NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

LISA M. ALVARADO,

Complainant,

v.

NEW YORK STATE, STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY COLLEGE AT OSWEGO,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10106654

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 January 7, 2008, by Christine Marbach Kellett, 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 KUMIKI GIBSON, 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, this 6th day of February, 2008.

KUMIKI GIBSON
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10106654**

SUMMARY

Complainant charged Respondent with unlawful discriminatory practices in employment (hostile work environment and retaliation). Respondent denied the charges. Complainant failed to establish a prima facie case of hostile work environment. Complainant failed to establish that Respondent's explanation for transferring her to another building after she complained of derogatory remarks was a pretext for illegal discrimination. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On February 2, 2006, 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 Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 15, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Paul Crapsi, Jr. Respondent was represented by Joel Pierre-Louis, Associate Counsel, The State University of New York.

Permission to file post-hearing briefs was granted. Both attorneys filed post-hearing submissions.

FINDINGS OF FACT

1. Complainant charged Respondent with unlawful discriminatory practices in relation to employment by condoning an alleged derogatory remark made by another employee about her, by failing to take seriously her complaints of harassment, by failing to take effective steps to stop the harassment, and with retaliation when it reassigned her to a different building after she had complained. (ALJ's Exh.1)

2. Respondent denied the charges. (ALJ's Exh. 3)

3. Complainant is female and of Puerto Rican descent. (Tr. 13)

4. Complainant began working for Respondent as a grade 5 custodian in 1992, and is currently in a grade 7 custodial position, in which she supervises lower level employees. (Tr. 13-4)

5. On April 5, 2005, Complainant reported to Nick Lyons ("Lyons"), a Vice-President at the College, that a co-worker, Steve Frasier ("Frasier"), had reported to Complainant that another co-worker, Billy Graham ("Graham"), had said that a third co-worker, Jeffery Seymour ("Seymour"), had referred to Complainant as a "triple p" in March 2005. (Tr. 14-5, 17)

6. Complainant and Seymour, who is a plumber in Respondent's maintenance department, had had an affair in 2003. (Tr. 16, 27, 29, 42, 163) Seymour's wife, also employed by Respondent, filed a complaint with Respondent against Complainant for harassment by phone calls and emails in 2003. (Tr. 32-36,55-56, 167, 218) Marta Santiago ("Santiago"), Respondent's Director of Human Resources, conducted the investigation in 2003 into Seymour's wife's charges, with the result that Seymour and his wife signed an agreement to stay away from Complainant. (Respondent's Exh. 2; Tr.55-57, 61, 167, 169, 216, 220-21) Complainant had refused to sign the Seymours' agreement, but agreed to avoid contact with them. (Complainant's Exh. 1; Respondent's Exhibits 3,4; Tr. 61)

7. Seymour was never Complainant's supervisor. (Tr. 163)

8. Although on several occasions between 2003 and 2005, Complainant saw Seymour in her assigned building doing plumbing repairs, and on one occasion between 2003 and April 5, 2005, Seymour had asked her where another co-worker was, Complainant had never complained about Seymour's conduct until the April 5, 2005, conversation with Lyons. (Tr. 24, 32, 63)

9. Complainant also asserted that between 2003 and April 21, 2005, Seymour had never harassed her, never made an inappropriate remark to her or made unwanted sexual advances to her. (Tr. 49)

10. But, when she heard, via Frazier's third hand report, of the alleged "triple p" remark, she went to Lyons to complain. (Tr. 64-5)

11. Complainant interpreted the term "triple p" as meaning "Puerto Rican piano polisher" a term she claimed related to oral sex, or to having sex on a piano. (Tr. 15-6, 48)

12. Complainant admitted no one, including Seymour, ever called her that directly although she believed "they" talked about it. (Tr. 49)

13. Lyons referred Complainant to Santiago; and after meeting with Santiago, Complainant filed a written complaint against both Seymour and Graham. (Respondent's Exh. 10; Tr. 221, 225)

14. In accordance with Respondent's policies, Santiago began an investigation, speaking with Complainant, Seymour, Frasier, Graham, Cooper, and two other employees. (Respondent's Exhibits 6,7; Tr. 49, 115, 138-39, 170, 227-28)

15. Seymour denied using the term. (Respondent's Exh. 9; Tr. 171, 175, 229)

16. Graham denied using the term. (Respondent's Exh. 8; Tr. 136-37, 145, 159, 229)

17. Frazier reported Graham used the term one time in connection with his going to Complainant's building. (Tr. 86-91, 92-3, 138)

18. In May 2005, after Seymour was questioned by Santiago about the "triple p" remark, he asked a co-worker, Joanne Cooper ("Cooper"), to tell Complainant he never said such a thing. (Tr. 37, 80-3, 175)

19. When informed by Complainant that Seymour had contacted Cooper and had asked Cooper to relay to Complainant a message on his behalf, Santiago gave Seymour informal counseling reinforcing that he was to avoid any contact with Complainant. (Respondent's Exh. 9; Tr. 228-30)

20. Santiago told Complainant that she could not find corroboration for the "triple p" comment. (Tr. 234-35)

21. Nonetheless, Respondent directed Seymour's supervisor, Michael Sterling ("Sterling") to remove Seymour from Hart Hall, where Complainant worked, in order to avoid contact with Complainant (Tr. 210)

22. Seymour was removed from Hart Hall, but continued to have responsibilities for other buildings, including Scales Hall. (Tr. 174, 177, 204)

23. Seymour knew he was supposed to stay away from Complainant but his supervisor had on occasion assigned him to plumbing work in her building. (Tr. 171-73, 179)

24. Seymour reported Sterling also started assigning another plumber to go with Seymour so that "nothing could be said that I was doing anything." (Tr. 177)

25. After April 21, 2005 Complainant had no direct contact with Seymour. (Tr. 37)

26. Her complaint was that she kept seeing Seymour on campus, or that he might drive by her building, or would come into her building to work. (Tr. 50, 51-2, 110)

27. She found it harassing that after he was told to stay away from her, she would see him on campus. (Tr. 53)

28. Lyons was approached by Complainant's union to move Complainant to a different building to avoid contact with Seymour. (Tr. 112-14, 233-34)

29. Rotation of custodial assignments was not unusual. (Respondent's Exh.1; Tr. 232-33)

30. During the summer of 2005, Rebecca Kempney ("Kempney"), supervisor of the custodial staff, approached Santiago about some proposed transfers. (Respondent's Exh. 1; 232)

31. Another custodian had been in a small building, Scales Hall, for a number of years, and Kempney wanted her to have experience in a larger building. (Tr. 232)

32. Meanwhile Complainant had discussed with Kempney how uncomfortable she was with Seymour's proximity. (Tr. 24-5)

33. At or near the same time, the union approached Santiago about moving Complainant. (Tr. 233)

34. In August, 2005 Santiago met with Complainant and gave her the option of moving to Scales or to a larger west side residence hall. (Tr. 236-237)

35. Complainant chose to go to Scales. (Respondent's Exhibits 1 and 11; Tr. 237)

36. Scales however was a building assigned to Seymour. (Tr. 177)

37. Complainant and Seymour would occasionally see each other in the morning when Seymour would be checking the plumbing systems. (Tr. 177)

38. Complainant continued to complain to Kempney about seeing Seymour on campus or in her building. (Respondent's Exh. 1)

39. In November, 2005, Complainant transferred to Oneida Hall, and has not complained to Kempney since that transfer. (Respondent's Exh. 1)

40. Complainant's job duties or compensation did not change as a result of the transfer, although the size of the buildings differed and she supervised more people in Oneida than she did in Hart or Scales. (Tr. 40, 42, 70, 114, 238)

OPINION AND DECISION

Human Rights Law sec. 296 (1) makes it an unlawful discriminatory employment practice for an employer to discriminate against on employee on the basis of sex or national origin. N.Y. Exec. Law §296 (1). Such discrimination may take the form of a hostile work environment. An employer is prohibited from retaliation against an employee for engaging in protected activities such as reporting discriminatory conduct or opposing discriminatory practices. N.Y. Exec. Law §296 (7)

Complainant charged Respondent with unlawful discrimination in the form of a hostile work environment in that she had complained that a co-worker had made a derogatory remark relating to her sex and national origin had been made, that Respondent did not take her claim

seriously, and that Respondent failed to take effective action to stop the harassing conduct. Complainant charged Respondent with retaliation when Respondent transferred Complainant to a different work site.

