

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**  
on the Complaint of

**RENEE IFRAH,**

Complainant,

v.

**COMMUNITY HEALTH CENTER OF BUFFALO,  
INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10105630

**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 July 30, 2008, by Spencer Phillips, 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”), WITH THE FOLLOWING AMENDMENTS:**

- Complainant’s backpay award is not “subsumed” within the remaining damage award as set forth in the Recommended Order. Instead, no back pay is awarded, as there is insufficient evidence in the record on which to base an award.
- The award of \$50,000 for the mental anguish Complainant suffered is justified by

the evidence presented of the degree and duration of Complainant's suffering and the severity of the discriminatory conduct. *See State Div. of Human Rights v. ARC XVI Inwood, Inc.*, 17 A.D.3d 239 (1st Dept. 2005); *New York State Dept. of Correctional Servs. v. State Div. of Human Rights*, 28 A.D.3d 906 (3d Dept. 2006). Complainant suffered from chronic anxiety and depression related to the hostile treatment she suffered at work. (Tr. 22) She suffered from post-traumatic stress disorder. (Tr. 63) She had difficulty sleeping and concentrating. (Tr. 2, 631) She sought and received counseling for approximately two months. (Tr. 24, 55, 61-62) She was prescribed anti-depressant medication. (Tr. 22-23) The damage award is appropriate for the degree of suffering Complainant experienced specifically as a result of Respondent's discriminatory actions. The award is made with consideration of the evidence that factors outside of the discrimination contributed to Complainant's state. It is noted that to the degree Complainant suffered anxiety and depression, Respondent's discriminatory conduct exacerbated Complainant's suffering. (Tr. 55, 63-64)

- It is further noted that Respondent is ordered to make payment within 60 days of the issuance of this Final 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: **MAY 29 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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HUMAN RIGHTS**

on the Complaint of

**RENEE IFRAH,**

Complainant,

v.

**COMMUNITY HEALTH CENTER OF  
BUFFALO, INC.,**

Respondent.

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

Case No. **10105630**

**SUMMARY**

Complainant alleged that Respondent subjected her to unlawful retaliatory treatment after she opposed conduct prohibited by the Human Rights Law. The Division finds that Respondent retaliated against Complainant. Complainant is entitled to relief in the form of an award for mental anguish.

**PROCEEDINGS IN THE CASE**

On May 11, 2005, 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 Martin Erazo, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held in Buffalo, New York on November 7-8, 2007. Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent was represented by Edward A. Trevvett, Esq. Following ALJ Erazo’s departure from state service, the Division assigned ALJ Spencer D. Phillips to review the record and render the recommended findings of fact, opinion and decision, and order.

Permission to file post-hearing briefs was granted. Complainant and Respondent each submitted timely post-hearing briefs.

### **FINDINGS OF FACT**

1. Renee Ifra (“Complainant”) alleged that her supervisor subjected her to unlawful discriminatory treatment because of her disability while she was employed by the Community Health Center of Buffalo, Inc. (“Respondent”). (ALJ’s Exh. 1 )
2. Respondent denied unlawful discrimination in its verified Answer. (ALJ’s Exh. 3)
3. Complainant worked as Respondent’s Director of Nursing from June 1, 2004 until March 24, 2005. (ALJ’s Exh. 1; Tr. 179-80)
4. Complainant weighed between 269-299 lbs. while employed by Respondent, and is five feet, six inches tall. (Tr. 208-09)
5. Complainant has been medically diagnosed as ‘morbidly obese.’ (Complainant’s Exh. 1)
6. Sandra DiPasquale was Respondent’s CEO and Complainant’s supervisor at all times relevant to this complaint. (Tr. 318)

7. In August 2004, DiPasquale and Complainant jointly interviewed a job candidate. After the interview, Complainant recommended the candidate be hired. DiPasquale stated that she “didn’t think it looked right to have an overweight person in [a Nurse Educator] position” and that she “did not want somebody who was fat teaching patients how to diet and exercise.” (Tr. 121-22, 183-84)

8. Complainant told DiPasquale it was very unfair not to hire candidates on the basis of weight and that weight has nothing to do with a person’s credentials. Complainant also acknowledged that she was overweight. (Tr. 184)

9. DiPasquale replied that Complainant was only hired because she “came with a promise to lose weight” and because DiPasquale was “desperate” to fill the Director of Nursing position. (Tr. 184-85, 323-24)

10. Complainant did not make a promise to lose weight as a condition of obtaining or maintaining her position. (Tr. 185)

11. Following the August 2004 interview meeting, DiPasquale subjected Complainant to discriminatory rules and repeatedly made derogatory, embarrassing comments about Complainant’s weight. These comments were made in Complainant’s presence and in the presence of Complainant’s co-workers. (Tr. 73, 188, 362)

12. Complainant’s duties included both clinical and administrative work. However, DiPasquale prohibited Complainant from performing clinical duties, except in emergency situations, until Complainant “kept her promise” to lose weight. (Tr. 181-82, 226-27)

13. In the fall of 2004, DiPasquale ordered Complainant a Size-52 lab coat and prohibited Complainant from leaving her office unless she was covered up by the lab coat. DiPasquale did not require other employees to wear lab coats when out of their offices. (Tr. 190-91)

14. DiPasquale threatened to terminate Complainant's employment if she could not begin to lose weight. (Tr. 194)

15. DiPasquale prohibited Complainant from eating in her office unless she worked ten hours a day. (Tr. 187-88, 230-31)

16. In late 2004, DiPasquale told Complainant she would give five hundred dollars of her personal money to Complainant if Complainant could lose fifty pounds. (Complainant's Exh. 5; Tr. 123, 187)

17. In January 2005, during a meeting at which Complainant and many of her coworkers were in attendance, DiPasquale opened the meeting by announcing that everyone in attendance needed to encourage Complainant to eat salad. (Tr. 188)

18. Complainant complained to Respondent's officers and administrators, including CEO DiPasquale, Medical Director Gregory Snyder, Human Resource Director Rachel Charette, and Practice Manager Irvette Horgan, regarding DiPasquale's discriminatory and harassing conduct. Respondent failed to address Complainant's complainants. (Tr. 124-25, 182, 196-201)

19. On March 24, 2005, Complainant sought medical treatment from Dr. Timothy McDaniel, a board-certified internist, for work-related anxiety and stress. Complainant continued to treat with McDaniel at the time of the public hearing. McDaniel diagnosed Complainant as suffering from insomnia, difficulty sleeping, eating disturbance, concentration disturbance and depressed mode. McDaniel found that Complainant's eating habits altered dramatically, she experienced periods of tearfulness and crying, nervousness and anxiety increase. McDaniel determined that these symptoms resulted from her employment with Respondent. (Tr. 18, 21-22, 25, 203, 205, 211-13)

20. McDaniel prescribed Trazadone to Complainant to treat her depression. He also directed Complainant to take a one-month medical leave of absence from work, and subsequently extended Complainant's medical leave to July 1, 2005. (Respondent's Exh. 2; Tr. 22, 28)

21. McDaniel referred Complainant to clinical psychologist James Shiffner for pharmacological therapy and counseling. Shiffner treated Complainant from March 30, 2005 to May 31, 2005. (Tr. 24, 26, 59-62)

22. Shiffner diagnosed Complainant with post traumatic stress disorder, based upon symptoms of anxiety, depression, difficult with concentration, resulting from her employment with Respondent. (Tr. 63, 81-82)

23. Complainant was also referred to, and treated by, psychiatrist Kristin Ahrens, M.D. for psychiatric evaluation and medication management. Ahrens prescribed Zoloft to Complainant to help treat her depression. (Respondent's Exh. 13; Tr. 203-05, 220-21)

## **OPINION AND DECISION**

### Discrimination Analysis

Under the Human Rights Law, it is unlawful for an employer to subject an employee to discriminatory terms, conditions and/or privileges of employment on the basis of disability. NY Exec. Law §296.1 (a). In order to establish a prima facie case based on disability, a complainant must show that she suffered from a disability, and that the disability engendered the behavior for which she was discriminated against in terms, conditions or privileges of employment. *Thide v. New York State Dep't of Transp.*, 27 A.D.2d 452, 811 N.Y.S.2d 418 (2d Dep't., 2006).

If complainant establishes a prima facie case of discrimination, respondent must articulate a legitimate, non-discriminatory business reason for its action(s). *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed.2d 407 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed 105 (2000).

Complainant is a person with a disability. Her diagnosis as “morbidly obese” falls within the scope of the term “disability” as defined by the Human Rights Law. NY Exec. Law § 292 (21); *State Division of Human Rights v. Xerox Corp.*, 102 A.D.2d 543, 478 N.Y.S.2d 982 (4<sup>th</sup> Dep’t., 1984). The testimony and evidence in the record demonstrate that Respondent subjected Complainant to discriminatory terms, conditions and privileges of employment on the basis of Complainant’s disability. She was not allowed to eat in her office. She could not leave her office unless she covered her body with a coat. She endured embarrassing public and private comments about her eating habits from Respondent’s highest ranking officer. She was threatened with termination if she did not lose weight.

I find that each of these discriminatory terms, conditions and privileges are based on Complainant’s disability. Therefore, Complainant has satisfied her prima facie burden. Furthermore, Respondent has failed to articulate a legitimate, non-discriminatory business reason for its treatment of Complainant. Because Respondent has failed to produce evidence showing that its actions were legitimate and non-discriminatory, Complainant has established that Respondent engaged in unlawful discrimination in violation of Human Rights Law § 296.1 (a).

#### Retaliation Analysis

The Human Rights Law also makes it illegal for an employer to “discriminate against any person because he or she has opposed any practices forbidden under this article.” NY Exec. Law §296.1 (e). To establish a prima facie case of retaliation under the Human Rights Law, a

complainant must show that: (1) they engaged in protected activity; (2) the respondent was aware they engaged in protected activity; (3) they suffered an adverse employment action based upon the protected activity; and (4) there is a causal connection between the protected activity and the adverse employment action taken by the respondent. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220, 223 (3d Dep't., 1999). An adverse employment action must be a materially adverse change in circumstances, including significantly diminished responsibilities, decrease in wage or salary, or termination. *Messinger v. Girl Scouts of the U.S.A.*, 16 A.D. 314, 792 N.Y.S.2d 56 (1<sup>st</sup> Dep't., 2005).

Complainant engaged in protected activity when she opposed DiPasquale's refusal to hire a "fat" person for the Nurse Educator position. By virtue of DiPasquale's presence at the meeting, Respondent was aware that Complainant engaged in protected activity. Immediately after Complainant opposed DiPasquale's discriminatory hiring practice, DiPasquale began to materially and adversely change the circumstances of Complainant's employment by: preventing Complainant from leaving her office unless she covered up with a Size-52 lab coat; barring Complainant from clinical work until she lost weight; prohibiting Complainant from eating in her office; mocking Complainant by stating that she promised to lose weight as a condition of employment; offering \$500 of her personal money if Complainant could lose 50 pounds; directing all of Respondent's managers and administrators to encourage Complainant to eat salad; and threatening to fire Complainant if she did not lose weight.

Because these materially adverse changes began occurring immediately after Complainant opposed DiPasquale's refusal to hire an overweight individual, Complainant has demonstrated the necessary causal connection between her protected activity and the materially

adverse employment actions taken by Respondent. Therefore, Complainant has established that Respondent engaged in unlawful retaliation in violation of Human Rights Law § 296.1(e).

#### Constructive Discharge Analysis

The Human Rights Law prohibits an employer from discharging an individual on the basis of disability. Human Rights Law § 296.1 (a). In order to maintain a cause of action for constructive discharge, complainant must demonstrate that respondent “deliberately made working conditions so intolerable that he or she was forced into involuntary resignation.” *Nelson v. HSBC Bank USA*, 2007 NY Slip Op 4803; 41 A.D.3d 445; 837 N.Y.S.2d 712 (2d Dep’t., 2007); *Petrosino v. Bell Atl.*, 385 F.3d 210 (2d Cir. 2004).

I find that Respondent’s discriminatory conduct was intentional, and that such conduct created working conditions so intolerable that a reasonable person in Complainant’s shoes would have been compelled to resign. *Petrosino v. Bell Atl.*, 385 F.3d 210, 230. Therefore, Complainant has established a claim for constructive discharge. However, the record is devoid of oral testimony or documentary evidence demonstrating the existence or extent of Complainant’s economic damages. Accordingly, Complainant’s backpay award, if such is warranted, is hereby subsumed within the damages award set forth below.

#### Complainant’s Award

I find that Respondent’s discriminatory and retaliatory conduct began in August of 2004 and continued throughout the remaining seven months of Complainant’s employment. I find that Respondent failed to address the unlawful conduct, despite receiving numerous urgent pleas from Complainant. I find that Complainant has suffered humiliation and mental anguish as a result of Respondent’s unlawful discriminatory and retaliatory conduct. This suffering resulted

in depression, insomnia, anxiety, eating and concentration disturbance, and difficulty sleeping, which symptoms continued to the date of public hearing on November 7, 2007.

The Human Rights Law attempts to restore Complainants to a situation comparable to the one they would have occupied, had no unlawful discrimination occurred. Given the severity of Respondent's conduct, the degree and duration of Complainant's suffering, I find that an award of \$50,000 for emotional distress, pain and suffering, humiliation and mental anguish, and unspecified economic damages, will effectuate the purpose of the Human Rights Law. *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (1987). This amount, which is neither excessive nor punitive, is reasonably related to Respondent's discriminatory and retaliatory conduct and Complainant's suffering as established by the testimony of Complainant and her physicians. *Gleason v. Callahan Industries, Inc.*, 203 A.D. 750, 610 N.Y.S.2d 671 (3d Dept. 1994).

### **ORDER**

Based on the foregoing, and pursuant to the provisions of the Human Rights Law and the Rules of Practice of the Division, it is hereby

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED, that respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within 30 days of the receipt of the Final Order of the Commissioner, respondent shall also pay to the complainant the sum of Fifty Thousand dollars (\$50,000), bearing interest from the date of the Commissioner's Order, in accordance with CPLR 5002, as compensatory

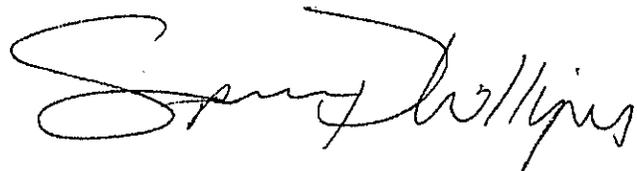
damages for the emotional distress, pain and suffering, humiliation and mental anguish caused by Respondent's discriminatory practices.

2. The aforesaid payment shall be made by Respondent in the form of certified check made payable to the order of Complainant and delivered by registered mail, Return Receipt Requested, to Complainant's attorney, Lindy Korn, 1904 Liberty Building, 424 Main Street, Buffalo, NY 14202, with copies to General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458 and Barbara Bonchristiano, New York State Division of Human Rights, One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.

3. Respondent shall transmit a memorandum to its employees, agents and officers, notifying them that retaliation for opposing discriminatory practices, filing a complaint, testifying, or assisting in any proceeding under the Human Rights Law is forbidden.

4. Respondent shall furnish written proof of its compliance with the directives herein contained, and shall cooperate with representatives of the General Counsel and the Division during any investigation into the compliance with the directives of this Order.

DATED: July 24, 2008  
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is fluid and cursive, with a large initial "S" and "P".

Spencer D. Phillips  
Administrative Law Judge