NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

GWENDOLYN FISHER,

Complainant,

v.

CHEMUNG COUNTY, DEPARTMENT OF SOCIAL SERVICES,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10109726

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on December 5, 2007, 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 KUMIKI GIBSON, 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, this 27th day of December, 2007.

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KUMIKI GIBSON
COMMISSIONER

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GWENDOLYN FISHER,
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CHEMUNG COUNTY, DEPARTMENT OF SOCIAL SERVICES,
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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10109726**

SUMMARY

Complainant, an African-American female, alleged that she was unlawfully discriminated against on the bases of sex (pregnancy) and race when she was treated differently by Respondent during the course of her employment, as well as when her employment was terminated. However, the case must be dismissed as Complainant failed to prove her claims.

PROCEEDINGS IN THE CASE

On January 17, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with an unlawful discriminatory practice 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held in Binghamton, New York on October 3-4, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Caroline J. Downey, Genral Counsel, by Christopher R. Knauth, Esq. Respondent was represented by Weeden A. Wetmore, Esq. of the law firm of Davidson & O'Mara, Elmira, New York.

Permission to file post-hearing briefs was granted. Respondent filed a post-hearing brief.

FINDINGS OF FACT

1. Complainant, an African-American female, alleged that she experienced differential treatment based on her sex (pregnancy) and race while employed as a caseworker by Respondent. Complainant also alleged that unlawful discrimination was the reason Respondent terminated her employment prior to the end of her probationary period. (ALJ Exh. 2)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 3)

3. Complainant had two years of previous casework experience prior to her employment with Respondent. (Tr. 89)

4. Respondent conducted "minority outreach" with over 200 hundred organizations and individuals in order to have minorities consider employment with Chemung County by encouraging them to take the civil service examination. (Respondent's Exhibit 2; Tr. 243-47)

Complainant Begins Employment with Respondent

5. In November, 2004, Complainant took the civil service examination. Complainant was offered employment by Respondent after being interviewed the following month. Complainant

credibly testified that race played no role in either the interviewing or hiring processes. (Tr. 171-73)

6. In January, 2005, Complainant began employment with Respondent as a caseworker in its foster care unit ("FCU"). Complainant's employment was conditioned on the successful completion of a one year probationary period. (Tr. 82, 83, 282)

7. Complainant credibly testified that race played no role in her assignment to the FCU. (Tr. 174)

8. Complainant's immediate supervisor in the FCU was Stephanie Van Atta. (Tr. 84, 204, 382)

9. Van Atta supervised Complainant on a regular basis. (Tr. 176, 177, 227, 383, 384, 385, 386)

10. Complainant was the only person on probation in the FCU as the five other newly-hired caseworkers were assigned to another unit. There were no African-Americans in the FCU other than Complainant. (Tr. 155, 156, 175-76, 359-60, 450)

11. In February, 2005 Complainant began training which alternated with her work schedule and lasted for approximately six months. In February or March, 2005, Complainant also received her own caseload of approximately four to six cases. Complainant was the primary case worker on her cases while other new caseworkers were the secondary caseworkers on their cases, i.e., they "shadowed" or were mentored by other primary caseworkers. (Respondent's Exh. 1; Tr. 86-88, 178, 179, 180, 184, 185-86, 196-98, 201-03, 226, 250, 385, 388)

12. Complainant credibly testified that race played no role in her being assigned cases when other new caseworkers either did not have their own caseload or were acting as secondary caseworkers. (Tr. 194)

Comments in the Workplace

13. While assigned to the FCU, Complainant overheard another caseworker who was referring to a Caucasian female client when he said, "If she stopped hanging out with those black guys then she wouldn't have all the problems she's having." (Tr. 205-09, 395-397)

14. Also while assigned to the FCU, Complainant overheard part of a conversation in which Van Atta was referring to children who were clients, "Those kids are white. They don't—they're not going to feel comfortable living in a black neighborhood. They don't want to live in a black neighborhood." (Tr. 210, 398-402)

15. Complainant, in light of these two events, decided to complain if another similar event occurred. (Tr. 211)

16. Subsequently, while servicing a foster family and seeing that a foster child was being shy, the foster mother said to Complainant, "Oh. She's afraid of you because you're black." (Tr. 212, 392, 485)

17. Complainant claimed that Van Atta made a comment to her that, "Black people can only have black hair and black eyes. They can't have anything else unless they color it and I should know." Van Atta credibly denied making this statement. (Tr. 31, 214, 404-05, 404-05, 453-54)

18. In approximately April, 2005, Complainant had a meeting with Van Atta to address the previous comments in the workplace. Van Atta agreed to speak to the head of the Adoption Unit ("AU") about the comment by the foster mother, and suggested that Complainant had not heard nor understood the context of the conversation concerning the children who were clients. As to the comments made by the caseworker, Complainant never identified the caseworker by name which prevented Van Atta from addressing the problem. (Tr. 213, 217-21, 392-94, 395-97, 398-402, 452-53)

Complainant's Evaluations for the Period of January to September, 2005

19. Complainant received two evaluations by Van Atta. The first, for the period January 10 to May 9, 2005, rated her as "successfully meets all" in each of five performance criteria; Van Atta commented that Complainant was "on target" given the length of time in her position. The second evaluation, for the period May to September 16, 2005, gave her a similar rating; Van Atta commented that Complainant continued to be "on target" for the length of time she had been working for Respondent. (Complainant's Exhs. 1, 2, 3; Tr. 407-10)

20. Complainant did not receive an evaluation for the time period September, 2005 to January, 2006. (Tr. 107)

21. Complainant credibly testified that race played no role in Van Atta's written evaluations of her. (Tr. 234)

22. Complainant's eventual termination, despite her satisfactory evaluations, was based on the fact that her first six months of employment with Respondent was spent in training and, consequently, handling a smaller caseload. (Tr. 282-83)

Complainant Transfers from the FCU

23. In September, 2005, Complainant accepted an offer to transfer from the FCU to the AU. (Tr. 90-92, 195-96, 230-32, 405-06, 411)

24. Complainant credibly testified that race played no part in her transfer to the AU. (Tr. 232-33)

25. Complainant's immediate supervisor in the AU was Kelly Lowman. (Tr. 92, 460, 465)

26. Complainant was the only person on probation in the AU. There were no African-Americans in the AU other than Complainant. (Tr. 155, 359-60)

27. In mid-September, 2005, both Complainant and Lowman were expecting children. Lowman had several cordial conversations with Complainant's about her pregnancy. (Tr. 102, 326, 479)

28. Complainant, despite her transfer, was still responsible for her FCU caseload as well as new AU cases. At this time Complainant answered to both Van Atta and Lowman. (Tr. 93-94, 106, 292)

29. Complainant was given "protected time" in order to help her close out her FCU caseload. Specifically, Complainant would be allowed time during her normal workday to concentrate solely on her nine outstanding FCU cases. (Tr. 291-93, 415-17)

30. Van Atta was subsequently made aware that Complainant's FCU caseload was still not completed despite having allowed her protected time for this purpose. Van Atta realized that Complainant was "very far behind" on her FCU caseload; Lowman thought she was "significantly further behind" than she had told them. Van Atta would not have evaluated Complainant as she did had she known at the time of her problems with the FCU caseload. (Tr. 294, 411-13, 414, 454, 468, 493, 494)

31. In October, 2005, Lowman and Van Atta met with Complainant on two occasions to create a plan for her to get current on her FCU caseload. As a result, Complainant was given two and one half days of protected time in late October and early November to accomplish this. At this time Complainant had been given a below-average caseload of 11 AU cases. (Tr. 469-70, 471, 472, 486)

32. On November 10, 2005, Van Atta and Lowman met with Complainant. The three

attempted to create a new plan to allow Complainant a greater amount of time to work solely on her FCU caseload; the remainder of the time would be spent on Complainant's AU cases. (Tr. 295-97, 354, 418-22, 437)

33. On November 14, 2005, Complainant was sent a memorandum entitled 'Corrective Action Plan' from Van Atta and Lowman memorializing their meeting of November 10, 2005. The memo outlined three areas of concern as to Complainant's FCU caseload, and allowed her protected time of two hours per work day and one day per week. (Respondent's Exh. 9; Tr. 117, 475, 476)

34. On December 5, 2005, Complainant was sent another memorandum entitled 'Work Plan' from Van Atta and Lowman intended to follow-up on the meeting of November 10, 2005. In the memo Complainant was informed of five areas of concern concerning her FCU caseload, and was also allowed to continue her protected time of two hours per work day and one day per week. The protected time Complainant was allowed continued until the day her employment was terminated. Van Atta credibly testified that this memo, which she described as "serious", would not have been necessary had Complainant been current on her FCU caseload. (Respondent's Exh. 3; Tr. 301-11, 422-23, 424, 442, 443, 477, 501)

35. In December, 2005, Complainant was given further caseworker training that she did not receive at the time of her initial hiring. (Tr. 203, 323)

36. Complainant credibly testified that race played no part in the decision to have her take the training in December, 2005. (Tr. 362, 553)

37. On January 3, 2006, Complainant was sent an e-mail message from supervisor Kimberly Ripley informing that her FCU caseload still had outstanding paperwork which was due. Ripley, who was involved in the original decision to hire Complainant, supervised the AU while

Lowman was out on maternity leave and credibly testified that Complainant received an extremely high level of supervision. Before leaving in mid-December, 2005, Lowman evaluated Complainant as unable to deal with her FCU caseload as she was behind in "every aspect" of her casework; Lowman had "concerns" about Complainant's ability to meet the policies, procedures and regulations associated with her FCU caseload. (Respondent's Exhs. 8, 10; Tr. 104, 332-33, 480-81, 484, 495, 501, 518, 519, 522, 524-26, 527, 528, 544)

38. By this time all three of Complainant's supervisors expressed reservations about her work. (Tr. 335)

39. Just prior to the termination of Complainant's employment, Van Atta, Ripley, Lowman and Respondent's Director of Services discussed whether she should be allowed to complete her probationary period. The group decided that Complainant was not going to be able to do the job given both her problems with the FCU caseload for the three months after she had transferred to the AU, and the realization that her caseload would eventually increase. Neither Complainant's pregnancy nor race played a part in this decision. (Tr. 259, 261, 425-28, 445, 489, 509, 534, 535, 542-44)

Complainant's Employment is Terminated

40. January 6, 2006, Complainant's employment was terminated. Complainant responded by acknowledging that the paperwork aspect of the job was overwhelming, and that she was relieved to be no longer working for Respondent. (Tr. 48, 108, 425, 429, 430, 457, 536, 545)

OPINION AND DECISION

The Human Rights Law states, in pertinent part, that it shall be an unlawful

discriminatory practice, "For an employer…, because of the…race…" or "…sex …of any individual…to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296 1.(a).

In order to establish a prima facie case of unlawful discrimination based on pregnancy, a complainant must show: 1) membership in a protected class; 2) discharge from a position for which he or she was qualified; 3) and that the discharge occurred under circumstances giving rise to an inference of discrimination. *Mittl v. N.Y. State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

In order to establish a prima facie case of unlawful discrimination based upon race, a complainant must show: 1) membership in a protected class; 2) an adverse employment action; and 3) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Hughes v. U.P.S,* 4 Misc. 1023A, 798 N.Y.S.2d 344 (2004).

In order to establish a prima facie case of a hostile environment based on race, a complainant must show: 1) membership in a protected class; 2) the conduct or words upon which the claim is based are unwelcome; 3) the conduct or words were prompted solely because of a complainant's protected status; 4) the conduct or words created a hostile work environment which affected a term or condition of employment; and 5) respondent is liable for the conduct. *Quinn v. JPMorgan Chase & Co.,* 12 Misc.3d 1160A, 819 N.Y.S.2d 212 (2006). The conduct complained of must be both objectively and subjectively offensive. Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile work environment; in order to be actionable, the offensive conduct must be pervasive. *Id.*

A respondent, should a complainant establish a prima facie case, has the burden of producing a legitimate, nondiscriminatory reason for its employment action. If successful,

the burden shifts back to complainant to show that the proffered reason is a pretext for unlawful discrimination. *McDonnell-Douglas Corp v. Green,* 411 U.S. 792 (1973).

Note that a complainant's burden in establishing a prima facie case has been found to be 'de minmis'. *Schwaller v. Squire, Sanders & Dempsey,* 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dep't., 1998).

Complainant establishes a prima facie case based on pregnancy insofar as she was a member of a protected class, was discharged, and her termination occurred not soon after her employer became aware of her pregnancy.

Likewise, Complainant establishes a prima facie case based on race insofar as she was a member of a protected class, suffered an adverse employment action, i.e., termination, and the adverse employment action occurred subsequent to comments in the workplace that referenced, intentionally or otherwise, Complainant's race. Additionally, Complainant was the only AU caseworker terminated while her remaining coworkers were all outside of her protected class.

Respondent's legitimate, nondiscriminatory reason for its employment action was the same as to both theories: Complainant was terminated solely for her unacceptable work performance as it related to her inability to deal with the FCU caseload.

Complainant failed to prove that Respondent's reason for her termination was a pretext for unlawful discrimination. The record showed, on the contrary, that Complainant was given an extraordinary amount of supervision and expanded protected time over the course of approximately three months. Both were provided in the hope that Complainant could finally close out her FCU caseload. The record shows that, not only did Complainant fail to do so, at the time of her termination she also expressed relief and admitted that the paperwork aspect of the job was overwhelming.

Additionally, in it post-hearing brief Respondent compellingly made reference to the "same actor" theory, i.e., the fact that at least one of the individuals responsible for Complainant's hire (Ripley) was also responsible for her termination approximately one year later. *Singh v. New York State Office of Real Property Services,* 40 A.D.3d 1354, 837 N.Y.S.2d 378 (3d Dep't., 2007)(a "strong inference exists that no discrimination was involved in the termination decision" when supervisors who terminated plaintiff were also responsible for hiring her a little more than a year earlier).

Complainant also testified to several statements made in her presence which suggested that a racially hostile work environment existed in the FCU. Here, Complainant cannot establish a prima facie case. It is true that Complainant was a member of a protected class, that the comments in question were unwelcome, and that Respondent was clearly responsible for the comments. However, Complainant did not prove that the comments were prompted solely because of her race. In fact, the record showed that the comments in question came about in discussions of work-related matters, were taken out of context by Complainant, or were credibly denied by Van Atta. Additionally, Van Atta, after speaking to Complainant about the comments, attempted to remediate the situation to the extent that she was able. Notably, afterwards there was no further complaint by Complainant in this regard.

Therefore, the complaint must be dismissed.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same hereby is, dismissed.

DATED: December 5, 2007
Bronx, New York

Robert J. Tuosto
Administrative Law Judge