and 12 of the initial decision. Those factual findings are briefly summarized as follows. The ALJ found that Respondent initiated layoffs, including Complainant's layoff, as a result of a 1999 budget reduction and the discontinued operation of two of Respondent's facilities, an incinerator and a compost facility (ID 3). The layoffs were originally scheduled to be effective November 5, 1999, but were delayed until November 19, 1999. Ibid.

The ALJ also noted that the 1999 staff reductions were part of a larger downsizing process and that from 1996 to 2001, Respondent reduced its labor force from 227 to 147, and reduced its annual expenditures from 21 million dollars to 16 million dollars (ID 12). The ALJ further found that Respondent initiated the November 1999 layoffs to reduce labor costs and in order to compete with private companies seeking to supplant its operation (ID 11). Respondent initially proposed to lay off a larger number of employees in 1999, but was able to reduce the number of actual layoffs by working with the labor union representing affected employees to create alternate jobs that were filled by some of those affected employees. Respondent was required to explain this modification of its layoff plan to the New Jersey Department of Personnel (DOP), and this process delayed the layoffs until November 19, 1999. Ibid.

The ALJ also determined that Respondent's need for the job duties performed by the laid-off employees was reduced either directly or indirectly by changes in technology due to new equipment, Respondent's practice of outsourcing work to private companies, the closure of Respondent's incinerator and composting facilities, and the completion of Respondent's newly constructed waste water treatment plant (ID 11). Finally, the ALJ concluded that neither Robert Cornforth, Herman Engelbert, nor Andrew Kircun (Respondent's Director of Operations and Maintenance, Executive Director, and Deputy Executive Director, respectively) intended to discriminate against Complainant in violation of the LAD. Ibid.

Conclusions of Law

The ALJ noted that Complainant was first required to establish a prima facie case of discrimination, and Respondent must then articulate a legitimate business reason for its action. The ALJ further concluded that once Respondent meets this burden of production, Complainant will prevail only upon a showing that Respondent's articulated reasons for his layoff were pretexts for unlawful discrimination (ID 12).

The ALJ did not make an explicit determination regarding whether Complainant established a prima facie case of national origin discrimination, but noted that Respondent presented "good faith" reasons for Complainant's layoff, including its use of seniority to determine which employees would be laid off (ID 14). The ALJ also found that, working with the employee union, Respondent made significant efforts to limit the number of layoffs and those efforts were inconsistent with bad faith. Ibid. The ALJ concluded that the assertions of discriminatory intent in Complainant's letter brief and testimony "did not bear any credible weight," (ID 14) and that Respondent's articulated lawful reasons for selecting Complainant for layoff were worthy of belief.

Finally, the ALJ summarily dismissed Complainant's allegations that Respondent subjected him to layoff in order to justify laying off Erik Stewart, who had more seniority than Complainant.

Complainant argued that Respondent subjected Stewart to layoff in unlawful retaliation for Stewart's involvement in "Civil Rights and harassment cases." The ALJ concluded that since Stewart's claim was dismissed due to his failure to participate or appear, Complainant could not prevail on any LAD claim that relied on Stewart's claim.

For all these reasons, the ALJ dismissed Complainant's LAD complaint.

EXCEPTIONS AND REPLIES OF THE PARTIES

Neither party filed exceptions to the ALJ's initial decision.

THE DIRECTOR'S DECISION

Findings of Fact

The Director adopts the ALJ's factual findings as set forth in the initial decision and as summarized above. Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Since neither party filed exceptions to the ALJ's initial decision, neither party has identified grounds upon which the Director could properly reject or modify the ALJ's factual findings. An agency head may reject or modify factual findings based on credibility of lay witnesses only upon a showing that the specific findings of the ALJ were arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record. N.J.A.C. 1:1-18.6(c); N.J.S.A. 52:14B-10.

Where a party disputes the ALJ's findings based on witness testimony, it is that party's responsibility to provide the agency head with the specific portions of the hearing transcript relating to each disputed fact, identifying those portions which support alternate or additional factual findings. Matter of Morrison, 216 N.J. Super. 143, 157-58 (App. Div. 1987). Complainant

has failed to do so here, and the Director finds no basis in the record for rejecting the ALJ's credibility determinations or the factual findings based on those determinations.

