NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

THEODORE DAVENPORT,

Complainant,

v.

TIOGA DOWNS RACETRACK, LLC,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10114347

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 February 23, 2009, by Lilliana Estrella-Castillo, 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 07 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

State Division of Human Rights
Enforcement Unit
Sharon J. Field, Director of Prosecutions
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Richard J. Van Coevering
Senior Attorney

Christine Marbach Kellett
Chief Administrative Law Judge

Lilliana Estrella-Castillo
Administrative Law Judge

Sara Toll East
Chief, Litigation and Appeals

Caroline J. Downey
General Counsel

Peter G. Buchenholz
Adjudication Counsel

Matthew Menes
Adjudication Counsel

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10114347**

SUMMARY

Respondent did not unlawfully discriminate against Complainant on the basis of sexual orientation when it terminated Complainant's employment for knowingly violating Respondent's policies and procedures.

PROCEEDINGS IN THE CASE

On October 17, 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 Lilliana Estrella-Castillo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on July 23 and 24, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Senior Attorney, of Counsel. Respondent was represented by Towne, Bartkowski & DeFio Kean, P.C., by James T. Towne and Susan Barthowski.

The parties timely proposed findings of fact and conclusions of law were received, reviewed and where appropriate, adopted.

FINDINGS OF FACT

1. Complainant is gay. (Tr. 17; ALJ Exhibit 1)

2. Respondent, a racing and gaming facility in Nichols, New York, commissioned by New York State, opened its facility in June 2006. (Tr. 146)

3. Respondent has an anti-harassment policy which it disseminates to its employees via an Associate Handbook. (Tr. 153; Respondent's Exhibit 5)

4. Complainant was hired by Thomas Hoy, Cage Operations Manager, on May 9, 2006, as a Cage Operations Supervisor ("Supervisor"). (Tr. 18, 249, 361-63, 365; Respondent's Exhibits 2 and 9)

5. Hoy hired Complainant because he valued Complainant's prior work experience in a gaming facility. Complainant made Hoy aware of Complainant's sexual orientation shortly after Complainant's employment began. (Tr. 100, 362-64, 366)

6. As a Supervisor, Complainant was "responsible for ensuring that all accounting activities in the Cage Department [*sic*] are performed accurately and efficiently, in accordance with all applicable laws, rules and regulations of the Gaming Commission, Federal and State Tax Commissions, and established company policies, procedures and control." (Respondent's Exhibit 1)

7. As part of those duties, and as relevant here, at the end of the day, the cashiers close their windows, count all their money and record it on their cashier balance sheets. At that point, "the supervisor will recount the bank. But unlike the opening where they just do a bulk count of straps, they will undo every strap, they will put it through the currency counter, they will repeat the exact same process that the cashier has just done. When they both agree that that's how much is there, the supervisor will then sign on their particular line, they'll put their badge number, the time, the date and compare the total to the system total that they got off the EM-GAM (computer) system." (Tr. 372-73)

8. Complainant supervised between four and five cashiers per shift. Each cashier starts the shift with $34,950.00 in cash. (Tr. 119-20; Respondent's Exhibit 4)

9. Respondent terminated Complainant's employment on September 22, 2006, for violating Respondent's policies and procedures. (Respondent's Exhibit 9)

10. Specifically, Complainant was terminated for (1) sending a cashier (Debra) off the property to purchase food on September 8, 2006; (2) also on September 8, 2006, Complainant gave his EM-GAM swipe card and private PIN number to a cashier (Jennifer Harding), when Complainant was leaving for his lunch break; and (3) on September 15 and 16, 2006, Complainant simply signed the cashiers' balance reports without counting or verifying the cash. (Tr. 104, 302-05, 313; Respondent's Exhibit 9)

11. Respondent's policy does not allow cage employees to leave the premises, not even for lunch. Complainant did not deny that he authorized a cashier to go off premises to get food. (Tr. 111-16, 305, 369)

12. Complainant did not deny that he gave his swipe card and PIN number to Harding, but explained that he needed to take his lunch break without interruptions. (Tr. 110-11, 118, 301-02)

13. Complainant was aware that as a Supervisor, his swipe card gave him clearance to override payments, authorize payouts, and change the balance of a cashier's drawer, none of which cashiers were authorized to perform. (Tr. 104)

14. Complainant agreed that he never verified the count in the cashier's drawer, unless the cashier's count and the computer count were off by more than $5.00. He also agreed that he would just sign the verification at the end of the shift. (Tr. 44-45, 124, 127-28, 414)

15. Complainant conceded that he knowingly violated Respondent's policy and procedures, but alleged that Respondent terminated his employment because Respondent did not want a gay person in its employ and because he engaged in protected activity when he complained about derogatory comments that were made regarding his sexual orientation. (Tr. 42-43; ALJ Exhibit 1; Respondent's Exhibit 8)

16. Complainant made Respondent's employees aware of his sexual orientation. (Tr. 325)

17. Complainant's subordinates complained that Complainant engaged in inappropriate discussions regarding Respondent's male guests. (Tr. 309-10, 333)

18. Complainant commented about the "ass" of the guests and once commented to Harding that "he was going to suck this guy's penis." (Tr. 307-08, 311, 328-29)

First Comment

19. On May 12, 2006, Ben Crowell, a co-worker, remarked that Complainant was "a flaming faggot." (Tr. 20-21, 179, 214)

20. The comment was made in the presence of Complainant's witness, Lindalee Marcou, who was Respondent's Human Resources Manager. (Tr. 152) Marcou immediately spoke with Crowell and informed him that such comments were against Respondent's policy, and reported the comment to her immediate supervisors. (Tr. 148-51)

21. Complainant agreed that Crowell never made any other derogatory remarks. (Tr. 24-25, 92)

Second Comment

22. In early July 2006, two security guards were over-heard making derogatory comments about Complainant on their two-way radios. (Tr. 26-27)

23. The comment, "this belongs to your girlfriend, Ted [Complainant]," was made in reference to a pink bracelet which was found on the casino floor. (Tr. 27)

24. Complainant complained about the comment, and immediately the security guards' supervisor investigated the complaint. (Tr. 28) No one was able to ascertain the identity of the two security guards who made the comment. (Tr. 347; Complainant's Exhibit 3)

25. There were no further inappropriate comments made over the two way radios. (Tr. 94-95)

Third Comment

26. At the end of August 2006, "a bunch of people" were making fun of Complainant and inquiring about his ability to have sexual relations with his partner while recovering from kidney stone surgery. (Tr. 33)

27. Complainant complained about these comments to Marcou, but he could not identify the persons making the comments. (Tr. 33, 96-98)

Fourth Comment

28. Marcou testified that just prior to Complainant's employment termination, Scott Morris, Human Resources Director, commented that Respondent "doesn't need gay people working there, its not good for the company." (Tr. 162, 216; Respondent's Exhibit 7)

29. Marcou did not report Morris' comment to anyone. (Tr. 190)

30. Marcou's testimony is also not credible because it was inconsistent with Complainant's testimony regarding their relationship. Complainant acknowledged that they are personal friends and communicate three to four times a month. (Tr. 134) Marcou, on the other hand, testified that after Complainant's employment termination she had not maintained a relationship with him "until recently." (Tr. 211)

31. Marcou testified inconsistently throughout the hearing. For example, she testified that she maintained a file with Complainant's complaints and that she gave the file to Morris. (Tr. 189) She testified that although she did not report Morris' comments to anyone, she made a notation directly on the file about the comment, but she could not have written the comment on the file because according to her own testimony she had already turned over the file. When confronted with her inconsistent testimony, she shrugged it off. (Tr. 218)

32. Respondent terminated Marcou's employment in December 2006. (Tr. 225) She filed two discrimination complaints against Respondent with the Division. (Tr. 134; Respondent's Exhibit 7) Marcou testified that it was not against Respondent's policy for Complainant to give a subordinate his swipe card and PIN number. (Tr. 168, 194-95, 199-200) And, she denied that she received complaints regarding Complainant making inappropriate comments, until confronted with her own statement indicating the contrary. (Tr. 219-20, 225-27; Respondent's Exhibit 7)

OPINION AND DECISION

The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer "because of . . . sexual orientation . . . to discriminate against an individual in compensation or in terms, conditions or privileges of employment." The Human Rights Law § 296 (7) makes it an unlawful discriminatory practice "for any person engaged in any activity to

which this section applies to retaliate or 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."

In addressing the merits of the complaint, Complainant must first make out a prima facie case of unlawful employment discrimination based on sexual orientation. *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). If Complainant succeeds in establishing a prima facie case, Respondent must then articulate legitimate, non-discriminatory reasons for its actions. If Respondent presents a reasonable, non-discriminatory reason for its employment decision, the burden then shifts back to Complainant, who must then demonstrate that the reasons articulated by Respondent are merely a pretext for unlawful discrimination. *Pace College, supra.* The burden of proof ultimately rests with Complainant, and conclusory allegations of discrimination are insufficient to meet this burden. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

Complainant alleges that he was unlawfully discriminated against on the basis of his sexual orientation when Respondent terminated his employment. To make out a prima facie case of sexual orientation discrimination, Complainant must demonstrate membership in a protected class, that he was qualified to hold the position, and that he was subjected to actions giving rise to an inference of discrimination. *See, Matter of Milonas v. Rosa,* 217 A.D.2d 825, 825-26, 629 N.Y.S.2d 535 (1995), *lv. denied* 78 N.Y.2d 806, 641 N.Y.S.2d 597 (1996).

Complainant made out a prima facie case of unlawful employment discrimination based on sexual orientation. Complainant, who is gay, is a member of a protected class. Complainant was qualified for the position he held because he had prior experience in the casino industry.

Complainant was subjected to actions giving rise to an inference of unlawful discrimination because of the alleged comment made regarding Complainant's sexual orientation.

Respondent presented reasonable and non-discriminatory reasons for terminating Complainant's employment. Respondent terminated Complainant's employment for violating Respondent's policies and procedures. Specifically, Complainant was terminated for (1) sending a cashier off the property to purchase food; (2) giving his EM-GAM swipe card and private PIN number to a cashier; and (3) not counting or verifying the cash in the cashiers' drawers at the end of the day.

Complainant did not deny that he engaged in the conduct that caused his employment termination. Instead, Complainant offered excuses for why he knowingly violated Respondent's policy and procedures. Complainant also did not produce any evidence to show that Respondent's reasons for terminating his employment were unworthy of belief or a pretext for unlawful discrimination. Therefore, because Complainant failed to sustain his burden regarding sexual orientation discrimination, the complaint must be dismissed.

To make out a prima facie case of retaliatory discrimination, Complainant must show that (1) he engaged in protected activity; (2) Respondent knew that Complainant engaged in protected activity; (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action. *See*, *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing, Dortz v. City of New York*, 904 F.Supp. 127, 156 (1995).

Complainant alleged that Respondent unlawfully terminated his employment because he complained to Respondent regarding the derogatory comments which were made by Respondent's employees regarding Complainant's sexual orientation.

Complainant made out a prima facie case of retaliation. Complainant engaged in protected activity when he complained regarding the offensive comments; Respondent became aware of the complaints because Marcou was Respondent's Human Resources Manager; Complainant suffered an adverse employment action when his employment was terminated; and, there was a causal connection between the protected activity and the adverse employment action because the last complaint was made in August 2006, and Complainant was terminated in September 2006.

However, as discussed above, Respondent terminated Complainant's employment for reasonable, non-discriminatory reasons. Complainant did not come forth with any evidence of pretext. Therefore, the retaliation complaint must be dismissed.

To satisfy a claim of hostile work environment based on sexual orientation, Complainant must produce evidence that demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were "sufficiently continuous and concerted" to have altered the conditions of his working environment. *Father Belle Community Center v. New York State Division of Human Rights,* 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997), (quoting, *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir. 1989)). And, the conduct complained of must be unwelcome. *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 68, 106 S. Ct. 2399(1986). Whether such conduct reaches the level of actionable harassment based on sexual orientation is determined by the totality of the circumstances under a reasonable person standard. *Father Belle, at* 50-51.

Complainant alleged that while employed by Respondent he was told by others that derogatory comments were made regarding his sexual orientation on two occasions and he personally heard one other comment. The first comment was made in May 2006. It was not

made in Complainant's presence, but referenced Complainant as "a flaming faggot." Respondent immediately addresses this comment. Respondent immediately addressed the second comment, which was made in July 2006, regarding a pink bracelet. The third comment, which was made in Complainant's presence in August 2006, dealt with inquiries from employees regarding Complainant's ability to have sexual relations with his partner after surgery. Respondent attempted to investigate, but Complainant failed to identify the employees that asked the inappropriate questions, alleging that he could not recall who they where. These were the only comments that Complainant testified occurred during his employment with Respondent.

Under a totality of circumstances analysis, a reasonable person would believe that the comments attributable to Respondent's employees were made because of Complainant's sexual orientation. The next question, whether all the incidents when taken together are "sufficiently continuous and concerted" to have altered Complainant's working environment, must be answered in the negative. Three comments over a period of five months are not sufficiently continuous, severe or pervasive. Complainant presented no other evidence to support the contention that a hostile work environment existed.

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: February 23, 2009
Bronx, New York

Lilliana Estrella-Castillo
Administrative Law Judge