



ineligible for Family and Medical Leave Act (FMLA) leave.<sup>1</sup> Respondent stated that it was prepared to re-employ Complainant when she was able to return to work, but Complainant failed to submit the necessary re-hire paperwork. Respondent stated that this process was fully explained to Complainant.

In an interview with DCR, Complainant stated that her fibromyalgia weakens her immune system and makes her subject to conditions such as pneumonia. Complainant stated that she was diagnosed with pneumonia on January 9, 2012, and while she was out, submitted medical notes to Respondent in order to keep them abreast of her return date. Complainant stated that she was given five hours of sick time for the ten month school year and she quickly exhausted this leave while out with pneumonia. Complainant stated that when her sick time ran out, Jones informed her that her position could only be held open for two additional weeks.

Complainant produced multiple medical notes that she stated were submitted to Respondent. A note dated January 9, 2012 stated that Complainant suffered from pneumonia and would be unable to return to work until January 17, 2012. An updated note dated January 11, 2012 stated that Complainant continued to suffer from pneumonia and would be able to return to work on January 26, 2012. A note dated January 25, 2012 indicated that Complainant continued to suffer from pneumonia and stated she could return to work February 9, 2012. A final note dated February 8, 2012 indicated that Complainant could return to work on February 15, 2012.

In addition to her medical notes, on January 31, 2012, Complainant contacted Respondent and requested FMLA leave, but was told that she did not qualify.

Respondent produced a Personnel Transaction Form that indicated Complainant was terminated as of January 26, 2012. The listed reason for termination was “medical.”

Respondent also produced a list that demonstrated that between November 23, 2009, and September 4, 2010, Respondent terminated seven employees who requested medical leave but were ineligible for FMLA. The individuals listed were subsequently re-hired to their former position at the same rate of pay they were earning at the time of termination.

In a written statement produced by Respondent, Staffing/Licensing Coordinator Brenda Saunders stated that she called Complainant on February 9, 2012, and explained that she was ineligible for FMLA and had been terminated. Saunders also informed Complainant that she would need to complete re-hire paperwork prior to returning to work, and the original documents would need to be submitted to the main office. Saunders stated that Complainant was upset that her supervisor, District Manager Sandra Jones, had not informed her that she had been terminated.

Saunders stated that Complainant returned to work on February 15, 2012, but did not submit the original paperwork as was required. Saunders called Complainant at the program site and requested that she bring the documents into the office. Saunders stated that Complainant became upset, began yelling, and left the program site.

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<sup>1</sup> Complainant did not work a sufficient number of hours in the prior year to be eligible for leave under the FMLA.

Program Director Lorin Powell also submitted a written statement that stated Saunders informed her that Complainant returned to work on February 15, 2012, without completing the required paperwork. After learning that Complainant had become angry and left the program site, Powell called Complainant and informed her that her position was still open. Powell stated that she asked Complainant to bring the paperwork into the main office the following morning to ensure that it was completed properly, but Complainant did not call or show up for her appointment.

DCR interviewed District Manager Sandra Jones, who stated that she aware that Complainant was out due to pneumonia but was not aware that it was related to her fibromyalgia condition. Jones stated that Complainant returned to work on February 15, 2012, without submitting the necessary re-hire paperwork. Jones stated that she did not discuss the re-hiring process with Complainant because hiring and firing were done by the human resources department.

DCR also interviewed Supervisor Sue Sailia who stated that Complainant had informed her of her fibromyalgia condition in 2008. Sailia stated that she informed Complainant that she had to complete re-hire paperwork prior to returning to work, and hand-delivered the paperwork because she was aware Complainant had pneumonia.

In response to the evidence presented by Respondent, Complainant confirmed that she was given paperwork from Respondent, and that she was told to submit original copies in order to be re-hired, but declined to do so. Complainant stated that did not understand why she had been terminated at all.

Information obtained during the investigation was shared with Complainant, and prior to the conclusion of the investigation, she was given an opportunity to submit additional information.

## 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.” N.J.A.C. 13:4-10. 2(a). “Probable cause” for purposes of this analysis means a “reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated.” N.J.A.C. 13:4-10. 2(b). If DCR 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 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 Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, 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.

Under the LAD, it is unlawful for an employer to fire, refuse to hire, or otherwise discriminate in the “terms, conditions or privileges of employment” based on disability. N.J.S.A. 10:5-12(a). Additionally, the LAD requires employers to provide reasonable accommodations to a person with a disability, “unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.” N.J.A.C. 13:13-2.5(b); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). A request for accommodation need not be in writing nor must an employee invoke a specific legal source. Tynan, 351 N.J. Super. at 400. If an employee requests an accommodation for a disability, the employer must engage in an “interactive process” to “identify the potential reasonable accommodations that could be adopted to overcome the employee’s precise limitations resulting from the disability.” Id.

The LAD broadly defines disability as a “physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness ... and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, 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 typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.” N.J.S.A. 10:5-5(q). This statutory definition is broad in scope, and is not limited to severe or immutable conditions. Viscik v. Fowler Equip. Co., 173 N.J. 1, 5 (2002).<sup>2</sup>

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent’s practice of terminating employees in need of medical leave who are not eligible for leave under the FMLA without considering whether the specific leave request would impose an undue hardship on the operation of its business does not comport with the requirements of the LAD.

Based on the broad definition of disability in the LAD, there is probable cause to believe Complainant’s fibromyalgia and pneumonia constituted disabilities under the Act. Although Respondent stated that it was unaware that Complainant’s pneumonia was related to her fibromyalgia, this knowledge was not necessary in order to recognize that Complainant suffered from a disabling medical condition. Complainant submitted multiple medical notes that indicated she was suffering from pneumonia, and Complainant’s supervisors were all aware that she was out of work due to pneumonia. Sailia stated that she hand-delivered re-hire paperwork to Complainant, demonstrating not only that she was aware of Complainant’s pneumonia, but also recognized the seriousness of the illness.

DCR’s investigation found that Complainant requested a disability accommodation on January 31, 2012, when she submitted a request for medical leave. At that time, Complainant

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<sup>2</sup> New Jersey courts have interpreted the definition of “disability” broadly. Viscik v. Fowler Equip. Co., 173 N. J. 1, 5 (2002); Clowes v. Terminix Intern Inc., 109 N. J. 575, (1989); In re Cahill, 245 N. J. Super. 397 (App. Div. 1991). The broad definition means the analysis of a disability discrimination claim often focuses not on whether an employee’s limitation qualify for protection, but on the employer’s response to the limitations presented by the employee. Tynan v. Vicinage 13 of Superior Court, 351 N. J. Super. 385, 398-99.

provided a note from her doctor indicating that her condition would keep her out of work until February 9, roughly an additional two weeks. The evidence revealed that on February 9, 2012, Complainant was told that her request for medical leave was denied because she was ineligible for FMLA, and Complainant was also informed that she had been terminated as of January 26, 2012. Respondent did not claim that holding Complainant's job open for another two weeks while she recovered would impose an undue hardship on its operations.

Respondent told DCR that it had a well-established practice of terminating employees who were absent for medical reasons, but were ineligible for FMLA leave. If employees were absent for medical reasons due to a condition that meets the definition of disability under the LAD, Respondent's policy and practice of summarily terminating them without individualized consideration of whether extending medical leave would impose an undue hardship appear to violate the law. Respondent also produced a list that demonstrated that between November 23, 2009, and September 4, 2010, Respondent terminated seven employees who requested medical leave but were ineligible for FMLA. Again, to the extent those employees requested medical leave for a condition that constituted a disability under the LAD, and Respondent could have accommodated them without undue hardship, these terminations appear to violate the LAD.

Respondent introduced no evidence that it ever engaged in any interactive process with employees who requested medical leave for a condition that constituted a disability under the LAD, or did anything other than automatically reject their requests for leave and terminate their employment. Such a policy violates the reasonable accommodation requirements of the LAD.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N. J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of disability discrimination and failure to accommodate.<sup>3</sup>

Date: November 20, 2019



Rachel Wainer Apter, Director  
NJ Division on Civil Rights

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<sup>3</sup> In this case, Respondent offered to reinstate Complainant to her prior position with the same hours and at her prior rate of pay as soon as she was cleared to return to work as long as she submitted the necessary "re-hire" paperwork. Complainant chose not to do so. It is thus not clear if Complainant suffered any out of pocket loss from Respondent's failure to follow the LAD's requirements for addressing reasonable accommodation requests. See Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

