



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DIEDRE WYNN,

Complainant,

v.

MONROE COUNTY,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10161178

Federal Charge No. 16GB302609

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 July 31, 2014, 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 HELEN DIANE FOSTER, 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: **DEC 30 2014**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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MONROE COUNTY,

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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10161178**

SUMMARY

Complainant alleged Respondent refused her a reasonable accommodation and issued her a formal counseling because of her race, gender and disability. Complainant failed to establish that Respondent unlawfully discriminated against her. Accordingly, this matter is dismissed.

PROCEEDINGS IN THE CASE

On April 4, 2013, 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. Public hearing sessions were held on January 8 and 9, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Fernando Santiago, Esq. Respondent was represented by Robert P. Yawman, III, Esq, Deputy County Attorney.

On May 23, 2014, the parties submitted timely post hearing briefs. The post hearing briefs were reviewed, considered, and where appropriate, adopted.

FINDINGS OF FACT

Parties

1. Complainant is an African-American female. (Tr. 68)

2. Complainant suffers from degenerative joint disease and arthritis in both hips.

(Complainant Exh. 9)

3. Complainant has been Respondent’s employee for approximately 15 years. (Tr. 50)

4. Complainant currently works for Respondent as an energy evaluator in the Department of Human Services (“DHS”) and has held this position for approximately ten years. (Respondent Exh. 10; Tr. 50-51)

5. Energy evaluators are responsible for determining an applicant’s eligibility for energy assistance programs. (Respondent Exh. 10)

6. Energy evaluators interview applicants who will have their utility service shut off or run out of heating fuel. Some applicants have scheduled appointments, but many others walk-in and are facing emergencies,. (Tr. 176)

7. There are 11 energy evaluators in Complainant’s unit. (Tr. 158)

8. When an energy evaluator is absent, other evaluators or department supervisors absorb that individual's work. (Tr. 176-77)

9. Complainant is a member of the Federation of Social Worker's Union (FSW). (Tr. 129)

10. Respondent has a collective bargaining agreement ("CBA") with FSW. (Complainant Exh. 24; Tr. 277)

Respondent's Policy

11. Respondent has a time and attendance policy. (Respondent Exh. 1, 2)

12. The CBA states that Respondent has the authority to discipline an employee for violating the time and attendance policy. (Complainant Exh. 24, p.25; Tr. 277)

13. DHS uses a time and attendance procedure to implement Respondent's policy. (Respondent Exh. 4)

14. Prior to the DHS procedure, that department experienced days when as many as 25% of its staff was absent from work. (Tr. 278)

15. DHS defines a single sick leave occurrence as one or more consecutive working days of absence on sick leave. Sick leave of a half-day or less is counted as a half occurrence. (Respondent Exh. 4, p.1; Tr. 129-30, 159)

16. An employee is subject to an informal counseling session if he accumulates five sick leave or tardiness occurrences in a 12-month period; a formal counseling if he accumulates a second group of five sick leave or tardiness occurrences in a 12-month period; a written reprimand if he accumulates a third group of five sick leave or tardiness occurrences in a 12-month period; a one-day suspension if he accumulates a fourth group of five sick leave or tardiness occurrences in a 12-month period; a three-day suspension if he accumulates fifth group of five sick leave or tardiness occurrences in a 12-month period: a five-day suspension if he

accumulates a sixth group of five sick leave or tardiness occurrences in a 12-month period; and a termination if he accumulates a seventh group of five sick leave or tardiness occurrences in a 12-month period. (Respondent Exh. 4, pp. 1, 2)

17. DHS does not count as an occurrence sick leave approved under the Family and Medical Leave Act (“FMLA”) or sick leave for a previously scheduled medical appointment. (Respondent Exh. 4; Tr. 116-17, 161, 195-96)

18. Under DHS time and attendance procedure, Respondent may excuse an absence because of a disability covered by the Americans with Disabilities Act (“ADA”). (Tr. 295)

19. DHS considers the written reprimand as the first level of discipline. (Respondent Exh. 4, p.2; Tr. 162)

20. In 2010, Complainant received a copy of DHS time and attendance procedure. (Respondent Exh. 4)

Informal Counseling

21. On January 28, 2011, Complainant received the first level step of an informal counseling based on time and attendance occurrences. (Complainant Exh. 15; Tr. 113)

Formal Counseling

22. On June 19, 2012, Complainant received the second level step of a formal counseling based on time and attendance occurrences. (Complainant Exh. 15, p.2)

23. In 2012, Complainant applied for, and DHS approved, sick leave under the FMLA. (Complainant Exh. 15; Tr. 164)

24. DHS subsequently rescinded the June 19, 2012 second level step of a formal counseling because some of Complainant’s absences qualified under the FMLA. (Complainant Exh. 15, p.2; Tr. 164)

25. In January 2013, Complainant received another second level step of a formal counseling based on time and attendance occurrences. (Complainant Exh. 15, p.1; Tr. 113)

26. The January 2013 formal counselling cited the following five occurrences: unscheduled absences on February 3, 2012; May 2 and 3, 2012; September 24 through 28, 2012; December 4, 2012; December 13, 2012. (Complainant Exhs. 15; 17, p.1; Tr. 30)

February and May 2012 Absences

27. Complainant received two occurrences for having called out sick on February 3, 2012; May 2 and 3, 2012. (Complainant Exhibit 15)

September 24-28 2012 Absences

28. Complainant was not able to work September 24 through 28, 2012, because she had a cold. (Respondent Exh. 9, p.2; Tr. 286)

29. Respondent denied Complainant's FMLA request for this period of absence because she did not have a serious medical condition. (Respondent Exh. 9, p.2)

30. Respondent found that Complainant's use of her sick leave for a cold "validates the appropriate use of sick leave credits" but that "the FMLA simply doesn't apply to employees who have a cold." (Respondent Exh. 9, p.2)

December 4, 2012 Absence

31. On December 4, 2012, Complainant went to see her physician, Myra Wiener, M.D. ("Wiener"), to seek treatment for hip pain that she had been experiencing. (Tr. 71)

32. When Complainant returned to work on December 5, 2012, she provided Respondent with a doctor's note from Wiener that stated, "[Complainant] was seen and treated at my office on 12/4/12. If you have any questions or concerns, please don't hesitate to call." (Complainant Exh. 11; Tr. 117)

33. The December 4, 2012 doctor's note did not mention any medical condition Weiner treated. (Complainant Exh.11)

December 13, 2012 Absence

34. On December 11, 2012, while at work, Complainant advised her department supervisor, Ken Bird ("Bird"), that she was experiencing pain due to arthritis in her hip and that she was awaiting confirmation of an appointment with University of Rochester Orthopedics.

(Complainant Exhs. 11, 12, p.2)

35. On December 12, 2012, Complainant asked Bird if she could leave early when she secured an appointment. (Complainant Exh. 12, p.1)

36. Bird approved Complainant's use of sick time for December 12, 2012. (Complainant Exh. 12)

37. Bird did not count Complainant's absence on December 12, 2012 as an occurrence towards her January 2013 formal counselling. (Complainant Exh. 15; Tr. 118)

38. Complainant called out sick on December 13, 2012. (Complainant Exh. 15; Tr. 116, 118, 173)

39. Under DHS procedure, Bird counted Complainant's December 13, 2012 absence as an occurrence. (Complainant Exh. 15)

40. When Complainant returned to work she provided Respondent a doctor's note for her December 12, 2012 absence that stated "[Complainant] may return to work with the following restrictions: limited walking for one month." (Complainant Exh. 13)

Insubordination

41. On January 17, 2013, Complainant refused to meet with Bird for the formal counselling. (Tr. 123, 165)

42. Bird informed his supervisor, Dan Condello (“Condello”), about Complainant’s refusal. (Tr. 165)

43. Condello requested to meet with Complainant. (Tr. Tr. 165)

44. Complainant also refused to meet with Condello. (Complainant Exhs. 16, p.1; 18; Tr. 124, 166)

45. The following day, on January 18, 2013, Complainant agreed to meet with Bird. (Complainant Exh. 14)

46. However, during the formal counselling interview, Complainant refused to sign a memorandum acknowledging that she read its contents. (Complainant Exhs. 16, 18 Tr. 88)

47. Later, Complainant signed the document with the words “under duress” under her signature. (Complainant Exh. 15, p.2; Tr. 167)

48. On February 14, 2013, Condello issued Complainant a written reprimand for insubordination based on her refusal to sign the memorandum. (Complainant Exh. 18; Tr.124, 262)

Accommodations

49. Respondent has a written policy prohibiting discrimination on the basis of disability. The policy is posted at every work site. (Respondent Exh. 3; Tr. 281)

50. Respondent’s policy states that any employee that is in need of a reasonable accommodation must make their needs known to their immediate supervisor or designated individual. (Respondent Exh. 3)

51. Respondent has an ADA compliance officer to address reasonable accommodations for employees with disabilities. (Tr. 280)

52. Other than the day of December 12, 2012, Complainant did not make a request to leave early or arrive late when experiencing pain. (Tr. 126-27)

53. Complainant did not a request any kind of accommodation that would have exempted her from the DHS time and attendance procedure. (Tr. 217-18)

54. Complainant conceded that prior to March 13, 2013 she had not requested an accommodation for any disability. (Tr. 122)

55. On March 13, 2013, Complainant requested an ergonomic chair from the ADA compliance officer, Rebecca Van Horn. (Respondent Exh. 8, p.1)

56. On March 30, 2013, Respondent granted Complainant's request for an ergonomic chair. (Respondent Exh. 8; Tr. 121)

57. In 2014, Complainant requested an accommodation for assistance in escorting clients in and out of her workplace. This accommodation was granted. (Tr. 122, 220-21)

OPINION AND DECISION

Disability Discrimination

It is unlawful for an employer to discriminate against an employee on the basis of disability, race or sex. N.Y. Exec. Law, art. 15 (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 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 present a legitimate, non-discriminatory reason for its

action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

At the public hearing Complainant did not present any evidence in support of her generalized claims that she was treated differently than her Caucasian counterparts. Complainant's claim that her supervisor is a white male is insufficient to make a prima facie case. Complainant's claim that her supervisor "watches her," is hostile to her, or is disrespectful, as generally compared with Caucasian staff, does not make out a prima facie case. Complainant also presented no information to support that her claim that her gender was a factor in her treatment. Therefore, those claims are dismissed.

With respect to Complainant's claim of disability, Complainant established that she has disabilities within the meaning of the Human Rights Law: degenerative joint disease, arthritis, and that she suffered from a cold during the period of September 24 to 28, 2012. 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 a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." Human Rights Law § 292.21. This definition has been interpreted to include medically diagnosable impairments and conditions that 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).

Complainant is qualified for the energy evaluator position as Respondent has employed her in that capacity for approximately ten years. Complainant suffered an adverse employment

action when Respondent gave her a written reprimand which is Respondent's first level of discipline. However, the written reprimand did not occur under circumstances giving rise to an inference of discrimination. There is no nexus between Complainant's disability and the written reprimand. Complainant's own evidence shows that she received the discipline because of insubordination.

Complainant did not establish that she suffered an adverse employment action when Respondent formally counseled her about the use of sick leave. An adverse employment action requires "a materially adverse change in the terms and conditions of employment." *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 306, 786 N.Y.S. 2d 382, 391 (2004). This may be shown by "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.* Complainant's own recitation of events failed to show that she suffered any adverse employment action on this issue. Respondent's actions in regard to her absences never went beyond a formal counseling.

Furthermore, contrary to Complainant's arguments, her own evidence shows that Respondent did not counsel her because she used sick leave time on December 4 and December 13, 2012. Rather the counseling was issued because Complainant had a total of ten unapproved uses of sick leave accruals during the period of February 2012 to January 2013. In addition, during that same time period, Complainant was also absent on additional occasions, with the use of approved sick leave accruals. Ultimately, Respondent did not prevent or deny the use of sick time but rather attempted to manage its excessive use because of the impact of absenteeism.

For purposes of the Human Rights Law, there was no adverse employment action when Respondent denied Complainant's FMLA application for a cold she experienced September 24

to 28, 2012.

Finally, there is no violation of the Human Rights Law merely because Respondent does not mention it along with the ADA and FMLA in its policy. It is a *sine qua non* that Respondent must comply with the Human Rights Law while making employment decisions in New York State. Respondent's sole consideration of these other statutes in its decision-making did not result in a violation of the Human Rights Law in this particular matter.

Reasonable Accommodation

A respondent is obligated to provide a reasonable accommodation for a complainant's known disability. Human Rights Law § 296.3. Forms of reasonable accommodation include, but are not limited to "making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position." 9 N.Y.C.R.R. § 466.11(a)(2). Furthermore, both the employee and the employer are obligated to engage in an interactive process, which includes the discussion and exchange of pertinent medical information, in order to arrive at a reasonable accommodation that will allow a disabled employee to perform the necessary job requirements. 9 N.Y.C.R.R. § 466.11(j)(4).

In order to establish a prima facie case for failure to provide a reasonable accommodation a complainant must demonstrate that she suffered from a disability, that she could perform the essential functions of the position with or without a reasonable accommodation, that her employer was aware of her need for an accommodation and that the employer failed to provide a reasonable accommodation. *See Abram v New York State Div. of Human Rights*, 71 A.D.3d 1471, 1473 (4th Dept. 2010); *see also McCarthy v St. Francis Hosp.*, 41 A.D.3d 794 (2d Dept. 2007).

Complainant did not establish a prima facie case for failure to provide a reasonable accommodation.

First, Complainant established that she suffers from disabilities. Complainant suffered from a cold and currently suffers from degenerative joint disease and arthritis in both hips. Complainant's medical conditions constitute disabilities under the Human Rights Law.

Second, the proof established that Complainant could perform the essential functions of her energy evaluation position, with or without a reasonable accommodation.

Third, Complainant claims that on December 12, 2012 Respondent became aware of her degenerative joint disease and arthritis. However, the evidence does not support Complainant's argument that Respondent should, therefore, have been aware for her need of an accommodation, and not charged her occurrences for the dates of December 4, 2012 and December 13, 2012. Complainant's use of sick leave accruals did not place Respondent on notice that she needed any accommodation. Indeed, Complainant did not make request an accommodation that she be exempt from Respondent's time and attendance procedure.

Prior to March 13, 2013 Complainant did not request an accommodation request for any disability. Complainant made an accommodation request on March 13, 2013 for an ergonomic chair. Respondent granted this request on March 30, 2013. In 2014, Respondent also granted Complainant's request for assistance in escorting clients in and out of her workplace. Therefore, when Complainant made respondent aware of the need for an accommodation, respondent granted them without hesitation.

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, this complaint is hereby dismissed.

DATED: July 31, 2014
Buffalo, New York

A handwritten signature in cursive script that reads "Martin Erazo, Jr.".

Martin Erazo, Jr.
Administrative Law Judge