NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

MELISSA C. MALLON,

Complainant,

v.

NEW YORK STATE, OFFICE OF MENTAL HEALTH, COOK-CHILL PRODUCTION CENTER,

Respondent.

and NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE, Necessary Party.

NOTICE AND FINAL ORDER

Case No. 10119266

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 April 29, 2009, by Lilliana Estrella-Castillo, 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: JUL 01 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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NEW YORK STATE, OFFICE OF MENTAL HEALTH, COOK-CHILL PRODUCTION CENTER,
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NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE,
Necessary Party.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10119266**

SUMMARY

Complainant alleged that she was discriminated against on the basis of age, sex, national origin, disability and retaliated against for having complained of discrimination. Complainant failed to sustain her burden. The complaint is therefore dismissed.

PROCEEDINGS IN THE CASE

On August 27, 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 Lilliana Estrella-Castillo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 1 and 2, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Jared M. Lefkowitz. Respondent was represented by Alan H. Sunukjian, Assistant Counsel. The New York State Department of Civil Service did not appear at the hearing.

The parties submitted timely proposed findings of fact and conclusions of law, which were considered and where appropriate adopted.

FINDINGS OF FACT

1. Complainant is an Irish Italian American white female born on October 24, 1948. (Tr. 66; ALJ Exhibit 1)

2. Complainant suffers from several diagnosed illnesses. (Tr. 49-52)

3. Respondent is a food production center operated by the New York State Office of Mental Health. (Tr. 100) It receives, prepares and delivers food to about 69 hospitals. (Tr. 100-01, 154)

4. Respondent hired Complainant on September 13, 2001, as a Food Service Worker 1 (FSW 1), which is an entry level position. (Tr. 12, 218) Men and women hired into these positions are expected to do the same work. (Tr. 12, 101-02, 226, 236)

5. FSWs are required to perform heavy work, including repetitious lifting, bending and twisting. (Tr. 104, 168-70, 217) All FSW employees have to clean and sanitize all the work areas, as well as move the trash at the end of the day. (Tr. 12, 156) This amount of work is unique to Respondent's facility. (Tr. 107, 168-70) FSWs employed in other facilities have less strenuous work. (Tr. 103-03, 110, 168-70)

6. As a result of the heavy and strenuous work performed in Respondent's facility, Respondent does not have light duty assignments. (Tr. 107, 170) Employees needing light duty are encouraged to apply for FSW positions in other facilities where the work is less strenuous. (Tr. 118)

7. Daniel Montgomery, a forty-year-old black male, who was hired in 1994, was promoted to Head Cook in 2004. He was responsible for the entire production floor and oversaw all the cooks, and FSWs, including Complainant. (Tr. 186, 200, 214-15, 221; Complainant's Exhibit 6)

8. The Operations Manager, Mary Cotter, a fifty-three-year-old white female, was Montgomery's supervisor. (Tr. 151, 172)

9. Josephine Fulbrook, a sixty-seven-year-old white female, was the Director of the facility, and had authority to hire employees at the facility. (Tr. 117, 149)

10. Complainant alleged that Respondent, specifically Montgomery, unlawfully discriminated against her because of her age, race and national origin when she was passed over for promotion to a Food Service Worker 2 (FSW 2) position. (ALJ Exhibit1)

11. To support her complaint, Complainant pointed out that she is the only one in her protected classes, and that in 2004, she witnessed Montgomery do a "power shake" (bumping fists) with another black employee while stating, "We blacks have to stick together." (Tr. 57-59, 147)

12. Complainant alleged that in May 2005, she took and passed, with a score of 100, a promotional test for FSW 2, but did not get the promotion. (Tr. 24-26) According to Complainant, Respondent discriminatorily promoted Lethia McGee, a black twenty-two-year-old female. (Tr. 26-27)

13. Civil Service did not administer a promotional test for FSW 2 in May 2005. (Tr. 111)

14. In 2005, Complainant and other FSW 1 participated in a voluntary review class to prepare for the Civil Service FSW 2 exam, and were given a practice exam by Respondent. (Tr. 171-72, 227) The employees were aware that this was a practice exam, and not an exam that would be used for promotional purposes. (Tr. 171-72)

15. Fulbrook promoted McGee provisionally to the title of FSW 2 because of McGee's hard work and leadership qualities. (Tr. 145)

16. In September 2005, Civil Service administered an exam for FSW 2. (Tr. 28) Complainant took and passed the exam with a score of 70. McGee also took and passed the exam, but with a score of 80 and was appointed to the FSW 2 position, which she held as a provisional employee. (Tr. 28; Complainant's Exhibit 2)

17. On June 27, 2007, Respondent canvassed for a FSW 2 position. (Tr. 31; Complainant's Exhibit 3) However, because the list contained less than three qualified candidates, Respondent was not required to hire from the list and could hire provisional FSW 2. (Tr. 113-115; Respondent's Exhibits 3 and 4)

18. Fulbrook hired Jason Drakeford, a twenty-nine-year-old African-American male, and Chacko James, a fifty-six-year-old Indian male, as provisional FSW 2s. (Tr. 34-37, 119, 146; Complainant's Exhibit 6)

19. When choosing a candidate to fill the provisional FSW 2 positions, Fulbrook looked for supervisory qualities, such as how well the candidates "work and play with others." (Tr. 119)

20. Fulbrook did not consider Complainant for the provisional appointments because she was aware of Complainant's difficulties in dealing with other employees and supervisors. (Tr. 120; Complainant's Exhibit 6)

21. During Complainant's employment with Respondent she had been the subject of several complaints about workplace behavior, some of which resulted in disciplinary action. (Complainant's Exhibit 6) Fulbrook had been called to the production floor on many occasions when Complainant became loud, disrespectful and abusive towards other co-workers and supervisors. (Tr. 120, 128-30)

22. Complainant was known for yelling, screaming and cursing at her coworkers and supervisors when she did not want to do her assigned work. (Tr. 233, 239) One time Complainant started throwing dishes and other things around because she was upset, and did not want to do the work because she was "not a maid." (Tr. 128)

23. On February 8, 2007, Cotter issued Complainant a counseling memo because Complainant was taking an excessive number of breaks throughout the day, and talking to other employees in a negative way, thereby "creating a very negative morale" for the staff. (Tr. 160-62; Respondent's Exhibit 5) On this occasion Complainant was asked by Montgomery to do a routine job, and she responded, "Would you expect your mother to do this work?" (Tr. 163-64)

24. On another occasion, Complainant called Montgomery a "dirt bag" when he was attempting to get her to perform her job; she then got dressed and left the work place. (Tr. 240-41) Complainant would often become upset, refuse to do her job, and then would get dressed and go home. (Tr. 234)

25. Complainant was also involved in several altercations with Bernadine Grogan, who appeared at the hearing as Complainant's witness. (Tr. 82-96; Complainant's Exhibit 6) Grogan's last day of work with Respondent was April 25, 2005. (Tr. 212)

26. Complainant alleged that Montgomery unlawfully retaliated against her when she complained by giving her heavier, more strenuous work to perform. (Tr. 17-18, 24) However, all the work performed at the facility is "heavy" and repetitious, and almost all the employees employed by Respondent believe that they are the ones performing the heavier, more strenuous work. (Complainant's Exhibit 6)

27. Complainant also alleged that Respondent unlawfully discriminated against her when it denied her a reasonable accommodation when she returned to work with a ten pound lifting restriction. (ALJ Exhibit 1)

28. Since 2003, Complainant has been in and out of work for medical reasons on several occasions. On November 21, 2007, Complainant was placed on medical leave pursuant to Civil Service Law Section 72, and has not returned to work. (Respondent's Exhibit 1) After a hearing, Civil Service found that Complainant "is not able to perform the duties of Food Service Worker I without restrictions." (Respondent's Exhibit 1)

29. During the Civil Service Law Section 72 hearing, Complainant admitted that "I cannot work. I agree, that's why I didn't get representation from my union. I don't even want to do that kind of work." She also stated: "I don't even want to do that work part-time." (Respondent's Exhibit 1)

30. Prior to going out on medical leave, Complainant presented herself at work on October 1, 2007, with a medical note informing Respondent that she was unable to work in her assigned area because she was unable to do repetitious work. (228, 231, 250-51; Complainant's Exhibit 7;

Respondent's Exhibit 6) Complainant also became loud and angry, and was yelling because she felt that a woman should not have to work in that area of production. Complainant then got dressed and went home (Tr. 229; Respondent's Exhibit 6)

31. Respondent did not have light duty work in its facility, but encouraged Complainant to apply to other facilities for FSW positions. (Tr. 107-09, 170-71, 198-99; Respondent's Exhibits 1 and 2)

OPINION AND DECISION

The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer "because of the . . . age . . . race . . . national origin . . . sex . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Complainant made out a prima facie case of employment discrimination by demonstrating that she is a fifty-nine-year-old Irish Italian American white female with a disability, was qualified to be promoted to the position of FSW 2, but was not promoted to that position under circumstances giving rise to an inference of discrimination when the position was awarded to others not in her protected classes. *Pace College v. Commission of Human Rights of the City of New York,* 38 N.Y.2d 39 (1975), *citing, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The burden then shifted to Respondent to rebut the presumption of discrimination by presenting evidence of "legitimate, independent, and nondiscriminatory reasons to support its employment decision." *Matter of Miller Brewing Co. v. State Div. of Human Rights,* 66 N.Y.2d 937, 938 (1985).

Respondent offered evidence to show that there were legitimate, nondiscriminatory reasons for its decisions not to promote Complainant. On both occasions, when there were

promotional opportunities, Respondent was not required to hire from the Civil Service list because the list contained less than three qualified candidates. Since there was no list, Respondent was able to hire provisional FSW 2. Fulbrook, who is a member of Complainant's protected class, in looking to fill the positions sought individuals who possessed supervisory qualities and were able to work well with others. Fulbrook did not consider Complainant a viable candidate because of Complainant's known difficulties with other employees and supervisors. Fulbrook was aware that Complainant had been the subject of complaints about workplace behavior, several of which resulted in disciplinary action. Complainant expressed disrespect towards her supervisor in the way that she addressed him and challenged his directives by asking questions such as, "Would you expect your mother to do this work?" and calling him a "dirt bag."

Respondent presented evidence of legitimate, nondiscriminatory reasons for not promoting Complainant to the position of FSW 2. The burden then returned to Complainant to prove that such reasons were "merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004). Complainant failed to affirmatively demonstrate that the reasons set forth by Respondent for not promoting her to the provisional positions were false.

I also find Complainant's allegations of retaliation to be without merit. Under the Human Rights Law §296.7 it is an unlawful discriminatory practice for an employer to "retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article . . ." To make out a prima facie case of retaliatory discrimination, Complainant must show that (1) she engaged in a protected activity; (2) respondent knew that complainant engaged in protected activity; (3) complainant suffered an adverse action; and (4) there was a causal

connection between the protected activity and the adverse action. *See, Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing, Dortz v. City of New York*, 904 F.Supp. 127, 156 (1995).

Although Complainant may have engaged in protected activity when she constantly complained that she was given heavier work to do than other employees because of her protected status, Complainant did not come forth with any evidence that her treatment was the result of retaliation. On the contrary, the evidence presented by Complainant showed a picture of a workforce where every other employee felt that they were given the heavier or less desirable work. Complainant's Exhibit 6 contains the statements of the employees that worked in Complainant's area, and all the employees gave statements that they were the only ones working hard, or the only department working hard, while everyone else was "sleeping" on the job.

Complainant's allegation of disability discrimination, for failure to accommodate, is without merit. The Human Rights Law prohibits an employer from discriminating against an employee because of a disability. *Matter of McEniry v. Landi,* 84 N.Y.2d 554, 558, 644 N.E.2d 1019, 620 N.Y.S.2d 328 (1994), *citing* N.Y. Exec. Law, Art. 15 (Human Rights Law) § 296.1. The statute defines the term "disability" as "physical, medical or mental impairments that 'do 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* Human Rights Law §292.21. The protection only applies to "disabilities which, upon provision of reasonable accommodations, do not prevent the [Complainant] from performing in a reasonable manner the activities involved in the job or occupation . . . sought." Human Rights Law §292.21; *Burton v. Metropolitan Transportation Corp.*, 244 F.Supp.2d 252 (2003); *see also, Fama v. American International Group, Inc.*, 306

A.D.2d 310, 760 N.Y.S.2d 534 (2003), lv denied 1 NY3D 508, 808 N.E.2D 1276, 777 N.Y.S.2d 17 (2004).

To establish a prima facie case of unlawful disability discrimination under the Human Rights Law Complainant must show that (1) she was disabled within the meaning of the Human Rights Law; (2) she was otherwise qualified to perform the essential functions of the job with or without a reasonable accommodation; (3) she suffered an adverse employment action; and (4) she suffered the adverse employment action because of her disability. *See, Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), *citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Complainant failed to establish a prima facie case of unlawful disability discrimination. Complainant met three of the four prongs of the prima facie test. Complainant is disabled as that term is defined under the Human Rights Law; she suffers from several diagnosed illnesses. Complainant suffered an adverse employment action when Respondent did not allow her to return to work on "light duty." Therefore, the adverse employment action was based on Complainant's disability. However, Complainant failed to show that she was otherwise qualified to perform the essential functions of the job with or without an accommodation.

Complainant has been out of work on Workers' Compensation since November 21, 2007, when she was placed on medical leave pursuant to Civil Service Law Section 72. After a hearing Complainant was found "not able to perform the duties of Food Service Worker I without restrictions." Complainant also admitted that she cannot work, and does not want to work as a FSW for Respondent. Furthermore, because of the nature of the work performed at its facility Respondent does not have "light duty" assignments. But, in an effort to help Complainant,

Respondent has encouraged Complainant to apply for FSW positions at other facilities where the work is not as heavy or repetitious.

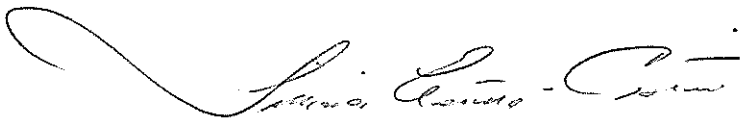
For the above reasons, and after considering all of Complainant's other arguments and having found them to be without merit, the complaint is dismissed.

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: April 29, 2009
Bronx, New York



Lilliana Estrella-Castillo
Administrative Law Judge