

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JULIE ENYIEMA,

Complainant,

v.

WORKMEN'S CIRCLE MULTICARE CENTER,
Respondent.

NOTICE AND
FINAL ORDER

Case No. 10113502

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 12, 2008, by Edward Luban, 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.

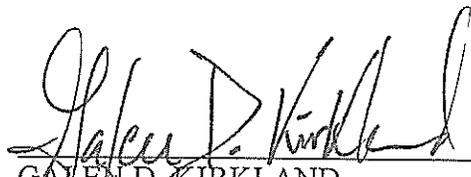
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **FEB 11 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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DIVISION OF HUMAN RIGHTS

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WORKMEN'S CIRCLE MULTICARE
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RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 10113502

SUMMARY

Complainant alleged that Respondent unlawfully terminated her employment because of her age and her national origin. Because Complainant failed to sustain her burden of proof, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On August 24, 2006, 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 February 1, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield, Esq. Respondent was represented by Joel E. Cohen, Esq.

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

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division.

FINDINGS OF FACT

1. Complainant is a Black woman of Nigerian origin. She was born on July 23, 1948. (Tr. 6, 117)
2. On January 19, 2004, Respondent hired Complainant as a nursing supervisor. (Tr. 6, 87) Complainant was 55 years of age at the time she was hired. (Tr. 117) Complainant worked on the evening shift. (Tr. 88)
3. In or about June 2006, Beverly Gumbs became Respondent's Director of Nursing Services ("DNS"), and Meldia Knibbs became an Assistant Director of Nursing Services ("ADNS").¹ Knibbs was in charge of the evening and night shifts. (Tr. 88)
4. Gumbs and Knibbs are Black women who were over 50 years of age during Complainant's tenure with Respondent. (Tr. 117-18, 128, 161) Gumbs is West Indian, and Knibbs is Panamanian. (Tr. 89, 161)
5. Yvonne Thompson, who is also West Indian, worked for Respondent as a nurse's aide. (Tr. 129, 171) On one occasion before May 2006, Complainant asked Thompson to shower a patient. Thompson refused, and she asked Complainant whether Africans showered. (Tr. 133,

¹ Neither Gumbs' nor Knibbs' first name was identified at the public hearing. These names were provided for the first time in Respondent's post-hearing Memorandum of Law.

169-70, 171-72). Complainant reported the incident; Respondent subsequently suspended Thompson for two weeks. (Tr. 133-34, 169-70, 171-72)

6. On June 20, 2006, Complainant noticed that four nursing supervisors were scheduled to work on June 21, 2006, while only two were scheduled to work on June 22, 2006. Complainant, who was scheduled to work on June 21 and to be off on June 22, decided to take off June 21 and work June 22 instead, so that three nursing supervisors would be working each night. (Tr. 138-39; Complainant's Exh. 2)

7. On June 28, 2006, Complainant was suspended for assigning herself a holiday on June 21 when she had been previously informed that all schedule changes must be approved by an ADNS, and for engaging in inappropriate behavior when she addressed the issue with nursing administrators. Complainant's initial suspension was for 10 days, but Brandy Shiloh, Respondent's Human Resources ("HR") Director, reduced it to five days. (Tr. 97, 99, 100-01; Complainant's Exh. 3)

8. Complainant was suspended effective June 27, 2006 through July 3, 2006. She was scheduled to return to work on July 4, 2006. (Tr. 101; Complainant's Exh. 3) However, she did not return to work until July 18, 2006. (Tr. 107)

9. On June 28, 2006, the same day she was suspended, Complainant verbally asked Gumbs for a two-week leave of absence for health reasons. (Tr. 105, 143-44, 155-56, 157) At the public hearing, Complainant testified that she made this request in writing, and she presented a document she identified as a copy of her request for a leave of absence. (Tr. 105-06; Complainant's Exh. 6)

10. Respondent requires that requests for leaves of absence be approved or disapproved in writing. (Tr. 173-74) When a leave of absence is approved, the change is reflected in the nursing schedule. (Tr. 151-52, 184, 195).

11. There was no documentation in Respondent's HR, payroll, or nursing records that Complainant requested a leave of absence on June 28, 2006 or that a leave of absence was approved. (Tr. 174, 184-86, 189-90, 195-96)

12. The nursing schedule for July 2006 did not show that Complainant was granted a leave of absence. (Tr. 185, 195; Respondent's Exh. E) Complainant was scheduled to work on July 6, 7, 8, 9, 10, 12, 13, 14, 17, and 18. (Respondent's Exh. E)

13. In her verified complaint, Complainant did not allege that she submitted a written request for a leave of absence. (ALJ Exh. 1) At the public hearing, Respondent's attorney asked Complainant when she first gave the Division a copy of the document she described as her written request for a leave of absence. Complainant was unable to answer this question. (Tr. 158-59)

14. Given the lack of any record of a request for a leave of absence, Complainant's failure to allege a written request in her complaint, Complainant's failure to mention the written request before the public hearing, and Complainant's failure to produce a written response to her request or to allege that she received a written response, I find neither Complainant's testimony that she requested a leave of absence in writing nor the document she claimed was her written request to be credible.

15. Gumbs left Respondent's employ on July 7, 2006. (Tr. 192) On July 10, 2006, Cynthia Goodstein replaced Gumbs as DNS. (Tr. 183-84) Goodstein was born on December 26, 1954 and was 52 years of age when hired. (Tr. 198)

16. When Goodstein began working as DNS, Knibbs told her that Complainant was not at work. (Tr. 187-88, 193) Goodstein contacted Steven Freifeld, Respondent's Administrator, and HR to find out whether Complainant was coming back to work. (Tr. 188, 189). Goodstein also asked her secretary, Knibbs, and HR to call Complainant. (Tr. 194)

17. On July 18, 2006, when Complainant came back to work, she introduced herself to Goodstein. Goodstein told Complainant to report to HR. (Tr. 107-08)

18. Complainant then met with Shiloh and Freifeld. Shiloh gave Complainant a letter terminating her employment for "job abandonment" because she had failed to show up for work July 6 through July 18. (Tr. 108-10; Complainant's Exh. 7) The notice was signed by Goodstein and Freifeld. (Complainant's Exh. 7)

19. Complainant never told Goodstein that she had a written document showing she had applied for a leave of absence. (Tr. 187)

20. Complainant admitted that she did not know whether Goodstein knew what country she came from. (Tr. 120) At the time Goodstein decided to terminate Complainant's employment, she did not know how old Complainant was or where she was born. (Tr. 188-89, 198)

21. Complainant's employment was terminated because she failed to show up for work. (Tr. 184, 191)

22. Complainant was not aware of any other Nigerians or Africans who worked in nursing administration during her tenure with Respondent. (Tr. 111, 122)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discharge an employee on the basis of age or national origin. Human Rights Law § 296.1(a). Complainant has the initial

burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class, that she was qualified for her position, that she was terminated from employment or suffered another adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305, 786 N.Y.S. 2d 382, 390 (2004). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reasons Respondent has presented were merely a pretext for discrimination. *Id.* The ultimate burden of proof always remains with Complainant. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 630, 665 N.Y.S. 2d 25, 29 (1997).

Complainant was a member of a protected class, she was qualified to be a nursing supervisor, and Respondent terminated her employment. However, Complainant failed to show that her age or her national origin played any role in Respondent's decision to discharge her. Complainant was 55 years old and was already a member of the protected class when Respondent hired her. "As many courts have recognized, there is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status." *Youth Action Homes, Inc. v. State Division of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). Complainant offered no evidence that anyone made any derogatory comments about her age after she was hired. In addition, Gumbs, Knibbs, and Goodstein, Complainant's supervisors, were also over 50 years of age. This further weighs against any inference of age discrimination.

The record contains no evidence to support Complainant's allegation of national origin discrimination. Goodstein testified that she did not know where Complainant was born.

Complainant conceded that she did not know whether Goodstein knew what country she came from, and she produced no evidence to support her allegation that her superiors knew she was Nigerian or African. The only indication that any of Respondent's employees knew Complainant's national origin was a remark made by Thompson, who was Complainant's subordinate. Respondent suspended Thompson promptly after she made this remark. Absent evidence that Complainant's superiors were aware of Complainant's national origin, there is no basis to infer discrimination. In addition, the evidence establishes that Complainant's employment was terminated not because of unlawful discrimination but because Complainant failed to show up for work for two weeks.

Complainant did not sustain her burden of proof. Therefore, the 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 complaint be and the same hereby is dismissed.

DATED: December 12, 2008
Syracuse, New York



Edward Luban
Administrative Law Judge

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