

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. ED06WB-67965

██████████,

Complainant,

v.

Exceptional Medical Transport,

**Administrative Action
FINDING OF PROBABLE CAUSE**

Respondent.

On January 22, 2020, ██████████ (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR),¹ alleging that Exceptional Medical Transport (Respondent) discriminated against her based on sex and pregnancy, and failed to accommodate her pregnancy-related medical restrictions in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a medical transportation company located in West Berlin, New Jersey. In July 2016, Respondent hired Complainant as an Emergency Medical Technician (EMT). In this position, she was responsible for providing medical and ambulance transportation to sick and injured patients to and from hospitals, nursing homes, doctors' offices and medical facilities. Complainant alleged that on October 7, 2019, Respondent forced her to resign after she requested a reasonable accommodation.

In the verified complaint, Complainant alleged that she was denied a reasonable accommodation because of her sex (female) and pregnancy, and was subsequently told she had to resign. Complainant provided her employer with a note from her physician stating that she should not lift more than 50 pounds due to a high-risk twin pregnancy. Complainant claimed that co-workers injured on the job and covered under Respondent's workers' compensation are given modified, light-duty assignments, but she was not offered that option.

In its response to the complaint, Respondent asserted that Complainant gave Human Resources Manager, Cynthia Oberle, a doctor's note on October 7, 2019, stating that she was no longer physically able to perform her job. According to Oberle, Complainant told Oberle she

¹ The complaint was initially filed with Equal Employment Opportunity Commission (EEOC) and dual filed with DCR pursuant to a work-sharing agreement between the two agencies.

would resign and contact her former employer to see if she could return to work there. Oberle denied telling Complainant she had to resign and stated that resigning was Complainant's suggestion. According to Respondent, Oberle told Complainant that she could apply for state disability. Respondent's position statement stated Complainant was visibly upset during her October 7, 2019 meeting with Oberle and that Oberle told Complainant to go home that day and get back to her after she decided whether she would resign or apply for state disability. Respondent alleged that Complainant never contacted Respondent again. In its position statement, Oberle also wrote:

[Respondent] does not provide modified/alternate work to any employee who is unable to perform their job due to a medical condition. Any employee deemed unable to work due to a medical condition has to apply for NJ short term disability.

Further, Respondent's position statement stated that on November 12, 2019, Respondent sent Complainant a Federal and Medical Leave Act (FMLA) notice to advise her she was eligible for 12 weeks of FMLA leave, but Complainant failed to return the paperwork.

In an interview with DCR, Complainant said that after she presented her doctor's note, which stated that she could not lift more than 50 pounds due to a high-risk twin pregnancy, Oberle suggested Complainant seek another job. Complainant stated that Oberle told her she had to resign and suggested she could return after she gave birth. Complainant recalled that Oberle told her State disability would deny her claim since it was a doctor's suggestion and not a requirement. Complainant told DCR she contacted the Equal Employment Opportunity Commission (EEOC) the following day and they advised her not to resign. Complainant agreed that she did not contact Respondent again because she was under the impression her only option was to sign a resignation letter. Complainant also stated that she received the FMLA documents in November 2019 but did not send them back because she wanted these benefits to apply later in her pregnancy when she was in the hospital.²

DCR interviewed Respondent's Human Resources Manager Cynthia Oberle. Oberle told DCR that any employee injured on the job is placed on modified duty doing menial work, such as making copies, highlighting documents or compiling packets. She explained that an employee can remain on the modified work assignment as long as the injury lasts, and that, though it is usually a couple of weeks, it can last a couple of months. Oberle said Respondent gives these employees modified work to keep its workers' compensation costs down and to incentivize the employees to return to their jobs even if they have medical restrictions. Oberle said Complainant could not perform an essential function of the job of an EMT because EMTs lift over 50 pounds often during the day; she said the stretcher alone weighs 130 pounds. When asked how she attempted to accommodate Complainant's pregnancy-related lifting restriction, Oberle said there was nothing they could do since her job required her to lift and she could not perform this duty. Oberle stated that Respondent did not have any openings in dispatch and there was no office work for

² Complainant was scheduled to be hospitalized on January 30, 2020 due to her high-risk pregnancy. She was scheduled to give birth on April 30, 2020 but she delivered prematurely on March 19, 2020.

Complainant. Oberle also said that there was not enough modified light-duty work to give Complainant.

DCR reviewed Respondent's EMT physical work requirements for Complainant's position, which included but were not limited to, the transportation of patients from one medical facility to another, moving the stretcher which, weighs 131 pounds when empty, transporting patients who generally weigh between 100 and 250 pounds, and are usually in a bed, moving medical equipment which usually weighs less than 50 pounds, lifting the patient from the bed to the stretcher, which is performed by two EMTs.

Complainant provided to DCR an email dated October 6, 2019 that she alleged was sent to all of Respondent's employees. The email stated in pertinent part "Open shifts all week! BLS, SCT, Berlin, Bordentown, and even dispatch! Call into dispatch to help!" This email contains Respondent's logo and appears to have been sent from the account of Samantha Leahey, Respondent's Senior Dispatcher and Scheduler and Complainant's direct supervisor. During DCR's interview with Ms. Leahey, she stated that she sends out emails similar to the October 6, 2019 email on essentially a daily basis in order to fill openings that are available because of vacations or call-outs. Ms. Leahey further stated that while she could not recall the exact email, it could have meant that there was an open shift available every day. Oberle denied having previous knowledge of the email.

ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b). If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." *Ibid.*

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate in the "terms, conditions or privileges of employment" based on pregnancy. N.J.S.A. 10:5-12(a). The Pregnant Workers Fairness Act, a 2014 amendment to the LAD, requires employers to provide reasonable accommodations to women "affected by pregnancy," which includes pregnancy, childbirth, medical conditions related to pregnancy or childbirth, and "recovery from childbirth." The statute provides:

[A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as temporary transfers to less strenuous or hazardous work ... for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer. The employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation. N.J.S.A. 10:5-12(s).

Additionally, any workplace accommodation provided to a pregnant employee cannot be provided in a manner less favorable than accommodations provided to other employees not affected by pregnancy but similar in their ability or inability to work. Ibid. As recently noted by the Appellate Division, N.J.S.A. 10:5-12(s) sets out an affirmative obligation on the part of employers to provide reasonable accommodations for individuals who are pregnant. See Delaney v. Twp. Of Ocean, 462 N.J. Super. 78 (App. Div. 2020). The Legislature found that the reasonable accommodation requirement was necessary to address concerns of pregnant women simply being placed on unpaid leave or fired when seeking an accommodation that would allow them to continue to work and maintain a healthy pregnancy. N.J.S.A. 10:5-3.1.

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based on pregnancy and failed to grant her a reasonable accommodation in the workplace for needs related to her pregnancy.

The evidence demonstrates that Respondent failed to even consider whether it could accommodate Complainant by transferring her to less strenuous or hazardous work to address Complainant's 50-lb lifting restriction during her pregnancy. The evidence showed that, rather than consider accommodating Complainant's lifting restriction, Respondent gave Complainant only two options: resign or go out on disability. These are precisely the harms the Legislature sought to address in enacting the Pregnant Worker's Fairness Act in 2014. See N.J.S.A. 10:5-3.1.

Respondent said that it applied what it stated was its standard policy of not providing modified or alternative work when an employee is unable to perform an essential function of her job. However, at least for pregnant people, such a practice conflicts with the plain language of N.J.S.A. 10:5-12(s), which requires reasonable accommodations for pregnant people, including "*temporary transfers to less strenuous or hazardous work*," unless the employer can demonstrate that providing the accommodation would be an undue hardship on its business. Here, Respondents provided no evidence of undue hardship.

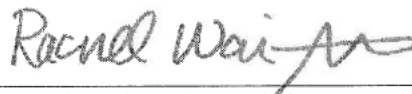
In addition, despite Respondent's purportedly standard policy of not providing modified or alternative work, Respondent concedes that employees who are injured on the job are given modified duties in accordance with their medical restrictions, for weeks or months. Respondent also concedes that it made no effort to modify Complainant's job duties in accordance with her pregnancy-related restrictions.

Further, the evidence supported Complainant's assertion that Respondent had openings in the dispatch position during the relevant time. Though Ms. Oberle denied knowledge of the October 6, 2019 email seeking help, Samantha Leahey admitted that there are often daily alerts posted for different positions, including dispatcher, because of employee vacations and call outs. The dispatch position does not require lifting and would have accommodated Complainant's pregnancy-related restriction. There is no indication that Respondent considered assigning Complainant to available dispatch duties during the time her doctor imposed lifting restrictions due to her pregnancy.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of [X] ~~and/or~~ and/or reprisal] .

11/9/20

DATE



Rachel Wainer Apter, Director
New Jersey Division on Civil Rights