

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MARIE A. SPINA,

Complainant,

v.

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 30 TRUST FUNDS,**

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 3506458

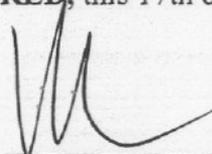
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 26, 2007, by Lilliana Estrella-Castillo, an Administrative Law Judge of the New York State Division of Human Rights (“Division”).

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 17th day of April, 2007.



KUMIKI GIBSON
COMMISSIONER

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STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
On The Complaint Of

MARIE A. SPINA,

Complainant,

-against-

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 30 TRUST FUND,

Respondent.

RECOMMENDED FINDINGS OF
FACT, DECISION AND OPINION,
AND ORDER

CASE NO: 3506458

PROCEEDINGS IN THE CASE

On October 2, 2001, Marie A. Spina (complainant) filed a verified complaint with the State Division of Human Rights (Division) charging International Union of Operating Engineers Local 30 Trust Fund (respondent) with an unlawful discriminatory practice in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that respondent had engaged in an unlawful employment discriminatory practice. Thereafter, the Division referred the case to public hearing.

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge of the Division.

A hearing was held from October 3, 2005, through October 6, 2005, and on November 22, 2005. The Law Office of David S. Feather, Esq., by David S. Feather, represented complainant. The law firm of Schwarz & DeMarco, LLP by Matthew J. DeMarco represented respondent.

Complainant claims that respondent discriminated against her on the basis of her disability when it refused to offer her a reasonable accommodation, and then terminated her employment because of her disability in violation of the Human Rights Law. Respondent denies any violation of the Human Rights Law (ALJ Exhibits I, III).

After evaluating the testimony and documentary evidence presented at the hearing, and assessing the credibility of the witnesses, it is recommended that the Division dismiss the complaint.

FINDINGS OF FACT

Complainant became employed by respondent on May 13, 1995, as an annuity coordinator (Tr. 38-39). On January 17, 2001, Complainant was transferred to the claims processing department as a medical claims processor, where she performed clerical duties (Tr. 38-42, 310-312). According to complainant, she was not required to lift anything over ten pounds in order to perform her duties (Tr. 89).

On January 13, 2000, complainant was injured in an automobile accident (Tr. 46-48). On March 26, 2001, as a direct result of the accident, complainant had a laminectomy diskectomy (spinal surgery) (Tr. 47-48, 65; Complainant Exhibit 5). After her surgery, complainant received short term disability insurance until September 2001 (Tr. 137-138, 299; Complainant Exhibit 22).

Complainant met with respondent's supervisors prior to her surgery and told them that her recovery period would be between three to six months (Tr. 71). On May 24, 2001, complainant received a letter from Lorraine Hardt, respondent's office manager in charge of staffing, requesting a monthly progress report from complainant's physician, in order to enable respondent to "plan out the day-to-day operations with the department while you continue your

disability.” Hardt also requested that the progress report provide an estimated date to return to work (Tr. 49, 72-73; Complainant Exhibit 6). Because complainant was not told that she was required to keep respondent abreast of her medical development during her leave, complainant expressed surprise when she received this request.

Complainant expressed displeasure with respondent’s request, both in writing and during telephone conversations. She felt that the request was hostile towards her because of her union activities; she was shop steward (Tr. 49, 73-74, 76, 317-319, 380; Complainant Exhibit 7). Complainant continues to express that her personal medical progress was not relevant to her job requirements (Tr. 323).

On June 26, 2001, Hardt once again wrote to complainant and advised her that respondent had not received any medical documentation describing her current condition (Tr. 83; Complainant Exhibit 9). Shortly thereafter, respondent received complainant’s doctor’s note dated June 20, 2001, which indicated that complainant was cleared to return to work on July 18, 2001, with no heavy lifting greater than ten pounds and “[s]he must wear flat walking sneakers.” (Tr. 66, 82; Complainant Exhibit 8). In response, Brendan McPartland, respondent’s office manager, wrote to complainant on July 11, 2001, informing her that the doctor’s note did not indicate the nature of the ailment or the anticipated date of full recovery (Tr. 85, 473, 539; Complainant Exhibit 10). McPartland also informed complainant that in order for respondent to determine whether a reasonable accommodation could be offered, it needed a written reply by the doctor as to when complainant would be fully recovered and whether a “flat, soft sole dress shoe would achieve the same purpose during [her] recovery.” (Tr. 90; Complainant Exhibit 10). Complainant did not seek the clarification required by respondent, instead she called her union

and represents that she was advised that her medical records were private and that the letter from her doctor was sufficient (Tr. 86-88; Complainant Exhibits 8, 10).

On July 17, 2001, McPartland wrote to complainant confirming their telephone conversation and again requested that complainant ask her doctor whether respondent's alternate accommodation of a "flat, soft sole dress shoe" instead of walking sneakers, was a reasonable alternative (Tr. 95; Complainant Exhibit 12). Complainant agrees that McPartland told her that as long as the note from her doctor responded to his inquiries she could return to work on July 18, 2001, but she did not ask the doctor about respondent's alternative accommodation (Tr. 91).

On July 18, 2001, complainant reported to work with a doctor's note that indicated complainant had surgery and "she must wear walking sneakers." (Tr. 92; Complainant Exhibit 11). This note does not indicate any lifting restrictions, although complainant continues to insist that she still cannot lift over ten pounds to this day (Tr. 336). Complainant then met with McPartland and Eileen Greer, her union representative, and was told by McPartland that the doctor's note was not acceptable and was sent home (Tr. 98-100). Greer testified that this happened because McPartland was seeking clarification regarding the restrictions, which was not forthcoming (Tr. 681).

According to complainant, although respondent has a written dress code which requires that employees dress in business casual attire, she was allowed to wear sneakers after her accident and prior to the surgery (Tr. 132-133, 327, 551-552, 646; Respondent Exhibit A). Complainant further represents that despite the dress code, she and other employees were permitted to wear sneakers at work (Tr. 133, 324-325). This contention is not supported by any evidence. None of the witnesses were able to recall that complainant wore sneakers at work or

that they, or any other employee, were ever permitted to wear sneakers at work after the dress policy was implemented (Tr. 255, 267, 513, 623-624, 655-656, 667-668, 695-696).

On July 24, 2001, McPartland wrote to complainant explaining that the restrictions on her employment would place an undue burden on the operation of the office, and effectively terminated her employment (Tr. 100; Complainant Exhibit 13).

After receipt of the July 24, 2001 letter, Complainant never provided respondent with any updates of her condition (Tr. 275, 280-282, 425-426). Complainant never asked her doctor whether the alternative shoe proposed by respondent was an acceptable accommodation (Tr. 284-285, 330-331). Instead, complainant followed the advice of her union in not providing respondent with any updates regarding her recovery or the restrictions (Tr. 298, 293).

On October 31, 2001, McPartland wrote to complainant with an offer of reinstatement (Complainant Exhibit 14). Complainant received the offer, but represents that on the advice of her union she did not respond or provide any information (Tr. 304-305, 308). Despite respondent's offer of reinstatement, complainant felt that respondent did not really want her back (Tr. 308-309).

McPartland testified on behalf of respondent and explained that when he wrote to complainant he was seeking clarification regarding the ten pound lifting restriction, and the restriction that complainant "must" wear sneakers (Tr. 482). He felt that respondent was entitled to an explanation regarding the restrictions and how long it would have to accommodate complainant (Tr. 566-567, 560). McPartland felt that it would be difficult to accommodate an employee with a ten pound restriction because although lifting was not an essential function of complainant's job, it was "part and parcel of the job" since many items that she would be required to handle weigh over ten pounds (Tr. 480, 545-550). He also felt that wearing shoes

was an essential function of the job because everyone was responsible for complying with respondent's dress code (Tr. 553).

McPartland credibly represented that if complainant had responded to his inquiries, complainant would have been reinstated (Tr. 562). But, instead of getting this clarification, complainant communicated to McPartland that respondent's requests for clarifications were "B.S." [*sic*] and further proof that respondent had a personal vendetta against her because of her activities as a union shop steward (Tr. 483-485).

Dr. Mark Eisenberg's affidavit was accepted into evidence (Respondent Exhibit F). It indicates that complainant never asked his opinion whether a "soft-sole dress shoe" would be an appropriate alternative to sneakers (Respondent Exhibit F). Dr. Eisenberg's affidavit indicates that his recommendation "was not a requirement that sneakers be worn, but rather a recommendation that I envisioned a flat soft-sole type of footwear to be helpful to a faster recovery." (Respondent Exhibit F).

