STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL03MB-63491
EEOC CHARGE NO. 17E-2013-00115

[redacted],

Complainant,

v.

George Dapper, Inc.,

Respondent.

Administrative Action

FINDING OF PROBABLE CAUSE

The Director of the New Jersey Division on Civil Rights ("DCR"), pursuant to N.J.S.A. 10:5-14 and attendant procedural regulations, hereby finds that probable cause exists to believe that a discriminatory practice has occurred in this matter in violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49.

On December 6, 2012, [redacted] ("Complainant") filed a verified complaint with the DCR alleging that her former employer, George Dapper, Inc. ("Respondent"), discriminated against her based on a disability in violation of sections 10:5-4 and 10:5-12 (a) of the LAD. After carefully reviewing the DCR's investigation of the matter, the Director finds for purposes of this disposition only, as follows.

Respondent is a privately owned bus company headquartered in Iselin, New Jersey, which provides transportation services to several school districts in central New Jersey. Respondent has a facility at 265 Whitehead Road, Hamilton, New Jersey ("Trenton office"). Respondent's President is George Dapper ("Mr. Dapper"). Its Operations Director is Mr. Dapper's daughter, Carli Dapper ("Ms. Dapper"). Ms. Dapper told DCR that it is a family-run business founded in 1969 that employs between 550 and 600 people.

Complainant is a Lawrence resident who was hired on or about September 1, 2003, as a part-time bus driver. On or about March 1, 2010, she was promoted to a full-time salaried

position with benefits, i.e., human resources ("HR") payroll clerk, and became responsible for administering the payroll and handling unemployment and disability claims for the Trenton office, i.e., approximately 175 employees. Her principal function was to compile time-sheet figures for all Trenton office employees for each two-week period and submit the data electronically to Respondent's payroll processing vendor by 5:00 p.m., on the Thursday of each payroll week. She also drove a bus when the company was short on drivers.

In early June 2012, Complainant asked that her schedule be reduced for one to two months. In particular, she asked to be allowed to work 1.5 hours each morning and 1.5 hours in the late afternoon so that she could take care of child custody issues. Mr. Dapper granted her request. The reduced schedule went into effect on or about June 7, 2012.

Complainant did not actually need the reduced schedule to tend to custody issues. Instead, she spent the time attending therapy sessions. During the week of June 18, 2012, in the course of her therapy program, Complainant was diagnosed with bipolar affective disorder, commonly referred to by the acronym, "BAD." At the time, she did not share that diagnosis with Respondent or reveal that she was attending therapy sessions.

On June 21, 2012, Complainant fell behind in her payroll duties. As a result, Respondent's Benefits Coordinator/Payroll Supervisor, Melissa Grbac, traveled from the Iselin office to the Trenton office to help Complainant process the payroll. Grbac told DCR that on that day, Complainant was "totally out of it," slurring her speech, and repeating herself. Grbac stated that together, they processed the payroll figures and submitted the information to the payroll vendor minutes before the 5 p.m., deadline was set to expire. Grbac stated that if she had not intervened, none of the Trenton employees would have been paid for the two-week pay period.

Grbac stated that when Complainant fell behind for the July 5, 2012, payroll deadline, Ms. Dapper assigned Madeline Santiago, who had formerly held the payroll clerk job, to help Complainant meet the submission deadline. Grbac stated that once again, Complainant would

not have been able to complete the work on her own and no one in the Trenton office would have been paid. Ms. Dapper told DCR that Complainant's performance as a payroll clerk had been very good until those two incidents.

On July 7, 2012, Ms. Dapper convened a meeting with Complainant, Grbac, and Mr. Dapper to discuss the two payroll incidents. Ms. Dapper stated that during the meeting, Complainant's "eyes rolled back in her head and she looked like she was on medication." Ms. Dapper stated that Complainant was "acting weird" and attributed her poor performance to a "nervous breakdown." Ms. Dapper issued her a verbal and written warning, and they directed Complainant to take a leave from work. Mr. Dapper stated that they told Complainant, "We want to you to get better." Mr. Dapper stated that he told Complainant during the meeting that when she returned, she would begin as a bus driver because they could not trust her to perform the payroll function accurately. The written warning dated July 7, 2012, contains handwritten notations by Ms. Dapper including one that states:

> Spoke to [Complainant] - Get herself together, call us next week. Get letter from doctor to return. Said she had a nervous breakdown. Told her to please get help. Call us next Friday. She has a job still, responsibilities may change - but still have a job. Upon return - with doctor's note.

Ms. Dapper stated that as Complainant was leaving the building after the meeting, she cursed at a female employee. Ms. Dapper took away Complainant's office keys and asked her if she was ok to drive, to which Complainant replied, "Yes." In memorializing the incident, Ms. Dapper wrote, "It was very scary, as [Complainant] seemed dazed." Mr. Dapper told DCR, "We knew her as a nice person, then she was like Dr. Jekyll and Mr. Hyde."

Following the July 7, 2012, meeting, Complainant continued her therapy program.

On July 13, 2012 (i.e., one week after Respondent told Complainant to take time off to take care of herself, and assured her that a job would be available to her when she obtained a doctor's note indicating that she was fit to return), Respondent removed Complainant from its payroll retroactive to July 6, 2012. DCR asked Ms. Dapper when Respondent made the

decision to terminate Complainant's employment. She replied, "Not at any specific time. We never made the decision that [Complainant] would never be the payroll person again." However, Mr. Dapper said that the company terminated Complainant's employment because "she was not doing what we asked, which was to go on disability and come back with a doctor's note." Instead, Mr. Dapper stated, she just kept calling the company to ask for her job back.

Complainant denied repeatedly calling the company asking for her job back. She stated that Respondent had not even informed her that she had been discharged at the time. Moreover, she stated that she was hospitalized during that time and did not have access to a telephone.

On August 3, 2012, Complainant completed her therapy program. On August 6, 2012, she sent an application for disability benefits that included her medical diagnosis to Respondent. The application for disability benefits included a letter from a psychiatrist that stated in part:

> [Complainant] has been in our program 5 days a week since June 7, 2012. She completed our program Friday August 3. She is more stable at this time and can return to work on Monday August 6. She is being referred to aftercare in the evenings to maintain stability.
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> [See Letter from Zinovy Izgur, M.D., Milestone Partial Hospital Program, to George Dapper, Inc., Aug. 3, 2012.]

The application also contained a similar letter from a licensed clinical social worker that stated in part:

> [Complainant] has been in our program 5 days a week, 8:30 am to 3:15 pm with full attendance since June 7, 2012. She completed our program Friday August 3 and can return to work on Monday August 6. Through the program, [Complainant] has become more stable and learned positive coping and interpersonal skills. Regular daily activities, including work, are appropriate for [Complainant]. She is being referred to aftercare in the evenings to maintain stability.
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> [See Letter from James Reis, LCSW, Supervisor, Milestone Partial Hospital Program, to George Dapper, Inc., Aug. 3, 2012.]

Respondent contends that its receipt of the application was "the first notice [it] had that Complainant had a mental disability" and made it realize that Complainant had been lying when

she told Mr. Dapper that she needed a reduced work schedule to attend to custody matters. Respondent's HR manager, Linda Crouse, faxed the application for temporary disability benefits to the New Jersey Office of Labor and Workforce Development ("Labor Department") on August 6, 2012.

Crouse told DCR that typically, an employee who wants to return from disability leave will contact the HR manager to announce that he or she is ready to return, and provide a doctor's note clearing him or her to return to work. Thereafter, the employee works with HR to get back on the schedule. Crouse stated that she could not recall any instance where an employee followed that procedure and was not allowed to return to his or her job. Regarding Respondent's dealings with employees who are on disability leave, Ms. Dapper stated, "We do not go out of our way to follow up on people when they are on medical leave." She stated, "It is the employee's responsibility to call the company to say they are ready to come back to work."

On August 10, 2012, Complainant asked Grbac about returning to work. Grbac told DCR that she informed Complainant that she was not certain of Complainant's status with the company and that Complainant should speak with Mr. or Ms. Dapper.

On August 12, 2012, Complainant called Crouse and asked about unemployment insurance compensation. She stated that Crouse advised her to apply for unemployment benefits. Complainant applied to the Labor Department for unemployment insurance benefits that same day.

On August 18, 2012, Complainant met with Mr. Dapper, Ms. Dapper, and Grbac at the Iselin office. Just as the meeting started, Mr. Dapper walked out of the room and slammed the door, thus, effectively ending the meeting with no determination of whether there would be a change in Complainant's status. Mr. Dapper told DCR that he had been angered by something Complainant said but could not recall the remark. Mr. Dapper said, "She would have to prove herself - the old personality. I needed to make sure she fit into the same mold. Her interactions

were not the same. She was nasty to people." Grbac told DCR that her impression was that Complainant's condition "seemed just as bad as before she went on leave."

Complainant said she contacted Mr. Dapper by phone on August 28, 2012, regarding returning to work, and he told her to file for unemployment benefits. Although Complainant had filed for unemployment benefits on August 12, 2012, she told DCR that upon hearing Mr. Dapper's remark, she learned that she officially had no position with Respondent.

DCR asked Mr. Dapper why Respondent did not place Complainant back in her position after she followed the protocol of providing a doctor's note and asking to come back. Mr. Dapper replied, "We did not consider bringing [Complainant] back for even a week because, if she had a chance, she would think it was permanent. Then after three to four weeks, if she could not do the job, we would have a problem." He stated that given her personality issues and the company's need for accurate numbers, it was determined that she could not do her job. Elsewhere, Respondent stated:

> When Complainant requested to return to full-time work, she was offered a position as van driver rather than the position as Payroll Manager. This was because Complainant had violated [Respondent's] trust by misrepresenting her need for reduced hours, failed to perform her job responsibilities while on reduced hours, failed to notify [Respondent] of her medical condition, and lied to George Dapper about the reason for the reduced hours."

On October 8, 2012, Ms. Dapper phoned Complainant and offered her a part-time position driving a van. Ms. Dapper recalled telling Complainant, "If you want to come back to work, I got a van driver route open. Come back as a van driver, and we will work you back. You have to earn back my trust." Ms. Dapper stated that Complainant would not commit to accepting the offer.

Complainant told DCR that she was humiliated by the offer because it meant fewer hours and a lower pay than her payroll clerk position, with no benefits. She told Ms. Dapper that she needed to think about the offer. She claimed that she later tried to call Ms. Dapper back,

but could not reach her directly, so she left a message, to which Ms. Dapper did not reply. She said that Ms. Dapper called her at some point in October and said that the offer had expired.

ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. 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. A finding of probable cause is not an adjudication on the merits but merely an "initial culling-out process" whereby a preliminary determination is made that further action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). If the Director determines that probable cause exists, the complaint 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, that finding is deemed to be a final agency order subject to review by the Appellate Division. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

It is settled that an employer cannot discriminate against an employee or applicant for employment in the terms, conditions, or privileges of employment based on that person's disability. N.J.S.A. 10:5-12(a). It is equally settled that an employer must make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, 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); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). The purpose of these laws is to ensure that persons with disabilities are not discriminated against in any aspects of employment including, but not limited to, hiring, promotion, tenure, training, assignment, transfers, and leaves. N.J.A.C. 13:13-2.5(a).

To determine what appropriate accommodation is necessary, the employer is required to "initiate an informal interactive process" with the employee. Tynan, supra, 351 N.J. Super. at

400. That process must identify the potential reasonable accommodations that could be adopted to overcome the employee's precise limitations resulting from the disability. Ibid. Once an employee with a disability has requested assistance, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Ibid. An employer will be deemed to have failed to participate in the interactive process if: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability, cf. Victor v. State, 203 N.J. 383, 414 (2010) (noting "neither a specific request nor the use of any 'magic words' is needed in order for an employee to be entitled to an interactive process focused on creating or accessing an accommodation"); (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Tynan, supra, 351 N.J. Super. at 400 (citing Jones v. Aluminum Shapes, 339 N.J. Super. at 400-01 (App. Div. 2001)). N.J.A.C. 13:13-2.5(a). Moreover, the employer is required to assess each individual's ability to perform a particular job "on an individual basis." N.J.A.C. 13:13-2.5(a).

In determining whether an accommodation is reasonable, factors to be considered include (a) the overall size of the employer's business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer's operations, including the composition and structure of the employer's workforce; (c) the nature and cost of the accommodation needed; and (d) 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. N.J.A.C. 13:13-2.5(b)(3).

Here, Respondent learned during a July 7, 2012 meeting that Complainant was attributing her June 21 and July 5 performance issues to a "nervous breakdown" and that she needed to "get help." During that meeting, Respondent told her to take some time off and obtain a doctor's note clearing her to return to work. Respondent told her that it would not fire

her, but that her "responsibilities may change." Respondent nonetheless terminated her employment on July 13, 2012, effective July 6, 2012.

On August 18, 2012, Respondent, fully aware of Complainant's medical diagnosis, met with Complainant to discuss the possibility of reinstating her. The meeting ended moments after it began, when Mr. Dapper stormed angrily out of the room.

Based on the foregoing, the Director finds that Respondent terminated Complainant's employment because of her disability. On July 7, 2012, it learned that prior performance issues were not, for instance, mere oversights or fleeting moments of confusion, but were being attributed to a medical condition. It fired her the following week.

The Director also finds that Respondent did not sufficiently engage in an interactive process as required by the LAD. Complainant's treating psychiatrist and clinical social worker stated that she was fit to return to work. Despite those expert opinions, Respondent believed that Complainant still had a disability that would adversely affect her ability to perform her job. Based on meeting with Complainant for a few moments on August 18, 2012, Respondent concluded that Complainant "seemed just as bad as before she went on leave." Respondent did so without obtaining or requesting additional information from Complainant's treating health care providers to address any questions Respondent may have had about the assessment that she was fit to return to her prior duties. Nor did Respondent seek clarification from her health care providers to address the possibility that reasonable accommodations, either temporary or ongoing, may have facilitated her return to her former position. Respondent made no evaluation of the impact that Complainant's disability would have on her ability to work. Indeed, it ignored the only pertinent medical evidence on the subject. It did not make a good faith effort to assist Complainant's in seeking an accommodation. It did not assess the reasonableness of any possible accommodation. It did not follow its normal practices when dealing with employees who seek to return from medical leave. Instead, it simply concluded that there was a likelihood that Complainant's disability would prevent her from doing her job and so it gave no

consideration to returning her to her job. Mr. Dapper stated, "We did not consider bringing [Complainant] back for even a week because, if she had a chance she would think it was permanent. Then in three to four weeks, if she could not do the job, we would have a problem."

It is true that on October 8, 2012, Ms. Dapper called Complainant and offered her a part-time driving position that meant a change of duties, lower pay, fewer hours, and no benefits. But that appears to be the full extent of the "interactive process." The Director finds, for purposes of this disposition only, that although the October 8, 2012 telephone call was a step in the right direction, it fell short of fulfilling Respondent's legal obligation to engage in a good faith interactive process. And as a direct result, Complainant suffered an adverse employment consequence.

WHEREFORE it is determined and found that Probable Cause exists to credit the allegations of the complaint.

3-31-14
Date

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS