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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

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]

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[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.

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	3/20/2013 Date
Commissioner Gayle Troy	3/22/2013 Date
Commissioner Christine C. Wellington, Esq.	3/23/13 Date