STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EG14HK-63539
EEOC CHARGE NO. 17E-2013-00153

Stacey Mack,	)	Administrative Action
	)	
Complainant,	)	**FINDING OF PROBABLE CAUSE**
	)	
v.	)	
	)	
Essex County Division of Welfare,	)	
	)	
Respondent.	)	

On December 7, 2012, East Orange resident Stacey Mack (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that when she developed a mobility impairment because of a high risk pregnancy and anemia, she asked her employer, Essex County Division of Welfare (Respondent), if her work station could be moved closer to the reception area so she would not have to walk as far. She alleges that Respondent failed to provide any accommodation or engage in the interactive process, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of disability discrimination in their entirety. DCR's ensuing investigation found as follows.

Respondent is a public agency located in Newark, which provides financial assistance and social services to Essex County residents.

In or around September 2010, Complainant was hired by Respondent to work as a family service worker (FSW). Examples of an FSW's job duties, according to the New Jersey Civil Service Commission (CSC), are as follows:

> Analyzes information on forms, applications, and other financial assistance documents for completeness and accuracy during the eligibility process.
>
> Identifies possible financial resources for applicants when appropriate, provides applicants with information necessary for them to seek benefits from other agencies such as the Social Security Administration, Veterans Administration, and State Employment Service.

Counsels and assists families/individuals who require assistance in planning and managing their affairs.

Responds to complaints regarding various social conditions and financial eligibility, and conducts investigations to resolve complaints.

Performs technical, financial work involved in eligibility determinations, validating public assistance applications, and redetermining financial assistance eligibility.

Verifies and determines entitlement and other required data.

Performs field and office work involved in determining economic needs of clients and their eligibility for various financial and other public assistance programs.

Collects, analyzes, and records data and information to be utilized to identify social service needs.

May assist in preparing summaries of cases involved in hearings, and attends hearings.

Evaluates client's need for social services, and provides referrals to other agencies for assistance in financial budgeting, money management, locating housing, homemaker's assistance, job training, and day care, services.

Works with families where disturbances in family relationships exist, contacts relatives or other agencies when protective services for aged and/or disabled clients or children are required, and assists in development of corrective plans.

Conveys information to the general public.

Counsels clients pertaining to various aspects of public assistance and related programs.

Consults with supervisor to discuss and seek assistance in resolving difficult/complex client eligibility and social problems.

Collaborates with appropriate staff members to plan and carry out social services for clients.

Prepares or dictates reports for case entries, and prepares social case histories.

Maintains liaison with community, religious, and civil organizations and other social agencies.

Maintains records and files.

Will be required to learn to utilize various types of electronic and/or manual recording and information systems used by the agency, office, or related units.

The CSC job description states that the above list is not exhaustive. In particular, the CSC document notes, "A particular position using this title may not perform all duties listed in this job specification. Conversely, all duties performed on the job may not be listed."

Complainant told DCR that her job consisted of conducting intake interviews of potential new clients at her desk to ascertain their eligibility for social service programs such as Medicaid and food stamps.

In the summer 2012, Complainant informed her supervisor, Diane Varner, that she was pregnant. In September 2012, Complainant left work early because she was not feeling well. She was treated in the emergency room.

On October 6, 2012, Complainant provided Respondent with a doctor's note that stated, "Ms. Mack has a Very high Pregnancy Risk. Limited Walking Advised." See Michael T. Dresdner M.D., F.A.C.O.G., South Orange OB/GYN and Infertility Group, Certificate for Return to School or Work, Oct. 3, 2012.

At the time, Complainant's work station was in the back of the building, which required her to walk approximately 216 feet to the Respondent's waiting area each time a new client arrived. She alleges that she verbally asked on more than one occasion to have her work area moved closer to the reception area so that she would not have to walk as far to greet her clients. Complainant told DCR that Responded refused her requests and, as a result, she was subjected to excruciating pain in the workplace and at home.

Respondent denies that Complainant every made any such request. Administrative Supervisor Aaron Crawley told DCR that Dr. Dresdner's recommendation of "limited walking" was unclear. Crawley said, "We were confused with the vagueness of that." Varner and Crawley stated that no one ever asked Complainant to explain her specific limitations or to clarify what "limited walking" meant.

Respondent's counsel noted during DCR's fact-finding conference that Complainant regularly left the building during her lunch break to walk to nearby stores—suggesting that her mobility was not as restricted as characterized.

DCR asked Crawley if Respondent made any attempt to discuss an accommodation with Complainant or engage in any sort of interactive process regarding the mobility issue. Crawley replied, "No." Respondent's counsel interjected that an interactive process occurred. Counsel stated that there was an internal discussion among the administrators to determine how to address the vagueness of the doctor's note, which resulted in Respondent's determination to send Complainant to a fitness-for-duty examination to see if the request could be accommodated. On November 14, 2012, Crawley sent an internal memorandum requesting that Complainant be sent to a fitness-for-duty examination. He wrote in part:

> I am requesting that Ms. Mack be seen by our county doctor to determine if she is fit for duty at this time. Ms. Mack's pregnancy is considered high risk and she has submitted a return to work notice from her doctor which advises limited walking at this point. There is no mention of how much walking is too much in the notice. Ms. Mack on more than one occasion has complained about the amount of walking needed to service her customers throughout the day.

See Memo from Crawley, to Sharon Butler, Deputy Director, Re: Stacey Mack, FSW, Nov. 14, 2012.

On December 11, 2012, Complainant wrote a letter to Varner, Crawley, and Administrator Karlene Mullings, stating in part, "Ms. Varner, in addition to agency administration, has on a daily basis disregarded my OB-GYN's written notification of limited walking restrictions due to my high risk pregnancy." DCR found no indication from the documents produced by the parties that Respondent acknowledged or responded to the December 11, 2012 letter.

Respondent notes that Complainant caused it to reschedule fitness-for-duty examinations on December 13, 2012, and January 18, 2013.

On January 25, 2013, Respondent's physician, Naipaul Rambaran, M.D., examined Complainant and found that she was not medically cleared to work. He wrote in part:

> 34 year old female in 3rd trimester-high risk pregnancy; she has very evident limited mobility and PMD's [primary medical doctor] instructions on limited walking. I do not see how given her medical state, she can in any meaningful way fulfill her duties as a Family Service Worker given the volume of work, acute need of clients-some also at risk health issue, and the need for timeliness. . . I reviewed with her, the high risk pregnancy and risk to herself given limited ambulation and trying to service high risk clients possibly compromising their care.
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> [See Naipaul Rambaran, M.D., Essex County Hospital Ctr., to HR Director Abramowitz, Re: Mack, Stacey, Jan. 25, 2013.]

Complainant was sent home that day. She returned to work on or around May 7, 2013, after giving birth.

Analysis

At the conclusion of an investigation, the 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 DCR 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., 111 S.Ct. 799. 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.

An employer cannot discriminate against an employee in the terms, conditions, or privileges of employment based on that person's actual or perceived disability. N.J.S.A. 10:5-12(a). An employer must 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). Respondent's institutional documents state in part, "Reasonable accommodation is any change or

adjustment to a job or work environment that permits . . . [an] employee with a disability . . . to perform the essential functions of a job, or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities." See County of Essex, Human Resources Policies & Procedures, Ch. II-2 (Sept. 1, 2004).

To determine what accommodation is necessary, an 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. In evaluating a reasonable accommodation claim, 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); see also, Jones v. Aluminum Shapes, 339 N.J. Super. at 425 (App. Div. 2001)); N.J.A.C. 13:13-2.5(a); cf. 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").

Moreover, an employer is required to assess each individual's ability to perform a particular job "on an individual basis." N.J.A.C. 13:13-2.5(a). An employer cannot simply succumb to generalized suspicions and unsubstantiated fears about a condition's possible effects. Cf. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. Super. 363, 383 (1988); Greenwood v. State Police Train. Ctr., 127 N.J. 500 (1992).

An accommodation is not "reasonable" and therefore not required if an employer can demonstrate that it would impose an "undue hardship on its business." N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, factors to be

considered include (a) the overall size of the employer's business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer's operations, including the composition and structure of the employer's workforce; c) the nature and cost of the accommodation needed; and (d) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. N.J.A.C. 13:13-2.5(b)(3).

Here, Respondent argues that Complainant never requested a reasonable accommodation for her mobility issue. However, Respondent acknowledges that it received Dr. Dresdner's note stating, "Ms. Mack has a Very high Pregnancy Risk. Limited Walking Advised." In addition, Crawley wrote in his November 14, 2012 memo that Complainant "on more than one occasion has complained about the amount of walking needed to service her customers throughout the day."

The Director finds for purpose of this disposition only that Dr. Dresdner's note and surrounding circumstances triggered the obligation for Respondent to engage in an interactive dialogue with Complainant regarding potential accommodations. Perhaps the parties could have discussed temporarily moving Complainant's work station closer to the reception area, or discussed temporarily assigning someone to escort the clients to her work station. Perhaps, after some discussion, Respondent may have presented Complainant with some reasons why it felt that such accommodations would impose an undue hardship on its operations. And any information Respondent provided might have prompted Complainant to propose one or more alternative accommodations. However, there is no evidence or allegation that any such interactive discussions with Complainant were attempted or even contemplated. Respondent stated that although it found the OB/GYN's note to be vague, it did not seek clarification from Complainant or her physician. When Respondent's Administrative Supervisor acknowledged that no interactive process occurred, Respondent's counsel argued that the interactive process was the internal discussion among administrators as to an appropriate response. However, a good faith interactive process

necessarily envisions some discussion and/or consultation with the employee and/or her treating medical providers about the potential accommodation.

Although an employer is within its rights to refer an employee for a fitness-for-duty examination in appropriate circumstances, the medical report that Respondent relied on to remove Complainant from the workplace raises concerns. Dr. Rambaran opines that allowing Complainant to continue performing her duties would create a "risk to herself given limited ambulation and trying to service high risk clients possibly compromising their care." However, apart from walking to the reception area to greet clients, Complainant's duties appear to be sedentary.[1] Dr. Rambaran does not explain anywhere in his report the basis for his conclusion that allowing her to continue "analyz[ing] information on forms, applications, and other financial assistance documents for completeness and accuracy" or any other essential functions of the actual job that she had been performing would compromise her clients' care. Indeed, the report raised some question as to whether Dr. Rambaran was fully aware of Complainant's actual duties.

This case presented no evidence of targeted hostility toward employees with disabilities. However, in view of the above, the Director is satisfied at this preliminary stage of the process, that the circumstances of this case support a "reasonable ground of suspicion . . . to warrant a cautious person in the belief," N.J.A.C. 13:4-10.2, that Respondent failed to engage in the requisite interactive process in this instance and, as a result, failed to offer or even discuss a reasonable accommodation that would allow Complainant to perform the essential functions of her job. Thus, the Director finds 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.

DATE: 5-18-15

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

[1] Respondent's counsel noted during the fact-finding conference that an FSW may be required to perform field visits. Complainant stated that she was required to conduct only one field visit during her tenure as an FSW.