NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

YASSER M. ALY,

Complainant,

v.

NEW YORK STATE OFFICE OF MENTAL HEALTH; CREEDMOOR PSYCHIATRIC CENTER,

Respondent.

NOTICE AND FINAL ORDER

Case No. 5807055

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 April 7, 2008, by Robert J. Tuosto, 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: JUL 01 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. 5807055

SUMMARY

Complainant, an Egyptian-American social worker employed at Creedmoor Psychiatric Center, alleged that his Respondent exposed him to a hostile work environment, retaliated against him, and that he suffered discrimination on the bases of his race, creed, national origin, and sex. However, Complainant has failed to prove his case and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 19, 2004, 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 Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on January 16-17, 2008, and February 29, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Arnold Koenig, Esq. and Jeffrey M. Samberg, Esq. of the law firm of Koenig and Samberg, Mineola, New York. Respondent was represented by Alan H. Sunukjian, Esq., Assistant Counsel, N.Y.S. Office of Mental Health, Albany, New York.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

1. Complainant alleged, while employed as a social worker at Creedmoor Psychiatric Center ("CPC"), that he suffered unlawful discrimination when, after the September 11, 2001 attacks, a coworker called him a "terrorist" and alleged he was anti-Semitic. Complainant also alleged that he was passed over for promotion on several occasions, and was harassed by several of CPC's employees. (ALJ Exhs. 1, 2; Tr. 333, 361)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 6)

3. In September, 1999, Complainant began employment with CPC as a social worker. Complainant was also attending school to obtain a doctorate and received permission from his employer for a "flex" work schedule of 7 a.m. to 3:30 p.m. on Mondays, and 8 a.m. to 4:30 p.m. on Tuesdays through Fridays. (Respondent's Exh. 2; Tr. 20, 308, 319, 330, 362, 441)

Complainant is Called a Terrorist

4. Starting in late 2001, Complainant was called a "terrorist" on three occasions by a coworker. After repeated complaints by Complainant, the coworker was given a verbal warning

and transferred to another ward. (Complainant's Exh. 1; Tr. 32-34, 269, 281, 404-05, 414, 430, 482)

5. Complainant did not file a Division complaint after this incident.

Complainant is Denied Promotions

6. Respondent's director of human resources credibly testified that Complainant did not score high enough on civil service examinations to be considered for selection as to two promotional opportunities in 2003 and 2004. (Joint Exhibit 1; Tr. 195-99, 510-16)

7. Complainant was passed over for promotion by Respondent for a position not requiring a civil service examination. However, I find that this promotional decision was consistent with civil service law, and based on the fact that the successful candidate spoke a foreign language which Complainant did not. (Tr. 517-19, 562-63)

Complainant's Conflicts with Levine

8. On February 27, 2004, Dr. Richard Levine, Chief of Mental Health Treatment Service at CPC and one of Complainant's superiors, allegedly rebuked him in a loud voice and prevented him from speaking in front of five other colleagues during discharge rounds. This incident was credibly denied by Levine who explained that Complainant had been unprepared for discharge rounds in the past and that all social workers were expected to be fully prepared to answer doctors' questions about their patients. Levine further credibly testified that he did not treat Complainant any differently in this regard relative to any other employee. (Tr. 98-100, 117, 297, 298, 332, 353, 356-60, 385-94, 483)

9. On March 8, 2004, Levine allegedly threatened Complainant with discipline should he again come late to work. In fact, Levine credibly denied doing anything other than noting that Complainant had arrived one half hour later than scheduled. Levine asked Complainant's direct

superior to speak to him about this. (Complainant's Exh. 7; Tr. 86, 93-94, 101-07, 298, 342, 366-68, 394-96, 397-98)

10. On March 16, 2004, Levine believed Complainant had been approximately one half hour late, and changed his time in the daily attendance log. No supervisors were normally present at 7:00 A.M. when Complainant would sign in at that time. Later that same day, Levine had a conference with Complainant in the presence of his direct superior which was motivated by the time and attendance issue of the previous week. Levine convened the conference because he perceived the Complainant as taking advantage of the honor system that was in place and he wanted to give him an opportunity to explain his apparent lateness on two separate occasions. Levine did raise the issue of Complainant's "flex" work schedule but, in fact, his schedule was subsequently unaffected. Complainant became upset and was hospitalized for several days after this incident, was out of work for three weeks, and subsequently saw a therapist who diagnosed him with 'Anxiety Disorder'. However, at the time he saw the therapist Complainant was also suffering from multiple stresses including: working two jobs and attending school, going through a divorce, suffering from a broken finger, experiencing a home burglary the previous month, dealing with the school problems of his son, handling a credit card theft problem, and having difficulties with a professor at school. (Complainant's Exhs. 3, 5, 8, 9, 10, 11; Respondent's Exh. 3; Tr. 51, 56, 57, 107-34, 135, 139, 238-74, 276, 277, 280, 284, 288, 289-90, 292, 299-04, 313, 341, 368-74, 375, 376, 379, 380, 396-97, 398, 399, 403, 407, 409, 410, 416-17, 423, 424, 427, 429-30, 443, 444, 445-52, 485, 488, 489-90)

11. Subsequently, Levine had no contact with Complainant concerning time and attendance issues. (Tr. 374-75)

12. In the spring of 2004, Complainant was transferred in response to the problems he was having at work. (Tr. 338-39, 422, 425)

13. On April 19, 2004, Complainant filed his Division complaint. (ALJ Exhs. 1, 2, 3)

Post-Complaint

14. On May 19, 2004, Dr. Lois Savoca, in the presence of Levine, inquired of Complainant as to why he happened to be on a particular ward. Savoca did not know at the time that Complainant was visiting a patient. Savoca did not treat Complainant this way because of his protected class memberships given that, as per a witness for Complainant whose testimony I credit, Savoca acted this way with other employees with whom she also did not get along. (Complainant's Exhs. 6, 14, 15; Tr. 171-77, 219-28, 231, 333, 334, 335, 339, 377-78, 412-14)

15. From 2004 onward, Complainant was unsuccessful in receiving a promotion because he did not score high enough on civil service examinations. (Joint Exhibit 1)

16. In September, 2005, Complainant was promoted to the position of social work supervisor. Levine had no connection to the promotional process as it related to Complainant and, in fact, credibly testified that the specific time and attendance problems between he and Complainant did not rise to the level of discipline, and that they had no effect on work performance evaluations. Complainant's work performance evaluations were always satisfactory. (Tr. 314, 317, 338, 344-345, 379, 380-81, 382, 394, 405, 418, 419, 422)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "because of the race, creed...national origin...[or]sex...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Human Rights Law § 296.1(a). Likewise, it is also an unlawful discriminatory practice for an employer to, "...discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law § 296.1(e).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.,* 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a prima facie case of employment discrimination based on protected class membership, a complaint must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Knighton v. Delphi Automotive Systems,* 2004 U.S. Dist. LEXIS 27893.

In order to establish a prima facie case based on retaliation, a complainant must show that: 1) she engaged in protected activity; 2) the respondent was aware she engaged in protected activity; 3) she suffered an adverse employment action based upon the activity; and 4) there is a causal connection between the protected activity and the adverse employment action taken by the respondent. *Pace,* 692 N.Y.S.2d 223, 224.

In order to establish a prima facie case of hostile work environment, a complainant must show that 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.3d 295, 786 N.Y.S.2d 382 (2004), *quoting Harris v. Forklift Sys., Inc.,* 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris,* at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *See id.* at 21.

Statute of Limitation

At the outset, I must decide whether to consider those matters beyond the one year statute of limitation. Human Rights Law § 297.5. Complainant, in support of such a contention, takes the position that a continuing violation has occurred. *See* 9 NYCRR. 465.3 (e).

Complainant alleges unlawful discrimination based on the statements of a coworker in 2001. This claim is only viable to the extent that Complainant can show a continuing violation as the conduct took place beyond the one year statute of limitation, i.e., prior to April 19, 2003. *Clark v. State of New York,* 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dep't., 2003)(in which a continuing violation is found where there is "...proof of ongoing discriminatory policies or

practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice.")

Here, being called a "terrorist" and the accusation of anti-Semitism were discrete, singular acts and not part of an ongoing pattern or practice so as to entitle Complainant to resort to the continuing violation theory.

Discrimination Analysis

Here, both of Complainant's protected class membership and retaliation claims fail for the same reason, namely, that he did not suffer an adverse employment action. Neither the denial of Complainant's promotions nor conflicts with superiors rise to the level of being adverse employment actions. *See Messinger v. Girl Scouts of the U.S.A.*, 16 A.D.314, 792 N.Y.S.2d 56 (1st Dep't., 2005)(adverse employment action found to be a materially adverse change in circumstances such as termination, decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation.)

As to the hostile work environment claim, Complainant has failed to prove that the conflict with Levine rose to the level of creating a hostile environment. The interactions between Complainant and Levine were based, correctly or not, solely on the latter's belief that a subordinate was violating Respondent's time and attendance procedure. The incidents in question, which took place over a time period of approximately two and one half weeks, do not show that Levine ever threatened or humiliated Complainant (note that Complainant's "flex" work schedule remained unchanged). Finally, while not intending to trivialize Complainant's subsequent psychological upset, the stressors operating in his life at the time of the central conflict with Levine provide an infinitely more credible reason for his ensuing hospitalization.

Likewise, the "harassment" by Savoca was a one-time incident that the record shows had no effect whatsoever on Complainant's work environment. This is especially true given that Complainant's work evaluations were always satisfactory and he was promoted the following year.

In conclusion, the essence of Complainant's complaint against Respondent appeared to be rooted in personality conflicts with coworkers. While unfortunate, the Human Rights Law--as with its Title VII federal analogue--does not set forth a "general civility code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998); *see* B. Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate "antipathy" and "snubbing" by supervisors and coworkers are not actionable).

Therefore, the complaint 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 the complaint be, and the same hereby is, dismissed.

DATED: April 7, 2008
Bronx, New York

Robert J. Tuosto
Administrative Law Judge