

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN39WB-64767

Ron Michael Lerner,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	PARTIAL FINDING OF
)	PROBABLE CAUSE
Advance Auto Parts,)	
)	
Respondent)	

On March 26, 2014, Middlesex County resident Ron Michael Lerner (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his employer, Advance Auto Parts (Respondent), discriminated against him based on religion, denied him a reasonable religious accommodation, and retaliated against him for requesting the accommodation, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

Findings of the Investigation

In or about December 2013, Complainant applied for a part-time position with Respondent. He wrote on his application, “[C]annot work Friday after 3 pm and no Saturdays.” After submitting his application, he was interviewed by the general manager of Respondent’s Hazlet store, Bhavyata (“Bobbi”) Francis. Complainant claims that during the interview, Francis asked him why he needed Friday evenings and Saturdays off, and he replied that it was to observe the Jewish Sabbath. Complainant alleges that Francis replied that she understood because one of her close friends is Jewish.

On or about January 10, 2014, Complainant began working as a part-time employee. During his first month of work, Complainant worked three to four shifts a week for an average of eighteen hours per week. At Francis’ request, Complainant worked a shift on Friday, January 17, 2014, which ended in the evening after sundown. Complainant told DCR that he reluctantly accepted the shift because he was a new employee.

On or around February 1, 2014, Complainant received his weekly schedule and saw that Francis had scheduled him for a Saturday shift on February 8, 2014. Complainant told Francis that he could not work Saturdays. She took him off the schedule for that Saturday.

On February 8, 2014, at 9:32 p.m., Complainant sent an email to Francis listing all the days he needed off through the end of June 2014 for religious reasons. In particular, Complainant reiterated that he would not be able to work Saturdays because it is the Jewish Sabbath and listed six religious holidays on which he would be unable to work. He wrote that based on the later sunset times as the season progressed, he would be available to work later on Fridays, and gave specific times, ranging from 4 p.m. to 7 p.m., for each Friday through the end of June.

Complainant told DCR that the next day, Francis told him that she could not grant all of the days off that he requested, and that he might need to work during some of his religious holidays just as she worked on some of her religious holidays. Complainant stated that Francis noted that he originally assured her that he was available to work on Saturdays. Complainant alleged that he told Francis that she was mistaken; he had never agreed to work on Saturdays. Complainant said that Francis told him that Respondent was a retail business and all its employees were supposed to be available seven days a week.

On February 16, 2014, Francis reduced Complainant's schedule to about six hours per week by scheduling him only on Sundays.

Complainant contends that Respondent's decision to reduce his hours to one day a week after he requested certain days off for religious reasons amounts to a failure to accommodate and/or retaliation.

Complainant alleged that although he was hired as a commercial driver, Francis required him to perform sales and customer service work because of his religion.

He also alleged that Francis reprimanded him for not meeting sales goals, while non-Jewish drivers were not required to perform those duties.

Complainant alleged that Respondent unlawfully fired him on March 23, 2014.

Respondent denied the allegations of discrimination and retaliation in their entirety. It rejected the allegation that Complainant was forced to perform sales and customer service work based on his religion. In support of that argument, Respondent produced documents showing that Complainant's position included both driving and sales components, and that others in the same job title performed similar tasks.

Respondent denied that Complainant was unfairly singled out for reprimands based on his religion. In support of that argument, Respondent produced information regarding alleged deficiencies in Complainant work performance, and argued that it never fired Complainant despite having cause to do so.

Respondent denied that it refused to grant reasonable religious accommodations to Complainant. Francis told DCR that she saw on Complainant's application that he needed off Friday after 3 p.m. and Saturdays, and discussed this with Complainant during his job interview.¹ She told DCR that during his interview, Complainant agreed to work Friday evenings and Saturdays as long as he was given sufficient advance notice. She denied asking Complainant why he needed Friday evenings and Saturdays off.

Francis told DCR that when she asked him to work on January 17, he told her not to make a habit of scheduling him to work on Friday evenings. She stated that when Complainant approached her in February about the additional religious holidays, she told him, "I cannot accommodate these." She said that when he reiterated that he wanted the days off for religious reasons, she said, "I understand that, but I wish you had told me that before because I would have hired someone with you, or not hired you."

Francis told DCR that she tried to devise a work schedule that would accommodate Complainant's requests, but he continued asking for more and more days off. Francis said that as a result of Complainant's requests, she decided to reduce his work schedule from three or four days a week to only Sundays, and wait for his availability to increase before reconsidering his schedule. In explaining her rationale to DCR, Francis stated that "work is work" and "people need it," so she expected Complainant to be more flexible.

Respondent denied firing Complainant on March 23, 2014. It produced evidence that Complainant continued to work until August 31, 2014, when he stopped showing up for his scheduled shifts. During the course of the investigation, Complainant acknowledged that he stopped coming to work of his own volition.

¹ In its answer to the verified complaint, counsel for Respondent appears to assert that Francis did not review Complainant's application before she interviewed him and therefore did not know that he was unavailable for work on Fridays after 3 p.m. and Saturdays. To the extent that counsel's statement contradicts Francis's own recollection of events, DCR finds for the purpose of this disposition that Francis read Complainant's application before interviewing him.

Analysis

The LAD makes it unlawful for employers to discriminate in the “terms, conditions or privileges of employment” based on religion, N.J.S.A. 10:5-12(a), and requires employers to accommodate an employee’s “sincerely held religious practice or religious observance” unless doing so would cause an “undue hardship” on the employer’s business. N.J.S.A. 10:5-12(q)(1). The LAD states:

It shall be an unlawful employment practice . . . [f]or any employer to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of the religion or religious belief, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business.

[ibid. (emphasis added).]

An “undue hardship” for purposes of religious accommodation analysis means “unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a collective bargaining agreement.” N.J.S.A. 10:5-12(q)(3)(a).

In determining whether a requested religious accommodation constitutes an undue hardship, factors to consider include: (a) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer; (b) the number of individuals who will need the particular accommodation for a sincerely held religious observance or practice; and (c) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities would make the accommodation more difficult or expensive. N.J.S.A. 10:5-12(q)(3)(b).

The employer bears the burden of demonstrating that a requested accommodation would create an undue hardship. N.J.S.A. 10:5-12(q)(3)(d)(ii).

At the conclusion of an investigation, the DCR Director is required to determine whether “probable cause exists to credit the allegations of the verified complaint.” N.J.A.C. 13:4-10.2. “Probable cause” for purposes of this analysis means a

“reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated.” Ibid.

If the Director finds there is no probable cause, then the finding is deemed a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

However, if the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits, but merely an initial “culling-out process” whereby the Director makes a threshold determination of “whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits.” Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev’d on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the “quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits.” Ibid.

In this case, the Director finds that the weight of the evidence does not support Complainant’s allegations that he was required to perform sales and customer service work beyond his expected driver duties, unfairly targeted for reprimand, and ultimately fired on March 23, 2014, because of his religious views. Thus, those allegations of the verified complainant are hereby dismissed based on a finding of no probable cause.

However, the allegations of failure to accommodate and retaliation survive this threshold scrutiny. The investigation found that before Complainant began working on or about January 10, 2014, Francis was aware that he requested Fridays after 3 p.m. and Saturdays off. In his February 8, 2016 email, Complainant reminded Francis that he would not be available to work on the Jewish Sabbath, and requested six additional religious holidays off beginning in mid-April through the end of June 2014. He wrote that based on the later sunset times as the season progressed, he would be available to work later on Fridays, and gave specific times, ranging from 4 p.m. to 7 p.m., for each Friday through the end of June.

Francis, who made the work schedules on a weekly basis, told Complainant and DCR that she could not create a schedule to accommodate his religious observance days without reducing his work hours. She never explained why it was necessary to reduce his hours to one shift to accommodate his religious observances, or why it would have been an undue hardship to continue scheduling him for approximately 18 hours weekly excluding his Sabbath and six religious holidays he designated beginning in mid-April.

Respondent argues that it accommodated Complainant by allowing him not to work on the specific days that he requested off. Complainant, on the other hand, argues that Respondent's decision to reduce his hours was punitive rather than accommodating, and resulted in a loss of income. On balance, the Director finds that Complainant's position is more persuasive. An accommodation that amounts to an adverse employment action—here, a loss of salary—is not a reasonable accommodation under the LAD. Unilaterally reducing Complainant's schedule to one day a week does not strike the Director as "engaging in a bona fide effort" to accommodate Complainant.

The Director recognizes that Complainant's request for certain days off may have posed an inconvenience to Francis, who was charged with devising each week's work schedule. However, Respondent has not demonstrated that any such inconvenience rose to the level of an undue hardship. N.J.S.A. 10:5-12(q)(1).

Francis appears to have expected Complainant be more flexible and sacrifice some religious holidays, as she had. It is Francis's prerogative to voluntarily elect to observe certain holidays, and not others. However, absent a showing of undue hardship, she cannot force a subordinate to choose between earning money and engaging in a "sincerely held religious practice or religious observance." N.J.S.A. 10:5-12(q)(1).

In view of the above, the Director finds that there is probable cause to support a finding of religious discrimination based on a failure to accommodate.

The Director also finds that there is a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that" the Respondent's response to Complainant's request for an accommodation amounted to retaliation.

The LAD prohibits employers from retaliating against employees for opposing any act forbidden by the LAD. N.J.S.A. 10:5-12(d). A complainant's burden to establish a prima facie case of retaliation is "not an onerous one." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him to an adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (1990).

Here, the Director is satisfied that Complainant's request for a religious accommodation amounted to LAD-protected activity known to his employer, and that having his work schedule reduced from eighteen to six hours a week was an adverse employment action. Francis acknowledged that she did so in response to Complainant's request. Thus, the causal connection between the two events appears

Respondent argues that it accommodated Complainant by allowing him not to work on the specific days that he requested off. Complainant, on the other hand, argues that Respondent's decision to reduce his hours was punitive rather than accommodating, and resulted in a loss of income. On balance, the Director finds that Complainant's position is more persuasive. An accommodation that amounts to an adverse employment action—here, a loss of salary—is not a reasonable accommodation under the LAD. Unilaterally reducing Complainant's schedule to one day a week does not strike the Director as "engaging in a bona fide effort" to accommodate Complainant.

The Director recognizes that Complainant's request for certain days off may have posed an inconvenience to Francis, who was charged with devising each week's work schedule. However, Respondent has not demonstrated that any such inconvenience rose to the level of an undue hardship. N.J.S.A. 10:5-12(q)(1).

Francis appears to have expected Complainant be more flexible and sacrifice some religious holidays, as she had. It is Francis's prerogative to voluntarily elect to observe certain holidays, and not others. However, absent a showing of undue hardship, she cannot force a subordinate to choose between earning money and engaging in a "sincerely held religious practice or religious observance." N.J.S.A. 10:5-12(q)(1).

In view of the above, the Director finds that there is probable cause to support a finding of religious discrimination based on a failure to accommodate.

The Director also finds that there is a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that" the Respondent's response to Complainant's request for an accommodation amounted to retaliation.

The LAD prohibits employers from retaliating against employees for opposing any act forbidden by the LAD. N.J.S.A. 10:5-12(d). A complainant's burden to establish a prima facie case of retaliation is "not an onerous one." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant must show that he engaged in LAD-protected activity known to his employer, that the employer thereafter subjected him to an adverse employment action, and that there was a causal connection between the two. Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (1990).

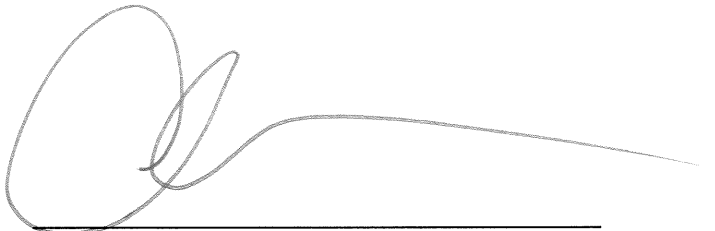
Here, the Director is satisfied that Complainant's request for a religious accommodation amounted to LAD-protected activity known to his employer, and that having his work schedule reduced from eighteen to six hours a week was an adverse employment action. Francis acknowledged that she did so in response to Complainant's request. Thus, the causal connection between the two events appears

to be established. And other than the vague claim of business efficiency, Respondent has provided no legitimate non-retaliatory explanation for reducing Complainant's hours. The non-Sabbath religious holidays Complainant requested did not begin until mid-April, and Francis devised the schedule each week. Respondent did not adequately explain its basis for determining more than two months in advance why it could not accommodate any of Complainant's requests.

The Director finds that Respondent has (a) not challenged the sincerity of Complainant's religious beliefs, (b) not proffered a legitimate non-discriminatory or non-retaliatory explanation for reducing Complainant's hours to one shift per week after he requested a religious accommodation, and (c) not shown that it would have been an undue hardship to adjust Complainant's schedule so that he could continue working the same approximate number of hours while observing his religious beliefs. Accordingly, at this preliminary stage of the process, the Director is satisfied that the circumstances of this case support a reasonable suspicion that Respondent's decision to cut Complainant's hours rather than allow him to continue working approximately eighteen hours a week while observing his religious convictions violated N.J.S.A. 10:5-12(q) (failure to accommodate) and N.J.S.A. 10:5-12(d) (retaliation).

DATED:

5-16-17



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS