

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Joseph LeFebvre, Complainant,)
)
and) DIA No. 12ICRC003
)
Iowa Civil Rights Commission)
)
v.)
) **PROPOSED DECISION**
Lieber Construction, Inc.,)
Respondent.)

STATEMENT OF THE CASE

This case involves a complaint filed by Joseph LeFebvre with the Iowa Civil Rights Commission (the commission) against respondent Lieber Construction (Lieber). The commission found probable cause and the case was transmitted to my office to hold a contested case hearing. The hearing was heard in person at the Law Enforcement Center in Sioux City, Iowa on May 6, 2013. One witness was unavailable on May 6, so the hearing was completed by telephone conference call on May 17. The parties were allowed time to file a brief. The commission's brief was timely filed by email on May 22. Respondent was allowed to May 29 to file a brief, but elected not to do so.

The commission called the following witnesses: Joseph LeFebvre, Will Barker, Mike Blivens, Rod Lieber, and Pat Rogers. The commission's exhibits 1-18 were admitted into the record. Respondent did not call any additional witnesses, nor did it present any exhibits not offered by the commission.

FINDINGS OF FACT

Background: Joe LeFebvre was born in St. Paulo, Brazil. At the age of three, he was adopted by a couple from Iowa. He was raised in Lawton and graduated from high school in 2001. He testified that he worked as a gutter installer for three to four years after high school.¹ (LeFebvre testimony).

¹ His employment application with Lieber stated he only worked as a gutter installer from May 13, 2007 through the time he filed the application on September 22, 2007. (Exhibit 13).

In or around September of 2007, Mr. LeFebvre was approached by Dustin Lieber about working as an equipment operator for Lieber Construction. Lieber was owned by Dustin's father and mother, Rod and Jodi Lieber. Mr. LeFebvre knew the family well. He went to high school with Dustin, and knew Rod and Jodi from school functions and because Jodi worked in the lunch room. Mr. LeFebvre filed an application with Lieber and was hired by the company in October of 2007. (LeFebvre testimony; Exhibit 13).

First work incident and follow-up: On June 4, 2008, Mr. LeFebvre was operating a scraper while working a project for Lieber. A scraper is a machine that uses a blade to scrape dirt from the ground. The machine moves the dirt to a tub. When the tub is full, it is dumped at a different location. On June 4, the employees were using a technique known as "push-loading," which involves a bulldozer pushing the scraper from behind to get a deeper cut into the surface. (LeFebvre testimony; Exhibit 6).

Mr. LeFebvre had a full load and needed to dump the load. He was required to cross a dam to get to the dump site. The dam was only wide enough to handle one vehicle. The practice was to give scrapers with full loads the right of way. Mr. LeFebvre was about to cross the dam, but saw another scraper coming across the dam from the other direction. Mr. LeFebvre had to kill his machine to stop it so the other machine could cross. This caused his bulldozer operator, Karl Braun, to yell at Mr. LeFebvre. Mr. Braun told him to "shut the F up" and "don't say a word or you are off the job site." It is unclear what authority Mr. Braun had over Mr. LeFebvre and why he told him to shut up, but Mr. LeFebvre testified that Mr. Braun constantly rode him when they worked together and assigned him worse jobs. He stated that Mr. Braun told others he wanted to get Mr. LeFebvre fired. (LeFebvre testimony; Exhibit 6).

Mr. LeFebvre was upset with Mr. Braun and talked to the foreman, Dave. Dave did nothing and told him to get back into the machine. Mr. LeFebvre then tried to call Rod Lieber, Jodi Lieber, and Will Barker, who was the project manager. Mr. Barker returned his call and told him that if there was no accident, there was no reason to have a conversation. Mr. LeFebvre also spoke to Mr. Lieber, and said he was being belittled and harassed by his co-workers. He also stated he would send a letter to explain the incident. (LeFebvre testimony; Exhibit 6).

On the June 5, 2008, the day after the scraper incident, Mr. LeFebvre was back at the job site operating the scraper. He testified that none of the bulldozer operators would push him. One of the operators was Gus Braun, who was Karl Braun's father. Karl later told Mr. LeFebvre that he told his dad not to associate with him. (LeFebvre testimony; Exhibit 7).

