STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EJ08FB-66929

[redacted],	)	
	)	
Complainant,	)	
	)	**Administrative Action**
v.	)	
	)	**FINDING OF PROBABLE CAUSE**
VCNY Home,	)	
	)	
Respondent.	)	

On April 10, 2018, New York resident [redacted] (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, VCNY Home (Respondent), violated the New Jersey Family Leave Act (FLA) N.J.S.A. 34:11B-1, et seq. when it denied her rights and protections provided by the FLA and then retaliated against her for asserting those rights. On January 30, 2019, Complainant amended her verified complaint to include allegations that Respondent retaliated against her during the course of her employment for engaging in FLA-protected activity, denied her a reasonable breastfeeding accommodation, and discharged her as a reprisal for engaging in FLA and LAD-protected activity and on account of her status as a breastfeeding mother, in violation of the New Jersey Family Leave Act (FLA) N.J.S.A. 34:11B-1, et seq., and the New Jersey Law Against Discrimination (LAD) (N.J.S.A. 10:5-1 et seq.). The DCR investigation found as follows.

Summary of Investigation

Respondent, headquartered in North Bergen, New Jersey, manufactures and imports bedding, window, and bath textiles. Founded and owned by brothers Joe and Toby Cohen, it also operates offices in Arkansas, China, and India. On or about July 1, 2016, Respondent hired Complainant as a Director of Marketing at its North Bergen corporate office. In this role, Complainant was responsible for overseeing and implementing the development and delivery of Respondent's marketing strategy, including campaigns, events, and digital marketing. During the relevant period, Complainant reported to several different people. Specifically, she reported to Owner and President Toby Cohen from April 2017 through July 2017, to President of Sales and Marketing Theresa Riley from August 2017 through October 2017, and to Vice President of Marketing Marie Malette from November 2017 until her discharge on October 3, 2018.

Complainant's initial allegations stemmed from her attempts to exercise her right to take leave covered by the FLA to care for her newborn daughter. She alleges that Respondent refused to grant her the full twelve-weeks of leave provided by the FLA until she filed the instant charge with DCR. She also alleges that Respondent retaliated against her for asserting her right to FLA leave by demanding that she use two weeks of not yet accrued vacation time as a substitute for

unpaid leave, and by neglecting to respond to her requests for assistance with respect to instructions and information on how to fill out relevant leave paperwork.

Moreover, Complainant further alleges that after filing the instant charge with DCR and subsequently returning to work from her FLA-covered leave, she was subjected to several instances of harassing conduct and retaliatory treatment such as the repositioning of a security camera to point directly at her workstation, inappropriate jokes regarding her maternity leave, exclusion from events that she was otherwise always involved in, and being assigned an unreasonable amount of additional work. She also alleges that Respondent failed to provide her with a reasonable breastfeeding accommodation when it demanded that she take a two-week international trip to India and China, and that it thereafter discharged her in retaliation for filing the instant charge with DCR in April 2018, for bringing allegations of retaliation to Vice President of Human Resources Lisa Brier in September 2018, and because she requested a breastfeeding accommodation.

Respondent denied the allegations in their entirety. DCR's investigation found as follows.

a. Denial/Interference with FLA Leave

At all times relevant herein, Respondent was a covered employer as defined by the FLA and Complainant was an eligible employee as defined by the FLA.[1]

On or around July 18, 2017, Complainant informed Brier and Cohen that she was pregnant and that she was due to give birth in or around January 2018. Shortly thereafter, Complainant approached then-Human Resources Generalist Jie Liang and requested information with respect to the interaction between federal Family and Medical Leave Act (FMLA)-covered leave and FLA-covered leave as it relates to the birth and subsequent care of a newborn child. In an e-mail dated July 31, 2017 in response to Complainant's verbal inquiry, Liang told Complainant that per Respondent's attorney, leave under the FMLA for a pregnancy-related disability and leave under the FLA for the care of a newborn child run simultaneously, rather than consecutively.[2]

On December 13, 2017, Complainant e-mailed Brier and newly hired Human Resources Generalist Stephanie Carbone,[3] among others, to advise that her expected due date was January 28, 2018, and that she planned to take time under the FMLA to physically recover from giving birth, followed by an additional twelve weeks of FLA-covered leave to care for and bond with her

[1] At the time Complainant filed the instant charge, the FLA defined a covered employer as one "which employs 50 or more employees, whether employed in New Jersey or not, for each working day during each of 20 or more calendar workweeks in the then current or immediately preceding calendar year." Likewise, it defined an eligible employee as "any individual employed by the same employer for 12 months or more, who has worked 1,000 hours or more base hours during the preceding 12 month period." Moreover, an employee is considered to be employed in the State of New Jersey if such employee works in New Jersey or routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey. N.J.A.C.13:14-1.2.
[2] Because federal Family and Medical Leave Act can be taken by an employee to care for their own medical condition, but New Jersey Family Leave Act leave cannot, an employee does not exhaust her FLA leave when taking medical leave to recover from childbirth. N.J.A.C. 13:14-1.6(b). Liang is no longer employed by Respondent.
[3] Upon information and belief, Carbone was hired as Liang's replacement.

newborn daughter after she had recovered. Brier replied to Complainant's e-mail stating, "We need to discuss with you the FMLA & baby bonding further. Please schedule some time with us."

On December 19, 2017, Complainant met with Brier and Carbone as requested. During the meeting, Brier expressed her belief that Complainant's understanding of the interaction between FMLA-covered leave and FLA-covered leave was incorrect, and that such leave does not run consecutively – i.e., that an individual cannot take up to twelve weeks of FMLA medical leave for pregnancy or to physically recover from childbirth, followed by up to an additional twelve weeks of FLA-covered leave to care for the child. Brier advised Complainant that she would look further into the matter and get back to her shortly.

On January 17, 2018, Complainant gave birth via Cesarean Section and commenced an FMLA medical disability leave, with appropriate documentation provided by her doctor.

On or about February 6, 2018, Complainant received a letter from Respondent's third party FMLA leave administrator, "FMLAMatters," advising that her FMLA-covered medical disability leave was approved through March 13, 2018. On March 2, 2018, Complainant's doctor submitted a letter to FMLAMatters requesting to extend Complainant's medical leave by four weeks, with a return to work date of April 11, 2018. On March 5, 2018, FMLAMatters extended Complainant's FMLA leave "[b]ased on the medical information provided" through April 10, 2018.[4]

On March 8, 2018, Complainant e-mailed Brier and Carbone reiterating that she planned to take twelve weeks of FLA-covered leave for the care of her newborn daughter at the conclusion of her FMLA medical leave – i.e., beginning on April 10, 2018. She also asked Brier and Carbone if she was required to fill out any paperwork for purposes of administering her upcoming FLA-covered leave. Brier replied to Complainant's e-mail stating, "FMLA coverage is 12 weeks in total. I'm not sure what you are talking about. Please arrange a call with us."

On March 9, 2018, Complainant e-mailed Brier and Carbone seeking to clarify her March 8 e-mail. Complainant advised Brier and Carbone that her research, including correspondence with DCR, revealed that her FLA leave was not exhausted when she took FMLA-covered medical leave to physically recover from the birth of a child, and that as such, she was entitled to twelve weeks of FLA-covered leave for the care of her newborn child at the conclusion of her medical FMLA leave. In a separate e-mail dated March 9, 2018, Complainant attached a copy of DCR's FLA fact sheet for Brier and Carbone's reference.

Later on March 9, 2018, Brier replied to Complainant's first e-mail, stating, in relevant part, "I'm not understanding your question. We will follow the guidelines as directed to us through the FMLA rules and NJFLA rules." Brier also replied to Complainant's second e-mail which included the FLA fact sheet, stating, "Why am I receiving this? We know what we have to do. You are not the first to be out. Have a great weekend."

On March 14, 2018, Carbone e-mailed Complainant, stating in relevant part, "Our interpretation of the [FMLA] and [FLA] as it applies to your situation is that you are entitled to 12

[4] FMLAMatters only administers FMLA-covered leave. It does not administer or oversee FLA-covered leave.

weeks of job protected leave under both statutes – to run concurrently." [Emphasis in original]. Carbone advised Complainant that she was expected to return to work on April 12, 2018.

On March 15, 2018, Complainant again e-mailed Brier and Carbone stating her belief that Respondent was misinterpreting the relationship between the FMLA and FLA as it related to her request for time off to care for her newborn child, and that she was entitled to twelve weeks of FLA-covered leave in addition to the twelve weeks of FMLA-covered medical leave she was currently using to physically recover from childbirth. Respondent did not reply to this e-mail. On March 22, 2018, Complainant sent a follow-up e-mail to Brier and Carbone asking them to confirm a return to work date of July 9, 2018.[5]

On March 23, 2018, Brier sent Complainant a letter stating, in part, that Complainant's interpretation of the FMLA and FLA statutes as they applied to her request for time off was "erroneous" and that FLA-covered leave for the care of a newborn child ran concurrently with her FMLA leave to physically recover from childbirth. The letter also set an expected return to work date of June 18, 2018, and stated that if Complainant failed to return to work on that date, she would be deemed to have resigned her position. During a DCR interview, Brier stated that the June 18, 2018 return to work date represented "a compromise" between Complainant's original April 12, 2018 return to work date and Complainant's requested July 9, 2018 return date.

On April 13, 2018, Brier sent Complainant an e-mail enclosing an executed Family Leave Insurance form. She also reminded Complainant that if she failed to return to work on June 18, 2018, Respondent would deem her to have voluntarily resigned her position.