In addition, in a consolidated case involving multiple agencies, the agency with predominant interest makes all factual findings and legal determinations within its statutory jurisdiction, leaving the deferring agency to decide only the unresolved issues and specific remedies which are within its jurisdiction. N.J.A.C. 1:1-17.8(b). Because the same factual determinations were essential to Complainant's MSB and LAD claims, principles of comity and res judicata require the Division to defer to the Merit System Board's adoption of the ALJ's findings of fact which underlie both the MSB and LAD claims. See, e.g., Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255, 273-274 (1997) and cases cited therein. See also, ALJ's October 1, 2001 Order of Consolidation and Order Establishing Predominant Interest at 3.

The Legal Standard

The LAD prohibits an employer from discharging an employee based on national origin. N.J.S.A. 10:5-12(a). An employee may attempt to prove employment discrimination by direct evidence or more commonly, by circumstantial evidence. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). To prevail in a direct evidence case, the complainant must present evidence which, if true, demonstrates "...not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid.

As a starting point for analyzing LAD cases relying on circumstantial evidence, the New Jersey courts have adopted the burden-shifting methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green³, 411 U.S. 792 (1973), and Texas

³Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Clowes v. Terminix, *supra*, 109 N.J. at 595. A complainant first bears the burden of establishing a prima facie case, which in the context of a layoff requires proof that the complainant is a member of a protected class, that he or she was performing his job at a level which met the employer's legitimate expectations, that he or she was terminated, and that the employer retained others not in the protected class. Marzano v. Computer Science Corp., 91 F. 3d 497, 503 (3rd Cir. 1996); Baker v. National State Bank, 161 N.J. 220, 232 (1999).

Once a complainant has established a prima facie case of unlawful discrimination, he or she has created a presumption that discrimination has occurred. The burden of production, but not the burden of persuasion, then shifts to the respondent to articulate some legitimate nondiscriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, *supra*, 450 U.S. at 253-54; *see* Andersen v. Exxon Co., 89 N.J. 483, 493 (1982).

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

Analysis

Applying these standards, Complainant did not offer any direct evidence of national origin discrimination, nor does the record before the Director present any direct evidence of such discrimination. Accordingly, it is appropriate to evaluate this matter using the standards for circumstantial evidence.

The ALJ did not explicitly determine that Complainant established a prima facie case of discrimination, nor did he dismiss the complaint for failure to make a prima facie case. Instead,

the ALJ accepted Respondent's explanations of its layoffs and concluded that Complainant failed to establish that these reasons were pretexts for unlawful discrimination. Accordingly, even though the ALJ did not render an express finding that Complainant established a prima facie case, the Director will consider whether the record supports the ALJ's ultimate conclusion that Respondent had non-discriminatory reasons for its actions and that Complainant did not establish that Respondent acted towards him with discriminatory intent. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." Baker v. National State Bank, 312 N.J. Super. 268, 287 (App. Div. 1998) , aff'd 161 N.J. 220 (1999)(citations omitted).

Specifically, the ALJ found it undisputed that layoffs were triggered by a 1999 budget reduction and the closing of Respondent's incinerator and compost facilities. (ID 3). In addition, Respondent asserted that new accounting software reduced its need for employees in Complainant's position, namely, inventory control clerks, and that Respondent relied on seniority to determine which two of the three inventory control clerks it would select for layoff. (ID 11). Based on this evidence, the Director adopts the ALJ's conclusion that Respondent articulated a legitimate non-discriminatory reason for selecting Complainant for layoff. O n c e a n employer produces evidence of a non-discriminatory reason for its actions, the presumption of discrimination created by a prima facie case is rebutted and drops from the case, and the complainant's burden of proving pretext merges with the ultimate burden of proving intentional discrimination. Baker v. National State Bank, supra, 312 N.J. Super. at 286-87, citing Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. at 255-256. 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.

In this instance, Complainant challenged the veracity of Respondent's articulated reasons for initiating layoffs. Specifically, Complainant contended that layoffs were unnecessary because Respondent had already reduced its operating costs prior to the layoffs, that public sector employers have never been concerned with economy, that Respondent offered certain provisional employees permanent positions after the layoffs without giving notice of new job postings to the permanent employees subject to layoff, and that Respondent gave different job titles to less senior employees in titles targeted for layoff in order to retain them (CB 1). With regard to his particular termination, Complainant contends that his job duties were unaffected by the closure of two facilities and that Respondent continues to have sufficient work for him to perform. Complainant further argued that he was targeted for layoff because Respondent wanted to lay off Erik Stewart, and could not do so consistent with seniority rules without first laying off Complainant (CB 2). Specifically, Complainant contended that Respondent laid off Stewart and certain other employees who were involved in "Civil Rights" and harassment cases against Respondent, implying that Respondent's motives in targeting those employees were unlawful reprisal in violation of the LAD. Ibid. In sum, Complainant argues that economic reasons were not Respondent's true reasons for the layoffs, and that Respondent afforded certain other employees more favorable treatment for discriminatory reasons.

