

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

TAMMY LANE,

Complainant,

v.

SCHENECTADY COUNTY,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10109790, 10113148

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 12, 2009, by Thomas J. Marlow, 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: **MAY 14 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case Nos. **10109790, 10113148**

SUMMARY

Complainant alleged that Respondent discriminated against her because of her sexual orientation and because she opposed unlawful discrimination. Because the evidence does not support the allegations, the complaints are dismissed.

PROCEEDINGS IN THE CASE

On January 19 and August 3, 2006, 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 Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on June 30 and July 1, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Nicholas J. Grasso, Esq., of Grasso, Rodriguez & Grasso. Respondent was represented by Jonathan Bernstein, Esq., of Goldberg Segalla LLP.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

FINDINGS OF FACT

1. Complainant is a lesbian. (ALJ’s Exhibit 1; Tr. 188-89, 226)
2. In 2002, Complainant began her employment with Respondent as a cleaner. (ALJ’s Exhibit 1; Tr. 25) Complainant was interviewed by and hired by Michael Gaffney (“Gaffney”), Director of Facilities for Respondent, and Elizabeth Lent (“Lent”), head cleaner for Respondent. (Tr. 64, 111-12, 267, 564-65) Lent has known Complainant since childhood and knew, when Complainant was hired, that Complainant was a lesbian. (Tr. 565-66) Complainant’s sexual orientation was “common knowledge.” (Tr. 565)
3. From 2002 to October of 2006, Lent was Complainant’s supervisor. (Tr. 26, 601-03) Complainant alleged that from the start of her employment with Respondent, Lent harassed her because of Complainant’s sexual orientation. (ALJ’s Exhibit 1)
4. In describing her management style, Lent testified that she has been likened to a “drill sergeant.” (Tr. 597) Lent was not pleased with the work of any of the cleaners on Complainant’s shift. (Tr. 346-47)

5. On December 16, 2005, Lent inappropriately yelled at Complainant for not working fast enough. (Tr. 32-34, 583)

6. On December 20, 2005, pursuant to Respondent's sexual harassment policy, Complainant filed a discrimination complaint with Respondent alleging that Lent discriminated against her because of Complainant's sexual orientation. (Respondent's Exhibit 8)

7. On January 19, 2006, Complainant filed a complaint ("first Division complaint") with the Division which included allegations that Lent threatened that Complainant would not have a job if she took a particular vacation, that Lent asked a Deputy Sheriff to give Complainant parking tickets, that Lent made derogatory comments about lesbians, that Lent assigned a job responsibility of buffing to another non-lesbian employee, Jon Paul Paswkiewz ("Paswkiewz") without offering it to Complainant, even though Complainant and Paswkiewz had the same job seniority, that, on a particular occasion, Lent screamed at Complainant about the pace of Complainant's work, that Lent accused Complainant of stealing time, and that Lent assigned Complainant to clean a boiler room, a task no cleaner had ever before been assigned.

(ALJ's Exhibit 1; Respondent's Exhibit 10; Tr. 78, 568)

8. In Complainant's first Division complaint, Complainant also alleged that Respondent had retaliated against her because she filed her discrimination complaint with Respondent on December 20, 2005. (ALJ's Exhibit 1)

9. On February 19, 2006, Complainant reported to the police that Lent committed Reckless Endangerment on February 17, 2006, at 12:25 p.m. by driving a county vehicle at a high rate of speed into the parking lot at Complainant's place of employment and nearly hitting Complainant. (Complainant's Exhibit 1; Tr. 34)

10. On March 17, 2006, after concluding its investigation into the allegations of Complainant's complaint of December 20, 2005, Respondent's Sexual Harassment Committee determined that the allegations were not substantiated. (Respondent's Exhibit 8)

11. In June and July of 2006, Lent received counseling regarding her communication style with subordinates. (Respondent's Exhibit 11; Tr. 74, 599)

12. On August 3, 2006, Complainant filed another complaint with the Division, alleging that Respondent continued to retaliate against her because she had opposed unlawful discrimination. (ALJ's Exhibit 1) Complainant included in her allegation that Lent was ". . . singling (Complainant) out for everything that goes wrong" and that Lent denied Complainant the proper amount of time, one hour, for lunch. (ALJ's Exhibit 1; Tr. 257-59)

13. On August 8, 2006, Complainant reported to the police that Lent committed Harassment at 3:10 p.m. of that day by violently grabbing her by the shirt while at work. (Complainant's Exhibit 1; Tr. 39)

14. On August 16, 2006, Complainant filed another discrimination complaint with Respondent pursuant to Respondent's sexual harassment policy alleging that Lent continued to discriminate against her because of Complainant's sexual orientation. (Respondent's Exhibit 4)

15. In or around October of 2006, Lent was reassigned to another location so that she and Complainant would have no contact during working hours. (Tr. 601-03)

16. On April 17, 2007, after concluding its investigation into the allegations of Complainant's complaint of August 16, 2006, Respondent determined that the allegations were not substantiated. (Respondent's Exhibit 4)

17. Lent had no negative feelings toward Complainant because she was a lesbian and did not treat Complainant differently because she was a lesbian. (Tr. 499-501, 564-65, 607-08, 721-23)

18. Lent never threatened Complainant that she would not have a job if she took a vacation. (Tr. 41-42, 570)

19. Lent's behavior on December 16, 2005 was a product of her abrasive management style and did not occur because Complainant is a lesbian. (Tr. 607-08)

20. Complainant used her mother's pass for parking in a "handicap spot" at her place of employment. Lent attempted to speak to Complainant about this but Complainant would not discuss it. Lent never observed another employee park in a "handicap spot" at their place of employment. Lent reported to the Sheriff's Department whenever she observed that Complainant was unlawfully parked. (Tr. 114-15, 571-72)

21. Lent did not make derogatory comments about lesbians. (Tr. 607-08)

22. After consulting with the labor union of Complainant and Paswkiewz, Gaffney assigned the buffing responsibility to Paswkiewz. There was no objection from the union because Paswkiewz had worked more days than Complainant. (Respondent's Exhibit 10; Tr. 130-33, 542-43)

23. Lent used the phrase "stealing time" with several employees, both male and female, including Complainant, if they were not giving good effort to their work. (Tr. 82-88, 367-68, 591-93, 724-25)

24. Lent never asked Complainant to clean a boiler room. (Tr. 98, 99-100) All cleaners had to clean the rooms where the circuit breakers were located. (Tr. 331, 333-35, 492-93, 594-95, 679, 723)

25. Complainant was only entitled to 30 minutes for lunch as a full time employee and was not denied her entitled time for lunch. (Tr. 257-59, 533-34, 593)

26. Lent did not commit Reckless Endangerment on February 17, 2006. (Tr. 621, 680-84)
Lent did not commit Harassment on August 8, 2006. (Tr. 609, 619)

27. I do not find Complainant's testimony or the testimony in support of Complainant's claims to be consistent or credible. (ALJ's Exhibit 1; Complainant's Exhibits 2, 7; Tr. 32-42, 48, 49, 82-84, 99-100, 122-26, 160, 174-75, 185, 194, 214-20, 225, 230-33, 236, 238-39, 270, 315-22, 328, 341-42, 348-49, 367-70, 404, 440, 443-44, 478-79, 462, 470, 480-82, 497-98, 501-02)

28. Complainant has a fear that, because she is a lesbian, some people will do her harm. (Tr. 138) Because of that fear Complainant had Lent arrested for the alleged harassment on August 8, 2006. (Tr. 138)

29. When Lent inappropriately yelled at Complainant for not working fast enough on December 16, 2005, Complainant was in fear that Lent was going to "kick (her) ass." Lent never touched Complainant during this incident. (Tr. 103) There was no evidence presented to show that Lent was ever accused of touching an employee prior to Complainant's allegation in August of 2006 or that Complainant had a reasonable basis for her fear.

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's sexual orientation, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination in the conditions of employment because of sexual orientation. Complainant can sustain her burden of proving unlawful discrimination in the conditions of employment because of sexual orientation by showing that there was a hostile work environment at her place of employment and that it existed because of her sexual orientation. After considering all of the evidence presented, however, and evaluating the credibility of the witnesses, I find that the credible evidence does not support a finding that a hostile work environment because of Complainant's sexual orientation existed. Clearly, Complainant worked with a head cleaner who had an abrasive management style that necessitated counseling to improve communication with subordinates. There was no credible connection established, however, between Lent's behavior and Complainant's sexual orientation. Not only did Lent hire Complainant knowing that she was a lesbian, but also all subordinates, male, female, whatever sexual orientation, had to deal with Lent's displeasure in their work and "drill sergeant" approach to supervising. There was much contradiction in the evidence presented in support of Complainant's contention of unlawful discrimination and credibility was lacking. It is clear, however, that, from a "reasonable person's standpoint," there was no proof presented of a workplace "permeated with discriminatory intimidation, ridicule, and insult," prompted by Complainant's sexual orientation, that was "sufficiently severe or pervasive" to alter the conditions of Complainant's employment. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997)

Complainant also raised an issue of discrimination in that Respondent retaliated against her because she opposed unlawful discrimination. Complainant has the burden to establish by a preponderance of the evidence that such retaliation occurred. To meet this burden, Complainant

must initially show by a preponderance of the evidence that she engaged in protected activity, that her employer was aware that she engaged in the protected activity, that she suffered an adverse employment action based on her activity, and that there is a causal connection between the protected activity and the adverse action. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312, 786 N.Y.S.2d 382, 396 (2004). The record is devoid of any evidence to establish that any actions attributable to Respondent constituted an adverse employment action. An adverse employment action would require a materially adverse change in the conditions of Complainant's employment, such as termination of employment, demotion, or diminished responsibilities, and there is no evidence of such a change. *Id.* at 306.

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: March 12, 2009
Bronx, New York



Thomas J. Marlow
Administrative Law Judge