



STATE OF NEW JERSEY  
 OFFICE OF THE ATTORNEY GENERAL  
 DEPARTMENT OF LAW & PUBLIC SAFETY  
 DIVISION ON CIVIL RIGHTS  
 OAL DOCKET NO. CRT 1307-06  
 DCR DOCKET NO. EB11HB-49622-E

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**BARBARA LAMPLEY,** )  
**and J. FRANK VESPA- PAPALETTO,** )  
**DIRECTOR,** )  
 )  
**Complainants,** )  
 )  
**v.** )  
**ASTRAL AIR PARTS, INC.,** )  
 )  
**Respondent.** )  
 \_\_\_\_\_

**ADMINISTRATIVE ACTION**  
**FINDINGS, DETERMINATION**  
**AND ORDER**

**APPEARANCES:**

James R. Michael, Deputy Attorney General, prosecuting this matter on behalf of the New Jersey Division on Civil Rights (Anne Milgram, Attorney General of New Jersey, attorney), for the complainants.

August R. Soltis, Esq., for the respondent.

**BY THE DIRECTOR:**

**INTRODUCTION**

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complainant filed by Barbara Lampley (Complainant), alleging that her former employer, Astral Air Parts, Inc. (Respondent), unlawfully discriminated against her and failed to reasonably accommodate her disabilities in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On July 3, 2007, the Honorable Maria Mancini LaFiandra,

Administrative Law Judge (ALJ), issued an initial decision<sup>1</sup> concluding that Respondent violated the disability discrimination provisions of the LAD, awarding compensatory damages and counsel fees and costs, and assessing a statutory penalty. After independently reviewing the evidence, the parties' submissions and the ALJ's decision, the Director adopts the ALJ's decision as modified herein.

### **PROCEDURAL HISTORY**

On September 12, 2003, Complainant filed a verified complaint with the Division alleging that Respondent unlawfully discriminated against her based on disability. Specifically, Complainant alleged that Respondent denied her reasonable accommodations by refusing to provide her with a smoke-free work environment, and refusing to retain her job while she was out on medical leave.

Respondent filed an answer denying the allegations of unlawful discrimination, and on December 16, 2003, after conducting an investigation, the Director issued a finding of probable cause supporting Complainant's allegations of unlawful disability discrimination. On March 12, 2004, the Director denied Respondent's motion to reconsider the probable cause determination. On January 14, 2005, the complaint was amended to add claims that Respondent discriminated against Complainant based on her race (Black) and creed (Baptist), and on April 29, 2005 the Director issued an Agency Determination which again found probable cause to support Complainant's allegations of disability discrimination, but found no probable cause to support the race or creed discrimination claims. Based on the probable cause determination regarding disability discrimination, the Director intervened as a complainant, and on January 12, 2006, the disability discrimination claim was transmitted to the Office of Administrative Law (OAL) for hearing.

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<sup>1</sup>Hereinafter, "ID" shall refer to the initial decision of the ALJ; "Re" shall refer to Respondent's exceptions to the ALJ's initial decision, and "Ce" shall refer to Complainant's reply to Respondent's exceptions; "Ex. P-#" and "Ex.R- #" shall refer to Complainant's and Respondent's exhibits admitted into evidence at the hearing, respectively; "Tr. 12/8/06" and "Tr. 12/11/06" shall refer to the hearing transcripts of those dates.

The ALJ conducted a hearing on December 8 and 11, 2006, and issued her initial decision on July 3, 2007. Respondent filed exceptions to the initial decision on July 23, 2007, and Complainant filed a reply on August 3, 2007. The Director's final decision on this matter is due on August 20, 2007.

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

The ALJ made findings of fact at pages 2-7 of the initial decision, noting that they are essentially undisputed. The factual findings relating to Complainant's allegations of unlawful discrimination are briefly summarized as follows. Complainant worked for Respondent from January 28, 1985 through August 12, 2003, as a full charge bookkeeper, insurance administrator, payroll clerk, and was responsible for accounts payable and accounts receivable. ID 2. Complainant has a number of chronic medical conditions, and while still working for Respondent in 2003, she was diagnosed with congestive heart failure and acute bronchitis. Complainant's primary care physician, Eileen Clifford, M.D., advised Complainant that she should be in a smoke-free environment. ID 3-4. After taking sick leave because of bronchitis, Complainant presented Respondent with a note from Dr. Clifford stating that Complainant could return to work on May 27, 2003 and "should be in a smoke-free work environment" (emphasis in the original). ID 4,8. Ernest Pomroy, Respondent's president, refused to take the doctor's note, said he could not accommodate Complainant's need for a smoke-free environment, and made no effort to assess whether Respondent could accommodate Complainant's request. ID 4. During Complainant's employment (which was prior to the enactment of the state law banning smoking in public places), Respondent permitted employees to smoke anywhere in the facility. ID 3. Respondent's facility is a one floor structure which includes a warehouse as well as foyer, office and shipping areas. Complainant worked in the office area, in close proximity with approximately six other employees, some of whom smoked at their desks. ID 2-3. After Complainant requested a smoke-free work environment, some employees voluntarily stopped smoking in her presence, but others continued to smoke. ID 4.

Complainant resorted to wearing a mask when co-workers smoked in her presence, but the mask was very uncomfortable and it often increased her coughing spells and made her eyes tear. ID 4. Adjacent to the office is a conference room with windows and another small windowless room housing office equipment. Although the conference room had been used as a workspace by Respondent's employees, Respondent never gave Complainant the opportunity to work in the conference room. ID 3.

In July 2003, Complainant was scheduled to undergo a cardiac catheterization procedure. Although she initially informed Respondent that she would be out only one day, complications developed and Complainant was hospitalized for two days. Her cardiologist advised her to remain out of work until August 1, 2006 to recover, and Dr. Clifford subsequently examined Complainant and determined that she should not return to work until August 18, 2006. ID 4-5. Complainant first informed Respondent of the August 1 return to work date, and subsequently of the extension to August 18. Ibid. Complainant generally took vacation the first week in August to attend an annual church convention, but initially told Respondent that she would report to work instead of attending it in 2003, because she had been out on sick leave. ID 5. After Dr. Clifford determined that she should not return to work until August 18, 2003, Complainant asked her whether she could attend her church convention in North Carolina. Dr. Clifford advised Complainant that she could attend the convention, subject to certain medical restrictions. Complainant was able to arrange for a ride and a hotel room, and attended the convention. ID 5. Mr. Pomroy learned of Complainant's trip and telephoned Complainant in her hotel room, and he was angry. Complainant tried to explain that her doctor had authorized the trip, and suggested that Pomroy speak with her doctor. When Complainant returned to New Jersey, Pomroy's son saw her at the bank, and shortly thereafter Pomroy called Complainant at home and terminated her employment. ID 6. Complainant pleaded with Pomroy to speak to her doctor, but he replied that he would not call or talk to doctors. Ibid.

Based on these factual findings, the ALJ concluded that Complainant was, at all relevant

times, a person with a disability as defined by the LAD, ID 7-8, and that she presented Respondent with sufficient information about her need for disability accommodations to require Respondent to initiate the process of attempting to provide reasonable accommodations. ID 10. The ALJ found that Complainant requested two distinct accommodations - - to work in a smoke-free environment, and for sufficient time off to recuperate from her cardiac surgery procedures. ID 10-11. As to the first accommodation request, the ALJ concluded that, although Respondent determined that no accommodations other than permitting Complainant to wear a mask were possible, Respondent presented no evidence other than Pomroy's opinion to support that conclusion. Ibid. The ALJ concluded that Respondent had failed to sustain its burden of showing that the requested accommodation would have imposed an undue hardship. ID 11. As to the time off following her cardiac procedures, the ALJ concluded that Respondent failed to accommodate Complainant's need for sufficient recuperation time. In reaching this conclusion, the ALJ noted that Respondent failed to consider Complainant's explanations or get any information from her physicians; at the time of her discharge, Complainant was scheduled to return in a week; and Respondent suffered no economic hardship, since Complainant was not being paid during her leave. ID 12-13.

The ALJ ordered remedies based in part on her factual findings regarding damages and penalties, which are summarized as follows. Complainant was 63 and a half years old when she was discharged, and planned to work until she was 65. ID 6. She was earning \$633 per week by 2003, and Respondent also paid the premiums on a \$30,000 life insurance policy and provided health insurance coverage with no contribution from the employee. ID 2. Due to subsequent medical problems and surgeries, Complainant was unable to work from August 20, 2003 until December 1, 2003, and from March 2004 on. Ibid. Complainant paid \$3602.40 to Respondent to continue her health insurance benefits for the period of September 2003 through August 2004. Ibid. Following her retirement, Complainant moved to Memphis, Tennessee, and incurred travel costs to attend the hearing - -\$185.10 for airfare and \$746 for hotel. ID 7.

The ALJ awarded backpay for the period from December 1, 2003 through March 3, 2004 in the amount of \$8515, plus interest, and also ordered Respondent to reimburse Complainant for the \$3602.40 in health insurance premiums, and \$931.80 in hearing-related travel costs. ID 13. Noting that Complainant testified as to the increased emotional distress she experienced both before and after she was discharged, including the humiliation she suffered when forced to wear a mask, the ALJ awarded \$30,000 in damages for emotional distress. ID 13. The ALJ also assessed a \$10,000 statutory penalty, and ordered that, upon submission of a certification of services from the Division's attorney, attorney's fees and costs would be assessed against Respondent. Ibid.

### **EXCEPTIONS AND REPLIES OF THE PARTIES**

First, Respondent takes exception to the ALJ's conclusion that Respondent failed to accommodate Complainant's request for a smoke-free environment. Respondent argues that it engaged in an interactive process with Complainant regarding her accommodation request, and that permitting Complainant to wear a mask, coupled with Respondent's 3-fan ventilation system, effectively accommodated Complainant's disability. Respondent further argues that the ALJ failed to properly consider testimony that Complainant's work habits precluded her from working in a secluded environment, and that prohibiting smoking would impair other employees' productivity. Re 1-2.

In response, Complainant cites hearing testimony to support the ALJ's conclusion that Respondent refused to engage in an interactive process regarding Complainant's accommodation requests. Ce 2. Complainant argues that Complainant's use of a mask was not an effective accommodation, but was Complainant's last-ditch effort to remain employed despite Respondent's refusal to accommodate her, and that Respondent's ventilation system was also ineffective in accommodating Complainant's need to work in a smoke-free environment. Ce 2.

Next, Respondent takes exception to the ALJ's award of emotional distress damages for

the period in which Complainant wore a mask at work, arguing that the record fails to support the conclusion that, after her May 27, 2003 return to work, either Complainant or her doctor advised Respondent that second-hand smoke continued to be a health problem for Complainant. Re 3-4. In response, Complainant reiterates that the mask was not an effective accommodation, and cites hearing testimony supporting the ALJ's conclusion that she suffered emotional harm as a result of, and despite, wearing the mask. Ce 4.

Respondent next takes exception to the ALJ's failure to consider Respondent's testimony that it had good cause, unrelated to her disability, for terminating Complainant's employment, including allegations of lying to Respondent about her North Carolina trip and conducting personal and church business during work hours and with Respondent's resources. Respondent further takes exception to the ALJ's conclusion that, on or about August 12, 2003, Complainant needed additional medical leave to recuperate from her surgery, contending that Complainant informed her doctor on August 11, 2003 that she could not and would not return to work, and applied for permanent Social Security disability benefits within a week. Re 4-5.

In response, Complainant disputes Respondent's contention that the ALJ erred in failing to credit Respondent's testimony regarding its reasons for terminating Complainant's employment, and argues that the ALJ properly considered that evidence but concluded that Respondent's contentions were not legitimate reasons for either denying Complainant additional time off to recover from her medical procedures or terminating her employment. Ce 4. Complainant cites hearing testimony to dispute Respondent's contention that she lied or admitted to lying about going to her church convention, and contends that Respondent refused to accept, obtain or consider medical documentation of her ability to return to work, and instead drew its own conclusions regarding her fitness to return to work. Ce 5.

Respondent takes exception to the ALJ's conclusion that Complainant is entitled to reimbursement of her health insurance payments for the period from September 2003 to August

2004, arguing that Respondent is not liable for nine months of these payments because Complainant was unable to work for medical reasons from September 2003 through November 2003 and from March 4, 2004 through August 2004. Respondent also takes exception to the ALJ's conclusion that Complainant was able to work from December 1, 2003 through March 3, 2004, and thus is entitled to backpay for that period, arguing that the ALJ erred in failing to place the burden on Complainant to present medical evidence demonstrating that she could perform the essential functions of her job during that period. Re 6-7.

In response, Complainant argues that the record demonstrates that if Respondent had provided effective accommodations for Complainant's disability, Complainant would have been able to perform the essential functions of her job during the periods for which the ALJ awarded backpay, and if she had remained employed with Respondent, she would have received uninterrupted medical benefits for the period awarded by the ALJ. Ce 6.

Next, Respondent takes exception to the ALJ's emotional distress damage award. Respondent argues that the amount is so excessive as to be punitive, that the medical evidence in the record fails to support the conclusion that Complainant suffered stress or discomfort, and that the ALJ's conclusion that Respondent's actions caused Complainant to experience "considerable emotional upheaval" is not supported by the record. Re 7-8.

In response, Complainant notes that the LAD provides for emotional distress damages to the same extent as may be awarded in Superior Court, and refers to hearing testimony of both Complainant and her treating physician supporting at least the amount of the ALJ's award, if not more. Ce 2, 6-7.

Lastly, Respondent takes exception to the ALJ's assessment of a \$10,000 statutory penalty. Respondent argues that assessing the maximum penalty is punitive, that any penalty is inappropriate because the ALJ erred in concluding that Respondent violated the LAD, and that if the Director concludes that Respondent did violate the LAD, any such violation was minor and did

not warrant the maximum penalty. In response, Complainant argues that the ALJ appropriately awarded the full statutory penalty, as Respondent subjected Complainant to two separate acts of disability discrimination, and made no effort to comply with the reasonable accommodation provisions of the LAD. Ce 7.

## **THE DIRECTOR'S DECISION**

### **THE DIRECTOR'S FINDINGS OF FACT**

The Director adopts the ALJ's factual findings.

### **THE LEGAL STANDARDS AND ANALYSIS**

The LAD prohibits disability discrimination in employment, and although it does not explicitly address reasonable accommodation, New Jersey courts have uniformly held that the law requires employers to reasonably accommodate employees' disabilities. See, e.g., Potente v. County of Hudson, 187 N.J. 103, 110 (2006); Viscik v. Fowler Equipment Co., 173 N.J. 1, 11 (2002); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 396 (App. Div. 2002). Based on the evidence in the record, the Director adopts the ALJ's conclusions that Complainant was, at all relevant times, a person with disabilities as defined by the LAD, ID 8, and that she requested two distinct accommodations for her disabilities - - first, to work in a smoke-free environment, ID 8-9,<sup>2</sup> and subsequently, for sufficient time off to recuperate from cardiac surgical procedures as directed by her physicians. ID 12-13. Employers are required to accommodate employees' disabilities unless they can prove that needed accommodations would impose an undue hardship on the employers' operations. See N.J.S.A. 10:5-29.1; N.J.A.C. 13:13-2.5.

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<sup>2</sup>Regarding the first accommodation request, the ALJ noted that there was contradictory testimony regarding whether Complainant presented Respondent with her doctor's note supporting her need to work in a smoke-free environment, Ex. P-3; ID 8, but the ALJ found Complainant to be more credible. ID 8. The Director finds no basis to set aside the ALJ's finding on this issue, as he may not reject or modify factual findings based on the ALJ's credibility determinations unless they are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence. N.J.A.C. 1:1-18.6(c). As the ALJ had the opportunity to observe the demeanor of the witnesses testifying at the hearing, the Director must give deference to the ALJ's credibility determinations. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-88 (1988).

### **Complainant's Request for a Smoke-Free Work Environment**

The Director adopts the ALJ's conclusion that Respondent failed to demonstrate that arranging a smoke-free work environment for Complainant would have been an undue hardship. ID 11. In its exceptions to the initial decision, Respondent contends that it accommodated Complainant's request to work in a smoke-free environment by permitting her to wear a surgical mask and by its "new" three-fan ventilation system, and that those accommodations were effective. Re 1-2. The Director finds no merit in Respondent's contention that it met its obligation to consider and provide such accommodations for Complainant's disabilities that would not be an undue hardship.

The record reflects that use of the mask was both ineffective and caused problems of its own. Complainant testified that she could not wear the mask continuously because it caused her to cough and made her eyes teary (Tr. 12/8/06 p. 28). Complainant also testified that as a mask got dirty, she struggled to breathe through it and that she felt "uncomfortable" and "miserable" wearing the mask (Tr. 12/8/06 p. 36-38). She testified that she felt "bad" and "isolated" because, upon seeing her wearing the mask, visitors would ask whether she had a contagious condition (Tr. 12/8/06 p. 37). She also testified that despite wearing the mask, the smoke gave her a headache (Tr. 12/8/06 p. 38). The record also reflects no evidence that Respondent's ventilation system, which was installed in 1988, was effective in decreasing the smoke in the office area in any significant way. Complainant testified that the cigarette smoke "lingered, like a cloud" (Tr. 12/8/06 p. 27).

Respondent contends that the mask and fans must have sufficiently accommodated Complainant's needs, because Complainant never again complained to Respondent about the smoke once she started wearing the surgical masks, and never again asked Respondent for alternate accommodations. Re 2. However, once an employee has requested assistance due to a disability, it is the employer's obligation to initiate the process of working with the employee to

determine the appropriate accommodations. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002) citing Taylor v. Phoenixville School District, 184 F.3d 296, 311 (3<sup>rd</sup> Cir. 1999). Through this interactive process, the employer and employee will identify the range of reasonable accommodations that could be implemented to overcome the precise limitations resulting from the employee's disability. The interactive process is crucial, because each party typically holds relevant information the other party does not have, and such information will ensure that the employer's assessment of potential accommodations is complete and, consequently, reasonable. See, e.g., Taylor v. Phoenixville School District, supra., 184 F. 3d at 317.

Here, regardless of whether Complainant reiterated her request for a smoke-free workspace, Pomroy's initial reaction to Complainant's request for accommodation made it clear that Respondent would not consider any further requests to make changes in the workplace so that Complainant could avoid working in the midst of cigarette smoke. Complainant testified that when she told Pomroy in May 2003 that her doctor prescribed a smoke-free work environment, she tried to give him her doctor's note, but he refused to take the note and told her that she could clean out her desk and seek work elsewhere if she needed a smoke-free workplace, and he also told her that he would not ask anyone to refrain from smoking or to smoke outside (Tr. 12/8/06 p. 41). At the hearing, Pomroy did not deny making these statements; he testified "I don't remember saying that. I could've said it. I don't know" (Tr. 12/11/06 p.140). He also admitted that he told the Division on Civil Rights that his business had always been a smoking office, since 1967, and that he had not asked employees to refrain from smoking in response to Complainant's request (Tr. 12/11/06 p.137, 140). Pomroy also testified that he never asked Complainant for medical information about her accommodation request, never called her doctor, never sent her for an independent medical examination or proposed any solution other than leaving her to work in the smoke, because he

decided that there was nothing else he could do (Tr. 12/11/06 p.143-44). He also testified that he did not undertake any assessment of potential accommodations that might address Complainant's needs after she presented her accommodation request, and felt that there was no need to do an additional assessment at that time, since he and his partner had discussed it previously and had installed a new ventilation system in 1988 "to make it as comfortable as possible" (Tr. 12/11/06 p.139, 160-61). Thus, Respondent both summarily cut off the interactive process and refused to assess any possible accommodations that might have been effective and reasonable.

In its exceptions to the initial decision, Respondent cites testimony purporting to explain why it could not have, for example, permitted Complainant to work in Respondent's conference room or prohibited smoking in the office area. This testimony standing alone is insufficient to meet Respondent's burden to demonstrate undue hardship. Moreover, regardless of whether Respondent's articulated problems with those potential solutions are sufficient to show undue hardship, there is no evidence that Respondent actually considered those or any potential solutions at the time of Complainant's request. As noted by the Third Circuit,

The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome.

Taylor v. Phoenixville School District, 184 F.3d 296, 3115-16 (3rd Cir. 1999).

The Appellate Division has articulated standards for evaluating a LAD claim that an employer failed to provide reasonable accommodation by failing to engage in a good faith interactive process. Tynan v. Vicinage 13, *supra*; Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (App. Div. 2001). To prevail in a claim that an employer failed to engage in the interactive process in good faith, an employee must show that "(1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the

employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith." Jones v. Aluminum Shapes, Inc., *supra*, 339 N.J. Super. at 421., citing Taylor v. Phoenixville School District, 184 F. 3d 296, 319-320 (3rd Cir. 1999).

Here, the record reflects that Respondent knew about Complainant's disabilities and that Complainant requested an accommodation. Addressing the third element, Respondent in its exceptions to the initial decision contends that it did engage in an interactive process with Complainant, citing Complainant's testimony that she spoke with Mr. Pomroy about the smoke, and he said that she could wear a mask. Re 2. There is no merit to this contention. Especially in light of Complainant's testimony that Pomroy told her that she should clean out her desk and get a new job if she needed a smoke-free environment, as well as the evidence that the mask was ineffective as an accommodation, this limited exchange could not even approach the level of a good faith effort to address Complainant's accommodation needs.

As noted above, the ALJ concluded that Respondent failed to demonstrate that accommodating Complainant's need for a smoke-free work environment would have been an undue hardship. ID 11. The ALJ found insufficient Pomroy's testimony that banning smoking from the office area would impair productivity, and noted that he dismissed other possible accommodations out of hand after merely discussing them with his partner. Ibid. The Director finds the ALJ's reasoning sound on these issues. The Director also finds insufficient Respondent's contention that Complainant could not be trusted to work in a secluded area (presumably the conference room). Re 2. If in fact Respondent felt Complainant had performance deficiencies, Respondent was free to address them independently as such, but an employee cannot be denied reasonable accommodations as a form of discipline for failure to comply with an employer's work rules. In any event, regardless of whether permitting Complainant to work in the conference room would have

been an effective accommodation, the fact that Respondent has now, in response to the Legislature's mandate,<sup>3</sup> banned smoking from the same office area in which Complainant worked is sufficient to demonstrate that Complainant could have been accommodated without undue hardship if Respondent had engaged in a good faith interactive process. Thus, Complainant has presented sufficient evidence to satisfy the final factor in Jones v. Aluminum Shapes, *supra*.

### **Complainant's Request for Medical Leave**

Moving to Complainant's second accommodation request, the Director adopts the ALJ's conclusion that Respondent failed to meet its obligation to reasonably accommodate her need for time off to recuperate from surgery. ID 12. As noted by the ALJ, Respondent has failed to prove that keeping Complainant's job open for another week, while she was on leave without pay, would have been an undue hardship. ID 12-13. The ALJ's conclusion that Respondent failed to get or consider information from Complainant or her medical providers before discharging her is also supported by the record. ID 12-13.

In its exceptions, Respondent argues that it did not deny Complainant additional medical leave, but instead discharged her for reasons unrelated to her disability. Re 4-5. Specifically, Respondent contends that Complainant continued to do church and personal business using company time and resources after Respondent warned her that she would be fired for doing so, and that she was terminated for allegedly lying to Mr. Pomroy when she told him she would not be attending her annual church convention. Re 4. Initially, Respondent's complaints regarding Complainant's work performance existed prior to her disability leave, and the record reflects no evidence that Respondent decided to terminate Complainant's employment before her leave commenced. Respondent contends that the incident that actually prompted Complainant's

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<sup>3</sup> The New Jersey Smoke-Free Air Act, N.J.S.A. 26:3D-55 to -64, which was enacted by the Legislature on January 15, 2006, banned smoking in structurally enclosed workplaces effective April 15, 2006.

termination was Pomroy's discovery that, while on medical leave, Complainant traveled to North Carolina to attend her annual church convention after telling him she would not be doing so. Re 4.

Respondent presents this as a reason unrelated to Complainant's disability, and argues that the ALJ failed to consider it as a legitimate non-discriminatory reason for Complainant's termination. However, the ALJ appropriately considered the issue of Complainant's activities during her medical leave to be a part of the reasonable accommodation process. ID 12. Respondent's failure to even consider Complainant's explanation for why her medical condition permitted her to attend the convention but not yet return to work, and its failure to request or consider medical documentation explaining any discrepancy Respondent believed existed, both cut off the interactive process and constituted a denial of reasonable accommodation. An employer's subjective belief that an employee does not have a genuine need for disability accommodation does not justify refusal to engage in or continue the interactive process. See, Taylor v. Virtua Health, Inc., 2007 U.S. Dist. LEXIS 45800, p. 18 (D.N.J. June 25, 2007.) Moreover, as is evident from the hearing testimony of Complainant's treating physician, Eileen Clifford, medical restrictions could permit a patient to engage in the type of travel involved in attending the August 2003 church convention even though he or she was not yet fit enough to return to work (Tr. 12/11/06, p. 18-19). An employer's refusal to even consider medical documentation that the employee asserts will justify her actions constitutes, at a minimum, a failure to engage in the interactive process in good faith. Thus, in concluding that Complainant was being deceptive about her activities during her medical leave, without considering any medical explanation or information that would reconcile the apparent inconsistencies, Pomroy's decision to discharge Complainant constituted a denial of reasonable accommodation in violation of the LAD.

As noted above, however, Respondent has not defended the unlawful discharge claim under

a reasonable accommodation analysis, but instead has asserted that Pomroy decided to discharge Complainant simply because he believed she lied to him. Respondent asserts that Pomroy made the decision without any thought about Complainant's request for additional medical leave or her disability, and argues that the evidence supports Respondent's claim that it was justified in discharging Complainant for reasons unrelated to her disability.

Respondent's argument - - that it had a legitimate non-discriminatory reason for discharging Complainant - - prompts application of the burden-shifting analysis typically applied in LAD differential treatment claims. Once a complainant has presented a prima facie case of differential treatment (by establishing that she is a member of a protected class, she was performing her job, she was terminated, and others performed her work after her termination), the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for terminating the employee. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457-459 (2005). If the employer meets this burden of production, the burden then shifts to Complainant, who must prove by a preponderance of the evidence this was not the employer's true reason, but was instead merely a pretext, and that the employer's true motivation was to terminate her because of her disability. Zive, supra, 182 N.J. at 449.

Here, Respondent's articulated reason for firing Complainant is that she "lied" when she told him she did not intend to travel to North Carolina to attend her church convention. However, Pomroy's own testimony demonstrates that, once he learned that Complainant had traveled to North Carolina for the convention, he terminated her because he simply did not believe that Complainant's disability precluded her from working. Describing his phone call to Complainant at her North Carolina hotel, he testified that he said to Complainant, "You're well enough to travel 1,000 miles to North Carolina, but you're not well enough to travel four miles to Elmwood Park to help us...I'm struggling with this and you're down at your church convention." (Tr. 12/11/06, p. 133-

134). He went on to testify that after his son saw Complainant at a bank less than a mile from Respondent's building, he told Complainant, "Barbara, you can go to the bank, you can't even stop to see how we're doing. You're done. I've had it. I can't deal with it anymore. You're terminated." (Tr. 12/11/06, p. 135).

This testimony demonstrates that, rather than any purported "lie" about her intention to attend the convention, Pomroy's decision to discharge Complainant was motivated by his subjective belief that if she was well enough to engage in other activities, she was well enough to return to work. Thus, the record reflects that Respondent's articulated reasons ("the lie" plus past performance problems) were not its true reasons for discharging Complainant, but were pretext for disability discrimination. Pomroy's decision to discharge Complainant because he couldn't "deal with it anymore," despite her offer of medical documentation explaining that her doctor had cleared her to engage in other restricted activities, but had not yet cleared her to return to work, demonstrates nothing less than an intolerance for Complainant because of her disability. Thus, whether evaluated under a reasonable accommodation analysis or a pretext analysis, the record reflects that Respondent violated the LAD in discharging Complainant.

## **REMEDIES**

### **A. Backpay**

The LAD provides that, upon a finding that a respondent has engaged in an unlawful employment practice, the Director may provide appropriate affirmative relief, including an award of back pay. N.J.S.A. 10:5-17. The basic purpose of awarding back pay is to make the victim whole by reimbursement of the economic loss suffered. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 35 (1981). Here, the Director concludes that the ALJ's backpay award of \$8515, covering the period from December 1, 2003 to March 3, 2004, plus pre-judgment interest, is supported by the evidence.

The ALJ's award is supported by the evidence that, although Complainant suffered another cardiac event following her August 2003 termination which further extended her need for disability leave, her physician cleared her to return to work effective December 1, 2003, and another cardiac event rendered her permanently disabled in March 2004 (Ex. P-6; Tr. 12/11/06 p. 21).

In its exceptions to the initial decision, Respondent argues that Complainant was required to present medical evidence demonstrating that she was able to perform the essential functions of her job from December 1, 2003 through March 3, 2004. Re 6. Respondent cites Brosshard v. Hackensack University Medical Center, 345 N.J. Super. 78 (App. Div. 2001) for the proposition that an employee must present medical testimony demonstrating that she was able to perform the essential functions of her job during the period for which backpay was requested. Re 6. The Brosshard case, however, makes no such ruling, and does not address either standards for awarding backpay or the type of evidence that will be sufficient to establish an employee's ability to perform the essential functions of her job.

Here, Complainant presented at the hearing Dr. Clifford's note clearing her to return to work effective December 1, 2003, so long as she would be in a smoke-free work environment (Ex. P-6), and Dr. Clifford's testimony that Complainant had a coronary bypass procedure in March 2004, and was unable to work again at that point (Tr. 12/11/06 p. 21). Although Respondent argues that Dr. Clifford's did not present sufficient testimony to support the conclusion that Complainant was able to perform the essential functions of her job during the relevant period, there is no caselaw holding that physician's testimony is required to prove entitlement to backpay.<sup>4</sup> Moreover, Dr.

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<sup>4</sup>Failure to mitigate damages is an affirmative defense, and the employer bears the burden of proving that the employee's mitigation efforts were not reasonable. Goodman v. London Metals Exchange, 86 N.J. 19, 40 (1981). Here, because Respondent has not presented evidence of lack of mitigation, there was no reason for Complainant to present evidence of her search for comparable work during the backpay period. However, the fact that such evidence is typically sufficient to defeat an employer's objections to backpay further undermines Respondent's argument that physician's testimony is required to prove an employee's entitlement to backpay after a period of disability.

Clifford's testimony that Complainant was fit to return to work on December 1, 2003, and was again unable to work at the point that she had the bypass procedure, is sufficient to support the ALJ's conclusion that she was able to work for the period in between those dates.

There is no evidence in the record to support Respondent's contention that Complainant may have become unable to perform her job again on December 10 or 11, 2003, or on some other date or dates before March 2004. Because both Complainant and Dr. Clifford testified at the hearing, Respondent was free to cross-examine them about these questions. Complainant satisfied her burden of proof that she was fit to return to work with Dr. Clifford's December 2003 note (Ex. P-6). She need not present affirmative evidence that she was fit to work every day thereafter. Instead, once an employee has presented evidence as to the amount of her lost wages resulting from the employer's discrimination, the burden shifts to the employer to prove that the employee is not entitled to the full amount of backpay sought. Sennello v. Reserve Life Insurance Co., 667 F. Supp. 1498, 1514 (D. Fla. 1987), aff'd, 872 F.2d 393, 396 (11th Cir. 1989).

Although backpay should not be awarded based on mere speculation, it is an equitable remedy and mathematical certainty or exactitude is not required; it may be appropriately awarded where it is based on a reasonable calculation. Grasso v. West New York Board of Education, 364 N.J. Super. 109, 121 (App. Div. 2003) (citations omitted). Even where evidence as to the precise amount of lost wages is unavailable, backpay may be awarded where the employee presents sufficient evidence to "enable the trier of facts to make a fair and reasonable estimate." Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128 (App. Div. 2002)(citations omitted).

Here, the ALJ, as the trier of fact, relied on the undisputed evidence in the record to determine that Complainant was entitled to backpay from her termination through the beginning of March 2004. Respondent has pointed to no evidence in the record contradicting the ALJ's determination that the damage period ended at some point prior to March 2004, and the Director's

independent review of the record has disclosed no such evidence. Respondent also failed to present any evidence that it would have been an undue hardship to accommodate Complainant by providing her with a medical leave of absence from August 2003 through December 1, 2003. In the absence of such evidence, Complainant is entitled to backpay to restore her to the position she would have occupied absent Respondent's unlawful discrimination. As LAD remedies, including backpay, are intended not only to redress the victim's losses, but to act as a deterrent against future discrimination, it is better to err on the side of ensuring that the victim does not bear the financial burden of the employer's unlawful discrimination. Grasso, supra, 364 N.J. Super. at 126.

Respondent also argues that Complainant did not intend to return to work for Respondent, citing Complainant's August 2003 application for Social Security Disability benefits, and well as a note in her medical record. Re 6 -7. Regarding the application for Social Security disability, New Jersey courts have held that an application for disability benefits is not irreconcilably inconsistent with an employee's claim that she could perform her job with reasonable accommodations under the LAD. Ramer v. New Jersey Transit Bus Operations, 335 N.J. Super. 304, 318 (App. Div. 2000). Here, Complainant explained that, at her Social Security interview, she was advised that she would likely be determined ineligible for disability benefits, and Complainant ultimately decided not to further pursue the disability application, because she would receive a higher benefit level receiving Social Security benefits under her husband's retirement account (Tr. 12/8/06, p.89). Thus, Complainant has presented sufficient evidence to reconcile her disability benefits application with her contention that she would have been able to return to work with reasonable accommodations.

The August 11, 2003 medical record in Dr. Clifford's file (Ex. R-15) contains a handwritten notation stating, "Not doing so great today....Not going back to work Doesn't feel she can work." Initially, there is no merit to Respondent's contention that this is evidence that Complainant quit her job on that date; at most, this note reflects that a week before the date her physician targeted for

her return to work, she did not feel that she was yet well enough to do so. Moreover, to the extent that she was anticipating a return without the accommodation of a smoke-free environment, her need for reasonable accommodations to return to work should not impair her right to backpay.

Based on all of the above, the Director adopts the ALJ's conclusion that Complainant was entitled to backpay for the period of December 1, 2003 through March 3, 2004. Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who was able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). Applying the interest rates set forth in New Jersey Court Rule 4:42-11, the Director awards Complainant prejudgment interest on the back pay award, through August 20, 2007.

**B. Reimbursement of Health Insurance Premiums and Out of Pocket Hearing Expenses**

Initially, the Director adopts the ALJ's award of out of pocket expenses for travel and hotel costs to attend the hearing. Respondent has not taken exception to this award, and the evidence supporting this request is not disputed.

The Director also concludes that the record supports an award to reimburse Complainant for some of her health insurance premiums. However, the Director rejects the ALJ's conclusion that this award should continue through August 2004. Instead, the Director concludes that Respondent should be liable for Complainant's health insurance premiums from her termination until she became permanently disabled at the beginning of March 2004.

Initially, the Director finds no merit in Respondent's argument that, because Complainant was unable to work for several months between her termination and December 1, 2003, Respondent should not be responsible for her medical insurance for that period. As discussed

above, it is the employer's burden to prove that providing needed accommodations for an employee's disability would impose an undue hardship on its operations, and a leave of absence may be a reasonable accommodation under appropriate circumstances. N.J.A.C. 13:13-2.5. Here, Respondent does not argue or present any evidence that continuing Complainant's medical leave until December 1, 2003 would have been an undue hardship, but instead merely points to the undisputed fact that Complainant was unable to work during that period. It is undisputed that Respondent would have provided Complainant with medical benefits at no cost had she not been unlawfully discharged. Since Respondent has not met its burden of demonstrating that continuing Complainant's medical leave would have been an undue hardship, the employer-provided health insurance during the medical leave, as well as coverage during the following months in which she would have returned to work, is part of her compensable losses.

Alternatively, applying the pretext analysis discussed above, Complainant's loss of her employer-provided health insurance flowed directly from Respondent's decision to discharge her because of her disability, and compensating her for that loss is necessary to make Complainant whole. Complainant has sustained her burden of proving damages resulting from that discrimination, and Respondent failed to show that she was not entitled to the full amount sought. Sennello v. Reserve Life Insurance Co., *supra*, 667 F. Supp. at 1514.

The record reflects, however, that Complainant became permanently unable to return to work at the beginning of March 2004. An indefinite leave of absence without a showing of the expected duration of an employee's impairment is not a reasonable accommodation. Svarnas v. AT&T Communications, 326 N.J. Super. 59, 79 (App. Div. 1999). Similarly, Complainant's work-related losses for an unlawful discharge would end at the point that she was no longer able to work due to reasons unrelated to Respondent's unlawful action. Accordingly, it cannot be argued that, absent her earlier unlawful termination, Respondent would have had an obligation to provide

Complainant with medical leave or continue her health benefits at the point that Complainant was no longer able to work. The Director concludes that by awarding Complainant the cost of her health insurance premiums up to March 1, 2004, in the amount of \$1801.20 plus interest, Complainant will be placed in the position she would have been absent Respondent's unlawful termination of her employment or refusal to reasonably accommodate her disabilities.

C. Emotional Distress Damages

It is well established that a victim of unlawful discrimination under the LAD is entitled to recover 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). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35. As provided in a recent amendment to the LAD, emotional distress damages are available in LAD actions filed with the Division to the same extent as in common law tort actions. N.J.S.A. 10:5-17.

A victim of discrimination is 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.

Here, the ALJ's conclusion that Complainant suffered considerable emotional upheaval as a result of her termination, as well as emotional distress as a result of Respondent's denial of reasonable accommodations during her employment, is well supported by the record. Complainant testified that the physical symptoms associated with wearing the mask at work made her "very

nervous and jittery” and “shaky, teary...miserable” (Tr. 12/8/06 p. 37-8). In addition, Complainant testified that she felt isolated because people asked whether she was wearing the mask due to a contagious disease (Tr. 12/8/06 p. 37). Describing her reaction when Respondent discharged her while she was recuperating from her cardiac procedures, Complainant testified that she “went hysterically crying” and bumped into a table, resulting in a broken toe (Tr. 12/8/06 p. 52). She testified that both her termination and working in the smoking environment had a very bad emotional effect on her, and made her very, very nervous to the point that she almost had a nervous breakdown (Tr. 12/8/06 p. 57). She testified that she spoke to Dr. Clifford about her reactions, who prescribed “anxiety pills” for a short period to try to control her symptoms. Ibid. Coupled with Complainant’s testimony as to the physical symptoms she suffered from wearing the mask in an attempt to continue working in the smoke-filled office, including “struggling hard to breathe through it,” (Tr. 12/8/06 p. 36), and experiencing increased coughing and teary eyes (Tr. 12/8/06 p. 37-8), the Director concludes that \$50,000 in damages to compensate Complainant for her pain and humiliation is appropriate in this case. Especially in light of the testimony regarding the physical and emotional symptoms Complainant suffered as a result of Respondent’s refusal to provide reasonable accommodations and unlawful termination of her employment, the Director finds no merit in Respondent’s contention that the amount of the ALJ’s award is punitive.

#### D. Statutory Penalty

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates these statutes. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is \$10,000. Ibid. The ALJ assessed a \$10,000 penalty against Respondent.

After review of the record, the Director concludes that the maximum penalty of \$10,000 is appropriate for Respondent’s LAD violation, especially because Respondent unlawfully terminated

Complainant's employment and denied her two distinct disability accommodations in this case, without even assessing the feasibility of the needed accommodations. Contrary to Respondent's contention, Respondent's LAD violations in this case were not "minor." As punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the \$10,000 civil penalty is the only remedy available to serve an admonitory or deterrent purpose in this case.

E. Counsel Fees

A prevailing party in a LAD action may be awarded "a reasonable attorney's fee." N.J.S.A. 10:5-27.1. See, also, Rendine v. Pantzer, 141 N.J. 292 (1995). Where, as here, Complainants' case was prosecuted by the attorney for the Division, counsel fees and costs may be assessed against Respondent. N.J.S.A. 10:5-27.1. The Director concludes that it is appropriate to make an award of attorney fees in this case.

The Director will leave the record open to permit the parties to attempt to reach an amicable resolution of the issues relating to counsel fees, or if that is not possible, to submit briefs and/or certifications addressing the fee award. The parties shall attempt to amicably resolve the counsel fee award within 15 days, and if such attempts fail, Complainant shall file with the Division and serve on Respondent any submissions within 7 days of the close of the 15 day negotiation period, and Respondent shall have 7 days to file and serve a reply.

**ORDER**

Based on all of the above, the Director concludes that Respondent engaged in unlawful discrimination 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.

2. Respondent shall immediately post the Division's official employment and public accommodations posters in a place easily visible by all employees, applicants for employment, and customers.

3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of \$ 62,002.09, comprised of \$8515.00 in compensation for lost wages, \$1801.20 in compensable medical insurance premiums, \$754.09 in pre-judgment interest on the lost wages and compensable medical insurance premiums, \$931.80 in reimbursement for her hotel/travel costs, and \$50,000 for emotional distress damages.

4. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of \$10,000 as a statutory penalty.

5. The penalty and all payments to be made by Respondent under this order shall be forwarded to Robert Siconolfi, New Jersey Division on Civil Rights, 31 Clinton Street, Newark, New Jersey 08721.

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.

7. During the 15 days following the issuance of this order, the parties shall attempt to stipulate to the amount of reasonable attorney's fees and costs accruing to the attorney for the Division pursuant to N.J.S.A. 10:5-27.1. If the parties are unable to stipulate to such an amount, the attorney for the Division shall, within 7 days after expiration of the 15 day negotiation period, file and serve on Respondent an application and certification for attorney's fees, and Respondent shall have 7 days to file and serve a reply.



August 17, 2007

Date

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

