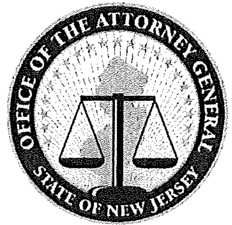

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO.: EG05FB-61348-E

DOROTHY ANN WILLIAMS and CHINH Q. LE, DIRECTOR, NEW JERSEY DIVISION ON CIVIL RIGHTS,

Complainants,

v.

UNITED SUPPORT SOLUTIONS,

Respondent.

FINDING OF PROBABLE CAUSE

Pursuant to a Verified Complaint filed on March 23, 2010, the above-named respondent has been charged with a denial of rights under the Family Leave Act in violation of N.J.S.A. 34:11B-1 *et seq.*

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

Complainant alleged that she was denied her rights under the Family Leave Act and discharged from her position of Welder.

SUMMARY OF RESPONSE

Respondent denied that Complainant was denied her rights under the Family Leave Act. Respondent asserted that Complainant never requested to take "family leave," and that she was discharged after refusing to accept a schedule change from first to second shift. Respondent contended that it decided to change Complainant's work schedule because of her history of excessive absenteeism and tardiness exemplified by her failure to report to work for three days in March 2010 for which she was scheduled. Respondent

stated that its second shift was more flexible with respect to time and had less pressure to produce and, therefore, was more suitable to Complainant's record of attendance. Respondent asserted that Complainant declined Respondent's offer, and as a result it discharged her on March 16, 2010.

BACKGROUND

Respondent, located at 134 Sand Park Road, Cedar Grove, Essex County, New Jersey, is a metal works and parts manufacturer.

Complainant, who resides at 82 North 22nd Street, East Orange, Essex County, New Jersey, was hired in February 2007 to the position of Welder. Complainant took three days off to care for her husband on March 10, 11, and 12, 2010. Complainant was discharged on March 16, 2010.

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION

This investigation revealed sufficient evidence to support a reasonable suspicion that Respondent denied family leave to Complainant and then discharged her in violation of the Family Leave Act.

On February 17, 2010, Complainant submitted a request for vacation time to care for her husband following his upcoming knee replacement surgery. Although she did not specifically request "family leave" at that time, she clearly noted in writing on the vacation request form that she needed this time to care for her husband who was having an operation. Respondent approved Complainant's request for vacation from March 15 to March 19, 2010. However, Complainant took three additional days off prior to her vacation, March 10, 11, and 12, 2010, that formed the basis of contention in this case.

Complainant alleged that she was not informed of her rights under the Family Leave Act (FLA) at the time of her request for vacation. Respondent asserted that there were posters on site pertaining to the FLA but did not refute Complainant's contention that her rights under the FLA were not discussed at the time she requested time to care for her husband.

According to Complainant, upon notification that her husband's surgery was scheduled for Wednesday, March 10, 2010, she informed her immediate supervisor, John Garvie, and other management staff that she would need to take that day off but intended to come to work on March 11 and 12. Complainant admitted that she did not request to take the 10th off in writing. However, she believed it was understood that she would not

be working on that day. Respondent denied that Complainant was formally authorized to take that day off. However, in an interview with the Division's investigator, Mr. Garvie stated that on March 9, 2010, Complainant did inform him her husband was having surgery the following day, and that he approved Complainant's request to take that day off.

Complainant contended that on the morning of the following day, March 11, 2010, she got an unexpected call from her husband asking her to come to the hospital because of complications from his surgery. According to Complainant, she immediately contacted Mr. Garvie to inform him that she had to go to the hospital to care for her husband and would not be at work for the rest of the week, Thursday and Friday, March 11 and 12, 2010. When questioned about Complainant's recollection of events, Mr. Garvie confirmed that he received a call from Complainant at approximately 6:00am on March 11th. He recalled that Complainant said "something about her husband" and that she would need to take the day off. Mr. Garvie stated that he told Complainant to contact the office because he could not give approval for more than one day of unscheduled absence.

Complainant acknowledged that she did not contact the office because she felt her conversation with Mr. Garvie was sufficient notification and because the office was closed at that time in the morning. Mr. Garvie did not specifically recall Complainant's request to take Friday off as well, although he stated that he may have called Complainant to inquire about how her husband was doing at some point after March 11th. Respondent, on the other hand, in its answer to the complaint, acknowledged that Complainant "advised her supervisor" that she would not be in on either March 11th or March 12th.

It is Respondent's contention that Complainant's unscheduled absences on March 10, 11 and 12, 2010, were part of a pattern and history of tardiness and absenteeism that caused a hardship on its business. Respondent supplied the Division with documentation to show that Complainant's record of attendance issues dated back to 2007. Respondent had also indicated on Complainant's 2008 performance evaluation that her attendance "needs improvement." Respondent stated that after these events, it determined that both the company and Complainant would be better served if she worked on the second shift where, it claimed, production is less time sensitive. Therefore, Respondent decided to change Complainant's scheduled shift from 8:00am - 3:30pm to 3:00pm - 11:00pm.

On Monday, March 15, 2010, Respondent's Director of Operations, John Machnicki, contacted Complainant by phone to inform her of Respondent's decision. According to Respondent, Complainant refused to accept the schedule change. In an interview with the Division's investigator, Mr. Machnicki recalled Complainant saying, "Ain't no way I'm going to second shift. You can do what you want to do. Let me go." Although Complainant did not deny Respondent's assertions about her attendance, she denied refusing to work on the second shift. Complainant stated that she expressed her desire to remain on the first shift, but she said she was willing to accept the change if necessary.

Complainant was discharged on Tuesday, March 16, 2010, the second day of her scheduled vacation.

ANALYSIS

At the conclusion of its investigation, the Division is required to determine whether "probable cause" exists to credit a complainant's allegations, in this case an alleged denial of rights under the Family Leave Act. Probable cause has been described under the New Jersey law as grounds for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. 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. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

As a preliminary matter, it is undisputed that Respondent had the requisite number of employees for coverage under the FLA, and that Complainant was an eligible employee under the Act. In the instant case, the investigation disclosed that Respondent failed to inform Complainant of her rights under the Family Leave Act at the time of her initial request for vacation leave to care for her husband. It is well settled that an employer must explain the relevant rights of an employee under the FLA once the employee expresses a need for leave for a purpose recognized by the Act. There is no need for an employee to specifically request "family leave" so long as she makes it clear that she needs a type of leave provided by the Act.

Here, the investigation revealed sufficient evidence to suggest that Complainant expressed a need to take time off from work on March 10, 2010, and again from March 15 to March 19, 2010, to care for her husband who was undergoing surgery. Respondent was made aware of the reason for the leave both by the notation on Complainant's initial leave request and in her conversation with her supervisor, Mr. Garvie. Therefore, Respondent had a duty to make FLA leave available to Complainant when she requested vacation leave to care for her husband.

The investigation also revealed sufficient evidence that Complainant was entitled to job-protected family leave for the period she sought it – from March 10 to March 19, 2010 – but that Respondent effectively denied her the leave to which she was entitled by characterizing her time off on March 10, 11, and 12, 2010, as unscheduled absences and then terminating her several days later, on March 16, 2010, in the middle of the remainder of her approved leave time.

The investigation established that Complainant was entitled to family leave for care of her husband, who had a qualifying serious health condition. The parties agree that Complainant was approved to take time off from March 15 to 19, 2010. Although there is no written evidence to support Complainant's assertion that she had prior approval to take off March 10, 2010, Complainant's supervisor, Mr. Garvie, acknowledged that he was aware of and approved her taking that day off. Complainant apparently stated an intention to work on the following two days, but the record shows that Complainant was faced with an unplanned emergency, when her husband informed her of unexpected complications following his operation. Once this issue arose, Complainant apparently contacted Mr. Garvie and requested additional leave to care for her husband.

Under circumstances such as this, the FLA provides flexibility with respect to advance notification to the employer. Specifically, N.J.A.C. 13:14-1.4(b) states that "in emergent circumstances, an employee may provide the employer with oral notice when written notice is impracticable." Complainant's call to her supervisor on the morning of March 11, 2010, constitutes reasonable oral notification of an emergent situation under the Act. Moreover, Respondent acknowledged in its answer that Complainant's supervisor was informed of her need to take time off on March 11 and 12 to care for her husband. Hence, there is sufficient evidence to support a reasonable suspicion that Complainant provided proper notice of her need for family leave.

Finally, the investigation found sufficient evidence to establish that Respondent unlawfully retaliated against Complainant in violation of the FLA. Despite what Respondent contends is a long history of poor attendance, the investigation revealed that it elected to reassign Complainant from the first to the second shift on March 15, 2010, in the middle of her protected family leave, and apparently motivated in part by what it characterized as her unscheduled absences on March 10, 11, and 12, 2010. The parties disagree about whether Complainant was amenable to the new shift when she was informed of it by Respondent's Director of Operations, Mr. Machnicki, but in any event, the proposed change resulted in Respondent terminating Complainant. Under these circumstances, there is a reasonable suspicion to believe Complainant was reassigned the new shift and/or terminated in retaliation for exercising her rights under the FLA.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that **Probable Cause** exists to credit the allegations of the complaint.

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01/13/2010
Date

Chinh Q. Le, Esq., Director
New Jersey Division on Civil Rights

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NUMBER: EG05FB-61348

DOROTHY WILLIAMS,	)	
	)	**AMENDED VERIFIED COMPLAINT**
COMPLAINANT,	)	
	)	Received and Recorded
-vs-	)	Date:
	)	Department of Law and Public Safety
UNITED SUPPORT SOLUTIONS,	)	Division on Civil Rights
	)	
RESPONDENT.	)	

I, Chinh Q. Le, Director of the New Jersey Division on Civil Rights, hereby intervene as a Complainant in the above referenced matter pursuant to N. J. A. C. 13:4-2.2 (e) and hereby amend the caption of the Verified Complainant, received and filed on March 23, 2010, to read as follows:

DOROTHY WILLIAMS, AND
CHINH Q. LE, DIRECTOR
DIVISION ON CIVIL RIGHTS,

COMPLAINANTS,

-vs-

UNITED SUPPORT SOLUTIONS,

RESPONDENT.

CHINH Q. LE, DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS

Sworn to and subscribed before me

on this 13TH day of January ,2011.

NOTARY PUBLIC OF NEW JERSEY

LORRAINE F. LE STER
NOTARY PUBLIC OF NEW JERSEY
Commission Exp[illegible]