ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

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| **NEW YORK STATE DIVISION OF HUMAN RIGHTS** on the Complaint of<br><br>**CHELSEA M. MCLANE,**<br>Complainant,<br>v.<br><br>**DELAWARE COUNTY, DEPARTMENT OF SOCIAL SERVICES,**<br>Respondent. | **NOTICE AND FINAL ORDER**<br><br>Case No. 10157506 |

Federal Charge No. 16GB204813

**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 24, 2015, by Michael T. Groben, 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.

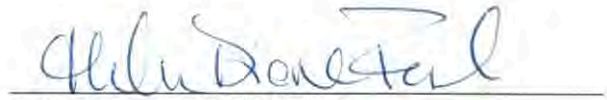
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER")**. In accordance with the Division's Rules of Practice, a copy of this Order has been 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: JUN 04 2015
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

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| **NEW YORK STATE DIVISION OF HUMAN RIGHTS**<br>on the Complaint of<br><br>**CHELSEA M. MCLANE,**<br>Complainant,<br>v.<br><br>**DELAWARE COUNTY, DEPARTMENT OF SOCIAL SERVICES,**<br>Respondent. | **RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER**<br><br>Case No. **10157506** |

## SUMMARY

Complainant alleges that she was subjected to discriminatory treatment in employment due to disability when Respondent harassed her, and terminated her employment when she filed a complaint of discrimination. Respondent denies the allegations. Complainant has failed to sustain her burden of proof, and the complaint is dismissed.

## PROCEEDINGS IN THE CASE

On September 18, 2012, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on May 19-20, July 21-22, and September 22-23, 2014.

Complainant and Respondent appeared at the hearing. The Division was represented by Robin Nussbaum, Esq. Respondent was represented by Frank W. Miller, Esq.

At the hearing, Ms. Nussbaum stated that Complainant's retaliation claim would be based on her September 7, 2012 verified complaint, Division case number 10157221, and that Complainant would not present proof regarding disability discrimination. (Tr. 7-8, 11-12, 104-05; ALJ Exhibit 3)

## FINDINGS OF FACT

1. Respondent provides and administers social services programs in Delaware County, New York, including Medicaid, public assistance, foster care, child protective services ("CPS"), preventive services, and adoption services. (Tr. 484-86)

2. Respondent provides these services through its own employees (approximately 105 in number), and through contractual arrangements with other agencies. (Tr. 485-86, 492)

3. One such agency is Delaware Opportunities, a nonprofit organization. Delaware Opportunities provides employees who work for Respondent under Respondent's oversight and daily direction. (Tr. 20, 748-49)

4. Complainant began work for Delaware Opportunities in or about 2001, and was assigned

to work as a juvenile justice assistant ("JJA") with the Delaware County Probation Department later that year. Her responsibilities involved working with "at risk youth," particularly those involved in the County "person in need of supervision" ("PINS") program. (Tr. 20-21, 23-24, 26-28, 500-04)

5. In 2007, responsibility for the PINS program was transferred from the Probation Department to Respondent. Complainant's JJA position was also transferred, and she retained the title of JJA. (Tr. 27-30, 496-500, 507, 749, 852-33, 922-23)

6. A JJA provides support for Respondent's caseworkers by doing errands such as picking up documents, gathering information, and reporting same to the caseworker. The JJA does not exercise independent authority. (Tr. 496, 761-62)

7. Warren R. Moon ("Moon") has been Respondent's Commissioner since 1980. He is responsible for all social services programs conducted by Delaware County. (Tr. 483-85, 588)

8. Susan Aikens ("Aikens") is Respondent's Deputy Commissioner and director of services. Her duties include general administration of Respondent's services division including foster care, adoption, preventive services, and child protective services. Aikens also monitors Delaware Opportunities employees in their work for Respondent. (Tr. 29, 492, 495, 747-49)

9. Melissa Pelligra ("Pelligra") has worked for Respondent in various titles, including that of caseworker, for 10 years. She has held the title of senior caseworker 2 for Respondent for four years. Her duties include supervising Respondent's caseworkers and support staff. (Tr. 35, 205, 686, 917-22, 959, 990)

