Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Hewitt

OATH Index No. 2135/23 (Feb. 15, 2024)

Evidence established that respondent has been excessively absent since November 2020 and absent without leave since May 2022. Termination recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH AND HOSPITALS CORPORATION (ELMHURST HOSPITAL CENTER)
Petitioner
- against -
LATOYA HEWITT
Respondent

REPORT AND RECOMMENDATION

JULIA H. LEE, *Administrative Law Judge*

Petitioner, the Health and Hospitals Corporation ("HHC"), brought this employee disciplinary proceeding against respondent, Latoya Hewitt, under section 75 of the Civil Service Law. Petitioner alleged that respondent committed the following time and leave violations: (1) excessive absence for a total of 26 days, six of which were before or after a scheduled day off from November 9, 2020, through September 7, 2021; (2) absent without official leave ("AWOL") for 55 days from February 18, 2021, through April 23, 2021; (3) excessive absence for a total of eleven days, three of which were before or after a scheduled day off from September 8, 2021, through February 2, 2022; (4) AWOL for thirty days from September 27, 2021, through November 5, 2021; (5) AWOL from March 28, 2022, through May 10, 2022; and (6) AWOL from May 12, 2022, to the present (ALJ Ex. 1).

At trial, which was conducted by WebEx videoconferencing due to the COVID-19 pandemic, petitioner relied on documentary evidence and called Grace Weick and Serena Altes as witnesses. Respondent testified on her own behalf and presented documentary evidence.

For the reasons below, the charges are sustained in part and denied in part.

ANALYSIS

Respondent has been employed by HHC since 2005 and has worked at Elmhurst Hospital as a patient care associate ("PCA") since 2014 (Tr. 56). As a PCA, her duties include collecting specimens, drawing blood, conducting EKGs, transporting equipment, and assisting patients and staff (*Id*. at 57; Pet. Ex. 6).

Petitioner proffered documents in support of respondent's time and leave violations, namely respondent's payroll records (Pet. Exs. 7, 7a), daily assignment records (Pet. Ex. 7b), and a summary of respondent's attendance record (Pet. Ex. 8) which demonstrate that respondent was absent on scheduled workdays as alleged in the petition. Letters from the facility and the Office of Labor Relations were sent to respondent on March 19, 2021, July 26, 2021, April 8, 2022, April 13, 2022, and May 13, 2022, giving her notice of her AWOL charges in 2021 and 2022 (Pet. Ex. 1). These letters directed her to respond promptly and submit medical documentation for her absence or alternatively, resign from her position (*Id*.).

Grace Ann Weick, Associate Director of Clinical Operations, testified that as the director in charge of the unit where respondent is assigned, she manages all of the clinical operation departments and oversees the daily operations relating to staffing such as reviewing time and attendance records and giving out assignments (Tr. 9-10). Ms. Weick explained that PCAs are "responsible for the direct care of patients, which includes transferring, walking patients, [] helping them go to the bathroom, the daily functions of what patients need" (*Id*. at 10; Pet. Ex. 6). Ms. Weick testified that respondent has been AWOL since on or about March 28, 2022. While recalling that respondent was often absent from work, she could not provide any details regarding respondent's absences but stated that she did not approve any leave for respondent and that respondent did not call in as required for her unscheduled absences (Tr. 11-12, 33-34). Ms. Weick further explained that respondent's absence caused operational hardship on a day-to-day basis due to staff shortage which required other staff to work overtime and perform respondent's duties (Tr. 27).

Excessive Absence and AWOL

In 2005 and 2017, respondent suffered injuries sustained while working. In 2005, she slipped on a freshly waxed floor and suffered back injuries. In 2017, a housekeeper, exiting a

closet, slammed a door into respondent's hand. As a result, respondent states that she still experiences pain because her hand is "neurologically damaged" (Tr. 57-58).

Respondent does not dispute that she was absent from work during the majority of the time periods alleged in the petition. Rather, she testified about her various health issues that led to her absence from work, including during time periods not charged in the petition, and argued that Ms. Weick prevented her from returning to work, marked her AWOL despite being at the hospital, and reassigned her from her position in the clinic to the operating room upon her return to work after being out on approved Paid Family Leave ("PFL"). Petitioner does not controvert respondent's testimony. Instead, petitioner relies primarily on the payroll and work assignment records to support the time and leave charges against respondent as Ms. Weick provided little probative testimony regarding respondent's time and leave violations. While these records indicate that respondent was absent from work on the alleged dates, they are not without errors and do not provide insight into the nature of the absences. While I also found respondent's testimony to be at times confusing and unresponsive, especially when asked questions relating to specific absences, I found the lapses in her answers to be attributable to her numerous absences rather than her credibility as a whole. *See, e.g.*, *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998) (relevant considerations in assessing credibility include demeanor, consistency of testimony, supporting evidence, witness motivation, bias or prejudice, and whether the testimony comports with common sense and human experience).

Specifications 1 and 3: Excessive Absences from November 9, 2020, through September 7, 2021, and *September 8, 2021, through February 2, 2022*

Petitioner brought two separate charges of excessive absences against respondent that I will be addressing together since the time periods charged are consecutive. In sum, respondent is charged with being excessively absent for a total of 37 days between November 9, 2020, through February 2, 2022[1]. While petitioner's rules do not specifically define excessive absenteeism, HHC's Operating Procedure No. 20-10 provides that "disciplinary action shall be taken after reasonable supervisory/managerial efforts have been made to assist an employee in correcting a deficiency in performance or conduct.... The supervisor/manager may conduct counseling for an

[1] Petitioner's Ex. 8 lists the dates of the absences charged against respondent.

employee who has had three (3) unscheduled absences, or two (2) unscheduled absences immediately before or after a holiday or pass day during any six-month period" (Pet. Ex. 5 at IV; IV(A)(2)(a)).

Respondent does not dispute or even address the majority of the dates for which she is alleged to be absent. However, she did provide an explanation regarding her absences from September 7 through 9, 2021. According to respondent, she was on bereavement leave from September 6 through 9, following the death of her father (Tr. 65-66). As a full-time employee, respondent is entitled to a "maximum of four workdays with pay for a death in the immediate family" (Pet. Ex. 4 at p. 25). Without any evidence to the contrary presented by petitioner, respondent's absences from work from September 7 through 9 constitute excused bereavement leave.

Notwithstanding the three bereavement days in September 2021, respondent's 34 unscheduled absences during a 14-month period are excessive per se. *See e.g., Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Seabrook*, OATH Index No. 1089/12 at 6 (May 4, 2012), *adopted*, CEO Dec. (May 23, 2012) (finding 23 unscheduled absences in 17 months to be excessive); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Rhines*, OATH Index No. 1888/10 at 2-3 (June 4, 2010) (finding 14 absences in a 13-month period to be excessive); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Norwood*, OATH Index No. 247/07 at 2-3 (Jan. 16, 2007), *adopted*, CEO Dec. (Feb. 1, 2007) (finding 35 absences in an eight-month period to be excessive). Petitioner demonstrated that respondent was excessively absent by having a total of 34 unscheduled absences during the time periods. Therefore, petitioner has proven by a preponderance of the evidence that respondent was excessively absent as charged in Specifications 1 and 3.

Specification 2: AWOL from February 18, 2021, through April 23, 2021

Petitioner alleges that respondent was AWOL from February 18, 2021, through April 23, 2021. It is undisputed that respondent did not report to work during this time period, and that she did not comply with procedures to notify the facility of her absence (Pet. Exs. 2, 7a, 7b). Respondent did, however, request to return to duty from her "unofficial Medical Leave of Absence" and was cleared to return to duty as of April 19, 2021, by Human Resources ("HR") (Resp. Ex. K). Respondent claimed that when she returned to work on April 19, Ms. Weick sent

her home stating that she had no knowledge of her return. Respondent then sent an email to Ms. Weick that morning explaining the medical reasons for her extended period of absence from work and informed her that due to her condition, there would be medical appointments in the future (Resp. Ex. J.). Ms. Weick notes that the email was the first correspondence received from respondent since February 2021 (*Id*.). Respondent states that she remained home for a week and a half until she was able to return. Petitioner's evidence does not refute respondent's contention that her absence the week of April 19 was due to Ms. Weick and not of her own volition. "An employer may not refuse or delay an employee's return to work and then charge this delay as AWOL or misconduct." *Dep't of Social Services (Dep't of Homeless Services) v. Anonymous,* OATH Index No. 1155/20 at 12-13 (Nov. 27, 2020), *adopted,* Comm'r Dec (Jan. 14, 2022) (internal citations omitted). Since respondent had medical clearance issued by HR to return to work, Ms. Weick lacked the authority to prevent respondent from working despite the extended period of absence. Thus, I find that she was not AWOL from April 19 through April 23, 2021, as she was prevented from reporting to work. I do find that petitioner has proven by a preponderance of the evidence that she was AWOL for the absences preceding the week of April 19, namely February 18, 2021, through April 18, 2021, and thus, the AWOL charges for that period of time are sustained.

Specification 4: AWOL September 27, 2021, through November 5, 2021

Respondent received a relief of duty notice dated September 14, 2021, informing her that she was being relieved from duty without pay starting September 27, 2021, until she presented proof of compliance with the COVID-19 vaccine requirement (Tr. 63-64; Resp. Ex. H). She was also informed by Ms. Weick that she could not report to the hospital until she was vaccinated (Tr. 63). Consequently, she was placed on leave and eventually cleared to return to work after becoming vaccinated on October 29, 2021 (Tr. 64). Now, petitioner is charging respondent with being AWOL from September 27, 2021, through November 5, 2021, while she remained unvaccinated. This charge is misplaced. It is arguable whether petitioner's delay in getting vaccinated could be considered misconduct mandating involuntary leave. *Cf. Agugliaro v Adams*, N.Y.L.J., Feb. 23, 2023 at 17, col. 2 (Sup. Ct. N.Y. Co.) (City enjoined from any adverse action against petitioner for refusing to be vaccinated). Nevertheless, petitioner cannot prove

that respondent was absent without leave if petitioner relieved her from duty and put her on the very leave for which she is being charged. Specification 4 is dismissed.

Specification 5: AWOL March 28, 2022, through May 10, 2022

Respondent is charged with being AWOL from March 28, 2022, through May 10, 2022. As background, respondent explained that she was out on approved PFL from February 24, 2022, through March 27, 2022, to care for her daughter after surgery with an expected return date of March 28, 2022 (Tr. 68-69; Resp. Ex. I). Respondent testified that she did not return to work on March 28, 2022, because her approval letter stated that her leave was until the 28th (Tr. 68). She also did not return to work on March 29, 2022, because she brought in the paperwork to show she had a court appearance and gave it to her supervisor Ms. Wang who, in turn, informed Ms. Weick. Respondent claims that Ms. Weick then told Ms. Wang to send her home (*Id*.). When she finally returned to work on March 30, 2022, respondent was told to return home by Ms. Weick because she did not have a doctor's note even though she had not been out sick. Respondent testified that she contacted Occupational Health Services ("OHS") who confirmed that a doctor's note was not required as well as HR who was "baffled" but respondent was told by Ms. Wang that Ms. Weick ordered her to "go home until I call you, until I tell you you could return" (Tr. 69-70). Respondent remained at home. She recalled participating in a teleconference on April 11 or May 11 "because of the AWOL notices" where they discussed Ms. Weick's incorrect coding on respondent's timesheet for the PFL which indicated she was AWOL during her approved leave which she maintains remain unchanged. She was not asked and did not testify as to whether there were any other discussions regarding her AWOL status during the teleconference such as her attempt to return to work on March 30. Respondent was told to return to work on May 12 and report to the operating room (Tr. 72). On May 12, 2022, respondent did not return to work. Instead, she submitted a reasonable accommodation request to be transferred back to the clinic (Tr. 73).

There is a dearth of evidence regarding this period of absence following respondent's return from PFL. Petitioner did not present any evidence to controvert respondent's testimony that Ms. Weick sent her home in error by mistakenly requesting a doctor's note. The employee handbook only refers to the requirement of a written notice and medical documentation when an employee returns from a medical leave of absence. The "45 days prior to returning to work"

notice and documentation requirement for employees returning from "an extensive approved leave of absences" also does not apply to respondent who was only on leave for approximately one month (Pet. Ex. 4 at 24). It remains that a medical note was not required and thus, respondent should not have been told to go home. This is further supported by Labor Relations allowing respondent to return to work without medical clearance immediately following the teleconference.

While respondent contends that she remained home for almost six weeks at the direction of Ms. Weick, there were letters from the hospital and Labor Relations dated April 8 and 13, respectively, charging her with being AWOL from March 30, 2022, and directing her to contact the Department Supervisor "immediately upon receipt of this letter" (Pet. Ex. 1). There is no evidence to indicate if she ever responded to the letters in an attempt to correct the error and return to work. Indeed, it defies reason and does not comport with common sense that respondent stayed home for such a lengthy period of time solely because of Ms. Weick's directive and took no action to return to work while AWOL notices were being sent to her home.

While I find that the uncontroverted evidence shows that respondent returned to work and was sent home on March 30, 2023, in error, I do not find credible respondent's assertion that she was prevented from returning to work for the ensuing six weeks. Moreover, while I credit respondent's testimony that she was excused from work due to the court date on March 29, respondent's mistaken belief that her return date was March 29, and not March 28, does not excuse her unscheduled absence on her expected date of return. Therefore, the evidence demonstrates that respondent was AWOL on March 28, 2023, and from March 31, 2023 to May 10, 2023.

Specification 6: AWOL May 12, 2022, to the present

Specification 6 alleges that respondent was AWOL from May 12, 2022, to the present. Respondent does not dispute her absence from work. Instead, she claims that her absence is attributable due to her reassignment to the operating room in retaliation for taking PFL and petitioner's failure to accommodate her reasonable accommodation request to work in a unit that did not require her to push or pull objects or people over ten pounds due to her "hand trauma" (Tr. 58, 72; Resp. Ex. D).

Upon learning that she was being reassigned from the clinic to the operating room during the teleconference, respondent testified that she immediately contacted Labor Relations and the union because her hand injury prevented her from working "on the floor" (Tr. 72). She was advised to contact the Equal Employment Opportunity ("EEO") office (*Id*.).

Serena Altes, the EEO/Affirmative Action Officer, testified that respondent submitted a request for reasonable accommodation by email on May 12, 2022 (Tr. 37-38; Pet. Ex. 9; Resp. Ex. A). After being told that she would be working in the operating room, respondent made a request to return to the "same area as before," referring to the clinic, because she could not "work the floor [as] it requires a lot of pushing pulling lifting" and transporting patients and equipment (Tr. 72, 75; Resp Ex. A). Respondent's handwritten medical note from Park Health Center that she asserts was submitted along with her request is dated May 2, 2022, and states that respondent has been "ill since 3/28/18 - pt returned back to work 9/20/20 and cont[inued] to work as of 4/1/22 and remained out of work until present due to hand trauma and is able to return to work on 5/10/22" (Tr. 80; Resp. Ex. C). In the section titled "Remarks/Limitations," is written "with limitations" (Resp. Ex. C). Ms. Altes testified that she explained to respondent that medical documentation was required which "states the condition and diagnosis, as well as any restrictions, if the employee is attempting to return with accommodations for work, as well as the timeframe in which they would need this accommodation" (Tr. 40). On May 31, 2022, respondent wrote Ms. Altes to follow-up on their conversation on May 12 (Pet. Ex. 10). Ms. Altes recalled having two discussions with respondent in May 2022. Ms. Altes then emailed respondent on August 19, 2022, inquiring as to whether there was a change in condition and "updated detailed medical documentation" (Pet. Exs. 10, 13). Respondent wrote back stating she was going to see her doctor for an updated note which she submitted in September 2022 (Resp. Exs. D, E). The note from Park Health Center dated September 2, 2022, states that respondent has been "ill since 7/21/21 + 4/12/22 to present for (disease): r[ight] hand derangement due to trauma and is able to return to work/school on 9/26/22 not able to lift more than 10 lbs." (Resp. Ex. D). Ms. Altes testified that this medical note did not state the diagnosis or condition and explained that "hand trauma" was vague and that she needed specific information regarding the extent of the disability, such as "what she can and cannot do with her hand" (Tr. 45, 48, 51-52). Ms. Altes followed up again with respondent in November 2022, but did not receive a response. Ms. Altes testified that because there were no further replies from respondent and insufficient

medical documentation, she administratively closed the matter in January 2023 (Tr. 40-42). She explained administratively closing requests when an employee fails to respond is an internal procedure and the employee is not notified (Tr. 49-50).

On March 9, 2023, respondent contacted Ms. Altes inquiring about her accommodation request. She was informed that her matter was administratively closed based on respondent's failure to submit updated documentation for many months and that a new request form with medical documentation would have to be submitted (Pet. Ex. 11; Resp. Ex. F). Respondent submitted a new request dated May 1, 2023, asking for a permanent assignment in a clinical setting where she would not have to push or pull patients or equipment or lift more than ten pounds (Resp. Ex. B). The request was denied on June 2, 2023 (Resp. Ex. G). The denial letter referred to a medical note dated May 12, 2023, requesting that respondent be restricted from "pulling, pushing or lifting over 5 pounds" in determining that the requested accommodation was "unreasonable and/or poses an undue hardship" (*Id*.). The May 12, 2023, medical note was not submitted as evidence. Ms. Altes further testified that she denied the request after speaking with the department because respondent's restrictions would prevent her from performing the essential duties of her position (Tr. 42).

Respondent claims that that after submitting her first reasonable accommodation request, she called, texted, and emailed "numerous times" only to be told by Ms. Altes that she had reached out to the department but had been told by Ms. Weick that there were no accommodations (Tr. 77). She contends that Ms. Altes did not reach out to her and that she contacted Ms. Altes in August whereupon she was informed that "another medical form" was needed (Tr. 77-79, 81). After she sent the second medical note by text message and email, respondent claims that there was no further communication until she contacted Ms. Altes in March of 2023 and was informed that the request had been closed in January (Tr. 80-81; Resp. Exs. D, E). After the second reasonable accommodation request was submitted, respondent contends that there were no in-person meetings or phone calls to discuss accommodations and that all communication was by e-mail. She claims that the emails consisted of respondent inquiring whether Ms. Altes contacted the department and Ms. Altes responding that she had contacted Ms. Weick (Tr. 82-83). The parties did not submit any documentary evidence of communication between respondent and Ms. Altes after the submission of the second request.

Respondent contends that petitioner failed to engage in any cooperative dialogue and that her request to be reassigned back to her clerical position should have been granted as there were other PCAs who worked in the clinic whose job duties did not include "pushing and pulling" (Tr. 76-77, 83).

Anti-discrimination laws may form the basis of an affirmative defense in an employee disciplinary action. *See Fire Dep't v. A. G.*, OATH Index No. 771/12 at 14 (July 5, 2012), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013); *Human Resources Admin. v. Varone*, OATH Index No. 457/95 at 19 (Mar. 17, 1995). The Americans with Disabilities Act ("ADA") prohibits discrimination in employment against a qualified employee "on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C.S. § 12112(a) (Lexis 2024). The statute defines "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires." 42 U.S.C.S. § 12111(8). To "discriminate against a qualified individual" means "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 such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id*. § 12112(b)(5)(A). The Human Rights Laws of New York State and New York City employ similar language but afford broader protections. *See* Exec. Law § 296(1)(a) (Lexis 2024); Admin. Code § 8-107(1)(a) (Lexis 2024); *see Phillips v. City of New York*, 66 A.D.3d 170, 176 (1st Dep't 2009).

To prevail on this defense, respondent must show that she has a disability; she is otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and petitioner denied her request for a reasonable accommodation. *See* 42 U.S.C.S. § 12111(8); *see also* Exec. Law § 292(21)(a) (Lexis 2024); Admin. Code § 8-107(15)(a); *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 148 (1st Dep't 2006); *Dep't of Correction v. Swannick*, OATH Index No. 899/07 at 3-4 (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). After an employer receives a request for an accommodation, the employer has a duty to engage in a cooperative dialogue with an employee to find an appropriate accommodation. *See, e.g.*, *Anonymous*, OATH 1781/12 at 34, (*citing* 29 C.F.R. Part 1630 Appendix; *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 338 (2d Cir. 2000), *Jackan*, 205 F.3d at 566). The NYC Human Rights Law defines a "cooperative dialogue" as "the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity." Admin. Code § 8-102.

Under the New York City Human Rights Law, petitioner must make an individualized assessment of whether employees can perform the essential functions of their jobs. *See* NYC Admin. Code § 8-107(1)(a); *Jacobsen v. NYC Health & Hosp. Corp.*, 22 N.Y.3d 824, 835-36 (2014); *Bellamy v. City of New York,* 14 A.D.3d 462, 463 (1st Dep't 2005); *Police Dep't v. M.V.*, OATH Index No. 1080/21 at 11 (Feb. 25, 2022), *adopted*, Comm'r Dec. (Mar. 11, 2022); *Transit Auth. v. Anonymous,* OATH Index No. 484/21 at 9 (May 3, 2021), *adopted*, CEO Dec. (June 2, 2021). A "reasonable accommodation can never involve the elimination of an essential function of a job." *A. G.*, OATH 71/12 at 14 (quoting *Shannon v. NYC Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003)).

Ms. Altes testified that she denied the reasonable accommodation request because after speaking to the department, she concluded that respondent could not perform the essential functions of her job (Tr. 42). Regarding respondent's claim that Ms. Altes failed to engage in cooperative dialogue, the evidence submitted by both parties demonstrates that there were lengthy lapses in communication by both Ms. Altes and respondent after the first accommodation request was submitted. After the second request was submitted, Ms. Altes and respondent testified that there were only emails exchanged (Tr. 47, 82-83). However, it appears that Ms. Altes concluded that respondent was not entitled to a reasonable accommodation under the ADA because her disability prevented her from performing the essential functions of the job and thus, cooperative dialogue to discuss accommodation did not occur.

Determining the essential functions of a job requires a fact-specific examination of the employer's description of the job and how it is actually performed in practice. *Echeverri v.*

Dep't of Sanitation, 2016 US Dist LEXIS 12923 at *15 (S.D.N.Y. Feb. 3, 2016). Relevant factors in this inquiry include: (1) the employer's judgment; (2) written job descriptions; (3) the amount of time spent on the job performing the function; (4) the mention of the function in a collective bargaining agreement; (4) the work experience of past employees in the position; and (5) the work experience of current employees in similar positions. *Id.* In making this determination, "[a] court must give considerable deference to an employer's judgment regarding what functions are essential for service in a particular position." *D'Amico v. City of New York*, 132 F.3d 145, 151 (2d Cir. 1998). Moreover, "[a] reasonable accommodation can never involve the elimination of an essential function of a job." *Shannon*, 332 F.3d at 100.

By respondent's own admission and as outlined in the PCA job description, one of the duties of a PCA in providing care to patients involves physical work, which may include pushing, pulling, and lifting objects over five or ten pounds (Pet. Ex. 6). Respondent describes working in the operating room as requiring "patient lifting, equipment lifting" and moving bed and machines which she states she is not able to perform, in contrast to the "pre-op" clinic where she greeted the patients, conducted the blood work and the EKGs, logged in information on the computer and ensured that information to clear a patient for surgery was available (Tr. 73).

While work assignments in the clinic involve less physically demanding tasks than the operating room, physical work involved in providing patient care such as pushing, pulling, or lifting objects over five or ten pounds appear to be essential functions of a PCA. In considering reasonable accommodation requests, respondent is not entitled to "permanent light duty" requiring less physically challenging tasks involving patients as a reasonable accommodation. *See Dep't of Correction v. Anonymous*, OATH Index No. 896/22 at 6 (May 3, 2022), *adopted*, Comm'r Dec. (July 26, 2022) (permanent light duty or assignment to post with no inmate contact not reasonable accommodation for a correction officer whose main job duties are care, custody, and control of inmates); *M.V.*, OATH 1080/21 at 14 (Department not under obligation to create a permanent light duty assignment for 911 dispatcher by allowing her to be a switchboard operator).

Moreover, to the extent that respondent claims she is being treated differently than other injured PCAs who were given accommodations, an administrative proceeding is not the proper forum for a claim of selective enforcement based upon impermissible discrimination. Rather, a selective enforcement defense may be addressed upon judicial review of an adverse

administrative determination. *A. G.*, OATH 771/12 at 27; *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 2 (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).

Finally, respondent's absence from work since May 12, 2022, is not obviated by her submission of a reasonable accommodation request. Such a finding would then excuse any employee from having to come to work and complying with leave procedures during the pendency of a reasonable accommodation request. *See, e.g., Health & Hospitals Corp. v Lewis*, OATH Index No. 433/15 (Jan. 26, 2015) (employee's absence not excused by submission of worker's compensation claim); *see also Anonymous*, OATH 896/22 (termination for long-term AWOL correction officer who requested lighter duty as a reasonable accommodation while she was absent from work). Therefore, I find that petitioner has proven by a preponderance of the evidence that respondent has been AWOL since May 12, 2022, and this charge is sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent was excessively absent on 34 dates from November 9, 2020, through February 2, 2022.

2. Petitioner proved that respondent was AWOL from February 18, 2021, through April 18, 2021.

3. Petitioner did not prove that respondent was AWOL from September 27, 2021, through November 5, 2021.

4. Petitioner proved that respondent was AWOL on March 28, 2022, and from March 30, 2022, through May 10, 2022.

5. Petitioner proved that respondent was AWOL from May 12, 2022, to the present.

RECOMMENDATION

Upon making this finding, I requested and reviewed respondent's personnel abstract. She has been employed by HHC since 2005. She received a satisfactory rating for her 2017 performance review. Her 2018 performance evaluation notes that she was out on sick leave since March 30, 2018. She has no prior disciplinary history.

Although respondent's lengthy employment with HHC and lack of a prior disciplinary record are mitigating factors, petitioner's request for termination is appropriate. Respondent has been excessively absent and AWOL on numerous occasions and has failed to comply with leave procedures since November 2020. Respondent has been AWOL for almost two years since May 12, 2022, effectively abandoning her position. Respondent is an essential employee and petitioner established that her absence burdens her employer and undermines the Department's mission to provide medical services. *See Health & Hospitals Corp. (Coney Island Hospital) v. Mapp*, OATH Index No. 1781/20 at 6 (Apr. 15, 2021) ("Respondent's unauthorized absence is a fundamental form of misconduct which substantially impedes the agency's ability to fulfill its mission.").

Under these circumstances, termination of employment is consistent with this tribunal's precedent. *See Dep't of Health & Mental Hygiene v. A.W.*, OATH Index No. 1844/22 (Oct. 27, 2022); *Health & Hospitals Corp. (Gouverneur Skilled Nursing Facility) v. Ward*, OATH Index No. 2025/22 (July 27, 2022), *adopted*, CEO Dec. (Sept. 22, 2022) (recommending termination of employment where employee found to be absent without leave for over 10 months).

Accordingly, I recommend termination of respondent's employment.

Julia H. Lee
Administrative Law Judge

Feb. 15, 2024

SUBMITTED TO:

HELEN ARTEAGA LANDAVERDE, MPH
Chief Executive Officer

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