The record established that, contrary to the assertions in the complaint, Respondent did take seriously Complainant's report of a disparaging remark, that Respondent did take prompt action to investigate Complainant's report of the derogatory remark and did take appropriate remedial measures to prevent further conduct. Respondent neither condoned nor approved discriminatory conduct. Complainant also failed to show that Respondent's explanation for Complainant's subsequent work site transfer was a pretext for illegal discrimination.

The complaint should be dismissed.

Hostile work environment claim

In order to establish a claim of discrimination based upon a hostile work environment, a complainant must establish that she is a member of a protected group or groups, that she endured unwelcome harassment based upon her protected class, that the unwelcome harassment altered the terms and conditions of her employment and that Respondents, having actual or constructive notice of the harassment, failed to take appropriate corrective action. *See: Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999)

A hostile work environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3rd 295, 310, 786 N.Y.S.2d 382, 394 (2004) (citations and internal quotations marks omitted).

Both the totality of the circumstances, and the perception of the victim, and that of a reasonable person, must be considered. *Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 A.D.2d 44, 51, 642 N.Y.S.2d 739,744 (4th Dept. 1996), *lv app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Here, the Complainant is a member of two protected categories: she is female, and she is of Puerto Rican national origin.

The record established that Complainant received a third hand report from a co-worker that another co-worker used the term "triple p" in reference to her. Complainant interpreted this comment as derogatory toward her on the basis of her sex and national origin. The record established that Respondent accepted Complainant's perception of the remark as offensive.

Respondent acted promptly in response to Complainant's complaint and conducted an investigation, interviewing the alleged sources of the comment, other co-workers and the Complainant. While the investigation could not confirm the remark had been made, each of the parties alleged to have made the remark, Graham and Seymour, were advised that such a remark if made was inappropriate and subject to discipline.

Respondent also took action to eliminate or reduce the opportunities for Complainant to have contact with Seymour, the alleged originator of the remark, by transferring Seymour from Complainant's building and by assigning a second plumber to be with Seymour if in Complainant's building.

The actions of Respondent establish it neither condoned nor approved the alleged remark.

Complainant acknowledged that prior to April 21, 2005, Seymour had neither harassed, made sexual remarks nor appropriate sexual advances to her. After she reported Graham's alleged use of Seymour's term in April 2005, Complainant acknowledged she had no direct contact with

Seymour. Her complaint became that she would catch glimpses of him on campus or in her building doing his work. Such incidental contact does not establish a hostile work environment. The hostile work environment claim should be dismissed.

Retaliation claim

Complainant charged Respondent with retaliation when Respondent transferred her work site after she reported the alleged discriminatory remark.

In order to establish a prima facie retaliation claim, a complainant must show that she engaged in a protected activity, that her employer was aware she engaged in the protected activity, that she suffered an adverse employment action and that there is a causal connection between the protected activity and the adverse employment action. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3rd 295, 312-13, 786 N.Y.S.2d 382, 396 (2004).

Complainant established three elements of her prima facie case of retaliation in that she engaged in the protected activity of reporting alleged discriminatory conduct, that she made this report to her employer who is therefore aware she had engaged in a protected activity, and there appeared to be at least a causal connection between her complaint about Seymour's remark and her transfer to a site at which Seymour did not work.

However, Complainant failed to establish she was subjected to an adverse employment action as a result of her engagement in a protected activity, and therefore failed to make a prima facie case of retaliation.

The record is clear that after April 21, 2005, when she reported the third hand remark, Complainant found that even the glimpse of Seymour made her uncomfortable. This discomfort occurred even though Seymour had no direct contact with Complainant. Respondent counseled Seymour for his one effort at indirect contact through Cooper.

The record established without contradiction from Complainant that Respondent would transfer its custodial staff periodically. The record established without contradiction that her union, on her behalf, requested Complainant's transfer. Complainant was consulted regarding the transfer site and picked the site to which she was assigned. Neither her job description, nor her salary nor the terms and conditions of her employment changed. When in the summer of 2005, Kempney determined it was advantageous to give another custodian an opportunity to experience a different work site, she was not motivated by Complainant's discrimination complaint. Complainant failed to establish a prima facie case of retaliation and the retaliation claim should be dismissed.

The burden of proof in discrimination complaints rests with Complainant. Complainant failed to establish either her claim of discrimination based on hostile work environment or her claim of discrimination based upon retaliation. The complaint should 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 the complaint be and the same hereby is dismissed.

DATED: January 7, 2008
Bronx, New York

Christine Marbach Kellett

Christine Marbach Kellett
Administrative Law Judge