NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

JULIE LILLIAN PERRY,

Complainant,

v.

NEW YORK STATE, DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

and NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE, NEW YORK STATE, OFFICE OF THE STATE COMPTROLLER, Necessary Parties.

NOTICE AND FINAL ORDER

Case No. 10108336

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 16, 2009, by Robert J. Tuosto, 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: MAY 18 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10108336**

SUMMARY

Complainant alleged that Respondent caused her to suffer unlawful discrimination on the basis of her disability, and that she suffered retaliation. However, Complainant has failed to prove her case and her complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 18, 2005, 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 Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were scheduled for June 5-7, 2007.

On March 30, 2007 the Division's Calendar Unit served each of the parties with a Notice of Hearing. The Notice advised the parties that the matter was scheduled for Preliminary Conference ("PC") on April 12, 2007 at 10:00 a.m., and that public hearing sessions were also scheduled for June 5-7, 2007. The Notice was mailed to Complainant at her last known address: 127 Horseheads Blvd., Elmira Heights, N.Y. 14903. The Notice was not returned by the U.S. Postal Service. (ALJ Exh. 2)

On April 12, 2007 Complainant did not participate in the PC because she had previously spoken with Division counsel. The PC proceeded as scheduled. The Division was represented by then-Acting General Counsel Caroline Downey, Esq., by Veanka McKenzie, Esq. Respondent participated in the PC and was represented by Andrew Lind, Esq. The aforementioned public hearing dates were confirmed at the PC, and no objection to them was raised.

On June 5, 2007 a public hearing session was held in Binghamton, New York. Complainant did not appear at the public hearing. The Division was represented by then-Acting General Counsel Caroline Downey, by Christopher Knauth, Esq. Respondent was represented by Andrew Lind, Esq. Senior Attorney, N.Y.S. Department of Correctional Services. The record was opened and Complainant absence was noted. Mr. Knauth stated for the record that

numerous attempts had been made to communicate with Complainant in order to confirm her attendance at the public hearing. Mr. Knauth also stated that Complainant advised him that she could not appear for medical reasons; that she did not have a doctor's note; and that she could only attend the public hearing if her live-in boyfriend brought her and he was unavailable. (Tr. 6-7, 11)

Complainant telephoned the public hearing site before the public hearing commenced on June 5, 2007. Complainant spoke with Division counsel but, when she was offered the opportunity to have her call transferred to the hearing room to speak with all parties and the presiding ALJ on the record, she refused. Respondent interposed a motion to dismiss. Division counsel elected to prosecute the complaint despite Complainant's absence. A decision on Respondent's motion was reserved. (Tr. 18)

On August 20, 2007 ALJ Jackson issued a Recommended Order dismissing Complainant's complaint "with prejudice".

On September 19, 2007 then-Commissioner Kumiki Gibson, by Matthew Menes, Esq., Adjudication Counsel, reopened the record in this case to: 1) return the matter to another ALJ; and 2) allow Complainant to appear and give direct testimony and rebuttal evidence subject to cross-examination by Respondent's counsel. (ALJ Exh. 3)

This case was then reassigned to ALJ Thomas Protano.

On November 28, 2007 another public hearing session was held in Onandaga, New York. Respondent appeared at the public hearing. The Division was represented by Richard Van Coevering, Esq. Respondent was represented by Andrew Lind, Esq. Complainant did not appear at the public hearing. Permission to file post-hearing submissions was granted.

Respondent timely filed a post-hearing submission. Complainant submitted written statements and documentation.

On January 30, 2008 ALJ Protano issued a Recommended Order dismissing Complainant's complaint.

On February 27, 2008, Commissioner Gibson, by Matthew Menes, Esq., Adjudication Counsel, reopened the record in this case to: 1) continue the public hearing in front of ALJ Protano; 2) assign new Division counsel to Complainant; and 3) allow all parties to introduce any relevant evidence including, but not limited to, supporting documents and witness testimony.

This case was then reassigned to ALJ Michael Groban.

On April 16, 2008 another public hearing session was held in Binghamton, New York. Complainant appeared at the public hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Benjamin H. Rondeau, Esq., Senior Attorney, N.Y.S. Department of Correctional Services.

On March 10, 2009 this case was reassigned to ALJ Robert J. Tuosto.

FINDINGS OF FACT

1. Complainant, a nurse at Respondent's Willard Drug Treatment Campus ("WDTC"), alleged that Respondent discriminated against her on the basis of her disability, namely, Type 2 diabetes mellitus and congenital adrenal hyperplasia. Specifically, Complainant alleges that she was forced to attend Respondent's "Shock" Training Program ("the program") despite her request to be excused as a reasonable accommodation, denied leave time donations from other employees and retaliated against when denied a requested assignment to the day shift. (ALJ Exh. 1; Complainant's Exhs. 1, 9; Tr. 13-15, 26, 91, 95)

2. Respondent denied unlawful discrimination in its verified Amended Answer. (ALJ Exh. 1)

3. I find that Complainant is "disabled" as that term is used in the Human Rights Law. (Tr. 91, 95)

Complainant Attends the Program

4. Prior to her transfer to WDTC Complainant, as with all WDTC employees, signed a memorandum agreeing to participate in the program as a condition of her employment. The program is a four and one half week event which familiarizes staff with the training given to qualified parolees who have violated their parole. Rather than being returned to prison, these parolees are sentenced to the program which consists of 90 days of daily exercise, lectures and discussions. The program is intended to reintegrate the parolees into their former communities. (Respondent's Exhs. 5, 6; Tr. 13, 31-73, 100, 102,-03, 107-08, 115-16, 123-24, 161, 163-65, 168-69, 171-77, 195, 203, 261-62)

5. On October 3, 2005 Complainant attended the program for the first time despite having started at WDTC in 2002 and being mandated to complete this requirement in previous years. Respondent agreed to accommodate Complainant, as per her request, by providing her with a single, non-smoking hotel room; a refrigerator in which Complainant could store her medication; assignment to the "medical platoon"[1]; allowing her to carry her medical kit; and allowing her to be excused when needed in order to eat between meal snacks. (Complainant's Exh. 3, 4, 5, 6; Tr. 16, 40, 62-67, 69-71, 81-82, 143, 149-50, 178-83, 183, 186, 196, 263-64)

6. On the morning of October 3, 2005 Complainant was sent home due to her request that she could not complete the training because it was too physically stressful; Complainant was

[1] A "medical platoon" is used during parts of the program for those people with limitations. (Tr. 40, 64, 69)

directed to return to her regular duties on October 4 and October 5, 2005. However, Complainant did not attend work on either of those days. Complainant unsuccessfully grieved the result of her attending the program. (Tr. 70, 72, 75, 78-79, 106, 125-26, 184-89, 191-92, 264)

7. On October 5, 2005 Complainant was informed by Respondent that she needed to provide a doctor's note in order to return to work. Complainant failed to do so and, as a result, was placed on leave pending a medical examination which occurred on October 26, 2005. Complainant then returned to work without having been penalized for not completing the program. (Tr. 77-78, 77, 80, 107, 141, 146, 193-95, 264)

Leave Time Donations

8. I find that Complainant exhausted her leave accruals and, "on numerous occasions", subsequently received substantial leave donations from other state employees, as per N.Y.S. Civil Service Law. (Respondent's Exh. 8; Tr. 205-11, 217-18)

Complainant's Request for Shift Change

9. In April, 2006 Complainant bid for a change to the day shift despite being unable to work overtime. Respondent gave the shift change to another nurse it deemed the best candidate for the job. The candidate chosen had an additional six years of nursing experience as compared to Complainant, and greater experience as a state employee; she was also, unlike Complainant, able to work overtime. Complainant conceded that overtime was an essential function of nursing in a prison setting in order to provide proper continuity of medical care. Complainant conceded that she did not know why she failed to receive the shift change. (Tr. 31, 48, 49-50, 82-89, 96-97, 101, 107-09, 118, 120-22, 138, 168, 252, 260, 265-67, 276)

10. Complainant then became upset at being denied the shift change, and left the WDTC without authorization. Complainant was considered absent without leave. Complainant conceded that she did not fill out a leave request form concerning this incident. As a result, Complainant was docked one day's pay after receiving a notice of discipline from Respondent. (Respondent's Exhs. 7, 9; Tr. 82, 90-91, 96-97, 115-17, 122, 136-38, 148, 226-28, 265-66, 270-71)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of the...disability...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

Under the Human Rights Law a disability is defined as "...a physical, mental or medical impairment resulting from anatomical, physiological, or neurological conditions which prevents the exercise of normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques..." Human Rights Law § 292.21. Respondent concedes that Complainant is "disabled" as that term is used in the Human Rights Law.

It is well settled that a complainant in a discrimination case has the burden of proof and must, at the outset, establish a prima facie case of unlawful discrimination. A complainant's burden in this regard has been found to be '*de minimis*'. *See Schwaller v. Squire Sanders &. Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998). Once a complainant establishes a prima facie case, a respondent must subsequently produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate, nondiscriminatory

reason for its action, a complainant must then show that the proffered reason was a pretext for unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502. The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Servs. Corp.,* 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

To make out a case of disability discrimination, Complainant must show that she suffers from a disability, and that she was discriminated against in the terms, conditions or privileges of employment because of that disability. *Thide v. New York State Dept. of Transp.,* 27 A.D.3d 452, 2006 N.Y. Slip Op 1609 (2d Dept., March 7, 2006).

Here, Complainant fails to make out a prima facie case. The record shows that Complainant was clearly disabled for the purposes of the Human Rights Law. However, Complainant did not establish that the alleged discrimination she suffered was related to her disability.

Complainant alleged that her disability was the reason that she was not reasonably accommodated while attending the program, as well as denied leave time donations. Yet, the record shows that, as to the former, Complainant was allowed to leave the program without penalty when she represented that she could not physically continue; additionally, Complainant was allowed to return to her normal job duties for the remainder of the program. As a result, Complainant was in no way disadvantaged by her disability. In fact, any disadvantage Complainant suffered in the wake of this incident was solely attributable to her failure to provide a doctor's note as a condition of returning to work. As to the purported denial of leave time donations, the proof showed the exact opposite of Complainant's allegation as she freely took advantage of leave accruals from other state employees.

Therefore, this claim must be dismissed.

Complainant also alleged that she was not awarded the shift change in retaliation of her experience at the program.

In order to show a prima facie case based upon retaliation, Complainant must show that: 1) she engaged in protected activity; 2) Respondent was aware that she engaged in protected activity; 3) an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action. *Pace,* 692 N.Y.S.2d at 223, 224.

Complainant established that she engaged in protected activity of which Respondent was aware given her having filed a grievance in the wake of her experience in the program. However, neither the denial of the shift change nor the six month time lapse between it and the filing of the grievance can fulfill the last two elements of the prima facie test. *See Messinger v. Girls Scouts of the U.S.A.,* 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dep't., 2005)(adverse employment action found to be a materially adverse change in circumstances such as termination, decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation.); *see also Pace* at 225 (time lapse of greater than two months between complaint and adverse employment actions found to be fatal to retaliation claim).

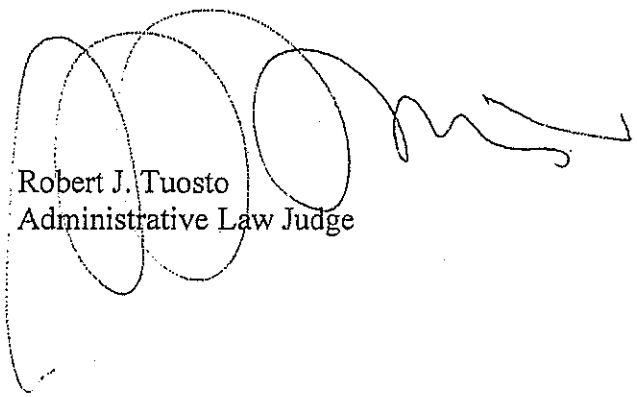
Therefore, the complaint must be dismissed.

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 16, 2009
Bronx, New York



Robert J. Tuosto
Administrative Law Judge