STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11HM-66075

Garland Barber, Jr.,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
City of Trenton,	)	
	)	
Respondent	)	

On August 10, 2016, Mercer County resident Garland Barber, Jr. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his employer, the City of Trenton (Respondent), discriminated against him based on disability, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. The DCR investigation found as follows.

Summary of the Investigation

In May 2001, Complainant began working for Respondent as a laborer. At all relevant times, he has had a prosthetic left eye and 20/20 vision in his right eye. His treating ophthalmologist described his condition as follows:

> [Complainant's] visual deficiency occurred in the left eye in 1998 as a result of a severe inflammation. His last exam with Dr. Wilson was on August 8, 2016 revealing his vision as being stable. [Complainant's] central and peripheral field of vision is 120 degrees in the right eye, with no field of vision in the left eye. Right eye visual acuity is 20/20 uncorrected. Left eye has no light perception. He also has normal color vision of red, green and amber in the right eye. [Complainant] has sufficient vision to perform the driving tasks required to operate a commercial vehicle. Finally, [Complainant] is able to drive safely at night.
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> [See Letter from Ronald B. Wilson, O.D., to "To Whom it May Concern," Aug. 8, 2016.]

Because Complainant had a commercial driver's license (CDL), he began filling in for drivers who were out. In 2003, he was promoted to an equipment operator position. In 2005, he was promoted to supervisor in the Road Department. In 2011, as a result of a reduction in force, he was demoted to an equipment operator and transferred to the Sewer Department where he still had managerial responsibilities.

In 2016, Respondent demoted Complainant to a laborer position because the New Jersey Motor Vehicle Commission (MVC) declined to renew his CDL. The circumstances leading to that non-renewal of his CDL go to the heart of this matter.

In New Jersey, a CDL is valid for four years. At least every two years, Complainant is required to have a doctor fill out a medical examination report (MER) and medical examiner's certificate (MEC) that include information about his vision.

Complainant never had a problem renewing his CDL. Until 2014, he obtained the MER and MEC from his personal physician and submitted copies to the MVC and Respondent. Complainant told DCR that beginning in 2014, employees with a CDL were required to see one of Respondent's designated doctors for the physical examination for a MEC.[1]

On December 9, 2014, one of Respondent's contracted doctors examined Complainant and completed the MEC form. There were no issues. The doctor wrote:

> I certify that I have examined [Complainant] in accordance with the Federal Motor Carrier Safety Regulations (49 CFR 391.41- 41-391.49) and with knowledge of the driving duties, I find this person is qualified; and, if applicable, only when: . . . X accompanied by a vision waiver/exemption.

See Ronald S. Glick, M.D., Capital Health, MEC Form, Dec. 9, 2014. Dr. Glick signed the MEC, wrote "12-9-15" in the box for expiration date, and listed his "medical examiner's license or certificate" and "national registry" numbers in the appropriate boxes on the form.

The next year, Dr. Glick again examined Complainant and completed his MER and MEC. Dr. Glick made no substantive changes regarding Complainant's vision except checking the box for "wearing corrective lenses" on the MEC. See R. Glick, M.D., Capital Health, MEC Form, Nov. 16, 2015. Complainant told DCR that he does not wear eyeglasses and has never been prescribed corrective lenses. Complainant's assertion is consistent with the August 8, 2016 letter from his treating ophthalmologist. See Letter from Ronald B. Wilson, O.D., supra, ("Right eye visual acuity is 20/20 uncorrected.").

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[1] Effective May 21, 2014, New Jersey adopted FMSCA standards that require MECs to be completed by doctors listed on the National Registry of Certified Medical Examiners. It is unclear whether Respondent's change of policy was related to this State-wide requirement.

Complainant told DCR that Dr. Glick told him to apply to the Federal Motor Carrier Safety Administration (FMCSA) for a vision exemption, and gave him a copy of an undated FMCSA instruction letter. To apply for the exemption, Complainant was required to submit information to FMCSA's Vision Exemption Program including his vital statistics, overall driving record, history of driving commercial vehicles, a certification from an ophthalmologist or optometrist stating that he has "sufficient vision to perform the driving tasks required to operate a commercial vehicle" and, notably, certain limited information from Respondent.

