STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EF14FB65915

Ashley M. Ruiz-Lopez, Complainant, v. Omni Baking Company, Respondent.	)	Administrative Action **FINDING OF PROBABLE CAUSE**

On May 10, 2016, Cumberland County resident Ashley M. Ruiz-Lopez (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Omni Baking Company (Respondent), fired her for taking pregnancy leave, in violation of the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1, et seq. The DCR investigation found as follows.

Summary of Investigation

Respondent is a contract bakery with facilities in Vineland and Bellmawr. On June 9, 2014, it hired Complainant to work as a receptionist in its Administrative Offices/Human Resources Department.

In or around May 2015, Complainant became pregnant.

In July 2015, she requested intermittent leave under the federal Family and Medical Leave Act (FMLA) to attend doctor's appointments for her pregnancy and other health complications.

On November 11, 2015, she requested and received a second medical leave through December 1, 2015, for issues related to her pregnancy.

On January 29, 2016, she went on maternity leave.

At some point before her delivery date, Complainant returned to the workplace to speak with Human Resources (HR) Manager Eleanor Mesiano and to drop off a claim for temporary disability benefits, which included a medical certificate from an OB/GYN that listed her estimated delivery date as February 27, 2016, and her approximate recovery date of April 10, 2016. See Deborah White, D.O., Medical Certificate, NJ

Dept. of Labor & Workforce Devel., Div. of Temporary Disability Ins., Part B, Feb. 8, 2016. Payroll Administrator Yvonne Frazier accepted the certificate but told Complainant that HR Manager Mesiano was not in.

On February 20, 2016, Complainant gave birth. Afterwards, she returned to the workplace with a note from the OB/GYN certifying that she gave birth by way of a caesarean section delivery on February 20, 2016, and that her "actual recovery date" was April 17, 2016. See D. White, D.O., Medical Certificate, NJ Dept. of Labor & Workforce Devel., Div. of Temporary Disability Ins., Part B, Feb. 29, 2016, p. 2. Complainant stated that she again asked for Mesiano, and was again told that Mesiano was not there. Complainant said she was told to call or come in on Fridays. Complainant stated that she returned to the office on the following Friday, but Mesiano had already left the office.

Complainant stated that on March 2, 2016, she called the office looking for Mesiano and spoke with Frazier, who suggested that she leave a voicemail for Mesiano. Complainant stated that per Frazier's suggestion, she called again and left a voicemail telling Mesiano that she was calling regarding her return date. Telephone records confirm that Complainant called Respondent's office twice on March 2, 2016 (at 9:35 a.m. and 9:36 a.m.) and on March 9, 2016.[1]

Complainant told DCR that in April 2016, she received a termination letter from Mesiano, which stated in part:

> You have been out on disability since 1/29/2016. Your FMLA ended on 3/14/2016. (You had used 6.77 weeks by 1/25/2016.) The maximum amount of leave that can be taken in a 12 month period is 12 weeks. Your employment with Omni Baking Company is terminated as of 3/29/2016 . . . When you have been released from disability you can reapply for a job at Omni Baking Company.

See Letter from Mesiano to Complainant, Mar. 29, 2016. Complainant alleged that Respondent never informed her of her rights under the NJFLA. See Verified Complainant, May 10, 2016, p. 2. She alleged that she had "[NJFLA] time available" and "could have taken time for child bonding under the [NJFLA]," and that her discharge violated the NJFLA. Ibid.

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[1] Telephone records show that Complainant also called Respondent three times on April 22, 2016, and once on June 15, 2016.

Respondent denied the allegations of wrongdoing in their entirety. It argued that it could not be faulted for not granting NJFLA leave to Complainant because she never requested it. See Answer to Verified Complaint, Aug. 30, 2016, p. 6 ("While Complainant may have had NJFLA time available to her, she failed to request such leave, as is her responsibility under the NJFLA."). Respondent argues that because Complainant "failed to notify [Respondent] of her intention of taking leave pursuant to the NJFLA . . . [Respondent] only knew that [she] failed to show up for work upon the expiration of her FMLA leave and was terminated according to [company] policy." Id. at 2.[2]

Respondent argues that when Complainant left for pregnancy leave, she was specifically told that (a) she had 5.33 weeks of FMLA remaining; (b) her FMLA would expire on March 14, 2016; and (c) she was required to "advise [Respondent], via Ms. Mesiano, every two weeks, of her status and her intent to return to work, which she failed to do." Id. at 4. Respondent claims that Complainant did not report in, but simply stopped by the office on a few occasions to show her baby to co-workers. Respondent acknowledged that when Complainant visited its office, she inquired about HR Manager Mesiano. However, Respondent notes that Complainant was told to contact Mesiano, but Complainant "never called, emailed or texted Ms. Mesiano despite having her contact information and having done so while working for [Respondent]." Id. at 6.

Respondent claimed that when the FMLA period expired and it had not heard from Complainant, it gave her an additional two week grace period but she still did not return to work or provide any notice as to her status. Respondent notes:

> [Respondent] awaited her return; however, she neither returned nor contacted [Respondent] on March 14, 2016. [Respondent] provided her an additional two weeks and she still did not return to work or contact

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[2] In support of its argument that Complainant violated its FMLA policy, Respondent points to its Employee handbook, which states in part:

> When seeking FMLA leave, you are required to provide . . . periodic reports as deemed appropriate during the leave regarding your status and intent to return to work . . . Failure to comply with the foregoing requirements may result in . . . disciplinary action, up to and including discharge. [See Employee Handbook, Dec. 2014, at p. pp. 22-23.]
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> Any employee who fails to return to work as scheduled after FMLA leave or exceeds the 12-week FMLA entitlement . . . will be subject to the company's standard leave of absence and attendance policies. This may result in discharge if you have no other company provided or legally mandated leave available to you that applies to your continued absence . . . [Id. at 24.]

> [Respondent]. As a result, she was terminated effective March 29, 2016. The Respondent's actions toward Complainant were not discriminatory in nature. At all times relevant, the Respondent has acted in accordance with applicable Federal and State laws as well as its own Employee Handbook.

Id. at 4. Respondent notes that under its personnel policy, an employee who is absent for two days without notifying the employer will be assumed to have voluntarily abandoned his/her position and will be removed from the payroll.

Mesiano told DCR that Respondent has approximately 450 employees. She acknowledged that the company was covered by the NJFLA and that Complainant was eligible for NJFLA benefits. She stated that Complainant was informed of her rights under the NJFLA when Respondent went over the handbook during orientation and through a DCR poster entitled, "The New Jersey Family Leave Act," displayed on the premises.

Respondent produced what it characterized as the relevant portions of its employee handbook. Although the handbook makes numerous mentions of the FMLA, it does not expressly mention the NJFLA. However, in a section entitled, "Pregnancy Accommodation," the handbook states, "If leave is provided as a reasonable accommodation, such leave may run concurrently with the Federal Family Leave Act and/or any other leave where permitted by state and federal law." See Employee Handbook, Dec. 2014, at p. 6 (emphasis added). The handbook also contains a section entitled, "Family Leave," which corresponds substantively with the NJFLA:

> All employees who have worked 1,000 hours in the previous 12 months of consecutive employment are eligible to receive up to 12 weeks of unpaid family leave within a 24 month period. The 24 month period is measured rolling backward from the date leave is used . . . Family leave may be used only in the event of a birth or adoption of a child or to provide care due to the serious health condition of a child, spouse, civil union partner, parent or your spouse's parent. Unless prevented by a medical emergency you must provide notice to the Human Resources department of your need for leave as soon as possible. You may be required to provide a certification issued by a licensed health care provider prior to the company granting a request for family leave.
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> [Id. at 36 (emphasis added).]

Mesiano stated that she never received any messages or voicemails from Complainant during the time she was out on medical leave. Mesiano stated that she

never saw any medical forms that contained a delivery date or estimated return date. Mesiano told DCR she had no with contact Complainant until she sent her a termination letter on March 29, 2016. She noted that it was Complainant's responsibility to contact Respondent every two weeks to report her status and intent to return to work. Mesiano stated that an employee can be entitled to up to 24 weeks under FMLA and NJFLA. She stated that she is required to tell employees about their rights under FMLA and that an employee does not have to specifically ask for FMLA leave. However, she stated that an employee must request NJFLA if they are seeking bonding time. Mesiano said that she would have absolutely granted time for bonding or additional time to recover if Complainant had simply contacted her before her FMLA expired.

Mesiano discussed scenarios involving FMLA and NJFLA entitlement. She said that an employee who needs leave for his/her own health issues first and then needs time to care for his/her child can be entitled to up to 24 weeks. Mesiano said that Complainant was entitled to twelve FMLA weeks and six weeks of bonding, but that Complainant failed to request NJFLA time.

Payroll Administrator Yvonne Frazier told DCR that the first medical form she received from Complainant was the application for disability benefits prior to her delivery (i.e., which listed her estimated delivery date as February 27, 2016, and her approximate recovery date as April 10, 2016). She stated that she recalled seeing the estimated return to work date, but did not recall informing Mesiano. Frazier stated that she is in charge of filling out disability documents after the employee brings the medical forms, then mailing out copies and placing them in the file. She said that Mesiano only goes into the file, located in Mesiano's office, if there is a problem or a question. Frazier recalled seeing Complainant in the office a few times after the baby was born. She recalled hearing Complainant ask for Mesiano and heard HR Coordinator Jadira Rodriguez tell her to call Mesiano. She also recalled Complainant calling the office and asking for Mesiano.

Frazier said that per company rules, employees who are out on FMLA must speak with Mesiano, Frazier, or Rodriguez every two weeks. She said that since the majority of Respondent's employees are covered by its health insurance, they have to go to their offices weekly to pay their insurance co-pays and that is when HR sees the employees and the reporting rule is met. In Complainant's case, she was not covered under Respondent's health insurance. When Frazier was asked about the difference between FMLA and NJFLA, she replied that the former is "federal" and "paid," and that NJFLA is unpaid and entitles the employee to six weeks of bonding time with the child. Respondent produced a signed statement from Frazier that stated:

[Complainant] came into the office brought baby for us to see. She asks if Eleanore [Mesiano] was in. We said that she is in on Friday's. [Complainant] said that she will be in on Friday to see her. [Complainant] came in on a Friday to see Eleanore, but Eleanore had left to go to 151 Foods. Jadira [Rodriguez] told her to call or email Eleanore to let her know when she can see her. We only talked about the baby.

[See Statement from Yvonne Frazier, Aug. 29, 2016 (*sic* throughout).]

HR Coordinator Rodriguez told DCR that she is in charge of running orientations and trains every new hire. She stated that Complainant twice came into the office with her baby. She recalled Complainant asking for Mesiano on at least one occasion. Rodriguez said she told Complainant to call or email Mesiano. Rodriguez claimed she may have emailed Mesiano telling her that Complainant stopped by and asked for her, but Mesiano told her Complainant did not contact her. When Rodriguez was asked about the difference between FMLA and NJFLA, she replied that FMLA is "job protection" for twelve weeks and NJFLA is "the extra insurance to cover for the bonding with a child" or serious health condition of a family member. Respondent produced a signed statement from Rodriguez that stated:

[Complainant] text me on Monday April 4, 2016 at 11:13am:

[Complainant]: Hey, Is Eleanore around today?

[Rodriguez]: Yes (I responded at 3:09pm)

[Complainant]: How about tomorrow? I was going to stop in today but I don't have time. (She responded at 3:10 pm)

[Rodriguez]: I don't think about tomorrow, but you can call her. (I responded at 3:11 pm)

[Complainant]: Ok (she responded at 3:12 pm)

- The times that [Complainant] came to the office was to bring in the baby.

[See Statement from Jadira Rodriguez, Aug. 29, 2016 (*sic* throughout).]

Respondent argued that based on its handbook, orientation, and posters—and particularly because Complainant worked as a receptionist in its Administrative Office/HR Department—Complainant knew the process for requesting NJFLA leave.

Respondent's records show that it approved FMLA leave for Complainant from July 17, 2015, on an intermittent basis to address her own health conditions related to pregnancy. It approved Complainant for leave from November 11, 2015 to December 1, 2015, for her own health conditions. Respondent's records also indicate that at the time Complainant left for maternity leave/temporary disability on January 29, 2016, she had used 6.77 weeks out of the twelve weeks granted by FMLA for a twelve-month period. Her FMLA was scheduled to run out by March 14, 2016.

The DCR investigation found that Complainant's prior medical leave did not reduce her eligibility for NJFLA leave because, unlike the FMLA, the NJFLA does not provide leave for an employee's own health condition. Thus, on March 14, 2016, Complainant was entitled to an additional twelve weeks of leave under the NJFLA in connection with the birth of her child.

During the course of the investigation, Respondent's attorney produced copies of the same two requests for disability benefits signed by Complainant's OBGYN that Complainant produced.

Analysis

a. The NJFLA

The NJFLA, adopted in 1989, established the 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." N.J.S.A. 34:11B-2; 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[3] to twelve weeks of family leave in any 24-month period upon advance notice to the employer[4] for the (1) birth of a child of the

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[3] 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.

[4] 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

employee; (2) placement for adoption of a child with an employee; or the (3) serious health condition of a family member of the employee. N.J.S.A. 34:11B-4. For leave taken in connection with the birth of a child, the NJFLA permits the employee to begin that leave at any time within one year of the child's birth. N.J.A.C. 13:14-1.5(c).

In D'Alia, the Appellate Division found it "highly significant" that the NJFLA requires employers to do more than just post notice of employees' rights, and declared that the employee's ability to request or take NJFLA leave should not depend on the employee's sophistication or independent knowledge of his or her legal rights. D'Alia, supra, 260 N.J. Super. at 9-10. Rather, the "critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a reason specified in [the NJFLA]." Id. at 9-10.

If the employee's need to take leave under the NJFLA due to the birth of a child is foreseeable, then the employee is required to give the employer prior notice of the expected birth in a manner which is reasonable and practicable. N.J.S.A. 34:11B-4(f). An employee is not required to use any "magic words" or specifically ask for leave under the NJFLA. D'Alia, supra, 260 N.J. Super. at 9. The employee's notice obligations are satisfied so long as he or she gives the employer sufficient information to alert it that the employee plans to take time off for a purpose covered by the NJFLA. Id. at 9-10.

Significantly, for purposes of this case, the D'Alia court found that an employee's "request for disability benefits and maternity leave" were enough to alert the employer of its obligations under the NJFLA, id. at 10, even though the employee requested leave due to medical complications from her pregnancy rather than to care for her child. Id. at 5. The Court held that the fact that D'Alia did "not specifically intend to invoke" her rights under the NJFLA was irrelevant so long as the employer knew that she experienced an event triggering entitlement under the NJFLA (she had given birth to a baby) and was seeking leave related to that event. Id. at 10.

When an employee returns from leave, 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 she was (1) employed by the respondent; (2) performing satisfactorily; (3) that a qualifying leave event occurred; (4) she took or sought to take leave from her employment; and (5) she suffered an adverse employment action as a result. DePalma, supra, 350 N.J. Super. at 213.

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twenty or more calendar workweeks in the then current or immediately preceding calendar year." Ibid.

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 statute has been violated. Ibid.

A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby 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., 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.

In this case, the Director finds that Complainant was an eligible "employee" and that Respondent is a covered "employer" for purposes of the NJFLA. The Director further finds that Respondent knew that (a) Complainant was scheduled to give birth on February 27, 2016, with an approximately recovery date of April 10, 2016, later revised to April 17, 2016; (b) the recovery date would occur after Complainant's FMLA leave would expire; and that (c) Complainant was entitled to NJFLA leave as a result of the child's birth. Guided by the Court's opinion in D'Alia, supra, the Director finds that the Complainant's request for disability benefits and maternity leave were enough to alert Respondent of its obligations under the NJFLA, even though Complainant did not expressly reference the NJFLA.

The Director rejects Respondent's argument that Complainant left it completely in the dark as to her intention to return. Complainant's claim that she made multiple attempts to speak with the HR manager about returning to work appear to be supported by Payroll Administrator Frazier and HR Coordinator Rodriguez. The investigation found that she stopped by the office, called the office, and left messages for the HR manager, who never returned her calls. And although the HR manager has no recollection of ever seeing the medical certificates, it is undisputed that they were submitted to Respondent where, according to the Payroll Administrator, they were stored in the HR manager's office.[5]

Accordingly, at this preliminary stage in the administrative process, the Director finds it reasonable to conclude that Respondent knew or should have known that this

[5] It appears that there may have also been some confusion among Respondent's HR personnel as to the parameters of the relevant family leave entitlements, such as the number of weeks available under the NJFLA.

was potentially an NJFLA-qualifying event (particularly in light of Complainant's known pregnancy, Respondent's awareness that Complainant's FMLA time had expired and that she had NJFLA time available). The Director concludes that there is sufficient evidence to support a reasonable suspicion that Respondent's decision to fire Complainant rather than extend NJFLA entitlements violated her rights under the statute.

b. The LAD

The LAD makes it unlawful for an employer to fire, refuse to hire, or otherwise discriminate against someone in the "terms, conditions or privileges of employment" based on gender or pregnancy. N.J.S.A. 10:5-12(a). The LAD also states that employers must provide reasonable accommodations to women "affected by pregnancy," which is defined to include pregnancy, childbirth, medical conditions related to pregnancy or childbirth, and "recovery from childbirth." The statute states:

> [A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace, such as . . . assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer. The employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation.
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> [N.J.S.A. 10:5-12(s).]

Here, the Director finds that Complainant was an employee "affected by pregnancy" for purposes of the LAD and was therefore entitled to a reasonable accommodation. Respondent was on notice that Complainant would be recovering from a caesarean section delivery until April 17, 2016. See D. White, D.O., Medical Certificate, supra at 2. There was no allegation or evidence that Complainant's need for four additional weeks of NJFLA leave would have caused an "undue disruption of the employer's operations." DePalma, supra, 350 N.J. Super. at 212. Indeed, Mesiano told DCR during the course of the investigation that she would have readily granted the leave if it had been requested.

The LAD also makes it unlawful for an employer to fire, refuse to hire, or otherwise discriminate against someone in the "terms, conditions or privileges of

employment" based on disability. N.J.S.A. 10:5-12(a). Our courts have "uniformly held that the [LAD] . . . requires an employer to reasonably accommodate an employee's disability." Potente v. County of Hudson, 187 N.J. 103, 110 (2006) (quoting Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 396 (App. Div. 2002)).

The Director finds that while recovering from caesarean section surgery, Complainant was a person with a disability for purposes of the LAD and was therefore entitled to a reasonable accommodation. The totality of the circumstances, including her submission of medical certificates showing her expected recovery dates, repeated visits to the office, repeated attempts to reach Mesiano, and the nature of her leave, was sufficient to trigger Respondent's legal responsibility to engage in the interactive process. As noted above, there was no allegation or evidence that allowing Complainant to return to work on April 17, 2016 (i.e., the date her doctor certified as being her "actual recovery date") would have caused an undue disruption of Respondent's operations.

Despite the OBGYN's certification that Complainant would be able to return to work on April 17, 2016, Respondent decided to fire Complainant while she was recovering from childbirth-related surgery without engaging in any communication or interactive process to determine whether it could provide a reasonable accommodation for her pregnancy related condition and/or disability. Accordingly, the Director finds—for purposes of this preliminary disposition only—that that the weight of the evidence supports a reasonable ground of suspicion that Respondent violated the LAD. In view of the above, the Director hereby amends the verified complaint to allege that in addition to the NJFLA claim, the underlying conduct violates the LAD under theories of gender, pregnancy, and disability discrimination.

Conclusion

Based on the investigation, the Director is satisfied that at this threshold stage of the process, that there is probable cause to support the allegations that Respondent violated the NJFLA and LAD and that this 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: JAN 27, 2017

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS