STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO: EB61FB-64619

Allison Blair,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
Tenafly Pediatrics, P.A.,	)	
	)	
Respondent.	)	

On May 7, 2014, Allison Blair (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Tenafly Pediatrics, P.A. (Respondent), violated the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 et seq., when it fired her for exercising her rights under the statute. Respondent denied that it violated the NJFLA and asserted that Complainant's employment was terminated because she did not adhere to certain policies and protocols. The ensuing DCR investigation found as follows.

Respondent operates healthcare facilities in Tenafly, Fort Lee, Clifton, Paramus, Oakland, and Park Ridge. In December 2006, Complainant began working for Respondent at the Tenafly location as a billing coordinator. In or around February 2013, Complainant's father was diagnosed with stage 4 lung cancer. Complainant stated that she shared this information with Billing Manager Diannis Rosa and Practice Administrator Thomas S. Zeug and told them that at some point, she would need to take family leave.

In February 2014, her father was placed in hospice care in his home in Saint Johnsville, New York. On March 18, 2014, Complainant received a telephone call from her stepmother, Linda Blair, stating that her father was suddenly unable to get out of bed and that Blair needed help lifting him and felt that the hospice nurse was not cleaning him properly. Blair reportedly said, "You need to get up here." Complainant alleged that she told her immediate supervisor, Rosa, about the

change in her father's circumstances that day and that she needed to take immediate family leave and travel to upstate New York to help care for him. Rosa told Complainant to inform Zeug. On March 19, 2014, Complainant relayed the information to Zeug.

In its answer to the complaint, Respondent described the time-line as follows:

> On Monday, March 17th, Ms. Blair told Diannis Rosa that her father was ill and that she needed to see him. She had used up her Paid Time Off time prior to this. There was no communication until Wednesday, March 19th, when she spoke with me on the phone. On the call she said she was going to file for Family Leave. I instructed her that until she furnished me with **Family Leave paperwork**, her absences were unexcused. I told her that without any kind of written warning of her Family Leave request she would need to keep me informed of how the paperwork was proceeding.
>
> [(emphasis added)]

Although there is a dispute as to whether Complainant spoke with Rosa on March 17 or 18, there appears to be no dispute that at some time between March 17 and 19, Complainant put Respondent on notice that she needed to take family leave to care for her terminally ill father.

Respondent did not give any "Family Leave paperwork" to Complainant. Complainant told DCR that she believed that Zeug was referring to the Application for Family Leave Insurance Benefits form (FL-1), which requires completion by the employee (i.e., Part A), patient, patient's doctor (Part C), and employer (Part D).

On March 19, 2014, Complainant left her Bergenfield home and went to stay with her father. On March 20, 2014, Complainant filled out her portion of the FL-1. She wrote on the form that she wanted her family leave insurance to begin on March 19, 2014, and that she would be returning to work on April 30, 2014. On March 25, 2014, Blair filled out the patient's portion of the application. Blair had power of attorney for her husband, who was too ill to complete the form. On March 26, 2014, the doctor completed his section of the application. The doctor noted that the father had terminal lung cancer and that Complainant was needed for emotional support and transportation.

During DCR's fact-finding conference, Zeug stated that he called Complainant on March 24 and 26 and left messages stating that they need to communicate and that her job was at risk. Complainant did not deny that Zeug tried calling her, but stated that she was in a remote location with limited cell phone coverage and did not receive the messages until March 27.

On March 27, 2014 at 10:27 p.m., Complainant sent an email to Zeug along with the FL-1. Complainant's email read as follows:

> Tom, My apologies for not getting back to you sooner. Things have been a little hectic and I just received your voice mails. I was finally able to have my father's doctor fill out the paperwork needed. I don't think I will be taking the full leave as he will not be with us too much longer. I have attached all required paperwork. Please email me with any further questions. My cell service in this area is very poor and my phone seems to be on the way out.

On March 28, 2014, at 9:10 a.m., Zeug responded to the above email stating as follows:

> Allison, I received your email, but I'm not happy AT ALL about how you handled this situation. There's no excuse for not contacting me or Diannis [Rosa] for over a week! Cell service or no cell service, we live in a day and age where contacting people, even through email as you did now, is completely available. It takes 20 seconds to compose an email or send a text, or make a call just letting me know what's going on. I'll review the paperwork but your assumption that you're still employed is a little surprising.

Minutes later, Zeug sent Complainant another email that read, "I will need a copy of Linda Blair's power of attorney notice. At this point the paperwork is incomplete." On the same day, Zeug sent a letter to Complainant's home via certified mail advising her that her employment was terminated effective that date. Complainant stated that she was not home on March 29 when the letter was delivered. She asked her boyfriend to open the letter and read it to her.[1] It stated in part:

> As mentioned in the telephone call on March 19th, any day you did not appear at work would be an unexcused absence, unless you furnished us with complete paperwork for Family Leave. Without any kind of communication for 9 days since

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[1] Complainant stated she obtained a copy of the power of attorney, which was executed on March 14, 2014, but did not forward it to Respondent because she was notified that she had been fired.

> then, you accumulated 7 days of unexcused absence which is excessive. Any kind of paperwork you submitted to us for Family Leave was not compete, and upon further investigation, was not valid.

Complainant's father passed away that day. She returned home to New Jersey on March 30.

In its answer to the complaint, Respondent stated that Complainant was fired because she did not adhere to its policy on communicating with its managers and did not follow the required family leave protocol. In particular, Respondent argued, in part:

> According to the NJ Office of Attorney General, notice should be give 15 days in the case of a relative's serious health condition. In this case, it was given 11 days after Ms. Blair's absence, and 9 days after we last heard from her. Upon review of the paperwork that Ms. Blair sent, it was noted that the person who signed the form on behalf of Mr. Blair's did not provide any proof of Power of Attorney.

Complainant responded to the above with the following statement:

> My father started to get visits from hospice in February. We knew since his diagnosis about a year earlier that his cancer was terminal. I did inform [Respondent] in the months prior to taking Family Leave that I would need to take leave eventually. The reason that I did take the leave without the 30 days notice is because he very suddenly became bed ridden and could no longer be left alone. Also his wife was having problems with the hospice nurses cleaning him properly and could not take care of him without assistance.

ANALYSIS

The NJFLA, adopted in 1989, established an employee's right to take leave "without the risk of termination of employment or retaliation . . . and without loss of certain benefits." N.J.S.A. 34:11B-2. The Legislature reasoned that employees should not have to "choose between job security and parenting or providing care for ill family members." Ibid.; see e.g., D'Alia v. Allied-Signal Corp., 260 N.J. Super. 1,6 (App. Div. 1992) (noting that the NJFLA "represents the culmination of a comprehensive legislative effort to maintain the integrity of the family unit and promote flexibility and productivity in the workplace.")

The NJFLA entitles an eligible employee[2] to twelve weeks of family leave in any 24-month period upon advance notice to the employer[3] for the (1) birth of a child of the employee; (2) placement for adoption of a child with an employee; or the (3) serious health condition[4] of a family member of the employee, including a father. N.J.S.A. 34:11B-4. In addition to taking consecutive weeks off, "such leave may be taken intermittently, N.J.S.A. 34:11B-4a, on a reduced leave schedule, so long as the employee provides reasonable notice under the circumstances and avoids undue disruption of the employer's operations. N.J.S.A. 34:11B-5." DePalma v. Building Inspect. Underwriters, 350 N.J. Super. 195, 212 (App. Div. 2002); cf. N.J.A.C. 13:14-1.5(c)(1) (employee must provide the employer with notice "no later than 30 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.")

When the employee returns from leave, he or she must be restored to the previous position or another position with equivalent employment benefits, pay, and other terms and conditions of employment. N.J.S.A. 34:11B-7. To state a claim under the NJFLA, a complainant must show that he or she was: (1) employed by the respondent; (2) performing satisfactorily; (3) that a qualifying leave event occurred; (4) he or she took or sought to take leave from her employment; and (5) he

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2 An eligible "employee" for purposes of the NJFLA is someone who has been "employed by the same employer in the State of New Jersey for 12 months or more and has worked 1,000 or more base hours during the preceding 12 month period. An employee is considered to be employed in the State of New Jersey if: (1) Such employee works in New Jersey; or (2) Such employee routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey." N.J.A.C. 13:14-1.2.

3 A covered "employer" for purposes of the NJFLA is an entity that employs fifty or more employees, "whether employed in New Jersey or not, for each working day during each of twenty or more calendar workweeks in the then current or immediately preceding calendar year." Ibid.

4 A "serious health condition" for purposes of the NJFLA is an "illness, injury, impairment, or physical or mental condition which requires: (1) Inpatient care in a hospital, hospice, or residential medical care facility; or (2) Continuing medical treatment or continuing supervision by a health care provider." And, perhaps most controversial, "care" is defined as including, but not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and person attendant services. N.J.A.C. 13:14-1.2.

or she suffered an adverse employment action as a result. DePalma, supra, 350 N.J. Super. at 213.

When the leave is unforeseeable, the employee's "obligation is to provide sufficient information for an employer to reasonably determine whether the FMLA [i.e., the Family Medical Leave Act, 29 U.S.C. 2601, et seq.] *may* apply to the leave request." Lichtenstein v. University of Pittsburgh Med. Ctr., 691 F.3d 294 (3d Cir. 2012) (emphasis in original).[5] In Lichtenstein, the plaintiff was a psychiatric technician whose short tenure working at the defendant hospital was "tarnished by attendance and scheduling difficulties." Id. at 296. On the day that she was scheduled to return from a one-week vacation, she called her supervisor and announced that she would not be coming to work because her mother had been rushed to the emergency room after collapsing with excruciating pain in her leg. The hospital fired her for attendance violations. She alleged that the hospital violated the FMLA. The hospital argued that she had not adequately invoked her right to family leave because merely stating that her mother had been taken to the emergency room was insufficient for the employer to "ascertain whether the leave [was] potentially FMLA-qualifying." Id. 303. The trial court agreed and granted the hospital's motion for summary judgment. The trial court reasoned:

> [T]he fact that a family member has been taken to the emergency room does not necessarily reflect a serious medical condition sufficient to support a request for leave under the FMLA. While the condition precipitating an emergency room visit may be serious, the condition might not require ongoing hospitalization or medical treatment.

Id. at 304.

The Third Circuit reversed and reinstated the FMLA claims. In so doing, the Court stated that the notice requirement is neither "onerous," id. at 303 (citing Burnett v. LFW, Inc., 472 F.3d

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[5] The NJFLA, regulations, and case law do not discuss in depth issues regarding the adequacy of notice for unforeseeable leave. In interpreting provisions of the NJFLA, courts have sought guidance from courts' interpretation of the statute's federal analog, the FMLA. See Wopert v. Abbott Labs, 817 F.Supp.2d 424, 437-38 (D.N.J. 2011).

471, 478 (7th Cir. 2006)), nor "formalistic or stringent," id. at 303 (citing Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398. 402 (3d Cir. 2007)), and that the "statutory and regulatory text suggests a liberal construction be given to FMLA's notice requirement." Id. at 303 (citing Sarnowski, supra, 510 F.3d at 402). The Third Circuit wrote, "The critical test is not whether the employee gave every necessary detail to determine if the FMLA applies, but how the information conveyed to the employer is reasonably interpreted." Id. at 303 (citing Sarnowski, supra, 510 F.3d at 402). Moreover, the Court wrote, "How the employee's notice is reasonably interpreted is generally a question of fact, not law." Ibid.

Likewise, in Zawadowicz v. CVS Corp., 99 F.Supp.2d 518 (D.N.J. 2000), the Court noted that generally, the sufficiency of notice is a matter for the fact-finder to determine. Id. at 529. There, plaintiff and his wife were employed by CVS and worked in the distribution system. Plaintiff had already "received several warnings concerning attendance problems" when, in October 1996, his pregnant wife suffered significant injuries to her back and neck during a workplace accident when she was struck by falling pallets. Id. at 521 & 522. Plaintiff was granted family leave on an intermittent basis to care for his wife and for unrelated reasons. He was required to call in each day that he planned to miss work and state the reason for his non-attendance. Plaintiff called or emailed his direct supervisor, James Lupinetti, whenever he planned to not show up. However, he did not always provide a reason but merely stated that he was taking "an unpaid day." Eventually, CVS terminated his employment for attendance and argued that merely announcing that he was not coming to work was "too vague and therefore insufficient to put it on notice that he was missing work for an FMLA reason, i.e., his wife's medical condition." Id. at 529. In denying the employer's motion for summary judgment, the Court reasoned, among other things, that a jury could reasonably conclude that the employer knew the purpose for the absences because plaintiff's supervisor "remained apprised of his wife's medical condition." Ibid. Judge Brotman wrote:

It is undisputed that plaintiff did not state the reason for his absences. . . . Sufficient

> evidence exists, however, from which a jury reasonably could conclude that CVS knew that plaintiff's post-January absences were due to his wife's condition. For instance, plaintiff typically reported his absences to James Lupinetti, a good friend of his. According to plaintiff, Mr. Lupinetti remained apprised of his wife's medical condition and even referred her to a certain physician . . . In addition, Chuck Martin requested that plaintiff "notify [him] personally or via Phone Mail (ext. 202) if he will be absent due to [his] wife's health condition." . . . At his deposition, Martin recalled that plaintiff indeed did telephone him on occasion when he missed work . . . Although Martin could not recall whether plaintiff stated the reason for his absence, it was Martin's understanding that plaintiff would contact him only if he was missing work in order to care for his wife.

[Id. at 529 (internal citations omitted).] It appears that the New Jersey federal district court, like Third Circuit Court of Appeals, construed the notice requirement liberally in favor of the employee.

Based on the above, the Director finds, for purposes of this disposition only, as follows. Complainant is an "employee" and Respondent is a covered "employer" for purposes of the NJFLA. The father's lung cancer and prognosis amounts to a "serious health condition" of an employee's family member, and the decision to terminate Complainant is an "adverse employment action" for purposes the statute.

Respondent does not challenge the characterization of the requested leave as protected activity. Nor does it challenge Complainant's entitlement to same. Rather, it appears to argue that Complainant was never on protected family leave because she never perfected her application. Respondent characterizes it as a failure to follow "required family leave protocol." See Respondent's Response to Information Request, Jul. 17, 2014. In particular, it argues that the Complainant did not timely submit a fully completed FL-1. Ibid. ("In this case, [the FL-1] **was given 11 days after Ms. Blair's absence**, and **9 days after we last heard from her.**") (boldface and underline original). However, the NJFLA does not require an employee to complete an FL-1 before family leave can begin. The FL-1 is submitted to an employer so an employee can file for family leave insurance benefits with the New Jersey Department of Labor. The Director finds that Complainant's verbal notice that she needed immediate family leave to tend to her terminally ill

father was sufficient for Respondent to ascertain whether the leave was potentially NJFLA-qualifying. Stated differently, Respondent asserts that it fired Complainant for taking family leave without first submitting the requisite FL-1. But the FL-1 was not required. And to the extent that Respondent seeks to unilaterally interject a strict FL-1 requirement into the process, the Director finds it to be unduly burdensome and contrary to the spirit of the statutory/regulatory scheme.

Respondent also argues that Complainant "did not adhere to [its] policy on communicating to managers." In particular, Respondent writes:

> **March 20th–no communication. March 21st–no communication. No emails or calls over the weekend of March 22nd–March 23rd. On March 24th I called and left her a message on her cell phone saying I still hadn't heard from her and it was important that she communicate with us or her job was at risk. On March 25th–no communication. On March 26th I called and left another message indicating her need to communicate. March 27th–no communication during the business day.** . . March 28th–email that Ms. Blair wrote at 10:27 pm the night before was received, apologizing for "not getting back to me sooner." **This was after 9 days of non-communication, a clear violation of our policy to communicate with management within 2 days of being absent with the understanding that after 2 days termination was possible.**
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> [Ibid. (boldface in original)]

Presumably, the above argument rests on Respondent's belief that Complainant was not on protected leave at the time because she had not yet submitted the FL-1 form. However, as set forth above, her verbal notices to Rosa (March 17 or 18) and Zeug (March 19) were sufficient to alert Respondent of her need to take leave. The Director finds that in this case, requiring Complainant to call into management daily during her protected leave--particularly if she is being asked to simply confirm what she twice told them--would impose a procedural requirement that would unnecessarily infringe on her rights under the NJFLA.

Respondent also argues that Complainant had a poor attendance record and that she exhausted all of her paid leave by March 17, 2014, when she advised the company that she was taking family leave. It also notes that Complainant was given written warnings for matters such as

sleeping on the floor and "borrowing cash . . . without prior approval." See Respondent's Response to Information Request. Because Complainant was qualified for family leave, her attendance and disciplinary record (which were not cited as a basis for her discharge in her termination letter) had no bearing on the decision in this case.

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. 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." N.J.A.C. 13:4-10.2. A finding of probable cause is not an adjudication on the merits, but merely an "initial culling-out process" whereby a preliminary determination is made that further action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). If the Director determines that probable cause exists, the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). If, on the other hand, the Director finds there is no probable cause, that finding is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

Here, there appears to be a fundamental misunderstanding by both parties as to how the NJFLA operates. It appears that Respondent believed that it needed to receive a fully completed FL-1 before the statutory and regulatory protections came into effect. But as set forth above, that is simply not the case. So although there is no evidence that Respondent harbored any sort of discriminatory animus toward Complainant, the weight of the evidence nevertheless supports a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that Respondent violated the NJFLA when it terminated Complainant's employment ten days after she commenced family leave to care for her dying father.

WHEREFORE, it is on this 29 day of Oct., 2014, determined and found that PROBABLE CAUSE exists to credit the allegations that Respondent violated the New Jersey Family Leave Act.

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS