



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MARY JOSEPH,**

Complainant,

v.

**COLD SPRING HILLS CENTER FOR NURSING  
AND REHABILITATION,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10137185

**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 December 29, 2011, by Margaret A. Jackson, 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.

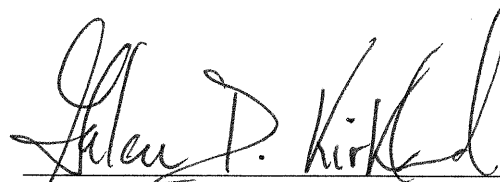
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: FEB 24 2012  
Bronx, New York



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GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
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on the Complaint of

**MARY JOSEPH,**

Complainant,

v.

**COLD SPRING HILLS CENTER FOR  
NURSING AND REHABILITATION,**

Respondent.

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

Case No. **10137185**

**SUMMARY**

Complainant alleges that she was unlawfully discriminated against on the basis of her national origin/race, age and disability when her employment terminated. Complainant failed to meet her burden of proof. Therefore, the complaint should be dismissed.

**PROCEEDINGS IN THE CASE**

On October 2, 2009, 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on July 20, 2011.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Peckar & Abramson, Esqs., Robert H. Benacchio, Esq. of Counsel.

Permission to file post-hearing briefs was granted. None were filed.

### **FINDINGS OF FACT**

1. Complainant, a female East Indian, was born on July 16, 1943. (Tr. 5)
2. On July 2, 2002, Complainant began working for Respondent as a housekeeper with some supervisory responsibilities. She was eventually promoted to assistant laundry manager. (Tr. 6, 188)
3. Between 2002 and 2009, there were always two or three supervisors and at least one director on Respondent’s housekeeping staff. (Tr. 194)
4. Respondent’s progressive discipline policy dictated that an employee receive a first written, second written and final written warning before termination of employment. (Tr. 196)
5. On November 15, 2002, Complainant was given a verbal warning for failing to complete tasks that were assigned to her by her supervisor, Michael Elwell. (Respondent’s Exhibit 2)

6. On January 2, 2003, Elwell placed a memo in Complainant's file because she failed to complete another assigned task. (Tr. 63; Respondent's Exhibit 3)

7. On January 7, 2003, Complainant was terminated from her position with Respondent for poor job performance and her inability to follow directions, supervise staff and follow through. (Tr. 69, 197)

8. Complainant appealed the decision to terminate her employment. (Tr.75-76)

9. In April of 2003, Respondent's Human Resources Director, Maureen Grech, agreed to give Complainant an opportunity to prove herself, and she was rehired. (Tr. 199)

10. Shortly after being rehired, administrator Lori Scullin criticized Complainant's work performance and gave her a written warning. (Tr. 77)

11. On October 10, 2003, the assistant director of housekeeping Tom Noll, who replaced Ewell as Complainant's supervisor, gave Complainant a written warning for poor work performance. (Tr. 78-79; Respondent's Exhibit 6)

12. In 2005 and 2006, Complainant continued to receive written warnings for poor work performance. (Tr. 85)

13. Complainant told Grech that director Tom Lucey was teasing her and telling her what to do. Meanwhile, Lucey was complaining to Grech that Complainant was not listening to him or other people. (Tr. 20, 226)

14. On March 11, 2008, another director, Robert Blanco, gave Complainant a written warning reflecting her poor work performance because she changed the daily work schedule without approval. He also noted that her "failure to improve and sustain the required corrective action may result in immediate discharge." (Tr. 89-90, 95-96, 98, 100)

15. Grech, administrator David Moskowitz and director Edwin Delgado developed an action plan at a meeting with Complainant. They outlined areas where Complainant needed to make immediate and sustained improvement. (Tr. 204; Respondent's Exhibit 10)

16. On April 27, 2009, Complainant was given another first written warning for failing to set up books and a cleaning schedule as directed. (Tr. 105, 114; Respondent's Exhibit 8)

17. On April 27, 2009, Complainant was given a second written warning for failing to follow-up by not locking and re-acquiring her keys to a trailer containing patient supplies. (Tr. 230; Respondent's Exhibit 9)

18. On May 7, 2009, Complainant was given a final written warning for poor work performance. Grech, Moskowitz and Delgado met with Complainant again to discuss the warnings and advise Complainant that her failure to improve would result in termination of her employment. (Tr. 117-18; Respondent's Exhibit 10)

19. Complainant did not tell anyone at work that the written warnings she received were based on her national origin/race, age or disability. (Tr. 136, 206)

20. On May 8, 2009, Complainant filed a workers compensation claim based on a back injury that she incurred while pushing a linen cart. (Respondent's Exhibit 12)

21. In June 2009, Respondent hired a white male named Vinny, who was younger than Complainant, as a housekeeper. Complainant was asked to train him. (Tr. 38-39,127,129)

22. Shortly thereafter, in July 2009, Complainant took two weeks leave because she was experiencing back pain associated with her work related injury. (Tr.125)

23. When Complainant returned to work on July 13, 2009, Grech, Moskowitz and Delgado met with Complainant and terminated her employment for failure to make immediate and sustained improvements in her job performance. (Tr.130, 203-04; Respondent's Exhibit 11)

## OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's national origin/race, age or disability. Human Rights Law § 296.1(a).

Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class; that she was qualified for her position; that she suffered an adverse employment action; and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.* The ultimate burden of proof always remains with Complainant. *Id.* at 630, 665 N.Y.S. 2d at 29.

A disability is “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques,” a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely “diagnosable medical anomalies.” *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant's back injury qualifies as a disability under the Human Rights Law. Therefore, Complainant is a member of a protected class. Complainant was qualified for her position, which she occupied for many years. Complainant walked slowly and took medical

leave when she experienced back pain. Arguably, Complainant may have established a prima facie case on the basis of her disability. However, Complainant did not suffer an adverse employment action because of her disability. Complainant's employment terminated because of her poor work performance.

Complainant is also a member of a protected group due to her age and race. She was qualified for her position and she suffered an adverse employment action in that her employment was terminated. However, this adverse employment action occurred under circumstances that do not give rise to an inference of unlawful discrimination simply because Respondent hired a younger white male and asked her to train him.

It is well settled under the Human Rights Law that Complainant bears the burden of proving discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). In this case, Complainant has failed to meet this burden. Respondent's actions have not been shown to be pretextual. Instead, Respondent made decisions that it believed to be in its best interest in operating its facility. Complainant received several written warnings throughout her tenure as a housekeeper and she failed to improve her work performance.

Respondent re-hired Complainant after the first time it discharged her. If Respondent were motivated by discriminatory animus it seems unlikely that it would re-hire someone in Complainant's protected class. It is more likely that Respondent utilized its business judgment in deciding which employees to hire and which employees to terminate. An employer may exercise its business judgment in making personnel decisions that are poor, unwise, bad, based on erroneous facts, or for no reason at all. Such judgment may not be second guessed as long as the reason is not discriminatory. *See, Visco v. Community Health Plan*, 957 F. Supp. 381 (N.D.N.Y. 1997).



Respondent demonstrated a legitimate, nondiscriminatory reason for its refusal to retain Complainant as an employee.

Complainant failed to present any evidence suggesting that Respondent terminated her employment for discriminatory reasons. Having failed to meet her burden of proof, the claim must be 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 that the complaint be and hereby is dismissed.

DATED: December 29, 2011  
Hempstead, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive, flowing style with a large loop at the end of the name.

Margaret A. Jackson  
Administrative Law Judge