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7-1700-109-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Linda C. Johnson, Commissioner,
Department of Human Rights, State of
Minnesota, Complainant,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

V.

GX Corporation, d/b/a Great Expectations
Precision Hair Styling, Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on August 7 and 8, 1986, at the Office of Administrative Hearings in Minneapolis. The record in this matter closed on September 30, 1986.

Elizabeth V. Cutter, Special Assistant Attorney General, 1100 Bremer Tower, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. Robert F. Collins, Suite 906, 2925 Dean Parkway, Minneapolis, Minnesota 55416, appeared on behalf of the Respondent ("Employer" or "GX").

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUE

Whether the Respondent illegally discriminated against the Charging Party, Tammy Englund, on the basis of pregnancy or disability in violation of Minn. Stat. 363.03, subs. (5) or (6) when it placed her on an unrequested medical leave of absence on October 28, 1983.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Tammy Englund was employed as a full-time hair stylist for the Respondent at its salon in the Southdale Shopping Center, Edina, Minnesota, from March 1982 to October 28, 1983.

2. Tammy Englund was an excellent employee. As a hair stylist, her basic duties included giving haircuts and permanents.

3. During September of 1983, Ms. Englund began to experience headaches whenever she administered a permanent wave to a customer. She attributed the headaches to her close exposure, while giving permanents, to fumes from permanent wave solution.

4. On or about October 14, 1983, Tammy Englund learned that she was pregnant.

5. On or about October 21, 1983, Tammy Englund asked Gloria Anderson, manager of the Southdale salon, to be relieved from giving permanents because she was experiencing headaches whenever she gave one. Ms. Anderson called Gerald Brennan, the Respondent's president and owner, regarding Englund's request. Brennan told Anderson to tell Tammy to get a note from her doctor.

6. Within a day or two of Brennan's request that she produce a doctor's note, Ms. Englund presented Gloria Anderson with a note from Robert H. Kaplan, M.D., an obstetrician at the St. Louis Park Medical Center. The note, dated October 21, 1983, reads:

"Tammy Englund is pregnant. At the present time she is advised to discontinue giving permanents because of headaches."

7. After October 21, 1983, Ms. Englund continued to work for the Respondent as a hair stylist without doing permanents. She remained active on the job performing haircuts. She experienced no headaches when not performing permanents.

B. Sometime between October 21 and October 28, 1983, Mr. Brennan received a telephone call from Mark Englund, Tammy's husband. Mr. Englund sounded upset to Brennan, spoke to him in an agitated manner, and cursed several times. Englund complained of Brennan's making his wife get a doctor's note and accused him of not believing Tammy. During the course of the conversation, permanent fumes and potential damage to Tammy's fetus were mentioned, and Mark Englund told Brennan that he was especially concerned about birth defects because he had a sister who was born with a cleft palate.

9. October 28, 1983 was the date set for performance reviews of employees at the Respondent's Southdale salon. Tammy Englund's review was done by Mr. Brennan, in the presence of Gloria Anderson and Joy Meyers, the salon's assistant manager. A few minutes prior to Englund's review, Anderson gave

Brennan the note reported at Finding 6. Brennan had not seen the note before then.

10. During the course of the performance review for the Charging Party, Brennan told Tammy that he was placing her on medical leave because of unresolved questions regarding her health and the health of her fetus. He said he was concerned because she would still be exposed to permanent solution fumes in the shop, even if she was not performing permanents, and that if the fumes gave her headaches, continued exposure to them could cause complications in her pregnancy. Ms. Englund requested to be allowed to continue working through the seventh month of her pregnancy, as she had planned. She asked to

be allowed to perform haircuts only, without administering permanents, and Brennan told her to get a (second) note or letter from her doctor saying it was safe for her to return to work.

11. Upon learning that she was being placed on leave, Tammy Englund became upset and started to cry. After rejecting Anderson's suggestion that Tammy act as the salon's receptionist (because of continued exposure to permanent fumes), Brennan told Tammy he might have a job for her in his office and asked if she could type. Tammy said she could not. He then said that he may have something else for her, or that he may be able to find a place for her working for one of his friends. Ms. Englund rejected those overtures and told Brennan that she could check with her father-in-law, "who may be able to get me a job at Target".

12. Before concluding Tammy Englund's performance review, Mr. Brennan also told her that she was an excellent employee and that he wanted her back. He told her that he would not contest the claim if she were to file for unemployment benefits and promised to pay her two weeks of vacation pay, which she had not yet earned. Tammy said that she would not go on unemployment.

13. Brennan followed up the conversation detailed in the preceding three Findings with a letter to Ms. Englund. It reads:

Dear Tammy,

Based on the letter from your doctor regarding your headaches, pregnancy and perms, we are placing you on a medical leave of absence.

When he writes that it is safe for you to return to work as a full-time hair stylist, we will be happy to reinstate you.

14. Brennan and his managers thought that he had made it clear to Ms. Englund that she could return to work if her doctor approved her working in an environment where permanent solution fumes were prevalent. It was their intention that, if Tammy's doctor approved, she could be employed at GX without actually having to perform permanents until she went on maternity leave.

Tammy understood differently. She interpreted Brennan's directive to come back to work after her doctor wrote that it was safe to return as a "full-time hair stylist" to mean that she could not work at Great Expectations until she could again perform permanents without problems from the fumes.

15. The Respondent's "Salon Employee Handbook", at page 3, describes the "duties" of a "stylist". In relevant part, the description reads:

"The main duties of the stylists are to perform in a professional manner the hair care services offered by the salon i.e., hair cutting and styling, permanent waving, coloring, bleaching, tinting, and any other hair related service."

16. On October 31, 1983 Tammy Englund filed for unemployment benefits. The Respondent never protested the claim, and Tammy received benefits with no penalty. She had to wait two weeks before receiving benefits because the

Respondent did give her two weeks of vacation pay. In connection with the unemployment claim, the employer filled out a Wage and Separation Information Form, which form gave GX the opportunity to explain or comment if the separation from work was for reasons other than a lack of work. Mr. Brennan completed the wage information and made no further comment on the form.

17. Tammy Englund never presented the employer with a "second" note from her doctor regarding her ability to work. She carried her pregnancy to term, and delivered a healthy baby boy with no birth defects.

18. Between 1981 and the time of the hearing, the GX Corporation (which has approximately 100 employees) has had approximately 40 women in its employ who went on maternity leave and returned to work after giving birth. Many of the women worked as full-time stylists up to the day before delivery. Tammy Englund was the only pregnant employee in the company's history to complain of headaches caused by permanent wave solution fumes.

19. From time to time, it has been necessary for the employer to relieve, temporarily, full-time hair stylists from the duty of performing permanents because they had cuts or other sores on their hands which prevented them from immersing their hands in permanent solution, which is caustic. These stylists were excused from performing permanents until their hands healed to the point where dipping them into the solution was not painful.

One other stylist was excused from doing permanents on a temporary basis after she developed a skin rash. After one week without touching permanent solution, the rash remained. The stylist then experimented with using a different brand of shampoo, and the rash still remained. She then resumed giving permanents and the rash eventually cleared up.

The above-noted situations are the only instances in the company's history where full-time hair stylists were excused from performing permanents as a term and condition of employment.

20. Administration of a permanent wave to a customer takes an average of two to two-and-one-half hours. As part of this process, the permanent solution, a strong-smelling chemical that curls the hair, is applied to a customer's hair for approximately 20 minutes. During that time, the stylist stands directly over the customer's head and is in close proximity to the

fumes generated by the solution.

21. During Tammy Englund's term of employment at the Southdale salon, Great Expectations stylists performed approximately 30 to 40 permanents per week. There were seven full-time stylists, who took permanent customers on a rotating basis, unless the customer's "regular" stylist was available. After October 21, 1983, Tammy Englund was dropped from the rotation and concentrated on performing haircuts.

22. At all times relevant to this case, Tammy Englund's work station was the second closest to the salon's door, which opened out onto the Southdale Mall. The two "permanent-only" stations were located in the back of the shop, approximately 25 to 35 feet from Englund's area. If both permanent stations were occupied when another customer wanted a permanent given, the stylist assigned to the customer performed the permanent at the stylist's regular station.

Although the fumes from permanent wave solution were generally weaker the closer a stylist was to the door (and therefore farther from the "permanent-only" stations), the presence of permanent fumes in the air of the salon was generally evident throughout a stylist's work shift. If the stylist positioned next to Ms Englund was not able to service a permanent customer at one of the "permanent-only" stations, then the work would have been performed in very close proximity to her.

23. Occasions arose during the course of Ms. Englund's employment at Great Expectations when as many as four to six permanents were being performed at once. On some of these occasions, the 20-minute application period when fumes from permanent solution are transmitted into the air of the salon occurred simultaneously at more than one work station.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction over this matter pursuant to Minn. Stat. 14.50 363.071. All relevant substantive and procedural requirements of statute or rule have been complied with by the Department of Human Rights.
2. The Respondent is an employer as defined in Minn. Stat. 363.01, subd. 15.
3. The Respondent did not discriminate against Tammy Englund by placing her on a medical leave of absence on October 28, 1983.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that the Complaint herein is DISMISSED.

Dated this day of October, 1986.

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped

MEMORANDUM

Minn. Stat. 363.03, subs. 1(5) and (6) read, in relevant parts:

Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(5) For an employer, ...not to treat women affected by pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in their ability or inability to work.

(6) For an employer with 50 or more permanent, full-time employees, ...not to make reasonable accommodation to the known disability of a qualified disabled person unless the employer can demonstrate that the accommodation would impose an undue hardship on the business... "Reasonable accommodation" means steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person.

Subdivision 1(6) goes on to list "job restructuring" as a type of reasonable accommodation that an employer must make to the known disability of a qualified disabled person. The statute also defines "undue hardship", but the question of whether an employer would suffer an undue hardship by making an accommodation for an employee does not arise unless that employee is a qualified disabled person whose disability is known.

Minn. Stat. 363.01, subs. 25 and 25a. define "disability" and "qualified disabled person". A "disability" is any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

A "qualified disabled person" is defined as a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question.

After analyzing the above-mentioned statutes, taken as a whole, the Administrative Law Judge is unable to find discrimination against Tammy Englund on the part of the Respondent.

Considering first the pregnancy anti-discrimination statute [subd. 1(5)], the Judge is unable to conclude that the Employer treated Tammy Englund differently than non-pregnant employees who were similar in their ability or inability to work. The evidence establishes that GX's policy on pregnant

employees is uniform and consistent pregnant employees are allowed to
work

as long as they are able and can come back to work as soon as they are able. Nothing in this record shows an inconsistency on the part of the employer in enforcing that policy with respect to Tammy Englund. That is, close proximity

to permanent wave solution caused the employee to experience headaches. The note received from Dr. Kaplan implied that such a problem would persist through the term of her pregnancy. The employee's husband was afraid of possible birth defects. The employee was unable to perform permanents, an essential job function, and the effect of remaining in an atmosphere where permanent fumes were prevalent (even if the employee stopped giving permanents

herself) was unknown. Under such circumstances, the employer was reasonable

in placing Tammy on leave until she could work again. In that respect, GX treated the Charging Party no differently than any other employee (pregnant or non-pregnant) who could no longer work.

The Complainant argues that the focus for analyzing a potential violation of subdivision 1(5) should be on the fact that the employer allowed other employees who could not perform permanents to be relieved of such duty and concentrate on haircuts until they could return to performance of permanent wave assignments. That argument depends on acceptance by the fact finder that

those other employees, who were unable to perform permanents because of rashes

or cuts on their hands that prevented them from dipping their hands in the caustic permanent wave solution, were similar to the Charging Party in their ability or inability to work. The Judge is unable to reach that conclusion.

The employees excused from performing permanents could not perform them because of temporary, transitory physical problems affecting their hands. In those cases, it was obvious that the problems experienced by the affected employees would be relieved, or more properly diagnosed, if they were given duties that avoided exposure of their hands to direct contact with the offensive liquid. Tammy Englund had an entirely different problem. Permanent

wave solution gave her headaches. Although not performing permanents seemed

to help in preventing the headaches, the fumes that caused the headaches still

permeated the shop. Until it could be established that Tammy would avoid headaches and/or jeopardizing of her fetus by not performing permanents, even though the headache-causing fumes permeated her work area, the Employer was reasonable in concluding that Tammy should be out of the environment. Her situation is different from that of the employees who could not give permanents because of cuts or rashes on their hands. Those persons could avoid the problem that permanent solution caused them by not putting their hands in the solution, but it was never shown that Tammy could avoid headaches

and/or jeopardizing the health of her fetus simply by no longer giving permanents. Because of that significant difference, it has not been shown (as

required by statute) that Tammy Englund was similar in her ability or inability to work as compared to the stylists who were excused from permanents

and allowed to concentrate on haircuts until their hands healed.

The problems with proving discrimination against Tammy Englund under subdivision 1(6), the disability anti-discrimination statute, arise because the extent of Tammy's disability, if any, was never "known" and there is no proof on the record that she was a "qualified disabled person" under the Human Rights Act.

The threshold inquiry in analyzing potential violation of subdivision 1(6) is whether Tammy Englund was a "disabled person" under the Human Rights Act. The Administrative Law Judge concludes that the evidence in this case

establishes that she was, because her physical impairment (headaches) "substantially limited" (prevented her from performing permanents) a "major life activity" (performance of her job as a hair stylist). Moreover, the Employer regarded Tammy as suffering from such an impairment.

It is concluded, however, that Tammy Englund was not a "qualified disabled person". If accommodation was made to her condition by relieving her from her permanent waving duties, the very act of making the accommodation would take her out of the class of "qualified" disabled persons because she would not be able to perform permanents, an essential function required on her job. The Employer's Salon Employee Handbook (Exhibit 9) lists performance of "permanent waving" as a "main duty" of a stylist, and Tammy Englund's own action reinforces that view. She testified that she interpreted Mr. Brennan's directive to produce a doctor's note allowing her to return to work as a "full-time hair stylist" to mean that she could come back whenever the doctor said it was safe for her to perform permanents. It is, therefore, apparent that both the Charging Party and the Respondent regarded permanent waving as an "essential function" of Ms. Englund's job. Therefore, the record fails to show that she was a "qualified disabled person" who could be discriminated against.

Another element of establishing a cause of action for disability discrimination under the Act is that the disability be "known". While it is true that the Employer regarded Ms. Englund as disabled in that she had a physical impairment that prevented her from performing permanents, the extent of that disability and how to properly "accommodate" to it were never ascertained. All that was known was that Tammy got headaches when she gave permanents. The fact that she had not gotten a headache while in the shop performing other duties is not enough, standing alone, to establish that she would experience no further problems during the term of her pregnancy if she continued working in an area where she could smell the offending, headache-inducing fumes. It is concluded that before the Employer had to "accommodate" to Tammy's problem of headaches while performing permanents, it had to know more about the extent to which it would be safe for the Charging Party to stay in the area of exposure to permanent fumes. Mr. Brennan and his managers testified that, had they learned that Dr. Kaplan specifically authorized Tammy to keep working without administering permanents, that she could have come back to work and concentrated on giving haircuts. Such an assignment (a job restructuring) would have been a "reasonable accommodation"

under the Act, but the Employer is not responsible for making an adjustment if the extent of the disability has not been made known to it.

GX was never informed by anyone that it was safe for Tammy Englund to work in the presence of permanent fumes, so long as she avoided giving permanents herself. While Tammy testified that she obtained a note from Dr. Kaplan authorizing her to return to work without having to perform permanents, she further testified that she did not present that note to Mr. Brennan or any other representative of her Employer. Ms. Englund's testimony to the effect that she produced the note for the Minnesota Department of Economic Security in connection with perfection of her unemployment benefits claim, concluding that Brennan would see the note because (she presumed) he had asked for it, fails to prove that GX was ever informed of the existence of such a note. Nor does it establish that any representative of the corporation ever actually saw such a writing. In the absence of any proof that Mr. Brennan or any of his managers saw a doctor's authorization specifically allowing Tammy to continue

working without performing permanents, it is concluded that the Charging Party never presented such a note to her Employer. It was only prudent on the part of the Respondent to require Tammy to produce a writing from a doctor to authorize her to work while still exposed to permanent fumes. Such prudence reflects concern for the health of Tammy and her fetus and a proper concern for avoidance of potential liability problems. It was a careful, correct business decision which does not violate the Human Rights Act because the extent of the Charging Party's disability, if any, was (and still is) unknown. Absent that knowledge, there was no way for the Employer to assess what should be done to accommodate the disability reasonably. In such a circumstance, there was no violation of subdivision 1(6).

The Employer's position in this case is further strengthened by the fact that Mr. Brennan made it clear to Tammy Englund during the course of her October 28, 1983 performance review that he wanted her to remain in his employ. Although he would not permit Tammy to work around permanent fumes until her doctor said it would be safe to do so, he offered her employment in his office or "leads" to possible openings with other companies. The alternative employment offer within the company is viewed as an effort to make a reasonable accommodation to Tammy's physical impairment within the meaning and intent of the Human Rights Act.

The Complainant argues that GX should be held liable for discrimination herein because it has not proven it relied on "competent medical advice" that the presence of permanent fumes presented a "reasonable probable risk of serious harm". See *Lewis v. Remmele Engineering, Inc.*, 314 N.W.2d 1, 4 (Minn. 1981). She further argues that GX was required to establish that its decision was supported by substantial evidence supporting the medical opinion. See *State v. Metropolitan Airport Comm'n.*, 358 N.W.2d 432, 434 (Minn. App. 1984). The above decisions set out elements of proof for establishing the "serious threat" defense found at Minn. Stat. 363.02, subd. 5, which reads, in relevant part:

"Subd. 5. Disability ... It is a defense to a complaint or action brought under this chapter that the person bringing the complaint or action has a disability which in the circumstances and even with reasonable accommodation ... poses a serious threat to the health or safety of the disabled person or others. The burden of proving this defense is upon the respondent."

The Administrative Law Judge concludes that the Complainant's argument regarding the Respondent's failure to prove up a "serious threat" defense is

misplaced. Remmele and Metropolitan Airport Comm'n. both involved situations where the employers screened out job applicants with pre-employment physicals. In this case, the "disability" issue was raised by an existing employee who had headaches and brought in a doctor's note excusing her from performing permanents, an essential job function.

When an employer requires an employee to have a pre-employment physical, the courts have held that it is the employer's duty to assure competence on the part of the employer's doctor and that the medical advice generated by the physical is reliable.

Here, however, an employee in a post-employment situation brought a note from her doctor which the employer relied upon and sought further clarification. Where the employee takes it upon herself to provide a medical opinion from the doctor of her choice, and when that opinion raises the possibility of a serious threat to the employee's health or safety, the employer is perfectly reasonable in seeking further clarification of the medical situation from the employee's own source. Under the facts of this case, GX did all it could to secure "competent medical advice" about what should be done regarding Tammy Englund's employment. It was not the Respondent's failure but rather Ms. Englund's own neglect in following through with the Employer's reasonable, prudent request to get a "second" note from Dr. Kaplan that prevented the Respondent from receiving sufficient evidence upon which to base a final decision. Under such circumstances, GX should not be held liable for discrimination.

R.C.L.