

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EB49NB-65015

Vlad Varga,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	Partial Finding of Probable Cause
)	
Diversified Automotive, Inc.,)	
)	
Respondent.)	

On November 21, 2014, Clifton resident Vlad Varga (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Diversified Automotive, Inc. (Respondent),¹ discriminated against him based on national origin, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On March 27, 2015, Complainant amended his verified complaint to allege that Respondent also violated the New Jersey Family Leave Act (NJFLA), N.J.S.A 34:11B-1 to 16. DCR's ensuing investigation found as follows.

Respondent is headquartered in Charlestown, Massachusetts, and operates three facilities in New Jersey. It describes itself as an "auto shipping and processing supplier" with a fleet of over 200 car-carriers, which provides transportation and storage services for thousands of car dealers.

In April 2010, it hired Complainant to work as a car hauler in its Ridgefield facility, where he was responsible for loading cars onto his truck, and delivering them to various dealerships. His direct supervisor was Ridgefield Terminal Manager Frank Pozzi.

¹ In the verified complaint, Respondent was identified as "Diversified Auto." The caption is hereby modified to reflect the representation from Respondent's counsel that the entity's proper name is "Diversified Automotive, Inc."

Complainant, who is Romanian and fluent in English, alleges that he told the company's president, Dennis Kraez, in January 2014 that his wife was pregnant and that he would need approximately four weeks off after the child was born to take his family to Romania for the baptism. Complainant alleges that Kraez replied that Complainant should provide advance notice of the exact dates he would be out.

Complainant alleges that he reminded Kraez in May 2014 and June 2014.

Complainant alleges that on or around July 20, 2014, he told Kraez that he would be leaving for Romania on August 20, 2014, and would return in approximately three and a half weeks. He alleges that Kraez replied that if Complainant went on the trip, he would be fired. Complainant told DCR that he had already booked the trip, so he told Kraez and his supervisor, Pozzi, that he would be going to Romania regardless of the consequences.

On August 19, 2014, Respondent fired Complainant for taking unapproved vacation time. Complainant told DCR that he was earning approximately \$85,000 a year at the time.

Complainant alleges that he was discriminated against based on his national origin. He alleges that a similarly situated, non-Romanian employee, H.V., was allowed to visit family in Guatemala for a month in 2013, and not fired despite also exceeding his accrued vacation time.

Complainant filed an amended verified complaint alleging that the above conduct also violated the NJFLA. In support of that allegation, he noted that he had worked for Respondent for over a year, logged over 1,000 hours over the previous twelve months, and that Respondent had over fifty employees and that time off due to the birth of his child was protected leave under the NJFLA.

Respondent denied the allegations of wrongdoing in their entirety. It claimed that it "terminated [Complainant's] employment because he used more vacation time than he was entitled to under Company policy." See Letter from Respondent's Counsel to DCR, Jun. 15, 2015, p. 2. It stated that in January 2014, Complainant told Kraez via telephone that he would need approximately four weeks off in or around August 2014 to take his family to Romania.

Respondent claims that Kraez replied that he could request up to two weeks of vacation but was required to fill out a *Benefit Day Request Form*.² Respondent states that Kraez told Complainant that given the expected business and staffing needs in August, there would be no way to approve a four-week vacation.

Complainant told DCR that he did not fill out the Benefit Day Request Form at the time because he was unsure of the exact dates he would need off. The parties agree that during Complainant's telephone conversation with Kraez, there was no mention of family leave or the NJFLA.

Kraez told DCR that he did not recall speaking again with Complainant in May 2014 about the latter's plan to go to Romania. Kraez stated:

I talk to hundreds of drivers per day. I don't remember every specific conversation I had with [Complainant] . . . The conversation shouldn't come to me. He should do what he is supposed to do. He is supposed to fill out paperwork and give it to HR. He never did any of that. He knows he is supposed to go through HR with this. The policy may not state that specifically, but in every meeting we have, we talk about submitting all paperwork with HR.

Respondent claims that on or around July 20, 2014, Complainant asked Pozzi if he could haul a load of cars to Boston so that he could speak face-to-face with Kraez to discuss his request for time off. Pozzi claims that during that conversation, he encouraged Complainant to request family leave time but Complainant declined. Pozzi stated:

I explained to him that he can apply for Family Leave. I offered this to him three times. He said, "I shouldn't have to do that, that's bullshit." I told him he was entitled to 14 weeks unpaid leave and that he was guaranteed his job back. He said, "I don't have to do that. I'm not doing that." He requested a load of cars to take to Boston. I gave that to him.

Respondent claims that Chris Predmore, who manages a different New Jersey facility, was present during the conversation. Respondent produced computer records that purport to confirm that Predmore was at the Ridgefield facility on that date. During the fact-finding

² The Benefit Day Request Form is a one-page form that asks employees to provide the following: Request Date; Driver's Name; Primary Facility; Start and End Date of Requested Leave; Total Number of Days; and whether the time off is Personal, Vacation, or a Floating Holiday.

conference, Predmore stated, "I was there. Reason being because at that time, my yard was slow. So a lot of times I will go help out in Ridgefield. So when things are slow, I'm at Ridgefield." He corroborated Pozzi's version of events.

Pozzi told DCR that another car hauler, Moises Acevedo, overheard the conversation too.

On or about that same day, Complainant drove to Boston to speak with Kraez about his plans. Kraez recalled the conversation as follows:

I told him that the vacation schedule was filled up and now he wants to take 3.5 weeks. I told him he can't do that. I told him that if he takes more than the two weeks he was allocated, he is effectively terminating himself. There was no mention of Family Leave Act period. It was about vacation. He was asking about vacation. I couldn't afford to let him go for 3.5 to 4 weeks. If he was asking me for four weeks in December or January, I would have given him the four weeks. It doesn't cost me anything. August and September is a very heavy business month and heavy vacation time. It's hard to balance those two things at once.

Kraez produced a "2014 Vacation Book," which appeared to corroborate his claim that more employees took vacation during the summer months.

Respondent said that when Complainant returned to New Jersey, he told Pozzi about his conversation with Kraez. Pozzi claims that he asked, "Why are you going through this? Why don't you just apply for family leave?"

Here again, Predmore corroborated Pozzi's version of events. He stated, "[Complainant] told us what happened with [Kraez]. [Pozzi] offered the family leave act and explained it to him. He said he wasn't gonna do that. He said he'd be able to land on his feet when he got back."

Respondent acknowledges that H.V. was granted a month-long leave, but states that it occurred in November 2012, not 2013. Kraez told DCR, "Volumes were low and vacations were low so we let [H.V.] go." Respondent produced business records that appear to corroborate the claim that the Ridgefield facility was busier in August and September 2014, than in the winter months. Respondent produced business records indicating that a female employee, S.G., was granted family leave in April 2014 and November 2014.

Respondent produced a Benefit Day Request Form purportedly submitted by Complainant on August 5, 2014. See Letter from Respondent's Counsel to DCR, supra, at 3 (“[O]n August 5, Varga completed a Benefit Day Request Form seeking almost four weeks vacation.”). The handwriting on the form does not appear to be Complainant's, and his last name is misspelled.

Respondent produced its “Family and Medical Leave Act (FMLA) Policy and Procedures” (FMLA policy). Respondent told DCR that its FMLA policy was “not distributed to complainant Vlad Varga.” However, Respondent claims that it “maintained and displayed in an easily visible place in the Ridgefield, New Jersey office, the [DCR]'s official New Jersey Family Act poster - - which Varga admittedly saw.”³ See Letter from Respondent's Counsel to DCR, Jan. 7, 2015. p. 2. Respondent's FMLA policy states in part:

It is the human resources [sic] responsibility to designate any absence that meets the eligibility requirement of the FMLA as family/medical leave. The designation of FMLA will occur either as a result of any employee request for FMLA leave or when the human resources becomes [sic] aware that the employee's absence qualifies as FMLA leave, even though the employee may not have requested FMLA leave.

As for providing notice, the FMLA policy states, “Form #1 FMLA Leave Notice of Designation, Request, & Approval, is available for this purpose; however, employees may submit a request for an FMLA leave by other means (memo, e-mail, etc.)”

Complainant did not dispute Respondent's assertions that H.V.'s leave occurred in November 2012 not 2013, or that the Ridgefield facility was busier in August and September 2014 than in the winter months, or that more employees requested vacation in August than December. However, Complainant insisted that Pozzi never suggested that family leave was an option. Complainant denied that Predmore was present during any conversation with Pozzi about the subject. He also denied using the term “vacation” when speaking with Kraez or Pozzi. He stated that he consistently referred to his need for “time off.” Complainant said:

³ Complainant acknowledged seeing the poster. The parties appear to agree that Respondent placed the poster on the wall in the workplace in or around June 2014.

This has nothing to do with vacation. I knew I was going to use the two weeks vacation that I am entitled to. I wasn't looking to get paid for an extra week and a half of leave. This isn't just me wanting to go relax on a beach. I save my personal time to help my wife. If I was offered family leave, I would have taken it, hands down. But there was no mention of that. It was, "If you take off, you're done."

DCR spoke with the other witness identified by Pozzi: Moises Acevedo. Acevedo confirmed hearing Complainant and Pozzi discuss Complainant's need for three weeks off to go to Romania. Acevedo said he recalled Pozzi stating, "Then you need to fill out the form," and assumed that Pozzi was referring to the Benefit Day Request Form. Acevedo stated that he did not recall Complainant stating, "That's bullshit. I don't need to do that." He stated that Complainant said, "I'd rather just talk to Dennis [Kraez]." Acevedo stated that he did not recall hearing any mention of "family leave" during the conversation.

During the DCR fact-finding conference, Complainant stated that in December 2012, Respondent allowed him to go to Romania for approximately four weeks for a baptism after the birth of another child even though he was out of vacation time.

Kraez remarked, "We weren't busy in December 2012. That's why we let you go . . . [I]f we have enough people we will let a person go for more than two weeks."

Analysis

At the conclusion of an investigation, the 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. "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.

A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby 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., 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 illegal to discharge or otherwise discriminate in the “terms, conditions or privileges of employment” based on national origin. N.J.S.A. 10:5-12(a). Here, Complainant notes that Respondent allowed a co-worker, H.V., who is Guatemalan, to take an extended leave of absence past his allotted two week vacation time. Thus, he argues that he was discriminated against in the terms, conditions or privileges of employment because he is Romanian.

Respondent stated that it allowed H.V. to take an extended leave of absence in November 2012 because winters are typically slower months and because fewer employees request to take vacation during the winter. Respondent produced records purporting to support its claims regarding the relative rates of business and vacation requests in the summer and winter months. Complainant did not dispute those characterizations. Nor did Complainant dispute that Respondent allowed him to take a leave of absence in December 2012 (i.e., a month after allowing H.V. to take a leave of absence) even though he had used up his allotted vacation time.

The DCR investigation found no direct, anecdotal, or statistical evidence—and none was produced by Complainant—to support his theory that Respondent harbored a discriminatory animus against persons from Romania. Because the weight of the evidence in no way suggests that Complainant was treated differently than H.V., or any other non-Romanian worker based on his nationality, the Director finds that there is no probable cause to support the LAD claim. This finding that no probable cause exists with regard to the allegations of national origin discrimination is a final agency action, subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

b. NJFLA

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 employee⁴ to twelve weeks of family leave in any 24-month period upon advance notice to the employer⁵ 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 of a family member of the employee. N.J.S.A. 34:11B-4. For leave taken in connection with the birth of a child, the NJFLA permits the employee to begin that leave at any time within one year of the child's birth. N.J.A.C. 13:14- 1.5(c).

New Jersey employers are required to ensure that employees understand their rights and obligations under the NJFLA. If an employer maintains an employee handbook or similar written guidance for employees, information concerning the NJFLA must be included in that document. N.J.A.C. 13:14-1.14(b). If not, the employer must "provide written guidance to each of its employees concerning all the employee's rights and obligations under the [NJFLA]" and

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 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.

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 workweeks in the then current or immediately preceding calendar year." ibid.

may do so by duplicating and distributing the NJFLA Fact Sheet provided on DCR's website.

Ibid.

The employee must provide notice to the employer "no later than 30 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice." N.J.A.C. 13:14-1.5(c)(1). When the leave is unforeseeable, the employee's "obligation is to provide sufficient information for an employer to reasonably determine whether the FMLA *may* apply to the leave request." Lichtenstein v. University of Pittsburgh Med. Ctr., 691 F.3d 294 (3d Cir. 2012) (emphasis in original).⁶ Courts have construed the notice requirement liberally in favor of the employee.⁷

An employer may require the employee to sign a certification attesting that he/she is taking family leave for the birth or adoption of a child, or to care for a family member because of that family member's serious health condition, whichever is applicable. N.J.A.C. 13:14-1.10 ("Any employee who refuses to sign such certification may be denied the requested leave."). The employer may not require the employee to sign or otherwise submit a form of certification attesting to additional facts, including the employee's eligibility for family leave. Ibid.

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 for violating 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

⁶ In interpreting provisions of the NJFLA, courts have sought guidance from courts' interpretation of the statute's federal analog, the Family Medical Leave Act (FMLA), 29 U.S.C. 2601, et seq. See Wopert v. Abbott Labs, 817 F.Supp.2d 424, 437-38 (D.N.J. 2011).

⁷ For example, the Third Circuit of Appeals found that the notice requirement is neither "onerous" nor "formalistic or stringent," and that the "statutory and regulatory text suggests a liberal construction be given to FMLA's notice requirement." Lichtenstein, supra, 691 F.3d 294, 303. The Court 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." Ibid. Moreover, the Court wrote, "How the employee's notice is reasonably interpreted is generally a question of fact, not law." Ibid.; see also Zawadowicz v. CVS Corp., 99 F.Supp.2d 518, 529 (D.N.J. 2000) (generally the sufficiency of notice is a matter for the fact-finder to determine).

leave from her employment; and (5) he or she suffered an adverse employment action as a result. DePalma, supra, 350 N.J. Super. at 213.

In this case, Respondent does not dispute that Complainant was an eligible “employee”⁸ or that it is a covered “employer” for purposes of the NJFLA, or that Complainant was performing satisfactorily and suffered an adverse employment action. And although it states that Complainant’s request for time off for the baptism of his newborn child was not a qualifying event for purposes of the NJFLA, it offers no support for that position. Instead, the focus of Respondent’s argument is that Complainant never requested family leave. In fact, Respondent argues that Complainant “clearly and unequivocally informed Diversified that he did not want to use NJFLA leave.” See Letter from Respondent’s Counsel to DCR, supra, at 2.

For purposes of this disposition only, we will assume that Complainant’s desire to spend time with his newborn child, regardless of whether in New Jersey or Romania, amounts to protected bonding activity as viewed by the NJFLA and its federal analog, the FMLA. See e.g., Metroka-Cantelli v. Postmaster Gen., 2015 U.S. Dist. LEXIS 124238 at *12-13 (N.D. Ohio Sept. 17, 2015). Thus, the issue boils down to whether Complainant sufficiently perfected his request or whether he refused the opportunity to take family leave, as Respondent contends.

The parties dispute whether Complainant characterized the requested leave as “vacation” or “time off.” They agree that he never expressly asked for NJFLA leave. However, the NJFLA places the onus on the employer to determine whether an employee’s request for time off triggers the statute’s protections:

[T]he focus is upon the employer and its obligations. We regard it as highly significant that employers must not only display notice of its employees' rights and obligations, but also must “use other appropriate means to keep its employees so informed.” N.J.S.A. 34:11B-6. The rights and benefits granted by the Act should not depend on the sophistication of the employee. It is incumbent upon the employer to apprise the employee of his or her rights and to effectuate

⁸ DCR notes that Respondent’s FMLA policy states that to be eligible, an “employee must have worked at least 1,250 hours” in the twelve months immediately preceding the first day of the FMLA leave. As noted above, in New Jersey, the requirement is 1,000 hours. N.J.A.C. 13:14-1.2.

them once the employee requests a leave of absence for any of the reasons provided by the Act.

[D'Alia, supra, 260 N.J. Super. at 10.]

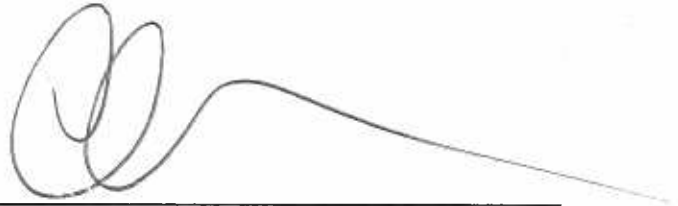
Similarly, Respondent's FMLA policy places the onus on management, not the employee, to recognize a request for family leave "even though the employee may not have requested FMLA leave." And in this case, it is clear that Respondent recognized that the request implicated its FMLA policy. Indeed, Pozzi maintains that he specifically and repeatedly offered NJFLA benefits to Complainant and that the latter declined. Respondent claims that Predmore and Acevedo witnessed the conversation. Predmore corroborated Pozzi's version of events. Acevedo did not. Moreover, Complainant insists that Predmore was not present for those conversations. He maintains that he was aware that he exceeded his allotted vacation time, and simply wanted unpaid time off to spend with his newborn and family. He states that if Pozzi had offered family leave benefits to him, he would have gladly accepted. Thus, Complainant appears to argue that regardless of how the time off was characterized, he was seeking the same benefit that he was granted two years earlier without issue.⁹

In view of the material factual dispute, the reasonable plausibility of Complainant's position, the somewhat contradictory evidence regarding Respondent's position, and the relatively low threshold required for a finding of probable cause, the Director is satisfied that the requisite facts and circumstances are met and that this matter should "proceed to the next step," Frank, supra, 228 N.J. Super. at 56, so that an administrative law judge can observe the parties and other witnesses testify, assess their respective credibility, and reach a conclusion as to whether or not Complainant was offered NJFLA benefits and if that overture was rejected by Complainant.

⁹ It was unclear from the personnel records produced by Respondent whether it characterized his December 2012 leave as an FMLA or NJFLA benefit. In any event, it appears that it was unpaid time off so that he could spend bonding time with his new born child.

Of course, if Respondent offered NJFLA benefits to Complainant and he declined, then he would have no basis for a claim. But as noted above, Complainant challenges Respondent's depiction, and one of the witnesses identified by Respondent did not fully corroborate its version of events. Ultimately, this is a factual dispute that needs to be heard by a trier of fact. In view of the above, the Director finds that probable cause exists to sustain the allegation that Respondent violated the NJFLA.

DATE: 4-7-16



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS