STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN16WB-64255

Stephanie Regina,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Wedgwood Gardens Care Center, LLC,	)	
	)	
Respondent.	)	

On November 26, 2013, Ocean County resident Stephanie Regina (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Wedgwood Gardens Care Center, LLC (Respondent), violated the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1, et seq., by refusing to reinstate her after she took time off to bond with her newborn, and violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by paying her less than her co-workers based on religion. The DCR investigation found as follows.[1]

Summary of Investigation

Respondent is a skilled nursing and rehabilitation facility in Freehold. On or about March 2, 2012, it hired Complainant to work as an activity assistant.[2]

On June 14, 2013, Complainant began maternity disability leave. At the time, Complainant's direct supervisor was Acting Activities Director Krista Fischer.

Complainant's doctor estimated that she would give birth on July 11, 2013. However, her son was born prematurely on June 17, 2013. After Complainant's post-partum disability ended, she applied for Family Leave Insurance benefits through the New Jersey Department of Labor. She originally intended to return to work in September. But because her baby was premature, she decided to take additional bonding leave under the FLA, and informed Director of Resident Accounts Madeline Mullins that she would be extending her leave to October 15.

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[1] The DCR investigation was delayed because this case was directed to DCR's early stage mediation program.

[2] In some documents and interviews, the position is sometimes identified as "activity aide." Because the job description refers to the position as activity assistant, DCR will use that title in this decision.

On July 8, 2013, Jayson Lotano took over as Director of Respondent's Department of Recreation and Volunteer Services, and became Complainant's supervisor.

Complainant told DCR that in or around mid-July 2013, she brought her baby into the office to visit her coworkers. She said that she was introduced to Lotano, and they briefly discussed her return to work.

In August or September 2013, Complainant went to the facility to discuss her return to work with Lotano in more detail. She told Lotano that she wanted to come in a little earlier and leave a little earlier to accommodate her childcare schedule, and proposed that she could fill in as the early morning receptionist. Complainant told DCR that Lotano agreed that she could work a modified schedule three days a week, i.e., working as receptionist from 8 a.m. to 9 a.m., and then in the Activities Department from 9 a.m. to 4 p.m. They agreed that she would return to work on October 15, 2013, she would work from 9 a.m. to 5 p.m. the first day, and that Assistant Activities Director Olivia Biggs-McKay would send the rest of the schedule to Complainant. She received the schedule by text message, showing that she would work 9 a.m. to 5 p.m. on Mondays and Fridays, and 8 a.m. to 4 p.m. on Tuesdays, Wednesdays, and Thursdays. Complainant did not retain a copy of that text message, but telephone records show that Complainant received a "picture" message from Biggs-McKay on September 23, 2013, at 9:59 a.m.

Complainant told DCR that when she called Lotano on October 14, to confirm her return to work the next day, he mentioned something about per diem work and told her that she needed to speak with Respondent's Administrator, Robert Kaszirer, about returning to work.

On October 14, 2013, Complainant sent the following text message to Lotano:

> Hey Jason, its stephanie Mr. Kaszirer didn't answer I left a message and tried calling you back but no answer as well you told me this morning that you guys wanted me to work perdium but was gonna talk to Mr. K about it . . . I need to know what's exactly going on. . . I'm just really confused because this Past month you told me that my schedule was good to work three days 9-4 and the rest I can do 9-5 and you said that was okay Olivia even sent me the schedule confirming it and the day before I'm supposed to return work everything has become discombulated and I'm extremely confused and concered due to the fact I have a child i need to support if you can let know by today that'd be terrific thank for you time hope to here from you asap.
>
> [*sic* throughout; ellipses in original.]

Lotano replied the same day, "Stephanie please try to call mr k again thank you."

On November 5, 2013, Complainant had the following text message exchange with Lotano:

Complainant:	Hey Jason it's Stephanie I still haven't heard from any of you I gave you guys a month to get back to me am I terminated or not I really need to know I have a four month old child to care for so please Get back to me asap.
Lotano:	Im sorry but you have to talk to mr k and he is away this week
Complainant:	But you're the boss Why is it always Mr. k I need to speak with. your the one who hires and fires people so let me know cause Mr. k never gets back to anyone and its already been a month Idk why you told me not to come in on the 15th of october if I did I could of found out if he didn't want me cause he would of then just sent me home this is ridiculous already how would you feel with a new born baby and no income you'd want answers too.
Lotano:	I understand what your saying unfortunately mr k said that he will be handling it

[*sic* throughout.]

On November 7, 2013, Complainant wrote a letter to Kaszirer noting, among other things, that she was hoping to return to work but that he appeared unwilling to communicate with her. She wrote in part:

> I recently had a child and was released on maternity leave. Due to an early birth I was unable to return at the end of my leave, so I opted to take additional time on the Family Leave Act to bond with my baby. I have been trying to contact u for several weeks and have spoken to several other employees including Jason, the Activity Director . . . whom all informed me you would be handling this situation

> personally. Since I have yet to hear from you, messages unanswered I have decided to settle with writing to you.
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> I am inquiring as to what your position stands as to my employment with your company. . . . I would appreciate a timely response as enough time has passed without any answers and will need to make arrangements upon my return to work.

Complainant told DCR that she received no response to her November 7, 2013 letter.

Respondent submitted a signed statement from Lotano. He wrote in part:

> Upon starting my position [Complainant] was out on maternity leave to my knowledge, and we spoke a couple of times about her coming back. She said that she could only work 7am-3pm on a daily basis, due to having to pick up her child. Mr. K said that the recreation aides come in at 9:00am, and offered her a position in housekeeping/laundry, to which she declined.

Lotano told DCR that he and Kaszirer met with Complainant to discuss her return to work, but he could not remember when that meeting occurred. He stated that Complainant told them that she wanted to return to work, but had restricted hours because she needed to pick up her child at daycare. He said that they offered her a housekeeping position from 7 a.m. to 3 p.m., but she declined. Lotano said that at the end of the meeting, the 9 a.m. to 5 p.m. activity assistant position was still open. Lotano told DCR that he was uncertain if Complainant said that she would call them back about that position.

DCR interviewed Kaszirer, who also said that he and Lotano met with Complainant to discuss her return to work, but he was not sure when that meeting occurred. He said that he suggested the meeting because Lotano told him there were some problems with Complainant's schedule. He said that Complainant called several times before he set up the meeting. Kaszirer stated that at the meeting, Complainant said that she could work only 7 a.m. to 3 p.m., and the dayshift activity assistants work 9 a.m. to 5 p.m. He said that he offered her a housekeeping position and agreed to keep her at her former pay rate even though the housekeeping position normally pays less. Kaszirer told DCR that Complainant rejected the housekeeping position, and he offered to keep her on the per diem list, which meant that they would call her for any open shifts. Kaszirer said that Complainant rejected the per diem option as well.

Complainant maintains that she never met with Kaszirer after she began her maternity leave. She stated that during her meeting with Lotano, Assistant Activities Director Biggs-McKay came in and out of the room but no one else was present. She said that Respondent never offered her a housekeeping position, and if they had offered her that option, she would have accepted it. She stated that before she went on maternity leave, she had often helped out in housekeeping.

DCR interviewed Complainant's former direct supervisor, Krista Fischer, who was no longer working for Respondent at the time of the interview. Fischer stated that shortly before Complainant's scheduled return to work, Lotano met with Complainant and everything was set for her return. Fischer stated the day before Complainant's return date, management announced that the position was no longer open. Fischer said that she did not understand why, as they were short-staffed, but that when she asked for an explanation, she was told only that it was Kaszirer's decision.

Respondent's employee handbook includes policies on medical leave and family leave.[3] For medical leave, the handbook provides in part:

> Eligible employees are normally granted leave for the period of the disability, up to a maximum of 12 weeks within any [*sic*] month period. Any combination of medical leave and family leave may not exceed this maximum limit. If the initial period of approved absence proves insufficient, consideration will be given to a request for an extension.

For family leave, the handbook provides in part:

> Eligible employees may request up to a maximum of 12 weeks of family leave within any 12-month period. Any combination of family leave and medical leave may not exceed this maximum limit. If this initial period of absence proves insufficient, consideration will be given to a written request for a single extension of no more than 60 calendar days. . . .
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> [A]n employee on family leave is requested to provide Wedgwood Gardens care center with at least two weeks advance notice of the date the employee intends to return to work. When a family leave ends, the employee will be reinstated to the same position, if it is available, or to an equivalent position for which the employee is qualified.

Complainant contends that she lost her job because she took maternity leave and that Respondent's refusal to reinstate her amounts to a violation of the NJFLA.

Complainant also alleges wage discrimination. When Complainant was hired in March 2012, she was paid $11 per hour. At the end of December 2012, her hourly wage was increased to $11.50 per hour. Complainant, who is Catholic, alleges that because Respondent's owners are Orthodox Jewish, they pay Orthodox Jewish employees higher wages than other employees.

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[3] As described later in this disposition, some aspects of Respondent's family leave policy do not comport with the NJFLA, which permits an otherwise eligible employee to take twelve weeks of leave to bond with a newly born child in addition to any time off for the employee's own medical disability. Other aspects of Respondent's policies are not addressed here because they are not relevant to Complainant's situation. DCR will address those policies with Respondent separately.

Specifically, Complainant alleges that Tziporah Schreiber and Brandel Steinnetz, who are both Orthodox Jewish, were paid a higher hourly wage than she received for substantially equal work.

In its position statement, counsel for Respondent acknowledged that Schreiber and Steinnetz were paid more, but asserted that there were non-discriminatory reasons for the wage differences. Counsel asserted that Schreiber was initially hired as an activity assistant, and was paid $12.50 per hour instead of $11.50 an hour because she opted to waive paid time off (PTO) in exchange for an additional $1 per hour, and that this was consistent with the union contract.

Article 9, Section 2 of the union contract states in pertinent part: "Any employee . . . waiving either PTO or MEDICAL benefits shall receive seventy–five ($75.00) per pay period."

Director of Resident Accounts Madeline Mullins told DCR that payroll was one of her duties. Mullins told DCR that she could not recall which employees waived paid time off, but for employees who did so, the payroll records would show a lump sum of $75 per pay period, rather than an increased hourly rate.

Payroll records for Schreiber show that in her final pay period, ending on December 12, 2013, she was paid $485.88 for 38.87 hours, marked with a "T." In response to a question from DCR during the investigation, counsel for Respondent wrote that a "T" designates paid time off. When asked to explain the codes on the payroll records provided by Respondent, Mullins confirmed that the letter "T" after a number indicates that the hours or dollar amount is paid time off. Thus, it appears that in her final paycheck, Schreiber received payment for accrued paid time off.

Respondent provided an Employee Status Change form indicating that on September 16, 2013, Schreiber was transferred from the Activities Department to the Admissions Department. A handwritten notation on that form states, "Tziporah will be working Admissions & filling in for Activities 2x a week to cover days off." In the position statement, counsel asserted that after the transfer, Schreiber served as a "Concierge/Resident Ambassador (similar to an Admissions Assistant position)" and contended that it was "was not comparable to" Complainant's activity assistant position.

Respondent produced a November 29, 2012 Employee Status Change form for Steinnetz, showing that effective December 3, 2012, as a new hire, she was placed in a Recreation/Admission Assistant position. In the position statement, counsel asserted that Steinnetz "was also originally hired as an Activity Aide but she was quickly transferred into the Admissions Department as a Concierge/Resident Ambassador, for which she was paid $14.00/hour." Payroll records provided by Respondent show that Steinnetz was paid $14 per hour beginning with her first paycheck, which was for the pay period ending on November 24, 2012.

Krista Fischer told DCR that when she was first hired, she was an activity assistant at $10.50 an hour, and when she became the Acting Activities Director, she was paid $14 an hour. Fischer said that she remembered working with Schreiber and Steinnetz, and said that both of them were activity assistants the entire time they worked there. DCR asked Fischer how the concierge/resident ambassador position differed from the activity assistant. She said that the person in that position would report to her, and when that person was out, the activity assistants would cover that desk. She said that sometimes Complainant took over, and sometimes it was Schreiber.

Fischer stated that when she was earning $14 an hour as Acting Activities Director, Steinnetz was hired at the same rate to do activity assistant work. Fischer told DCR that when she asked why Steinnetz was being paid so much, she was told that it was because of her work experience. When DCR asked Fischer if she believed that was accurate, Fischer said that she believes that management might have paid Steinnetz more because she and the owners are members of the same religion. In response to DCR's request for the pay history and creed of all activity assistants employed from 2012 to 2015, Respondent provided information for twenty activity assistants, showing hourly wages ranging from $11 to $12 per hour. Respondent asserted that it did not have any information regarding the religion of its employees.

Analysis

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." See N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD or the FLA] has been violated." Ibid. If the Director finds there is no probable cause, then that determination 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(e); R. 2:2-3(a)(2).

However, if the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. See N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

a. NJFLA

The NJFLA, enacted in 1989, established an employee's right to take leave for certain family-related reasons, without risk of termination of employment or retaliation. 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." N.J.S.A. 34:11B-2; 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 work place.")

The NJFLA entitles an eligible employee[4] to twelve weeks of family leave in any 24-month period upon notice to the employer[5] for specified reasons, including caring for the employee's newborn child, where the leave begins within a year of the child's birth. N.J.S.A. 34:11B-4; N.J.A.C. 13:14- 1.5. 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. DCR's investigation found that Complainant was eligible for job-protected leave under the FLA because she had worked at least 1000 hours during the 12-month period prior to taking leave, and Respondent was a covered employer.

Because the NJFLA does not provide leave for the employee's own disability, it does not run concurrently with the leave taken under the federal Family and Medical Leave Act for periods in which a woman is unable to work due to pregnancy or recovery from childbirth. N.J.A.C. 13:14-1.6. Thus, Complainant was entitled to take a full twelve weeks of job-protected leave after the birth of her child under the NJFLA.

Here, Complainant and Respondent provided conflicting versions of events regarding Complainant's request for reinstatement after taking NJFLA leave. Lotano and Kaszirer contend that they met with Complainant and offered her either her old job working from 9 a.m. to 5 p.m., or a housekeeping position working from 7 a.m. to 3 p.m. to accommodate her childcare schedule.

Complainant, on the other hand, alleges that Respondent refused to reinstate her after she took leave under the NJFLA. She asserts that she initially made arrangements with Lotano to return to work, but Lotano then revoked that offer. She maintains that she never met with Kaszirer after she began her maternity leave, and that he never responded to her communications.

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[4] 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 twelve months or more and has worked 1,000 or more base hours during the preceding twelve month period. N.J.A.C. 13:14-1.2.

[5] 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 work weeks in the then current or immediately preceding calendar year." Ibid.

Complainant produced copies of text messages that support her claim that she was attempting to return to work, that she believed she had made arrangements to do so, and that at the last minute, she was refused reinstatement. Phone records also provide some corroboration for her contention that she received a schedule via text message after meeting with Lotano and Biggs-McKay. Corroboration also came from Fischer, who told DCR that everything was set for Complainant to return to work, but that the day before her return date, she was told that Kaszirer had decided not to allow Complainant to return.

At this threshold stage of the administrative process, the Director is satisfied that there is sufficient evidence to support a reasonable suspicion that Respondent refused to reinstate Complainant after she took job-protected NJFLA leave, and that this matter should proceed to an administrative hearing where each party will have an opportunity to present witnesses and other evidence, and an administrative law judge will be charged with making credibility determinations where necessary to resolve factual disputes.

b. Wage Discrimination

The LAD prohibits wage discrimination and other forms of differential treatment based on creed or religion. N.J.S.A. 10:5-12(a). Here, the investigation found that Complainant's Orthodox Jewish comparators were hired at $12.50 and $14 per hour, while Complainant was hired at $11 per hour, and after receiving a raise, earned $11.50 per hour.

Respondent contends that there were legitimate non-discriminatory business reasons for the wage disparities. However, the investigation found evidence contradicting those explanations. For instance, Respondent alleged that Schreiber received an additional $1 per hour because she waived paid time off. However, Respondent's payroll records showed that Schreiber received a payment for unused leave time when she resigned. And Mullins told DCR that employees who waived paid time off received a lump sum payment—not an increase in their hourly wage. Mullins' assertion appeared to be consistent with the union contract.

Respondent contends that Steinnetz was not in the same position as Complainant because she was hired as an activity assistant but quickly transferred into a concierge/resident ambassador position. Complainant argues that they both performed concierge/ambassador work. Complainant's position was supported by her former supervisor, Fischer, who told DCR that Complainant and Steinnetz performed the same work. Fischer told DCR that although she was supervising Steinnetz, she and Steinnetz were paid the same amount. Fischer believed that Steinnetz might have been paid a higher wage because, unlike Fischer, she and Respondent's owners share the same religion.

In a case alleging wage discrimination, the employer bears the burden of articulating a legitimate, non-discriminatory reason for the wage disparities. See, e.g., Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 272-73 (App. Div. 1996); Hutchins v. UPS, 2005 U.S. Dist. LEXIS 15624 (D.N.J. 2005). If the employer does so, the employee must present evidence

demonstrating that the articulated reasons were not the employer's true reasons, but were instead a pretext designed to mask a discriminatory motive. Fuentes v. Perskie, 32 F. 3d 759, 763-64 (3rd Cir. 1994). To prevail, the employee "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions" in the employer's explanations that would permit a rational factfinder to find them "unworthy of credence." Id. at 765.

Here, the employer articulated non-discriminatory explanations for its decision to pay the employees different wages. But the investigation found sufficient evidence contradicting those explanations and thus supporting a reasonable suspicion that the explanations were a pretext designed to mask a discriminatory animus. Accordingly, at this threshold stage of the administrative process, the Director is satisfied that this matter should proceed to an administrative hearing where each party will have an opportunity to present witnesses and other evidence, and an administrative law judge will be charged with making credibility determinations where necessary to resolve factual disputes.

Conclusion

Based on the investigation, the Director is satisfied that this matter should "proceed to the next step on the road to an adjudication on the merits," Frank, supra, 228 N.J. Super. at 56, rather than be dismissed with prejudice, on the allegations that Respondent violated the NJFLA and LAD.

DATE: 6-8-18

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS