STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EG14HB-65777

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| R.B., | ) | |
| | ) | Administrative Action |
| Complainant, | ) | |
| | ) | **FINDING OF PROBABLE CAUSE** |
| v. | ) | |
| | ) | |
| P. Judge & Sons, Inc., | ) | |
| | ) | |
| Respondent. | ) | |

On October 26, 2015, Essex County resident R.B. (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, P. Judge & Sons, Inc. (Respondent), discriminated against him because of his disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

## Overview

Respondent is a trucking company subject to U.S. Department of Transportation (DOT) regulations, with locations in Port Newark, New Jersey, Chicago, Illinois, and Savannah, Georgia.

On or around January 6, 2014, it hired Complainant to work as a yard switcher at its Port Newark location. Complainant was responsible for performing various tasks that included, but were not limited to, conducting inspections of vehicles, maintaining the yard, moving loads, emptying containers and trailers from the yard to the loading docks, and regularly entering and exiting trucks and trailers. Complainant reported to Respondent's Manager Jeff Catania. Respondent's Vice President is Patrick Judge.

During the course of his employment with Respondent, Complainant was diagnosed with sleep apnea and placed on medical leave. Complainant was treated for his condition and obtained a medical examiner's certificate (MEC)[1] clearing him to return to work as required by DOT regulations. Respondent refused to reinstate him. Complainant alleges that Respondent's refusal to let him return to work amounts to disability discrimination. He also alleges that Respondent failed to engage him in the interactive process.

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[1] A medical examiner's certificate (MEC) is a form completed by a medical examiner that establishes and confirms that the examined individual is physically qualified to drive a commercial motor vehicle for a predetermined time period.

Respondent denied the allegations of discrimination in their entirety. It argues that it had a legitimate, non-discriminatory business reason for not permitting him to return to work. Specifically, it argues that Complainant's MEC was "insufficient" because it was valid for only one month, rather than the three-month or one-year MECs that Respondents claims are commonplace in its industry. Therefore, Respondent alleged that allowing Complainant to return to work under such a restriction created a potential safety hazard. After being denied reinstatement, Complainant obtained a three-month MEC, but Respondent again refused to reinstate him, citing the same safety concerns it did in denying his initial request.

Complainant alleged that a similarly-situated employee, J.A., provided Respondent with a similar MEC but was allowed to return to work.

## Factual Background

Concentra Medical Center in Newark, New Jersey (Concentra) serves as Respondent's medical services provider. On or about December 23, 2014, and pursuant to DOT regulation, Complainant underwent a physical examination at Concentra to obtain his DOT medical recertification and be cleared to continue working. During the exam, he was instructed to participate in a medical study to determine whether he had sleep apnea. Following this exam, Concentra's medical examiner issued Complainant an MEC valid until March 23, 2015 (three months).

On March 23, 2015, upon the expiration of his three-month MEC, Complainant returned to Concentra for another physical exam. This time, the medical examiner diagnosed him with sleep apnea and did not renew his MEC.

Between March 23, 2015 and August 11, 2015, Complainant sought treatment for sleep apnea and participated in monthly medical evaluations and sleep studies that were administered by his personal doctor. He was placed on a medical leave of absence during that time.

On August 11, 2015, Respondent authorized Complainant to undergo a physical exam at Concentra to determine whether he could return to work. The medical examiner determined that Complainant could return to work but required him to continue receiving treatment for his sleep apnea. The medical examiner issued Complainant an MEC valid for a month, after which Complainant would be required to pass another physical exam in order to receive an MEC and continue working.

When Complainant presented the MEC to Respondent, Manager Jeff Catania refused to reinstate him. Catania told Complainant that he could not return to work with an MEC that was only valid for one month, and that Complainant could not return to work until he was no longer receiving treatment for sleep apnea.

On or about September 14, 2015, Complainant underwent another physical exam at Concentra. The medical examiner again issued Complainant an MEC valid for a month.

Complainant faxed and hand-delivered a copy of the September 14, 2015 MEC to Respondent. However, Catania told Complainant that he could not return to work until he obtained an MEC that would be valid for at least three months.

On or about September 24, 2015, Complainant made an appointment for another physical exam at Concentra. This time, the medical examiner issued Complainant an MEC valid for three months (i.e., until December 24, 2015). Complainant faxed the three-month MEC to Respondent.

Catania told Complainant that he could not return to work because he was still undergoing treatment for his disability and because Respondent reviewed the sleep statistics from his sleep evaluations and determined that his "numbers" were not yet "up to par." Complainant has not worked for Respondent since.

DCR interviewed Catania and Vice President Judge. Judge and Catania stated that one-month and three-month MECs were "an issue" for Respondent. Catania stated, "We had a little issue with [Complainant] because he was given a one-month [MEC]. I had to get the safety director, Robert St. John, involved. I explained to [Judge and St. John] that [Complainant] had come back with a one-month certificate . . . This is the first time I've seen a one-month [MEC]."

Catania stated, "Usually with the three-month [MEC] they're on a three-month [MEC] because they have a medical issue that they are being treated for. Usually they'll go back after the three months and then be recertified for another year." Catania stated that when he received Complainant's three-month MEC, he met with Judge and Safety Director Robert St. John and they decided that they "weren't going to put [Complainant] back on the schedule because of his medical issue." Catania stated, "I told [Complainant] that his sleep apnea test wasn't up to par and it wasn't complete. [Concentra] said he still has to be treated for it. So we didn't know if he was going to be out another four to six months. . . I told [Complainant] he needs to get his numbers up on the [medical] test." Elsewhere, Catania reiterated:

> We didn't know if he would go back after three months and then be out of work for another six months. [We] couldn't take that chance. I explained to [Complainant] that we couldn't keep sending him to the medical place every month or three months. And also, what if he goes back in three months and they don't give him a [MEC]?

Judge stated, "The three-month [MEC] is also an issue . . . [A] guy can go to work, three months goes by then he's off, has to go to the doctor and we're getting charged by Concentra for the medical treatment. We pay for it. . . . In the past it would be, you go get your physical and you would pass for two years . . . Nowadays it's

common to see a three-month [MEC]." When asked why Respondent did not permit Complainant to return to work despite being cleared to do so by a medical professional, Judge stated, "A normal driver, they go to the doctor and they get a two-year [MEC]. Now, this day and age, we're getting these three-month [MECs] and they're putting this medical thing on us . . . Robert St. John read [Complainant's] long form [medical evaluation report] and it said that he had not completed his sleep apnea test. And I know that [St. John] had sleep apnea and that's required to wear a machine and all kinds of stuff at night time."

Safety Director St. John told DCR that when Complainant attempted to return to work in August 2015 with the one-month MEC, it was insufficient because the report provided by the medical examiner showed Complainant was "noncompliant" with his sleep study. When asked to be more specific as to what constituted "non-compliance," St. John stated that Complainant was still undergoing treatment for his disability. He stated that this was not acceptable because it means that Complainant "is still dealing with symptoms of sleep apnea and putting him back to work would be a huge safety risk."

Judge and Catania told DCR that Complainant was not terminated, adding that Respondent never heard from Complainant after it rejected his September 24, 2015 MEC. However, St. John told DCR that to his knowledge, Respondent had decided to terminate Complainant's employment before Complainant had provided Respondent with the September 24, 2015 MEC. When asked why Complainant's employment was terminated, St. John stated, "We're under no obligation to employ individuals who are non-compliant with their health."

When asked if Respondent attempted to seek permission from Complainant to speak to either his personal doctor or Concentra's doctors regarding its concerns about Complainant's fitness for duty, Judge replied, "Again, see you're putting it on us. What do I know about a doctor? The doctor isn't going to tell me about you. We don't have the people for that or the time for that. We have customers that expect things to happen." Judge noted, "What are we supposed to say to our customers? They are depending on these people to work so that we make our deliveries on time."

In response to the same question, St. John replied, "Nobody in the industry does that." St. John stated that Respondent interpreted the long form medical evaluation report to mean that Complainant was not fit to return to work because he was still receiving treatment; however, he acknowledged that Respondent did not follow up with the medical professional to confirm that assertion or to gain additional information on Complainant's condition.

During the investigation, DCR asked Respondent how it came to the conclusion that Complainant was not fit for duty despite being cleared to return to work. Catania stated, "Robert [St. John] used to have sleep apnea so we conferred with him about it." Judge stated, "Like I said, this is what I get all day, the emails and articles about [Complainant's disability] and how bad it is to drivers. Times fluctuate in the industry. . . .

All of those articles that I read about sleep apnea say that you need the air and you need your hours to be regulated." Judge, Catania, and St. John confirmed that they had no prior experience working in the medical field. Judge added, "I go by what I read."

Judge told DCR that he does not believe that a one-month MEC is a "complete certification" and that Respondent has never had any employees working on a one-month MEC. However, in a separate interview, St. John told DCR that there have been employees who returned to work on a one-month MEC.

To support St. John's assertion that Complainant's return to work would have presented a safety hazard because of the likelihood of Complainant falling asleep while driving a vehicle because of his disability, Respondent provided DCR with several articles and letters from various publications. For example, a letter dated September 3, 2008 from Dr. Jon Freudman, M.D., to the DOT states, "Consequences of OSA [obstructive sleep apnea] include daytime fatigue severe enough to cause falling asleep during activities such as driving and operating equipment." Another article states, "Truckers who fully complied with OSA treatment had a crash rate no different than those who did not have the condition." Respondent provided no evidence that Complainant was not complying with his treatment plan, only that it was not satisfied with the results of the treatment.

The investigation found no DOT regulation or written company policy—and none was produced by Respondent—to support the assertion that employees cannot return to work unless he/she carries a MEC that is valid for more than three months. The DOT's website states, "A DOT physical exam is valid for up to 24 months. The medical examiner may also issue a medical examiner's certificate for less than 24 months when it is desirable to monitor a condition, such as high blood pressure." See https://www.fmcsa.dot.gov/medical/driver-medical-requirements/dot-medical-exam-and-commercial-motor-vehicle-certification (last accessed Feb. 7, 2017).[2]

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[2] DOT's "Proposed Recommendations on Obstructive Sleep Apnea" section 3 Conditional Certification states in relevant part:

> Drivers may be granted conditional certification if any of the following conditions are met:
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> 1. The driver has an AHI of greater than 20 until compliant with PAP; or
> 2. The driver has undergone surgery and is pending post-op findings per Recommendations VI-VIII; *or*
> 3. The driver has a Body Mass Index (BMI) of greater than or equal to 35 kg/m2 pending a sleep study.
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> * * *
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> Conditional certification should include the following elements:
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> * * *
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> 2. Within 60 days, if a driver being treated with OSA is compliant with treatment (per Recommendations I.D. and V-IX), the driver may receive an additional 90-day conditional certification.

The investigation corroborated Complainant's claim that his comparator J.A., was allowed to return to work on a three-month MEC after he had eye surgery to treat glaucoma. Judge stated, "We sat down and told [J.A.] that a three month was a problem. He went to his own doctor and she either called or wrote a letter." Catania stated that J.A.'s doctor "sent paperwork that he was being treated and he went back after that three month and now he has a year [MEC]."

DCR asked Respondent why it allowed J.A. to return on a three-month MEC yet rejected Complainant's September 24, 2015 three-month MEC. Catania responded, "[Complainant] had a lot of medical issues. High blood pressure, he wasn't sleeping." Judge followed by stating, "We talked and said if [J.A.] comes back and gives us a three-month [MEC], we would ask his doctor if the procedure worked or didn't work."

## 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 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.

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate against an employee in the terms, conditions, or privileges of employment based on his or her actual or perceived disability. N.J.S.A. 10:5-12(a). Moreover, an 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 making personnel decisions, an employer cannot simply succumb to generalized suspicions and unsubstantiated fears about a condition's possible effects. Cf. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. Super. 363, 383 (1988); Greenwood v. State Police Train. Ctr., 127 N.J. 500 (1992).

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3. After 90 days, if the driver is still compliant with treatment, the driver may be certified for no more than 1 year. Future certification should be dependent on continued compliance.

In this case, Complainant was diagnosed during the first year of his employment as having sleep apnea. Complainant received treatment and was cleared by Respondent's medical services provider to return to work with the understanding that he return after a month to be re-evaluated. After being told twice that a one-month MEC was unacceptable, Complainant was re-examined by Respondent's medical services provider and obtained a three-month MEC.

Respondent determined that Complainant still was not fit to return to work. In so doing, Respondent appears to have ignored the conclusions reached by its medical professionals who performed in-person evaluations before making their assessments. Although DCR fully appreciates Respondent's concern that an employee operating a motor vehicle while afflicted with sleep apnea may lead to an accident, such concern does not allow Respondent to substitute its judgment for that of the unanimous consensus of medical professionals who examined the employee. Here, the only medical evidence before Respondent was that Complainant was cleared to return to work. If Respondent had questions or concerns, it could have engaged Complainant in the interactive process in an effort to obtain additional information about any suspected limitations, or contacted its own medical professionals who performed Complainant's physical and cleared him to return to work three times, or contacted Complainant's personal doctor.

No matter how well-intentioned, managers without medical training cannot subject an employee to an adverse employment consequence based simply on assumptions derived from internet articles or anecdotal experiences of another employee or family member who had the same condition.

That investigation found nothing in the DOT regulations or Respondent's own internal policies to support Respondent's assertion that it could not allow Complainant to return to work on a one- or three-month MEC.[3] Indeed, that assertion appears to be contradicted by Respondent's treatment of J.A. and St. John's statement that other employees have returned to work on a one-month MEC. But even assuming for the moment that Respondent had such an internal policy in place, it would be required to 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).

To determine what accommodation is necessary, the employer must "initiate an informal interactive process" with the employee to identify potential reasonable accommodations that could be adopted to overcome the limitations resulting from the disability. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). Once an employee with a disability requests 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)

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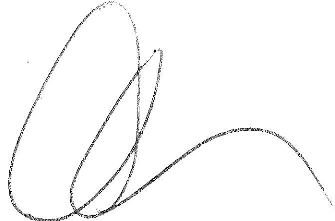
[3] DCR takes no position as to Respondent's assertion that a yard switcher is required by DOC regulations to obtain an MEC.

the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability, (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. Id. 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).

An employee is not required to formally request an accommodation to trigger the employer's legal obligations. See 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"). In this case, if Respondent believed that Complainant had a disability, it should have initiated an informal interactive process to see if there was a way to reasonably accommodate him.

Based on the above, the Director finds—for purposes of this disposition only—that Respondent did not allow Complainant to return to work based on an actual or perceived disability, did not engage in an interactive process to the extent that it believed him to have a disability, and has not met its burden of showing that allowing Complainant to return to work would have amounted to an undue hardship. Thus, at this preliminary stage of the process, the Director finds that the circumstances of this case 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.



DATED: 2-7-17

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS