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NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

All documents shall be directed to:

Norman Lindell
Acting Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 23rd day of November, 1994.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Norman Lindell

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DOROTHY K. STAPLES,

Complainant,

v. **DOCKET NO. EH-230-93**

CHARLESTON AREA MEDICAL CENTER, INC., CAMC GENERAL DIVISION,

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THIS MATTER matured for public hearing on 24 June 1994. The hearing was held at the offices of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant appeared in person and by her counsel, Sandra K. Henson and William D. Turner. The respondent appeared by its representative and personnel director, Michael Sims, and by its counsel, Stephen A. Weber.

I. ISSUE TO BE DECIDED

Whether respondent violated W.Va. Code §5-11-9(1) and the regulations promulgated pursuant thereto by failing or refusing to reasonably accommodate complainant's handicap or

disability and by discharging plaintiff from her employment on 29 June 1992 for violation of respondent's attendance policy.

II. STIPULATED FACTS

The following facts were submitted by written joint stipulation of the parties:

1. Complainant Dorothy K. Staples has, and at the time of her discharge had, Meniere's Disease and is handicapped within the meaning of W.Va. Code §5-11-3(m).

2. Complainant worked for Respondent from November 7, 1977, until June 29, 1992, when she was discharged. During that time she worked as a receptionist, pharmacy attendant, pharmacy pricing clerk and, most recently, as a pharmacy technician.

3. Complainant was diagnosed with Meniere's Disease in March 1992 by Dr. James T. Spencer. In June 1992, he advised Respondent by letter that her illness was Meniere's Disease.

4. Respondent discharged Complainant because her absences from work exceeded those permitted by Respondent's attendance policy. Complainant would testify that the absences which precipitated her termination were caused by (1) surgical procedures unrelated to Meniere's Disease

and (2) acute attacks of Meniere's Disease which precluded her from reporting to work. Respondent cannot produce any evidence to the contrary.

5. The nature of Complainant's handicap is that its attacks are unpredictable, fluctuant, and symptoms can occur at any time unannounced.

6. Prior to her discharge, the accommodation requested by Complainant for her handicap was that she not be charged with a occasion of absence when her unscheduled absences were due to her handicap, but, instead, that she be allowed to count such absences as "paid time off" to the extent she had accrued "paid time off" days to draw upon.

7. At the time of her termination, Complainant had 54.4 hours of paid time off accrued.

8. At all times during Complainant's employment with Respondent, she satisfactorily carried out her job duties when present to do so.

III. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and

the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence, including the depositions submitted to supplement the testimony at hearing, and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:[1]

A. THE OPERATION OF CAMC'S PHARMACIES

1. At the time of her discharge, complainant Dorothy K. Staples was employed by Charleston Area Medical Center (CAMC) as a pharmacy technician. CAMC's pharmacies are open and must be staffed 24 hours a day, 365 days a year. The primary function of an in-hospital pharmacy is to respond to medical orders from the medical staff in a timely manner. A pharmacy technician performs duties that do not require the professional judgment of a pharmacist, such as preparation of medications, retrieval of medications and delivery of completed orders.

2. Mr. Jeffrey A. Hess, CAMC's director of pharmacy operations, testified that each of CAMC's pharmacies operate three shifts per day. The day shift, which Ms. Staples was working at

[1] To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

the time of her discharge, is usually staffed by five or six pharmacy technicians and an equal amount of pharmacists. CAMC employs a total of approximately 16 pharmacists and 15 pharmacy technicians.

3. Mr. Hess testified that when a technician has an unanticipated absence, he has several options for assuring adequate staffing:

(a) asking an off-duty technician to come in;

(b) requesting or directing an on-duty employee to work overtime;

(c) using a combination of the above by keeping an on-duty employee at work for half of a shift and calling in an off-duty technician for the second half of the shift; or

(d) assigning a pharmacist to do not only his/her own duties, but also the duties of the absent technician.

Mr. Hess identified several general hardships associated with the above options: fatigue of overworked employees, loss of morale, and, when a pharmacist performs both jobs, the loss of a "double check" to assure that a prescription has been properly filled.

4. Employees not trained as pharmacists or pharmacy technicians are not qualified or suitable for temporary transfer to the pharmacy when a technician is absent.

5. CAMC does not have an available pool of part time technicians to draw on in a case of an unscheduled absence.

B. CAMC'S ATTENDANCE POLICY AND MS. STAPLES' HISTORY OF ATTENDANCE.

6. CAMC's Employee Handbook provides an extensive policy governing attendance and sets out a progressive disciplinary procedure designed to control absenteeism. The policy provides, in full, as follows:

> **ATTENDANCE**
>
> One of the primary needs of the Medical Center is dependable employees. Regular attendance is an important part of every employee's performance. In an effort to control absenteeism, this section outlines our policy which we hope will identify absenteeism problems in their early stages so proper corrective action can be taken.
>
> An absence is defined as failure to report for a scheduled shift exclusive of the following day(s):
>
> **Exclusions**
>
> 1. A court appearance on behalf of CAMC
> 2. Scheduled Paid Time Off Day
> 3. A shift on which an employee becomes ill or is injured and is sent home by Employee Health or their approved designee, and is paid for the entire shift
> 4. Jury duty
> 5. Funeral Leave not to exceed three (3) days, inclusive of scheduled days off
> 6. Authorized time off without pay when staffing or workflow of the department is such that time may be taken off (part or entire shift) with approval of the Department Manager
> 7. All approved leaves of absence
> 8. Lost time due to compensable Workers' Compensation injuries
> 9. Time off without pay scheduled in advance and approved by the Department Manager (not to exceed thirty days per occurrence)
>
> The following standard is based on occasions of absence, not individual days:

Step 1 - Oral Warning: When a full-time employee has acquired four (4) occasions of absence within six (6) months or a part-time employee has acquired two (2) occasions of absence within six (6) months, you will receive an oral warning. Your supervisor will note the date of the warning for future reference and will advise you that a written warning will follow if absenteeism continues.

Step 2 - Written Warning: If you acquire two (2) additional occasions of absence within six (6) months of the date of the oral warning you will receive a written warning. The written warning will advise you that a suspension equal to one week's pay will follow if you have two more occasions of absence within six (6) months of your written warning.

Step 3 - Suspension: If you acquire two (2) additional occasions of absence within six (6) months following the date of your written warning you will receive a suspension equal to one week's pay. The suspension document will advise you that your employment will be terminated if you have two (2) more occasions of absence within six (6) moths of your suspension.

Step 4 - Discharge: If you have two (2) additional occasions of absence within six (6) months of your suspension you will be terminated.

If you have two (2) occasions of absence within twelve (12) months of the last corrective action, the last corrective action will be repeated unless the time frame requires a progression to the next corrective action as stated previously.

If you receive not further corrective action for any reason within one year from the date of your last attendance related corrective action you may apply, in writing, to your Personnel Director requesting the removal of the document from your personnel record.

If after returning to work you are required to be off work again for the same illness within five (5) calendar days, you will not be charged with another occasion of absence.

Leave of absence time will not be considered in determining the six (6) month time period.

Failure to notify your manager in advance of each shift of an impending absence in accordance with your departmental call-in policy will result in your being charged with two (2) occasions of absence in accordance with this policy.

Two (2) consecutive unnotified absences will be considered a voluntary resignation on your part and will be recorded as resigning without proper notice.

One unnotified absence will result in your suspension equal to one week's pay for the first offense and will count as two (2) occasions of absence in accordance with this policy.

Weekend flex Registered Nurses will be treated as part time employees under this policy.

If you do not work your regularly scheduled shift the day before, the day of or the day after one of the designated time and one-half days (seven have been assigned) this incident shall result in two (2) occasions of absence for disciplinary purposes.

7. It must be emphasized that the policy counts occasions of absence, not days of absence. Thus, an employee off work due to illness for five consecutive working days and an employee off for only one day are both charged with one occasion of absence.

8. On 4 December 1991, Mr. Hess issued a written warning to Ms. Staples pursuant to CAMC's attendance-related disciplinary procedure. The warning (Joint Exhibit 3(d)) states that Ms. Staples had been absent from work on 3 December 1991. It notes that Ms. Staples had been verbally warned about absences on 11 September 1991. After receiving the verbal warning, she had two more occasions of absence (14 October 1991 and 3 December 1991), which, under the attendance policy, triggered the written warning.

9. The written warning makes clear that "2 additional occasions in 6 months will result in suspension".

10. On 20 March 1992, Ms. Staples was suspended for violation of the attendance policy. Within the six month period set forth in the December 1991 written warning she had accumulated two additional occasions of absence.

11. The second occasion of absence after the written warning, which was the absence that triggered the suspension, was due to surgery. Ms. Staples was off work from 9 January 1992 to 19 March 1992. Upon her return to work, she was immediately suspended for one week without pay.

12. The written suspension form makes clear that "2 more occasions in 6 months will result in discharge". (Joint Exhibit 3(c)).

13. On or about 20 March 1992, Ms. Staples, Mr. Hess and Mr. Sims, the personnel director, discussed the possibility of complainant going on short-term disability. It is undisputed that Ms. Staples inquired whether an absence while on short-term disability would be counted against her as an occasion of absence under the attendance policy. It is also undisputed that a CAMC personnel assistant first said that short-term disability leave is not counted as an occasion of absence and that it was only after Ms. Staples went on short-term disability that she was informed that a mistake had been made and that, in fact, an absence while on short-term disability was, indeed, a chargeable occasion of absence.

14. Ms. Staples remained on short-term disability from 27 March 1992 until 1 May 1992. This was her first occasion of absence within six months of the suspension. She returned to work on

4 May. Ms. Staples understood that if she had one more occasion of absence prior to 9 July 1992, she would be fired for violation of the attendance policy.

15. Complainant worked without absence or incident from 4 May 1992 until 16 June 1992.

16. On 17 June 1992, Ms. Staples reported to work four hours late due to an attack of Meniere's Disease. As always, she had telephoned the pharmacy to inform her supervisors that she would be late. After discussing her condition with Mr. Hess and stating that she felt that it was dangerous to her to be at work, Ms. Staples was sent home. This was her second occasion of absence within six months of her suspension and is the absence which triggered her discharge.

C. LONG-TERM DISABILITY CONSIDERATIONS AND DISCHARGE

17. Prior to 17 June 1992, Mr. Hess and Mr. Sims had asked Ms. Staples to consider applying for long-term disability benefits. She declined, stating that she felt that she was too young and not ill enough to go on long-term disability.

18. After sending Ms. Staples home on 17 June 1992, Mr. Hess sent a memo to Mr. Sims that same day detailing his action. In the memo he asked Mr. Sims "What options do we have at this point??? A candidate for disability???" (Hess Deposition, Ex. 4)

19. On 18 June 1992, Ms. Staples spoke to Mr. Hess by phone and, according to his notes, "says she wishes to pursue LTD". Mr. Hess replied that he needed to discuss that issue with Mr. Sims and that he "would call her as soon as I spoke to him". (Hess Deposition, Exhibit 3).

20. On 18 June 1992, Mr. Hess and Mr. Sims met. According to Mr. Hess' notes, Mr. Sims stated that "he saw no choice but to discharge." (Id.) The notes do not reflect whether they discussed Ms. Staples applying for LTD, as they had previously suggested to her.

21. On 22 June 1992, Ms. Staples testified, she went to the pharmacy to discuss her application for LTD. Mr. Hess denied that he had arranged such a meeting and testified that Ms. Staples' appearance at work was unscheduled. As discussed above, however, Mr. Hess' own notes indicate that complainant had expressed interest in pursuing LTD benefits just a few days prior thereto in a phone conversation with Mr. Hess.

22. Regardless of the meeting's intended purpose or whether it was scheduled, it is not disputed that on 22 June 1992, Mr. Hess informed Ms. Staples that she was being discharged for violation of the attendance policy. When Ms. Staples protested her discharge, Mr. Hess said that he "would suspend her pending an investigation". (Hess Deposition, Exhibit 5).

23. On 29 June 1992, Ms. Staples was notified in writing that her employment with respondent was "terminated effective 6/29/92 due to attendance violations". (Sims Deposition, Exhibit 6).

D. TESTIMONY OF DR. SPENCER

24. Complainant's treating physician, Dr. James T. Spencer, Jr., is a Board certified otolaryngologist, with a specialty in the treatment of Meniere's Disease. His testimony was proffered by deposition and he did not appear at hearing. Dr. Spencer was the only medical expert to testify in this matter.

25. Meniere's Disease, according to Dr. Spencer, is an inner ear disturbance that effects both hearing and balance. It is an episodic disease, meaning that patients can be asymptomatic for an extended period of time, then have a sudden acute attack. A classic, full-blown attack of the disease results in vertigo, tinnitus and other hearing impairments, and nausea. Acute episodes may last a matter of hours or days. The disease, as Dr. Spencer put it "is unpredictable", and there is no way to foresee when a patient is going to have an acute onset.

26. There is no positive cure for Meniere's Disease. The goal of treatment is to stabilize the disease through dietary management and medication. Dr. Spencer testified that approximately 75% of his patients benefit from treatment and become, more or less, symptom free.

27. Dr. Spencer admitted that during an acute attack of Meniere's Disease it is highly likely that the patient would not be able to report to work. He further testified that he could give no assurance that a patient would be able to maintain a regular and predictable work schedule.

28. Dr. Spencer began treating Ms. Staples in March 1992. She had been suffering symptoms of the disease for eight to ten years. He characterized her case as "moderately severe" and "moderately active".

29. On 26 March 1992, Dr. Spencer wrote a "To Whom It May Concern" letter, which Ms. Staples caused to be delivered to Mr. Hess. The letter states:

> This patient was seen by me initially on March 25, 1992, for disequilibrium, an inner ear dysfunction believed to be related to a long standing Type IV hyperlipoproteinemia, for which she is being treated in anticipation that there will be some lessening of her inner ear dysfunction, and also the associated headache symptoms.
>
> Her response to the treatment will determine how soon she will be able to return to work.

30. On 24 June 1992, while Ms. Staples' discharge was under investigation, Dr. Spencer wrote a second "To Whom It May Concern" letter, which was also delivered to Mr. Hess. The second letter states:

> Ms. Staples is suffering from Meniere's Disease, which is a complication related to her hyperlipidema. She is under treatment for this condition, and there is every expectation that to the extent that her lipid abnormality is brought under good control she will symptomatically improve. However, this is likely to be a lifetime concern. Until that time when her lipids are normal, and she becomes symptom free, it would be expected that she will feel the stress and anxiety that goes with the condition, and any added stress from other causes can further aggravate her problem.
>
> Meniere's Disease is a very frustrating situation in that it is unpredictable, it is fluctuant, and symptoms can occur at any time, unannounced, and greatly interfere with a person's performance. She very much needs the support of her friends and colleagues, and the understanding of her employer.

31. CAMC made no response or inquiry to either of Dr. Spencer's letters.

32. Regarding Ms. Staples, Dr. Spencer testified that throughout the period of June to December 1992 she was very symptomatic. However, her failure to respond to treatment may have been due to the stress caused by her discharge. He believed that if Ms. Staples had not been fired "she would have symptomatically improved much more dramatically than the records show . . ." (Spencer Deposition p. 98-99. See also, pp. 114-115). On the other hand, Dr. Spencer testified, he could not say with any assurance that she would have been capable of regular attendance if she had been permitted to return to work after 22 June 1992.

E. POST-DISCHARGE

33. Subsequent to her discharge, complainant looked for, but was unable to find, other employment. She received unemployment compensation benefits and withdrew money from her retirement fund at CAMC. She also was required to borrow money from her children to meet living expenses and received food stamps. She testified that she also went without needed medication because she could not afford the cost.

34. In December 1992, she became eligible for and began drawing Social Security disability benefits.

IV. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

The West Virginia Human Rights Act (HRA) provides protection from discrimination on the job to qualified handicapped persons who are able and competent, with or without reasonable accommodation, to perform the essential functions of the job in question. Morris Nursing Home v. Human Rights Commission, 189 W.Va. 314, 431 S.E. 2d 353 (1993).[2]

Applying the HRA's general rule of protection to a particular individual in a particular job requires consideration of the following elements:

(1) What are the essential functions of the job in question?

(2) Can the employee or applicant perform the essential functions of the job without an accommodation?

(3) If an accommodation is required, can an accommodation he identified which is plausible?

(4) Is the employer able to make the accommodation and, if so, can it be done without undue hardship?

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[2] It is not necessary to address whether complainant established a prima facie case. Once all the evidence has been taken, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the factfinder after taking all of the evidence is to address "the ultimate question of discrimination *vel non*". 103 S.Ct. at 1481.

A. ATTENDANCE IS AN ESSENTIAL FUNCTION OF THE JOB

Whether with or without accommodation, an allegedly disabled employee must be able to perform the essential functions of her position. The only essential function of the job of pharmacy technician that is placed at issue in this case is attendance. Of course, attendance is the bedrock essential function upon which all others are dependent. It is axiomatic that an essential function of nearly every job in the economy is "a regular and reliable level of attendance".[3] Tyndall v. National Educ. Centers, 31 F. 3d 209, 213 (4th Cir. 1994); Carr v. Reno, 23 F. 3d 535 (D.C. Cir. 1994); Jackson v. Veterans Administration, 22 F. 2d 277 (11th Cir. 1994). An employee who "cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual . . .". under the HRA. Tyndall, 31 F. 3d at 213. It is likewise manifest that a perfect record of attendance is seldom required by any employer.

A rational starting point in determining the level of attendance that would constitute an essential function of a particular job at issue is the articulated attendance policy of the employer. Here, CAMC has an extensive written policy which is distributed to employees via the "Employee Handbook" and which allows an employee up to nine "occasions of absence" within a two year period. A tenth occasion of absence, which Ms. Staples incurred on 17 June 1992, results, as we have seen, in termination.

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[3] Complainant does not contend that she fits within the unusual category of persons who can perform the essential duties of their job from their home or some location other than the employer designated work premises.

While, at first blush, ten occasions of absence appears to be the employer designated dividing line between individuals meeting the essential function of attendance, even if minimally so, and those who are not, CAMC also allows other specific absences from work which it does not count as an "occasion of absence". The attendance policy specifically excludes from the definition of "absence" a failure to report to work for any of the following reasons:

1. A court appearance on behalf of CAMC
2. Scheduled Paid Time Off Day
3. A shift on which an employee becomes ill or is injured and is sent home by Employee Health or their approved designee, and is paid for the entire shift
4. Jury duty
5. Funeral Leave not to exceed three (3) days, inclusive of scheduled days off
6. Authorized time off without pay when staffing or workflow of the department is such that time may be taken off (part of entire shift) with approval of the Department Manager
7. All approved leaves of absence
8. Lost time due to compensable Workers' Compensation injuries
9. Time off without pay scheduled in advance and approved by the Department Manager (not to exceed thirty days per occurrence)

(Joint Exhibit 1, p. B-1).

Thus, if Ms. Staples had missed four hours of work on 17 June 1992 because of an attack of Meniere's Disease striking her in mid-shift (exception No. 3 above), rather than prior to the beginning of the shift, she would not have been charged with an occasion of absence and would not have been discharged as a result of becoming ill on that day. Regardless of when the attack occurred, Mr. Hess would have been in the same position in terms of arranging coverage for her absence, i.e. he would have had to exercise one of the options set forth in finding of fact #3.

Similarly, if an attack of Meniere's disease had struck toward the very end of a shift, and appeared to Ms. Staples to be particularly severe, it is conceivable that she could have scheduled a Paid Time Off Day (exception #2 above) for the next shift and not been charged with an occasion of absence.

While ten official occasions of absence appears to be the reasonable bright line used by CAMC in distinguishing between employees who meet the essential function of attendance and those who do not, the employer's attendance policy is reasonably flexible and accommodates other specific absences by excluding them from the definition of an occasion of absence. Here, however, despite such flexibility, none of Ms. Staples' absences were among those eligible to be excluded and all were counted towards her termination.

B. THE NEED FOR AN ACCOMMODATION

Even if its attendance policy is more flexible than the strict "less than ten occasions" position CAMC takes here, it is not disputed that in June 1992 Ms. Staples was unable to perform an essential function of her job as it was technically defined by her employer. She could not appear for work on a regular and predictable basis within the parameters of the occasions of absence established by the attendance policy, including consideration of the "excused" absences excluded from the definition of an occasion of absence.

Where, as here, a disabled person is not able to perform an essential function of the job, the next step is to "consider whether a reasonable accommodation by the employer would enable the handicapped person to perform those functions". School Board of Nassau County v. Arline, 480 U.S. 273, 287, N. 17, 107 S.Ct. 1123, 1131 N. 17 (1987).

C. THE ACCOMMODATION REQUESTED

Once an accommodation proves necessary, the burden is on the complainant to "provide evidence sufficient to make at least a facial showing that reasonable accommodation is possible". *Buckingham v. U.S. Postal Service*, 998 F.2d 735, 2 ADD 523, 541 (9th Cir. 1993); *Arneson v. Heckler*, 879 F.2d 393, 396 (8th Cir. 1989); *Gilbert v. Frank*, 949 F.2d 637, 642 (2nd Cir. 1991).[4]

Here, complainant's requested accommodation was that she be permitted to use her accumulated Paid Time Off (PTO) leave, in lieu of being charged with an occasion of absence, whenever an attack of Meniere's disease caused an unscheduled absence. Implicitly, plaintiff was requesting an accommodation that would allow her sufficient time to stabilize her condition under Dr. Spencer's treatment and care. If her absences exceeded her accumulated PTO, she could be fired.

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[4] While respondent is correct that complainant bears the burden of proving that she is a "qualified handicapped person", the burden imposed upon Ms. Staples is not "a heavy one". *Gilbert*, 949 F.2d at 642: "We would deem it sufficient on this issue for the plaintiff to present evidence as to her or his individual capabilities and suggestions for some reasonable assistance or job modification by the employer". Ibid.

In attempting to make her "facial showing" that the suggested accommodation was possible, *Buckingham, supra*, complainant produced the following evidence:

(1) She had 54.4 hours of accumulated Paid Time Off, the approximate equivalent of 6.8 eight-hour work shifts;

(2) She had worked from 4 May to 16 June 1992 without an occasion of absence;

(3) A list of occasions of absence kept by Mr. Hess indicated that six of her absences since January 1991 were for only one shift (Hess Depo. Ex. 1);

(4) The testimony of Dr. Spencer that it is possible that she could have responded to treatment and become, more or less, symptom free, like 75% of his patients, and as she had been for the thirty or so work days between 4 May and 17 June 1992; and

(5) She had adequately performed her job, while suffering from Meniere's disease, for more than eight years before her symptoms became acute.

In holding that Ms. Staples met her burden of making a facial showing that her suggested accommodation was possible, the factfinder, in addition to the evidence cited by complainant, relies on the following:

(1) Ms. Staples requested a relatively closed-end period of accommodation (absences not to exceed her accumulated PTO) that could be measured and controlled, and was not requesting that she be accommodated beyond her leave or *ad infinitum*; and

(2) There are sufficient exceptions to the definition of an occasion of absence to defeat the allegation that any number of occasions of absence greater than ten is per se an undue hardship on CAMC or is per se the equivalent of eliminating an essential function of the job.[5]

D. THE BURDEN ON CAMC

Once complainant met her burden of providing evidence sufficient to make at least a facial showing that reasonable accommodation is possible, the "burden then shifts to defendants to prove that they are unable to accommodate the plaintiff or that the proposed accommodation is unreasonable. An accommodation is unreasonable if it would necessitate modification of the essential nature of the program or place undue burdens on the employer". *Wood v. Omaha School Dist.*, 985 F.2d 437, 439 (8th Cir. 1993). See also, *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1387 (3rd Cir. 1991); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 308 (5th Cir. 1983); *Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985); *Buckingham, supra; Arneson, supra; Gilbert, supra.*

[5] To the extent that complainant argues in her post-hearing brief that she also requested the accommodation of going on LTD, that argument is rejected as inconsistent with the facts stipulated to by the parties. (See Stipulated Fact No. 6).

A switching to the employer of the ultimate burden of proof on the issue of reasonable accommodation appears consistent with the legislative regulations promulgated pursuant to the HRA. 77 W.Va. C.S.R. §77-1-1 et seq..[6] Rule §77-1-4.4 states, in part, that:

> Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable a handicapped employee to remain in the position for which she/he was hired.
>
> (Emphasis added.)

