

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

YANIRA A. JOSEPH,

Complainant,

v.

WHITE PLAINS HOSPITAL CENTER,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10118431

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 4, 2008, by Thomas S. Protano, 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 22 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. 10118431

SUMMARY

Complainant's employment with Respondent was terminated at the end of her disability leave. Complainant alleges that she was fired because of her disability. Respondent had a reasonable belief that Complainant's claims of disability were false and terminated Complainant's employment. Complainant has failed to prove her claim and the case must be dismissed.

PROCEEDINGS IN THE CASE

On May 25, 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 unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on August 28, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Jane M. Stack, Esq. Respondent was represented by Francis Carling, Esq. At the hearing the caption was amended to reflect the correct spelling of Complainant's first name.

Permission to file post-hearing briefs was granted. The Division attorney and the attorney for Respondent filed timely briefs.

FINDINGS OF FACT

1. Complainant was hired by Respondent as a nursing technician in October, 2004. In the spring of 2005, she became a bed control coordinator in Respondent's admitting department.

(Tr. 27-28)

2. As a bed control coordinator, Complainant was responsible for inputting patient data and, occasionally, assisting in transporting patients. Complainant's work primarily involved sitting at a desk. (Tr. 30-31, 131)

3. In February of 2007, Complainant had surgery to remove fibroids. (Tr. 32) For that, Complainant sought and received a medical leave from Respondent. Complainant had initially intended to be out of work from mid-February until March 29, 2007. (Respondent's Exhibit 1;

Tr. 33)

4. After the surgery was performed on February 15, 2007, Complainant was instructed to remain in bed for about one week. Thereafter, she was told not to bend or twist or lift any heavy

objects. Complainant was also told to “walk continuously to...get [her] abdominal muscles working,” but that she should limit her walking to just an hour at a time. (Tr. 39)

5. On or about February 28, 2007, Complainant’s surgeon, Dr. Trishit Mukherjee. Mukherjee recommended that Complainant remain out of work until April 19, 2007. (Respondent’s Exhibit 2; Tr. 38)

6. On March 8, 2007, March 22, 2007, March 29, 2007 and April 5, 2007, Mukherjee confirmed that Complainant would be able to return to work on April 19, 2007. (Respondent’s Exhibits 3 & 4; Tr. 41, 47)

7. On February 22, 2007, Complainant was involved in an automobile accident. While Complainant was a passenger in her friend’s car, they were rear-ended by another car. Complainant’s friend’s car sustained scratches to the rear bumper. Complainant was wearing her seat belt. (Tr. 49-50)

8. As a result of this accident, Complainant and her friend, Georgiana Deen, made a claim for damages against the driver of the car that hit them. The claim was settled and Complainant received damages. (Tr. 53-54)

9. Complainant felt back pain after the automobile accident. She sought treatment from Dr. Okon Umana, a primary care physician, “two or three weeks” after the accident. (Tr. 57, 62, 64)

10. On March 24, 2007, Complainant was given an MRI exam for her back, which determined she had herniated a disc. (Complainant’s Exhibit 3; Tr. 72)

11. Complainant never inquired whether Umana was board certified in orthopedics or whether he had any expertise at all in orthopedics. (Tr. 71-72)

12. On April 20, 2007, one day after she was to return to work, according to Mukherjee's recommendation, Complainant got a note from Umana indicating that because of her injuries from the car accident, Complainant was "unable to bend, lift or carry heavy object[s]." Umana indicated that Complainant could return to work on May 30, 2007. (Respondent's Exhibit 8; Tr. 74-75)

13. Complainant was not required to bend, twist or lift any heavy objects in the performance of her normal duties with Respondent. (Tr. 131)

14. Complainant did not tell Umana what her job duties were and Umana did not ask. (Tr. 62, 66, 67)

15. On May 7, 2007, Umana revised his prognosis for Complainant and stated that Complainant could return to work on June 4, 2007. The date was not considered "definite" but was rather an "approximate" date of return, according to Umana. (Complainant's Exhibit 1; Respondent's Exhibit 9)

16. Michael Pagliaro, Respondent's senior vice president for human resources, reviewed the notes submitted from Umana. Pagliaro consulted with Sue Liller, head nurse, who indicated to Pagliaro that she felt Complainant's claims were false. In addition, Liller had never heard of Umana and could not find any information about Umana. (Tr. 128)

17. Because of Respondent's suspicions, Complainant was sent to an independent orthopedist, Dr. Martin Barschi, who examined Complainant. Barschi discussed Complainant's work duties with her and determined that she was capable of performing the duties of her job. (Respondent's Exhibit 12; Tr. 89-90, 128-29)

18. Pagliaro felt Complainant's disability claim was false and noted that one of Complainant's medical notes appeared to have been falsified. In fact, Complainant submitted

two notes from Umana which were identical except that the date of the examination had been changed. The second document, which purports to have been written on May 17, 2007, looks exactly like the note Umana wrote on May 7, 2007, except for the fact that the number 1 was inserted in two places to change the date from May 7 to May 17. (Respondent's Exhibits 9 & 10; Tr. 128)

19. In response to Barschi's evaluation and what appeared to be a forged document, Pagliaro ordered Complainant back to work on May 23, 2007. Complainant showed up for work two hours late that day. (Tr. 11, 95, 106)

20. Complainant met with Pagliaro. She insisted she was disabled and stated she would only return to work "under protest." Because of Complainant's attitude and her statement, Pagliaro concluded Complainant was lying about her condition and fired Complainant. (Tr. 129-32)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability and to refuse to provide a reasonable accommodation to an employee's disability. *See* Human Rights Law §§ 296.1(a), 296.3(a).

In order to prevail, the Complainant must first make out a prima facie case by showing that she is a member of a protected class, she was capable of performing the duties of the job in a reasonable manner and Respondent terminated Complainant's employment under circumstances that could lead one to infer that she had been discriminated against. *Pace College v. Commission*

on Human Rights of the City of New York, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *McEniry v. Landi*, 84 N.Y.2d 554, 620 N.Y.S.2d 328 (1994). If the complainant succeeds in establishing a prima facie case, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its actions. Thereafter, the complainant must demonstrate that the reasons offered by the respondent are merely a pretext for unlawful discrimination. *Matter of Pace University v. New York City Comm. On Human Rights*, 85 NY2d 125, 128 (1995); and, *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999).

Complainant in the instant case suffered from a herniated disc in her back. She was terminated from her position as a bed control coordinator while on leave because of that injury. Complainant has established a prima facie case of disability discrimination.

Respondent replies with its assertion that it did not believe Complainant's claims of disability were legitimate. Respondent notes that Barschi evaluated Complainant and found her fit to return to work. In addition, Umana's assessment that Complainant could not bend, twist or lift heavy objects was unrelated to Complainant's job duties and his credentials were questioned. Finally, Respondent had reason to believe that Complainant had submitted an altered doctor's note in an attempt to continue her leave and her attitude upon return was poor. For all these reasons, Pagliaro decided to fire Complainant. Complainant has not shown that any of Respondent's stated reasons were a pretext for discrimination and, given the fact that Respondent never questioned Complainant initial request for a leave of absence or her notes from Mukherjee, there is no reason to believe Respondent was motivated by discriminatory animus owing to Complainant's disability.

In sum, Respondent had a reasonable belief that Complainant was not being truthful about the nature of her physical impairment and its effect on her ability to perform her job. Respondent investigated her claim further and sought an independent medical examination. When Barschi confirmed Respondent's suspicions, Respondent ordered Complainant back to work. Complainant returned with a poor attitude and, after considering all of the circumstances, Pagliaro fired Complainant. There is no evidence of discrimination.

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 case be, and the same hereby is, dismissed.

DATED:

Bronx, New York

Thomas S. Protano
Administrative Law Judge

In sum, Respondent had a reasonable belief that Complainant was not being truthful about the nature of her physical impairment and its effect on her ability to perform her job. Respondent investigated her claim further and sought an independent medical examination. When Barschi confirmed Respondent's suspicions, Respondent ordered Complainant back to work. Complainant returned with a poor attitude and, after considering all of the circumstances, Pagliaro fired Complainant. There is no evidence of discrimination.

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 case be, and the same hereby is, dismissed.

DATED: December 4, 2008
Bronx, New York



Thomas S. Protano
Administrative Law Judge