

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

MISTIE HICKEY,

Complainant,

v.

SAMARITAN MEDICAL CENTER,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10114501

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 April 24, 2008, by Rosalie Wohlstatter, 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.

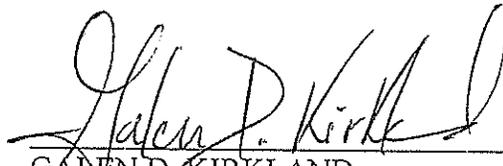
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER").** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **AUG 06 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**MISTIE HICKEY,**

Complainant,

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**SAMARITAN MEDICAL CENTER,**

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

Case No. 10114501

**SUMMARY**

Complainant charged the Respondent with violations of the Human Right Law on the basis of sexual harassment and retaliation. Complainant has failed to show that Respondent was responsible for the sexual harassment. The Respondent has shown a legitimate non-discriminatory basis for its alleged retaliatory acts. The complaint should, therefore, be dismissed.

**PROCEEDINGS IN THE CASE**

On October 26, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division") charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before David Bowden, a former Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on November 28, 2007, November 29, 2007, November 30, 2007 and December 28, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Bradley M. Pinsky, Esq. Respondent was represented by Roy R. Galewski, Esq.

Permission to file post-hearing briefs was granted. Complainant and Respondent both submitted post-hearing briefs. After ALJ Bowden left state service, the case was reassigned to ALJ Rosalie Wohlstatter to write recommended findings of fact, a decision, and order.

### FINDINGS OF FACT

1. Complainant, a female, was employed by Respondent as a phlebotomist from 1996 until December 5, 2005. (ALJ Exh. 1; Complainant’s Exhibits1, 33; Tr. 30, 31)
2. In January of 2005, Complainant met Ralph Babcock, an outpatient at Respondent, when she was assigned to draw his blood. (Tr.48-49)
3. At the time of their meeting, Babcock was an 85 year-old man, about six feet tall. (Tr.50-51)
4. On one day in February of 2005, Babcock asked Complainant to lunch. She went to lunch with him, for which he paid, at a restaurant. (Tr. 65-66)

5. Sometime in February of 2005, Babcock began to visit Complainant on days when he did not have an appointment at Respondent. He would stay from twenty minutes to half an hour. (Tr. 67-68)
6. Even after Complainant would ask him to leave, he would continue to sit and talk. (Tr. 71)
7. On February 14, 2005, Babcock brought Complainant a necklace that had a heart on it. (Tr. 71)
8. On the same day, Babcock hugged her and asked her how she felt about him. (Tr. 73-74)
9. Complainant's response to him was that he was an old man, that she had a husband, and that she wanted him to leave. (Tr. 74)
10. Complainant told her husband, Bryan, that Babcock was coming to her workplace and making it difficult to work. (Tr. 82)
11. At some point, Babcock had given Complainant his business card, which listed his home and cell phone numbers. (Complainant's Exh. 4; Tr. 83)
12. Bryan Hickey called Babcock to tell him to stay away from his wife. (Tr. 82-85)
13. In early March of 2005, Complainant discussed Babcock with her supervisor, Tony Marra: she told him that Babcock was a lonely old man who needed a friend. (Tr. 1142)
14. Sometime before March 16, 2005, Carolyn Habib, Respondent's attorney, told Babcock that he was barred from the hospital and the plaza. (Complainant's Exh. 5; Tr. 220)
15. Sometime later in March, 2005, Complainant told Marra that Babcock was visiting her more often and becoming annoying. (TR. 1144)

16. Marra then told Habib that Complainant was having a problem with Babcock. (Tr. 496)

17. On March 29, 2005, Habib spoke with Complainant on the phone regarding Babcock. Complainant complained that Babcock told her that he loved her, that he called her twice a day, wanted to hug her, looked for her at the hospital, and had called her house. She could not get rid of him.. (Complainant's Exh. 7: Tr. 498)

18. Habib had asked Complainant during this conversation whether she had considered getting a restraining order. Complainant said that she had not. Habib offered to have the hospital send a letter to Babcock. ( Complainant's Exh. 7; Tr.503)

19. On April 1, 2005, Habib sent a letter to Babcock.. This letter informed him that he could not enter Respondent's premises without an appointment. The letter also warned him that any visit other than for a previously scheduled appointment, for an emergency, or for the purpose of visiting patients would result in a call to the police. (Complainant's Exh. 11; Tr. 537)

20. A few days later, after speaking to Jeanne Goodfriend, an employee in the cancer treatment center of Respondent, Habib discovered that Babcock had previously annoyed some employees in the cancer treatment center; however, he was no longer a problem there and no restraining order against him had been obtained. (Tr. 500-501)

21. On March 30, 2005, Complainant again called Habib regarding Babcock. Complainant said that the patient had visited her again and that she had told him to stop visiting her. Complainant stated that she was considering obtaining a restraining order against Babcock.. (Respondent's Exh. 7; Tr. 503)

22. On April 1, 2005, at Respondent Medical Center, Habib met with Marra, Complainant, and a police officer in order to help Complainant obtain a restraining order. (Complainant's Exh. 9; Tr. 517-520)

23. The hospital offered Complainant an escort to and from her car, which Complainant declined. (Tr. 529)

24. An order of protection for Complainant was served on Babcock on April 28, 2005. (Complainant's Exh. 12; Tr. 535)

25. In late November, 2005, Ralph Babcock's wife called Habib to complain that Complainant had called her husband and had asked him for a fifteen-hundred dollar check. Babcock then asked his wife to write the check and to leave the signature and memo lines blank. He completed these himself. Then he and his wife drove together to the plaza, where Complainant worked, to drop off the check. (Respondent's Exh. 9; Tr. 556-8)

26. Mrs. Babcock told Habib that Babcock had written the word, "loan," on the memo line of the check.. (Tr. 564)

27. Complainant endorsed and deposited the check; however, Mrs. Babcock had placed a stop-payment on it so the funds were not released. (Respondent's Exh. 10; Tr. 566,568)

28. On December 5, 2005, Habib received a copy of the endorsed check from the bank. The memo line on this copy read, "gift." (Respondent's Exh. 11; Tr. 575)

29. On December 13, 2005, Ms Habib spoke with Ralph Babcock regarding the check.. He told her that he had written the word, "loan," on the check. And that if he had made any changes to the check, he would have initialed them. However, no discussion was had as to whether he had authorized Complainant to make any changes. (Tr. 578-9)

30. On January 26, 2006, Babcock did, however, tell Habib that the check was intended to be a loan; that he never meant for it to be a gift. (Tr. 580-1)

31. On December 5, 2005, Juanita Babcock, Ralph Babcock's daughter, spoke to Habib and told her that Complainant had told her father that she that if he could not afford \$1500, she would accept \$500 in cash instead. (Tr. 613-4)

32. Habib met with Complainant, Marra and Lynda Goldman on December 6, 2005. At that meeting, Complainant admitted that she had pulled Babcock's phone number from the hospital's medical record system. She also admitted depositing the \$1500 check from Babcock. (Respondent's Exh. 13; Tr. 612,617,620, 623, 627)

33. At the time Complainant solicited the check from Babcock, she knew he had dementia. (Complainant's Exhibits 8, 9, 13; Tr. 655-6))

34. Complainant had been trained on privacy issues and knew that accessing a patient's records for reasons other than treatment violated the Health Insurance Portability and Accountability Act. (HIPAA). (Tr. 640-1)

35. In December of 2005, Respondent had an off-duty misconduct policy that allowed for employee discipline where an employee had been accused of a criminal act related to the employee's work. (Respondent's Exh. 15; Tr. 637)

36. On December 13, 2005, Respondent made the decision to terminate Complainant's employment. Habib had recommended termination because Complainant had violated the off-duty misconduct policy, confidentiality rules, and HIPAA. (Complainant's Exh. 1; Tr. 646-7)

## OPINION AND DECISION

It is unlawful under N.Y. Exec. Law, Art. 15 (Human Rights Law) §296.1(a) for an employer to discriminate against an individual because of the individual's sex.. (Sexual harassment)

Additionally, an employer may not discriminate against an employee because she has made a complaint. NY Executive Law §296.1(e). (Retaliation)

### Sexual Harassment claim

Sex discrimination can take the form of sexual harassment. *Meritor Savings Bank v. Vinson*, 417 U.S. 57, 106 S.Ct. 2399 (1986). One way to prove sexual harassment is to show that the employee has been subject to a hostile work environment. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D.2d44, 642N.Y.S. 2d 739 (4<sup>th</sup> Dept. 1996), *lv. denied* 89 N.Y. 2d 809, 716 N.Y.S. 2d533 (1997). A hostile work environment occurs where the employer's workplace is permeated with discriminatory intimidation that is sufficiently severe or pervasive to alter the conditions of the employee's employment. *Id.* An employer can be found liable for a hostile work environment where the employer acquiesced in the discriminatory conduct or subsequently condoned it. *Id.*

Complainant was subject to a hostile work environment in that Babcock's advances were relentless and grew in intensity. He had touched her in unwelcome ways. However, the Respondent, in this case, did not engage in any after-the-fact forgiveness or acceptance of Babcock's actions toward Complainant. Respondent's attorney sent a letter to Babcock warning him not to come to the hospital when he was not scheduled for an appointment. The letter also threatened him with police action should he not comply. Additionally, Respondent's attorney

assisted Complainant in obtaining an order of protection against Babcock. Corrective action by Respondent serves to disprove condonation. *See Vitale v. Rosina Food Prods.*, 283 A.D.2d141, 143, 725 N.Y. S. 2d 215, 218 (4<sup>th</sup> Dept. 2001). It was Complainant who initiated contact with Babcock by telephoning him after several uneventful months had gone by.

### Retaliation Claim

In order to establish a prima facie case of retaliation a complainant must prove that he or she engaged in a protected activity, that he or she suffered an adverse employment action based on that activity, and that there is a causal connection between the activity and the adverse action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S. 2d 220, 223-24 (3<sup>rd</sup> Dept. 1999) The Complainant has the burden of proof in a discrimination case., and must first establish a prima facie case. *Id.* at 39-40. Once a prima facie case is established, the Respondent must come forward with evidence that it had a nondiscriminatory reason for its conduct. The Complainant must then show that the Respondent's asserted reason was pretextual. *Id.*

Complainant engaged in protected activity by lodging a complaint against Babcock for harassment, and she suffered an adverse employment action in that she was terminated from her employment. There is a causal relationship between Complainant's initial complaint about Babcock and her eventual termination. However, the Respondent had a legitimate non-discriminatory reason for firing her. She had looked in confidential patient records, had solicited money from a patient with dementia, and had altered his check. Complainant has not shown that Respondent's reasons are a pretext. Complainant has, therefore, not shown that her termination by Respondent was retaliatory.

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 case be, and the same hereby is, dismissed.

DATED: April 24, 2008  
Bronx, New York



Rosalie Wohlstatter  
Administrative Law Judge