STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 05588-02
DCR DOCKET NO.: EB54WB-44933-E
DATED: January 26, 2004

SUZANNE DEBRA CEBULA,	)	
	)	
Complainant,	)	
	)	
v.	)	**ADMINISTRATIVE ACTION**
	)	
CATALINA MARKETING CORP.,	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
Respondent.	)	
	)	

APPEARANCES:

Harriet Heuer Miller, Esq., for the complainant.

Terri L. Freeman, Esq., and John M. Nolan, Esq. (Jackson and Lewis, LLC), 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 complaint filed by the complainant, Suzanne Debra Cebula (Complainant), alleging that the respondent, Catalina Marketing Corporation (Respondent), subjected her to unlawful employment practices in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 to -16. On October 24, 2003, the Honorable Sandra Ann Robinson, Administrative Law Judge (ALJ), issued an initial decision[1] dismissing the complaint. Having independently reviewed the record,[2]

[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Tr." shall refer to the transcript of the administrative hearing held on February 25, 2003, February 26, 2003, June 3, 2003 and June 12, 2003; "Ex. P" and "Ex. R" shall refer to Complainant's and Respondent's exhibits admitted into evidence at the administrative hearing, respectively; and "CE" shall refer to Complainant's exceptions to the initial decision and "RE" shall refer to Respondent's reply to Complainant's exceptions.

the Director rejects the ALJ's dismissal of the case, and concludes instead that Respondent subjected Complainant to unlawful employment practices in violation of the LAD and the NJFLA.

PROCEDURAL HISTORY

On May 10, 1999, Complainant filed a verified complaint with the Division alleging that Respondent discriminated against her based on her sex/pregnancy and disability in violation of the LAD. On March 16, 2000, Complainant amended her complaint to add the allegation that Respondent denied her family leave and terminated her employment in violation of the NJFLA. Respondent denied subjecting Complainant to any unlawful employment practices. The Division conducted an investigation and issued a finding of probable cause on November 9, 2001. On July 2, 2002, after attempts to conciliate this case failed, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. The ALJ conducted a hearing on the merits and issued an initial decision on October 24, 2003. Complainant filed exceptions to the initial decision on November 12, 2003 and Respondent filed a reply on November 18, 2003. The Director was granted one extension of time to issue his final determination in this matter, which is now due on January 26, 2004.

THE ALJ'S DECISION

FACTUAL DETERMINATIONS

The ALJ summarized the parties' joint stipulation of facts at pages 6 to 7 of the initial decision. To briefly summarize the stipulations, Complainant began working for Respondent on November 7, 1995 as a client service representative, performed her work satisfactorily, received merit increases, awards and bonuses, and was promoted to client service executive (ID 6). She

[2]The record in this matter includes transcripts of the February 25, February 26, June 3, and June 12, 2003 hearing dates. Although the initial decision refers to a June 13, 2003 hearing date (ID 2), no transcript of the June 13, 2003 proceedings is included in the file received from the Office of Administrative Law.

informed Respondent of her pregnancy in or about June of 1998, and Respondent advised Complainant that she was entitled to a twelve week maternity leave under the federal Family and Medical Leave Act. Complainant began her maternity leave on December 23, 1998 and gave birth to her child on December 24, 1998 (ID 6-7). Complainant worked for Respondent at least 1,000 hours during the twelve months prior to the birth of her child, and was earning $47,789 annually at the time of her discharge (ID 7).

After summarizing the stipulations, the ALJ added the following background facts. On March 15, 1999, Respondent received a fax from Complainant's doctor stating that Complainant would be unable to return to work on March 22, 1999 because of a diagnosis related to her pregnancy (ID 7). On March 17, 1999, Respondent's human resource supervisor notified Complainant that a discharge notice was pending for her because Respondent's policy disallowed maternity leaves exceeding the twelve weeks provided by the federal Family and Medical Leave Act. Ibid. Respondent terminated Complainant's employment on March 24, 1999. Ibid.

The ALJ provided an extremely detailed summary of the witness testimony at pages 8 to 19 of the initial decision. Although the ALJ did not make specific factual findings in her summary of the testimony, it appears that few factual disputes were raised by the testimony and evidence. The following specific factual findings can be gleaned from the ALJ's discussion and analysis. Complainant had a back ailment (lumbar facet syndrome) which prevented her from working after she had exhausted her twelve weeks of leave under the federal Family and Medical Leave Act, and she requested an extension of leave due to her own medical condition (ID 23-24, 26). Respondent offered Complainant part time work as an accommodation, and would have rehired Complainant if she had been cleared to return to work and had reapplied in June 1999 (ID 22). Respondent had and has on display a flyer about NJFLA or FMLA (ID 28). Respondent established that jobs were available within a two-month period of Complainant's clearance to return to work (ID 26).

ANALYSIS AND CONCLUSIONS OF LAW

The ALJ concluded that Complainant had a disability as defined by the LAD, and that Respondent met its obligation to engage in an interactive process with Complainant to determine what accommodation could be provided for her disability, and made a good faith effort to accommodate Complainant's disability (ID 28). The ALJ relied on Respondent's offer to permit Complainant to work part time as an accommodation (ID 27).

The ALJ also concluded that Respondent's reasons for denying Complainant additional leave were not pretextual, and that Respondent did not terminate Complainant's employment based on her disability or pregnancy in violation of the LAD (ID 26, 28).

Regarding Complainant's NJFLA claim, the ALJ concluded that because Complainant requested additional leave due to her own medical condition, and the NJFLA does not provide leave for that purpose, Respondent did not violate the NJFLA (ID 23, 28).

EXCEPTIONS AND REPLIES OF THE PARTIES

Complainant's Exceptions

Complainant filed exceptions regarding the ALJ's findings and conclusions on both her NJFLA claim and her LAD claim. Regarding her NJFLA claim, Complainant cites testimony regarding communications between the parties about the NJFLA, her pregnancy and her leave request, and argues that the ALJ erred in concluding that Respondent met its obligation to inform her about her NJFLA rights (CE 1-2). Citing testimony regarding the notice she gave to Respondent about her medical condition, Complainant challenges the ALJ's conclusions that she was not protected by the NJFLA after she exhausted her initial twelve weeks of leave, and that Respondent did not violate the NJFLA by terminating her employment without providing her with leave to care for her newborn (CE 2). Complainant also takes exception to the ALJ's findings concerning the federal FMLA and references to the EEOC, as her complaint did not allege violations of federal law (CE 3).

