

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11HB-62843

Nicole Fitchett,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINDING OF PROBABLE CAUSE
)	
Horizon NJ Health,)	
)	
Respondent.)	

This is an employment discrimination case. Mercer County resident Nicole Fitchett (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Horizon NJ Health (Respondent or Horizon), fired her rather than grant a reasonable disability accommodation, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. DCR's investigation found as follows.

Horizon is a health service corporation that provides a variety of medical, health and wellness insurance products and services. On May 15, 2006, it hired Complainant to work as an Administrative Assistant. On November 11, 2008, it promoted her to Pharmacy Benefit Analyst under the supervision of Manager of Pharmacy Operations Darla Lester.

Horizon told DCR that Complainant was discharged because she did not obtain a pharmacy technician certification (PTC) by a designated deadline. Horizon stated that Complainant was aware that a PTC was required when she accepted the promotion. Complainant contends that Respondent should have extended her deadline as a reasonable accommodation, to make up for time she lost during an approved disability leave.

Horizon employees obtain a PTC through a third-party, the Pharmacy Technician Certification Board (PTC Board), which purports to administer a nationally accredited certification program for pharmacy technicians and related titles. A candidate seeking a PTC applies via the PTC Board website, and schedules an appointment for an exam to be taken at a PTC test center.

During a fact-finding conference that DCR convened with the parties pursuant to N.J.A.C. 13:4-4.7, Lester stated that management encouraged Complainant to obtain a PTC when she was first promoted to Pharmacy Benefit Analyst, but did not begin to enforce the requirement until 2010 because Horizon was short-staffed until then, and management recognized that Complainant's workload would make it difficult for her to prepare for the exam.

In Complainant's performance evaluations, she consistently received ratings of "fully meets expectations" in providing "exceptional service" to internal and external customers. Each annual evaluation, however, noted that Complainant had not yet obtained her certification. In the 2008 evaluation, Lester noted that Complainant had not yet taken the PTC exam, but expected to take it by mid-2009. In the 2009 evaluation, Lester wrote, "Due to priorities and finances Nicole has not taken the exam. She will be expected to take the exam in the 1st quarter of 2010." In the 2010 evaluation, Lester wrote, "Nicole took the Certification Exam on 12/3/10 but did not pass. She will be given until the end of March 2011 to retake and pass the exam."¹

Lester stated that in early May 2011, she asked Complainant about her plans to re-take the exam and Complainant replied that she had no time to do so because of her heavy workload. Lester told DCR that she agreed that Complainant's workload up to that time hindered her from preparing for the exam, and that she did not hold Complainant accountable for the delay in re-taking the PTC at the time.

In a May 9, 2011 memorandum, Lester notified Complainant that her deadline to obtain the PTC was being extended to October 31, 2011, and that if she failed to fulfill this requirement by that date, her employment would be terminated. Two other employees— Pharmacy Benefit Analyst K.B. and Pharmacy Specialist 1 S.P.—received similar memos on that same date, and Pharmacy Specialist 1 E.L. received a similar memo on May 16, 2011. K.B. had been in the Pharmacy Benefit Analyst position since May 22, 2010, and took the PTC examination on April 28, 2011 but, like Complainant, received a failing grade. E.L. and S.P. were in their Pharmacy Specialist positions since February 27, 2010 and February 2001, respectively. E.L. had taken the PTC examination on March 26, 2011, and S.P. had taken it on April 29, 2011, and both had failed. Soon after Lester issued those memos, Horizon offered all four the opportunity to take an on-line examination preparatory course for the PTC at Horizon's expense.

¹ Horizon gave several different explanations for its decision to enforce the PTC requirement in May 2011. At the fact-finding conference, Roberson said that Horizon decided to require Pharmacy Benefit Analysts to complete the certification process to ensure that they could properly address all questions and requests from pharmacies, physicians and medical plan members. Respondent also asserted that it was entering a Medicare market that required all pharmacy staff to be certified. Elsewhere, Lester stated that Horizon decided to enforce the PTC requirement because it was "going for either URAC [Utilization Review Accreditation Commission] or NCQA [National Committee for Quality Assurance] accreditation which required the certification."

