**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| THOMAS BARRETT,<br><br>Plaintiff,<br><br>v.<br><br>ROBERT HALF CORPORATION, et al.,<br><br>Defendants. | Civil Action No. 15-6245<br><br>**ORDER** |

Before the Court is the motion of defendants Robert Half Corporation and Robert Half International, Inc. ("Defendants") to dismiss the Amended Complaint of plaintiff Thomas Barrett ("Plaintiff") pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 12. Plaintiff opposes the motion. ECF No. 13. The motion is decided without oral argument pursuant to Federal Rule of Civil Procedure 78. It appearing that:

1. Plaintiff suffers from severe, chronic pain caused by herniated and bulging discs, for which he was issued a license to use medical marijuana from the State of New Jersey Department of Health on April 8, 2013. See Amd. Compl. ¶¶ 8-9. In or about January 2014, Plaintiff commenced employment with Defendants. See id. ¶ 6. He notified Defendants of his disability and license to use marijuana "for the treatment and care of his disability." See id. ¶ 11. On or about September 18, 2014, Plaintiff submitted to a mandatory drug test at Defendants' behest. See id. ¶ 12. On or about September 30, 2014, Defendants notified Plaintiff they were terminating his employment due to a positive test result. See id. ¶ 22.
2. On June 11, 2015, Plaintiff filed a Complaint against Defendants in the Superior Court of New Jersey, which Defendants removed to this Court on August 17, 2015. ECF

No. 1. On May 25, 2016, this Court granted Defendants' motion to dismiss and granted Plaintiff leave to file an amended complaint. ECF No. 8. On June 15, 2016, Plaintiff filed an Amended Complaint. ECF No. 9. Plaintiff asserts Defendants violated the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 et seq. ("NJLAD"), by failing to accommodate his disability and by wrongfully terminating him for his disability. Compl. ¶¶ 23-31. On July 13, 2016, Defendants moved to dismiss Plaintiff's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 12.

3. To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In evaluating the sufficiency of a complaint, the Court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. See Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008). Nevertheless, "[a] pleading that offers mere 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations omitted).
4. To prevail on a failure to accommodate claim under the NJLAD, a plaintiff must plead that: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his 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. Tourtellotte v. Eli Lilly & Co., No. 15-1090, 2016 WL 146455, at *11 (3d Cir. Jan. 13,

2016) (citing Victor v. State, 4 A.3d 126, 145 (N.J. 2010)); see also Bertolotti v. AutoZone, Inc., 132 F. Supp. 3d 590, 601 (D.N.J. 2015) (citing Armstrong v. Burdette Tomlin Mem. Hosp., 438 F.3d 240, 246 (3d Cir. 2006)).[1]

5. As in the initial Complaint, Plaintiff's Amended Complaint also fails to plead that he requested accommodation for his disability. "While there are no magic words to seek an accommodation," an employee "must make clear that . . . assistance is desired for his or her disability." Tynan v. Vicinage 13 of Superior Court, 798 A.2d 648, 657 (App. Div. 2002) (quoting Jones v. United Parcel Service, 214 F.3d 402, 408 (3d Cir. 2000) (internal quotation marks and alterations omitted)). Plaintiff's Amended Complaint differs from the initial complaint by elaborating upon the alleged conversations preceding the drug test and by the addition of a second count that references "required certain reasonable accommodations." Amd. Compl. ¶¶ 14-20, 28-31. However, Plaintiff's elaboration still pleads merely that he notified Defendants that he was licensed to use medical marijuana as part of treatment for his disability, but does not allege that he requested assistance in connection with his disability. Amd. Compl. ¶ 11, 13, 17, 18. Plaintiff's reference to "required certain reasonable accommodations" does not clarify what those accommodations were and whether Plaintiff ever requested said accommodations. As the Court explained in the prior order, this also is insufficient to establish a request for accommodation. See Linton v. L'Oreal USA, No. CIV A 06-5080(JLL), 2009 WL 838766, at *6 (D.N.J. Mar. 27, 2009) (rejecting the plaintiff's

[1] To the extent Plaintiff contends that, under Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), he is not required to plead all of the elements of an employment discrimination claim, the Court notes that the Third Circuit has recognized "[t]he demise of Swierkiewicz" in light of the Supreme Court's subsequent decisions in Twombly and Iqbal. Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

"constructive notice" theory and finding that "[s]omething more is required of an employee under the NJLAD than merely apprising her employer that she is . . . injured.").[2]

Accordingly,

**IT IS** on this 21 day of February, 2017,

**ORDERED** that Defendants' motion to dismiss, ECF No. 12, is **GRANTED**; and it is further

**ORDERED** that Plaintiff's Complaint is dismissed without prejudice; and it is further

**ORDERED** that, to the extent Plaintiff can cure the pleading deficiency by way of amendment, the Court permits Plaintiff to file an Amended Complaint within thirty (30) days of the date of this Order.

**SO ORDERED.**

**CLAIRE C. CECCHI, U.S.D.J.**

[2] The Court also notes that many other jurisdictions have rejected claims similar to those Plaintiff advances here. See Garcia v. Tractor Supply Co., No. CV 15-00735 WJ/WPL, 2016 WL 93717, at *2 (D.N.M. Jan. 7, 2016); Steele v. Stallion Rockies Ltd, 106 F. Supp. 3d 1205, 1219 (D. Colo. 2015); Curry v. MillerCoors, Inc., No. 12-CV-02471-JLK, 2013 WL 4494307, at *3 (D. Colo. Aug. 21, 2013); Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 923 (W.D. Mich. 2011); Coats v. Dish Network, LLC, 350 P.3d 849, 85 (Colo. 2015); Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 204 (Cal. 2008).