

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

IRENE C. EMMA,

Complainant,

v.

**KRAMER & RUBIN, PLLC, RUBIN &
ROSENBLUM, PLLC,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10114118

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 23, 2009, 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.

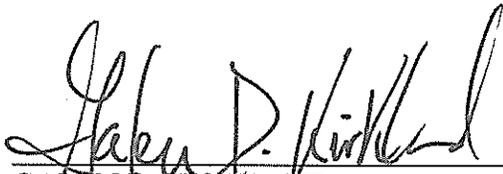
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **JUN 19 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

State Division of Human Rights
Enforcement Unit
Sharon J. Field, Director of Prosecutions
One Fordham Plaza, 4th Floor
Bronx, New York 10458

April 23, 2009
Administrative Law Judge

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**NEW YORK STATE
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on the Complaint of

IRENE C. EMMA,

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v.

**KRAMER & RUBIN, PLLC, RUBIN &
ROSENBLUM, PLLC,**

Respondents.

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

Case No. **10114118**

SUMMARY

Complainant alleged that Respondents discriminated against her by terminating her employment because of her age and disability. Since the record does not support Complainant's charges of unlawful discrimination, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 19, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 February 9-10, 2009.

Complainant and Respondents appeared at the hearing. Complainant was represented by Raymond Nardo, Esq. Respondents were represented by Lynne Adair Kramer, Esq. and Ralph R. Hochberg, Esq.

FINDINGS OF FACT

1. Complainant was born on November 19, 1941. (Tr. 8)
2. From in or about 1985 until September 2006, Complainant worked as a legal assistant for various law firms practicing in the area of matrimonial law. (Tr. 21-25, 37)
3. Lynne Adair Kramer, Esq. is an attorney practicing in the area of matrimonial law since the late 1970s. (Tr. 260, 263)
4. In or about 2001, Kramer became a partner at the law firm Tabat, Cohen, Blum & Kramer ("TCBK"). (Tr. 265-66) At this time, Kramer first met Complainant, who had been working at TCBK as a legal assistant. (Tr. 22, 266-67)
5. In 2003, Kramer left TCBK and started her law practice, Kramer & Rabinowitz. (Tr. 263, 267)
6. In 2003, TCBK terminated Complainant's employment. (Tr. 119-20) Kramer, who had already left TCBK, was not involved in the decision to terminate Complainant's employment with TCBK. (Tr. 120, 268)
7. Kramer hired Complainant to work as a legal assistant at Kramer & Rabinowitz in February or March 2004. (Tr. 23, 27, 221-22, 270) In 2006, Kramer "fired" Rabinowitz, and Kramer named Debra Rubin, Esq. to be her partner in Respondent law firm Kramer & Rubin, PLLC ("K & R") in the spring of 2006. (Tr. 25, 428) Kramer retained Complainant as an employee of K & R. (Tr. 221-22)

8. Rubin was a partner at K & R in name only. (Tr. 480) She did not have an equity interest in the firm, had no managerial authority, and had no authority to hire or fire employees. (Tr. 225, 245, 275, 428-29; Complainant's Exh. 7) Rubin continued to work for Kramer as a salaried employee, and Kramer retained sole managerial authority in the firm. (Tr. 225, 275, 428-29, 431) During her employment with K & R, Complainant's W-2 statement listed Kramer as Complainant's employer. (Complainant's Exh. 1)

9. In or about the spring of 2006, Kramer assigned Complainant to work as a legal assistant for Rubin. (Tr. 24-25, 427) Although Complainant was a competent legal assistant, the record is replete with testimony establishing that her work relationship with Rubin was poor. (Tr. 157, 240-43, 273, 281, 283, 401-03, 405, 429-35, 478, 504) Rubin found Complainant to be uncooperative and inconsistent in completing tasks assigned to her by Rubin. (Tr. 429-34) Rubin, who did not have the authority to discipline or discharge Complainant, felt like she was "walking on eggshells" working with Complainant. (Tr. 430-32)

10. Although Rubin brought this matter to the attention of Kramer and Rose Bonn, the office manager at K & R, the work relationship between Complainant and Rubin did not improve. (Tr. 28-29, 162, 240-43, 433-35, 456-58)

11. In or about 1996, Complainant suffered a torn meniscus in her knee, and she had difficulty going up and down stairs. (Tr. 33, 98) In the spring of 2006, Complainant informed Kramer and Bonn that she had scheduled knee replacement surgery in August 2006. (Tr. 35) Complainant underwent knee replacement surgery on August 22, 2006, and she was scheduled to be out of work for approximately three months. (Tr. 8-9, 34-36)

12. Deborah Cruger, a thirty-two year old part-time legal assistant at K & R, worked full-time as Rubin's legal assistant while Complainant was out of work on disability leave. (Tr. 379,

386-87, 389, 398, 409, 437, 479) At that time, Cruger had paralegal training and roughly ten years of experience as a legal assistant. (Tr. 318, 325, 380-86, 405) Rubin appreciated Cruger's superior work ethic and enjoyed an excellent work relationship with her. (Tr. 405-06, 437-38)

13. In late August or early September 2006, Kramer received notice that she was chosen for a full-time faculty position at Touro College, Jacob D. Fuchsberg Law Center ("Touro"). (Tr. 9, 220, 272-74) Kramer accepted the position, terminated the business operations of K & R and discharged all of its employees effective early October 2006. (Tr. 37-38, 95, 103, 134, 228, 272-74, 276-77, 288, 306-07, 392, 400, 439)

14. Shortly after Kramer announced the dissolution of K & R, Rubin and Gayle Rosenblum, an associate attorney with K & R, decided to form their own law firm, Respondent Rubin & Rosenblum, PLLC ("R & R"). (Tr. 307-11, 439-42)

15. Complainant was out of work on disability leave at the time of Kramer's announcement, and Kramer instructed Rubin to notify Complainant about the dissolution of the firm and the termination of Complainant's employment. (Tr. 8-9, 37, 204, 277-78) Rubin called Complainant on the telephone in September 2006 and informed her that Kramer had discharged all of the employees of K & R because Kramer had accepted a full-time faculty position at Touro. (Tr. 37-38, 95, 443)

16. Complainant alleged that, during this telephone conversation, Rubin told Complainant that Complainant was "burnt out." (Tr. 38; ALJ's Exh. 1)

17. Complainant initially testified that Rubin also told Complainant that Complainant was "getting old." (Tr. 38) Complainant did not raise this allegation in her complaint, and she recanted this testimony during cross-examination. (Tr. 94-95; ALJ's Exh. 1)

18. At the time K & R ceased its operations, it employed approximately fifteen people. (Tr. 91-93, 238, 312-13) R & R, a much smaller firm than K & R, could not offer employment to all of the former employees of K & R. R & R offered employment to those former employees of K & R who had the best work ethic and were best suited to the needs of the new firm and the personalities of the two managing partners, Rubin and Rosenblum. (Tr. 238-40, 280, 311-19, 442, 444-45, 463)

19. When R & R began its operations, the firm employed approximately eight individuals. (Tr. 239-40, 312-13) The firm currently has six employees. (Tr. 321-22, 450)

20. R & R hired Cruger to work as Rubin's legal assistant because she was a "team player" and had an excellent work relationship with Rubin. (Tr. 317, 392, 398, 405, 437-38) R & R also hired Mary Anne Greenfield, a sixty-five year old legal assistant who had worked at K & R, to work as Rosenblum's legal assistant. Greenfield was hired because she was a "team player" and had an excellent work ethic. (Tr. 71, 88, 314, 318-19, 358-59, 364, 366)

21. R & R did not hire Complainant. (Tr. 39, 315, 444) Rubin did not wish to hire Complainant because of their poor work relationship at K & R. (Tr. 444-45) Rosenblum also chose not to hire Complainant because she had negative experiences working with Complainant when Rosenblum was a newly admitted attorney. Rosenblum felt that Complainant was uncooperative and did not respect her. Rosenblum also learned about negative comments that Complainant made about her to co-workers. (Tr. 316-17, 326-27, 330-32, 366)

22. Kramer played no role in the decision not to hire Complainant at R & R. Kramer worked part-time as a contract partner at R & R and had no equity interest or managerial authority in the firm. (Tr. 163, 179, 230, 235-36, 312-13, 322, 352, 365, 407-08, 441-42, 449; Complainant's Exh. 7)

23. R & R did not assume any of the liabilities of K & R and was not obligated to represent clients referred to the firm by Kramer. (Tr. 196, 233-34, 319-21, 365; Complainant's Exh. 7)

OPINION AND DECISION

Complainant cannot sustain her claims of age and disability discrimination. It is unlawful for an employer to discriminate against an employee on the basis of age or disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). 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 Respondents' actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondents to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for their employment decision. The ultimate burden rests with Complainant to show that Respondents' proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant has failed to show that the termination of her employment from Respondent K & R was in any way related to her age or disability. The undisputed facts establish that Kramer, the sole managerial and equity partner at K & R, terminated K & R's business operations and discharged all of its employees because Kramer accepted a full-time faculty position at Touro. There is no inference of discrimination when the facts firmly establish that Kramer, the same individual who hired Complainant to work for K & R roughly six months earlier, universally discharged all of the employees of K & R for a legitimate, nondiscriminatory purpose. The record shows that none of the discharged employees were replaced, and K & R

ceased its business operations shortly after Kramer's announcement.

Rubin was not a managerial or equity partner at K & R and, after Rubin's employment at K & R was terminated, she formed a new firm, Respondent R & R. Rubin and Rosenblum were the only two managerial partners at R & R. K & R did not engage in any unlawful discriminatory conduct that could give rise to successor liability on the part of R & R.

Although Complainant did not explicitly allege that R & R refused to hire Complainant because of her age or disability, the pleadings are conformed to the proof to include these allegations. *See* 9 N.Y.C.R.R. § 465.12(f)(14). However, these charges cannot be sustained.

Complainant was a member of an age-protected class, was qualified for the position of legal assistant, and was not offered a position by R & R. However, Complainant did not apply for a position with R & R, and there is nothing in the record giving rise to an inference of unlawful discrimination.

Complainant did not show that anyone associated with R & R acted with discriminatory animus. In September 2006, Rubin called Complainant on the telephone to inform her that Kramer discharged all of the employees of K & R because Kramer accepted a full-time faculty position at Touro. Complainant initially testified that, during this telephone conversation, Rubin told Complainant that Complainant was "getting old." Complainant did not raise this allegation in her complaint, and she recanted this testimony during cross-examination.

Complainant also alleged that Rubin told Complainant that Complainant was "burnt out." This ambiguous, isolated remark is the only evidence of discriminatory animus offered by Complainant, and it is insufficient to establish a viable claim. It is well settled that stray remarks, even if made by a decision-maker, do not constitute sufficient evidence to make out a claim of employment discrimination. *See Moon v. Clear Channel Communications, Inc.*, 307

A.D.2d 628, 632, 763 N.Y.S.2d 157, 161 (3d Dept. 2003).

R & R, a much smaller firm than K & R, could not hire all of the former employees of K & R. R & R offered employment to those former employees of K & R who had the best work ethic and were best suited to the needs of the new firm and the personalities of the two managing partners, Rubin and Rosenblum.

R & R hired the thirty-two year old Cruger to work as Rubin's legal assistant because she was an experienced legal assistant with paralegal training, was a "team player" and had an excellent work relationship with Rubin. The record also shows that R & R hired Greenfield, who is similar in age to Complainant, to work as Rosenblum's legal assistant. R & R did not hire Complainant because she had a poor work relationship with both Rubin and Rosenblum.

Finally, there is nothing in the record supporting an inference that R & R did not hire Complainant because of her disability. In order to accommodate Complainant's knee replacement surgery, K & R granted Complainant disability leave to allow her a reasonable time for recovery. *See* 9 N.Y.C.R.R. § 466.11(i)(1). Kramer discharged all of the employees of K & R while Complainant was out of work.

Complainant did not show that anyone associated with R & R acted with discriminatory animus. Furthermore, there is nothing in the record showing that Complainant actively sought employment with R & R or proposed a reasonable accommodation that R & R refused to provide. The record establishes that the two managing partners of R & R, Rubin and Rosenblum, did not hire Complainant based on legitimate business reasons related to their past work relationships with Complainant.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondents intentionally discriminated against her. *See Bailey v. New York Westchester Square*

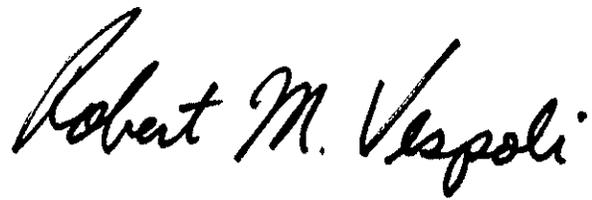
Med. Ctr., 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to meet this burden.

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: April 23, 2009
Hempstead, 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