

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. ER08HB-66510**

D.R,)
)
Complainant,)
)
v.)
)
Cedar Lawn Cemetery,)
)
Respondent.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On February 13, 2017, D.R. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Cedar Lawn Cemetery (Respondent) discriminated against him based on 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 non-denominational cemetery located in Paterson, New Jersey. On April 6, 2009, Respondent hired Complainant as a seasonal worker and promoted him to groundskeeper in October 2012. In this position, he was responsible for maintaining the grounds, digging graves, moving headstones, and carrying caskets as needed. On August 15, 2016, Respondent discharged Complainant.

In the verified complaint, Complaint alleged that he was on a two-week medical leave and subsequently discharged because of his disability.

Complainant provided medical documents showing that on or about July 29, 2016, he injured his back carrying a casket. On August 1, 2016, he went to Hackensack University Medical Center's emergency room and was diagnosed with a sprained lower back and back strain. Complainant alleged that he provided his supervisor, Reynaldo Ortiz, a note from his physician excusing him from work from August 2, 2016 to August 8, 2016. Respondent alleged Ortiz verbally informed Complainant he had to make an appointment with Respondent's workers' compensation doctor but that Complainant failed to do so. Complainant denies that he was instructed by anyone to make appointment an appointment with Respondent's workers' compensation physician.

Complainant alleged that on August 8, 2016, he provided Respondent a second note from his physician excusing him from work until August 15, 2016, at which time he could return to work without restrictions. Respondent alleged that it again verbally instructed Complainant to make an appointment with the workers' compensation doctor. Complainant denies that Ortiz or

anyone else told him that he must make an appointment to see Respondent's workers' compensation doctor.

Complainant alleged that on August 15, 2016, he left Respondent a voicemail, after hours, stating he would not be able to return to work the next day because of a medical condition. Complainant asserted that he had gone to Hackensack University Medical Center's emergency room that night because he had shortness of breath and chest pains. Ortiz acknowledged receiving a voicemail from Complainant stating he could not breathe and was going to the hospital. Respondent stated Complainant failed to provide documentation excusing his absence on August 15, 2016.

In its response to the complaint, Respondent denied that disability played any part in its decision, and asserted that Complainant was fired because he failed to report to the workers' compensation doctor as instructed on multiple occasions.

In an interview with DCR, Complainant said that he received notice of his termination when he returned to work on August 16, 2016. Complainant alleged that, contrary to Respondent's assertion, he had a doctor's note excusing his absence the prior day. He maintained that Respondent never told him he had to see a worker's compensation doctor, never notified him that he would be fired if he failed to do so, and never gave him a deadline by which he needed to be examined by the workers' compensation doctor or face termination.

DCR reviewed the August 1, 2016 Hackensack University Medical Center After-Visit Summary documenting Complainant's work-related injury. The Summary instructed Complainant to visit North Hudson Community Clinic for a follow-up within two days. Complainant also provided DCR documents showing that he was treated in the emergency room on August 15, 2016 for shortness of breath and chest pain.

DCR interviewed Complainant's supervisor, Reynaldo Ortiz. Ortiz explained the decision to terminate Complainant was based on the fact that he had, on at least three occasions within a two-week timeframe, instructed Complainant to see a workers' compensation doctor. Ortiz also stated that he did not want to "deal with" why Complainant had not seen the doctor as instructed and was now claiming an additional medical issue in addition to his back injury. He stated Complainant failed to file a workers' compensation claim even after his termination. Ortiz also stated Respondent never received documentation regarding Complainant's August 15, 2016 medical issue. He noted Complainant filed a union grievance and the outcome was in Respondent's favor. There is no dispute that the union did not take the grievance to arbitration. According to documents provided to DCR by Respondent, the union found that Complainant was terminated "...for his lack of responsibility to his job and for not following procedure with the injury he sustained on the job." The Grievance Form further stated that the union discussed a Last Chance Agreement with Respondent, but Respondent denied granting Complainant another chance and upheld the termination.

In response to the evidence presented by Respondent, Complainant told DCR that Respondent did not inform him that he must report to the workers' compensation doctor and he was not aware of any obligation to do so. DCR was unable to determine whether Complainant provided the August 15, 2016 medical note to Respondent.

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.*

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).

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based on disability since, as stated by Complainant’s supervisor, Complainant was fired, at least in part, because Respondent did not want to “deal with” Complainant’s disabilities. Respondent acknowledges receiving Complainant’s phone call advising he could not breathe and was going to the hospital on August 15, 2016, the day that Complainant was due to return to work after a two-week medical leave. Respondent further acknowledged that it made the decision to discharge Complainant after learning he needed to go the hospital but prior to and without receiving any medical documentation concerning whether Complainant’s medical condition would affect his ability to perform his job.

Respondent’s assertion that Complainant was discharged for failing to make an appointment to be seen by a workers’ compensation doctor is not supported by the evidence. For example, Respondent did not submit evidence showing a mandatory company policy that required examination by its workers’ compensation provider be initiated by the injured employee. Nor was there evidence that Complainant was instructed to contact a workers’ compensation physician by a date certain or face termination. Of note here, Complainant was terminated on his first day back at work after a two-week medical leave. Gillett v. Fairleigh Dickinson University, 2011 WL 2935651 (App. Div. July 22, 2011)(noting that an inference of discrimination arises where employee is fired shortly after revealing that he is disabled).

The evidence was inconclusive as to whether Respondent verbally instructed Complainant to see a workers’ compensation doctor and whether Complainant provided Respondent with documentation of his August 15, 2016 emergency room visit but, given Ortiz’ admission that he didn’t want to “deal with” Complainant’s disabilities, such evidence is not dispositive at this

juncture. It is sufficient to establish that a full plenary hearing is necessary to resolve this matter, where an Administrative Law Judge will be able to assess the credibility of the witnesses.

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.



Rachel Wainer Apter, Director
NJ Division on Civil Rights

Date: April 27, 2020