



STATE OF NEW JERSEY
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW & PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 DCR DOCKET NO. ED35HE-53733
 REFERRAL NO. 17E 2008 00277

JOANNE M. DEMITRI,)	
and)	
CHINH Q. LE, ESQ.)	
DIRECTOR, NEW JERSEY DIVISION ON)	
CIVIL RIGHTS,)	
)	
Complainants,)	
)	
v.)	FINDING OF PROBABLE CAUSE
)	
WINSLOW TOWNSHIP BOARD OF)	
EDUCATION,)	
)	
Respondent.)	
)	

Consistent with a Verified Complaint filed on January 31, 2008, the above-named respondent has been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, et seq., and specifically within the meaning of N.J.S.A. 10:5-12(a) because of disability.

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

Complainant, who simultaneously held both Teaching Assistant and Head Care Giver positions with Respondent, alleged that she was discriminated against based on her disability, ventral hernia. Complainant alleged that, after taking an approved medical leave, she returned to work and presented a physician's note which permanently restricted her from lifting more than 5 pounds. Complainant further alleged that she returned to her Teaching Assistant position, but Respondent refused to reasonably accommodate her lifting restriction in the Head Care Giver position and discharged her from that position.

SUMMARY OF RESPONSE

Respondent denied discriminating against Complainant for any reason including disability. Respondent admitted discharging Complainant from her position of Head Care Giver in Respondent's Before and After School Program because of her 5 pound lifting restriction. Respondent asserted that this restriction would not allow her to perform the essential functions of her position.

BACKGROUND

Respondent, located in Atco, Camden County, New Jersey, provides education and recreation activities for children 3 years of age and older.

Complainant, who resides in Williamstown, Gloucester County, New Jersey, began work for Respondent as a Teaching Assistant in 1984.

Chinh Q. Le is Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION

This investigation revealed sufficient evidence to support a reasonable suspicion that Complainant was subjected to unlawful discrimination when Respondent discharged her from the Head Care Giver position.

The investigation revealed that in 2003, after employing Complainant as a Teaching Assistant for a number of years, Respondent hired Complainant for an additional position -- Head Care Giver in Respondent's Before and After School Program at Winslow Township School #3. As Teaching Assistant, Complainant was assigned to a classroom teacher to provide assistance to students in various activities under the supervision of the teacher. As Head Care Giver, Complainant supervised five Care Givers in carrying out Respondent's programs and activities for 3 to 8 year old students. The investigation revealed that from April 2007 to August 19, 2007, Complainant was out of work on an authorized medical leave. She returned to work on August 20, 2007 with a permanent lifting restriction of 5 pounds, related to a disability. Complainant returned to her Teacher Assistant position, but Respondent discharged her from the Head Care Giver position.

Respondent asserted that it discharged Complainant because she needed to lift more than five pounds to perform the essential functions of a Head Care Giver. Respondent asserted that the Head Care Givers are responsible for the supervision and oversight of the children, and that this responsibility requires the lifting and carrying of children when necessary. Respondent also asserted that Head Care Givers must lift and carry materials and snacks weighing more than 5 pounds.

In response to the Division's Document and Information Request, Respondent failed to provide the Division with a written job description for the Head Care Giver position, but asserted that the essential functions of the position include:

- *Providing for the adequate supervision and ensuring the safety of several dozen students, who range in age from three to eight years of age;*
- *Setting up materials before the arrival and putting materials away after the departure of the students;*
- *Planning and organizing activities for the children;*
- *Setting up and clearing snack items for the children; and*
- *Completing paperwork related to staff and student attendance.*

The Division's investigation did not support Respondent's contention that Head Care Givers must be capable of lifting or carrying children or objects weighing more than 5 pounds to perform the essential functions of that position. In an interview with the Division investigator, Complainant asserted that during her four year tenure as a Head Care Giver, she never had to lift or carry a child, nor perform any heavy lifting, and that when lifting was required, Complainant utilized the 5 Care Givers whom she supervised and who were on site, to perform those duties.

The Division's investigation interviewed each of Respondent's 7 Head Care Givers. Each oversees a Before and After School Program at one of Respondent's schools, and their tenure in that position ranges from 2 to 16 years. These employees provided additional evidence that lifting more than five pounds is not required to perform the essential functions of the job. Only 2 of the 7 Head Care Givers said that they ever lifted or carried children or moved boxes or supplies to carry out the necessary functions of their jobs. The remaining 5 of the Head Care Givers said that they are always able to utilize their Care Givers to perform any lifting or carrying of children, boxes, supplies, games and milk cartons, because the Care Givers work directly with the children, and are there to perform these types of tasks. Although two of these five stated that they sometimes voluntarily chose to lift or carry children on occasion (for example, to comfort a child whose parent was leaving), they noted that they could have accomplished the task in other ways, and it was not necessary to perform their jobs. One of the Head Care Givers also noted that children with disabilities have personal aides to assist them, and another noted that when a child is injured, it may be inappropriate for the Head Care Givers or Care Givers to move the child, and it may be advisable to wait until a medical professional arrives. Based on the evidence that only two of the seven Head Care Givers ever felt it necessary to lift or carry children or objects weighing more than five pounds, the investigation cannot conclude that the ability to lift more than five pounds is necessary to perform the essential functions of Head Care Giver, including her role in supervising and ensuring the safety of children, and arranging and setting up activities and snacks.

The Division's investigation further revealed that before discharging Complainant,

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Respondent made no attempt to explore possible disability accommodations that might enable Complainant to perform the essential functions of her job, and did not engage Complainant in an interactive process to determine whether any accommodations were necessary or feasible. During the Division's investigation, Complainant asserted that Respondent had alternatives readily available, such as assigning her to School #6, which had a student population of third to fifth graders, who are more self-sufficient and would be less likely to need assistance from staff. In an interview with the Division investigator, the Head Care Giver at School #6 stated that she had worked in that capacity for about 16 years, and had never lifted or carried a child. The investigation disclosed that, before discharging Complainant, Respondent gave her no opportunity to suggest potential accommodations that could be provided without undue hardship. Instead, without giving Complainant an opportunity to demonstrate that she could perform the essential duties of the position, with or without reasonable accommodation, Respondent concluded that Complainant could not perform the duties of Head Care Giver, and discharged her without any exploration of alternatives.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. 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., 111 S. Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218,226 (App. Div.1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

The LAD prohibits discharging an employee because of a disability, unless the employer reasonably arrives at the conclusion that limitations resulting from the employee's disability preclude performing the essential functions of the job. Before discharging an employee on the grounds that a disability precludes job performance, the employer must determine whether there are reasonable accommodations that can enable the employee to perform the essential functions of the job, and must provide those accommodations that do not impose an undue burden on its operations. The employer's determination must be based on an individualized assessment of the employee's limitations and the job duties, and the employer bears the burden of demonstrating that its decision is based on an objective standard, and supported by factual evidence.

Here, Respondent discharged Complainant from the Head Care Giver position because her disability prevented her from lifting more than 5 pounds, asserting that her job duties required her to lift and/or carry children and other objects. The investigation's interviews with Complainant and the other Head Care Givers support the conclusion that they could perform the

essential functions of their jobs without engaging in such lifting or carrying. The investigation disclosed sufficient evidence to conclude that on the occasions in which other Head Care Givers lifted children or other heavy objects, they would have been able to carry out the essential functions of their jobs without doing so. Thus, the investigation supports Complainant's contention that no accommodation was even necessary for her to continue her employment as a Head Care Giver. This supports a finding of probable cause that Respondent did not reasonably arrive at its conclusion that Complainant could not perform the essential functions of her job, and shows probable cause that Complainant's discharge violated the disability discrimination provisions of the LAD.

In addition, the investigation disclosed no evidence that, after learning of Complainant's lifting restriction, Respondent made any effort to engage in an interactive process with Complainant or otherwise gather relevant facts to determine whether Complainant could perform the essential functions of the Head Care Giver position, with or without reasonable accommodation. Complainant has presented at least one accommodation that would have addressed Respondent's concerns about lifting children - - re-assignment to a school servicing older children who are more self-sufficient. This is evidence that, if Respondent had engaged in an interactive process with Complainant, Respondent could have reasonably accommodated Complainant's limitations without undue hardship. Respondent's failure to do so is additional evidence that Respondent did not reasonably arrive at its conclusion that Complainant's disability precluded job performance, and supports a finding of probable cause that Complainant's discharge violated the disability discrimination provisions of the LAD.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

Date

CHINH Q. LE, DIRECTOR
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