

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

CHRISTINA BYRD,

Complainant,

v.

KALEIDA HEALTH,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10117256

**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 31, 2008, by Thomas J. Marlow, 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: **SEP - 9 2000**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**CHRISTINA BYRD,**

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v.

**KALEIDA HEALTH,**

Respondent.

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

Case No. 10117256

**SUMMARY**

Complainant alleged that Respondent discriminated against her because of her criminal convictions and because of disability. Because the evidence does not support the allegations, the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On April 16, 2007, 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 J. Marlow, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on March 19, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Sarah E. Tollner, Esq., of Saeli & Tollner, P.C.

The Division and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

#### **FINDINGS OF FACT**

1. On September 13, 2006, Complainant applied for a job with Respondent via the internet by submitting an online application. (Respondent's Exhibit 1; Tr. 44-50, 92-94) In this application, Complainant indicated that she had not been convicted of a crime when, in fact, she had been convicted of a crime. (Respondent's Exhibit 1; Tr. 16, 48-49) Complainant, as she stated, "didn't want to tell the truth" because she "thought it would be held against (her)." (Tr. 49)

2. On October 12, 2006, at Respondent's corporate headquarters, Complainant completed another application for employment with Respondent via a computer program, again indicating that she had not been convicted of a crime. (Complainant's Exhibit 1; Tr. 14-16) Complainant did this, as she stated, because "(her) first intent was to not to tell the truth." She further stated that, if she told the truth, "(She) figured that would stop (her) from being employed by them." (Tr. 17)

3. Complainant testified that, on October 12, she wanted to change her answer that indicated that she had not been convicted of a crime but the computer program would not allow changes. (Tr. 17-18)

4. On October 12, Complainant told Respondent's employment recruiter that she made a mistake on the application regarding having been convicted of a crime. Thereafter, Complainant filled out a consent form indicating that she had been convicted of a crime and that she gave permission to Respondent to conduct a background search that would include a search for any criminal record. (Complainant's Exhibit 2; Tr. 19-20)

5. On November 13, 2006, Complainant started her employment with Respondent by attending an orientation at Respondent's corporate headquarters. (Respondent's Exhibit 6; Tr. 9-10) On November 13, while at the corporate headquarters, Complainant filled out a form ("Department of Health form") authorizing the New York State Department of Health ("Department of Health") to conduct a criminal record search about her, indicating on the form that she had been convicted of a crime. (Complainant's Exhibit 3; Tr. 23-24)

6. On November 14, 2006, Complainant attended an on-site orientation at the Kaleida Health Deaconess Center ("Center"), a nursing home, and, thereafter, began working as a certified nurse's assistant at the Center. (Respondent's Exhibit 6, Complainant's Exhibit 5; Tr. 9-10, 29, 67-68, 115)

7. On December 28, 2006, Complainant went on a disability leave from work. (Tr. 9, 63)

8. In February of 2007, while Complainant was still on disability leave, she received correspondence from the Department of Health indicating that her criminal record may disqualify her from employment. (Complainant's Exhibit 4; Tr. 26-27) Attached to this correspondence was a criminal record that was not Complainant's criminal record.

(Complainant's Exhibit 4; Tr. 27) Complainant contacted Respondent and provided Respondent with the correct criminal record. (Tr. 28)

9. Susan Passmore ("Passmore"), an employee relations specialist in Respondent's human resources department, and Margaret Mary Wagner ("Wagner"), administrator of the Center, were notified of the criminal record received from the Department of Health and attributed to Complainant. (Tr. 126-29) According to the procedure of Respondent, Passmore reviewed Complainant's personnel file to check three forms: the application form and consent form completed at corporate headquarters on October 12, 2006, and the Department of Health form completed at corporate headquarters on November 13, 2006. (Tr. 127-30)

10. According to Respondent's procedure, before considering the nature of the conviction, Passmore and Wagner checked the abovementioned three forms to see if Complainant had been honest on the three forms. (Tr. 128-29) After reviewing the forms, they determined that Complainant was dishonest when filling out the application. (Tr. 129-30)

11. By letter dated February 20, 2007, Passmore informed Complainant that her employment had been terminated because she was dishonest in filling out her application on October 12, 2006. (Complainant's Exhibit 5) After sending this letter, Passmore and Complainant had a conversation wherein Complainant explained how she tried to change the answer on October 12 and had explained everything to the recruiter. (Tr. 133) Passmore shared this information with Wagner but they decided that the decision to terminate employment for the failure to be honest in filling out the application should not be changed. (Tr. 134)

12. Complainant testified that she thinks that she was not discriminated against because of her disability. (Tr. 64)

## OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to deny employment to any individual because she has been convicted of a criminal offense when such denial violates Article 23-A of the Correction Law of the State of New York (“Article 23-A”). *See* Human Rights Law § 296.15

The complaint raised an issue of discrimination in employment claiming that Complainant had been denied employment because she had been convicted of a criminal offense and such denial violated Article 23-A. Pursuant to Article 23-A, an employer may not deny employment to any individual because she has been convicted of a criminal offense unless the employer can show that there is a direct relationship between the criminal offense and the employment held. Article 23-A sets forth various factors to be considered by an employer in determining whether to deny employment because of a conviction for a criminal offense. Complainant has the burden to establish by a preponderance of the evidence that such discrimination occurred. The evidence establishes that Complainant has a criminal record, Complainant was employed by Respondent as a certified nurse’s assistant, and her employment was terminated after Respondent received what was purported to be her criminal record. There was no evidence offered to show that Respondent considered the various factors set forth in Article 23-A before terminating Complainant’s employment.

To meet her burden to establish that discrimination occurred, Complainant must initially show that she is a member of a protected class, that she was qualified for the position, that she suffered an adverse employment action, and that this adverse action occurred under circumstances giving rise to an inference of unlawful discrimination because of her status as a member of a protected class. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 665

N.Y.S.2d 25 (1997). The credible evidence establishes that Complainant is a member of protected class, a person who has been convicted of a criminal offense, that she was capable of performing her duties in a reasonable manner, and that she suffered an adverse employment action, termination, under circumstances inferring discrimination because of a criminal record. Complainant has established a prima facie case, the burden of which has been described as “de minimus.” *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1<sup>st</sup> Dept. 1998) Because Complainant has established a prima facie case of discrimination because of a criminal record, the burden shifts to Respondent to establish a legitimate, nondiscriminatory basis for terminating the employment of Complainant. *See Ferrante*, 90 N.Y.2d at 629.

Respondent has established through credible testimony that, when its employee relations specialist and administrator of the Center learned that Complainant had been convicted of a criminal offense but before they considered the nature of the offense, they followed Respondent’s procedure of reviewing three forms filled out by Complainant to see if Complainant had been honest on each form. When they saw that Complainant was dishonest on one of the forms, the application form completed at corporate headquarters, they made a determination to terminate Complainant’s employment for dishonesty, not because she had a conviction for a criminal offense. Inaccuracies or omissions in an employment application can constitute a legitimate nondiscriminatory basis for the denial of employment. *See Grant v. State Com. for Human Rights*, 54 Misc.2d 775, 283 N.Y.S.2d 486 (Sup. Ct. New York Co. 1967)

Since Respondent has established a valid, nondiscriminatory reason for its action, the burden shifts back to Complainant to prove that the reason proffered by Respondent was merely a pretext for discrimination. *See Ferrante*, 90 N.Y.2d at 629-30. Complainant offered no evidence to prove that the reason proffered by Respondent was a pretext for discrimination.



Therefore, she has not met her burden of showing that Respondent's reason for terminating her employment was a pretext for discrimination.

The complaint also raised an issue of discrimination because of disability. At the public hearing, however, Complainant testified that she thought that she was not discriminated against because of her disability and offered no evidence to support a finding of discrimination because of disability.

**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 complaint be, and hereby is, dismissed.

DATED: July 31, 2008  
Bronx, New York



Thomas J. Marlow  
Administrative Law Judge