STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. EC05FE-62357

Helyna Nikulicz,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
City of Burlington Public Schools,	)	
	)	
Respondent.	)	

On May 25, 2011, Complainant Halyna Nikilicz filed a verified complaint with the Director of the New Jersey Division on Civil Rights (DCR) alleging that her former employer, the City of Burlington Public Schools, violated the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 et seq., when it terminated her employment for exercising her rights under the statute. Respondent denied that its conduct violated the NJFLA. The ensuing DCR investigation found as follows.

Respondent is a public school district in Burlington County. Its attendance policy allows all non-tenured support staff to take ten "sick" days, three "personal" days, and two "family" days each year for a total of 15 days. Days taken off that do not fall under those categories or that cause an employee to exceed the 15-day limit are considered "miscellaneous" days without pay.

Complainant began working for Respondent as an educational assistant on September 1, 2005. She was assigned to assist special education teachers in Burlington High School and was considered to be non-tenured support staff. Her duties included providing clerical assistance for administrative tasks, and working with students in the presence of and under the direction of the classroom teacher on a one-to-one basis or in small groups.

Individuals in Complainant's position serve for a one-year term, which must be renewed each year by the Board of Education. Complainant's employment was renewed by the Board each year between 2005 and 2011.

On January 3, 2011, Complainant submitted a written request to Superintendent of Schools Patricia T. Doloughty seeking unpaid family leave from February 7, through April 4, 2011, to care for her husband, who was scheduled for open-heart surgery.

On January 4, 2011, Complainant received an evaluation which, for the first, time, rated her as "below expectations" in the category of "Attendance." The comment to the evaluation stated:

> [Complainant] works with five different professional staff members throughout the day. She consistently performs the duties asked of her by those staff members. He [sic] works cooperatively with students when in the classroom and is willing to assist other students as needed. [Complainant] consistently maintains a calm demeanor within the classroom and can have a calming effect on many of her students. [Complainant] has been absent eight days this year which is higher than the district average for the school year.

She was rated as "exceeds expectations" in the performance categories of "Cooperation" and "Dependability." She was rated as "meets expectations" in the remaining categories, i.e., "Utilization of Time," "Punctuality," "Communication," and "Confidentiality."[1] Complainant signed the evaluation on January 7, 2011.

On January 11, 2011, Superintendent Doloughty sent a memo to Complainant approving her request and granted her family leave time. In particular, Respondent wrote:

> Please be advised, at their January 10, 2011 meeting, the Board of Education approved your request for a Family Medical Leave of Absence without pay for the period February 7, 2011 through April 3, 2011 with continuation of medical benefits under the Federal Medical Leave Act. This approval is contingent upon verification from your husband's physician that you are needed to care for him during this timeframe. Attached for your review is the Board of Education Policy No. 3431.1 Family Leave. The Board joins me in wishing your husband a speedy recovery.

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[1] The same person completed Complainant's evaluation a year earlier on January 4, 2010. Although Complainant had fourteen absences between the start of that school year in September 2009, and her evaluation, he rated her attendance in the January 2010 evaluation as "meets expectations."

On February 7, 2011, Complainant began her family leave. She was out for 39 days and returned to work as scheduled on or about April 4, 2011.

On April 26, 2011, Complainant took another day off to accompany her husband to his post-operative visit with the heart surgeon. Respondent charged that day as a "family" absence.[2] That same day, Superintendent Doloughty sent a memo to Complainant that stated in part:

> Please be advised that, pursuant to the requirements in NJSA 10:4-12B(8), you are hereby notified that at the Board of Education's special meeting, to be held on Monday evening, May 2, 2011, at 6:00 p.m., in the Wilbur Watts Intermediate School Large Group Instruction Room, the Superintendent and or Principal/Supervisor will report to the Board of Education on your 2010/2011 performance and 2011/2012 employment.

On April 28, 2011, School Principal Julian Jenkins, Jr., told Complainant that she would not be offered a position for the upcoming school year (i.e., 2011-12) based on her poor attendance.

On May 2, 2011, Complainant and her husband attended the Board meeting during which Jenkins stated that Complainant's contract was not going to be renewed based on her attendance.

On May 10, 2011, Doloughty sent Complainant a memo advising her that the Board at its regular meeting the previous night, approved for action the non-renewal of her contract for the 2011-12 school year and terminating her employment effective June 30, 2011.

On May 17, 2011, Complainant requested a written explanation for the non-renewal of her contract. On June 11, 2011, Doloughty provided Complainant with a memorandum entitled, "Statement of Reasons," in which she wrote:

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[2] As previously stated, non-tenured support staff members are allowed two "family" absences per school year. This was the first "family" absence charged to Complainant.

For the past six (6) years, you have been absent from work without pay ranging from 1 day to 39 days. Two years, 2007-2008 and 2010-2011, you requested FMLA for extended leaves. However, in the other years you were absent without pay as follows

- 2005-2006 1 day
- 2006-2007 3 days
- 2008-2009 4 days
- 2009-2010 14 days

During the course of her employment, Complainant's absences were as follows:

School Year	Total Days Absent	Protected Absences
2005-06	14	0
2006-07	13.5	0
2007-08	26	14.5 (FMLA)[3]
2008-09	19	0
2009-10	30	0
2010-11	49.5	39 (FLA/FMLA)[4]

During the course of her employment, Complainant received eleven performance evaluations from several different supervisors. Although Complainant exceeded the allowable number of absences during the 2008-09 and 2009-10 school years, her supervisors rated her attendance as "meets expectations," and there was never any indication in the comment sections of those evaluations that her attendance was a problem or that it affected her job performance in any way.

Other education assistants employed by Respondent had similar attendance records. Records provided by Respondent showed the following absences:

3 Complainant requested and was granted time off under the FMLA due to emergency knee surgery. In addition to the time off under the FMLA, Complainant was absent 11.5 days during the 2007-2008 school year.

4 Prior to beginning her family leave in the 2010-2011 school year, Complainant was absent nine days (seven full days and two half-days). After her return from family leave, she was absent one and one-half days (a full day on April 26th and a half day on May 25th). The total number of "unprotected" days she was absent was 10.5.

Employee	2007/08	2008/09	2009/10	2010/11
M. B.	18	12	15	16
K. C.	15	10	26	14.5
T.C.	18	16.5	20.5	10
Z.E.	18	11	26.5	20.5
W.T.	27	21.6	22.5	21

The employment of each of those individuals was renewed for the 2011-2012 school year.

Analysis

The NJFLA, adopted in 1989, established an employee's right to take leave "without risk of termination of employment or retaliation . . . and without loss of certain benefits." N.J.S.A. 34:11B-2. The Legislature reasoned that employees should not have to "choose between job security and parenting or providing care for ill family members." Ibid.; see e.g., D'Alia v. Allied-Signal Corp., 260 N.J. Super. 1, 6 (App. Div. 1992) (noting that the NJFLA "represents the culmination of a comprehensive legislative effort to maintain the integrity of the family unit and promote flexibility and productivity in the work place.")

The NJFLA entitles an eligible employee[5] to twelve weeks of family leave in any 24-month period upon advance notice to the employer[6] for the (1) birth of a child of the employee; (2) placement for adoption of a child with an employee; or the (3) serious health condition[7] of family member of the employee, including a spouse. N.J.S.A. 34:11B-4. In addition to taking

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5 An eligible "employee" for purposes of the NJFLA is someone who has been "employed by the same employer in the State of New Jersey for 12 months or more and has worked 1,000 or more base hours during the preceding 12 month period. An employee is considered to be employed in the State of New Jersey if: (1) Such employee works in New Jersey; or (2) Such employee 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.

6 A covered "employer" for purposes of the NJFLA is an entity that employs fifty or more employees, "whether employed in New Jersey or not, for each working day during each of twenty or more calendar workweeks in the then current or immediately preceding calendar year." Ibid.

7 A "serious health condition" for purposes of NJFLA is an "illness, injury, impairment, or physical or mental condition which requires: (1) Inpatient care in a hospital, hospice, or residential medical care facility; or (2) Continuing medical treatment or continuing supervision by a health care provider." N.J.A.C. 13:14-1.2.

consecutive weeks off, "such leave may be taken intermittently, N.J.S.A. 34:11B-4a, on a reduced leave schedule, so long as the employee provides reasonable notice under the circumstances and avoids undue disruption of the employer's operations. N.J.S.A. 34:11B-5." DePalma v. Building Inspect. Underwriters, 350 N.J. Super. 195, 212 (App. Div. 2002); cf. N.J.A.C. 13:14-1.5(c)(1) (employee must provide the employer with notice "no later than 30 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.")