The ALJ first rejected Complainant's arguments that Respondent's explanation for undertaking a layoff was unworthy of belief and instead found as fact that Respondent initiated the layoffs to reduce costs in the face of reduced labor needs and to compete with private companies seeking to supplant Respondent's operations (ID 11). The ALJ further found as fact that Respondent significantly reduced the size of its labor force and its actual expenditures from 1996 to 2001. (ID 12). Having conducted a thorough and independent review of the record, and in light of Complainant's failure to file exceptions or to present hearing transcripts or other

evidence that would support rejection of these findings and also in light of the MSB's adoption of these factual findings to which deference must be given in this consolidated case, the Director finds good cause to adopt the ALJ's finding that Respondent initiated a bona fide reduction in force for economic reasons and terminated Complainant's employment as part of this process. The Director next considers whether Respondent's motive in selecting Complainant for layoff was discriminatory.

Complainant asserts in his verified complaint that Respondent subjected him to layoff but retained three non-Indian employees with less seniority. However, the record does not disclose any evidence that supports this allegation. Complainant's post-hearing brief made no mention of discrimination based on Complainant's national origin, nor does the ALJ's initial decision cite any evidence, testimony or argument submitted at the hearing that would support the conclusion that Respondent selected Complainant for layoff because of his national origin.

Even taking as true Complainant's contentions that the layoffs were unnecessary, misguided or imprudent, such findings of fact, if made, would be insufficient to establish that Respondent's decision to subject Complainant to layoff violated the LAD. Complainant must go further to persuade the decisionmaker that Complainant's national origin was a determinative factor in Respondent's challenged employment decision. Fuentes v. Perskie, 32 F. 3d 759, 764 (3rd Cir. 1994).

The ALJ concluded that Respondent relied on seniority to select Complainant for layoff (ID 14), and Complainant has not pointed to competent evidence in the record which would permit the Director to reject that conclusion. Moreover, in alleging that Respondent targeted him for layoff so that it could then discharge the more senior employee, Erik Stewart, Complainant himself acknowledges that Respondent relied, at least in part, on seniority in making layoff decisions.

In arguing that Respondent laid him off as a necessary step in its scheme to retaliate

against Stewart in violation of the LAD, Complainant claimed that he was an innocent victim of Respondent's discriminatory reprisal against Stewart. (RB 2). The New Jersey Supreme Court has recognized that "third-party reprisals" may be cognizable LAD claims in certain circumstances. See, e.g., Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 632-633 (1995) (Co-workers who were close friends of employee who brought a federal discrimination claim against employer had standing to bring LAD reprisal claim based on their own terminations). Generally, to present a prima facie case of unlawful reprisal, a complainant must establish that he or she engaged in LAD-protected activity which was known to the employer, that he or she was thereafter subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action. Romano v. Brown & Williamson Tobacco, 284 N.J. Super. 543, 548-549 (App. Div. 1995). In a third-party reprisal claim, a complainant must first establish that either the complainant, or another person with whom the complainant was in some manner associated, took some action protected by the LAD. Cf., Craig v. Suburban Cablevision, supra, 140 N.J. at 629-632. Here, Complainant alleges that Stewart was "involved in Civil Rights and harassment cases" against Respondent. (CB 2). However, after review of the record, the Director finds no evidence that would support a factual finding that, prior to Complainant's layoff, Stewart or Complainant engaged in activity protected by the LAD. The Director notes that Complainant did not present Stewart as a witness, and Stewart never testified at the hearing. Thus, Complainant has not established a prima facie case of reprisal, and his third-party reprisal claim must fail.⁴

⁴The ALJ concluded that because Stewart's case was dismissed, to the extent that Complainant relied on that case, Complainant's "case is effectively ended as well." (ID 14). It is unclear what the ALJ meant by this statement, but the Director notes that if Complainant had presented evidence to prove that Stewart engaged in activity protected by the LAD, it would be immaterial whether Stewart prevailed on, proceeded with or even filed a LAD complaint. For example, a third-party reprisal claim may succeed even where the employer has not taken adverse action against the employee who engaged in protected activity, but has retaliated only against others associated with that employee. See, e.g. De Medina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978), cited in Craig v. Suburban Cablevision, supra, 140 N.J. at 631-632.

