



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MARY ANN NEMCEK,

Complainant,

v.

**NEW YORK STATE, STATE UNIVERSITY OF
NEW YORK AT BINGHAMTON,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10135341

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 28, 2011, 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 GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENT:

- Finding of Fact 18 is clarified to the extent that the record reveals that regardless

of the CBA definition of temporary disability, Respondent's policy during the relevant period was to make reasonable accommodations for its disabled employees. (Tr. 257-58, 268, 345-46, 370, 374, 395, 400-401, 408; Respondent's April 29, 2011, Post-Hearing Brief, p. 9; Respondent's August 8, 2011, Objections, p. 2).

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: JAN 17 2012
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

MARY ANN NEMCEK,

Complainant,

v.

**NEW YORK STATE, STATE UNIVERSITY
OF NEW YORK AT BINGHAMTON,**

Respondent.

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

Case No. **10135341**

SUMMARY

Complainant alleges that Respondent discriminated against her in employment by denying her a reasonable accommodation for her disability. Complainant fails to set forth a prima facie case, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On July 23, 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 Michael T. Groben, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on February 23 and 24, 2011.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by the Office of the University Counsel, by Barbara Westbrook Scarlett, Esq., of counsel.

Permission to file post-hearing briefs was granted. The Division and Respondent timely filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant holds various degrees in the field of Nursing, including a Bachelors, Masters and Doctorate. (Tr. 38-39) She worked in hospital and clinical settings in the late 1970’s, and then taught nursing, including clinical and lecture courses, at various nursing schools from the 1980’s through 2003. (Tr. 39-43, 157-59, 160-61). She is married to David Nemcek. (Tr. 224-25)
2. Complainant suffers from osteoarthritis in her hips and knees, which causes her pain. At all times relevant to the complaint, Complainant was under treatment for this condition. (Tr. 49-53, 55-56, 163-64, 191-92)
3. Respondent operates the Decker School of Nursing. At all times relevant to the complaint, Joyce Ferrario (“Ferrario”) was the dean of the nursing school. Her duties

encompassed overall responsibility for the administration and operation of the nursing school, including assigning faculty to teach courses. (Tr. 277-78, 297-99) Prior to each semester, Ferrario would request that Respondent's teaching faculty advise her as to their preferences for course assignment; she would then review these assignment requests with Respondent's program directors, and assign instructors to their preferred courses if feasible. (Tr. 306-308)

4. Respondent's nursing school offers both classroom lecture courses, and clinical courses. Clinical courses are taught at a medical facility, such as a hospital. One such clinical site is Lourdes Hospital ("Lourdes"). (Tr. 45, 299-300, 304-06) A clinical course instructor exercises supervision of nursing students as they interact with patients. Senior level undergraduates and graduate students are given less supervision because of their experience and expertise. Because clinical courses entail a longer workday, and require the instructor to move to different areas of the clinical site in order to monitor students, a clinical course requires more physical effort and activity from the instructor than a lecture course. (Tr. 57-59, 300-01, 346)

5. In January 2004, Respondent hired Complainant to teach clinical nursing courses as a Clinical Assistant professor of nursing. Complainant became a tenure-track Assistant Professor in 2005. (Tr. 43-49, 163, 300, 327-28)

6. Because of her educational background and experience, Complainant was generally assigned to teach clinical courses, at Lourdes. (Tr. 55, 157-59, 192-94, 306, 329-30, 360-63)

7. At all times relevant to the complaint, Complainant was a member of a union known as United University Professions. Complainant's union and New York State were parties to a collective bargaining agreement ("CBA"), which governed labor relations between Respondent and its employees. (Tr. 366-368)

8. Valerie Hampton (“Hampton”) has been employed as Respondent's director of affirmative action for approximately 10 years. Her responsibilities include monitoring Respondent’s compliance with federal and state statutes pertaining to equal opportunity, and coordinating Respondent's provision of reasonable accommodations for employees with disabilities. (Tr. 78, 253-55, 267-68, 283)

9. Joseph Schultz (“Schultz”) has been employed as Respondent's director of human resources for approximately 3 years. Prior to that, he was associate director. His duties include overseeing benefits, employment and labor relations. (Tr. 68, 365-66)

10. Respondent's policy regarding reasonable accommodations normally requires that employees fill out a written reasonable accommodation request, although a request can also be made verbally. (Tr. 276, 286-87, 295, 409-10, 411-13)

Spring Semester 2009

11. Complainant requested to be assigned a lecture course identified as number 530 (“530”) and a seminar course number 470 (“470”) for the spring 2009 semester. This request was granted. (Tr. 54, 59-60, 165, 308) However, because 470 required the participation of approximately 22 students, and only seven were enrolled, Respondent decided to cancel that course. On or about January 27, 2009 Respondent notified Complainant of the cancellation, and that she would be reassigned to teach clinical course number 471 (“471”). (Tr. 60-61, 165-66, 197, 308-12, 335-39, 340, 358)

12. The instructor originally chosen to teach 471 had resigned in late January 2009. Although Complainant had not taught 471 before, Ferrario chose to assign 471 to her because the course was based at Lourdes, where Complainant had taught before; 471 was not a particularly difficult course to teach; Respondent's only two remaining classes without instructors were the

two sections of 471; and Complainant's strong clinical background was appropriate for the course. (Tr. 63, 306, 309-10, 311)

13. The clinical portion of 471 was scheduled to begin February 11, 2009, and Respondent made several attempts to contact Complainant. Complainant finally replied on February 4, advising that she lacked the necessary experience to teach 471, that she was unable to walk the necessary amount to supervise nursing students, and that she was not available to teach 471 because she had another job, the schedule of which conflicted with that of 471. (Complainant's Exhibit 1, Complainant's Exhibit 2; Tr. 63-65, 163-65, 166, 169-72, 177-78, 196, 313-15).

14. As with Respondent's other clinical nursing courses, teaching 471 required more physical activity and exertion than a lecture course. (Tr. 63, 121-23)

15. By letter dated February 5, 2009, Ferrario responded to the issues raised in Complainant's February 4 letter, advising her, in pertinent part, that if she believed she was suffering from a temporary disability, she should contact Respondent's human resources department or, in the alternative, contact Hampton regarding any claim of disability pursuant to the Americans with Disabilities Act. (Complainant's Exhibit 4; Tr. 66-67, 317, 340-41, 375-77, 395) On February 6, Ferrario again wrote to Complainant, ordering her to report to work to teach 471. (Complainant's Exhibit 3; Tr. 332-33)

16. Complainant responded by arranging for a meeting for February 9, 2009, with Schultz, David Nemcek, and Ed Singer of Respondent's human resources department. (Tr. 66, 67-69, 78, 256, 366-67) At that meeting, Complainant presented Schultz with her February 4, 2009 e-mail and a note from her doctor which stated in pertinent part that Complainant's condition would prevent her from standing for "excessive" hours. (Complainant's Exhibits 1, 16 [p. 1]; Tr. 68-70, 72-77, 225-28) Complainant requested that she be relieved from the requirement of teaching 471,

instead teaching only 503. However, a normal full-time teaching load for an instructor is at least two courses. (Tr. 88, 357)

17. Schultz advised Complainant that pursuant to Respondent's "full duty or no duty" policy, if Complainant were unable to perform her job, she could either take disability leave or request a reasonable accommodation which would allow her to perform her job, such as the use of a scooter or taking rest periods. (Tr. 88, 367, 369-70, 408-09)

18. Article 23 of the CBA addresses employee leave time. In that context, CBA Section 23.4(f) (1) defines a "temporary disability" as including any temporary physical impairment of health which disables an employee from the full performance of duty. This provision is interpreted by Respondent as authorizing its "full duty or no duty" policy with respect to leave. (Complainant's Exhibit 14; Tr. 368-69, 392-93, 416-17) Respondent only offers light duty in the event that an employee has been injured on the job, and is able to return to full work performance within 60 days. (Tr. 389-92, 396-97) Complainant did not fulfill either of these requirements. (Tr. 394)

19. Hampton then joined the meeting, in order to further discuss reasonable accommodation. She explained the reasonable accommodation process to Complainant, and Schultz reiterated that Complainant could go out on sick leave or request a reasonable accommodation. Complainant was provided with an application for reasonable accommodation. (Tr. 77, 228-30, 255-58, 268-70, 279-81, 284-85, 294, 319-21, 341-43, 359-60, 371-75, 398-403, 408-409, 415-16) Complainant agreed to set up a meeting with Hampton to discuss a reasonable accommodation. She did not do so, choosing to go on disability leave instead. (Tr. 166-69, 258-59)

20. Hampton, expecting that Complainant would pursue a request for accommodation, discussed Complainant's job requirements with Ferrario. In her testimony at the public hearing, Hampton opined that a reasonable accommodation could have been granted if Complainant had pursued same. (Tr. 277-80, 282-83, 290, 292-93, 295-96)

21. On February 10, Complainant submitted a statement from her doctor certifying that she was disabled and unable to work. She then went on disability leave for the entire spring 2009 semester. (Complainant's Exhibits 9 and 16 [pp. 2, 3, 4]; Tr. 83-88, 90-91, 95-96, 156, 377-79)

22. Both Complainant and David Nemcek testified at the public hearing that there was no discussion of reasonable accommodation at the February 9 meeting. (Tr. 78-80, 90, 172-175, 243-44) I did not find this testimony credible.

23. Within a few days of the February 9, 2009 meeting, Ferrario contacted Ralph Klotzbaugh, a nurse practitioner and research assistant at Respondent's nursing school, to see if he would be available to teach 471 in the event that Complainant could not. Klotzburg did eventually teach the course. (Tr. 70-72, 110-20, 318, 334-35)

24. In correspondence in April and early May, 2009, Complainant and her doctor, Janice Pegels, M.D., ("Dr. Pegels") advised Respondent of Complainant's ability to return to work. Dr. Pegels indicated that it was "not clear" if Complainant could handle a class which required "prolonged standing," but imposed no restrictions on her return to work. (Complainant's Exhibits 7, 8, 16 [pp. 4, 5]; Tr. 379-81, 413-15)

Fall Semester 2009

25. Complainant requested lecture courses for the fall semester of 2009; she was again assigned one lecture course "503" and a clinical course "353." (Tr. 100-02, 322-23) When Ferrario assigned these classes to Complainant, she knew that Complainant had been cleared to

return to work by her doctor, but was unaware of Dr. Pegels' letter setting forth concerns about prolonged standing for Complainant. Ferrario credibly testified that she would have attempted to change Complainant's assignment had she been aware of this prior to setting the teaching schedule. (Complainant's Exhibit 16 [p. 5]; Tr. 343-46)

26. Complainant was concerned about her course assignments, but did not attempt to contact Ferrario. (Tr. 105-06) On July 17, 2009, Dr. Pegels certified that Complainant was fit to work if "prolonged periods of walking & standing are not required," and during the week of August 10, 2009, following meetings with Schultz and Hampton, Complainant submitted documents requesting a request for reasonable accommodation in the form of a change in her teaching assignments so that she could avoid prolonged periods of standing or walking. (Complainant's Exhibits 5, 6, 15, and 16 [p. 6] ; Respondent's Exhibit 1; Tr. 124-35, 177-78, 276-77, 285-87, 346-50, 381-84)¹

27. Complainant submitted the necessary medical documentation for her reasonable accommodation request on or about August 26, 2009, shortly before the start of the fall semester. (Complainant's Exhibits 15 and 16 [p. 7]) Ferrario and Hampton discussed Complainant's reasonable accommodation request. Ferrario concluded that it was not feasible to reassign Complainant because it was so close to the beginning of the semester and no lecture courses were available for Complainant, and because Complainant's primary function was to teach clinical courses. (Tr. 287-88, 323-25) Hampton then visited Lourdes to view the site for Complainant's clinical course, and to discuss possible accommodations with Lourdes' management. (Tr. 261-64, 290)

¹ Complainant's Exhibit 5 is an incomplete copy of Respondent's Exhibit 1. (Tr. 405-06)

28. Just prior to the beginning of the fall semester, Complainant, David Nemcek, and Hampton met at a medical supply store in order select equipment for Complainant to use in order to avoid prolonged standing and walking. (Tr. 135-37, 232, 264-65)

29. Several options were discussed, and a wheelchair and a portable folding “cane chair” were ultimately selected. (Tr. 136-39, 186-87, 232-36, 246-50, 264-66) Although Complainant and David Nemcek both testified that Complainant had wished to use an electric scooter instead of the wheelchair, and had advised Hampton that the wheelchair was unsuitable, Complainant used the wheelchair in teaching her clinical course without requesting a change to said accommodation. (Tr. 138-40, 187-90, 234-35, 266)

30. Complainant was scheduled to begin teaching a third course in the latter part of the 2009 fall semester, course number 362 (“362”). In correspondence to Respondent in October 2009, and in her testimony at the public hearing, Complainant stated that a co-worker, Margaret White, had volunteered to teach that course. Complainant asked that she be relieved from teaching 362 or, in the alternative that she be paid extra for teaching 362. (Complainant's Exhibits 10, 11, 13; Tr. 103-04, 142-47)

31. Margaret White testified credibly that she had never made such an offer to Complainant. (Tr. 208-14) Complainant's testimony on this issue was not credible.

32. Complainant's request regarding 362 was not granted, and she completed teaching her assigned courses. (Complainant's Exhibit 12; Tr. 145-46, 186)

Comparators

33. Complainant cited two of Respondent's instructors who she alleged had disabilities and who no longer taught clinical courses. Complainant did not know whether or not these

instructors had ceased teaching clinical courses due to their disabilities, or whether they had ever sought reasonable accommodation for same. (Tr. 149-50, 151-52)

34. Complainant also testified that a third instructor, Caroline Pierce, had been relieved of teaching clinical courses by Ferrario as an accommodation because she suffered from hypertension. (Tr. 149-50) Complainant is incorrect. Pierce never requested an accommodation relieving her from teaching clinical courses. (Tr. 350-52)

35. Respondent has not changed the schedules of any of its other instructors as a reasonable accommodation for disability, however at least one other instructor has taught a clinical course using an electric scooter. (Tr. 288-89, 352-53)

36. Complainant ceased working for Respondent in June 2010. (Tr. 49)

OPINION AND DECISION

An employer is obligated to provide a reasonable accommodation for an employee's known disability. N.Y. Exec. Law, art. 15 (Human Rights Law) § 296.3. A disability is defined under the Human Rights Law as including “a physical... 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.” Human Rights Law § 292.21. Complainant's osteoarthritis and resulting pain and discomfort constitute a disability.

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 a 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 order to make out a prima facie case on the basis 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; and (4) the employer refused to make such accommodations. *Pimental v. Citibank, N.A.*, 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dept. 2006)

Spring Semester 2009

It is clear from the record that Complainant suffered from a disability in the form of osteoarthritis, and that her employer had notice of that condition. However, although Complainant made her difficulties with teaching the clinical course known to Respondent, she chose to take sick leave, rather than proceeding with a request for reasonable accommodation. I found no credible evidence that Respondent misled Complainant with respect to her right to a reasonable accommodation or that it had refused to grant same. Instead, the parties engaged in the appropriate interactive process and Complainant ultimately chose a different solution to her problem. Complainant fails to present a prima facie case of discrimination.

Fall Semester 2009

The verified complaint alleged that Respondent had continued its pattern of discrimination in assigning clinical courses to Complainant in the fall semester of 2009. These

allegations were more fully set forth in testimony and documentary evidence at the public hearing. I find that Respondent had adequate notice of Complainant's charge of discrimination in the fall semester, and pursuant to the Rules of Practice of the Division, I hereby amend the complaint to conform to the proof adduced at the public hearing. 9 N.Y.C.R.R. § 465.12 (f) (14).

Complainant requested a reasonable accommodation, and Respondent granted same. The proof adduced at the hearing makes clear that whether or not the wheelchair which Complainant used in teaching her clinical courses was the ideal solution, or the one most pleasing to Complainant, it did enable Complainant to perform her job responsibilities in a satisfactory manner. Had Complainant been unable to perform her duties in a wheelchair, it was incumbent on her to inform Respondent, and to present medical documentation of said inability. She did not do so.

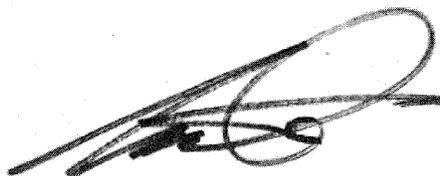
With respect to Complainant's allegations that she was assigned a third course to teach in October of the fall semester, Complainant presented no credible proof that this was done for discriminatory reasons, or that she requested a reasonable accommodation regarding same. By this time, Complainant was well aware of her rights regarding reasonable accommodations, and well aware of the procedure in requesting a reasonable accommodation. Complainant has failed to set forth a prima facie case of discrimination.

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: June 24, 2011
Bronx, New York

A handwritten signature in black ink, appearing to read "Michael T. Groben", with a large, stylized flourish at the end.

Michael T. Groben
Administrative Law Judge