

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JOSEPHINE MURRAY,

Complainant,

v.

GLEN COVE OB-GYN ASSOCIATES,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 3502983

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 January 17, 2007, by David William Bowden, an Administrative Law Judge of the New York State Division of Human Rights (“Division”).

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, 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, this 27th day of April, 2007.


KUMIKI GIBSON
COMMISSIONER

TO:

Josephine Murray
30 Post Street
Glen Head, NY 11545-1809

Glen Cove OB-GYN Associates
Attn: Dr. Daniel Pagnani and Dr. George Fulmere JR.
50 School Street
Glen Cove, NY 11542

Frank J. Livoti, Esq.
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Hon. Andrew Cuomo, Attorney General
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State Division of Human Rights

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Trevor G. Usher
Chief Calendar Clerk

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

JOSEPHINE MURRAY,
Complainant

-against-

GLEN COVE OB-GYN ASSOCIATES,
Respondent

RECOMMENDED FINDINGS OF
FACT, DECISION AND OPINION,
AND ORDER

CASE NUMBER:
3502983

PROCEEDINGS IN THE CASE

On May 3, 1995, Complainant Josephine Murray filed a complaint, thereafter amended, with the New York State Division of Human Rights charging respondent with unlawfully discriminatory employment practices on the basis of age and retaliation, in violation of Article 15 of the Executive Law of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint, that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices, and referred the case for a public hearing. Upon due notice, the case was tried before the Hon. David Wm. Bowden, an Administrative Law Judge of the Division on February 10, and 11, 2004. The complaint was represented by Gina M. Lopez Summa, Esq., General Counsel, by Bellew McManus, Esq. Respondent was represented by Frank J. Livoti, Esq. Defense counsel has moved to dismiss the complaint for failure to establish a prima facie case. Decision was reserved. Neither party has submitted a post trial brief. Respondent has submitted no documentary evidence.

FINDINGS OF FACT

Complainant began to work for the Respondent Glen Cove medical firm when it merged with the firm of physicians for whom she was working, in January 1988. She was its office manager. Her duties included processing the payroll, paying the bills, ordering supplies and preparing work schedules for the staff. One partner of the respondent firm was Dr. Daniel Pagnani. (T.164)

Complainant received a notice to appear at the office of the Division of Human Rights, in reference to the case of one Fran DeMarco, formerly a fellow employee of complainant, who had lost her job with respondent. Complainant informed respondent of the need for her to testify, and she told Dr. Pagnani that she was not a liar and that she was not going to lie under oath. (T.25) On April 20, 1994, she testified, as aforesaid. (ALJ Exhibit I)

She was accompanied by defense counsel in the case at bar, Frank J. Livoti, Esq. (T.26) Upon return to the office, complainant told Dr. Pagnani that she had been asked questions about Fran DeMarco and that she had told the truth. (T.30) Complainant credibly denies having received any complaints regarding her work before this event. (T.96)

Complainant had been paid \$775 gross for a four day week. (Complainant's Exhibit I; T.33-34) After the complainant testified in the DeMarco case on April 20, 1994, as aforesaid, all of the office staff under her supervision (except Chi Chi Fulmer, daughter of Dr. Fulmer, a partner in the respondent firm) received raises of salary, as of July 4, 1994. However, the complainant did not receive a raise. (Complainant's Exhibit 2; T.40-41,82) Effective July 11, 1994, complainant was reduced to a three day week at a gross salary of \$582. Respondent told complainant that they had to reduce her salary because they were not making enough money. (T.34) Complainant was the only person whose hours and pay were cut. (T.35) Complainant knew this to be a fact from processing the payroll. (T.36) These facts are undisputed.

Complainant was the oldest woman working there, at age 56. (T.69,92) This is undenied. I find it to be a fact.

Although complainant's work had never been criticized, on March 4, 1995, Dr. Pagnani discharged her from her job. At that time, he said that he did not like the way the office was run. (T.46,50-51) Complainant felt "very upset" and "humiliated" in front of her staff, as she cleaned out her desk while they asked what had happened. The complainant explained to them what had happened to her. (T.52) She called her husband and girlfriend and was reduced to tears. (T.53) Complainant did not seek the professional services of medical nor therapeutic personnel, in aid of her emotional distress.

In 1993, complainant earned \$41,075. In 1994, she earned \$36,832. In 1995, she earned \$6,402 and received \$7,800 in unemployment insurance. In 1996, she got a job working part time for her physician, Dr. Allan Tofler, earning \$16,364. In 1997, she earned \$18,877. In 1998, she earned \$18,962. (T. 55-59) In 1999, she earned \$20,152. In 2000, she earned \$22,408. In 2001, she earned \$26,516 and finally, in 2002, she earned \$24,956. (Complainant's Exhibit 5; T.119-120)

On behalf of respondent, Dr. Daniel Pagnani testified that Glen Cove OB/GYN Associates was formed in January 1988, and that he has been a full partner since then. (T.164) He asserted that "As the office manager, Ms. Murray's duties were to oversee all of our employees and make sure that the work was being accomplished, whether she carried it out herself or had it done by the employees." (T.167) He also said that:

"The job of an office manager is to get her employees to function and to work. Ms. Murray was not able to do that, be it the billing department be it the secretarial in the front, or scheduling." (T.174)

When asked the reasons that in July of 1994 respondent reduced the complainant's wages and hours and gave raises to the other employees, Dr. Pagnani said that the entrance of managed care medicine was a significant reason for the changes. He alleged that it was also done to reduce expenses. He further alleged that another reason for her pay cut was that the complainant did not want to increase her computer skills, which were then more important to the respondent, with managed care. (T.166-168)

Her hours were reduced from four days to three days per week to take that money and place it elsewhere in the practice without increasing respondent's wages allegedly because money was tight at that time, from decreased revenues. (T.165,168)

When Dr. Pagnani was asked the reasons that complainant was fired, he claimed that it was because of her inability to get the employees to function on a more efficient basis and that she was informed of this on a weekly basis. (T.169) He alleged that complainant was unable to either "get along with" (T.170) or to get the employees to function in the way that respondent wanted them to function, and that was her job. When asked if he meant there was personal friction among the staff, he said he did not know but alleged that complainant was unable to "achieve things" that the respondent "wanted accomplished" (T.170); efforts to ascertain, with specificity, what the respondent wanted accomplished were unsuccessful. He denied discriminating against complainant upon the basis of her age.(T.171) He denied cutting complainant's pay or firing her for any reason other than those of which he has told us. (T.172)

When asked whether there were any specific employees whom he felt that the complainant wasn't supervising adequately, he answered that:

"I thought that in general she wasn't doing a good supervisory job in total." (T.173)

When asked again which staff members had complained against complainant, Dr. Pagnani said that "... there was a general feeling that Ms. Murray could not control the staff" (T.178) implying that all the employees (T. 179) wanted to be controlled. Dr. Pagnani said that complainant was fired because she could not get the employees to function more efficiently. When asked if there were specific employees whom she couldn't get to function more efficiently he did not identify any. (T.173)

Dr. Pagnani alleged a disinclination in the complainant to improve her computer skills, claiming that they had become more important to his practice, and that billing, scheduling and payroll were the three most important functions performed on the computer; yet, he did not indicate any ill effects that arose in regard to billing, nor scheduling, nor payroll. He spoke of "a general feeling that Ms. Murray could not control the staff" (T.178) and yet respondent raised almost all of the wages of the purportedly uncontrolled staff, within a week of cutting complainant's pay, which he justified on grounds of deficient funds. He alleged that all members of his staff had complained against the complainant, but he did not remember any specific criticism against her, (T.178,182) alleging that they had wanted "a smoother running organization." (T.182) Dr. Pagnani failed to identify any absences of smoothness.

Dr. Pagnani denied that billing was done wrong. (T.173) He said that he was satisfied with the work but "not satisfied with the supervision of that work." (T.177) He said that "... as reimbursements decreased, it was necessary to follow up closer on things." (T.173) He indicated that complainant's billing staff did satisfactorily follow up:

"...they were following. The job of an office manager is to get her employees to function and to work. Ms. Murray was not able to do that, be it the billing department, be it the secretarial in the front, or scheduling. Like she made a comment yesterday that she covered when people couldn't work, but she only covered when people couldn't work when she couldn't find anyone else to work that day so. [sic]" (T.175)

I understood this language to be disapproval of the quality of complainant's work. When asked how it should have been, he said: "That's the way it should be. Absolutely." (T.174-75)

Dr. Pagnani alleged that he had concerns about scheduling of staff for adequate office coverage (T.183); yet, he admitted that he had no memory of any occasion of an insufficiency of necessary personnel to cover the office. (T.184) He asserted that: "There was an unrest and an uneasiness between [sic] her inability to function as an office manager" (T.181) and that: "...the employees we have functioning with us now are the same ones that were under Ms. Murray back then"; (T.176) yet, he did not offer the testimony of any of them, in proof of their alleged discontent, nor did he explain the absence of their testimony. I took a negative inference with regard to how those employees would have testified.

I did not believe Dr. Pagnani's testimony. His demeanor gave me the impression that he was dissembling. I found his testimony to be profoundly and evasively vague, insofar as any particular error of the complainant. When probed for greater specificity, he uttered negative comments about his memory. (T.178;182) While observing his testimony, I suspected that he was choosing his words to obfuscate and to distract, rather than to directly answer the questions that had been addressed to him.

Complainant's Exhibit 2 shows that the raises granted to the other employees in July of 1994 were of diverse percentages. Therefore we cannot calculate the size of the raise that the complainant would have received, in the absence of unlawful retaliation. From July 11, 1994 until Dec. 31, 1994, the complainant's pay cut cost her \$193 for each of 25 weeks = \$4,825.

In 1995, the complainant earned \$6,402 from the respondent and \$7,800 from unemployment insurance = \$14,202, whereas I find that she would have earned \$775 for each of 52 weeks = \$40,300, in the absence of unlawful retaliation. Therefore, in 1995 she suffered a loss of \$26,098. I find that complainant should be compensated for the anguish of her pay cut. Complainant also credibly described her humiliation of the day on which she was fired. I find compensation of \$7,500 for her emotional suffering to be in order.

In January of 1996, the complainant got a part time job working for her physician, Dr. Allan Toffler, in his office, where she earned \$16,364, for a loss of \$23,936. Complainant alleged that she continued to seek employment in mitigation of her damages, including opportunities beyond the medical area, such as bookkeeping or secretarial work. She did not submit resumes to any potential employers. Complainant testified that after she began to work in her part time job for Dr. Toffler in 1996:

"I looked around, you know, but not that serious.... Well, I would ask some of the girls in the building if they knew of any openings." (T.88-91)

She had been paid as an office manager for several years. The record is devoid of evidence that she attempted to get work managing an office. In furtherance of her duty to mitigate damages, the complainant was supposed to have done her best to find comparable work. She did not do this. Accordingly, I find that lost earnings are awardable only through the end of 1995, until the complainant began her tenure in the part time job wherein she continued to work until the time of her retirement.

DECISION AND OPINION

In order to prevail, the complainant must prove a prima facie case of unlawful employment discrimination. Hence, she must prove that she was the victim of an adverse employment decision, resulting from her age or from illegal retaliation. In order to prove a prima facie case of age based discrimination, complainant must prove: (1) that she belonged to that protected class; (2) that she was qualified for her position; (3) that she suffered adverse employment action; (4) that surrounding circumstances give rise to an inference of discrimination on the basis of her membership in that class.

If the complainant does that, the burden of going forward shifts to the employer clearly to articulate a lawful reason for his adverse employment decisions. If that is done, the burden reverts to the complainant to prove that respondent's clearly articulated reason for adverse decisions is pretextual concealment of respondent's unlawful age based discrimination. McDonnell Douglas Corporation v. Green 411 US 792 (1973) The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Department of Community Affairs v. Burdine 450 US at 253 (1981) Respondent's articulation of justification of its decision for adverse employment action must be clear and specific.

"The analytical framework for evaluating a claim of discrimination in violation of Title VII is well established. We apply the three-step burden shifting analysis enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-08, 113 S. Ct. 2742 (1993) Initially, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252-53. Second, assuming the plaintiff demonstrates a prima facie case, the burden of production shifts to the employer to articulate a legitimate, clear, specific and non-discriminatory reason for refusing to promote the employee. Gallo v. Prudential Residential Services, Ltd., 22 F.3d 1219, 1226 (2d Cir. 1994). Hicks, 509 U.S. at 515 " Holt v. KMI 95 F.3d 123 (1996)

"Once a plaintiff demonstrates a prima facie case of age discrimination, the defendant is obligated to produce evidence 'which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action.' Hicks, 125 L. Ed. 2d 407, 113 S. Ct. 2742 at 2748 ... This explanation must be 'clear and specific.' Meiri, 759 F.2d at 997." Gallo v. Prudential Residential Servs., Ltd. Pshp., 22 F.3d 1219 (1994)

To prove a prima facie case of retaliation, complainant must show: 1. involvement in protected activity 2. that her employer knew of that activity 3. that she was the victim of adverse employment action 4. that the protected activity caused that adverse employment action. Treglia v. Town of Manlius 313 F.3d 713 (2d Cir. 2002)

I find that the complainant has proven a prima facie case of retaliatory discrimination, complainant's testimony being the protected activity, with the complainant having informed Dr. Pagnani of her said testimony, before her pay was cut and she was subsequently fired. Respondent's articulation of a reason for reducing complainant's remuneration (when each staff member, except Chi C. Fulmer, received raises) was too vague and general, being neither "clear" nor "specific". The respondent's articulation of a reason for discharging the complainant from her employment was cast in broad generalities, being neither "clear" nor "specific." Therefore, I find that the respondent has failed to articulate any lawful reason for either of its adverse employment decisions against complainant. In any event, even if the respondent actually had satisfied his duty to clearly articulate a lawful and specific reason in justification of his adverse employment decisions, in my estimation, a fair reading of the record in its entirety, demonstrates that the respondent's alleged reasons constitute pretextual concealment of unlawful retaliatory discrimination.

I have rejected the reasons proffered by respondent in justification of the discrimination as to earnings, as well as the reason proffered for discharging the complainant from her employment, as not being credible;

"... rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination ...and the Court of Appeals was correct when it noted that, upon such rejection, [n]o additional proof of discrimination is required'... Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." St. Mary's Honor Center v. Hicks 509 U.S. 502, 113 S.Ct. 2742 (1993); Reeves v. Sanderson Plumbing Prod. 530 U.S. 133, 120 S.Ct 2097 (2000)

I have credited the complainant's testimony.

Dr. Pagnani asserted that: "There was an unrest and an uneasiness between [sic] her inability to function as an office manager" (T.181) and he said that: "... the employees we have functioning with us now are the same ones that were under Ms. Murray back then"; (T.176) yet, he did not offer the testimony of any of them, in proof of their alleged discontent, nor did he explain the absence of those witnesses, in support of their alleged "uneasiness" or "unrest" or desire for "a smoother running organization." I infer that the respondent would have called those witnesses, if he knew that their testimony would have supported what he has alleged of their sentiments and desires in this matter. His failure to have called those witnesses has cast his credibility in a negative light.

He admitted that complainant's billing staff did a satisfactory job, following up on billing, as they should have done:

"... they were following. The job of an office manager is to get her employees to function and to work. Ms. Murray was not able to do that, be it the billing department, be it the secretarial in the front or scheduling"

The record shows that the allegedly non-functioning and non-working staff were granted raises. It is a strain upon credulity that the complainant's staff would be rewarded with enlargements of their salaries when money was allegedly *tight*, if they were not functioning and were not working, as Dr. Pagnani has asserted.

Dr. Pagnani's testimony was rendered in very broad generalities insofar as he described the quality of the complainant's service to his firm. His testimony was singularly lacking in the identification of any particular ill effect that resulted from the professed inadequacies of complainant's supervision of the office staff. I consider Dr. Pagnani's failure to reveal any discrete, untoward consequence of complainant's supervision, more likely than not, to result from the *absence* of the error that he employs vague language to allege. In my judgment, it is more likely than not, that if complainant had caused any trouble on the job, Dr. Pagnani would not be reticent to identify it, to justify reducing her pay and dismissing her. His testimony is strikingly devoid of reference to any incident in the experience of his firm indicating that anything bad happened, as a result of defective supervision. The failures of memory to which Dr. Pagnani has testified have not been persuasive.

I find that the complainant was the victim of unlawful retaliatory discrimination in the amount of her pay, and as to the loss of her job, as alleged in the instant complaint.

Concerning the instant cause of action for unlawful age discrimination: I find that the record is devoid of evidence that any action was taken against complainant on the basis of her age. Complainant has not proven a prima facie case of unlawful age based discrimination, in that no employment decision was applied to her under circumstances that give rise to an inference of unlawful age based discrimination. Accordingly, that cause of action is dismissed on the merits.

I do not find that the complainant satisfied her legal duty to mitigate her damages as well as possible.

"... The law casts upon the plaintiff, as the injured party, the responsibility of making a reasonable effort to reduce damages which he or she has sustained as a result of the wrongful acts of the defendant, and precludes recovery for ensuing losses which the plaintiff could have prevented by reasonable effort."
36 NY Jurisprudence §127 Damages

She had been paid as an office manager for several years. The record is devoid of evidence of any attempt to get work managing an office. In furtherance of her duty to mitigate, complainant was obligated to do her best to find comparable employment. Accordingly, I find that wages are awardable only through the end of 1995, until the complainant began the part time job in which she remained until her retirement.

DAMAGES

Complainant's Exhibit 2 shows that the raises granted to the other employees in July 1994 were of diverse percentages; hence, we cannot calculate the size of raise that complainant would have gotten, in the absence of unlawful retaliation. From July 11, 1994 until Dec. 31, 1994, the complainant's pay cut cost her \$193 for each of 25 weeks = \$4,825. In 1995, she earned \$6,402 from the respondent and \$7,800 from unemployment insurance = \$14,202, whereas I find that she would have earned \$775 for each of 52 weeks = \$40,300, in the absence of unlawful retaliation. Thus, in 1995, complainant lost: \$26,098. 1994 and 1995 losses = \$30,923; (\$4,825 + \$26,098 = \$30,923). Complainant is legally entitled to be compensated therefor. New York Executive Law Article 15, §297.4 (c)(iii) Thus, respondent is liable to complainant for \$30,923, at a rate of 9% per annum, at simple interest, since "a reasonable intermediate date" of March 4, 1995. CPLR §§5001-5004 Aurecchione v. New York State Division of Human Rights, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002)

The complainant has credibly described the anguish and the embarrassment that she felt on the day on which respondent fired her. Complainant felt "very upset" and "humiliated" in front of her staff, as she cleaned out her desk while they asked what had happened. Complainant explained what had happened to her. (T.52)

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Complainant called her husband and her girlfriend. She had been reduced to tears by the humiliation of being fired and cleaning out her desk in front of her staff. (T.53) I find that a compensation of \$7,500 for this emotional pain is appropriate. New York State Department of Corr. Svcs. v. New York State Division of Human Rights, 265 A.D.2d 809, 695 N.Y.S.2d 647 (4th Dept. 1999). Interest shall apply to this award for emotional suffering at the rate of 9% per annum from the service of this decision until payment has been rendered.

ORDER

Based upon the foregoing Findings of Fact, Decision and Opinion, and pursuant to Article 15 of the Executive Law, it is

ORDERED, that the motion to dismiss the complaint for failure to establish a prima facie case is denied, as to the instant cause of action for unlawful retaliation, and the said motion is granted, as to the instant cause of action for unlawful age based discrimination; the latter cause of action is dismissed on the merits. It is further

ORDERED, that within 60 days of the service of this decision, respondent pay complainant the sum of \$30,923.00, as back wages, which represents revenue lost by complainant since the reduction of her remuneration on July 11, 1994, and which includes the time from which complainant's employment was unlawfully terminated, until the end of 1995, concerning which she has proven lost earnings in consequence of respondent's unlawful retaliation, as hereinbefore set forth. It is further

ORDERED, that respondent pay complainant simple interest at the rate of 9% *per annum* on the aforesaid back wages from the "reasonable intermediate date" of March 4, 1995, until full payment has been rendered. CPLR §§5001-5004 It is further

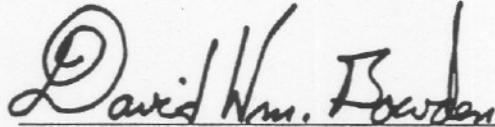
ORDERED, that the respondent pay the complainant \$7,500 in compensation for anguish attendant to the reduction of her remuneration and in compensation for anguish attendant to the loss of her position, with no deductions taken therefrom. It is further

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ORDERED, that the respondent pay complainant interest upon the aforesaid award in compensation for anguish, at the rate of 9% per annum, from service of this decision until payment has been rendered. It is further

ORDERED, that respondent render the aforesaid payments in the form of certified checks made payable to the order of complainant and delivered by registered mail to Caroline J. Downey, Acting General Counsel of the New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458. It is further

ORDERED, that the respondent will cooperate with representatives of the General Counsel and the Division during any investigation into compliance herewith.



David William Bowden
Administrative Law Judge

DATED: JANUARY 17, 2007
BRONX, NEW YORK