



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ALBERTHA WRAY,

Complainant,

v.

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10155005

Federal Charge No. 16GB202952

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 24, 2014, by Thomas S. Protano, 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: **AUG 08 2014**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. **10155005**

SUMMARY

Complainant alleges that she was suspended and dismissed from her job because of her age, sex and disability. Respondent denies the charge and asserts that Complainant waived her claims when she signed a release after settling a union grievance. Complainant did not waive her claim and is allowed to proceed. However, Complainant has not proved her claims of discrimination and the charges must be dismissed.

PROCEEDINGS IN THE CASE

On May 11, 2012, 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on March 25, 2013, March 26, 2013, June 4, 2013, October 28, 2013 and December 13, 2013.

Complainant and Respondent appeared at the hearing. The Division was represented by Veanka S. McKenzie, Esq., Senior Attorney. Respondent was represented by Laura C. Rountree, Esq., Assistant Corporation Counsel.

FINDINGS OF FACT

1. Complainant is a female, 63 years of age. (ALJ Exhibit 2)
2. Complainant suffers from high blood pressure. (Tr. 54)
3. On August 29, 2005, Complainant began working for Respondent, which operates hospital centers for the City of New York, as a clerical associate III. (Tr. 11)
4. In 2007, Complainant became a coordinating manager in the risk management division. (Tr. 14)
5. Risk management is comprised of two units. One is adverse events and the other is claims. (Tr. 343)
6. Complainant worked in the claims unit. Her duties included working with attorneys who represented the hospital in litigation, processing subpoenas, and generally assisting the attorneys. (Tr. 344-45)

7. Complainant and Dawn McKenzie were the only two members of the claims unit. (Tr. 346)

8. Isabel McFarlane was the senior associate director of risk management. (Tr. 342)

9. When McFarlane became the director of risk management, in January of 2011, she determined that better systems needed to be put into place for the claims unit. (Tr. 342, 346-48)

10. On June 6, 2011, McFarlane held a meeting with Complainant and McKenzie. At the meeting, it was determined that any documents that were processed would be placed in a binder, which could be used to determine the status of the information request. (Respondent's Exhibit 6; Tr. 348)

11. After two months, McFarlane held a follow up meeting and determined that McKenzie's binder was complete and up to date, but Complainant was not following the new system. (Tr. 353)

12. The iVOS system is a computer program that Respondent uses to keep track of the malpractice cases that are filed against Respondent. (Tr. 357)

13. In November of 2011, McFarlane asked Complainant to run a report on the iVOS system. Complainant was unable to obtain the report. (Tr. 359)

14. The following week, McFarlane again asked Complainant to run a report from iVOS. Complainant produced a report that was inaccurate. (Tr. 360)

15. On December 2, 2011, McFarlane again asked to see the binders Complainant and McKenzie maintained. (Tr. 364)

16. After examining the binders, McFarlane discovered that McKenzie worked on more than twice as many cases as Complainant since the binder system had been implemented the previous June. (Tr. 365)

17. On December 6, 2011, McKenzie and Complainant engaged in a loud argument about a case that Complainant had been working on. (Tr. 367)

18. When McFarlane went to investigate, Complainant was very argumentative and loud. Complainant accused co-workers of “being against her” and “taking her stuff.” (Tr. 368)

19. After that incident, McFarlane issued Complainant a warning for what McFarlane considered “disruptive behavior.” (Tr. 383)

20. Complainant responded to the memo with a memo accusing Michele Welcome, assistant director of risk management, of punching Complainant in the chest. Welcome, when asked about this by McFarlane, denied punching or pushing Complainant in any way. Welcome continues to deny the accusation, and McFarlane does not believe the allegation to be true. (Respondent Exhibit 9; Tr. 575-76)

21. On December 9, 2011, Complainant was to receive a six-month reevaluation. She did not receive the reevaluation, because McFarlane was unable to administer it prior to the end of the day. Because Complainant called in sick for several days thereafter, the reevaluation was not done until December 19, 2011. (Tr. 389-90, 396)

22. Complainant had called in sick between December 9, 2011 and December 19, 2011, because of complications related to high blood pressure. (Tr. 54)

23. Complainant was unhappy with the reevaluation and refused to sign it. (Tr. 399)

24. After receiving the reevaluation, Complainant was taken to human resources. While in human resources, Complainant was informed that, because of her disruptive behavior on December 6, 2011, she was going to be suspended for 30 days. (Tr. 80-81)

25. Complainant returned to the department with security officers to retrieve her belongings and left. (Tr. 82-83)

26. Upon leaving the building, Complainant realized that she had left a bag with her shoes in it in the department. (Tr. 89)

27. Complainant attempted to retrieve the shoes, but was unable to because she was not allowed back in the department. (Tr. 90)

28. Complainant was taken back to the department area and, as Complainant waited outside, Welcome searched for the bag and found it. When Welcome looked inside the bag, she found Complainant's shoes and documents belonging to Respondent in the bag. Welcome retained the bag and Complainant was escorted off the premises. (Respondent's Exhibit 23; Tr. 590)

29. After Welcome found the Respondent's documents in the bag, she reported what she found to Colin Copeland, director of labor relations. (Respondent's Exhibit 23; Tr. 592)

30. The bag was sent to Copeland who, upon learning that the bag contained patients' medical records, drafted disciplinary charges against Complainant. (Tr. 668)

31. Copeland recommended that Complainant's employment be terminated. He sought termination because Complainant had attempted to remove records from her department. In addition, Copeland reviewed photographs from surveillance cameras showing Complainant leaving the premises with binders belonging to the risk management department. (Tr. 669)

32. Complainant later returned one of the missing binders to Respondent. Copeland believes that some of the pages from the binder were missing when it was returned because he observed that the binder in the photograph had significantly more pages than the one that was returned. (Tr. 671)

33. Complainant filed a grievance through her union, challenging the termination. On May 14, 2012, the grievance was settled before the case was heard by an arbitrator. (Tr. 675-76)

34. Under the terms of the agreement, Complainant agreed to resign her position “for personal reasons” and released Respondent “for any and all claims...in connection with the underlying dispute...” Complainant received no monetary benefit from the agreement.

(Respondent’s Exhibit 1)

35. Complainant did not understand that she was agreeing to relinquish her rights to file a Division complaint against Respondent when she agreed to settle the grievance. (Tr. 140)

OPINION AND DECISION

Respondent asserts that the Complainant waived her right to proceed with this claim when she signed the agreement to settle her union grievance. It is undisputed that Complainant signed the agreement. In general, a waiver of statutory rights is permissible if: (1) the statute does not preclude a waiver, (2) the waiver does not contravene the legislative purpose of the statute, (3) the waiver is freely, openly and knowingly made, with the absence of duress, coercion or bad faith and, (4) the employee gets a desired benefit in exchange for the waiver. *American Broadcasting Company v. Roberts*, 61 N.Y.2d, 244, 249-50, 473 N.Y.S. 2d 370 (1984).

In this case, points one and two do not apply. With respect to point three, Complainant was adamant that she did not understand that the settlement would extinguish her claim at the Division. The fact that she signed the agreement just three days after filing her Division complaint supports her claim that she was unaware that she was waiving her rights under the Human Rights Law. There is no evidence of “duress, coercion or bad faith” on Respondent’s part, but Complainant did not “knowingly” agree to a waiver. Regarding point four, Complainant did not receive any benefit for waiving her rights under the Human Rights Law. She was allowed to resign rather than be fired from her job, but the result was the same:

Complainant no longer had a job. She gave up her right to challenge the termination at arbitration and released Respondent of all claims related the termination of her employment and received no discernable benefit. Therefore, Complainant's release is not enforceable; she can maintain her action for discrimination against Respondent.

It is unlawful for an employer to discriminate against an employee on the basis of age, sex or disability. Human Rights Law § 296.1(a). Complainant asserts that she was discriminated against on the basis of her age, sex and disability when she was suspended and fired from her position with Respondent.

In order to prevail, Complainant must first make out a prima facie case of discrimination. Complainant can do so 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 unlawful 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 burden then shifts to Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant satisfies the first three prongs of the above-stated test. She was a member of various protected classes, she was certainly qualified for the job she held for over four years, she was suspended and, ultimately, her employment was terminated. Complainant fails however, to show that, given the circumstances, one can infer that the suspension and/or termination were motivated by unlawful discrimination. Complainant had engaged in a serious verbal dispute with

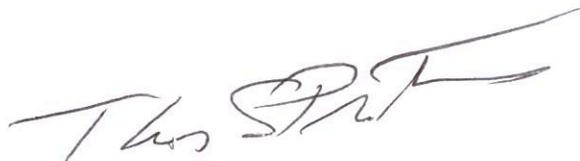
a co-worker. When McFarlane, Complainant's supervisor, attempted to quell the situation, Complainant continued the argument with her. Complainant then made an allegation about Welcome that Welcome credibly denied and McFarlane did not believe. This incident, coupled with the poor evaluation and problems with Complainant's work, caused Respondent to seek to Complainant's suspension. When Complainant left the premises, Copeland and Welcome discovered that she had taken Respondent's documents with her. This led Respondent to seek to terminate Complainant's employment. There is no evidence that Complainant's age, sex or disability played a role in the decision making process.

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 case be dismissed.

DATED: June 24, 2014
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is stylized and written in a cursive-like font.

Thomas S. Protano
Administrative Law Judge