



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

LINDA M. STRANAHAN,

Complainant,

v.

VERIZON NEW YORK INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10124420

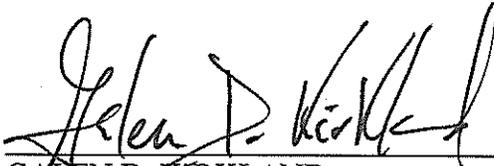
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on November 2, 2010, by Martin Erazo, Jr., an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was 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 25 2011**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



DAVID A. PATERSON
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

LINDA M. STRANAHAN,

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VERIZON NEW YORK INC.,

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

Case No. **10124420**

SUMMARY

Respondent failed to hire Complainant because of a prior conviction for conspiracy. Complainant has proven her case and is entitled to an award of \$7,500 for mental anguish.

PROCEEDINGS IN THE CASE

On March 27, 2008, 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 Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on May 5, 2010.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn and Charles L. Miller, Esqs., of the Law Offices of Lindy Korn. Respondent was represented by Scott H. Casher, Esq., of the Law Offices of White & Williams, LLP.

Permission to file post-hearing briefs was granted and both sides filed timely submissions.

On October 22, 2010, Korn and Casher stipulated that Respondent employee known as "Nancy Taylor" was also known as "Nancy Kelly." The stipulation was moved into the record as ALJ Exhibit 5.

FINDINGS OF FACT

1. In 1992, Complainant pled guilty to the crime of criminal possession of a controlled substance. Complainant was given a sentence of probation. (Complainant's Exhibit 11; Tr. 52-57, 85, 88)

2. On June 27, 1995, Complainant was convicted of the crime of conspiracy to commit murder in the second degree. (Complainant's Exhibit 1; Tr. 18)

3. On March 22, 1999, Complainant was paroled after serving three years and nine months of incarceration on the conspiracy conviction. (Complainant's Exhibit 1; Tr. 18-19)

4. On April 26, 1999, Boston Valley Terra Cotta, Inc. ("Terra Cotta") hired Complainant as a finisher and subsequently promoted her to supervisor. (Tr. 20)

5. On October 28, 2003, Complainant completed her conspiracy sentence and was discharged from parole. (Complainant's Exhibit 2)

6. In September 2007, Terra Cotta dismissed Complainant due to an economic downturn. (Tr. 21)

7. In January 2008, Complainant completed on an online application for a customer service position with Respondent. (Respondent's Exhibit 7, p.6)

8. In response to Respondent's online application questions, Complainant revealed that she had been convicted of "conspiracy." (Tr. 23)

9. Complainant did not reveal she had a conviction for criminal possession of a controlled substance. (Tr. 55-56)

10. Complainant passed Respondent's three required aptitude tests. (Tr. 23-28; Complainant's Exhibits 3,4, 5, 6, 7)

11. Nancy Taylor ("Taylor") was also known as "Nancy Kelly." Taylor holds the title of "staffer" in Respondent's Human Resources Department ("HR"). (ALJ Exhibit 5; Respondent's Exhibits 2, 3; Tr. 142)

12. Taylor was assigned to review and consider Complainant's online employment application. (Tr. 144, 147-48)

13. In February 2008, Taylor interviewed Complainant for a service representative position after confirmation that she had successfully completed the aptitude tests. (Tr. 144-45, 147-48).

14. Although Complainant indicated on the online application that she had a college degree, during the interview Complainant clarified she only attended college. (Respondent's Exhibit 7; Tr. 147-49)

15. Taylor understood Complainant's online entry of a college degree as a mistake and did not hold it against her. (Tr. 150)

16. On February 8, 2008, Taylor asked A-Check America, Inc. ("A-Check") to conduct a criminal and background check of Complainant. (Respondent's Exhibits 1, 2; Tr. 155)

17. On February 8, 2008 a Respondent's letter from HR congratulated Complainant on her selection as a new employee. (Complainant's Exhibit 8)

18. On February 14, 2008 Respondent sent another letter to Complainant confirming the following: job offer as a service representative contingent on a drug test and background investigation; a weekly pay rate of \$327.50; and an anticipated start date of March 3, 2008. (Complainant's Exhibit 9; Tr. 158-59)

19. On February 19, 2008, Respondent received the results of A-Check's criminal and background check of Complainant. (Respondent's Exhibits 1, 8; Tr. 156)

20. A-Check reported that Complainant was charged with and found guilty of "conspiracy 2nd." A-Check flagged the conviction as an area of concern ("AOC"). The report also gave the following information: sentence term; the dates when Complainant was released from prison and placed on parole; and the date when Complainant was discharged from parole. (Respondent's Exhibit 1; Tr. 159)

21. Brian Norris ("Norris") is Respondent's liaison with A-Check. (Tr. 182-83)

22. Taylor spoke with Norris for clarification on the nature of the conspiracy conviction. Norris informed Taylor that the conviction was for conspiracy to commit murder. (Tr. 182-83)

23. Respondent has a no hire policy if an applicant has been paroled less than seven years at the time of employment application. Respondent's policy does not apply to those living in New York State ("NYS"). (Tr. 161-63)

24. On February 19, 2008, Taylor telephoned Complainant and withdrew Respondent's job offer. (Respondent's Exhibit 8; Tr.177)

25. Taylor told Complainant she had not cleared seven years since the last date of parole and therefore was not eligible to work for Respondent until October, 2010. (Complainant's Exhibit 10, p.2; Tr. 32-34)

26. In order to withdraw Respondent's job offer Taylor claims she applied the factors enumerated in Article 23-A of the New York State Correction Law ("Correction Law"), using Respondent's matrix format. Respondent's matrix tracks the factors in the Correction Law. (Respondent's Exhibit 4; Tr. 151-52, 159-60, 177)

27. On February 19, 2008, the complete universe of Complainant's criminal background information known to Taylor came from A-Check, Norris, and Complainant's online application. (Respondent's Exhibits 1, 7; Tr. 182-83)

28. Taylor weighed the matrix factor of "nature of the job" element against Complainant because Complainant could potentially place an office at risk. (Respondent's Exhibit 4; Tr. 171)

29. Taylor explained her assessment of "nature of the job" at public hearing indicating that Complainant could potentially engage in the same behavior at work as when Complainant attempted to hire someone to murder her husband. (Respondent's Exhibit 4; Tr. 171)

30. Administrative notice is taken that the Division's investigatory conference was held on October 9, 2008.

31. Taylor first became aware of Complainant's claim of domestic violence during the Division's investigatory conference. (Complainant's Exhibit 11; Respondent's Exhibit 4; Tr. 175)

32. Taylor weighed the matrix factor "reason crime was committed" against Complainant. Taylor's elusive answer at public hearing was that even if Complainant had been a victim of

domestic violence, that factor would not justify the crime committed. (Respondent's Exhibit 4; Tr. 174-75)

33. Taylor testified that she could automatically deny employment without further inquiry if she uncovered misrepresented or falsified information on the application. (Tr. 149-50)

34. A-Check uncovered dates of incarceration that overlap with Complainant's employment dates at Lyndon Landscaping and self-employment. (Respondent's Exhibit 1)

35. Taylor weighed the matrix factor "misrepresentation or falsification" in favor of Complainant. (Respondent's Exhibit 4) Taylor explained that her decision on this factor would have weighed against Complainant if Taylor had known that Complainant failed to reveal the conviction for criminal possession of a controlled substance. (Tr. 169-70)

36. Taylor explained at public hearing that she weighed the matrix factor of "evidence of successful employment following crime" against Complainant because Taylor viewed the overlapping dates as being false. (Respondent's Exhibit 4; Tr. 150-51, 175-76, 187-88)

37. Respondent's matrix factor of "nature of crime" asks the assessor to weigh crimes of integrity against an applicant requiring a high degree of trust or limited supervision. (Respondent's Exhibit 4)

38. Taylor weighed the matrix factor of "nature of crime" against Complainant. Taylor explained at public hearing that Complainant's integrity was called into question when Complainant attempted to hire someone to murder her husband. (Respondent's Exhibit 4; Tr. 172-73)

39. Taylor testified: "I felt in any crime there's some integrity. You have to think about what you are doing prior to a crime, doing a crime. I felt that the integrity of this individual was something that had to come into [Complainant's] decision-making on why Complainant may

have hired someone to kill her husband. We all have problems in our lives and there's many, many divorces. I'm a divorced person myself and I have never gone to that point in my life where I would actually have tried to have someone killed." (Tr. 169)

40. Taylor first became aware of Complainant's drug conviction during the Division's October 9, 2008 investigation conference. (169-70)

41. Complainant did not sustain any lost wages. (Tr. 79)

42. If Complainant had been hired in March of 2008 she would have earned a weekly wage of \$327.50. (Complainant's Exhibit 9; Tr. 72)

43. In March of 2008 Complainant was earning approximately \$2,500 a month from multiple employers. (Tr. 39-43, 79)

44. Complainant testified that working for Respondent would have been "like a dream come true." Employment with Respondent would have offered excellent benefits and promotional opportunities. Complainant was "shocked," "upset," and had "difficulty sleeping" when Respondent withdrew the job offer. (Tr. 31-32, 36-37)

45. Complainant provided no proof that her preexisting history of migraine headaches became worse because of Respondent's conduct. She also provided no proof that her lack of sexual activity with her partner was related to Respondent's actions. (Tr. 36-37)

OPINION AND DECISION

Respondent unlawfully discriminated against Complainant based on a prior criminal conviction of conspiracy.

It is a violation of the Human Rights Law for an employer to deny employment to any individual because that individual has been convicted of one or more criminal offenses "when

such denial is in violation of the provisions of article twenty-three-A of the correction law.”
Human Rights Law § 296.15.

Two exceptions contained in the statute permit a respondent to consider prior criminal offenses: where there is a direct relationship between the offense and the employment sought or where the employment sought would involve “an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.” N.Y. Corr. Law § 752.

While making a determination regarding the two exceptions, a respondent must consider the following factors in Article 23-A of the Correction Law: the public policy of NYS to encourage the employment of persons previously convicted; the specific duties and responsibilities necessarily related to the employment sought; the bearing, if any, the criminal offense will have on his fitness or ability to perform his duties or responsibilities; the time elapsed since the commission of the offense; the age of the person at the time of the criminal offense; the seriousness of the offense; any information produced by the person or on his behalf regarding rehabilitation and good conduct; the respondent’s legitimate interest in protecting property, the safety and welfare of specific individuals, or the general public. N.Y. Corr. Law § 753.1.

Respondent admits that it withdrew its job offer because of Complainant’s conspiracy conviction. Respondent argued that Complainant lied when she completed the January, 2008 online application: she stated she had a college degree; provided employment dates that subsequently were found to overlap with incarceration dates; and failed to reveal she had a conviction for criminal possession of a controlled substance. Respondent also claimed that it applied the Correction Law factors when it decided to withdraw its job offer.

When Taylor first interviewed Complainant in February, 2008, Taylor forgave Complainant's entry of a college degree as an error and continued with the application process. Respondent cannot currently claim that Respondent properly could have refused to hire Complainant on this basis when Respondent chose to disregard the college degree entry at that point in time.

A-Check's report contained incarceration dates that overlap with employment dates. Taylor did not consider this fact upon receipt of the February 19, 2008 A-Check report. The proof established that Taylor was immediately concerned with A-Check's "area of concern" designation of Complainant's conspiracy conviction. On the same day, Taylor gathered additional information from other Respondent personnel. Taylor became aware that Complainant's conspiracy involved attempted murder. Taylor then immediately called Complainant and withdrew the job offer. Taylor inaccurately informed Complainant that Respondent's NYS policy was not to hire individuals who were within seven years of ending parole. Respondent cannot currently claim that it could have refused to hire Complainant on the basis of the overlapping dates when this was not the actual reason for Respondent's employment action at that time.

Taylor applied the enumerated Correction Law factors only after the employment denial. The information known to Taylor on February 19, 2008 was that Complainant had been convicted of a conspiracy to commit murder. However, at public hearing, Taylor testified to a more robust understanding of Complainant's circumstance when she analyzed several of the Correction Law factors. For instance, Taylor revealed the additional information that Complainant had attempted to hire an individual to murder her husband. Taylor also analyzed

Complainant's claims of domestic violence although she only became aware of this issue at the Division's October, 2008 investigation conference.

Furthermore, "all factors enumerated in Correction Law § 753" must be "properly addressed and considered." *Black v. N.Y. Off. of Mental Ret. & Dev. Disabilities*, 20 Misc.3d 581, 858 N.Y.S.2d 859 (Sup. Ct. Monroe Co. 2008) Respondent did not properly weigh all the Correction Law factors when they were considered. Respondent's matrix items of "nature of crime" and "nature of job" tracks Correction Law factors of "the specific duties and responsibilities related...to employment sought"; "the bearing, if any, the criminal offense ... will have on his fitness or ability to perform one or more such duties..."; and "the seriousness of the offense." When Taylor weighed the nature of crime and job against Complainant, Taylor considered her own personal experiences regarding relationships instead of relating Complainant's conviction to the job. Taylor also rendered meaningless Respondent's own matrix factor "nature of crime." Respondent's own matrix asks the assessor to weigh crimes of integrity against an applicant requiring a high degree of trust or limited supervision. Instead, Taylor testified that in any crime there is some integrity problem that calls into question an applicant's decision making. There could not have been an individualized assessment of Complainant's circumstance, as required by statute, if Taylor was predisposed to not hire Complainant because she committed a crime.

Respondent's matrix item of "evidence of successful employment following crime" tracks Correction Law factor of "any information produced by the person or on his behalf" regarding rehabilitation and good conduct. Respondent's own matrix asks the assessor to weigh this factor in favor of an applicant with a satisfactory employment history. Taylor categorically rejected Complainant's successful post-incarceration, eight year work history, at Terra Cotta, as

a finisher and subsequently a supervisor. Taylor concluded that the factor should immediately weigh against Complainant because A-Check's report contained incarceration dates that overlap with some employment dates. Taylor viewed the overlap in dates as falsification. However, Taylor's explanation is simply not credible. Taylor had A-Check's report when she applied Respondent's matrix. At that point in time, Taylor weighed Respondent's matrix item of "misrepresentation and falsification" in favor of Complainant. The only reasonable explanation for Taylor's actions is that Complainant's successful work history was never considered.

The weighing of factors cannot be a sham. The review cannot merely be an artificial exercise in order to seemingly meet statutory requirements while actually seeking a predetermined conclusion. *Boatwright v. N.Y. Off. of Mental Ret. & Dev. Disabilities*, 2007 N.Y. Misc. LEXIS 3399, 237 N.Y.L.J. 85 (Sup. Ct. N.Y. 2007)

Complainant failed to reveal that she had an earlier conviction for criminal possession of a controlled substance in her January, 2008 online application. A-Check had not uncovered this conviction in its February 19, 2008 report. Taylor became aware of this conviction during the Division's October, 2008 investigation. However, Respondent's after-acquired evidence is not a bar to establishing Respondent liability but affects Complainant's damages. *Baldwin v. Cablevision Systems Corp.*, 65 A.D.3d 961, 888 N.Y.S.2d 1 (1st Dept. 2009)

Respondent established that Complainant's concealment of the conviction for drug possession was of such severity that Complainant would have been dismissed upon its discovery. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879 (1995) Therefore, Complainant's back pay award is limited to the date Respondent discovered the information which would have led to her discharge. *Mugavero v. Arms Acres, Inc., et.al.*, 680 F.Supp. 2d 544 (S.D.N.Y. 2010)

However, since Complainant was not entitled to a back pay award in the first instance, there is no back pay limitation to apply in this case.

Complainant is entitled to an award for mental anguish and humiliation. A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

The only evidence of mental anguish and humiliation was Complainant's testimony that she was "shocked," "upset," and had "difficulty sleeping" when Respondent withdrew the job offer. There is no proof as to the duration of Complainant's condition, its severity or consequences. Therefore, in the absence of evidence of any medical treatment an award of \$7,500 is appropriate. *Mohawk Valley Orthopedics, LLP v. State Div. of Human Rights*

(*Carcone*), 66 A.D.3d 1350, 886 N.Y.S.2d 52 (4th Dept. 2009) (comparable reaction to a dismissal based on testimony alone); *Sherwood Terrace Apartments v. New York State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009) (comparable reaction to a refusal to rent based on testimony alone); *Peterman v. Kelly Services, Inc.*, DHR Case No. 4704621 (May 24, 2006) (comparable reaction to a refusal to hire based on testimony alone)

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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

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

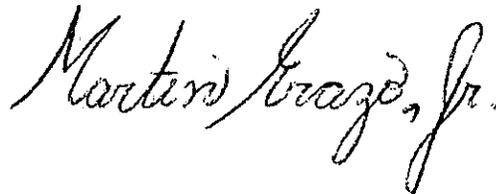
1. Within sixty days of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$7,500 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.
2. The payments shall be made by Respondent in the form of a certified check, made

payable to the order of Linda M. Stranahan, and delivered by certified mail, return receipt requested, to Complainant's attorney, Lindy Korn, Esq., 424 Main Street, Suite 1904, Buffalo, New York 14202. A copy of the certified check shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

3. Within sixty days of the Commissioner's Final Order, Respondent shall develop and implement a training program in the prevention of unlawful discrimination in accordance with the Human Rights Law. Respondent shall provide the formal training to all personnel involved in the process of handling applicants with prior criminal convictions. A copy of the training program shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: November 2, 2010
Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge