STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 15882-2016
DCR DOCKET NO. EN11WB-63949

Nichelle Tate-Munawar, Complainant, v. Family Based Services of New Jersey, Respondent.	)	Administrative Action **FINDINGS, DETERMINATION AND ORDER**

Nichelle Tate-Munawar, Complainant, *pro se*

Lourdes Lucas, Esq. (Law Offices of Peter C. Lucas, LLC, attorneys) for the Respondent.

This matter comes before the Division on Civil Rights (DCR) from a verified complaint filed by Nichelle Tate-Munawar (Complainant) alleging that her former employer, Family Based Services of New Jersey (Respondent or FBS), discriminated against her based on disability, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. She alleged that the decision amounted to disability discrimination based on a failure to accommodate.

On June 30, 2017, Administrative Law Judge Sarah G. Crowley issued an initial decision dismissing the complaint with prejudice. After evaluating the record, the DCR Director adopts the ALJ's conclusions that Respondent did not violate the LAD and that the complaint should be dismissed.

Procedural History

On June 20, 2013, Complainant filed a verified complaint with the DCR alleging that Respondent violated the LAD when it decided to terminate her employment, rather than extend her medical leave. See Verified Complaint, Jun. 20, 2013, ¶6.1. She alleged that the decision amounted to disability discrimination. Ibid.

Respondent filed an answer denying the allegations of discrimination in their entirety, and DCR began an investigation. On October 18, 2016, at Complainant's request, DCR ceased its investigation and transmitted the matter to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 10:5-13.

On June 6, 2017, and ALJ Crowley conducted a hearing. On June 30, 2017, the ALJ issued an initial decision recommending dismissal of Complainant's complaint.[1] Complainant filed exceptions to the initial decision on August 14, 2017. Respondent filed a reply on August 18, 2017.[2] The DCR Director received an extension of time to issue the final order, which is now due on September 28, 2017.

The Evidence Submitted at the Hearing

Complainant appeared *pro se* at the June 6, 2017 hearing. She testified in support of her complaint and presented no other witnesses. FBS Executive Director Ann Goldman was the sole witness testifying on behalf of Respondent.

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[1] "ID" refers to the ALJ's June 30, 2017 initial decision; "Exh. J-" refers to the joint exhibits submitted at the hearing; "CE" refers to Complainant's exceptions to the ID. "RE" refers to Respondent's reply to Complainant's exceptions.

[2] On August 28, 2017, Complainant asked DCR for an additional two weeks to submit supplemental exceptions, stating that she had consulted with an attorney. Respondent objected to Complainant's request to submit supplemental exceptions, and also declined to consent to DCR's request for a second extension of time for the Director to issue the final order in this matter. DCR granted Complainant until September 5, 2017 to file supplemental exceptions and requested a notice of appearance from any attorney representing her, but received no supplemental exceptions or notice of appearance.

Complainant began medical leave on March 20, 2013, and submitted a number of doctor's notes signed by her treating physician, Nami Khulusi, M.D. The first note was dated March 22, 2013, and excused Complainant from work from March 20 to April 4, 2013. (Exh. J-2.) The second note was dated April 2, 2013, and excused Complainant from work from April 2 to April 16, 2013. (Exh. J-3.) The third note was dated April 7, 2013, and excused her from work from April 16 to May 7, 2013. (Exh. J-4.) Because Complainant was unable to return to work on May 7, 2013, her doctor gave her a fourth note, excusing her from work until June 4, 2013. (Exh. J-5; ID2-3.)

Goldman testified that on May 9, 2013, she wrote a letter to Complainant acknowledging receipt of her medical notes, but requiring her to return to work by May 15, 2013. She wrote in part:

> [Y]ou have exhausted your paid and unpaid leave. Unless you are able to return to work by May 15, 2013, we will have no choice but to terminate your employment. If you are able to return to work with reasonable accommodation, please contact us immediately upon receipt of this letter so that we may discuss your options. Your doctor would have to clear you to return to work with any agreed upon accommodations. FBSA values its employees and we will do all . . . that we can, within reason, to accommodate you.
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> [Exh. J-1.]

According to the ALJ's summary of the hearing testimony, Complainant testified that after receiving Goldman's letter, she spoke with her direct supervisor, Yvette Williams, and told Williams that although the fourth doctor's note released her to return to work on June 4, she would not be able to return on that date. (ID2-3.) In her exceptions, Complainant wrote, in pertinent part:

> In the testimony and factual findings, it was indicated that I testified that I would be able to return to work on June 4, 2013. However, it was stated that I testified that I had to undergo some testing by my cardiologist, but

> by no means do I recall testifying that I was not able to return due to the future testing . . . The reasonable accommodation would have been to allow me to return to work on June 4, 2013.
>
> [CE1.]

Respondent terminated Complainant's employment on May 15, 2013. According to Goldman, although Complainant may have spoken to Williams after receiving the May 9, 2013 letter, Williams never shared that information with Goldman. (ID4.)

At the hearing, Complainant acknowledged that although she was aware that Respondent did not hire a replacement for several months, she never contacted anyone at FBS after her conversation with Williams to let anyone know when she could return to work. (ID2-3.) In her exceptions, Complainant wrote:

> I immediately applied for unemployment after June 4, 2013, due to my termination and I didn't reach out to my previous employer, because the decision had already been made to terminate my employment . . . by Ann Goldman, Director and if she felt I would be eligible for rehire then the termination letter it should've been stated but instead she wished me well in my future endeavors.
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> [CE1-2.]

According to Goldman, Complainant was discharged "due to her absence from work." (ID3.) In her summary of Goldman's testimony, the ALJ wrote, "[T]hey were very busy" and "[h]er staff, of only ten or eleven, was already overworked and they needed to fill the position." (ID3-4.) "[It] was difficult to function as an organization with one staff member out for an extended period of time." (ID4.) Goldman also noted that it was difficult to fill Complainant's position, and that FSB "would have taken her back if she advised that she could return before a replacement was found, but complainant never advised that she could return to work." (Ibid.)

The ALJ's Decision

The ALJ made findings of fact at pages 5-6 of the ID, including the following:

13. The complainant was terminated for her failure to return to work.
14. The complainant was not terminated for her disability.
15. The complainant never requested any accommodation.

(ID6.) The ALJ concluded that Complainant "was terminated for her failure to return to work and not for a disability" and that "complainant never requested any accommodation for a disability." (ID9.)

The Director's Decision

The LAD prohibits employment discrimination based on disability. N.J.S.A. 10:5-12a & 4.1. Although the statute itself does not explicitly address reasonable accommodation, New Jersey courts have uniformly held that the law requires employers to reasonably accommodate employees' disabilities. See, e.g., Potente v. County of Hudson, 187 N.J. 103, 110 (2006); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 396 (App. Div. 2002). Those holdings are reflected in DCR's regulations, which require employers to accommodate employees' disabilities unless they can prove that doing so would impose an undue hardship on the employers' operations. See N.J.A.C. 13:13-2.5.

After independently evaluating the record, including Complainant's exceptions and Respondent's reply to exceptions, the Director finds that except as noted in the discussion below, the ALJ's factual findings are supported by substantial credible evidence and adopts them as his own. Because the ALJ had the opportunity to hear the testimony of witnesses and observe their demeanor, it is the ALJ who is best able to judge the credibility of those witnesses on particular issues, Clowes v. Terminix Int'l,

Inc., 109 N.J. 575, 587-88 (1988). Unless there is evidence that the ALJ's factual findings based on the credibility of lay witnesses were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence in the record, the Director has no basis for rejecting those credibility determinations or the ALJ's factual findings based on those determinations. N.J.A.C. 1:1-18.6.

Based on the evidence in the record, the Director rejects the ALJ's finding that Complainant "never requested any accommodation." An employee need not use the phrase "reasonable accommodation" or put the request in writing, but is merely required to make it clear that she needs some assistance because of a disability. Tynan, supra, 351 N.J. Super. at 400. Because medical leave is a form of disability accommodation, see Svarnas v. AT&T Communications, 326 N.J. Super. 59, 79-80 (App. Div. 1999), Complainant requested accommodations for her disabilities in this case. And Respondent granted Complainant's first three requested accommodations.

Regarding the ALJ's finding that Complainant "was not terminated for her disability" (ID6), the Director clarifies that Respondent terminated Complainant's employment because she could not return to work due to her disability, but in the specific context of this case, that decision did not violate the LAD. Goldman's testimony demonstrates that Respondent made the decision to terminate Complainant's employment only after granting her first three requests for disability leave, evaluating her request for additional leave to accommodate her disability, and concluding that granting that accommodation would impose an undue hardship on its operations. In determining whether a needed accommodation would impose an undue hardship on a particular employer's operations, factors to be considered include the number of

employees on staff, and the nature of the work performed by the employee. N.J.A.C. 13:13-2.5(c). Goldman testified that "the staff . . . was already overworked and [it] was difficult to function as an organization with one staff member out for an extended period of time." The ALJ found Goldman's testimony "credible" and "consistent with the documentary evidence." (ID5.)

Complainant takes exception to the ALJ's statement that she told Yvette Williams that she would not be able to return to work on June 4, 2013. However, even accepting Complainant's version of her conversation with Williams as true, Complainant has not addressed Respondent's evidence that it would have been an undue hardship to extend her leave beyond May 15, 2013.

In her exceptions, Complainant asserts that if Goldman questioned her need for an extension of her medical leave, she could have requested an "IME (Independent Medical Exam)." (CE1.) And addressing the ALJ's statement that she did not apply for family leave, (ID3), Complainant notes that there was no need for her to apply for family leave because she had not yet exhausted the benefits available to her under State Plan disability.[3] (CE1.) Because Respondent has not disputed that Complainant had a disability that made her unable to return to work until June 4, 2013, neither of these arguments would be sufficient to show that Respondent violated the LAD by terminating her employment. Instead, the issue is whether it was an undue hardship for Respondent to continue the disability leave that she needed for an undisputed disability.

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[3] It is unclear why "family leave" was addressed in the testimony or other evidence submitted at the hearing. In the specific context of this case, any request for family leave or Family Leave Insurance benefits is not relevant to Complainant's LAD claims. It appears that Respondent had fewer than fifty employees at the times relevant to this complaint (ID3-4), and for that reason was not subject to the federal Family and Medical Leave Act, which can provide job-protected leave for an employee's serious health condition.

Without specific evidence that the ALJ's factual findings based on the credibility of lay witnesses were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence in the record, the Director has no basis for rejecting those credibility determinations or the ALJ's factual findings based on those determinations. N.J.A.C. 1:1-18.6. Here, Complainant has pointed to no competent evidence that would permit the Director to reject Goldman's testimony regarding the hardship additional leave would impose on Respondent's operations.

Conclusion

Based on the evidence in the record and in the specific context of this case, the Director adopts the ALJ's conclusion that Respondent did not violate the LAD by terminating Complainant's employment.

DATE: 9-22-17

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS