



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MARSHA POLAKOFF,**

Complainant,

v.

**BOARD OF COOPERATIVE EDUCATIONAL  
SERVICES (BOCES), ROCKLAND,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10179725

Federal Charge No. 16GB601440

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on April 30, 2018, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: JUN 19 2018,  
Bronx, New York

  
HELEN DIANE FOSTER  
COMMISSIONER



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**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10179725**

**SUMMARY**

Complainant asserts that Respondent, her employer, discriminated against her because of her age and disabilities, retaliated against her when she complained of discrimination and constructively discharged her from her employment, forcing her to retire. Respondent denied all claims. Complainant has prevailed on the retaliation portion of her complaint and is awarded damages owing to her emotional distress. Civil fines and penalties are also assessed. The remaining claims are dismissed.

## PROCEEDINGS IN THE CASE

On February 4, 2016, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on June 26, 2017, June 27, 2017, October 4, 2017 and December 12, 2017.

Complainant and Respondent appeared at the hearing. The Division was represented by Veanka S. McKenzie, Esq. Respondent was represented by Gregg T. Johnson, Esq.

## FINDINGS OF FACT

1. Complainant suffers from several medical conditions. She has had two herniated discs, two torn rotator cuffs, knee surgery, foot surgery, spinal stenosis, COPD and asthma. (Tr. 14)
2. Complainant was born in September 1950; she is 67 years of age. (Tr. 31)
3. Respondent is an educational agency in Rockland County, New York. It provides educational services for disabled students from kindergarten through 12<sup>th</sup> grade. It works with families of disabled students to ensure that the students receive all the services they need and it helps students transition into adulthood. It also provides services to adults, such as English as a second language and general equivalency diploma programs. (Tr. 311)

4. Complainant began working for Respondent on January 13, 2000, as a clerk-typist. (Tr. 13)
5. As a clerk-typist, Complainant's duties included keeping attendance records, filing, scheduling, keeping class lists, keeping Medicaid records up to date, and attending to daily correspondence. (Tr. 47-48)
6. From 2013 to 2017, Complainant asked Respondent for various accommodations for her disabilities. (Tr. 14, 16, 18, 19)
7. In 2013, Complainant asked for help when moving boxes. Respondent provided Complainant with students to help her with that task. (Tr. 15)
8. During the 2014-2015 school year, Complainant asked that a grab bar be installed in the ladies' room. Respondent's maintenance department installed the grab bar as Complainant requested. (Tr. 16-17)
9. In August of 2014, Complainant asked to be excused from the annual Superintendent's Day meeting because Complainant needed a walker to ambulate and the building holding the meeting was not accessible. (Tr. 19)
10. Pamela Star Charles, principal of CBI Tech High School, did not excuse Complainant from Superintendent's Day. Instead, Charles reserved a chair for Complainant to use and maintenance personnel were made available to assist Complainant in and out of the building. (Tr. 19, 25, 407)
11. In June 2015, Charles completed an evaluation of Complainant's performance for the period of September 1, 2014 to June 30, 2015. (Complainant's Exhibit 2)

12. The evaluation found Complainant to be satisfactory in the three main categories: quality, quantity and relationships. Complainant's performance was found to be in need of improvement in five of 18 sub-categories. (Complainant's Exhibit 2)

13. Complainant took exception to the evaluation and specifically objected to references to her disabilities. Regarding Complainant's work habits and attitudes, Charles wrote that Complainant "has been caught crying or complaining due to pain on occasion. [Complainant] has limited movement." (Complainant's Exhibit 2; Tr. 41)

14. The evaluation further noted that it was "difficult to depend on" Complainant because "her attendance is poor." (Complainant's Exhibit 2)

15. Complainant had provided doctor's notes to support her absences and had complied with Respondent's time and attendance requirements. (Tr. 51-53)

16. After she received the evaluation, Complainant called her union representative to complain about the references to Complainant's disability. (Tr. 54)

17. A meeting with Charles was arranged. At that meeting, Charles informed Complainant that a new evaluation would be issued. (Tr. 55-56)

18. On August 10, 2015, Charles submitted a second evaluation of Complainant's performance for the period September 1, 2014 to June 30, 2015. (Complainant's Exhibit 4; Tr. 56)

19. The references to Complainant's absences, limited movement and crying were removed from the second evaluation. (Complainant's Exhibit 4; Tr. 59)

20. The second evaluation, however, found that Complainant's performance during that 2014-2015 school year was significantly worse than the first evaluation had found. (Complainant's Exhibits 2 & 4)

21. While the first evaluation found that Complainant needed improvement in five categories, the second evaluation found that Complainant needed improvement in 13 categories, including quality and quantity of work. (Complainant's Exhibit 2 & 4; Tr. 60)

22. Complainant felt "angry" when she received the second evaluation, stating that she "could not have humanly possibly gone down in eight different areas, and I felt that it was retaliation to me for...complaining." (Tr. 63-64)

23. Both evaluations were marked "Unfinalized." Complainant did not have a finalized evaluation for the 2014-2015 school year. (Complainant's Exhibit 2 & 4; Tr. 126)

24. Evaluations are finalized when an employee electronically acknowledges his or her evaluation at the end of the process. (Tr. 126)

25. Charles stated that in changing the evaluation it was her "intent to focus on the what...the previous evaluation I had focused on the why...So the evaluation only talked about facts...It was strictly about the what." (Tr. 446)

26. After Complainant took exception to her evaluations, she found that Charles' attitude changed. She felt that Charles' tone of voice was harsher towards her. (Tr. 65-69)

27. Charles caused Complainant to be "terribly nervous." Complainant suffered lower self-esteem and began to doubt her abilities. (Tr. 73)

28. Due to the stress she felt, Complainant decided that she could not continue working for Respondent. She retired on January 20, 2017. (Tr. 73-74)

29. Charles did not initiate conversations about retirement with Complainant. She learned of Complainant's retirement when she received a November 2016 letter indicating Complainant's intent to retire. (Tr. 426)

### OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee because of that employee's age or disabilities. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a).

Complainant has the burden of establishing a prima facie case of disparate treatment discrimination by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of unlawful discrimination. *See Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant has not established a prima facie case of disability or age discrimination.

A disability is defined in the Human Rights Law as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21.

Complainant has satisfied the first two elements of her prima facie case. The undisputed evidence establishes that Complainant suffers from multiple disabilities. The record also shows that Complainant was qualified to work in the position she held for 17 years. However, Complainant has failed to show that she suffered an adverse employment action.

An adverse employment action requires "a materially adverse change in the terms and conditions of employment." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 306, 786 N.Y.S.2d 382, 391 (2004). This may be shown by "a termination of employment, a demotion

evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.” *Id.* (citations and internal quotation marks omitted). Neither Charles’ comments on Complainant’s evaluation nor the alleged harsh tone in Charles’ voice constituted a change in the terms and conditions of Complainant’s employment as the Court described in *Forrest*.

Therefore, Complainant’s claim for disparate treatment discrimination based upon disability must fail. With respect to her claim of age discrimination, she has similarly not shown any adverse employment action and, in addition, there is no evidence that anyone referenced her age or impending retirement through negative comments or actions.

Complainant has also charged Respondent with failing to provide an accommodation for her disability. Under the Human Rights Law, an employer is obligated to provide reasonable accommodations for an employee’s known disabilities. Human Rights Law § 296.3. To establish a claim for failure to provide a reasonable accommodation, Complainant must demonstrate that she suffered from a disability, she could perform the essential functions of the position with a reasonable accommodation, Respondent was on notice of Complainant’s need for an accommodation, and Respondent refused to make such accommodation. *See County of Erie v. New York State Div. of Human Rights*, 121 A.D.3d 1564, 1565, 993 N.Y.S.2d 849, 850 (4th Dept. 2014). Complainant has identified some requests for accommodation, but the evidence shows that Respondent provided Complainant with accommodations that allowed her to perform her duties. Although Complainant did not get the accommodation she sought when she asked to be excused from the Superintendent’s Day meeting, she was, nevertheless, provided with assistance that allowed her to attend the conference. One could argue that his accommodation was insufficient, since the “assistance” provided to Complainant was maintenance personnel to

assist her, not medical personnel. There is no evidence that the maintenance personnel were qualified to give Complainant the assistance she required. Nevertheless, the claim for failure to accommodate in this instance cannot be sustained, since it occurred more than one year prior to the filing of this complaint. The Human Rights Law § 297.5 provides that, “[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.” This provision is mandatory and constitutes a statute of limitations. See *Queensborough Cmty. Coll. v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

The Human Rights Law also makes it an unlawfully discriminatory practice “for any employer to...otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.” Human Rights Law §296.1 (e).

Complainant made a complaint about the content of her evaluation and later received a second rating that she believes to be retaliatory. To prove a prima facie case of retaliation, Complainant must establish that she engaged in activity protected by the Human Rights Law, that Respondent was aware she engaged in the protected activity, that she suffered an adverse employment action based on her activity, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999). If Complainants meet this burden, Respondent must present legitimate, non-discriminatory reasons for its action. If Respondent does so, Complainants must show that the reasons Respondent has presented were merely a pretext for discrimination. *Id.*

Complainant meets her burden. She has clearly established the first two elements of the

prima facie case. She has also shown that there is an adverse employment action. In a retaliation case, "an adverse employment action is one which 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Mejia v. Roosevelt Island Medical Assoc.*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), *aff'd.*, 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed*, 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013), citing *Burlington Northern & Santa Fe Railway Co. v. White*, 543 U.S. 53, 68 (2006). This adverse employment action standard is lower than the standard for disparate treatment discrimination described above. Complainant's evaluation was downgraded immediately after she complained about the references to her disability in the previous evaluation, which is enough to dissuade one from making such a complaint.

After Complainant complained about the references to her disabilities in her evaluation, Charles evaluated Complainant's performance significantly worse than she had previously. No other intervening factor could have led Charles to downgrade Complainant's evaluation, since the evaluation period (September 1, 2014 to June 30, 2015) had already passed. Therefore, there is no legitimate explanation for changing the evaluation so significantly and Charles' incoherent explanation about "focusing on the what" does not articulate a legitimate reason for the changes. Even though the evaluation remained unfinalized, the fact that Complainant's evaluation was downgraded after she complained could have a chilling effect on complaints of that sort. Complainant has, therefore, proven her claim of retaliation for having complained of discrimination.

Complainant eventually retired from her position effective January 20, 2017. She asserts that Respondent forced her to retire against her wishes. To maintain a claim for constructive discharge, Complainant must demonstrate that Respondent deliberately made her working

conditions “so intolerable that the employee is forced into an involuntary resignation.” *Morris v. Schroeder Capital*, 7 N.Y.3d 616, 621 (N.Y. 2006) quoting *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). When a constructive discharge is found, an employee’s resignation is treated as if the employer had actually terminated the employee. *Morris at 622*.

Complainant cannot establish that she was subjected to a constructive discharge. She alleges that Charles spoke in a sharper tone after her complaint of disability discrimination, but even if we accept that allegation as fact, she has not shown that this made her work environment so intolerable that she had to retire. A supervisor’s sharp tone, though unpleasant, is not severe enough to force a person to retire against his or her wishes. Accordingly, Complainant’s claim of a constructive discharge must be dismissed.

As a result of Respondent’s unlawfully discriminatory acts, Complainant is entitled to damages owing to her emotional distress. Complainant felt distress in the form of anger after her evaluation was downgraded. “Mental injury may be proved by the complainant’s own testimony, corroborated by referenced to the circumstances of the alleged misconduct.” *New York City Transit Auth. v. N.Y. State Div. of Human Rights (Nash)*, N.Y. 2d 207, 573 N.Y.S.2d 49, 54 (1991); *Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 452, 442 N.Y.S.2d 470 (1981). The severity, frequency, and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep’t of Corr. Serv. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996). In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *N.Y. State Div. of Human Rights v. Mutia*, 176 A.D.2d 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Complainant suffered the humiliation of having

her evaluation downgraded. Taking into account the fact that Complainant did not show she lost any wages and her evaluation was unfinalized, she is entitled to \$5,000.00, which will effectuate the purpose of the Human Rights Law. See, *New York State Division of Human Rights v. SUV Production, Inc.*, 149 A.D. 3d 523, 52 N.Y.S.3d 94, (1st Dept. 2017).

Human Rights Law § 297 (4)(c)(vi) permits the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.”

Furthermore, Human Rights Law § 297 (4)(e) requires that “any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.” The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent’s culpability; any relevant history of respondent’s actions; respondent’s financial resources; other matters as justice may require. *Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff’d*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009), *119-121 East 97th Street Corp. et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996).

The goal of deterrence, Respondent’s degree of culpability, and the nature and circumstances of Respondent’s violation warrant this penalty. Complainant asserted her rights under the Human Rights Law and, in response, was retaliated against by Respondent. Given the

circumstances in this case and considering the goal of deterrence, the nature and circumstances of the violation and the degree of Respondent's culpability, \$10,000.00 is an appropriate civil fine and penalty. *See Noe v. Kirkland*, 101 A.D.3d 1756 (4th Dept. 2012); *Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514 (2d Dept. 2012).

## ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee or prospective employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondent shall pay \$5,000.00 to Complainant, Marsha Polakoff, as compensatory damages for the mental anguish she suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per year, from the date of this Order until payment is actually made.
2. Within sixty days of the date of this Order, Respondent shall pay \$10,000.00 to the State of New York as a civil fine and penalty as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per year, from the date of this Order until payment is actually made.
3. Payment of the compensatory damages shall be made by Respondent in the form of a certified check, made payable to Complainant and delivered by certified mail, return receipt requested, to The New York State Division of Human Rights, c/o Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Payment of the civil fine and penalty shall be made by Respondent in the form of a certified check, made payable to the State of New York and delivered by certified mail, return receipt requested, to The New York State Division of Human Rights, c/o Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.
5. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: April 30, 2018  
Bronx, New York



Thomas S. Protano  
Administrative Law Judge