

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

CAMILLE L. MALETTA,

Complainant,

v.

THE ENRICHMENT CENTER AT LITTLE
VILLAGE,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10109737

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 23, 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: **APR 15 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. 10109737

SUMMARY

Complainant alleges she was discriminated against by Respondent on the basis of her sex. She has failed to establish a claim of sex discrimination. She did not allege discrimination based upon her disability in her complaint but, at hearing, she alleged that she was fired because of a severe back injury. An analysis of the evidence, however, reveals that she is unable to sustain a claim for discrimination based upon sex or disability.

PROCEEDINGS IN THE CASE

On January 17, 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing was held on September 17, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Sandra S. Thomas O’Neill, Esq. Respondent was represented by Stanley R. Goodman, Esq.

Permission to file post-hearing briefs was granted. The attorney for Respondent filed a timely brief.

FINDINGS OF FACT

1. Complainant was hired by the Respondent in October, 2002 as a teacher’s aide. (Tr. 12)
2. Respondent is a nursery school and extended day care program for children. (Tr. 88-89)
3. As a teacher’s aide, Complainant assisted in classroom instruction, made sure the classrooms were clean and took charge in the teacher’s absence. Complainant performed her duties well. (Tr. 12, 91)
4. On December 22, 2004, Complainant sustained a back injury after falling while at work. After the injury, Complainant continued to work through the winter. (Tr. 14-15)
5. In April of 2005, Complainant took time off from work because the pain in her back had become severe. She returned to work on or about May 16, 2005, after Caryl Bank, Respondent’s director, indicated to Complainant that Respondent would not be able to hold her job open. Respondent was having trouble filling the class with teacher’s aides. (Tr. 16, 92)
6. Because of her back problems, Complainant was unable to lift and carry the children. Complainant informed Respondent she could not lift any children and Respondent did not force her to do so. (Tr. 25, 94)

7. Complainant's attendance was sporadic after her return to work. From May 16, 2005 through June 23, 2005, Complainant took five days off. During this period she was experiencing back pain. She also took some time off from work to watch her granddaughter while her daughter had surgery. (Tr. 53)

8. From January, 2005 through June 2005, Complainant was absent a total of 35 days. (Respondent's Exhibit 4)

9. In May, 2005, Complainant was told she would be transferred from the class with four and five year olds to the classroom with two and three year olds. The transfer was to occur after the summer vacation ended in September. (Tr. 19-20, 57)

10. Complainant alleges that she was to be transferred because Respondent wanted to place a male in her previous position. (Tr. 17-18) Dawn Fishman, Respondent's supervisor, denied that Complainant was reassigned so that a male could be hired in her place. (Tr. 82)

11. Teacher's aides were routinely moved from class to class by Respondent. The Respondent's school was growing and aides, including Complainant, were shifted. A male was one of 12 individuals hired for the following September. However, he was not hired specifically to replace Complainant. (Tr. 98-99)

12. Complainant never did transfer to the other classroom. Instead, Bank terminated Complainant's employment in June of 2005 because of poor attendance. Complainant admitted that she "could not work with the children" any longer due to her back problems. (Tr. 61, 97, 99)

13. Complainant asked Bank for a clerical position. No clerical positions were available at the time. (Tr. 103)

14. At the public hearing, Complainant expressed her belief that the termination of her employment “was something that was done because of my injury.” (Tr. 23)

OPINION AND DECISION

The Human Rights Law makes it unlawful to discriminate against anyone with respect to the terms, conditions or privileges of employment because of that person’s sex or disability. Human Rights Law §296.

In order to prevail, Complainant must first make out a prima facie case of discrimination. To make out a prima facie case of unlawful discrimination under the Human Rights Law (N.Y. Exec. Law §296(1)(a)), a complainant must show (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 28-29 (1997).

Complainant in the instant complaint is unable to make out a prima facie complaint of discrimination for either sex or disability discrimination. With respect to her termination and her claim that it was done “because of [her] injury,” Complainant has admitted that she was unable to perform her job. Thus, she was not qualified to hold her position any longer when Bank terminated her employment. In addition, with respect to her disability, in order to be covered under the Human Rights Law, her disability must be one that does not ‘prevent the complainant from performing in a reasonable manner the activities involved in the job.’” *Pembroke v. New York State Office of Court Administration*, 306 A.D.2d 185; 761 N.Y.S.2d 214, 215 (1st Dept. 2003), citing *Executive Law §292 (21)*.

With respect to her claim that she was to be transferred to another classroom so that Respondent could place a man in her old classroom, Complainant has similarly failed to establish a prima facie case, even if her claims—though denied by Respondent—are accepted as true. She did not suffer an adverse employment action at that point. According to Bank, transfers were routine. And, more importantly, Complainant did not allege that the transfer would have cost her anything in damages: her salary, job title and status would have remained the same. Respondent has a right to assign its workers as it sees fit and a simple re-assignment such as the one contemplated before Complainant was dismissed by Respondent does not constitute an adverse employment action. An adverse employment action requires that there must be a materially adverse change in the employee's working conditions that is more than just an inconvenience or reassignment of duties. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004); *See also, Feteiha v. City of New York*, DHR Case No. 9000615 (May 16, 2006). The change of classroom that Complainant complains of does not meet that level.

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 23, 2008
Bronx, New York



Thomas S. Protano
Administrative Law Judge