On or around April 19, 2018, Respondent accepted service of the instant charge.[6] On May 17, 2018, Complainant e-mailed Brier and Carbone again asking Respondent to confirm a return to work date of July 9, 2018. Brier confirmed that return to work date via e-mail on May 18, 2018.

In a DCR interview, Brier acknowledged that Respondent's understanding of the relationship between FMLA-covered medical leave to physically recover from the birth of a child and FLA-covered leave to care for the newborn child may have been incorrect. She stated that she was aware that such leave ran consecutively for a total of up to 24 weeks, but she deferred to Respondent's attorney, who advised her that such leave ran concurrently, for 12 total weeks. Brier stated that although Complainant provided her with DCR resources, she did not feel it necessary to contact DCR for further clarification because she trusted that Respondent's counsel would provide her with accurate information. Brier also acknowledged that Respondent did not approve Complainant's requested July 9, 2018 return to work date until after it was served with the instant charge.

b. Reprisal for Opposing Respondent's FLA Denial

[5] Complainant's return to work date after twelve weeks of FLA-covered leave should have been July 5, 2018. However, Complainant requested to use two vacation days on Thursday, July 5, 2018 and Friday, July 6, 2018 respectively. Therefore, she asked Respondent to confirm a return to work date of Monday, July 9, 2018.

[6] The service date is taken from Respondent's counsel's April 19, 2018 letter to DCR requesting an extension to file an answer to the complaint.

Complainant alleges that Respondent subjected her to retaliatory acts after she requested to take leave under the FLA to care for her newborn daughter. Specifically, in addition to setting a June 18, 2018 return to work date rather than a July 9, 2018 return to work date, Brier's March 23, 2018 letter advised Complainant, for the first time, that even though she did not have any remaining unused vacation days, she would be required to use two weeks of not-yet accrued vacation time that she was set to earn on her anniversary date – June 1, 2018 – as a substitute for unpaid leave, retroactive to the weeks of May 20, 2018 and May 27, 2018. Complainant alleges that Respondent does not typically utilize this practice, and thus, this action was a retaliatory measure meant to discourage Complainant from, and punish Complainant for, asserting her rights under the FLA.

DCR reviewed Respondent's leave policy, which provides that "any paid leave first will be substituted for any unpaid family/medical leave." However, Brier told DCR that Respondent did not enforce this policy. Rather, she stated that Respondent allowed its employees to choose whether they preferred to use their remaining paid vacation time as a substitute for unpaid leave, but they were not required to do so. She also stated that she had never before demanded that an employee taking leave use their paid vacation time as a substitute for unpaid leave. Brier confirmed that Respondent maintains no policy stating that an employee taking leave must use unaccrued paid vacation time, or that such unaccrued paid vacation time can be retroactively applied at Respondent's discretion.

In her interview, Brier stated that Respondent's attorney advised her that Complainant should be required to use paid vacation time as a substitute for unpaid time off because such a procedure is part of Respondent's leave policy. Brier further stated that she was unclear as to why Respondent required Complainant to apply not-yet accrued vacation time retroactively to the weeks of May 20, 2018 and May 27, 2018. She also stated that she did not actually draft the March 23, 2018 letter; rather, Respondent's attorney drafted it and added the retroactive provision without explanation. Brier acknowledged that she signed the letter. After service of the instant complaint, Respondent changed its position and did not require Complainant to use her unaccrued paid vacation time as a substitute for unpaid leave.[6]

c. Reprisal for Filing April 10, 2018 Charge, Taking FLA Leave, and Participation in September 20, 2018 FLA Reprisal Inquiry

As stated above, Complainant filed the instant charge on April 10, 2018 and Respondent acknowledged receipt of same on or around April 19, 2018. Complainant alleges that upon her return to work on Monday, July 9, 2018 and thereafter, she was subject to several instances of harassing conduct and reprisal including, but not limited to, the following:

i. Respondent affixed a security camera to point directly at Complainant's workspace in order to monitor her at all times.

[6] Complainant also alleged that Brier and Carbone neglected to respond to her requests for assistance regarding instructions and information on how to fill out relevant leave paperwork. She alleged that this action is another example of Respondent's attempts to discourage her from asserting rights and protections provided by the FLA. However, Complainant did not provide sufficient evidence to support this claim, and e-mail records reviewed by DCR indicate that Respondent provided Complainant with all necessary paperwork.

ii. Respondent's Chief Operating Officer made an inappropriate and demeaning joke regarding the amount of time Complainant was out of the office on leave.

iii. Owner Toby Cohen refused to speak to Complainant and purposely excluded her from important high-level strategy meetings, instead inviting Complainant's direct reports, which he had not done previously.

iv. Respondent excluded Complainant from participating in its bi-annual "market week" – an event that Complainant was heavily involved with throughout her employment.

v. Respondent removed and reassigned Complainant's oversight over the packaging department, which she had been under her purview since her date of hire.

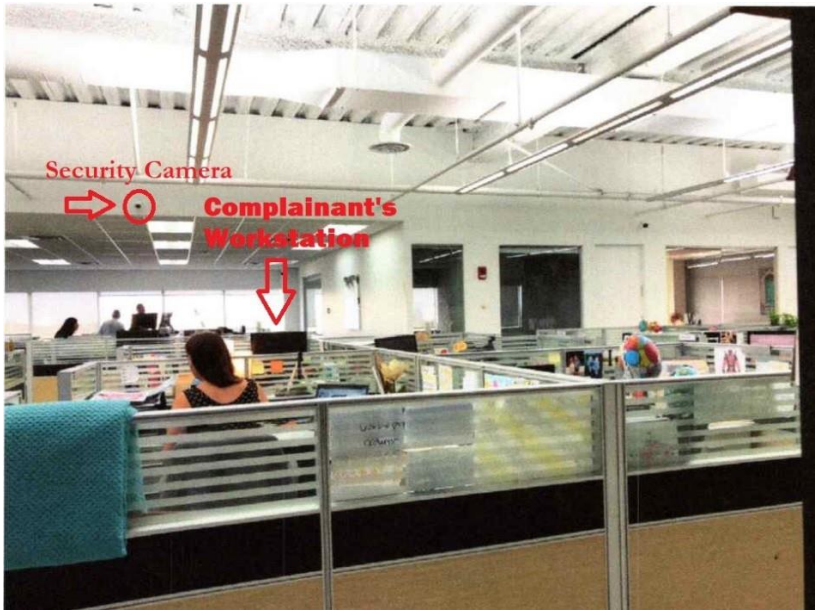
vi. Respondent accessed and read Complainant's work e-mails without her knowledge, which it had never done before.

vii. Respondent began assigning Complainant an unreasonable amount of additional work with unreasonable deadlines, including, but not limited, a Bed Bath and Beyond all-store market analysis.

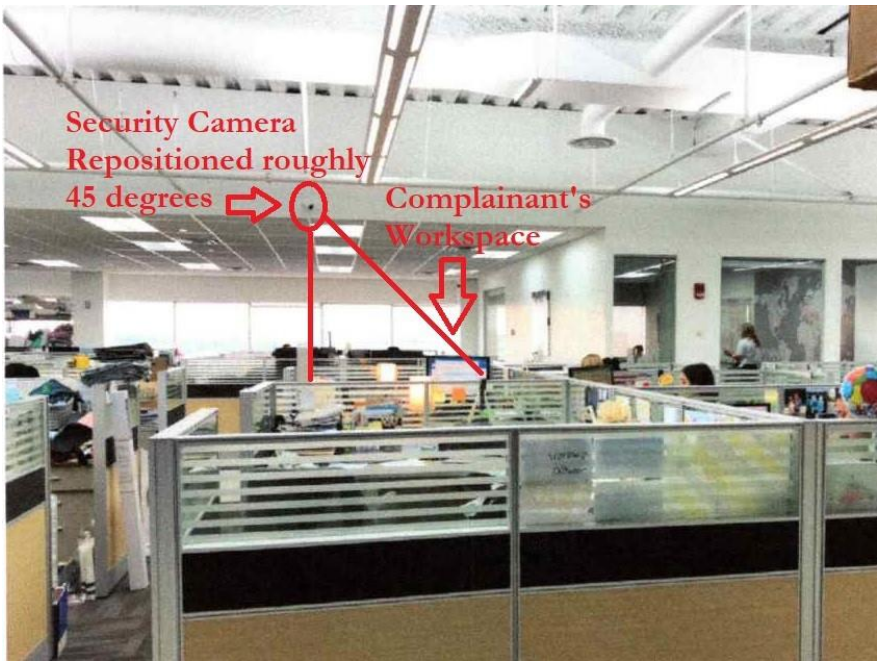
DCR considers each of these allegations in turn.

i. Security Camera

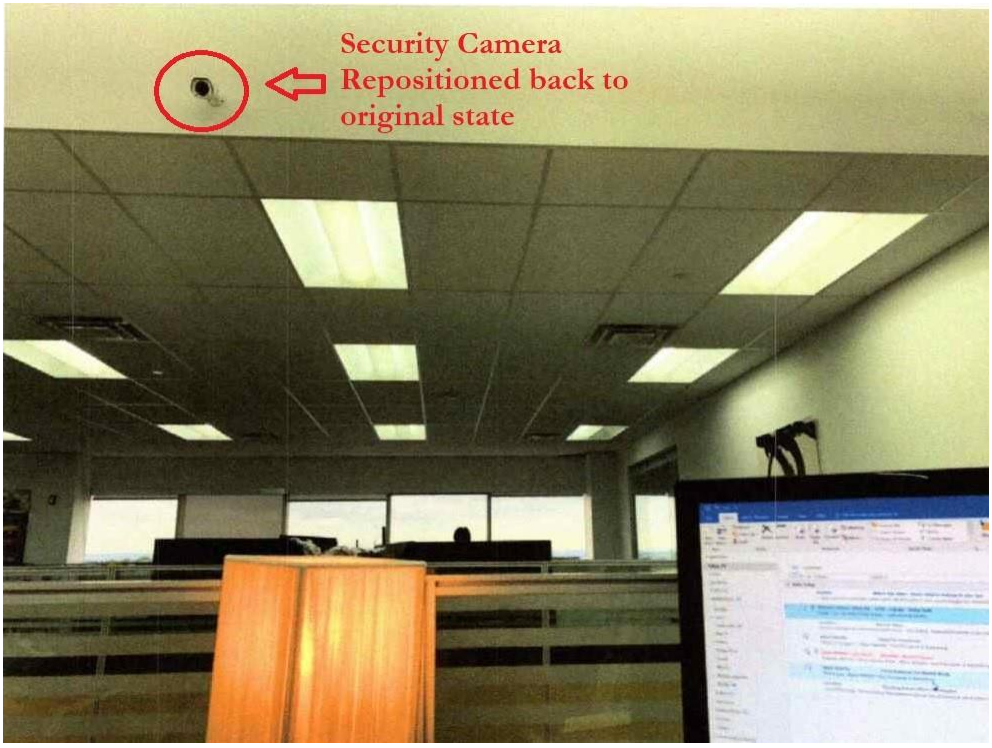
Complainant provided DCR with a photograph dated August 1, 2018 depicting the work area of Respondent's marketing department. She told DCR that she took the photograph for the purpose of showing DCR the physical layout of the office and where she sat in relation to her supervisor and her direct reports. Complainant told DCR that in doing so, she unwittingly captured the position of a security camera, which appears to be pointing directly towards the back of the room at a 90 degree angle in relation to the wall it is attached to:



On Wednesday, August 15, 2018, DCR interviewed Brier and Carbone as part of its investigation into whether Respondent had violated the FLA. According to Complainant, as she was leaving work on Friday, August 17, 2018, VP of Marketing Marie Malette approached her in Respondent's parking lot and asked her if she had noticed that the security camera depicted above had been repositioned and now pointed directly at her cubicle. Complainant told Malette that she had not noticed. However, when she reported to work on Monday, August 20, 2018, Complainant took a photograph from roughly the same spot that she took the August 1, 2018 photograph, confirming that the security camera had been rotated counter-clockwise roughly 45 degrees to point directly at her workstation:



In a meeting on September 20, 2018, Complainant advised Brier and Malette that she believed Respondent was retaliating against her for filing the instant charge with DCR. The following day, on September 21, 2018, Complainant noticed that the security camera had been repositioned back to its August 1 state. She took the following photograph from inside her cubicle:



Complainant alleges that Respondent intentionally positioned the camera to point directly at her cubicle immediately after the August 15, 2018 DCR interviews to monitor her actions, and that it was only when she put Respondent on notice by alleging retaliation at the September 20, 2018 meeting that Respondent repositioned the camera back to its original state. She alleges that Respondent's manipulation of the security camera was a retaliatory measure designed to harass and punish her for engaging in LAD and FLA-protected activity.

During a DCR fact-finding conference, Head of Sourcing Albert Sasson stated that he controls the security cameras. He denied that he received any request or direction from owners Toby or Joe Cohen, or anybody else, to aim the camera directly at Complainant's work station, and stated that the cameras are repositioned on a semi-regular basis for security purposes because an employee's purse was stolen several years earlier. Respondent provided no evidence to support this statement.

DCR attempted to interview Malette - who resigned her employment with Respondent in or around February 2019 - but she refused to be interviewed.

ii. COO's "inappropriate and demeaning joke"

Complainant alleges that on or about July 16, 2018, Chief Operating Officer Marcelo Slutsky approached her and stated, "So how old is your daughter? Six years old by now?" She alleges that this remark was intended to mock the fact that she had taken a full 24 weeks of FMLA and FLA leave. Complainant told DCR that she believed this remark may have been overheard by employees in the area surrounding her cubicle; however, she was unable to identify any specific witnesses. DCR interviewed Slutsky, who denied making the comment.

iii. Owner Toby Cohen's treatment of Complainant upon her return to work

In November 2017, about two months before Complainant gave birth and began her leave, Respondent restructured its marketing department, hiring Marie Malette as Vice President of Marketing. Malette reported directly to Toby Cohen, and became Complainant's direct supervisor.

Complainant alleges that upon her return from leave in July 2018, Cohen excluded her from high-level strategy meetings that she otherwise attended, instead inviting her direct reports, such as marketing assistant [redacted]. and packaging designer [redacted]. She alleges that Cohen intentionally excluded her from several critical meetings and tasks, including, but not limited to:

- On July 23, 2018, Cohen asked [redacted] to provide him with all documentation from Respondent's Bath Bundle project even though Complainant was the project lead. Cohen was aware that Complainant was the project lead but did not involve her in any meetings held to discuss strategy and next steps for the initiative.

- On August 1, 2018, Cohen invited [redacted] to attend a meeting with a packaging agency at Respondent's New York City showroom. At the time, the packaging department fell under Complainant's purview, but Cohen did not invite Complainant to the meeting.

- On August 1, 2018, Complainant was not invited to a social media photo shoot, even as photography fell under her purview at the time. Complainant asked Malette if she could attend the shoot, but Malette told her that she could not because the room was too small and there were already too many people attending.

- On August 3, 2018, Cohen held a meeting with Malette and [redacted]. regarding area rug photography pricing, but did not invite Complainant.

- On August 7, 2018, [redacted] informed Complainant that throughout the previous week, she attended several market-week meetings and also attended a bedding meeting on August 6, 2018. Complainant was not included in any of these meetings despite having been extremely involved in all market weeks prior to her maternity leave.

- On August 9, 2018, Complainant was not invited to a branding and content strategy meeting at Respondent's New York City show room, even as branding fell under Complainant's purview.

- On August 14, 2018, Cohen invited [redacted]. to a meeting regarding product selection for a website photo shoot, but did not invite Complainant, even as photography fell under Complainant's purview.

In addition to the above, Complainant told DCR that Cohen refused to speak with her, or even make eye contact with her, after she returned from leave. She stated that before she took leave, Cohen routinely invited her to his office to discuss strategy, decision-making, and other high-level items. Complainant alleges that Cohen intentionally marginalized her in order to diminish her value with the company in retaliation for filing the instant charge with DCR and for taking FLA protected leave.

In its answer to the amended verified complaint, Respondent acknowledged Complainant's reduced role, but attributed it to a restructuring of its marketing department, and "other structural changes" resulting from Respondent's engagement in "many more new projects and partnerships including many digital and web-related projects." Respondent did not provide any examples of such new projects and partnerships, nor did it explain in any detail how those new initiatives affected Complainant's role.

During the fact-finding conference, Cohen stated that his decision not to include Complainant in various meetings and initiatives was not a retaliatory measure; rather, he merely requested the attendance of those who "need[ed] to be there," and Complainant's attendance was not necessary. He stated that he did not agree with Complainant's statement that she did not attend a single high-level meeting after she returned from leave, but added that because Respondent has over 130 employees, he "cannot meet with every single one." He also stated that many of the meetings in question revolved around Respondent's "B2C" (Business to Consumer) initiative, which Complainant "had nothing to do with." Cohen further stated that if there was a meeting that required Complainant's attendance, she was invited. However, he was unable to provide any examples of such meetings. Complainant clarified that she was included in meetings that were initiated by Malette, but was never included in those initiated by Cohen after she returned from leave. She stated that Cohen "excluded [her] completely."

When questioned further about his relationship with Complainant after she returned from maternity leave and his exclusion of Complainant from various meetings and tasks, Cohen expressed frustration, stating that he did not understand why Complainant believed that she was retaliated against or "why she's upset." He stated that Complainant was "chasing ghosts" and that the issues she raised in the verified complaint regarding her exclusion "don't exist."

iv. Exclusion from market week

In addition to the above, Complainant alleges that Cohen and Respondent excluded her from participating in its bi-annual market week – an industry-wide showcase wherein manufacturers and suppliers presented and marketed their products and ideas to retailers that sold soft home goods/textiles - e.g., Macy's, Wayfair, Walmart, Bed Bath & Beyond, etc. In her role as Director of Marketing, Complainant had previously prepared and executed each market week since she was hired. However, Complainant's role in the September 2018 market week – Respondent's first market week following Complainant's return to work – was greatly reduced.

Previously, Complainant had been heavily involved in all market-week related cross-departmental meetings, strategy discussions, and final execution at Respondent's New York City show room. In preparation for the September 2018 market week, Complainant stated that she was given menial tasks that had previously been assigned to her direct reports, such as answering customer service e-mails and placing and picking up food and supply orders. When market week began on September 23, 2018, Complainant was not involved in any capacity.

During the fact-finding conference, Cohen acknowledged Complainant's reduced role in the September 2018 market week, stating that Respondent's work during this particular market week was geared towards merchandising and rebranding, and therefore, Respondent was not pitching any particular product that required a large marketing presence. Thus, the role of the marketing department during market week was reduced. Cohen stated that Complainant did not participate as much as she had in previous years because there was not enough work for Complainant to do. However, he acknowledged that Complainant's direct reports [redacted]. and [redacted] participated.

v. Removal of packaging department oversight

Prior to Complainant's leave, Complainant's responsibilities included oversight over Respondent's packaging department.[7] Her direct reports in this capacity included packaging designer [redacted] and graphics designers [redacted]. and [redacted]. Upon her return, Complainant stated that she believed that her responsibilities and reporting structure remained intact, as she had not been told otherwise, and had been assigned packaging-related tasks upon returning from leave as early as July 19, 2018, when she was asked to complete a "comp shop" for packaging materials used by a blackout curtain manufacturer.[8] Additionally, during her first few weeks back from leave, Complainant was regularly included on e-mail chains regarding packaging deliverables. Complainant produced copies of these e-mail chains.

On August 2, 2018, Malette sent an e-mail to upper management advising that packaging now reported directly to her (Malette), including Complainant's former direct reports, [redacted] Malette also stated that all packaging-related inquiries should be directed to [redacted]

On August 3, 2018, Complainant met with Malette to discuss the restructuring of the packaging department's reporting protocols. Complainant audio recorded this meeting and submitted the file to DCR. At the beginning of the recording, Complainant expressed her surprise that packaging had been removed from under her purview. Malette stated that the change occurred prior to the start of Complainant's leave, but Complainant stated that the first time she was advised of such a change was in Malette's August 2, 2018 e-mail. Malette then stated that she previously held a team meeting to discuss the restructure, and called [redacted]. in to ask whether she recalled such a meeting. [redacted]. replied that she only remembered attending a one-on-one meeting with Malette, but not a full team meeting. Malette then called in [redacted] and asked her the same question. [redacted]. responded stating that she too only recalled attending a one-on one-meeting with

[7] Respondent's packaging department handles the packaging that products such as linens, comforters, and bed sheets are sold in.

[8] A comp shop is an industry term for when retail associates conduct in-store research to evaluate trends, new products, and retailer priorities.

Malette rather than a full team meeting. During the conversation, Malette did not appear to dispute that Complainant was never advised of this change in reporting structure until August 2, 2018, as she stated that Complainant was out of the office on the day of the purported team meeting.

During the fact-finding conference, Cohen, Respondent's co-owner and Malette's direct supervisor, stated that he was unaware that Malette restructured the packaging department's reporting protocol.

vi. Access of Complainant's work e-mail account

Complainant alleges that on Sunday evening, July 29, 2018, she checked her company e-mail account and noticed that an e-mail sent to her after hours on Friday, July 27, 2018 had been opened. She alleges that she had not previously opened the e-mail, as she had not checked her e-mail account between the time she left the office on Friday, July 27 and the evening of Sunday, July 29. Complainant produced a screen shot depicting the opened e-mail. She alleges that even though Respondent was well within its rights to monitor incoming and outgoing company e-mails, doing so was not its common practice, as it did not similarly access the accounts of other employees. Rather, she alleges that Respondent singled her out in this regard as a means to harass, intimidate, and/or punish her, for engaging in LAD and FLA-protected activity.

During the fact-finding conference, the Cohens and Sasson denied improperly accessing Complainant's e-mail account or ordering others to access Complainant's e-mail account, but stated that it had accessed the company e-mail accounts of other employees in the past. Respondent produced no evidence to support this statement.

vii. Increased workload with unrealistic deadlines – Bed Bath and Beyond project

As mentioned earlier, on September 20, 2018, Complainant approached HR Director Brier and VP of Marketing Malette alleging unlawful retaliation. Earlier on that same date, Respondent had asked Complainant to take a two-week international business trip to India and China beginning in early October (see section e, infra).

On Wednesday, September 26, 2018 at 5:13 a.m., Complainant received an e-mail from Malette assigning her an all-store Beth Bath and Beyond (BBB) market analysis in Edison, to be completed by close of business on Friday, September 28, 2018. Complainant was apprehensive about conducting the analysis at the Edison store because she was exclusively breastfeeding her daughter, and thus expressed milk during the work day. She feared that because BBB's Edison store was roughly an hour away from Respondent's North Bergen office, she would not be able to complete the project in time if she had to drive back and forth between the store and the office to pump. She was also concerned because both Brier and Malette were aware that Complainant was seeking to meet with Brier at some point between September 26 and September 28 to further discuss her reprisal allegations, and that she was then scheduled to take a week of paid vacation time beginning the following Monday (October 1).

She believed that by assigning her the BBB analysis, which kept her in the field and out of the office for the remainder of the work week, knowing that she would be out of the office the

following week for vacation, and then an additional two weeks for the India/China trip as well, Respondent was attempting to discourage her from meeting with Brier to explain her reprisal allegations in greater detail.

Upon her arrival to work on September 26, Complainant met with Brier and asked if she could instead conduct the analysis at BBB's Paramus location, which is closer to Respondent's office. Brier granted the request. Complainant also requested that her direct report, [redacted] or another employee, accompany her to BBB to provide assistance in order to ensure that she would meet the September 28 deadline. Brier brought Complainant's request to Joe Cohen, who rejected it, stating that no other qualified employees could be spared due to market week demands. Malette then advised Complainant to complete as much of the project as she could.

Complainant alleges that the timing of the BBB assignment, as well as Respondent's refusal to allow her to bring along a co-worker for assistance, was a retaliatory measure designed to intimidate, harass, and punish her for engaging in LAD and FLA-protected activity. Specifically, she alleges Respondent knew that she would likely be unable to complete the assignment within the stipulated time frame, and was merely attempting to create a false narrative of poor performance that would ultimately lead to the termination of her employment.

During the fact-finding conference, Toby Cohen stated that Complainant was given the BBB assignment because everybody else was tied up with market week. He stated that Respondent required the assignment to be completed by September 28 because representatives from BBB were scheduled to visit Respondent's showroom the following week, and he wanted the team to be prepared to present and discuss updated data and information. He denied that the assignment was a retaliatory measure and stated that the project should have only taken "a couple of hours" to complete. He produced as evidence a sample of a store market analysis that had been previously conducted to demonstrate the ease of the assignment.

Complainant reviewed the document and refuted Cohen's claim, stating that the report he presented was a bare bones representation of a proper store market analysis. She referred DCR to Malette's September 26, 2018 e-mail wherein Malette outlined the tasks Complainant was expected to complete and stated that Respondent's document did not accurately reflect the complicated nature of the assignment. DCR reviewed both documents. Malette's e-mail asked Complainant to complete the following tasks for three separate categories – bedding, bath, and home décor:

1. Pictures of all category areas
2. Pricing by area and item count
3. Assign personas to each item
4. A count of units by area and item

As depicted in the photo below, Respondent's sample analysis does not appear to contain any photos, nor does it contain any pricing information or any information with respect to a count of units by area and item.

BED BATH & BEYOND IN STORE ASSORTMENT

	Modern Casual	Casual	Casual Classic	Preppy Classic	Preppy Casual	Traditional	Opulent Traditional	Bohemian	Core Basics
HIGH	Ellen Degeneress	UGG	Bridge Street /Piper and Wright	Kate Spade		Waterford	J Queen		Wamsutta
MEDIUM	Ink and Ivy				Nautica			Anthology	
LOW		Style Co -op	PROMO	X		PROMO		PROMO	

R 29.

Notwithstanding, Cohen claimed that Complainant "refused" to even begin the assignment. Complainant vehemently disputed that assertion, stating that she left Respondent's office for the Paramus store around 2 p.m. on September 26, 2018 after her meeting with Brier concluded. She provided DCR with time and date-stamped photographs indicating that she began the project on the afternoon of September 26, 2018.

On September 27, 2018, Complainant called out of work sick. On September 28, 2018, Complainant reported to work and met with Brier to discuss her retaliation allegations from roughly 8 a.m. until 1:15 p.m., after which she left the office for a pre-scheduled doctor's appointment. Complainant stated that she was not able to complete the BBB analysis for these reasons.

d. Failure to Provide a Reasonable Breastfeeding Accommodation and Discharge

During a meeting on September 20, 2018, Head of Sourcing Sasson advised Complainant that he required her to accompany him on a two-week photography studio scouting trip to India sometime in early October 2018. In a subsequent meeting with Brier and Malette later on September 20, 2018,[9] Complainant expressed concern that her attendance on the trip would adversely affect her infant daughter's well-being because she was exclusively breastfeeding. She followed up the meeting with an e-mail to Sasson, Malette, and Brier dated September 21, 2018:

> I happily and willingly will support any strategic business decisions/shifts the company makes. As it is known by senior management, HR and my team, I am exclusively breastfeeding [my daughter]. That makes it impossible for me to travel and be away from her as I am her sole nutrition provider. Also, as I am sure you both are aware, coordinating childcare is a major undertaking and I would need time in order to do so. Being asked to travel to India with two weeks' notice to help find photo studios, when to date I have not been involved in any conversations, doings, next steps regarding photography in India or most photography matters to date. [redacted] has. I appreciate you acknowledging my expertise as the reason for tapping me, but as it is evident to all, I have not been tapped for my expertise since my return. All of a sudden, I am being asked to travel to India with two weeks' notice. I will happily travel once I am no longer exclusively breastfeeding my daughter. I will be more than happy to lend my expertise remotely and work with

[9] This is the same meeting wherein, as stated earlier, Complainant alleged retaliation to Brier and Malette, including her belief that requiring her to attend the trip abroad was retaliatory. Complainant audio recorded the September 20, 2018 meeting and submitted the file to DCR.

> our India office and you Albert on the best next steps. When [redacted] in July 2017, both Lisa and Albert along with Toby and Joe felt she had the expertise at that time and you intended for her to travel then. I voiced my concerns at the time, but you proceeded with the shift in responsibility. So, if you felt she had the expertise over a year ago, she by all means has more experience and could easily take the helm with travel until I am able to travel.
>
> Again, I want to reiterate that I am happy to assist in any and all photography matters remotely or ones that are based domestically.

Later that day, having not received a response to the above e-mail, Complainant sent another e-mail to Sasson, Malette, and Brier, brainstorming ways that she could support the trip remotely from Respondent's North Bergen office, such as participating in meetings and scouting potential studio locations remotely via Skype. Complainant did not receive a response to this e-mail.

In a separate e-mail chain dated September 21, 2018, Brier told Complainant that she would like to meet with her to further discuss her reprisal allegations, stating, in part, "I would like to sit down with you, better understand the matter, conduct an internal investigation and if necessary, take appropriate action." In response, Complainant requested that Toby Cohen be present during the meeting. Brier rejected that request, stating that such a meeting between Complainant and Cohen would not be appropriate.

In a follow-up e-mail, Complainant explained to Brier that she preferred that Cohen be present because she felt it was important that somebody with vast overall knowledge of the marketing department be present to assist Brier, who had limited knowledge in that area, in understanding and addressing her concerns. After not receiving a response to that e-mail, Complainant e-mailed Brier again, explaining that she also preferred Cohen to attend the meeting because she did not fully trust Brier given the way her leave was handled, and that she wanted to explain her concerns to Cohen, face to face.

On September 26, 2018, at 7:47am, Brier e-mailed Complainant, scheduling a meeting for Friday, September 28, 2018 at 8:30 a.m. to discuss her reprisal allegations, and stating that she could arrange for Joe Cohen to be present at the meeting in Toby's stead. She also indicated that she planned to interview marketing department employees [redacted] as part of her investigation. Additionally, Brier stated, "the company has not changed its plan for you to visit India. The date as of now for the trip is October 8th. When we speak on Friday we will discuss how we may reasonably accommodate your desire to continue pumping for your baby."

As discussed previously, Complainant then met with Brier on the morning of September 26, 2018 to discuss her concerns relating to the BBB assignment. During that meeting, Complainant also raised additional concerns regarding the trip. Complainant audio recorded this meeting and submitted the file to DCR. Towards the beginning of the meeting, Complainant disclosed a breastfeeding-related medical condition – specifically, that her breast milk contained an excess of an enzyme called Lipase, which breaks down fats found in breast milk. Excess Lipase speeds up this process, which can lead to a spoiled supply if the milk is stored for more than a day

or two. She explained to Brier that she discovered the condition when her entire supply suddenly spoiled, leaving her without an inventory, and thus, she was only able to feed her daughter milk she pumped that day or the previous day.

Later in the meeting, Complainant again expressed her concerns with respect to the trip. She told Brier that by separating her from her child for two weeks, Respondent was effectively denying her daughter her only source of sustenance. She also expressed concerns regarding the proper refrigeration and next-day transportation of breastmilk from India to the U.S., as well as the potential lack of sanitary pumping conditions in India. Complainant then told Brier that [redacted] had previously been accommodated when she was unable to attend trips abroad (i.e., [redacted]. was ultimately not required to attend). Brier responded, stating, "Can you take the baby to India?" Complainant, seemingly surprised by the question, replied that she would consider it, but needed to speak with her pediatrician first. Complainant then again stated her belief that [redacted]. could attend the trip in her stead, as Respondent had previously asked [redacted]. to travel abroad for similar trips, to which Brier replied that [redacted]. "doesn't like traveling."

Towards the end of the meeting, Complainant reiterated that the trip would have "a direct impact on [her] baby." She then asked Brier if she could provide her with additional information about the trip, such as tentative departure and return dates, and whether there was any flexibility with the departure date in case she could not immediately obtain childcare. The meeting concluded with Complainant explaining to Brier that she felt Respondent was "attacking [her] baby" by demanding she attend the trip. She also stated her belief that Respondent did not begin treating her adversely until after she filed the instant charge with DCR and returned to work from leave.

On September 27, 2018, Complainant called out of work sick. On that date, Sasson sent Complainant an e-mail, which she did not open until she arrived at the office on September 28, 2018. The e-mail provided Complainant with the itinerary for the trip, which included a fourteen-hour flight to India on October 8, a six-hour flight from India to China on October 15, a six-hour flight from China to India on October 17, a fourteen-hour flight from India back to the U.S. on October 20, and several road trips to various Indian and Chinese cities in between.

On September 28, 2018, Complainant met with Brier for their previously scheduled meeting. Complainant audio recorded this meeting and submitted the file to DCR. At the beginning of the meeting, Brier informed Complainant that she was going to conduct an investigation into her reprisal allegations based off the statements Complainant made during the meeting. Complainant began by expressing further concern that Respondent had now added a visit to China as part of the trip. Brier responded by informing Complainant that Respondent had approved an accommodation wherein it would pay for Complainant to take the baby and a childcare provider of her choice on the trip. Complainant reminded Brier that she would need to speak to her pediatrician to assess whether it was safe to take the infant on the trip. She also explained that procuring a childcare provider whom she trusted and who was willing to take a two-week trip to India and China on such short notice would be nearly impossible. She asked Brier if she thought that Respondent's expectation that she procure such childcare by October 8 was reasonable. Brier replied: "I don't know."

Complainant further stated, "In order for [this accommodation] to be reasonable, it needs to be okay medically from my pediatrician and I need to be able to align child care. Does the company agree with that and understand that?" She also stated, "I don't have a backup stash of milk. So if there were any hiccups, it would mean my daughter wouldn't have her food supply. So that's not something I am willing to risk and I would hope the company would be supportive of that." Brier did not respond to these statements. Brier stated that Complainant's baby could likely stay with the childcare provider in the hotel while Complainant accompanied Sasson on road trips. Complainant then again raised her concerns with respect to the refrigeration of her milk and the potential lack of sanitary conditions for pumping. She advised Brier that the company would have to guarantee and stipulate exactly where she would be able to safely pump and how the milk would be kept cold. Brier did not provide Complainant with any potential solutions to these issues.

At several points during the meeting, Brier asked Complainant to definitively state whether or not she intended to attend the trip. For example, at one point, Brier stated, "If you've made your decision already that you can't go, then let's state that you can't go." Complainant responded that she could not commit to attending the trip until her concerns regarding pumping sanitation and refrigeration were resolved and she was able to speak to her pediatrician. At another point, Brier asked Complainant if she was still "on the fence" about attending the trip or if she was stating that she did not plan to attend. The following is a transcript of this exchange:

> **Brier:** So are you still on the fence about going and finding out more information possibly? Or are you really saying, 'no I'm not gonna go. Let's move on.'
>
> **Complainant:** Do I really have a choice? I don't know, Lisa. Do I have a choice?
>
> **Brier:** Well, they're asking you to go. They feel that based on your job skill set, this is a need and necessity for them as a company, that it is urgent that they get this information, and that you're the right person for it. So with that you and I have to decide based on what you want to do if you're still thinking about going.
>
> **Complainant:** I guess, the truth is that, no, my preference as stated in my e-mail from last Friday would be not to go because of all of these circumstances, the main one being my child and providing her nutrition in an appropriate, feasible, plausible manner. I'm trying to sit at the end of this table as a professional who has always delivered on my job to troubleshoot and work with the company even though I am 100% certain, with whatever version of the stories senior management wants to come up with, that this is retaliatory in nature. I am still trying to see if it's plausible, even though in my mind it is unconscionable that this is being asked of me. So that's why I am trying to sit across the table from you trying to figure out if it's possible so that I can deliver.
>
> **Brier:** Okay, but still the question is, today, we're still talking about it, is whether or not you are able to take this trip.

Complainant then reiterated that she could not commit to a departure date of October 8 due to the uncertainty and lack of information surrounding what she believed to be her legitimate concerns and the fact that she had not yet spoken to her pediatrician.

A few minutes later, Complainant requested an alternative accommodation to the one offered by Respondent. Specifically, she stated, "I am asking not to go [on the trip] as an accommodation for my breastfeeding needs." The following is a transcript of this exchange:

> **Brier:** So you're saying no. Or are you saying later on when you have clarity, –
>
> **Complainant:** I'm saying – yes – I'm sitting here across the table saying – but I also have other ideas and brainstorms and solutions for how I can support this need without having to be there physically or possibly the company seeing if someone else can travel. I'm trying to sit across the table to try and figure out how I can help and support the business given the constraints.
>
> **Brier:** Just so we're clear, they're asking *you* to go.
>
> **Complainant:** I am clear on that. I am asking for the accommodation. That's the first thing. I am stating that with more clarity and time, contingent on information, pumping options, and resolutions, I am willing to consider the trip at a future date that is feasible. Lastly, I would like to offer ideas and other solutions to support the business need that doesn't require traveling internationally.

The remainder of the meeting revolved around Complainant's allegations that the company had been retaliating against her for filing the instant charge with DCR. At the end of the meeting, Brier informed Complainant that she would bring her accommodation request to be excused from the trip to Joe Cohen for review.

Just minutes after the conclusion of the September 28, 2018 meeting, Brier approached Complainant and informed her that Joe Cohen had denied her accommodation request. Brier restated Respondent's initial offer that Respondent would pay for Complainant to take her baby and a childcare provider of her choice on the trip. Complainant advised Brier that she would consult her pediatrician and get back to her over the weekend.

On Saturday, September 29, 2018, Brier sent a text message and e-mail to Complainant, stating, "Good morning. Thank you for your time yesterday. I need to know no later than Sunday, September 30th if you will be traveling to India/China with a departure date of October 8th." Later that day, Complainant responded, stating:

> Hi Lisa –
>
> I thank you for your time and meeting with me as well on these important matters.
>
> I realize that you and the company need a decision on the trip to India/China as soon as possible. As you know, I was not given a final definitive answer if the

company was willing to accommodate my accommodation request until I departed from the office on Friday around 1:15 p.m. I will give you an answer on Monday, October 1st.

Thank you for your understanding.

On October 1, 2018, Complainant e-mailed Brier the following:

Hi Lisa –

I am writing to state that I will not be able to travel to India and China, not because I do not want to travel and do my job, but because the reasonable accommodation provided by the company puts my daughter's health and wellbeing at risk. Attached you will find a letter from [my daughter's] pediatrician, strongly advising against [my daughter] traveling to India and China. Her letter states both the need for [my daughter] to be in close proximity to me as I am her sole nutrition provider and that the expectation for [my daughter] to travel to India and China is not advised for both medical reasons and others.

As mentioned previously, I am open to discussing alternatives. I would be more than happy and willing to support this business initiative: through strategic planning meetings; offering my insights and ideas; Skype or FaceTime calls while Albert and [redacted][10] are at the prospective facilities; working directly with Albert Sasson and [redacted] on next steps; etc. I am also re-mentioning that [redacted], who was tapped to oversee photography, is another employee that could be asked to travel on this type of trip.

I have every intention and willingness to travel on behalf of the company, once my daughter is no longer exclusively breastfeeding and she naturally weans from breastmilk.

Thank you, Lisa.

Complainant attached a letter from her pediatrician, which stated the following, in relevant part:

[Jane][11] was born small for gestational age and had difficulties gaining weight. With a lot of commitment and effort her mother managed to nurse her and she has been thriving. Given [Jane's] young age and her relying on her mother as main source of nutrition, I highly recommend her mother being accommodated to stay in close proximity to her daughter to ensure her continued thriving until she is weaned off the breastmilk. Concerning [Jane] joining her mother on a business trip there are significant health risks associated with international travel, specifically to developing countries. This includes but is not limited to risk of serious infections including Malaria, Typhoid Fever, Hepatitis A, Cholera, and Japanese Encephalitis.

[10] "[redacted]" works in Respondent's India-based office.
[11] "Jane" is a pseudonym for Complainant's infant daughter.

> Infants have decreased immunity and pathogens spread more easily. Regarding the travel to India, [Jane] would have to take Malaria prophylaxis medication, as recommended by the CDC, which has potentially significant side effects. Following the CDC guidelines, she would also have to be immunized against Mumps, Measles, and Rubella. Other problems associated with international travel are the sleep disturbances due to travel in different time zones and separation from her father, caretakers and familiar environment. For all those above mentioned reasons, I would advise for [Jane] not to travel to India and China.

On Wednesday, October 3, 2018, while Complainant was out of the office on vacation, Brier e-mailed Complainant informing her that Respondent had decided to terminate her employment due to her "inability or unwillingness" to attend the trip. Brier wrote:

> Dear [V],
>
> We have had several discussions with you concerning you're [sic] travelling to India and China. We have concluded that the interactive process has not resulted in identifying a reasonable accommodation for your inability or unwillingness to perform an essential function of your job. We believed that having a nanny and your daughter with you on these trips, at Company expense, was more than reasonable.
>
> In light of the above, we must inform you that your employment and benefits with VCNY Home are terminated this date.
>
> You will be paid accrued unused benefit time in your next scheduled paycheck.
>
> If there comes a time in the future when you can and will do international travel, let us know. You will be considered for re-employment at that time.

Complainant told DCR that Respondent never advised her at any point prior to her termination that she could potentially face termination for refusing to go on the trip, nor did it notify her that she could face any other form of discipline.

Respondent told DCR that Complainant had previously taken five such trips during her employment tenure and that while it never notified her of the fact that she could be terminated for refusing to attend the trip, it notified her during meetings about the China/India trip that it considered her attendance to be an essential function of her position.

Moreover, Respondent told DCR that it considered Complainant's presence on the October 8 trip necessary due to the effect that impending Chinese tariffs would have on the viability of Respondent's business. However, Respondent provided DCR with no evidence regarding the need for Complainant's immediate attendance, offering only conclusory statements that Chinese tariffs were scheduled to take effect sometime in the future and that, therefore, Complainant's immediate attendance on the India/China trip on October 8, 2018 was essential to its business needs. Respondent also told DCR that its offer for Complainant to bring her baby and a childcare provider

on the trip at the company's expense was a "more than reasonable" accommodation because its employees "receive 5-star accommodations when traveling abroad."

Complainant, however, told DCR that her attendance on the trip in such an abbreviated timeframe was not an essential function of her position and that her request to be excused from the trip as an accommodation would not have created an undue hardship on Respondent's business, as marketing assistant [redacted] who had been overseeing photography since July 2017, and had previously been asked to travel abroad for similar studio scouting trips, could have attended the trip in her place. Respondent did not produce any evidence documenting how excusing Complainant from the trip would have created an undue hardship on its business operations.

During the DCR fact-finding conference, Sasson stated that he selected Complainant for the trip because she was the most qualified employee available, as she had previously taken five similar trips to China prior to her pregnancy. Sasson confirmed Complainant's claim that [redacted] had previously been asked to attend similar studio scouting trips, but had declined each time because she did not want to leave her children for a long period of time or because she was fearful of traveling. Toby Cohen confirmed that [redacted]. was not discharged or in any way disciplined for choosing not to participate in the trips she was asked to attend.

Brier, Sasson, and the Cohens all confirmed to DCR that Complainant was never given any warning that she could be terminated or otherwise disciplined if she declined to attend the trip. Brier also acknowledged receiving and reviewing the pediatrician's letter attached to Complainant's October 1, 2018 e-mail, and stated that she presented the e-mail and letter to Joe Cohen, who advised Brier to immediately terminate Complainant's employment.

When asked why he advised Brier to terminate Complainant's employment, Joe Cohen stated that he did so based on advice from counsel. When pressed further, he stated that his conversations with his attorney are privileged and that he would not share any further information on the subject.[12]

Toby Cohen stated that he supported his brother's decision to terminate Complainant's employment, saying: "We think she was communicating with lawyers and they were telling her what to do." He then suggested that Complainant was merely attempting to extort Respondent.

Sasson stated that he ultimately ended up going on the trip by himself, and that he "made it work." He stated that he too supported Complainant's termination because he felt that "it was a game" for Complainant. Specifically, Sasson stated that when he chose Complainant for the trip, he was aware that Complainant had recently given birth, was exclusively breastfeeding, and was required to pump three to four times per day, and that had Complainant simply advised him that she could not attend the trip when he initially broached it with her on September 20, 2018, he would have postponed the trip or devised an alternative plan, no questions asked. He referred DCR to a September 20, 2018 e-mail to Brier wherein he stated, in relevant part, "I'm not sure how [Complainant] spun this into me being a bad guy when I only asked if possible that she can

[12] In a follow-up letter to DCR dated July 18, 2019, Respondent stated that Joe Cohen "misunderstood the question and believed [the investigator was] asking him to disclose a privileged conversation that he had with attorney regarding the termination." It referred DCR to its amended position statement wherein it wrote that Complainant was terminated because she was unwilling to attend the India/China trip.

travel[.] I never insisted[.] I was merely asking so I know how to plan my trip." However, he told DCR that instead of simply informing him that she could not attend the trip, Complainant became defensive and "everything became, 'okay I want to go to HR.'"

Sasson told DCR that when the Cohens asked Sasson for his opinion on whether Complainant should be fired, he told them that Complainant was "irrelevant" to him because she was clearly "not willing to help." Sasson stated that he was not aware that Complainant had filed the instant charge with DCR until she amended her complaint to include allegations of reprisal in January 2019 and that his decision to choose Complainant for the trip was not retaliation for her filing a complaint with DCR.

At the end of the fact-finding conference, Brier stated that she conducted an investigation into Complainant's reprisal allegations after Complainant's employment was terminated. When asked to provide details of her investigation and to identify any witnesses she interviewed, Brier stated that she interviewed Malette on October 5, 2018, and that she "talked to" Sasson on October 8, 2018 and Toby Cohen on October 12, 2018. Brier produced what she stated was a transcript of her October 5 interview with Malette, which appears to be signed by Malette. However, as stated above, DCR attempted to interview Malette, in part to confirm the contents of this transcript, but Malette declined to participate in the investigation. Brier was unable to produce any such transcripts or notes from her alleged interviews with Cohen and Sasson, nor did she produce any evidence to suggest that she interviewed marketing department employees [redacted]., as she suggested she would in her September 26, 2018 e-mail to Complainant.

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. "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 [FLA or LAD] has been violated." Ibid. If the Director determines that probable cause exists, the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). If, on the other hand, the Director finds there is no probable cause to believe the FLA or LAD has been violated, that finding is 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.

Here, as stated below, DCR's investigation found sufficient evidence to support a reasonable suspicion to credit Complainant's allegations that Respondent violated the FLA and the LAD.

a. Denial/Interference with FLA Leave

The FLA makes it unlawful for an employer to interfere with, deny, or otherwise restrain the exercise of an employee's rights to receive FLA leave. N.J.S.A. 34:11B-9(a). As of the date of the initial complaint, the FLA provided eligible employees with job-protected leave for up to twelve weeks within any 24-month period for, inter alia, the care of a newly born or adopted child. N.J.A.C. 13:14-1.5.[13] Such leave can begin any time within one year of the birth or adoption of the child. Ibid. Moreover, "If an employee first takes FMLA leave because of his or her own disability, including a disability related to pregnancy or childbirth, the employee would be entitled to an *additional* 12 weeks of leave within 24 months under the [FLA] to care for a seriously ill family member *or a newly born or adopted child, because the prior disability leave was taken for a purpose not covered by the [FLA]*." [Emphasis added] N.J.A.C. 13:14-1.6(b)(1).

To state a claim for a violation of the FLA, Complainant must show that her employer did not provide her with the FLA leave to which she was entitled, or otherwise interfered with her FLA rights. Here, Complainant requested twelve weeks of FLA leave to care for her newborn daughter, beginning on or about April 12, 2018 – i.e., at the conclusion of her medical leave under the FMLA.

However, records indicate that between HR Generalist Liang's July 31, 2017 e-mail, wherein she erroneously informed Complainant that FMLA-covered leave for a pregnancy or childbirth-related medical disability runs concurrently with FLA-covered leave for the care of a newborn child, and Complainant's March 22, 2018 e-mail requesting a July 9, 2018 (including two vacation days) return to work date, Respondent denied Complainant's request for FLA-leave.

It was not until Respondent was served the instant charge that it reconsidered its position and agreed to provide Complainant with her full twelve weeks of FLA-covered leave, allowing her to return to work on July 9, 2018.

The FLA requires that an employer grant an eligible employee their full FLA leave entitlement. The FLA is in place specifically to provide such eligible employees with leave protections without having to battle with their employer at a time when they are trying to enjoy spending time with their newborn child, or when they are caring for a seriously ill family member. In this case, Respondent, perhaps acting out of ignorance or misplaced reliance on its counsel's advice, did not approve Complainant's request for FLA leave at the time she submitted the request. However, after being served with the instant complaint, Respondent did ultimately grant Complainant the required leave, and did not require her to return to work at any point before July 9, 2018. Therefore, while Complainant was ultimately able to utilize her full FLA entitlement, her complaint with DCR appears to have been the catalyst for Respondent to reconsider its position.

b. Reprisal for Opposing Respondent's FLA Denial

[13] On February 19, 2019, the FLA was amended to expand certain protections for eligible employees. However, because all alleged actions in this complaint took place before that amendment went into effect, this disposition does not consider the amendment.

The FLA prohibits an employer from interfering with, denying, or otherwise restraining the exercise of an employee's rights to receive FLA leave and retaliating against an employee for opposing any practice made unlawful by that act. N.J.S.A.34:11b-9(a)&(b); N.J.A.C. 13:14-1.15. In order to prevail on the merits of a retaliation claim under the FLA, Complainant must establish a causal connection between her request for FLA leave and the retaliatory act to which she alleges she was subjected. The New Jersey Supreme Court has defined a retaliatory act to be an act that is "materially adverse, which in [the retaliation context] means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Roa v. Roa, 200 N.J. 555, 575 (2010).

Here, Complainant alleges that in retaliation for opposing Respondent's denials of her FLA leave request, Respondent altered its practice of providing its employees the option to use remaining paid vacation time as a substitute for unpaid leave by demanding that she instead utilize paid vacation time that she had not yet accrued. She alleges that this action was a retaliatory measure designed to discourage her from, and punish her for, asserting her FLA rights.

N.J.A.C. 13:14-1.7 states, in relevant part, "If an employer has a policy of allowing employees to take unpaid leaves without first exhausting accrued paid leave while on leave, it shall not require employees to exhaust accrued paid leave while on family leave." DCR's investigation found that while Respondent's written leave policy stipulates that employees taking leave must use any remaining paid vacation time as a substitute for unpaid leave, Respondent does not enforce that procedure and instead allows the employee taking leave to choose whether or not to use accrued vacation time.

In a DCR interview, Brier admitted that Respondent modified this procedure specifically for Complainant, and that it had never before demanded that an employee taking leave use their remaining paid vacation time, let alone yet to be earned vacation time. However, after receiving the verified complaint and before Complainant was charged with use of accrued time during her FLA leave, Respondent ultimately did not force Complainant to utilize her paid but not-yet-accrued vacation time. As with the initial denial of Complainant's FLA request, while Complainant was not ultimately forced to use her accrued time during her FLA leave, her complaint with DCR appears to have been the catalyst for Respondent to reconsider its position.

c. Reprisal for Filing April 10, 2018 FLA Charge, Taking FLA Leave, and Complaining of Retaliation

The FLA prohibits an employer from retaliating against an employee for filing a charge related to the Act, for giving information in connection with an inquiry or proceeding under the Act, and from exercising any right granted under the Act, including taking leave. N.J.S.A.34:11B-9(c)(1) and (c)(2); N.J.A.C. 13:14-1.15.

Here, there is no dispute that Complainant engaged in activity protected by N.J.S.A.34:11B-9(c)(1) and (c)(2) and N.J.A.C. 13:14-1.15 on at least three occasions – i.e., (1) when she filed the instant charge with DCR on April 10, 2018; (2) when she took FLA leave; and (3) when she complained of unlawful retaliation to HR Director Brier in September 2018. While the DCR investigation did not find sufficient evidence to credit all allegations of retaliatory

conduct to which Complainant claimed she was subjected after her return to work in July 2018 (e.g., COO Slutsky's alleged demeaning joke referencing the length of Complainant's leave, and the alleged accessing of Complainant's company e-mail account), it did find sufficient evidence to credit several.

With respect to Complainant's claim that in August 2018, Respondent positioned its security camera to monitor her workstation, Respondent denied that it tactically positioned the camera to point directly at Complainant's work area. Instead, Respondent told DCR that it routinely rotates its security cameras to combat theft, explaining the timing between the August 15, 2018 DCR interviews of Respondent's witnesses and the August 17, 2018 positioning of the camera on Complainant's workstation as merely coincidental. However, Respondent then moved the camera's position away from Complainant's workplace immediately after she advised Brier on September 20, 2018 that she believed Respondent was retaliating against her. The Director finds the timing of both these actions is sufficiently suspect to warrant a reasonable suspicion that the positioning of the camera at Complainant's workplace may have been retaliatory in nature.

With respect to Toby Cohen's exclusion of Complainant from key high-level strategy meetings in August 2018, the Director finds that Cohen may have been at least partially motivated by a retaliatory animus against Complainant for taking FLA leave and for filing the instant charge with DCR. Indeed, during the DCR fact-finding conference, Cohen dismissed Complainant's allegations of exclusion as "chasing ghosts," and stated that he did not understand "why [Complainant] is upset." Although Cohen refuted Complainant's claim that he intentionally excluded her from meetings, stating that he did invite her to some meetings that she did ultimately attend, neither he nor Respondent were able to provide any examples of such meetings, while Complainant was able to provide several examples of meetings that she was excluded from while her direct reports were invited instead. Therefore, the Director finds sufficient evidence to credit Complainant's allegation that her exclusions from high-level strategy meetings after she returned from leave may have been retaliatory in nature.

Regarding Complainant's allegation of exclusion from market week in September 2018, Cohen acknowledged that Complainant had been involved in all previous market weeks prior to her leave of absence, but that her role was largely diminished for the market week that immediately followed her return. He attributed this reduced role to a change in focus from marketing to merchandising and rebranding and stated that as a result, there was simply not enough work for Complainant to do. However, Cohen admitted that Complainant's direct report, marketing assistant [redacted]., was heavily involved in the September 2018 market week. He offered no explanation as to why [redacted]. was chosen to represent Respondent alongside Malette instead of Complainant, who was [redacted]'s direct supervisor, and had represented Respondent during all prior market weeks for which she was an employee. Therefore, the Director finds sufficient evidence to credit Complainant's allegation that her exclusion from the September 2018 market week after the filing of her DCR complaint may have been retaliatory in nature.

Finally, on September 20, 2018, Complainant alleged unlawful retaliation to HR Director Brier and VP of Marketing Malette. On September 26, 2018, Malette assigned her the BBB market analysis, requiring that she complete it no later than September 28, 2019. Complainant alleged that, in her experience, such a comprehensive and complicated assignment required more than a

two day period to complete, and Respondent assigned it to her within such a restricted time frame in retaliation for her meeting with HR Director Brier and VP of Marketing Malette less than a week before. During the DCR fact-finding conference, Cohen attempted to portray Complainant as an insubordinate, substandard performer by asserting that she "refused" to accept the BBB assignment. However, the DCR investigation did not support this characterization, as Complainant produced records indicating that she accepted and began the assignment as instructed.

In addition, Cohen alleged that the assignment was a simple one that Complainant could have completed "in a couple of hours." He provided DCR with a sample analysis as evidence that Complainant could have completed the BBB project within Respondent's expected time frame. Complainant, however, provided DCR with evidence that what Cohen submitted to DCR was a very basic analysis that lacked many of the elements that the BBB analysis actually required, suggesting that the BBB assignment would have required much more time to complete.

Given the timing of the assignment in relation to Complainant's September 20, 2018 meeting with management to discuss her reprisal allegations, as well as the assignment's short time frame juxtaposed with the amount of work that was actually required, the Director finds sufficient evidence to credit Complainant's allegation that the BBB analysis assignment and the compressed deadline she was given to complete it may have been the result of retaliation.

