Maine Human Rights Commission
51 State House Station | Augusta ME 04333-0051

Physical location: 19 Union Street, Augusta ME 04330
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: 1-888-557-6690
www.maine.gov/mhrc

Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

INVESTIGATOR'S REPORT
E11-0208

July 26, 2012

[redacted]

v.

[redacted]

I. Complainant's Charge:

Complainant [redacted] ("Complainant") alleges that Respondent [redacted] ("Respondent" and "City") subjected him to an unlawful medical examination after his doctor had released him to work, failed to provide a reasonable accommodation (desk work), and terminated him because of his physical disability (myelogenous leukemia).

II. Respondent's Answer:

Respondent denies any disability discrimination. Given Complainant's medical condition and previously extended medical leave, Respondent referred him to a fitness for duty evaluation. It provided accommodations (donated vacation time and health insurance) to keep Complainant in his job as a Police Sergeant. Respondent finally terminated Complainant when he took another medical leave with an estimated date of return in one year.

III. Jurisdictional Data:

1) Date of alleged discrimination: December 27, 2010 – February 18, 2011.

2) Date complaint filed with the Maine Human Rights Commission: March 8, 2011.

3) Respondent is subject to the Maine Human Rights Act and the Americans with Disabilities Act, as well as state and federal employment regulations.

4) Complainant is unrepresented. Respondent is represented by William A. Lee, Esq. and Edward R. Benjamin, Jr., Esq.

5) This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds".

IV. **Development of Facts:**

1) The parties and issues in this case are as follows:

   a) Complainant began working for the [redacted] ("Department") on March 15, 1988. He last worked as Police Sergeant before his termination on February 18, 2011.

   b) Important third parties: Police Chief JM ("Police Chief") supervised Complainant. The City Manager MR ("City Manager") referred Complainant to a fitness for duty evaluation.

2) Undisputed Facts:

   a) A Police Sergeant is the third level of supervision of the Department and is subordinate only to the Chief and Deputy Chief. During the absence of a higher level commander, the on-duty Police Sergeant automatically assumes full responsibility for the operations of the Department. Typically, the Police Sergeant supervises a complement of six to twelve officers and support staff. The Police Sergeant's responsibilities may range from field supervisor to the acting administrative head of the Department. In addition, the Police Sergeant must also fulfill all minimum requirements of a patrol officer's job.

   b) Complainant and his union had agreed the City could replace him on a temporary basis when he first became ill in 2009.

   c) On December 5, 2009, Complainant began his first medical leave of absence because of leukemia. He was ready to return to work in December 2010.

   d) On or about December 29, 2010, Complainant submitted a doctor's note ("Note") that cleared him to return to work without restrictions. (A copy is attached as Exhibit A.) Complainant's treating physician is Dr. AH ("Oncologist"), who has over 20 years of experience and is medical director of the Oncology Services department and the head oncologist at the Harold Alfond Center for Cancer Care (MaineGeneral Medical Center) in Augusta.

   e) The City referred Complainant to its designated medical provider, Dr. JB ("City Doctor"), for a medical examination. The City Doctor serves as the medical director of Workplace Health Services for MaineGeneral Medical Center in Augusta and Waterville. He is also an Occupational Medicine Specialist and is board certified in Family Medicine.

3) Complainant provided the following information with respect to the medical evaluation:

   a) The Oncologist was familiar with Complainant's medical history and treatment for over a year.

   b) Oncologist supported Complainant's application for the Maine State Retirement Disability ("MSRD") at the time of his diagnosis. Complainant was approved for those benefits during his illness.

c) Once his cancer was in remission, Complainant wanted to and was physically able to work. The Oncologist was fully aware of his job duties as Police Sergeant and "had no problem with [his] returning to work."

d) Complainant and Oncologist were aware that Complainant had been working day shifts as a Police Sergeant when he went out on medical leave. Before his medical leave, Complainant had arranged with another officer to switch to the night shifts, but the arrangement was not finalized before he began his leave; therefore, he would have returned to day shifts when his leave expired. During the weekdays (Monday through Friday) on the day shift, other equal and higher ranking members would be on duty, including the Police Chief, Deputy Chief, and the Communication Sergeant. The Detective Sergeant would also be on duty Monday through Thursday. Complainant would never have been the highest-ranking officer on duty.

e) The Oncologist cleared him for work but was not available to complete the Note. Another doctor, Doctor RH, worked closely with the Oncologist in the same department and wrote the Note so Complainant could submit to the City.

f) When Complainant presented the Note, the Police Chief stated that he should undergo a physical fitness test. On the same day, the City Administrator contacted Complainant and stated that he would be examined by the City Doctor at Workplace Health, "presumably a 'fitness for duty' exam."

g) In January 2011, Complainant was evaluated by the City Doctor. The City Doctor later contacted the Oncologist regarding a cardiac stress test. The Oncologist advised Complainant that the test was not necessary. The Oncologist had been treating Complainant for over a year on almost a weekly basis and felt that his heart was functioning fine.

h) On January 25, 2011, Complainant took and passed a cardiac stress test conducted by the City Doctor. The City Doctor then requested that he take a "lifting test." The City Doctor stated that Complainant would have to pass a physical fitness test (a "lifting test") for a patrolman before returning to work. The second evaluation was scheduled in two weeks.

i) The City Doctor was mistaken as to the physical standards that Complainant had to satisfy. The City Doctor mentioned that he received a copy of the physical standards for a new hire from the Maine Criminal Justice Academy. These standards would not apply to Complainant as he was not a new hire.

j) Pursuant to the City's agreement with Complainant's union ("Union Contract"), officers are required to take the physical fitness test twice a year. No employee returning to work has ever been made to take this test except when it is regularly scheduled on two yearly dates. Moreover, the Union Contract provides that an officer be allowed to fail the test a total of five times over a period of 2 and ½ years before being terminated. (Union Contract, Art. 35, Secs. 10 & 11.)

k) No other employees in the 20 years of Complainant's employment had been required to be evaluated by the City Doctor, including those with medical conditions such as major back surgery, knee surgery, and pregnancy.

l) Before the scheduled lifting test, Complainant's cancer returned. On February 24, 2011, while being treated in the hospital, he was notified in writing that his termination was effective on February 18, 2012.

4) Respondent provided the following response regarding the medical evaluation:

a) In mid-December 2010, Complainant informed the Police Chief that he qualified for MSRD. He could not return to work as his immunity system was too compromised. He said the only difficulty was that if he retired, he would not qualify for Medicare for a year and a half. He asked if the City could pay for his family medical insurance until he qualified for Medicare.

b) In early January 2011, Complainant provided the Note clearing him to return to work. He stated to Police Chief that he had no choice but to return to work since the City would not pay his health insurance.

c) Because of Complainant's representations about MSRD and not being able to return to work as well as his previous extended leave, the City decided to exercise its right under the Union Contract and referred him for a medical examination.

d) Complainant's fitness for duty was not readily apparent given his medical condition. Also, Complainant developed diabetes after he went out on medical leave. "It was perfectly reasonable for (the City Doctor) to want to determine if (Complainant's) heart function had been affected."

e) The City was relying on the City Doctor's evaluation to state whether Complainant could work, how many hours at a time, what restrictions were needed and what accommodations might be necessary. If the City Doctor determined that there were any restrictions, the City could then meet with Complainant to determine if it could accommodate the restrictions.

f) The City Doctor evaluated Complainant on January 6, 2011. Complainant then passed the cardiac stress test on January 25, 2011. He was scheduled for a physical test on February 7, 2011. The City Doctor had conferred with the Oncologist about Complainant's condition. Afterward, the Oncologist concurred that additional testing was needed. There were several reasons for the City Doctor to require a strength test. Complainant was out of work for 14 months. Complainant stated to the City Doctor that he was only out of bed for 12 and ½ hours a day.

g) The Note clearing Complainant to work does not indicate that the doctor knew the physical requirements of the Sergeant position. The position of Sergeant works 12-hour shifts. The job description of Sergeant includes the physical requirements of a patrol officer, whose work can be strenuous at a moment's notice. At night and on the weekend, the single Sergeant on duty is responsible for the supervision of all patrol officers and dispatchers and all operations of the Department. There is no higher ranking officer on duty during this period. At a moment's notice, a Sergeant may be attending to a domestic disturbance, a bar fight, a serious crime, a traffic matter or some other emergency.

5) Complainant provided the following information with respect to accommodation and termination:

   a) When he tried to return to work, Complainant never stated to the Police Chief that he "had no choice but to return to work since the city would not pay for [his] health insurance."

   b) The City "dragged" the testing out over six weeks after the Oncologist had cleared him for full duty without restrictions in December 2010. Complainant agreed to take the tests that the City Doctor had wanted, but these tests were delayed for weeks because the City did not want to pay for them. There was no medical reason for the tests. Contrary to the City Doctor's concerns about his medication, many prescription drugs carry similar warnings including heart issues and death.

   c) On January 7, 2011, the City Doctor wrote a letter ("Report") to the City stating that Complainant could return to work and be given "desk duty." In or about late February 2011, Complainant discovered this Report only after he requested his medical records from the City Doctor.

   d) In January 2011, the City never advised him of, or offered him, the accommodation as recommended by the City Doctor. During his employment, the City had offered "desk duty or light duty" to other employees with various injuries (broken wrist, broken ankle, pregnancy).

   e) At the time that Complainant was cleared to work, the Detective Secretary JL ("Detective Secretary") was out on leave. He could have performed the work that she did, including court work and other desk duties. His return to "desk duty" would not have caused the City "any money or inconvenience."

