

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

HARRIET OPPENHEIMER,

Complainant,

v.

NORTH EAST CENTER FOR SPECIAL CARE,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10107958

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 30, 2009, by Robert M. Vespoli, 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 13 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**NORTH EAST CENTER FOR SPECIAL
CARE,**

Respondent.

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

Case No. **10107958**

SUMMARY

Complainant alleged that Respondent discriminated against her based on her disability, age and creed by terminating her employment as the director of Respondent's Café.

Complainant also alleged that Respondent retaliated against her because she refused to follow her supervisor's directive to discharge a disabled employee. Since the credible record does not support Complainant's allegations, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 23, 2005, 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 Migdalia Pares, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 22 and 23, 2007 and November 5, 2007. The case was subsequently reassigned to Robert M. Vespoli, ALJ.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield. Respondent was represented by Matthew J. DeMarco, Esq.

FINDINGS OF FACT

1. Complainant is a member of the Jewish faith. (Tr. 51)
2. Complainant was born on September 27, 1946. (Tr. 25)
3. Respondent is a licensed skilled nursing facility performing long-term rehabilitation mostly for individuals with traumatic brain injuries. (Tr. 368-70)
4. Respondent hired Complainant in or about September 2001 to work as an emergency medical technician (“EMT”). (Tr. 18-19)
5. In July 2004, Donald Policastro, Respondent’s administrator during the relevant time period, promoted Complainant to the position of director of Respondent’s Café. (Tr. 112-13, 116, 365-66, 377, 381) Policastro was Complainant’s direct supervisor at this time. (Tr. 26, 116, 367)
6. Beginning in September 2003 and continuing during Complainant’s tenure as director of the Café, state and federal regulators exposed problems with Respondent’s facility that required strict oversight by regulatory authorities. (Tr. 179, 193, 365-66, 384, 400, 403)
7. In December 2004, Complainant injured her ankle and returned to work 1 or 2 weeks later. (Tr. 41-42) In January 2005, Complainant had surgery to relieve stenosis in her carotid artery, and she was out of work for several weeks. (Tr. 29-30, 39; Complainant’s Exh. 5)

Respondent allowed Complainant to take the necessary time off for recovery, and she returned to work without restrictions each time. (Tr. 172-73) Complainant testified that Policastro never said anything derogatory or offensive about her medical condition. (Tr. 169-73)

8. Complainant alleged that around the time of her ankle injury, Policastro instructed her to terminate the employment of Mary Wiedemann, an employee working in Respondent's Café. (Tr. 28-29, 40; ALJ's Exh. 1) Complainant alleged that Policastro wanted to terminate Wiedemann's employment because Wiedemann was receiving workers' compensation benefits. (Tr. 28-29) Complainant stated that she refused to follow Policastro's directive to discharge Wiedemann because it called for Complainant to engage in "unethical" conduct. (Tr. 29)

9. Policastro stated that he never instructed Complainant to terminate Wiedemann's employment. (Tr. 388-90, 430) Complainant admitted that she did not have the authority to terminate Wiedemann's employment without approval from Kari English, director of human resources for Respondent. (Tr. 129, 437) As the facility administrator, Policastro had the authority to unilaterally terminate Wiedemann's employment. (Tr. 390-91) The record shows that Wiedemann continued working for Respondent until the fall of 2005 when her physician notified Respondent that she was totally disabled. (Tr. 499-501)

10. Complainant alleged that when she refused to comply with Policastro's directive to discharge Wiedemann, Policastro began "torturing" her. (Tr. 40-42; ALJ's Exh. 1) She stated that Policastro subsequently moved her office downstairs into the Finance Unit near the Café. (Tr. 42-43, 139-44) Policastro testified that he moved Complainant to this office because it was closer to the Café, and it was in a secure area where Complainant could count money and learn how to balance the register properly. (Tr. 384-86)

11. Complainant could not identify the dates of any alleged retaliatory acts committed by Policastro. (Tr. 40, 135-38)

12. Complainant also alleged that Policastro harassed her by constantly referring to her as an “old lady” in front of her peers. (Tr. 44-45, 47) Complainant produced a former employee of Respondent, Mary Lettaeri, who testified that she heard Policastro refer to Complainant as an “old lady” on 2 or 3 occasions in March or April 2005. (Tr. 275-76, 287-88) Lettaeri’s shaky testimony on this issue was not persuasive. (Tr. 287-89, 292-95) The record shows that Respondent discharged Lettaeri for cause in October 2005, and Lettaeri became friendly with Complainant after Lettaeri’s discharge. (Tr. 286, 295, 505-07; Respondent’s Exh. 6)

13. Policastro testified that he never referred to Complainant as an “old lady”. (Tr. 396-97) This testimony was corroborated by English, Joseph Merante, Respondent’s food service director, and Cynthia Pope, a nurse manager for Respondent. (Tr. 300, 313-14, 331, 339, 473)

14. Complainant alleged that Policastro denied her time off from work on one occasion to observe a Jewish holiday. (Tr. 51-52, 148, 151-52) Policastro denied this allegation. (Tr. 373) Complainant’s testimony on this issue was muddled, and she could not identify the date, the time of year or the Jewish holiday in question. (Tr. 148-52) The record also shows that Complainant did not adhere to Respondent’s established leave request policy and procedure for the holiday in issue. (Tr. 373-74, 492-93)

15. Complainant received an employee handbook containing Respondent’s antidiscrimination policies and complaint procedures. (Tr. 154, 156, 468, 470; Respondent’s Exhibits 2, 12) Complainant never filed a complaint about Policastro’s alleged discriminatory conduct. (Tr. 164-65, 590) Although Complainant initially testified that she informally spoke to English about Policastro’s alleged unlawful conduct, her subsequent testimony on this issue was

ambiguous and contradictory. (Tr. 47-48, 160-65, 590-91) English testified that she never received a complaint from Complainant, formal or informal, regarding discriminatory or retaliatory conduct on the part of Policastro. (Tr. 470-71)

16. Complainant exhibited job performance problems in or about the fall of 2004. (Tr. 384) The credible record shows that Respondent provided Complainant with training and counseling regarding the handling of cash, the lawful scheduling of minors working in the Café, and the proper storage and handling of food. (Tr. 121-23, 305, 317-18, 379, 385, 400-12, 420, 484-88) Complainant also received counseling regarding her harassing conduct toward other employees. (Tr. 304-11, 336-38, 383, 399, 418-19, 519-20)

17. Complainant received several written counseling and disciplinary warnings. (Complainant's Exhibits 4A-4F; Respondent's Exh. 3) On February 6, 2005, Policastro issued a written warning to Complainant because she failed to follow correct sanitary and infection control procedures by scooping tuna fish from a container with her bare hands during a regulatory survey inspection. (Tr. 407-08; Complainant's Exh. 4B) Merante also observed this incident. (Tr. 305) Complainant was previously instructed to stay out of the kitchen for failing to follow proper infection control procedures. (Tr. 407-09, 305, 312-13; Complainant's Exh. 4B)

18. On February 18, 2005, English issued a disciplinary warning to Complainant because she knowingly scheduled a minor employee, Kayla Camara, to work excessive hours in violation of the New York State Labor Law. (Tr. 411-13, 484; Complainant's Exh. 4C) Pope, Camara's mother, testified that Camara was less than 16 years of age at the time, and Pope reported Complainant's misconduct to English. (Tr. 334-35)

19. On February 23, 2005, Policastro issued a written warning to Complainant because she disregarded his instructions regarding the appropriate pricing of products sold in Respondent's Café. (Tr. 415-17; Complainant's Exh. 4D)

20. On March 16, 2005, Policastro issued a written warning to Complainant because employees complained that Complainant treated them in a "demeaning" and "dehumanizing" manner. (Tr. 418; Complainant's Exh. 4E) English and Merante testified that Complainant frequently mistreated staff, and she received prior internal training regarding the treatment of fellow employees. (Tr. 306-07, 312, 519-20)

21. On March 24, 2005, Policastro issued another written warning to Complainant because she did not follow Respondent's infection control procedures by failing to serve cold food at the proper temperature. (Tr. 401-03, 419-20; Complainant's Exh. 4F) This infraction also occurred during a regulatory survey inspection and could have resulted in the closing of Respondent's facility. (Tr. 401-03, 420)

22. On April 11, 2005, Policastro terminated Complainant's employment because she inappropriately reprimanded two young female members of her staff. (Tr. 421-27, 519-20; Respondent's Exh. 3) Pope's daughter Camara was involved in this incident and was extremely upset about the way Complainant spoke to her. (Tr. 334, 336, 357) Pope advised Policastro about the incident verbally and in written form. (Tr. 336, 426; Respondent's Exh. 5) Merante observed this incident and stated that Complainant made inappropriate remarks to the girls which caused them to be visibly upset. (Tr. 309-11; Respondent's Exh. 4) Merante reported this incident to Policastro verbally and in writing. (Tr. 425; Respondent's Exh. 4)

23. Respondent terminated Complainant's employment because she repeatedly violated Respondent's established policies and procedures. (Tr. 423, 478)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of disability, creed or age. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a). Complainant has the burden of establishing a prima facie case of discrimination by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondent’s actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent’s proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass’n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant has established a prima facie case of age discrimination. Complainant is a member of an age-protected group, she had the bare qualifications for the position she held and Respondent terminated her employment on April 11, 2005. Furthermore, Complainant and Lettaeri testified that Policastro referred to Complainant as an “old lady” while she was under his supervision.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

Through documentation and the credible testimony of several witnesses, Respondent showed that it terminated Complainant’s employment because she repeatedly violated Respondent’s established policies and procedures. The credible record establishes that Respondent provided Complainant with training and counseling regarding the lawful scheduling

of minors working in the Café and the proper storage and handling of food. Complainant also received counseling regarding her harassing conduct toward other employees. Nevertheless, Complainant continued to violate these policies and procedures. She violated proper infection control procedures during a regulatory survey inspection which could have resulted in the closing of Respondent's facility and continued to address other employees in an inappropriate, demeaning manner. Respondent finally terminated Complainant's employment when she inappropriately reprimanded two young female employees in her charge.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet her burden.

Complainant did not show that Policastro, or anyone else associated with Respondent, acted with discriminatory animus. Complainant's testimony that Policastro constantly referred to her as an "old lady" cannot be credited. Lettaeri, a former employee of Respondent, testified that she heard Policastro refer to Complainant as an "old lady" on 2 or 3 occasions in March or April 2005, but Lettaeri's testimony on this issue was vacillating and unconvincing. Lettaeri's friendship with Complainant and the fact that Respondent discharged Lettaeri for cause further undermined the value of Lettaeri's testimony.

Policastro credibly denied this allegation, and Respondent produced several credible witnesses who corroborated his testimony. Although Complainant received an employee handbook containing Respondent's antidiscrimination policies and complaint procedures, she never filed a complaint. Complainant's testimony on this issue was ambiguous and contradictory.

Complainant failed to show that her age played any role in Respondent's decision making process. Respondent hired Complainant when she was 55 years old, already a member of the

protected class. Policastro promoted Complainant to the position of director of the Café when she was almost 58 years old. “As many courts have recognized, there is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status.” *Youth Action Homes, Inc. v. State Div. of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). Complainant offered no plausible evidence showing that, within the roughly 9 month period Complainant worked as the director of the Café, Policastro began discriminating against her based on her age. *See Strohmeier v. Int’l Bhd. of Painters & Allied Trades*, 989 F. Supp. 455, 460 (W.D.N.Y. 1997).

Complainant’s creed and disability discrimination claims are also without merit. Complainant alleged that Respondent discriminated against her based on her creed when Policastro denied her time off from work on one occasion to observe a Jewish holiday. However, Complainant’s testimony on this issue was muddled, and she could not identify the date, the time of year or the Jewish holiday in question. Furthermore, Complainant did not establish that Respondent denied her the time off required for the observance of the actual holiday. The record also shows that Complainant did not adhere to Respondent’s established leave request policy and procedure for the holiday in issue.

Complainant claimed that she became disabled when she injured her ankle in December 2004 and when she had surgery to relieve stenosis in her carotid artery in January 2005. The record does not establish that Complainant’s medical condition played any role in the discipline she received or the termination of her employment. Respondent allowed Complainant to take the necessary time off for recovery, and she returned to work without restrictions each time. Moreover, Complainant admitted that Policastro never said anything derogatory or offensive about her medical condition.

Complainant also alleged that Respondent retaliated against her because she refused to follow Policastro's directive to discharge Wiedemann, a disabled employee. The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

The credible record does not support Complainant's retaliation claim. Policastro had the authority to unilaterally terminate Wiedemann's employment while Complainant did not. The record shows that Wiedemann continued working for Respondent until she became totally disabled in the fall of 2005, roughly 1 year after Complainant's alleged refusal to discharge Wiedemann in December 2004.

Next, Complainant did not show that Policastro began "torturing" her when she allegedly refused to follow his directive to discharge Wiedemann. Complainant's claims that Policastro constantly referred to her as an "old lady" are not credible. Furthermore, the record establishes that Policastro moved Complainant's office for legitimate reasons related to her job functions.

Finally, Complainant did not establish a causal nexus between her alleged refusal to discharge Wiedemann and any retaliatory acts committed by Policastro. Complainant could not

identify the dates of any alleged retaliatory acts committed by Policastro. Moreover, Respondent terminated Complainant's employment roughly 4 months after Complainant's alleged refusal to discharge Wiedemann in December 2004. Without any additional evidence of causation, this temporal relationship is too remote to sustain a claim of retaliatory discharge. *See id.* at 105, 692 N.Y.S.2d at 225 (finding no causal connection for alleged acts of retaliation occurring more than 2 months after protected activity).

Even if Complainant established a prima facie case of retaliation, Respondent successfully articulated legitimate, nondiscriminatory reasons for terminating Complainant's employment.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful retaliation. Complainant has failed to meet her burden.

The ultimate burden of persuasion lies at all times with Complainant. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to establish that she was the subject of retaliation or that Respondent treated her in an unlawful manner because of her age, creed or disability.

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 instant complaint be, and the same hereby is, dismissed.

DATED: January 30, 2009
Hempstead, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive style with a large, looping initial 'R'.

Robert M. Vespoli
Administrative Law Judge