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V.

OLD DUTCH MUSTARD CO. INC. D/B/A PILGRIM FOODS

HRC ECRNO 0209-15; 16D-2015-00220

DECISION ON THE MERITS AFTER PUBLIC HEARING ON MAY 22, 2019

I. PROCEDURAL BACKGROUND

1. Irvin Joseph filed a Charge of Discrimination based on race, color and national origin in employment on August 11, 2015 against Old Dutch Mustard Co., Inc. d/b/a Pilgrim Foods ("Old Dutch Mustard").
2. After the investigation by the Commission based on document production, interviews and legal analysis concluded on October 23, 2017, the Investigating Commissioner found sufficient evidence had been produced to find probable cause that differential treatment based on race, color, and/or national origin had occurred. Additionally, the Investigating Commissioner found sufficient evidence had been produced to find probable cause that harassment based on race, color, and/or national origin had occurred.
3. The Commission issued Orders of Notice on August 9, 2018, which indicated the Investigating Commissioner had found probable cause in this case and the next steps in the process.
4. A public hearing was held on October 18, 2018. Due to a malfunction of the recording equipment, the Commission subsequently held a new public hearing *de novo* on May 22, 2019.

5. On March 8, 2019, the Commission conducted a Prehearing Conference at which the parties agreed the issues that would be presented for decision at the public hearing would be:
 - A. ISSUE 1: Whether the Complainant was subjected to unlawful discrimination based on his race, color, or national origin in the form of differential treatment;
 - B. ISSUE 2: Whether the Complainant was subjected to unlawful discrimination based on his race, color, or national origin when he was discharged; and
 - C. ISSUE 3: Whether the Complainant was subjected to unlawful discrimination based on his race, color, or national origin in the form of harassment.
6. At the Prehearing Conference, the Public Hearing was scheduled for May 22, 2019.
7. Commissioner Matt Mayberry, as Chair, Commissioner Jose Luna and Commissioner Alex Samuel were assigned to hear the case at the Public Hearing on May 22, 2019. Irvin Joseph appeared *pro se* as the Complainant and Attorney Christopher Kaczmarek appeared on behalf of the Respondent, Old Dutch Mustard.

II. FINDINGS OF FACT BY COMMISSION PANEL

8. Mr. Joseph identifies as African American and Hispanic. Mr. Joseph identifies his national origin as Haitian.
9. Old Dutch Mustard operates a manufacturing facility in Greenville, New Hampshire.
10. Mr. Joseph began working for Old Dutch Mustard on January 6, 2014 as a full-time Chemical Operator in its Vinegar Plant.
11. Old Dutch Mustard's manufacturing facility comprises three areas: the Vinegar Plant, the Barrel House, and the Laboratory.
12. On September 24, 2014, Mr. Joseph injured his back.
13. Mr. Joseph sought medical treatment and went on medical leave.

14. On April 20, 2015, Mr. Joseph was released to return to work with certain medical related restrictions.
15. Old Dutch Mustard assigned Mr. Joseph to assist with light maintenance and general work around the facility.
16. On May 20, 2015, Mr. Joseph was released to work without restrictions.
17. Old Dutch Mustard assigned Mr. Joseph to work in the Barrel House because his position in the Vinegar Plant had been filled.
18. Mr. Joseph's hours of work and hourly rate of pay remained the same when he returned to work.
19. Working in the Barrel House was more physically demanding than working in the Vinegar Plant.
20. Employees working in the Barrel House were subject to uncomfortable working conditions compared to the Vinegar Plant. Specifically, employees were subject to uncomfortable temperatures and strong odors that were limited to the Vinegar Plant.
21. In early June 2015, Mr. Santich reviewed Old Dutch Mustard's payroll and determined that too many employees were working in the Barrel House.
22. Eric Sanford, Vinegar Plant Liquid Process Manager, recommended Mr. Joseph be laid off rather than the other employee working in the Barrel House, Christopher Thibault.
23. Mr. Thibault had worked at Old Dutch Mustard significantly longer than Mr. Joseph and was cross-trained in several positions.
24. Mr. Santich testified that Mr. Joseph was an average employee.
25. Mr. Joseph was terminated from his position at Old Dutch Mustard on June 17, 2015.
26. Mr. Joseph testified that Mr. Santich called him a racial slur on two separate occasions during his employment with Old Dutch Mustard.
27. Mr. Santich testified that he never called Mr. Joseph a racial slur on any occasion.

28. Mr. Joseph and Mr. Santich were both considered to be credible and truthful witnesses by the Commission Panel.

III. DECISION ON THE MERITS

In order to receive a favorable decision the complainant shall have the burden of proving the case for the complaint by a preponderance of the evidence. NH Admin. R. PART Hum. 315.07.

A. ISSUE 1 - DIFFERING TREATMENT

LEGAL STANDARD:

In order to establish a case of differing treatment because of an employee's race, color and/or national origin, a complainant must show:

- a) That complainant is a member of the protected class;
- b) That complainant was qualified for the position and was performing in a satisfactory manner;
- c) That an adverse action was taken against the complainant, and
- d) The complainant was treated differently because of their protected class.

29. The Commission Panel found that Mr. Joseph is a member of a protected class based on his race, color and national origin. Mr. Joseph identifies as African American and Hispanic. Mr. Joseph identifies his national origin as Haitian.

30. The Commission Panel found that Mr. Joseph was qualified for the position and was performing in a satisfactory manner. Mr. Santich's testimony left the impression that Mr. Joseph was an average employee.

31. The Commission Panel found that an adverse action was taken against the complainant. Specifically, Mr. Joseph was assigned to work in the Barrel House after returning from medical leave. The conditions in the Barrel House were considerably worse in almost all respects compared to the Vinegar Plant where Mr. Joseph was employed before he was injured and left on medical leave.

32. The Commission Panel found that Mr. Joseph did not satisfy his burden of proving that he was treated differently based on his race, color or national origin. Mr. Joseph and Mr. Santich were both credible witnesses. Their opposing testimonies were carefully considered. The burden remains with the complainant to prove every element of the case.

33. The Commission Panel did not find that the preponderance of the evidence demonstrated that Mr. Joseph was treated differently based on his race, color or national origin.

B. ISSUE 2 - DIFFERING TREATMENT - DISCHARGE

LEGAL STANDARD:

As mentioned above, in order to establish a case of differing treatment because of an employee's race, color and/or national origin, a complainant must prove the following elements:

- a) That complainant is a member of the protected class;
- b) That complainant was qualified for the position and was performing in a satisfactory manner;
- c) That an adverse action was taken against the complainant, and
- d) The complainant was treated differently because of their protected class.

34. The Commission Panel found that Mr. Joseph is a member of a protected class based on his race, color and national original. Mr. Joseph identifies as African American and Hispanic. Mr. Joseph identifies his national origin as Haitian.
35. The Commission Panel found that Mr. Joseph was qualified for the position and was performing in a satisfactory manner. Mr. Santich's testimony left the impression that Mr. Joseph was an average employee.
36. The Commission Panel found that an adverse action was taken against the complainant. Specifically, Mr. Joseph was terminated from his position at Old Dutch Mustard.
37. The Commission Panel found that Mr. Joseph did not satisfy his burden of proving that he was treated differently because of his protected class. As stated previously, Mr. Joseph and Mr. Santich were both credible witnesses. The Commission Panel did not find that the preponderance of the evidence demonstrated that Mr. Joseph was treated differently based on his race, color or national origin.

C. ISSUE 3 - HARASSMENT

LEGAL STANDARD:

In order to establish a case of harassment because of an employee's protected class, a complainant must show:

- a) Complainant is a member of the protected category;

- b) Complainant was subjected to harassing conduct;
- c) The harassing conduct was based on the Complainant's protected class;
- d) The harassing conduct affected a term, condition, or privilege of employment and create a work environment that a reasonable person would find offensive, it had the purpose or effect of unreasonably interfering with the Complainant's work performance, or it otherwise adversely affected the charging party's employment opportunities;
- e) There is some basis for employer liability.

38. The Commission Panel found that Mr. Joseph is a member of a protected class based on his race, color and national original. Mr. Joseph identifies as African American and Hispanic. Mr. Joseph identifies his national origin as Haitian.

39. The Commission Panel found that Mr. Joseph did not satisfy his burden of proving that he was subjected to harassing conduct. As previously, Mr. Joseph and Mr. Santich both appeared to be credible witnesses.

40. The Complainant, having failed to meet his burden with respect to element b of the Legal Standard above, the Commission Panel does not feel it needs to consider elements c through e.

COMPLAINT DISMISSED. NEITHER PARTY IS ENTITLED TO ATTORNEY FEES OR COSTS.

SO ORDERED.

07 July 2019
Date

7-11-2019
Date

7/11/2019
Date

Matt Mayberry
Commissioner Matt Mayberry, Chair

Alex Samuel
Commissioner Alex Samuel

Jose Luna
Commissioner Jose Luna

Cc: Irvin Joseph, *pro se*
Christopher Kaczmarek, Esq.