The Director also finds that while each of these actions, when viewed in isolation, may not rise to the level of the Roa standard, taken together they do. "Retaliation need not be a single discrete action [and] can include . . . many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct." Green v. Jersey City Bd. Of Educ., 177 N.J. 434, 448 (2003); see also Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 25-26 (2002) (finding that the retaliatory acts alleged by plaintiffs are sufficient to present a hostile work environment claim when viewed cumulatively even when allegations, standing alone, would be insufficient to state a cause of action).

Therefore, the Director finds that Respondent may have engaged in a pattern of retaliatory conduct against Complainant after she filed her April 10, 2018 FLA charge, took protected FLA leave, and raised allegations of retaliation on September 20, 2018. Based on the above, the Director finds there is sufficient evidence to support a reasonable ground of suspicion that Respondent violated N.J.S.A.34:11B-9(c)(1) and (c)(2).

d. Failure to Provide a Reasonable Breastfeeding Accommodation

The LAD affirmatively requires that an employer make reasonable accommodations for its pregnant or breastfeeding employees when that employee, on the advice of a physician, requests such an accommodation. N.J.S.A. 10:5-12(s). It also prohibits an employer from treating an employee who is affected by pregnancy or breastfeeding in a manner less favorable than others who are similarly situated in their ability or inability to work N.J.S.A. 10:5-12(s). An employer can defend its failure to accommodate pregnancy or breastfeeding by proving that the requested accommodation would impose an undue hardship on the operation of its business. N.J.S.A. 10:5-

12(s). Some of the factors to be considered in determining whether an undue hardship exists in providing a breastfeeding accommodation are:

> 1) The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
>
> 2) The type of the employer's operations, including the composition and structure of the employer's workforce;
>
> 3) The nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and
>
> 4) The extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

On September 20, 2018, Respondent requested that Complainant travel to India and China on a photography studio scouting trip that was scheduled for October 8, 2018. During the meeting, Complainant expressed concern that her attendance on the trip would adversely affect her infant daughter's well-being because she was exclusively breastfeeding the child and was her only source of sustenance. Complainant followed up her comments with an e-mail to management again expressing concern regarding her daughter's health and how the lack of notice would impact her ability to make alternate arrangements for her baby's proper nourishment. She stated that she would be happy to travel at a later date when she was no longer her daughter's sole source of nutrition.

During several subsequent meetings with Respondent's management, Complainant then suggested that Respondent assign someone else to go on the trip, delay the trip to a time when her childcare and breastfeeding concerns could be adequately addressed, or allow her to support the trip in any other manner from the New Jersey office.

Respondent does not appear to dispute any of this. Nor does it dispute that Complainant had a breastfeeding-related medical condition - specifically, excess Lipase enzyme - that she disclosed to her supervisor and Respondent's HR Director during conversations she recorded on September 26th and September 28th. Instead, Respondent offered Complainant an alternative accommodation – specifically, that it would pay for Complainant to take her nine-month old daughter and a childcare provider of her choice on the trip. It stated that this alternative accommodation was "more than reasonable" because its employees "receive 5-star accommodations when traveling abroad." When Complainant declined to attend the trip after providing Respondent with a letter from her pediatrician advising that it would be unsafe for her child to travel abroad, Respondent fired her, stating that no other employee could attend the India/China trip because it was an essential function of Complainant's position.

Respondent told DCR that Complainant had taken five similar trips to China during her employment with Respondent at various points prior to her pregnancy. However, the DCR investigation found insufficient evidence to credit Respondent's allegation that attending the

India/China trip was an essential function of Complainant's position. While Respondent told DCR that impending Chinese tariffs created a sense of urgency that necessitated immediate action on its part to move its photography studios from China to India, it did not provide DCR with evidence that Complainant's travel on the dates it set forth were essential functions of her position, other than its conclusory statements that the trip was "necessary" and no one else but she could attend. These assertions were even contradicted by Sasson, who told DCR he "never insisted" that Complainant go on the trip and that he "was merely asking" if Complainant could accompany him so he knew how to plan his trip.

The DCR investigation found that Complainant may not have been the only employee qualified to take such trips. By Respondent's own admission, marketing assistant [redacted]. had been previously asked to attend similar trips, but declined due to her fear of traveling and/or her reluctance to leave her children. However, unlike Complainant, [redacted]. was not discharged nor otherwise disciplined for declining to attend. Under the LAD, any workplace accommodation provided to a breastfeeding employee cannot be provided in a manner less favorable than accommodations provided to other employees not breastfeeding but similar in their ability or inability to work. Here, Respondent appears to have treated Complainant in a less favorable manner than it treated [redacted]., who was not breastfeeding when she declined to travel abroad.

Moreover, Respondent failed to demonstrate how granting Complainant's accommodation request to be excused from the trip would have imposed an undue hardship on its business. Indeed, Sasson testified during the fact-finding conference that he ultimately attended the trip alone and that he "made it work." Respondent did not assert that it took a monetary loss, or any other loss, as a result of Complainant's inability to travel to India and China.

Lastly, DCR's investigation did not find sufficient support for Respondent's position that its suggested alternative accommodation of taking a nine-month old and a childcare provider on a thirteen-day trip to India and China on less than two weeks' notice was a reasonable accommodation, even if it was at the company's expense. While an employee is not entitled to the accommodation of his or her choice, any alternative accommodation offered must be "effective." Here, there is sufficient evidence in this case that the alternative accommodation proposed by Respondent would not have been effective. Complainant submitted a letter from her daughter's pediatrician explaining, in detail, why she advised against Complainant's daughter travelling to India and China, and Respondent introduced no evidence to disprove anything stated in that letter.

Therefore, the Director finds sufficient evidence to support a reasonable ground of suspicion that Respondent failed to provide Complainant with a reasonable breastfeeding accommodation pursuant to N.J.S.A. 10:5-12(s).

e. Differential Treatment

The LAD also makes it unlawful for "an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work." N.J.S.A. 10:5-12(s).

The investigation found that Complainant was terminated for refusing to accompany Sasson on the trip to India and China. Respondent clearly knew Complainant's objections to going on the trip revolved around the fact that she was breastfeeding her daughter. Still, Respondent refused to excuse her from attending the trip. The investigation found that contrary to the way in which it treated Complainant, Respondent excused [redacted]., who was not breastfeeding, from similar trips because she did not like traveling and/or did not want to leave her children. Accordingly, there is sufficient evidence to support a reasonable ground of suspicion that Respondent treated Complainant differently because she was breastfeeding.

f. Retaliatory Discharge

The FLA prohibits an employer from discharging an employee for filing a charge related to the act, or for giving information in connection with an inquiry or proceeding relating to a right provided under the act. N.J.S.A.34:11B-9(c)(1) and (c)(2); N.J.A.C. 13:14-1.15.

Similarly, the LAD makes it unlawful for an employer to in any way penalize an employee in terms, conditions or privileges of employment for requesting or using a breastfeeding accommodation. N.J.S.A. 10:5-12(s).

Here, the DCR investigation found sufficient evidence to credit Complainant's allegation that Respondent discharged her a least in part due to her request for a reasonable breastfeeding accommodation and as a result of her April 10, 2018 FLA complaint and her September 20, 2018 allegations of retaliation.

Specifically, Toby Cohen's testimony at the DCR fact-finding conference provides an indication of Respondent's retaliatory animus against Complainant for filing a charge with DCR and complaining about retaliation. For example, when Toby Cohen was asked if he supported the decision to discharge Complainant, rather than cite a legitimate business reason for her termination, he instead replied, "We think she was communicating with lawyers and they were telling her what to do."[14] He also suggested that Complainant's true motivation for filing the instant charge with DCR was to extort Respondent. In addition, Sasson stated that he too supported the decision to terminate Complainant's employment, as he believed that Complainant was playing a "game" because "everything became, 'okay, I want to go to HR.'"

There is also evidence that Respondent fired Complainant in retaliation for requesting a reasonable accommodation. It is undisputed that Complainant requested a reasonable breastfeeding accommodation – i.e., to be excused from the India/China trip, that Respondent declined Complainant's accommodation request, and then immediately terminated her employment when she stated that she would not be able to attend the India/China trip. This was despite Sasson's statement to DCR that he did not insist that Complainant go on the trip.

Complainant was never at any time advised that she could be fired or disciplined if she declined to attend the trip, and [redacted] was never disciplined or fired for refusing to participate in similar trips.

[14] The LAD makes it unlawful to take reprisals against an employee who seeks legal advice regarding her rights under the LAD, or shares relevant information with legal counsel or a government entity.

Therefore, the timing and circumstances of Complainant's termination – i.e., just three days after Complainant requested to be excused from the trip as a reasonable breastfeeding accommodation - gives rise to a reasonable ground of suspicion that Complainant's breastfeeding accommodation request, and/or her assertion of her rights under the FLA, may have also been a motivating factor in Respondent's decision to terminate Complainant's employment, in violation of N.J.S.A. 10:5-12(s), N.J.S.A.34:11B-9(c)(1) and (c)(2), and N.J.A.C. 13:14-1.15.

* * *

Based on the investigation, the Director is satisfied at this preliminary stage of the process that there is **PROBABLE CAUSE** to support Complainant's allegations of discrimination, retaliation, and FLA violations, and that the matter should "proceed to the next step on the road to an adjudication on the merits," Frank, supra, 228 N.J. Super. at 56.

Date: January 10, 2020

Rachel Wainer Apter, Director
NJ Division on Civil Rights