

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

NANCY L. HARRISON,

Complainant,

v.

**CHESTNUT DONUTS, INC. D/B/A DUNKIN'
DONUTS,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10115274

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 January 17, 2008, by Christine Marbach Kellett, 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”), WITH THE FOLLOWING AMENDMENT:

- The Recommended Order contains a typographical error. The Human Rights Law provision at issue in this matter is Section 296.3(a), not Section 296.3-a(a) as stated. The remainder of the Recommended Order is adopted and approved in full.

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 8th day of February, 2008.



KUMIKI GIBSON
COMMISSIONER

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on the Complaint of

NANCY L. HARRISON,

Complainant,

v.

**CHESTNUT DONUTS, INC. D/B/A DUNKIN'
DONUTS,**

Respondent.

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

Case No. **10115274**

SUMMARY

Complainant charged Respondent terminated her employment because she had a disability. Respondent established non-discriminatory reasons for complainant's termination. Complainant did not establish that Respondent's reasons were a pretext for illegal discrimination. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On January 10, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on September 11, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by James E. Konstanty, Esq.. Respondent was represented by Andrew B. Howard, Esq.

Permission to file post-hearing briefs was granted. The attorneys timely filed post-hearing submissions.

FINDINGS OF FACT

1. Complainant charged Respondent with unlawful discriminatory practices in violation of the Human Rights Law based upon disability when Respondent terminated her employment on October 14, 2006. (ALJ’s Exh. 1)
2. Respondent denied the charges. (ALJ’s Exh. 3)
3. Since 1992 Complainant has been diagnosed with multiple sclerosis (“M.S.”). (Tr. 131)
4. The MS has affected her ability to walk so that she uses a wheel chair, crutches or a walker for walking or standing. (Tr. 132)
5. In July 2006 she approached Viola (Vicki) Wycoff (“Wycoff”), the manager of the Chestnut Donuts store in Oneonta about a job. (Tr. 135)
6. Wycoff hired her on July 10, 2006, and found an office chair that permitted Complainant to work at the drive-thru window, where Complainant collected the money and handed the customers their orders. (Tr. 135-36)

16. Metcalf discovered Wycoff had never written up an employee. (Tr. 334-38)

17. Complainant's witnesses agreed that Wycoff seldom discussed complainants individually with an employee; rather she used a global approach, speaking to the employees as teams needing improvement, rather than as individual employees. (Tr. 37-38, 43-44, 64-65, 76, 78-79, 88-90, 102, 106-07, 111-13, 122-23)

18. On October 13, 1996, when Complainant went to work she found she was no longer on the schedule for the following week. (Tr. 139-40)

19. She called the new manager and he told her he was letting her go. (Tr. 140)

20. He then turned the phone conversation to Leal, who told her over the phone that they were downsizing the staff and letting her go because it was not fair to keep her when she could not do the whole job. (Tr. 141, 249, 367, 404-406)

21. Metcalf had looked at several factors in determining who to let go including known complaints, and seniority. (Tr. 352, 355-57, 409-10, 418, 429)

22. On October 14, 2006, Complainant and five other employees including Wycoff were terminated. (Respondent's Exh. 3; Tr. 359-60).

23. On October 22, 2006, two other co-workers were terminated. (Respondent's Exh. 3)

24. In total, sixteen individuals at the Chestnut Donuts store were terminated between October 12, 2006, and December 2006. (Respondent's Exh. 3; Tr. 50, 86, 117, 232, 368-430)

25. By early January when Complainant returned to the store to get coffee, she did not recognize more than one person as a former co-worker. (Tr. 64-65, 112-13)

1308, 665 N.Y.S.2d 25 (1997).

Complainant is a person with a disability. She has MS, which meets the definition of a disability under Human Rights Law section 292 (21). She is therefore in a protected class. Complainant was hired for a position of crew member, and her employment infers she was qualified for the position. Complainant's subsequent termination is an adverse employment action. The circumstances, including the comment by Leal that her employment was unfair to the other crew members because she could not do certain tasks gives rise to an inference of disability discrimination. Complainant established a prima facie case of discrimination based upon disability.

Respondent described the situation in which it found its manager had violated its internal and external rules, including stealing from Respondent. Upon review of Wycoff's management, Respondent determined it was overstaffed. Respondent terminated more than a third of its staff, including Complainant. The criteria used in selecting employees for termination, including seniority and number of customer complaints, were unrelated to Complainant's disability. The other employees who were terminated at the same time as Complainant or shortly thereafter are not identified as having disabilities.

The burden of proof in a discrimination complaint belongs to the complainant. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25 (1997). The complainant has failed to meet that burden. The complaint should 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: January 15, 2008
Bronx, New York

A handwritten signature in cursive script that reads "Christine Marbach Kellett".

Christine Marbach Kellett
Administrative Law Judge