Fire Dep't v. A. G.

OATH Index No. 771/12 (July 5, 2012)

Respondent charged with being excessively or habitually late, tardy or absent from work in 2010 and 2011. Respondent unsuccessfully asserted a number of defenses including failure to provide a reasonable accommodation under the ADA, discrimination, and selective enforcement. Respondent's absences were found to be excessive *per se*. Termination of her employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
A.G.
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Fire Department, pursuant to section 75 of the Civil Service Law. The charges allege that respondent A. G.[1], a clerical associate in the Fire Prevention Unit, has been excessively or habitually late, tardy or absent from work in 2010 and 2011 (ALJ. Ex. 1).

During a three-day hearing held before me, petitioner presented the testimony of one witness, Albert Simmonds. Respondent presented the testimony of William G.[2] and testified on

[1] Although respondent did not request anonymity, I elected to withhold her name pursuant to section 1-49(d) of OATH's Rules of Practice because this report contains sensitive medical information about her. 48 RCNY § 1-49(d) (2012). *See Admin. for Children's Services v. Anonymous*, OATH Index No. 212/12 at 1 (Dec. 15, 2011) (withholding respondent's name because the report discussed sensitive medical issues); *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at n. 1 (Apr. 5, 2010) (withholding respondent's name because the report discussed her medical condition).

[2] William G. is respondent's father. In order to ensure respondent's anonymity, he will be referred to as Mr. G.

her own behalf. For the reasons provided below, I find that petitioner established the charges by a preponderance of the credible evidence and recommend that her employment be terminated.

PRELIMINARY MATTER

Petitioner charged respondent with excessive absenteeism pursuant to section nine of the Department's Civilian Code of Conduct and section 75 of the Civil Service Law. Respondent was served with charges on September 26, 2011,[3] and amended charges on or about December 19, 2011. The initial charges alleged excessive absenteeism from on or about January 1, 2009 through the present. The amended charges, however, allege that respondent had been excessively or habitually late, tardy, or absent from work for over 700 hours in 2010 and over 700 hours in 2011.

Respondent argued that a number of the dates incorporated in the charges were barred by section 75(4) of the Civil Service Law, which mandates that "no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct" as described in the charges. Civil Service Law §75(4) (Lexis 2012). Petitioner asserted one of the exceptions to the 18-month statute of limitations, arguing that respondent's excessive absenteeism is a continuing course of conduct, thereby tolling the statute. *See Dep't of Education v. Honan*, OATH Index No. 2231/07 at 2 (Mar. 14, 2008); *Dep't of Correction v. Benston*, OATH Index No. 1557/05 at 3 (Nov. 7, 2005).

In a concisely worded decision, the Second Department, held in *Cintron v. Bowen*, 51 A.D.2d 569 (2nd Dep't 1976), that the absences charged in a disciplinary case against a Long Beach sanitation worker may be considered a continuous course of absences in determining whether the absences were time-barred by the provisions of the contract between the city and the Civil Service Employees' Association. A review of the record in *Cintron*, revealed that Mr. Cintron was charged with excessive absences between December 1973 and December 1974. The absences, while numerous, were periodic and not consecutive. For instance, Mr. Cintron was absent during the month of March in 1974 on March 2, 6, 11, 16, 18, 20, 21, 22, and 23. *Cintron*, Record on Appeal, at 31-34. Nevertheless, the Second Department concluded that Mr.

[3] The parties had stipulated that respondent was served with the initial charges on September 23, 2011. That date, however, was the day the charges were actually drafted. Respondent's signature acknowledging receipt of the Statement of Charges is dated September 26, 2011, at 1105 hours (Pet. Ex. 33).

Cintron's excessive absences constituted a continuous course of conduct. Similarly, respondent's numerous absences were periodic and not consecutive. Under the reasoning in *Cintron*, respondent's absences also would appear to be a continuous course of conduct that constitutes an exception to the 18-month statute of limitations.

It is of some note, however, that regardless of whether a strict application of the statute of limitations or the exception under *Cintron* is applied, it is of little consequence here. Applying the continuous course of conduct theory to the charges proffered against respondent, the Department alleged that she was absent 51% of her scheduled work time in 2010 and 65% of her work time in 2011. If the statute of limitations were strictly applied, eliminating absences charged in January and February 2010, the percentage of respondent's absences for 2010 actually increases to 56%. In other words, the Department would have been able to charge respondent with excessive absences for 2010 either way. *See Triborough Bridge & Tunnel Auth. v. Cicero*, OATH Index No. 569/98 (Mar. 4, 1998) citing *Bd. of Education v. Hunter*, OATH Index No. 384/90 (Mar. 5, 1990), *modified*, Bd. Dec. (Apr. 4, 1990) (where the number of absences exceed 50% of the total work days, the absenteeism may be deemed excessive). *See also*, *Triborough Bridge & Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 12 (Mar. 21, 2012), adopted, Comm'r Dec. (Apr. 11, 2012); *Triborough Bridge & Tunnel Auth. v. Davi*, OATH Index No. 339/01 at 7 (June 8, 2001).

ANALYSIS

Respondent has worked for the Department since 1997. Pursuant to the Department's Time and Leave Manual, respondent must work seven hours a day, five days a week. She was provided with a one-hour flextime, between 9:00 and 10:00 a.m., which means that she should depart at the end of the day between 5:00 and 6:00 p.m., depending on when she arrives, unless she has been given an overtime assignment (Fire Dep't Time & Leave Manual, Dec. 2007, at 2; Tr. 87-88).

Calculation of Excessive Absences

Albert Simmonds, a data analyst in the Department's Absence Control Unit, conducted an audit of respondent's time and leave for calendar years 2010 and 2011. After producing the

report from the payroll data stored in the Citywide Human Resources Management's database, he forwarded the information to Department's counsel, Tyrone Hughes, Esq. (Pet. Exs. 1, 5; Tr. 20). Mr. Hughes and his colleague, Siheem Roseborough, Esq., created several tables to chart respondent's absences which were subsequently reviewed and checked against the raw data by Mr. Simmonds (Pet. Exs. 3, 4, 6, 7; Tr. 18, 20, 25).

The Department calculated how many work days there are per month for each year and the actual number of full days during each month that respondent had worked without an attendance issue. If respondent was absent without leave or arrived late or departed early, the day was not included in the Department's calculation. Therefore, only those days in which respondent arrived at work on time and stayed for the entire day, departing at her scheduled end time were considered. For four months, November 2010 through and including February 2011, respondent was granted extended leave, which was not monitored by the Absence Control Unit. Since extended leave is monitored by the Extended Leave Department, there was no payroll data available to Mr. Simmonds for the four-month period (Pet. Ex. 2; Tr. 22, 45, 55-56). The Department submitted the following tables (Pet. Exs. 4, 7) to demonstrate how many full days respondent worked during 2010 and 2011.

2010 Work History

Month	Work days per month	Actual Days worked without attendance issue
January	19	1
February	19	0
March	23	1
April	22	2
May	20	2
June	22	1
July	21	2
August	22	7
September	21	7
October	21	6
November	19	0
December	21	0
TOTAL:	250	29

2011 Work History

Month	Work days per month	Actual Days worked without attendance issue
January	19	0
February	19	0
March	23	5
April	21	2
May	22	2
June	22	1
July	21	0
August	23	3
September	21	8
October	20	1
November	19	0
December	21	0
TOTAL:	251	22

The tables represent that respondent worked only 29 full days in 2010 and 22 full days in 2011 (Pet. Exs. 4, 7; Tr. 39-43, 55-56, 82-83). The Department also calculated respondent's absences by hours worked and percentage of missed time. The total number of hours that respondent was absent from work in 2010 was 637 hours and 15 minutes, which was derived from the Absence Control Unit's report. During 2010, respondent used annual leave for scheduled vacation, sick leave, and excused leave for 13 hours and 29 minutes, which was not considered an absence issue and was consequently subtracted from the total numbers of hours worked. The 280 hours of absence while respondent was on extended leave in November and December 2010, was added to the total number of hours that respondent did not work for the year. The total number of hours of absence for 2010 equals 903 hours and 46 minutes, which when divided by 7 hours per day, equals 129 work days. In other words, respondent was absent 129 out of 250[4] scheduled work days in 2010. Her absenteeism rate for 2010 was 51.6% (Pet. Ex. 3; Tr. 21, 22, 26-28, 45, 51, 55-56).

With respect to 2011, the total number of hours that respondent was not at work, as derived from the Absence Control Unit's report, was 1036 hours and 41 minutes. During 2011, respondent used annual leave for scheduled vacation, sick leave, and excused leave for 143 hours and 43 minutes, which were not considered an absence issue and were consequently subtracted from the total numbers of hours worked. The 266 hours of absence while respondent was on extended leave in January and February 2011, was added to the total number of hours that respondent did not work for the year. The total number of hours of absence for 2011 equals 1158 hours and 58 minutes, when divided by 7 hours per day, equated to 165 work days. In other words, respondent was absent 165 out of 251 scheduled work days in 2011. Her absenteeism rate for 2011 was 65.7% (Pet. Ex. 6; Tr. 47-48, 56).

In order to dispute the Department's calculations regarding respondent's absences, respondent presented the testimony of William G., a certified Senior Professional in Human Resources and respondent's father. Mr. G. worked as a firefighter for the Department for 21 years, from 1973 through 1994. In addition, he worked in the Air Force for 33 years, for the most part as a reservist. Mr. G. has 12 years of experience as a Human Resources investigator or

[4] There were only 250 scheduled work days in 2010, as opposed to 251 work days in 2011, due to respondent's absence the day before a City holiday. As a consequence, respondent was not given credit for the City holiday.

specialist (Tr. 116-18). Mr. G. was qualified as an expert over petitioner's objection. Once a witness is allowed to testify as an expert, however, the extent of his qualifications becomes a matter bearing on the weight to be given to the testimony by the trier of fact. *See Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998); *Felt v. Olson*, 51 N.Y.2d 977, 979 (1980); *Kwansy v. Feinberg*, 157 A.D.2d 396, 400 (2d Dep't 1990); *DeLuce v. Kameros*, 130 A.D.2d 705, 705-06 (2d Dep't 1987).

Although Mr. G. worked for the Department for 21 years, he retired from the Department 18 years ago. While he was with the Department, Mr. G. supervised three civilian employees for a four-year period between 1984 and 1988, which included managing their time and leave. Although Mr. G.'s work experience is somewhat relevant, it is unfortunately outdated. The current timekeeping system, City Time, was not in place when Mr. G. was employed by the Department. Similarly, the Time and Leave manual in effect at the time of the charges, was effective as of December 2007, 13 years after Mr. G. left the Department's employ (Tr. 115-18, 126-30).

With respect to computer data analysis, Mr. G. testified that he had a degree in Computer Information Services in 1988 and worked for four months in the Department's computer information services unit. Mr. G. acknowledged since 1988, he has not been employed as a computer data analyst (Tr. 128-29). Mr. G. reviewed petitioner's exhibits, in particular the tables created to demonstrate respondent's full days of work without attendance issues (Pet. Exs. 4, 7). Mr. G.'s analysis of the computer data reflected his limited experience in the field. Despite being unaware of the source of the data and the data parameters, Mr. G. still concluded that the numbers were incorrect and that the results were flawed. Indeed, Mr. G. testified it was "absolutely, unequivocally, incorrect" that respondent only worked 29 days in 2010 (Tr. 148). Mr. G. based his conclusion on the fact that he prepared respondent's taxes every year and that respondent, whose base salary is $44,444, earned $32,449 in 2010. Mr. G. maintained that it would be impossible to earn $32,449 in 2010 and only work 29 days. He had a similar dispute with the Department's data indicating that respondent worked 22 days in 2011. Mr. G. testified that respondent earned $15,009 in 2011, which would indicate that she worked more than 22 days that year.

Although Mr. G. was qualified as an expert, his testimony merits little, if any, weight. "An expert's opinion, which is not supported, and indeed is refuted by facts established in the record, has little probative value." *Talon Air Services LLC v. CMA Design Studio, P.C.*, 86 A.D.3d 511, 515 (1st Dep't 2011). Mr. G.'s analysis was flawed and incomplete. Without ascertaining the data parameters, he concluded that the information was incorrect. Mr. Simmonds presented the underlying data and set forth the formula the Department used to determine how many full days that respondent had reported to work in 2010 and 2011. Mr. G., without any insight into the calculation method reached a conclusion totally unsupported by fact. Accordingly, I find the Department's data and calculations to be far more reliable than respondent's unconfirmed assertions.

Respondent's Testimony

Respondent testified that in 2009, her fiancé died in a motorcycle accident, which had a detrimental affect on her emotionally and financially. Although respondent suffered from migraines, depression, and anxiety during most of her employment with the Department, her condition was exacerbated after her fiancé's death, causing her to take a lot of sick leave. The medication respondent was taking for some of her ailments often caused her to oversleep. Respondent testified that for years, her supervisor had given her an "unofficial reasonable accommodation" (Tr. 202). He allowed her to arrive late and make up the time either after her shift or on the weekends. For instance, if she arrived at work at 11:00 a.m., he would permit her to work until 7:00 p.m. or come in on a Saturday to make up the missed time. Respondent testified that her supervisor had told her that he would prefer her to report to work for a half of a day or a partial day rather than take the whole day off. She perceived her supervisor to be a friend who permitted her to work an unofficial flextime schedule and accrue as much overtime as she needed to make up for her absences (Tr. 197, 200, 202, 206-11, 213, 229-30, 364).

Respondent contended that her supervisor started sexually harassing her sometime after she had started dating again after her fiancé's passing.[5] When pressed about the nature of the sexual harassment, respondent stated that her supervisor had always made inappropriate

[5] As respondent's unit supervisor did not testify during this proceeding, respondent's allegations of sexual harassment were not defended against and are uncorroborated. Respondent has a separate claim of harassment pending with the New York State Division of Human Rights.

statements during their relationship, but she would ignore it because they were friends. Moreover, she maintained, that as a woman, who works with men, she expects a certain amount of comments about her appearance. Respondent maintained that she did not interpret the comments as sexual harassment until her supervisor used his power and control to negatively affect her by refusing to allow her to work overtime. According to respondent, her supervisor was aware that she was in financial distress and used her economic situation to pressure her. She testified that when she would not do what her supervisor wanted her to do he took away her "unofficial reasonable accommodation," refusing to allow her to make up for the time she missed and requiring her to take her overtime as compensatory time instead of cash. Respondent asked her supervisor's supervisor to intervene but he ignored her (Resp. Ex. B; Tr. 201-03, 205-06, 225-26, 297-300, 302-03, 307, 313-14, 319, 321, 324, 328, 330, 417, 459-61).

Respondent testified that she endured months of fighting with her supervisor, difficulties getting her timesheets approved, and the loss of pay. She filed a harassment claim with the Department's Equal Employment Opportunity (EEO) office, but it was found unsubstantiated. Respondent maintained that after she filed a claim with the State Division of Human Rights, the Department retaliated against her by serving her with charges for excessive absenteeism. As a consequence, she filed additional claims against the Department at the State Division of Human Rights (Pet. Exs. 26, 30; Resp. Ex. B; Tr. 217, 219, 225-26, 307, 321, 324, 330, 417, 471).

At some point in 2010, respondent's supervisor was promoted to unit supervisor. Thus, respondent's new supervisor reported to him. However, respondent's former supervisor (now unit supervisor) was still monitoring her time and leave. Respondent was still having problems with her attendance. In response, respondent's new supervisor sent a number of e-mails regarding respondent's absences and latenesses to respondent, copying the unit supervisor. Respondent testified that her late arrivals and absences were a result of her depression and anxiety disorder, which prevented her from sleeping. She would have horrible bouts of insomnia where she would go for days without sleeping, so she would have to medicate herself. On some occasions she would not fall asleep until 6:00 a.m. and then oversleep. On one occasion in particular in May, 2010, respondent's new supervisor complained that she did not call one hour before her start time to indicate that she was going to be late. The next time she had a sleeping problem, respondent decided to send him a text in the middle of the night saying that she took

medication and if she was late to work then that was her notification. Respondent was indeed late for work that day, arriving at 1:50 p.m. with a medical note. Her supervisor was not pleased and complained to the unit supervisor about the situation. He also informed respondent via e-mail that it was unacceptable to send a text in the middle of the night to pre-empt lateness the next day and that she is required to call one hour before her start time. Respondent replied by e-mail that she was starting to feel harassed. Respondent testified that it was impossible for her to call if she was sleeping and insisted that her former supervisor was forcing her new supervisor to deny her overtime and harass her (Pet. Exs. 8, 9; Tr. 376-77, 402, 404-05, 407, 410, 418).

Respondent's unit supervisor subsequently sent respondent an e-mail suggesting that she should consider a transfer to a less demanding unit. In the e-mail he said that her absences were causing a problem for the unit because they needed to "bring in inspectors to do her clerical work." Although respondent acknowledged that he mentioned a transfer, she contended that the unit supervisor was being untruthful because he never had inspectors do her work. Regardless, she was not interested in transferring to another unit (Pet. Ex. 8; Tr. 400, 410).

Respondent acknowledged that her unit supervisor had informed her that overtime is a privilege and is assigned at the discretion of supervision. Moreover, she was apprised that as an employee with a negative balance she would not be able to work overtime until she worked at least 40 hours per week (Pet. Exs. 21, 23; Tr. 573-74, 578). Nevertheless, respondent contended she was being treated unfairly because her requests to work overtime in her unit were denied and she was prevented from working overtime in other units as well. In addition, other employees in the unit, in similar time and leave situations, were given overtime assignments. The unit supervisor told respondent that overtime assignments in other units had to be approved by him in writing, in advance. On July 13, 2010, however, respondent sent an e-mail to the unit supervisor saying that she wanted to work overtime on a particular day and if he did not respond she would assume that he approved the overtime. When asked about this particular e-mail, she said that she was frustrated because he kept deleting her overtime requests without responding. The unit supervisor responded to this e-mail by telling respondent that she would have to follow the overtime policy or be written up. He further reminded respondent that there were three requirements to overtime – make a request for overtime in writing, work a 35-hour week, and

prior written approval. Respondent, however, insisted that the requirements kept changing to suit his whims (Pet. Exs. 25, 27; Tr. 304, 337, 590, 594-96).

Respondent testified that she followed the procedures set forth in the Department's Time and Leave Manual by providing medical documentation for her absences. She maintained that her condition was worsening and she was placed on additional medications because of the poor treatment she was receiving at work. Respondent contended that the Department refused to help her and instead attacked her financially by altering her timesheets and withholding pay. Respondent testified that in October 2010, her supervisor confronted her at her desk and was "yelling and screaming at her" (Tr. 220). He embarrassed her and "caused her to have a mental breakdown" (Tr. 220, 615). She experienced "heart palpitations" and thought she was having a heart attack (Tr. 220, 615). As a consequence, respondent's physician placed her on an extended medical leave from October 2010 through February 2011. Respondent returned to work in March 2011 (Pet. Ex. 17; Resp. Exs. C, D, M; Tr. 213-14, 220-21, 231, 348-49, 362, 448-49, 498-99, 504-07, 614).

Respondent missed additional time due to a back injury. In April, 2011, an MRI of respondent's lumbar spine demonstrated that she suffered from a herniated disc (Resp. Ex. J). Respondent testified that she requested a reasonable accommodation from her supervisor to leave work three hours early, three days a week for physical therapy. The request, however, was denied. Respondent contended that her supervisor went to her doctor's office and the physical therapist's office to harass and intimidate them into giving him her medical records, which they refused. Respondent testified that even though her supervisor denied her request, she went to physical therapy anyway, either before work by arriving late, during an extended lunch, or at the end of the day by leaving early (Tr. 269, 271).

Respondent argued that she was not being treated the same as her co-workers. Indeed, she insisted that her supervisor was targeting her and treating everyone else in her unit differently than her. She testified that she was monitoring her co-workers absences from the office and even though their time was similar to hers, they were still permitted to leave early for physical therapy. Moreover, she was the only one who was denied overtime. Respondent testified that she had applied twice for a reasonable accommodation from the EEO office, first to have a three-hour flextime and second, to attend physical therapy during work hours for three

hours at a time, three times per week. Both requests were denied (Resp. Exs. B, C, D, M; Tr. 227, 252, 254, 304, 307, 332, 348-49, 355, 357, 359-60, 410, 416-17, 643-647).

On June 9, 2011, Donay J. Queenan, Assistant Commissioner for Human Resources sent a certified letter to respondent, stating that her attendance throughout her career had been problematic and that her recent absences interfered with the efficient operation of her unit. Since respondent claimed her absences had been due to medical and mental health issues, Assistant Commissioner Queenan directed her to appear for both a physical and psychiatric exam that the Department had scheduled for her (Pet. Ex. 20).

On June 16, 2011, the Department sent respondent for a physical exam with Dr. George Brief. During the examination, respondent insisted that her decreased work attendance was attributable to a stressful work environment as opposed to any particular medical issue. Dr. Brief determined that respondent suffered from intermittent allergies and edema. He stated that her headaches were psychosomatic resulting from an anxiety/depression disorder. He suggested that respondent's psychological issues be evaluated by a psychiatrist, but concluded that there was no medical condition that would interfere with her ability to discharge her professional duties (Resp. Ex. F; Tr. 258, 260, 372-73).

On June 22, 2011, respondent was sent for a psychiatric exam with Dr. Azariah Eshkenazi. Respondent informed Dr. Eshkenazi that she was taking a number of medications, including Ambien for sleeping. This particular medication caused her to have trouble waking up in the morning, which is why she had requested an accommodation to come to work later. Respondent complained to Dr. Eshkenazi about her supervisor's harassment of her. She indicated that she wanted to be transferred. Dr. Eshkenazi's psychiatric diagnosis was Life Circumstance Problem and Generalized Anxiety. He concluded that from a psychiatric perspective, respondent was able to perform her duties. Interestingly, Dr. Eshkenazi noted that the effect of Ambien lasts no more than six hours. If the Ambien was really responsible for making her too sleepy, then her medication should be adjusted (Resp. Ex. E; Tr. 368, 370-71).

Respondent testified that she was very cautious when she spoke with Dr. Eshkenazi because he informed her that there was no doctor-patient confidentiality and that he would be sharing what they discussed with the Department. As a result, while she answered his questions, she was not as forthcoming as she could have been. Respondent emphatically disagreed with Dr.

Eshkenazi's conclusion that Ambien should last no more than six hours. She contended that there are a number of factors that need to be considered in determining the effects of a medication, such as dosage, whether she has eaten, what time the Ambien is taken, and what other medications she is on when she takes it (Tr. 257-58, 375, 381-83).

Respondent testified that her medications in general made her lightheaded and dizzy. She was anxious about taking the subway during rush hour because she was afraid that she would not get a seat and may fall. She often waited to leave later in the morning to avoid this problem. Respondent testified that in June, 2011, she had gotten so dizzy from her medications that she fell and broke her toe. Respondent was out on medical leave as a result between June 30, and August 22, 2011, because she was unable to walk up and down stairs in the subway stations (Resp Ex. I; Tr. 266-67, 351).

On September 27, 2011, Dr. Abolghasem Moomiaie wrote a letter to the Department stating that he has been respondent's primary care physician for 12 years. He indicated that respondent was suffering from chronic sinusitis, hay fever, anemia, lower back pain, high uric acid/gout, mild hyper-tension/edema (legs), tension headaches/migraine, insomnia, and anxiety syndrome. He further indicated that she was under the care of a neurologist and a psychiatrist (Resp. Ex. G, K; Tr. 265, 386).

On January 10, 2012, Dr. Moomiaie provided another letter to the Department indicating that he has been treating respondent since 1998. He outlined respondent's medical history from 2005 going forward. The letter stated that respondent's symptoms had gotten progressively worse. By 2010, her physical symptoms were not manageable with medication. Dr. Moomiaie referred respondent to a psychiatrist but found that she was experiencing severe side effects from the medications. He further recommended her to a neurologist to help with pain management (Resp. Ex. H, Tr. 385-87).

Several factors need to be taken into consideration in assessing respondent's credibility, such as witness demeanor, consistency of witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience. *See Department of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb. 4, 1998), *aff'd* NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998). I find respondent to be a less than reliable witness. Her self-interested

testimony was inconsistent and evasive at times. Respondent was very defensive and hostile when questioned about her conduct. Whether it is a result of the number of perceived and actual ailments or the combination of medications that she is currently taking, respondent was extremely emotional. Her perspective on her employment situation was also skewed and not entirely reality based. Rather than understanding that the Department could not continue to permit her to work overtime because of her excessive absenteeism, she twisted the situation into a more palatable reality. Instead of taking responsibility for her actions, she relegated the blame to everyone else around her, especially when someone said something she did not want to hear. As a consequence, I did not credit much of her testimony.

Americans with Disability Act

Respondent repeatedly contended that she is very familiar with the Americans with Disabilities Act ("ADA") and its amendments because she researched the subject online. Her interpretation of the ADA and its application, especially to her situation, is unfortunately inaccurate in many ways.

The ADA prohibits employment discrimination "against a qualified individual on the basis of a disability." 42 U.S.C.A. § 12112(a) (Lexis 2012); *see also* Exec. Law § 296(1)(a) ("It shall be an unlawful discriminatory practice" for an employer because of an individual's disability "to discriminate against such individual in compensation or in terms, conditions or privileges of employment."); Admin. Code § 8-107(1)(a) ("It shall be an unlawful discriminatory practice" for an employer because of an individual's disability "to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.").

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (Lexis 2012); *see also* Exec. Law § 292(21)(a) ("disability" means "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function"); Admin. Code § 8-102(16)(a) ("disability" means "any physical, medical, mental or psychological impairment, or a history or record of such impairment.).

The ADA defines the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business." 42 U.S.C. § 12112(b)(5)(A) (Lexis 2012); *see also* Exec. Law § 296(2)(c)(i) ("discriminatory practice" includes "a refusal to make reasonable modifications in policies, practices, or procedures . . . unless . . . making such modifications would fundamentally alter the nature of such facilities, privileges, advantages or accommodations."); Admin. Code § 8-107(15)(a) (employers shall make a reasonable accommodation to a person with a disability, "provided that the disability is known or should have been known" by the employer.).

Reasonable accommodations may include "job restructuring, part-time or modified work schedules, [or] reassignment to a vacant position . . . ." 42 U.S.C. § 12111(9)(B); *see also* 29 C.F.R. § 1630.2(o)(2)(ii). However, "a reasonable accommodation can never involve the elimination of an essential function of a job." *Shannon v. NYC Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003); *see also Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 120 (2d Cir. 2004); W*ernick v. FRB*, 91 F.3d 379, 384 (2d Cir. 1996); *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991).

In the context of disciplinary proceedings, this tribunal has considered affirmative defenses founded upon the failure of an agency to make a reasonable accommodation pursuant to the ADA. *See, e.g., Fire Dep't v. Rivera*, OATH Index No. 3416/09 at 4 (July 30, 2010), *superseding* (July 28, 2010), *adopted*, Comm'r Dec. (Sept. 24, 2010); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 at 10 (Dec. 12, 2007); *Human Resourcs Admin v. Varone*, OATH Index No. 457/95 at 9 (Mar. 17, 1995). In doing so, we have noted our responsibility to "consider the legality of agency actions with regard to this federal law as part of our obligation to provide a complete evaluation of the legality of all options available to the appointing agency." *Dep't of Correction v. Van-Osten*, OATH Index No. 1793/05 at 3 (Nov. 18, 2005); *see also Dep't of Correction v. Noriega-Harvey*, OATH Index No. 1250/97 at 9 (Aug. 14, 1997).

To prevail on this defense an employee bears the burden of showing that he or she suffers from a disability; that the employee is "otherwise qualified" to perform the essential functions of his or her job with or without an accommodation; that the employee requested an

accommodation prior to the date of the misconduct alleged; and that his or her employer failed to reasonably accommodate him or her. *Fire Dep't v. Rivera*, OATH Index No. 3416/09 at 4 (July 30, 2010), *superseding* (July 28, 2010), *adopted*, Comm'r Dec. (Sept. 24, 2010); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 at 10 (Dec. 12, 2007); *Dep't of Correction v. Swannick*, OATH Index No. 899/07 at 3-5 (Feb. 16, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-87-SA (Aug. 14, 2007). If these elements are established, the burden shifts to the employer to show that making the accommodation would be an undue hardship. *Jackan v. NYS Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2004); *Stone v. City of Mount Vernon*, 118 F.3d 92, 98 (2d Cir. 1997).

Otherwise Qualified

Inherent in a determination that an employee is otherwise qualified for his or her job is a determination that the disability was the cause of the misconduct alleged. Accordingly, this tribunal has rejected defenses based on the ADA where the employee has failed to show that absences or latenesses were caused by his or her disability. *See, e.g., Dep't of Correction v. Swannick*, OATH Index No. 899/07 at 4 (Feb. 16, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-87-SA (Aug. 14, 2007) (rejecting the claim where respondent failed to show that many of his absences were due to physical, mental, or medical impairment); *Human Resources Admin. v. Metz*, OATH Index No. 1000/02 at 3 (Dec. 20, 2002) (generalized statements that medications made respondent drowsy insufficient to rebut the charge that she engaged in misconduct when she was late); *see also Health & Hospitals Corp. (Elmhurst Hosp. Ctr.) v. J.E.*, OATH Index No. 248/11 at 5-7 (Sept. 14, 2011) (rejecting defense based on the City Human Rights Law where there was no evidence that respondent's latenesses or absences were caused by his alleged disability); *see also Ricketts v. NYC Health & Hospitals Corp.*, 88 A.D.3d 593, 594-95 (1st Dep't 2011) (upholding finding of misconduct where respondent failed to show that the misconduct alleged was caused by his disability).

Here, it is questionable whether or not respondent's disability caused her absences and latenesses. Her accommodation request to the Department said that she needed an accommodation of a three-hour flextime because the medications she was taking for stress, anxiety, panic disorder, and migraine headaches caused her to oversleep (Resp. Ex. D). Respondent testified, however, that the drowsiness caused by her medications was only "part of

the reason" she missed work or would come in late (Tr. 213, 273). Though respondent stated that the medications made her dizzy and nauseous in the morning (Tr. 266, 351, 373), she also testified that she could take her medications in a way that would not make her late for work (Tr. 384).

Further, respondent failed to provide medical documentation that sufficiently supported her request. The EEOC has clarified that medical documentation is sufficient to support an accommodation request if it "(1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed." EEOC Notice No. 915.002, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* at question 10 (July 27, 2000), available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_54. Here, several doctors indicated that her medical diagnoses would not impact her ability to perform her duties (Pet. Ex. 30; Resp. Ex. F). Likewise, as respondent admitted, no doctor ever provided her with written documentation that stated she needed a wider flextime (Tr. 351, 624-25, 633), or that she should be able to come into work at noon to accommodate her medical issues (Tr. 713-14). Respondent's medical documentation was insufficient to support her accommodation request and she failed to establish that a disability was the cause of her alleged misconduct.

Timely Attendance as an Essential Function of the Job

As noted above, to prevail on an ADA defense, the respondent must prove that she is otherwise qualified to perform the essential functions of her job with or without a reasonable accommodation and a reasonable accommodation can not involve the elimination of an essential function. The EEOC's regulations implementing the ADA define an essential function as "the fundamental job duties of the employment position the individual with a disability holds or desires," and provides that a function may be considered essential for several reasons, including:

> (i) The function may be essential because the reason the position exists is to perform that function;
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2) (Lexis 2012). Whether or not a function qualifies as an essential function is a factual determination to be made on a case by case basis. *King v. Town of Wallkill*, 302 F. Supp. 2d 279, 289 (S.D.N.Y. 2004); *Sharp v. Abate*, 887 F. Supp. 695, 699 (S.D.N.Y. 1995). In making that determination, the regulations provide that the employer's judgment, written job descriptions, the consequences of not requiring the employee to perform the function, and the terms of a collective bargaining agreement should be considered. 29 C.F.R. § 1630.2(n)(3). The Second Circuit gives "considerable deference" to an employer's judgment of what is an essential function. *D'Amico v. City of New York*, 132 F.3d 145, 151 (2d Cir. 1998); *see also Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 120 (2d Cir. 2004); *Shannon v. NYC Transit Auth*., 332 F.3d 95, 100 (2d Cir. 2003).

Attendance has been found to be an "essential function" of most jobs. *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1516 (2d Cir. 1995) ("It is clear that an essential aspect of many jobs is the ability to appear at work regularly and on time"); *Vandenbroek v. PSEG Power Ct LLC*, 356 Fed. Appx. 457, 460 (2d Cir. 2009) (quoting *Daddazio v. Katharine Gibbs School, Inc*., 1999 U.S. Dist. LEXIS 5408 at *14 (S.D.N.Y. Apr. 20, 1999), *aff'd*, 205 F.3d 1322 (2d Cir. 2000)) ("'Regularly attending work' is an essential function of virtually every job."); *Scalera v. Electrograph Systems*, 2012 U.S. Dist. LEXIS 40465 at *21 (E.D.N.Y. Mar. 26, 2012) ("Indeed, one such essential function of an employee's job is showing up for work"); *Shepheard v. City of New York*, 577 F. Supp. 2d 669, 676 (S.D.N.Y. 2008), aff'd, 2009 U.S. App. Lexis 27447 (2d Cir. 2009) ("Another essential function that would necessarily be required of a [Department of Correction] Captain is reporting to work."); *Querry v. Messar*, 14 F. Supp. 2d 437, 445 (S.D.N.Y. 1998) (employee is not otherwise qualified when she could not achieve regular and predictable attendance); *Davis v. Bowes*, 1997 U.S. Dist. LEXIS 16258 at *49 (S.D.N.Y. Oct. 20, 1997) ("An employee cannot be considered 'otherwise qualified' when she is unable to report to

work at the time required, because she is not able to perform one of the essential functions of her job.").

The broad language of the opinions on attendance "may be applied equally to absence and tardiness." *McMillan v. City of New York*, 2011 U.S. Dist. LEXIS 95062 at 17 (S.D.N.Y. Aug. 23, 2011). For example, the Southern District has explained that "some degree of regular, predictable attendance is fundamental to most jobs" *Mislek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995). Accordingly, the Southern District has found that arrival at work in a designated time period with some degree of consistency may be an essential function of a job. *See McMilla*n, 2011 U.S. Dist. LEXIS 95062 (employee's request for a 2 hour flex time unreasonable as it eliminated essential function of the job); *Guice-Mills v. Derwinski*, 772 F. Supp. 188, 199 (S.D.N.Y. 1991), *aff'd*, 967 F.2d 794 (2d Cir. 1992) (employee not otherwise qualified for a position when he is unable to arrive at work at a designated time).

In *Human Resources Administration v. Varone*, OATH Index No. 457/95 at 10-11 (Mar. 17, 1995), *modified on penalty*, Comm'r Dec. (June 9, 1995), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 99-80-M (July 20, 1999), Administrative Law Judge John B. Spooner found that respondent's request for a floating work schedule, which would allow him to come into work two hours late, was not a reasonable accommodation of his sleep disorder where the schedule would have placed respondent beyond the reach of any supervision and kept him from communicating directly and regularly with his colleagues. And in *Department of Education v. Conyers*, Chancellor's Dec. at 15 (Dec. 8, 2006), *modifying*, OATH Index No. 624/06 (Oct. 25, 2006), the Chancellor rejected a finding that the respondent was entitled to protection under the ADA and could not be penalized for her tardiness. The Chancellor reasoned that the flex-time the employee had requested to accommodate her sleep apnea, chronic fatigue, insomnia, and depression was unreasonable because "the majority of the work for which Respondent was responsible needed to be assigned and completed in the course of regular work hours." Chancellor's Dec. at 15.

Consistent with the language of 29 C.F.R. § 1630.2(n)(3), courts also look to the employer's judgment and general policies, as well as written job descriptions in determining whether or not attendance is essential. *See, e.g., Aquinas v. Federal Express Corp.*, 940 F. Supp.

73, 78 (S.D.N.Y. 1996) (attendance essential function where employer "informed its employees repeatedly and unambiguously that daily attendance is 'imperative' to the success of its operations"); *McMillan*, 2011 U.S. Dist. LEXIS 95062 (giving considerable deference to the employer's judgment in finding punctuality an essential function of an HRA caseworker); *Samper v. Providence St. Vincent Medical Ctr*., 675 F.3d 1233, 1238 (9th Cir. 2012) (noting that "attendance" and "punctuality" were listed as essential functions in employee job description); *Fisher v. Vizioncore, Inc*., 429 Fed. Appx. 613, 616 (7th Cir. 2011) (employer handbook established that attendance was an essential function of the job); *Earl*, 207 F.3d at 1366 (finding that punctuality was an essential function based in part on employer's policy handbook); *Martinez v. Pacificorp*, 211 F.3d 1278 (10th Cir. 2000) (for reasons stated in 2000 U.S. App. LEXIS 8542 at *6 (10th Cir. Apr. 28, 2000)) (punctuality is an essential function of the job; employee's "personal opinion cannot override her employer's stated requirements and the language contained in her collective bargaining agreement"); *but see Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 328-29 (3d Cir. 2003) (finding punctuality not an essential function of a marketing production manager where employer's sole basis for deeming it essential was a desire for the manager to set a good example).

Taken as a whole, the record demonstrates that timely attendance is an essential function of respondent's job (Pet. Ex. 19). The Department stressed that respondent was the only administrative staff member in her unit and no one would be able to supervise respondent if she was working off-hours (Resp. Ex. C). As far back as 2003, respondent was put on notice that her attendance was a problem and that she needed to maintain satisfactory attendance in her new assignment (Pet. Ex. 18). Additionally, respondent was informed that there were demands and deadlines that had to be complied with, requiring the unit supervisor to bring in inspectors to do her clerical work (Pet. Ex. 8). It is further notable that the Department's Time and Leave Manual states that the "core period" employees are expected to work "is set according to the needs of the agency" (Time and Leave Manual at 13). It also states that "Excessive absence and/or lateness impacts operations and may effect workload of co-workers and supervisors" (Time and Leave Manual at 8). As timely attendance was an essential function of respondent's job, the Department was not required to accommodate her disability by changing her schedule to provide her with a three-hour flextime.

Reasonable Accommodation

Even if timely attendance were not an essential function of respondent's job, she would still need to show the accommodation sought was reasonable. Courts have found that accommodations are unreasonable as a matter of law if the accommodation would not enable the employee to perform the essential functions of his or her job. For example, in *McMillan v. City of New York*, 2011 U.S. Dist. LEXIS 95062 at *25-26 (S.D.N.Y. Aug. 23, 2011), the court found that the plaintiff's request for a three hour flex time was unreasonable because the record showed that he arrived at work on several occasions after his requested start time. Likewise, in *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) the Fifth Circuit found that an employee was not "otherwise qualified" for his job because the one-hour flex time he had requested would not have helped him arrive on time as required; he frequently was over an hour late. *See also Querry v. Messar*, 14 F. Supp. 2d 437, 444 (S.D.N.Y. 1998) (employee could not show that she was "otherwise qualified" where even if accommodated by four-hour shifts she could not perform the essential functions of her job); *Walders v. Garrett*, 765 F. Supp. 303, 314 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992) (proposed accommodations would cause undue burden because they "offer no real prospect that plaintiff would be able to achieve reasonably regular and predictable work attendance").

In this case, respondent failed to show the existence of an accommodation that would allow her to fulfill the essential functions of her job. Though she requested a three hour flex time, her records show that on the days she reported to work in 2011, respondent missed more than three hours of work on approximately 23 occasions (Pet. Ex. 7). Thus, respondent has failed to demonstrate that there was an accommodation that would have made her "otherwise qualified" to do her job.

Interactive Process

Respondent asserted that the Department did not engage in an interactive process and thus discriminated against her because it refused to accommodate her by giving her a three-hour flextime. After an employer has received a request for an accommodation, the employer has a duty to engage in an interactive process with an employee to find an appropriate accommodation. 29 C.F.R. Part 1630 Appendix; *Jackan v. NYS Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000); *Jernigan v. Dalton Management Co., LLC*, 819 F. Supp. 2d 282, 291 (S.D.N.Y. 2011); *see also*

Vinikoff v. NYS Division of Human Rights, 83 A.D.3d 1159, 1162 (3d Dep't 2011); *Phillips v. City of New York*, 66 A.D.3d 170, 176 (1st Dep't 2009).

Respondent, however, was partly at fault for a breakdown in the interactive process. "[B]oth the employer and the employee have a duty to act in good faith once the interactive process begins, and an employee who is responsible for the breakdown of that interactive process may not recover for a failure to accommodate." *Vinikoff*, 83 A.D.3d at 1163 (citing *Conneen*, 334 F.3d at 333; *Nugent v. St. Lukes-Roosevelt Hospital Ctr.*, 303 Fed. Appx. 943, 946 (2d Cir 2008)); *see also Jackson v. Elmhurst Hospital Ctr*., 2012 U.S. Dist. LEXIS 34508 at *16 (E.D.N.Y. Mar. 14, 2012) ("where the employee causes the interactive process to collapse, an employer will not be liable for failing to make an accommodation under the ADA.).

It is permissible for an employer as part of the interactive process to request a medical examination or medical documentation to establish that the employee has a disability requiring a reasonable accommodation. *Kennedy v. Superior Printing Co*., 215 F.3d 650, 656 (6th Cir. 2000) (citing 29 C.F.R. § 1630.14(c)); *EEOC v. Prevo's Family Market*, 135 F.3d 1089, 1094 (6th Cir. 1998) ("the employer need not take the employee's word for it that the employee has an illness that may require special accommodation. Instead, the employer has the ability to confirm or disprove the employee's statement."); *see also Delson v. Mineta*, 144 Fed. Appx. 136, 138 (2d Cir. 2005). Where an employee has not cooperated with such a request, the employee cannot establish a violation of the ADA as it is the employee who precipitated the failure of the interactive process. *Delson*, 144 Fed. Appx. at 137; *Kennedy*, 215 F.3d at 656.

Respondent initially did not provide the Department with medical documentation to support her request for an accommodation. Furthermore, the documentation that she eventually provided did not establish that she had a disability that would affect her ability to attend work or substantiate why an accommodation was needed. Respondent acknowledged that none of her doctors provided her with medical documentation to establish that a three-hour flextime was necessary. At one point, her psychiatrist provided a note to the Department recommending that respondent work a part-time schedule. Yet, when the Department asked if she wanted to work part-time, she refused. Respondent never provided another alternative to the Department's offer (Pet. Ex. 30; Tr. 620-26, 632, 681-82). Respondent may not maintain that the Department failed to meet the requirements of the ADA, when she did not properly comply with legitimate requests

to supply specific medical documentation on why an accommodation was needed. Similarly, when the Department did receive a suggested accommodation from respondent's psychiatrist and tried to discuss it with respondent, she refused.

Undue Hardship

The federal regulations provide that in determining whether or not an accommodation would constitute an undue hardship, several factors should be considered, including, "the impact of the accommodation upon the operation of the facility, the impact on the ability of other employees to perform their duties, and the impact on the facility's ability to conduct business." 29 C.F.R. § 1630.2(p)(2)(v). Consistent with this, courts have found that permitting a late arrival time creates an undue hardship where an employee's duties would need to be reassigned. *See, e.g., Guice-Mills*, 772 F. Supp. at 199 (requested accommodation of 10:00 a.m. start time for Head Nurse unreasonable burden on hospital because her duties would have to be reassigned); *Soto-Ocasio v. Federal Express Corp*., 150 F.3d 14, 20 (1st Cir. 1998) (recognizing that requested accommodation would require that employer reallocate other employees to complete appellant's data-entry work to ensure that her deadlines were met); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) ("the U.S. Attorney's Office has demonstrated that its 4:00 p.m. deadline renders a flexible schedule constitute's an undue hardship" because others would have to do plaintiff's work on a regular basis); *Walders v. Garrett*, 765 F. Supp. 303, 313-14 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992) (request for flexible schedule undue hardship for employer where it was a small office with tight deadlines and budget restraints); *Dexler v. Tisch*, 660 F. Supp. 1418, 1428 (D. Conn. 1987) (accommodation imposed undue hardship because it would require other workers to "double up" on tasks).

Here, respondent was the only clerical worker for her unit, requiring the Department to assign others to do her work when she was out because it was time sensitive (Pet. Ex. 8, 18, 19, 20). Under these circumstances, permitting a flexible start time is an undue hardship.

"Unofficial Reasonable Accommodation"

Respondent repeatedly contended that her supervisor provided her with an "unofficial reasonable accommodation" and then unfairly took the accommodation away from her.

Respondent ultimately acknowledged that there is no such thing as an "unofficial reasonable accommodation" and that she had coined the phrase herself. Although it was not clearly articulated, respondent appeared to imply that her employer condoned her flexible time schedule that permitted her to make up time she missed either during the week after work hours or on weekends. According to respondent, her supervisor then arbitrarily refused to permit her to continue working a flexible time schedule and overtime. She maintained that it was unfair and discriminatory to eliminate her "unofficial reasonable accommodation."

Condonation and waiver is an affirmative defense that respondent bears the burden of proving. *See Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 10 (Jan. 8, 2010); *Dep't of Correction v. Ramola*, OATH Index Nos. 1899/96 & 1900/96 at 9 (Mar. 31, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-78-A (July 14, 1998); *Dep't of Correction v. Burkert*, OATH Index No. 1494/96 at 8 (Sept. 9, 1996). For condonation and waiver to apply as a defense to misconduct, respondent must show that the behavior alleged to be misconduct was a regular practice known to and accepted by her supervisor. *See Dominguez*, OATH 550/10 & 551/10 at 10; *Dep't of Correction v. Heredia*, OATH Index No. 1070/91 at 12 (Aug. 23, 1991).

Respondent, however, acknowledged that she was put on notice that her "unofficial reasonable accommodation" was no longer permitted. Regardless, of the circumstances of why it was taken away, respondent was aware that she was no longer permitted to work extra hours at the end of her shift or on weekends to make up for lost time because of her late arrivals or early departures. Since this was no longer a regular practice accepted by her supervisor, a defense of condonation would not apply.

Moreover, it is not entirely clear from the record that respondent's supervisor was actually offering her a flexible work schedule. At one point, she testified that her supervisor had told her that he would prefer her to report to work for a half of a day or a partial day rather than take the whole day off (Tr. 208). Respondent somehow interpreted this to mean that he was permitting her to come to work late and allowing her to work a flexible schedule. It appears, however, that respondent only heard what she wanted to hear. Instead of providing her with an "unofficial reasonable accommodation," it is more likely that her supervisor was indicating that he would rather have her present and working for most or part of the day rather than missing an

entire day because she was going to be late. Undoubtedly, he was not giving her permission to show up whenever she wanted.

With respect to overtime, respondent testified that her supervisor would permit her to stay late and make up the time she had missed during the week. Then, suddenly he prohibited it. The Department has two types of overtime, authorized voluntary overtime and ordered involuntary overtime. Authorized voluntary overtime occurs when an employee is asked to work beyond her regularly scheduled hours, which she can either accept or decline. In order to qualify, however, for overtime and/or compensatory time an employee has to work her regularly scheduled hours (Time and Leave Manual, at 2; Tr. 88). Although her supervisor was permitting her to work extra hours, it could not be classified as overtime until she worked more than 40 hours for the week. Respondent would earn a regular rate of pay if she worked up to 40 hours in one week. Once she exceeded 40 hours, she would qualify for an overtime rate of pay of time and a half.

Respondent had an attendance problem throughout her employment with the Department. In 2010 and 2011, however, her absences more than doubled (Pet. Ex. 10). As a consequence of her excessive absenteeism, her supervisor could not permit her to work overtime to make up missed time. In other words, the Department could not and did not permit her to work less time during work hours than she did after hours and as overtime.

Excessive Absences/Latenesses

Respondent asserted that she did not commit misconduct because she provided the Department with medical notes to explain her absences. However, under Section 75 of the Civil Service Law excessive absenteeism may result in termination of employment even if the absences are due to verified illnesses. *See Dep't of Correction v. Duclet*, OATH Index No. 972/09 at 2 (May 19, 2009). Respondent further argued that the Department does not have the authority to discipline her for excessive absences because it lacks a clearly defined rule regarding how many absences are deemed excessive. Mr. Simmonds pointed out, however, that while the Department does not clearly define excessive absences, the Department's Time and Leave Manual does address absences, latenesses, and early departures. All employees are required to report to work as scheduled and work a complete shift. (Time and Leave Manual, at 1).

Employees are required to report to work in accordance with their scheduled arrival time. An employee who is not at her work location at her scheduled time is considered late. (Time and Leave Manual, at 12). Similarly, an employee is not permitted to leave work prior to her scheduled departure time, unless the supervisor has given her prior written permission. (Time and Leave Manual, at 3, 15). Should an employee depart at an earlier time without prior written approval, the employee may be considered absent without official leave (AWOL) and subject to pay deduction and/or disciplinary action. (Time and Leave Manual at 3; Tr. 85) Moreover, repeated or prolonged absence that establishes a pattern of abuse of the sick leave benefit may result in disciplinary action. (Time and Leave Manual at 5; Tr. 60-61).

It is has been held that whether an agency has a clearly defined rule regarding a maximum number of permitted absences is not determinative in making a finding of excessive absences. In prior cases where excessive absence has been charged but not specifically defined by agency rules, this tribunal has noted three circumstances which would give rise to sanctions: (i) absences which are so extensive in number that they are excessive per se; (ii) absences which are excessive because of the disruption they cause to the workplace and the adverse impact they have on workplace efficiency and operations; and (iii) absences which are excessive based on circumstances surrounding the missed days of work. *See Dep't of Education v. Medina,* OATH Index No. 1865/11 at 3 (July 22, 2011), *adopted,* Chancellor's Dec. (Aug. 25, 2011); *Admin. for Children's Services v. Scipio,* OATH Index No. 2144/11 at 4 (June 21, 2011).

Relevant factors to consider when determining excessive absence include available leave balances, the cause for the absences, documentation, approval, the impact on office operations, and whether the employee received warnings about attendance. *Scipio,* 2144/11 at 4-5; *Human Resources Admin. v. McCaskill-Bourdeau,* OATH Index No. 164/11 at 16-17 (Oct. 22, 2010) (20 absences in nine months were excessive where employee had a large number of unauthorized absences, never gave advance notice of her absences, and her absences had negative impact on the workplace); *Transit Auth. v. Montgomery and Dunham,* OATH Index Nos. 1144, 1145/99 at 8 (July 15, 1999), *aff'd*, *Dunham v. Transit Auth.*, NYC Civ. Serv. Comm'n Item No. CD 00-33-SA (Apr. 6, 2000) (127 absences in nine months deemed excessive).

In this case, the relevant factors demonstrate that respondent's absences were excessive. She works in a small unit, many of the absences were unplanned, she exhausted her leave

balances, she received warnings about her attendance, and her absences had a negative impact on her unit. *See Dep't of Education v. Medina*, OATH Index No. 1865/11 at 3 (July 22, 2011), *adopted*, Chancellor's Dec. (Aug. 25, 2011); *Human Resources Admin. v. McCaskill-Bourdeau*, OATH Index No. 164/11 at 16-17 (Oct. 22, 2010) (20 absences over nine-month period were excessive where employee had a large number of unauthorized absences, never gave advance notice of her absences and her absences had a negative impact on the workplace); *Bd. of Education v. Anderson*, OATH Index No. 343/90 at 9 (Jan. 19, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 93-26 (May 20, 1993) (79 absences in 16-month period excessive where they far exceeded annual allocations for sick or annual leave and had a negative effect on office operations and morale); *Bd. of Education v. Hunter*, OATH Index No. 384/90 at 23 (Mar. 5, 1990), *adopted in part, rejected in part*, Bd. Dec. (Apr. 18, 1990), *aff'd sub nom. Hunter v. Bd. of Education*, 190 A.D.2d 851 (2d Dep't 1993) (30 days of absence in 12-month period was excessive in light of numerous supervisory warnings and the adverse impact on office operations). Here, even without those aggravating factors, respondent's absences qualify as excessive.

Respondent only worked 29 full days in 2010 and 22 full days in 2011. On every other work day she was either absent, late, or departed early. Her total number of hours of absence for 2010 equals 903 hours and 46 minutes, when divided by 7 hours per day, equated to 129 work days. In 2010, respondent was absent from work the equivalent of 129 out of 250 scheduled work days and her absence percentage for 2010 was 51.6%. The total number of hours of absence for 2011 equals 1158 hours and 58 minutes, when divided by 7 hours per day, equated to 165 work days. In 2011, respondent was absent from work the equivalent of 165 out of 251 work days and her absence percentage was 65.7% (Pet. Exs. 1, 2, 3, 4, 5, 6, 7; Tr. 28, 48, 56).

Respondent accumulated an extraordinary number of absences over the course of two years. The sheer number of absences is excessive *per se*. Indeed, far fewer absences from the workplace may be deemed excessive. *See Health and Hospitals Corp. (Harlem Hospital Center) v. Pabon*, OATH Index No. 270/04 (Oct. 29, 2003) (finding 57 absences over a 13 month period excessive); *Health and Hospitals Corp. (Metropolitan Hospital) v. Coley*, OATH Index No. 2044/96 (Sept. 11, 1996) (finding 21 absences in a nine month period, including 12 approved absences, to be excessive); *Dep't of Parks & Recreation v. Lenoble*, OATH Index No. 823/91

(Apr. 30, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. 92-43 (Apr. 9, 1992) (69 unauthorized absences in a 15-month period excessive). *See also, Romano v. Town Bd. of the Town of Colonie*, 200 A.D.2d 934 (3d Dep't 1994) (upholding termination of employee who was absent from work 41 days in five months and finding it irrelevant that each absence was authorized). Accordingly, I find that respondent was excessively absent or late in 2010 and 2011.

Selective Enforcement

Finally, respondent argued that she tracked her co-workers' absences to determine whether she was being unjustly denied her unofficial accommodation. She noted that other employees were permitted to leave early for therapy. In addition, respondent maintained that she was the only one prevented from working overtime (Tr. 227). However, respondent does not have access to her colleagues' time and leave records. As such, she has no way of knowing how her co-workers' absences or early departures for medical appointments or therapy were classified on their time records. Moreover, respondent's argument that she was being treated differently than her co-workers is not properly before this tribunal. An administrative proceeding is not the proper forum for a claim of selective enforcement based upon impermissible discrimination. A selective enforcement defense may be addressed upon judicial review of any adverse administrative determination. *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96, at 3 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997); *see Office of the Comptroller v. Lee*, OATH Index No. 2518/11 at 8 (Dec. 2, 2011); *Fire Dep't v. Dixon*, OATH Index No. 1758/10 at 7 (Sept. 7, 2010). Therefore, this defense is beyond the purview of this tribunal.

FINDINGS AND CONCLUSIONS

Respondent was excessively or habitually late, tardy or absent from work in 2010 and 2011.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Department. Respondent was appointed to

her position as a clerical associate on April 4, 1997. During her 15-year tenure with the Department, she has never been formally disciplined.

Petitioner has requested that respondent be terminated from her position as a clerical associate if the charges are sustained. This is appropriate under the circumstances. Under similar circumstances, excessive absenteeism routinely results in termination of employment. *See Dep't of Correction v. Peters,* OATH Index No. 1118/03 (Sept. 24, 2003) (termination of employment where employee used 69 sick days in 12 months); *Dep't of Correction v. Purcell,* OATH Index No. 1336/96, at 18 (July 8, 1996), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 97-106-SA (Nov. 21, 1997) (termination of employment deemed the "only appropriate penalty" where employee used 90 sick days in 12 months); *Bd. of Education v. Gomez,* OATH Index No. 228/84 (Nov. 13, 1984), *modified on penalty,* Bd. Dec. (Jan. 10, 1985), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 88-64 (May 12, 1988), *aff'd sub nom. Gomez v. NYC Civ. Serv. Comm'n,* NYLJ, Dec. 29, 1988, at 26, col. 4 (Sup. Ct. N.Y. Co.)(employment terminated for time and leave violations, including 46 absences and 129 latenesses in one year, despite lack of prior disciplinary record); *see also Chaffer v. Bd. of Education of the City School Dist. of City of Long Beach,* 229 F.Supp.2d 185 (E.D.N.Y. 2002), *aff'd,* 75 Fed. Appx. 12 (2d Cir. 2003) (upholding termination of employment of school groundskeeper who was absent more than 87 times within 18 months).

While respondent may believe that her absences were medically justified, courts have repeatedly upheld the termination of employment due to poor attendance, stressing the unpredictable, disruptive, and burdensome impact of excessive absenteeism, even if the absences are approved. *See Cicero,* 264 A.D.2d at 336 ("Petitioner's argument that his absences were approved and medically justified misperceives the nature of the charges. Petitioner was dismissed on the sole ground that his excessive absenteeism constituted incompetence under Civil Service Law § 75"); *Romano v. Town Bd. of the Town of Colonie,* 200 A.D.2d 934 (3d Dep't 1994) (in upholding termination of employee who was absent from work 41 days in five months, finding that "the fact that petitioner may have had a 'valid' reason for each one of the individual absences is irrelevant to . . . whether his unreliability and its disruptive and burdensome effect on the employer rendered him incompetent to continue his employment"). *See also Truss v. Westchester County Health Care Corp.,* 301 A.D.2d 607 (2d Dep't 2003) (fact

that appropriate leave balances were deducted to cover employee's absences and latenesses is irrelevant where there is proof of excessive and disruptive absences and other attendance violations).

Respondent appears to be unwilling or incapable to accept any responsibility for her absences. She lacks self-insight into her situation. While she may have suffered some hardship in life, she seems to use this as an excuse. The Department is entitled to have an employee who regularly and consistently reports to work on time and stays for her assigned hours. However, for the past two years respondent has been absent more than fifty percent of the time. Respondent shows no indication that she will change this pattern. The Department can not be expected to work around respondent's erratic and unpredictable attendance.

Accordingly, I recommend that respondent be terminated from her employment.

Kara J. Miller
Administrative Law Judge

July 5, 2012

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

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