§77-1-4.5 provides that:

> An employer shall make reasonable accommodation to the known physical or mental impairments of qualified handicapped applicants or employees where necessary to enable a qualified handicapped person to perform the essential functions of the job.
>
> (Emphasis added.)

§77-1-4.6 makes clear that:

> An employer shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business.
>
> (Emphasis added.)

Finally, a switching of the burden on the issue of reasonable accommodation is suggested by the Supreme Court of Appeals' decision in *Morris Nursing Home v. Human Rights Com'n*, 189

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[6] The regulations cited are those which were in effect at the time of the discharge, having become effective on 29 May 1991. These rules were later amended effective 19 May 1994. The later amendments are not applied or considered in this decision.

W.Va. 314, 431 S.E.2d 353 (1993), in which it stated that "a duty is imposed upon the employer to reasonably accommodate the handicapped employee". 189 W.Va. at 319.[7]

Once the burden of proof switched to respondent, it was necessary for CAMC to prove by a preponderance of the evidence that it was unable to accommodate the suggested accommodation without the elimination of an essential function or that the proposed accommodation would create an undue hardship.

To the extent that CAMC argues that accommodation was not warranted because its attendance policy is "blind" and does not discriminate between disabled and non-disabled employees, its position is rejected as inconsistent with law. The duty imposed upon employers in handicapped cases "goes beyond mere nondiscrimination" against disabled employees and creates an "affirmative obligation to accommodate". *Buckingham*, 998 F.2d at 739, 2 ADD at 541. An "affirmative obligation" to accommodate would include a reasonable deviation from an established policy, especially when the requested deviation appears no greater in scope or impact than the employer articulated and accepted "exclusions" from the policy.

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[7] To be fair to the parties, and for purposes of consideration on appeal, a determination as to the burden of proof on the issue of reasonable accommodation is crucial to any decision in this case. As discussed infra, the evidence submitted presented an extremely difficult case as to whether the suggested accommodation would have resulted in Ms. Staples becoming capable of regular attendance. If the burden of proof on complainant was more than a "facial showing" that an accommodation is plausible, e.g. if complainant had to show that "more likely than not" her requested accommodation would have ultimately enabled her to remain in her position without the elimination of an essential function, Ms. Staples would not have prevailed.

A much more difficult question is CAMC's contention that it is not required to make an accommodation when the accommodation requested would, in effect, eliminate an essential function of a pharmacy technician's job such as attendance. 77 W.Va. C.R.S. §77-1-4.5.4.a.1.

As has been discussed, CAMC cannot rest its argument on a strict interpretation of the occasions of absence policy. Likewise, the limited nature of the requested accommodation makes it difficult for CAMC to argue that the request is unreasonable or would, in and of itself, require the elimination of the essential function of attendance. As stated *supra*, Ms. Staples was requesting an accommodation equal to roughly six shifts of work, not a permanent personal exception to the attendance policy.

Rather, CAMC appears to argue that the inherent nature of Meniere's Disease makes Ms. Staples' attendance unreliable and, as proof, it offers that Ms. Staples was very symptomatic from 17 June 1992 through December 1992 and would have easily exhausted her accumulated PTO and been discharged anyway. It appears, in other words, that CAMC's position is that an employee with Meniere's Disease can never be reasonably accommodated in regard to regular attendance.

Respondent's counsel's cross-examination of Dr. Spencer was effective in showing the unpredictable nature of Meniere's Disease and the lack of a positive cure. Counsel was equally effective in showing that during the months after her discharge, Ms. Staples did not respond to treatment and, even if she had, Dr. Spencer could still offer no assurance that she would be able to attend work regularly.

On the other hand, Dr. Spencer testified that he could not discount the effect of her discharge on Ms. Staples' failure to respond to treatment and he emphasized that she is an exception to his otherwise high rate of success in patients being able to return to their job. He reiterated that it was his belief that she would have had a much more dramatic improvement in her condition had she not been fired.

Weighing the testimony of Dr. Spencer, which is the only medical evidence of record, the factfinder cannot conclude that CAMC showed by a preponderance of the evidence that Ms. Staples was, in fact, incapable of regular attendance at work even if her requested accommodation had been accepted. We simply do not know, and it is impossible to determine one way or the other from Dr. Spencer's testimony, whether Ms. Staples, if she had not been fired, would have responded to treatment and stabilized her condition to a sufficient degree, that she would have been able to return to a level of regular and acceptable attendance.

The doubt as to whether or not Ms. Staples would have responded to treatment and returned to work must be resolved against CAMC. An employer "may not merely speculate that a suggested accommodation is not feasible." *Buckingham*, 998 F.2d at 740. Here, respondent, relying on strict adherence to its attendance policy, appears to have given no consideration whatsoever to complainant's requested accommodation prior to terminating her. It did not seek detailed information about her condition from Dr. Spencer, though it knew he was treating Ms. Staples, nor did in consult with any of its own medical experts to determine a prognosis or consider whether an accommodation was possible or feasible.

Having failed to "gather sufficient information from the [employee] and qualified experts as necessary to determine what accommodations", if any, were available, *Mantolete*, 767 F.2d at 1423, and having quite possibly exacerbated complainant's condition by discharging her, the employer cannot now rest its case on speculation that all reasonable efforts to accommodate Ms. Staples would ultimately have been for naught and that the inherent nature of her disease makes regular attendance at work simply impossible.

From the evidence presented, we cannot say with any degree of certainty that Ms. Staples would or would not have stabilized. What we can say with certainty is that CAMC's decision to fire her prevented any objective assessment of her very narrow and limited requested accommodation.

As the Ninth Circuit stated in *Kimbro v. Atlantic Richfield Co.*, 889 F.2d, 869, 879 (1989):

> As long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation.

Based on Dr. Spencer's testimony, Ms. Staples' suggested accommodation was a plausible, if not a probable, solution to the problem and might have enabled her to remain in her position. 77 W.Va. C.R.R. §77-1-4.4. Since the suggested accommodation was not per se unreasonable, CAMC erred in failing to attempt it.

The cases relied upon by CAMC are not persuasive in light of its action in this case. In *Carr v. Barr*, 23 F.3d 525 (D.C. Cir. 1994), the employer exerted extraordinary efforts to accommodate

Ms. Carr's Meniere's Disease, including, for a time, allowing her to come and go from work at will. Despite her employer's liberality, Ms. Carr still frequently failed to show up for work at all and failed to notify her employer that she would be absent. The opinion of the court implies, but does not explicitly state, that Ms. Carr had exhausted her paid time off well prior to her discharge, if she had ever spent enough time on the job to accrue paid time off in the first place.

In *Jackson v. Veterans Administration*, 22 F.3d 277 (11th Cir. 1994), the plaintiff was a temporary employee who had used, but not exceeded all of his paid time off. In less than three months on the job, he had been absent from work a total of six days. The court's repeated reference to Jackson's temporary status in analyzing his rights clearly distinguishes that case from the one at bar.

In *Walders v. Garrett*, 765 F.Supp. 303 (E.D. Va. 1991), plaintiff's employment record "was consistently marked by a high rate of absenteeism". At 305. Including "annual and sick leave which she almost invariably exhausted, [plus] plaintiff missed work for all or part of more than sixty days per year, and probably much closer to 90 days". Over a three year period, "she was absent from work, excluding vacation and sick leave, for more than four weeks per year". At 306.

In *Santiago v. Temple University*, 739 F.Supp. 974 (E.D.Pa. 1990), the plaintiff was absent from work 29 times in his last year of employment and could not recall at trial if as many as 21 of the absences were or were not related to his alleged disability.

Had CAMC worked with Ms. Staples and Dr. Spencer, perhaps in conjunction with its own medical expert, and had the requested accommodation failed, cases such as *Carr* would be dispositive of this matter. However, CAMC offered less than a fraction of the cooperation that Ms. Carr's employer offered to her. While the employer in *Carr* arguably did much more than was required by law, CAMC offered nothing but strict adherence to its policy.

Finally, CAMC was unable to establish that the accommodation requested by Ms. Staples would impose an undue hardship upon it.

In determining whether or not an accommodation imposes an undue hardship, the factfinder must consider the following factors:

> 4.6.1 The overall size and profitability of the employer's operation; and/or
>
> 4.6.2 The nature of the employer's operation, including composition and structure of the employer's workforce; and/or
>
> 4.6.3 The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as Division of Vocational Rehabilitation);
>
> 4.6.4 The possibility that the same accommodations may be able to be used by other prospective employees;
>
> 77 W.Va. C.S.R. §77-1-4.6.

Here, CAMC, which is a large and profitable employer, did not contend that the costs of accommodation were prohibitive. Rather, its argument was that the composition and structure of its

pharmacy workforce meant that covering complainant's unexpected absence created such hardships as employee fatigue, loss of morale, and loss of a "double check".

While CAMC's concerns are legitimate, the testimony offered was never more than speculative. Despite complainant having accumulated the maximum number of occasions of absence, not one concrete incident was offered that indicated that other employees were unwilling to cover for complainant or were suffering from fatigue or loss of morale. Similarly, there was no testimony that a prescription was ever misfilled or almost misfilled because of a technician's absence and loss of the "double check".

Given the lack of more than theoretical evidence as to hardship, and especially given the very limited duration of the requested accommodation, respondent failed to prove that meeting Ms. Staples' requested accommodation would impose an undue hardship upon it.[8]

V. FINDINGS OF ULTIMATE FACTS

1. The Administrative Law Judge finds as fact that complainant, Dorothy K. Staples, is a qualified handicapped person who is able and competent, with reasonable accommodation, to perform the essential functions of the job of a pharmacy technician.

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[8] This case was not tried under a disparate impact theory and that issue, raised in complainant's post-hearing brief, is not addressed.

2. The Administrative Law Judge finds as fact that CAMC failed to attempt the accommodation identified by Ms. Staples, and failed to establish that the accommodation would require the elimination of an essential function of the job.

3. The Administrative Law Judge finds as fact that CAMC failed to establish at hearing that the accommodation identified by Ms. Staples imposed an undue hardship on the conduct of its business.

4. The Administrative Law Judge finds as fact that respondent, by discharging plaintiff under the facts and circumstances set forth supra, violated W.Va. Code §5-11-9(1) and the legislative regulations promulgated pursuant to the HRA.

5. The Administrative Law Judge finds as fact that as a result of respondent's unlawful act complainant suffered lost earnings and is entitled to a "make whole" remedy.

6. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act Ms. Staples suffered embarrassment, humiliation, annoyance and mental and emotional distress.

VI. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d).

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).

3. The Human Rights Commission has jurisdiction over this matter, complainant having filed a timely, verified complaint and complied with all procedural requirements of the West Virginia Human Rights Act, W.Va. Code §5-11-1, et al..

4. Complainant produced sufficient evidence to show that at the time of her discharge, she was able and competent, with reasonable accommodation, to perform the duties of a pharmacy technician. W.Va. C.S.R. §§77-1-4.2, 4.3. Morris Nursing Home v. Human Rights Commission, 431 S.E.2d 353, 358 (W.VA. 1993).

5. Once complainant produced evidence to show that a reasonable accommodation was plausible, the burden of proof switched to respondent to show that it was unable to accommodate the complainant without elimination of an essential function of the job or that the proposed accommodation would impose an undue hardship upon it.

6. The respondent failed to prove by a preponderance of the evidence that it was unable to accommodate Ms. Staples or that complainant's proposed accommodation would require it to eliminate an essential function of the job of pharmacy technician.

7. The respondent failed to prove by a preponderance of the evidence that complainant's proposed accommodation would impose an undue hardship upon it.

8. Respondent violated W.Va. Code §5-11-9(1) and the legislative regulations promulgated pursuant thereto by failing to reasonably accommodate complainant's handicap and discriminated against her because of her disability.

9. Complainant is entitled to the following relief:[9]

(a) Backpay for the period of 29 June 1992 to 4 July 1992 in the amount of $284.00;

(b) Backpay for the period of 7 July 1992 to 30 November 1992 in the amount of $8,700.00;

(c) The difference between the amount complainant paid in COBRA premiums and the amount of health insurance premiums complainant paid for coverage while employed by CAMC, for the period of July 1992 to December 1993;

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[9] The figures on which the relief awarded is based were submitted by joint stipulation of the parties. Respondent submitted no argument addressing any issue or amount in damages requested by complainant.

(d) The amount in missed pension contributions, plus employer's matching contribution, plus interest, for the period of July 1992 through November 1992;

(e) Reimbursement into her pension account of $18,000 complainant was required to withdraw from said account for living expenses incurred after her discharge;

(f) Pre- and post-judgment interest on the above elements of backpay (a thru e) in the amount of 10% per annum;

(g) Incidental damages in the amount of $2,950.00 for the humiliation, embarrassment and loss of personal dignity suffered by complainant as a result of the respondent's unlawful act.

(h) Complainant shall have the right to apply for long-term disability benefits, if she so chooses, and respondent is ORDERED to accept her application as if tendered in July 1992. Any amount of long term disability benefits received by complainant shall be offset by the amount she receives in Social Security disability benefits.[10]

(i) Respondent is ORDERED to reimburse the West Virginia Unemployment Trust Fund in the amount of $4,998, which is the amount of unemployment benefits complainant received through November 1992.

10. Complainant, as a prevailing party, is entitled to recover her costs, expenses and reasonable attorneys' fees. Complainant submitted a petition for fees and costs in the amount of

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[10] Complainant did not offer any facts showing her eligibility for LTD. She did, however, provide convincing evidence that she would have applied for LTD in late June or July 1992, if she had not been discharged. This remedy, as fashioned, puts her in the same position as she would have been had she not been discharged on 29 June 1992.

$37,721.90. Respondent having not filed an objection to any portion of the petition, fees and costs are awarded in the full amount set forth in the petition.[11]

11. Finally, a cease and desist Order is hereby directed against CAMC to cease and desist from engaging in acts of unlawful discrimination in violation of the West Virginia Human Rights Act. CAMC is further ORDERED to post a copy of this decision on a bulletin board in its General Division facility that is fully accessible to its employees.

Decided this 23rd day of November, 1994.

Mike Kelly

MIKE KELLY
Administrative Law Judge
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[11] Absent an objection to fees and costs, it is not incumbent upon the factfinder to unilaterally apply the usual "lodestar" formula to determine if the amount requested is, indeed, reasonable. Therefore, the factfinder offers no opinion whether the fees and costs requested in this case, which consisted of one-half day of hearing and five depositions, plus briefs, are reasonable.