

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

VERA PADGETT,

Complainant,

v.

**A. HOLLY PATTERSON GERIATRIC CENTER,
NOW KNOWN AS A. HOLLY PATTERSON
EXTENDED CARE FACILITY; NASSAU HEALTH
CARE CORPORATION, AS OPERATOR,**

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 3504938

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 12, 2007, by Robert M. Vespoli, 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 8th day of May, 2007.



KUMIKI GIBSON
COMMISSIONER

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STATE OF NEW YORK
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A. HOLLY PATTERSON GERIATRIC CENTER,
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EXTENDED CARE FACILITY; NASSAU HEALTH
CARE CORPORATION, AS OPERATOR,

Respondent.

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

Case No. 3504938

PROCEEDINGS IN THE CASE

On February 9, 1999, Complainant filed a verified complaint with the State Division of Human Rights (Division), charging Respondent with unlawful discriminatory practices relating to employment in violation of the Human Rights Law of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge (A.L.J.) of the Division. Public hearing sessions were held on November 7, 9, and 10, 2005.

Complainant and Respondent appeared at the hearing. Complainant was represented by Frederick K. Brewington, Esq.. Respondent was represented by the Office of the County Attorney for the County of Nassau, by Deputy County Attorney Damon Levenstien, Esq., of Counsel.

Complainant and Respondent filed timely post-hearing briefs.

FINDINGS OF FACT

1. Respondent appeared at the public hearing as "A. Holly Patterson Geriatric Center." (Tr. 3). At the public hearing, the presiding A.L.J. asked Respondent's attorney if Respondent's correct legal name appeared in the caption. Respondent's attorney answered in the affirmative. (Tr. 8). However, a search of Respondent's website indicates that it now does business as "A. Holly Patterson Extended Care Facility," which is operated by, and is a Division of "Nassau Health Care Corporation."¹ A search of the official website for the New York State Department of Health ("DOH") confirms this information.² The presiding A.L.J. takes judicial notice of this information and the caption in this proceeding is amended naming the Respondent as follows: "A. Holly Patterson Geriatric Center, now known as A. Holly Patterson Extended Care Facility; Nassau Health Care Corporation, as Operator."
2. Complainant alleged that Respondent unlawfully discriminated against her by failing to provide a reasonable accommodation for her pregnancy related disability and by terminating her because of her pregnancy. (ALJ Exhibit I).
3. Respondent denied these allegations. (ALJ Exhibit II).
4. On November 1, 1996, Complainant began her employment with Respondent as a part-time Food Service Worker I. (Tr. 21- 22, 44, 222, 226-227, 336-337; Respondent's Exhibit C).
5. The Food Service Worker I position does not technically have a light duty assignment available. (Tr. 229, 246). However, the Food Service Worker I position involved two different types of full duty work locations: the cafeteria and the kitchen. (Tr. 22-23, 222-223,

¹ This information was obtained by using <http://www.numc.edu/index.php?id=214> and <http://www.numc.edu/fileadmin/media/broAHollyPatterson.pdf>.

² This information was obtained by using http://www.health.state.ny.us/facilities/nursing/facility_characteristics/pfi0534.htm.

- 246). In the kitchen, employees pushed and lifted heavy food trays along an assembly line at a rapid speed, pulled heavy wagons, lifted garbage cans, and lifted cases of food weighing approximately 36 pounds. (Tr. 23, 247-248). In the cafeteria, food preparation was conducted in an air-conditioned environment with no heavy lifting involved. (Tr. 22, 222-223, 342).
6. It is undisputed that cafeteria work was less physically demanding than kitchen work. (Tr. 22-24, 53-54, 204, 230, 246, 248, 343).
 7. At all times during Complainant's employment with Respondent, employees were governed by the collective bargaining agreements ("CBA") between the County of Nassau and the Civil Service Employees Association, Inc. ("CSEA") in effect from January 1, 1993 until December 31, 1997 and January 1, 1998 through December 31, 2002. (Joint Exhibits 1, 2). Under these agreements, part-time workers must complete a five-year probationary period. (Tr. 335, 463; Joint Exhibits 1, 2).
 8. At all times during her tenure with Respondent, Complainant was employed on a part-time basis and worked as a Food Service Worker I in either the kitchen or the cafeteria. (Tr. 22-23, 204-205).
 9. Complainant's work history with Respondent was satisfactory and she did not receive any disciplinary action. (Tr. 83)
 10. In April 1998, Complainant brought a note from her physician, Dr. Marilyn Robertson, to Diane Cameron, the director of food services, informing Respondent that she was pregnant. (Tr. 43, 220; Complainant's Exhibits 4, 7). Complainant's estimated date of delivery was November 18, 1998. (Complainant's Exhibit 2).

11. On May 12, 1998, after being diagnosed with lower abdominal pain due to pregnancy, Complainant provided Respondent a letter from Dr. Robertson stating that Complainant needed to be assigned to light duty work as a result of her medical condition. (Tr. 250-251, 147-148; Complainant's Exhibit 2).
12. Complainant then requested to be transferred from the kitchen to the cafeteria. Complainant's testimony that Respondent denied this request is inconsistent with the factual record and is not credible. (Tr. 46-47, 150, 527).
13. Roarty and Cameron credibly testified that, shortly after Complainant's May 12, 1998 doctor's note was presented to Respondent, Complainant was reassigned from the kitchen to the cafeteria where the work was less physically demanding. (Tr. 231, 246, 264, 340, 342, 381-382). However, because the Food Services Department does not officially recognize light duty assignments, Cameron told Complainant that she must first obtain another note from her doctor stating that she could resume a normal workload. (Tr. 230-231, 261-262). On or about May 13, 1998, Complainant presented Cameron with a note from Dr. Robertson stating that she was "sufficiently recovered to resume a normal workload." (Tr. 231; Complainant's Exhibit 6). Complainant was then assigned to work in the cafeteria. (Tr. 231, 340, 342, 381-382).
14. On or about June 6, 1998, Complainant left work and went to the Nassau County Medical Center ("NCMC") complaining of pregnancy related abdominal pain and a headache. (Tr. 56, 58, 157, 193; Complainant's Exhibits 8, 8-A). Respondent received a note confirming Complainant's visit to the NCMC on June 9, 1998. (Complainant's Exhibits 8, 8-A).
15. On or about June 27, 1998, Complainant left work early because she was not feeling well and did not return to work. (Tr. 167, 232-233; Complainant's Exhibit 9).

16. On or about June 28, 1998, Complainant did not report to work for her scheduled shift. (Tr. 168, 233). Complainant did not notify Respondent that she would be out sick that day. (Tr. 168, 234; Complainant's Exhibit 10).
17. On or about June 29, 1998, Complainant came to work for the sole purpose of picking up her paycheck from Cameron, the supervisor on duty. (Tr. 169, 234-235). Complainant was unable to work at that time and she decided to seek maternity leave. (Tr. 84, 169, 236). June 27, 1998 was the last day Complainant worked for Respondent. (Tr. 170, 238; Complainant's Exhibits 10, 13).
18. On July 1, 1998, Respondent sent a letter to Complainant stating that she had not reported to work since June 27, that she failed to explain her absence on June 28, and that she would be terminated for job abandonment if she did not return to work by July 10, 1998. This letter also requested that Complainant complete a resignation form if she wished to resign. (Tr. 170-171; Complainant's Exhibit 10).
19. On July 6, 1998, Complainant reported to Maureen Roarty, personnel officer for Respondent, and presented her with a handwritten note requesting maternity leave due to her worsening condition. (Tr. 172-173, 349, 393-394; Complainant's Exhibit 11). It is noted that Complainant's handwritten letter does not request a transfer from the kitchen to the cafeteria. (Complainant's Exhibit 11). Complainant's request for maternity leave was denied because maternity leave is not available to part-time employees under CBA § 44-5.1 and § 44-5.2. (Tr. 350, 400; Joint Exhibits 1, 2). Under these provisions of the CBA, part-time workers are not entitled to time and leave benefits until they complete 1000 hours of work for Nassau County. The record does not establish that Complainant met this criterion. Further,

supplemental leave at half-pay was not available to part-time employees regardless of the number of hours worked. (Joint Exhibits 1, 2; Respondent's Exhibit G).

