STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EF05FB-67232

W.S.,	)	
	)	
Complainant,	)	
	)	**Administrative Action**
v.	)	
	)	**FINDING OF PROBABLE CAUSE**
Academy Lines LLC,	)	
	)	
Respondent.	)	

On July 16, 2018, W.S. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Academy Lines LLC (Respondent), discharged him in violation of the New Jersey Family Leave Act (FLA) N.J.S.A. 34:11B-1, et seq. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a privately owned transportation company. On or about October 5, 2006, Respondent hired Complainant as a bus driver at its Leonardo Terminal in Hoboken. In that role, he reported to General Manager Cathy Ciliento.

In the verified complaint, Complainant alleged that Respondent unlawfully terminated his employment while he was out on intermittent FLA leave to care for a family member with a serious health condition.[1]

In its answer to the verified complaint, Respondent denied that it violated the FLA, stating that it discharged Complainant because he failed to provide sufficient advance notice of leave and because he failed to provide a medical certification to support his request for leave.

On or about December 14, 2016, Complainant submitted a request to take intermittent leave in two increments of three weeks each to care for his father – specifically, from December 31, 2016 through January 20, 2017, and March 16, 2017 through April 5, 2017.[2] Respondent approved Complainant's leave request, and Complainant submitted the applicable medical certificate on or about January 4, 2017, five days after he had commenced his leave. The medical certificate stated

[1] The FLA defines intermittent leave as leave "taken in separate periods of time, where each period of leave is at least one workweek." N.J.A.C. 13:14-1.2.

[2] While Complainant's request for leave was made on his employer's Federal Medical Leave Act (FMLA) form, when an employee requests leave for a reason covered by both the FLA and FMLA, the leave simultaneously counts against the employee's entitlement under both laws. N.J.A.C. 13:14-1.6 (a).

that Complainant's father had Chronic Lymphocytic Leukemia in relapse. Under the section titled, "Date you estimate patient will no longer require care by the care provider," the physician wrote, "Unable to estimate, as long as he lives." The medical certificate further stated, "No recovery date expected." Upon Complainant's April 2017 return to work, he had six weeks of FLA leave available.

DCR's investigation found that on or about November 8, 2017, Complainant verbally requested an additional two weeks of intermittent FLA leave to care for his father – specifically, from November 13, 2017 through November 28, 2017. According to Respondent, Ciliento's assistant, Diane Pace, informed Complainant that he needed to submit an updated medical certificate in order for Respondent to approve the request. Complainant took leave to care for his father from November 13, 2017 through November 29, 2017. He did not produce an updated medical certificate for that leave.

On or about November 30, 2017, Complainant verbally requested additional intermittent FLA leave for four weeks, again to care for his father – specifically, from December 6, 2017 through January 4, 2018. Complainant also submitted to Respondent a written request for that four week leave on December 5, 2017. Because Complainant had still not submitted an updated medical certificate, Ciliento, and Safety Manager, Tom Ball, met with Complainant that day to discuss his most recent leave request. Complainant told DCR that he was unable to obtain an updated medical certification at this time because both the short term and long term treatment plans for his father were yet to be determined due to his father's deteriorating condition. He said that, as he explained to Ciliento at the December 5 meeting, he planned to provide Respondent with an updated certification once a treatment plan was determined. Complainant told DCR that it was possible his father would pass during his trip and that the situation was very fluid. He stated that it was unclear at this time whether his father would remain in the hospital, be placed in hospice care, or be sent home.

In an interview with DCR, Ciliento said that she informed Complainant during the December 5 meeting that if he did not immediately provide an updated medical certificate, his request for leave would be denied and he would be discharged if he did not report to work on December 6. During DCR's interview, Ball confirmed Ciliento's statement. However, Complainant disputed Ciliento and Ball's account of the December 5 meeting, stating that he told Ciliento that he would provide the certificate at a later date due to the uncertainty with respect to his father's care plan.[3] Complainant denied that Ciliento advised him that he could be discharged if he failed to submit the updated medical certification.

On December 6, 2017, Complainant commenced leave to care for his father. Because Complainant did not provide an updated medical certification before leaving work, Ciliento sent an Employee Change of Status Form to Respondent's Human Resources Department, stating that Complainant's employment was being terminated effectively immediately due to "absences." According to records reviewed by DCR, Human Resources Specialist, Jennifer Santana, mailed Complainant a COBRA package on December 21, 2017. Complainant told DCR that he was not aware he had been discharged until he received the COBRA package by mail on or about December 30, 2017, after he had returned home from caring for his father in North Carolina.

[3] Complainant's father ultimately passed away on June 3, 2019.

In a DCR interview, Ciliento acknowledged that she terminated Complainant's employment on December 6, 2017, and did not allow Complainant to submit an updated medical certificate when he was due to return to work in early January 2018. She acknowledged that she was aware of Complainant's father's medical condition and prognosis, as stated in the medical certificate that Complainant had previously submitted. Ciliento told DCR that she made the decision to discharge Complainant because she "need[ed] bus drivers."

In a separate interview with DCR, Santana, and Director of Human Resources, Violet Penyaczek, acknowledged that they too were aware of Complainant's father's medical condition and prognosis. Both witnesses told DCR that they were aware that the medical certificate that Complainant submitted on or about January 4, 2017 stated that his father was suffering from a terminal illness that would require care until his death. Both witnesses told DCR that when they received the Change of Status form from Ciliento terminating Complainant's employment, they did not follow up with Ciliento or Complainant to obtain additional information about Ciliento's decision to terminate Complainant. Santana acknowledged that the December 21, 2017 COBRA package that had been mailed out to Complainant would have been the first time Respondent notified Complainant of his discharge outside of any alleged verbal discussion Complainant may have had with Ciliento on December 5.[4]

DCR reviewed Respondent's FLA policy, which states, in relevant part, "An employee requesting FLA leave in order to care for the employee's seriously ill spouse, civil union partner, child, or parent may be required to provide a certification issued by a health care provider supporting the need for the requested FLA leave." Respondent's policy does not contain a time frame or deadline by which a medical certification must be provided. Nor does the policy say that failure to provide a medical certification by a date certain could result in termination. Ciliento told DCR that she did not recall any other instance wherein Respondent fired an employee because they did not provide an updated medical certification regarding a terminally ill parent.

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; N.J.A.C. 13:14-1.16. "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 [FLA] has been violated." Ibid. If the Director determines that probable cause exists, the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). If, on the other hand, the Director finds there is no probable cause to believe the LAD has been violated, that finding is 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).

[4] Respondent claimed that Complainant's claims should be dismissed as time-barred pursuant to N.J.S.A. 10:5-18 because Respondent discharged him on December 6, 2017, and he did not contact DCR until June 28, 2018 - more than 180 days later. However, Complainant's contention that he only became aware of the December 6, 2017 discharge on December 30, 2017 seems to be supported by Santana's testimony. Under these circumstances, it appears Complainant filed his complaint within 180 days of receiving notice of his discharge. Consequently, DCR declines to dismiss the complaint on this basis at this time. Respondent is not foreclosed from reasserting this argument if an Administrative Law Judge determines that Complainant knew of his determination prior to December 30, 2017.

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 FLA, employees are "entitled to take a period of leave upon… the serious health condition of a family member without risk of termination of employment or retaliation by employers and without loss of certain benefits." N.J.S.A. 34:11B-2. The Act makes it "unlawful for any employer to interfere with, restrain or deny the exercise of, or the attempt to exercise" rights provided under the FLA or to "discharge or in any way retaliate against or penalize any employee because such employee . . . exercised any rights granted under the [FLA]." N.J.S.A.34:11b-9(a), N.J.A.C. 13:14-1.15.

An employer is permitted to require a certification supporting a request for leave under the FLA. The enforcing regulations provide that where the certification is for the serious health condition of a family member of the employee, the certification shall be sufficient if it states the approximate date on which the serious health condition commenced, the probable duration of the condition, and the medical facts within the provider's knowledge showing that the family member's health condition meets the criteria of a serious health condition. N.J.A.C. 13:14-1.10(b)(1). The FLA explicitly prohibits an employer from using the certification requirements to intimidate, harass, or otherwise discourage an employee from requesting or taking family leave or asserting any of the employee's rights to family leave. N.J.A.C. 13:14-1.10(c). Moreover, the "emergent circumstances" provision of the FLA provides that a failure to provide 30 days advance notice is not, in some circumstances, standing alone, a basis to deny a leave request. N.J.A.C. 13:14-1.4(a).

Here, the initial certification submitted by Complainant on January 4, 2017 for the care of his father contained information deemed sufficient under the FLA's enforcing regulations. N.J.A.C. 13:14-1.10(b)(1). When Complainant later requested additional intermittent leave in December 2017 for the same reason, Respondent asked him to provide an updated medical certification. However, Complainant told DCR that at the time he sought to exercise his right to intermittent leave in December 2017, the treatment plan for his father was unknown because his condition had worsened. Complainant stated that this is what he told his supervisor when he met with her on December 5, 2017. Complainant stated that it was possible his father could pass away at any time. There is some support for Complainant's statement concerning his father's condition, as Complainant's father did pass away just six months later. Under these circumstances, the Director is satisfied for purposes of this disposition that Complainant met the "emergent circumstances" provision of the FLA and was not required to provide Respondent with 30 days advanced notice. N.J.A.C. 13:14-1.4(a).

Complainant told DCR that he notified Respondent that he would provide an updated medical certification once he had more information from his father's treating physician. And while Respondent refuted that claim, it failed to articulate a legitimate reason for why it required

Complainant to immediately produce a new certification or face termination. Rather, Complainant's supervisor told DCR that she sought Complainant's termination, notwithstanding his remaining FLA entitlement, merely because the company "needed bus drivers." Thus, Respondent's true motives are in question, and there is a reasonable suspicion that Respondent used the FLA's medical certification requirements to discourage and impede Complainant's right to take FLA, in violation of N.J.A.C. 13:14-1.10(c).

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 v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988). Therefore, the Director finds probable cause to support Complainant's allegation that Respondent violated the FLA.

April 7, 2020

DATE

Rachel Wainer Apter, Director
New Jersey Division on Civil Rights