6) Respondent provided the following response concerning accommodation and termination:

   a) On January 6, 2011, the City Doctor evaluated Complainant. The City Doctor never wrote any letter clearing Complainant for desk duty. On January 7, 2011, the City Doctor wrote a letter ("Form") stating only that there would be further discussion with the employee about the evaluation that is needed. (A copy of the Form is attached as Exhibit B.)

   b) The City never received the City Doctor's Report stating that Complainant could do some "light duty" work until Complainant signed a release after he was terminated and the Charge of Discrimination was filed.

   c) Even if the City had received the City Doctor's Report soon after the evaluation, it would have wanted to see the test results before returning him to work. There was only one sergeant on duty at a time, the City would have had to determine which of his duties he could perform and how that would fit with staffing needs.

   d) Before the lifting test, Complainant contacted the City and stated that his leukemia had returned. The lifting test was canceled. The City requested a letter from the Oncologist regarding when Complainant could return to work again. When the City was told it would be at least a year, it had no choice but to terminate his employment.

e) Complainant's medical condition was unique within the Department. Other employees had routine conditions with predictable recovery rates and involve short term leaves.

f) The City could have terminated Complainant when he ran out of paid leave on September 27, 2010. However, it allowed employees to donate their vacation time to Complainant, so he could continue in full pay status until the end of 2010. The City continued to pay for his family health insurance, while he was scheduled for the various tests by the City Doctor. Complainant's pay and employment only ceased after the City was advised that he would be out at least another year.

7) Additional information provided in response to request for additional information at the Issues and Resolution Conference (4/26/2012):

a) When asked about the City Doctor's recommendation of "desk activities" for Complainant, the City denied any knowledge of this recommendation. It did not have Complainant's Report because he allegedly did not sign any disclosure form before he was terminated.

b) The City was requested to explain whether the City was responsible for obtaining the Report and notifying Complainant of its own designated doctor's recommendation of accommodation. The City allegedly did not have access to the medical notes until after the Charge was filed. Without access, it did not know and could not tell Complainant of the proposed accommodation.

8) Relevant documents include the following:

a) Medical notes by the Oncologist (12/29/2010, 2/8/2011 & 2/22/2011) (Copies are collectively attached as Exhibit A.) –After conferring with the City Doctor, the Oncologist stated in his notes: "If [Complainant's] work does include heavy physical exertion, it (the cardiac workup) would be prudent in view of his medical history." On February 8, 2011, Complainant's cancer returned. On February 22, 2011, the City was informed that it would be at least a year before Complainant could return to work.

b) Copy of the Complainant's Fitness for Duty Evaluation (1/7/2011) (Copies of the Form and Report are attached collectively as Exhibit B.) – With respect to a plan for Complainant's return to duty, the City Doctor stated, "My suggestion is that he be allowed to return to work at his desk activities. I believe that it is a safe guess that in terms of lifting and carrying would be 25-35 pounds to start, gradually increasing as tolerated." (Report, p. 5, ¶3.)

c) Job descriptions for the positions of "Sergeant" and "Patrol Officer" (Resp. Ex. 5.)

d) Emails between various City personnel (1/11/2011) (Copies are attached collectively as Exhibit C.) – The emails indicate that Respondent was aware of the City Doctor's recommendation of "'light' duty assignment, but that could be problematic for [the City]." The concern was that "If [the Department] accept [Complainant] back, he thinks [Complainant] should be given 4-8 weeks of training in order to pass the tests in the spring."

e) Letter of Termination ("Letter") (February 23, 2011) (A copy is attached as Exhibit D.) – In explaining the reasons for termination to Complainant, the City Manager stated, "[s]ince your

position has been filled on a temporary basis since December 2009, the City needs to move forward to return to full employment in the Police Department."

f) Letters of the Police Chief (6/11/2012) and the City's HR Officer (6/14/2012) – The documents address the City's efforts to accommodate Complainant and the medical evaluation. According to the HR Officer, when the City refers an employee for a second opinion to determine if the employee can return to work, it is only entitled to receive a report answering only the questions posed. The Genetic Information and Non-discrimination Act (GINA) prohibits employers from requesting genetic information from employees. Genetic information includes information about the manifestation of a disease in a person or family members. Medical examinations routinely elicit this information from patients. Therefore, the City did not have access to Complainant's evaluation report without his release.

V. Analysis:

1) The Maine Human Rights Act ("MHRA") provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

2) Here, Complainant alleges that Respondent subjected him to an unlawful medical evaluation after he was released to work and failed to accommodate him by refusing to allow him to return to work. Respondent asserts that it did what it could legally to keep Complainant on full pay status and finally terminated him for medical reasons.

3) The Maine Human Rights Act provides that it is unlawful to deny employment opportunities to an employee who is an otherwise qualified individual with a disability, if the denial is based on the need to make reasonable accommodation to the physical impairments of the employee, 5 M.R.S.A. §§ 4553(2)(F), 4572(1)(A); or to fail to make reasonable accommodations to the known physical limitations of an otherwise qualified employee with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity, 5 M.R.S.A. §§ 4553(2)(e), 4572(1)(A). [1]

4) To establish a failure to accommodate claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that he is a "qualified individual with a disability" within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant's physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent's failure to do so affected the terms, conditions, or privileges of Complainant's employment. *See id.*

5) The term "qualified individual with a disability" means "an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of

[1] Unlike the existence of such a claim under the federal Americans with Disabilities Act, there is no separate claim under the MHRA for a failure to engage in a good faith interactive process with a disabled employee to identify and make reasonable accommodations for that disability. *See Kezer v. Central Maine Medical Center*, 2012 ME 54, ¶¶ 26-27.

the employment position that the individual holds or desires." 5 M.R.S.A. § 4553(8-D). Examples of "reasonable accommodations" include, but are not limited to, making facilities accessible, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . ." 5 M.R.S.A. § 4553(9-A).

6) In proving that an accommodation is "reasonable," Complainant must show "not only that the proposed accommodation would enable [him] to perform the essential functions of [his] job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm'n Reg. 3.08(D)(1) (July 17, 1999). The term "undue hardship" means "an action requiring undue financial or administrative hardship." 5 M.R.S.A. § 4553(9-B).

7) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.

8) The MHRA does not prohibit an employer from discharging an individual with a physical or mental disability when the employer can show that the employee or applicant, "because of the physical or mental disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others. . . ." 5 M.R.S.A. §4573-A(1-B).

9) The defense requires an individualized assessment of the relationship between an employee or job applicant's physical or mental disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee or job applicant's physical or mental disability renders him unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the employee or job applicant or others. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234. An employer cannot deny an employee or applicant an equal opportunity to obtain gainful employment on the mere possibility that a physical or mental disability might endanger health or safety. *See Id*

10) The MHRA allows an employer to require a medical examination if it is shown to be job-related and consistent with business necessity. 5 M.R.S.A. § 4572(2)(D). This includes circumstances in which an employer has an objective basis to believe that an employee constitutes a "direct threat" due to a medical condition. *See, e.g.*, EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/qanda-inquiries.html.

11) It is not unlawful discrimination to temporarily suspend an individual while waiting for a medical examination that is necessary to determine whether the individual constitutes a "direct threat." *See Fitzpatrick v. Town of Falmouth*, 2005 ME 97, ¶¶33-34.

12) Here, Complainant has established a failure to accommodate claim as follows:

a) Complainant was diagnosed with leukemia (a form of cancer) and had a record of his disability. Under the MHRA, cancer is a *per se* disability. 5 M.R.S.A. §4553-A(1)(B).

b) The alleged failure to accommodate involves Complainant's efforts to return to work. When presented with the Note from his Oncologist, Respondent referred him for a fit-for-duty evaluation.

c) Complainant believes that because the Oncologist had cleared him to work, the City discriminated against him because of his cancer when it referred him for another medical examination.

d) In response, the City asserted that it had a contractual right under the Union Contract to require an employee to undergo an examination before returning to work. Further, Respondent contended that the evaluation was a "sound business decision." Complainant had been out of work for 14 months, had already qualified for MSRD, and his alleged statements to the Police Chief. Thus, it was allegedly reasonable for the City Doctor to ensure that Complainant was physically able to perform his job before clearing him to return to work and determine if there were any restrictions in his ability to perform some aspects of his job.

e) These proffered reasons sufficiently constitute a factual basis for the City to believe that, to a reasonable probability, Complainant's physical disability might render him unable to perform his job duties. Although it is questionable that the Patrol Officer position description and fitness-for-duty test that City Doctor used would apply properly to a veteran officer such as Complainant, the proffered physical requirements of the Police Sergeant and fitness-for-duty testing seem to support the City's claim that the medical examination is job-related.

f) Complainant also stated that no other employees out on leave had been required to have a medical examination before being allowed to return to work. He referenced employees having various medical conditions. It would be speculative here to comment on these other employees' circumstances as compared to Complainant's. Regardless, similar to Complainant's situation, each employee would have been entitled to an individualized assessment based on his/her medical condition and needs, if any. At this stage of preliminary investigation, it would be impossible to ascertain this claim without reviewing the other employees' confidential personnel and medical records.

g) In sum, Complainant's referral to City Doctor was permissible under the MHRA.

h) Based on the evaluation on January 6, 2011, the City Doctor recommended that Complainant be returned to "desk activities" until he could be cleared after further testing.

i) The City does deny knowing of any such recommendation for "desk activities". The City Doctor wrote the Form merely stating that "there will be further discussion with the employee about the evaluation that is needed." Complainant himself only became aware of the City Doctor's recommendation after he was terminated.

i. The City rationalized that it could not have access to Complainant's medical records (including the fit for duty evaluation by the City Doctor) without Complainant's medical release. Thus, the City did not know and could not have conveyed the accommodation recommended by its own designated doctor.

ii. Further, the City argued that under GINA, the City was not entitled to Complainant's medical information and would be subjected to penalties for requesting it without his informed consent. In addition, the Report was allegedly never finalized as the final test was never completed due to the recurrence of leukemia.

j) The City's rationalization – that it simply did not know of City Doctor's recommendation for "desk activities"—is not persuasive:

i. The City itself referred Complainant to its designated doctor for a medical examination. The City posed some questions to the City Doctor to evaluate Complainant's fitness for duty and provided the two disputed job descriptions (Sergeant and Patrol Officer) to the City Doctor. Although Complainant protested, he acquiesced to the evaluation and testing. There is no evidence that he refused any request to sign any release. The City's belated attempt to pass the responsibility of obtaining the Report to Complainant is not supported by law nor justified by facts here.

ii. The City's denial of any knowledge of the recommendation is contradicted by the emails (1/11/2011). Management was discussing the "'light' duty accommodation." If the City had another factual basis to believe (to a reasonable probability) that the suggested "desk activities" were unreasonable or not feasible, it could have referred Complainant to another medical evaluation. Various key City personnel did not appear to possess the medical expertise to disagree with the Oncologist's clearance (return to work with no restrictions) or the City Doctor's subsequent recommendation ("desk activities").

k) The City Doctor's recommendation indicates Complainant's need for–and constitutes a request for—reasonable accommodation. The evidence does not show conclusively that Respondent had in its possession the Report soon after Complainant's evaluation on January 6, 2011. However, Respondent was at least aware of, to some degree, Complainant's need for accommodation at or about that time period.

l) This accommodation appeared reasonable under the circumstances. There is no evidence to dispute Complainant's assertion that desk work was available when he requested to return to work, and the City has not established that allowing Complainant to work "desk activities" would have been an undue hardship.

m) The City's failure to accommodate Complainant affected the terms and conditions of his employment. Complainant was not allowed to return to even "light duty" work. Here, the City took no further actions until it terminated Complainant's employment when he went out of work on medical leave for the second time.[2]

[2] Following Complainant's relapse in February 2011, which rendered him unable to work, Respondent did not violate the MHRA by terminating his employment. Complainant's final doctor's note stated that "[h]is expected return to work is very difficult to guess," and indicated only that he "may be able to return to work in approximately one year." An

VI. Recommendation:

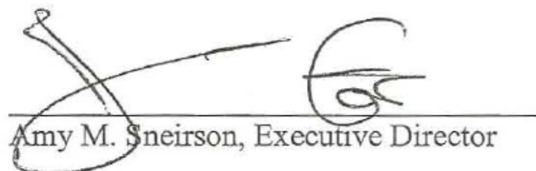
For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

1. There are **No Reasonable Grounds** to believe that Respondent [redacted] subjected Complainant [redacted] to an unlawful medical examination or terminated his employment because of his physical disability; and

2. This portion of the complaint should be dismissed in accordance with 5 M.R.S.A. § 4612(2); and

3. There are **Reasonable Grounds** to believe that Respondent [redacted] discriminated against Complainant [redacted] by failing to provide him with a reasonable accommodation; and

4. Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director

Domini Pham, Investigator

employer is not obligated to provide an indefinite leave of absence as a reasonable accommodation. *See Watkins v. J & S Oil Co., Inc.*, 164 F.3d 55, 62 (1st Cir. 1998).