

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

TINA DUFFY,

Complainant,

v.

NEW YORK CITY SAKS, LLC D/B/A SAKS 5TH  
AVENUE,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 3508155

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, 2008, 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 01 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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DIVISION OF HUMAN RIGHTS**

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**TINA DUFFY,**

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**NEW YORK CITY SAKS, LLC D/B/A SAKS  
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Respondent.

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

Case No. **3508155**

**SUMMARY**

Complainant maintained that Respondent failed to provide her with a reasonable accommodation and discharged her in violation of the Human Rights Law. Complainant failed to sustain her burden when she failed to show that Respondent's reason for her termination, that she exposed her bare chest to Respondent's managers, was a pretext for discrimination.

**PROCEEDINGS IN THE CASE**

On July 13, 2004, 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 August 22, 2007, August 23, 2007, October 9, 2007 and November 16, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by the Law Offices of John Thomas Roesch, by John T. Roesch. Respondent was represented by Lester Schwab Katz & Dwyer, LLP, by Richard Granofsky.

Complainant charged Respondent with unlawful employment discrimination based on age and disability. During the course of the hearing, Complainant withdrew her age discrimination complaint, based, in part, on the fact that the person who replaced Complainant was ten years older than Complainant. (Tr. 276-277, 539, 662-663)

The parties filed timely proposed findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Respondent employed Complainant on November 1, 2002, as a make-up artist with Cle de Peau cosmetics. (Tr. 81-82, 362; ALJ Exhibit 1)
2. Complainant was a “very good” make-up artist and made the Cle de Peau cosmetic line profitable. (Tr. 460, 573; Respondent’s Exhibit F)
3. Complainant went on disability leave from April 21, 2003 through September 8, 2003, during which she underwent several surgeries, including a mastectomy of the left breast. (Tr. 84, 86-87, 174, 530; ALJ Exhibit 1)
4. Respondent provided Complainant with half pay income during the period that she was unable to work, pursuant to its sick pay/short term disability policy. (Tr. 522, 525, 533; Respondent’s Exhibit K)

5. On December 31, 2003, Complainant started what was supposed to be a short disability leave to have reconstructive surgery, but the doctors discovered that Complainant had cancer in her right breast and, as a result, Complainant had to undergo a second mastectomy. (Tr. 88, 530; ALJ Exhibit 1)

6. In January 2004, when it became apparent that Complainant would be out on a second extended leave of absence, the vendor for Cle de Peau demanded that Respondent fill Complainant's position. (Tr. 461)

7. The vendor for Cle de Peau was putting pressure on Respondent to fill the make-up artist position because it was losing money as a result of Complainant's position remaining open. (Tr. 272-273, 461, 526, 533-534, 537; Respondent's Exhibit F)

8. It was undisputed that while Complainant was out on disability leave the Cle de Peau cosmetic line profits dropped. (Respondent's Exhibit F)

9. As a result, on January 21, 2004, Susan Ishkanian, Respondent's Assistant Store Manager, informed Complainant that Respondent had to fill the make-up artist position with Cle de Peau. (Tr. 300-302, 524-526, 529-530)

10. Ishkanian advised Complainant that when she was ready to return to work Respondent would find a suitable position for her. (Tr. 526, 531-532)

11. Annette Stark, who was ten years older than Complainant, was offered the make-up artist position with Cle de Peau. She started on February 1, 2004. (Tr. 239, 324, 541)

12. Once again Respondent approved Complainant's disability leave pursuant to its sick pay/short term disability policy. (Tr. 522, 525, 533; Respondent's Exhibit K)

13. At the end of March 2004, when Complainant was ready to return to work, Respondent offered her, and she accepted a cosmetic sales associate position with Trish McEvoy. (Tr. 303-305, 393, 414, 539-541; Complainant's Exhibit 7)

14. On June 17, 2004, Complainant and Trish McEvoy's Regional Manager and Associate Executive, Patricia Fitzsimmons, had several disagreements which resulted in Complainant walking off the sales floor. (Tr. 193-194, 299, 311-312, 543-545, 602, 618-619-623, 628-629)

15. The following day, Pamela Oliver, Respondent's Human Resources Manager and Anne Marie Santillo, Cosmetic Manager, scheduled a meeting with Complainant to discuss the complaints they received from Fitzsimmons, and to hear Complainant's side of the story. (Tr. 313-314, 471-472) It was not their intent to terminate Complainant's employment. (Tr. 313, 472)

16. During the meeting Complainant became "extremely upset and agitated" apparently believing that she was going to be terminated. (Tr. 315, 472-473) Complainant called Oliver and Santillo "mean" and "evil people." (Tr. 315)

17. Complainant then, without warning, lifted her blouse and exposed her bare chest to Oliver and Santillo. (Tr. 316; Respondent's Exhibit A)

18. Oliver was shocked and closed her eyes refusing to see Complainant's mastectomy scars. (Tr. 316, 472-473) Santillo, who was sitting next to Complainant, did not turn to look at Complainant and just stared at Oliver's shocked face. (Tr. 500).

19. Complainant then turned around and walked directly into Respondent's general manager's office, Alan Tobman. (Tr. 317)

20. Complainant walked into Tobman's office yelling "these people don't understand. I'm a sick woman." (Tr. 428) Complainant then pulled up her shirt screaming at Tobman, "Look at me. Look at me. I'm a sick woman. Look at me." (Tr. 428)

21. Tobman saw the mastectomy scars on Complainant's chest because Complainant was not wearing a bra. (Tr. 435-436)

22. Tobman was shocked and upset by Complainant's actions. (Tr. 317, 429). He recommended that Complainant's employment be terminated immediately. (Tr. 318-319, 429-430, 440)

23. Complainant's employment was terminated on June 21, 2004, for violating company policy. (Tr. 227, 549-550; Respondent's Exhibit G) Specifically, violating the section that states that an associate must not be insubordinate, "... using abusive, disrespectful, or threatening language, conduct or gestures toward a supervisor or member of management." (Tr. 551, 587; Respondent's Exhibit H)

24. Complainant's testimony that she had absolutely no idea why she was terminated was not credible. (Tr. 192, 203, 224, 245)

25. According to Complainant she could not recall what happened during the meeting with Oliver and Santillo, but denied that she screamed at them or that she lifted her blouse to expose her bare breasts. (Tr. 224, 249). However, in Complainant's sworn submission to the Division she states that she did not expose her breasts, because "[s]he in fact, has no breast to expose. She did expose her scars on her chest ...." (Respondent's Exhibit A)

26. As part of Complainant's unlawful discrimination complaint, she also alleged that Respondent created a hostile work environment by not accommodating her medical appointments, and by making her lift items that were greater than ten pounds. (ALJ Exhibit 1)

27. The record is clear that Respondent accommodated Complainant's medical appointments. (Tr. 89, 278, 282, 292, 308-309, 462-464)

28. The record is also clear that Complainant was not required to lift anything over ten pounds. (Tr. 288, 465-467, 493, 495, 497, 569)

### OPINION AND DECISION

The Human Rights Law prohibits an employer from discriminating against an employee because of a disability. *Matter of McEniry v. Landi*, 84 N.Y.2d 554, 558, 644 N.E.2d 1019, 620 N.Y.S.2d 328 (1994), *citing* Human Rights Law § 296 (1). The statute defines the term "disability" as a "physical, medical or mental impairments that 'do not prevent the complainant from performing in a reasonable manner the activities involved in the job.'" *Pembroke v. New York State Office of Court Administration*, 306 A.D.2d 185; 761 N.Y.S.2d 214, 215 (1<sup>st</sup> Dept. 2003), *citing* Human Rights Law §292 (21).

The burden is on Complainant to establish that she suffered from a disability, and that Respondent terminated her employment because of her disability. Complainant sustained her prima facie burden. Complainant suffered from a covered disability, breast cancer, and her employment was terminated by Respondent. However, a careful review of the record supports Respondent's position that it had a legitimate and justifiable reason for terminating Complainant's employment; to wit: she exposed her "breasts" to members of management. Respondent's witnesses credibly testified that Complainant, without provocation or warning, lifted her blouse and exposed her mastectomy scars while screaming at them that they were "mean" and "evil people." Respondent's witnesses credibly testified that Complainant's actions shocked and upset them, and they feared that Complainant would engage in the same behavior on the sales floor. Complainant did not show that her actions were justified, or that

Respondent's decision to terminate her for such behavior was unworthy of belief. On the contrary, it was Complainant's explanations that were incredible. First, Complainant denied that she exposed herself. Then, Complainant tried to explain that she did not expose her "breast" because she does not have breasts to expose. But, the overwhelming weight of the evidence supports Respondent's position that Complainant exposed her "breasts" to her managers without justification and therefore Respondent had good cause to terminate her employment. Further, and more importantly, Complainant did not argue that her actions did not warrant termination, but rather that because Respondent's managers were "shocked" and "closed their eyes" and did not "actually" see Complainant's "breasts", Complainant could not have been terminated for exposing her "breasts." Complainant's argument is absurd, and without merit.

Complainant also argued that Respondent discriminated against her by refusing to accommodate her disability. The record supports a contrary finding. Respondent accommodated Complainant's disability. For instance, Respondent granted Complainant two extended leave of absence. During the first disability leave, which lasted over five months, Respondent held Complainant's position open while she recovered, although the cosmetic line's profits were suffering. Respondent then granted Complainant a second disability leave, but when it turned into another extended leave, Respondent explained to Complainant that it could no longer keep her position open and available. But, Complainant's employment was not terminated, she continued on paid medical leave until she was ready to return to work. Respondent did not violate the Human Rights Law when it filled Complainant's position. See, *Scott v. Memorial Sloan-Kettering Cancer Center*, 190 F.Supp.2d 590 (S.D.N.Y. 2002) (wherein the court held that the law does not require that an employer hold an injured employee's position open indefinitely while the employee attempts to recover). Moreover, when Complainant recovered

and was able to return to work, Respondent offered and Complainant accepted the position that was available at the time.

Complainant further alleged that her medical appointments and her lifting restrictions were not accommodated by Respondent. Under the Human Rights Law the employer has a statutory duty to “provide reasonable accommodations to the known disabilities of an employee [...] in connection with a job or occupation sought or held.” *Executive Law §296 (3)(a)*. A “reasonable accommodation” is defined as actions taken by an employer which “permit an employee [...] with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held [...] provided, however, that such actions do not impose an undue hardship on the business.” *Executive Law §292 (21-e)*.

The burden is on Complainant to establish that she proposed a reasonable accommodation and that Respondent refused to make such accommodation. *Pembroke v. New York State Office of Court Administration*, 306 A.D. at 185, citing, *Moritz v. Frontier Airlines, Inc.*, 147 F. 3d 784, 787 (8<sup>th</sup> Cir. 1998). Complainant failed to meet her burden.

Complainant argued that she was told by Respondent’s managers that she had to make her medical appointments on her own time or on her days off. This, Complainant felt, was wrong. It was Complainant’s feeling that Respondent should pay her while she attended to her medical needs. Respondent, however, accommodated Complainant’s medical appointments by allowing Complainant to adjust her work schedule; she was allowed to arrive earlier or later depending on the time of the appointment.

Complainant also argued that she had a lifting restriction which was not acknowledged by Respondent. The credible testimony showed that Complainant did not make an accommodation request, but even if she had, Complainant was not required to lift heavy items. Therefore, an accommodation was not required or needed by Complainant.

**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: March 31, 2008  
Bronx, New York



Lilliana Estrella-Castillo  
Administrative Law Judge