

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

STATE DIVISION OF HUMAN RIGHTS

on the Complaint of

FRANCES V. RAPPO,

Complainant,

v.

**THE CITY OF NEW YORK; NEW YORK CITY
HUMAN RESOURCES ADMINISTRATION,**

Respondent.

**and NEW YORK CITY CIVIL SERVICE
COMMISSION, NEW YORK CITY DEPARTMENT
OF PERSONNEL,**

Necessary Parties.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 2302494

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on September 29, 2006, by Michelle Cheney Donaldson, former Commissioner, after a hearing held before Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). Objections to the Alternative Proposed Order were submitted by the Complainant on March 19, 2007.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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 3rd day of April, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

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**STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS

On the Complaint of

FRANCES V. RAPPO,

Complainant,

-against-

**THE CITY OF NEW YORK; NEW YORK CITY
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Respondents,

-and-

**NEW YORK CITY CIVIL SERVICE
COMMISSION; and NEW YORK CITY
DEPARTMENT OF PERSONNEL,**

Necessary Parties.

**ALTERNATIVE
PROPOSED ORDER**

CASE NO. 2302494

PROCEEDINGS IN THE CASE

On February 8, 1993, Complainant filed a verified complaint, thereafter amended, with the New York State Division of Human Rights (Division) charging Respondents with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law of the State of New York.

On August 18, 1995, the complaint was dismissed as untimely. Complainant appealed the dismissal to the Supreme Court, New York County. On October 31, 1995, the Supreme Court ruled that her complaint be considered filed as of May 1992, when she first contacted the Division. Complainant amended her complaint on July 31, 1996, to include additional allegations.

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. Thereafter, the Division referred the case to a Public Hearing.

After due notice, the case came on for a Public Hearing before Robert J. Tuosto, an Administrative Law Judge (A.L.J.) of the Division. A Public Hearing was held on September 13 and 14, 2004, January 25 and 26, March 2, 3 and 4 and June 29 and 30, 2005.

Complainant and Respondents appeared at the hearing. The Division was represented by Gina M. Lopez Summa, Esq., General Counsel, Arlene Zwyer, Esq., of Counsel. Respondents were represented by Matthew J. Driscoll, Esq., of HRA's Office of Legal Affairs/Employment Law Division.

The parties were granted permission to file post-hearing briefs. Both Complainant and counsel for Respondents filed post hearing briefs which were timely submitted and considered.

On December 28, 2005, A.L.J. Tuosto issued a recommended Findings of Fact, Decision and Opinion, and Order (Recommended Order). Objections to the Recommended Order were filed by the Complainant, by the Division and by the Respondent.

This alternative proposed order changes the A.L.J.'s conclusion that all charges in the complaint were time-barred, and instead dismisses the allegations, regarding events during May 1991 and thereafter, on the merits.

FINDINGS OF FACT

1. Complainant alleged that she was unlawfully discriminated against because of her disability of mental illness when, during the course of her employment, she was not transferred after having requested this on various occasions; as a result, Complainant allegedly suffered

“hostility and harassment” from co-workers who knew of her prior psychiatric history. (A.L.J.’s Exhibit 1).

Background

2. Complainant has been under psychiatric care since she was eighteen years of age. (Tr. 902, 911-12, 919) Complainant received various diagnoses concerning her mental condition (Tr. 904), and alternated between taking and not taking her medication. (Tr. 1173, 1178). In 1990, Complainant was diagnosed with Manic Depression, also referred to as Bipolar Disorder. (Tr. 57, 58)

3. On January 17, 1972, Complainant was hired by HRA and commenced employment in the civil service titles of Stenographer and provisional Senior Stenographer. (Tr. 61, 333, 361). Prior to working with HRA, Complainant was diagnosed with Severe Reactive Depression and received medication for the treatment of same. (Tr. 902-903).

4. In 1975, Complainant took a voluntary leave of absence during which time she was hospitalized for about one month. Upon her return in January of 1976, Complainant was demoted from the provisional Senior Stenographer position due to her absence; she continued to hold the Stenographer position. (Tr. 64-72, 334-36, 905, 907). Complainant, upon her return, suffered a loss in salary of one thousand three hundred dollars and a demotion in civil service title. (Tr. 850-51).

5. Complainant did not file a complaint with the Division after her demotion and loss of salary in 1976.

6. In July of 1980, Complainant took an approved voluntary leave of absence which lasted until January of 1981. During this time Complainant maintained weekly or twice weekly visits with her psychiatrist. (Complainant’s Exhibits 54, 55, 55; Tr. 449-58, 466-67, 905).

7. Prior to November of 1982, Complainant was experiencing personal problems that were affecting her job performance. (Tr. 910). As a result, on November 15, 1982, Complainant was directed by her supervisor, Eileen Erickson, to begin an involuntary medical leave of absence after being interviewed by an agency psychiatrist. This directive was made pursuant to N.Y.S. Civil Service Law §§72 and 73, which mandated, inter alia, that an employee adjudged to be unable to perform the duties of her position by reason of a disability was required to undergo a medical examination; an employee could be subsequently reinstated upon being medically certified that she was fit to perform the duties of her former position. (Complainant's Exhibit 1; Respondents' Exhibit O). Complainant was then forcibly escorted to Bellevue Hospital; she was then detained for two weeks in a hospital closer to her home. (Complainant's Exhibits 1, 57-58; Tr. 74-83, 170-72, 175, 177, 857, 859, 860, 875-76).

8. Complainant did not file a complaint with the Division after her involuntary medical leave of absence in November of 1982.

9. In February of 1983, Complainant met with an agency psychiatrist in an attempt to be reinstated. (Tr. 85).

10. In approximately July of 1983, Complainant was reinstated. (Complainant's Exhibit 3; Tr. 84-91).

11. Complainant worked for Respondents without further mental health episodes from July of 1983 until December of 1985.

12. In August of 1983, Complainant was assigned to HRA's Office of Home Care Services (OHCS). (Tr. 91). Complainant worked at OHCS from August of 1983 to December of 1985 in the title of 'Office Associate.' (Tr. 92, 402-03).

13. Prior to December of 1985, Complainant had been experiencing emotional problems. (Tr. 880). In December of 1985, Complainant was directed by Respondents' Office of Personnel to again take an involuntary medical leave of absence. (Tr. 93). As a result, Complainant left work and did not report back. (Tr. 93). On December 31, 1985, Complainant received a telegram at her home informing her that she had been placed on an involuntary leave of absence. (Complainant's Exhibit 5; Tr. 93). On the same day, Complainant also received a mailgram confirming transmission of the telegram to her, and directing her to appear at the Office of Personnel on January 6, 1986. (Complainant's Exhibit 6; Tr. 98-100).

14. Complainant did not file a Division complaint after her involuntary medical leave of absence in December of 1985.

15. On January 6, 1986, Complainant did not report to the Office of Personnel. (Tr. 101).

16. On January 10, 1986, Complainant was sent a letter directing her to visit Dr. Ruth Cohen, a psychiatrist independently retained by Respondents. (Tr. 1408). Complainant's appointment was scheduled for January 17, 1986, but she failed to appear. (Complainant's Exhibit 7; Tr. 106).

17. Complainant was unemployed until she made application to be reinstated in December of 1988. (Complainant's Exhibits 8; Tr. 102-03, 107, 884-90).

18. On February 23, 1989, as a requirement of the reinstatement process mandated by N.Y. Civil Service Law §§72 and 73, Complainant was evaluated by Dr. Azariah Eshkenazi, a psychiatrist independently retained by Respondents. Complainant was diagnosed as suffering from Schizophrenia, Schizoaffective Type and had a demonstrated lack of insight into her condition. Dr. Eshkenazi was of the opinion that Complainant could be reinstated if she was placed in a pressure-free environment, continued taking medication, maintained psychiatric

treatment, and was closely monitored. (Complainant's Exhibits 62-63; Respondents' Exhibit P; Tr. 1338-39, 1341-42, 1346, 1370, 1383).

19. Dr. Eshkenazi, who testified as an expert in the field of psychiatry with an emphasis on the psychiatric fitness of employees seeking reinstatement, had no further contact with Complainant. (Tr. 1324, 1343).

20. On March 2, 1989, Complainant received a letter from Respondents' Personnel Director, Judith A. Levitt, informing her that she had failed to be certified by Dr. Eshkenazi as fit for reinstatement. Complainant was also informed that she could reapply for another medical examination within one year to determine her fitness for reinstatement, and that said application should be made at least sixty days after her prior examination and was to contain further documentation indicating that her disability had been terminated. (Complainant's Exhibit 64; Tr. 513, 1401-03). In his testimony, Dr. Eshkenazi accounted for the discrepancy between this letter and his original recommendation by surmising that Respondents' letter may have been influenced by the conditional nature of his recommendation concerning Complainant's ability to be reinstated. (Tr. 1403, 1412).

21. In April and June of 1989, Complainant provided two doctor's notes from her personal physician supporting her desire for reinstatement, and the likelihood of success if allowed to return to her former position. (Complainant's Exhibits 11, 13; Tr. 125).

22. On May 18, 1989, Dr. Eshkenazi was asked by Robin Germany of HRA's Office of Legal Affairs (OLA) for clarification concerning his earlier diagnosis and recommendations concerning Complainant. He wrote that Complainant's disability was still present, that it required medication, and that Complainant could continue to function while on medication, but would decompensate if she stopped. (Respondents' Exhibit Q; Tr. 1365-66, 1368).

The 1989 Transfer Request

23. In September of 1989, Complainant was directed by William Carnevale, Deputy Administrator for Personnel Services, to be reinstated to her position at OHCS despite her personal physician's request that she be placed in another work location in order to avoid co-workers who knew of her prior involuntary medical leaves and made "nasty" remarks and comments about same. Specifically, Complainant testified that a co-worker said to her, "We know you. We know about you. You see a psychiatrist." (Complainant's Exhibits 14, 66-69; Tr. 115, 133, 144, 258, 545, 548, 555-57, 559-63, 577-78, 582-84, 895-96, 933, 1206). Complainant applied for a transfer but was unsuccessful. (Tr. 145, 148, 564).

24. Complainant did not file a complaint with the Division after her transfer request was denied in or about September of 1989.

25. Complainant worked for Respondents without further mental health episodes from September of 1989 until May of 1990.

26. In or about May of 1990, Complainant had been suffering from deteriorating job performance due to her behavior. (Complainant's Exhibit 16). On May 14, 1990, Complainant was directed by Respondents' Bureau of Medical and Professional Review to be evaluated the following day by Dr. Grace Gorham, an agency psychiatrist. (Complainant's Exhibit 71; Tr. 149, 606-07, 610-13, 891-92). As a result, Complainant was placed on a temporary involuntary leave of absence due to a finding by Dr. Gorham that she was "currently psychotic" and that her "presence on the job [is] inappropriate" in that her behavior is "unpredictable and hostile." (Complainant's Exhibits 16-17; Tr. 152, 622). Complainant was directed by Deputy Administrator Carnevale to appear for an evaluation by an agency psychiatrist on June 7, 1990, after having failed to appear for same on May 31, 1990. (Complainant's Exhibits 17, 18; Tr.

159). Complainant failed to attend both appointments because she felt “very paranoid.” (Tr. 159-60).

27. Complainant did not file a complaint with the Division after her temporary involuntary medical leave of absence in May of 1990.

28. On June 18, 1990, Complainant was placed on an involuntary medical leave of absence as a result of her failure to appear for an evaluation; she was also informed that she had one year in which to apply for a medical examination to determine her mental fitness in order to be reinstated. (Complainant’s Exhibit 19; Tr. 180-81). Complainant was hospitalized in August of 1990, at which time it was explained to Complainant that she was suffering from ‘Manic Depression’ and that, as a result, she would have to be placed on medication. Her psychiatrist also recommended that Complainant’s “... job location should be changed.” (Complainant’s Exhibit 72; Tr. 186, 188-89, 628-31).

29. Complainant did not file a Division complaint after her involuntary medical leave of absence in June of 1990.

30. On both December 31, 1990 and January 9, 1991, Complainant was again examined by Dr. Cohen. (Complainant’s Exhibit 21; Tr. 200-02, 644, 648-49).

The 1991 Transfer Request

31. On May 29, 1991, Complainant returned to OHCS after having been certified as mentally fit for reinstatement. (Complainant’s Exhibit 22; Tr. 203-10, 212, 238, 395, 638, 650, 652, 654, 657, 929).

32. Complainant worked for Respondents without further mental health episodes from May of 1991 until she resigned in 1994.

33. On July 5, 1991, Complainant filed a medical hardship transfer request containing a letter from her physician which again requested that she not work in the same office with coworkers who knew of her prior leaves of absence; Complainant was specifically seeking a transfer to the "Executive Offices." (Complainant's Exhibit 27; Respondents' Exhibits A, B, C, D, E; Tr. 243, 250-51, 253, 255-57, 395-96, 404, 954, 977, 1194-95, 1263).

34. On one occasion in or about July of 1991, while Complainant was working as a "floater" for OHCS, co-workers made derogatory statements about her psychiatric condition. In another incident, Complainant saw something that a co-worker wrote concerning her mental health which she described as "very cruel." Complainant later complained about these incidents to her superiors. Complainant was unable to testify to any details of these incidents. (Tr. 255-60, 404).

35. On July 26, 1991, Complainant's transfer request was disapproved on the ground that the medical documentation reviewed by the Office of Personnel did not indicate that a transfer was necessary. (Respondents' Exhibit F; Tr. 259, 265, 397, 1079, 1263-64) On the same day the Office of Personnel Services also denied the request on the ground that Complainant's medical documentation was "insufficient" because it failed to provide a diagnosis, and establish a nexus between the medical condition and the accommodation requested. (Respondents' Exhibit G; Tr. 1107).

36. Complainant did not file a complaint with the Division after her transfer request was denied in July of 1991.

37. On September 5, 1991, Complainant indicated to a member of the Respondent HRA's Office of Equal Employment Opportunity (EEO) that she preferred to stay where she was rather

than be redeployed to other subdivisions of HRA. (Respondents' Exhibit H; Tr. 1009, 1200, 1210, 1265-67).

38. On September 9, 1991, Complainant filed a grievance alleging, among other things, that Respondents failed to transfer her. (Complainant's Exhibits 26, 30, 31, 32, 33; Tr. 231, 234-35, 267).

39. On March 10, 1992, Complainant's grievance was denied on the ground that Complainant failed to sufficiently submit documentation to warrant her transfer request. (Tr. 292-93; Complainant's Exhibit 34).

40. On February 8, 1993, Complainant filed her Division complaint. (A.L.J. Exhibit 1). Pursuant to the order of the Supreme Court, New York County, October 31, 1995, this complaint must be considered as if it were filed on May 21, 1992.

Subsequent events

41. In 1993, Complainant became a Principal Administrative Associate-1 (PAA-1) after passing a civil service examination. (Complainant's Exhibit 53; Tr. 445, 664). In April of 1993, Complainant left OHCS and, as a result of her new PAA-1 job title, was reassigned to OLA. (Tr. 665-66, 684).

42. On October 20, 1993, Complainant requested that she be allowed to remain in a work area at OLA which she found acceptable. This request was made because, during the previous six months while at OLA, Complainant was relocated several times to areas that caused her distress due to the noise which surrounded her work environment. (Respondents' Exhibit J; Tr. 1243-47, 1271-72).

43. On November 9, 1993, the aforementioned request was denied. It was determined that, given that this was a new assignment for Complainant and that she was a great distance from her

work unit, keeping her in this area was impractical as it would impede the ability of her supervisor to train, supervise and evaluate her work during her probationary period.

(Respondents' Exhibit J; Tr. 1017).

44. As a result of the above, Complainant was given her own office closer to her supervisor. At this time, most PAA-1's did not have their own offices. (Tr. 1229).

45. On January 12, 1994, the Complainant filed a complaint of discrimination with EEO based upon disability which alleged that OLA failed to allow her to work in a wing of the building opposite that of both her unit and supervisor. (Respondents' Exhibit N).

46. On January 14, 1994, Complainant was informed by EEO that the original determination would stand. Complainant expressed her dissatisfaction with this result. (Respondents' Exhibit N).

47. On January 27, 1994, and after an apparent request for a review of the Complainant's change in work area, her office assignment was deemed sufficient by Phil Corwin, Director of OLA's Administrative Services. (Respondents' Exhibit K; Tr. 1021-22).

48. On February 3, 1994, a further review by Deputy Administrator Carolyn Morant determined that the decision regarding Complainant's office assignment would remain unchanged. (Respondents' Exhibit L).

49. On February 8, 1994, Complainant's January 12, 1994, EEO complaint resulted in a "closed" determination, and that the denial of Complainant's work location choice would remain in effect. Prior to the determination, both an on-site visit was made and contact with an agency physician was had concerning Complainant's mental disability and the need for the precise request which she had made. (Respondents' Exhibit N).

50. Complainant requested, but never received, a special chair to accommodate her back pain. (Tr. 698, 717, 893-94, 1241-42). However, the Division finds that Respondents ordered an acceptable chair for Complainant because there were none available in the office in which she worked. (Tr. 1242). It is unclear from the record whether such a chair was procured prior to when Complainant separated from Respondents in 1994.

51. On June 5, 1994, Complainant resigned her employment with Respondents and accepted a severance agreement or "buyout" which was offered at that time to municipal employees. (Complainant's Exhibits 85-86).

DECISION AND OPINION

Complainant asserted that she was unlawfully discriminated against on the basis of her disability of mental illness when she was denied transfers in 1989 and 1991. Complainant also alleged unlawful discrimination when forced to undergo involuntary medical leaves of absence on three occasions in 1982, 1985 and 1990, and when she was demoted and suffered a loss of salary in 1976. Finally, Complainant avers that she suffered a hostile work environment from co-workers who knew of her prior mental health history and who ridiculed her when she returned from said leaves. In her amended complaint, she alleges she was denied a suitable office after her promotion to the P.A.A.1 title in 1993. She also alleges she was forced to retire in 1994 because of discriminatory treatment. Respondents deny the allegations in the complaint, and aver that they attempted to reasonably accommodate Complainant.

Initially, the Division must decide whether to consider those matters occurring before May 1991, which are beyond the one year statute of limitation. N.Y. Exec. Law, Art. 15 (Human Rights Law) §297.5. Complainant, in support of such a contention, takes the position that a

continuing violation has occurred. *See*, 9 N.Y.C.R.R. §465.3 (e); *Clark v. State of New York*, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dept. 2003) (in which a continuing violation is found where there is "... proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice.")

Here, the transfer denials in 1989 and 1991, the involuntary medical leaves of absence in 1982, 1985 and 1990, and the demotion and loss of salary in 1976 were all discrete, isolated acts without proof in the record that they were a product of an ongoing unlawful policy or practice of Respondents. Therefore, only those allegations of discrimination occurring after May 21, 1991, will be considered. Based on the liberal rules regarding amendment of Division complaints, and the particular circumstances of this case, the allegations regarding 1993 and 1994 will be considered on the merits. 9 N.Y.C.R.R. §465.4.

In May 1991, after a medical leave, Complainant was returned to her previous job despite her request, backed by her doctor's recommendation, that she not be returned to that job, because of the stress involved and its impact on her mental health. In July 1991, Complainant requested a transfer from this job, which was denied. It is to be determined whether this should be considered a denial of a reasonable accommodation of Complainant's disability.

First of all, it must be noted that Respondent has accommodated the Complainant. Complainant was provided with medical leaves of absence during periods when she was unable to perform her job in the reasonable manner due to her disability, and she was allowed to return to work when she was again able to perform her job. Thus, this record provides no evidence of a pattern of refusal to accommodate Complainant. Respondent did deny Complainant's request for a different job in May and July of 1991, but Respondent was not required to provide

Complainant with a different job as a reasonable accommodation, absent some reason to believe that Complainant could *not* reasonably perform her job duties, but *would* be able to reasonably perform in another assignment. Complainant's doctor indicated that she should not be returned to the previous job, but her doctor had no specific knowledge of other jobs that might be available and the stress levels involved in those other jobs.

Complainant's request was substantially similar to a request for a change of supervisor as a reasonable accommodation. According to the U.S. Equal Employment Opportunity Commission's publication entitled Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, at paragraph 33, the "employer does not have to provide an employee with a new supervisor as a reasonable accommodation." *See, also, Weiler v. Household Finance Corp.*, 101 F.3d 513 (7th Cir. 1996) (ADA cannot require a transfer of an employee or a supervisor as a reasonable accommodation); *Kennedy v. Dresser Rand, Inc.*, 193 F.3d 120 (2d Cir. 1999), (there is a presumption that a request to change supervisors is unreasonable).

Complainant alleged harassment by co-workers in 1991, based on one verbal and one written comment. The content of these comments is unknown, other than that they related to Complainant's mental illness. This is insufficient to state a claim for a hostile environment on the basis of disability.

In 1993, Complainant requested to be allowed to continue to work in an office in a different wing of the building from her co-workers and supervisor. This request was denied as unreasonable, because keeping her in this area was impractical as it would impede the ability of her supervisor to train, supervise and evaluate her work during her probationary period. Complainant was given an office closer to her supervisor. Thus, Complainant was not provided

with the accommodation she requested, but her needs were addressed and a different accommodation was provided.

Since it is found that Respondent did accommodate Complainant, and that there was no hostile environment is violation of the Human Rights Law, there can be no basis for a claim of constructive discharge or forced retirement.

ORDER

Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that the complaint be, and the same hereby is, dismissed.

SEP 29 2006

DATED:

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS


MICHELLE CHENEY DONALDSON
Commissioner