

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MARYANN ROSSI,**

Complainant,

v.

**IONA COLLEGE,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 1254904

**PLEASE TAKE NOTICE** that the attached is a true copy of an Order issued by the Peter G. Buchenholz, Adjudication Counsel, as designated by the Honorable Kumiki Gibson, Commissioner of the New York State Division of Human Rights (“Division”), after a hearing held before Patricia L. Moro, an Administrative Law Judge of the Division. 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.

DATED: October 31, 2007  
Bronx, New York

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PETER G. BUCHENHOLZ  
Adjudication Counsel

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

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**MARYANN ROSSI,**

Complainant,

Case No. **1254904**

v.

**IONA COLLEGE,**

Respondent.

Complainant alleged that Respondent unlawfully terminated her employment as an Assistant Dean because of her age when it replaced her with a younger, less-qualified individual. Because the record supports the allegations in the complaint, the complaint is sustained. Complainant is entitled to relief in the form of an award of compensatory damages for back pay in the amount of \$110,005 and \$150,000 for her mental anguish.

**PROCEEDINGS IN THE CASE**

On August 14, 2002, 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.

After due notice, the case came on for hearing before Patricia L. Moro, formerly an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 23 and 26; March 23 and 30; June 6 and 8; and November 28 and 29, 2006.

Complainant and Respondent appeared at the hearing. Complainant was represented by Anne Golden, Esq. and Mark R. Humowiccki, Esq., of Outten & Golden, LLP. Respondent was represented by Anthony D. Dougherty, Esq., of Tarter Krinsky & Drogin, LLP.

Post-hearing briefs were filed by both parties.

ALJ Moro issued a recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”) on August 6, 2007. Objections to the Recommended Order were filed with the Commissioner’s Order Preparation Unit by Respondent’s counsel dated August 24, 2007. Complainant’s counsel filed a response to the Objections dated October 1, 2007.

### **FINDINGS OF FACT**

1. Complainant was born on January 31, 1948, and was fifty-four years old at the time her position was terminated by Respondent. (ALJ’s Exhibit I; Tr. 23)

2. Respondent is a college, located in New Rochelle, New York. Respondent’s Office of the Dean of the School of Arts and Sciences was made up of the Dean, an Associate Dean, and two Assistant Deans. (Tr. 33, 228-30, 236, 239, 466).

3. In 1999, Dr. Warren Rosenberg served as the Dean. (Tr. 522) Dr. Michael Jordan served as the Associate Dean, and Respondent was looking to hire two Assistant Deans. (Tr. 532-33, 962, 966)

4. In May 1999, after a competitive national search, conducted by a committee headed by Associate Dean Jordan, Complainant was hired by Respondent as Assistant Dean for Academic Programs. (Complainant’s Exhibits 1, 21; Tr. 29-30, 990-94) Complainant held a Ph.D. in American Studies and two Master’s degrees. She was the committee’s unanimous first choice. (Complainant’s Exhibits 2, 21) Jordan testified that the fact Complainant possessed a Ph.D. was significant because Respondent was “looking for someone who would work as a peer with the

department chairs,” all of whom possessed doctoral degrees. Complainant also had significant administrative experience. (Tr. 991-92) Complainant’s starting salary was \$45,000 per year.

(Tr. 31)

5. The same search committee conducted another competitive national search, which resulted in the hiring of Laurie Wenchell, at the same time as Complainant, as Assistant Dean for Student Advancement. (Tr. 33, 948, 953) For Wenchell’s position, a Ph.D. was not required because her responsibilities were “going to be mostly academic, advising students.” (Tr. 992) Wenchell, who was fifteen years younger than Complainant, was paid at a higher rate than Complainant, despite this difference in education. (Tr. 67, 71, 162)

6. Neither Complainant nor Wenchell were graduates of Respondent. (Tr. 996)

7. The record shows that Complainant performed well as Assistant Dean for two years. She received strong annual evaluations and a merit pay bonus in 2001. (Complainant’s Exhibit 6; Tr. 43-45) Her primary responsibilities included course scheduling and developing academic programs. (Tr. 36-40, 997) In addition, Complainant headed the development of Respondent’s teacher certification program, coordinated the reviews of each department, led Respondent’s efforts to establish a new distance learning project, reviewed the accreditation of junior colleges attended by Respondent’s transfer students, and administered faculty contracts. (Tr. 36-39, 587-89, 997-98)

8. Dean Jordan and Associate Dean Rosenberg recognized Complainant’s industriousness and assigned her projects outside her job description. (Tr. 46, 585-91) Complainant, who had experience running a city museum, administered the new college art gallery. (Tr. 37, 49-50, 589-90, 999-1000) Complainant also took over as interim chair of the Foreign Language Department. The record shows that it was unusual for a member of a Dean’s Office to chair an

academic department. (Tr. 46-47, 998-99) The faculty, however, welcomed Complainant. (Tr. 36-37, 46, 998-99) In addition, Complainant attended some meetings in place of Associate Dean Rosenberg and performed evaluations of faculty members. (Tr. 47, 1000-01)

9. In July of 2001, Dean Rosenberg became Respondent's Provost, and the position of Dean was filled on an interim basis by Dr. Alex Eodice. (Tr. 968-70) Jordan, displeased at being passed over for Dean, returned to teaching, leaving a vacancy for the Associate Dean position. (Tr. 969-70) His resignation left the Dean's Office with an inexperienced Acting Dean (Eodice) and two Assistant Deans (Complainant and Wenchell) to fulfill the duties of the office. (Tr. 969-70)

10. Eodice asked Jordan to remain Associate Dean. When Jordan refused, Eodice approached Dr. Catherine Ricardo and Dr. Bill Englemen to fill the position, both of whom declined. Jordan was fifty years old at the time, and Ricardo and Englemen were both older than Complainant. (Tr. 179, 182, 422, 638-39) Having unsuccessfully attempted to fill the Associate Dean's position, Eodice determined that he needed to restructure the Dean's Office. He created a new Assistant Dean for Budget Management and Program Development. (Tr. 244-47)

11. The record shows that Eodice knew in 2001, that he would be unable to retain three permanent Assistant Deans when he changed Complainant's position and hired Walsh. He testified that he "knew he could not simply add another position and did not intend to." (Tr. 244) When asked if he could have added an Associate Dean without eliminating one of the Assistant Deans, Eodice replied, "[c]ertainly not on my own and likely not given the budget constraints." (Tr. 275) The ALJ credited Eodice's testimony that he never intended to permanently eliminate the Associate Dean position. (Tr. 239)

12. No search committee or national advertisements were utilized for the Assistant Dean for Budget Management position or the Assistant Dean for Academic Programming position Complainant vacated – despite the fact that, as Jordan testified, “[i]t was routine when we searched a position, we did a national search for hiring for faculty or for Assistant Dean . . .” (Tr. 252, 995)

13. Eodice did not post the position for Assistant Dean for Budget Management as he had Complainant in mind for it when he created it, and he testified that the only person he had in mind for the position of Assistant Dean for Academic Programming was Mary Ellen Walsh, who was twenty-five years old at the time. (Tr. 94, 100, 147, 253)

14. Complainant was offered and accepted the new position of Assistant Dean for Budget Management and Program Development, and Complainant’s salary increased to \$55,000 per year. (Respondent’s Exhibit A; Tr. 67, 71, 162). Eodice testified, “I would not call it a promotion, as there are no ranks among Assistant Deans. But I would say the level of responsibility was certainly enhanced.” (Tr. 259)

15. And, on August 22, 2001, Eodice hired Walsh, his former half-time administrative assistant, into Complainant’s previous position of Assistant Dean for Academic Programming. Respondent denied that Walsh replaced Complainant; however, the record shows that Walsh filled the position and budget line previously held by Complainant. (Complainant’s Exhibit 19; Tr. 66-69, 448) Walsh assumed Complainant’s primary responsibility (course scheduling). (Tr. 66-67, 70, 256-57, 759-60) Walsh, however, had no Ph.D., had no academic, administrative experience, and had minimal teaching experience. (Complainant’s Exhibit 22; Tr. 82, 256-57, 733, 746, 757, 991-92) Rosenberg explained that there is no formal mentoring of administrators, as Respondent “like[s] to hire people who are qualified for the position into which they are

stepping. There is generally no need to teach.” (Tr. 548) The ALJ credited Complainant’s testimony that Eodice told her to teach Walsh “how to do her job and be quick about it.” (Tr. 82)

16. In mid-July 2002, Eodice again restructured the Dean’s Office. The effect of this restructuring was to eliminate Complainant’s new position. The two remaining Assistant Deans (Walsh and Wenchell) were respectfully twenty-eight and fifteen years younger than Complainant. (Tr. 94, 100)

17. In a December 17, 2002, position statement, Respondent asserted that once the Associate Dean position was filled, “it became quite apparent that based on the talents and capabilities of the new Associate Dean that the Dean’s Office was overstaffed.” (Complainant’s Exhibit 31) Eodice, however, admitted that he had not yet hired an Associate Dean when Complainant was fired. (Tr. 369-70)

18. At the hearing, Eodice testified that it would have been difficult to have moved Complainant back into the Assistant Dean for Programming position because she was unfamiliar with, and would require “significant training” for, new computer software that had been utilized for course scheduling. (Tr. 357) Eodice, however, was unaware of the level of software training Complainant had achieved. He admitted, in fact, that it might have been true that everyone in the Dean’s Office had the same level of computer training. (Tr. 359) Furthermore, Eodice later admitted that Complainant could have performed Walsh’s job duties. (Tr. 495, 519).

19. Complainant credibly testified that the manner in which she was terminated was traumatic. (Tr. 102) Don Herring, Respondent’s Human Resources Director, called Complainant to a meeting and announced that her position was being eliminated. (Tr. 94-95) Eodice stated that he was eliminating her position simply, “because he could.” (Tr. 95) Eodice

told her that her termination was effective immediately and that she was required to pack her belongings and vacate the premises within twenty minutes. (Tr. 189)

20. Complainant was escorted back to the Dean's Office by security guards who supervised her packing. (Tr. 189-90) Complainant was not allowed to touch her computer and was monitored at all times. (Tr. 189) Complainant called a friend to pick her up because her belongings, including several bookcases, framed art, and many books and other personal effects, could not fit in her car. (Tr. 203) Security guards then escorted Complainant to the sidewalk near the college parking lot to wait with all her belongings for her friend to arrive. (Tr. 189, 307-09)

21. The record shows that the timing of the termination of Complainant's position impacted negatively on her job search. Finding an academic position in late July was all but impossible. (Tr. 110, 113, 125-26, 1018) Complainant immediately began searching for work. She searched the New York Times, the Chronicle for Higher Education, and Highereducation.com everyday for positions, "and where there was even a remote possibility, [Complainant] sent in an application and resume." (Tr. 113) She applied for positions with Marist College, Western Connecticut State University, St. Quineby, Sacred Heart University, Fairfield University, and more. She searched within a sixty-mile radius of her home. (Tr. 114) She taught courses as an adjunct professor at a number of local colleges, including Western Connecticut State University, Sacred Heart University, St. Basil's Seminary and Empire State College. She earned a few thousand dollars per course. (Tr. 113-19) Complainant also performed title search work to raise extra money. (Tr. 117-18)

22. In 2004, Complainant began working as Clerk for the Redding Probate Court for which she was paid \$16 per hour for twenty hours per week. (Tr. 116) In January of 2006,

Complainant was hired as Associate Dean for the Professional School at Western Connecticut State University. This job was comparable to her full-time position with Respondent. (Tr. 23-24, 123-24)

23. At the time of the termination, Complainant credibly testified that she was earning \$57,000 per year as Assistant Dean, plus \$4,200 per year as Adjunct Professor, for a total salary of \$61,200 per year. (Respondent's Exhibit A; Tr. 111) Including Unemployment Insurance, Complainant earned \$49,544 in 2002 with a loss of \$11,656 from what she would have earned had Respondent not unlawfully terminated her employment. (Complainant's Exhibit 12) In 2003, Complainant earned only \$19,301 in wages, for a loss of \$41,899. (Complainant's Exhibit 13) In 2004, Complainant earned \$33,220 in wages, for a loss of \$27,980. (Complainant's Exhibit 14) In 2005, Complainant earned \$32,730, for a loss of \$28,470. (Tr. 123) Thus, Complainant's total loss from the termination through the end of 2005 was \$110,005.

24. The record shows that Complainant's sudden termination and prolonged unemployment and under-employment caused her emotional distress. (Tr. 125-27) The ALJ credited Complainant's testimony that she withdrew from others and became depressed as a result. (Tr. 128-29, 317-18) As a single mother, she feared losing her home and being unable to support herself and her child. (Tr. 127, 318) The ALJ credited Complainant's testimony that without insurance or much savings, she could not afford the assistance of a therapist. (Tr. 317-22) Amy Day, Complainant's friend, credibly testified regarding the emotional and physical toll of Complainant's discharge including her social withdrawal and depression. (Tr. 317-320)

25. The ALJ credited Complainant's testimony that the stress caused by her termination, and the ensuing financial insecurity, also took its toll on her health. She suffered a pinched nerve, which was aggravated by stress she experienced from the discrimination and she

developed psoriasis, both of which she endured for several years. (Tr. 127-28, 197)

Complainant also was unable to sleep through the night. (Tr. 128)

### **OPINION AND DECISION**

Complainant alleged that Respondent discriminated against her when it terminated her employment and replaced her with a younger, less-qualified individual. Because the record supports the allegations in her complaint, the complaint is sustained.

The Human Rights Law prohibits an employer from discriminating against an employee because of that employee's age. Human Rights Law § 296.1.

Absent direct evidence, Complainant may prove she was discriminated against utilizing the burden-shifting analysis incorporated into New York law by *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 377 N.Y.S.2d 472 (1975). Complainant has the burden of proving a prima facie case of discrimination by demonstrating that she was qualified for the position she held, and that Respondent subjected her to adverse action because of her membership in a protected class. Complainant's "burden of establishing a prima facie case has been described as 'de minimis.'" *Goldman v. White Plains Ctr. Nursing Care LLC*, 2006 N.Y. Misc. LEXIS 2617, 263 N.Y.L.J. 55 (2006) (citing *Wiesen v. New York University*, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51 (1st Dept. 2003) (citing *Exxon Shipping Co. v. NYS Div of Human Rights*, 303 A.D.2d 241, 755 N.Y.S.2d 608 (1st Dept. 2003))). The burden of production then shifts to Respondent to articulate non-discriminatory reasons for its actions. If Respondent meets that burden, Complainant then must come forward with or point to evidence that Respondent's proffered reasons were a pretext for discrimination. *See Pace College*, 38 N.Y.2d at 38; *see also Stevenson v. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 811 N.Y.S.2d 633 (2006).

In the instant matter, Complainant has established a prima facie case of age discrimination. In 2001, she was replaced by Walsh, who was significantly younger and less-qualified. Respondent denied that Walsh replaced Complainant; however, the record shows that Walsh filled the position and budget line previously held by Complainant and that Walsh performed the main functions of Complainant's former position. And, the record makes clear that when Eodice moved Complainant, he was aware the position he moved her into would eventually be eliminated. Thus, Complainant was essentially set-up to be fired, after having been replaced by a younger, less-qualified individual. Thus, she has made out a prima facie case of discrimination based on age.

The manner in which Walsh was hired strongly suggests age bias. In contrast to Complainant's and Wenchell's hiring as Assistant Deans and to Respondent's "routine" practice, no national search was conducted and no search committee was established for the vacant position. Complainant was moved into the Assistant Dean for Budget position in the same manner. Eodice admitted that he had each in mind for those positions. Evidence that Respondent "departed from its usual employment practices and procedures" gives rise to an inference of discriminatory motive. *See Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 97 (2d Cir. 1999); *see also Ottaviani v. State University of New York*, 679 F. Supp. 288, 326 (S.D.N.Y. 1988).

In addition, as noted above, at the time that Respondent made these decisions, it knew that Complainant's new position would be eliminated, and it did so, as intended. Respondent's discrimination was commenced when it replaced Complainant with Walsh and was completed when Complainant was fired. "[T]hose who discriminate unlawfully are not likely to do so in open, plainly-appearing fashion. . . . Instead, there is likely to be covert resort to subtle tactics

and the pretext of intermingled motives and reasons to obscure the substantial cause.” *Pace College*, 38 at 40 (citations omitted).

Respondent’s position that Complainant was fired for operational reasons is clearly pretextual. It claims that it was done for budgetary reasons, but does not, and cannot explain why Complainant was moved and Walsh was hired if it knew it would face that problem. And, Eodice’s assertion that he could not fire Walsh and return Complainant to the position she held as Assistant Dean for Academic Programming because Complainant would need “significant training” in software rings hollow in light of his testimony that he was unaware of how much training anyone in the Dean’s Office had in that area, and his admission that it was possible that all Dean’s Office employees had the same amount of training, and the evidence that Walsh lacked even more significant skills at the time she was hired into the position.

Finally, contrary to Respondent’s assertion, the fact that Eodice initially attempted to fill the Associate Dean position by seeking to recruit two individuals who were older than Complainant does not demonstrate non-discrimination with respect to Complainant. The Associate Dean position was not similarly-situated to the Assistant Dean position, as evidenced by Eodice’s insistence that the Associate Dean be a tenured member of Respondent’s faculty. Moreover, the two similarly-situated employees whom Respondent chose to retain in its employ were, as already mentioned, significantly younger than Complainant.

In sum, because the evidence demonstrates that Respondent discriminated against Complainant when it replaced her with a younger, less-qualified individual, the complaint is sustained.

As a result of Respondent’s discriminatory conduct, Complainant is entitled to be compensated for the wages she lost after the termination. *See* Human Rights Law § 297.4(a).

Complainant demonstrated that she made diligent efforts to mitigate her damages to January 2006, and Respondent has failed to prove otherwise. *See Walter Motor Truck Co. v. New York State Human Rights Appeal Bd.*, 72 A.D.2d 635, 421 N.Y.S.2d 131 (3rd Dept. 1979) (burden is on Respondent to prove Complainant's lack of diligent efforts to mitigate damages); *see also New York State Div. of Human Rights v. Wackenhut Corp.*, 248 A.D.2d 926, 670 N.Y.S.2d 134 (4<sup>th</sup> Dept. 1998), *appeal denied*, 92 N.Y.2d 812 (1998) (burden is on Respondent to demonstrate that Complainant "did not exercise diligent efforts to mitigate [his] damages."). As a result of Respondent's discriminatory conduct, Complainant is entitled to lost wages in the amount of \$110,005.

In addition to lost wages, "an award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish." *Board of Educ. v. McCall*, 108 A.D.2d 855, 150 A.D.2d 442, 485 N.Y.S.2d 357 (2d Dept. 1985), *appeal denied*, 65 N.Y.2d 601 (1985). And, such compensation may be based solely on Complainant's testimony. *See Id.*; *see also Cullen v. Nassau County Civil Svc. Commission*, 53 N.Y.2d 492, 442 N.Y.S.2d 470 (1981).

The degree of Complainant's mental anguish is readily apparent from the facts of this case. *See 300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 N.Y.2d 176, 184, 408 N.Y.S.2d 54 (1978). Complainant was terminated in a cruel and humiliating manner from a prestigious position, at a time when finding another position in academia was difficult at best, which caused her significant pain and suffering. Complainant withdrew from others and became depressed as a result of Respondent's discrimination. As a single mother, she feared losing her home and being unable to support herself and her child. Without insurance or much savings, she could not afford the assistance of a therapist. Amy Day credibly testified regarding the

emotional and physical toll of Complainant's discharge including her social withdrawal and depression.

The stress caused by Respondent's unlawful termination, and the ensuing financial insecurity, also took its toll on Complainant's health. She suffered a pinched nerve that was aggravated by the stress she experienced from the discrimination, and she developed psoriasis, both of which she endured for several years. Complainant also was unable to sleep through the night.

In consideration of the nature of Respondent's unlawful act, and its severity and consequences with regard to Complainant, an award of \$150,000 will effectuate the purposes of the Human Rights Law. *See Allender v. Mercado*, 233 A.D.2d 153, 649 N.Y.S.2d 144 (1<sup>st</sup> Dept. 1996), *appeal denied and dismissed*, 89 N.Y.2d 1055, 659 N.Y.S.2d 846 (1997); *see also Boutique Indus. v. New York State Div. of Human Rights*, 228 A.D.2d 171, 643 N.Y.S.2d 986 (1st Dept. 1996); *See also Gleason v. Callanan Indus.*, 203 A.D.2d 750, 610 N.Y.S.2d 671 (3rd Dept. 1994).

### **ORDER**

Pursuant to 9 NYCRR § 465.17(c)(3), Adjudication Counsel Peter G. Buchenholz has been designated by the Commissioner of the Division, Kumiki Gibson, to issue this Final Order. The Adjudication Counsel has not taken part in any of the prior proceedings with respect to this case.

Based on 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

**ORDERED** that Respondent, its agents, representatives, employees, successors and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of his or her employment based on age; and it is further

**ORDERED** that Respondent, its agents, representatives, employees, successors and assigns, shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of \$110,005, as damages for back pay for the period between 2002 through 2005. Interest shall accrue on the award at the rate of nine percent per annum from October 2004, a reasonable intermediate date, until the date payment is actually made by Respondent.

2. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of \$150,000, as compensation for the mental anguish she suffered as a result of Respondent's unlawful actions. Interest shall also accrue on the award at a rate of nine percent per annum, from the date of this Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of two certified checks made payable to the order of Complainant, Maryann Rossi, and delivered to Caroline J. Downey, General Counsel of the Division, at One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458, by certified mail, return receipt requested.

4. Respondent shall cooperate with the Division during any investigation into its compliance with the directives contained in this Order.

DATED:  
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS

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PETER G. BUCHENHOLZ  
Adjudication Counsel