ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **LOURDES DE QUILLIEN,** Complainant, v. **HSBC BANK USA, N.A.,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10143736

Federal Charge No. 16GB005147

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 24, 2014, 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 HELEN DIANE FOSTER, 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 24 2014
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **LOURDES DE QUILLIEN,** Complainant, v. **HSBC BANK USA, N.A.,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case Nos. **10143736, 10159501**

SUMMARY

Complainant first alleged that Respondent, her former employer, exposed her to a hostile work environment and retaliated against her. Complaint's second complaint alleged that Respondent treated her differently on the basis of her protected class memberships as a female and of Peruvian Hispanic national origin, discriminated against her on the basis of her disability/perceived disability, and further retaliated against her. However, Complainant has failed to prove her claims and the complaints are dismissed.

PROCEEDINGS IN THE CASE

On September 7, 2010 and January 10, 2013, Complainant filed 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 the complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 9-10, 2013.

Complainant and Respondent appeared at the hearing. Complainant was represented by Leeds Brown Law, P.C., Carle Place, New York by Sean O'Hara, Esq. Respondent was represented by Paul, Hastings, Janofsky & Walker, L.L.P.,[1] New York, New York by Allan S. Bloom and Rachel Santoro, Esqs.

FINDINGS OF FACT

1. Complainant is a female of Peruvian Hispanic national origin. (ALJ Exh. 1; Tr. 28-29, 130)

2. Respondent is a leading financial services company with branches throughout the metropolitan New York area. (Respondent's Exh. 1; Tr. 130)

Respondent Hires Complainant

3. On May 18, 2009, Respondent offered Complainant a position as a Vice-President, Senior Premier Relationship Manager ("PRM"). (Respondent's Exh. 1; Tr. 28, 130)

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[1] During the pendency of this case both Mr. Bloom and Ms. Santoro moved to a new law firm but maintained continued representation of Respondent.

4. As a PRM Complainant was to oversee a branch's book of business made up of large depositors who were to be serviced in the areas of banking, investments and lending. Complainant was also responsible for servicing walk-in customers. Regular attendance was important in servicing walk-in customers. (Tr. 107-08, 493, 495, 511, 514, 605)

5. After Complainant's hire in June, 2009, she subsequently became aware of, and familiarized herself with, Respondent's New Employee Welcome Guide, Business Principles and Code of Ethics, Equal Employment, Harassment and Anti-Retaliation policies. (Respondent's Exhs. 3, 4, 6, 7, 8; Tr. 28, 129, 134-37)

6. Complainant was first assigned as a PRM to Respondent's branch located at 2 Park Avenue, New York, New York. (ALJ Exh. 1; Tr. 29)

June, 2009--Complainant First Complains About Michael Camberari

7. On June 30, 2009, Complainant sent an e-mail to Lisa Gallato, Respondent's Segment Leader overseeing several branches, complaining that her branch manager, Michael Camberari, went through the locked drawers of her desk. (Complainant's Exh. 1; Respondent's Exh. 13; Tr. 29-30, 139, 144)

8. Gallato immediately responded and informed Complainant that there was no expectation of privacy in Respondent's desks and that a branch manager, if he or she needed something, could go into someone else's desk. (Respondent's Exh. 13; Tr. 138-39)

9. On August 5, 2009, Complainant sent an e-mail to Gallato requesting a transfer but did not state a reason for her request. (Complainant's Exh. 3; Tr. 100-04)

10. Gallato immediately responded and offered to speak to her about that subject later that afternoon. (Complainant's Exh. 3)

September, 2009--Complainant Complains in Writing About Camberari

11. On September 24, 2009, Complainant sent an e-mail to Gallato complaining that Camberari had creaed a hostile work environment. (Complainant's Exh. 2; Respondent's Exh. 16; Tr. 28; Tr. 31-34, 36-39, 100-04, 109-10, 145, 147, 150)

12. Complainant stated in her e-mail that Camberari's conduct at work made her unable to sleep, that she was no longer able to work under him, that he had been profane and aggressive towards her and her coworkers since she started working for Respondent, that he referred to minority coworkers as "monkeys", and that she witnessed him slap a coworker with a pen on her bottom. (Respondent's Exgh. 16)

13. On September 25, 2009, Gallato sent Camberari an e-mail instructing him to "Please refrain from any contact with Lourdes until further notice." (Respondent's Exh. 18; Tr. 150-51, 182)

14. On or about October 1, 2009, Complainant, as a result of her complaint, was temporarily transferred to Respondent's Herald Square branch and then permanently transferred to Respondent's Soho, New York City branch. Complainant never had any contact with Camberari after her September 24 e-mail. Complainant's pay and job title remained the same after her transfer, and none of her accounts were taken from her. (ALJ Exh. 1; Tr. 40, 152-53, 157-164)

15. On October 7, 2009, Complainant sent an e-mail to Debra Jackson, Respondent's Employee Relations Manager, alleging that Camberari retaliated against her by having a week's pay wrongfully withheld. (ALJ Exh. 1; Complainant's Exh. 4; Respondent's Exh. 19; Tr. 100-04, 154, 271)

16. On October 15, 2009, Respondent terminated Camberari's employment for having wrongfully withheld one week of Complainant's pay, and threatening to have Complainant fired for comments that she made during Respondent's investigation of him. (Respondent's Exh. 21; Tr. 111, 156-57

2009-10--Complainant's Work Performance Issues

17. On December 16, 2009, Complainant received her year end review for 2009. The review showed that Complainant was given a "3-Strong" rating, with "1" being best and "5" being worst. (Respondent's Exh. 22; Tr. 162, 285, 407, 414)

18. On January 13, 2010, Complainant complained to Gallato that her superior, David Artis, was giving some of her clients to another PRM in the Soho branch. (Complainant's Exh. 1; Tr. 49-50)

19. I do not credit Complainant's testimony that Artis was giving some of her clients to another PRM in the Soho branch as, later that same year, Complainant had 135 more clients than the other PRM. (Tr. 216-18, 286-87, 294-95, 412-13, 416-17, 468)

20. On March 1, 2010, Complainant was the subject of a Coaching Plan by Artis. All PRMs routinely received Coaching Plans as a way for managers to keep track of production and discuss goals. Artis' intent in doing this was to help Complainant improve her performance. (Respondent's Exh. 23; Tr. 47, 165, 401-02, 418, 467, 494)

21. On March 30, 2010, Complainant had a meeting with Artis and Jose Estevez, Respondent's Senior Operations Officer, concerning time and attendance issues. (Respondent's Exh. 24; Tr. 48, 166, 419-20, 422-23)

22. On April 2, 2010, Complainant was the subject of a second Coaching Plan by Artis. (Respondent's Exh. 25; Tr. 167)

23. On April 19, 2010, Complainant brought up the issue of a transfer with Gallato due to commuting and childcare issues. However, Respondent had a policy ("the transfer policy") whereby an employee could not transfer from a branch at which they had not worked for a minimum of one year. (Respondent's Exh. 26; Tr. 168-69, 181)

24. Despite the transfer policy, Artis allowed Complainant to post for positions in Respondent's other branches. (Tr. 181)

25. Complainant was unsuccessful in obtaining a transfer. (Tr. 53-54)

26. On May 5, 2010, Complainant was the subject of a third Coaching Plan by Artis. (Respondent's Exh. 27; Tr. 173)

27. On May 14, 2010, Complainant was the subject of a Corrective Action Form ("CAF") which constituted an initial warning over time and attendance issues. Complainant conceded that she was spoken to by superiors about this subject many times. (Respondent's Exh. 28; Tr. 171, 173, 419-20, 422-23)

28. In June, 2010, Complainant was the subject of a fourth Coaching Plan by Artis. (Respondent's Exh. 30; Tr. 175)

29. On June 16, 2010, Complainant was the subject of a written warning in the form of a Performance Improvement Plan ("PIP") which expected her to meet the minimum monthly standards for her position for June and July, 2010. Complainant's inconsistent performance had caused her to previously fail to meet her sales production goals in four of seven categories in March, 2010, and five of seven sales production goals in April, 2010. (Respondent's Exh. 31; Tr. 167, 173, 176, 177-78, 180, 234, 315, 425, 457-58, 483)

30. Complainant's Monthly Trends statement for the period April-July, 2010 showed that she was not meeting her goals in the areas of activities or sales. (Complainant's Exh. 13; Tr. 458)

31. On June 29, 2010, Complainant received her mid-year review for the first half of 2010. In the review Complainant was given a "4-Inconsistent" rating. (Complainant's Exh. 11; Respondent's Exh. 32; Tr. 182, 186-187, 371, 426, 489)

32. Complainant conceded that there was no evidence that her "4" rating was based on her protected class membership. (Tr. 187)

33. In July, 2010, Complainant was the subject of a fifth Coaching Plan by Artis. (Respondent's Exh. 33; Tr. 188)

34. On July 13, 2010, Complainant sent an e-mail to Gallato requesting clarification as to her overall performance rating. Complainant met with Artis and Gallato but her overall performance rating was not changed. (Respondent's Exh. 119; Tr. 429-30, 466)

35. Respondent has an internal performance measurement correction system called True Resolution which allows a third party review of employee ratings. This third party confirmed Complainant's ratings. (Tr. 278, 290-91, 500, 570-71)

Summer, 2010--Lunchtime Movies

36. In the summer of 2010, Complainant first complained to Respondent's Employee Relations Specialist, Peter Hutter, about lunchtime movies of various genres rated "PG-13" and "R" which were shown in the break room of Complainant's branch. Two of Complainant's coworkers credibly testified that she also watched the movies. (Respondent's Exhs. 36, 37; Tr. 43-46, 66-67, 111, 188-89, 191, 194, 196-97, 199, 301, 403-06, 430, 463)

37. The showing of the lunchtime movies immediately stopped after an investigation by Human Resources ("HR") personnel of Complainant's complaint. Artis was given a written warning for having allowed the movies to be shown. (Tr. 201, 303, 313, 364, 369, 378, 463, 481)

July, 2010--Complainant Commences a Leave of Absence

38. On July 15, 2010, Complainant commenced a leave of absence pursuant to Respondent's Family and Medical Leave policy for what she described as a "nervous breakdown." Complainant waited until August, 2010 to see a physician. Complainant was neither hospitalized nor medicated at this time. (Respondent's Exh. 60; Tr. 69-70, 202-03, 206-07, 324, 431)

August, 2010--Complainant Files Her First Division Complaint

39. On August 13, 2010 Complainant filed her first Division complaint under case number 10143736 alleging unlawful discrimination based on being exposed to a hostile work environment and retaliation. (ALJ Exh. 1)

40. In or about September 17, 2010, Complainant's application for short term disability benefits due to depression was denied by Respondents' insurance carrier, Liberty Mutual. This determination was reaffirmed two months later. (Respondents Exhs. 39, 41; Tr. 108, 205, 214, 510)

41. I find that Liberty Mutual's denial of Complainant's application for short term disability benefits was made independent of Respondent. (Tr. 313, 430-31, 510)

Fall, 2010--Complainant Returns From Her Leave of Absence

42. December 3, 2010, Complainant returned to the Soho branch after her leave of

absence. Complainant was still on a PIP when she returned to work. (Respondent's Exh. 40; Tr. 71, 80, 202, 207, 317)

43. Contrary to Complainant's testimony, the clientele at the Soho branch were affluent insofar as there were many corporate officers who had accounts at that branch. (Tr. 122-23, 514)

44. On December 8, 2010, a review of the Soho branch accounts portfolio led Artis to transfer 67 clients from Complainant to a coworker to remedy an imbalance between the two. As a result, Complainant, who had started with 135 more clients than her coworker, now had approximately the same number of accounts as he had. (Respondent's Exh. 42; Tr. 216-18, 286-87, 294-95, 412-13, 416-17, 468)

45. There is no proof in the record that this account allocation was retaliatory. (Tr. 218)

46. December 15, 2010, Complainant sent an e-mail to Artis complaining about the fact that some of her personal desk items were missing after having been packed away during her leave. (Respondent's Exh. 44; Tr. 114, 211-12, 214, 384, 432-34, 474)

47. After an investigation, Respondent offered Complainant a $250 gift card to cover the cost of the missing items. Complainant refused this offer. (Tr. 212, 317, 335, 434)

48. Complainant also complained about finding dog biscuits in her desk upon her return. The Soho branch was a "dog friendly" branch in which clients would bring their dogs in with them where they would be fed dog treats by branch personnel. (Tr. 210, 255, 266, 288-89, 318-19, 336, 383, 435, 470-71)

49. On December 16, 2010, Complainant sent an e-mail to Artis about not having authorized access to Respondent's proprietary Cross Sell ("CS") program. CS, which Complainant did not use while she was out on leave, becomes inactive after an employee does not use it for 90 days. CS was eventually reinstalled upon Complainant's return. Despite not

having access to CS for approximately two to three weeks from the time of her return, Complainant was still able to make client calls, achieve sales and have access to her client book. (Complainant's Exh. 8; Tr. 76-77, 100-04, 115, 215, 305, 437, 439-40, 484)

50. Respondent did not count Complainant's December, 2010 production numbers against her as this was considered a "ramp up" month. At this time Complainant was still able to open new accounts, and Artis also allowed her to have a preference in selecting from Respondent's portfolio of clients. (Tr. 208, 265, 288, 306, 381, 436-38)

51. On January 7, 2011, Complainant was the subject of a year end review. Complainant was given a rating of "Not Rated. New Hire (Too Soon)." This rating, in which Complainant was not held accountable for her performance, was due to her 2010 leave of absence. (Respondent's Exh. 46; Tr. 219, 407, 441-42)

52. Complainant was still on a PIP in 2011. (Tr. 233)

53. In January, 2011, Complainant failed to meet her goals in seven out of eight categories. (T. 234)

2011--Complainant's Work Performance Issues Continue

54. On January, 2011, Complainant was the subject of a sixth Coaching Plan by Artis. Artis credibly testified that at this time Complainant's performance was still "inconsistent." (Respondent's Exh. 45; Tr. 82, 220, 442)

55. On January 26, 2011, Complainant received an e-mail from Artis that explained why new accounts were divided up among the branch's PRMs. The e-mail noted that Complainant only got two of the ten new accounts because she had been repeatedly out of the office and unavailable. (Respondent's Exh. 47; Tr. 221, 443)

56. On January 28, 2011 Complainant, after having told Artis that she was pregnant, sent an

e-mail message inquiring about pregnancy disability leave and working remotely. (Complainant's Exh. 6; Tr. 100-04, 116-17, 221, 443-44)

57. At this time Complainant did not make a formal reasonable accommodation request. (Tr. 222)

58. In February 2011, Complainant was the subject of a seventh Coaching Plan by Artis. (Respondent's Exh. 49; Tr. 82, 222)

February, 2011--Complainant Makes an Informal Reasonable Accommodation Request

59. On February 1, 2011 Complainant sent an e-mail to Hutter asking that she be allowed to report to one of Respondent's branches nearer to her home during inclement weather. (Respondent's Exh. 50)

60. Hutter replied to Complainant that same day that he would attempt to assist her. (Respondent's Exh. 50; Tr. 227)

61. On February 18, 2011, Gallato sent an e-mail to Complainant noting, among other things, her "lack of insurance production" which needed to be addressed immediately. (Respondent's Exh. 52; Tr. 223)

62. On February 22, 2011, a complaint was made against Complainant by Respondent's Vice President of Premier Markets which alleged that she failed to interact with guests at a prearranged client event. (Respondent's Exh. 53; Tr. 446)

February, 2011--Complainant Makes Her First Formal Reasonable Accommodation Request

63. On February 22, 2011, Complainant made a written request for accommodation to allow her to work at a branch closer to her home due to her pregnancy. (Respondent's Exhs. 54, 55; Tr. 225, 230-31, 235)

64. On March 2, 2011, Complainant's February 22 reasonable accommodation request was granted to the extent that it allowed her to work at a branch closer to her home during inclement weather or when she had a doctor's appointment. (Respondent's Exhs. 56, 60, 61; Tr. 227-28, 232)

March, 2011--Complainant is Threatened with Potential Employment Termination

65. On March 3, 2011, Complainant was the subject of a second CAF which constituted a written warning over performance issues. The form stated "Should she continue to fail to meet ...expectations and otherwise fully meet the responsibilities of a Sr. Premier Relationship Manager; management will discuss with Lourdes her overall ability to be successful in this role, which may result in further disciplinary action up to and including termination." (Respondent's Exh. 57; Tr. 82, 233, 445)

March, 2011--Complainant Makes Her Second Formal Reasonable Accommodation Request

66. On March 15, 2011, Complainant requested that she be allowed to work permanently at a branch closer to her home on Long Island. (Respondent's Exh. 60; Tr. 235, 237; 324)

67. On March 21, 2011, an investigation by Respondent was concluded concerning various complaints by Complainant concerning Respondent not giving her credit for her work, as well as her reasonable accommodation request that she be allowed to work from Long Island. (Respondent's Exh. 60; Tr. 82, 320-24, 375)

68. The result of the investigation was that Complainant's work performance was "inconsistent"; that management decided on its own to offer her the $250 gift card despite not being liable for any loss; and that any credit not given to her for bank business, such as referrals or mortgages, was because the business had not yet "closed" making it premature for it to be counted in her favor. Respondent also decided that Complainant could not be allowed to work

from Long Island as her PRM position was a Manhattan-based, "customer-facing role" which required her to interact with the branch's walk-in clients. (Respondent's Exh. 60; Tr. 323-24, 373, 376-77, 385, 406, 448, 459, 496-97, 511)

April, 2011--Complainant Commences Maternity Leave

69. From April to August, 2011, Complainant was out of work on maternity leave. (Tr. 241, 326, 446)

August, 2011--Complainant Commences Work at Respondent's 8th Ave. New York City Branch

70. Complainant, upon her return from maternity leave, was sent to Respondent's 8th Ave. branch after having requested a transfer. (Tr. 241-42, 307, 326, 366)

71. Immediately upon going to the 8th Ave. branch Complainant expressed to both Hutter and her new manager, Mehruddin Jan, that she would not be able to work at this branch due to childcare and commuting concerns. (Respondent's Exhs. 67, 68; Tr. 244-45, 522)

72. Hutter immediately responded to Complainant by pointing out that by staying out 12 weeks she had reached the upper limit of Respondent's maternity policy, and that she would be allowed to post for other positions despite not normally being allowed to do so because of her previous "4"rating. (Tr. 247-48, 328)

73. Contrary to Complainant's testimony, I credit Jan's testimony that the 8th Ave. branch had affluent clients. (Tr. 514, 580, 587-88, 624)

74. I do not credit Complainant's testimony that she took the 8th Ave. branch from the worst performing branch to first or second best performing branch. Jan credibly testified that the branch was not in last place, and that Complainant did not contribute much towards the progress that the branch subsequently made. (Tr. 527-28)

August, 2011--Complainant Makes Her Third Formal Reasonable Accommodation Request

75. On August 3, 2011, Complainant inquired if she could have a room in which to express milk, as neither the branch bathroom nor the automatic teller machine room was acceptable. (Respondent's Exh. 68; Tr. 97, 105, 119-21, 247-48, 588)

76. Complainant was given a room in a nearby branch in which to express milk. The nearby branch was approximately an eight minute walk from Complainant's branch. (Complainant's Exh. 7; Respondent's Exh. 69; Tr. 100-04, 249, 328-30, 379, 530-32)

77. I find that all of Complainant's pregnancy-related reasonable accommodation requests were granted by Respondent. (Tr. 320)

2011-12--Complainant's Worsening Performance and Time & Attendance Issues

78. On August 4, 2011, Jan noted that Complainant sent him a text message informing that she would not be coming to work that day. Respondent's superiors noted that Complainant was likely to run out of her yearly allotment of 23 personal days. (Respondent's Exhs. 70, 71; Tr. 535-36, 591-92)

79. On August 22, 2011, Jan noted that Complainant was out on August 19. (Respondent's Exh. 72; Tr. 537)

80. Jan did not count Complainant's production during the month of August against her given that she was new at the branch and had to undergo mandatory training. (Tr. 527, 529-30)

81. On September 10, 2011, Complainant was warned, via e-mail by Jan, that her child care issues did not excuse her from her responsibility to attend to Respondent's goals. (Respondent's Exh. 73; Tr. 538)

82. On September 12, 2001, Jan noted that Complainant was down to three of her yearly allotment of 23 personal days. (Respondent's Exh. 74; Tr. 539, 566)

83. On September 19, 2001, Jan noted that Complainant was down to two of her yearly allotment of 23 personal days. (Respondent's Exh. 75; Tr. 541)

84. On September 30, 2011, Jan noted that Complainant informed him that she would be out for the week of October 3. Jan further noted that, because Complainant would have exhausted her yearly allotment of 23 days, any future days off will be unpaid. (Respondent's Exhs. 76, 77, 78, 79, 81; Tr. 253, 331, 542-47, 576)

85. During the month of October Complainant was out for several days and, as a result, her pay was adjusted. (Respondent's Exhs. 78, 79, 80; Tr. 542-47)

86. On November 1, 2011, Complainant was the subject of a third CAF which was an initial warning for a "serious policy violation" for her having used Respondent's internal bank systems to view her personal bank account on more than one occasion. An investigation by Respondent s HR personnel was undertaken. Although Respondent terminated the employment of other employees from similar violations, the investigation resulted only in Complainant being counseled. (Respondent's Exhs. 81, 82, 83; Tr. 82, 253, 256, 332-33, 334, 336, 381)

87. In November, 2011, Complainant claimed that she was not given credit in two instances when her clients sought mortgages from Respondent. However, Jan credibly testified that this was rectified. (Complainant's Exhs. 19, 20; Tr. 500-501, 503, 616-19)

88. On November 29, 2011, Jan noted in an e-mail that Complainant would not be at work and that, as a result, her pay would have to be adjusted. (Respondent's Exh. 86; Tr. 553)

89. December 2, 2011, Jan noted in an e-mail that Complainant would not be in and that, as a result, her pay would have to be adjusted. Jan further noted that "This is her third absence this week." (Respondent's Exh. 87, 88; Tr. 554, 561)

90. On December 15, 2011, Jan noted in an e-mail that Complainant had called and

informed that she would be in at 1:00 p.m. at the latest but that "So far, she is not here." (Respondent's Exh. 90; Tr. 556)

91. On December 16, 2011, Jan noted in an e-mail to Respondent's HR personnel that Complainant's attendance continued to be "very very erratic." Jan further stated, "Her erratic attendance places a huge and continuing burden on the operations of the branch and it would be unfair to the entire team if she isn't held accountable." (Respondent's Exh. 91; Tr. 337, 533, 556, 561)

92. On December 20, 2011, Complainant was the subject of a fourth CAF which was a final written warning for her having continued to "perform at an unacceptable level." The CAF noted that Complainant had achieved her sales and activity goals for only one of the previous ten months. This was so even after taking into account her maternity leave, and not including the month of August against her. (Respondent's Exh. 92; Tr. 82, 257-58, 557)

93. At this time Complainant did not make a reasonable accommodation request for injury or illness. (Tr. 564)

94. On December 21, 2011, Jan noted in an e-mail that Complainant she would be out and that her pay would have to be adjusted. (Respondent's Exh. 93; Tr. 543, 559)

95. On December 23, 2011, Jan noted in an e-mail that Complainant would be out and that "This is her second absence this week." (Respondent's Exh. 94; Tr. 559)

96. On December 28, 2011, Jan noted in an e-mail to Respondent's HR personnel that Complainant "continues to come in late…" (Respondent's Exh. 95; 560, 612)

97. On November 15, 2011, Complainant received her year end review for 2011. Complainant was given a "4-Inconsistent" rating. Complainant's time and attendance problems affected her rating. (Respondent's Exh. 96; Tr. 257, 407, 550)

98. Complainant conceded that she had no proof that her "4" rating was because she was Hispanic or female. (Tr. 257)

99. On January 19, 2012, Jan received an e-mail from a fellow Vice-President, Financial Advisor who wrote of Complainant "...I would like to express my concern that we seem to have a no show PRM in 8th Avenue and 53rd Street...her absence has nearly jeopardized the successful efforts of our new and VERY valuable partner..." (Respondent's Exh. 102; Tr. 563)

100. On January 19, 2012, Jan noted that Complainant "...has now been out for 12 working days. I seriously doubt that she will be able to meet her goals for January." (Respondent's Exh. 101; Tr. 564)

101. On January 24, 2012, Complainant sent Jan an e-mail informing that she would be out that day. That same day, Jan sent an e-mail to Respondent's HR personnel noting that "...she's burned through *(sic)* 14 [personal] days so far...she has worked only 1 day (yesterday) in the entire month of January and will certainly miss her goals again." (Respondents' Exhs. 103, 104; Tr. 565, 567)

102. On January 25 and 26, 2012, Complainant sent Jan e-mails informing that she would be out each day. (Respondent's Exhs. 105, 106; Tr. 568-69)

103. On January 26, 2012, Jan sent an e-mail to Complainant concerning her written response to her final written warning, and stated, "In terms of the e-mail you sent me, I want to be very clear in telling you that I was in no way encouraging you to resign nor did I say it would be better if you resigned." (Respondent's Exh. 98; Tr. 570-71)

104. On January 27, 2012, Jan noted in an e-mail that Complainant would be out that day, and that "Today is the 17th day that she has been out of the office." (Respondent's Exh. 107; Tr. 572)

105. On February 1, 2012, Jan noted in an e-mail that Complainant returned to work that day and that "So far, she has used up 19 of her 23 [personal] days for the entire year." (Respondent's Exh. 108; Tr. 573)

106. On February 13, 2012, Jan noted in an e-mail that Complainant would not be in that day, and that "This would be the 21st [personal] day that Lourdes has taken this year. She has only 2 more [personal] days left for the entire year." (Respondent's Exh. 110; Tr. 575)

107. On February 17, 2012, Jan sent an e-mail to Respondent's HR personnel noting that Complainant's personal days for the entire year ran out the previous day. (Respondent's Exh. 111; Tr. 252, 337, 576)

March, 2012--Complainant's Employment is Terminated

108. On March 3, 2012, Complainant's employment was terminated for unsatisfactory performance. It was noted on the termination form that Complainant failed to meet her performance goals for the months of December, 2011, and January and February 2012. (Respondent's Exh. 114; Tr. 97-98, 260, 263, 272, 309, 338, 340, 463, 523, 525, 593-94)

109. Specifically, Complainant, in the month before her employment termination, failed to meet her goals in all of the following six categories:

Category	Goal	Actual
Investment Sales Points	13, 429	0
Insurance Sales Points	1,990	0
Mortgage Sales Points	3,066	0
Client Contacts	240	14
Contacts	280	190
Appointments Kept	60	30

(Respondent's Exh. 114; Tr. 626-28)

110. Complainant testified "I don't know" when asked if her employment was terminated because she was Hispanic or a female. (Tr. 262, 341)

111. Complainant was replaced by an Hispanic. (Tr. 578)

January, 2013--Complainant Files Her Second Division Complaint

112. On January 10, 2013 Complainant filed her second Division complaint under case number 10159501 alleging unlawful discrimination based on national origin, gender, sexual harassment, disability/perceived disability and retaliation. (ALJ Exh. 4)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of an individual's...national origin...sex ,[or] disability...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a). The Human Rights Law also makes it 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 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 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.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 make out a prima facie case of retaliation, a complainant must show: 1) she engaged in protected activity; 2) the respondent was aware that she engaged in protected activity; 3) an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action. *Pace,* 257 A.D.2d at 104.

In order to establish a prima facie case of employment discrimination based on protected class membership, a 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,* 3 N.Y.3d 295.

In order to make out a prima facie case on the basis of disability discrimination based upon an employer's failure to provide a reasonable accommodation, a complainant must show that: 1) the employee was an individual who had a "disability" within the meaning of the Human Rights Law; 2) the employer had notice of the disability; 3) with reasonable accommodation the employee could perform the essential functions of the position; and 4) the employer refused to make such accommodations. *Pimental v. Citibank, N.A.,* 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dept. 2006).

COMPLAINANT'S FIRST COMPLAINT

Hostile Work Environment

Complainant alleges that Camberari's conduct towards her while she worked at the 2 Park Ave. branch, as well as her exposure to the lunchtime movies at the Soho branch, each constitute an actionable hostile work environment.

As to the first allegation, the record establishes that Complainant made out a prima facie case of hostile work environment on the basis of Camberari's workplace conduct while he was her superior. Here, Camberari engaged in the outright harassment of Complainant when he wrongfully withheld her pay, and when he threatened to have her employment terminated for comments that she made during Respondent's investigation of him. The record also showed that Camberari also engaged in such boorish behavior that he changed the nature of Complainant's workplace environment. Complainant stated in her contemporaneous e-mail that Camberari's conduct at work made her unable to sleep, that she was no longer able to work under him, that he had been profane and aggressive towards her and her coworkers since she started working for Respondent, that he referred to minority coworkers as "monkeys", and that she witnessed him slap a coworker on the bottom with a pen.

However, despite Complainant having proved the creation of a hostile environment by Camberari as a matter of law, the record does not show that Respondent was itself liable for his conduct. *Matter of Totem Taxi v. New York State Division of Human Rights,* 65 N.Y.2d 300, 305, 491 N.Y.S.2d 293 (1985)(employer not held liable for an employee's discriminatory act unless the employer became a party to it by "encouraging, condoning, or approving it"); *see Matter of State Div. of Human Rights v. St. Elizabeth's Hosp.,* 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411 (1985); *Matter of Medical Express Ambulance Corp. v. Kirkland,* 79 A.D.3d 886, 913 N.Y.S.2d 296 (2010). Here, once Respondent was first made aware of Complainant's complaint regarding Camberari, it did not "encourage, condone or approve" of it. On the contrary, the record showed that Respondent acted responsibly by promptly investigating the matter, separating Camberari physically from the victim, and terminating his employment within approximately three weeks of receiving Complainant's written complaint. This allows Respondent to escape liability for any of Camberari's acts.

As to the second allegation, Complainant failed to establish a prima facie case of hostile work environment based on Artis' having allowed the lunchtime movies to be shown in the Soho branch during her tenure there. The proof shows that Complainant, rather than having subjectively viewed the lunchtime movies as abusive, was instead a participant by watching them with her coworkers. Additionally, nothing in the record suggests that the conduct in question caused Complainant to be physically threatened, suffer psychological harm or have her work environment altered. Finally, it is debatable whether the content of the movies, viewed by Complainant as an adult, would fulfill the prima facie case requirement that such conduct be seen as objectionably hostile or abusive given that these were non-pornographic, "PG-13" and "R" rated movies of various genres.

Therefore, both of these claims must be dismissed.

Retaliation

Complainant alleges that, in the time period between complaining to Gallato in January, 2010 and the August, 2010 filing of her first Division complaint, the Coaching Plans, the May, 2010 CAF, the PIP, and 2010 mid-year review constituted retaliatory acts.

The record shows that Complainant cannot establish a prima facie case. Here, Complainant did not show that she engaged in the required protected activity during the January to August, 2010 timeframe. Complainant did testify that, in January, 2010, she complained to Gallato about Artis giving her clients to another PRM. However, even assuming that this suffices to meet the first two prongs of the test, Complainant cannot show that she subsequently suffered an adverse employment action. A party alleging retaliation must show that a reasonable employee would have found the challenged action materially adverse, which in this context means that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006) (analyzing adverse employment action in Title VII retaliation claim). Here, the fact of Complainant's having been the subject of the various documents in question does not, of itself, rise to the level of being adverse employment actions for prima facie case purposes. Instead, the several Coaching Plans, the May, 2010 CAF, the PIP, and 2010 mid-year review were corrective in nature and solely intended to get Complainant to improve her workplace performance. None of these acts threatened employment termination and all of the particulars of Complainant's position, namely, job title, salary, etc., remained the same. Further, the record is devoid of any proof that a reasonable employee would have been reluctant to make or support a charge of unlawful discrimination upon also being the subject of said documents.

Therefore, this claim must be dismissed.

COMPLAINANT'S SECOND COMPLAINT

Protected Class Membership

Complainant alleges that her employment termination was a product of unlawful discrimination based on her protected class memberships, namely, having been female and of Peruvian Hispanic national origin.

Once again, Complainant cannot establish a prima facie case. While Complainant established the first three prongs of the prima facie test, she did not show that unlawful discrimination can be inferred from the circumstances of her employment termination. The record shows that Complainant's discharge was, in fact, a product of a demonstrated history of having rendered subpar work performance. The proof shows that, other than for the "3" rating which Complainant received at the beginning of her tenure at the Soho branch, she was, at best, an inconsistent performer. The record is replete with instances of time and attendance issues, multiple written warnings, and inconsistent ratings which show Complainant's employment termination to be free of the suggestion that it was a product of unlawful discrimination. This is especially true given that, in three separate instances (the December, 2010 "ramp up" period, her 2010 year end review and her August, 2011 production), Respondent did not hold Complainant's lack of production against her. Finally, Respondent's decision to replace Complainant with someone from the same protected class belies the suggestion that it was motivated to act as it did due to animus against Hispanics.

Therefore, this claim must be dismissed.

Disability/Perceived Disability

Complainant alleges that Respondent failed to reasonably accommodate her on the three

occasions when she formally requested same.

Complainant's first formal reasonable accommodation request (which, in effect, subsumed her prior informal reasonable accommodation request) asked that she be allowed to temporarily work at a branch closer her to her home due to her pregnancy. The record shows that this request was granted such that Complainant could do so during inclement weather or when she had a doctor's appointment. Nothing in the record suggests that this accommodation was unacceptable to Complainant during the time that she was pregnant. Therefore, Complainant's prima facie case fails to establish the fourth element of the test.

Complainant's second formal reasonable accommodation request was for her to be allowed to work permanently at a branch closer to her home on Long Island. The record shows that the unique nature of Complainant's position, *i.e.,* that it was a "customer-facing role" requiring her to service the walk-in customers at Respondent's branch, made it impossible for her to be permanently stationed at another branch on Long Island. In this instance, Complainant's prima facie case fails to establish the first prong of the test, that is, that she was "disabled" as that term is used in the Human Rights Law. Here, Complainant's reasonable accommodation request was not based on a disability, real or perceived. Instead, Complainant's desired an easier commute to and from a branch closer to her home as a permanent work relocation which was unrelated to the issue of her pregnancy. However, the law makes clear that an employer is under no obligation "to meet the personal preferences of...employees... Accommodations need only be 'sufficient to meet the job-related needs of the individual being accommodated.' [And] difficulties commuting to a job need not be accommodated." *Raffaele v. City of New York,* 2004 WL 1969869 (E.D.N.Y. 2004); *see also Metz v. County of Suffolk,* 4 Misc.3d 914, 782 N.Y.S.2d 552 (Sup. Ct. Suffolk Co. 2004).

Complainant's third formal reasonable accommodation request was for a lactation room in which to express milk. The record shows that Complainant was provided with a second room after the first room was found to be unacceptable. The second room was located at a nearby branch approximately eight minutes walk distance from the 8th Ave. branch. Once again, nothing in the record suggests that this accommodation was unacceptable to Complainant, and she availed herself of the room when needed. Thus, Complainant's prima facie case fails to again establish the fourth element of the test.

Therefore, this claim must be dismissed.

Retaliation

Complainant alleges that numerous workplace acts (being denied short term disability leave, her reviews and ratings, the allocation by superiors of PRM clients, the purported failure to be reasonably accommodated by a transfer to Long Island, the missing desk items, the dog treats found in her desk, not having access to CS, and her discharge) after the filing of her first Division complaint constitute unlawful retaliation.

The record shows that the protected activity cited by Complainant as the basis for the subsequent aforementioned acts was her first Division complaint. This suffices to establish the first two prongs of the prima facie test. Once again, as stated above, of the aforementioned acts, only Complainant's employment termination can be considered an adverse employment action for prima facie case purposes. However, as to the fourth prong of the test requiring temporality between the protected activity and the adverse employment action, the record shows that the nineteen month period between the filing of the first Division complaint (August, 2010) and the date of Complainant's employment termination (March, 2012) is too great to meet this requirement. *See Abram v. New York State Div. of Human Rights*, 71 A.D.3d 1471, 1475, 896

N.Y.S.2d 764, 768 (4th Dept. 2010) (temporal proximity must be "very close" in order to establish causation); *Pace,* 257 A.D.2d at 104-105 (10 months too long a period of time in which to establish temporal proximity).

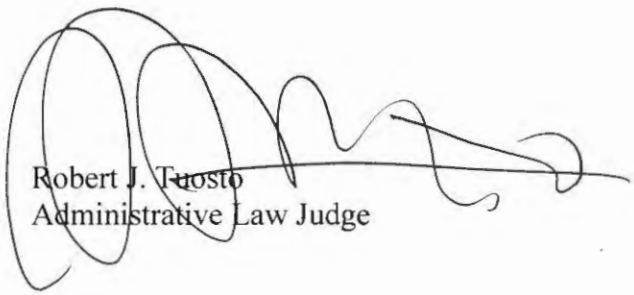
As to the fourth element of the test, showing temporal proximity is not the only means of establishing causation. *See Sorrentini v. City of New York,* 17 Misc.3d 1102(a) (N.Y. Sup. Ct. 2007). A causal connection can be shown by either directly demonstrating a retaliatory animus or by indirectly establishing temporal proximity, i.e., adverse employment action followed closely after complainant's complaint. *Morales v. Deluxe Caterers of Shelter Rock, Inc.,* DHR Case No. 10113699, *citing, Torres v. Gristede's Operating Corp.,* 628 F. Supp.2d 447, 473 (S.D.N.Y. 2006). Nevertheless, in this case, the record showed that Respondent had legitimate, non-discriminatory reasons to act as it did concerning the multiple incidents cited by Complainant as the basis for her retaliation claim. Complainant failed to demonstrate that any of these reasons were a pretext for unlawful discrimination.

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 the same hereby are, dismissed.

DATED: February 24, 2014
Bronx, New York



Robert J. Tuosto
Administrative Law Judge