STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EJ08GB-65389

Kleiny Coronado,	)	
	)	
Complainant,	)	
	)	
v.	)	**Administrative Action**
	)	**FINDING OF PROBABLE CAUSE**
Bergen Logistics,	)	
	)	
Respondent.	)	

On April 23, 2015, Kleiny Coronado (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Bergen Logistics (Respondent), discriminated against her on the basis of pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is an order fulfillment provider located in North Bergen, New Jersey. On November 28, 2011, Respondent hired Complainant as a packer/picker, where she was responsible for hand picking orders by reading pick tickets, completing paperwork, moving products to the fulfillment shipping area, operating barcode scanners and packaging kits to order specifications. Complainant worked in this position until April 13, 2015, when she was placed on unpaid leave by Respondent.

In the verified complaint, Complainant alleged that on April 3, 2015, she provided Respondent with a note from her physician requesting that, because of her pregnancy, she be permitted to take frequent bathroom breaks and not lift greater than twenty pounds. Complainant maintains that Respondent could have accommodated her restrictions and allowed her to work but instead forced her go on unpaid leave of absence.

In its response to the complaint, Respondent denied discriminating against Complainant. It asserted that Complainant went out on leave under Family Medical Leave Act (FMLA) because of a high-risk pregnancy that limited her physical exertion and ability to perform her job duties. Respondent stated that it routinely asks employees to be obtain medical clearance with no restrictions since it does not have light duty. It says it maintains this policy to protect its employees from further injuries. It further stated that it held Complainant's job for 12 weeks under the FMLA and that she could return to her job when her physical limitations were lifted by her doctor.

In an interview with DCR, Complainant said that on April 3, 2015, she gave her floor supervisor a note from her treating obstetrician stating that she needed to take frequent bathroom

breaks and should not lift more than 20 pounds. Complainant told DCR that the supervisor then instructed her to either go back to her doctor to have the medical restrictions removed or find another doctor who would allow her to work without restrictions. Complainant told DCR that she asked if she could continue working until she could see her physician again. Complainant said that she worked her regular work schedule the week of April 6th through April 10th and did not have to lift more than 20 pounds. Complainant stated that although lifting more than 20 pounds was not an essential job duty of the job that she was in at the time, she presented the note to Respondent to ensure that it did not transfer her during her pregnancy to different job that may have required lifting more than 20 pounds.

Complainant followed Respondent's instructions and tried to revisit the issue of restrictions with her doctor. Complainant told DCR during a fact-finding conference that her primary physician was not available on the day of her appointment so she saw a different doctor. She said that physician would not remove the restrictions and also refused to complete FMLA paperwork provided by Respondent.

DCR reviewed Complainant's medical records, which evidenced an April 13, 2015 doctor's visit. The physician notes in Complainant's medical records from that visit state that the doctor declined to complete the FMLA paperwork because Complainant was capable of working. The physician notes state, in relevant part,

The notes in Complainant's medical records also state that Complainant reported during a subsequent visit that she was removed from her job because of her lifting restriction.[1]

Respondent provided DCR with a copy of a second physician's note, which showed that it was received by Respondent's Human Resources Director, Gregg Oliver, on April 14, 2015. The note states, "To whom it may concern, the above patient is [redacted] pregnant. Please excuse patient from excessive physical exertion." [2] According to Respondent, there was no modified light duty for Complainant and she was instructed to go on leave and return to work when the restrictions were removed. Oliver prepared FMLA paperwork for Complainant to have her doctor complete, indicating that her last day of work was April 10, 2015. In its position statement, Respondent told DCR that "it is routine to ask for medical clearance with no restrictions when any medical condition is brought to the Human Recourses Department as we do not have light duty. We are seeking to protect our employees from any further injuries that may become serious."

[1] Nothing in Complainant's doctor's notes provided to Respondent support Respondent's contention that Complainant had a "high risk" pregnancy at the time she requested accommodation.

[2] Complainant told DCR during a fact-finding conference that she never provided Respondent with the April 13, 2015 doctor's note, nor did she have any knowledge of how Respondent received it.

DCR reviewed the disability accommodation policy contained in Respondent's employee handbook. The policy states, in part, "We will provide reasonable accommodations to an employee with a disability to enable the employee to perform the essential functions of the position unless the accommodation would impose an undue hardship on our operations. Qualified individuals with disabilities are entitled to equal pay and other forms of compensation (or changes in compensation) as well as job assignments, classifications, organizational structures, positions descriptions and lines of progression."

In response to the evidence presented by Respondent, Complainant reiterated that the limitations imposed by her doctor did not affect her ability to do her job and that she submitted the doctor's note only so that Respondent would not change her work assignment to one requiring heavier lifting. Complainant also stated that she worked with other pregnant employees but did not know if any of them had medical restrictions.

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. "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 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." Id.

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate in the "terms, conditions or privileges of employment" based on pregnancy. N.J.S.A. 10:5-12(a). The statute also requires employers to "make available to [a pregnant] employee reasonable accommodation in the workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, … unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer." N.J.S.A. 10:5-12(s). In addition, an employer cannot in any way penalize a pregnant employee in the terms, conditions, or privileges of employment for requesting or using the accommodation. Any workplace accommodation provided to a pregnant employee cannot be provided in a manner less favorable than accommodations provided to other

employees not affected by pregnancy but similar in their ability or inability to work. Ibid. The Appellate Division has recently reinforced that N.J.S.A. 10:5-12(s) sets out an affirmative obligation on the part of employers to provide reasonable accommodations for individuals who are pregnant. See Delanoy v. Twp. Of Ocean, 462 N.J. Super. 78 (App. Div. 2020).

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based on pregnancy. Complainant notified Respondent of her pregnancy in early April 2015 and presented a note from her physician requesting pregnancy-related reasonable accommodations, including increased bathroom breaks and a 20-pound lifting restriction. According to Complainant, her regular job duties did not require her to lift more than 20 pounds but she presented the note to ensure that Respondent was aware of the restriction and did not transfer her to a different job with would require lifting heavier objects. Moreover, Complainant told DCR that she worked her normal duties without accommodation for a full week after providing the note and never needed to lift more than 20 pounds.

Respondent failed to provide evidence demonstrating that lifting more than 20 pounds was an essential requirement of Complainant's job at the time she presented the note. Additionally, Respondent failed to provide evidence showing that, had Complainant been required to lift more than 20 pounds, no accommodation could be provided or that any such accommodation would impose an undue hardship on Complainant's business operations.

Instead, the evidence shows that Respondent has policy where employees are only permitted to work when they have no medical restrictions. Such a policy, by definition, nullifies consideration of providing a reasonable accommodation to an employee with a disability-related limitation. The evidence suggests that, in practice and despite its written accommodations policy, Respondent did not consider providing a reasonable accommodation, did not engage in the interactive process to determine an appropriate accommodation to Complainant's pregnancy-related restrictions, and refused to permit Complainant to work unless and until she presented a note stating that she has no medical restrictions. Complainant's statement that Respondent requested a medical clearance with no restrictions is undisputed by Respondent.

In addition, the evidence suggests that the notes advising Respondent of Complainant's restrictions were of no material consequence since the essential functions of her job were not impacted by her pregnancy-related limitations. Respondent did not produce, and the investigation did not find, evidence to suggest otherwise. Complainant told DCR that she submitted the notes only to ensure that she was not transferred to a different positon while pregnant.

Submission of the note from Complainant's treating physician requesting that Complainant be provided a reasonable accommodation triggered Respondent's obligation under the LAD to engage in the "interactive process," in which "both employer and employee bear responsibility for communicating with one another to "identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations." Jones v. Aluminum Shapes, 339 N.J. Super 412, 422 (App. Div. 2001), quoting Smith v. Midland Brake, 180 F.3d 1154, 1171 (10th Cir. 1999).

In order for an employer to successfully defend against a charge of failure to provide a reasonable accommodation, it must be able to demonstrate that doing so would create an undue burden, or hardship, on its business operations. N.J.A.C. 13:13-2.5; see also: Jones, supra, at 425. Here, Respondent failed to provide any evidence of such burden or hardship, or that relocating Complainant to a different position or relieving her of a heavy-lifting task would have impacted its business operations in any way. Thus, even assuming Respondent had engaged in the interactive process, it has not shown that an accommodation, should it have become necessary, would be burdensome. The investigation demonstrated that Respondent failed to engage in an interactive process with Complainant and, instead, refused to permit her to work unless she presented a different note stating that she had no restrictions.

In enacting the New Jersey Pregnant Workers Fairness Act, codified at N.J.S.A. 10:5-12(s), the Legislature found that "pregnant women are vulnerable to discrimination in the workplace in New Jersey, as indicated in reports that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are being removed from their positions, placed on unpaid leave, or fired." N.J.S.A. 10:5-3.1(a). The Legislature further declared its intent "to combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work" absent a showing of undue hardship. N.J.S.A. 10:5-3.1(b). Indeed, requiring Complainant to take an unpaid leave of absence rather the attempting to provide the relatively minor accommodations she sought for her pregnancy seems to be precisely the type of harm the New Jersey Pregnant Workers Fairness Act seeks to prevent.

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 pregnancy discrimination.

Date: April 27, 2020

Rachel Wainer Apter, Director
NJ Division on Civil Rights