NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of GAY GRAY, Complainant, v. VERIZON NEW YORK, INC., Respondent.	**NOTICE AND FINAL ORDER** Case No. 10109794

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 March 11, 2008, by Christine Marbach Kellett, 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 KUMIKI GIBSON, 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, this 9th day of April, 2008.

KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

GAY GRAY,

Complainant,

v.

VERIZON NEW YORK, INC.,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10109794**

SUMMARY

Complainant charged the Respondent with violations of the Human Rights Law on the basis of sex and disability in connection with light duty assignments, the application of Respondent's absence control plan, and Complainant's termination. Complainant failed to establish a prima facie case under either basis. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On January 19, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent 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 Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 31, November 1, 2007, and December 5, 6, 2007.

Respondent appeared at the hearing. Respondent was represented by Matthew T. Miklave, Esq. Complainant was represented by Michael T. Paes, Esq. Complainant attended the public hearing on October 31, and November 1, 2007, but left without explanation during her direct examination on December 5, 2007, and failed to return. Respondent moved to strike the complainant's testimony, and to dismiss the complaint in light of Complainant's failure to continue her direct examination and her failure to appear for cross-examination, and for a directed verdict. (Tr. 970-72, 977) Decision on the motions was reserved.

Permission to file post-hearing briefs was granted. Respondent timely filed its post-hearing brief.

FINDINGS OF FACT

1. Complainant charged Respondent with unlawful discriminatory practices in employment on the basis of sex and disability when it terminated her on the basis of excessive absences. (ALJ Exh. 1)

2. Respondent denied the charges of discrimination. (ALJ Exh. 3)

3. Respondent has an absence control plan calling for progressive "stepping" for unauthorized absences from work for medical reasons. (Complainant's Exh. 8; Tr. 167) Each step up in the progression results in a longer period without unauthorized absences being required in order to regress down. (Tr. 168) An employee who has sufficient unauthorized absences to reach step 6 is subject to termination. (Complainant's Exh. 8) The 4th through 6th steps involve union representation as they are approaching discipline measures subject to the

union grievance process. (Complainant's Exh. 8; Tr. 1049) Non-medical unauthorized absences are handled through the ordinary discipline process.

4. Excluded from the progressive stepping are so called authorized absences including documented medical leave covered under the Family and Medical Leave Act (FMLA), excused absences (for personal affairs, leaves of absence, funerals, military activities and jury duty), and approved vacation leave. (Complainant's Exh. 8)

5. Complainant is female. (Tr. 65, 163)

6. Complainant began working for Respondent as a splicer in 1987. (Tr. 24, 164)

7. Splicers, also called field technicians, splice cables together on poles or in manholes. (Tr. 25, 164)

8. Complainant reported she has disabilities relaying to her feet and her back. (ALJ Exh. 1; Tr. 163-164)

9. Complainant was familiar with Respondent's absence control plan as she had experienced progression and regression over the years. (Tr. 428-432; Complainant's Exh. 20; Respondent's Exhibits 3, 4, 5, 6, 7, 8)

10. During the time frame 2000-2004, Complainant had both approved medical leave under the FMLA, which does not result in progression or stepping, and FMLA ineligible absences, which may result in progression or stepping. (Tr. 430-32; Complainant's Exh. 20)

Disability Discrimination Charge

11. In the year 2000, Complainant had 90 absences and had exhausted her leave accruals; in the year 2001, Complainant had 51 absences and used all her leave credits; in the year 2002, Complainant had 129 absences, including an extended absence after an insubordination incident involving her direct supervisor; in the year 2003, Complainant had 82

absences and was on Step 4 in the absence control plan. (Tr. 402-05; Complainant's Exh. 20; Respondent's Exhibits 5,6, 7, 8, 22)

12. During the period September 9, 2003, through October 24, 2004, Complainant was out on a fully paid short term disability. During this approved leave, Complainant regressed from step 4 to step 1. (Complainant's Exh. 20; Respondent's Exhibits 5,6, 7, 8, 22)

13. In the next fourteen months, November 2004 through December 2005, Complainant took off 93 days of work as follows:

a. On October 25, 2004, Complainant returned to work on step 1, an improvement from the step 4 she had previously attained before her leave.

b. On November 15-19, 2004, Complainant was out sick with sinus issues. Complainant was moved to Step 2 as she provided no medical documentation for her absences, and had exhausted her eligibility for FMLA leave. (5 days)

c. Complainant went out for surgery on her wrist between February 9, 2005, and April 8, 2005, but failed to supply the requested medical documentation and was not eligible for FMLA leave. Complainant progressed to step 3 as a result of this absence. (43 days)

d. Complainant called in ill on June 28, 2005, and did not return to work until August 9, 2005. She was not eligible for FMLA, failed to provide medical documentation and progressed to step 4. (31 days)

e. On October 19, 2005, Complainant came to work late and immediately left, saying she was feeling ill. Complainant returned on November 1, 2005. No medical documentation was provided. Complainant was still not eligible for FMLA and was moved up a step to step 5. (9 days)

f. On November 3, 2005, Complainant left work without permission, allegedly to go to the doctor. (1 day). The employer convened an investigatory meeting for the purpose of discussing further discipline. It decided to take no formal action, but advised Complainant that she must schedule any further medical appointments after her regular working hours.

g. On both December 5, 2005, and December 14, 2005, Complainant worked only partial days, but no step increase occurred. (1 day total)

h. On Friday, December 16, 2005, Complainant called in saying she would be late due to icy conditions. (1 day) She did not report to work at all that day but returned on December 19, 2005, having decided to attend to some personal business, including a doctor's visit. This was an unauthorized absence and Complainant faced movement to Step 6, a ten day suspension pending termination.

(Complainant's Exh. 20; Respondent's Exhibits 22, 24; Tr. 1012-013, 1085-090)

14. In addition to the above days out of work, on November 17, 2005, Complainant reported she had injured her back on the job. Complainant did not return to work until November 29, 2005, when she returned to work in light duty status. Although she was out for 7 days, as the injury allegedly occurred on-the-job no increase in step occurred. (Complainant's Exh. 7; Respondent's Exhibits 22, 24)

15. Although Complainant's doctor provided a return to work on light duty on November 29, 2005, Complainant testified at the public hearing that she was actually unable to perform the essential functions of her job, even the light duty assignments as she could not stand nor lift ten pounds. (Complainant's Exh. 20; Tr. 62, 1018-019)

16. Consequently Complainant would report to work and then leave voluntarily rather than stay with the light duty work assigned to her. (Complainant's Exh. 20; Respondent's Exhibits 22, 24; Tr. 62, 776, 1018-019)

17. During year 2005 Complainant had also taken her allotted 20 vacation days and seven paid holidays. (Complainant's Exh. 20; Respondent's Exh. 22)

18. As a result of Complainant's actions on December 12-15, 2005, when she had first called in to say she would be late for work, as it was icy out, and then failed to appear at all, another investigatory meeting was held on December 20, 2005 to discuss disciplinary actions against Complainant for her excessive absences without leave. During that meeting, Complainant admitted to her supervisor in the presence of her union representative that on December 16, 2005 she just refused to drive on ice and was AWOL. (Respondent's Exh. 22; Tr. 823-24)

19. Respondent terminated Complainant in January 2006 for excessive absences. (Tr. 206)

20. Complainant's physical limitations remain and she is unable to return to work as a splicer. (Complainant's Exh. 14)

21. Complainant's attorney conceded that Complainant had not been stepped under the absence control plan because of her sex or her stated disabilities. (Tr. 611, 621-22, 1092)

Sex Discrimination complaint

22. As an example of the discrimination based upon sex (hostile work environment) Complainant reported that in 2002 a male co-worker refused to go out on assignment with her, she complained and she does not know if the co-worker was disciplined. (Tr. 41-46)

23. Although Complainant had reported that male employees were allowed to be on light duty assignments in the garage for years at a time, Complainant's own witness, Francine Priest ("Priest"), testified no male employee ever just stayed in the garage all day (Tr. 653); that both she and her husband, both employees of Respondent in the same title as Complainant, had the same experiences and assignments including clerical tasks in the offices, when they each were on light duty (Tr. 677-686); that when she requested light duty it was provided. (Tr. 656, 677-80)

24. Priest also admitted that her information regarding other employees other than herself and her husband came from gossip and she had no direct information regarding light duty status of the male employees. (Tr. 716)

Retaliation complaint

25. On May 21, 1992, Complainant had filed a complaint with the Division charging her employer New York Telephone with a hostile work environment. (Complainant's Exh. 1; Tr. 27-35)

26. New York Telephone is the predecessor company for Respondent Verizon. (Tr. 181) (Complainant's Exh. 1)

27. Complainant admitted that the liner who was 'instigating it all' resigned. (Tr. 29)

Complainant's abandonment of her testimony

28. Complainant's direct testimony began on October 31, 2007.

29. Due to witness availability, Complainant's attorney requested Complainant's direct examination be interrupted in order to accommodate the schedules of three of Complainant's witnesses, Dr. Stephen L. Hermele ("Hermele"); Complainant's psychiatrist; Francine Priest, Complainant's co-worker and fact witness; and Louis Spina , Complainant's Job counselor. (Tr. 208) Additionally, one Respondent witness, Thomas Dwyer ("Dwyer"), a former supervisor of Complainant, testified before Complainant could finish her direct examination or begin her cross examination. (Tr. 370, 413)

30. Complainant returned for continued direct testimony on November 5, 2007.

31. In the middle of her direct testimony, Complainant abruptly announced she could "not do this"; she "quit", and left the hearing room without further explanation. (Tr. 826) In order to ascertain Complainant's intention, the hearing was adjourned for lunch. (Tr. 826) Just prior to abandoning the hearing, Complainant had become increasingly confused and upset, had asked for and received breaks to compose herself, and had been visibly agitated, announcing she was unable to remember the details required. (Tr. 756-58, 763, 769, 771-72, 803, 807-08, 815-16, 825-26)

32. Subsequent attempts by her attorney to contact Complainant were unsuccessful. (Tr. 965-68)

33. Although requested (Tr. 1121), no explanation for Complainant's absence has been received.

OPINION AND DECISION

Respondent's motion to dismiss

Respondent's motion for dismissal on the basis of Complainant's failure to complete her direct testimony and submit to cross examination is denied. Prior to Complainant's departure, Complainant had presented, and Respondent had the opportunity to cross examine, other fact witnesses. Complainant was represented by private counsel who attended each session and participated fully in the presentation of the case before and after Complainant's departure. Respondent's voir dire of Complainant gave Respondent an opportunity to probe Complainant's credibility. Respondent had the opportunity to produce its own witnesses and raise its own arguments, and did so. Under the record created at this hearing, there is no prejudice to the Respondent in ruling on the merits of the case

The discrimination complaint

The Human Rights Law declares it to be an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of sex and disability. NY Executive Law § 296.1(a)

The Human Rights Law also declares it to be an unlawful discriminatory practice for an employer to discriminate against an employee on the basis of retaliation because she has filed a complaint. NY Executive Law § 296.1(e).

Complainant charged Respondent with discrimination based upon sex and disability in

its application of Respondent's attendance control plan. The discriminatory acts complained of included hostile work environment, disparate treatment, and wrongful termination. Complainant also charged Respondent with discrimination based upon retaliation.

Complainant failed to make a prima facie case of discrimination based upon any theory of discrimination: retaliation, disability or sex. The complaint should be dismissed.

For its analysis of claims brought under the Human Rights Law, the Division has adopted the McDonnell Douglas model used by the federal courts in cases brought under Title VII. *Father Belle Community Center, Inc. v. New York State Division of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept., 1996), *mot. for leave to appeal denied*, 89 N.Y.2d 809, 678 N.E.2d 502, 655 N.Y.S.2d 889 (1997)

In that analysis, a complainant has the burden of producing evidence in support of a prima facie case, that is: that she is a member of a protected class or classes; that in cases of employment she was qualified for her position, that she suffered an adverse employment action for reasons from which an inference of discrimination can be made. *Pace College v. Commission on Human Rights of the City of New York,* 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471, 479, 399 N.E.2d 880, 885-886 (1975), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 668 (1973)

Once Complainant establishes a prima facie case, a burden of production requires the respondent to come forward with an explanation of its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S.502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993); Reeves *v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 120 S.Ct. 2097, 147 L. Ed. 105 (2000). The burden of proof then requires the complainant to establish that the explanation produced is a pretext for illegal discrimination. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665

N.Y.S.2d 25 (1977)

Discrimination complaint (sex)

Complainant is in a protected class in that she is female. She was qualified for her position as a splicer, having served the company in that capacity for nearly eighteen years. Complainant suffered an adverse employment action in that she was terminated. However, her bare assertions that men were treated differently than women with regard to light duty assignments or the absence control plan are not supported by the record at the public hearing Complainant herself and her witness admit these assertions are the result of gossip and innuendo. Her fact witness not only admits that her information is based upon rumor, she affirmatively testified that both she and her husband were treated the same way in connection with light duty assignment. This does not support a prima facie case of discrimination based upon sex. The charge of discrimination based upon sex should be dismissed.

Discrimination complaint (disability)

In connection with her claim of discrimination based upon disability, made two arguments: first, she claimed that Respondent failed to accommodate her light duty requirements, and second, that the attendance control plan had a disparate impact on persons with disabilities. Complainant failed to establish a prima facie case of discrimination based upon disability under either theory.

In a disability case, the complainant must establish that she is a person with a disability that does not prevent her from performing the essential functions of the position, with or without an accommodation, and that either she is denied the reasonable accommodation requested or that she is treated differently than other persons without the disability. *See New York City Transit Auth. v. State Div. of Human Rights (Nash)* 78 N.Y.2d 207, 573 N.Y.S.2d 49

(1991)

Complainant identified two physical disabilities, problems with her feet that prevented her from wearing the required safety boots, and problems with her back, as the bases of her complaint. Complainant's first inability to meet the prima facie case of discrimination based upon disability is that she asserted she is unable to work at the essential functions of the position of cable splicer. Her limitations on walking, sitting, standing, squatting, bending, lifting and inability to wear the required safety boots are inconsistent with the requirements of the position according to the Complainant herself.

But Complainant's back and feet limitations are not the bases for Complainant's attendance difficulties under the attendance control policy. In 2005, there is one incident involving injury to Complainant's back. Complainant's absences as a result of that injury do not result in a stepping. In 2005, the absences for which Complainant is stepped are those such as not reporting to work because it was icy, or claiming to have cold, without documentation for the many days out of work, or leaving work without permission.

The record at the public hearing established that when Complainant required light duty work, she was assigned to light duty work.

An employee owes the duty of regular attendance to her employer. Complainant is not penalized for having a disability or multiple disabilities. She was penalized for not coming to work, not just once or twice, but repeatedly and abusively. Complainant could not be counted on to come to work, or stay at work even when given light duty assignments. The charge of discrimination based upon disabilities should be dismissed.

Under a theory of disparate impact, a complainant must establish that a facially neutral policy or practice has a substantial adverse impact on members of a protected class. Respondent

Complainant chose to focus her attention on relating her speculations regarding a comparator who had ceased working for Respondent in 2002. Under the Human Rights Law there is a one year statute of Limitations for the filing of a complaint with the Division. NYS Executive Law § 297.5 In order to go back beyond the statutory period, a complainant must establish either that there was discriminatory conduct of a similar nature during the statutory period so that a course of conduct is established, or that the earlier discriminatory conduct continues to impact the Complainant and constitute a continuing violation. *See Russell Sage College v. State Div. of Human Rights*, 45 A.D.2d 153, 357 N.Y.S.2d 171 (3rd Dept. 1974), *aff'd* 36 N.Y.2d 985. Complainant provided no factual information in support of either theory.

The record established at the public hearing, particularly the record established by Complainant's own limited direct examination, does not support a finding that Complainant was the victim of discrimination, either in the past so that she continued to be impacted or as part of a pattern or practice of continuing conduct that was present in 2005.

When one considers that a year has 365 day, that 102 of those days are Saturdays and Sundays, that Complainant enjoyed 20 days of vacation a year, 4 days of personal leave, and 6 paid holidays, that left 233 days for Complainant to appear at work. In 2005, Complainant had 99 unexcused absences. Complainant was absent without leave credits more than 40% of the time in 2005, not because she was a woman and not because she had disabilities. Complainant could not and did not point to any one stepping event and claim it did not meet the definition of an unauthorized absence. The record showed that when Complainant provided the documentation for light duty, Complainant was placed on light duty. Complainant's own log shows she frequently volunteered to leave rather than work the light duty assigned to her. Complainant's own witness, Priest, did not support Complainant's charge that men received

preferential light duty assignments.

The ultimate burden of establishing discrimination is on the complainant. Complainant failed to meet that burden and the complaint should be dismissed. .

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 the complaint be and the same hereby is dismissed.

DATED: March 11, 2008
Bronx, New York

Christine Marbach Kellett

Christine Marbach Kellett
Administrative Law Judge