

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ANDREA M. CARCONE,

Complainant,

v.

MOHAWK VALLEY ORTHOPEDICS, LLP,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10115529

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 May 29, 2008, by Rosalie Wohlstatter, 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”), WITH THE FOLLOWING AMENDMENT:

- The caption and complaint are hereby amended to reflect Respondent’s proper legal name. 9 NYCRR § 465.4

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

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MOHAWK VALLEY ORTHOPEDICS,

Respondent.

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

Case No. **10115529**

SUMMARY

Respondent unlawfully discriminated against Complainant on the basis of her disability by terminating her employment. Accordingly, Complainant is entitled to compensatory damages for the mental anguish she suffered in the amount of \$7,500 and reimbursement of her health insurance payments in the amount of \$2180.

PROCEEDINGS IN THE CASE

On January 23, 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 David Bowden, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on November 13, 2007.

After ALJ Bowden left the Division, the case was reassigned to ALJ Rosalie Wohlstatter to write the recommended findings of fact, opinion and decision, and order.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield, Esq. Respondent was represented by Joseph S. Deery, Jr, Esq.

Permission to file post-hearing briefs was granted. The Division filed a timely post-hearing brief.

FINDINGS OF FACT

1. A review of the record shows that Respondent's legal name is Mohawk Valley Orthopedics, LLP. No issue with respect to the name of Respondent was raised at the hearing. (Complainant's Exhs. 1, 2)
2. Complainant worked in patient registration for Respondent from October 16, 2006 until December 1, 2006 when she was terminated. (ALJ's Exh. 1; Tr. 15, 20)
3. On November 23, 2006, Complainant was diagnosed with hypertension. (ALJ's Exhs. 1, 4)
4. Prior to Complainant's termination, Respondent had made only positive comments on Complainant's work performance. (Tr. 17-18, 53)
5. On November 27, 2006, after the Thanksgiving holiday, Respondent's office manager, Kathleen Kenealy, was told by Complainant that Complainant had hypertension and that she would need some time during the work week to go to the doctor for more tests. Kenealy's response to this was "oh, boy." (Tr. 19, 55)
6. Following this conversation, Complainant did, in fact, miss a few hours of work so that she could go to the doctor. (Tr. 35)

7. At the time Respondent terminated Complainant on December 1, 2006, Respondent did not provide Complainant with a reason for the termination. (ALJ Exh. 1)

8. Respondent now claims, without any substantiation, that Complainant was terminated because she had complained about receiving less pay than her predecessor in the job, and had also complained that she was given too much work. Complainant credibly denies complaining about her work load or her salary. (Tr. 37-38, 46-52)

9. Kenealy claimed that Respondent had never terminated an employee for missing time from work. However, Marianne K. Pratt, a nurse who worked for Respondent, testified that Respondent had considered firing another newly hired employee because of missed time, and that the employee was, in fact, terminated. (Tr. 61, 79)

10. Respondent had paid Complainant \$9.00 an hour. Complainant's work-week was 40 hours during the time she was employed by Respondent. (TR.16-17)

11. Complainant received health benefits from Respondent. Complainant's contribution was nominal. (Tr. 22)

12. Complainant testified that she continued to receive health benefits pursuant to COBRA for two months and was required to pay \$348 per month for the continuation of her benefits. However, these payments were not corroborated by her documentation. (Complainant's Exh. 3; Tr. 23)

13. Beginning in February of 2007, Complainant enrolled in the Healthy New York insurance plan, for which she paid \$218 a month. These payments continued until the hearing date. (Complainant's Exh. 4)

14. On February 26, 2007, Complainant returned to her former employer Accutel, Inc. She worked, on average, 25 hours a week for Accutel and had earned \$7,886.42 from her job at Accutel up until November 7, 2007. (Complainant's Exh. 5; (Tr.27-28)

15. After her termination, Complainant felt humiliated and scared. (Tr. 30-31)

16. Complainant offered no evidence of efforts to find comparable, that is, full-time employment. (Tr. 27)

OPINION AND DECISION

The Human Rights Law prohibits discrimination on the basis of disability. *See* Human Rights Law § 296.1 (a). A disability is defined as “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which...is demonstrable by medically accepted clinical or diagnostic techniques...” To meet the definition of a disability under the Human Rights Law, the disability must not prevent the Complainant from performing her duties in a reasonable manner with reasonable accommodations. Human Rights Law § 292.21.

Complainant has the burden of establishing a prima facie case of discrimination. She can do so 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 the adverse action occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to articulate a legitimate, non-discriminatory reason for its employment action. The ultimate burden rests with Complainant to show that Respondent's proffered reasons are actually a pretext for unlawful discrimination.

Ferrante v. American Lung Ass'n, 90 N.Y. 2d 623, 687 N. E. 2d 1308, 665 N.Y.S. 2d 25 (1997)

The parties have agreed that Complainant was diagnosed with hypertension on

November 23, 2006. Respondent became aware of this before it terminated Complainant. Complainant's hypertension fell within the meaning of a disability in the Human Rights Law. It was a medical impairment that was demonstrable by medically accepted diagnostic techniques and did not prevent Complainant from performing her duties in a reasonable manner. There was no dispute that Complainant was qualified for her position. On November 27, 2006, Complainant informed Respondent of her condition, that she was required to undergo more tests, and that she would have to go the doctor during the work week. Shortly thereafter, on December 1, 2006, Complainant's employment was terminated. The closeness in time, coupled with Respondent's refusal to provide Complainant with an explanation for its actions at the time of termination, gives rise to an inference of unlawful discrimination.

The reason that Respondent now provides for its action, that Complainant complained about her job and her salary, is pretextual. Up until her termination, Complainant had received only positive comments on her job performance. Complainant's prima facie case, combined with sufficient evidence that Respondent's proffered explanation for its action is false, would be enough to allow for the conclusion that Respondent unlawfully discriminated. *See Mittl v. N.Y. State Div. of Human Rights*, 100 N.Y. 2d 326, 763 N. Y. S. 2d 518 (2003). In this case, there is the additional credible evidence that Respondent had, in the past, terminated newly hired employees for missing time from work. Shortly before her discharge, Complainant had missed a few hours of work in order to go to doctor appointments related to her hypertension. The evidence therefore, establishes that Respondent unlawfully discriminated against Complainant on the basis of her disability.

The Commissioner has broad powers to redress an injury, including, but not limited to awarding back pay and compensatory damages. Human Rights Law §297.4 (c); *see, also*,

Imperial Diner, Inc. v. State Human Rights Appeal Bd. 52 N.Y.2d 72, 436 N. Y. S. 2d 231 (1980) Complainant, however, has a duty to exercise due diligence to mitigate her damages by making reasonable efforts to obtain comparable employment. *Rio Mar Restaurant v. New York State Div. of Human Rights*, 270 A. D. 2d 47, 704 N.Y.S.2d 230 (1st Dept. 2000) The employment that Complainant found was only part-time, however, and she offered no evidence that she had sought full-time, that is, comparable work. Therefore, no damages for back pay will be awarded.

Complainant is also entitled to reimbursement for the health insurance costs she incurred. The record establishes that Complainant paid \$218 a month for ten months after her discharge. The total health insurance cost was \$2180.

Complainant is also entitled to compensation for mental anguish. This award must be reasonably related to the wrongdoing and comparable to awards for similar injuries. *See State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 575 N.Y. S. 2d 957 (3rd Dept. 1991). Because of the “strong” anti-discrimination policy of the Human Rights Law, a complainant seeking an award for pain and suffering under the Human Rights Law “need not produce the quantum and quality of evidence to prove compensatory damages he would have to produce under an analogous provision.” *Batavia Lodge No. v. New York State Div. of Human Rights*, 35 N.Y. 2d 143, 147, 359 N.Y.S. 2d 25, 28 (1974) Mental injury may be proved by the complainant’s testimony, where supported by reference to the circumstances of the misconduct. *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S. 2d 49, 54 (1991) In this case, Complainant felt humiliated and scared after her unexplained termination. The Division finds the award of \$7,500 for mental anguish is appropriate under the circumstances.

ORDER

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

ORDERED that the caption is hereby amended as follows:

Respondent's name whenever it appears shall be Mohawk Valley Orthopedics, LLP.

ORDERED that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$7, 500 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination against her. Interest shall accrue on the award at the rate of nine per cent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.
2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$2180 as reimbursement for Complainant's health insurance premiums. Interest shall accrue on the award at the rate of nine per cent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.
3. The aforesaid payments shall be made by Respondent in the form of two certified checks made payable to the order of the Complainant, and delivered by certified mail,


return receipt requested, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

Respondent shall furnish proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondent also shall promulgate policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting mechanism for employees in the event of discriminatory and/or harassing behavior or treatment, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. Training shall be provided to all employees. A copy of these policies and procedures shall be provided, within the sixty day timeframe to Caroline Downey, General Counsel of the New York State division of Human Rights, 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 within this Order.

Dated: May 29, 2008

Bronx, New York


Rosalie Wohlstatter
Administrative Law Judge