DECISION AND OPINION

Complainant maintains that respondent failed to provide her with a reasonable accommodation and discriminatorily discharged her in violation of the Human Rights Law. It is my decision and opinion that respondent did not discriminate against complainant in violation of the Human Rights Law.

To make out a prima facie case of employment discrimination based on disability under the Human Rights Law, complainant must demonstrate that she suffered from a disability and that the disability caused the behavior for which she was terminated. I find that complainant has come forward with sufficient evidence to meet her burden of establishing a prima facie case of disability discrimination.

First, the term “disability” is defined as “physical, medical or mental impairments that ‘do not prevent the complainant from performing in a reasonable manner the activities involved in the job.’” *Pembroke v. New York State Office of Court Administration*, 306 A.D.2d 185; 761 N.Y.S.2d 214, 215 (1st Dept. 2003), citing *Executive Law §292 (21)*. All that a complainant has to show is that she suffers from a “medically diagnosable impairment.” See, *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998).

Second, the employer then has a statutory duty to “provide reasonable accommodations to the known disabilities of an employee [...] in connection with a job or occupation sought or held.” *Executive Law §296 (3)(a)*. A “reasonable accommodation” is defined as actions taken by an employer which “permit an employee [...] with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held [...] provided, however, that such actions do not impose an undue hardship on the business.” *Executive Law §292 (21-e)*.

The burden is on complainant to establish that she proposed a reasonable accommodation and that respondent refused to make such accommodation. *Pembroke v. New York State Office of Court Administration*, 306 A.D. at 185, citing, *Moritz v. Frontier Airlines, Inc.*, 147 F. 3d 784, 787 (8th Cir. 1998). Here, there is no issue that complainant suffered from a disability as defined by the Human Rights Law, and that she requested a reasonable accommodation from respondent. She requested to be allowed to work with a lifting restriction of not more than ten pounds, and to be exempted from the dress code which forbade sneakers. However, as stated below, complainant failed to engage in an interactive process by refusing to respond to respondent’s inquiries regarding an alternative accommodation.

Complainant initially presented herself to the employer with two limitations, no heavy lifting over ten pounds, and “must wear sneakers.” When complainant returned to work the only

limitation was that she "must wear sneakers." Respondent, through its office manager, McPartland, inquired whether a "flat, soft sole dress shoe" would achieve the same purpose during her recovery. McPartland asked complainant to ask her doctor whether this would be an acceptable accommodation/alternative. Complainant chose not to. Instead, complainant consulted with her union representatives who advised her not to respond to respondent's request.

This was a fatal error by complainant and her union because there is nothing in the law that requires that an employer provide the disabled employee with the accommodation that the employee "requests or prefers." *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996). On the contrary, the statute envisions a process in which the employer and employee engage in an interactive process in arriving at a reasonable accommodation for a disabled employee. *See, Pimentel v. Citibank, N.A.*, 29 A.D.3d 141; 811 N.Y.S.2d 381 (1st Dept. 2006), *citing, Parker v. Columbia Pictures Industries*, 204 F.3d 326, 338 (2d Cir. 2000).

In the instant complaint, respondent provided sufficient proof that it took steps towards engaging in an interactive process. When complainant advised respondent of her limitations respondent requested additional information to understand the limitations and their duration. Respondent proved that it considered complainant's request, and offered an alternative to the limitation that she "must" wear sneakers. Complainant on the other hand, refused to engage in the process by not seeking the information requested by respondent. Had complainant sought this clarification from her doctor she would have discovered that it was a reasonable alternative.

As a result of complainant's failure to participate with respondent in an interactive process to find a reasonable accommodation, respondent cannot be found to have violated its duty to accommodate complainant's disability. *See, Donofrio v. New York Times*, 2001 U.S.

Recommended Order

2002 U.S. Dist. LEXIS 2399, 2002 WL 230820 (SDNY Feb. 14, 2002).

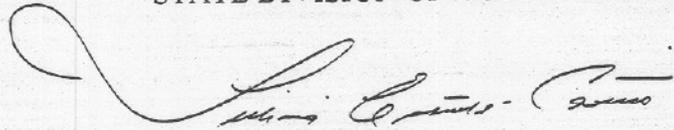
ORDER

Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED, that the complaint be, and the same hereby is dismissed.

Dated: January 26, 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



Lilliana Estrella-Castillo
Administrative Law Judge