

**STATE OF NEW JERSEY
DEPT. OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL10HE-66664**

████,)
)
Complainant,)
)
v.)
)
Princeton Public Schools,)
)
Respondent.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On September 27, 2017, █████ (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Princeton Public Schools (Respondent), discriminated against him based on disability, and failed to accommodate his disability 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 a public school district in Princeton, New Jersey with an enrollment of approximately 3,800 students in pre-kindergarten through twelfth grade. On March 16, 2015, Respondent entered into a one-year employment contract to hire Complainant as a Utilities Maintenance Person in the Maintenance and Facilities Department. In this position, Complainant was responsible for the general upkeep and maintenance of the schools in the district. Complainant reported to Joe Vaccaro, Foreman and first tier supervisor, Peter Vasquez, Operations Manager and second-tier supervisor, and Gary Weisman, Director of Plant Operations and third tier supervisor. Respondent renewed Complainant’s annual contract for the 2016-2017 school year. On May 15, 2017, Respondent informed Complainant that it would not renew his employment contract for the 2017-2018 school year.

In the verified complaint, Complaint alleges that Respondent failed to grant him reasonable accommodations for his disabilities and subsequently discharged him because of his disabilities. Specifically, Complainant alleges that because of his disability he was absent from work for approximately forty-one (41) days between February 2016 and May 2017 on approved medical leave and that despite approving his leave time Respondent terminated him on June 30, 2017, for poor attendance and poor work performance related to his disability.

In its response to the complaint, Respondent denied that Complainant’s disabilities played any part in its decision, and asserted that it did not renew Complainant’s contract for the 2017-2018 school year for poor attendance and work performance. Respondent claimed that Complainant was absent from work 66.5 days between February 2016 and May 2017.

In an interview with DCR, Complainant stated that in the summer of 2016, he was diagnosed with a viral/neurological medical condition. Shortly after his diagnosis, he reported to work and informed Vaccaro of his condition. That same day, he went to Respondent's Human Resources office and submitted doctor's notes for medical appointments and treatments related to this condition. Respondent approved the time off. Respondent produced these notes, which excused Complainant from work for June 14 and 15, 2016.

Complainant stated that on or about July 23, 2016, he was diagnosed with degenerative disk disease. Shortly after this diagnosis, he reported to work, informed Assistant Superintendent for Human Resources Lewis Goldstein of his condition, and submitted doctor's notes on August 23, 2016. Respondent produced these notes, which excuse Complainant from work on August 17, 18, 19 and 22, 2016 for appointments and treatments related to this condition.

Complainant stated that in mid-December, 2016, he was diagnosed with a chronic neurological condition. Shortly after his diagnosis, he reported to work and informed Vaccaro and Vasquez of his condition. Respondent produced doctor's notes, which Complainant submitted on December 14, 2016, excusing him from work on November 7, 21, 22 and 23 and December 19, 2016 for appointments related to his condition.

Complainant told DCR that he met with Gary Weisman, Director of Plant Operations, in late December 2016, regarding his November 1, 2016 performance evaluation for the 2015-2016 school year. Respondent produced this evaluation, which rates employees as highly effective, effective, partially effective or ineffective. Weisman rated Complainant as effective for "Quality of Work," "Quantity of Work," "Relationships with People" and "Work Habits" and partially effective for "Dependability," with a comment that Complainant's "attendance needs to improve." His overall score was effective.

In early January 2017, Complainant submitted a doctor's note to Human Resources, which stated he would need to periodically be absent from work for treatments for the neurological condition. Respondent approved the time off for this treatment. Respondent produced doctor's notes which Complainant submitted excusing him from work on January 24 (submitted on May 17, 2017), March 23 (submitted when he returned to work on May 16, 2017) and April 18, 2017 (submitted when he returned to work on May 16, 2017).

Complainant told DCR that in mid-April, 2017, he had a stroke, for which he was admitted to the hospital three times in April and May of 2017. Complainant was ultimately out of work from April 26 through May 15, 2017. Respondent produced doctor's notes submitted by Complainant when he returned to work on May 16, 2017, which excused him from work from April 26, 2017 through May 16, 2017 for this condition. Complainant told DCR that since he had exhausted his sick days Respondent approved him for leave under the federal Family and Medical Leave Act (FMLA).

In an evaluation dated May 12, 2017 (while Complainant was still out of work for treatment for his stroke and before Respondent had received the doctors notes submitted on May 16, 2017), Weisman rated Complainant as effective for "Quality of Work" and "Relationships with People," partially effective for "Quantity of Work" and "Work Habits," and ineffective for "Dependability,"

with a comment that “[Complainant’s] attendance continues to be a problem that affects his work and the productivity of the department. His attendance was referenced on prior evaluations and at this point I recommend that he not be reviewed for future employment.”

Complainant told DCR that on May 16, 2017, the day he returned to work after being released from the hospital for treatment for his stroke, he received a letter from Respondent dated May 15, 2017. The letter informed him that his employment would not be renewed for the 2017-2018 school year. The letter states in relevant part “based on your performance this year, it has been determined at this time that the Princeton Public School District will not be able to offer you a position as a Utility Maintenance Worker for the 2017-2018 school year.”

Complainant stated that that same day, he met with Weisman, Vasquez, [REDACTED] [REDACTED] to discuss why his contract was not renewed. Weisman and Vasquez stated that Complainant’s attendance affected the quantity of his work and that was the reason his employment contract was not renewed. Complainant said that [REDACTED] reminded Weisman that Complainant had told him and Vasquez about his medical conditions and absences for treatments, which Weisman did not deny. But Weisman reiterated that if Complainant was not at work, he could not perform his duties, which affected his overall job performance. Complainant did not sign this performance review.

During his DCR interview, [REDACTED] confirmed Complainant’s account of this meeting. [REDACTED] stated that Complainant’s job performance could not have been the reason his contract was not renewed, because [REDACTED] spoke with Vaccaro, Complainant’s direct supervisor, who had nothing but praise for Complainant’s work. [REDACTED] also thought Respondent was “flip-flopping” with the reason for not re-hiring Complainant, because the termination letter referred to performance, but Vasquez and Weisman referred to attendance during the meeting. [REDACTED] advised Complainant to grieve the failure to re-hire, which he did, but it was denied by the School Board and Superintendent Steve Cochrane.

Respondent produced its sick leave policy, under which Complainant received 12 sick leave days per school year. Employees may carry over unused sick days to the next school year. Employees are required to submit medical documentation for absences of three consecutive days or more and for more than seven days per school year. Respondent also produced its vacation and personal day policy, under which Complainant received 10 vacation days per school year and three personal days per school year.

Respondent produced Complainant’s attendance calendar for the 2015-2016 school year. This calendar reflects that Complainant used 10.5 of his 15 available sick days (12 for the 2015-2016 calendar year and three carried over from the 2014-2015 calendar year). Complainant submitted doctor’s notes for six of these days. The three days for which he did not submit notes were not consecutive absences and did not require medical documentation. Complainant used 6.5 of his 10 available vacation days and all three of his personal days.

Respondent produced Complainant’s attendance calendar for the 2016-2017 school year. This calendar reflects that Complainant used all of his vacation (10), personal (three) and sick days (16.5, 12 for the 2015-2016 calendar year and 4.5 carried over from the 2015-2016 calendar year).

Complainant submitted doctor's notes for 11 of the sick days.² The five days for which he did not submit notes were not consecutive absences and did not require medical documentation. Respondent placed Complainant on 14 days of FMLA leave for the stroke he suffered in April of 2017.

During his DCR interview, Superintendent Steve Cochran reviewed Complainant's attendance calendar for the 2016-2017 school year and the doctor's notes Complainant's submitted to Respondent. Cochran stated that Complainant submitted notes for absences of three days or more during the 2016-2017 school year (August 17, 18, 19, 22, 2016; November 21, 22, 23, 2016; and April 26, 2017 through May 15, 2017), as required by Respondent's sick leave policy. When asked why Complainant received a partially effective rating for 2016-2017, Cochran stated that his absences made it difficult for Complainant to complete his work. Cochran further stated that he denied Complainant's grievance because Weisman warned Complainant in his 2015-2016 review that his "attendance needs to improve," but it did not. Cochran stated that Complainant submitted several doctor's notes excusing his absences after they made the decision not to renew his contract (while he was out because of his stroke). However, Cochran also admitted that Respondent's policy does not specify when notes must be submitted.

During his DCR interview, Goldstein stated that Complainant did not exceed his allocated sick, vacation, and personal days for the 2015-2016 and 2016-2017 school years, and Respondent put Complainant on FMLA leave in April and May of 2017. Goldstein said that employees should not use all of their paid time off, because it does not make the employee look good. Goldstein further stated that Complainant did not communicate with him regarding his illnesses and treatments and submitted some of the doctor's notes after the dates on the note. Goldstein stated that Complainant received an "ineffective" rating for the 2016-2017 school year for "dependability," because he was absent more frequently than in 2015-2016.

During his DCR interview, Gary Weisman, Director of Plant Operations, said that he completed Complainant's performance evaluations and told Complainant that he needed to improve his attendance. Weisman said that the quality of Complainant's work was "really good," especially his carpentry. However, when Complainant was absent, the other maintenance employees had to complete his work in addition to their own, which disrupted their workflow. Weisman also told DCR that Complainant was frequently absent on Fridays and Mondays.

During his DCR interview on June 21, 2018, Pete Vasquez, Operations Manager, confirmed that the quality of Complainant's work was good, but he was absent too often. Vasquez agreed with Respondent's decision not to re-hire Complainant. At the time of Vasquez' interview, Respondent had not hired a replacement for Complainant.

During his DCR interview, Joe Vaccaro, Respondent's Foreman, said that Complainant was one of Respondent's best maintenance technicians in terms of the quality of his work. Vaccaro was aware that Complainant was undergoing tests and treatments for his medical conditions. Vaccaro also stated that Complainant asked which days would be best for him to schedule doctor's appointments and treatments. Vaccaro told him Fridays, because Respondent would typically not start new projects at the end of a workweek.

² November 7, 21, 22 and 23; December 19, 2016; January 20 and 24; March 6, 22, and 23 and April 18, 2017.

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.

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent failed to reasonably accommodate Complainant’s disabilities and discharged Complainant based on his disabilities and his approved use of medical leave to address and treat those disabilities.

The essential facts concerning the non-renewal of Complainant’s 2017-2018 employment contract with the school district are not disputed. Each of the witnesses that DCR interviewed indicated the high quality of Complainant’s work during the prior and then-current school years. All also corroborated that Complainant had multiple absences from work for the 2015-2016 and 2016-2017 school years and that he produced medical notes to support those absences. All corroborated that the medical notes were substantially adequate to properly account for Complainant’s absences under the terms of the district’s sick leave policy and that Complainant never exceeded his allotted leave time during the 2015-2016 school year. All corroborated that Complainant took FMLA leave for a period in 2017 when he was out of work due to a stroke after he had already exhausted all of his available sick time. The witnesses indicated that Respondent decided not to renew Complainant’s employment contract for the 2017-2018 school year based on an alleged decrease in the quantity of his work and workflow disruptions due to Complainant’s approved medical absences.

The LAD makes it unlawful 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). It is also unlawful for an employer to refuse to make reasonable accommodations to its rules and procedures necessary to allow a disabled employee to perform his job duties, unless such an accommodation would impose an undue hardship on its operations. N.J.S.A. 10:5-4.1; N.J.S.A. 10:5-12(a); N.J.A.C. 13:13-2.5. Providing an employee with time off from work for medical treatment can be

a reasonable accommodation. See N.J.A.C. 13:13-2.5(b)(1)(ii). It is uncontested that Complainant had disabilities within the meaning of the LAD in that he suffered multiple physical ailments, including degenerative disk disease and a stroke, causing a wide variety of symptoms on continuing, episodic and single-event bases, and that he sought time off from work to obtain medical treatment for these disabilities.

While Respondent approved Complainant's time off at the time it was requested, it nonetheless informed him that his employment was being terminated upon his return from leave because of the time he took off.³ Authorizing an employee to take approved medical leave to address a disability or disabilities and then firing that employee either because of the time he took off from work for the leave or because the "quantity" of his production decreased while he was out on the approved leave vitiates the effectiveness of the leave and may constitute a failure to accommodate discrimination based on disability. See Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998) (assertion by employer that termination was based on absenteeism rather than employee's disability does not justify the termination "where the absence was the requested accommodation"); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (penalizing employee for work missed during leave taken as reasonable accommodation "would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation"). Under the circumstances here, where Complainant was not permitted to retain his employment following his approved leave, there is a reasonable suspicion that Respondent failed to accommodate Complainant's disabilities and terminated his employment because of his need for a reasonable accommodation.

Further, the LAD also prohibits employers from retaliating against employees for exercising any right granted or protected by the act. N.J.S.A. 10:5-12(d). To set forth a prima facie case of discriminatory retaliation, there must be evidence that the employee "engaged in a protected activity known to the [employer,]" the employee was "subjected to an adverse employment decision[,]" and there is a causal link between the protected activity and the adverse employment action. Battaglia v. United Parcel Service, Inc., 214 N.J. 518, 547 (2013). Requesting a reasonable accommodation for a disability is a form of protected activity under the LAD. See, e.g., Boles v. Wal-Mart Stores, Inc., 2014 U.S. Dist. LEXIS 41926, at *21-*26 (D.N.J. 2014); see also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (penalizing employee for work missed during leave taken as reasonable accommodation "would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law"). And courts have found a causal connection when the protected activity is closely followed by an adverse employment action. See, e.g., Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995). Since Complainant was informed of his termination immediately upon his return from

³ Although Respondent may characterize the action here as a nonrenewal of Complainant's employment rather than a termination, the New Jersey Supreme Court has stated that the failure to renew the employment of an existing employee should be treated as a termination of employment rather than a failure to hire. Nini v. Mercer County Cmty. College, 202 N.J. 98, 115 (2009).

medical leave, there is reason to suspect that Respondent's actions may also have violated N.J.S.A. 10:5-12(d).⁴

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, 28 N.J. Super. at 56. The Director thus finds there is PROBABLE CAUSE to believe Respondent subjected Complainant to discrimination based on his disability and unlawful reprisal, and this case will proceed to a hearing on the merits on that allegation.



Rachel Wainer Apter, Director
NJ Division on Civil Rights

Date: October 2, 2019

⁴To the extent the original verified complaint did not expressly allege a violation of N.J.S.A. 10:5-12(d), it is hereby amended to reflect this alleged violation. See N.J.A.C. 13:4-2.9.