

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

SHARON JONES,

Complainant,

v.

**THE CITY OF NEW YORK DEPARTMENT OF
SANITATION,**

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 4602834

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 8, 2006, by Ronald A. Gregg, an Administrative Law Judge of the New York State Division of Human Rights ("Division").

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 13th day of April, 2007.



KUMIKI GIBSON
COMMISSIONER

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STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
OFFICE OF ADMINISTRATIVE LAW JUDGES

STATE DIVISION OF HUMAN RIGHTS
On The Complaint Of

SHARON JONES,

Complainant,

-against-

THE CITY OF NEW YORK, DEPARTMENT
OF SANITATION,
Respondents.

RECOMMENDED FINDINGS OF
FACT, DECISION AND OPINION,
AND ORDER

CASE NUMBER:
1A-E-DORS-95-4602834

PROCEEDINGS IN THE CASE

On July 14, 1995, Sharon Jones (Complainant) filed verified complaint with the State Division of Human Rights (Division) charging the New York City Department of Sanitation (Respondents) with unlawful discriminatory practices relating to employment in violation of New York State Executive Law, Article 15-Human Rights Law (NYSHRL).

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that the Respondents had engaged in unlawful discriminatory practices. Thereafter, the Division referred the case to Public Hearing.

After due notice, the case came on for Public Hearing before Robert J. Tuosto, an Administrative Law Judge (ALJ) of the Division.

After the first day of testimony, Judge Tuosto recused himself from the case and the matter was reassigned to Administrative Law Judge Ronald A. Gregg. Both Complainant and Respondents appeared at the hearing.

A Public Hearing was held on July 15, 2003, March 15, 16, and 22, 2004, May 17 and 18, 2004, December 17, 2004, June 2, 3, and 6, 2005 and July 21, 2005.

The Division was represented by Gina M. Lopez Summa, Esq., General Counsel of the Division, by Marilyn Balcacer, Esq. Respondents were represented by the New York City Law Department, Office of the Corporation Counsel, by Danielle M. Dandridge, Esq. and Chad Rosenthal, Esq. A post hearing brief was timely filed by Respondents' counsel. Division Counsel did not file a brief.

FINDINGS OF FACT

1. Complainant alleged disparate treatment on account of disability and failure to accommodate her disability subsequent to returning to work after major surgery in December 1993. Complainant also alleged that Respondents refused to provide her with proper work

equipment, failed to provide adequate training, subjected her to a hostile work environment and terminated her because of her race, sex and gender. (ALJ's Exhibit I; Complainant's Exhibit 2; Tr. 61-75, 100-116)

2. Respondents specifically denied all the allegations in the complaint. Respondents stated that Complainant was not discriminated against because of her gender or sex and that she was reasonably accommodated by being placed on a light duty assignment. Respondents further stated that Complainant received training and appropriate equipment and was terminated for just cause while on probation. (Complainant's Exhibits 1, II; Respondents' Exhibits A, B, C, L, P, R; Tr. 25 -28, 41-46, 48-51)

3. Complainant, an African American female, was employed by the New York City Department of Sanitation ("DSNY") as a probationary Sanitation Worker from July 31, 1990 to June, 1991 when she was laid off due to budget cuts. (ALJ's Exhibits I, II, III; Tr. 16, 21, 36-37)

4. In March 1993, Respondents called the Complainant to ask whether or not she wanted to be restored to duty after her furlough. Complainant advised Respondents that because of three major

surgeries unrelated to employment she could not immediately return to work. (Tr. 37-40)

5. In December 1993, Complainant contacted Respondents and indicated that she was ready to return to work but because of the three surgeries, required an accommodation. During the following two weeks Complainant was medically examined by Respondents' medical unit and required to present copies of her medical records in connection with a pre-employment return to work medical review. (Respondents' Exhibit U; Tr. 41-46)

6. Complainant complied with Respondent's directives and, upon returning to work, was granted an accommodation and placed on a limited duty assignment. The limited or light duty assignment in the Department of Sanitation is called a "tissue" assignment. All tissue designations range in grades from 1-4 and are approved or assigned by Respondent's medical unit. (Tr. 41-45)

7. On January 3, 1994, Complainant received a tissue assignment upon returning to work. Although Complainant testified that she received a "number four (4) tissue" the most restrictive type of light duty allowing employees to only perform clerical or paper work, the record demonstrates that Complainant, in fact, was assigned a "number one (1) tissue" category. This category is the least

restrictive type of work which generally allowed employees to perform general maintenance duties work such as a porter or sweeper. (Complainant's Exhibits 1, 2, 3; Respondents' Exhibit L; Tr. 26, 41-57, 98)

8. Complainant initially was assigned porter duties once she returned to work from her medical condition in January 1994. Complainant believed Respondents discriminated against her by requiring her to do manual labor while on limited duty instead of clerical type work. But the record shows that Complainant's duties as a porter were consistent with those responsibilities required of a Sanitation worker on "tissue one" and in accordance with her job's tasks and standards for a probationary sanitation worker. (Tr.106-107)

9. The Complainant's regular job duties included routine trash and collection, sanitation work, driving a truck, street cleaning, waste collection, snow removal, waste disposal and related work. Complainant was scheduled for all the above tasks including three (3) days of training. (ALJ's Exhibit V; Tr. 62-65, 83-84, 88; Complainant's Exhibit 2; Respondents' Exhibits E , L, U; Tr. 41, 1022-1028, 1054, 1059)

10. Upon Complainant's return to the Bureau of Cleaning and Collection ("BCC"), Complainant was reappointed and returned to work

subject to another one year probationary period. The record shows that Respondents accommodated Complainant's disability when she returned to work. (Complainant's Exhibits 2, 3; Respondents' Exhibit E; Tr. 22-28, 40-46, 1024-1026)

11. Complainant further alleged disparate treatment by being denied several training opportunities. However the record shows that upon her return to work Complainant was scheduled for three (3) days of training but because of a snow emergency only attended one day. (ALJ's Exhibit V; Tr. 62-65, 83-84, 88) The record is devoid of any significant evidence demonstrating Respondents failed to train Complainant and Complainant's testimony was that she was unaware of other white male employees in her work location that specifically received training. (ALJ's Exhibit 1, ¶ 3; & II; Tr. 53-55, 81-85, 97-99, 103, 115, 189, 228, 656)

12. Complainant further alleged she was denied routine work and had her assignments changed by DSNY office staff and several unidentified managers. Complainant also alleged retaliation by management when she advised them about the work assignment changes. I do not credit Complainant's testimony about the identity of those who allegedly changed the assignments or denied her routine work assignments. Complainant's own witness, Lennard Hubbard, did

not witness anyone at the work location change Complainant's work assignments. Hubbard also personally called Complainant to advise her that she had been scheduled for work and that she had failed to appear. (ALJ's Exhibit 1, ¶ 7; Tr. 14-18, 44-49, 274, 281)

13. Complainant also alleged that Respondents created a hostile work environment because of her gender, by not allowing white male employees to work with her or to assist her in performing her required work task. Complainant could not recall to whom she had told this to or even if she complained or ask a supervisor for help. (Tr. 99-106)

14. Complainant alleged that in April 1994, she experienced several incidents of sexual harassment by white male employees. As a result of her verbal complaints to Superintendent Marsiglia, Complainant also believed that this situation became worse. Complainant filed no written report nor could she recall names of individuals or state more specifically how the purported incidents were occasioned by race, sex or in retaliation. (Tr. 85, 101, 347-349, 390, 1026, 1059)

15. Complainant alleged that she was subjected to a hostile work environment by white male Sanitation employees at the work location, who refused to work with her and used rude and

inappropriate language in speaking to Complainant because she was an African American female. Complainant alleged that she did not complain to any supervisor about white co-workers who did not want to work with her. Complainant's own testimony demonstrated that she did not notify a supervisor or that Complainant believed this to be a major problem testifying "...why go to a white man to complain about a white man." (Tr.98-105)

16. Complainant initially was assigned porter duties once she returned to work from her medical condition in January 1994. Complainant believed Respondents discriminated against her by requiring her to do manual labor while on limited duty instead of clerical type work. But the record shows that Complainant's duties as a porter were consistent with those responsibilities required of a Sanitation worker on "tissue one" and in accordance with her job's task and standards for a probationary sanitation worker. (Tr.106-107)

17. Complainant finally alleged that she was also denied or not given proper work equipment to enable her to perform her job and alleged "that they don't give you anything" but failed to specify what equipment or identify whether other non black males received specific equipment. Based on these non specific allegations, I do not credit

Complainant's testimony concerning Respondents denying her proper work equipment to adequately perform her job. (Tr. 111-116)

18. Complainant filed a complaint with the Respondents' Equal Employment Office (EEO) concerning the allegations and other complaints but, after initial investigation by the EEO staff, Complainant refused to give specific names of alleged violators. Respondents' EEO office advised Complainant that the investigation could not be completed without the alleged discriminators being identified. Complainant left the EEO office without completing the official complaint process. The EEO office determined that the issues raised by complainant were more labor or union related issues instead of discrimination that would have been more appropriate to be considered by Complainant's union representatives. (Respondents' Exhibit K; Tr. 933-937)

19. Complainant was placed in a restrictive sick category because of her excess use of sick time. Complainant's sick leave status required that she be placed in a restrictive sick category "C". Category "C" employees such as Complainant were subjected to more stringent scrutiny and sick leave regulations for which violations thereof can lead to disciplinary charges. (Tr.1037-1039, 1067-1080)

20. Complainant was correctly placed in a restrictive sick leave status that required on her first day of sick notification that she report in person to the Medical Clinic when she called in sick. Failure to comply with these rules would subject Complainant to disciplinary charges, suspension and termination for non-compliance. (Respondent's Exhibit E; Tr. 1039, 1066-1070, 1075-1080)

21. Respondents' policy and procedures also provided that if a category "C" employee could not report to the Medical Clinic on their first day of sick leave, then they must notify the Clinic and substantiate their absence with a doctor's note. (Tr. 1066-1070)

22. Complainant, on more than one occasion in 1994, was placed in Category "C" and did not appear at the Medical Clinic on her first day of sick leave or notify the clinic that she would be absent. Consequently, Complainant was issued several disciplinary complaints for violating the Respondent's policy and procedure for sick leave notification. (Respondents' Exhibits H, I; Tr. 1069-1079)

23. Complainant was advised when hired that a probationary sanitation worker could have their probation extended for many reasons including a medical "tissue" assignment, being AWOL or when excessively on sick leave. (Respondents' Exhibits B, C; Tr. 1023, 1202, 1265, 1355)

24. On May 3, 1994, Complainant received a letter extending her probation for an additional thirty-four (34) days until June 12, 1994, because she had not performed in-title duties as a sanitation worker while she was on sick leave and assigned to limited or light duty. (Respondents' Exhibit "C"; Tr. 1209, 1219)

25. Complainant received two additional extensions of her probationary time, for an additional one hundred and sixty-nine (169) days pursuant to Department of Personnel Rule 5.2.8(b) and for an additional six (6) months pursuant to Department of Sanitation Rule 5.2.8(a). Based upon the two additional extensions, Complainant's probationary period was extended until December 12, 1994. (Respondents' Exhibits A, D; Tr. 1209, 1216-1217, 1219-1220)

26. One month prior to the end of Complainant's probationary period being completed, Respondent's Evaluation Review Board (ERB) met and reviewed her entire probationary period. The ERB is made up of a member from the EEO office, the Department's advocate, a member from the Human Resources office, the medical unit and the director of Personnel. The ERB reviewed the Complainant's records and determined, based upon her numerous rules violations and infractions including two AWOL's while on probation, that Complainant

would not pass her probation and would be subject to termination.
(Respondents' Exhibits G, H, Q, O, P, R; Tr. 1201-1219, 1261-1267)

27. Based upon the final recommendation of the ERB and ratified by the Deputy Commissioner of DOS, Complainant failed her probationary period and was terminated by Respondents on December 12, 1994. (ALJ's Exhibit I, P; Tr. 1232-1235)

DECISION AND OPINION

The Complainant asserts that Respondents unlawfully discriminated against her on the bases of disability, gender, sex, race, hostile environment and retaliation, respectively.

The Respondents defend and contend that the Complainant has failed to meet her burden of proof concerning any of her claims, and that all employment decisions regarding the Complainant were a product of legitimate business judgment.

For the reasons which follow, I find that the Complainant has not proven that she was the victim of unlawful discrimination.

It is well settled that in discrimination cases a complainant has the burden of proof and must, at the outset, establish a prima facie case of unlawful discrimination.

If a complainant establishes a prima facie case of discrimination, then a respondent must subsequently produce evidence showing that its action was legitimate and nondiscriminatory. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

If a respondent articulates a legitimate, non-discriminatory reason for its actions, complainant must then show that the proffered reason is pretext. The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden.

As to unlawful discrimination based upon sex and gender, I find that the Complainant fails to make out a prima facie case.

NYSHRL §§ 296.1 (a), in pertinent part, makes it a violation for an employer, because of the, "...sex...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

To establish such a case based upon sex and gender, the Complainant must demonstrate: 1) membership in the protected class; 2) satisfactory job performance; 3) that she suffered an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Ferrante v. American Lung Ass'n., 90 N.Y.2d 63 (1997).

Complainant fails to make out a prima facie case.

First, the Complainant was clearly within the class of persons protected by the statute. However, the record is clear that during the relevant time, Complainant was not satisfactorily performing her duties as a sanitation worker.

Neither the alleged failure to work with Complainant, sexual harassment nor the purported denial of training opportunities or providing equipment constitute an adverse action because Complainant failed to demonstrate she was subjected to this action or disparate treatment.

Respondents were neither put on notice nor requested to correct situations that may have occurred and there is no evidence that they were aware of this. As to the purported denial of training opportunities, proper equipment being provided to Complainant, this assertion is unsupported by the record. Further, given the credible testimony of Respondent and lack of comparative evidence and the sole testimony by Complainant does not support this allegation.

With respect to the allegation of sexual harassment, even if we conform the pleadings to the proof, the Complainant's testimony does not support this belated unsubstantiated allegation.

As to unlawful discrimination based upon a hostile environment, I find that the Complainant failed to prove that she was subjected to a hostile work environment.

To establish such a case based upon a hostile environment, the Complainant must demonstrate that the workplace is permeated with discriminatory intimidation, ridicule and insult that are sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Note that the Complainant need not show that the harassment involved race, sexual advances or other explicit sexual conduct; however, she must show that the harassing conduct was pervasive. Martin v. New York State Dep't. of Correctional Services, 115 F. Supp.2d 307 (2000). Generally, isolated incidents of harassment ordinarily do not rise to this level. See, e.g., San Juan v. Leach, 278 A.D.2d 299, 717 N.Y.S.2d 334 (2d Dep't., 2000). In the end, determining whether work place harassment was severe or pervasive enough to be actionable depends on the totality of the circumstances. Novak v. Royal Life Ins. Co. of New York, 284 A.D.2d 892, 726 N.Y.S.2d 784 (3d Dep't., 2001).

Additionally, the Complainant must also establish that the conduct in question can be imputed to the City by the actions of co-

workers. Where, as here, there is no identifiable individual, an employer may raise an affirmative defense which rebuts the presumption of liability by proving that: (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).

The record shows that, after an investigation by Respondent's EEO office there was no basis for Complainant's allegations.

Even if one were to assume that the comments in question were directed at the Complainant because of her gender or race, i.e., that they were directed at her and not at similarly-situated white males, recovery under this theory is still unavailing. While such comments may have been both unfortunate and unprofessional, an examination of the totality of the circumstances shows that the Complainant refused to cooperate with the EEO by providing necessary information to complete their investigation. Complainant states that several incidents were harassing but fails to articulate what the specific events were or even state clearly the nature of the offensive language.

I find that the Complainant failed to demonstrate how the aforementioned language or conduct created a regular and pervasive atmosphere of hostility that was sufficiently severe or persuasive to alter the conditions of her work environment. Additionally, I also find that the conditions of the Complainant's working environment were not altered insofar as the comments, even if uttered, do not go beyond that which would be described as merely offensive or boorish.

As to unlawful discrimination based upon disability, the record does not support a determination that Respondent subjected Complainant to disparate treatment.

Complainant must first make out a prima facie case that the Respondent subjected her to adverse action under circumstances which would lead one to infer that the action was taken because of her disability.

If Complainant succeeds in establishing a prima facie case, the burden then shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The employer need not conclusively establish the validity of its proffered reasons; rather, it merely must show that such

reason, " if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the adverse employment action" St. Mary's Honor Ctr. v. Hicks, supra, at 507, 113 S.Ct. at 2747, 125 L.Ed.2d at 416.

Thereafter, Complainant must demonstrate that the reasons offered by the Respondent are merely a pretext for unlawful discrimination. Pace College v. Commission on Human Rights of the City of New York, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975).

To establish a prima facie case of disability discrimination, Complainant must show (1) membership in a protected class (2) qualification for employment, (3) an adverse employment action and (4) circumstances that give rise to an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); See also Romney v. New York City Transit Authority, 45 Fed.App.48, 49 (2d Cir. 2002); Spencer v. City Univ. of New York, 932 F.Supp. 540, 546 (S.D.N.Y.1996.)

Here, Complainant failed to establish a prima facie case. As to the first and third prongs of the test, Complainant failed to demonstrate how her surgeries prevented her from performing in a reasonable manner her job as a sanitation worker and that she was subjected to an adverse employment action. Complainant also failed to

offer any evidence showing that her alleged disability was the determining or even a major factor in her termination. During the entire Public Hearing, Complainant failed to articulate how her disability affected the terms and conditions of her employment, or contributed to her being terminated. In fact, Respondents offered credible testimony that they reasonably accommodated Complainant, and that the sole reason complainant was terminated was because she failed to pass her probation.

Finally, with respect to the Complainant's retaliation claim, I find that the Complainant has failed to make out a prima facie case.

NYSHRL § 296.1 (e), in pertinent part, makes it a violation for any employer to, "discharge, expel or otherwise discriminate against any person because she has opposed any practices forbidden under this article or because she has filed a complaint, testified or assisted in any proceeding under this article."

To establish such a case based upon retaliation, the Complainant must demonstrate: 1) participation in a protected activity; 2) that the employer knew of the protected activity; 3) that she suffered an adverse employment action; and 4) that there was a causal connection between the protected activity and the adverse employment action.

Pace v. Ogden Services Corp., 257 A.D.2d 101, 104, 692 N.Y.S.2d 220 (3d Dep't., 1999).

First, the Complainant engaged in a protected activity upon filing her EEO complaint. Second, the Respondents knew of the filing of this complaint. However, the Complainant failed to make the proper connection or nexus showing that the protected conduct caused her to suffer an adverse employment action subsequent to the filing of her complaint. Complainant failed to prove that any employment action was taken under circumstances giving rise to discrimination or were causally connected to any protected activities.

Complainant does proffer that her termination was an adverse employment action. However Complainant did not establish a nexus that her termination was in retaliation for her engaging in any protected activity. The record is clear that the legitimate non-discriminatory reason for Complainant's termination was a poor performance record during her probationary period as a sanitation worker. Thus, this claim must also be dismissed.

Notice of Recommended Order
SDHR Case No. 4602834
Sharon Jones v. The City of New York, Department of Sanitation

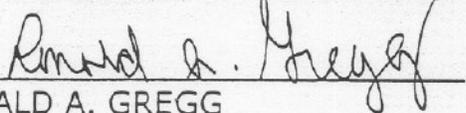
ORDER

Based on the foregoing, and pursuant to the provisions of the NYSHRL, and the Rules of Practice of the Division, it is

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

Dated: December 8, 2006
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



RONALD A. GREGG
Administrative Law Judge