

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JEAN E. FRANCIS,

Complainant,

v.

WORKMEN'S CIRCLE MULTICARE CENTER,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10111669

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal (“Recommended Order”), issued on December 1, 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.

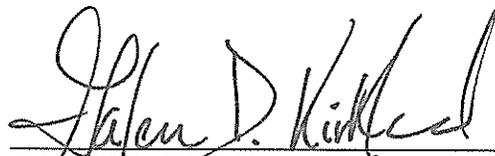
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **JAN 28 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**WORKMEN'S CIRCLE MULTICARE
CENTER,**

Respondent.

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

Case No. 10111669

SUMMARY

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

PROCEEDINGS IN THE CASE

On May 10, 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 Wm. 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 was born on April 16, 1946. (Tr. 6) At the time her employment was terminated, Complainant was 59 years of age.

2. Complainant was employed by Respondent from February 18, 1983 to March 3, 2006. Complainant's last job title was payroll director. (Tr. 6)

3. Arthur Cooperberg, Respondent's Chief Financial Officer, was Complainant's supervisor. (Tr. 36, 69, 77) Cooperberg was born on April 28, 1964. (Tr. 69)

4. In September 2003, Laura Smith became Respondent's Assistant Director of Finance. (Tr. 57). Smith was born on April 12, 1977. (Tr. 57) She is now known as Laura Valentine. (Tr. 56)

5. Complainant felt that Smith harassed and mistreated her. (Tr. 12-13, 17; Complainant's Exh. 4) Smith considered Complainant's job performance satisfactory, but she felt Complainant

was disrespectful. (Tr. 58) However, as of March 2006, Smith believed she and Complainant were getting along well. (Tr. 65, 66)

6. One morning in or about March 2006, Smith arrived at work, went into her office, and found her voice mail light on. She reached for the phone and found that the receiver was stuck; there was a sticky glue-like substance on it. Smith found the same substance on the top of her computer mouse. (Tr. 60-62)

7. Smith immediately called Cooperberg, who was not yet in his office. (Tr. 61, 72) Cooperberg told her to stay in his office and wait until he arrived. (Tr. 63, 72).

8. Cooperberg came in about 15 minutes later. (Tr. 63, 73) He immediately went to Smith's work area, touched the phone and mouse, and felt the sticky substance. (Tr. 72-73)

9. Cooperberg asked everyone in the department whether they had seen anything, but nobody had. (Tr. 73) There was a surveillance camera in the finance department. Cooperberg asked Steven Freifeld, Respondent's Administrator, for permission to view the videotape from the time Smith left work the previous day to the time she discovered the vandalism that morning. (Tr. 63, 73-74)

10. Cooperberg and Smith viewed the tape. (Tr. 63-64, 74) The tape showed the hallway outside Smith's office area but not inside the office itself. (Tr. 51, 64). The tape showed that only two people, Complainant and Tamika Darby, were in or close to Smith's work area between the time Smith left the day before and the time she came in that morning. (Tr. 64)

11. Darby was in Smith's work area for two to three seconds. (Tr. 65) She would not have had time to go to Smith's phone, which was at the other end of Smith's cubicle. (Tr. 65)

12. Complainant was in Smith's work area for 20 to 30 seconds. (Tr. 64) When Complainant left Smith's area, she had a tissue in her hand. The tape showed Complainant smelling the tissue and wiping her hands. (Tr. 68, 74)

13. Cooperberg asked Respondent's Human Resources ("HR") director; its Labor Relations director; David Londin, Executive Director; and Freifeld to view the tape. (Tr. 74) After Londin viewed the tape, he agreed that Complainant had committed the vandalism and should be terminated. (Tr. 74-75, 76)

14. Londin is in his 50's. (Tr. 48)

15. Brandy Shiloh and Guyanne Christphonte called Complainant into HR and told her she was terminated effective immediately. (Tr. 27) Shiloh and Christphonte explained that Complainant was accused of putting something on Smith's phone and computer mouse. (Tr. 48-49). Complainant denied the accusation. (Tr. 49) Smith and Christphonte then showed Complainant the surveillance tape. (Tr. 50-51)

16. Complainant's duties required her to go into Smith's area to get a binder to call in payroll taxes. However, payroll taxes had been called in earlier that week. (Tr. 78) On the surveillance tape, Complainant was not holding a binder. (Tr. 78)

17. Denise Gonzalez replaced Complainant as payroll manager. (Tr. 44, 71) Gonzalez was born on August 4, 1957 and is approximately 11 years younger than Complainant. (Respondent's Exh. 3) Gonzalez still served as payroll manager at the time of the public hearing. (Tr. 71)

18. Complainant's sister, Valerie Stevens, was born on July 4, 1949. (Tr. 46; Respondent's Exh. 3) At the time of the public hearing, Stevens was still employed in Respondent's finance department as accounts receivable manager. (Tr. 45-46, 70)

19. Audrey Chapman, who is in her 50's, also worked in the finance department at the time of the public hearing. (Tr. 47, 70)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discharge an employee on the basis of age. 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 actively or constructively discharged, and that the discharge occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). 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*, 90 N.Y. 2d at 630, 665 N.Y.S. 2d at 29.

Complainant is a member of a protected class and was qualified for her position, which she held for many years. Complainant suffered an adverse employment action when her employment was terminated. Finally, Complainant's termination occurred in circumstances that give rise to an inference of discrimination: Her replacement, Gonzalez, was 11 years younger than Complainant. Therefore, Complainant has established a prima facie case.

However, Respondent has presented evidence of a legitimate, non-discriminatory reason for discharging Complainant. Respondent had a good-faith belief, based on a surveillance tape, that Complainant vandalized Smith's work area. Respondent confronted Complainant with this

accusation and allowed her to view the tape before it discharged her. At that time, Complainant denied that she vandalized Smith's office, but she did not offer a legitimate explanation for what the tape showed.

Complainant failed to prove that Respondent's explanation for her discharge was a pretext for discrimination. First, Complainant failed to rebut Respondent's evidence about the incident. According to testimony from Smith and Cooperberg, the surveillance tape showed that Complainant was the only person who was in Smith's work area long enough to have committed the acts of vandalism; that when Complainant left the area she was holding a tissue, smelled it, and wiped her hands; that the only legitimate reason Complainant had to be in Smith's work area was to get the payroll taxes binder; that payroll taxes had been called in earlier that week; and that Complainant was not carrying the binder when she left Smith's work area. Complainant offered no evidence to rebut this testimony. Significantly, when Complainant testified, she did not deny that she committed the acts of vandalism.

In addition, Complainant offered no evidence to support her claim of age discrimination, except to note that Smith, who Complainant claimed mistreated her, was in her 20's. However, Londin, who approved Cooperberg's decision to discharge Complainant, was himself over 50 years of age. Moreover, the finance department continued to employ Complainant's sister and Chapman, both of whom were over 50 years of age, after Complainant was discharged. Finally, Gonzalez, who was 48 years old when she replaced Complainant, remained payroll manager when she was over 50 years of age.

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 1, 2008
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge