



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

CLAUDETTE M. APOLLON,

Complainant,

v.

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION, JACOBI MEDICAL CENTER,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10124029

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 28, 2010, by Katherine Huang, 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: **JAN 03 2011**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



DAVID A. PATERSON
GOVERNOR

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CLAUDETTE M. APOLLON,

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**NEW YORK CITY HEALTH & HOSPITALS
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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10124029**

SUMMARY

Complainant alleges that Respondent unlawfully discriminated against her because of her sexual orientation. However, Complainant has failed to prove her case and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 11, 2008, 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 Katherine Huang, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 14, 2009 and January 20, 2010.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels, Esq. Respondent was represented by Abigail Goldenberg, Esq., and Jane E. Andersen, Esq.

Permission to file post-hearing briefs was granted. Respondent timely submitted a post trial brief.

FINDINGS OF FACT

1. From October 16, 2006 through January 17, 2008, Complainant, a lesbian, was appointed as a provisional Clerical Associate level 3 and employed by the Respondent at Jacobi Medical Center (“Jacobi”). (Tr. 17, 263-66, 122, 314, Comp. Exh. 10, 22)
2. As a provisional employee, Complainant received union assistance in dealings with management but acquired no tenure or vested rights to her position. Complainant also could be terminated at any time, with or without cause. (Tr. 266, Comp. Exh. 22)
3. On October 16, 2006, Complainant signed a letter indicating that she was aware her appointment was subject to a probationary period. (Comp. Exh. 22)
4. Complainant’s job assignment required her to handle patient registration, verify insurance and make patient reminder calls, prepare records for the patient’s clinical session and other administrative duties. (Comp. Exh 2, 7)

5. Complainant conceded that Respondent had a written policy and procedure for employees to follow when making complaints of unlawful discrimination. (Comp. Exh. 13) Complainant further conceded that she was given these policies when she started working for Respondent. (Tr. 27-8)

6. Complainant never complained about comments her coworkers made. (Tr. 27)

7. Complainant reported to various managers, including Gerald Medina and Estella Soccio. (Tr. 17) Both reported to Associate Director Juanita Perez. (Tr. 17, 323-4)

8. At no point during Complainant's employment was Perez aware that Complainant is a lesbian. (Tr. 326)

9. On Thursday, December 14 and Friday, December 15, 2006, Complainant took sick time due to laryngitis. (Tr. 34, Comp. Exh. 2)

10. On or about December, 2006, Medina informed Complainant that he knew who she was dating, a female also employed at Jacobi. (Tr. 18-19, 92)

11. Complainant enjoyed a good relationship with Medina, and socialized with him outside of work. (Tr. 241)

12. Complainant's girlfriend worked as a hospital police officer on the first floor of Jacobi. Complainant worked on the third floor. (Tr. 93, 95)

13. Complainant's girlfriend never visited Complainant at her workstation, nor did Complainant share with co-workers the identity of the person she was dating. (Tr. 97-9)

14. During business hours, Complainant would visit her girlfriend on the first floor during her breaks or lunch hour but always maintained a professional relationship during work. (Tr. 99-100)

15. Complainant kept her sexual orientation a private matter, to such an extent that she would refer to her girlfriend as a "he" during conversations with coworkers. (Tr. 21, 29-30)

16. On Monday, January 29 and Tuesday, January 30, 2007, Complainant called out of work for unscheduled time off because her car was towed for unpaid tickets. (Tr. 35-6)

17. On April 30, 2007, Complainant was issued an Employee Performance Evaluation. ("EPE") (Comp. Exh. 2) The EPE stated that Complainant needed improvement in attendance and in getting to her work station on time. The EPE noted that Complainant was failing probation and that a lack of improvement in her behavior would lead to disciplinary action and possibly dismissal. (Comp. Exh. 2)

18. On August 8, 2007, Complainant called in sick. (Tr. 238)

19. On August 9, 2007, Complainant received an Employee Warning Notice for leaving her work station prior to notifying a supervisor. (Comp. Exh. 6) Complainant left her work station to go to the first floor to drop off a bag of sneakers. (Tr. 64, 95)

20. On or about November, 2007, Perez waited outside the bathroom for Complainant to leave and remarked, "now I can feel comfortable using the facilities." (Tr. 23) Complainant interpreted this statement to mean that Perez didn't want to use the bathroom with someone who was a lesbian. (Tr. 2607)

21. On November 13-15, 2007 Complainant called in sick. (Tr. 238-9)

22. On December 5, 2007 Complainant was issued a Notice to Report for Counseling ("NRC") as a result of excessive absenteeism. (Comp. Exh. 20)

23. On December 18, 2007 Complainant was issued a second NRC as a result of a complaint from a patient that Complainant spoke to him in a rude manner. (Comp. Exh. 29)

24. Perez spoke to Susan Morris, Respondent's Director of Labor Relations, about her concerns with Complainant's time and leave issues. (Tr. 255, 275). Perez complained about the rippling effect stemming from Complainant's absenteeism upon the clinic, such as clients not receiving information for their care, finding a substitute to do Complainant's job, or having to reassign a manager to do Complainant's job. (Tr. 276, 325)

25. On January 4, 2008 Complainant was issued a second EPE. (Comp. Exh. 7) The summary of this evaluation stated that Complainant had unsatisfactory performance and attendance, did not meet expected deadlines, and was considered unreliable in carrying out assignments. (Comp. Exh. 7) As a result, Complainant failed her probation. (Comp. Exh. 7)

26. On January 17, 2008, Complainant's employment was terminated. (Comp. Exh. 10)

OPINION AND DECISION

The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer "because of an individual's ...sex...to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

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, the burden shifts to respondent to articulate legitimate, non-discriminatory reasons for its actions. The complainant must then demonstrate the reasons articulated by respondent are a pretext for unlawful discrimination. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 764 N.Y.S.2d 675 (1st Dept. 2003).

In order to make out a prima facie case, Complainant must demonstrate that she was: 1) a member of a protected class; 2) qualified to hold the position; 3) suffered an adverse employment action, and 4) the adverse employment action occurred under circumstances that raise an inference of unlawful discrimination. *Pace College*, supra.

I conclude as a matter of law that Complainant failed to establish a prima facie case of unlawful discrimination. Although Complainant is a lesbian and was qualified for the position, she failed to satisfy the remaining prong of the test in that she did not suffer an adverse employment action in circumstances that give rise to an inference of discrimination.

Respondent had a legitimate reason for terminating Complainant's employment for excessive absences during her probationary period and for failing to meet professional work standards. In Complainant's capacity as a clerical associate, it was vital to Respondent that Complainant reliably report to work and interact courteously with patients. Complainant took several days off prior to a weekend while on probation and was subsequently issued a performance evaluation which informed her that she was failing probation due to the attendance issues and not getting to her work station on time.. Complainant was then issued a warning for leaving her work station prior to notifying a supervisor. In December, 2007, Complainant was counseled for excessive absenteeism and for speaking rudely to a patient. By January, 2008, Complainant had failed her probation due to unsatisfactory attendance and work performance.

Complainant also raised an issue of unlawful discrimination because of sex. Complainant claims that she was exposed to a hostile work environment because her manager was aware that Complainant was a lesbian. Complainant has the burden to establish by a preponderance of the evidence that unlawful discrimination took place. To sustain her burden of proving unlawful discrimination in the conditions of employment because of sex, Complainant

must show there was a hostile work environment at her place of employment, and that it existed because of her sex.

In order to establish that a hostile work environment existed, Complainant must show she is a member of a protected class, the conduct upon which discrimination claims are based were unwelcome and that such conduct were sufficient pervasive or severe as to alter the conditions of her employment. The Complainant must demonstrate that the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficient severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.2d 382 (2004) quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993). The totality of the circumstances of complainant's environment must be evaluated to determine if it is hostile or abusive. Such circumstances include the frequency and severity of the conduct; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it reasonably interfered with the complainant's work performance. Whether the complainant found the environment abusive requires consideration of both the objective reasonable person standard and the subjective perspective of the victim. *Matter of Father Belle Comm. Ctr. v. N.Y. St. Div. Human Rights*, 221 A.D.2d 44, 51, 642

Complainant failed to establish that a hostile work environment existed. While the proof established that Complainant was dating someone who worked in the same building, there is nothing in the record to support the contention that Complainant was subject to unlawful discrimination because of this relationship. Complainant's girlfriend never visited her at work, nor was there testimony that the conditions of Complainant's employment were changed as a result of this relationship. Complainant's allegation that her supervisor knew she was dating a woman was not supported by the evidence. Complainant took great care at work to conceal the

fact that she was dating a woman, including even referring to her partner as a "he" to coworkers. The one isolated remark by Complainant's supervisor that she could use the ladies' room once Complainant left, without any evidence that the supervisor made the remark because she knew Complainant was a lesbian, does not support Complainant's claim that her workplace was hostile. Nor did the single comment by her coworker of his knowledge of the identity of Complainant's girlfriend establish her work environment was filled with severe or pervasive discriminatory ridicule.

Thus, 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 is hereby dismissed.

DATED: April 28, 2010
Bronx, New York



Katherine Huang
Administrative Law Judge