ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

RHODA M. ROBERSON-RUFFIN,
Complainant,

v.

HEALTHNOW NEW YORK INC. D/B/A BLUECROSS BLUESHIELD OF WESTERN NEW YORK,
Respondent.

NOTICE AND FINAL ORDER

Case No. 10138169

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 1, 2012, by Martin Erazo, Jr., 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"), WITH THE FOLLOWING AMENDMENTS:

- Complainant's ultimate burden of proof is to show that discrimination occurred, not that

"Respondent's proffered explanations are a pretext," as stated in the Recommended Order. *See Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 630 (1997).

- That portion of the Recommended Order which states that "[i]t is well settled that an employer may make reasonable inquiry into an employee's ability to return to work after a medical leave" is not adopted herein. Under the Human Rights Law, an employer may inquire into a current employee's medical condition in order to determine if a reasonable accommodation is available. This inquiry, however, is triggered only "once the need for an accommodation is made known or requested." *See* 9 N.Y.C.R.R. 466.11(j)(4). An employer has the right to medical information necessary to verify the existence of the disability or necessary for consideration of an accommodation only "[o]nce an accommodation is under consideration." 9 N.Y.C.R.R. § 466.11(j)(5). In the instant case, Complainant was not requesting an accommodation and thus, Respondent's inquiry can not be justified on this basis. Though New York case law has not examined when it may or may not be appropriate for an employer to make medical inquiries of employees, federal law provides guidance. In order to overcome the general prohibition against medical examinations and inquiries, an employer must show the examination or inquiry is job-related and consistent with business necessity and "that the asserted business necessity is 'vital to the business,' that the examination [or inquiry] 'genuinely served the asserted business necessity,' and that 'the request is no broader or more intrusive than necessary.'" The employer need not show "that the examination or inquiry is the only way of achieving a business necessity, but the examination or inquiry must be a reasonably effective method of achieving the employer's goal." *Shannon v. Verizon New York Inc.*, 2009 WL 1514478, at *5 (N.D.N.Y. 2009) (*citing Rivera v. Smith*, 2009 WL

124968, at *4 (S.D.N.Y. 2009) (*quoting Conroy v. New York Dept. of Corr. Servs.*, 333 F.3d 88, 98 (2d Cir.2003)). ". . . [C]ourts will readily find a business necessity if an employer can demonstrate that a medical examination or inquiry is necessary to determine 1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee's work) or 2) whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy." *Conroy,* 333 F.3d at 98. In the instant matter, Respondent sought a medical examination of Complainant because she had taken several extended leaves of absence due to her disability. Respondent sought to assess her ability to perform her job-related duties in contemplation of her return to work. Further, Respondent suspected that Complainant may have been abusing its sick leave policy. Thus, the IME served a business necessity. Accordingly, Respondent did not discriminate against Complainant and the complaint is hereby dismissed.

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: 8/13/2012
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

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RHODA M. ROBERSON-RUFFIN,
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HEALTHNOW NEW YORK INC. D/B/A BLUECROSS BLUESHIELD OF WESTERN NEW YORK,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10138169**

SUMMARY

Complainant failed to establish that Respondent unlawfully discriminated against her on the basis of disability when refusing to allow her return to work. Therefore, this matter must be dismissed.

PROCEEDINGS IN THE CASE

On December 8, 2009, 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 Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on October 19, 2011.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq., Senior Attorney. Respondent was represented by its in-house counsel, Sarah E. Tollner, Esq.

The parties submitted post-hearing briefs.

FINDINGS OF FACT

1. Respondent hired Complainant as a customer service representative on February 14, 2000. (ALJ Exhibit 2)

2. Complainant suffers from anxiety, dizziness, and headaches. (Tr. 104)

3. During the five year preceding June 2008, Complainant had a history of extended leaves each lasting for a period of several months. (Tr. 98)

4. On June 11, 2008 Complainant went on medical leave again. (ALJ Exhibit 2)

5. On November 13, 2009 Respondent received Complainant's medical note from her doctor that stated: "Ms. Ruffin is able to return to work on 12/4/09." The medical note did not contain any further information. (ALJ Exhibit 2; Joint Exhibit 9)

6. Respondent wanted its own assessment of Complainant's ability to return to work. (Joint Exhibits 2, 3)

7. On December 1, 2009, at Respondent's request, Complainant had an independent medical examination ("IME") conducted by Dr. Mark Costanza. (Joint Exhibit 1; Tr. 48)

8. Dr. Costanza could not complete his medical assessment because Complainant did not provide him with any medical records from her doctor. (Joint Exhibit 1; Tr. 48)

9. Bruce A. Morlock is Respondent's Director of Employee Benefits. (Tr. 64, 66)

10. In a letter dated December 2, 2009, Morlock informed Complainant that she could not return to work on December 4, 2009, because Dr. Costanza could not complete a medical assessment of her without her medical records. (Joint Exhibits 1, 10; Tr. 22, 67)

11. In the same letter Morlock informed Complainant that there would not be any negative impact to her continued employment due to any delay in Respondent's review of Dr. Costanza's report. However, Morlock also informed Complainant that she and her doctor must cooperate and exchange information with Dr. Costanza by December 11, 2009. (Joint Exhibit 1; Tr. 74-75)

12. On December 3, 2009, Respondent's Human Resources ("HR") employee, Laura Kamela, followed up with a telephone call and explained to Complainant the contents of Respondent's December 2, 2009 letter. (Joint Exhibits 1, 3, 10; Tr. 22, 68-69)

13. Complainant reported to work on December 4, 2009. (Tr. 20)

14. Respondent's line security guard, Jason Wiechec, received a formal counseling notice because he violated post orders by allowing Complainant to walk into the building without checking her identification. (Joint Exhibits 5, 6, 7; Tr. 119-122)

15. When Complainant reported to her supervisor, Joseph Golomoski, he directed her to HR. (Tr. 35)

16. Complainant spoke with Morlock who reminded her that her doctor had to share medical information with Dr. Costanza so an IME could be completed. (Joint Exhibits 2, 3)

17. Complainant responded to Morlock that "she was not authoring her physician to do so." (Joint Exhibits 2, 3)

18. Morlock instructed Complainant to leave the building. (Tr. 70-71, 80, 99, 106)

19. Complainant did not follow Morlock's instructions to leave. Instead, Complainant waited in the hallway in order to speak with her union representative. (Tr. 37-43)

20. Respondent is a health insurance company with protected health information. Any individual who is not authorized to be in the building must leave the premises. (Tr. 71-72, 91)

21. Respondent's security guard ordered Complainant to leave and escorted her out of the building. Complainant decided to wait for the union representative in the parking lot. (Tr. 37-40)

22. A second security guard approached Complainant's car and informed her that she could not stay on the premises. (Tr. 40-41)

23. Complainant disregarded the second security guard's instructions, went into the building, and met with the union representative. (Tr. 41-42)

24. Complainant filed a union grievance charging Respondent with asking her "to leave work without sufficient and just cause." (Joint Exhibit 2)

25. After Complainant completed her grievance, the first security guard returned and again instructed Complainant to leave the premises. (Tr. 42)

26. As a settlement of the grievance, Respondent returned Complainant to work on December 15, 2009. Respondent also paid Complainant six days of wages for the period of December 4, 2009 to December 14, 2009. (Joint Exhibit 4; Tr. 46-47, 63)

27. Complainant was allowed to return to work without completing the IME Respondent had initially sought. (Tr. 84)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of disability. Human Rights Law § 296.1(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 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 by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See, Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant established a prima facie case of disability discrimination. First, Complainant has a disability within the meaning of the Human Rights Law in that she suffers from anxiety, dizziness, and headaches. Second, Complainant was qualified for the position she held. Respondent hired her as customer service representative in February, 2000 and did not raise any work performance issues at public hearing. Third, Complainant suffered an adverse employment action under circumstances giving rise to an inference of discrimination when Respondent refused to allow her to return to work from her medical leave, although cleared by her doctor.

However, Respondent clearly articulated legitimate, nondiscriminatory reasons for its employment decisions that Complainant failed to demonstrate were a pretext for unlawful discrimination.

Respondent had a legitimate reason to have Complainant attend an IME before commencing work on December 4, 2009. Respondent also had a legitimate reason to order Complainant to leave the building on the same date.

First, Complainant placed her own medical condition at issue as a reason for her inability to work during a period of six months. Complainant's one sentence medical note was inadequate to meet Respondent's legitimate inquiry about her ability to perform her work duties. Second, Complainant had a history of repeatedly taking extended leaves of absence, thus raising additional legitimate concerns about her ability to return to work. Third, Complainant was wholly uncooperative with Respondent's Dr. Costanza. Complainant made it clear to Respondent that she would not cooperate by providing the medical records from her doctor. Fourth, Complainant appeared unannounced, on Respondent's work premises, on December 4, 2009. Complainant knew that she did not have Respondent's permission to return to work. Contrary to Complainant's claim, Respondent's security guards did not behave unlawfully when they asked her to leave Respondent's work premises.

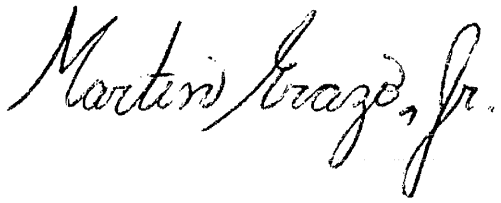
It is well settled that an employer may make reasonable inquiry into an employee's ability to return to work after a medical leave. *See Gary Milano v. Caterpillar Tractor Company,* 184 A.D.2d 807, 584 N.Y.S.2d 234 (3rd Dept. 1992) (Milano's doctor cleared his return to work. Caterpillar had Milano's medical condition reviewed by its own physician to ascertain Milano's ability to perform the duties of job.); *Rose Anna Shepard v. New York City Correctional Department,* 2010 WL 106692 (2nd Cir. N.Y.) (The N.Y.C. Correctional Department challenged the adequacy of Shepard's medical note that cleared her to return to work. The medical note did not contain any indication that her doctor was familiar with her job duties.)

After resolving Complainant's union grievance, Respondent allowed Complainant to return to work on December 15, 2009. Respondent paid for Complainant's missed work time from December 4, 2009 to December 15, 2009, without requiring Complainant to complete the IME. Nonetheless, the settlement of the union grievance is not an indication that Respondent violated the Human Rights Law. Before allowing Complainant to return to work, Respondent properly asked Complainant to have her medical condition reviewed by an IME.

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 dismissed.

DATED: February 27, 2012
Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge