

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MELINDA S. CHAPMAN,

Complainant,

v.

THE SALVATION ARMY,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10113438

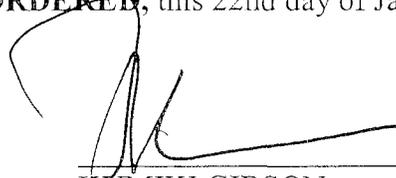
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on December 28, 2007, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was 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 KUMIKI GIBSON, 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, this 22nd day of January, 2008.

A handwritten signature in black ink, appearing to read 'Kumiki Gibson', is written over a horizontal line. The signature is stylized and somewhat cursive.

KUMIKI GIBSON
COMMISSIONER

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

Case No. 10113438

SUMMARY

Complainant suffers from a seizure disorder. She was dismissed from her position at Respondent's Corning, New York, store and alleges that it was because of her disability. Respondent has shown that Complainant's employment was terminated because Respondent believed Complainant had placed merchandise in an unauthorized area and then removed the merchandise from the store without paying for it. As a result, the case must be dismissed.

PROCEEDINGS IN THE CASE

On September 18, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with an unlawful discriminatory practice 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 an unlawful discriminatory practice. 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. A public hearing was held on November 7, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Neil L. Zions, Esq. Respondent was represented by Matthew J. DeMarco, Esq.

Permission to file post-hearing briefs was granted. Division counsel and Respondent’s counsel filed post hearing submissions.

FINDINGS OF FACT

1. Complainant has a seizure disorder, which causes her to have seizures in the early hours of the morning, usually between two and three o’clock. (Tr. 11-12)

2. Complainant was employed by Respondent as a part time clerk on March 28, 2006. (ALJ Exhibit 2; Tr. 11) Complainant did not have seizures during her work hours and the seizures did not prevent her from working. (Tr. 14) Complainant was fired on August 1, 2006. She alleges that she was fired because of her disability. (ALJ Exhibit 2)

3. Judy Donley is the store manager of the Corning, New York, store at which Complainant worked. Donley interviewed and hired Complainant. (Tr. 10-11, 61)

4. Shortly after Complainant began working for Respondent, she told Donley about her seizures. Complainant continued to work, but when her tongue was swollen from having been bitten during a seizure the previous night, Donley asked others to work on the register and answer the phones. (Tr. 14, 63)

5. In or about July, 2006, Complainant noticed a sign in Respondent’s front door seeking additional help. Complainant then asked Donley if she could be given additional hours.

Complainant asserts that Donley refused to give the hours to Complainant and told Complainant she could not have the hours because of her seizures. (Tr. Tr. 18) Donley denied making such a statement. (Tr. 78)

6. In fact, Complainant could not get additional hours because there were none available when Complainant asked for them. Donley had already hired Jennifer Wright, who began working for Respondent on July 18, 2006. (Tr. 65-66)

7. In August of 2006, Complainant was scheduled to be admitted to Strong Memorial Hospital for observations in order to determine the cause of her seizures. (Tr. 16) She asked for, and received, time off for her hospital stay. (Tr. 17-18)

8. When she sought the medical leave, neither Complainant, nor her doctors, knew what was causing the seizures. (Tr. 48)

9. On August 1, 2006, before Complainant began her hospital stay, Respondent terminated Complainant's employment for violating Respondent's Rules of Conduct. Specifically, Respondent terminated Complainant because it was alleged that Complainant violated Rule Number 18, which is "unauthorized sorting or handling of donated material." (Respondent's Exhibits 3 & 5; Tr. 103)

10. Sandra Hostrander, Complainant's co-worker, had informed Donley that on July 29, 2006, Hostrander saw Complainant remove items from the store without paying for them. (Tr. 78-79)

11. Donley then called her supervisor, Perry Rindenow. Rindenow asked for a written statement and, at Donley's request, Hostrander provided one. (Respondent's Exhibit 4; Tr. 88)

12. The written statement was forwarded to Rindenow who also spoke directly with Hostrander. Rindenow relied on Hostrander's statements and determined that Complainant needed to be fired. (Tr. 101-02)

13. After her employment was terminated, Complainant contacted Rindenow. She asserted that she was not treated fairly and denied taking any merchandise from the store. Complainant asked Rindenow to investigate further and Rindenow agreed to do so. (Tr. 111-12)

14. Rindenow visited the Corning store a few days later. He spoke to Hostrander again and sought information from other employees who were present on the day Complainant was accused of taking the merchandise. No one had any further information and, as a result, Rindenow saw no reason to change his decision. (Tr. 113-14)

15. Rindenow was able to demonstrate that from 2003 through 2007 Respondent terminated at least at least four other employees for violating Rule 18. (Respondent's Exhibits 6, 7, 8 & 9; Tr. 105-10)

16. Complainant asserted that she purchased the items she was accused of taking and produced a receipt for the purchase. The receipt Complainant produced, dated July 7, 2006, did not identify any items that were purchased. (Complainant's Exhibit 3; Tr. 46) Complainant was accused of mishandling merchandise received by Respondent on July 29, 2006. (Respondent's Exhibit 5)

OPINION AND DECISION

An employer may not fire or otherwise discriminate against an employee on the basis of his or her disability unless that disability precludes the employee from performing the essential duties of the job. Human Rights Law §296.1(a). *See also, Miller v. Ravitch*, 60 N.Y.2d 527 (1983).

In order to prevail, the Complainant must first make out a prima facie case by showing that she is a member of a protected class, she was capable of performing the duties of the job in a reasonable manner and Respondent terminated Complainant's employment under circumstances that could lead one to infer that she had been discriminated against. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *McEniry v. Landi*, 84 N.Y.2d 554, 620 N.Y.S.2d 328 (1994). If the Complainant succeeds in establishing a prima facie case, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its actions. Thereafter, the complainant must demonstrate that the reasons offered by the respondent are merely a pretext for unlawful discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Complainant in the instant case has established a prima facie case. She has shown that she suffers from a disability, that she was performing her job and that she was fired after she sought permission for a leave of absence to attend to her disability.

Respondent counters with evidence that it received information that Complainant had mishandled merchandise, in violation of Respondent's Rules of Conduct. The store manager, Donley, passed the information on to her supervisor, Rindenow, who investigated the matter twice. Respondent takes its Rules of Conduct seriously and has terminated the employment of others for violating the same rule. There is no evidence that Respondent considered Complainant's disability in any way during this process.

Complainant has not shown that Respondent's stated reason for terminating Complainant was a pretext for discrimination. She asserts that she did not take anything from the store, and presents a receipt in support of this claim. The receipt, however, offers no support for her claim.

It is a receipt for a sale that occurred three weeks before Complainant is alleged to have violated Respondent's rules. Rindenow, who ultimately made the determination to fire Complainant, relied on information he received from Donley and Hostrander. He believed Complainant violated Rule 18 and acted accordingly. Respondent was willing to give Complainant leave for her hospital stay and there is no evidence that Respondent's stated reason for firing Complainant was a pretext for unlawful discrimination based upon disability. The Complainant's case 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 case be, and the same hereby is, dismissed.

DATED: December 28, 2007
Bronx, New York



Thomas S. Protano
Administrative Law Judge