The information that FMCSA requires from an employer is strictly factual. The employer must provide the following on company letterhead:

> [T]he company's DOT# or ICC#; if your job was driving a CMV; what type of vehicle was operated; GVWR [gross vehicle weight rating] of the vehicle; whether you drove full-time or part-time (list hours per week driven on public highways); and the dates (month/day/year) you started and stopped driving a CMV.
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> [See FMCSA Instruction Letter.]

Complainant told DCR that before he went to Dr. Glick, he knew nothing about the need for a vision exemption from FMCSA. Previously, he simply scheduled an examination with his doctor. His doctor would complete the MER and MEC, which he, in turn, would submit to Respondent and the MVC.

MVC Records Technician Joseph Mirando told DCR that MVC procedures changed around 2014, and that because of Complainant's visual impairment, he was required to obtain an exemption from the vision standards established by the FMCSA and submit proof of this vision exemption to the MVC.

Complainant delivered Dr. Glick's 2015 MEC and MER along with a copy of his driver's abstract and instructions for obtaining the vision exemption to his direct supervisor, Augustin "Papo" DeJesus.

Complainant told DCR that when he followed up, DeJesus assured him that all of the paperwork had been submitted to Personnel Officer Steve Ponella, and was being reviewed by officials at City Hall.

Complainant claims that when he asked Ponella about the delay in processing the letter, Ponella replied, "It's not me."

Complainant said that over the next six months, he met with DeJesus and Sewer Department Superintendent McIntyre multiple times to discuss the status of his application.

Complainant said that DeJesus, McIntyre, and former Director of Public Works Sean Semple told him that there was a "liability issue."[2]

Ponella did not dispute any of the above. He told DCR that he received Complainant's documents from Sewer Department Superintendent Joseph McIntyre, and drafted a letter to the FMCSA in accordance with the standards. The letter, dated December 18, 2015, reads in pertinent part:

> [Complainant] is actively driving twenty (20) hours per week during daylight plus a varied number of nighttime hours due to required rotating standby shift. Most of his driving is within the city limits of Trenton, New Jersey with an approximate weekly mileage of seventy-five (75). He's responsible for operating trucks with air brakes, dump trucks and a back hoe. The weights of the vehicles are 26,001 pounds or greater. The commodities transported are non-hazardous dry-bulk materials such as concrete, sand, rock, asphalt and dirt.
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> * * *
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> In addition, he possesses a Medical Examiner's Certificate, certificate number 25MA03237100 valid in New Jersey through May 16, 2016. [Complainant's] Medical Examiner's Certificate was certified on November 16, 2015 by Dr. Ronald S. Glick of the Corporate Health Center, Capital Health.
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> Enclosed for your review is [Complainant's] valid Commercial Driver's License, valid Medical Examiner's Certificate, Medical Examination Report for Commercial Driver Fitness Determination report, 5-year Driver's Abstract and letter of medical examination by Dr. Ronald S. Glick, OD.
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> [See Draft letter from S. Ponella to FMCSA, Dec. 18, 2015 (unsigned).]

Ponella told DCR that he delivered the letter to Respondent's legal department for approval, but was unable to get authorization to send it. Ponella stated that he received an email from McIntyre expressing concern that Complainant's blindness in one eye might be problematic.

During the DCR investigation, counsel for Respondent was present during DCR's interviews of Ponella and other management employees. Defense counsel objected to all questions about discussions with Respondent's legal staff about signing or sending the letter. Defense counsel would not permit Ponella or anyone else with personal knowledge to explain

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[2] DeJesus, McIntyre, and Semple all told DCR that they were unaware that Complainant was blind in his left eye prior to December 2015. After the investigator pointed out that Complainant has a prosthetic left eye, DeJesus acknowledged that he knew that something wrong with his left eye.

why Respondent would not approve Ponella's letter. Respondent was requested to produce a copy of the email from McIntyre referenced by Ponella, but did not do so.

Semple denied suggesting to Complainant that he was regarded as a "liability" because of his vision. He stated that he had nothing to do with Respondent's decision with regard to the vision exemption.

McIntyre acknowledged that he believed that Complainant was a potential liability if allowed to continue operating City vehicles because of his visual impairment. However, he stated that he did not make the decision to withhold the Ponella letter, and asserted that Respondent's personnel office made that decision.

It appears that at some point, Complainant submitted his application to the FMCSA without the required letter from his employer. FMCSA replied that additional information was required to evaluate his application for a vision exemption. Among other things, the letter directed Complainant to:

> Submit a signed statement on company letterhead from City of Trenton, indicating: (1) the company's DOT# or MC#; (2) the dates (month/day/year) you started and stopped driving a CMV; (3) the type of vehicle you drove; (4) the GVWR of the vehicle operated; and (5) the number of hours per week, on average, you **operated** commercial vehicles on public roads.
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> Note: Working hours are not acceptable. Please verify that your employer (s) provide the number of hours **driving** a CMV per week.

See Letter from FMCSA's Vision Exemption Program to Complainant, Sept. 27, 2016 (emphasis in original). FMSCA also asked Complainant to submit clarification and "a formal perimetry test for the right eye" from his doctor. Ibid. Complainant complied with that request by submitting a November 21, 2016 letter and test report from Dr. Wilson, which stated in part, that Complainant was "capable of seeing at least 120 degrees in the horizontal as the Federal Motor Carrier Safety Administration requested."

Between December 2015 and the present day, Respondent has not authorized Ponella or anyone else to provide the employer information required by the FMCSA for a vision exemption.

The investigation found no evidence that Complainant ever had an accident or moving violation while operating a CMV during his employment with Respondent. Respondent has not submitted to the FMCSA, MVC, or DCR any other evidence or information regarding Complainant's fitness, or unfitness, to drive a CMV.

Complainant claims that after Respondent demoted him to laborer, he lost overtime hours, and management would not consider him for promotions that require a CDL, or even promotions that require driving of non-commercial vehicles, even though he still has a basic

driver's license. For example, Complainant told DCR that Respondent will not promote him to the Street Supervisor position even though he ranked first on the Civil Service list for that job. He stated that Respondent passed him over for this promotion because he does not have an active CDL. Complainant told DCR that he knows of other supervisors, including but not limited to Sanitation Supervisor Perez, who maintain supervisory roles but do not have CDLs. He stated that he can no longer do the intermittent part-time work as a truck driver he had previously done for a friend's company, and lost the income associated with that second job.

Complainant told DCR that in March 2017, he interviewed with McIntyre for a Repairman position that was posted on Respondent's website. Respondent offered him the position and he accepted it. Despite being given a different Civil Service title, Complainant said that his pay remained the same.

Respondent maintains that it acted lawfully at all times. It argues that Complainant was demoted "[b]ecause of the seriousness of [his] vision impairment," and that it had a "duty to protect the health and welfare of all of its constituents, including its employees" because Complainant no longer had a CDL. See Letter from Susan E. Volkert, Esq., to DCR, Oct. 21, 2016, p. 1. Respondent also argues that it provided Complainant with a reasonable accommodation for his disability by finding a non-driving position for him, without reducing his salary or benefits.

Analysis

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid.

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" whereby the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

a. Adverse Treatment Based on Disability

The LAD makes it unlawful to discriminate in the terms, conditions, or privileges of employment based on an employee or applicant's actual or perceived disability. N.J.S.A. 10:5-12(a). New Jersey law seeks to ensure that people with disabilities enjoy full and equal access to employment "bounded only by the actual physical limits that they cannot surmount." Andersen

v. Exxon Co., 89 N.J. 483, 495 (1982); see also Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 374 (1988).

When Respondent declined to submit the Ponella letter in support of the vision exemption, it knew or should have known that as a result, Complainant would lose his CDL. Respondent then demoted Complainant because he no longer had a CDL.

Respondent appears to be arguing that its decision was justified by safety concerns. McIntyre reportedly conveyed those concerns to Ponella and Complainant. McIntyre acknowledged his concerns when speaking to DCR—he stated that he believed that Complainant was a potential danger to himself and others because of his visual impairment. And Respondent acknowledges that its actions were prompted by concerns over the "seriousness of [Complainant]'s vision impairment." See Letter from Volkert, supra, at 1.

Legitimate safety concerns may present a perfectly valid defense to charges of disability discrimination. Indeed, DCR's regulations provide that discrimination based on disability is justified where the employer demonstrates "that the employment of that individual in a particular position would be hazardous to the safety or health of such individual, other employees, clients or customers where hazard cannot be eliminated or reduced by reasonable accommodation." N.J.A.C. 13:13-2.8(a).

However, that regulation requires more than subjective concerns, no matter how genuine and well-intentioned. The regulation states in part:

> Such a decision must be based upon an objective standard supported by factual or scientifically validated evidence, rather than on the basis of general assumptions that a particular disability would create a hazard to the safety or health of such individual, other employees, clients or customers. A "hazard" to the person with a disability is a materially enhanced risk of serious harm.
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> [N.J.A.C. 13:13-2.8(a).]

That regulation was relied upon by the New Jersey Supreme Court in Jansen, supra, 110 N.J. 363, where a supermarket decided to reassign a butcher named Jansen to a non-butcher job after he had an epileptic seizure while holding a butcher knife in the workplace. The employer's decision was based on concerns that Jansen would hurt himself or others. When Jansen refused to be reassigned, he was discharged.

Jansen's treating neurologist told the employer that Jansen's seizures "have been under fair control on medication," that he had "increased [Jansen's] medication so as to help prevent recurrence of such seizures in the future," and expected "to be able to achieve better seizure control for Mr. Jansen." Id. at 370.

The supermarket arranged for Jansen to be examined by a psychiatrist and a neurosurgeon. The psychiatrist found no psychopathology but concluded, "I still think, as I did in my general impression of Mr. Jansen, is that considering the kind of neurological that he has, impresses me as risky and dangerous to perform the task that a meat cutter has to do." Id. at 370-71.

The neurosurgeon performed a complete physical and neurological examination and issued a report, concluding:

> Thus far, he has not been really adequately controlled by medication, but even if such control is obtained, one can never state with certainty that such a patient may not have another attack in spite of adequate medication. For these reasons, I think that such patients, including Mr. Jansen, need to be protected, as well as other people, from the effects of such seizures, and I think, therefore, that any occupational activity in which the patient might injure himself or others, were he to have a seizure, should be avoided. Therefore, as I indicated in my initial report, I think that the occupation of butcher and meat cutter entailing as it does, access to knives and other dangerous instruments, is inappropriate and potentially hazardous in this instance.
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> [Id. at 371.]

The Supreme Court found the reports from the psychiatrist and neurosurgeon to be insufficient to justify the personnel action. It ruled on behalf of Jansen. In so doing, the Court noted that "under the safety defense, an employer's decision not to employ a handicapped person must be justified by a 'probability' rather than a 'possibility' of injury to the handicapped person or others." Id. at 376. The Court stated:

> That decision requires the employer to conclude with a reasonable degree of certainty that the handicap will probably cause such an injury. The mere fact that the applicant is an epileptic will not suffice. Otherwise, unfounded fears or prejudice about epilepsy could bar epileptics from the work force.
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> [Id. at 374.]

The Court held that the "appropriate test is not whether the employee suffers from epilepsy or whether he or she may experience a seizure on the job, but whether the continued employment of the employee in his or her present position poses a reasonable probability of substantial harm." Id. at 374-75 (emphasis added).

Four years later, the Supreme Court reached a similar decision in Greenwood v. State Police Training Center, 127 N.J. 500 (1992). There, the Court held that a police academy did not have good cause to dismiss a temporary sheriff's officer who—like Complainant in this case—

was "essentially monocular" from its training program based on his visual impairment. Id. at 507. The director of the training program dismissed Greenwood because he feared that an injury to the cadet's left eye might render him virtually sightless. The Court noted that an employer may not base a decision to discharge an employee for safety reasons on "subjective evaluations or conclusory medical reports," but must instead produce "factual or scientifically–validated evidence" demonstrating that the employee's performance in a particular position "will probably cause substantial injury to that employee or others." Id. at 511.

Here, Complainant drove commercial vehicles and equipment for Respondent from approximately 2003 until 2015. Neither Ponella, DeJesus, McIntyre, nor Semple provided any evidence or information to show that Complainant operated Respondent's vehicles in an unsafe or inappropriate manner. None of them relayed any incidents in which he was in any way hindered in performing his driving duties, or any other duties, because of his monocular vision. Respondent's position statement does not allege that Complainant exhibited any deficiencies in his ability to drive or perform any other assigned tasks.

Respondent has not shown that it relied on medical evidence, test results, or other scientifically-validated evidence in concluding that Complainant's visual impairment reasonably precludes his operation of Respondent's equipment. Thus, Respondent has not demonstrated that that it "reasonably arrived at" its conclusion that Complainant's monocular vision poses a "reasonable probability of substantial harm" to himself or others. Jansen, supra, 110 N.J. at 375; N.J.S.A. 10:5-2.1.

Respondent appears to argue that if it had submitted Ponella's letter, the CDL would have been renewed and Complainant would be jeopardizing the safety of himself and others. The Director has no doubt that Respondent genuinely holds those concerns. But New Jersey law makes clear that no matter how well-intentioned, when making personnel decisions managers or lawyers without medical training cannot simply succumb to generalized suspicions and unsubstantiated fears about a condition's possible effects. Cf. id. at 383; Greenwood, supra, 127 N.J. at 511. The Director finds—for purposes of this disposition only—that it was precisely because of Complainant's disability that Respondent elected not to submit the Ponella letter. And it was precisely because the letter was not submitted that Complainant was demoted to a laborer position with no eligibility for promotions and overtime that require a CDL (and it appears that Respondent deemed Complainant ineligible for positions that require driving non-commercial vehicles).

Based on the above, the Director finds that probable cause exists to support the allegations that Respondent discriminated against Complainant in the workplace based on an actual or perceived disability.

b. Failure to Accommodate

The Complainant also pled—and Respondent defended—allegations of a failure to accommodate. In New Jersey, employers are required to make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. 13:13-2.5(b).

To determine what accommodation is necessary, the employer must "initiate an informal interactive process" with the employee to identify potential reasonable accommodations that could be adopted to overcome the limitations resulting from the disability. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002).

Once an employee with a disability requests assistance, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Ibid. An employer will be deemed to have failed to participate in the interactive process if: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400 (citing Jones v. Aluminum Shapes, 339 N.J. Super. at 400-01 (App. Div. 2001)); N.J.A.C. 13:13-2.5(a).

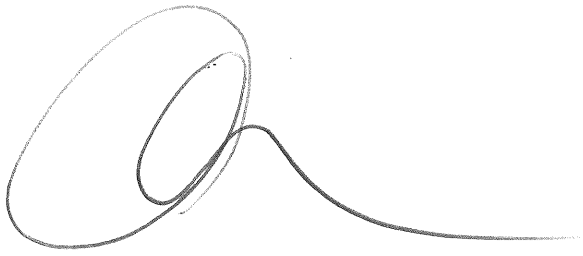
An employee is not required to formally request an accommodation to trigger the employer's legal obligations. See Victor v. State, 203 N.J. 383, 414 (2010) (noting "neither a specific request nor the use of any 'magic words' is needed in order for an employee to be entitled to an interactive process focused on creating or accessing an accommodation").

In this case, Complainant alleges that as a reasonable accommodation for his physical condition, he was simply asking his employer to maintain the status quo, i.e., by filling out a federal form that it would be normally required to do in the regular course of its business. Although Complainant did not characterize it as a request for a reasonable accommodation, no such formality is required. If upon receiving that request, Respondent believed that Complainant's condition materially interfered with his ability to perform his job, it should have initiated an informal interactive process to see if there was a way to reasonably accommodate him. It did not do so. Instead, it instructed Complainant's supervisor not to submit the letter that would have supported his vision exemption and unilaterally reassigned him to a laborer position with less eligibility for overtime or promotional opportunities. Nor has Respondent met its burden of showing that the act of submitting the Ponella letter and thereby allowing Complainant to continue in the position that he had been performing without incident since 2011 would have amounted to an undue hardship.

Conclusion

At this preliminary stage of the process, the Director is satisfied that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that Complainant's allegations of disability discrimination should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56.

DATE: 11-9-17



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