Regarding her LAD claim, Complainant contends that the ALJ erred in finding that

Respondent engaged in an interactive process with Complainant, attempted to provide reasonable accommodation or offered to accommodate Complainant with part time work (CE 4-5). Complainant argues that the ALJ applied the wrong legal standards, and erred in relying on federal caselaw and chronic absenteeism cases (CE 5). Complainant argues that Respondent's suggestion that Complainant reapply for work once she was able is no defense to a discriminatory discharge claim (CE 6). Complainant also takes exception to the ALJ's decision to exclude the Division's file (Ex. P-13) from evidence. Ibid.

In addition, Complainant argues that the ALJ erred in not awarding her damages for her LAD and NJFLA claims , and delineates the specific amounts and forms of relief she seeks in this action (CE 7).

Respondent's Reply

In reply to the NJFLA portion of Complainant's exceptions, Respondent argues that the ALJ did not err in concluding that Respondent met its NJFLA notice obligations, and specifically contends that Respondent had no duty to inform Complainant of any leave provided under the NJFLA because she requested leave for her own disability, which is not covered by the NJFLA (RE 1-2).

In reply to the LAD portion of Complainant's exceptions, Respondent notes that it does not believe Complainant was a person with a disability under the LAD, but contends that it did nonetheless offer part time work and the opportunity to reapply as accommodations, which Complainant refused (RE 2-4). Respondent argues that it was not required to provide the exact accommodation Complainant requested, and that Complainant's decision to ignore Respondent's offers "can hardly be deemed interactive" (RE 3). Respondent argues that the ALJ applied the correct legal standards and reached appropriate conclusions. Ibid. Respondent argues that the ALJ properly concluded that Complainant is not entitled to any damages, and that Complainant's failure to reapply for employment with Respondent cuts off any damages that might otherwise be

awarded if she prevailed (RE 4). Regarding the admissibility of the Division's file, Respondent agrees with Complainant that it should have been admitted, except for the Division's Finding of Probable Cause (RE 2).

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

The Director adopts the ALJ's factual findings as set forth in the initial decision and summarized above. In addition, based on the ALJ's summary of the witness testimony and the Director's review of the transcripts and documentary evidence, the Director makes the following additional findings of fact.

Complainant received a copy of Respondent's Employee Handbook (ID 8). That Employee Handbook (Handbook) specifies the types of leaves of absence Respondent provides, and under the heading "Family and Medical Leaves of Absence" the Handbook includes information about medical leaves of absence (for a serious health condition of the employee or the employee's spouse, child or parent) and family leaves of absence (for a child's birth or placement for adoption or foster care) (Ex. P-2, 16-24). The Handbook provides that eligible employees are entitled to up to twelve workweeks of unpaid leave during any twelve month period for medical leave, family leave or a combination of medical and family leave.

In a separate section entitled "Non-Work-Related Medical Leave," the Handbook provides that an employee will be entitled to a medical leave of absence if unable to work due to personal illness or injury, including a pregnancy-related disability, and that except under extraordinary circumstances, leave for non-work-related medical disability will not exceed four months. Id. at 25.

Complainant also received from Respondent a three page document entitled "Having a Baby? Congratulations!" and an August 5, 1998 interoffice memo regarding her maternity leave from Respondent's benefits administrator (ID 8; Ex. P-3; Ex. P-11). Neither of those documents

mentioned the New Jersey Family Leave Act or an eligible employee's right to take time off to care for a newborn under New Jersey law.

THE LEGAL STANDARDS AND ANALYSIS

A. The NJFLA

Applying the appropriate legal standards to the ALJ's factual findings and the evidence in the record, the Director concludes that Respondent violated the NJFLA both in failing to use appropriate means to inform Complainant of her rights and in failing to provide Complainant with an additional twelve weeks of leave to care for her child as required by the NJFLA. In reaching this conclusion, the Director does not disturb any of the ALJ's credibility determinations or factual findings based on those determinations, but as discussed below, relies on both the plain language of the NJFLA and the Appellate Division's interpretations of that statute. N.J.A.C. 1:1-18.6(b).

The NJFLA, in pertinent part, requires covered employers to grant eligible employees up to twelve weeks of leave in a 24-month period to care for a newly born child. N.J.S.A. 34:11B-4. An employer is "covered" by the NJFLA if it employed 50 or more employees for each workday during 20 or more workweeks in the current or preceding calendar year, regardless of where the employees work. N.J.S.A. 34:11B-3(f); N.J.A.C. 13:14-1.2. Based on the size of its workforce, Respondent was at all relevant times an employer subject to the NJFLA (Ex. P-14). Complainant was a NJFLA-eligible employee, as she had been employed by Respondent for 12 months or more, and worked at least 1000 hours during the preceding 12 months. N.J.S.A. 34:11B-3(e); N.J.A.C. 13:14-1.2.

Many New Jersey employers are also subject to the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. Although the Division has no jurisdiction to enforce the federal FMLA, in some cases an employee's right to time off based on a specific event will be protected

by both the federal leave act and the NJFLA. An employee's right to time off under the federal FMLA will simultaneously count against his or her leave allotment under the NJFLA only where the reason for the leave is covered by both leave laws. N.J.A.C. 13:14-1.6. The FMLA permits employees to take up to twelve weeks of leave for the employee's own illness or disability, but the NJFLA does not provide leave for the employee's own disability. N.J.S.A. 34:11B-3; N.J.S.A. 34:11B-4. As a result, an employee who has taken a twelve week leave under the FMLA for her own pregnancy-related or childbirth-related disability has not yet taken any leave for a reason covered by the NJFLA, and will, if eligible, be entitled to take an additional twelve weeks of NJFLA leave after the child's birth to care for her newborn. N.J.A.C. 13:14-1.6. Because an employee may begin NJFLA leave at any time within a year of the child's birth, N.J.S.A 34:11B-4(c), she can choose to commence her child care leave at the conclusion of any federal FMLA leave she first took for her own disability.

Employers are required to conspicuously display notice of employees' rights and obligations under the NJFLA, and must use other appropriate means to keep employees informed of those rights and obligations. N.J.S.A. 34:11B-6. Here, the ALJ found as fact that Respondent had on display a flyer about NJFLA or FMLA (ID 28), and Respondent's witness testified that Exhibit R-5, a notice about employees' rights to leave under the NJFLA, was posted on a bulletin board in the company kitchen/lunchroom during Complainant's employment (ID 13; Tr. 6/21/03, 50-51).[3] Nevertheless, posting of such a notice is not necessarily enough to satisfy an employer's notice obligations. In a case strikingly similar to the present matter, the Appellate Division found it "highly significant" that the NJFLA requires employers to do more than just post notice of employees' rights, and went on to explain that the employee's ability to request or take NJFLA leave should not depend on the employee's sophistication or independent knowledge of his or her legal rights.

[3]Exhibit R-5 is a copy of the Division-issued notice about employees' rights under the NJFLA.

D'Alia v. Allied-Signal Corp., 260 N.J.Super.1, 9-10 (App. Div. 1992). It is the employer's obligation to effectively notify the employee of her right to leave under the Act, so that she can in turn give the employer reasonable advance notice of how much leave she intends to take and when she intends to take it. Ibid.

Where the employee's need to take leave under the NJFLA due to the birth of a child is foreseeable, the employee is required to give the employer prior notice of the expected birth in a manner which is reasonable and practicable. N.J.S.A. 34:11B-4(f). The Director concludes that Complainant met the NJFLA's notice obligations, as it is undisputed that Complainant told Respondent of her pregnancy in or about June of 1998 (ID 6), roughly six months prior to the date she began her maternity leave. The employee is not required to use any "magic words" or specifically ask for leave under the NJFLA; the purpose of the notice provision is to enable the employer to plan for the employee's absence and ultimate return. D'Alia v. Allied-Signal Corporation, supra, 260 N.J. Super. at 9-10. The Appellate Division has held that the employee's notice obligations will be satisfied so long as he or she gives the employer sufficient information to alert it that the employee plans to take time off for a purpose covered by the NJFLA. Ibid.

In D'Alia, supra, the Appellate Division held that an employee's request for disability benefits and maternity leave were enough to alert the employer of its obligations under the NJFLA, even though the employee requested leave due to medical complications from her pregnancy, rather than to care for her child. 260 N.J. Super. at 5,10. The court held that the fact that Ms. D'Alia did not intend to invoke her rights under the NJFLA was irrelevant, so long as the employer knew that she experienced an event triggering entitlement under the NJFLA (she had given birth to a baby) and was seeking leave related to that event. Id. at 10. In reversing the trial court's conclusion that the plaintiff was not entitled to the protections of the NJFLA because she requested leave based on her employer's disability leave policies, the Appellate Division stated that the judge focused too narrowly on the plaintiff employee's expressed intent, which was based on her limited

knowledge, and should have instead asked whether the employer had enough information to alert it to the fact that she was asking for leave related to the birth and care of her newborn child. Id. at 9-10.

The Director concludes that, like the trial court in D'Alia, the ALJ erred in relying on Complainant's expressed request to take additional leave based on her disability. Like the D'Alia plaintiff, Complainant may not have understood that she had the right to take leave to care for her newborn under the NJFLA. Even though Respondent may have posted a Division-approved NJFLA notice in the workplace, Respondent directly provided Complainant with other information about its leave policies which could be reasonably interpreted to inform Complainant that could she could take no more than a total of twelve weeks of leave to cover both her own period of disability and time to care for her newborn, which is contrary to the manner in which the NJFLA interacts with the federal FMLA. N.J.A.C. 13:13-1.6. For example, Respondent's Employee Handbook (P-2) states that eligible employees can take unpaid leave due to the birth of a child, but the length of such leave, combined with any leave taken for the employee's own serious health condition, cannot exceed 12 weeks in a 12 month period.[4] Id. at p. 23. Thus, the leave policies in Respondent's Employee Handbook conflict with the NJFLA, and for all practical purposes nullify any notice provided by Respondent's NJFLA poster.[5]

Moreover, a separate section of the Handbook puts employees on notice that they can

[4] Although the Employee Handbook does not cite the federal FMLA, the leave policy delineated under "Family and Medical Leaves of Absence" tracks the provisions of the FMLA, and appears to be written to comply with the federal leave law.

[5] While not applicable to Complainant, the leave policies delineated in Respondent's Employee Handbook would deny leave to some other employees who are entitled to time off under the NJFLA. For example, the Handbook states that only employees who have worked 1250 hours during the preceding twelve months are eligible for family/medical leave, while NJFLA leave is available to employees who have worked only 1000 hours in the preceding twelve months. As another example, the Handbook states that where a husband and wife both work for Respondent, they are jointly entitled to a total of only twelve weeks of leave, while the NJFLA permits each family member to take to up to twelve weeks of leave. See p. 17-18; 22-23; N.J.A.C. 13:14-1.12. These provisions also nullify the efficacy of Respondent's posted notice.

request more than the twelve weeks of leave based on the employee's own disability. The section entitled "Non-Work-Related Medical Leave" provides that employees may be entitled to up to four months of non-work-related disability leave, and in extraordinary circumstances, employees may be entitled to even more than four months of disability leave (Ex. P-2, p. 25;see also, Tr. 2/25/03, p. 34). By contrast, the Handbook gives employees absolutely no indication that any leave exceeding twelve weeks of combined family/medical leave might be approved for care of a newborn child. Thus, although Respondent's additional disability leave is discretionary, the Handbook would reasonably lead an employee in Complainant's situation to conclude that she might possibly be granted more than twelve weeks of leave based on her own disability, but would have no grounds to request additional leave based on her newly born child. Such a conclusion is reinforced by the pre-maternity leave memo Complainant received from Respondent (Ex. P-3), which advised her that she should provide a note from a doctor to support any requests for additional leave. See also, Tr. 2/25/03, p. 4.

Although Respondent may have conspicuously displayed the appropriate NJFLA poster, its Handbook and other communications with Complainant regarding her maternity leave gave her contradictory information which rendered the posting ineffective as a means of informing Complainant of her NJFLA rights. Thus, the Director concludes that Respondent violated the NJFLA by failing to give Complainant appropriate notice of her rights to leave under that law. N.J.S.A. 34:11B-6.

Moreover, Respondent violated the NJFLA by terminating Complainant for failure to return to work without first giving her the opportunity to take up to twelve weeks of NJFLA leave to care for her newborn. Complainant was eligible to take up to twelve weeks of NJFLA leave to care for her child, separate and apart from any leave she may have been entitled to take under the federal FMLA or the employer's policies for her own disability. It is undisputed that Respondent knew that Complainant was physically unable to work due to pregnancy at the time she began her leave, and

also knew that Complainant gave birth to a child. Respondent was not permitted to count any leave Complainant took for her own disability against her twelve week NJFLA allotment. See, N.J.A.C. 13:14-1.6(a). It is also undisputed that, after the birth of her baby, Complainant asked Respondent for an extension of her initial twelve week leave. Having received Complainant's request for additional leave within a year of the birth of her child, Respondent should have known that Complainant was entitled to child care leave under the NJFLA, separate and apart from any leave she had previously taken for her own disability. Even though Complainant informed Respondent that she was requesting additional leave because of her disability, her failure to request leave to care for her child was a direct result of Respondent's failure to effectively inform Complainant of her NJFLA rights. Based on the factual determinations made by the ALJ and the undisputed evidence in the record, the Director concludes that Respondent violated the NJFLA by terminating Complainant's employment rather than granting her the leave to which she was entitled under the NJFLA.[6] N.J.S.A 34:11B-4.

B. The LAD

Applying the appropriate legal standards to the ALJ's factual findings and the evidence in the record, the Director concludes that Respondent violated the reasonable accommodation provisions of the LAD. In reaching this conclusion, the Director does not disturb any of the ALJ's credibility determinations or factual findings based on those determinations, but as discussed below, relies on both the plain language of the LAD and caselaw interpreting that statute. N.J.A.C. 1:1-18.6(b).

[6] The fact that an employee may have a disability would not preclude her from giving care to her newborn child, and consequently does not preclude her from taking NJFLA leave for this purpose. N.J.A.C. 13:14-1.6(c).

The LAD prohibits discrimination against employees with disabilities. N.J.S.A. 10:5-4.1; N.J.S.A. 10:5-12(a). There are two distinct types of disability discrimination claims under the LAD: claims alleging that an employee with a disability was treated less favorably than other employees based on his or her disability (differential treatment cases), and claims alleging that an employer failed to reasonably accommodate an employee's known disability. Viscik v. Fowler Equipment Co., 173 N.J. 1 (2002).

This is a reasonable accommodation case, as Complainant asserts that Respondent's decision to terminate her employment constitutes a failure to accommodate her known, medically diagnosed back condition. In a reasonable accommodation case, the burden shifting methodology articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)[7] for use in differential treatment cases is inapplicable.[8] In the disability context, the McDonnell Douglas methodology is applied where an employer defends a discrimination claim by asserting that its employment decision was based on factors other than disability; it provides a framework in which the employee can present circumstantial evidence to persuade the decisionmaker that the employer's asserted reason was not its true reason, but was instead a pretext for a decision based on the employee's disability. In a reasonable accommodation case, it is undisputed that the employer's decision to terminate the employee was based on the employee's disability, and there is no need for the employee to prove that the employer's asserted reason was pretextual. Seiden v. Marina Associates, 315 N.J. Super. 451, 465-66 (Law Div. 1998); see also, Viscik v. Fowler Equipment, supra, 173 N.J. 1, 20. Instead, what is in dispute in a reasonable accommodation case is whether the employer's decision to discharge the employee because of his

[7]Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

[8]Contrary to Respondent's contention (RE 3), the court in Seiden v. Marina Associates, 315 N.J. Super. 451(Law Div. 1998), specifically held that the McDonnell Douglas burden shifting methodology is inapplicable to reasonable accommodation cases. 315 N.J. Super. at 465.

or her disability was appropriate under the circumstances because the nature and extent of the employee's disability reasonably precludes job performance. N.J.S.A. 10:5-29.1. An employer is required to reasonably accommodate an employee with a disability unless it can demonstrate that the needed accommodation would impose an undue hardship on the operation of the employer's business. N.J.A.C. 13:13-2.5.

For the reasons discussed below, the Director concludes that Respondent failed to reasonably accommodate Complainant and failed to engage in the required interactive process to explore ways in which her disability might be accommodated.

1. Reasonable Accommodation

In reasonable accommodation cases under the LAD, an employee meets his or her prima facie burden by establishing that he or she (1) had a disability, (2) was otherwise qualified to perform the essential functions of the job, with or without accommodation, and (3) was nonetheless subjected to an adverse employment action because of the disability. Seiden, supra, 315 N.J. Super. at 465-466. Here, the Director concludes that Complainant met her prima facie burden.

Initially, the Director adopts the ALJ's conclusion that Complainant was a person with a disability within the meaning of the LAD, and finds no merit in Respondent's contention that Complainant did not have a disability (RE 2). The LAD's protections for people with disabilities are broader than the protections provided by the federal Americans with Disabilities Act (ADA), and include temporary disabilities. Viscik, supra, 173 N.J. at 16; Soules v. Mount Holiness Memorial Park, 354 N.J. Super. 569, 575-576 (App. Div. 2002).

Next, the Director concludes that Complainant would have been otherwise able to perform the essential functions of her job if she had been provided the accommodation of a finite amount of additional time off to recover from her back ailment. The record reflects that Complainant was performing her job at a level which met her employer's legitimate expectations before she began her pregnancy leave, as she received awards, bonuses and promotions (ID 6). In addition,

Respondent's offer to permit her to work part time during her recuperation, as well as its suggestion that she re-apply for her job once her doctor released her to return to work, support the conclusion that Respondent was satisfied with her work. Complainant's request for additional time off was supported by a March 12, 1999 letter from Complainant's chiropractic physician, Dr. Pucci, which stated that Complainant was at that time restricted in her ability to sit, lift, bend and physically exert herself, but that Complainant was in a rehabilitative program and he expected her to be recovered on July 1, 1999 (Ex. C-8). There is no evidence in the record contradicting this prognosis that Complainant would be able to resume her job duties in a little over three months. In fact, it appears that she recovered more quickly than expected, as Dr. Pucci subsequently released her to return to work on May 31, 1999 (Ex. R-6). Based on Complainant's past performance and the prognosis for her recovery, the Director concludes that Complainant would have been able to perform the essential functions of her job with reasonable accommodation.

The ALJ concluded that Complainant failed to establish the second prong of her prima facie case because she never returned to work after her back ailment developed, and consequently did not show that she could meet her employer's legitimate expectations during her period of disability (ID 21). The Director rejects this conclusion because in a reasonable accommodation case Complainant can satisfy the second prong by showing that she could meet her employer's legitimate expectations with reasonable accommodation. Since the accommodation requested was additional leave to recover from her disability, Complainant could meet her burden by showing that she would be able to perform her job at the end of the leave extension. If an employee seeking accommodation were required to show that he or she could meet her employer's expectations without accommodation, he or she would be put in the absurd position of having to prove that no accommodation was really necessary.

Moving to the third prong of the prima facie case, it is undisputed that Respondent terminated Complainant's employment because her medical condition prevented her from returning to work at

the conclusion of her maternity leave. See, e.g., Tr. 2/26/2003, p. 47. Thus, the Director concludes that Complainant met her prima facie burden.

Once the employee presents this prima facie case, the burden shifts to the employer to prove that needed accommodations would impose an undue hardship on its business. Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 363 (App. Div. 1994), citing Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 383 (1988). An employer must provide a reasonable accommodation unless it can show that the necessary accommodation would be an undue hardship on its business, and is required to consider the possibility of reasonable accommodation before firing an employee on the grounds that his or her disability precludes job performance. N.J.A.C. 13:13-2.5(b) and (c).

