STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EA02WB-66096

Luis D. Sanchez, Complainant, v. TJM Atlantic City Management LLC d/b/a The Claridge Hotel, Respondent.	)	Administrative Action **PARTIAL FINDING OF PROBABLE CAUSE**

On September 6, 2016, Atlantic County resident Luis D. Sanchez (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, TJM Atlantic City Management LLC d/b/a The Claridge Hotel (Respondent), unfairly disciplined him because of his national origin and denied his request for a reasonable disability accommodation, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. For the reasons set forth below, the DCR investigation did not substantiate the allegations of national origin discrimination, but found probable cause as to the failure to accommodate claim.

Summary of Investigation

Respondent is a Florida corporation that owns and operates the Claridge Hotel located at Park Place & Boardwalk in Atlantic City, New Jersey. On or about February 26, 2016, it hired Complainant to work as a full-time Maintenance Mechanic for $15/hour.

On July 12, 2016, Managers John Speed and Fred Cooper issued a written reprimand to Complainant for leaving a bathroom in disrepair. The written reprimand said, "[C.R.] Merkle found bathroom in this condition (See attached photos) . . . Clogged Toilet, Maintenance Mechanic called to repair, left bathroom in this condition. Not acceptable."

Complainant alleged that on August 5, 2016, Regional Human Resources (HR) Manager Carrie Weeks suspended him "after accusing him of making copies of a master key and of clocking in and going home." See Verified Complaint, p. 2.

On August 11, 2016, Weeks verbally admonished Complainant for driving too fast in the parking garage and playing his car music too loudly. Complainant alleged that during that verbal admonishment, Weeks "told him that she did not like Hispanic or Black people." Ibid.

On August 25, 2016, Manager Mina Souras drafted a written reprimand to Complainant for being late to work twice that week (by a half hour and 2.75 hours) and the parking lot incident ("Carrie from HR witnessed you driving at a high rate of speed and blasting [your] stereo. Met you at the Time Clock to discuss further and advised that can never happen again when traveling in the Garage.").

On August 26, 2016, Souras noted on the written reprimand that Complainant notified his supervisor via text message at 3 p.m. that he would not be coming in for his 3 p.m. to 11 p.m. shift.

On August 27, 2016, Manager John Speed sent an email to Souras reporting that Complainant "disappeared for a few hours and could not be reached" and did not complete work to three bathrooms as directed.

On August 30, 2016, Complainant told Weeks that he had been hospitalized for an ulcer. He requested eleven days off to undergo tests related to that condition. He submitted a doctor's note from Barry D. Glasser, M.D., recommending that he be excused from work from August 31, 2016, to September 11, 2016. Weeks denied his request and told him to resign or be discharged because he was not entitled to FMLA since he had not worked there a full year.

On August 31, 2016, Complainant did not report to work. He was listed as "no call/no show."

On September 1, 2016, Complainant did not report to work. He was listed as "no call/no show."

On September 2, 2016, Respondent received a letter from Complainant reiterating his request for time off from August 31, 2016 to September 11, 2016. That day, Weeks wrote to Complainant stating that he was deemed to have voluntarily resigned "with eligibility for rehire." She wrote in part:

> As you know, you presented a doctor's note requesting medical leave from August 31, 2016 to an estimated return date of September 11, 2016. Unfortunately, your absences do not qualify as an absence protected by the FMLA (Federal Medical Leave Act) because you have not been employed with the company for (1) year and worked 1250 hours in the twelve preceding months. Therefore, we must deny your request and separate your employment effective, August 31, 2016. Your status will reflect voluntary resignation with eligibility for rehire.
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> [See Letter from Weeks to Complainant, Re: Request for Medical Leave, Sept. 2, 2016.]

Complainant alleges that Respondent could have accommodated his request for unpaid leave without incurring an undue hardship, but instead directed him to resign or be discharged. Complainant alleges that he was treated in that manner because of his national origin. He contends that the above amounts to national origin and disability discrimination.

Respondent denied the allegations of national origin and disability discrimination in their entirety. It said that within months after he began working, Complainant "began to have significant work performance and attendance problems." See Doc. & Info. Request, Sep. 11, 2016, p. 1. The suspicion that he made an unauthorized copy of a hotel master key arose from an investigation of theft from a guest room. Respondent said that its internal investigation found that Complainant was one of two employees who entered the room on the day of the theft. Id. at 2. It argued that Complainant was disciplined for attendance issues and because he was speeding in the parking garage and blasting his radio, and discharged for failing to show up for his shifts on August 31, 2016 and September 1, 2016 without proper notice. It asserted that the discharge was in accordance with the attendance policy, which states in pertinent part: "Two no-call/no-shows within a twelve-month rolling period will be grounds for automatic termination." See Claridge Hotel, Team Member Handbook, p. 14. Respondent argued that the suspension, written reprimand, and discharge were performance-based and unrelated to Complainant's national origin.

Respondent denied failing to provide a reasonable accommodation for Complainant's disability. It stated that Complainant told Weeks through a translator that he had an ulcer and needed six weeks off. It said that Weeks told Complainant that if he needed that much time off, he could resign and be eligible for rehire when he was ready to return to work.

Respondent argued that it never had the opportunity to determine if Complainant's condition qualified as a disability because he did not supply adequate medical information. It claimed that he only showed them two doctor's notes and neither contained a diagnosis. Respondent argued:

> To date, Respondent has no information regarding Complainant's condition which would enable it to make a determination as to whether the condition is one which has a physical or mental impairment that substantially limits one or more major life activities. Complainant's sole offer of proof was two doctor's notes, neither of which contained a diagnosis, and his own statement that he has an ulcer. Respondent is not required to make an accommodation for a minor condition or without a doctor's confirmation of a qualifying condition.

See Response to Document & Information Requests, "Disability Questionnaire," undated, p. 1. Respondent argued that under the circumstances, Complainant "was not eligible for leave under the FMLA and Respondent had no obligation under the FMLA to grant him the time off or to engage in an interactive process with him." Ibid.

Respondent argued, "Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." See "Respondent's Written Explanatory Answer to the Verified Complaint," undated, p. 4 (citing 29 CFR 825.113(d) (defining "serious health condition" for purposes of the FMLA)). It argued:

> While the standards for determining an ADA disability case may be different than the one used to determine a disability under the FMLA, the Gidden [v. UPS Supply Chain Solutions, No. 11-616 NLH/JS (D. Del.)]'s court highlights the fact that minor ulcers have been recognized as common conditions which are not necessarily serious health conditions or ones that must automatically be considered a disability.
>
> [Ibid.]

Respondent also argued that allowing Complainant to take six weeks off would have imposed an undue hardship on its operations. See Explanatory Answer, supra, at p. 4. It wrote:

> Further, although perhaps clumsy, Ms. Weeks' statement to Complainant that the company could not grant him a six (6) week leave was correct under both the FMLA and ADA. Respondent is a small company and it operates with minimum staff, despite this, it must operate on a 24/7 basis. To have a team member, from one of its smallest departments out for that long would cause Respondent to incur large amounts of overtime expense and would push the remaining department members to the breaking point. This would be a hardship to Respondent and its team members. It is important to note, that the conversation between the parties was never intended to end at the close of the August 30, 2016 meeting. Complainant informed Respondent he was going back to talk to his doctor. Respondent reasonably believed at that point that it would be presented with further information on which it could make its decision.

Ibid. In that answer, counsel for Respondent told DCR that it replaced Complainant with a new employee on September 12, 2016.

Weeks denied the allegations of discrimination too. She told DCR that she served as the HR Manager from June 18, 2016 to November 11, 2016. She denied targeting Complainant for adverse treatment based on his national origin. She stated that she did not even know he was Dominican. She denied disliking Hispanics, expressing that sentiment, or discriminating against any employees based on their national origin.

She stated that the decision to suspend Complainant was made by his former supervisor, John Speed, who reported that Complainant may have secretly made an extra copy of a hotel

master key. She stated that she merely conducted the investigation on behalf of HR. She said that she brought Complainant back into the workplace because she could not corroborate the allegation. She denied that Complainant was discharged because of his national origin. She stated that he was discharged for consecutive no-call/no-shows.

Weeks also denied the failure to accommodate allegation. She stated that Complainant gave her a note requesting time off with no additional details. She stated that given the lack of information, she could not determine whether his condition amounted a disability for purposes of the American with Disabilities Act (ADA). She claimed that she sent a packet to him requesting additional information but neither she nor Respondent produced evidence of same. She stated he may have requested one month off but she could not recall. She said that after she told him he was not eligible for FMLA leave, he left her office with his doctor's note. Weeks stated that Hotel Controller Gloria Santos translated the conversation.

Weeks said that no one was hired to replace Complainant after he stopped working. DCR asked Weeks if accommodating Complainant's request for leave would have amounted to an undue hardship for Respondent. Weeks replied that they did not have enough information and she could not recall if the department was short staffed. Weeks was asked about her knowledge of reasonable accommodations under the LAD. She replied that an employer must determine if the employee can perform the essential functions of the job, it is based on business needs and is discretionary upon the company. Respondent produced a written narrative from Weeks in which she wrote in pertinent part:

> Luis mentioned something about having an ulcer. I advised Gloria [Santos] to tell him that he could resign for medical reasons and when he was fit for duty, he would be eligible for rehire. Luis mentioned something about Disability and I told Gloria, he is eligible for Short Disability through the state, but his position is not protected because he is not eligible for FMLA. He took the note back and Gloria advised me that he would go back to the doctor. The 2 of them (Luis and Gloria) were speaking in Spanish, so I was not able to understand what was being discussed. On September 2nd, I sent a letter to Luis' home acknowledging the note and advising him that he was not eligible for a leave of absence.
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> On September 2, 2016 I received a letter from Luis notarized by someone that I violated his Civil Rights attached with a Medical One doctor's note putting [out] until September 11th. ([T]**his was not the original note that was brought in on or about August 30th**). In the meantime, Luis was not calling out of work and accumulated 2+ nc/ns (no calls/no shows) therefore he is in direct violation of the attendance policy and we were separating his employment.
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> [See Memo from C. Weeks, Sept. 26, 2016 (boldface in original)]

Former Controller Gloria Santos told DCR that she recalled serving as an English-Spanish translator when Complainant presented a doctor's note to Weeks and asked for time off. Santos stated that she did not see the note but recalled Weeks stating that Complainant was requesting about one month off. Santos recalled Weeks telling him that he did not qualify for FMLA and that he could resign and be rehired. She said that Weeks did not ask for a more detailed note or additional information, but simply said she could not approve his request for medical leave. She said Complainant replied that he did not want to quit and that he would go back to his doctor to see if he could get a notice authorizing him to return to work with certain restrictions.

C.R. worked with Complainant as a housekeeping supervisor. He currently works for a different hotel operated by Respondent. C.R. told DCR that Weeks displayed a negative attitude towards Hispanic employees. He claimed that she disciplined Hispanics more often than "Americans" for similar offenses but could not provide any details. C.R. told DCR that he could have picked up Complainant's duties while he was out on medical leave.

A maintenance employee, W.L., told DCR that Weeks spoke condescendingly to Hispanics but was nice and professional with non-Hispanics. W.L. told DCR that he could have picked up Complainant's duties while he was out on medical leave. W.L. stated that he and C.R. took over Complainant's responsibilities when he left since they all have the same skills and work experience.

During Complainant's rebuttal interview, he did not dispute that it was Manager Speed—not Weeks—who suspended him for allegedly making a copy of a master key. Complainant told DCR that Speed was always trying to get him in trouble because he was jealous that a female employee liked Complainant more than Speed.

Complainant produced a recording of his conversation with Weeks, in which Santos served as the interpreter:

Santos:	Ella dice que tú eres inegible porque no tienes menos que un año. **[Translation: She says you are ineligible because you have less than a year.]**
Santos:	Si, he is asking [inaudible] -- 11 days. **[Translation: Yes he is asking [inaudible] -- 11 days.]**
Weeks:	No it's October, he can go to disability but he has to resign.
Santos:	He said what can he do with his stomach problem.
Weeks:	He can resign. He is not eligible for FMLA.

Santos:	She said you have to resign.
Complainant:	Yo no voy a renunciar. Yo no tengo que renunciar si me siento mal. Que ella quiere que llame call-out si no vengo a trabajar para ella botarme. **[Translation: I am not going to resign. I do not have to resign if I don't feel well. What does she want for me to call out and if I don't come to work, she is going to fire me.]**
Santos:	He was in the hospital last night because he had ulcers. He said to come to work, should he call out all the time?
Weeks:	He is not keeping the job.
Santos:	Si llamas call-out te botan por call-outs. **[Translation: If you call out they will fire you for call outs.]**
Weeks:	FMLA protects your job, that's what FMLA is. It protects your job.
Santos:	He does not want FMLA. He wants medical leave
Weeks:	There is no difference. FMLA is a family medical leave. It's either you are going out for a family member or you are going out for yourself. However, to be eligible of protected leave so he wouldn't lose his job, you have to be with the company for one year.
Weeks:	Disability is just getting paid while you are out. It's not protection of your job. He can resign and then reapply when he is physically fit but I can't guarantee it.
Santos:	No califica y si no viene a trabajar está terminado. **[Translation: You do not qualify and if you don't come to work you are terminated.]**
Santos:	He said that he feels so bad but what he has -- ulcers -- he thinks he cannot come to work.
Weeks:	If he is incapable of doing the job, he does not want it.
Complainant:	No me tiene que dar las seis semanas pero si me dan tres días libres yo estoy supuesto a estar afuera por el doctor, legalmente. **[Translation: She doesn't have to give me six weeks but she can give me three days off I am supposed to be out per the doctor legally.]**

Weeks:	Either he'll be terminated if he does not resign. It's either way.
Santos:	O te van a botar o tienes que renunciar. Tú tomas la decisión. **[Translation: They are going to fire you or you have to resign. You make the decision.]**
Santos:	He said that he has the hours. He said it's the year or the hours.
Weeks:	It's one year of employment and 1250 hour, it's both trust me I know, I did it for like 10 years. I know legal absences.
Complainant:	Yo voy al doctor y vengo para atrás. **[Translation: I'll go to the doctor and I'll be back.]**

Complainant acknowledged that Santos gave him some forms to be filled out by his doctor. He said that he attempted to return the forms on September 11, 2016, but was not allowed. Neither party provided documentation to show additional medical documentation was requested or submitted.

Analysis

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." 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 has been violated. Ibid. If DCR 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 New Jersey Superior Court. N.J.A.C. 13:4-10(e).

On the other hand, if DCR finds that probable cause exists, the matter will proceed to a conciliation discussion and, if unable to be amicably resolved, will proceed to a plenary hearing. A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" whereby DCR 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., 111 S.Ct. 799. 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. National Origin Discrimination

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate against someone in the "terms, conditions or privileges of employment" based on national origin. N.J.S.A. 10:5-12(a).

Complainant alleges that he was unfairly suspended and then discharged because of his national origin. Two Hispanic former employees told DCR that Weeks had a more professional attitude with non-Hispanic employees. One said that Weeks disciplined Hispanic employees more frequently but offered no examples. Complainant said that Weeks once told him that she did not like "Hispanic or Black people." Weeks denied harboring any sort of discriminatory animus against Hispanics. And Complainant is not fluent in English. But even assuming that she disfavored Hispanics, there was no persuasive evidence that she suspended Complainant and then discharged him based on that alleged bias. Indeed, during the course of the investigation Complainant acknowledged that it was Speed, not Weeks, who suspended him for the master key incident. In fact, the undisputed evidence is that Weeks brought Complainant back to work after concluding that the master key allegation could not be substantiated.

As to the written reprimand he received for allegedly playing his car music too loudly in the parking lot (among other offenses), there was no evidence—apart from Complainant's conjecture—that Weeks would not have reported the matter to his supervisor but for his national origin. The same holds for the discharge. It appears undisputed that Weeks repeatedly said that Complainant would be eligible for re-hire. In view of the above, DCR cannot find a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person" to believe that Weeks targeted him for discipline and sought to remove him from the workforce because she did not like Hispanics. See N.J.A.C. 13:4-10.2. Because the weight of the evidence does not support Complainant's allegations that he was disciplined because of his national origin, those allegations are hereby dismissed based on a finding of NO PROBABLE CAUSE.

b. Disability Discrimination

The LAD requires employers to make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." See N.J.A.C. 13:13-2.5(b); Potente v. County of Hudson, 187 N.J. 103, 110 (2006) (noting that our courts have "uniformly held that the [LAD] . . . requires an employer to reasonably accommodate an employee's disability").

New Jersey law makes clear that once an employee with a disability requests assistance, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002).

The employer is not required to provide the precise accommodation an employee requests, but is required to "initiate an informal interactive process" with the employee to identify potential reasonable accommodations that could be adopted to overcome the limitations resulting from the disability. Ibid. That "interactive process" is crucial because each party normally holds relevant information that the other party does not possess, and the exchange of such information will ensure that the assessment of potential accommodations is complete and reasonable. Taylor v. Phoenixville School Dist., 184 F.3d 296, 317 (3d Cir. 1999).

An employer will be deemed to have failed to participate in the interactive process if: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability, (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400; see also, Jones v. Aluminum Shapes, 339 N.J. Super. at 425 (App. Div. 2001)); N.J.A.C. 13:13-2.5(a); cf. Victor v. State, 203 N.J. 383, 414 (2010) (noting "neither a specific request nor the use of any 'magic words' is needed in order for an employee to be entitled to an interactive process focused on creating or accessing an accommodation").

Moreover, an employer is required to assess each individual's ability to perform a particular job "on an individual basis." N.J.A.C. 13:13-2.5(a). An employer cannot simply succumb to generalized suspicions and unsubstantiated fears about a condition's possible effects. Cf. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. Super. 363, 383 (1988); Greenwood v. State Police Train. Ctr., 127 N.J. 500 (1992).

An accommodation is not required if an employer can demonstrate that it would impose an "undue hardship on its business." N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, factors to be considered include (a) the overall size of the employer's business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer's operations, including the composition and structure of the employer's workforce; (c) the nature and cost of the accommodation needed; and (d) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. N.J.A.C. 13:13-2.5(b)(3). The burden of proving undue hardship is on the employer. N.J.A.C. 13:13-2.8; cf. Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), certif. denied, 212 N.J. 198 (2012) ("If a defendant's response to a reasonable accommodation claim is that that accommodation would be unduly burdensome or an undue hardship, this defense is considered an affirmative defense and the defendant assumes the burden of proof on this issue.").

In this case, Complainant requested unpaid time off so he could tend to a medical condition. Respondent appears to take different positions as to the amount of unpaid leave at issue. At one point, Respondent suggests that the operative request was for six weeks.

Elsewhere, it notes that he requested eleven days off. Based on its review of the evidence, DCR finds that Complainant initially asked Weeks for six weeks off, then reduced his request to eleven days off. Weeks summarily denied his request for any medical leave whatsoever, stating that he was not entitled to FMLA because he had not been employed long enough. Weeks told Complainant that he must resign and that there was no guarantee, but he would be eligible for re-hire. She memorialized the denial in a letter but referenced the eleven-day period.

Respondent argues that Complainant did not produce sufficient information from which it could determine whether he was entitled to a disability accommodation. That argument fails for two reasons. First, it appears clear that Respondent was convinced that the matter had to be analyzed exclusively as an FMLA request. Therefore, no matter what information was provided, the response would presumably be that Complainant was ineligible for FMLA leave and must resign or be fired, and could reapply when his doctors released him to return to work. Second, as noted above, once an employee puts his employer on notice that he is requesting an accommodation for a medical condition, the onus is on the employer to engage in an interactive process to determine if a reasonable accommodation exists. Here, Complainant told Weeks that he had been hospitalized for an ulcer and presented a doctor's note recommending that he be allowed eleven days of treatment/recovery. If Respondent had questions about the diagnosis and/or scope or authenticity of the claim, it could have requested additional information or sought to speak with Complainant's doctor whose contact information was printed on the form. Instead, Respondent simply advised him through its HR representative that he must resign.

It appears that Weeks may have dismissed the medical condition based on the belief that an ulcer is not "a physical or mental impairment that substantially limits one or more major life activities." See Doc. & Info. Request, "Disability Questionnaire," p. 1. DCR finds it significant that in Weeks' September 2, 2016 letter, she did not request additional information. She did not suggest that the matter was under consideration. She simply wrote that he was ineligible for leave and deemed to be discharged. She wrote in part, "[W]e must deny your request and separate your employment effective, August 31, 2016."

Respondent argued that under "an ADA disability case . . . minor ulcers have been recognized as common conditions which are not necessarily serious health conditions or ones that must automatically be considered a disability." In referencing the ADA, it appears that Respondent may have presumed that to qualify for an accommodation, a condition must be shown to substantially limit one or more of major life activities. However, that is not the appropriate standard. The LAD defines "disability" as follows:

> "Disability" means physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual

> impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

N.J.S.A. 10:5-5(q). The New Jersey Supreme Court noted that the above definition is "very broad in its scope." See Clowes v. Terminix Int'l, 109 N.J. 575, 593 (1988). The Court states that the term "disability" is "deserving of a liberal construction" because the LAD is "remedial social legislation." Id. at 590. Thus, for example, although the ADA defines "disability" as an impairment that "substantially limits one or more of her major life activities," the LAD has no such requirement. See Gimello v. Agency Rent-A-Car Systems, 250 N.J. Super. 338, 358 (App. Div. 1991); see e.g., Andersen v. Exxon Co., 89 N.J. 483, 495 (1982) ("We need not limit this remedial legislation to the halt, the maimed or the blind . . . There is simply no basis for limiting its coverage to so-called severe disabilities.").

Moreover, by making sweeping statements about the de minimis effects of ulcers, Respondent ignores its responsibility to assess each individual's ability to perform a particular job "on an individual basis," N.J.A.C. 13:13-2.5(a), and to not rely on generalized assumptions about a condition's possible effects. See Jansen, 110 N.J. Super. 363, 383; Greenwood, 127 N.J. 500.

In view of the above, DCR is satisfied—for purpose of this preliminary disposition only—that Dr. Glasser's note and surrounding circumstances triggered the obligation for Respondent to engage in an interactive dialogue with Complainant regarding potential accommodations, but that no such interactive discussion was attempted or even contemplated. Respondent stated that it found the doctor's note to be insufficient, but did not seek clarification from Complainant or his physician. Instead, it appears that Respondent had reached its final decision on August 30, 2016, which it memorialized in written form on September 2, 2016. There is nothing in Weeks's recorded discussion, or letter, or the recollection of Santos suggesting that Weeks had any intention of reviewing additional medical information. It appears that she had already reached a final determination. She stated unequivocally to Santos, "He is not keeping the job . . . Either he'll be terminated if he does not resign. It's either way."

Lastly, DCR finds that Respondent has not shown that allowing Complainant to take eleven days off would have imposed an "undue hardship" on the operation of its business. See N.J.A.C. 13:13-2.5(b). Respondent's argument that granting such a request would have "push[ed] the remaining department members to the breaking point" was called into question by

C.R. and W.L.'s statements to DCR that they could have readily assumed his responsibilities in his absence. The argument is further belied by Respondent's assertion that it did not replace Complainant until September 12, 2016 (i.e., the day after he would have returned if granted an 11-day leave) and/or Weeks' assertion that Complainant was not replaced.

Conclusion

Based on the investigation, DCR finds that no probable cause exists as to the allegations of national origin discrimination. However, DCR find that there is a sufficient basis—at this threshold stage of the process—to support the allegations that Respondent violated the LAD and that this matter should "proceed to the next step on the road to an adjudication on the merits" as to whether Respondent improperly evaluated (and ultimately denied) Complainant's request for a disability accommodation. Frank, 228 N.J. Super. at 56. Accordingly, it is found that PROBABLE CAUSE exists to credit Complainant's allegations of disability discrimination.

DATE: 5-8-18

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS