STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EA02GB-67259

Rosella S. Burress,	)	
	)	
Complainant,	)	
	)	**Administrative Action**
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
FantaSea Resorts,	)	
	)	
Respondent.	)	

On January 14, 2019, Rosella S. Burress (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that FantaSea Resorts (Respondent) discriminated against her based on pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent, located in Atlantic City, is a provider of vacation ownership products and services. On or around August 7, 2017, Respondent hired Complainant as an Administrative Assistant. Complainant was responsible for entering all bookings into its system, filing booking sheets, answering the phone for the main line incoming calls, assisting in the completion of welcome packets, and other related tasks. Respondent discharged Complainant on July 18, 2018.

In the verified complaint, Complainant alleged that she was treated differently because of her pregnancy and discharged because of her pregnancy. Complainant said she was not allowed to change her schedule, whereas non-pregnant employees were able to change theirs. She stated that Respondent penalized her for properly using flex time[1] by giving her points for attendance, but did not penalize non-pregnant employees. She also stated that Director of Marketing Lisa Matthieu-Barbato gave her permission to take a leave of absence for about five weeks starting the beginning of July 2018; her initial due date was July 1, 2018. Complainant delivered her baby earlier than anticipated on June 5, 2018. On the same day, Complainant said that Director of Human Resources Tracy Good called and, after Complainant informed her that she was delivering her baby, told her that she could only have two weeks of leave. Complainant returned to work on

[1] According to Respondent's Associate Handbook, "flex time is offered as a paid time off benefit to be used if the employee or family member is ill, to observe a religious holiday or to take care of personal business. Eligible full time associates accrue flex day benefits at the rate of 1 day (8 hours) per month beginning the first of the month following ninety (90) days of continuous employment to a maximum of six (6) days in the first calendar year of employment. Thereafter, six (6) flex days are granted at the beginning of each calendar year." Human Resources Director Tracy Good said that all employees get eight hours every month for a max of 48 hours.

June 21, 2018. Complainant stated that Matthieu-Barbato discharged her for attendance points on July 18, 2018.

In its response to the complaint, Respondent denied that Complainant's pregnancy played any part in its decision and asserted that it discharged Complainant over poor attendance and lateness when she accumulated eight and a half points, exceeding her allotted amount of points.[2] It asserted that Complainant was out on medical leave from June 5, 2018 to June 21, 2018 and Respondent did not assess any points during that time.

a. Pregnancy: Accommodation Request

Respondent's position statement stated that Complainant was ineligible for leave under the federal Family Medical Leave Act (FMLA) because she had been employed for less than one year. It also stated that when Good told Complainant she was not eligible and asked how much time Complainant needed, Complainant responded one or two weeks. Good then asked Complainant how she would be able to come back so quickly. Complainant responded saying it was her eighth child and that it would not be a problem. Good approved her for a two-week unpaid personal leave.[3]

During DCR's Fact Finding Conference, Matthieu-Barbato told DCR that Respondent learned about Complainant's pregnancy in or around April 2018. In a subsequent interview with DCR, Complainant stated that all employees, including Matthieu-Barbato, knew of her pregnancy as early as December 2017. Complainant stated that in or around March 2018, she initially requested to be off for about five weeks from her anticipated due date of July 1, 2018 until around the first week of August 2018. Complainant said that Matthieu-Barbato verbally granted her request.

Matthieu-Barbato stated that Complainant told her she was due sometime in mid- or late July 2018. She claimed Complainant said her due date was after July 20, 2018 and the reason she remembered that date was because it was around her birthday. Matthieu-Barbato told DCR she asked Complainant how long she needed off and Complainant said, "Just a couple of weeks." Matthieu-Barbato was surprised and questioned her about needing a couple of weeks if she was having a baby. Matthieu-Barbato said Complainant told her she was a "pro" at this and that she already had seven or eight children. Matthieu-Barbato stated that she might have written down the second week of August for Complainant's return and asked Complainant if she would be back before Labor Day,[4] since that is Respondent's busy season.

Complainant disagreed. Complainant stated she was due on July 1, 2018 and there was no way she would have asked for her leave to start at the end of July. Complainant said she might

[2] Per Respondent's Handbook and according to Good, eight is the maximum number of points an employee is allowed to amass before being terminated.

[3] Respondent's Associate Handbook describes its personal leave of absence policy as a time off without pay for up to 10 consecutive workdays in a 12-month period, and this leave may be taken for medical, family, maternity, education and other personal reasons not covered by paid time off or other types of leave.

[4] Labor Day in 2018 was Monday, September 3, 2018.

have asked for a few weeks but she was referring to a period from July 1, 2018 to the first week of August 2018, not one or two weeks.

On June 5, 2018, Matthieu-Barbato was out on vacation and Good called Complainant while Complainant was in labor. Complainant stated that Good just thought she did not show up to work and appeared to not know she was pregnant. Complainant said she told Good about Matthieu-Barbato's verbal approval of about five weeks' maternity leave. At this time, Good told her that she could not take more than two weeks off because she had not been there long enough to take FMLA, and would not be eligible for FMLA until August 2018. Good told her that she had to be employed for one year to take anything beyond two weeks.

Complainant stated that as soon as the two weeks were up, Good called her, on a Tuesday, to inform her that she had to return the following day or she was going to be terminated for job abandonment. Complainant asked Good if she could return on that Thursday and Good agreed.

Good stated to DCR that Complainant was not eligible for FMLA leave because her hire date was August 7, 2017. Good recalled that when she asked Complainant how many weeks she needed off post-birth, Complainant told her a couple of weeks. Good claimed she questioned Complainant how she would be able to come back so quickly and Complainant said this would be her eighth child, not her first. Good then told her she was not eligible for FMLA leave and Respondent's policy offered two weeks for personal leave.

Good asserted that if the request fell under Respondent's policy and if the employee had been there for a year, they would be granted the leave. When asked if Respondent could have granted a longer maternity leave, Good said that it was not Respondent's policy, as the policy required an employee to work for one year before being eligible for leave.

During DCR's Fact Finding Conference, Good and Matthieu-Barbato told DCR that there were two administrative assistants at the time, Complainant and [redacted]. They said while Complainant was out, multiple people shared Complainant's duties, including [redacted], Matthieu-Barbato, and [redacted]. They did not hire any new employees in Complainant's absence from June 5, 2018 to June 21, 2018.

Matthieu-Barbato said it would have been almost impossible to have other employees cover Complainant's duties for five weeks. She said that 90 percent of Complainant's job was entering bookings into its system. She explained that the referral department did not enter their own bookings. Matthieu-Barbato also said it was the middle of summer and it received 60 to 75 bookings per week. She stated that Complainant, as her assistant, also did other jobs such as copying and paperwork, which is why Complainant had been hired. She said other employees could help with the administrative duties but this was not their primary job.

Complainant disagreed with Matthieu-Barbato and said that [redacted] was Matthieu-Barbato's assistant. Complainant also disagreed with the assertion that it would have been impossible for others to cover her duties in her absence. Complainant explained that even during the busy summer months with 60 to 75 bookings a week, which translated to 12 bookings a day, she was able to do all 12 bookings in just one hour out of her eight-hour shift. Complainant explained that because

she was able to finish her booking inputs so quickly, she was assigned to other tasks such as bookings/sales. Complainant said her duties consisted of 40 percent entering bookings and 60 percent of bookings/sales. Matthieu-Barbato disagreed.

Complainant told DCR that Respondent allowed non-pregnant booker [redacted] to go on an extended leave of absence, despite not having enough time earned. Complainant said Matthieu-Barbato granted [redacted] an extended three or four-week vacation in or around November 2017. Matthieu-Barbato denied granting [redacted] an extended vacation and stated that [redacted] was terminated and rehired. DCR reviewed supporting documentation showing [redacted] was terminated from payroll on September 8, 2017 and added back on October 9, 2017.

b. Discharge and Differential Treatment Because of Pregnancy: Not Allowed to Change Schedules and Penalized for Using Flex Time Leading to Termination.

Complainant told DCR that she accumulated eight and a half points for using flex time, while other employees were able to change their work schedules and not accumulate points. Complainant said that either the majority of employees or everyone else in the office could change their work schedule if they needed a day off during their workweek, whether it was a temporary or permanent change. If someone needed a day off during the week, they could come in on a weekend day or if they needed a few hours off, they could make it up. However, Complainant stated she was forced to use flex time and consequently accumulated attendance points. Complainant alleged that [redacted] were allowed to change their work schedules without using flex time or accumulating attendance points.

