

***Health & Hospitals Corp. (Renaissance
Health Network) v. James***

OATH Index No. 2085/15 (Jan. 4, 2016)

Petitioner proved that respondent had an altercation in which she pushed a co-worker and was excessively late for work. Termination of employment recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**HEALTH AND HOSPITALS CORPORATION
(RENAISSANCE HEALTH NETWORK)**
Petitioner
-against-
DOROTHY JAMES
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

Petitioner, the Health and Hospitals Corporation, brought this disciplinary action against respondent, principal administrative associate Dorothy James, under section 7:5 of its Personnel Rules and Regulations, alleging that she was excessively late for work for a total of nearly two hours from December 2012 to April 2013, and that she engaged in a physical altercation, in which she pushed a co-worker, on June 3, 2014 (ALJ Ex. 1).

At trial petitioner relied on the testimony of seven witnesses and documentary evidence. Respondent testified on her own behalf and presented additional documentary evidence. For the reasons below, I find that petitioner proved the charges and recommend termination of respondent's employment.

ANALYSIS

The main charge stems from events that took place at the Drew Hamilton Clinic on 143rd Street and Eighth Avenue in Harlem on June 3, 2014. Petitioner alleged respondent approached

a co-worker, Donald Waiters, engaged in a shoving match, and loudly cursed at him. The incident, which took place in front of co-workers and patients, including children, did not end until a doctor intervened.

Clerical associate Donald Waiters testified that he was working at the Drew Hamilton Clinic on the morning of June 3, 2014 (Tr. 15). As Mr. Waiters conferred with colleagues at the nurses' station, respondent approached (Tr. 15). According to Mr. Waiters, respondent had "this strange look on her face" (Tr. 15, 41). Mr. Waiters, who had worked with respondent for a few months without any problem, said, "What's wrong with you?" (Tr. 15, 36, 39, 41). Respondent, with the back of her hand, flicked Mr. Waiters' hand which was down by his side. When he responded in kind by pushing respondent's hand back, her watch fell to the floor (Tr. 16, 38-39, 42). She said to Mr. Waiters, "You going to get my motherfucking watch fixed?" (Tr. 16). Mr. Waiters replied, "I'm not getting nothing fixed" and respondent said, "I'm tired of this shit" (Tr. 16).

One of the doctors told respondent and Mr. Waiters, "Let's be professional" (Tr. 17, 42). At the suggestion of another co-worker, Mr. Waiters walked away (Tr. 17). Ten to fifteen minutes later, two New York City Police Officers approached Mr. Waiters and told him that they had received a report from one of his co-workers stating that she had been sexually assaulted by him (Tr. 27). The officers told Mr. Waiters that they investigated and found no evidence of criminality (Tr. 28). Mr. Waiters denied that he had ever made any sexual references or comments to respondent (Tr. 30). Other than pushing her hands away, he had no other physical contact with her (Tr. 30). The police left without making an arrest (Tr. 29-30).

After the police left, Mr. Waiters' supervisor told him to report to the Human Resources Department ("HR"), located a few blocks away at Harlem Hospital (Tr. 31). Mr. Waiters reported there and was immediately suspended without pay for three weeks (Tr. 31-32, 45). A union representative told Mr. Waiters that respondent had filed a police complaint against him; Mr. Waiters went to the local precinct and filed a cross-complaint against respondent (Tr. 32).

Mr. Waiters signed a typewritten statement shortly after the day of the incident (Pet. Ex. 7; Tr. 33). According to that statement, respondent pushed Mr. Waiters' arm and he pushed her arm. They pushed each other's arms a few times, until respondent's watch fell off. After picking up the watch, respondent told Waiters that he had to fix her watch and he refused to do

so. “Due to a loud commotion” and respondent’s “cursing, ranting, and raving,” a doctor and another clerical associate intervened (Pet. Ex. 7).

Clerical associate Gregory Griffin supported Mr. Waiters’ testimony. Griffin credibly testified that he overheard scuffling and turned around to see Mr. Waiters and respondent pushing each other (Tr. 48, 58). Mr. Griffin heard respondent tell Mr. Waiters, “You’re going to get my fucking watch fixed” (Tr. 49). And Mr. Waiters replied, “I’m not going to get your watch fixed. I didn’t break your watch” (Tr. 50). They calmed down and went their separate ways, and the police arrived shortly afterwards (Tr. 50). Mr. Griffin did not see or hear who started the scuffle, and did not see any injuries (Tr. 56, 58). He later wrote a memo about the incident, which was consistent with his trial testimony (Tr. 56; Pet. Ex. 8).

Petitioner presented three other witnesses, nurse Denise Benford, patient care associate Carmen Tiburcio, and institutional aide Troy Robinson, who saw or heard some of the incident. Two other witnesses, chronic care coordinator Marlon Wright and associate director of operations Cheryl Isaacs, were present in the immediate aftermath of the incident. All of these witnesses testified in a straightforward, credible manner, and they had no apparent motive to lie. Though there were minor inconsistencies in their accounts, they further corroborated Mr. Waiters’ testimony.

For example, Ms. Benford recalled that she was sitting at her desk, talking on the phone, when she noticed a “ruckus” (Tr. 61, 67). She turned and saw Mr. Waiters, standing on opposite sides of a chair, jockeying for position (Tr. 61, 68, 73). Respondent was chasing Mr. Waiters, who was saying “something’s wrong with you” (Tr. 62, 68). Mr. Waiters was trying to get away and respondent was going after him (Tr. 68-69). Ms. Benford, who was busy on the phone and did not see the whole dispute, did not see any physical contact but she heard something fall on the floor, saw respondent pick it up, and heard respondent say, “You broke my fucking watch” and you’re going to pay for it (Tr. 62, 64, 69). Ms. Benford testified that Mr. Robinson and a doctor intervened (Tr. 63). The doctor said, “This can’t go on. This is a place of business. I have children here” (Tr. 63). In handwritten reports about the incident that Ms. Benford wrote shortly afterwards, she stated that respondent told Mr. Waiters, “I’m tired of your shit” and continued to yell profanities at Mr. Waiters after he walked away (Pet. Exs. 9, 10; Tr. 64-65).

Ms. Tiburcio overheard some shouting but was unable to see what happened because she was seated at her desk and a partition blocked her view (Tr. 114, 117, 119). When she jumped up and turned around, it was already over (Tr. 117).

Mr. Robinson testified that he heard some fussing and cursing (Tr. 101). Respondent said something like “You’re going to fix my fucking watch” (Tr. 101, 110). Mr. Waiters was nearby, standing near a chair (Tr. 105). At Mr. Robinson’s suggestion, Mr. Waiters walked away (Tr. 105). In written reports about the incident, Mr. Robinson noted that, as Mr. Waiters walked away, respondent cursed and complained about her watch (Pet. Exs. 15, 16). He noted that Dr. Dascy told respondent to be more respectful because patients were there (Pet. Exs. 15, 16).

Mr. Wright was in his office on the day of the incident. Respondent told him that Mr. Waiters had slapped her on the hand, she did not, however, mention any sexual comments (Tr. 77). In a report about the incident, Mr. Wright wrote that respondent told him that “she got into it” with Mr. Waiters (Tr. 79; Pet. Ex. 11).

Ms. Isaacs testified that she received word of a dispute on June 3, 2014, and immediately notified hospital police (Tr. 91). When Ms. Isaacs arrived at the scene, she overheard respondent telling the police that she had been assaulted (Tr. 92). After speaking with the Labor Relations Office, Ms. Isaacs relieved respondent and Mr. Waiters of their duties and told them to report to HR (Tr. 93). Respondent replied that she was assaulted and that she was going home (Tr. 93). Ms. Isaacs also spoke to Dr. Dascy, who has since retired. Dr. Dascy told Ms. Isaacs that she heard a loud noise and a scuffle, she heard someone curse, and she saw respondent (Tr. 97).

Though petitioner’s witnesses had different vantage points and saw different parts of the dispute, they were generally in agreement that respondent actively participated in the dispute. In contrast, respondent offered incredible and unsupported claims that she was the victim of an unprovoked attack. Respondent’s claims defied belief.

According to respondent, she was the victim of Mr. Waiters’ harassment. She testified that, three months before this incident, she told Ms. Isaacs, in person and via e-mail, that Mr. Waiters had engaged in sexual harassment and inappropriate behavior (Tr. 128). Among other things, respondent claimed that Mr. Waiters had opened his zipper in her face (Tr. 128). Respondent did not report any sexual harassment to the hospital’s EEO officer (Tr. 140). Nor

did respondent produce a copy of the e-mail that she supposedly sent to Ms. Isaacs about this earlier incident; she claimed that she did not have access to it after her suspension for the present charges (Tr. 129).

As for the present charge, respondent recalled that she went to the nurses' station for the morning meeting, but nobody was there except for Ms. Benford and Ms. Tiburcio (Tr. 131). Because respondent had other work to do, she told them that she was going back to her office (Tr. 131). Respondent claimed that when she walked towards her office, Mr. Waiters blocked her way (Tr. 134). After saying "good morning," respondent stepped to the right, but Mr. Waiters stepped over and continued to block her way (Tr. 134). According to respondent, Mr. Waiters grabbed her upper arms near her shoulders and said, "You don't fucking come in here without saying hello to me" and he pulled her close to him (Tr. 134). They were face-to-face (Tr. 134).

Respondent claimed that, when she tried to pull away from Mr. Waiters' grasp, her watch "got snatched" from her arm and fell (Tr. 135). She further claimed that as she tried to get away from Mr. Waiters, he grabbed her by the knees and flipped her over backwards over a garbage pail and against the wall, where she fell to the floor (Tr. 135).

According to respondent, Ms. Tiburcio approached and asked if she was okay (Tr. 136). Replying that she was "shocked" and not okay, respondent grabbed her phone and walked away (Tr. 136). She was going out the door to call 911 when she saw Mr. Robinson (Tr. 136).

Respondent claimed that she called 911 and the Hospital Police. The New York City Police arrived first (Tr. 136). When the police arrived, respondent told them what happened (Tr. 137). Respondent told Mr. Wright that Mr. Waiters had "attacked" her (Tr. 137). According to respondent, her knee swelled up (Tr. 137). She recalled that Mr. Wright told the police that "this woman [respondent] has only worked at this clinic for a small time, and this man [Mr. Waiters] has been coming after her" (Tr. 137). Respondent did not call for an ambulance (Tr. 142).

According to respondent, the police told her that they were not going to arrest Mr. Waiters this time, but if she called again, they would (Tr. 138). Respondent said that she was very fearful and she saw Ms. Isaacs arrive on the scene (Tr. 138). Ms. Isaacs told her that she had to go to HR and although she replied that she had to go home, she went to HR first and was immediately suspended (Tr. 138).

In a written statement to the hospital police that respondent signed, she stated that Mr. Waiters told her, “You don’t come into this area and don’t speak first, something is wrong with you.” He grabbed her wrist and said, “You got a problem and I’m tired of it.” Instead of flipping her over, as she claimed at trial, respondent reported that he “chest” bumped her and grabbed her legs (Resp. Ex. A).

Respondent’s testimony was not credible for several reasons. None of the other witnesses supported her claim that Mr. Waiters engaged in an unprovoked attack in plain view at the work place. Her claim that Mr. Waiters “flipped her over” was particularly unbelievable. None of the other witnesses, who were in the immediate vicinity, saw or heard anything like that. There was no credible evidence that respondent sustained an injury that would be consistent with having been flipped over. Indeed, she denied emergency medical attention and no medical records were offered to show any knee injury. And respondent never said anything about being “flipped over” to the police, supervisors, or colleagues at the scene. Her written statement, which she signed a few hours after the incident, referred to a chest bump and made no mention of being flipped over.

Notably, respondent testified that Dr. Dascy was not present during the altercation (Tr. 136). However Mr. Waiters, Ms. Benford, and Mr. Robinson credibly recalled that Dr. Dascy intervened and told both Mr. Waiters and respondent to stop fighting and to act more professionally. Similarly, respondent never acknowledged that she used any profanity. But petitioner’s witnesses credibly testified that respondent repeatedly cursed at Mr. Waiters.

It also appears that respondent has a financial stake in embellishing Mr. Waiters’ actions while minimizing her role in the dispute. Respondent claimed that she was seeking medical treatment and has tried to receive worker’s compensation for her knee injury (Tr. 140). Asked whether she has sued petitioner, respondent initially said, “I choose not to answer that question” (Tr. 141). When pressed, respondent said that she had initiated a human rights claim which led to a lawsuit (Tr. 141). She denied that she was seeking money from that lawsuit; instead she said that she was “seeking justice” and financial compensation for “pain and suffering” (Tr. 142).

Physical altercations at the workplace are impermissible. Regardless of who initiates a dispute, an employee commits misconduct by willingly participating or prolonging it. *See, e.g. Health & Hospitals Corp.(Woodhull Medical & Mental Health Ctr.) v. Elter*, OATH Index No.

519/96 at 7 (Jan. 11, 1996) (employee had a duty to avoid physical confrontation and is only justified in using force in self-defense when there is no reasonable means of avoiding an altercation); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Garces*, OATH Index No. 1617/08 at 6 (June 27, 2008), *modified on penalty*, Assoc. Exec. Dir. Dec. (Aug. 12, 2008) (misconduct for employee to slap supervisor in the face and curse at him in response to insulting remarks).

Here, the credible evidence showed that respondent engaged in an improper physical altercation at the workplace. The evidence supports the conclusion that respondent was a willing participant who repeatedly cursed at her co-worker. Multiple witnesses saw or heard respondent engage in a pushing and shoving match with a co-worker. During the dispute, respondent used obscenities. It became so loud and disruptive that a doctor had to intervene. In short, the evidence showed that respondent engaged in a physical altercation at the workplace. There was no support for respondent's claim of sexual harassment. Nor was there any support for respondent's claim that her co-worker had flipped her over and injured her knee. The charge should be sustained.

Petitioner also charged respondent with excessive lateness. Petitioner alleged that respondent was excessively late on 15 occasions from December 10, 2012 to April 5, 2013, for a total of one hour and 57 minutes (ALJ Ex. 1). Respondent did not dispute the charges. She stipulated that she was late for work as alleged by the petitioner and set forth in the petition and confirmed by her timesheets and sign-in sheets (Pet. Exs. 12, 13; Tr. 83, 85, 87).

Under petitioner's rules, "excessive lateness" is defined as three or more unexcused instances of lateness or more than 30 minutes of lateness in a month (Pet. Ex. 2, Operating Procedure No. 20-2, IV(B), V(J)). Based on the undisputed evidence presented, respondent had three or more unexcused instances of lateness in December 2012, and January, February, and April, 2013. This charge should be sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent engaged in a physical altercation with a co-worker on June 3, 2014, as alleged in the petition.

2. Petitioner proved that respondent was excessively late for work from December 10, 2012 to April 5, 2013, as alleged in the petition.

RECOMMENDATION

After making the above findings and conclusions, I requested and received a summary of respondent's personnel record. Respondent has worked for the Health and Hospitals Corporation for 18 years, and she has worked for the Renaissance Healthcare Network for the past 13 years. Her disciplinary record is extensive. The penalties imposed just over the past ten years included a 15-day penalty for insubordination in 2006, a 45-day penalty for excessive lateness in 2010, and a 55-day penalty in 2011 for excessive lateness and insubordination. Her last five performance evaluations were quarterly evaluations and rated her work as "needs improvement." Each of the evaluations notes her excessive lateness. Her April 22, 2013 to July 21, 2013 evaluation also notes that respondent "has a very combative way of speaking to people, also sometimes tactless."

Petitioner now seeks termination of respondent's employment. That request is appropriate considering respondent's substantial disciplinary history. The most serious proven charge is that respondent engaged in a physical altercation with a co-worker while on-duty. Penalties for such misconduct range from a ten-day suspension to termination of employment, depending upon several factors, including the employee's disciplinary history, provocation, and the amount of force used. *See, e.g., Health & Hospitals Corp. (Kings. Co. Hospital Ctr.) v. Meyers*, OATH Index No. 1487/09 (Jan. 26, 2009), *aff'd*, NYC Pers. Rev. Bd. Dec. No. 1349 ((July 31, 2009) (10-day suspension without pay imposed where employee intentionally chest-bumped co-worker, causing her to stumble); *Health & Hospitals Corp. (Kings. Co. Hospital Ctr.) v. Edinboro*, OATH Index No. 1867/10 (Apr. 28, 2010) (10-day suspension recommended for intentionally pushing a swivel chair into a co-worker); *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Lopez*, OATH Index No. 300/13 at 19-20 (Mar. 12, 2013) (termination of employment recommended where institutional aide, whose prior disciplinary record included a 60-calendar day suspension and probation, threatened and repeatedly punched a supervisor in the chest); *Health & Hospitals Corp. (Coler Goldwater Memorial Hospital) v. Cato*, OATH Index No. 643/11 at 13-14 (Jan. 19, 2011) (termination of employment

recommended for long-term employee with considerable disciplinary history who assaulted co-worker and threatened hospital manager).

Here, it is unclear who started the fight or why. It appeared to be a brief bout of pushing and shoving accompanied by some profanity. No punches were thrown, no serious injuries were inflicted, and nobody required medical attention. The episode apparently lasted a few seconds and ended when a doctor told both sides to stop and be more professional. Nevertheless, this type of misconduct does not belong in the workplace; especially in a busy health care facility where patients, including children, were being treated.

Respondent's co-worker, Mr. Waiters, accepted responsibility for his misconduct and received a 15-day suspension. A higher penalty should be imposed on respondent because she failed to accept responsibility for her actions, she escalated the situation by cursing about her watch, and she continued to use profanity after the physical altercation had ended. It is also troubling that respondent followed the incident by making a baseless allegation of sexual assault and wildly exaggerated the amount of force used by Mr. Waiters.

Petitioner also proved that respondent was excessively late for work for five out of six months beginning in December 2012. The penalties for excessive lateness and related attendance issues range from a 10-day suspension to termination, depending on the degree of lateness and the employee's history. *See, e.g., Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Smith Bey*, OATH Index No. 857/02, at 12-13 (July 9, 2002) (penalty of ten-workday suspension recommended for excessive absenteeism and excessive lateness, where prior misconduct was seven years earlier and for an unrelated matter); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Lewis*, OATH Index No. 911/14 (Feb. 13, 2014), *aff'd*, HHC Pers. Rev. Bd. Dec. No. 1579 (July 8, 2015) (25-day suspension recommended for investigator who was absent on 22 occasions for 31 full days, departed from work almost three hours early one day, and arrived more than an hour late on another day); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Seabrook*, OATH Index No. 1089/12 (May 4, 2012) (termination of employment recommended for excessive absence and lateness, where clerical associate received progressive penalties of 20-, 30-, and 60-day suspensions for similar misconduct).

Over the span of four months, respondent was late for work 15 times, for a total of nearly two hours. Though respondent was never late more than 11 minutes on any of the dates at issue,

she offered no explanation for her repeated failure to show up on time for work. Respondent has been previously counseled and disciplined for excessive lateness yet she continues to be tardy. This repeated pattern of lateness undermines petitioner's mission and shows a disregard for patients as well as co-workers.

Accordingly, in light of respondent's extensive disciplinary history and the misconduct which occurred here, I recommend that respondent's employment be terminated.

Kara J. Miller
Administrative Law Judge

January 4, 2016

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