DCR's investigation found that URAC and NCQA are accrediting bodies that, among other things, evaluate healthcare organizations to determine whether they meet certain standards. Both URAC and NCQA informed DCR that organizations seeking case management accreditations are not required to have non-supervisory staff such as Pharmacy Benefit Analysts hold certifications. URAC's website indicates that it granted Horizon accreditation in case management in 2012. Because the specific allegations of this complaint did not warrant questioning the PTC requirement itself, DCR's investigation into the various rationales was limited to determining whether failure to meet the October 31, 2011 deadline had a specific impact on Respondent's operations. The investigation found that it did not.

On July 18, 2011, Complainant's doctor placed her on a leave of absence for her disabilities until September 20, 2011. This two-month leave was approved by Horizon and was documented in Complainant's employee profile as a short-term disability leave.

During the fact-finding conference, Complainant stated that she began the PTC preparatory course prior to being placed on disability leave by her doctor, and that her doctor advised her not to do anything work-related during her leave. Complainant stated that she resumed the review course following her return from disability leave. Lester acknowledged that Complainant began the course before going out on medical leave. Lester did not know whether Complainant resumed the course when she returned to work.

On October 18, 2011, Lester and Human Resources Manager Pamela Roberson met with Complainant, following her return from disability leave, to get an update on her efforts to obtain her PTC. Lester stated that she and Roberson left it up to Complainant to suggest a time-frame for fulfilling the requirement. Roberson told DCR that during that meeting, she gave Complainant a week to come up with a plan to obtain the PTC.

On October 21, 2011, Complainant asked Roberson for a two-month extension to compensate for the time lost while she was on disability leave and unable to prepare for the exam. Roberson told Complainant that she would forward her request to Lester and Director Sam Currie.

Lester told DCR that she discussed Complainant's request with Currie, and they decided not to grant Complainant any extra time to get the certification. She said that they considered the fact that the PTC had been required since Complainant's promotion in 2008, and that another analyst obtained her certification between May and October 2011 despite the same heavy workload.

In a "Termination Review" form dated October 26, 2011, Respondent's Employee Relations unit approved Roberson's recommendation to discharge Complainant "for failure to meet the minimum job requirements for the Pharmacy Benefit Analyst position." In the "key facts" section of the form, after noting that Complainant had been advised of the PTC requirement since 2008 and on May 9, 2011 was given six months to fulfill the requirement, Roberson wrote:

- On October 18, 2011, I met with Nicole and Darla to get an update on completion. Nicole stated that she has not completed the prep course nor has she taken the certification test. She stated that she does plan to take it whether she is here at Horizon or elsewhere. I asked Nicole if she have [sic] a plan for completion. She said she did not. I asked her to please come up for [sic] a plan for completion and follow up with me on Friday, October 21.
- On October 21, 2011 I met with Nicole and she stated that she was out on disability 7/18/11 – 9/20/11 and requested an additional 2 months to complete

(December 31, 2011). I told Nicole would discuss her request with her manager and get back to her with an answer.

- Darla [Lester] and her Director Sam Currie would like not to extend Nicole the additional time. There were four employees who were advised the same timeframe as Nicole in May. . . . Nicole has had 3 - 4 years time to prepare and take the certification test and the director does not want to continue granting this employee extensions.

Of the four employees who received the PTC-deadline memo in May 2011, only K.B. met the requirement—she obtained her PTC on September 24, 2011. E.L. was discharged on June 24, 2011, for reasons unrelated to the PTC requirement, and S.P. applied for and was re-assigned to Managed Care Coordinator on July 2, 2011, which does not have a PTC requirement.

Analysis

The LAD is “remedial legislation” designed to root out the “cancer of discrimination,” Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). In enacting the law, the New Jersey Legislature declared that “discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State.” N.J.S.A. 10:5-3; see also L.W. v. Toms River, 189 N.J. 381, 399 (2007) (noting “[f]reedom from discrimination is one of the fundamental principles of our society”).

Because of the LAD’s remedial purpose, courts have adhered to the Legislative mandate that the statute be “liberally construed,” N.J.S.A. 10:5-3, by consistently interpreting the LAD “with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.” Andersen v. Exxon Co., 89 N.J. 483 (1982); Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005).

The LAD prohibits employers from discriminating based on disability, and requires employers to provide such reasonable disability accommodations that will enable an employee to perform the essential functions of the position, unless the required accommodations will impose an undue hardship on the employer’s operations. N.J.S.A. 10:5-4.1; N.J.S.A. 10:5-12(a); N.J.A.C.13:13-2.5.

An employer is not required to provide the precise accommodation an employee requests, but is required to engage in an interactive process with the employee to determine whether there is a less burdensome accommodation that will meet the employee’s needs. Tynan v. Vicinage 13 of the Super. Ct., 351 N.J. Super. 385 400 (App. Div. 2002). The interactive process is crucial because each party normally holds relevant information that the other party does not possess, and the exchange of such information will ensure that the assessment of potential accommodations is complete and reasonable. Taylor v. Phoenixville School Dist., 184 F.3d 296, 317 (3d Cir. 1999).

An accommodation is not "reasonable" and therefore not required if an employer can demonstrate that it would impose an "undue hardship on its business." N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, 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).

The burden of proving undue hardship is on the employer. N.J.A.C. 13:13-2.8; cf. Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), certif. denied, 212 N.J. 198 (2012) ("If a defendant's response to a reasonable accommodation claim is that that accommodation would be unduly burdensome or an undue hardship, this defense is considered an affirmative defense and the defendant assumes the burden of proof on this issue.").

At the conclusion of an investigation, DCR is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. For purposes of that analysis, probable cause 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." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby DCR 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), certif. den., 111 S.Ct. 799. 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.

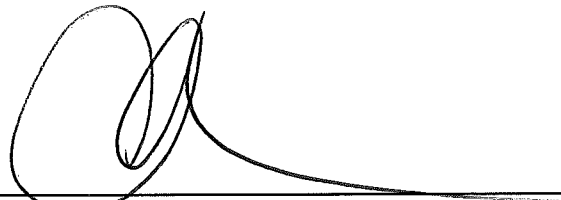
Here, Respondent does not dispute that Complainant is a person with a disability, or that she requested an accommodation that directly addressed the impact of her disability leave on a requirement of that position, or that it denied her request. Nor does it appear to contend that granting Complainant's request would have imposed an undue financial or administrative burden or fundamentally altered its operations. Rather, Respondent argues that after Complainant was promoted, she had ample time to obtain the certification. However, the investigation found that Respondent did not strictly enforce the PTC requirement when Complainant was first promoted, and Lester acknowledged that Complainant's workload prohibited her from obtaining the PTC prior to May 2011. The investigation found that after receiving the May 9, 2011 memo, Complainant began the prep course, but was interrupted by her two-month disability leave.

After Complainant returned to work, she was asked her how much time she needed to prepare for the PTC exam. She replied that she needed the two months that she lost while out on disability leave. If granted, the extension would have provided Complainant the same amount of time that three other employees received to meet the PTC requirement. Respondent

has not demonstrated that the October 31, 2011 deadline had some specific significance, or provided any other evidence that extending Complainant's deadline until December 31, 2011 would have imposed an undue hardship on its operations. But if there was some reason why Complainant's proposed accommodation would be unduly burdensome, Respondent had a legal obligation to discuss the matter with Complainant to determine whether there were less burdensome alternatives. It did not do so. Instead, it simply denied the request and fired her.

Based on the above, the Director is satisfied at this threshold stage of the process that there is enough to support a "reasonable ground of suspicion" to warrant a cautious person in the belief 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. Accordingly, it is found that PROBABLE CAUSE exists to credit Complainant's allegations of disability discrimination.

DATE: 12-29-15



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS