



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHELSEA WILLIS,

Complainant,

v.

**ADVANCED INSTITUTIONAL SUPPORT
SERVICES, LLC,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10161582

Federal Charge No. 16GB302905

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 July 25, 2014, by Michael T. Groben, 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 HELEN DIANE FOSTER, 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 16 2014**¹
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

CHELSEA WILLIS,

Complainant,

v.

**ADVANCED INSTITUTIONAL SUPPORT
SERVICES, LLC,**

Respondent.

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

Case No. **10161582**

SUMMARY

Complainant alleges that she was subjected to unlawful discrimination in employment when her employer disciplined her, denied her a reasonable accommodation for her disability, and terminated her employment because of disability. Respondent denies the allegations. Complainant has failed to sustain her burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 24, 2013, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing was held on March 24, 2014.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Richard J. Van Coevering. Respondent was represented by Bond, Schoeneck and King, PLLC; Patrick V. Melfi, Esq., of counsel.

At the hearing, a document was marked for identification as Respondent's Exhibit 18. However, although this document was properly identified and authenticated on the record, it was inadvertently not received in evidence. (Tr. 175) Respondent's Exhibit 18 is hereby received in evidence.

FINDINGS OF FACT

1. Complainant suffers from an allergy to raw or cooked fish and other seafood. She may suffer an allergic reaction, such as swelling in her throat and hives, if she touches seafood or smells it. She takes medication for this condition when she knows she will be around seafood. (Tr. 22-23, 29-30)

2. Respondent, also known as "Advanced Meal," is a food service operation with approximately 250 employees, which provides daily meals to approximately 2,000 persons, including residents of nursing homes, and housing and community programs. Respondent's operation is limited to food service. (Tr. 30-31, 52, 81-82, 130-131, 146-47)

3. Respondent is a division, or business unit, of the Loretto company ("Loretto"). Loretto operates a number of business units, including nursing homes, assisted living facilities, and adult day care facilities. Most of the meals provided by Respondent are served to residents of Loretto facilities. (Tr. 130-31, 157)

4. During the time relevant to the complaint, Complainant was employed by Respondent as one of approximately 50 food service workers at the Cunningham long-term care facility, located in Syracuse, New York. The facility had approximately 585 elderly residents, and also a day program serving 300 persons. (Tr. 9-11, 16, 131-32)

5. Complainant was a member of SEIU Local 1199 East ("the Union"). (Tr. 60, 157)

6. Complainant's preference and general practice was to work approximately 28 to 37 hours per week. (Tr. 151, 168)

7. Thomas Schattinger ("Schattinger") has been Respondent's director of operations for approximately 2 years. (Tr. 14-15, 130)

8. Debra Brisson ("Brisson") is the assistant director of food service for Respondent, and was Complainant's supervisor. (Tr. 14, 145-46)

9. Jocelyn Vega ("Vega") provides human resources services to Respondent and various other business units of Loretto. At the time relevant to the complaint, she was a senior human resources generalist, until her promotion to human resources operations manager in April of 2013. (Tr. 138, 142, 156-57)

10. Minnie Hunter-Cotton ("Hunter-Cotton") is Complainant's mother. She is employed by Loretto as a certified nursing assistant ("CNA"). (Tr. 7, 110, 122-23)

11. Brisson supervised Complainant's work on the "Cunningham tray line," a room with a moving conveyor belt on which food trays were assembled. Eight employees were stationed at

different places along the conveyor belt, each responsible for placing different food items on each tray, employing a tray menu as a guide. (Tr. 146)

12. Adjacent to the tray line room were a decanting area, a dish room which is open to the tray line room, and a food preparation room, located down a hall from the tray line room. (Tr. 147)

Respondent's Attendance Policy

13. Respondent operates pursuant to an employee attendance policy which is set forth in the collective bargaining agreement (the "CBA") between Loretto and the Union. Respondent is unable to change the terms of the attendance policy without the consent of the Union. (Tr. 158-59, 161-62; Respondent's Exhibit 16 [p. 89-92])

14. Pursuant to the attendance policy, an employee who is absent or late for work is charged with an "occurrence." An employee who calls in sick on a scheduled workday receives one occurrence point; an employee who leaves work two or more hours before the end of her shift also receives one occurrence point. After accumulating 12 occurrence points, an employee is discharged. (Tr. 18-19, 158-59; Respondent's Exhibit 16 [p. 89-92])

15. An employee who has accumulated eight or more occurrence points may appeal to the attendance committee. The attendance committee is comprised of representatives of the Union, Loretto, and Respondent. The attendance committee commonly deals with employees who have medical issues or disabilities, and may request and consider medical documentation in its deliberations. (Tr. 136-37, 159-61; Respondent's Exhibit 16 [p. 90-91])

Respondent's Transfer Policy

16. Respondent's employees may apply for posted employment positions in a different business unit of Loretto through a process known as "bidding," which is set forth in the CBA. (Tr. 162-63; Respondent's Exhibit 16 [pp. 19-21])

17. In order to be eligible to bid, the employee must meet certain job requirements, and must have no more than 10 occurrence points within the last 12 months, or eight occurrence points within the last six months. An employee exceeding those occurrence points is disqualified from bidding. (Tr. 62-63, 162-64; Respondent's Exhibit 16 [p. 90])

18. In January 2010, Complainant received a notice of disciplinary action because she had accumulated 10 occurrence points. (Tr. 59-60; Respondent's Exhibit 4)

19. In July 2010, Complainant was denied the opportunity to bid for a position because she had 10 occurrence points. These occurrence points were not related to Complainant's disability. (Tr. 56-58, 163; Respondent's Exhibit 3)

20. Respondent was unable to unilaterally change the bid process, or transfer an employee in violation of the bid process, because it is set forth in the CBA. In order to transfer an employee under circumstances which do not comply with the bid process, e.g. as a reasonable accommodation, Respondent must have the agreement of the Union. (Tr. 164)

Respondent's Menus

21. Respondent produces meals pursuant to a seasonal menu, in which a series of different weekly menus is repeated several times per season, on a rotating basis. Each seasonal menu is composed approximately two months in advance. (Tr. 132-33; Respondent's Exhibits 1 and 2)

22. The menus are prepared by Respondent's dietitians. Fish and other seafood items are often on the menus, both because seafood is high in protein and to provide menu variety. (Tr. 133-35; Respondent's Exhibit 14)

Complainant's Disability

23. In August 2011, Complainant again applied for transfer to another position, this time a training class for a community home health aide. Complainant's stated reason on the application for requesting the transfer was "I want a career change." This request was also denied because Complainant had accumulated 10 occurrence points. (Tr. 19-20, 22, 61-62; Respondent's Exhibit 5)

24. In or about 2011, Complainant's allergy worsened, and Schattinger and Brisson learned of her sensitivity to seafood. Complainant was allowed not to work Fridays, or was moved to other rooms or areas of the Cunningham tray line when seafood was present. (Tr. 15, 29, 50-51, 111, 132, 135, 147-48)

25. In September 2012, Complainant found it necessary to go to the hospital because of an allergic reaction she had to tuna at work. Hunter-Cotton dropped off a note at Complainant's workplace from Complainant's doctor, requesting that Complainant not work around seafood. (Tr. 9-12, 15, 112-14)

26. Respondent continued to attempt to accommodate Complainant's allergy by allowing her to swap shifts with another worker on days when seafood was present, by changing her work assignment so that she did not come in contact with seafood, by allowing Complainant to leave work when necessary without accumulating occurrence points, and, when feasible, by scheduling Complainant to work on days when seafood was not on the menu. (Tr. 51-52, 135-36, 147-54)

27. Fish or other seafood was either served as a menu selection or was being prepared on the majority of days at Complainant's workplace. (Tr. 33-41, 42-49, 79; Respondent's Exhibits 1 and 2)

28. If Complainant's work hours were limited to days on which seafood was not served or prepared, Complainant would work less than two days per week, and she would not be able to work the number of hours she required. (Tr. 41, 48, 50, 52-53; Respondent's Exhibits 1 and 2)

29. After her allergic reaction, Complainant was frequently absent from work, either because she had an illness unrelated to her allergic condition, or because she left work when seafood was present. (Tr. 18)

30. Complainant's testimony on the issue of whether or not she had been permitted to leave work without accumulating occurrence points was not consistent. (Tr. 65-67) Complainant's testimony on this issue was not credible.

Complainant's Employment is Terminated

31. On August 15, 2012, Complainant received notification that she had accumulated 10 occurrence points (Tr. 64-65; Respondent's Exhibit 6)

32. During the summer of 2012 and the spring of 2013, Complainant continued to accumulate occurrence points for absences. On March 5, 2013, Respondent terminated Complainant's employment because she had accumulated 19 occurrence points, well in excess of the 12 required for termination. The final occurrence point incurred by Complainant was for an absence unrelated to her disability. (Tr. 12-13, 23-24, 65, 67-69, 117-18, 136; Respondent's Exhibit 7)

33. On March 21, 2013, the Union filed an eligibility request on Complainant's behalf with the attendance committee, which was accepted. (Tr. 24-25, 69-71; Respondent's Exhibit 8)

34. In April, 2013, Complainant and her Union representatives met with the attendance committee. Complainant submitted medical documents to the committee excusing her various absences. Some of these documents were regarding medical conditions, illnesses or other excuses for absence unrelated to her seafood allergy. (Tr. 70-77, 118; Respondent's Exhibits 9 and 10)

Complainant Is Reinstated

35. The committee reduced Complainant's occurrence points to 10, and reinstated her. (Tr. 118, 165-66; Respondent's Exhibit 17)

36. On April 9, 2013, Respondent's human resources personnel notified Brisson and Schattinger of the attendance committee's decision, and asked whether an accommodation could be made for Complainant's allergy to seafood. (Tr. 166-67; Respondent's Exhibit 15)

37. Based on his experiences attempting to accommodate Complainant, Schattinger had concluded that it was not possible to effectively insulate Complainant from seafood while working for Respondent. (Tr. 139)

38. Schattinger called Vega, advising her that he and Brisson had attempted to accommodate Complainant's condition, without success, and that it was not possible to insulate Complainant from the smell or presence of seafood as a food preparation worker. Vega agreed to try to find another position for Complainant. (Tr. 137-39, 141-42, 149-50; Respondent's Exhibit 15)

Complainant Refuses to Work

39. Complainant was scheduled to return to work on a Monday in April, when seafood was on the menu. Because of that, Complainant refused to work. She believed that Brisson had

deliberately scheduled her on a day when seafood was present. Complainant provided no evidence for this other than her own opinion. (Tr. 12-14, 25-26, 78-79, 83, 87-89, 102-03)

40. After this incident, Schattinger, Complainant, and Hunter-Cotton met to discuss the situation. Complainant advised Schattinger that she wanted to be admitted to the CNA training class. Schattinger agreed to try to address the situation, and advised Complainant that she would not accrue any further occurrence points for absences until the situation was resolved. (Tr. 71-80, 82, 118-19, 125-27, 139-40)

41. Complainant concluded that she was unable to continue working for Respondent, and refused to return to her job as a food service worker. (Tr. 80-81, 91-93, 140)

Complainant's New Job

42. Vega consulted with Schattinger and concluded that no accommodation within Respondent's food service operation was possible. She then began to investigate other positions in the Loretto organization. (Tr. 166-67, 168-69)

43. Vega then met with Complainant, Hunter-Cotton, and a Union representative. Complainant stated that she did not want to go back to her position as a food service worker for Respondent because of her allergy. Vega assured her that she would attempt to accommodate Complainant either with Respondent or, with the help of the Union, in another position. (Tr. 90-91, 167-68)

44. During a second meeting with Complainant, Vega advised her that a laundry worker position was open. However, Vega later ascertained that the position had been filled, although still shown as vacant in Respondent's records. Vega advised Complainant of this, and continued to look for a suitable assignment for her. (Tr. 96-97, 168-70)

45. On May 2, 2013, Complainant, Vega, and two Union representatives met to discuss alternative positions for Complainant. Vega proposed to Complainant that she consider the position of support service worker, a job which entailed duties both as a housekeeper and as a dining room server.¹ Vega proposed that Complainant's allergy be accommodated by increasing the hours she would perform housekeeping duties, so that she could avoid performing dining room server duties on days when fish was being served. (Tr. 170-71, 175; Respondent's Exhibits 12 and 18)

46. Complainant declined the support service worker position and the proposed accommodation, because she believed that she might still be exposed to seafood. (Tr. 93-95, 171)

47. Complainant stated that she wanted to train as a certified nursing assistant ("CNA"). (Tr. 97-98, 172; Respondent's Exhibit 18)

48. The CNA position is considered a desirable job because of the hourly pay rate and state certification, which permits a CNA to move to other nursing assistant positions outside Loretto. (Tr. 56, 83-85, 172-73)

49. Complainant did not qualify to bid for the CNA class because she still had too many occurrence points. Pursuant to a memorandum of agreement between Complainant, Loretto, and the Union, it was agreed that the Union would waive the work rule regarding occurrences and Complainant would be admitted to the class. (Tr. 84, 90, 93, 90, 98-99, 142-43, 173; Respondent's Exhibit 13)

50. In May 2013, Complainant began the CNA class. She completed the class and was hired by Loretto as a CNA, for which she received a wage increase of approximately two dollars per hour. (Tr. 5-7, 21, 26, 54, 56, 98, 119-21, 173-74)

¹ The transcript incorrectly describes the server duty as "dine your own" server. (Tr. 171)

OPINION AND DECISION

Statute of Limitations

N.Y. Exec. Law, art. 15 ("Human Rights Law") provides that "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." Human Rights Law § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Community College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

Complainant filed her complaint on April 24, 2013. Acts that occurred between April 24, 2012 and April 24, 2013, fall within the statutory time period. Complainant was issued a number of occurrence points starting in 2010 through 2013. Those instances of alleged discriminatory acts which occurred prior to April 24, 2012, are outside the limitations period, and are viable claims only if Complainant can prove a continuing violation. 9 N.Y.C.R.R. § 465.3 (e). A continuing violation may be found where there was 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. *Clark v. State of New York*, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dept. 2003). In the instant case, Complainant has failed to prove that the instances of alleged discrimination occurring prior to April 24, 2012, are the result of a discriminatory policy or practice, and these instances are included herein only as background.

Reasonable Accommodation

An employer is obligated to provide a reasonable accommodation for an employee's known disability. Human Rights Law § 296.3.

A disability is defined under the Human Rights Law as "... a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques..." Human Rights Law § 292.21. In order to meet this definition, an employee must only show that she suffers from some diagnosable impairment. *Nowak v. EGW Home Care, Inc.*, 82 F. Supp. 2d 101, 111 (W.D.N.Y. 2000) (citing *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106 (1985)). The term "disability" is limited to those disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in her job. Human Rights Law § 292.21.

In order to make out a prima facie case of disability discrimination based upon an employer's failure to provide a reasonable accommodation, a complainant must show that: (1) the employee was an individual who had a disability within the meaning of the Human Rights Law; (2) the employer had notice of the disability; (3) with reasonable accommodation the employee could perform the essential functions of the position; (4) the employer refused to make such accommodation. *Pimentel v. Citibank*, 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dept. 2006).

Forms of reasonable accommodation include, but are not limited to: "making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position..." 9 N.Y.C.R.R. § 466.11 (a) (2). Both the employee and the employer are obligated to engage in an interactive process, which includes the discussion and exchange of pertinent medical information, in order to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job

requirements. 9 N.Y.C.R.R. § 466.11 (j), (k).

In the instant case, Complainant suffers from an allergy to seafood, a disability under the definition of the Human Rights Law, and Respondent had notice of the disability. However, Complainant failed to identify a reasonable accommodation which would permit her to fulfill her job functions as a food service worker while at the same time fully insulating her from contact with seafood. It is noted that Complainant's allergy was so severe that she could not even tolerate the smell of seafood. The record demonstrates that Respondent made a number of adjustments to Complainant's job and schedule in an effort to accommodate her. These efforts were unavailing. In order to fully protect Complainant, Respondent would have had to eliminate seafood entirely from its menu, which would not be either feasible or desirable, in view of the value of seafood as a menu item. The alternative would be to limit Complainant's work to only a few hours per week. Not only was this unacceptable to Complainant, there would still be a risk that she could come in contact with a seafood item, possibly with dire consequences.

The complainant bears the burden of proving the existence of a reasonable accommodation that would have enabled the employee to perform the essential functions of the job. *Jacobson v New York City Health and Hospitals Corporation* , 22 N.Y.3d 824, 2014 WL 1237421 (2014). Complainant has failed to meet her burden of proof, and this claim is dismissed.

Disability Discrimination

It is an unlawful act for an employer to discriminate against employees on the basis of disability. Human Rights Law § 296.1(a).

In discrimination cases the complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once the complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that

its action was legitimate and nondiscriminatory. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with the complainant, and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

In order to establish a prima facie case of employment discrimination based on protected class membership, the complainant must show: (1) membership in a protected class; (2) that she was qualified for the position; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

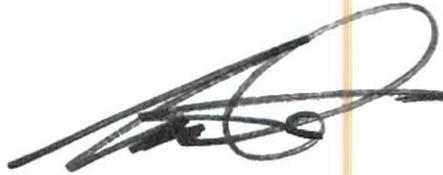
Complainant has a disability and so belongs to a protected class. Complainant was qualified for the position. She suffered an adverse employment action when she was disciplined for poor attendance resulting in an inability to bid for other jobs, and when Respondent terminated her employment. However, Respondent's actions did not occur under circumstances permitting an inference of unlawful discrimination. Complainant admitted that an unspecified number of the occurrence points she accumulated were for absences unrelated to her disability. She did not demonstrate that she was either disciplined or terminated because of absences connected to her disability. On the contrary, when Complainant provided Respondent with evidence that some of the occurrences were a result of her disability, Respondent discounted the occurrence points and offered Complainant her employment back. Further, Respondent took action to help Complainant by an initiating a dialogue with the Union which allowed Complainant to get training and be hired in a new position, which resulted in Complainant working in a position that did not expose her to seafood, and also paid her a higher salary. This claim 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 hereby is, dismissed.

DATED: July 25, 2014
Bronx, New York

A handwritten signature in black ink, appearing to read 'Michael T. Groben', written over a horizontal line.

Michael T. Groben
Administrative Law Judge