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NH COMMISSION
FOR HUMAN RIGHTS

**STATE OF NEW HAMPSHIRE
HUMAN RIGHTS COMMISSION**

No. ED 0051-10

June Bowers

v.

Professional Physical Therapy Services

Order on the Merits

A public hearing was held in this matter on September 5, 2012, in the Merrimack County Superior Court. John Vanacore of Vanacore Law Office represented complainant. Andru Volinsky of Bernstein Shur represented respondent.

Commissioners Gayle Troy, David N. Cole, Esq., and Christine C. Wellington, Esq. served as the hearing panel. Commissioner Cole served as Chair.

PROCEDURAL HISTORY

1. Complainant filed a charge of disability discrimination in employment for failure to accommodate under NH RSA 354-A:7(I) and (VII)(a) on December 15, 2009. An amendment to correct the respondent's legal name and to formalize an allegation of retaliation for termination after requesting accommodation was filed February 1, 2013. See RSA 354-A:19. Under N.H. Admin. R. PART Hum 202.05(b), the amendment formally dates back to the original filing date of December 15, 2009.
2. Respondent filed a verified response and answer alleging specific and general denials and defenses on or about February 22, 2010.
3. An investigation, including requests for information as further detailed in the investigative report, witness interviews, and analysis of the entire record was conducted between the filing of the charge and March 1, 2012.
4. On March 10, 2012, Investigating Commissioner Shirley ruled on the findings of the commission's investigation of the parties' allegations and defenses, finding probable cause on the allegation of disability discrimination and no probable cause on the issue of retaliation by termination for requesting

accommodation for disability. Complainant did not appeal the no probable cause finding.

5. There were three issues for decision at hearing: Is complainant a person with a disability? Did respondent fail to provide complainant with a reasonable accommodation for her disability in the workplace? If so, was complainant terminated for a decline in performance related to her disability resulting from respondent's failure to provide reasonable accommodation?

FACTUAL FINDINGS

6. Complainant was hired to work for respondent, a physical therapy provider, in June 2008 as a receptionist.

7. There was credible testimony from complainant and Shainey Blais, the complainant's immediate supervisor, that complainant notified Blais she suffered from debilitating migraines that could be triggered by exposure to strong odors including certain perfumes, colognes, and chemicals. The commissioners accepted Blais' testimony that when Bowers told Blais her perfume was a migraine trigger for her and Blais agreed not to wear her own perfume again, the conversation established complainant's initial notice of disability to respondent.

8. The testimony of complainant, Blais, and Ian MacDonald, a physical therapist who worked with complainant at satellite offices, was found to be credible that MacDonald wore at least two colognes that triggered migraines and related symptoms in complainant. Blais admitted that complainant called her crying about it. MacDonald admitted he was alerted by complainant that certain of his colognes caused her to experience migraines. The testimony of complainant, Blais, and MacDonald not only established that MacDonald continued to wear these colognes in the workplace causing complainant to suffer migraines, but that complainant's supervisor Blais and company owner Peter Minnehan were aware of MacDonald's conduct.

9. The testimony of the complainant, Blais, Minnehan, and MacDonald, together with a lack of any documents in complainant's personnel file, convinced the hearing panel that respondent failed to accommodate complainant's disability by granting her request or by failing to engage in any interactive process with complainant so an alternative accommodation could be made that would allow her to perform the essential functions of her job.

10. Furthermore, the hearing panel concluded that the easiest, least costly, least disruptive to everyone at respondent's workplace, and most effective accommodation would have been for respondent to tell MacDonald to stop wearing the colognes as complainant requested. Wearing cologne was elective

and unrelated to MacDonald's job requirements. The testimony of Blais and Minnehan that respondent offered complainant a change of schedule, allowing her to work with Minnehan instead of MacDonald as an accommodation, was too complicated, and testimony established that the change would not eliminate all personal interaction between complainant and MacDonald, thus not ensuring accommodation of complainant's disability. The panel also felt the timing of the offer of that purported accommodation was too late.

LEGAL ANALYSIS

11. Complainant met her burden of proof by a preponderance of the evidence that she is a person with a physical disability as defined by RSA 354-A:7(I). Her migraines, here triggered by exposure to perfume, the use of office cleaning products, and primarily her co-worker's cologne, affected the complainant's major life activities of working, thinking, and concentrating. The migraines were at times so completely incapacitating that complainant had to seek emergency medical treatment. Complainant testified to the adverse way in which perfume, cologne, and office chemicals affected her and produced doctor's office notes to substantiate this. The panel disagreed with respondent's argument that expert medical testimony was necessary to show that the scents caused complainant's migraines. The hearing panel found that the evidence submitted was sufficiently clear and uncontradicted by other testimony, expert or otherwise, to establish the nature of complainant's disability, its symptoms, and how the accommodation she requested would have been quite effective.

12. Complainant met her burden of proof by a preponderance of the evidence that she provided notice of her disability to her employer and that she requested a reasonable accommodation to perform her work successfully. RSA 354-A:7(VII)(a)(b). The hearing panel found that the complainant met her burden of proof that she had been performing her job with no difficulties from June 2008 when she was hired until January 2009 when repeated exposure to MacDonald's cologne caused her to become increasingly symptomatic with migraines, resulting in medical treatment. The hearing panel found by a preponderance of the evidence that respondent's failure to provide a reasonable accommodation as described above caused the complainant's work performance to decline.

13. Complainant was terminated on November 10, 2009, for deficient work performance. A list of performance issues was shown to her at that time by Shainey Blais citing instances between July 28, 2009, and October 8, 2009.¹

¹ The parties' jointly submitted redacted exhibit packet at tabs 4 & 5 show the list continuing past the termination date of November 10, 2009, and up to and including December 3, 2009.

14. Upon establishing a prima facie case of disability discrimination:

a) being an employee who meets the definition of a qualified individual with a disability; b) who notified her employer of her disability; c) who requested a reasonable accommodation; and d) whose employer failed to provide reasonable accommodation, a respondent may offer the affirmative defense that either the accommodation in question poses undue hardship or that the employee, even with reasonable accommodation, poses a direct threat of harm to self or others. Respondent has failed to put forth evidence to satisfy either defense. The hearing panel rejects the respondent's assertion that complainant's refusal to accept the schedule change accommodation offered by respondent defeats her claim for the reasons described above.

15. Respondent's list of performance issues that the hearing panel found was presented to her for the first time on the day she was terminated demonstrates that the respondent's failure to provide the complainant with a reasonable accommodation led to a decline in performance that would have been avoidable had a reasonable accommodation been provided. There was credible evidence that complainant had been performing her job successfully until her repeated and cumulative exposure to her co-worker's cologne and subsequent migraines and other symptoms caused by that exposure. The hearing panel found it notable that until the date of termination respondent had no documents to show it had engaged in or issued any verbal disciplinary coaching, letters of warning, performance improvement plan, or other personnel action. Therefore, the hearing panel rejected respondent's defense of legitimate nondiscriminatory performance based termination.

DECISION

16. Based on a preponderance of the evidence the panel finds:

a. Complainant is a person with a disability within the meaning of the law;

b. Respondent had notice of complainant's disability and request for accommodation;

c. Respondent failed to provide complainant with a reasonable accommodation for her disability; and

d. Complainant was terminated for a decline in performance related to her disability resulting from respondent's failure to provide reasonable accommodation.


DAMAGES

17. The hearing panel finds that the complainant suffered lost wages following her termination. The W-2 issued to complainant by respondent for calendar year 2009 shows taxable gross earnings of \$22,992.00. See Exhibit 10, page 123. The hearing panel takes notice that W-2s represent documents that report earnings through the date of last wages paid by an employer in a calendar year. See N.H. Admin. R. PART Hum 315.06(c)(3). The hearing panel awards complainant the sum of \$22,992.00 in lost wages.

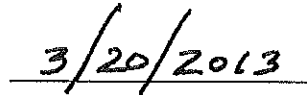
18. The panel awards the complainant her reasonable attorney's fees and costs. An itemization of same is to be submitted by counsel for complainant for the hearing panel's review and consideration within 30 days of the date of this decision. Respondent will have 15 days from the date of receipt of complainant's submission of attorney's fees and costs to file any objection to the itemization.

This was a unanimous decision.

SO ORDERED.



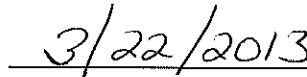
Commissioner David N. Cole, Esq., Chair



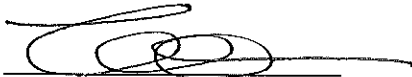
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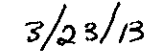
Commissioner Gayle Troy



Date



Commissioner Christine C. Wellington, Esq.



Date