

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**  
on the Complaint of

**MELISSA A. DECKER,**

Complainant,

v.

**DONALD R. HUSBAND, INCORPORATED AND  
MAINE COIL AND TRANSFORMER CO., INC.,**  
Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10118671

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 31, 2009, by Michael T. Groben, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

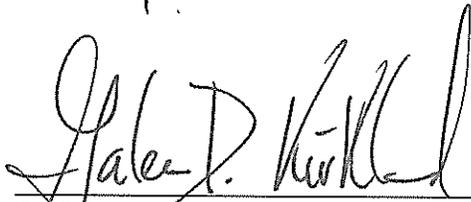
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **APR 15 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**DONALD R. HUSBAND, INCORPORATED  
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CO., INC.,**

Respondent.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10118671**

**SUMMARY**

Complainant alleges that Respondents illegally discriminated against her by terminating her employment because of perceived disability. Respondent denied the allegations. Complainant failed to sustain her burden of proof, and it is recommended that the complaint be dismissed.

**PROCEEDINGS IN THE CASE**

On June 26, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Maine Coil and Transformer Co., Inc., with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing session was held on July 2, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Dawn J. Lanouette, Esq.

At the public hearing, the caption was amended to include Donald R. Husband, Incorporated, as a Respondent.

Permission to file post-hearing briefs was granted, and proposed findings of fact and conclusions of law were timely filed by both parties.

### **FINDINGS OF FACT**

1. On May 7, 2007, Respondent Maine Coil and Transformer Co., Inc. ("Maine Coil") hired Complainant to work as a production worker (also known as an assembly operator) at its premises located at East Main Road, Johnson City, New York. (Respondent's Exhibit 1, 3; Tr. 17, 76-77, 121)
2. Maine Coil is a wholly owned subsidiary of Respondent Donald R. Husband, Incorporated. (Respondent's Exhibit 2; Tr. 7) In 2007, Maine Coil had approximately 6 employees. (Tr. 68)
3. At all times relevant to the complaint, Donald Husband ("Husband") was the president and owner of Maine Coil through his ownership of Respondent Donald R. Husband, Inc. (Tr. 28, 68)
4. At all times relevant to the complaint, Donna McFadden ("McFadden") was a senior employee of Respondent Maine Coil, and also its office manager. (Tr. 119)

5. As a production worker, Complainant assembled, packed and inspected electrical coils on a production line in a room with other workers. Husband also worked in the production room as necessary. (Respondent's Exhibit 2; Tr. 17-18, 21-22, 75-77)

6. Brenda Olson ("Olson"), Kristin Ramey ("Ramey"), and Tracy Farr ("Farr") were co-workers of Complainant. (Tr. 20, 24, 51, 156, 166, 173)<sup>1</sup>

7. Complainant was observed by both Farr and Ramey to sleep while at her work location. (Tr. 156-57, 167-68) Farr advised Husband and McFadden of her observation. (Tr. 80, 124, 168) At the public hearing, Complainant denied that she had fallen asleep at work. (Tr. 44, 52) I found her testimony on this point not credible.

8. Complainant's job required the use of both hands. However, Complainant ate while working. (Tr. 45, 48-49, 79-80) Husband, Ramey and Farr also observed this, and Farr complained to McFadden about it. (Tr. 83, 156, 167-68) Coils were assembled using epoxy, and an employee who ate while working could contaminate her work with food residue, which would prevent the epoxy from sticking to the coil. Husband asked McFadden to speak to Complainant about this problem. (Tr. 80, 82-83, 168-69, 175-76)

9. Complainant also talked frequently and at length to her co-workers about personal matters while working, leading both Husband and McFadden to direct her to stop this practice and concentrate on her work. (Tr. 51, 127-29, 153-54)

10. On or about early June 2007, Respondent began requiring that Ramey and Complainant fill out daily production sheets recording their work production. (Respondent's Exhibit 4, Respondent's Exhibit 5; Tr. 18-23, 158)

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<sup>1</sup> Brenda Olson was misidentified as "Donna Olson" several times in testimony. (Tr. 19, 20, 37, 39, 51)

11. Based on the production sheets and his own observations, Husband concluded that Complainant was working too slowly, and sometimes not at all. He also observed that the production of Ramey and Complainant was approximately the same, even though Complainant had been hired first and was more experienced than Remy. (Tr. 78, 84-86, 96, 118)

12. Olson also observed that Complainant was working too slowly. (Tr. 173-74)

13. On or about June 6, 2007, McFadden spoke to Complainant and Ramey about their work performance and requested that they "speed up". (Tr. 40-41, 50-51, 66-67, 123-24, 145, 157-59). Both Olson and McFadden tried to help Complainant improve her work production. (Tr. 135-38, 157-58, 169-70, 174-75, 182-83).

14. McFadden attempted to help Complainant with her soldering because she was aware that Husband was not satisfied with Complainant's performance. (Tr. 132-35)

15. McFadden provided Complainant with a clock so that she could time her work on certain tasks, and so improve her performance. Complainant would not use the clock. (Tr. 135-38)

16. Ramey's production improved, while Complainant's did not. (Tr. 141-42)

17. On or about June 11, 2007, Complainant became concerned that she had been exposed to Fifth Disease, from her nephew. (Tr. 23-24) Complainant then called Nurse Direct, a telephone service which provides advice regarding health and non-emergency medical matters. She advised them that she had been exposed, and that she had a fellow employee who was pregnant. The Nurse Direct worker advised her to tell the pregnant co-worker of the exposure, although the worker did not explain why she should do so. (Tr. 24-27)

18. The next day, Complainant reported to work and confronted Ramey, who was pregnant. Complainant did not call Husband, or anyone else at work, to advise them of her exposure before

reporting to work. Complainant advised Ramey that she had been exposed to Fifth Disease and that it caused miscarriages. Ramey was upset and reported this to Husband. (Tr. 27-28, 56, 86-87, 160-61)

19. Husband then called Complainant into his office, explained that Ramey was concerned, and directed Complainant to see a doctor. (Tr. 28-29) After Complainant and Husband spoke by telephone to medical personnel in a local doctor's office, Husband again directed Complainant to visit a doctor. (Tr. 29-32, 91, 162)

20. Complainant was examined by G. Wynne Stubbs, M.D., who provided Complainant with a note advising that he had found no evidence of Fifth Disease, but that Complainant could be excused from work through June 16, if there was "concern" about spreading the disease at work. (Respondent's Exhibit 6; Tr. 34-35)

21. Complainant then called Husband and advised him of the doctor's conclusions. Because Husband was concerned that Complainant's presence in the office might disrupt productivity, and also because of the possibility that she might infect others, Husband advised her to stay out of work for the rest of the week. (Tr. 36, 90-92)

22. On June 13, 2007 Complainant again called Husband and asked if her hours could be changed to allow her to come in to work later. Husband advised her that he had reviewed her production sheets, that she was not an asset to the company, and that she was not doing a good job. Husband then terminated her. (Tr. 38-39, 41, 121)

23. Complainant was terminated because of her poor work performance. (Tr. 95-96, 117-18, 150)

24. Respondent has permitted several of its employees, including Ramey, to take leaves of absence due to pregnancy or illness, and has not terminated said employees. (Tr. 98-100, 150-52, 155) Respondent has also made reasonable accommodations for disabilities suffered by Farr (psoriasis and partial blindness) and has not terminated her employment. (Tr. 170-71)

### OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual by discharging said individual from employment because of disability. Human Rights Law § 296.1 (a)

A complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to respondent to rebut the presumption of unlawful discrimination. The ultimate burden rests with complainant to show that respondent's proffered explanation is a pretext for unlawful discrimination. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997).

In the instant case, Complainant established a prima facie case of discrimination. A disability is defined under the Human Rights Law as including "a physical...or medical impairment resulting from anatomical (or) physiological...conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or...a record of such an impairment or...a condition regarded by others as such an impairment..." Human Rights Law § 292.21 The record demonstrates that

Respondent believed Complainant to have been exposed to Fifth Disease, thus posing a danger of contagion to her co-workers, and that he acted on that belief in sending her home. Respondent regarded Complainant as suffering from a disability. Whether or not she actually carried the disease is of no moment. *Matter of North Shore University Hospital v. Rosa*, 194 A.D.2d 727, 600 N.Y.S.2d 90 (1<sup>st</sup> Dept. 1993), *Ashker v. International Business Machines*, 168 A.D.2d 724, 563 N.Y.S.2d 572 (3<sup>rd</sup> Dept. 1990).

Complainant was qualified for her position, and she suffered the adverse employment action of termination at about the same time her employer learned of the disability, thus permitting an inference of discrimination.

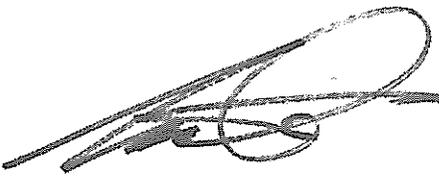
However, Respondent's witnesses testified credibly, and in detail, regarding Complainant's poor job performance. It is clear that Respondent reasonably concluded that Complainant's performance would not improve sufficiently to make her an asset to Respondent's business. Respondent thereby established a legitimate, nondiscriminatory reason for its discharge of Complainant, and Complainant failed to rebut this crucial testimony.

#### ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that complaint be and hereby is, dismissed.

DATED: January 31, 2009  
Bronx, New York



Michael T. Groben  
Administrative Law Judge