

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**RICHARD CATRONE,**

Complainant,

v.

**JEFFREY STEIN SALON NORTH, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10109934

**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 December 10, 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”), WITH THE FOLLOWING AMENDMENT:**

- With regard to Complainant’s claims that his employment was terminated as a result of his sexual orientation, Complainant has failed to make out a prima facie case. He has not produced credible evidence that connects the termination to his membership in a protected class. Accordingly, that claim is dismissed. The

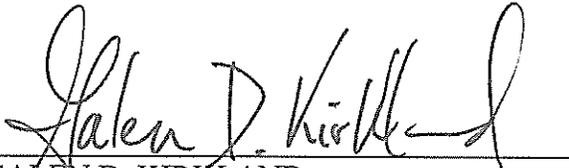
remainder of the Recommended Order is herein adopted and issued as the Final Order.

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 30 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

TO:

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Director of Prosecutions

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on the Complaint of

**RICHARD CATRONE,**

Complainant,

v.

**JEFFREY STEIN SALON NORTH, INC.**

Respondent.

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

Case No. 10109934

**SUMMARY**

Complainant alleged that Respondent exposed him to a hostile work environment and terminated his employment because he is a homosexual; Complainant also alleged that he suffered retaliation. However, Complainant has not proven his case and the complaint must be dismissed.

**PROCEEDINGS IN THE CASE**

On January 26, 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 Rosalie Wohlstatter, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on July 21-22, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by David M. Marcus, Esq., of the Law Offices of David Marcus, P.C. Respondent was represented by Michael Fox, pro se.

During the public hearing ALJ Wohlstatter amended the caption to read 'Jeffrey Stein Salon North, Inc.'. (Tr. 5)

On September 16, 2008 ALJ Wohlstatter left state service. This case was subsequently reassigned to ALJ Robert J. Tuosto.

Permission to file post-hearing briefs was granted. Counsel for Complainant filed a post-hearing 'Proposed Statement of Fact and Law'.

### **FINDINGS OF FACT**

1. Complainant alleged that Respondent exposed him to a hostile environment and terminated his employment because he is a homosexual; Complainant also alleged that he suffered retaliation. (ALJ Exh. 1)
2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 5)
3. In March, 2003 Complainant began employment with Respondent as a hair stylist. Respondent is a hair salon whose workforce is approximately 40 percent homosexual. Fox, who is an officer in the corporation which owns Respondent, was Complainant's immediate supervisor. (Tr. 11, 60, 93, 134, 169, 189-91)

4. In late 2003, Complainant sought and received a change in his work schedule so that he would not have to work with three Russian coworkers with whom he did not get along. (Tr. 95, 176-77, 183, 187, 229-30)

5. In 2004 an unknown person or persons urinated in a coffee pot in Respondent's place of business. Complainant, along with other of Respondent's employees, signed a petition objecting to the continued employment of the three Russian coworkers who were suspected of having done this; none of the three Russian coworkers signed the petition. One of the suspected individuals, a man named "Boris", later had his employment terminated. (Tr. 12-18, 178, 286, 404, 406, 414)

6. Several weeks after Boris' employment was terminated, an unknown individual wearing a mask came into Respondent's place of business and threw a bucket of feces around the salon. Complainant cooperated with the subsequent police investigation of this incident. (Tr. 19-21, 288, 355)

7. In 2004 one of Respondent's employees, Albert Abayev, had a sketch artist make a caricature drawing of him which was hung in Respondent's break room for approximately one month. The drawing depicted Abayev chasing a partially naked coworker. Abayev was one of the three Russian coworkers with whom Complainant did not get along. Both Fox and Abayev knew Complainant was a homosexual. Complainant did not inform Fox of any alleged homophobic slurs used by Abayev. (Tr. 21-25, 125, 127, 166, 168, 175-76, 178, 203-04, 223-24, 303, 335, 350-51, 389, 402-03, 412)

8. On January 21, 2005 Complainant had an altercation with Abayev in Respondent's break room in which Abayev allegedly used homophobic slurs. As a result, Complainant suffered injuries and filed a police report which stated "Complainant states that Defendant scratched his face causing a laceration to his left cheek while having a fight." Abayev was

arrested after this incident and charged with three counts of assault and one count of harassment. (Complainant's Exhs. 1, 2, 4, 5, 6, 10; Tr. 25-39, 72, 99-107, 193-94, 210, 215, 220, 290, 292-94, 312-13, 318, 323, 337-45, 357-68, 390-91, 394-95, 397, 411)

9. Complainant was issued a temporary Order of Protection ("OP") against Abayev. The OP nonetheless allowed Abayev to return to work while it was in effect. (Complainant's Exh. 6; Tr. 115-16, 122)

10. On January 26, 2005 Complainant was working in Respondent's salon when Abayev appeared. Complainant spoke to Fox about his being uncomfortable in Abayev's presence, as well as his mistaken belief that the OP was being violated by Abayev. This was the first time Complainant and Fox had spoken since the altercation with Abayev. Both Complainant and Fox engaged in such a heated conversation about this that Complainant cursed at Fox. As a result, Fox chose to immediately terminate Complainant's employment. Complainant, an at-will employee, conceded that he was not sure if his employment was terminated because of a disability, i.e., the injuries he sustained in his altercation with Abayev, because he went to the police concerning his altercation, or because he was a homosexual. (Tr. 54-56, 84-85, 92, 128-29, 132-33, 139-40, 170, 193-99, 239, 326, 399-402, 428)

11. On February 7, 2005 Complainant wrote a letter to his former employer referencing the altercation, as well as his employment termination, in an attempt to request "how this situation will be handled." In this letter Complainant did not mention either that Abayev engaged in the use of homophobic slurs, or that Fox terminated his employment because he was a homosexual. (Complainant's Exh. 3; Tr. 419)

12. On January 26, 2006 Complainant filed his Division complaint. (ALJ Exhs. 1, 4)

## OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, “because of the...sexual orientation...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law § 296.1.(a). It is also an unlawful discriminatory practice for any employer to, “discharge...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 produce evidence showing 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 hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest*, 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 of 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 of 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.

In order to establish a prima facie case of employment discrimination based on protected class membership, Complainant must show: 1) membership in a protected class; 2) that she 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. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

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

As to the creation of a hostile work environment, Complainant’s claim is beyond the one year statute of limitations as any alleged acts occurred prior to January 26, 2005. Therefore, this claim is time-barred. Human Rights Law § 297.5.

As to making out a prima facie case based on having his employment terminated due to protected class membership, Complainant makes out all four prongs of the test: he was a member of a protected class, was qualified for his position, and suffered an adverse employment action .

The fourth prong of the test requiring an inference of unlawful discrimination can be met as the record shows that Complainant's employment was terminated by Fox, an individual who knew of Complainant's homosexuality and discharged him while not discharging the presumably non-homosexual Abayev, at the first opportunity Fox had to do so.

As to retaliation, Complainant also suggests that the termination of his employment was a product of retaliation. Assuming that contacting the police and cooperating with them constitutes protected activity, Complainant once again makes out all four prongs of the test: there was protected activity of which Respondent was aware occurring just prior to the termination of Complainant's employment.

However, in both instances, Respondent showed a legitimate, nondiscriminatory reason for its employment decision. The record showed that Complainant's employment was terminated solely because he was an at-will employee who cursed at his superior. The various reasons given by Complainant as to why his employment was terminated, namely, either because of a "disability", because he went to the police concerning his altercation, or because he was a homosexual, are all unavailing. Respondent had every opportunity prior to this date to discriminate against Complainant for these reasons. For instance, Complainant had cooperated with police in 2004 without suffering reprisal. Likewise, Complainant worked in an environment in which approximately forty percent of the workforce was also homosexual. On his last day of work Complainant lost his temper after pressing his concerns, however mistaken, on Fox. In response, Fox terminated his employment. Fox was free to do so for any reason or for no reason just as long as the reason did not violate the Human Rights Law.

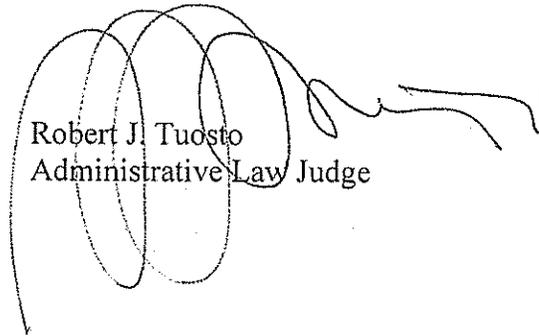
Therefore, the complaint must be dismissed.

**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: December 10, 2008  
Bronx, New York

  
Robert J. Tuosto  
Administrative Law Judge