STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 02913-01
DCR DOCKET NO. ED08HM-44575

TAMARA HIDALGO,	)	
	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
CAMDEN CITY POLICE DEPARTMENT,	)	
	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

Tamara Hidalgo, Complainant, pro se.
Frank A. Salvati, Assistant City Attorney, for the respondent (Lewis Wilson, City Attorney, attorney).

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 Tamara Hidalgo (Complainant), alleging that the Camden City Police Department (Respondent) unlawfully discriminated against her and terminated her employment based on perceived disability/obesity, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On October 5, 2005, the Honorable John R. Futey, Administrative Law Judge (ALJ), issued an initial decision[1] dismissing the complaint. After independently reviewing the evidence, the parties' submissions and the ALJ's decision, the Director

[1]Hereinafter, "ID" shall refer to the initial decision of the ALJ; "CS "shall refer to Complainant's June 19, 2005 post-hearing written summation; "P-#" and "R- #" shall refer to Complainant's and Respondent's exhibits admitted into evidence at the hearing, respectively.

adopts the ALJ's decision as modified herein.

PROCEDURAL HISTORY

On February 4, 1999, Complainant filed a verified complaint with the Division alleging that Respondent unlawfully discriminated against her based on perceived disability/obesity. Specifically, Complainant alleged that Respondent differentially treated and harassed her, and terminated her employment after she was injured, while retaining similarly situated non-disabled trainees who were also injured. Respondent filed an answer denying the allegations of unlawful discrimination, and the Division commenced an investigation. Prior to the completion of the Division's investigation, this matter was transmitted to the Office of Administrative Law (OAL) for hearing at Complainant's request pursuant to N.J.S.A. 10:5-13.

In addition to her complaint filed with the Division, Complainant contested the Gloucester County Police Academy's decision to dismiss her from its training program by appealing that dismissal to the Police Training Commission (PTC), and contested the Camden City Police Department's decision to terminate her employment as a police officer by appealing that decision to the Merit System Board (MSB). On May 7, 2002, the ALJ issued a recommended order consolidating all three of Complainant's complaints and concluding that the PTC has the predominant interest in these cases. As no objections were filed, the ALJ's predominant interest recommendation became a final ruling. A hearing was held on April 18 and 19, 2005, and the record remained open until July 22, 2005 for Complainant to submit supplemental proofs.

After being granted additional time, the ALJ issued his initial decision on October 21, 2005. Neither party filed exceptions to the initial decision. In accordance with the predominant interest order, the initial decision was first reviewed by the PTC, which on March 28, 2006 issued its final decision adopting the ALJ's dismissal of Complainant's PTC claims. In so doing, the PTC concluded that Complainant was properly dismissed from the academy training course due to her shoulder injury. The PTC then transmitted the record to the Division and the MSB for each

agency's review of Complainant's claims within its jurisdiction. The MSB issued its final decision on May 12, 2006, modifying the ALJ's recommended decision. The MSB adopted the ALJ's conclusion that Complainant's separation from employment was justified, but concluded that the disciplinary penalty of removal was unduly harsh, and modified the removal to a resignation in good standing. The Director's final decision on Complainant's LAD claim is now due on May 22, 2006.

THE ALJ'S DECISION

The ALJ recounted the undisputed facts at pages 3-4 of the initial decision, which are briefly summarized as follows**.** Respondent hired Complainant as a police officer recruit in 1998, and assigned her to attend mandatory training at the Gloucester County Police Academy beginning on August 24, 1998. After attending five physical training sessions, Complainant was injured doing pushups on September 4, 1998, and a medical determination precluded her from engaging in physical training until September 25, 1998. When she resumed physical training on that date, she re-injured herself during a light physical exercise. She was unable to complete the required 40 physical training sessions, and was dismissed from the police training academy on October 26, 1998. The next day, upon receiving notification that Complainant had been dismissed from the training academy, the Camden City Police Department terminated her employment.

In addition to the facts he identified as undisputed, the following factual findings can be gleaned from the ALJ's analysis. Sergeant William J. Murray, who was a physical training instructor for Complainant's academy class, identified a group of overweight recruits he called the "Magnificent 7," but did not include Complainant in that group. ID 14, 16. Murray did include Complainant in another group he called the "sick, lame and lazy." ID 15. Upon learning that Complainant had been injured, Murray properly sent her to the City of Camden's doctors for evaluation and treatment, which resulted in the medical determination that she was incapable of participating in the physical training for a sizable period of time. ID 16. Complainant's shoulder injury was the sole reason she was not able to graduate from the academy. ID 15. Completion

of the academy training is a pre-requisite for continued employment with Respondent. ID 17.

Complainant was experiencing difficulties with the physical training even prior to her injury, and she had a negative attitude, especially about the running component. ID 16. Murray demonstrated a brash teaching style expected in law enforcement training; he was uniformly tough on all recruits and constantly evaluated them and challenged them to reach their full potential. ID 15. Physical training for recruits may vary from academy to academy, as the parameters set by the PTC give each police training academy significant latitude to tailor the training to meet its own specific objectives. Ibid.

The ALJ concluded that Complainant failed to present sufficient evidence to prove that she was treated differently than other recruits who were injured, or to prove that she was similarly situated to the other recruits she claimed received more favorable treatment. ID 16. He concluded that none of Murray's actions towards Complainant served as the basis for her dismissal. ID 16. He ultimately concluded that Complainant was properly dismissed from the police academy, properly terminated from her employment, and that Complainant failed to prove that she was subjected to disability discrimination. ID 17.

THE DIRECTOR'S DECISION

The Director adopts the ALJ's factual findings as set forth in the initial decision and summarized above. Especially since Complainant has filed no exceptions to the initial decision, and provided no evidence that any of the ALJ's factual findings were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence, the Director finds no basis for rejecting the ALJ's credibility determinations or his factual findings based on those determinations. N.J.A.C. 1:1-18.6.

The LAD prohibits employment discrimination based on actual or perceived disability, N.J.S.A. 10:5-12(a); N.J.A.C. 13:13-1.3. Complainant alleges that Respondent treated her less favorably than other injured employees because she was perceived to have a disability (obesity),

and also harassed her because of that perceived obesity.[2]

To present an actionable harassment claim under the LAD, Complainant must demonstrate that she was subjected to comments or actions, which would not have occurred but for perceived obesity, and that were severe or pervasive enough to make a reasonable person conclude that the work environment had been altered and had become hostile or abusive. Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 24 (2002).

Complainant alleges that Murray, who was employed by Respondent while he monitored training at the academy, had a prejudice against "people of size," singled her out because he believed she was too fat, and that his critical comments to the class about poor eating and drinking habits were really directed at her to personally humiliate her. ID 5, 8. She also alleges that Murray briefly included her in the group of overweight recruits he alternately called either the "Magnificent 7" or the "Done Lapped" group. ID 9.

The ALJ found that both Murray's grouping of overweight recruits and his grouping of "sick, lame and lazy" recruits were inappropriate and counterproductive, but did not violate the LAD. ID 15. The Director agrees. However, the mere existence of such groupings does not establish that Complainant was subjected to conduct sufficiently "severe or pervasive" to create a hostile work environment. The totality of the circumstances must be evaluated to determine whether an employee was subjected to a hostile work environment based on a characteristic protected by the LAD. Mandel v. UBS PaineWebber, Inc., 373 N.J. Super. 55, 73 (App. Div. 2004).

Here, the evidence is insufficient to support the conclusion that Complainant was subjected to harassing comments or conduct because of perceived obesity, or that any comments or conduct that could be construed as harassment because of perceived obesity were severe or pervasive

[2]While merely being overweight is not necessarily a disability, diagnosed obesity can be a disability when it causes illness, infirmity, disease or pathology. Viscik v. Fowler Equipment Co., 173 N.J. 1, 17-18 (2002). Where the employer perceives an employee's overweight condition to constitute a disability, the employee may be protected by the LAD. See, e.g., Gimello v. Agency Rent-A-Car Systems, Inc., 250 N.J. Super. 338, 354-355 (App. Div. 1991).

enough to render her training environment hostile or abusive. The ALJ found that Complainant was not included in the overweight group, ID 15, and as noted above, the Director has insufficient evidence to reject that factual finding. The record reflects that Murray included Complainant in the "sick, lame and lazy" group because of her shoulder injury. However, Complainant has presented no evidence that she was placed in that group even in part because of perceived obesity, or that placement in the group put her at a disadvantage or otherwise created a hostile work environment. There is insufficient evidence in the record to support the conclusion that Murray's comments to the class at large about beer drinking, fattening foods or getting in shape targeted Complainant specifically because of perceived obesity. Nor were Murray's groups and comments in the aggregate severe or pervasive enough to make a reasonable person believe that Complainant's work/training environment had been rendered hostile or abusive because of perceived obesity.

The record reflects that the training environment for all the recruits in Complainant's class was uniformly harsh and abrasive, and Murray's training style was "brash." ID 15. A supervisor's lack of civility or boorishness does not qualify as severe or pervasive discriminatory conduct under the LAD. Shepherd v. Hunterdon Developmental Center, supra, 174 N.J. at 25. The evidence and examples provided by Complainant simply are not enough to conclude that, because of perceived obesity, Complainant's training environment was worse than the training environment the other recruits experienced. The LAD does not make all abrasive or critical comments or actions unlawful, and this may be particularly noticeable in a setting such as this in which police recruits are trained for the hazards of law enforcement work. The Director concludes that Complainant was not subjected to a hostile work environment because of perceived obesity.

Complainant's claim that she was differentially treated based on perceived obesity also fails. Complainant contends that Respondent retained other injured recruits who were not perceived to be obese, and provided them with modified assignments to enable them to complete the physical training. Complainant contends that, because of perceived obesity, Respondent refused to

accommodate her injury as it did for others, and instead terminated her employment. To present a prima facie case of discriminatory termination, Complainant must show 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. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457-458 (2005).

The ALJ made no factual findings about whether Complainant had an obesity-related disability, actual or perceived. For the purposes of this analysis, the Director will presume that the medical evidence that Complainant is overweight, P-51; P-53, plus Complainant's testimony that Murray made critical comments about her weight, ID 5, although disputed by Respondent, are sufficient to establish that Respondent perceived her to have an obesity-related disability. See, Zive, supra, 182 N.J. at 448, holding that only the plaintiff's evidence should be considered in evaluating the prima facie case. The record shows no dispute that Complainant had been performing as a recruit until her injury, and that she was terminated. For the final prong of the prima facie case, the Director concludes that in these circumstances, where Complainant was in training rather than at work, the fact that other injured recruits were retained is sufficient to satisfy the fourth prong of a prima facie case. The burden of establishing a prima facie case is not onerous, and its elements will vary in differing factual circumstances. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-254 (1981).

Once Complainant has presented a prima facie case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for terminating Complainant. Id. at 449. Respondent asserts that Complainant was terminated because, after she incurred a shoulder injury, she was dismissed from the police academy for non-participation in physical training, P-102, ID 14. This is sufficient to satisfy Respondent's burden of production. The burden then shifts to Complainant, who must prove by a preponderance of the evidence this was not Respondent's true reason, but was instead merely a pretext, and that Respondent's true motivation was to discharge her because of perceived obesity. Zive, supra, 182 N.J. at 449.

Complainant takes issue with Respondent's and the police academy's use of the term "non-participation," arguing that she did not refuse to participate, but instead became unable to participate in the training because of her injury. CS 2. However, Respondent never alleged that Complainant willfully avoided the physical training or voluntarily dropped out, and Respondent has consistently acknowledged that it was Complainant's injury that prevented her from completing the training. Although Complainant may have been offended by the term "non-participation," Respondent's choice of that term does not contradict its claim that Complainant was terminated because she could not complete the training due to her shoulder injury. Thus, the phrasing of her termination notice provides no evidence that Respondent's articulated reason was not its true reason.

Complainant also attempts to discredit Respondent's articulated reason by arguing that Murray did not always terminate injured recruits, and instead permitted others to remain in the physical training program by giving them "partial duty." CS 4.[3] Complainant identifies Pamela Rigney, Amelia Villegas, Matthew Reeves, and Julius Cobbs as recruits who were given partial duty. Ibid. Rigney and Villegas testified at the hearing, but the ALJ's summary of their testimony includes no evidence that they were injured or were given partial duty, and their names do not appear on Respondent's list of injured recruits. ID 10-11; P-121. The Director cannot conclude that Respondent's treatment of Rigney or Villegas shows evidence of differential treatment.

Reeves testified that he was in Murray's "sick, lame and lazy" group for recruits who were not medically cleared, and for about a week he did no physical training. ID 9. The record reflects that Reeves was released for full duty a week after his injury. P-121. Cobbs did not testify at the hearing, but the record reflects that he was released for full duty a month after incurring a knee

[3]As discussed below, the extent to which "partial duty" might be a reasonable accommodation for Complainant's injuries must be evaluated based on the specific limitations imposed by her injuries, and the physical demands of the training or job.

injury. P-121. Although Murray testified that he did not remember Cobbs' injury, he stated that some injuries could be accommodated by assigning alternative exercises to a recruit, and surmised that such alternative exercises might have enabled Cobbs to complete 61 out of 62 physical training sessions despite his injury. ID 13.

Although the Reeves and Cobbs situations constitute evidence that Respondent did not always dismiss injured recruits, Complainant has presented insufficient evidence to demonstrate that she was similarly situated to these injured recruits in terms of the limitations imposed by her injuries. Reeves and Cobbs were able to return to full duty in one month or less. In contrast, Complainant has presented no medical evidence that she was able to resume physical training earlier than February 3, 1999, which is almost five months after her injury, and well after the December 1998 conclusion of her class at the academy. P-108. Moreover, there is no evidence that Complainant advised Respondent that she believed she was capable of partial duty prior to her second injury, or that the condition of her shoulder either before or after her second injury would have permitted her to safely engage in partial duty. An employee's ability to perform a job with accommodations must be assessed on an individual basis, and an accommodation appropriate for one employee may be ineffective or unsafe for another employee. N.J.A.C. 13:13-2.5.

In any event, even if Complainant had presented evidence to show that she was treated less favorably than similarly situated recruits, she has not presented sufficient evidence to show that she was targeted because of perceived obesity. To prove pretext, Complainant must do more than show that the reason her employer gave for dismissing her was false; she must show that the employer's true reason was unlawful discrimination, in this case, discrimination against people with obesity. Viscik v. Fowler Equipment, 173 N.J. 1, 14 (2002).

Complainant points to Murray's statements about people being out of shape. CS 4. However, such statements are not necessarily inappropriate in a law enforcement physical training program designed to improve recruits' physical fitness. Similarly, Murray's comments to the group

about drinking beer and eating cheesesteaks and other fattening foods are not evidence of discriminatory intent. As the ALJ noted, Murray's focus on proper nutrition and physical fitness, and his efforts to get the recruits to improve in these areas is expected in law enforcement training. ID 15. In addition, Respondent's "Goals of the Physical Training Program" specify that recruits are to be taught about proper diet and nutrition. R-59-75. Moreover, Complainant has not shown that the recruits who received modified assignments were not also overweight or perceived to be obese. The Director concludes that Complainant failed to present sufficient evidence to discredit Respondent's claim that she was terminated because she could not complete the mandatory physical training due to a shoulder injury, and that Respondent was actually motivated by discrimination based on perceived obesity.

An additional point should be addressed here, although it was not explicitly raised in Complainant's complaint. The disability discrimination provisions of the LAD apply to temporary as well as permanent disabilities. Soules v. Mount Holiness Memorial Park, 354 N.J. Super. 569, 575-576 (App. Div. 2002). Thus, Complainant's shoulder injury was a disability, and Respondent could lawfully terminate her employment because of that disability only if the injury reasonably precluded job performance. N.J.A.C. 13:13-2.5. Before deciding that a disability precludes job performance, an employer must assess whether there are reasonable accommodations that would enable the employee to perform the job; it must either offer such accommodations or demonstrate that any appropriate accommodations would impose an undue hardship on its operations. Ibid.

At the time of her injury, Complainant was assigned to complete the four month training course at the Gloucester County Police Academy, which was mandatory for all new recruits. The Academy, rather than the Camden City Police Department, set the training curriculum within parameters set by regulations of the New Jersey Police Training Commission. For this reason, the range of accommodations Respondent Camden City Police Department could provide to

Complainant were limited.

The record reflects that on September 10, 1998, after Complainant's first injury, Respondent's examining physician restricted her from participating in any physical training. P-104. After a re-examination on September 24, 1998, that examining physician released her to return to limited physical training, with no overhead use of her right arm. P-111. Complainant resumed physical training the next day, and was injured while jogging. She was examined by Lawrence Barr, M.D. the same day, who recommended that she stay out of all physical activity and undergo a MRI. P-105. On October 7, 1998, after evaluating Complainant's MRI, Dr. Barr prescribed three additional weeks of therapy, and recommended no physical activity at that point. P-106. In a separate letter the same date, Barr stated that he did not feel Complainant would be able to resume full duties as a police officer, because she would be at risk of further dislocations of her shoulder. P-107.

Given the medical evidence restricting Complainant's activity, Respondent concluded that Complainant would be unable to complete the physical training portion of the academy class in which she was enrolled. At that point, Respondent offered to accommodate Complainant's disability by permitting her to resign from the academy, so that she could re-enroll in a new session once her shoulder healed. ID 14, P-129. Complainant has presented no contradictory medical evidence which would show that she was able to safely engage in physical training at the time of her dismissal, or would have been able to do so at any time before her academy class graduated. Moreover, based on the October 7, 1998 letter from Dr. Barr, Respondent could have reasonably concluded that, aside from being unable to complete the physical training, Complainant's shoulder injury could prevent her from performing the duties of a police officer. P-107. Based on this evidence, the Director concludes that Respondent considered possible accommodations, offered the accommodation of resignation and re-enrollment, and reasonably arrived at the conclusion that Complainant's injuries precluded job performance.

By letter dated October 20, 1998, Complainant rejected the accommodation offered by Respondent, and requested a different accommodation - - permission to complete the non-physical components of the academy and return to the academy to complete the physical training once her injury healed. P-129. The LAD's reasonable accommodation provisions do not mandate that an employer provide the specific accommodation requested by an employee. Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App. Div. 2001). However, reasonable accommodation requires the employer and the employee to work together in good faith to assess the employee's abilities and limitations and the range of available accommodations which would not impose an undue burden on the employer's operations. See, e.g. Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 400 (App. Div. 2002).

Here, the record is silent on whether Respondent considered Complainant's alternate accommodation request, and if it did, why it was rejected. However, even if Respondent failed in good faith to consider Complainant's alternate accommodation, by the time the matter comes to a hearing, the employee must prove that she could have been reasonably accommodated but for her employer's lack of good faith. Jones v. Aluminum Shapes, Inc., supra, 339 N.J. Super. 412, 423 (App. Div. 2001) citing Taylor v. Phoenixville School District, 184 F. 3d 296, 319-320 (3rd Cir. 1999).

After review of the record, the Director concludes that Complainant has failed to present sufficient evidence to demonstrate that Respondent was capable of providing the accommodation she requested, or any reasonable accommodation other than the one it originally offered. To support her contention that Respondent could have permitted her to complete the non-physical academy requirements and go back for the physical component later, Complainant presents evidence that in 1994, Respondent recommended that police recruit Gail Sharper be given a similar accommodation after fracturing her leg, and the Camden County Police Academy provided that accommodation. P-142. However, this is insufficient to prove that Respondent would have been able to provide the same accommodation to Complainant, as Sharper was enrolled in a

different police academy, almost four years before Complainant's injury.

Since the respondent here is the Camden City Police Department and not the academy, the analysis must focus on what the police department was capable of doing to accommodate Complainant. Lloyd Dumont, the Dean of Public Safety and Security for the Gloucester County Police Academy, testified that his academy grants no extensions for physical training delays. ID 5. Whether that academy policy is reasonable or not cannot be addressed in this matter, since the police department/employer, rather than the academy, is here charged with disability discrimination. Moreover, since the PTC, which has the predominant interest in this case, has affirmed the ALJ's ruling that Complainant's dismissal from the academy was appropriate, the Director is bound by that ruling. As Complainant has presented insufficient evidence to demonstrate that the Gloucester County Police Academy would have permitted Complainant to complete the non-physical coursework and return later for the physical training component, the Director cannot conclude that it was within Respondent's power to provide the accommodation Complainant requested.

Respondent offered Complainant an accommodation - - to resign, re-enroll later and retain her job. As noted above, the LAD does not mandate that an employee be given the precise accommodation requested. Jones v. Aluminum Shapes, Inc., supra, 339 N.J. Super. at 428. Respondent did not terminate Complainant's employment until October 27, 1998, after she rejected the opportunity to resign, and was dismissed from the academy due to her inability to complete the physical training. The Director concludes that Respondent did not violate the LAD's reasonable accommodation provisions, and reasonably arrived at the conclusion that Complainant's second shoulder injury precluded job performance.

CONCLUSION

For the reasons discussed above, the Director concludes that Complainant was not differentially treated or subjected to a hostile work environment due to perceived obesity, and that Respondent reasonably arrived at the decision that her temporary disability precluded job

performance.[4] Based on all of the above, the Director adopts the ALJ's dismissal of the complaint.

Date

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

[4]The MSB has now ruled that Respondent acted too harshly in using the disciplinary penalty of removal to separate her from her employment, and that a resignation in good standing was appropriate. However, even if Respondent had offered Complainant the option of resignation in good standing in October 1998, that option would not have enabled her to perform her duties. Thus, the MSB's ruling provides no evidence that there were reasonable accommodations that would have permitted Complainant to perform her job, and does not undermine Respondent's conclusion that her injury precluded job performance. Nor is the option to resign in good standing evidence of differential treatment based on perceived obesity, as there is no evidence that Respondent treated similarly situated non-obese recruits more favorably by offering them the option to resign.