

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MARIE C. VITAL-MARSEILLE,

Complainant,

v.

**FRIEDWALD CENTER FOR REHABILITATION
& NURSING, INC.,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10117529

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, 2009, by Migdalia Pares, 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.

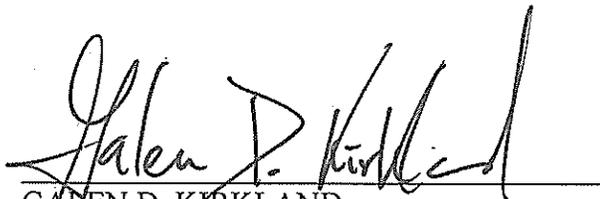
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division’s Rules of Practice, a copy of this Order has been filed 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: **SEP 18 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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MARIE C. VITAL-MARSEILLE,
Complainant,

v.

**FRIEDWALD CENTER FOR
REHABILITATION & NURSING, INC.,**
Respondent.

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

Case No. **10117529**

SUMMARY

Complainant alleged that she was subjected to a differential in pay based upon her race. However, Complainant failed to satisfy her legal burden and the complaint is therefore dismissed.

PROCEEDINGS IN THE CASE

On May 15, 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 Rosalie Wohlstatter, an Administrative Law Judge (“ALJ”) of the Division. ALJ Wohlstatter held public hearing sessions on June 11 and 12, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Jerold W. Miles, Esq. Respondent was represented by Jodi L. Campbell, Esq.

Permission to file post-hearing brief was granted. On August 13, 2008, Respondent filed timely post hearing submissions. Complainant did not file post hearing submissions.

On May 19, 2009, pursuant to 9 NYCRR § 465.12(d) (2), the case was re-assigned to ALJ Migdalia Parés to render a decision.

FINDINGS OF FACT

1. Complainant is Black. (ALJ Exh. 1)
2. Complainant alleged that she was subjected to a differential in pay based upon her race. (ALJ Exhibits 1, 2, 3, 4)
3. Respondent denied that it engaged in unlawful discriminatory practices relating to employment. (ALJ Exh. 4)
4. Respondent is a nursing home. Every year during the months of August and September Respondent begins preparation for an annual “unannounced state survey” from government regulators. (Tr. 185)
5. During the relevant time Respondent was experiencing difficulty recruiting and retaining experienced nurse professionals due to a shortage of skilled registered nurses. (Tr. 185)

6. From 1990 to 1999, Complainant worked for Respondent as a registered nurse. (Tr. 10-11)
7. In 1998 Complainant received a Bachelor's Degree in Nursing from Dominican College. (Tr. 10-11)
8. In 1999 Complainant voluntarily resigned her employment with Respondent. (Tr. 11-12)
9. In September 2005, Respondent rehired Complainant as a wound care nurse. (Tr. 12-13)
10. In November 2005, Complainant voluntarily resigned. (Tr. 13)
11. In January 2006, Respondent, by administrator Maria Pares, ("Pares"), and Rosita Manzano, ("Manzano") Director of Nursing, ("DON") reached out to Complainant and asked her to return to work for Respondent as assistant director of nursing ("ADON"). (Tr. 4, 14-15)
12. At the time Complainant had three years of experience as ADON at Nyack (Ramapo) Manor nursing and 19 years of overall nursing experience. (ALJ Exhibit 1; Tr. 27)
13. In January 2006, Complainant negotiated with Pares and Manzano and they reached a verbal agreement that: 1) she would work seven hours a day; 2) her work hours were set as 8AM to 3PM to allow her to leave in time for a second job; 3) she would be paid an annual salary of \$70,000.00; and 4) Complainant's salary would increase to \$75,000.00 annually after three months of satisfactory employment. (Tr. 24, 35)
14. Complainant was to supervise all of the nurses and unit nurse managers in each of the four nursing units, prepare incident and accident reports and function as the DON when the director was not present. (Tr. 43)
15. After three months of satisfactory employment Respondent did not increase Complainant's salary as per the verbal employment agreement. In June 2006 Complainant asked

Pares, for the pay increase. Pares processed Complainant's salary raise that same month to \$75,000.00. (Tr. 25)

16. In June 2006, Pares resigned from Respondent's employment. (Tr. 25)

17. In July 2006, Respondent hired Jael Herman, Caucasian, to replace Pares. (Tr. 34, 81)

18. Respondent was looking to hire nurses. Michelle Maroney, a coworker of Complainant referred to Herman two nurses interested in interviewing with Respondent, Marie Fallon, ("Fallon") and Ann Marie Harke-Berman, (Harke-Berman"). (Tr. 81)

19. Fallon and Harke-Berman are Caucasian. (Tr. 81, 182)

20. In September 2006, Herman hired Fallon as a unit nurse manager. Fallon's salary was in the low \$70,000's. (Tr. 181, 188-89) Herman explained that Fallon's salary reflected that she: 1) was DON at Cortland Nursing Home; 2) had more experience than Complainant and; 3) was making a higher salary as a DON at the Cortland Nursing Home than what she accepted as a unit manager with Respondent. (Tr. 181, 192, 196)

21. Fallon left Respondent's employment two weeks after being hired because she felt she was more qualified for a higher pay nurse management position than unit nurse manager. (Tr. 165-66)

22. In September 2006, Herman hired Harke-Berman as an ADON at an annual salary of \$85,000.00. Harke-Berman's work hours were 8AM to 4:30PM. This is an eight and a half hour day. (Tr. 82,185-86)

23. Harke-Berman indicated that during her interview she was asked what salary she wanted. Harke-Berman replied that she wanted \$90,000.00 because she was already making \$80,000.00 working three miles from home while Respondent's place of employment was 50

miles away. (Tr. 156, 163) Harke-Berman indicated that Respondent then offered her \$85,000.00 and she accepted. (Tr. 153)

24. Herman explained that she did not want to lose the opportunity of obtaining the services of an experienced seasoned nurse manager who had 31 years of overall nursing experience. Herman explained that Harke-Berman's salary reflected that she: 1) was already making \$80,000.00 with her present employer; 2) she was working three miles away from home, while Respondent's work location was 50 miles away from home; 3) was a registered nurse in practice since 1977; 4) had held varied supervisory positions in health care institutions prior to coming to Respondent; 5) over the 30 years of her nursing career, Harke-Berman supervised nursing staff at an adult daycare center, the emergency room at a major Bronx hospital, Jacobi Hospital, a home care company, and at a long term care facility; 6) due to the nurse shortage it was difficult to recruit an experienced supervisory nurse such as her without the added incentive of a higher salary than what she was already earning with her present employer; 7) Harke-Berman had more experience than Complainant; 8) Respondent needed to have as full a staff as possible in preparation for the annual state survey; 9) Harke-Berman agreed to work longer hours, if necessary, until her replacement arrived. Complainant was unable to meet this request because her work schedule was set to allow her to leave in time for a second job. (Tr. 151-2)

25. In September 2006, Manzano advised Complainant that Harke-Berman had been hired as an ADON. (Tr. 22-24, 26)

26. Herman told Complainant that she and Harke-Berman would each be responsible for two of the four nursing units with similar duties and responsibilities. (Tr. 43)

27. In October 2006, Herman told Complainant that in anticipation of the annual regulatory state survey, she was needed at work one hour early, at 7AM instead of 8 AM. Complainant

agreed to the new work schedule as long as it was temporary and only until the survey was completed.(Tr. 34-37)

28. As compensation for the increase of one hour, Herman increased Complainant's annual salary to \$78,000.00. (Tr. 34-37)

29. After the state survey was completed, Complainant advised Manzano that she would resume her normal work hours of 8 AM to 3:00PM. (Tr. 34-37)

30. Two weeks after she resumed the 8AM to 3PM schedule, Herman called Complainant and "reprimanded" her for changing her work shift. Herman told Complainant that she had to remain on the 7AM to 3PM shift permanently or "step down to be a unit nurse manager." Complainant chose to remain on the 7AM to 3PM shift as an ADON. (Tr. 38-39, 46-47, 69-71)

31. In February 2007 Complainant learned that Harke-Berman's annual salary as an ADON was \$85,000.00. (Tr. 28, 31, 47-48)

32. In February 2007, Complainant's annual salary as an ADON was \$78,000.00. Therefore, there was a difference of \$7,000.00 in the wages paid to Harke-Berman, who had the same title and responsibilities as Complainant. (Tr. 24)

33. In February, March and April 2007, Complainant went to Herman, seeking an explanation for the disparity in wages. Complainant also requested salary parity with Berman. (Tr. 33, 41, 44, 48, 53)

34. Herman repeatedly told Complainant that she "would look into it." (Tr. 33, 41, 44, 48)

35. Complainant then sought an explanation from "Barry," the putative "owner" of Respondent. Barry advised Complainant that he would talk to Herman. (Tr. 42)

36. In April 2007, Herman offered Complainant an annual salary of \$83,000.00. (Tr. 5-13, (Tr. 33, 41, 44, 48)

37. Complainant declined the salary increase as it would not place her in pay parity with Berman's annual salary of \$85,000.00. (Tr. 51-3)

38. In May 2007, Complainant formally filed the instant complaint with the Division. (ALJ Exhibit 1; Tr. 72)

39. According to Maroney in the middle of May 2007, Respondent consolidated the two ADON positions. As a result of the consolidation, Harke-Berman resigned and took another position in Respondent's adult daycare center. (Tr. 29, 166-67)

40. In May 2007, Complainant remained as the only assistant director of nursing. (Tr. 29, 49)

OPINION AND DECISION

Complainant alleged that Respondent unlawfully discriminated against her by subjecting her to different terms, conditions and privileges of employment, specifically, a differential in pay based upon race.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms and conditions of her employment because of her race. Human Rights Law §296.1 (a).

In order to prove a disparity in pay based upon race, Complainant must prove that: (1) she is a member of a protected class; (2) she was paid less than non-members of her class for work involving substantially the same amount of skill, effort and responsibility, and (3) that she performed such work under substantially the same conditions as the non-members of her class.

Classic Coach v. Mercado, 280 A.D. 2d 164, 722 N.Y.S. 2d 551 (2d Dept. 2001). A

discriminatory intent may be inferred from the very fact that an employee offers a sham excuse

for its action. *Morse v. Wyoming County Community Hosp. and Nursing Facility*, 305 A.D. 2d 1028, 758 N.Y.S. 2d 749 (4th Dept. 2003).

Complainant met her burden of showing a prima facie case. Complainant is Black and in the protected class, she was paid a lesser annual salary of \$78,000.00 while the Caucasian employee was paid \$85,000.00 for performing the same work as an ADON and they both performed such work under substantially the same conditions.

Once Complainant proves a prima facie case the burden shifts to the employer to show some legitimate non discriminatory reason for the pay differential. If that is done, then the burden reverts to Complainant to prove that the employer's articulated reasons are pretext for unlawful discrimination. *Ferrante v. American Lung Assoc.*, 90 N.Y. 2d 623, 665 N.Y.S. 2d 25 (1997).

Factors other than race, such as an employee's educational background and relevant work experience can be taken into account when employers decide to offer certain individuals higher salaries than others. However, an employer who attempts to justify a pay differential based on factors other than race must prove that the race neutral factor was adopted for a legitimate business reason. *Kent v. Papert Cos. .*, 309 A.D. 2d 234, 764 N.Y.S. 2d 675 (1st Dept. 2003)

In the instant case, Respondent articulated that: 1) the shortage of nurses created a competitive environment from which to recruit qualified supervisory nurses; 2) Harke-Berman had at least 30 years of experience versus Complainant's 19 years of experience; 3) Harke-Berman's supervisory experience was more varied and extensive than Complainant who had only three years of supervisory experience; 4) Harke-Berman's present job was only three miles away and she was not willing to accept a lesser salary which required her to commute more time without additional compensation; 5) Respondent had the added pressure of having to make sure

it met its statutory mandate by hiring an experienced nurse supervisor who knew what needed to be accomplished for the annual state survey; and 6) Harke-Berman, unlike Complainant, was willing to work overtime, if necessary, until her replacement arrived.

Respondent met its burden of offering a legitimate business reason for its decision to pay Harke-Berman a higher salary than Complainant. Respondent having proffered its explanation shifted the burden to Complainant to show that Respondent's explanation was a pretext to mask unlawful discrimination.

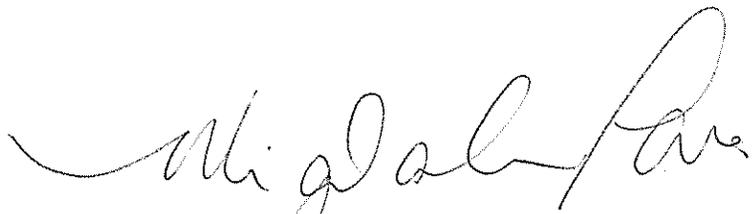
Complainant failed to meet her burden of showing that Respondent's explanation was a pretext, therefore the case is dismissed.

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 complaint be and the same hereby is dismissed.

DATED: June 18, 2009
Bronx, New York



Migdalia Parés
Administrative Law Judge