STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 8661-00
DCR DOCKET NO.: ED08HB-39766
DATED: OCTOBER 22, 2002

JOANN WEISS,	)	
Complainant,	)	
v.	)	ADMINISTRATIVE ACTION
COOPER HOSPITAL/ UNIVERSITY MEDICAL CENTER,	)	FINDINGS, DETERMINATION AND ORDER
Respondent.	)	

APPEARANCES:

Katherine D. Hartman, Esq. (Attorneys Hartman, Chartered, attorneys) for complainant.

Peter L. Frattarelli, Esq. (Archer & Greiner, P.C., attorneys) for respondent.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Joann Weiss (Complainant), alleging that the respondent, Cooper Hospital/University Medical Center (Respondent), subjected her to unlawful employment discrimination based on her disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On May 29, 2002, the Honorable Bruce R. Campbell, Administrative Law Judge (ALJ), issued an initial decision[1] dismissing the complaint. Having

[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ;"CE" shall refer to Complainant's exceptions to the ID; "RR" shall refer to Respondent 's reply to Complainant's exceptions; "TR" shall refer to the transcript of the September 27, 2001 hearing; "CTB" and "RTB" shall refer to Complainant's and Respondent's trial briefs, respectively, and "CPB" and "RPB" shall refer to Complainant's and Respondent's post-trial briefs, respectively.

independently reviewed the record, including the ALJ's decision, the hearing transcript and the exceptions and replies filed by the parties, the Director rejects the ALJ's decision to dismiss the complaint and concludes instead that Respondent subjected Complainant to unlawful employment discrimination in violation of the LAD.

PROCEDURAL HISTORY

On June 26, 1995, Complainant filed a verified complaint with the Division alleging that Respondent failed to provide her with reasonable accommodations, subjected her to differential treatment and terminated her employment based on her disability (fibromyalgia). Respondent filed an answer on August 5, 1996 denying the allegations of unlawful discrimination, and the Division commenced an investigation. On August 10, 1998, the Division concluded its investigation and found no probable cause to support the allegations of the complaint. Complainant then appealed the no probable cause finding to the Appellate Division of the Superior Court of New Jersey. After reviewing the Division's investigation in connection with the appeal, the Division moved successfully before the Appellate Division for a temporary remand to permit the Division to conduct further investigation and to reconsider the finding of no probable cause. After supplemental investigation on remand, the Division issued a finding of probable cause on February 15, 2000, and the appeal was withdrawn.

On November 28, 2000, after attempting to conciliate the matter as required by the LAD, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. The ALJ conducted a hearing on the merits on September 27, 2001. Respondent submitted a post-hearing letter brief on October 29, 2001, and Complainant submitted a post-hearing letter brief on October 31, 2001. The ALJ issued an initial decision on May 29, 2002. Complainant filed exceptions to the initial decision on July 3, 2002, and Respondent filed a reply to Complainant's exceptions on July 12, 2002. The Director obtained three extensions of time to file his final determination in this matter, which is now due on October 22, 2002.

THE ALJ'S DECISION

Findings of Fact

The ALJ set forth the stipulated facts at pages 2 through 5 of the initial decision, and at pages 13 through 17 made his own findings of fact based on the evidence presented at the hearing. Briefly summarizing the factual findings, Complainant was employed by Respondent as a registered nurse, and assigned to a floor nurse position which had physical requirements such as lifting and stretching (ID 2, 4). Complainant received good evaluations and no disciplinary action greater than a written warning (ID 2).

Complainant was on medical leave of absence due to work-related injuries from October 26, 1993 through November 5, 1993, from March 5, 1994 through March 22, 1994, and from May 6, 1994 through July 25, 1994 (ID 13-14). After each of these leaves, Respondent notified Complainant that she was entitled to a maximum of 12 weeks leave time in any 12 month period. Complainant was diagnosed with fibromyalgia on May 19, 1994, and when she returned to work Respondent changed her schedule for two weeks, reducing her shifts from 12 to 8 hours, and scheduling days off between her workdays (ID 14). Complainant suffered another work-related injury on September 19, 1994, and began another medical leave of absence. On October 19, 1994, Respondent placed Complainant on an optional extension of benefits leave, and advised her that this type of leave does not guarantee that her position will be kept open for her, but that Respondent would attempt to place her in the same or a similar position at such time as she became able to return to work. Ibid.

On September 1, 1994, Complainant submitted bids for a position in Ambulatory Care and a position in Quality Assurance, and her bid form indicated that she was bidding for those positions based on her physician's recommendation that she no longer work as a floor nurse (ID 14-15). The positions Complainant sought were not promotions, but were lateral transfers to other R.N. positions which Complainant believed she was qualified to fill and in which there was a greater

likelihood that she could physically perform the required duties (ID 15). On October 7, 1994, Respondent advised Complainant that there were no available openings for a Quality Assurance R.N. (ID 14). The ALJ found no evidence in the record of any such openings at that time (ID 17). In November of 1994, while Complainant was still on leave, her doctors advised her that she could not return to her former position of floor nurse because of her health. Consequently, on November 22, 1994, Respondent's manager, Joan Cooker, was notified that Complainant needed a different job. On December 19, 1994, Respondent terminated Complainant's employment because she was not able to return to work (ID 14).

The ALJ specifically found "less than credible" Complainant's testimony that she submitted four or five bids for Ambulatory Care positions, three bids for Quality Assurance positions and at least two bids for Case Management positions, but as noted above, accepted as true that Complainant bid for ambulatory care and quality assurance positions on at least one occasion (ID 14-16). The ALJ found that Respondent awarded one Ambulatory Care position to Christine McIntyre Rickette "based strictly on seniority" and another Ambulatory Care position to Diane Bassett instead of Complainant because Complainant was unable to work (ID 16, 18). The ALJ found that seniority for R.N. positions refers to time in any position requiring an R.N. certification, as opposed to time working at Cooper Hospital (ID 16).[2]

Conclusions of Law

The ALJ concluded that Respondent met its burden of articulating legitimate, non-discriminatory reasons for not awarding the Ambulatory Care positions to Complainant (ID 18). Specifically, the ALJ concluded that in September 1994, Respondent awarded the first Ambulatory Care position to Christine McIntyre Rickette based on seniority, and in November 1994 awarded the second Ambulatory Care position to Diane Bassett instead of Complainant because

[2] This factual finding of the ALJ is somewhat unclear, because he cited exhibits which refer to original hire dates of employees entering non-R.N. positions (Exhibits R-9; R-18).

Complainant was unable to work. Ibid. The ALJ further concluded that Respondent met its burden of providing reasonable accommodations for Complainant's disability by providing Complainant with medical leaves of absence, an extended benefits leave, and a temporary reduced shift/reduced work week assignment (ID 18-19).

The ALJ noted that Complainant also argued that Respondent violated the LAD by failing to rehire her after her termination. The ALJ concluded that this claim was barred because it was not raised in the pleadings, and that even if the claim had been raised in a timely manner, nothing in the LAD affords a person with a disability greater rights to re-employment after termination (ID 21). Accordingly, the ALJ concluded that Respondent did not violate the LAD and dismissed the complaint. Ibid.

EXCEPTIONS AND REPLIES OF THE PARTIES

In her exceptions, Complainant argues that the ALJ misapplied the law regarding reasonable accommodation. Specifically, Complainant cites the recent United States Supreme Court decision in U.S. Airways v. Barnett, 152 S.Ct. 1516 (2002) for the proposition that Respondent had an affirmative obligation to place Complainant in a vacant position absent undue hardship. Complainant argues that while Barnett holds that the existence of an established policy of granting transfer requests based on seniority renders an accommodation request which circumvents seniority unreasonable, in this case there were "no expectations by other employees that they would be awarded a transfer bid based on seniority" (CE 2). Complainant argues that without such expectations, her transfer request was presumptively reasonable, requiring Respondent to prove "undue hardship," and that Respondent failed to provide such proof in this record. Id.

In response, Respondent argues that Complainant's exceptions should be disregarded because they were not submitted in a timely manner. Addressing the merits, Respondent argues that Barnett only provides further support for the dismissal, given the Court's holding that ordinarily

an accommodation demand violative of a seniority system will not be deemed to be "reasonable," and that complainant presented no evidence of "special circumstances" to obviate this general rule (RR 5). Respondent argues that there is ample support in the record showing that seniority was "an established policy for job transfers within Cooper" (RR 6-7).

THE DIRECTOR'S DECISION

The Legal Standards

The LAD prohibits discrimination against employees with disabilities, and its protections are to be applied in such a manner as to ensure that employees with disabilities have equal access to employment "subject only to limits that they cannot overcome." N.J.S.A. 10:5-4.1; Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 374 (1988). There are two distinct types of disability discrimination claims under the LAD: claims alleging that an employee with a disability was treated less favorably than fully-abled employees based on his or her disability (differential treatment cases), and claims alleging that an employer failed to reasonably accommodate an employee's known disability. Viscik v. Fowler Equipment Co., 173 N.J. 1 (2002).

The burden-shifting methodology articulated by the United States Supreme Court (and adopted by the New Jersey courts as a starting point for analyzing LAD cases) is applicable to differential treatment cases, since in those cases the complainant bears the ultimate burden of proving that the employer acted with discriminatory intent. McDonnell Douglas Corp. v. Green[3], 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Clowes v. Terminix International, Inc., 109 N.J. 575, 595 (1988). Where an employer defends a disability discrimination claim by asserting that its employment decision was based on factors other than the employee's disability, the McDonnell Douglas test will be applied to permit the employee to present

[3]Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD.
Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

circumstantial evidence to persuade the decisionmaker that the employer's articulated reason was not its true reason, but was instead a pretext for a discriminatory motive. Clowes v. Terminix, supra, 109 N.J. at 596.

Where the employer instead defends by asserting that the disability rendered the employee incapable of job performance, there is no need for the complainant to attempt to prove that the employer made the adverse employment decision because of the employee's disability – in such a case the employer's motive is undisputed, and the McDonnell Douglas test is inapplicable. Seiden v. Marina Associates, 315 N.J. Super. 451, 465-66 (Law Div. 1998). Instead, what is in dispute is whether the employer's decision to discharge the employee because of her disability was appropriate under the circumstances because the nature and extent of the employee's disability reasonably precludes job performance. N.J.S.A. 10:5-29.1. Where an employer maintains that it has reasonably concluded that the employee's disability precludes job performance, and has terminated the employee for that reason, the employer bears the burden of proof. Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 363 (App. Div. 1994), citing Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 383. Moreover, an employer must consider the possibility of reasonable accommodation before determining that the employee's disability precludes continued job performance. Job reassignment is a form of accommodation which may be reasonable depending on the particular circumstances of a case. Ibid.

Once an employee has shown that he or she meets the objective qualifications for the job, a decision to deny or terminate employment because of disability is presumptively violative of the LAD. Accordingly, in order to establish that a disability-based decision falls within the narrow exception established in the LAD, such decisions must be based on a complete understanding of the individual's abilities, full consideration of the available accommodations that would enable the employee to perform the essential functions of his or her job, and the burdens such accommodations would impose on the employer, rather than on a general assumption that a

particular disabled employee is unable to adequately perform his or her job. See Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 378-80. In accordance with this rationale, to establish that a decision to terminate an individual's employment because of his or her disability was lawful and reasonable, an employer must prove that it made an individualized assessment of the employee's ability to perform his or her job and fully considered all available reasonable accommodations before concluding that the employee's disability precluded continued employment. Thus, the LAD requires a person-specific, job-specific analysis of abilities and possible accommodations before a decision to exclude an employee or prospective employee based on disability can be deemed reasonable and lawful. Jansen v. Food Circus Supermarkets, Inc., supra, 110 N.J. at 379.

In addition, employers are required to reasonably accommodate employees' disabilities unless they can prove that the accommodations needed would impose an undue hardship on the employer's operations. See N.J.S.A. 10:5-29.1; N.J.A.C. 13:13-2.5. The employer's duty to gather sufficient information from the employee, workplace, and, where appropriate, medical experts to determine what accommodations are necessary to enable the employee to perform his or her job has been construed as including a duty to engage in an interactive process. Accordingly, reasonable accommodation requires an interactive process in which both the employer and the employee work together in good faith to conduct an individualized assessment of the employee's abilities and limitations and the range of available accommodations which would not impose an undue burden on the employer's operations. See, e.g. Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 400 (App. Div. 2002). The interactive process is crucial, because each party normally holds relevant information the other party does not have, and such information will ensure that the employer's assessment of potential accommodations is complete and, consequently, reasonable. See, e.g., Taylor v. Phoenixville School District, 184 F. 3d 296, 317 (3rd Cir. 1999). Pro-active participation of the employer is required. "The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for

accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome." Id at 315-316.

The Appellate Division of the Superior Court of New Jersey has recently articulated standards for evaluating a LAD claim that an employer failed to provide reasonable accommodation by failing to engage in a good faith interactive process. Tynan v. Vicinage 13, supra; Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (App. Div. 2001). The court ruled that to prevail in a claim that an employer failed to engage in the interactive process in good faith, an employee must show that "(1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith." Jones v. Aluminum Shapes, Inc., supra, 339 N.J. Super. at 421, citing Taylor v. Phoenixville School District, 184 F. 3d 296, 319-320 (3rd Cir. 1999).

Analysis

In the present case, it is undisputed that Respondent discharged Complainant because her disability precluded her from performing her position as a floor nurse and Respondent declined to provide Complainant with the accommodation of a transfer to a position she could perform (ID 4, 14). Accordingly, Complainant's discriminatory discharge claim is appropriately evaluated as a denial of reasonable accommodation claim rather than a pretext claim.[4]

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[4]The Director notes that the verified complaint also alleges differential treatment, and asserts that Respondent told Complainant a bachelor's degree was required for the ambulatory care position, but hired a fully-abled employee who had only an associate's degree and had less experience than Complainant. To the extent that Complainant's claims might be construed to treat the individual transfer denials as separate incidents of differential treatment, it would be appropriate to apply the McDonnell Douglas standards for pretext cases. However, the evidence presented supports the conclusion that Complainant clearly indicated that she was requesting to be transferred to less strenuous R.N. positions as a reasonable accommodation for her disability, and in this context, it is appropriate to apply the reasonable accommodation standards which place the burden on Respondent to show undue hardship, rather than the McDonnell Douglas standards which place the burden on Complainant to prove pretext.

The ALJ treated this case as a pretext or disparate treatment case and did not apply the legal standards required when evaluating allegations of a failure to consider or provide reasonable accommodations. See Viscik v. Fowler Equipment Co., Inc. 173 N.J. 1 (2002). Applying the legal standards for a differential treatment analysis, the ALJ concluded that Respondent met its burden under McDonnell Douglas of articulating legitimate non-discriminatory reasons for rejecting Complainant for the positions awarded to Rickette and Bassett. However, the ALJ did not set forth an analysis or specific finding regarding whether Complainant established that Respondent's articulated reasons were pretexts for discriminatory animus based on her disability. More significantly, the Director is constrained to reject the ALJ's legal conclusions on this record, because the ALJ failed to apply the appropriate legal standards for evaluating Complainant's allegations that Respondent failed to provide her with reasonable accommodation and unlawfully terminated her employment because of her disability. For these reasons, the Director rejects the ALJ's legal conclusion that the verified complaint should be dismissed because Respondent articulated a non-discriminatory reason for its employment decisions and provided some reasonable accommodations in the form of medical leaves and a limited period of a light duty schedule.

The record reflects that Complainant has established a prima facie case of failure to reasonably accommodate, as she was at all relevant times a person with a disability, she was qualified to perform the essential functions of a R.N. position with the accommodation of an assignment that did not require heavy lifting or stretching, and she was nonetheless terminated because of her disability. See, e.g. Seiden v. Marina Associates, 315 N.J. Super. 451, 465-466 (Law Div. 1998). Having established prima facie evidence of disability discrimination in a reasonable accommodation case, the burden of proof shifts to Respondent to establish that it could not accommodate Complainant without undue burden. Ensslin v. Tp. of North Bergen, supra, 275 N.J. Super. at 363. More specifically, Respondent must establish that it reasonably concluded that providing Complainant with accommodations to enable her to return to work would

cause it undue burden.

Complainant identified two vacant Ambulatory Care nursing positions that she could have performed consistent with her medical restrictions. With respect to the first position, the ALJ concluded that Respondent lawfully awarded the September 1994 ambulatory care position to Christine McIntyre Rickette "based strictly on seniority" (ID 16). Complainant argues that the United States Supreme Court's analysis of the impact of seniority on reasonable accommodations in U.S. Airways v. Barnett, 152 S. Ct. 1516 (2002), mandates a ruling in her favor, and Respondent, interpreting Barnett differently, argues that Barnett instead mandates dismissal.[5] After review of the record, the Director concludes that Respondent did not have in place the type of seniority system for filling nursing vacancies which would warrant applying the Barnett standards to this case.[6]

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[5] Regarding Respondent's arguments that Complainant filed her exceptions significantly late, the Director notes that Complainant did not request an extension of time in advance or show that there was an emergency or other unforeseen circumstance which prevented her from doing so, nor did she offer any explanation for her untimely submission which could be evaluated to determine whether there was good cause for extending time pursuant to N.J.A.C. 1:1-18.8. Regardless of whether Complainant's exceptions should be disregarded as untimely, the Director has an independent obligation to review the ALJ's initial decision to ensure that the final decision correctly and completely applies the law. The Director concludes that even if Complainant had not filed exceptions citing Barnett, a thorough analysis of the ALJ's decision and the law would require discussion of that Supreme Court ruling. The Director also notes that the remainder of the reasons for reversal relied upon in the within final order were not raised in Complainant's exceptions, and exclusion of the exceptions would have had no bearing on the outcome of this case. However, timeliness requirements will not generally be ignored, and in appropriate circumstances parties' submissions will be excluded for failure to comply with the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1 to -21.6.

[6]The Barnett holding was based on the ADA rather than the LAD, and in the brief period since Barnett was decided neither the New Jersey courts or the federal courts have addressed the issue of whether the holding of Barnett should apply to the reasonable accommodation provisions of the LAD. As noted above, although the Division is not bound by federal precedent, the New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990). However, where appropriate, the New Jersey courts have not hesitated to interpret the LAD's protections more broadly than the protections of federal law. See, e.g, Svarnas v. At&T Communications, 326 N.J. Super. 59, 73 (App. Div. 1999)(The LAD defines "disability" more broadly than the ADA, and is not limited to conditions that substantially impair a major life activity.) However, the Director concludes that since, as discussed in the body of this order, the type of seniority system addressed in Barnett was not present in this case, it is unnecessary to reach the question of whether Barnett is applicable to reasonable accommodation obligations under the LAD.

In Barnett, the United States Supreme Court addressed the question of whether the Americans with Disabilities Act (ADA) "requires an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under the employer's 'established seniority system.'" 152 S. Ct. at 1525. The Court rejected the employee's argument that contravention of an established seniority system would be relevant only to the employer's proofs that the accommodation would impose an undue hardship on its operations, and would have no impact on the "reasonableness" of a requested accommodation. Id. at 1523. Instead, the Court held that although another employee's entitlement to the position does not automatically render the requested accommodation unreasonable, once the employer makes a showing that the transfer would violate an existing seniority system, the burden of proof shifts to the employee to "present evidence of ... special circumstances in the particular case that demonstrate the assignment is nonetheless reasonable." Ibid. Examples of special circumstances which might suffice to show that the requested accommodation is reasonable under the particular circumstances include evidence that the employer fairly frequently changes the seniority system, or that the system already contains exceptions such that one more exception is unlikely to matter. Id. at 1525. Under such and similar circumstances, the Court reasoned, employees would not necessarily have clear or high expectations that seniority will consistently and strictly rule transfer applications, and the benefits, purposes and goals of seniority systems will not be impeded by accommodating the employee's disability. Ibid.

The evidence in the record regarding the role of seniority in Respondent's transfer decisions is quite limited. Respondent presented no testimony of its decision-makers or other evidence that seniority was the dispositive factor in its selection of Rickette in September 1994. The only hearing testimony regarding the role of seniority in Respondent's transfer decisions came on direct examination of Respondent's human resource consultant, Paul DiLeo. The relevant testimony was as follows:

Q What are the criteria considered by Cooper in deciding whether an employee would receive the job transfer request or not?

A Qualifications for the job.

Q Does seniority enter it at all?

A If, all things being equal, yes.

TR. 179.

Review of the record disclosed only two documents regarding Respondent's transfer procedures. One is page 29 of a book entitled "Summary of Benefits for Employees" labeled with the heading "Transfers and Promotions," which states "All applicants for job openings are reviewed on the basis of their qualifications for the job, past performance and their seniority in the hospital" (Exhibit R-18). The other is a December, 1994 revision to Respondent's "Human Resources Policies and Procedures Manual" regarding "Promotions and/or Voluntary/Involuntary Transfers," which states "The most qualified employee to perform the job and who meets all of the required criteria will be offered the position" (Exhibit P-15). Both of these documents indicate that Respondent considers subjective criteria other than seniority in awarding transfers, i.e., past performance and a determination as to which applicant is "the most qualified employee to perform the job." Consistent with this documentary evidence is Respondent's June 17, 1994 letter to Christine McIntyre (Rickette), advising her that another candidate was selected for the first ambulatory care vacancy she sought (Exhibit R-22). That letter made no mention of seniority as the determinative factor in selecting the successful candidate, but instead stated that after consideration of all candidates' "experience, qualifications and achievements ....a candidate has been chosen whose qualifications most closely match the requirements and specialized needs in filling this position." Ibid. Thus, the evidence in the record does not support the conclusion that Respondent's employees would have an expectation that, assuming they met the objective criteria for a particular vacancy, Respondent would decide between eligible candidates based on their

respective seniority alone, without consideration of subjective factors. This is borne out by the lack of evidence that Respondent ever specifically considered Complainant for the opening it later awarded to Diane Bassett, even though Complainant had more seniority than Bassett. At best, the evidence suggests that seniority is merely used as a tie-breaker between equally qualified candidates, where subjective factors such as management preferences are not dispositive. Based on the evidence in the record, the Director concludes that Respondent did not have in place at the times relevant to this case the type of established system for awarding transfers based on seniority which under Barnett would shift the burden to Complainant to prove special circumstances.[7]

Accordingly, in the absence of such an established seniority system, Respondent bears the burden of proving that granting the position to Complainant would impose an undue hardship on Respondent's operations. Ensslin v. Township of North Bergen, supra, 275 N.J. Super. at 363, citing Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 383; Andersen v. Exxon Co., 89 N.J. 483, 500 (1982). Respondent asserts that Christine McIntyre Rickette was selected over Complainant based on seniority, and the record also reflects that Rickette was Respondent's

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[7]Even if Respondent's procedure for awarding transfers were the type of seniority system triggering the shifting burdens under Barnett, the record reflects the type of special circumstances to establish that the requested transfer would have been a reasonable deviation from such a system, as the record reflects that Respondent routinely considered subjective factors other than seniority in awarding transfers. Although the Director adopts the ALJ's finding that Christine McIntyre Rickette had more seniority than Complainant, there is insufficient evidence in the record to determine whether Rickette had more seniority than any other applicants for the September 1994 vacancy. Thus, after a thorough review of the record, the Director concludes that there is insufficient evidence to support the ALJ's conclusion that after Beth Sweeney left the ambulatory care position, Respondent selected Rickette because she was "the next senior applicant" (ID 16). Instead, the record reflects that Respondent selected Rickette because of her general qualifications and management preferences. As discussed above, seniority was not mentioned as a determinative factor in the June 17, 1994 letter to Rickette (Exhibit R-22) and handwritten notes on that document state "....Christine was our other choice for attached opening. Beth was selected & is leaving & Kathy wants Christine...." In addition, without even contacting Complainant to discuss her availability for the second position, Respondent bypassed Complainant to reach Diane Bassett, who had less seniority. Thus, Respondent considered subjective factors other than seniority frequently enough that Respondent's employees would not have the expectation that their seniority would strictly and uniformly govern transfer requests. Accordingly, the record reflects the type of special circumstances which would meet Complainant's burden under Barnett.

second choice to fill an earlier vacancy (Exhibits R-21; R-22). The record reflects that Respondent never interviewed Complainant for the position (ID 4), and there is no evidence in the record to support the conclusion that Respondent otherwise considered Complainant's transfer request in such a manner as to determine whether placing her in the position would impose an undue hardship on its operations. After review of the record, the Director concludes that Respondent has not met its burden of establishing that transferring Complainant to the vacant, funded ambulatory care position in September of 1994 would have imposed an undue hardship on its operations.

With regard to the other available position, the ALJ concluded that Respondent did not violate the LAD by denying Complainant a transfer to the ambulatory care position awarded to Diane Bassett in November of 1994 because Complainant "was unable to perform any duties when Bassett was chosen" (ID 18). The ALJ reached this conclusion despite Complainant's contradictory testimony explaining that she would have been able to work in a nursing position that did not require heavy lifting (TR. 23; 36; 77). The ALJ relied on a NJ Department of Labor form entitled "Request for Claimant Medical Information" completed by Complainant's physician on February 28, 1995 (Exhibit R-13; ID 15), which indicated retroactively that Complainant was unable to work from September 19, 1994 through February 14, 1995,[8] as well as leave slips from Complainant's physicians indicating that Complainant was evaluated and would continue to be out of work (Exhibits R-11a to11g; ID 14).

In relying on medical reports to support an employment decision, an employer must ensure that the physician's medical recommendation regarding fitness for work is supported by sufficient facts regarding the employee's abilities and essential job functions. Jansen, supra,110 N.J. at 379, citing Andersen, 89 N.J. at 502 (finding deficient a report which failed to distinguish between the

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[8]The second date was actually filled in as "2/14/94," but this was clearly an error and intended to be "2/14/95." Moreover, the unemployment form completed by Complainant's physician (Exhibit R-13) and relied on by the ALJ was completed on February 28, 1995. Accordingly, Respondent could not have relied on this form in making its decisions to award the ambulatory care positions to Rickette and Bassett in the fall of 1994.

risk of a seizure and the ability to perform job duties safely). Moreover, the employer must also consider the purpose for which the medical report was prepared. As discussed below, a physician's conclusion that an employee is eligible for worker's compensation or other disability benefits will not in all cases support the conclusion that the employee's disability precludes his or her performance of a particular job.

The United States Supreme Court has considered the relationship between assertions that an employee is totally disabled and facially inconsistent requests for reasonable accommodations to enable the employee to return to work. In Cleveland v. Policy Management Systems, 119 S. Ct. 1597 (1999), the Court addressed an employer's argument that an employee's statement that she was totally disabled in her application for Social Security Disability Insurance (SSDI) benefits estopped her from proving that she was able to perform the essential functions of her job. The Court held that an employee's sworn statement in an application for disability benefits that she is 'unable to work' does not absolutely negate an essential element of her ADA case, nor does it even create a rebuttable presumption that she is unable to work with or without reasonable accommodations. 119 S.Ct. at 1602, 1604. While the employee may not completely ignore her inconsistent statements, she may prevent dismissal by offering a sufficient explanation to reconcile the apparent inconsistencies. Id. at 1604.

The Court noted that a representation of total disability is not a purely factual assertion, and "often implies a context-related legal conclusion," which varies based on the purposes and definitions of the specific disability-related statute addressed -- in that case, the Social Security Act. Id. at 1601. After examining the purposes of the Social Security Act and the ADA, the Court concluded that there are many situations in which an individual's assertion that his or her limitations are severe enough to meet the standards for SSDI is not legally inconsistent with the same individual's assertion that an employer violated the ADA by denying the employee new or continued employment. Id. at 1602. For example, since the SSA evaluates an individual's impairments and capabilities without the possibility of reasonable accommodation, the SSA may determine that an

individual is disabled, even though reasonable accommodations contemplated by the ADA may enable the individual to work. Ibid. Thus, even assuming the truth of the employee's assertion that he or she was disabled for the purposes of an application for SSDI, a fact-finder could reasonably conclude that the employee could return to work if provided with reasonable accommodations for her disabilities.

As noted above, Cleveland addressed the apparent inconsistency between an employee's own sworn statement of disability, and her assertion that she could perform the essential functions of her job. By contrast, in the present case, the documents relied upon by the ALJ were not only unsworn statements, they were completed by Complainant's physician[9] rather than Complainant.[10] Moreover, the Request for Medical Information form states that the information requested was for a determination regarding Complainant's application for unemployment insurance benefits, and Complainant testified that she challenged the unemployment office's determination that she should be on disability benefits rather than unemployment, stating that she eventually won her unemployment hearing because she was able to prove "there are a lot of nursing jobs that you can do with a disability" (TR. 26).

Complainant's testimony, her notations on her transfer bid forms, (Exhibits R-9; R-10), as well as the physician's statement that Complainant's return to work would be restricted to positions which did not involve heavy lifting or repetitive motions, all serve to explain that neither Complainant's need to be on medical leave of absence from her floor nursing position, nor her

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[9]The Director notes that all of Complainant's treating physicians were also Respondent's employees, and the record reflects that Respondent directed Complainant to consult these particular physicians (TR. 13; see also Exhibits R1, R2, R3).

[10]Although not discussed by the ALJ, Respondent further argues that the Workmen's [sic] Compensation Supplementary Reports completed by Complainant's physicians (Exhibits R-7a to -7d) compel the conclusion that Complainant was unable to work during the relevant period, because they indicate that Complainant's return to work date was "to be determined" (RB p. 4). As these also were statements of physicians rather than sworn statements made by Complainant, they do not estop Complainant from asserting that she was able to work. Moreover, as discussed below, the record reflects a sufficient explanation for Complainant's receipt of worker's compensation temporary disability benefits and her assertion that she was able to work with reasonable accommodations.

physician's statements that she was unable to work precluded a finding that in November of 1994 she could return to work with the reasonable accommodation of a transfer to an ambulatory care position. As the physician's statement on the Request for Claimant Medical Information form (R-13) is not Complainant's assertion, it should not be imputed to Complainant, especially in light of Complainant's explanation to the contrary that she would have been able to work in a job that did not require heavy lifting. However, to the extent that the physician's statements might be construed as evidence contradicting Complainant's availability to return to work with reasonable accommodations, the Director concludes that, just as ADA can be harmonized with an assertion of total disability under the SSA, the LAD provisions prohibiting discrimination against employees with disabilities who are able to work with reasonable accommodations can be similarly harmonized with an assertion that the employee needed a medical leave of absence from her unaccommodated position and was unable to work for the purposes of a claim for unemployment insurance benefits.[11]

See also, Ramer v. New Jersey Transit, 335 N.J. Super. 304, 318-319 (App. Div. 2000) (concluding that plaintiff's statement that she was disabled for the purposes of recovering credit disability insurance proceeds were not irreconcilably inconsistent with LAD claim that she could perform her job with reasonable accommodation, while also noting that the broader federal principles of judicial estoppel applied in Cleveland, supra, were inapplicable under New Jersey law, which limits judicial estoppel to prior inconsistent statements made in a judicial proceeding).

Based on all of the above, the Director concludes as a matter of law that neither Complainant's need for a medical leave of absence from her floor nurse position, nor her

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[11]Although not discussed by the ALJ, Respondent also argued that Complainant's receipt of temporary disability benefits under the worker's compensation statute and her request for long term disability application forms compel the conclusion that she was unable to work in any capacity (RPB p. 3-4). As an employee's ability to work with the accommodation of transfer to a different job would not necessarily be considered in a worker's compensation or long term disability claim, the same rationale applied here to unemployment benefits would apply to applications for or receipt of temporary or long term disability benefits. Moreover, Complainant testified that although she received the long term disability forms, she never submitted an application for those benefits (TR. 52, 54-55). Accordingly, the Director concludes that the evidence in the record sufficiently explains any facial contradictions posed by that evidence.

physician's February 28, 1995 statement that she had been unable to work in any occupation for the purposes of her claim for unemployment insurance benefits rendered Complainant unable to work as a nurse with the reasonable accommodation of a transfer to a position which did not require heavy lifting or repetitive motion of any of the extremities. Significantly, there is no testimony or other competent evidence in the record to support the conclusion that Respondent actually relied on a belief that Complainant was completely unable to perform any work when it made its decision to award the position to Bassett. Respondent's decision-maker did not testify at the hearing, and Respondent presented no other evidence which would support the conclusion that it considered Complainant for the vacancy, nor did Respondent present any evidence of the reasons it chose Bassett for the vacancy.

Consequently, the Director concludes that Respondent has failed to show that it was an undue hardship to the operation of its business to accommodate Complainant's disability by transferring Complainant to either the September 1994 or the November 1994 ambulatory care vacancy. Nor has Respondent established that it considered or offered alternative accommodations which would have reasonably and effectively accommodated Complainant's disabilities.

Although the ALJ determined that Respondent fully complied with its leave and disability policies by returning Complainant to her former position without loss of seniority after each medical leave of absence, and by granting Complainant a light duty schedule for two weeks (ID 19), such compliance with standardized policies is not necessarily sufficient to constitute reasonable accommodation under the LAD. Instead, as discussed above, a reasonable accommodation analysis requires an individualized assessment of the employee's abilities and possible accommodations that would enable the employee to remain on the job. Jansen v. Food Service Supermarkets, Inc., supra, 110 N.J. at 379. The circumstances of this case are strikingly similar to the circumstances recently evaluated by the Third Circuit in Shapiro v. Township of Lakewood, 292 F. 3d 356 (3rd Cir. 2002). Shapiro was an ADA case in which an emergency medical

technician injured his back lifting a patient and was left with disabilities which, among other things, prevented him from lifting more than 25 pounds. 292 F.3d at 358. His employer granted him a brief period of light duty and he then was placed on disability leave. Ibid. Shapiro requested permanent light duty or transfer to another position as a reasonable accommodation for his disability, but at no point did the employer contact him to discuss how it might accommodate him. The Third Circuit ruled that by requesting accommodation and identifying positions into which he could have been transferred, Complainant presented sufficient evidence to defeat summary judgment. The Shapiro court's determination that providing the disabled employee with a brief period of light duty and the right to return to his former position after a disability leave was not in and of itself sufficient to meet the employer's reasonable accommodation requirements is instructive here. In the present case, Respondent's actions paralleled those of the employer in Shapiro, in that, other than a brief period of light duty, the accommodation offered was limited to permitting the employee to return to work if, and only if, she became well enough to resume her former duties without accommodation. Both the ADA and the LAD require more than that in the way of reasonable accommodation. After receiving notice of Complainant's disability and her restrictions for return to work, it became abundantly clear that the only effective accommodation for Complainant would be a transfer to a position that did not require heavy lifting. The record is devoid of any evidence that Respondent actually considered Complainant's need for a transfer as an accommodation, and made any sort of reasoned determination as to whether such a transfer could be effected without undue burden.

Although not specifically argued by Complainant, after thorough review of the record, the Director concludes that Respondent also failed to meet its obligations under the LAD to participate in the interactive process in good faith. Applying the standards articulated by the Appellate Division in Jones and Tynan, supra, the record reflects that Complainant informed Respondent of her disability (Stipulations 15 and 26; Exhibits R7, R9, R10; TR. 20-21, TR. 36, TR. 55-56) and requested accommodation in the form of a transfer to a R.N. position which did not involve lifting,

and applied for specific positions which were posted as available (TR. 15-17). Accordingly, the Director concludes that Complainant took the actions necessary to trigger the interactive process. Moving ahead to the fourth prong of the Jones/Tynan test, the record reflects that the ambulatory care positions filled by Christine McIntyre Rickette and Diane Bassett were vacant, funded positions which Complainant could perform despite her disability, and that those positions were at the same level as Complainant's floor nurse assignment. (ID 15; Exhibits R9, R10).

The third prong of the Jones/Tynan test constitutes the crux of this type of analysis. After review of the record regarding Respondent's actions, the Director concludes that Respondent failed to make a good faith effort to assist Complainant in seeking accommodation. Respondent did not discuss with Complainant the feasibility of transferring her to the positions awarded to Bassett and Rickette as a reasonable accommodation for her disability and instead gave at least one of the positions to a less senior person (ID 4, 18). Nor did Respondent offer or discuss alternative accommodations, if it felt that awarding either of those positions to Complainant was for some reason unduly burdensome. As noted by the Appellate Division in Jones, supra, an employer can show good faith in a number of ways, such as, meeting with the employee, asking what type of accommodation the employee wants or showing some sign of having considered the employee's request. 339 N.J. Super. at 424-425, citing Taylor v. Phoenixville School Dist., supra, 184 F.3d at 317. Here, Respondent never met with Complainant to discuss the accommodations needed for her to return to work or made any other effort to talk with Complainant about what other transfers, possibly including transfers to non-R.N. positions, might be available as accommodations for her disability. There is no evidence that Respondent showed any sign of having considered or evaluated Complainant's request for a transfer as an accommodation. Consequently, the Director concludes that, under the standards articulated in Jones and Tynan, Respondent failed to participate in the interactive process as required by the LAD. Tynan v. Vicinage 13 Of The Superior Court of New Jersey, supra, 351 N.J. Super. at 401-402; Jones v. Aluminum Shapes, Inc.,supra,

339 N.J. Super. at 424-425.

In dismissing the verified complaint, the ALJ relied on the Appellate Division's unreported decision in Armstrong v. Glaxo, Inc., A-6256-96T1 (July 13, 1999), to hold that an employer has no obligation to transfer an employee to another assignment as a reasonable accommodation for the employee's disability (ID 20). In Armstrong, an employer denied the complainant's request for a transfer to a different region and a different manager because the employee was on probation for poor performance and therefore not qualified for the transfer. The employee then disclosed that he was a person with disabilities (depression, anxiety and related conditions) and requested the transfer as an accommodation. His employer again refused to transfer him, but attempted to accommodate him by changing the employee's reporting relationship to by-pass the supervisor whom the employee alleged was problematic. Despite this accommodation, the employee refused to return to work unless he was transferred to a completely new assignment, and the employer discharged him. Affirming the Division's finding of no probable cause, the Appellate Division held that, by changing the reporting/supervisory relationship, the employer provided a reasonable accommodation for the employee's disability under the particular circumstances of that case, and that the employee was not entitled to dictate that he would accept only one form of accommodation where the employer offered an effective alternative.

This ruling is consistent with the case law discussed above, contemplating that the employer and employee will engage in an interactive process to determine whether and in what manner an employee can best be accommodated without causing the employer undue burden. Armstrong does not, however, hold that an employer will never be obligated to grant an employee's request for a specific transfer as a reasonable accommodation especially where, as in the present case, the employee is qualified for the desired position. Moreover, the reasonableness of the requested accommodation and the availability of alternate accommodations which would enable the employee to perform the job are to be evaluated on a case-by-case basis. The regulatory language providing

that reasonable accommodation "may" rather than "shall" include job reassignment is not inconsistent with such a case-specific analysis, N.J.A.C. 13:13-2.3, and the word "may" does not give an employer complete freedom to refuse a transfer if no other effective accommodation is available, absent a showing that the specific transfer requested imposes an undue hardship on the operation of its business. N.J.A.C. 13:13-2.5. Accordingly, even if Armstrong had precedential value, it would not change the reasonable accommodation analysis applied in the present case.

Regarding Complainant's argument that Respondent's failure to rehire her after she was terminated also violated the LAD, without reaching question of how long after termination an employer remains obligated to attempt to reasonably accommodate a former employee, the Director notes that Complainant has not established that there was a vacant, funded position that she was qualified to fill. To establish a prima facie case for failure to hire, Complainant would be required to show that she applied for a specific vacancy for which she met the minimum qualifications. See, e.g. , Goodman v. London Metals Exchange, 86 N.J. 19, 31 (1981). After review of the record, the Director concludes that Complainant has not met her burden of establishing that, after her termination, there were specific vacancies for positions she was qualified and able to perform, with or without reasonable accommodation. Accordingly, Complainant's claim that Respondent's failure to re-hire her violated the LAD must fail.

Conclusion

Based on all of the above, the Director finds good cause to reject the ALJ's legal conclusion that Respondent's refusal to transfer Complainant into available Ambulatory Care positions and its termination of Complainant's employment did not violate the LAD. The Director concludes instead that Respondent failed to establish with a preponderance of the credible evidence that it reasonably determined that Complainant's disability precluded her continued employment and that there were no available reasonable accommodations that would enable her to continue working.

REMEDIES

Although the ALJ made no factual findings regarding damages, after reviewing the record, including the transcript of the hearing testimony, the Director determines that it is appropriate to make both factual findings and legal conclusion regarding damages.

A. Back Pay

The LAD provides that, upon a finding that a respondent has engaged in an unlawful employment practice, the Director may provide appropriate affirmative relief, including an award of back pay. N.J.S.A. 10:5-17. The measure of an employee's lost wages is usually the amount the employee would have earned if not for the unlawful discharge, less any wages the employee actually earned, or would have earned with appropriate mitigation of damages. Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 34 (1981). Complainant stipulates that at the time of the hearing her earnings exceeded the wages she would have earned with Respondent (TR. 98-99) and contends that, assuming she would have received a 1% raise each year, her lost wages from 1995 through 2000 total $138,019.00, before prejudgment interest (CTB 16-17). Respondent contends that Complainant did an extremely limited job search after 1996, and decided to change careers despite a "good to strong" job market, and argues that for those reasons any back pay award should be limited to 1995 and 1996 (RPB 23).

The parties stipulated that Complainant's earnings shown on her tax returns were $17,205.00 for 1996; $8,912.00 for 1997; $12,502.00 for 1998; $28,031.00 for 1999 and $22,371.00 for 2000, and the record includes Complainant's tax returns for those years (Exhibits P-24 through P-28). Complainant testified that she earned no money that was not included on W-2 forms or tax returns (TR 38). The parties also stipulated that Complainant's W-2 tax form from Respondent for 1993 stated earnings of $38,412.00, and Complainant testified that she was earning a little less than $40,000 yearly when Respondent terminated her employment (TR. 98). Review of the record disclosed no testimony regarding Complainant's earnings in 1995, and the only evidence in the

record regarding Complainant's earnings for that year are two W-2 forms (Exhibit P-23), one for $9,183.25 from Burlington Woods Conv. Center, and the other is unreadable.

Both Christine McIntyre Rickette and Diane Bassett testified that Respondent's ambulatory care unit closed in July of 1999 (TR. 131-132; TR. 162). As a result of the unit closing, Rickette was laid off in July,1999, and was re-hired 5 weeks later as a cardiology research nurse (TR. 131-132). Bassett left the unit in May, 1999, having successfully bid on an operating room nurse position after receiving notice that the ambulatory care unit would be closing (TR. 162). Based on Rickette's layoff and the closing of the ambulatory care unit, the Director concludes that if Complainant had been awarded either of the ambulatory care vacancies, she would have been laid off in July of 1999, and consequently she is entitled to no back pay after that date.[12]

However, after review of the evidence in the record regarding mitigation of damages, the Director concludes that it is appropriate to further limit Complainant's back pay award. Failure to mitigate damages is an affirmative defense, and the employer bears the burden of proving that the employee's mitigation efforts were not reasonable. Goodman v. London Metals Exchange, supra, 86 N.J. at 40. The employer establishes a prima facie case of failure to mitigate by showing that employment opportunities comparable to the wrongfully lost position were available, and if the lowered sights doctrine is applicable, that there were other suitable jobs. Id. at 41. The burden then shifts to the employee to present evidence that there were no comparable jobs available, that she made reasonable and diligent efforts to find appropriate work, but was unsuccessful, or that the circumstances did not justify acceptance of a dissimilar job. Ibid.

On cross-examination, Complainant testified that at the time of the hearing, the nursing field was "in the midst of the worst shortage in nursing history" (TR. 97). She further testified that in

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[12]There is no evidence in the record regarding Complainant's qualifications for or ability to perform the operating room or cardiological research positions, and Complainant testified that she limited her job search to case management, ambulatory care and quality assurance positions. Accordingly, there is no basis in the record to conclude that Complainant would have been transferred to another position in lieu of layoff.

1999 the shortage had begun, and prior to that time the job market for nurses was "probably a little bit hard." Ibid. In response to the question "So the job market was relatively good, then, you'd say, late 1990's," Complainant replied "Now, yeah." Ibid. Although Complainant did not specifically acknowledge that the nursing shortage began earlier than 1999, in describing her job search, Complainant does not assert that no appropriate jobs were available. Instead, Complainant contends that she would have been hired for available jobs if prospective employers did not know about her fibromyalgia (TR. 30-31). Complainant testified that she was hired "on the spot" for her temporary positions at Burlington Woods and Lakewood at Voorhees (TR. 31-32). Complainant applied to Burlington Woods on July 30, 1995, and worked there for nine months. (Exhibit P-30; TR. 31). Almost immediately thereafter, on March 23, 1996 Complainant applied to Lakewood at Voorhees and was hired as a nursing manager for six months (Exhibit P-30; TR. 32). Based on Complainant's success in securing lengthy, albeit temporary, employment during the 1995-1996 period, as well as her own testimony that she would have been hired for specific jobs if prospective employers had not learned of her fibromyalgia, the Director concludes that there were comparable or suitable nursing jobs available. Accordingly, the burden shifts to Complainant to establish that there were no comparable nursing jobs available, that despite diligent and reasonable efforts she could not find suitable work, or that the circumstances did not justify accepting dissimilar work.

Complainant introduced into evidence copies of the job application letters she retained, and those include only three job applications sent out in 1997 and three more sent out in 1998 (Exhibit P-30). When asked on cross-examination why she only sent a few letters to prospective employers in 1997 and 1998, Complainant testified that she went to real estate school because she couldn't get a job, and then was "trying to do real estate at that time..." (TR. 97-98). Complainant's tax returns for 1997 show $6659 in business income, and although a 1997 1099 form in the record is largely unreadable, it is clear that the payer is a real estate company (Exhibit P-25). Complainant's 1998 tax return and 1099 form show $12,502 in net business earnings from First MidAtlantic Realty

(Exhibit P-26). The record reflects that Complainant earned only $93.75 in the nursing field in 1997 (Exhibit P-25) and had no nursing income in 1998 (Exhibit P-26).

Based on Complainant's testimony and this documentary evidence, it is clear that Complainant made a decision to abandon or suspend any efforts to seek employment in the nursing field to embark on self-employment in real estate sales. While a career change may be a reasonable and necessary form of mitigation under appropriate circumstances, the evidence in the record simply does not support the conclusion that it was reasonable or prudent for Complainant to completely abandon all attempts to earn wages using her nursing skills to instead rely on the unpredictable and irregular income which would flow from starting a new career in real estate sales. Complainant's evidence of her job search after she stopped working at Lakewood at Voorhees in late 1996 was meager at best, even though her job searches in 1995 and 1996 were successful, resulting in two relatively long term temporary nursing positions, the latter in management. Other than the conclusory statement that she went to real estate school because she "couldn't get a job," (TR. 98), Complainant presented no evidence of a steady, diligent job search immediately prior to embarking on the real estate venture, nor does the record reflect the degree of frustration with her job search which would justify completely abandoning her nursing career to take on the risks of the commission-based real estate sales field. Based on the evidence in the record, the Director concludes that Complainant ceased making reasonable attempts to mitigate her damages when she abandoned her nursing job search to enter the real estate sales field. Accordingly, Complainant's entitlement to back pay ceased at the end of 1996.

Complainant argues that she would have earned $40,000 in 1995 and $40,400 in 1996 if she had remained employed by Respondent (CB 16-17). There was no joint stipulation as to Complainant's 1995 earnings, however Complainant argues that she earned $15,000 in 1995 (CB-17). Respondent argued that if any back pay were awarded to Complainant, it should be limited to the years 1995 and 1996 (RPB 23). Respondent did not challenge Complainant's contentions

regarding either her actual earnings or her anticipated income, nor did it offer alternative methods of computing Complainant's lost wages for this period (RPB 23-24). Based on these figures for 1995 and Complainant's stipulated income for 1996, Complainant is entitled to back pay in the amount of $25,000 for 1995 and $23,195 for 1996.

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who was able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). Applying the computation method set forth in New Jersey Court Rule 4:42-11, the Director awards $24,362 in prejudgment interest on the back pay award.

B. Emotional Distress Damages

It is well established that a victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970). Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318.

Here, the Director finds that Complainant was extremely distressed by Respondent's

disregard of her request for reasonable accommodations in the form of a transfer, and by Respondent declining to take her telephone calls and general failure to engage in the type of interactive dialogue which would enable Complainant to return to work, or would show that Respondent was at the very least evaluating what accommodations were available. Complainant's own testimony, and that of her fiancé and daughter-in-law, demonstrate that Complainant suffered emotional distress from Respondent's actions and the devastating financial consequences of her period of unemployment and subsequent lowered income, including the need to apply for public assistance and assistance from a charitable organization, the loss of her apartment, inability to provide needed medical treatment for her children and inability to continue providing dance and gymnastics lessons for them (TR. 26-29; 34-36).

The Director generally seeks to ensure that pain and humiliation damage awards are consistent with awards granted to other prevailing complainants who have come before the Division, based on the extent and duration of emotional suffering experienced by each complainant. After reviewing the applicable portions of the record, and considering emotional distress damage awards made to other prevailing complainants, the Director concludes that an award of $5,000 in pain and humiliation damages is appropriate in this case.

C. Penalties

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates the LAD. N.J.S.A. 10:5-14.1a. At the time of the hearing, $2,000 was the maximum penalty for a first violation of the LAD. Effective November 15, 2001, the LAD was amended to provide that the Director may assess a statutory penalty of not more than $10,000 for a respondent's first violation of the LAD. Ibid. Generally, absent language to the contrary, legislation imposing enhanced civil penalties may be applied retroactively. Administrative proceedings imposing penalties have been recognized as civil in nature and, therefore, the imposition of an administrative penalty does not infringe on any

constitutional rights or vested interests of the assessed party. In the Matter of Robert Kaplan, D.O., 178 N.J. Super. 487, 495 (App. Div. 1985)(retroactive application of statute governing civil penalties for medical fraud does not violate federal and state constitutional provisions prohibiting ex post facto laws, provided amount of penalty is not inequitable). See also State, Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div.1981)(remedial statute may be given retroactive effect without unconstitutionally infringing on vested rights, provided that new statutory remedy is for redress of preexisting actionable wrong rather than for actions that were not unlawful when the legislation was passed); In re D'Aconti, 316 N.J. Super. 1(App. Div. 1998). Accordingly, the Director concludes that, based on the legislature's amendment of N.J.S.A. 10:5-14.1a to increase the maximum statutory penalty effective November 15, 2001, the Director has the power to impose up to $10,000 in penalties for Respondent's LAD violations. After review of the record, the Director concludes that a penalty of $7,500 is appropriate in this case.

D. Other Relief

Complainant also argues that she should be compensated for the cost of lost medical benefits and educational benefits, but she does not identify any out of pocket expenditures for these items to be reimbursed, nor does she provide evidence that she would have received cash payments for these items if she had not been discharged. Consequently, the Director concludes it is not appropriate to require Respondent to compensate Complainant for these items.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainant to unlawful employment discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to –49.

2. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant $72,557 for her lost wages with interest thereon.

3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of $5,000 as compensation for her pain and humiliation.

4. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to “Treasurer, State of New Jersey,” in the amount of $7,500 as a statutory penalty.

5. The penalty and all payments to be made by the Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

6. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

DATE:________________

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J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS