

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

THERESA H. SOVIE,

Complainant,

v.

BLOSSOM VIEW NURSING HOME, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10115291

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 June 18, 2008, by Robert 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: **JUL 28 2010**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF
HUMAN RIGHTS

on the Complaint of

THERESA H. SOVIE,

Complainant,

v.

BLOSSOM VIEW NURSING HOME, INC.,

Respondent.

RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 10115291

SUMMARY

Complainant charged that Respondent terminated her employment as a dietary supervisor because of her sex. Respondent denied Complainant's allegations of discrimination. Since the credible record does not support Complainant's charge of discrimination, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 12, 2007, 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 5 and 6, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq. Respondent was represented by Andrew J. Ryan, Esq.

The parties submitted timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant alleged that Respondent terminated her employment because of her sex. (ALJ's Exh. 1)
2. Respondent denied Complainant's allegations of discrimination. (ALJ's Exh. 3)
3. Complainant is a female who began working for Respondent on September 12, 2006 as a dietary supervisor. (Tr. 6; ALJ's Exh. 1) Complainant was qualified for this position. (Tr. 6)
4. During the relevant time period, Respondent employed 2 dietary supervisors: Kay Olgren, a female, and Complainant. (Tr. 229, 251, 293)
5. In or about February 2007, Respondent employed approximately 212 people, 173 of which were female. Of the 28 department heads and supervisors employed by Respondent, 22 were female. (Tr. 427-29)
6. When Complainant was hired, Alan Fitch was the director of Respondent's Dietary Department. (Tr. 16) Fitch trained Complainant for approximately 4 weeks until he left Respondent's employ on October 13, 2006. (Tr. 15-16, 91, 186)
7. When Fitch left, Complainant's acting supervisor was Paul Molisani, the assistant director of Respondent's Dietary Department. (Tr. 321, 324-25, 332) Nancy Tourje,

Respondent's facility administrator, expected that, after 4 weeks of training, Complainant could capably perform her job duties. (Tr. 173-74, 181)

8. When Complainant began to work independently as the dietary supervisor, she did not perform her job well. (Tr. 175-81, 326-30, 407-08) Complainant had difficulty organizing and assigning tasks to her staff of dietary aides, did not understand her job responsibilities and cried when she was confused. (Tr. 213-14, 254-57, 302, 327, 329-31, 340, 407-08, 418) Tourje immediately arranged for additional training for Complainant. (Tr. 184-86)

9. Respondent began to receive complaints from the residents about the quality of Respondent's food service under Complainant's supervision. (Tr. 181, 186, 344)

10. On or about October 23, 2006, Respondent hired Richard Sweet and Peter Conroy to act as co-directors of the Dietary Department. (Tr. 186-87, 251, 299) They were hired to implement changes in the design, menu and method of service in the dining room. (Tr. 186-89, 300-01)

11. Sweet became Complainant's immediate supervisor. (Tr. 19, 251, 324) He immediately noticed that Complainant was overwhelmed by her job duties. (Tr. 256) He testified that she had difficulty leading her staff, needed constant direction, was confused about her job responsibilities, was unable to handle unexpected situations as they arose and cried on a daily basis. (Tr. 254-57) Sweet was also concerned that Complainant did not understand the basic job descriptions of her staff. (Tr. 255) This testimony was corroborated by Conroy and Christine Chelini, the woman who eventually replaced Complainant. (Tr. 270, 301-03, 403-04, 407, 414-16)

12. Sweet attempted to assist Complainant during daily meetings and provided her with additional training. (Tr. 253, 257-58) However, Complainant's performance did not improve. (Tr. 259)

13. Complainant testified that she loved her job and that Respondent did not subject her to workplace discrimination until Respondent hired Sweet. (Tr. 42-43, 56, 113-14) She felt that her work conditions began to change on October 25, 2006. (Tr. 56)

14. Complainant alleged that Respondent discriminated against her by not supporting her efforts to discipline male staff under her supervision. (Tr. 19-29, 59; Complainant's Exhibits 1, 2, 3) Complainant claimed that she submitted disciplinary notices regarding insubordinate male staff members dated October 15, 23 and 24, 2006. (Tr. 19-28; Complainant's Exhibits 1, 2, 3) She alleged that Sweet took no action with regard to these disciplinary notices. (Tr. 59) However, Respondent hired Sweet on October 23, 2006 and he did not immediately assume complete control of the Dietary Department. (Tr. 251, 290, 332-35) The record establishes that Molisani was still Complainant's acting supervisor during the period of these disciplinary notices. (Tr. 290, 332-34) Furthermore, the disciplinary notices produced by Complainant were unsigned and Molisani testified that he never received them. (Tr. 333-34)

15. Complainant also alleged that Sweet required only female employees to pour coffee for the residents at mealtime. (Tr. 39-42) The record establishes that dietary aides, both male and female, routinely poured coffee for the residents at mealtime and that the cooks did not perform this function due to the logistics of Respondent's food service procedures. (Tr. 272, 308-10, 361-63, 394, 397, 409-10, 418)

16. Respondent employed 2 male cooks and 2 female cooks during the relevant time period. (Tr. 274-75) All of the cooks were required to taste the food before it was served to ensure that it had the proper consistency to meet the dietary needs of specific residents. (Tr. 292, 393, 408) Otherwise, employees were not allowed to eat in the kitchen. (Tr. 292, 392, 408-09)

17. On November 17, 2006, during Complainant's shift, a resident was served food she could not eat because of its improper consistency. (Tr. 29-31, 259-60, 303, 348; Respondent's Exh. 2) The resident's daughter, Pauline Parmer, was upset because this problem occurred on several prior occasions when Complainant supervised the kitchen. (Tr. 30, 259, 303, 348-52) Parmer spoke to Complainant but Complainant did not adequately address the problem. (Tr. 259, 348-52) When Sweet became aware of this incident, he discussed it with Complainant and subsequently issued a written disciplinary warning to Complainant because she did not properly handle the situation. (Tr. 30, 259-61, 353; Respondent's Exh. 2)

18. On November 20, 2006, an incident occurred between Complainant and William Christman, an employee of Respondent's Laundry Department. (Tr. 45-49, 262, 371-77; Respondent's Exh. 3) Christman was gathering tablecloths from the dining room that day and he shook the debris from the tablecloths onto the rug. (Tr. 45, 373-74) This was Respondent's established procedure for many years because it helped to avoid clogging of the laundry machines. (Tr. 199-200, 263-64, 375, 379; Respondent's Exh. 8) Complainant was unaware of this procedure and told Christman to stop. (Tr. 45, 127-29, 373-76, 379) A vociferous verbal altercation ensued between Complainant and Christman. (Tr. 49, 130-31, 374-77; Respondent's Exh. 3)

19. The next day, Respondent's workplace violence team met to review this incident and Respondent issued a written disciplinary warning to Christman. (Tr. 197, 201, 205-06, 265, 448-49; Respondent's Exh. 5)

20. By this time, Sweet and Conroy were fully dissatisfied with Complainant's behavior, substandard performance and lack of awareness of Respondent's policies and procedures. (Tr. 266-67, 304-07; Respondent's Exhibits 3, 4) Both Sweet and Conroy recommended to Tourje

that Respondent terminate Complainant's employment. (Tr. 207-08, 267-68, 270, 307-08, 431; Respondent's Exhibits 3, 4)

21. On November 21, 2006, Sweet, Conroy, Tourje and Lisa Williamson, Respondent's director of human resources, met with Complainant to discuss the status of Complainant's employment. (Tr. 206-07, 269, 306, 424, 430-31)

22. During this meeting, Complainant's conduct was defensive and irrational. (Tr. 212-16, 431-33) Tourje was convinced that Complainant's performance would not improve and decided to terminate Complainant's employment at that time. (Tr. 215-16, 268, 307-08, 431-32)

23. Respondent formally terminated Complainant's employment on November 21, 2006. (Tr. 6-7; Respondent's Exh. 6)

24. Although Complainant claimed that Sweet hired a male, Jason Strakal, to replace her, this claim is not supported in the record. (Tr. 33-34) The record establishes that, in or about October 2006, Respondent rehired Strakal to work as an executive chef, a management position superior to dietary supervisor. (Tr. 387, 398) After Respondent terminated Complainant's employment, Strakal continued to perform his duties as an executive chef and covered some of Complainant's duties until Respondent hired Chelini to replace Complainant. (Tr. 391)

25. The record establishes that Sweet promoted Chelini to replace Complainant in December 2006. (Tr. 270, 391, 403-04, 420)

26. After Olgren left Respondent's employ in November 2006, Sweet hired another female, Cassandra Rodgers, to replace Olgren as the other dietary supervisor. (Tr. 294)

OPINION AND DECISION

Complainant alleged that Respondent terminated her employment because of her sex. It is unlawful for an employer to discriminate against an employee on the basis of sex. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a). Complainant has the burden of establishing a prima facie case 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 clearly met the first three elements of her prima facie case. However, Complainant did not show that her discharge was causally related to her sex. The record shows that, during the relevant time period, a vast majority of Respondent’s employees were female. Respondent employed approximately 212 people, 173 of which were female. Of the 28 department heads and supervisors employed by Respondent, 22 were female.

Furthermore, there is nothing in the record showing that Respondent acted with any discriminatory animus. During Complainant’s employment, Complainant and Olgren, both of whom are female, were the only dietary supervisors employed by Respondent. The decision to terminate Complainant’s employment was made by Tourje, a female. Sweet selected Chelini, a female, to replace Complainant. Additionally, when Olgren left Respondent’s employ, Sweet

replaced her with Rodgers, another female. The record is simply devoid of evidence showing that Complainant's sex played a role in Respondent's decision to terminate her employment.

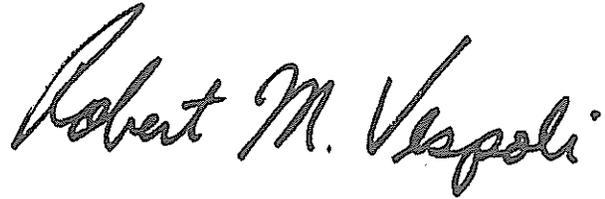
Even if Complainant successfully established a prima facie case of discrimination, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent established that it terminated Complainant's employment because of her substandard performance as a dietary supervisor. Complainant's shortcomings became apparent immediately after she was asked to perform her job independently. The record establishes that Complainant had difficulty leading her staff, needed constant direction, was confused about her job responsibilities, was unable to handle unexpected situations as they arose and often cried when she was confused. Although Respondent provided her with ample training and assistance, Complainant was unable to improve her performance.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *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 meet her burden.

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: June 18, 2008
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 initial 'R'.

Robert M. Vespoli
Administrative Law Judge