Mr. Lieber testified that neither Gus nor Karl Braun was to blame for the failure to push-load him on June 5, 2008, and that he made the decision that no one would push-load Mr. LeFebvre's scraper. Mr. Lieber had received a report that Mr. LeFebvre was on the edge of the dam when he stopped the machine on June 4, and was close to losing the machine over the edge. As a result, he directed the crew not to push-load Mr. LeFebvre on June 5 out of concern for safety and company equipment. Mr. Lieber testified that the June 4, 2008 report was the first time he questioned Mr. LeFebvre's competence to operate equipment. (Lieber testimony).

Within a week of the incident, Mr. LeFebvre wrote a letter and hand-delivered it to Rod and Jodi at their home. The Liebers' business office is at the same location as their home. Mr. LeFebvre testified that he put his letter in an envelope and put it in the mailbox outside the home. A copy of the letter was admitted as exhibit 6. It summarizes the events of June 4, 2008 at the construction site. Mr. LeFebvre complained about Mr. Braun's conduct, stating it made him feel "belittled or less of a man." He also complained about Dave's failure to deal with the problem. (LeFebvre testimony; Exhibit 6).

Mr. LeFebvre testified that the Liebers did not respond to his letter. Mr. LeFebvre did not follow up by calling Mr. or Ms. Lieber to request a conference. He decided to let it go and not "stir the pot." Mr. Lieber denied receiving the letter. He testified the letter would have stood out and he would have remembered it if it was received. (LeFebvre, Lieber testimony).

Mr. LeFebvre testified he received a written warning for leaving the job site and insubordination approximately one week later. It was not completely clear that the warning resulted conduct occurring after the June 4 incident, but that was the inference. Mr. LeFebvre stated he was the only person how received a warning. He was the only minority on the job site that day. He testified that another employee told him he should have "just taken the ass chewing," which inferred that he left the job site after Mr. Braun yelled at him. (LeFebvre testimony).

Mr. LeFebvre worked the remainder of the year without incident. He was off work during the winter when no construction work was performed, but was called back to work for Lieber in 2009. (LeFebvre testimony).

Incident involving use of a slur: In May of 2009, Mr. LeFebvre was assigned to work at a development known as Spanish Bay in Dakota Dunes, South Dakota. A coworker was cut and Mr. LeFebvre helped him bandage his hand. Another employee, Brandon Brown, told him not to "get any hot sauce in the wound." Mr. LeFebvre took the remark as a racial slur, due to his national origin. While Mr. LeFebvre is originally from Brazil,

people believe he is Mexican based on his appearance. Mr. LeFebvre stated that Will Barker was present at laughed at the remark. This surprised Mr. LeFebvre. He thought that Mr. Barker, as a supervisor, would correct the other employee. (LeFebvre testimony; Exhibit 9).

Mr. LeFebvre did not report the incident to Rod or Jodi Lieber pursuant to the company harassment and discrimination policy. He testified that he did not want to “stir the pot” any more than he had with the complaint he made in June of 2008. Mr. LeFebvre testified generally that he heard slurs on other occasions as well, although he did not identify who make the remarks or when they occurred. The remarks included suggestions that he could get a better deal on Taco Tuesday because he was Mexican, or use of the term a “Mexican backhoe,” which is a reference to a man with a shovel. There is no evidence that he complained or told his supervisors about these comments. (LeFebvre testimony; Exhibit 5).

Rod Lieber testified that he never received a complaint from Mr. LeFebvre regarding any racial or national origin slurs. He was not aware of the “hot sauce” comment until after the civil rights complaint was filed. He agreed that the comment was a slur and would violate the company’s policy equal employment opportunity and anti-harassment and discrimination policies. (Lieber testimony; Exhibits 4-5).

Track loader accident: On May 16, 2009, Mr. LeFebvre was driving on a wheel track loader at the Spanish Bay job site. A wheel track loader is similar to a pay loader, but has tracks rather than wheels. Mr. LeFebvre was driving the machine for the first time. He was lining up to a side dump bucket and touched the bead lock on the tire of the side dump vehicle and flattened the tire. He estimated that the tire repair took one to two hours. Dustin Lieber gave Mr. LeFebvre a written warning. Mr. LeFebvre has seen other similar accident on three or four times. He is not aware of any of those employees being warned or reprimanded. Complainant did not submit personnel records or other reliable evidence to show how other employees were disciplined or whether the conduct was similarly. (LeFebvre testimony).

Mr. Lieber considered this accident with Mr. LeFebvre to be more serious than most job site accidents. He agreed that tires do break, but not in the same manner caused by Mr. LeFebvre. Further, the accident damaged the rim as well as the tire, so both had to be replaced. Mr. Lieber testified that the machine was down for half a day. In contrast, some other accidents (such as a broken window), do not stop work. Mr. Lieber did not consider the incident to be minor. (Lieber testimony).

Car accident: On June 17, 2009, Mr. LeFebvre was operating a wheel loader to haul dirt onto lots at the Spanish Bay work site. Some of the lots were developed and had homes.

The Lieber employees were using one of the finished streets as a route to transfer dirt. Mr. LeFebvre testified to having made seven trips prior to his accident. At approximately 2:45 in the afternoon, Mr. LeFebvre was hauling a load down the street when he hit a parked car. The car was owned by a cleaning woman who was working at one of the homes in the development. Mr. LeFebvre estimated that he was driving approximately 20 miles per hour at the time. The parties contested the extent of the damage, but there is no dispute that was significant. Mr. LeFebvre admitted that the crash ripped off the front bumper, burst the radiator, and broke the front windshield. A photograph shows the damage was extensive to the front half of the car, with dirt from the load covering the roof. (LeFebvre testimony; exhibit 18).

Rod Lieber personally went to the scene of the accident. He told Mr. LeFebvre to cooperate with law enforcement and with the company's safety director, Mike Blivens. Mr. LeFebvre talked to the investigating officer. He did not receive a citation. Mr. Blevins took him to a physician's office to provide a sample for alcohol and drug testing, which is required by company policy. The tests came back negative for alcohol or drugs. (LeFebvre testimony; exhibits 3 (p. 8), 15-16).

The parties disputed whether Mr. Blevins gave Mr. LeFebvre any assurances about this job. Mr. LeFebvre testified that he told Mr. Blivens he needed the job, and that Mr. Blevins responded that he did not see a problem as long as the test came back negative. Mr. LeFebvre stated that another employee, Mikey Behrens, had a similar accident while working for the Liebers' Bridgeport company and returned to work the same day. Mr. Blevins agreed during his testimony that Mr. LeFebvre expressed concern about keeping his job, but denied giving any assurances. He testified that he refused to respond to Mr. LeFebvre's concerns because he did not want to presume what the company would do. Mr. Blivens testified that Mr. LeFebvre's accident was the most severe he saw at Lieber during his two and a half years he worked there. He testified that the driver's life would have been at risk if she had been in the car at the time. Mr. Lieber likewise testified that he felt lucky someone was not killed by the crash. (LeFebvre, Blivens, Lieber testimony).

Mr. Blivens and Mr. Lieber both testified that the accident could have been prevented if Mr. LeFebvre had been driving more slowly and with the bucket lowered so he could see better. Mr. Blivens testified that the operator should not have driven any faster than 5 mph under those circumstances. Mr. Blevins and Mr. Lieber had the impression that Mr. LeFebvre had been driving so fast that the loader actually drove up onto the car. Mr. Lieber testified he was emotionally upset by the accident because he felt he employed an incompetent employee who could have killed a person in a parked car. Mr. Blivens recommended that LeFebvre not be allowed to operate machinery in the future. (Blivens, Lieber testimony; exhibit 14).

Mr. LeFebvre tried to place some level of fault on the driver by claiming that there was no parking allowed on that street. He did not present any evidence to corroborate that assertion, and Mr. Lieber, Mr. Blivens, and Mr. Barker all testified that there were no signs prohibiting parking along the street. The weight of the evidence shows no prohibition of parking on the street. (LeFebvre, Lieber, Blevins, Barker testimony).