Complainant explained that while other employees were hired as bookers, they all performed the same duties. She said the bookers knew how to perform Complainant's duties and Complainant also worked as a booker herself. Complainant said she was never busy as an administrative assistant and was always able to do bookings. Complainant agreed that [redacted] was the other employee with the administrative staff title but Complainant considered herself a booker and administrative staff because she did both job functions. She alleged Respondent could have allowed her to switch some days to weekends so she could make up the time needed during her work schedule for doctor's appointments related to her pregnancy and other reasons.

Respondent's Position Statement alleged that Complainant asked to change her schedule to work during the weekends, but Complainant was not hired for that and Respondent could not accommodate her based on its business demands. Complainant said she only requested to change a weekday for a weekend on a few occasions but denied asking to work weekends on a permanent basis.

Matthieu-Barbato said the employees Complainant compared herself to were in different positions requiring different duties and as such were not true comparators. Matthieu-Barbato said these employees required a different schedule. In addition, if she needed them on demand and the workflow required it, she changed the employees' schedules. For example, if their regular day off was a Tuesday or Wednesday and she needed them on another day, they had to switch that day due to business demand. Complainant disagreed and said that the schedule changes were done per

employees' requests, not business demands or Matthieu-Barbato's needs. DCR attempted to interview Complainant's witnesses, but they were either unresponsive or refused to participate in DCR's investigation.

Good and Matthieu-Barbato said if an employee provided advance notice and requested a day off, that was considered flex time if it was requested properly. Matthieu-Barbato said that if someone gave 48-hours notice in advance, they could use flex time and Respondent would not issue points. Good said Respondent assessed points only when an employee called out for the day without giving notice. Good also said that flex time could be used if an employee was sick or if there was a family emergency, but it was still a call out and considered an absence. She explained that even if the employee did not give enough notice, a manager can still approve the flex time just so the employee could get paid, but it would not exempt the employee from accruing points.

Respondent's policy on use and scheduling of flex time states that "Associates must schedule flex days in advance with their supervisor, except if a flex day is being used for illness or family emergency. Associates can only use consecutive flex days when they are approved in advance. In the event of a medical emergency that necessitates the use of consecutive flex days, the associate must submit medical documentation confirming the illness upon their return to work. Failure to properly schedule flex days at least 72 hours in advance will be considered an occurrence of absence." Per Respondent's Attendance Policy, "Ninety (90) days without an occurrence (absence, tardiness, etc.) will result in the removal of one (1) occurrence from the total occurrences." According to Respondent's Associate Handbook, the following absences were not considered lost time provided proper notice was given: jury duty, military leave, leave of absence, layoff, pre-approved absence, vacation, work-related injury, bereavement leave, weather, holiday/personal day, disciplinary time off and early out, and pre-approved by management.

Complainant said that because of her pregnancy she had to have regularly scheduled doctors' appointments - weekly, every two weeks, or monthly - and accordingly her points did not drop.

Complainant said that when she was late or called out, it was often due to a pregnancy related doctor's appointment and she gave the employer at least a few days' notice. However, at the end of her employment, Complainant said she stopped providing doctor's notes to her employer because she was still being issued attendance points even when she provided notes from her doctor. She did not recall exactly when she stopped providing the notes.

Complainant generally worked from Monday through Friday from 1pm to 9pm. Complainant said that Matthieu-Barbato told her she needed to be more conscious of her schedule and that she should have arranged for the doctors' appointments before work. Complainant said she tried but certain pregnancy related doctors could not accommodate her schedule.

DCR requested a copy of all medical notes from both parties. Respondent provided one copy of Complainant's Work Release Form from a medical facility stating Complainant had been seen and treated in its emergency department and was able to return to work on March 3, 2018. Respondent received this note on March 5, 2018 but the note did not indicate when Complainant was seen at the medical facility. Complainant said she might have requested to attend an

appointment on February 27, 2018 and the next day had to call out for emergency pregnancy related medical tests.

Matthieu-Barbato said Complainant did not make any request in advance for anything nor did Complainant provide doctors' notes for any of the points she accrued. Matthieu-Barbato told DCR that besides the documented absences and lateness occurrences that led to her discharge, Complainant also had other absences. DCR reviewed Complainant's 90-day performance evaluation dated March 6, 2018[5], which states, "needs to work on working her schedule regardless of personal issues." Complainant stated that some of the write-ups she received mentioned her doctors' appointments. Two out of the five attendance write-ups DCR reviewed indicated, "Rosella needs to be more conscious of her schedule. If there are dr. appointments or other personal matters that she needs to take care of outside of her work schedule." These notes were dated on March 5, 2018 and March 8, 2018 and were for call outs on February 28, 2018 and March 7, 2018.

Complainant told DCR that Respondent issued the following attendance points and, based on her recollection, these were the reasons why she was absent or late:

- 12/18/2017| late ½ point: Complainant said she might have had a doctor's appointment related to her pregnancy.
- 12/27/2017| late ½ point: Complainant said she might have had a doctor's appointment related to her pregnancy.
- 2/1/2018| late ½ point: Complainant said she might have had a doctor's appointment related to her pregnancy.
- 2/12/2018| callout 1 point: Complainant said she called out on this day but she was not sure about the reason.
- 2/27/2018| late ½ point: Complainant said she was not completely sure but it might have been a doctor's appointment.
- 2/28/2018| callout without proper notice 1 & ½ points: Complainant said it was an emergency pregnancy related doctor's appointment because there was something wrong with her medical test results. She said she received an additional half point because she called instead of sending a text message to the manager. She did not have her cellphone with her to send a text message.
- 3/7/18| callout 1 point: Complainant said she was not sure about this date.
- 4/2/18| callout 1 point: Complainant said she was not sure about this date.
- 7/2/18| callout 1point: Complainant said the call out was not related to pregnancy. She said she requested to work on a Saturday instead, but Respondent denied it.
- 7/13/18| late ½ point: Complainant was late due to car issues.
- 7/16/18| late ½ point: Complainant was late. She stated that [redacted] approved a late start of 2pm because Complainant had to take public transportation to come to work.

[5] It is unclear why a 90-day performance evaluation was dated on March 6, 2018 when Complainant began her employment on August 7, 2017.

Matthieu-Barbato further said that [redacted], did not have authority to approve changes in schedules.

According to Complainant, [redacted] had been late often and had called out but did not receive any points. Complainant said [redacted] was late once a week or once every two weeks and might have called out six times but she could not provide specific dates. Matthieu-Barbato denied [redacted] being late or having any attendance issues or write-ups related to attendance. Matthieu-Barbato told DCR that [redacted] worked from 1p.m. to 9 p.m., and at times stayed until 10 p.m. to finish her work. DCR subpoenaed Respondent for [redacted] payroll records, from August 2017 until June 2018, which showed [redacted] was late about 145 times during this period. [redacted] records showed she only stayed past 9 p.m. on five occasions. [redacted] records also showed she had nine absences during this timeframe but records do not show if they were scheduled within at least 72-hours' notice as per Respondent's policy to not warrant attendance points. In addition, DCR's review of [redacted] disciplinary records confirmed that Respondent did not issue any absence or lateness points for [redacted] but it issued two warnings in 2019, a verbal and a written one, for working past 10 p.m. and 11p.m.

In response to the evidence provided by Respondent, Complainant said she also believed her pregnancy was a factor in her discharge, because starting August 7, 2018 she would have been qualified to take medical leave for bonding.

ANALYSIS

a. Finding of Probable Cause: Differential Treatment and Discharge.

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe" that the LAD was violated. Ibid.; Sprague v. Glassboro State College, 161 N.J. Super. 218, 224-25 (App. Div. 1978). If DCR finds there is no probable cause to credit the allegations of a complaint, that determination is a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.S.A. 10:5-21; N.J.A.C. 13:4-10.2(e).

However, if the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. See N.J.S.A. 10:5-16; N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which 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 the grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. 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 in the "terms, conditions or privileges of employment" based on pregnancy. N.J.S.A. 10:5-12(a).

Here, Complainant's allegations of pregnancy discrimination, together with her assertion that her employer was aware of her pregnancy as early as December 2017, are supported by two attendance write-ups where Matthieu-Barbato memorializes that "Rosella needs to be more conscious of her schedule. If there are dr. appointments or other personal matters that she needs to take care of outside of her work schedule." In addition, a March 3, 2018 medical note supports Complainant's assertion that she had to attend an emergency medical visit but was still assessed one and a half points on February 28, 2018, showing that Respondent knew of Complainant's doctor appointments and knew or should have known they were pregnancy related.

Additionally, Complainant's comparator, [redacted] was frequently late and contrary to Matthieu-Barbato's assertion that [redacted] made up her time and stayed past 9 p.m., the evidence showed that she only stayed past 9 p.m. on five occasions during the time in question compared to the 145 times she arrived late. Moreover, later in 2019, Respondent disciplined [redacted] for staying beyond her scheduled time but did not issue [redacted] any attendance/lateness points nor did they provide an explanation of why [redacted] was allowed to stay past her scheduled time to make up for work whereas Complainant was assessed points every time she was late leading to her termination.

b. Finding of Probable Cause: Failure to Accommodate based on Pregnancy and Disability

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate in the "terms, conditions or privileges of employment" based on pregnancy and disability. N.J.S.A. 10:5-12(a). It also requires employers to 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 . . . … modified work schedules … 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.

N.J.S.A. 10:5-12(s).

Additionally, 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 Complainant was an employee "affected by pregnancy" for purposes of the LAD and was therefore entitled to a reasonable accommodation unless granting such an accommodation would have been an undue burden on Respondent's operations.

Respondent was on notice in April 2018 that Complainant would be recovering from giving birth in July 2018, although she ultimately delivered on June 5, 2018. There was not sufficient evidence produced that Complainant's need for five total weeks of medical leave would have caused an "undue disruption of the employer's operations." Respondent only granted Complainant 12 business days as an accommodation of medical leave from June 5, 2018 to June 21, 2018. While Matthieu-Barbato asserted it would have been impossible for others to perform her job for an extended leave because it was not their primary job, there was no dispute that others knew how to do it and were performing Complainant's job in her absence. Moreover, Matthieu-Barbato did not dispute Complainant's assertion that even in the busy months, her administrative duties were completed in a short amount of time and that is why she was also assigned additional duties in booking/sales.

Here, Complainant's allegations of pregnancy discrimination, together with her assertion that Matthieu-Barbato verbally granted her four to five weeks from her initial delivery date of July 1, 2018, are supported by both parties' assertion that Matthieu-Barbato and Complainant spoke in April 2018 and decided on a return date in early August 2018. Although the parties disagreed on Complainant's verbal mention of her initial delivery date, there is no indication that Complainant would have provided Matthieu-Barbato with the wrong initial delivery date.

In this case, evidence showed that Respondent was aware of Complainant's pregnancy and Complainant was forced to accept the two weeks Good offered after she informed her that is all she was entitled to because she was not eligible for FMLA.

Respondent alleges that it did not discriminate against Complainant or fail to accommodate her pregnancy leave because she was not entitled to FMLA. Per Good's own assertion, had Complainant been an employee for one full year, Respondent would have granted a longer maternity leave in accordance with its policy[6]. However, even for employees who are not entitled to FMLA leave, a temporary leave of absence from work may be a reasonable accommodation for a disability, as long as it does not impose an undue hardship on Respondent's operations. See N.J.A.C. 13:13-2.5(b)(1)(ii); see also Santiago v. Cnty. of Passaic, 2009 N.J. Super. Unpub. LEXIS 441, at *13 (App. Div. 2009) (observing that New Jersey courts "have indicated that a leave of absence may constitute a reasonable accommodation under the [NJ]LAD.").

The Director finds that while recovering from childbirth, 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 the nature of her leave, was sufficient to trigger Respondent's legal responsibility to engage in the interactive process. Telling Complainant, she was only entitled to two weeks of leave and that is all Respondent could grant her does not constitute an interactive process. At his juncture, Respondent has not shown persuasive evidence that allowing Complainant additional time, over two weeks, would have caused an undue disruption of Respondent's operations.[7]

[6] At the time of delivery, Complainant was two months away from being entitled to FMLA leave.

[7] Both Matthiew-Barbato and Good expressed to DCR that they were surprised that Complainant would only need two weeks to recover from child birth while at the same time Respondent does not even suggest that it offered Complainant any more time than two weeks of leave taken.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of pregnancy and disability discrimination.

Date: April 7, 2020

Rachel Wainer Apter, Director
NJ Division on Civil Rights