20. Roarty advised Complainant that, as long as she was unable to work due to her pregnancy, she could keep her job as long as she followed Respondent's established policy. Under this policy, Complainant was obligated to provide medical documentation stating that her pregnancy rendered her unable to work and to provide any further documentation requested by Respondent. She was also required to maintain regular contact with her department head regarding her status. (Tr. 350). This policy was uniformly applied by Respondent to both part-time and full-time employees. (Tr. 352). Although Roarty testified that this was not a written a policy, it is consistent with Respondent's formal leave of absence policy for an employee suffering from a personal illness. (Tr. 352; Respondent's Exhibit H).
21. Complainant denied that Roarty informed her of this policy. (Tr. 174). However, Complainant does not even recall meeting with Roarty on or about July 6, 1998. (Tr. 173). Her recollection of these events is unreliable, uncorroborated and cannot be credited.
22. On or about July 9, 1998, Complainant filed a contract grievance with her union requesting that she receive childcare leave pursuant to § 9 and § 42-15 of the CBA. Complainant's grievance makes no reference for relief in the form of a job reassignment from the kitchen to the cafeteria. This grievance was denied. (Complainant's Exhibit 12).
23. In or about early July, 1998, Complainant complained to Nassau County Legislator Roger Corbin detailing her inability to work due to her pregnancy. (Tr. 60-61, 63). After an inquiry was made to Respondent by Legislator Corbin's office, Roarty responded on behalf of Respondent stating that Complainant abandoned her position because she "hurt too much" and that Complainant had not submitted any requested medical documentation to substantiate

her current inability to work. (Tr. 434-436; Complainant's Exhibit 9). While this document refers to Complainant's eligibility for childcare leave, it does not reference any request by Complainant to be reassigned from the kitchen to the cafeteria. (Complainant's Exhibit 9).

24. The record is devoid of evidence showing that Complainant supplied medical documentation verifying her inability to return to work after June 27, 1998, her last day of work.
25. On or about July 15, 1998, Complainant received a letter from Respondent, requesting that Complainant return to work immediately. (Tr. 179, 365; Respondent's Exhibits B, E).
26. On or about July 20, 1998, Respondent sent a termination letter to Complainant stating that she was terminated pursuant to § 10-1.2 of the CBA, which designates a five year probationary period for all part-time employees. (Tr. 355, 417; Complainant's Exhibit 13; Joint Exhibits 1, 2). Complainant's termination was effective June 27, 1998. (Complainant's Exhibit 13).

OPINION AND DECISION

Complainant alleged that Respondent unlawfully discriminated against her by failing to provide a reasonable accommodation for her pregnancy related disability and by terminating her because of her pregnancy. The Division finds that Respondent did not discriminate against Complainant because of her pregnancy in violation of the New York State Human Rights Law ("NYSHRL").

Under the NYSHRL, it is unlawful for an employer to terminate an individual on the basis of his or her disability. N.Y. EXEC. LAW § 296(1)(a). A complainant has the burden of establishing a *prima facie* case by showing that he or she is a member of a protected group, that he or she suffered an adverse employment action and that the respondent's action occurred under circumstances giving rise to an inference of discrimination. Once a *prima facie* case is

established, the burden of production shifts to the respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with the complainant to show that the respondent's proffered explanations are a pretext for unlawful discrimination. *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)); see also, *McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328 (1994) (burden shifting analysis applicable to disability claims).

N.Y. EXEC. LAW § 292(21) defines "disability" in the following manner:

(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

It is unlawful for an employer to terminate a woman because she is pregnant. *Mittl v. N.Y. State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). Since pregnancy qualifies as a temporary disability under the NYSHRL, Complainant's claims must be analyzed in the same context as any other temporary physical disability. See *State Div. of Human Rights ex rel. Henretta v. City School Dist.*, 75 A.D.2d 1009, 429 N.Y.S.2d 322 (4th Dept. 1980). An employer is obligated to provide a reasonable accommodation for an employee's known disability. N.Y. EXEC. LAW § 296(3). The Division's General Regulations identify factors involved in assessing reasonable accommodations for temporary disabilities in

the following manner:

(3) The Human Rights Law may require reasonable accommodation of temporary disabilities in the areas of modified work schedules, reassignment to an available position or available light duty, or adjustments to work schedules for recovery. The employer's past practice, pre-existing policies regarding leave time and/or light duty, specific workplace needs, the size and flexibility of the relevant workforce, and the employee's overall attendance record will be important factors in determining reasonable accommodation in this context.

9 NYCRR § 466.11(i)(3).

Respondent provided Complainant with a reasonable accommodation by reassigning her to a position in the cafeteria shortly after she made her need for an accommodation known to Respondent on or about May 12, 1998. The testimony of Cameron and Roarty on this issue is credible and consistent.

Complainant testified that Respondent denied her request for a transfer from the kitchen to the cafeteria. However, Complainant's testimony on this critical issue is contradicted in the record. First, when Complainant chose to document her complaints in early July, 1998, none of her written complaints included a request for a job reassignment from the kitchen to the cafeteria. Complainant's handwritten letter dated July 6, 1998, Roarty's July 2, 1998 response to Legislator Corbin's inquiry, and Complainant's contract grievance submitted July 9, 1998, all specifically refer to Complainant's requests for childcare leave or maternity leave but make no reference to a job reassignment request by Complainant. If she was truly working in the kitchen around that time as she alleges, and she was too sick to work in the kitchen, it is reasonable to expect that her written complaints at that time would include a request for a transfer from the kitchen to the cafeteria.

Further, Complainant's demeanor on cross examination on this issue was manifestly defensive and insincere. Thus, the credible record establishes that Respondent provided

Complainant with a reasonable accommodation by granting her request for reassignment from the kitchen to the cafeteria.

However, Complainant was still unable to perform the essential functions of her job. At that time, Respondent attempted to further accommodate Complainant. Roarty advised Complainant that, as long as she was unable to work due to her pregnancy, she could keep her job as long as she followed Respondent's established policy. Under this policy, Complainant was obligated to provide medical documentation stating that her pregnancy rendered her unable to work and to provide any further documentation requested by Respondent. She was also required to maintain regular contact with her department head regarding her status.

Complainant denied that Roarty advised her of this policy. However, her shaky recollection of these events is not credible. Roarty's steady testimony here is credible and is corroborated in the record by Respondent's leave of absence policy for an employee suffering from a personal illness.

Although Complainant requested childcare leave or maternity leave, the record establishes that, as a part-time worker, Complainant was not eligible for such leave under the CBA. However, Respondent provided Complainant with the opportunity to keep her job if she followed Respondent's established policy. Complainant failed to follow this policy. The record is devoid of evidence showing that Complainant supplied medical documentation verifying her inability to return to work after June 27, 1998, her last day of work.

Respondent is entitled to rely on its past practice and pre-existing policies regarding leave time. *See* 9 NYCRR § 466.11(i)(3). Complainant has proffered no evidence showing that Respondent's established practices and personnel policies were applied in a discriminatory manner. The record shows that Complainant failed to follow Respondent's established policy

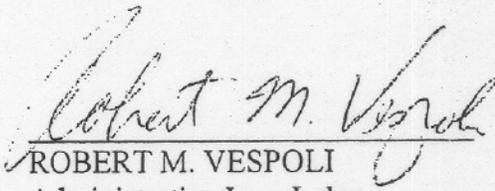
and that she failed to respond to Respondent's attempts to contact her in order to ascertain her employment status. Complainant was ultimately terminated for job abandonment. The only finding permitted on this record is that Respondent's actions were valid.

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: April 12, 2007
Hempstead, New York


ROBERT M. VESPOLI
Administrative Law Judge