NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

SHERRY A. TURNER,

Complainant,

v.

GENERAL MILLS CEREALS OPERATIONS, INC.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10111753

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 June 15, 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: SEP 21 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10111753**

SUMMARY

Complainant alleges that Respondent discriminated against her in employment by suspending her from work because of disability and race/color. Respondent denies these allegations. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On May 15, 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 Martin Erazo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 20 and 21, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Toni Ann Hollifield, Esq. Respondent was represented by Jeannine R. Idrissa, Esq.

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

The case was then assigned to ALJ Michael Groben for decision.

FINDINGS OF FACT

1. Complainant is a black-woman. (ALJ Exhibit 1; Tr. I 28-29) [1] She has been diagnosed with a disorder related to lupus, which she described at the public hearing as "antilipid phosphorous antibody syndrome", and with osteoarthritis in both knees. (Tr. I 29-30)[2]

2. At all times relevant to the complaint, Complainant was employed by Respondent as a mechanic. (Tr. I 32, 52) In November 2005, Respondent suspended her from work for one day due to attendance problems. (ALJ Exhibit 1)

3. Kevin McFeely ("McFeely") was Complainant's team leader. His responsibilities included production, safety, and employee discipline. (Tr. I 82-83)

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[1] The first volume of the transcript of the public hearing will be cited as "Tr. I"; the second will be referenced as "Tr. II."

[2] A lupus-related condition, "antiphospholipid antibody syndrome", is referenced in the McGraw-Hill Concise Dictionary of Modern Medicine (2002 McGraw-Hill Companies, Inc.)

4. At all times relevant to the complaint, Pamela O'Neill (O'Neill") was Respondent's Human Resources assistant. Her responsibilities included hiring, disciplinary actions and maintenance of personnel records. (Tr. II 8-9)[3]

5. Respondent maintains Equal Employment Opportunity and Harassment Free Workplace policies, which are published in its employee handbook and distributed to its employees. (Respondent's Exhibit 1, 2; Tr. I 83, Tr. II 9-11) Complainant received a copy of the employee handbook when she was hired by Respondent. (Respondent's Exhibit 4)

6. Pursuant to Respondent's Attendance Control policy, absences from work are divided into two categories: "excused" absences, and "unexcused" absences. Absences for leave pursuant to the Family Medical Leave Act ("FMLA") will be excused. (Respondent's Exhibit 3)

7. In order for an absence to be excused, Respondent requires its employees to telephone its contractor, known as the Reed Group. (Respondent's Exhibit 3; Tr. I 31-32, 85, 104-05)

8. Pursuant to the Attendance Control policy, employees are assigned two attendance points for each unexcused absence. When 15 points are accumulated, the employee is given a verbal warning; at 18 points, a written warning; at 21 points, a suspension without pay; and at 24 points, the employee is terminated. This policy is published in Respondent's employee handbook, and it is the responsibility of each employee to monitor her own attendance and the accumulation of attendance points. (Respondent's Exhibit 3; Tr. I 32-33, 84-85, Tr. II 26)

9. If an employee has accumulated attendance points, but had maintained perfect attendance for the previous three month "quarter", two attendance points are deducted. (Respondent's Exhibit 3; Tr. I 86)

10. Respondent tracks employee attendance through its "Workbrain" computer attendance system. Each employee uses a card or electric keypod (sic) to enter her arrival and departure into

[3] O'Neill's name is erroneously spelled as "O'Neal" in Volume I of the transcript.

a time clock, which is connected to the Workbrain system. (Tr. I 86-87, Tr. II 11-12) All absences are initially entered by the employee's team leader into the Workbrain system. Respondent's plant nurse will then communicate with the Reed Group to ascertain whether the employee has FMLA leave or some other reason to excuse the absence. If so, no attendance points will be assigned to the employee for that absence. (Tr. I 85-86, 87-89)

11. When attendance points are assigned, an employee may submit documentation to the Reed Group which sustains her claim that a particular absence should have been excused. The Reed Group and Respondent's plant nurse will then have the erroneously assigned points deleted. (Tr. I 105-06, Tr. II 23-25)

12. Complainant testified that she notified Respondent of her disability through the Reed Group. (Tr. I 30, 70-71, 77-78)

13. On or about July 26, 2005, Complainant submitted a certification from her health care provider to the Reed Group, requesting "intermittent" FMLA leave for the next six months. It was Complainant's practice to submit such a certification every few months in anticipation that she would occasionally be unable to work because of her disabilities, and would then call in to report each day of FMLA absence as necessary. (Complainant's Exhibit 3; Tr. I 31-34)

14. That certification stated that Complainant suffered from a chronic serious health condition which required periodic visits for treatment and would either continue over an extended period of time, or cause an episodic, rather than a continuing, period of incapacity. (Complainant's Exhibit 3)

15. Respondent required an employee who had certified intermittent FMLA leave to call in for each absence to the Reed Group. These calls were required to be made no more than two days before or after the day of absence. (Complainant's Exhibit 2; Tr. I 34-35)

16. Complainant testified that she had made all calls regarding the FMLA absences on her own telephone or on Respondent's company phone. (Tr. I 35-36) Complainant testified at the public hearing that in or about August of 2005, she began to have problems with the Reed Group not recording her FMLA absence telephone calls and "interrelating" her regular time with FMLA time, and that the consequence of this was that she began to accumulate attendance points without knowing why such points were being imposed. (Tr. I 35-36, 37-38, 56) Complainant became afraid that she would be fired. (Tr. I 38)

17. In August 2005, Complainant notified Respondent of these problems by E-mailing her supervisors and asking for help, "calling in" to Respondent's company nurse Lou Ann Luther, and also calling O'Neill, the Reed Group, Complainant's supervisor, and her union representative. (Tr. I 36-37, 59)

18. On August 22, 2005, McFeely warned Complainant about her accumulation of 10 attendance points. (Respondent's Exhibit 5; Tr. I 90-91)

19. On September 14, 2005 Respondent's team leader Clay Crane warned Complainant about her accumulation of 13 attendance points. (Complainant's Exhibit 4)

20. Shortly after September 20, 2005, Complainant submitted to McFeely a copy of Respondent's list of FMLA and unexcused absences between June 6 and September 20, 2005 and the 16 attendance points assessed against her for that period, on which Complainant had written notes indicating that she contested 10 of the 16 attendance points assessed. (Respondent's Exhibit 6; Tr. I 91-92) McFeely then provided that document to O'Neill. (Respondent's Exhibit 7; Tr. I 91, 93-94, Tr. II 12-13)

21. Complainant testified at the public hearing that no one from Respondent corporation offered her assistance in disputing the attendance points, prior to her eventual suspension in

November 2005. (Tr. I 59-60) However, on October 4, 2005 O'Neill sent send an E-mail offering to help Complainant. Complainant rejected that offer. (Respondent's Exhibit 7; Tr. I 61-63, Tr. II 13-15)

22. Complainant testified at the public hearing that she had not been given a verbal warning prior to her suspension in November 2005. (Tr. I 58-59) However, on October 5, 2005 McFeely gave Complainant a verbal warning for violating Respondent's attendance policy due to her accumulation of attendance points. McFeeley provided documentation of that warning to Complainant. (Respondent's Exhibit 8; Tr. I 95, Tr. II 15)

23. As of October 31, 2005, Complainant had accumulated 23 attendance points. (Respondent's Exhibit 25; Tr. I 99)

24. On or about November 12, 2005 McFeely gave Complainant a written warning for accumulating 18 or more attendance points. (Complainant's Exhibit 7 and Respondent's Exhibit 10; Tr. I 95-98, Tr. II 16) He also advised Complainant that the next step in the discipline process would be suspension, and that she should send copies of any documentation which she had provided to the Reed Group, to O'Neill. (Respondent's Exhibit 12; Tr. I 100-01) Complainant did not do so. (Tr. II 19-20)

25. O'Neill then met with Complainant to discuss the matter and offer her assistance, and Complainant advised that she was not going to be "bothered" with the matter any more. O'Neill concluded that Complainant did not want to pursue contesting the attendance points. (Tr. II 16-17)

26. O'Neill advised Respondent's assistant Human Resources Manager, Jason Whetstone, of Complainant's response, and the decision was made to proceed with a suspension. (Tr. II 17-19)

27. Complainant's union representative did not request that the suspension be delayed or held in abeyance. (Tr. II 20)

28. On or about November 17, 2005, while McFeely was on vacation, Respondent's team leader Clay Crane advised Complainant that she had accumulated 23 attendance points and that she was suspended from work for one day. (Respondent's Exhibit 11; Tr. I 38-40, 41)

29. On or about December 5, 2005, Complainant gave Whetstone a copy of the call logs for her personal telephone, which she had marked up to indicate days on which she had called the Reed Group to notify them of a FMLA absence. Whetstone gave these telephone logs to O'Neill and asked her to investigate. (Respondent's Exhibit 14; Tr. I 42, Tr. II 20-21)

30. O'Neill gave the logs to the Reed Group and asked them to verify the telephone calls. Based on that investigation, O'Neill and the Reed Group determined that one attendance point should be removed from Complainant's record. One point was removed. (Respondent's Exhibit 16; Tr. II 22-23, 25)

31. Complainant's suspension was not reversed at that time, however, because she still had 22 attendance points, one more than needed for a suspension. (Tr. II 25-26)

32. Complainant believed that her suspension was due to her disability and race because other Caucasian employees in her situation were not suspended but were given additional "chances", when they accumulated attendance points. These Caucasian employees were Tom Bakowski ("Bakowski"), Jennifer Babula ("Babula"), and Barry Phillips ("Phillips"). [4] (Tr. I 40-41, 50, 52) Of those three, only Bakowski suffered from a disability. (ALJ Exhibit 1, 2, Complainant's Exhibit 10; Tr. 103-06)

[4] Babula's name is erroneously spelled as "Bobola" in Volume I of the transcript.

33. Complainant was advised by Bakowski that he had received opportunities to bring in documentary proof to have his attendance points removed. (Tr. 44-45, 47) At the public hearing, Complainant claimed that Respondent had not allowed her this opportunity, and that "no one else" had been suspended or written up for attendance problems. (Tr. I 44-45)

34. Bakowski received a written warning regarding his attendance points on or about November 12, 2005. (Respondent's Exhibit 9; Tr. I 101-02) He accumulated sufficient attendance points to be suspended, but at the urging of his union representative, the suspension was temporarily held in abeyance in order to give Bakowski the opportunity to obtain and submit additional telephone records to support his appeal of the imposition of attendance points. Bakowski was later terminated due to his attendance problems. (Respondent's Exhibit 15, 18; Tr. I 102-09)

35. Complainant believed that Babula had also been given an opportunity to have attendance points removed, because another employee, whose name she could not remember, had told her this. (Tr. I 45-48)

36. Babula did receive a verbal warning regarding her attendance, but was not suspended because she never accumulated a sufficient number of attendance points. (Respondent's Exhibit 27; Tr. II 41-43)

37. Complainant believed that Phillips had also been given an opportunity to address his attendance points, because she had looked through various employee files on her supervisor's desk and observed that Phillips had accumulated a high number of points, between 22 and 24 points. (Tr. I 49-51) Complainant testified that Phillips had not been suspended or given a written warning. (Tr. I 50-51)

38. Phillips did accumulate 21 attendance points as of June 2, 2006. However, he was not suspended, because he had achieved perfect attendance in the previous quarter, resulting in the deduction of two attendance points. Phillips did receive verbal and written warnings. (Respondent's Exhibit 28; Tr. II 43-47, 51)

39. Complainant submitted a grievance through her union regarding the one-day suspension. On November 22nd, 2006 the written warning and suspension were removed from her file, and her pay for the day of suspension was restored. (Complainant's Exhibit 9, Respondent's Exhibit 19; Tr. II 26-30)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of disability or race/color. N.Y. Exec. Law, art. 15 (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 held, that she suffered an adverse employment action, and that the 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 the respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with the complainant to show that the 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).

Race/Color Discrimination

Complainant established a prima facie case regarding race/color discrimination. This

burden has been described as de minimis. *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dep't. 1998). Complainant is a member of a protected group due to her race and color, and qualified for her position as a mechanic. The one-day suspension imposed on her, although not an onerous punishment, was an adverse job action. Finally, because she presented some evidence that three similarly situated Caucasian employees were not warned or suspended when she was, Complainant has satisfied the last element of her prima facie case.

However, Respondent articulated legitimate nondiscriminatory reasons for its decision to suspend Complainant. Respondent suspended Complainant because she had accumulated sufficient attendance points, and it reasonably concluded that Complainant chose not to contest the matter. Complainant's claims that Respondent had failed to give her a verbal warning, and ignored her request for assistance in submitting documentation, was contradicted by reliable record evidence. Respondent established that none of the Caucasian employees Complainant cited as comparators received favorable treatment due to their race, and that Respondent's attendance policy was not selectively enforced against Complainant. Complainant failed to rebut this evidence.

Disability Discrimination

A disability is defined under the Human Rights Law as a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21. This definition has been

interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

As a threshold matter, I note that the verified complaint did not set forth any claim that Complainant suffered from a lupus-related ailment. Pursuant to the Rules of Practice of the Division, I hereby amend the complaint to conform to the proof adduced at the public hearing. 9 NYCRR § 465.12(f)(14).

Complainant is a member of a protected group in that she suffered from the disabilities of osteoarthritis and a lupus-related malady. As noted above, Complainant was qualified for her position, and she suffered an adverse employment action. Complainant also presented evidence indicating that two non-disabled employees were not warned or suspended for their own attendance problems. However, Respondent established that these non-disabled employees were not treated differently, and presented legitimate, non-discriminatory reasons for its suspension of Complainant. Complainant failed to show that these reasons were a pretext for discrimination.

The complaint is 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 hereby is, dismissed.

DATED: June 15, 2009
Bronx, New York

Michael T. Groben
Administrative Law Judge