10. Pelligra was Complainant's immediate supervisor from 2011 until Complainant's employment was terminated. (Tr. 757-58, 922-23, 943, 959; Respondent's Exhibit 7)

11. Aikens was Pelligra's supervisor. (Tr. 713)

12. Sylvia Armanno ("Armanno") is Respondent's Deputy Commissioner and director of programs. From 2002 through 2008, Armanno worked as Respondent's staff developer, providing Respondent's workers with orientation and training regarding Respondent's policies, including confidentiality and reporting policies. (Tr. 1021-22)

13. Linda Overton ("Overton") is a senior systems coordinator for Respondent. Her duties include functioning as a backup computer network administrator and providing computer support to Respondent's workers. (Tr. 365-66, 405-06, 1135-37)

***Employer***

14. Complainant received yearly written evaluations from Respondent which were produced via a cooperative consultation and discussion process between Delaware Opportunities and Respondent. (Tr. 32-35, 38-39, 795)

15. Complainant also received verbal feedback from her supervisors at Respondent. (Tr. 35-38)

16. Complainant was paid by Delaware Opportunities with funds obtained by Respondent from a grant. (Tr. 123-24)

17. Complainant worked at Respondent's office. (Tr. 127-28, 134-35, 1140)

18. Complainant received daily supervision from Respondent's personnel. This supervision included her daily tasks and assignments. (Tr. 126-28, 943)

19. When Complainant required time off from work, she did so through her supervisor at Respondent. (Tr. 124-25)

20. Complainant received an identification badge from Respondent. (Tr. 128-34; Complainant's Exhibits 6 and 7)

21. Complainant used a computer and e-mail address at work provided by Respondent. (Tr.

132-33)

22. When Complainant performed work requiring travel, she was provided with a vehicle by Respondent. Complainant's travel expenses were reimbursed by Respondent. (Tr. 135-36, 511)

***Respondent's Computer System and Training***

23. Social service agencies in New York State share information via a computer network known as the Human Services Enterprise Network ("HSEN"). These agencies have access to a statewide shared database of information regarding child protective services and other social services information via a database known as "Connections." (Tr. 195-96, 1137-38, 1141)

24. Respondent operates its own local secure computer network, similar to the state network. (Tr. 1137-38)

25. Respondent's workers are provided with a username and password. Senior administrators are given a high level of access to the various computer applications. (Tr. 1137-40)

26. Complainant was given access only to Respondent's local network because, as a JJA, she was considered support staff. (Tr. 1140-42, 1157)

27. Respondent has various restrictions on use of its computers, including a prohibition against sending e-mails from its computers to a personal computer over the internet, due to security concerns. (Tr. 726, 1143-45)

28. On two occasions in 2007, when Complainant transferred to Respondent as a JJA, and again in 2008, she received extensive training in protecting the confidentiality of information in Respondent's files, including that stored or transmitted on a computer. (Tr. 40, 189-90, 196-97, 248-49, 510-11, 539-40, 1022, 1124-25, 1029; Complainant's Exhibit 8, Respondent's Exhibit 8)

29. During the 2007 training sessions, Complainant received training on security guidelines promulgated by the New York State Office of Children and Family Services ("OCFS") which,

inter alia, forbid transmitting confidential information over "unsecured" connections, such as the internet. (Tr. 1028-33; Respondent's Exhibits 8 and 9)

30. During the 2007 training sessions, Complainant also received training regarding the privacy and protection of health information pursuant to the Health Insurance Portability and Accountability Act ("HIPAA"); the Delaware County Employee Handbook, which sets forth a confidential computer use policy; and Respondent's Policy and Procedure Manual, which, *inter alia*, notes that all information retained by Respondent is considered confidential and that disclosure is prohibited. (Tr. 251-53, 512-13, 1026-28, 1050, 1052, 1054-55, 1057-58, 1060-61, 1072-74, 1076-78, 1098-1102, 1104-05, 1120-23; Respondent's Exhibits 3, 6, 11, 13, 14, 15 and 16)

31. In January 2008, Complainant received additional training in which she was again provided with the computer use policy from the Delaware County Employee Handbook, and was advised about Respondent's prohibition against unauthorized release of information, inappropriate disclosure of information or use of computers, and of Respondent's prohibition against e-mailing confidential information from work computers to an employee's home. [1](Tr. 1004, 1033-41, 1061, 1109-10; Respondent's Exhibits 6A, 8 and 10)

32. In June 2008, Complainant received an OCFS memorandum regarding the consequences of violating prohibitions against dissemination or improper use of confidential information in social services agencies. That same month, Complainant received additional training regarding computer confidentiality. (Tr. 198-204, 253-55, 513, 942, 1065-67, 1072, 1082-83; Respondent's Exhibit 1 and 12)

33. When Complainant logged on to her work computer, it displayed a warning notice which

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[1] The transcript incorrectly records the phrase "County/Agency business" as "Caribbean Agency Business." (Tr. 1037)

stated in pertinent part that the system "and all data accessed through it are confidential." (Tr. 543-44, 942-43, 1142; Respondent's Exhibit 2)

***Complainant's New Duties and Job Performance***

34. When Complainant began work with Respondent, her caseload of PINS and similar matters ranged between 30 to over 60 cases. (Tr. 497-98, 504-05)

35. That caseload diminished over time to approximately 10 cases in 2011, and to less than five in 2012. (Tr. 188, 504-05, 639, 731-33, 923)

36. In 2012, Aikens recommended to Moon that the JJA position be terminated because of the diminished caseload. Instead, Moon decided that Complainant's job description should be revised and that she should be assigned additional duties so that she would have something to do. These new duties included assisting caseworkers on child welfare cases and child protective cases, and typing caseworkers' progress notes into Respondent's computer record system. (Tr. 505-10, 702, 762-63, 766-67, 851-52, 854, 876-77, 929-30)

37. In July 2012, Complainant was assigned to travel to foster homes to take photographs of foster children for Respondent's files. (Tr. 224-25, 924-25)

38. Complainant began to assign the task of taking photographs of foster children to her co-workers, in the belief that she was permitted to do so. After being told by Aikens in August 2012 that she could not do this, Complainant still continued to assign this task to her co-workers, and repeatedly made excuses to avoid taking the photographs. (Tr. 409-10, 769-70, 773-75, 779-80, 834-36, 841, 926, 960)

39. Complainant's new duties also included distributing Medicaid cards for foster children to the foster parents. Complainant did not complete this task either. (Tr. 776, 928-29)

40. At a meeting in early August 2012 between Aikens, Complainant, Pelligra, and

representatives of Delaware Opportunities, the participants discussed Complainant's waning caseload and what could be done to modify Complainant's job description so that she had sufficient duties to justify her continued employment. (Tr. 775, 839, 932-33)

41. In response, Complainant stated that she had spoken to an attorney, and to personnel at the Department of Labor and the Division of Human Rights, and that she had been advised that she should not consent to performing new duties. (Tr. 220-21, 639-40, 767, 775-76, 794, 851, 861, 868, 923-24, 933, 952, 960-62)

42. Complainant performed her new job duty of typing caseworkers' notes into the computer system without objection. (Tr. 205-06, 782-83)

43. On August 7, 2012, after holding two meetings with Complainant regarding her new assignments, Moon directed Complainant's supervisors, both from Respondent and from Delaware Opportunities, to complete the revision of her job description to include the new duties. Moon also requested that Complainant provide "input and suggestions" regarding this project. (Tr. 635-42, 710-12; Respondent's Exhibit 4, pp. 101-03)

44. On one occasion, in or about July 2012, Complainant decided that Respondent had erroneously failed to report a possible matter of concern involving a foster child. Rather than reporting this to her supervisor, Complainant chose to make a complaint to OCFS, sparking a lengthy state investigation of Respondent's procedures and practices. (Tr. 669-70, 674-75, 808-812, 819, 842-44, 845-47, 868-69, 878-82, 885-86, 890-91, 898)

45. When Aikens remonstrated with Complainant regarding this occurrence, Complainant was defiant and told Aikens that she was wrong. (Tr. 810)

46. On another occasion, Complainant took it upon herself to cause Respondent's investigations unit to investigate and interview a foster child. In doing so, Complainant exceeded

her authority and ignored Respondent's chain of command. (Tr. 534-36, 934-35)

47. At a meeting on August 10, 2012, involving Moon, Complainant, and Pelligra, Complainant stated that she did not feel safe at work, in part because a fellow employee had pushed a wheeled chair at her. Moon directed that Complainant report to work at Delaware Opportunities and work on revising her job description, until he was able to investigate Complainant's concerns. (Tr. 211-13, 375-77, 433, 646-47, 767-68, 933-34; Complainant's Exhibit 1)

48. At that meeting, Moon rebuked Complainant for going outside of Respondent's chain of command and making her complaints directly to state officials and to Respondent's investigations unit. Moon asked Complainant whether she thought she was "the Lone Ranger." (Tr. 527-28, 536-37, 935-36)

49. During this investigation, Moon received complaints from Complainant's supervisors that she was insubordinate. (Tr. 715-16)

50. Complainant reported to work at Delaware Opportunities for a short time, at full pay, until Moon was satisfied that Complainant's concerns were unfounded. She then resumed reporting to work at Respondent's office. (Tr. 96, 98-99, 105-06, 211, 213-16, 526-27, 530-32, 768, 933-34; Complainant's Exhibits 1 and 2)

51. By letter dated August 17, 2012, Moon again directed Complainant to assist in finalizing the revision of her job duties statement, and to follow Respondent's chain of command in the future. Moon also directed Pelligra to review Complainant's written work. (Tr. 631-34, 712; Complainant's Exhibit 1)

52. In several meetings Aikens held in August 2012 to address Complainant's performance, Complainant again stated reasons that she would not perform the new duties assigned to her, such

as obtaining photographs of foster children and distributing Medicaid cards. (Tr. 702, 765, 768-69, 783, 785-86, 826-27, 849)

53. Complainant was counseled by her supervisors several times during the summer of 2012, for such behavior as being absent from her work area, insubordination, and refusal to perform her duties. None of these counseling sessions resulted in suspension, or loss of pay or benefits. (Tr. 50-52, 59, 71-72, 332-34, 386-87, 937-38, 962-63)

54. Pelligra and Aikens observed that Complainant was crying and upset at work, that she left work early, and that she did not do her assigned tasks. Aikens believed that Complainant was "stressed out" by her job, and she recommended to Moon that Complainant's employment be terminated. Moon refused. (Tr. 802-04, 858, 936-37)

55. Aikens held two meetings in early September 2012 with Complainant and Pelligra regarding Complainant's performance. At those meetings, Complainant again expressed her refusal to perform the new duties assigned to her. (Tr. 713, 786-90, 875-76)

56. Complainant filed her first Division complaint number 10157221 on September 7, 2012, alleging discrimination due to disability, and retaliation. (Tr. 99, 104-05; ALJ Exhibit 4)

57. On September 11, 2012, Moon learned that Complainant had filed that complaint. He referred the matter to Porter Kirkwood, Esq., the Delaware County Attorney. (Tr. 594-96, 608, 610-11, 707)

***Respondent's Review of Computer Records***

58. Respondent's supervisory personnel routinely access and review their employees' computers. Respondent also conducts regular reviews of its computers through its computer support staff, and promulgates reports of the results. (Tr. 358, 614-16, 987-88, 1001-02, 1010-11, 1140-41, 1159-61, 1174)

59. Through Respondent's computer support department, Pelligra and Aikens monitored the computers of caseworkers and support staff under their supervision, including Complainant, on a regular basis. They did this in order to make sure that important information was appropriately "backed up," to monitor the productivity of employees under their supervision, and to make sure that employees were not spending too much of their time on personal e-mails. (Tr. 605, 770-73, 863-64, 867-68, 930-32, 936, 988-90)

60. On September 12, 2012, Aikens reviewed Complainant's computer to evaluate her job performance, and found that Complainant had sent confidential information to her personal e-mail address. (Tr. 229-30, 790-91, 865-68, 997)

61. Aikens did not perform that computer review because Complainant had filed a Division complaint. (Tr. 795, 868)

62. Aikens informed Pelligra of her discovery. Pelligra recommended that Complainant's employment be terminated. (Tr. 952-53)

63. That same day, Aikens advised Moon of her findings and provided him with copies of Complainant's e-mails. (Tr. 592-99, 600-01, 603-04, 606, 608-10, 707-08, 791, 858-59)

64. Those e-mails had attached confidential documents which included the names of foster children under Respondent's jurisdiction, and a document maintained by Respondent entitled "Who Is Where in Foster Care," which contained the names and addresses of foster children and foster parents, and directions to the various foster homes.[2] (Tr. 263, 266-67, 275-76, 279, 304-05, 540-42, 545-50, 558, 561-63, 569-72, 574-79, 597-99, 600-01, 685-92, 693, 945-47, 992; Respondent's Exhibit 4, pp. 12-13, 56-58, 59-61, 117-30, 167-68)

65. Respondent regards information regarding foster children and parents as highly

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[2] The transcript refers to "Bates stamped" page numbers on Exhibits as "date stamped." (Tr. 545, 556)

confidential, in part because a foster child may have a protective order or other restriction in force against the biological parent. (Tr. 190-91, 206, 233-34, 314-15, 572-74, 949, 985-86)

66. Sending confidential information to a personal e-mail address over the internet, such as that sent by Complainant, is a serious violation of Respondent's policies. (Tr. 950, 990-92, 1000-01, 1004, 1162-68, 1177-78, 1218, 1221)

67. Contrary to Complainant's claim, Respondent did not routinely permit its employees to violate its policies by sending confidential information to a personal e-mail address over the internet. (Tr. 425-26, 626-27, 802, 948-49, 990, 1084-85, 1145-52, 1157-58, 1163, 1167-73)

68. Complainant did not seek or receive permission from Respondent to send confidential documents from her work computer to her personal e-mail address. (Tr. 238-39, 305, 321, 429, 550-52, 563, 568-69, 580, 596-97, 691, 719, 944-45, 947, 949-53, 1168)

69. Moon reviewed the e-mails which had been retrieved on September 12, 2012, and determined that they had been sent to Complainant's personal e-mail address in violation of N.Y. Social Services Law and Respondent's computer policies. (Tr. 541-42, 550-52, 618, 688, 726)

70. Moon then requested a full audit of Complainant's computer, which revealed more confidential documents that Complainant had sent to her personal e-mail address without permission. (Tr. 263, 271, 274-75, 277, 283-84, 305, 317-21, 542, 555-558, 566-68, 580, 595, 599-600, 602-03, 1162; Respondent's Exhibit 4, pp. 16-18, 86-87, 114, 131-44)

71. On September 14, 2012, Moon decided to terminate Complainant's contract. (Tr. 581, 596)

72. On September 18, 2012, Complainant's contract was terminated for her violations of confidentiality rules, insubordination, and her continuing refusal to perform the new duties assigned to her. (Tr. 47, 72-74, 106-07, 322-24, 385-86, 581-84, 587-88, 590, 611-12, 628-29,

701-02, 708, 735-38, 739-42, 792-93, 804; Complainant's Exhibit 4)

73. Complainant was then informed by Delaware Opportunities that her position was eliminated. Delaware Opportunities offered Complainant the opportunity to apply for another position, an offer she did not accept. (Tr. 180-82, 184, 344-45, 793-94)

74. Respondent permitted an employee to perform work on confidential agency information at home, provided that said employee used a secure computer provided by Respondent, accessed their work computer through a secure web connection, or used an encrypted and password-protected flash drive provided by Respondent. (Tr. 1012-14, 1019, 1149-50, 1153-56)

75. Complainant did not seek or obtain permission to perform work on confidential documents using any of the above means. (Tr. 552-53, 1052-54, 1156)

76. Complainant did not seek or receive permission from Respondent to work on confidential documents from home. (Tr. 553-54, 580, 719, 943-44, 948, 1084-85)

77. Complainant removed a confidential, original document containing the names of foster children from Respondent's offices without permission and placed said document into evidence at the public hearing. (Tr. 1201-02, 1213-14, 1218-19, 1245-46, 1249-50; Complainant's Exhibit 13)

78. Complainant acknowledged at the public hearing that she had sent Respondent's confidential documents to her personal e-mail address, which she accessed using a smartphone, and that she still had access to said documents. (Tr. 1217-18, 1224, 1259-60; Respondent's Exhibit 4)

***Comparators***

79. Respondent has investigated a number of its employees and contract workers for violations of its confidentiality policy, and has terminated the employment of several of them.

(Tr. 613-14, 618-22, 695-701, 719-20, 723-25, 795-801, 820-22, 1002, 1005)

## OPINION AND DECISION

***Employer***

Respondent, in its answer to the instant complaint, denied that it was ever Complainant's employer, and alleged that Complainant was at all times employed by Delaware Opportunities.

New York Executive Law art. 15 ("Human Rights Law") does not define the term "employer." "Generally, four elements are considered in determining whether the relationship of employer and employee exists: (1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct. The really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter." *State Div. of Human Rights v. GTE Corporation*, 109 A.D.2d 1082, 487 N.Y.S.2d 234 (4th Dept. 1985).

In the instant case, Complainant was paid her wages by Delaware Opportunities, acting as a conduit for grant monies obtained by Respondent. She lost her position with Delaware Opportunities when Respondent terminated her contract, in effect, exercising the power of dismissal. Respondent controlled Complainant's conduct: Complainant received her daily instructions and assignments from Respondent's personnel, she worked at Respondent's offices using Respondent's computer and other office equipment, her time and attendance was supervised by Respondent, she was reimbursed by Respondent for expenses as necessary, and she was provided with a vehicle by Respondent for necessary travel. Finally, Complainant was counseled by Respondent for infractions of Respondent's work rules and standards. Under the

circumstances presented, I conclude that Respondent was a co-employer of Complainant.

***Retaliation***

It is an unlawful discriminatory practice to retaliate against a person who has filed a complaint under the Human Rights Law. Human Rights Law § 296.7. To prove a prima facie case of retaliation, Complainant must establish that she engaged in protected activity, that Respondent was aware that she engaged in such activity, that she suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 20, 223-24 (3d Dept. 1999). In a retaliation case, "an adverse employment action is one which 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Mejia v. Roosevelt Island Medical Ass'n*, 31 Misc. 3d 1206 (A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), (citing *Burlington Northern & Santa Fe Railway Co. v. White*, 543 U.S. 53, 68 (2006)), *aff'd*, 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed*, 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013).

Complainant engaged in protected activity when she filed her first Division complaint, and Respondent became aware of this only a few days before Complainant's employment was terminated. Complainant suffered an adverse employment action when Respondent terminated her contract. Complainant established a causal connection between her termination and her Division complaint. Causation may be established by temporal proximity between the protected activity and an adverse action. *See Calhoun v. County of Herkimer*, 114 A.D.3d 1304, 1307, 980 N.Y.S.2d 664, 667 (4th Dept. 2014) (causation may be established by "showing that the protected activity was followed closely by [retaliatory] treatment."); (citations omitted); *Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 25, 987 N.Y.S.2d

338, 343 (1st Dept. 2014 ("plaintiff's termination two months after the second complaint may establish the necessary causal nexus between the protected activity and her discharge"). Complainant has established a prima facie case of retaliation. Because Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant must then show that the reasons presented are a pretext for unlawful retaliation.

Respondent showed that, in an effort to preserve Complainant's employment, it assigned her new job responsibilities. Respondent terminated Complainant's employment because Complainant failed to perform her duties, was insubordinate when told to perform her duties, and repeatedly violated Respondent's policies regarding the confidentiality of its records. Complainant received extensive training in this regard, and was well aware of the restrictions in effect regarding the transmission of said records using unsecured services, such as the internet. Complainant sent records containing the names and addresses of foster children and foster parents over the internet to her personal e-mail address. At the time of the hearing, Complainant still had access to these confidential records, including one original document which she removed from Respondent's offices and introduced into evidence.

Respondent demonstrated its legitimate, nondiscriminatory reasons for terminating Complainant's employment. Respondent has met its burden of proof.

Complainant failed to demonstrate that Respondent's proffered reasons were pretextual in nature. 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 hereby is, dismissed.

DATED: April 24, 2015
Bronx, New York

Michael T. Groben
Administrative Law Judge