LeFebvre's termination from Lieber: Lieber maintains a safety committee that reviews job accidents and makes recommendations to management for action if necessary. The safety committee included Mike Blivens, Will Barker, Jodi Lieber, and Pat Rogers. Mr. Rogers owns an insurance agency and is the agent for Lieber. Mr. Rogers recommended that the company seriously consider terminating Mr. LeFebvre's employment, or at least, remove him from similar work in the future. Mr. Rogers described the crash as grossly negligent, and he advised Lieber that it could be held liable for future accidents under a legal theory for retaining employees who have committed prior acts of gross negligence. He also advised Lieber that the company risked losing insurance if a similar accident occurred in the future. Insurability was a significant issue, as Lieber would not be able to bid for jobs without proof of insurance. Mr. Rogers testified that Lieber paid the car owner as a total loss (minus the amount recovered as scrap). (Lieber, Rogers testimony).

Mr. Lieber testified that he gave Mr. Barker authority to make the decision to terminate Mr. LeFebvre, although that decision was jointly made with the safety committee. However, there was some inconsistency with the evidence as to who made the decision and for what reasons. Mr. Lieber testified that Mr. LeFebvre was terminated due to his accidents, particularly the car accident. Mr. Barker testified that Mr. LeFebvre was terminated due to the accidents and lack of work. Lieber had not identified lack of work as a reason for the termination during discovery. Mr. Lieber later testified that he and Jodi ultimately make termination decisions, and that Mr. Barker is more of a mouthpiece. Mr. Lieber stated that he wanted to terminate Mr. LeFebvre due to safety and insurability, and that lack of work was not a factor for him. All agreed that Mr. LeFebvre's national origin was not discussed or a factor. (Barker, Lieber, Rogers testimony).

Mr. LeFebvre was formally terminated on June 24, 2009. He met Jodi Lieber, left his safety equipment, and signed a form to verify that he had returned all equipment. Lieber presented an "exit interview" form, that included a statement describing the reason for employment separation ("Accident with Front Loader – Ran over vehicle at Spanish Bay"). Mr. LeFebvre acknowledged that he might have signed the form, but denied that the reason for separation was written on the form at the time he signed it. Lieber could not verify that the reason for separation was on the form at the time Mr. LeFebvre signed it. The manager who signed the form did not testify at hearing, and the company did not

otherwise independent corroborate that fact. (LeFebvre testimony; Exhibit 2).

Mr. LeFebvre testified that he believes he was terminated due to his national origin, but his justification was not all that clear. When asked at hearing why he believed he was discriminated against based on national origin, he responded that he knew and socialized with the company superintendent when he was younger, but the individual had changed by the time he worked there because he “only talked to [people] who had money.” He stated that he “caught a lot of extra heat” because he appeared to be Mexican. Mr. LeFebvre also cited to the incidents outlined above and that he was frequently the only person of Hispanic appearance at many of the worksites. (LeFebvre testimony).

Mr. Lieber testified that he has two Hispanic employees who have worked for him for years without any report of discrimination. He asserted that Mr. LeFebvre was terminated based on the accidents and was unrelated to his race. Mr. Lieber also denied knowing that Mr. LeFebvre made any complaint about discrimination until after he filed the civil rights complaint following his termination. (Lieber testimony).

Damages: Mr. LeFebvre testified that he earned \$28,000 per year working for Lieber. He has struggled holding jobs since then. He worked as a job leader for K & O Construction, but had a “falling out” because the company was paying illegal workers low wages. He has also worked as a telemarketer, but is currently unemployed and is not receiving unemployment benefits. He tried going back to college, but has two children and abandoned school because it was too difficult to manage with children. His only financial support is food assistance, which has been demoralizing for him because he has not relied on public assistance in the past. His parents are respected in the community, and it has been difficult for him to discuss his problems with them. He broke up with the woman he had been dating for seven years when she left with their daughter. He has not seen a therapist, but has suffered weight loss and just now believes he is getting back to a “right frame of mind.” (LeFebvre testimony).

CONCLUSIONS OF LAW

The Iowa Civil Rights Act was adopted to enforce State laws preventing unfair and discriminatory practices in public accommodations, employment, education, and credit practices.² The Commission has the responsibility to receive, investigate, mediate, and finally determine the merits of complaints alleging unfair or discriminatory practices.³ Any person claiming to be aggrieved by a discriminatory or unfair practice may file a complaint with the commission.⁴ If probable cause is found and conciliation

2 Iowa Code sections 216.1, 216.5.

3 Iowa Code section 216.5(2).

4 Iowa Code section 216.15(1).

unsuccessful, the commission may file a statement of charges and set the case for hearing before an administrative law judge.⁵ The hearing shall be conducted in accordance with the procedural protections required by Iowa Code chapter 17A.⁶

As related to this case, an “unfair or discriminatory practice” is defined to include discharge of any employee because of the person’s race, creed, color, or national origin.⁷ It is also an “unfair or discriminatory practice” to retaliate against a person because such person has lawfully opposed any practice forbidden under the Iowa Civil Rights Act.⁸ There is no direct evidence of discrimination or retaliation, so the complainant must meet the tests for indirect evidence as set forth below.

National origin discrimination: Legal standard: The Iowa courts apply the burden shifting test established in *McDonnell Douglas Corp. v. Green* to decide discriminations claims in cases involving indirect evidence.⁹ The plaintiff must first prove a prima facie case of discrimination. To establish a prima facie case of national origin discrimination for an existing employee/employer relationship, the plaintiff must show by a preponderance of the evidence that: (1) he belongs to a protected group; (2) he was qualified to retain the job; (3) he was terminated; and (4) it is more likely than not that the termination was based on an impermissible consideration, in this case national origin.¹⁰

Once the prima facie case is established, a presumption arises that the employer discriminated against the employee.¹¹ In the second stage, the employer must go forward with evidence to rebut the presumption of discrimination. The employer does so by producing evidence that the employee was terminated for a legitimate, nondiscriminatory reason. In the third stage, the employee has the burden to show that the employer's proffered reason was not the true reason for the employment decision. The employee may meet this burden in two ways. The employee may directly persuade the fact finder that a discriminatory reason more likely motivated the employer or may indirectly show the employer's proffered reason is not worthy of belief.

Prima facie case of discrimination based on national origin: There is no question that Mr. LeFebvre met the first and third elements of the prima facie case. He belongs to a

5 Iowa Code section 216.15(6).

6 Iowa Code section 216.15(8).

7 Iowa Code section 216.6(1)(a).

8 Iowa Code section 216.11(2).

9 *Reiss v. ICI Seeds, Inc.*, 548 N.W.2d 170, 174 (Iowa App. 1996) (citing *McDonnell Douglas*, 411 US. 792 (1973).)

10 *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 231 (Iowa 1995)

11 *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Com'n*, 453 N.W.2d 512, 517 (Iowa 1990).

protected group as his national origin is Brazil.¹² His employment was terminated. There are questions as to the second and fourth elements.

In *Falcynski v. Amoco Oil*, the Iowa Supreme Court considered a district court decision finding that the plaintiff failed to meet the same two elements of the prima facie test.¹³ In *Falcynski*, the employer stated it terminated the employee for excessive absences. The employee filed a civil rights action based, in part, on national origin discrimination. The supreme court found that the plaintiff was not qualified to retain the job because her excessive absences prevented her from performing the essential functions of her computer data entry job. The court also found that the employer legally based its termination decision on the plaintiff's absenteeism, as opposed to the impermissible consideration of national origin. The court noted that the employer followed its policy and took its disciplinary actions directly in response to the plaintiff's absences. The court did not find persuasive the plaintiff's claims that the policy was not evenly applied to others based on national origin.

The same principles apply to this case. Lieber admitted that Mr. LeFebvre was initially qualified for employment as an equipment operator, however the element requires the plaintiff to show that he was qualified to retain the job. In *Falcynski*, the plaintiff was initially qualified for her job as a data entry operator, but the court found she was not qualified to retain her job due to her work absences. In this case, Lieber claims that Mr. LeFebvre was not qualified to retain his job as a machine operator due to his work accidents, particularly the accident in which he totaled a parked car.

The parked car accident, standing alone, is persuasive evidence to show he was not qualified to retain his job as a machine operator. He crashed into a parked car while driving approximately 20 mph down a city street while driving a piece of heavy equipment. The accident totaled the car and could have caused serious injury or death if the operator had been inside. Mr. LeFebvre did not describe any extenuating circumstances. Mr. LeFebvre had a prior accident the month before involving company vehicle damage for which he was given a written reprimand, so there was prior documented discipline. Lieber's safety director and insurance agent recommended that

12 Lieber seemed to argue at times that Mr. LeFebvre could not make out a claim of national origin discrimination because he was treated as if he was Mexican rather than Brazilian. There is no distinction between the two to the extent Mr. LeFebvre can show impermissible discrimination. If Lieber discriminated against Mr. LeFebvre because it thought he was Mexican when he was actually Brazilian, it is still discrimination based on national origin (or race or color), even if mistakenly so. To find otherwise would be to excuse a discriminatory practice by an employer or coworkers because they stereotype all people with a Central or South American national origin as Mexican.

13 533 N.W.2d at 231-34.

Mr. LeFebvre not operate machinery any longer, and the agent expressly recommended that the company consider termination. All employees of Lieber were required to perform their duties according to good safety practices and refrain from unsafe acts that might endanger themselves or their fellow workers.¹⁴ While there were some vague allegations that other employees had not been fired after similar accidents, there was no reliable evidence to prove the circumstances of those accidents and the corresponding discipline. Mr. LeFebvre has not proved the second element of the prima facie case, that is, that he was qualified to retain his job in light of his accidents.

Mr. LeFebvre likewise cannot prove the fourth element. The company policy provides for progressive discipline, but the company may discharge an employee with no prior discipline depending on the seriousness of the infraction. In this case, Lieber assessed the parked car accident to be extremely serious based on the actual damage, the potential for personal injury had someone been in the vehicle, and the lack of care demonstrated by Mr. LeFebvre. The severity of the accident cannot be denied, and Mr. LeFebvre himself acknowledged he was worried he would lose his job following the accident. The courts frequently state that they do not sit as super-personnel departments to second-guess the business decisions of employers.¹⁵ Lieber was within its right to terminate Mr. LeFebvre based on demonstrated concerns for individual safety and damage to property owned by the company and others.

The termination directly followed the parked car accident by just a few days. Lieber followed protocol by calling its safety committee together to discuss the action before making an employment decision. Mr. Blivens and Mr. Rogers both recommended that Mr. LeFebvre be removed from his job at the minimum, and Mr. Rogers recommended that termination be considered. There is no allegation that Mr. Blivens or Mr. Rogers had a discriminatory animus when making their recommendations. There are no facts showing that Mr. or Ms. Lieber had a discriminatory motive to fire Mr. LeFebvre. Neither was alleged to have made any comments about Mr. LeFebvre's race or national origin or been present during any incident or uses of racial slurs. In fact, Mr. LeFebvre was originally hired through his long-time friendship and association with the Lieber family without concern over his national origin, race or color.

The only evidence of any national origin discrimination by one of the decision makers applies to Mr. Barker. He was present for and laughed at a racial slur directed toward Mr. LeFebvre as he provided aid to a coworker. The slur was offensive, and Mr. Barker's laughter and failure to take corrective action was inexcusable. Still, there is no evidence to show that that incident had anything to do with the termination decision. The

14 Exhibit 3, p. 4.

15 *Hill v. St. Louis University*, 123 F.3d 1114, 1120 (8th Cir. 1997).

incident involving Mr. Barker can best be categorized as a stray comment, and not direct evidence of discrimination with regard to the termination decision.¹⁶

The testimony regarding who made the termination decision and the exact reason or reasons was imprecise, but it did not detract from the nondiscriminatory reason for the termination. All of the Lieber witnesses who were called at hearing testified uniformly that Mr. LeFebvre should not operate machinery any longer.¹⁷ Mr. Lieber was adamant that the termination was justified by the accidents alone. Mr. Barker testified to two reasons for termination, with one being the safety concerns and lack of work being an additional concern. Mr. Barker's additional justification is not inconsistent with the discussion, because if the company was going to consider placing Mr. LeFebvre in some other position, the availability of work would come into play.

The evidence surrounding the exit interview document did not reflect well on Lieber, but it does not show Mr. LeFebvre was terminated for discriminatory reasons. Mr. LeFebvre testified credibly that the reason for separation section was not filled out when he signed the document. He insinuated that the document was forged to make it appear that Mr. LeFebvre had acknowledged the grounds for the termination. However, Lieber did not make that claim. The document does accurately state Lieber's justification for termination. It appears that someone completed the separation section after the fact to document Lieber's stated grounds for termination, without considering that Mr. LeFebvre had already signed the document. Lieber's action was sloppy and unprofessional, but there is no indication it was done to hide or cover up discrimination.

Remainder of the *McDonnell Douglas* test: Even if the prima facie case was proved, Lieber would still prevail on the remainder of the *McDonnell Douglas* test (for reasons discussed above). Lieber proved a legitimate nondiscriminatory reason for terminating Mr. LeFebvre. Mr. LeFebvre has not presented sufficient evidence to show the termination decision was pretext for discrimination.

Retaliation: Legal standard: The courts likewise apply the *McDonnell Douglas* burden-shifting analysis to decide claims based on retaliation, although the elements of the prima facie case are different.¹⁸ The plaintiff must prove the following elements to establish a prima facie case on a retaliation claim: (1) he engaged in a protected activity; (2) his employer took an adverse employment action; and (3) the adverse action is causally linked to the protected activity. If the plaintiff establishes a prima facie case of

¹⁶ See e.g. *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934 (8th Cir. 2006).

¹⁷ The complainant actually called the witnesses who worked for or with Lieber, but they testified positively for the company, so I refer to them collectively as the Lieber witnesses.

¹⁸ *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 750 (Iowa 2006); *Wilson v. City of Des Moines*, 338 F.Supp.2d 1008, 1025 -1028 (S.D. Iowa 2004).

retaliation, the employer must then offer a legitimate and nondiscriminatory reason for the adverse employment action.¹⁹ If the employer meets this test, the burden shifts back to the employee to offer evidence that the proffered reason is pretextual, or that the proffered explanation is unworthy of credence.

Prima facie case of retaliation: The first element concerns whether Mr. LeFebvre engaged in a protected activity. He claimed he met this element based on the letter he allegedly gave to Rod and Jodi Lieber after the incident involving Karl Braun on June 4, 2008. Lieber argued that Mr. LeFebvre did not meet the element for two reasons. First, the letter does not make a claim of discrimination. Mr. LeFebvre responded that the letter discussed mistreatment, which should be inferred as a claim of discrimination. Second, Rod and Jodi Lieber did not receive the letter, so they did not know about it even if it made a claim of discrimination.

Mr. LeFebvre did not need to file a formal complaint of discrimination to prove he engaged in a protected activity. The range of protected activity includes an informal complaint to management.²⁰ However, the complaint must include sufficient facts to raise an inference of unlawful discrimination.²¹ In *Guimaraes v. SuperValue*, the court did not consider a complaint to fall within the definition of a statutory protected activity when the complaint did not raise an issue of national origin discrimination.

This case is comparable to *Guimaraes*. Mr. LeFebvre's letter was written in response to an incident occurring at a job site. The company was considering disciplinary action against Mr. LeFebvre for leaving the job site. The letter gave Mr. LeFebvre's view of what happened. The letter stated that Mr. Braun told him to "shut the F up," and that he had been "hassled" by Mr. Braun. Mr. LeFebvre added that he felt "belittled or less of a man by Karl." The letter does not expressly reference any discriminatory or derogatory comments based on national origin, race or color, nor can a claim of discrimination be reasonably inferred. Mr. LeFebvre never followed up on the letter to make a claim of national origin discrimination. Even assuming the letter was received by Lieber, it does not constitute a protected activity under the statute.

Mr. LeFebvre likewise cannot prove that the letter was actually received by Lieber. He testified that he personally put the letter in the company mailbox outside Lieber's home and business office. I find no reason to doubt his testimony on this point. Ron Lieber testified that he never received the letter, and Mr. Lieber was likewise credible to this point. This potential conflict in the testimony raises the question whether placement of the letter in the Lieber's mailbox constitutes delivery of the complaint.

¹⁹ *Wilson*, 338 F.Supp.2d at 1025-26 (cites omitted).

²⁰ *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 862 (Iowa 2001)

²¹ *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 978-79 (8th Cir. 2012).

If Mr. LeFebvre had actually mailed the letter, he could claim a presumption of regularity that the post office had delivered the letter.²² In that instance, Lieber's "bare denial of receipt," without any other supporting evidence, will not be sufficient to show that the letter was not served.²³ However, Mr. LeFebvre did not deposit the letter in the mail – he just put it in the mail box. He is not entitled to any presumption of delivery because he did not mail the letter by properly addressing the letter and attaching the needed postage. Further, the mode of delivery raises the potential for an intervening cause why the Liebers may not have received the letter, most notably, that a mail carrier may have picked up the letter as outgoing mail and not delivered it because it was not appropriately addressed with proper postage. This possibility could harmonize the testimony and resolve the potential for inconsistency between the testimony of the two parties. Mr. LeFebvre could have resolved these issues if he had simply taken the letter to the office itself, or if he had followed up with Mr. or Ms. Lieber to discuss the status. Under these facts, Mr. LeFebvre has not shown with a reasonable sense of reliability that Lieber received notice of his complaint.

Even if the complaint had been received and considered a protected activity, there is no evidence of the third element of the prima facie case, that is, a causal connection between the letter and his termination. Mr. LeFebvre testified that he left the letter at Lieber's mailbox approximately one week after the work incident on June 4, 2008. He was terminated on June 24, 2009 – more than a year later. The courts have repeatedly held that the inference of retaliation becomes weaker with the passage of time, and thus requires stronger alternate evidence of causation.²⁴ For example, in *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 685 (8th Cir.2001), the court found a seven month time lapse between the protected activity and the alleged retaliatory act, without more evidence, to be "too long for the incidents to be temporally-and therefore causally-related." The Iowa Supreme Court has adopted the same approach, finding no causal connection with the gap between the protected activity and adverse action was six months.²⁵

There was no additional evidence connecting the termination to any protected activity. Rather, there is overwhelming evidence that the termination was directly connected with

²² See e.g. *Liberty Mutual Insurance Co. v. Caterpillar Tractor Comp.*, 353 N.W.2d 854, 858 (Iowa 1984) (discussing presumption that the post office has properly delivered mail).

²³ *McDonald v. Sanders*, 2002 WL 31114131, fnt. 2 (Iowa App. 2002); See also *State v. Williams*, 445 N.W.2d 408, 411 (Iowa App. 1989).

²⁴ See *Tyler v. Univ. of Ark. Bd. of Trs.*, 628 F.3d 980, 986 (8th Cir. 2011).

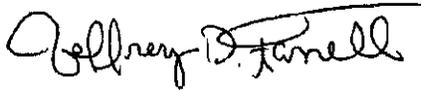
²⁵ *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992); See also *Teachout v. Forest City Community School Dist.*, 584 N.W.2d 296, 298-99, 303 (Iowa 1998) (failing to find causation when the alleged protected activity preceded discharge by as little as four days).

the parked car crash that occurred on June 17, 2009. The accident was considered so significant that the company's owner and operator, insurance agent, and project manager all personally went to the scene to view the damage. The accident was regarded by Lieber's safety director as the worst in his time at Lieber. Contrary to Mr. LeFebvre's claim, the accident was not minor, and the only reason the damages were limited to a few thousand dollars was because the car was older and one was inside at the time. The company followed through with termination just a few days later. Lieber could have considered some alternative employment action, but there is no doubt that the adverse action was directly related to the accident, as opposed to any protected activity.

ORDER

The complainant has failed to prove an unfair or discriminatory practice in employment. All further proceedings are dismissed.

Issued on August 2, 2013.



Jeffrey D. Farrell
Administrative Law Judge

cc: AGO – Grant Dugdale
Complainant – Joseph LeFebvre
Attorney – Brian Vakulskas

NOTICE

Any adversely affected party may appeal this decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.²⁶ Any appeal must be in writing, signed, contain a certificate of service upon the other parties, and identify the following:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

Additionally, the commission itself may initiate its own review of a proposed decision on its own motion at any time within 60 days of the date of the decision.

²⁶ 161 IAC 4.23.

