STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN26GB-65214

Sophiana Attah,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Senior Helpers,	)	
	)	
Respondent.	)	

On March 6, 2015, Middlesex County resident Sophiana Attah (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her employer, Senior Helpers (Respondent), discriminated against her based on pregnancy 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. DCR's ensuing investigation found as follows.

Respondent is a home health care service. It assigns home health aides (HHA) to private residences to assist elderly clients with activities such as bathing, dressing, toileting, walking, eating, running errands, transportation, and light housekeeping. HHAs also provide companionship. Respondent offers assignments to its HHAs on a *per diem* basis. On August 19, 2009, Respondent hired Complainant to work as an HHA.

When Complainant became pregnant in August 2014, she did not inform Respondent because she believed that her condition did not limit her ability to perform her job.

On December 2, 2014, Complainant's assignment ended because the client went to Florida for the winter. That assignment involved strenuous physical labor, which Complainant completed without complaint or problems.

On December 12, 2014, Respondent offered Complainant a new assignment caring for a woman, M.W. Complainant reported to the assignment on December 15, 2014. After one night, Complainant decided that it was not a good match for her. She told Respondent's Staff Coordinator Sylvia Dennis that M.W. "needs a maid, not an aide," and was unreasonably expecting Complainant to perform work outside the scope of her duties, such as moving furniture in order to fit a Christmas tree in the room, setting up and decorating the Christmas tree, and rearranging book shelves. Complainant said that Dennis was aware that M.W. was a challenging client, and told her that other HHAs had refused to work for M.W. Complainant said that she did not mention her pregnancy to Dennis at that point because it was not relevant to her decision to stop caring for M.W., and because her pregnancy did not restrict her ability to work as an HHA.

Complainant told DCR that she also told M.W's husband, N.S., that she would not be returning because his wife was asking her to perform tasks that were beyond her job

description. She claims that N.S. acknowledged that his wife was difficult and told her that all of the previous HHAs had quit for similar reasons. During that conversation, Complainant mentioned to N.S. that she was pregnant. She denies saying that her pregnancy was the reason she would not return to the assignment.

On December 17, 2014, Director of Operations Patricia Coram spoke with N.S. Coram claims that N.S. stated that he liked Complainant but that she refused to work for M.W. because she was five months pregnant and could not do all of the running around that his wife required. That was how Respondent learned of Complainant's pregnancy. Coram told Dennis to have Complainant provide medical documentation clearing her to perform the duties of an HHA.

Dennis contacted Complainant who confirmed that she was pregnant and told Dennis that she had no restrictions. Nonetheless, Dennis asked Complainant to provide a doctor's note clearing her to work.

Complainant told DCR that in early January 2015, she gave a doctor's note to Dennis, which did not impose any restrictions on her ability to perform her duties. Coram rejected that note because it was not on a prescription pad. Complainant told DCR that she obtained a second note from her doctor on a prescription pad (again imposing no restrictions) but Coram rejected that note because her doctor did not date it. Dennis confirmed that Coram rejected Complainant's first note because it was not written on a prescription pad but did not know why Coram rejected the second note. Complainant told DCR that at some point, Coram asked Complainant for permission to speak with her doctor and that she granted permission.[1]

On February 9, 2015, Dennis sent an email to Complainant with a copy of Complainant's job description, and asked her to have her doctor "review it and indicate whether there are any restriction [*sic*] or no restriction on a prescription pad." On February 12, 2015, Complainant's doctor signed the job description and wrote, "Ms. Attah should not lift anything heavier than 10 lbs." By then, eight weeks had elapsed since the time Respondent became aware that Complainant was pregnant.

Complainant alleges that immediately after Respondent learned of her pregnancy on December 17, 2014, it stopped assigning new cases to her even though it knew that she did not have any restrictions on her ability to work during December and January.

Respondent claims that it contacted Complainant with job opportunities during December and January. Respondent states that after it learned that Complainant was pregnant, she remained on its "blast email" list (an email list that Respondent uses to inform HHAs of newly available cases). Dennis told DCR that Respondent's common procedure is to call HHAs, because many of them do not check email regularly.

Coram also asserts that staff contacted Complainant directly, and submitted a log showing that Respondent left Complainant a phone message on January 23, 2015, regarding a new case. According to Respondent, Complainant did not reply to that message. Neither Dennis nor Respondent's lead scheduler, Annmarie Mione (the two employees who are responsible for contacting HHAs by phone), recall contacting Complainant directly regarding specific jobs between December 17, 2014 (when Dennis directed her to provide a doctor's note) and January 25, 2015.

---

[1] There was no indication that Respondent ever contacted the doctor.

Respondent submitted documents showing that on January 25, 2015, staff left a phone message for Complainant about a position in South River, New Jersey. According to Coram, Complainant did not receive the South River job because she did not provide a doctor's note that met Respondent's requirements until after the job had been assigned to another HHA. Dennis told DCR that the South River job did not require lifting, and that if it did, Complainant could have been transferred to another job. Dennis also stated that there was a "companion case"[2] available at that time, the O. case, which required no lifting. Coram stated that Mione contacted Complainant regarding the O. case on February 23, 2015. Complainant stated that she never received an offer to work that case, and never received any other offers or assignments. Complainant said that she received no further communications from Respondent until March 24, 2015, when Coram sent her a Family Medical Leave and Family Leave Act packet.

In an interview with DCR, Dennis confirmed that until the February 12 doctor's note, Complainant asked for no accommodations and gave no indication that her pregnancy limited her ability to do her job. According to Dennis, Complainant said that she mentioned her pregnancy in casual conversation with N.S., but not as a basis for her decision to stop working for M.W. Dennis confirmed that Complainant told her that she did not want to work for M.W. because the client demanded that she perform work outside the scope of her duties.

DCR interviewed N.S. He did not recall ever telling Coram that Complainant attributed her decision not to care for M.W. to her pregnancy. He stated that to the extent that he remembered Complainant, she seemed fit to perform the job. He acknowledged that his wife frequently asked HHAs to perform tasks that they should not be expected to do, and that over twenty HHAs had quit.

Respondent produced documentation showing that between August 2014 and November 2015, twenty different HHAs were assigned to work with M.W., twelve of whom visited M.W. less than three times before quitting.

Mione and Dennis told DCR that Respondent's unwritten policy is to require a doctor's note from all pregnant employees before allowing them to work on any cases.[3] Mione told DCR that pregnant employees are required to obtain a doctor's note both clearing them to work and listing any activity restrictions related to the pregnancy before being permitted to work. Mione said that pregnant employees are usually given companion cases due to lifting restrictions.

Respondent's position statement appears to confirm that the company's "Standard Operating Procedure" is to require all pregnant HHAs to provide a doctor's note clearing them to work while pregnant, and that without such a note, pregnant HHAs will not be scheduled for cases. See Respondent's Position Statement, May 13, 2015, p. 3. ("It is . . . Standard Operating Procedure to have said individual's treating physician make the determination as to

---

[2] A "companion case" typically requires less physical labor than a normal HHA case. It generally involves driving the client places, shopping and similar less-physical tasks. Respondent noted that companion cases are paid less and therefore less desirable to HHAs.

[3] The investigation found that Respondent similarly requires doctor's notes from employees who have a "medical condition" of any kind. To the extent that Respondent's policy may violate the LAD's ban on disability discrimination, DCR will address this issue with Respondent independent of Complainant's claims of pregnancy discrimination.

his/her patient's ability to safely perform the essential functions of their job based on their job description, noting any limitations or restrictions as well.").

Coram stated that the purpose of the policy is to ensure the safety of clients and its employees. Dennis told DCR that Coram told her in general conversations that allowing pregnant women to work is a liability and that they needed to be treated the same as employees with disabilities.

Analysis

The LAD makes it unlawful for any employer to treat an employee "that the employer knows, or should know, is affected by pregnancy in a manner less favorable than the treatment of other persons not affected by pregnancy but similar in their ability or inability to work." N.J.S.A. 10:5-12(s). The LAD requires employers to provide reasonable accommodations for pregnant employees, including "temporary transfers to less strenuous or hazardous work . . . unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer." Ibid.

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, but 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.

In this case, the Director finds—for purposes of this disposition only—as follows. It is Respondent's policy to require pregnant HHAs to furnish a doctor's note clearing them to work before assigning them new cases or allowing them to continue working on current cases. The existence of that policy is supported by Complainant's recitation of facts, Respondent's position statement, and assertions from three of Respondent's administrators.

In mid-December 2014, Complainant assured Respondent that her pregnancy did not limit her ability to do her job. Respondent had no reasonable basis to doubt Complainant's assertion. The initial notes from her doctor—which she produced at Respondent's direction—imposed no restrictions whatsoever. Respondent rejected the notes.

Coram states that to the extent she had concerns about Complainant's condition, it was because she was told that Complainant left an assignment due to her pregnancy. The investigation did not support that claim. Dennis told DCR that Complainant left the assignment because of the client's inappropriate demands. N.S.—the person whom Coram claims to have been the source of her information—did not corroborate Coram's claim. He did not recall Complainant ever stating that she was leaving the assignment because of her pregnancy, and did not recall ever making any such statement to Coram. Moreover, the notion that Complainant left the assignment based on the client's personality is supported by Respondent's staffing records, which show that approximately twenty aides left the same assignment because they found the client to be unreasonable.

By late February, when Complainant's doctor provided a note that satisfied Respondent, Complainant's pregnancy had advanced to a stage at which her doctor recommended activity restrictions that were not necessary in December or January. At that point, Complainant could have been assigned companion cases or other matters that did not require lifting more than ten pounds. Information provided by Respondent shows that such assignments were available. Although there is a factual dispute regarding whether Respondent contacted Complainant regarding the O. case, there is no indication that Complainant received any further offers or assignments from Respondent. There is no evidence that Respondent contacted her to discuss possible accommodations.

The investigation found that prior to her pregnancy, Respondent offered *per diem* assignments to Complainant on a regular basis, and that after Respondent learned that Complainant was pregnant on December 17, 2014, Complainant never worked another assignment. The investigation found that prior to February 12, 2015 note, Complainant's doctor had not placed any lifting or other restrictions on her. The fact that Respondent stopped assigning cases to Complainant after learning that she was pregnant supports her allegation of pregnancy discrimination. A policy that requires pregnant workers to present evidence of their fitness for duty solely because that worker is pregnant may be direct evidence of pregnancy discrimination, and further supports Complainant's allegation that she was treated less favorably than similarly situated non-pregnant employees. See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999).

Lastly, it appears that Respondent did not undertake good faith efforts to reasonably accommodate Complainant so that she could continue working. The LAD states that "an employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer." N.J.S.A. 10:5-12(s). The investigation found that once Complainant's physician placed the lifting restriction on her duties, Respondent failed to provide her available assignments that she could accomplish within the specified restrictions.

Based on the above, the Director is satisfied at this threshold stage of the process that the evidence supports a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Accordingly, it is found that probable cause exists to support Complainant's allegations of pregnancy discrimination.

DATE: 2-12-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS