STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. PG14HB-65199

D.F.,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF NO PROBABLE CAUSE**
	)	
PSE&G,	)	
	)	
Respondent.	)	

On March 24, 2015, Hunterdon County resident D.F. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Public Service Electric and Gas Company (PSE&G or Respondent) failed to reasonably accommodate her disability, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

In or about 1986, Complainant moved into her home in Whitehouse Station, New Jersey. In or around February 2006, Respondent, a public utility headquartered in Newark that provides gas and electricity to the public, installed a gas meter with an Encoder Receiver Transmitter (ERT meter) to the exterior of her home.

Complainant, who believes that she has a hypersensitivity to electromagnetic fields, told DCR that "[a]fter the RF [radio frequency] meter was installed," she began experiencing "health problems" inside her home, and her symptoms would dissipate when she left her home. See Verified Complaint, Mar. 24, 2015, ¶4. Complainant told DCR that those health problems include chronic fatigue, memory loss, and joint pain.

Complainant said that her family's health was adversely affected as well. She stated that her husband, who had been healthy, died suddenly of a heart attack in 2008, and that her children have assorted health issues (two are deaf, one has a shunt in his brain, one has a mechanical heart valve). She also stated that she lost six of twelve pregnancies.

She said that in 2013, she began asking Respondent to remove the ERT meter and re-install an analog meter. She stated that Respondent's refusal to do so "caused or exacerbated" her and her family's disabilities and, therefore, amounts to an unlawful failure to accommodate. Id., at ¶¶5 & 8.

She produced a letter from a New York board-certified infectious diseases physician, Susan Levine, M.D., recommending that the ERT meter be removed. She provided the note to Respondent at some point before November 2014. The letter states:

> I recently evaluated the above patient who has symptoms of daily profound weakness, fatigue, post-exertional malaise, cognitive deficits, including short term memory loss and diminished concentration and who meets the criteria for Chronic Fatigue Syndrome (CFS). She also suffers from Fibromyalgia for many years and is treated with analgesics by a pain management specialist.
>
> As a result of her compromised immune system I feel it is very dangerous for her to have an RF meter and I strongly urge you to remove it immediately as it will result in further deterioration of her current conditions.
>
> [See Letter from Susan Levine, M.D., to Whom it May Concern, Sept. 3, 2014.]

DCR hoped to speak with Dr. Levine for clarification as to whether she was claiming that Complainant had a disability and, if so, whether she was claiming that the ERT meter was directly connected to her disability. DCR contacted Dr. Levine, who asked the agency to submit any questions in written form. DCR sent the following message to her:

> Dr. Levine,
>
> As I explained when I called you today, my name is Lorraine LeSter and I am the manager of the Special Investigations Unit for the New Jersey Division on Civil Rights. One of your patients, [D.F.], signed a Medical Release authorizing me to obtain information form you in connection with her complaint against PSE&G. In that connection, I was hoping to obtain the following information form you:

1. How long have you been treating [D.F.]?

2. What medical conditions are you treating [D.F.] for?

3. In your medical opinion, did the Radio Frequency Gas Meter, which was placed on the outside of [D.F.]'s home, cause or exacerbate these conditions? If so, please explain.

4. Can you explain how the Radio Frequency Meter is interfering with her conditions?

5. Can you, with a reasonable degree of professional certainty, certify that [D.F.]'s medical conditions are a direct result of the Radio Frequency Meter, and/or that the meter is interfering with her conditions?

6. Are there any accommodations you can suggest, short of removing the Radio Frequency Meter, that would be appropriate for [D.F.]?

[See Email from Supervising Investigator Lorraine LeSter to Susan Levine, M.D., Aug. 7, 2015, 3:44 p.m.]

Dr. Levine replied, "I saw this patient one time and don't wish to comment any further." See Email from Dr. Levine to Supervising Investigator LeSter, Aug. 7, 2015, 7:41 p.m.

Complainant stated that one of her doctors, Dan Gutfinger, told Respondent that the meter was negatively impacting her daughter's mechanical heart valve. PSE&G told DCR that Complainant made the claim but attributed it to Dr. Gutfinger. PSE&G said that when it spoke to Dr. Gutfinger, he denied making any such statement. PSE&G claims that Dr. Gutfinger acknowledged that a mechanical heart valve has no electrical or electronic components and therefore could not be impacted by RF emissions. In an attempt to clarify which version of events was correct, DCR asked Complainant for permission to speak with Dr. Gutfinger. Complainant would not grant DCR permission to speak with Dr. Gutfinger about her daughtyer's medical condition.

At the request of Complainant and her friend, J.W.,[1] DCR interviewed Magda Havas, PhD, who is an environmental toxicologist. She told DCR that microwave radiation from smart

[1] J.W. is a neighbor who filed a similar complaint against PSE&G. See J.W. v. PSE&G, DCR Docket No. PG14HB-65090 (filed Jan. 21, 2015). J.W. alleged that she has a hypersensitivity to

meters, cordless phones, and WiFi devices are harmful to humans. She said that 1% to 5% of the population has a hypersensitivity to electromagnetism and cannot stay in their homes. She said that she is not a medical doctor and never examined Complainant or reviewed her medical records.

At the request of Complainant and J.W., DCR interviewed David Carpenter, M.D., who is a noted critic of smart meters and cellular phones. He stated that although smart meters do not exceed the current FCC guidelines, he believed that the guidelines were inadequate. He stated that he never examined Complainant or reviewed her medical records.

Complainant told DCR that even if Respondent were to remove the ERT meter, she would still be living in the "Bermuda Triangle" where her health would still be adversely affected by a nearby substation and power lines in her neighborhood.

Complainant told DCR that she had additional supporting medical documents that she did not want to share with DCR.[2]

Respondent argues that Complainant does not have a disability for purposes of the LAD. It claims that when Complainant first called in 2013, she was calling on behalf of J.W. Respondent stated that on September 15, 2014, Complainant reported that her meter was damaged and needed to be replaced. PSE&G states that during that conversation, Complainant stated that Dr. Gutfinger was the family's attending cardiologist who warned that her daughter's mechanical heart valve was being affected by RF waves.

On September 17, 2014, a PSE&G technician visited Complainant's home to examine the meter. He determined that it was working properly. Respondent argues that the meter is not causally related to her medical ailments or those of her family. It notes that the meter

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electromagnetism, and that PSE&G's refusal to remove her ERT meter amounted to disability discrimination. Ibid.

[2] Complainant showed the DCR investigator a letter from another doctor, but stated that she did not submit it to PSE&G and did not want the letter discussed because it contained confidential health information.

transmits a low-power signal and is much less powerful than a cellular telephone. It also claims that it contacted Dr. Gutfinger who refuted Complainant's version of events.

PSE&G argues that if it were to replace Complainant's ERT meter with an analog gas meter as she requests, then she would have the only analog gas meter in the service area. PSE&G argues that because analog gas meters must be visually read on-site by an employee, PSE&G would have to change its current territory-wide business model and create a route for a human meter reader to exclusively travel to her home and visually inspect her meter. PSE&G claims that the creation of that position and route, and their associated operational disruptions and costs, would impose an undue burden on its operation.

Analysis

The LAD makes it unlawful for a place of public accommodation to "refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof," based on a person's disability. N.J.S.A. 10:5-12(f).

A place of public accommodation must "make reasonable accommodations to the limitations of a patron . . . with a disability, including making such reasonable modifications in policies, practices or procedures, as may be required to afford . . . services . . . to a person with a disability, unless the . . . public accommodation demonstrates that making the accommodations would impose an undue burden on its operation." N.J.A.C. 13:13-4.11(a). The determination as to whether there has been a failure to make reasonable accommodations is made on a fact-sensitive, case-by-case basis. Ibid.

For a complainant to establish that she was denied an opportunity because of her disability, she must show that the "accommodations offered were not reasonable and that the accommodations demanded were *required* to afford the services sought." Wojtkowiak v. New Jersey Motor Vehicle Comm'n, 439 N.J. Super. 1, 14 (App. Div. 2015) (citing N.J.A.C. 13:13-4.11(a)) (emphasis added).

Even if the accommodation sought can be shown to be "required" from a medical standpoint, the LAD does not compel a business to fundamentally alter the nature of the services provided. Stated differently, modification is not required if the place of public accommodation demonstrates that making the accommodations would impose an "undue burden on its operation." Id. at 14-15 (citing N.J.A.C. 13:13-4.11(a) and Lasky v. Moorestown Twp., 425 N.J. Super. 530, 544-46 (App. Div.), certif. denied, 212 N.J. 198 (2012)). When determining whether an accommodation would impose an undue burden on the operation of a place of public accommodation, factors to be considered include the overall size of the entity, the nature and cost of the accommodation sought, and whether the accommodation sought will result in a fundamental alteration to the goods, services, program or activity offered. Id. at 15 (citing N.J.A.C. 13:13-4.11(b)(1)-(3)).

In Wojtkowiak, supra, the Court held that in the absence of sufficient expert medical evidence, a complainant "cannot show that . . . the accommodations she demanded were required." Id. at 15. In that case, the complainant sought an accommodation of not having to drive to the Motor Vehicle Commission, which was more than five miles from her home, based in part on a doctor's note that stated:

> Robin Wojtkowiak is a 46 year old woman who is well known to our practice, having been our patient since 1998.
>
> Robin has a longstanding history of agoraphobia and gets uncomfortable and anxious when out of her comfort zone. However, she is slowly progressing with exposure and desensitization techniques, and I am very hopeful for the future.
>
> I understand there is a question of her ability to drive. There is nothing medically to contraindicate her driving, and she tells me that she is totally able to drive comfortably within her safety zone of five miles from her home. She tells me she drives everyday to stores, restaurants, gym, etc.
>
> Therefore, I do believe that Robin is physically and mentally able to handle the responsibilities of driving short distances alone. If I can be of any further assistance to you regarding this patient's medical condition, please do not hesitate to contact my office.
>
> [Id. at 10.]

The Court found that the doctor's note was too vague to prove that the requested accommodation was required. The Court noted that a specific and unequivocal medical note is "crucial in considering the reasonableness of the accommodations offered and demanded," and that in Ms. Wojtkowiak's case the evidence was "less than definitive" to support her assertion that the accommodation was necessary. Id. at 18. In finding that the doctor's note did not clearly state that the accommodation was necessary, the Court noted, "Even if it could be argued that such a conclusion was implicit in the letter, we see no reason why, if that were the doctor's opinions, he could not have simply said so in unequivocal language." Id. at 17 (quoting Heitzman v. Monmouth Cnty., 321 N.J. Super. 133, 141 (App. Div. 1999)).

In Heitzman, supra, 321 N.J. Super. 133, the court affirmed a summary judgment dismissing a disability discrimination claim brought under the LAD. There, an employee alleged that he was demoted because he suffered from a hypersensitivity to second-hand cigarette smoke. At issue was the sufficiency of the letter from the doctor, which stated:

> Thirty-six year old Mr. Heitzman was seen for complaints of cigarette smoke related symptoms. He is quite sensitive to smoke exposure which causes difficulty breathing, coughing, sore throat, nasal irritation and frequent ear infections. Unfortunately he has had to work closely with smokers at various positions at the Monmouth County Reclamation Center despite a no smoking policy. I would strongly recommend that Mr. Heitzman be allowed to work away from smokers even if it means he be transferred to another county agency.
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> [Id. at 141.]

In finding that the doctor's note fell "far short of the kind of expert medical opinion required to support a handicap discrimination claim," the Court identified a number of deficiencies:

> [T]he letter does not assert that plaintiff's sensitivity to second-hand smoke is "caused by bodily injury, birth defect or illness." It does not assert, for example, that plaintiff suffers from asthma, emphysema or any other pulmonary disease which could make a person especially sensitive to smoke . . . In addition, the doctor's conclusions rest entirely on plaintiff's subjective "complaints of cigarette smoke related symptoms." The letter does not refer to any tests or examinations which showed the existence of a pulmonary condition or allergy that would provide a medical explanation for plaintiff's complaints.

[Ibid.]

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person" to believe that the LAD was violated. Ibid. If the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if the Director finds there is no probable cause, then the finding is deemed 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(e); R. 2:2-3(a)(2).

For purposes of this disposition only, DCR will proceed under the assumption that PSE&G is a place of public accommodation,[3] that DCR has jurisdiction to reach a determination in this matter,[4] and that Complainant is a person with disabilities for purposes of the LAD.

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[3] The LAD defines the term, "place of public accommodation," as follows:

> "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other

It is undisputed that Complainant requested an accommodation from PSE&G, i.e., replacement of the ERT meter. As in Wojtkowiak, the issue becomes whether the expert evidence supports Complainant's claim that the requested accommodation was medically "required." The expert medical evidence in this case appears to be similar to that found to be insufficient in Wojtkowiak and Heitzman.

DCR hoped to interview Drs. Levine and Gutfinger for clarification as to whether they were claiming that the requested accommodation was required for medical purposes. Dr. Levine appeared to be unwilling to affirmatively state to DCR that Complainant's health problems were caused by the ERT meter. Complainant would not authorize DCR to speak with Dr. Gutfinger.

Like the doctor's note that the Court found to be fatally flawed in Heitzman, the comments in Dr. Levine's letter appeared to rest entirely on Complainant's subjective complaints and observations. As in Heitzman, Dr. Levine's letter does not refer to any tests or clinical examinations that showed the existence of electromagnetic hypersensitivity that would provide a medical explanation for Complainant's reported complaints. And whereas the doctor in Wojtkowiak had a long-standing relationship with the patient, there was no such evidence in this case. When asked to elaborate on what she wrote in the letter, Dr. Levine told DCR, "I saw this patient one time and don't wish to comment any further." See Email from Levine to LeSter, supra, Aug. 7, 2015, 7:41 p.m.

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than race, creed, color, national origin, ancestry, gender identity or expression or affectional or sexual orientation in the admission of students.

[N.J.S.A. 10:5-5(l).]

[4] PSE&G contends that DCR lacks subject matter jurisdiction over this case and/or should transfer the matter to New Jersey Board of Public Utilities (BPU) under a theory of primary jurisdiction. PSE&G cites Glen View Develop. Co. v. PSE&G, 57 N.J. 34 (1970) and Dalleman v. Elizabethtown Gas Co. 77 N.J. 267, 269 n.1 (1978) and Hackensack v. Winner, 82 N.J. 1, 83 (1980), in support of its jurisdictional arguments.

Complainant provided no medical evidence showing a causal connection between the meter and her husband's death and children's health issues. It is unclear whether Complainant was alleging that the issues related to her pregnancies were attributable to the meter, or if those reproductive issues occurred after the meter was installed in 2006.

Although DCR has no doubt that Complainant genuinely believes that her ailments and those of her family are directly caused by PSE&G's refusal to replace her gas meter, those subjective beliefs—in the absence of evidence from a treating medical provider that meets the Wojtkowiak standard—are simply not enough for DCR to find that PSE&G acted illegally.[5]

In view of the above, DCR finds that the investigation did not corroborate Complainant's allegations of an unlawful failure to accommodate under the LAD. In reaching that conclusion, DCR by no means intends to preclude the possibility that persons who suffer from a hypersensitivity to electromagnetism may under other circumstances be entitled to disability accommodations related to devices that emit RF waves. Nor does the Director make any findings regarding the potential health risks associated with radiofrequency electromagnetic fields. The conclusion is based upon the specific record in this matter, which does not support Complainant's allegations that Respondent discriminated against her based on disability by failing to provide her with a reasonable accommodation. Accordingly, this case will be closed NO PROBABLE CAUSE.

DATE: 10-23-15

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

[5] Complainant appears to state that replacing the ERT meter would not be an effective accommodation. She told DCR that she and her family are afflicted with a hypersensitivity to electromagnetism and that even if the ERT meter were removed, their health would still be adversely affected by a nearby substation and power lines. She said, "Even if they remove the meter . . . we're still at square one." DCR notes that a general matter, a respondent cannot be under a legal obligation to provide an accommodation that a complainant claims would be ineffective.