



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

KATHLEEN BEGIN,

Complainant,

v.

NBTY, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10142752

Federal Charge No. 16GB004411

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 July 11, 2013, by Robert M. Vespoli, 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 GALEN D. KIRKLAND, 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.

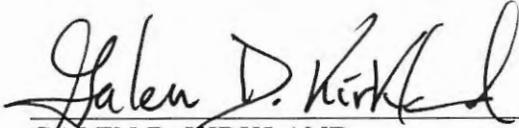
PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory 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:

8/12/13

Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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Respondent.

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

Case No. **10142752**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her based on her sex. Complainant also alleged that Respondent unlawfully retaliated against her when she opposed unlawful discrimination in the workplace. Because the record does not support Complainant's allegations, the instant complaint must be dismissed.

PROCEEDINGS IN THE CASE

On July 16, 2010, 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 Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 23-24, 2013.

Complainant and Respondent appeared at the hearing. Complainant was represented by Paul E. Levitt, Esq. Respondent was represented by Domenique Camacho Moran, Esq.

The parties filed timely post-hearing briefs which were considered and, where appropriate, adopted.

FINDINGS OF FACT

1. Respondent manufactures vitamins. (Tr. 21)
2. On January 21, 1993, Complainant, a female, began working for Respondent as a “picker” in the Shipping Department. (Tr. 18-19; ALJ’s Exh. 1)
3. Shortly after Complainant began working for Respondent, she was promoted to a supervisory position. (Tr. 19)
4. In or about November 2001, Respondent promoted Complainant to the position of third shift supervisor in the Encapsulation Department (“ED”) producing soft gel capsules. (Tr. 27-30) At that time, Complainant had no previous soft gel encapsulation or production experience. (Tr. 439)
5. As a third shift supervisor, Complainant worked Sunday through Thursday, from 11:00 p.m. until 7:30 a.m. (Tr. 24, 441) Complainant was required to arrive at work one hour earlier

on Sundays in order to warm the gel and prime the machines to begin production at the appropriate start time. (Tr. 441)

6. In 2001, Donna Friedmann was the manager of Respondent's soft gel manufacturing process. (Tr. 435) Friedmann hired Complainant for the third shift supervisor position and was Complainant's supervisor. (Tr. 39, 440-41)

7. Friedmann also supervised the first and second shift supervisors, Jose Moreno¹ and Mahboob Rahman respectively. Moreno and Rahman are both male, and they were supervisors in the ED before Friedmann joined that department in 1999. (Tr. 25-26, 36-37, 436-39; ALJ's Exh. 1)

8. Friedmann never heard Moreno make disparaging remarks about a woman's ability to work in the ED. (Tr. 438)

9. In 2005, Respondent promoted Complainant, Moreno, and Rahman to the position of assistant manager. (Tr. 30-31, 38) All of these individuals received a salary increase at that time. (Tr. 31)

10. Complainant received a larger salary increase than both Moreno and Rahman. (Respondent's Exhibits 12-14, 17)

11. In July 2008, Respondent hired Raymond Mulvey as the director of Respondent's soft gel manufacturing process. (Tr. 269) At that time, Friedmann was reassigned to oversee Respondent's tablet manufacturing process, and Mulvey assumed Friedmann's supervisory role over Complainant, Moreno, and Rahman. (Tr. 437-38, 441-42)

12. Complainant never complained to Friedmann that anyone working for Respondent treated her differently because she is a woman. (Tr. 443-44)

¹ The transcript incorrectly spells Moreno's last name "Morino."

13. In March 2009, Mulvey gave Complainant a larger salary increase than he gave to either Moreno or Rahman. (Tr. 279-80; Respondent's Exhibits 12-14, 17)

14. After the March 2009 salary increases, Complainant was still earning a lower salary than both Moreno and Rahman. At that time, Complainant's annual salary was \$95,388.00, Rahman's annual salary was \$98,946.00, and Moreno's annual salary was \$113,006.00. (Respondent's Exhibits 12-14, 17)

15. Moreno had significant experience working in soft gel manufacturing and research and development prior to his employment with Respondent. (Tr. 275, 437) Unlike Rahman and Complainant, Moreno was also responsible for research and development, training, and keeping track of dye inventory and materials for Respondent. (Tr. 273-75, 436)

16. Rahman also had "extensive supervisory experience" and knowledge about all phases of pharmaceutical production prior to his employment with Respondent. (Respondent's Exh. 19)

17. Mulvey checked the speed, running temperatures, and other measurements of every production machine on a daily basis. (Tr. 322) He noticed that the machines were running more slowly on the second and third shifts. (Tr. 323) Mulvey raised this issue with both Complainant and Rahman in order to understand and correct the production problems that caused the machines to slow down at certain times. (Tr. 323-24)

18. Complainant acknowledged that Mulvey addressed this issue with both her and Rahman. (Tr. 170)

19. Mulvey credibly denied that he told Complainant that she reminded him of a woman he fired at a previous place of employment. (Tr. 289)

20. Complainant believed that Moreno and Mulvey "were teaming up against [her] for whatever reason." (Tr. 53)

21. On May 8, 2009, Complainant sent an e-mail to Respondent's vice president, Dan Parkhideh, complaining about the amount of her salary increase that year and seeking Parkhideh's opinion about her job performance. Complainant did not allege that she was being discriminated against because of her sex. (Complainant's Exh. 2)

22. On June 15, 2009, Complainant sent another e-mail to Parkhideh expressing her frustration over her interactions with Mulvey. In this e-mail, Complainant complained that Mulvey favored Moreno and the first shift over other managers and supervisors. Complainant also stated that other managers and supervisors have had disagreements with Moreno and were disappointed with the effectiveness of Mulvey's staff meetings. (Complainant's Exh. 3)

23. These other managers and supervisors are both male and female. (Tr. 194-95)

24. Parkhideh assured Complainant that Mulvey was not planning to terminate her employment. He encouraged Complainant to work out the problems she was having with Mulvey. (Tr. 198)

25. On September 15, 2009, Complainant met with Mulvey. However, Complainant left the meeting feeling frustrated and angry because she believed that Mulvey did not tell the truth and was "[trying] to turn everything around on [her]." Complainant continued to believe that Mulvey was trying to terminate her employment. (Tr. 200; Respondent's Exh. 7)

26. Complainant acknowledged that Mulvey did not bring any disciplinary action against her. (Tr. 156-57, 201)

27. On September 15, 2009, Complainant met with Pamela Antos, Respondent's director of human resources, and spoke to her about the problems she was having at work. (Tr. 199, 327; Respondent's Exh. 7) This was the first time Complainant spoke to Antos about this subject. (Tr. 199, 345)

28. When Complainant met with Antos, she told Antos that Mulvey did not listen to her, did not respect her, ignored her in staff meetings, and favored Moreno and the first shift. (Tr. 345-46)

29. Complainant believed that Mulvey favored Moreno over every other supervisor. (Tr. 152)

30. Complainant did not inform Antos that she believed that Mulvey or anyone else associated with Respondent discriminated against her because of her sex. (Tr. 346, 425)

31. Complainant later sent Antos copies of all the e-mails that Complainant believed were evidence of Mulvey's unfair treatment. (Tr. 151-52, 201, 347; Respondent's Exhibits 3, 7)

32. On September 28, 2009, Antos met with Mulvey and Complainant to resolve the communication problems between Complainant and Mulvey. (Tr. 205, 347-48, 358)

33. Complainant brought the e-mails that she believed were evidence of Mulvey's unfair treatment. (Tr. 151-52, 162; Respondent's Exh. 3) None of these e-mails can reasonably be construed to be complaints of sex-based discrimination. (Respondent's Exh. 3)

34. Complainant also made "crib notes" in anticipation of the September 28 meeting. Complainant prepared these notes to remind her of important points to address at the meeting. (Tr. 154; Respondent's Exh. 2)

35. Complainant's notes include complaints that Mulvey did not tell the truth, did not want Complainant to "speak up," "talk[ed] down to [her]," talked about her to other supervisors, did not "respond to some e-mails," embarrassed her in front of others, contradicted everything Complainant said, favored the first shift over the second and third shifts, and did not acknowledge Complainant's vacation time. None of the points listed in Complainant's notes can reasonably be construed to be complaints of sex-based discrimination. (Respondent's Exh. 2)

36. At the September 28 meeting, Complainant stated that Mulvey did not treat her fairly and that he sided with Moreno over Complainant. (Tr. 206, 358-59) The examples cited by Complainant included a meeting wherein Mulvey gave Moreno the last word over Complainant, an instance when Mulvey left what Complainant perceived to be a sarcastic note about a production issue, and a disagreement between Complainant and Mulvey over the location of a meeting they had previously arranged to discuss their differences. None of the examples given by Complainant included allegations of sex-based discrimination. (Tr. 358-63; Respondent's Exh. 21)

37. At the meeting, Complainant became very agitated because she felt that Antos was favoring Mulvey. Complainant ultimately stopped participating in the discussion. She stated that she could no longer work for Respondent and began to walk toward the door. (Tr. 362; Respondent's Exh. 21)

38. Antos told Complainant that the meeting was not over and that she would be resigning her position if she walked out of the meeting. Complainant then gave Antos her badge and office keys, and she left the meeting room. (Tr. 362, 404; Respondent's Exh. 21)

39. Respondent accepted Complainant's resignation. (Tr. 288, 404; Respondent's Exh. 21)

40. Respondent subsequently hired Jose Ruiz, a male employee, as the third shift assistant manager. Respondent paid Ruiz an annual salary of \$75,000.00. (Tr. 370; Respondent's Exh. 15)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of sex. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a).

In order to establish a prima facie disparate pay claim, Complainant must show that she is a member of a protected group; she was paid less than non-members of her group for work involving substantially the same amount of skill, effort, and responsibility; and she performed such work under substantially similar conditions as the non-members of her group. *Classic Coach v. Mercado*, 280 A.D.2d 164, 170, 722 N.Y.S.2d 551, 555 (2d Dept. 2001), *lv. denied*, 97 N.Y.2d 601, 735 N.Y.S.2d 490 (2001).

Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The burden then shifts to Complainant to show that Respondent’s proffered explanations are a pretext for unlawful discrimination. *Ferrante v. Am. Lung Ass’n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant, a female, is a member of a protected group. In 2005, Respondent promoted Complainant, Moreno, and Rahman to the position of assistant manager. Complainant alleged that Respondent paid Complainant a lower salary than her male counterparts, Moreno and Rahman, because of her sex. In 2009, Complainant was still earning a lower salary than both Moreno and Rahman. At that time, Complainant’s annual salary was \$95,388.00, Rahman’s annual salary was \$98,946.00, and Moreno’s annual salary was \$113,006.00.

The record shows that Moreno had additional, different skills and responsibilities than Complainant and Rahman. Unlike Rahman and Complainant, Moreno was also responsible for research and development, training, and keeping track of dye inventory and materials. These

responsibilities involve different skill sets and require additional work. Therefore, the record does not establish that Moreno was a similarly situated employee, and her disparate pay claim with regard to Moreno must fail.

The record does not show that Rahman had substantially different responsibilities than Complainant. Moreover, Complainant performed the assistant manager job under substantially similar conditions as Rahman. Therefore, Complainant has established a prima facie disparate pay claim with regard to Rahman.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

Respondent showed that any disparities in compensation between Complainant, Moreno, and Rahman were related to significant differences in their skills, experience, and seniority. In determining the compensation offered to a prospective employee, an employer is entitled to consider the nature and extent of the employee's relevant work experience, background, skills, "marketplace value" and previous salary. *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 244, 764 N.Y.S.2d 675, 683 (1st Dept. 2003) (citations omitted).

The record shows that Complainant did not possess the same seniority, skills, or experience as either Moreno or Rahman. When Complainant was promoted to third shift supervisor in November 2001, she had no previous soft gel encapsulation or production experience. Conversely, Moreno, who had greater seniority than Complainant, had significant experience working in soft gel manufacturing and research and development prior to his employment with Respondent. Rahman also had greater seniority than Complainant and had extensive supervisory experience and knowledge about all phases of pharmaceutical production prior to his employment with Respondent. These differences constitute legitimate,

nondiscriminatory reasons for the disparity in compensation between Complainant, Moreno, and Rahman. *Id.* at 245, 764 N.Y.S.2d at 683.

Notably, Respondent awarded Complainant salary increases which exceeded the salary increases received by both Moreno and Rahman.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet her burden.

Complainant also alleged that Respondent terminated her employment because of her sex and because she complained about unlawful sex-based discrimination. These claims cannot be sustained.

Complainant has the burden of establishing a prima facie case of 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. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The burden then shifts to Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante* at 629-30, 665 N.Y.S.2d at 29.

It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between

the protected activity and the adverse employment action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

During the time that Complainant was employed by Respondent, she did not make an internal complaint of unlawful discrimination or engage in any other protected activity. Moreover, the record is devoid of evidence showing that Respondent subjected Complainant to any form of harassment because of her sex or that she suffered any adverse employment action. Rather, the record shows that Complainant resigned her position after she became agitated and frustrated at the September 28, 2009, meeting.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant cannot rely on supposition and conclusory allegations to satisfy this burden. *Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

Complainant has failed to meet her burden. Accordingly, the instant complaint must be dismissed.

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 the instant complaint be, and the same hereby is, dismissed.

DATED: July 11, 2013
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli
Administrative Law Judge