When the employee returns from leave, he or she must be restored to the previous position or another position with equivalent employment benefits, pay, and other terms and conditions of employment. N.J.S.A. 34:11B-7. To state a claim under the NJFLA, a plaintiff must show that he or she was: (1) employed by the respondent; (2) performing satisfactorily; (3) that a qualifying leave event occurred; (4) he or she took or sought to take leave from her employment; and (5) he or she suffered an adverse employment action as a result. DePalma, supra, 350 N.J. Super. at 213.

At the conclusion of an investigation, the Director is required to determine whether there is "probable cause" which, for purposes of this analysis, means a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the [NJFLA] 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" where the DCR makes a preliminary 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., 111 S.Ct. 799; Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978).

Based on the above, the DCR Director now finds, for purposes of this disposition only, as follows. Complainant is an "employee" and Respondent is a covered "employer" for purposes of the NJFLA. Complainant's 39-day leave to care for her husband who was

scheduled for open heart surgery was a "serious health condition" of an employee's family member for purposes of the NJFLA. Respondent's decision to not renew her contract for attendance reasons within weeks after she returned from the 39-day NJFLA leave, and days after she took off to accompany her husband to a post-operative visit with the heart surgeon, was an "adverse employment action" for purposes of the statute. Respondent does not challenge the characterization of the leave as protected activity. Rather, it argues that its employment decision was not motivated by the 39-day leave but by Complainant's unprotected absences from 2005 to 2010.

However, the record does not support Respondent's assertion that it had concerns about her absences prior to her request for leave in 2011. Indeed, her prior evaluations rated her attendance as "meets expectations." The question becomes what, if anything, occurred in 2011 that transformed formerly acceptable conduct into unacceptable conduct. Complainant points to the 39-day NJFLA leave. Respondents did not articulate any explanation for its apparent change of position. Nor did it, for instance, produce testimony, internal memoranda, emails, etc., indicating that it was already planning to not renew her contract before she requested the 39-day leave.

The notion that her attendance in prior years was the sole motivating factor in the employment decision is also belied by the fact that Z.E. and W.T. were renewed even though their attendance records for the school years from 2007 to 2011 were equal to or worse than Complainant's. During that four-year period, Complainant and Z.E. each had 78 unprotected absences, and W.T. had 92.6 unprotected absences.

Respondent argued that Z.E. and W.T. were assigned to the pre-school classrooms and that their absences were not disruptive to the educational process and could be better "tolerated" as it was much easier to find a substitute employee whereas Complainant, on the other hand, was assigned as an assistant for a student with special needs and that student's IEP required the student have an assistant.

Complainant disputed that argument. She told DCR that she was not assigned to any specific student, but was assigned to assist all students working in self-contained classes with a Certified Special Education teacher.

When asked to respond to Complainant's rebuttal, Respondent submitted a "Teacher Locator" for 2010-2011. It is not clear whether that schedule supports Respondent's position that Complainant was assigned to one specific student. It appears to indicate that Complainant's schedule required her to work with various teachers during the day in different classrooms and different grades.

Even if Complainant's position was more crucial to Respondent's operation than Z.E.'s and W.T.'s, the fact remains that her attendance was not raised as an issue prior to January 2011. Instead, it was first raised the day after she requested a 39-day family leave. In terms of sheer temporal proximity, the fact that Respondent decided to memorialize a concern with Complainant's attendance the day after she requested a 39-day family leave and terminate her employment a few weeks after she returned from family leave (and two days after she took another day for her husband's heart condition) is by no means conclusive, but raises a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the 39 days of protected family leave that Complainant used in 2011 factored into Respondent's decision not to renew her contract. Additionally, five other educational assistants had similar or greater number of absenses than Complainant, but were renewed.

WHEREFORE, it is on this 13th day of May, 2014 determined and found that Probable Cause exists to credit the allegations of the complaint.

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS