STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Windsong Lavalley Charging Party	)	
	)	
v.	)	HRC Charge No. E10-0001
	)	EEOC# 16K-2009-00129
	)	
	)	
Vermont Department of Health & Reasonable Accommodation Committee Responding Parties	)	

FINAL DETERMINATION

Pursuant to 9 V.S.A. §4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are **reasonable grounds** to believe that Vermont Department of Health and the Reasonable Accommodation Committee, the Respondents, illegally discriminated against Windsong Lavalley, the Charging Party, in violation of Vermont's Fair Employment Practices Act on the grounds of disability by improperly failing to provide Ms. Lavalley with a reasonable accommodation with regard to her request that equipment be placed in a location closer to her work station.

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent__	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For ✓	Against __	Absent __	Recused __
Mercedes Mack	For ✓	Against __	Absent __	Recused __
Donald Vickers	For ✓	Against __	Absent __	Recused __

Entry: ✓ Reasonable Grounds __ Motion failed

Dated at Winooski, Vermont, this 28th day of July, 2011.

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers

**** Please note that this Investigative Report has been amended to remove portions that addressed allegations regarding which the Human Rights Commissioners found there were no reasonable grounds to believe there was a violation of Vermont law. ****

INVESTIGATIVE REPORT
HRC Case No.:E10-0001
EEOC Case No. 16K-2009-00129

CHARGING PARTY: Windsong Lavalley

RESPONDENTS: Vermont Department of Health, Reasonable Accommodation Committee[1]

CHARGE: employment/ disability

SUMMARY OF CHARGE: In her Charge of Discrimination of July 15, 2009, as amended on August 3, 2010, Windsong Lavalley states she is an individual with disabilities and alleges that both the Vermont Department of Health and the Reasonable Accommodation Committee failed to provide her with a reasonable accommodation for her disabilities.

SUMMARY OF RESPONSE: In their September 6, 2010 response to Ms. Lavalley's amended Charge of Discrimination, both the Vermont Department of Health and the Reasonable Accommodation Committee denied that they improperly failed to provide Ms. Lavalley with a reasonable accommodation for her disabilities.

[1] The Reasonable Accommodation Committee is within the Vermont Department of Human Resources' Labor Relations Division.

PRELIMINARY RECOMMENDATIONS: This investigative report makes a preliminary recommendation to the Human Rights Commission that there are reasonable grounds to believe that the Vermont Department of Health and the Reasonable Accommodation Committee improperly failed to provide Ms. Lavalley with a reasonable accommodation with regard to her request that equipment be placed in a location closer to her work station.

INTERVIEWS

= Linda Bloschies, 1/20/11
= Charon Goldwyn, 10/12/10
= Annette Gregoire, 1/20/11
= Phyllis Houle, 1/20/11
= Windsong Lavalley, 10/23/09, 10/7/10, 2/1/11, 2/14/11,
= Richard McCoy, 10/12/10
= Terry Price, 1/20/11

DOCUMENTS

= Report of Dr. Claude Nichols: III, 9/20/93
= Report of Dr. John Bisaccia: 8/20/98
= Journal entries of Ms. Lavalley: 12/26/07 – 4/15/09
= Emails between Ms. Lavalley and Mr. McCoy and Ms. Goldwyn: 2/21/08 – 5/4/09
= Letters of Dr. Charles McLean: 5/22/08, 6/18/08, 7/3/08, 8/20/08, 9/8/08, 10/30/08, 5/22/09, 10/6/09
= Request for reasonable accommodation re equipment: 8/13/08
= Letters of Reasonable Accommodation Committee to Ms. Lavalley: 8/8/08, 10/21/08, 10/22/08
= Correspondence from Ms. Lavalley to HRC: 3/17/09, 8/3/09, 9/20/10, 5/12/11, 5/20/11
= Initial Charge of Discrimination: 7/16/09
= Amended Charge of Discrimination: 8/3/10
= Correspondence from respondents to HRC: 8/21/09, 9/6/10, 4/7/11, 1/21/11

CASE ELEMENTS

FAILURE TO PROVIDE REASONABLE ACCOMMODATIONS

The Charging Party must show by a preponderance of the evidence:
(1) Charging party was a person with one or more disabilities pursuant to Vermont's Fair Employment Practices Act (FEPA);
(2) Respondent employer is covered by FEPA and had notice of the charging party's disability(ies);
(3) With reasonable accommodation, the charging party could have performed the essential functions of her job; and
(4) Respondent employer failed to make such accommodations.

Adapted from Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 183-184 (2d Cir. 2006)

I. FACTS

A. UNDISPUTED FACTS

The facts detailed in paragraphs 1 – 4, below, are not disputed by the parties.

1. The charging party, Windsong Lavalley, was employed as an Administrative Secretary in the Health Surveillance Division (the Division) of the Vermont Department of Health (DOH) from December 11, 2006 to December 22, 2009.

2. DOH terminated Ms. Lavalley's employment by a disability reduction in force (disability RIF).

3. From the December 2006 start of Ms. Lavalley's work for DOH to

August 2008, her immediate supervisor was Richard McCoy. From August 2008 until her departure from DOH, Ms. Lavalley's immediate supervisor was Charon Goldwyn. Throughout Ms. Lavalley's tenure with DOH, both Ms. Goldwyn and Mr. McCoy exercised supervisory authority over Ms. Lavalley.

4. The Reasonable Accommodation Committee (RAC) is a subdivision of the Vermont Department of Human Resources, Labor Relations Division. According to the State of Vermont Personnel Policies and Procedures Manual at §3.2, the RAC is empowered to review the decision of any department when it denies a state employee her or his request for a reasonable accommodation.

B. MS. LAVALLEY'S ASSERTED DISABILITIES

5. Ms. Lavalley stated that she was in an automobile accident in 1996 which injured her spine. Her spinal injuries have caused her great pain since the accident. Additionally, Ms. Lavalley asserts that she has an impairment of her knees that pre-dates the 1996 accident. According to Ms. Lavalley, her impairments and the accompanying pain have caused limitations in her ability to walk.

C. NOTICE TO EMPLOYER OF DISABILITIES

6. Ms. Lavalley stated that during her 2006 job interview, she disclosed her disabilities and functional limitations to DOH supervisors Charon Goldwyn and Richard McCoy.

7. Both Charon Goldwyn and Richard McCoy said that Ms. Lavalley stated during her job interview that she had a limited ability to stand for long periods. They each recall responding to Ms. Lavalley's statement by saying that standing should not be a problem because the job of Administrative Secretary was primarily a desk job. Ms. Goldwyn and Mr. McCoy stated that Ms. Lavalley made no additional disclosures of disability or limitations during her job interview.

8. During his interview with this investigation, Mr. McCoy stated that it was "apparent" to him that Ms. Lavalley had difficulty walking.

9. During her interview with this investigation, Ms. Goldwyn stated that at times she could "sense" that Ms. Lavalley's knees hurt her.

10. Ms. Lavalley stated that she could not afford to pay the state employee's portion of the premium to purchase health insurance coverage. This hampered her ability to secure medical documentation to support her request for reasonable accommodation.

D. WRITTEN REQUEST FOR REASONABLE ACCOMMODATION – EQUIPMENT LOANS

11. Ms. Lavalley stated to this investigation as follows: She was responsible for lending out several pieces of equipment that were kept in a locked storage cabinet that was kept in another room. The equipment included a conference telephone and two LCD projectors. The walk to and from that storage cabinet caused her pain. Ms. Lavalley believed that there would be enough room to accommodate the storage cabinet in a stock room close to her work station, and she suggested that to Ms. Goldwyn during her first month of employment. Ms. Goldwyn rejected the idea. Ms. Lavalley subsequently proposed that, instead of walking to the storage cabinet, Ms. Lavalley could hand the storage cabinet key to any DOH employee who wished to borrow equipment, and that employee could return the key, allowing Ms. Lavalley to then inspect the equipment before its use. Upon the return of the equipment, Ms. Lavalley could again inspect the equipment, and the borrower could again be given the key to place the equipment back in the storage cabinet. Ms. Goldwyn rejected this idea as well.

12. Ms. Lavalley's annual performance evaluations specify one of her job duties as "Manage all requests for equipment loans."

13. On August 13, 2008, Ms. Lavalley submitted a written request for reasonable accommodation on a Request for Reasonable Accommodation (RRA) form. This RRA form formalized Ms. Lavalley's two alternative proposals detailed above, i.e., that the storage cabinet be placed closer to her work station or that DOH employees retrieve equipment for themselves under Ms. Lavalley's supervision. With regard to employees retrieving equipment for themselves, Ms. Lavalley stated in the RRA form that she actually engaged in that practice for over a year and that the practice "worked reasonably well." Ms. Lavalley also stated in the RRA form that she experiences pain in her knees and that the more she walks the more pain she experiences. She attached a 1993 report from Claude Nichols, M.D. which stated that Ms. Lavalley experienced swelling and pain in her knees, and which concludes with the following statement: "I do not see any situation in which [Ms. Lavalley's] clinical picture will change dramatically over time."

The Division supervisors' written response to Ms. Lavalley's RRA form states, in essence, that the Division could not satisfy Ms. Lavalley's request because the stock room was too small to accommodate the supply cabinet, and that providing other DOH employees with the key to the supply cabinet would "not address the need for quality control and security of equipment

and assorted accessories associated with equipment."

14. An October 22, 2008 letter to Ms. Lavalley from John Berard, Chair of the RAC, stated that the DOH had requested that the RAC provide it with an advisory opinion regarding Ms. Lavalley's RRA form. The RAC letter goes on to state in pertinent part:

> After fully reviewing your request, all accompanying medical documentation and available information, the Committee offers the following opinion.
>
> While the Committee does not dispute that you suffer from a medical impairment of your right knee, insufficient evidence was presented to determine you are a qualified individual with a disability as defined by the Americans with Disabilities Act of 1990 (ADA). Your request for reasonable accommodation does not identify what major life activities are substantially limited by your medical impairment as compared to the average person in the general population as required under the ADA.
>
> Therefore, the Committee encourages you to continue discussions with your Supervisor and Human Resources Administrator in an effort to provide additional information that would enable a definitive determination to be made regarding whether you are a qualified individual with a disability and to explore alternatives which may appropriately address this matter ...
>
> Should you wish to provide the Committee with additional information for consideration, you may forward such information to my attention at the Department of Human Resources ...
>
> Please contact me ... should you have any questions regarding this matter.

Based upon the October 22, 2008 RAC letter, DOH denied Ms. Lavalley's request for reasonable accommodation.

15. Asked by this investigation why they had rejected Ms. Lavalley's

two proposals regarding the equipment, Ms. Goldwyn and Mr. McCoy stated that the stock room near Ms. Lavalley's work station was too small and that there was too much material (especially paper) moved in and out of it to be a practical location for the storage cabinet. Regarding the proposal for employees to retrieve their own equipment under Ms. Lavalley's supervision, they stated that during the time Ms. Lavalley operated under that system problems arose such as missing cords and unreported damage to equipment.

16. Non-supervisory Division staff members interviewed by this investigation each indicated their belief that the stock room would have been too small to accommodate the storage cabinet.

17. In January 2009, Ms. Lavalley proposed a third option to Ms. Goldwyn: Ms. Lavalley had a locking wall cabinet in her office that would accommodate the three items most frequently borrowed from the storage cabinet. Ms. Lavalley proposed that those items be stored in her wall cabinet. Ms. Goldwyn rejected this proposal as well.

18. Asked by this investigation why the Division had rejected Ms. Lavalley's proposal to store frequently used equipment in her locking wall cabinet, an Assistant Attorney General responded on behalf of DOH stating, in summary:

> Ms. Lavalley was not entitled to an accommodation because the RAC had determined she had not provided sufficient evidence showing that she was an individual with a disability;
> As part of her job duties, Ms. Lavalley walked farther for her daily mail delivery circuit than she did to manage the storage cabinet. She also walked daily to and from a lunchroom and her car. Ms. Lavalley did these things without complaint.

19. Asked to respond to the statement that she performed other work tasks that required walking, Ms. Lavalley responded in pertinent part as follows [unedited]:

> Vehicle: I did walk daily to and from my vehicle because there was no alternative to be at work daily. Yes it was painful, and I sometimes had to use a cane when the pain was severe enough to interfere ... I had to use a cane everyday and had to get a handicap parking plaque because it was so intensely painful to walk to my office. Everyone knew I hurt, everyone, including Goldwyn, witnessed my struggle with the walk from the parking garage to the chair at my desk, and everyone witnessed that I could not stand or leave my chair for several minutes while I recovered from the pain. It was ubiquitous knowledge.
>
> Cafe: I had to walk to the cafe because there was no other option any nearer (other than eating at my desk) where I could have lunch as there was no employee lunch room. Also, the cafe was on the same floor as a spare room used for exercise where I performed stretches to help alleviate the pain. I walked to the cafe, sat for 10-15 minutes to recuperate from the pain of walking that far, and then was able to continue to the work-out space where I could sit, stretch, and perform deep breathing exercises to reduce pain and stress ... I went to the work out space daily until [Ms. Lavalley sustained an injury not detailed here] ... and then I could not even make it that far. It was very painful to get to the cafe, and I had to stop 2-3 times in the hall between the elevator and the cafe to lean against the wall to rest and control the pain and back spasms enough to continue on to the cafe. Everyone who walked the corridor saw me, and it was a regular daily thing such that people came to expect it and no longer stopped to ask if I was alright. On days the pain was too great I tried

to use any conference room on the same floor as my office that was closer than the cafe which was not in use, but it was rare that a conference room was not in use.

Mailroom: I was assigned 2 mail runs a day and it was a part of my job which could not be performed any other way. Phone coverage had to be provided for the lines I answered while I performed this service. I held onto the mail cart instead of using my cane which helped to stabelize my gate, support my balance, and decreased my pain. I was not physically capable of performing the mail run without useing the cart as I was not capable of carrying the mail without incapacitating back spasms and knee pain. I combined taking a coffee break and rest room break with the mail run for two years as it cut all walking in half and ment I did not have to request additional phone coverage. The cafe was 1/2 way between the office and mail room and it gave me a chance to sit and recover from the pain of walking, and if I used the 2nd entrance to the my office suite that entered at the restrooms I completely eliminated the walking of an extra trip for a rest room break which also gave me recovery time for my back and legs before I had to stand and sort the mail into the staff mailboxes. Doing things this way greatly reduced my pain and increased my function. I also pre-sorted the mail in the mail room so that my time standing at the mail boxes in the office was drastically reduced and mail that did not belong in the Health Surveillance (HS) mail boxes did not have to be taken back to the mail room on the next mail run thereby insuring that other offices for which the mail was intended did not have to wait several hours or until the next day to receive the mail inadvertently placed in the HS mail box ...

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The point of difference in the above three activities and having to go get the equipment from a closet in another suite entirely is that all of the above functions HAD to be performed and there were no other alternatives, whereas there WERE alternatives to how the equipment was managed...

II. ANALYSIS

Vermont's Fair Employment Practices Act (FEPA), 21 VSA §495(a)

provides in pertinent part as follows:

> (a) It shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, place of birth, age, or physical or mental condition:
>
> (1) For any employer, employment agency, or labor organization to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, or age or against a qualified disabled individual;

FEPA at 21 VSA §495d(5) provides in pertinent part as follows:

> "Individual with a disability" means any natural person who ... has a physical or mental impairment which substantially limits one or more major life activities ...

FEPA at 21 VSA §495d(6)(A) provides in pertinent part as follows:

> "Qualified individual with a disability" means ...
>
> An individual with a disability who is capable of performing the essential functions of the job or jobs for which the individual is being considered with reasonable accommodation to the disability.

Vermont's Supreme Court has noted the similarity between the disability discrimination provisions of FEPA and the federal Americans with Disabilities Act (ADA). Potvin v. Champlain Cable Corp., 165 Vt. 504, 508 (1996). For this reason, the Court looks to ADA case law, regulations and administrative guidance in its interpretation of FEPA. Id.[2] This

[2] According to the Vermont Supreme Court, FEPA was "patterned after" section 504 of the federal Rehabilitation Act of 1973. State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995). "Therefore, we look to federal case law to guide our interpretation [of FEPA], the allocations of burdens and

investigation likewise looks for interpretive assistance in ADA case law, regulations and administrative guidance.

Following the 1990 passage of the ADA, the U.S. Supreme Court issued several decisions restricting the law's scope. In 2008, the U.S. Congress passed the Americans with Disabilities Act Amendments Act (ADAAA), the purpose of which was to clarify who is covered by the ADA. It did so by expressly rejecting two key U.S. Supreme Court decisions. The ADAAA became effective on January 1, 2009. With regard to all events that occurred in the instant matter on and after that date, this investigation looks to the ADAAA for guidance.

A. PRIMA FACIE ELEMENTS; BURDEN SHIFTING ANALYSIS

Direct evidence of employment discrimination resulting in adverse employment action is rarely available because "an employer who discriminates against its employees is unlikely to leave a well-marked trail, such as a notation to that effect in the employee's personnel file." Carleton v. Mystic Transportation, Inc., 202 F.3d 129, 135 (2d Cir. 2000). However, a charging party may use circumstantial evidence to prove discrimination. When circumstantial evidence is used, the employee must first establish

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standards of proof." Id. at 180. The ADA was, in turn, partially modeled after section 504 of the

the case elements (also known as prima facie elements) by a preponderance of the evidence. The charging party's "burden of proof in the prima facie case is minimal. . . . The Court of Appeals for the Second Circuit has repeatedly called it 'de minimis.'" Boulton v. CLD Consulting Engineers, Inc., 175 Vt. 413, 421 (2003). If the charging party meets that burden, the respondent has the burden of production to demonstrate that it had legitimate, nondiscriminatory reasons for its actions. Id. If the employer articulates such a reason, the charging party then has the opportunity to show that the proffered reason is pretextual. Id.

To establish a prima facie case of discrimination in employment because of an employer's failure to provide reasonable accommodations, Ms. Lavalley must show the following by a preponderance of the evidence:

> (1) Charging party was a person with one or more disabilities pursuant to Vermont's Fair Employment Practices Act (FEPA);
> (2) Respondent employer is covered by FEPA and had notice of the charging party's disability(ies);
> (3) With reasonable accommodation, the charging party could have performed the essential functions of her job; and
> (4) Respondent employer failed to make such accommodations.

Adapted from Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 183-184 (2d Cir. 2006). There can be no dispute that the respondents are covered by FEPA.

Rehabilitation Act. The ADA expressly requires that it shall be interpreted to meet or exceed the standards pursuant to the Rehabilitation Act and its regulations. 42 USC §12201(a).

B. FAILURE TO PROVIDE REASONABLE ACCOMMODATION FOR WALKING LIMITATIONS

Ms. Lavalley's walking limitations were "apparent" to DOH supervisor Mr. McCoy. Ms. Lavalley stated that knowledge of her walking limitations was "ubiquitous" in her workplace. Because this limitation was obvious rather than hidden, there was no need for medical documentation.[3]

DOH may have had good reasons not to provide Ms. Lavalley with her two initial proposals to accommodate her walking limitation (i.e., moving the equipment storage cabinet and allowing DOH employees to secure equipment from the cabinet on their own). This investigation believes, however, that Ms. Lavalley's third proposal (i.e., locking equipment in a cabinet at her work station) was reasonable, it would have incurred no expense, and it would have assisted Ms. Lavalley's performance of an essential job function, managing DOH equipment loans. This investigation believes that DOH and RAC have not provided a legitimate, nondiscriminatory reason for its failure to grant this request for a reasonable accommodation.

This conclusion is bolstered by the ADAAA, which became effective

[3] "An employer cannot ask for [medical] documentation when ... both the disability and the need for reasonable accommodation are obvious." EEOC Enforcement Guidance:

the same month Ms. Lavalley proposed storing the most often used equipment in her locking wall cabinet. The ADAAA states among its express purposes:

> [T]o reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
> [T]o convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis ...

ADAAA, Section 2(B).

This investigation's conclusion is further bolstered by regulations recently promulgated by the EEOC to implement the ADAAA, which state in pertinent part:

> (1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an

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Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (10/17/02) at Question 8.

individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

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(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis ...

29 CFR 1630.2(j).

In summary, because Ms. Lavalley's walking limitations were apparent, pursuant to the ADAAA and FEPA the DOH was required to provide Ms. Lavalley with a reasonable accommodation without medical documentation of her walking limitation. When Ms. Lavalley proposed a simple and cost-free accommodation, DOH unlawfully declined Ms. Lavalley's proposal.

PRELIMINARY RECOMMENDATIONS: This investigative report makes the following preliminary recommendation to the Human Rights Commission: there are reasonable grounds to believe that the Vermont Department of Health and the Reasonable Accommodation Committee improperly failed to provide Ms. Lavalley with a reasonable accommodation

with regard to her request that equipment be placed in a location closer to her work station.

_____

Paul Erlbaum Date
Investigator

APPROVED:

_____

Robert Appel Date
Executive Director