NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **LATANGE DAVIS, DORIS IRENE SMITH, and GWINNETTE HERNANDEZ** Complainant, v. **ARNOT OGDEN MEDICAL CENTER,** Respondent.	**NOTICE AND FINAL ORDER** Case Nos. 10116827, 10116832 & 10116829

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 March 31, 2009, by Michael T. Groben, 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 03 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

TO:

Complainant
Latange Davis
213 Prescott Avenue, Apt. 2FS
Elmira, NY 14903

Complainant
Doris Irene Smith
331 Irvine Place
Elmira, NY 14901

Complainant
Gwinnette Hernandez
375 West Gray Street, Apt. C
Elmira, NY 14905

Respondent
Arnot Ogden Medical Center
Attn: Brian K. Forrest, Senior Director, Human Resources
600 Roe Avenue
Elmira, NY 14905

Respondent Attorney
Raymond J. Pascucci, Esq.
Bond, Schoeneck and King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

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

Erin Sobkowski
Senior Attorney

Michael T. Groben
Administrative Law Judge

Sara Toll East
Chief, Litigation and Appeals

Caroline J. Downey
General Counsel

Peter G. Buchenholz
Adjudication Counsel

Matthew Menes
Adjudication Counsel

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

LATANGE DAVIS, DORIS IRENE SMITH, and GWINNETTE HERNANDEZ,

Complainants,

v.

ARNOT OGDEN MEDICAL CENTER,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Nos. **10116827, 10116832, 10116829**

SUMMARY

Complainants, three African-American women, alleged in nearly identical verified complaints that Respondent discriminated against them in the terms and conditions of their employment over a period of several years by, inter alia, requiring them to attend counseling sessions at work, upon threat of termination. All Complainants have failed to prove their claims. Therefore, all three cases are dismissed.

PROCEEDINGS IN THE CASE

On March 23, 2007, Complainants Latange Davis, Doris Irene Smith, and Gwinnette Hernandez each filed separate verified complaints 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 all three complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred these cases to public hearing.

After due notice, these cases came on for hearing before Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 12, 13 and 14, 2008.

Complainants and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Raymond J. Pascucci, Esq.

Permission to file post-hearing briefs was granted. The Complainants and Respondent timely filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainants Latange Davis, Doris Irene Smith, and Gwinnette Hernandez are African-American women. [1] (ALJ Exhibit 1, 5, 9)

2. Respondent operates a hospital (the "Hospital") in Elmira, New York. Hospital operations include a large practice in high risk maternity cases. (ALJ's Exhibit 1, 2, 5, 6, 9, 10; Tr. 845-46)

3. Elizabeth Hilson has been the director of the Hospital's Perinatal Unit since July 2004, and was the Complainants' immediate supervisor. (Tr. 19, 840-41) The Perinatal Unit includes three subdivisions: obstetrics, nursery, and labor and delivery. (Tr. 841)

4. Martha Williams is Senior Director of Nursing Services at the Hospital, and Hilson's supervisor. (Tr. 153, 932-33, 1006-07)

[1] Gwinnette Hernandez is also known as "Gwinnette Graham." (Tr. 849)

5. Brian Forrest has been Respondent's Senior Director of Human Resources since 2002. His duties include, but are not limited to, creating and maintaining Respondent's personnel policies. (Tr. 778-79, 782)

6. Complainant Hernandez was employed as a registered nurse at the Hospital from 2000 to 2007. (Tr. 14-15)

7. From 2001 until her resignation, Hernandez worked in the Perinatal Unit. Her duties included admissions, assessments, medication, teaching, supervision of the postpartum unit and other patient care. (Tr. 14) The approximately 20 nurses in the Perinatal Unit worked five days per week on either a day shift (7 a.m. to 3:30 p.m.), an evening shift (3 p.m. to 11:30 p.m.), or a night shift (11 p.m. to 7:30 a.m.). During the majority of her time in the Perinatal Unit, Hernandez worked on the evening shift. (Tr. 15-18, 21, 103)

8. In or about 2001-2002, Hernandez received a discipline from her then-supervisor, Patricia Eckerd (Tr. 33)

9. Complainant Smith began work as a full-time registered nurse at the Hospital in June 2004. In or about October 2004, she was granted a transfer to the Perinatal Unit, where she worked on the evening shift. (Respondent's Exhibit 4; Tr. 247-48, 354-57, 359, 869-70)

10. Complainant Davis began work as a registered nurse in the Perinatal Unit on July 21, 2000. At all times relevant to the complaint, she was employed on the evening shift (Tr. 570-71)

11. In November of 2002, Davis received a written warning for insubordinate behavior from her then-supervisor, Patricia Eckerd. (Respondent's Exhibit 25; Tr. 655, 799-801)

12. **Twelve-hour shift-** In the autumn of 2004, Hernandez and Davis asked Hilson to change their working hours and permit them to work three 12-hour days per week, instead of the five eight-hour days per week that they had been working. Hilson refused because this would

affect the overall staffing pattern. At that time, nurses in the postpartum nursery unit were not regularly assigned to 12-hour shifts, and permitting 12-hour shifts would have required revising the work schedule for the entire unit. (Respondent's Exhibit 1 [p. 1]; Tr. 15, 18-20, 23, 27-28, 29-30, 102-03, 106-10, 116-17, 121-22, 124, 136-38, 571-73, 861-65)

13. Over the next few months, the Complainants, now including Smith, persisted in their efforts to formulate a proposal agreeable to Hilson for a 12-hour shift schedule. These efforts included polling a number of nurses to see who would be amenable to such a schedule, and preparing a "mock" 12 hour schedule for Complainants, which was presented to Hilson during their discussions. On all occasions, Hilson advised Complainants that their proposals would not be feasible. (Tr. 20-26, 118, 125-26, 127-34, 138-40, 248-52, 359-66, 526, 856-66)

14. Finally, Smith attempted to devise a second mock 12-hour schedule, which she abandoned as unworkable. (Tr. 365-66, 543-44, 546) Hilson never approved the request of Complainants to work 12-hour shifts. (Tr. 252, 573)

15. In early 2005, Hilson did approve the requests of Hernandez and Davis that their schedules be adjusted so that they could attend college classes on Wednesdays. (Tr. 145-52, 154-55, 846-49) Smith then began a school schedule which required her to attend classes every Wednesday. Smith acknowledged that in doing so without permission from Hilson, she had created a scheduling problem for Respondent. Hilson then adjusted Smith's schedule to permit her to attend classes on Wednesdays. (Respondent's Exhibits 7, 38; Tr. 253-54, 374-80, 384-90, 850-60) No Caucasian nurses were granted this adjustment to schedule. (Tr. 145-52)

16. In March and April 2005, Hilson posted Job Opportunity notices allowing nurses to bid to work 12-hour shifts on Fridays, Saturdays and Sundays only. (Respondent's Exhibit 5; Tr. 28-

29, 366-68, 866-68) These notices were posted in an area accessible to all employees. (Tr. 369-70)

17. Two Caucasian nurses bid pursuant to the Job Opportunity notices, and were assigned to the newly created 12-hour shifts. Complainants did not bid. (Tr. 29-32, 101, 142-43, 371-73, 495, 544-45, 869)

18. Complainants testified at the public hearing that they had been refused the opportunity to work a 12-hour shift because of their race, however, they were unable to offer any proof other than the fact that the weekend 12-hour shifts had been granted to Caucasian nurses. (Tr. 101, 213, 494-96, 645-46)

19. Mary Micelotta was employed as a registered nurse at the Hospital during 2005 and 2006, assigned to the evening shift. (Tr. 695) Leora Kishbaugh has been employed as registered nurse at the Perinatal Unit since 2004. (Tr. 767-68) Joelle Paulisczak has been employed as a part-time registered nurse on the evening shift in the Hospital's maternity unit since approximately 2003. (Tr. 741-43) I observed at the public hearing that all three appeared to be Caucasian.

20. On February 9, 2005 Hernandez was assigned as the "charge" nurse for her shift, responsible for assigning patients to a particular nurse. She directed Micelotta to care for a new patient. Micelotta refused, on the grounds that she already had charge of a post-operative patient who was experiencing blood pressure problems. (Tr. 35-39, 167-68, 172). Micelotta asked Hernandez to assist with her own patient, and initially Hernandez declined. (Tr. 701-02) An argument then ensued between Hernandez and Micelotta. (Tr. 168-69, 275-76, 696-709)

21. Dr. Sungji Chai, a physician, was present during the above incident. In a written statement to Hilson, Chai criticized Hernandez's behavior during the above incident as

"obstructionist and petty," and noted that patient care had been impeded by the personal conflict between Hernandez and Micelotta. (Respondent's Exhibit 31; Tr. 182, 882-85)

22. Hilson then came to the postpartum/nursery area and asked Hernandez what had happened. Hernandez explained what had happened, but testified at the public hearing that she "did not get the chance" to tell Hilson that she had not been arguing. (Tr. 163-66, 870-75)

23. At the public hearing, Hernandez denied that she had known Micilotta's patient had been "critical" at the time of the incident, but she acknowledged that Micelotta had asked for her assistance. (Tr. 159-60, 162-63, 166-68, 181-82)

24. On or about February 10, 2005, Hilson, in response to the above-noted incident, posted a notice for all staff, which, in pertinent part, directed staff to respond to requests for help from other staff members, without questioning the need for same. (Complainant's Exhibit 9; Tr. 875-76) Hilson also proposed a meeting between herself, Micelotta, and Hernandez. Hernandez refused to attend such a meeting because she believed that the February 10 notice was "accusative" towards her. (Respondent's Exhibit 32, 33; Tr. 187-91, 227-34, 877-80)

25. Instead of requiring Hernandez to attend the meeting with Micelotta, Hilson directed Hernandez to apologize to her. Hernandez did not do so. (Tr. 50-54, 880-82) Hernandez denied that she had agreed to apologize to Micelotta. (Tr. 182-85) Hernandez testified that she had agreed to assure Micelotta that she would help her in the future, but that she had not given this assurance to Micelotta either, because Hilson had not given her a deadline by which to do so. (Tr. 185-87)

26. Approximately three weeks later, Hilson learned that Hernandez had not obeyed her directive to apologize to Micelotta. (Tr. 885-86, 911) On or about March 8, 2005 Hilson issued a "verbal conference" Notice of Discipline to Hernandez, which she refused to sign. Hernandez

was charged with inadequately assisting a co-worker (Micelotta) and arguing with her at the nurses' station during the February 9 incident. (Respondent's Exhibit 3; Tr. 33-39, 46, 48-51, 54-55, 176-78, 244, 886-91)

27. Before issuing that March 8, 2005 Notice of Discipline, Hilson had consulted Colleen Cable, a white nurse who observed the incident, but not Smith, who was also a witness. (Tr. 44-46) At the public hearing, Hernandez testified as to her belief that Hilson did not consider her version of the events because she is African-American. (Tr. 181-82, 213) However, Hernandez admitted that she had not informed Hilson of Smith's involvement, so that she could be interviewed by Hilson prior to the issuance of the Notice of Discipline. (Tr. 163-66)

28. Hernandez denied, and then admitted, that she had had an opportunity to set forth her own written comments on the March 8, 2005 Notice of Discipline. Hernandez's testimony on this issue was inconsistent, evasive and not credible. (Tr. 176-78, 227, 244-46)

29. On or about May 26, 2005, Hernandez discussed the March 8, 2005 Notice, and certain of her concerns regarding working conditions, with Hilson and Forrest. She then submitted a list some of her concerns to Hilson. Hernandez advised Hilson and Brian Forrest that she believed that she was being discriminated against, and that although she had other concerns, she was not ready to discuss them. Hernandez returned the next day and presented a list of her concerns to Hilson, which Hilson reviewed with her. (Complainant's Exhibit 1; Tr. 40-44, 55, 191-98, 898-915)

30. Smith testified at the public hearing that in late March 2005, Hilson looked at Smith's attire and asked her whether she was "prepared to work", while permitting a white co-worker, Micelotta, to wear pajama bottoms to work. Smith was not disciplined for her attire, and she did not know whether Micelotta had been disciplined. (Tr. 528-29, 255-56)

31. On December 2, 2005, Hilson issued Smith a discipline "verbal warning" because while speaking to another nurse at the nurse's station, Smith had referred to the husband of one of Respondent's maternity patients as a "jackass" in his hearing. (Respondent's Exhibit 14; Tr. 475-79, 940-43) Hilson set forth her concerns regarding Smith's personality issues in her next yearly evaluation form. (Respondent's Exhibit 11; Tr. 945-48)

32. Susan Vitucci has been employed as a registered nurse in the maternity unit at Respondent's hospital since 1994. (Tr. 723-24)

33. On March 3, 2005, Davis was involved in a dispute at the nurse's station. During an argument involving Davis, Smith, and Vitucci and Susan Stamp (both Caucasian nurses), Davis told Vitucci to "take her fat ass home." (Tr. 576-87, 646-51, 655-56, 725-28) Following formal complaints by Vitucci and Stamp to Hilson, Davis received a "warning" notice of discipline. (Respondent's Exhibit 20; Tr. 730, 892-96) At a meeting with Hilson, Davis essentially admitted the allegation in Vitucci's and Stamp's complaints, although she claimed to have used the word "butt" instead of "ass". (Respondent's Exhibit 39; Tr. 896-98) I find that the difference is not material.

34. In July or August of 2005, Davis rudely prevented an elderly visitor from walking through the nurse's station on his way to a maternity patient's room. Paulisczak and Davis then argued over her actions. Davis became angry with Paulisczak and called her a "two-faced mole." (Tr. 612, 657, 666-67, 744-49) Following complaints by Paulisczak and staff physician Dr. Qaderi, Davis was issued a notice of discipline from Hilson and Williams for exhibiting rudeness to the visitor and Paulisczak. Davis was then suspended for three days. (Respondent's Exhibit 22, 35 ; Tr. 601, 656-57, 588-94, 749, 916-22)

35. **EAP Program-** In June or July of 2005, Smith suggested to her supervisor that Respondent should commence meetings for the purpose of conflict resolution. Smith made this suggestion because she felt that there was a tense atmosphere at work, which was not "friendly." (Tr. 200-01, 280, 424-26, 469, 539, 537, 788-89, 923, 1007-09)

36. Faye Ewing and Steve Paro are employed as employee assistance counselors by Employee Network, Inc. ("ENI"), a company which provided employee counseling and conflict resolution services to Respondent. In response to an inquiry from Respondent, ENI designed a program proposal. (Respondent's Exhibit 17; Tr. 548-52, 789-91, 924, 997-98)

37. On or about August 1, 2005, Hilson notified Smith that she was to attend an individual EAP session with Ewing and Paro. At that meeting, Smith related her concerns to Ewing and Paro. (Complainant's Exhibit 11; Tr. 276-79, 280-82, 427-29)

38. Respondent then posted notice of a mandatory staff meeting regarding employee conflict resolution, to be held August 18, 2005. Complainants Hernandez, Davis and Smith all attended this meeting, as did Ewing, Paro, and nurses Kishbaugh, Paulisczak, and Micelotta. (Complainant's Exhibit 2; Tr. 55-64, 202-05, 276, 553, 556, 595, 710-11, 750-52)

39. At that meeting, Kishbaugh, Paulisczak, and Micelotta expressed discomfort at working with Hernandez, Davis and Smith. (Tr. 57-64, 595-600) Micelotta expressed concern that Hernandez, Smith and Davis might not help her with a patient if she needed it. (Tr. 287)

40. Paulisczak expressed concern that she would "never be able to win" with Davis and that Davis might not help her with a patient if she needed it. In reply, Davis stated that "You will never be able to win with me because I got written up as a result of you." (Tr. 598-600)

41. During the meeting, Ewing and Paro announced a second EAP meeting for nurses on the evening shift. (Tr. 206, 561).

42. Respondent then posted notice of that second EAP meeting, to be held September 1, 2005. (Complainant's Exhibit 3; Tr. 925-26) Hernandez did not attend because the notice did not specifically state that it was a "mandatory" meeting, and because she felt that she would be addressed in the same manner she had been at the first EAP meeting. Hernandez, Davis and Smith discussed the matter and decided not to attend. (Tr. 206-09, 303, 601-05)

43. Smith testified at the public hearing that she did not attend because she had to care for her mother on that date, and that she left a telephone voice message for Hilson prior to the meeting to that effect. (Tr. 303-05, 435, 439-40)

44. Davis did not attend because she did not believe that the meeting would be productive. (Tr. 601-02)

45. Kishbaugh, Paulisczak, and Micelotta did attend the meeting. (Complainant's Exhibit 3; Tr. 64-69, 73-74, 212, 473-75, 562, 712, 752-53).

46. Ewing concluded that any progress made in the first group EAP session had been "stifled" by the failure of Hernandez, Davis and Smith to attend the second, and recommended that Hilson schedule individual EAP counseling sessions with Hernandez, Smith, and Davis. (Tr. 563, 792-93, 926-27,1010-11)

47. On September 1, 2005 Hilson issued a memorandum of understanding to Hernandez, reprimanding her for her failure to attend the September 1, 2005 EAP meeting, and directing her to attend EAP individual counseling sessions. (Complainant's Exhibit 4, 17; Tr. 72-75, 209-10, 928-30)

48. On or about September 2, 2005, Hilson issued a Notice of Disciplinary Procedure to Smith, requiring her to attend EAP counseling sessions. This was accompanied by a note directing her to return the signed Notice and a Consent for Release of Confidential Information

to Williams. (Complainant's Exhibit 14, 15, 17; Tr. 305-11, 317, 319-20) Smith discussed the Notice of Disciplinary Procedure with Hernandez and Davis and did not sign or return said documents. (Tr. 311-12)

49. In response to objections by either Davis or Hernandez to wording on the Notice of Disciplinary Procedure, Williams then issued a revised version of said Notice. Smith then signed that revised Notice. (Complainant's Exhibit 16; Tr. 312-14, 320-23, 930-34, 1011-15).

50. Hernandez then signed a similar Notice of Disciplinary Procedure and Consent for Release of Confidential Information. (Complainant's Exhibit 5, 6; Tr. 72-79)

51. Hernandez testified that other nurses had missed regularly scheduled staff meetings for cause (such as inability to obtain child care services) and that she was unaware of any being disciplined for same. (Tr. 69-72) Hernandez testified that she was disciplined because of her race. (Tr. 213)

52. Davis also received a Notice of Discipline for her refusal to attend the September 1 EAP meeting, and she was also required to attend individual EAP counseling sessions. (Tr. 605-07)

53. ENI, not Respondent, determined the necessity for and required number of counseling sessions for Davis, Hernandez and Smith. (Respondents 10, 34; Tr. 323-26, 442-47, 935-39)

54. Davis, Hernandez and Smith all completed the recommended individual counseling sessions. (Respondent's Exhibit 18; Tr. 80-82, 564-65, 939-40)

55. On August 2, 2006 Davis was disrespectful towards Clinical Nursing Supervisor Wendy Bell, declaring to the Charge Nurse in Bell's presence that "I don't even know her." Bell found the statement and the tone in which it was offered so objectionable that she sent a letter of protest to Hilson. (Respondent's Exhibit 30; Tr. 614, 820-29, 951-53)

56. On August 8, 2006, Davis, annoyed because Kishbaugh had called her on the telephone regarding hospital business, loudly and repeatedly stated these phones are "bullshit" in the presence of Kishbaugh. These statements were audible and alarming to visitors to the ward. (Respondent's Exhibit 23; Tr. 616-19, 770-77, 950-51)

57. On August 15, 2006 Davis confronted Vitucci and, incorrectly, accused her of posting a note disparaging Davis's work performance. Vitucci then filed a written complaint accusing Davis of being loud and argumentative. (Respondent's Exhibit 21) At the public hearing, Davis admitted that when Vitucci had asked her to stop being "loud" Davis replied to her that "to get loud is to raise your voice" and that she then "demonstrated it." (Tr. 620-22) After being confronted with her error, Davis apologized. (Tr. 732-38, 740, 953-55)

58. Pursuant to discussion between Forrest, Hilson and Williams, each of the three above noted incidents involving Davis was investigated, and referenced in summary form in a statement of possible disciplinary action for review and discussion with Davis. This statement also included a summary of previous warnings and charges, including the July 2005 suspension. (Joint Exhibit 2; Tr. 794-98, 955-56)

59. Respondent has a progressive discipline policy for its employees, requiring progressive levels of counseling or discipline prior to termination. A suspension is the last step in the disciplinary process prior to termination. Employees are subject to Respondent's performance standards requiring them, inter alia, to treat visitors and co-workers with respect, and to limit loud talk and noise. (Respondent's Exhibit 24, 27, 29; Tr. 655, 782-88, 819).

60. After a meeting and discussion with Hilson and Forrest, pursuant to Respondent's Progressive Disciplinary Policy, Davis was terminated from her position on August 24, 2006 for

continuing rude and inappropriate behavior, and insubordination. (Joint Exhibit 2; Tr. 570, 608, 662, 684, 794-819)

61. In 2006, a co-worker, Amy Collins, spoke rudely to Smith. Smith reported the incident to Hilson; she did not know whether Collins had ever been disciplined. Hilson advised Smith that she had corrected Collins regarding this behavior. (Tr. 256-57, 403-05)

62. In the spring of 2006, Hilson advised Smith that other workers were complaining about her being hostile and not communicative at work. At the public hearing, Smith acknowledged that she had chosen to isolate herself from her fellow nurses because she felt she was being "scrutinized." (Tr. 271-75, 452-53)

63. On or about April 12, 2006, Smith received a performance evaluation form from Hilson, which cautioned Smith that Hilson had noticed some strain in her working relationships because her co-workers perceived "anger and impatience" in Smith. (Respondent's Exhibit 11 [p. 2]; Tr. 457-60)

64. Jeanne Ellis conducts Childbirth Education classes for pregnant women at the Hospital. (Tr. 406) In or about July 2006, Ellis requested that Smith, who was then assigned to the nursery, permit her class to view a newborn baby. Smith refused, because the newborns under her care were currently breast-feeding and she did not want them to be distracted. (Tr. 257-59, 406-07)

65. Ellis complained in writing to Hilson regarding this incident, stating that Smith had been rude while refusing Ellis's request, and that Smith had claimed at the time that she had asked all of the nursing mothers, and none of them wished to allow Ellis's class to view their babies. (Joint Exhibit 1 [pp. 4-5]) At the public hearing, Smith testified that she did not

remember stating that to Ellis, and that she had not been rude, although she did acknowledge that she might have given Ellis "a look of stress." (Tr. 406-11)

66. Hilson then asked each of the mothers in question to verify whether or not Smith had asked their permission. Hilson verified that Smith had not. (Tr. 964)

67. On or about August 22, 2006, Smith received a Notice of Discipline because of this incident. (Joint Exhibit 1; Tr. 259-64, 956-60)

68. A second charge set forth in that Notice of Discipline stated that on or about August 18, 2006, Smith had taken a personal leave day in violation of Respondent's attendance policy regarding personal emergency leave requests. (Joint Exhibit 1; Tr. 265, 960-61) Smith testified at the public hearing that she had taken the day off to care for her ailing mother, and had gone out to a local restaurant that evening, where she was seen by Paulisczak and Paulisczak's husband. (Tr. 265-71) Paulisczak's husband, who also worked at the Hospital, then reported this to Hilson. (Tr. 758-61)

69. Respondent's Policy and Procedure Manual in effect at the time stated, in pertinent part, that personal emergencies leave requests are appropriate only for unexpected needs, for which advance notice is not possible. At the public hearing, Smith acknowledged that her leave request had not, in fact, been for an emergency. (Respondent's Exhibit 9; Tr. 412-19, 779-82)

70. Smith was upset with Paulisczak for reporting to Hilson that she had seen Smith at the restaurant (Tr. 448-50). Smith believed that the Respondent had made an example of her over this personal emergency leave, because she knew that her co-workers were aware of it. (Tr. 460-63)

71. On or about October 2, 2006, Paulisczak wrote to Smith and Hernandez, advising them that she had requested a meeting at Hilson's office with them for the purpose of discussing the

"animosity" between the three of them. Smith replied in writing. (Complainant's Exhibit 12, 13, Tr. 293-96, 447) Smith attended that meeting, where she advised Paulisczak that she misunderstood Smith because of her lack of cultural exposure to black people. Smith considered this to be a productive meeting. (Tr. 294, 298-99, 451).

72. By letter dated November 21, 2006, effective December 7, 2006 Smith reduced her employment at the Hospital from full time to "per diem" status in order to spend more time with her ailing mother. (Respondent's Exhibit 15; Tr. 327, 480-85, 970-71) She began a part-time day nursing position at Lourdes Hospital on or about December 15, 2006, because she preferred to work during the day, rather than evenings as she had for Respondent. (Tr. 504-05, 517-18)

73. Carol Hammond has been a clinical nurse supervisor at the Hospital since 1981. (Tr. 829-30) On February 6, 2007, Smith visited the Perinatal Unit while off duty, and spent time talking with Hernandez in the nursery. (Respondent's Exhibit 1 [p. 5]; Tr. 235-36, 240-43) Hammond noticed this and asked Micelotta to keep track of the time that Smith and Hernandez spent visiting, and to report it to her. Micelotta did so, and credibly testified at the public hearing that the visit lasted for over two hours. (Tr. 712-14)

74. Hernandez acknowledged that Smith had been with her in the nursery for "about 45 minutes". (Tr. 83-85) I did not credit this testimony.

75. Hammond then rebuked Hernandez for taking two hours off from work to visit with Smith, and expressed concern that Smith should not have been on the ward when she was not scheduled to work. (Tr. 830-38)

76. On another occasion, Smith became upset that she was called by Respondent for a per diem assignment shortly before the shift began. (Tr. 486-88) Smith was then advised by nurse Renée Casterline that if Smith refused to report for a per diem shift, that other nurses were

required to document that fact. (Tr. 327, 488-91) Hilson had so directed, because Smith had complained about not being called for per diem shifts, and Hilson wished to verify that Smith was being given her fair share of per diem assignments. (Tr. 488-90, 972-73)

77. On February 22, 2007, because of her concerns that she was under scrutiny by management, because she felt that she was not receiving her share of per diem assignments, and because she felt uncomfortable working for Respondent, Smith resigned. (Respondent's Exhibit 16; Tr. 327-31, 485-86, 488, 490-92, 496, 971) Smith acknowledged that an additional reason for her resignation was that she could not perform her part-time job at Lourdes Hospital and work for Respondent at the same time. (Tr. 503-11)

78. On or about February 6, 2007, Hernandez resigned, because she felt mistreated and that her employment with Respondent was not secure. (Tr. 87-89, 98, 234-36)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's race or color. Human Rights Law § 296.1(a)

As a threshold matter, it is noted that the proof presented at trial by Complainants contained additional allegations, consonant with their claims of discrimination as set forth in the three verified complaints. Pursuant to the Division's Rules of Practice, I amend said complaints to conform to the proof presented during the hearing. 9 N.Y.C.RR 465.12(f)(14)

A claim pursuant to the Human Rights Law must be filed with the Division "within one year after the alleged unlawful discriminatory practice." Human Rights Law § 297(5); *Queensborough Community College of New York v. State Division of Human Rights Appeal Bd.*,

41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977). In order to go back beyond the statutory period, a complainant must establish either that there was discriminatory conduct of a similar nature during the statutory period so that a course of conduct is established, or that the earlier discriminatory conduct continues to impact the complainant and constitutes a continuing violation. *Russell Sage College v. State Division of Human Rights*, 45 A.D.2d 153, 357 N.Y.S.2d 171 (3rd Dept. 1974), *aff'd* 36 N.Y.2d 985. A continuing violation may be found where there is proof of specific 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. *Clark v. State*, 302 A.D.2d 942, 945, 754 N.Y.S.2d 814 (4th Dept. 2003)

In the instant case, the three complaints were filed on March 23, 2007, and so the complainants would ordinarily be limited to events occurring no earlier than March 23, 2006. However, in this case Complainants have alleged instances of discrimination over a period of years, which, although preceding that date, appear to adequately state claims for ongoing discriminatory practices by Respondent against these three African-American employees. For that reason, these allegations, including those regarding the Complainants' attempts to secure permission to work 12-hour shifts, and the EAP program, will be considered in this opinion.

In order to make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4), the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n* , 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind* , 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390

(2004).

In the instant case, it is clear that all of the Complainants were members of a protected class, by virtue of their status as African-American women; all three were qualified for their positions as registered nurses at Respondent's Hospital; and all three suffered adverse employment actions in the form of Respondent's denial of their request to be permitted to work 12-hour shifts, and the various disciplinary actions taken against all three of them, leading up to, and continuing during their involvement in Respondent's EAP program. These actions culminated in the termination of Complainant Davis, and the resignations of Complainants Smith and Hernandez, which occurred during a period of heightened scrutiny and criticism of these Complainants by their employer. All of the complaints which led to these disciplinary actions against Complainants were brought by white co-workers, several of whom expressed discomfort at working with Complainants. These circumstances permit an inference of discrimination. A complainant's burden in setting forth a prima facie case been held to be de minimus, and I find that all three Complainants made out a prima facie case.

If a complainant makes out a prima facie case of discrimination, the burden shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

In the instant case, Respondent presented proof that its denial of Complainants' request to be permitted to work 12-hour shifts, while permitting Caucasian nurses to do so during weekends, was founded upon legitimate business reasons. Respondent's witness credibly

testified that such a schedule change would not have been feasible, given the number of nurses at work in its Perinatal Unit during any particular week. Further, is clear that Complainants were eligible to bid for the weekend 12-hour shift proffered by Respondent, but that they chose not to do so.

Respondent's institution of the EAP program, and the various disciplinary charges stemming from it against all three Complainants because of their refusal to attend, was also clearly supported by evidence in the record. This program was created in response to a suggestion of one of the Complainants, who perceived a need for this program due to the tense atmosphere at her workplace. Respondents hired ENI, a neutral outside agency, to conduct the program, and left responsibility for determining the necessity for and frequency of counseling sessions, to its consultant. The record also demonstrated that Respondent's decision as to what action, if any would be taken against Complainants for boycotting these counseling sessions, was made upon consultation with ENI.

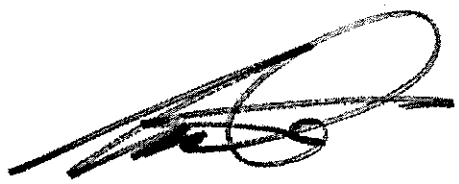
All three Complainants were repeatedly disciplined by Respondent for loud and abusive behavior throughout their careers in the Perinatal Unit. Respondent's witnesses presented credible testimony regarding the need for Respondent to require quiet, civil and cooperative behavior of its nursing staff, who were in close proximity to expectant mothers and newly delivered infants. Under these circumstances, Respondent established legitimate non-discriminatory reasons for the disciplinary actions taken against Complainants Smith and Hernandez, and the termination of the employment of Complainant Davis. Complainants failed to demonstrate that these reasons were a pretext for discrimination, and all three complaints are 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 complaints be and hereby are, dismissed.

DATED: March 31, 2009
Bronx, New York



Michael T. Groben
Administrative Law Judge