

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL03WB-66774**

██████████,)
)
 Complainant,)
)
 v.)
)
 Healthcare Services Group,)
 Inc.,)

**Administrative Action
FINDING OF PROBABLE CAUSE**

Respondent.

On December 27, 2017, ██████████ (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Healthcare Services Group, Inc. (Respondent) discharged her based on pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49 and discharged her in violation of the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 to -16 (FLA). Respondent denied the allegations of discrimination in their entirety. DCR’s investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a Pennsylvania corporation that provides housekeeping, laundry, and dietary services to long-term care institutions, including a facility in Hamilton Square, N.J. On July 20, 2010, Respondent hired Complainant as a Light Housekeeper at the Hamilton Square location. In this position, she was responsible for cleaning and sanitizing an assigned area which included patient rooms, hallways, entryways and dining rooms. On May 30, 2017, Complainant was discharged.

In the verified complaint, Complainant alleged that after informing her Director of Housekeeping, Terrance Cowans, that she was pregnant, she went out on leave under the federal Family and Medical Leave Act (FMLA) starting February 24, 2017 with a return-to-work date of May 20, 2017. Complainant alleged that on or about April 14, 2017, she informed Cowans that she had given birth via C-section and was therefore entitled to additional leave. Complainant alleged that her return to work date was adjusted to June 12, 2017. Complainant alleged that she also informed Cowan that in addition to her maternity disability leave, she planned on exercising her right to bonding time under the N.J. Family Leave Act. Complainant alleged that Cowan advised her to inform Supervisor, Charles Martin, of her plans to take bonding time after her leave ended on June 12, 2017, but all of her calls to Martin went unanswered. Complainant alleged that she submitted a medical note clearing her to return to work on June 12, 2017, and waited to hear from Respondent about her scheduled return date. Complainant alleged that she did not hear from Respondent and her calls to Martin continued to go unanswered. Complainant alleged that on

September 7, 2017, a representative from the N.J. Department of Labor advised her that she had been discharged by Respondent for failing to return to work on May 20, 2017.

In its response to the complaint, Respondent stated that Complainant was discharged and replaced for failing to return to work after her FMLA leave expired on May 20, 2017. Respondent stated that they attempted to contact Complainant prior to the expiration of her FMLA but received no response. Additionally, Respondent stated that Complainant never requested leave under the New Jersey Family Leave Act (NJFLA). Respondent also stated that Complainant's position was filled but she was offered another position at a different facility, but she never responded to the offer.

In an interview with DCR, Complainant said that she started her FMLA leave on February 24, 2017 and gave birth on March 16, 2017. Complainant stated that in early April, she went into the office to speak to Cowans and his supervisor Keith (last name unknown), and expressed that she needed more leave time due to delivering via C-section. Complainant stated that Cowans confirmed that she could extend her leave until June 12, 2017 and also informed her that she was entitled to bonding time. Complainant stated that she was under the impression that she was taking FMLA until May 20, 2017 and then using her bonding time.

Complainant stated that once she was medically cleared to return to work, she submitted a doctor's note in early June 2017, because that is what Cowans had instructed her to do. Complainant stated that when she was not contacted regarding returning to work, she contacted Cowans and he informed her that he no longer worked at that location. Complainant stated that she then contacted the front desk but was unable to speak to a manager. Complainant recalled speaking to the new supervisor, Chris Martin, in July 2017 regarding her leave time, but did not recall him offering her another position.

DCR interviewed Cowans, who told DCR that, after giving birth, Complainant stated that she would need additional time off and he informed her that she was entitled to additional leave. Cowans also stated that Complainant brought in a note from her doctor stating that she needed to extend her leave until June 12, 2017.¹ Cowans denied meeting with Complainant and Keith, and stated that it would have been unnecessary because he already knew that Complainant would be out on maternity leave. Cowans stated that he put the note in Complainant's file and was under the impression that she would be able to return on June 12, 2017. Cowans stated that he was transferred to a different facility in April 2017, but told his replacement, Charles Martin, that Complainant was returning on June 12, 2017 and should be put back on a full-time schedule.

DCR interviewed Martin, who stated that he understood Complainant would return to work on May 20, 2017 based on the paperwork he received from Human Resources. Martin said that he made multiple attempts to reach Complainant prior to her return date but was unable to reach her. Martin stated that Complainant contacted him on May 30, 2017 requesting to extend her FMLA, even though it had already expired. Martin stated that he contacted [REDACTED], FMLA

¹ In a follow-up interview with DCR, Complainant stated that she did not submit a medical note from her doctor requesting that her leave be extended until June 12, 2017. She confirmed that she understood from Cowans that no additional documentation was necessary and that she was entitled to extend her leave to June 12, 2017.

Administrator, who told him to contact HR and the district manager about the issue. Martin told DCR that he had already filled Complainant's position, so he had a discussion with Human Resources and the district manager about finding hours for Complainant at another building. Martin stated that these hours were offered to Complainant but she never responded. When asked about Complainant's claim under the NJFLA, Martin stated that he was unaware of the existence of the NJFLA.

DCR interviewed Respondent's Leave of Absence Supervisor, Michele Bailey, who stated that she and three other employees are responsible for processing all medical leaves. When asked about the NJFLA, Bailey stated that New Jersey employees are sent paperwork with information on the process for applying for NJFLA in the form of a paper packet. When asked for the paperwork that was sent to Complainant regarding NJFLA, Bailey stated that Respondent did not have the paperwork and its delivery to Complainant was not tracked.

DCR reviewed a April 20, 2017 letter addressed to Complainant, from [REDACTED], FMLA Administrator, which stated that Complainant's FMLA would expire on May 20, 2017. The letter stated a doctor's note would need to be provided when returning to work. The letter also stated "This is your final notification of your responsibilities with respect to your leave." FMLA was the only leave mentioned in the letter. Respondent was asked to produce any documents it sent to Complainant regarding her entitlement to bonding time under the NJFLA. In an email to DCR, Respondent stated that during Complainant's employment, Respondent did not have a formal NJFLA process in place, but if an employee requested NJFLA leave, Respondent "worked with them."² Respondent also indicated that the required FMLA poster was posted visibly at all of its New Jersey locations, but made no mention of the required NJFLA notice.

In a follow-up interview with DCR, Complainant stated that she attempted to respond to Martin regarding the letters she received about the expiration of her FMLA, but was unable to reach him. She stated that she was under the impression that her bonding time would start once her FMLA expired on May 20, 2017. Complainant stated that she did not recall Martin offering her hours at another facility.

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).

² Respondent told DCR they have since implemented a process to work with employees when they request NJFLA to bond with a newborn.

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.” Id.

The LAD does not explicitly list an extension of leave as a reasonable accommodation of pregnancy. However, under the LAD, a non-pregnant employee with a disability is entitled to a reasonable accommodation, including a leave of absence, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. N.J.A.C. 13:13-2.5(b). Additionally, the LAD makes it unlawful for an employer to treat a woman that the employer knows, or should know, is affected by pregnancy, or medical conditions related to pregnancy, in a manner less favorable than the treatment of other persons not affected by pregnancy but similar in their ability or inability to work. N.J.S.A. 10:5-12(s). Therefore, an employee affected by pregnancy may also be entitled to an extension of her leave of absence as a reasonable accommodation, the same as a disabled employee.

Additionally, pursuant to the NJFLA, an employee is entitled to up to 12 weeks of bonding time after the birth or adoption of a child under the NJFLA, in addition to their 12-week entitlement under the FMLA. N.J.S.A. 34:11B-1 to -16. Employers must provide written guidance concerning an employee’s rights and obligations under the FLA, and must also display a Family Leave Act poster in places easily visible to all employees. N.J.A.C. 13:8-2.2; N.J.A.C. 13:14-1.14. Under the governing regulations, if a covered employer maintains written guidance concerning employee benefits or leave rights, such as in an employee handbook, information concerning leave under the FLA and employee obligations under the FLA must be included in the handbook or other document. Id. If an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer is required to provide written guidance to each of its employees concerning employee rights and obligations under the FLA, which may include duplicating and providing a copy of the NJFLA Fact Sheet, which is available on DCR’s website. Id.

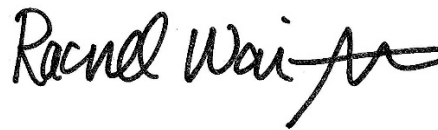
Here, the investigation found that Complainant requested additional 3 weeks of leave, beyond her 12-week FMLA entitlement, due to a pregnancy-related medical condition. Although Respondent denied receiving a request from Complainant to extend her leave, Complainant’s supervisor, Cowans, confirmed that she did request additional leave time and also that he agreed to extend her leave until June 12, 2017. Although there was conflicting information as to whether Complainant provided medical documentation supporting her request, Cowans informed Complainant both that her request for an additional 3 weeks of leave was granted and her return to work date was June 12, 2017. Complainant was nevertheless subsequently told that she was terminated because she failed to return to work on May 20, 2017. The investigation supported Complainant’s allegation that Respondent failed to grant her request for a 3-week extension of leave of absence as an accommodation to her pregnancy-related disability. Respondent’s assertion the Complainant did not request an extension of her leave was refuted by Cowan, Complainant’s supervisor at the time of the request, who confirmed that Complainant made, and he granted, the request.

With regard to Complainant’s FLA claim, an employee may request to utilize FLA to care for a newly born child whether or not the employee has fully recovered from any pregnancy-related disability. N.J.A.C. 13:14-1.6(c). Respondent maintained that Complainant never requested NJFLA. It is not clear from the evidence whether Complainant expressly requested bonding time or expressed an intention to utilize it in the future. Nevertheless, DCR’s investigation found that Respondent failed to inform Complainant of her rights under the NJFLA and failed to display the required NJFLA posters. Martin admitted to DCR that he was not aware of the existence of the NJFLA, and it necessarily follows that he could not have been aware of her entitlement under the NJFLA. Bailey initially told DCR that Respondent had mailed Complainant information about the NJFLA process, but the investigation found that Respondent mailed only information about the FMLA. Respondent later conceded to DCR that it did not, in fact, have a system in place for notifying, or processing, requests for leave under the NJFLA at the time of Complainant’s employment. Further, an employee should not be penalized for failure to follow specific protocols for requesting FLA when the employer has not provided the employee with required guidance. See, D’Alia v. Allied-Signal Corp., 260 N.J. Super. 1, 9 (App. Div. 1992)(once on notice of the employee’s intention to take leave under the FLA, the employer must grant the employee “all of the rights accorded by the statute...”); see also, Barone v. Leukemia Society, 42 F. Supp. 2d 452, 462 (D.N.J. 1998).

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 pregnancy discrimination.

February 24, 2021

DATE



Rachel Wainer Apter, Director
New Jersey Division on Civil Rights