The ALJ concluded that Respondent met its burden by offering Complainant part time work and the opportunity to reapply for employment once she no longer needed accommodation for her disability. Based on the evidence in the record, and without disturbing any of the ALJ's factual findings or credibility determinations, the Director concludes that Respondent failed to meet its burden of proving that it reasonably accommodated Complainant, or that needed accommodations would be unduly burdensome.

The ALJ concluded that Respondent's offer to permit Complainant to work part time constituted a reasonable accommodation, "which Complainant could not or did not meet" (ID 27). However, if Complainant "could not" work part time because of her medical limitations, the offer of part time work is not a reasonable accommodation for her disability. Ms. Brecher's suggestion that Complainant work part time was made before Complainant provided the medical documentation explaining her limitations. Dr. Pucci's March 12, 1999 note constituted the first notice to Respondent of the specific physical limitations to be addressed in evaluating reasonable accommodations for Complainant's disability, and there is no evidence that Respondent considered the medical information or Complainant's specific physical limitations at any time in deciding that its offer of part

time work would reasonably accommodate Complainant. There is nothing in the record, and particularly nothing in Dr. Pucci's note, that would suggest part-time employment would accommodate Complainant's disability.

Moreover, Respondent terminated Complainant before she had a real opportunity to accept, decline or provide more information about the offer of part time work. Thus, the record does not support the conclusion that Complainant unreasonably chose not to return to work part time, or simply ignored that suggestion. Without disturbing the ALJ's factual findings or credibility determinations, the Director concludes that Respondent's offer of part time work did not constitute a reasonable accommodation for Complainant's disability.

In addition, the Director finds no merit in Respondent's claim that it reasonably accommodated Complainant's disability by suggesting that she reapply once she was physically able to work. The LAD requires employers to evaluate potential accommodations before firing an employee because of a disability, N.J.A.C. 13:13-2.5, and an offer to re-evaluate the employee's fitness for hire once he or she no longer needs any accommodation does not meet the employer's obligation.

2. Interactive Process

Before concluding that the employee's disability precludes continued employment, the LAD requires an employer to make an individualized assessment of the employee's ability to perform his or her job and to fully consider available reasonable accommodations. Jansen v. Food Circus Supermarkets, Inc., supra, 110 N.J. at 379. This individualized assessment requires an interactive process in which the employer and the employee work together in good faith to evaluate the employee's abilities and limitations and the feasibility of possible accommodations. See, e.g., Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 400 (App. Div. 2002). The interactive process is crucial, because each party normally holds relevant information that the other party does not have, and exchange of 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, 184 F. 3d 296, 317 (3rd Cir. 1999).

The ALJ concluded that Respondent met its obligation to engage in an interactive process with Complainant to determine whether any reasonable accommodations were available to enable her to resume or retain her employment (ID 28). In her exceptions, Complainant asserts that the ALJ erred in failing to make factual findings to support her conclusion that Respondent met its obligation to engage in an interactive process with Complainant, and asserts that there was no evidence supporting that conclusion (CE 5). In reply, Respondent asserts that undisputed evidence supports the conclusion that Respondent met its obligation to engage in the interactive process, but points to no specific evidence supporting that conclusion (RE 3).

The Appellate Division recently articulated standards for evaluating a claim that an employer violated the reasonable accommodation provisions of the LAD by failing to engage in a good faith interactive process. Tynan v. Vicinage 13, supra at 400-401; Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (App. Div. 2001). To prevail in such a claim, 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 423, citing Taylor v. Phoenixville School District, supra, 184 F. 3d at 319-320.

To trigger the interactive process, the employee is not required to use the phrase "reasonable accommodation" or mention the LAD, but must in some way make it clear that he or she is asking the employer for some form of assistance for his or her disability. Tynan, supra, at 400. Once the employer learns of the employee's need for assistance because of a disability, it is the employer who must initiate the process of determining the appropriate accommodation. Ibid.

Here, Complainant's conversations with Respondent's management and Dr. Pucci's March

12, 1999 note establish both that Respondent knew about Complainant's back condition and that she requested time off because of that back condition (Tr. 6/12/03, p.4; Tr. 2/26/03, p. 44). Thus, the Director concludes that Complainant established the first two elements of her claim. The next question is whether Respondent made a good faith effort to assist Complainant in seeking accommodation. An employer can show its good faith in a number of ways, including meeting with the employee, asking the employee what he or she specifically wants or even showing some sign of having considered the employee's request. Jones, supra, at 425, citing Taylor at 317.

The ALJ did not specify the facts on which she relied to conclude that Respondent initiated or engaged in an exchange of information with Complainant to determine how her medical restrictions might be accommodated. The hearing testimony discloses the following communications between Complainant and Respondent regarding her accommodation request. Complainant initially told her immediate supervisor, Bonnie Brecher, that her doctor said she might need an additional three months of leave because of her back problem, and that she would fax a doctor's note to Respondent (TR. 2/25/03, p. 47-48; TR. 6/12/03, p. 60). Ms. Brecher testified that she subsequently learned from someone in Respondent's Human Resources unit, probably Geri DeBilzan, that Complainant had requested an extension of her leave (TR. 6/12/03, p. 64). Ms. Brecher testified that, before Respondent made the decision to terminate Complainant's employment, she offered Complainant the option of returning to work part time, and Complainant responded by saying something like she didn't know, and might discuss it with her husband (Tr. 6/12/03, p. 67-68).

The record establishes that Respondent terminated Complainant without any further discussion, and without Complainant formally declining the offer. After Respondent made the decision to deny Complainant's leave request and terminate her employment, Ms. Brecher and Rose Bugge together tried to call Complainant; because there was no answer, Ms. Bugge said she would communicate the information to Complainant (TR. 6/12/03, p. 122). Ms. Bugge had only one conversation with Complainant about her request for an extension of her leave, which took place a

few days after Respondent received the leave request (TR. 2/26/03, p. 21, 37). In that conversation she told Complainant that her request for additional leave had been denied, and that she was being terminated, but was eligible for re-hire and could reapply when she was able. (TR. 2/26/03, p. 20).

In total, then, Complainant had a conversation with Bonnie Brecher in which she explained that she needed more time off because of her back. In response, Brecher offered her part time work. Complainant then requested a leave extension supported by a doctor's note, and without any interim communications between the parties, Rose Bugge telephoned Complainant to tell her that Respondent had decided to terminate her employment, but that she was eligible to reapply for employment with Respondent when she was able to work. The record reflects that none of Respondent's employees spoke to Complainant after receiving her doctor's note explaining her limitations, nor did they make any attempt to communicate with her about her request for accommodation until after Respondent had already made the decision to terminate Complainant's employment.[9] Respondent relied solely on the note from Dr. Pucci (Ex. P-4; TR. 2/26/03, p. 44) and terminated Complainant because the requested extension violated their standard leave policy, without asking Complainant for additional information or giving her the opportunity to provide additional information.

Moreover, the record reflects that Respondent failed to make an individualized assessment of Complainant's specific limitations, abilities and potential accommodations which might be provided to enable her to retain her position. Rose Bugge (Respondent's Senior Director of Compensation), who together with Shelley Shwemley made the decision to terminate Complainant's employment (TR. 2/26/03, p. 43), testified on both direct and cross-examination that Respondent denied Complainant's request for additional leave because they were trying to be consistent with how they

[9]Complainant denies receiving a telephone message from Bonnie Brecher; this notwithstanding, by Ms. Brecher's own testimony she left the message for Complainant only after Rose Bugge had already informed Complainant of her termination (Tr. 6/12/03, p. 68-69).

had handled other employees in similar situations in the past (TR. 2/26/03, p. 15, 36). Although it may be appropriate for an employer to apply uniform and consistent policies in evaluating requests for non-disability leave, uniform leave allotments are the antithesis of the individualized assessment required to evaluate a reasonable accommodation request.

Even if Respondent offered Complainant part time employment, such a "take it or leave it" offer is not an interactive information exchange, especially since there was no indication that Complainant would have been physically able to work part time with her medical restrictions. While an employer may have good cause to reject a specific leave request because it would cause undue hardship based on the particular facts of the case, it must then initiate the interactive process with the employee to determine whether there are alternative accommodations which might be acceptable. See, e.g., Tynan, supra, 351 N.J. Super. at 401-402 (employer's decision to ignore employee's accommodation request which included a request for an extension of medical leave could constitute bad faith, where employer elected not to initiate interactive process with employee, and instead orchestrated her termination).

Based on the undisputed evidence in the record regarding Respondent's actions and reactions to Complainant's request for additional leave due to disability, and without disturbing any of the ALJ's factual findings or credibility determinations, the Director concludes that Respondent made no genuine effort to evaluate Complainant's request for accommodation to determine whether it could reasonably accommodate her specific disability without undue hardship. Thus, the Director concludes that Respondent did not make a good faith effort to assist Complainant in seeking accommodation for her temporary disability.

As noted above, to prevail in a claim that Respondent violated the LAD by failing to engage in a good faith interactive process, Complainant must also establish that she 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 423, citing Taylor v. Phoenixville School District, supra, 184 F. 3d at

319-320. Time off from work is a form of accommodation which may be reasonable, depending on the particular circumstances of the case. See, e.g., Soules v. Mt. Holiness, supra, 354 N.J. Super. at 577; Tynan v. Vicinage 13, supra, 351 N.J. Super. at 412. Although an indefinite leave may exceed the bounds of reasonable accommodation, and excessive absenteeism over a prolonged period due to disability need not be accommodated, an employer must evaluate an employee's request for leave based on the specific facts of the case to determine whether it can be accommodated without undue hardship. Soules v. Mount Holiness Memorial Park, 354 N.J. Super. 569, 577 (App. Div. 2002); Malone v. Aramark Servs., Inc., 334 N.J. Super. 669, 680 (Law Div. 2000); Svarnas v. AT&T Communications, 326 N.J. Super. 59, 80-81 (App. Div. 1999).

Here, the record reflects that Complainant could have been accommodated without undue hardship. Respondent hired Lisa Scillia prior to Complainant beginning her maternity leave, and intended to keep Ms. Scillia on as an employee after Complainant's expected return (Tr. 6/12/03, p. 145). The next employee hired in Complainant's position was Rita Matthews, who was not hired until September, 1999 (TR. 6/12/03, p. 140;CE 6). Based on this undisputed evidence, the Director concludes that Complainant has met her burden of establishing that Respondent's business would not have suffered undue hardship by extending Complainant's leave until July 1, 1999.

Although an employer is not required to grant the precise accommodation requested by the employee, and the employer is free to suggest alternative accommodations as part of an interactive information exchange with the employee, in this case the competent evidence shows that the accommodation initially requested by Complainant could have been granted without undue hardship. While Complainant would not have had the right to insist on this, and only this, accommodation if Respondent had suggested viable alternatives, the evidence that at least one reasonable accommodation could have been provided is sufficient to meet Complainant's burden of proof on failure to engage in the interactive process.

In sum, Respondent's offer of part time employment and its suggestion that Complainant

reapply for employment once she no longer needed accommodation did not constitute reasonable accommodations for Complainant's disability, and did not satisfy Respondent's obligation to consider or provide reasonable accommodations before firing Complainant because her disability prevented her from returning to work. Since its suggestions did not reasonably accommodate Complainant, Respondent had an obligation to initiate or engage in a good faith interactive process to make an individualized assessment of accommodations which might be feasible alternatives to terminating Complainant's employment. Respondent failed to do so. Thus, the Director concludes that Respondent violated the reasonable accommodation provisions of the LAD by failing to consider, offer or provide reasonable accommodation for Complainant's disability.

REMEDIES

The ALJ concluded that Complainant was entitled to no damages because Respondent did not violate the LAD or NJFLA. Although she made no factual findings regarding damages, the ALJ did summarize the witness testimony regarding damages. After reviewing the record, including the transcripts of the hearing testimony, the Director determines that the record permits him to make certain factual findings and legal conclusions regarding damages and other relief. As discussed below, the Director will leave the record open to permit the parties to brief specific issues relating to remedies.

A. Back Pay

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 measure of an employee's lost wages is usually the amount the employee would have earned if not for the unlawful discharge, less any wages the employee actually earned, or would have earned with appropriate mitigation of damages. Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 34 (1981). Complainant seeks back pay of $47,789 annually, plus an increase of from three and five percent for each year, from June 2, 1999 through the date of trial.

Complainant stipulates that she is not entitled to back pay for the periods in which she was unable to work because of her back condition (March 21, 1999 through June 1, 1999) and due to the birth of a second child (April 2002 through July 2002) (CE 7). Complainant also stipulates that "about $10,000" in wages she earned between her termination and the trial date should be deducted from the back pay she seeks. Ibid.

After review of the evidence in the record regarding mitigation of damages, the Director concludes that it is appropriate to further limit Complainant's back pay award. 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, supra, 86 N.J. at 40. The employer establishes a prima facie case of failure to mitigate by showing that employment opportunities comparable to the wrongfully lost position were available, and if the lowered sights doctrine is applicable, that there were other suitable jobs. Id. at 41. The burden then shifts to the employee to present evidence that there were no comparable jobs available, that she made reasonable and diligent efforts to find appropriate work, but was unsuccessful, or that the circumstances did not justify acceptance of a dissimilar job. Ibid.

Respondent retained a career management consultant, Charles L. Sodikoff, Ph.D., to testify as an expert on job searches, and Complainant stipulated that Dr. Sodikoff could be qualified as an expert (Tr. 2/26/93, p. 110). Dr. Sodikoff prepared a report entitled "Assessment of Job Search Activity in the Matter of Cebula v. Catalina Marketing," which was admitted into evidence as Exhibit R-3. Dr. Sodikoff testified that if Complainant had conducted a dedicated and fully active job search, she would have found a comparable position within two to six months (Tr. 2/26/93, p.116,120,138). He testified that the types of jobs Complainant was seeking (sales, sales management, sales coordination, retail, sales management) were plentiful in July 1999. Id. at 135-137. He testified that he based his conclusion on factors including Complainant's qualifications and work experience, Bureau of Labor Statistics reports showing that the average length of time for jobseekers to secure

jobs in July 1999 was 13.5 weeks, as well his review of employment advertisements from the Star Ledger for one Sunday each month from July 1999 through December 2002. Id. at 135-138,117-118; Ex. R-3, p.3. Regarding the conclusions he drew from the Star Ledger ads, Dr. Sodikoff testified that he selected the Star Ledger because it was one of the three newspapers Complainant stated she used in her job search, and although he did not know the salaries or locations of each job advertised, he excluded ads which appeared to be for jobs like managing fast food restaurants or small stores (Tr. 2/26/93, p. 173-176).

Based on Dr. Sodikoff's testimony, the Director concludes that Respondent has met its prima facie burden of establishing that employment opportunities comparable to Complainant's prior position were available. The burden then shifts to Complainant to prove that there were no comparable jobs available, that she made reasonable and diligent efforts to find appropriate work, but was unsuccessful, or that her circumstances did not justify accepting a dissimilar job.

Complainant testified that she began her job search in July 1999 by revising her resume, asking a lot of her friends if they knew of job openings, and looking at the Sunday papers and the internet (Tr. 2/25/03,p. 84). She would call or fax a resume in response to ads, and would wait for a response; if she received no response she "just chucked it away." Id. at 85. She testified that she was looking for a job in sales, possibly garment sales or client services, and believed Respondent's client companies would not hire her because Respondent had fired her. Id. at 84-85. Complainant did not contact any "headhunters" or other employment agencies. Id. at115. Complainant did not retain any of the job ads she applied for, or copies of any job search letters she sent out. Id. at 115-116.

Complainant got two interviews in 1999; she was not offered the first job she interviewed for, but was hired part-time at a business called "Paintin Place," and worked there from January 2000 until the business closed in late August/early September 2000 (Id. at 85-86; Complainant's answers to Respondent's Interrogatories, p. 6). Complainant was offered 16 hours of work a week at Paintin

Place, and she earned $10/hour with no benefits (Tr. 2/25/03, p. 87).

Based on the evidence in the record, the Director concludes that for most of the period for which Complainant seeks back pay, she has not met her burden of proving that there were no comparable jobs available, that she made reasonable and diligent efforts to find appropriate work, or that her circumstances did not justify accepting a dissimilar job. Initially, Complainant has presented no testimony or other evidence to dispute Respondent's evidence that there were comparable jobs available; she presented almost no specifics about the number or types of jobs she actually applied for, about how she evaluated advertised jobs to determine if they were comparable or appropriate, or what was inappropriate about those advertised jobs she did not pursue.

In addition, Complainant has not shown that she made diligent and reasonable efforts to find comparable work throughout the back pay period. Based on Complainant's job search activities, at the latest, any back pay award would terminate when Complainant began her part time job at Paintin Place, because she presented no evidence that she continued searching for a comparable or full time job during the eight or nine months she was employed there. Although taking a part time or significantly lower paying position is in many cases an appropriate form of mitigation, Goodman v. London Metals Exchange, supra, 88 N.J. at 41, continuing back pay will only be awarded if the employee shows that she is still in the full time labor market by continuing to seek work comparable to the lost position.

In addition, the Director finds that Complainant's failure to reapply for a position with Respondent buttresses the conclusion that Complainant failed to adequately mitigate damages. It does not, however, compel the conclusion that Complainant is entitled to no back pay. The ALJ concluded that Respondent would have re-hired Complainant if she had applied in June 1999 (ID 22). An employee's rejection of an employer's unconditional offer to rehire the wrongfully discharged employee in a substantially equivalent job will normally cut off any further back pay award. Ford Motor Co. v. EEOC, 458 U.S. 219, 230-231(1982). However, the evidence does not

support the conclusion that Respondent ever made an unconditional job offer to Complainant. Instead, the "talking points" document, which outlined what should be addressed in notifying Complainant of her termination, states "You are eligible for rehire, and are welcome to reapply should there be an opening in the future" (Ex. R-1). The record reflects that Ms. Bugge was the only employee of Respondent who spoke with Complaint about her termination or in an official capacity after she was terminated. Ms. Bugge testified that she discussed the "talking points" with Complainant, and told her that "she was eligible for rehire and to reapply when she was able to come back to work." These communications did not constitute an unconditional job offer, but merely an invitation for Complainant to re-apply, to be considered for hire if she applied for a future opening. Thus, the Director concludes that Complainant's failure to reapply to Respondent was not a rejection of a comparable job, and does not completely preclude any back pay.

Complainant testified that she did not reapply for work with Respondent because Ms. Brecher did not respond to her phone messages or otherwise communicate with her, and because Complainant felt Respondent would not hire her because she had filed a complaint with the Division. Id. at 104-105. Complainant never contacted Respondent to inquire about re-employment after she was able to return to work. Id. at 109.

To ensure that she reasonably and diligently pursued her job search to mitigate damages, Complainant had a duty to explore all reasonable opportunities, including re-applying for work with Respondent. Complainant had a right to amend her complaint if she believed she was denied re-hire in retaliation for filing her complaint. Both the LAD and the NJFLA prohibit employers from retaliating or taking reprisals against anyone for filing a complaint with the Division or otherwise asserting their rights under those statutes. N.J.S.A 10:5-12(d); N.J.S.A. 34:11B-9.

Despite the above, the Director concludes that it would not be unreasonable for Complainant to begin her job search by initially seeking a new job with a different employer. The Director bases this conclusion on Complainant's testimony that Ms. Brecher failed to return Complainant's phone

calls (which is supported by the handwritten notation on Ex. P-8 stating that Ms. Brecher received a voicemail message from Complainant), as well as Respondent's failure to show that it advertised a vacancy for Complainant's job or a comparable job or notified Complainant of any comparable job openings.

The Director further concludes that after the initial stages of her job search proved unsuccessful, a reasonable and diligent job seeker would be expected to at least inquire with her former employer to determine whether a comparable job was available. Thus, the Director finds that Complainant's failure to reapply with Respondent is relevant as one factor in determining whether she made reasonable and diligent efforts to find comparable work. Complainant presented very little evidence to support her contention that she diligently sought comparable work, as she not only presented no documentary evidence of specific jobs she sought, she did not even testify about specific companies or jobs for which she applied. Based on the limited evidence of Complainant's job search, and her failure to reapply for comparable work with Respondent after her search for comparable work elsewhere proved unsuccessful, the Director concludes that Complainant's back pay entitlement should be limited to the period it would take a diligent job seeker to secure comparable work. Dr. Sodikoff testified that a person in Complainant's position conducting a fully active job search would have obtained a job in two to six months, that the average job seeker found a job in 13.5 weeks, and that the rule of thumb is that it takes one month of job search for each $10,000 of salary (Tr. 2/26/03, p. 120, 135, 138). Based on this evidence, the Director concludes that Complainant's back pay entitlement should cease four months after her release to return to work. The Director further concludes that Complainant's back pay award should be calculated based on the $47,789 in salary and other compensation she was earning when she was discharged, for a total of $15,929.67 in back pay.

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 computation method set forth in New Jersey Court Rule 4:42-11, the Director awards $4753.10 in prejudgment interest on the back pay award.

B. Reinstatement/Front Pay

Complainant seeks reinstatement, which is one form of equitable relief the Director may grant for violations of either the LAD or the NJFLA. N.J.S.A. 10:5-17; N.J.S.A. Although immediate reinstatement is the preferred remedy to make a discrimination victim whole, it is not always feasible. See, e.g., Maxfield v. Sinclair International, 766 F. 2d 788, 796 (3rd Cir. 1985), cert. denied 474. U.S. 1057. Front pay may be awarded as an interim remedy to compensate a discrimination victim for wages that would have been earned during the time between judgment and reinstatement, or as an alternative remedy where reinstatement is not a viable option. Grasso v. West New York Bd of Education, 2003 WL 22470143, p. 9 (App. Div. Nov. 3, 2003); Pollard v. E.I. du Pont de Nemours, 532 U.S. 843, 846 (2001). Reinstatement may be unfeasible, for example, where there is continued hostility between the victim and the employer or other employees. Pollard, supra, 532 U.S. at 846. Where front pay is awarded instead of reinstatement, the duration of front pay is in the discretion of the decisionmaker. Goss v. Exxon Office Systems Co., 747 F. 2d 885, 890 (3rd Cir. 1984.) The extent of the employee's efforts to mitigate damages will be considered, and may result in a reduction in or denial of front pay. See. e.g., Anastasio v. Schering Corp., 838 F.2d 701, 710 (3rd Cir. 1988). As with back pay, the employer bears the burden of proof on failure to mitigate. Id. at 707.

The parties have not addressed the issues of reinstatement or front pay, and the Director has insufficient information to determine whether, or in what manner, it would be appropriate to award these remedies. The Director will leave the record open for 30 days to permit the parties to attempt

to reach an amicable resolution of the issues relating to reinstatement, or if that is not possible, to submit briefs and/or certifications addressing the appropriateness of reinstatement and/or front pay as a remedy in this case. Submissions should include the following issues: legal or equitable bars to reinstatement in this case, whether a comparable position is currently available or is expected to be available in the near future; the impact of mitigation on reinstatement and on any front pay which might be awarded until or in lieu of reinstatement, and the rate and duration of any front pay award. Complainant shall file and serve her submissions within 20 days, and Respondent shall file and serve its submissions within 10 days of receipt of Complainant's submissions. Based on the parties' submissions, the Director will render a decision or, if necessary, will remand this matter for further testimony limited to these issues.

B. 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.

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, Complainant's own testimony, as well as that of her husband, demonstrate that Complainant suffered emotional distress as a result of the sudden and unplanned loss of the job she

excelled in for over four years, and Respondent's almost immediate and unilateral decision to discharge her, without any discussion, evaluation or attempt to accommodate her brief disability. Complainant testified that she began experiencing anxiety attacks after she was terminated, and became depressed wondering how she and her husband were going to support their new baby (Tr. 2/25/03, p. 71). She testified that she began to cry over things that previously did not make her cry, and while she and her husband rarely argued before she was terminated, they'd "fight constantly" after she was terminated. Id. at 72-73. Complainant also testified that she developed severe migraines, stomach ailments and insomnia after she was terminated. Id. at 82-83.

Complainant's husband, Michael Cebula, testified that after Complainant was terminated, she became isolated and withdrawn, and tended to become irate at small things. Id. at 149-150. He testified that Complainant "was scared, and it showed." Id at 153.

The Director generally seeks to ensure that pain and humiliation damage awards are consistent with awards granted to other prevailing complainants who have come before the Division, based on the extent and duration of emotional suffering experienced by each complainant. After reviewing the applicable portions of the record, and considering emotional distress damage awards made to other prevailing complainants, the Director concludes that an award of $7,500 in pain and humiliation damages is appropriate in this case.

C. Penalties

In addition to any other remedies, both the NJFLA and the LAD provide 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; N.J.S.A. 34:11B-10. The maximum penalty for a first violation of the NJFLA is $2,000, and the maximum penalty for a first violation of the LAD is $10,000. Ibid. After review of the record, the Director concludes that the maximum penalty of $2000 is appropriate for Respondent's NJFLA violation, and the maximum penalty of $10,000 is appropriate for Respondent's LAD violation.

D. 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). The Director concludes that it is appropriate to make an award of attorney fees to Complainant in this case. The Director will leave the record open for 30 days 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. Complainant shall file and serve any submissions within 20 days, and Respondent shall have 10 days to reply.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful employment practices in violation of the LAD and the NJFLA. 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 or the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 to -16. Within 60 days, Respondent shall issue to all its New Jersey employees a revised policy clearly informing employees of their rights to leave under the NJFLA and their rights to reasonable accommodation under the LAD, and shall provide the Division with a copy of that revised policy.

2. 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 $20,682.77 for back pay with interest.

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 $7,500 as compensation for her pain and humiliation.

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 $12,000 as a statutory

penalty.

5. The penalty and all payments to be made by Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

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. The record in this matter shall remain open for 30 days for the limited purpose of permitting the parties to address the appropriateness of reinstatement and/or front pay as an additional equitable remedy in this case, and the amount of counsel fees. The Director will issue a supplemental order addressing these issues.

DATE:_____

_____
J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS