NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

CHINIQUA D. LEVINE,

Complainant,

v.

VERIZON, VERIZON NEW YORK, INC.,

Respondents.

NOTICE AND FINAL ORDER

Case No. 10112376

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 May 8, 2008, by Margaret A. Jackson, 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 0 6 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
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on the Complaint of

CHINIQUA D. LEVINE,
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v.

VERIZON, VERIZON NEW YORK, INC.,
Respondents.

Ammended
RECOMMENDED ORDER OF DISMISSAL

Case No. **10112376**

SUMMARY

Complainant alleged that Respondents harassed her throughout the course of her employment on the basis of her race and gender then retaliated against her when she complained. Respondents denied all allegations. Complainant did not establish a prima facie case. Therefore, her complaint must be dismissed.

PROCEEDINGS IN THE CASE

On June 21, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

The case was assigned to Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. Complainant was represented by Kate J. Webber, Esq. Respondents were represented by Matthew T. Miklave, Esq.

FINDINGS OF FACT

1. Complainant was hired by Respondents on July 17, 1989, as an operator. (Tr. 158)

2. In September of 2005, Respondents transferred Complainant to their 140 West Street location. Complainant was scheduled to report to work at 11 P.M. on the evening of September 5, 2005. (Tr. 159, 161, 567)

3. Director Michael Boraz assigned Robert Rathbone and Susan Duborg as Complainant's supervisors at the new facility. Rathbone was on a scheduled vacation on the day that Complainant was scheduled to report to work. However, Duborg was present and covered for Rathbone in his absence. (Tr. 650-51)

4. On September 6, 2005, Complainant went to the Harlem Hospital emergency room because she was the victim of domestic violence. (Tr. 159-61, 355)

5. Complainant asked the attending nurse to call Duborg. (Tr. 354, 569-61)

6. Dubourg received the message and told the caller that Complainant would have to provide medical documentation confirming her hospital stay when she reported back to work. (Tr. 161-62)

7. On September 7, 2005, Complainant called Duborg to confirm that she had received the message from the hospital nurse. (Tr. 161)

8. After speaking with Duborg Complainant concluded that Duborg was treating her unfairly and was retaliating against her for being ill when she was told Complainant that she would not be paid without medical documentation for her illness. (Tr. 362-65)

9. On the eight day of Complainant's absence, Duborg received a telephone call from someone stating that they were Complainant's cousin. The caller said that Complainant was

unable to report to work. Duborg told the caller that Complainant would need a doctor's note to ensure being paid for her absence. (Tr. 588)

10. On September 14, 2005, Respondent sent Complainant a letter informing her that failure to produce the requested medical documentation would lead to her separation from the payroll. (Complainant's Exhibit 3)

11. On September 15, 2005, Duborg received an illegible doctor's note that was faxed from a camera and copy store located near complainant's residence in Montclair, New Jersey. The note stated that Complainant was treated at New York Presbyterian hospital on September 12th and 13th. (Tr. 181-82, 184, 368)

12. Duborg contacted Complainant requesting a more legible copy of the note, on hospital letterhead, as well as a doctor's note for the September 5th absence and an explanation why she called from Harlem Hospital on September 5th but submitted a note for treatment from New York Presbyterian on September 12th and 13th. (Tr. 597)

13. Respondents have a race/ gender neutral policy of requesting absence fraud investigations for employees if their absence is not supported with medical documentation. Respondents' policy also includes termination of employment where absence fraud is found. (Tr. 401-402)

14. When the requested documentation was not received from Complainant, Duborg requested Respondents' security conduct an absence fraud investigation. (Tr. 201-202, 600, Respondents' Exhibit 8,)

15. On September 22, 2005, Complainant was separated from the payroll for failure to produce medical documentation to legitimize her September 5, 2005 absence. Complainant

believed that the letters requesting medical documentation were a form of harassment. (Tr. 163-65, 465, Complainant's Exhibit 5)

16. Believing that that MetLife could authorize her to be paid and there was nothing that Rathbone or Duborg could do about it, Complainant sent a letter to MetLife advising them that as a result of her being the victim of a domestic violence dispute and everything that happened to her during her 18years of employment with Respondents, she was emotionally traumatized, unable to care for herself and suicidal. (Tr. 421-23, 465,163-65)

17. MetLife approved Complainant's request for leave under the Family Medical Leave Act, (FMLA) effective September 7, 2005 through November 7, 2005. (Tr. 195, 418)

18. In November of 2005, Complainant returned to work. At that time, security attempted to interview Complainant about her hospital visit on September 5, 2005. However, Complainant became very uncooperative and the interviewed concluded. (Tr. 399)

19. On November 28, 2005, security attempted to interview Complainant a second time about her absence a second time. As part of their investigation, security contacted MetLife and was told that the only medical documentation they had pertained to Complainant's visit to New York Presbyterian Hospital. Again, security asked Complainant to provide the necessary medical documentation. When Complainant did not do so and became disruptive, the interview terminated. (Tr. 399)

20. On January 31, 2006, security issued a report concluding that Complainant had falsified her absence. (Tr. 486, Respondents' Exhibit 9)

21. Complainant contacted Lynda Patton in Respondents' EEO/ethics department claiming that the withholding of her check was racially motivated. (Tr. 726, 754)

22. Complainant also told Patton that she was being harassed by Respondents. She said that the basis of "the harassment was not gender or race but a general feeling of being picked upon." (Tr. 745)

23. In January of 2006, another employee, Ron Natole, posted pictures on the employee bulletin board located on the eighth floor. The pictures depicted images of penises, a man in bed with a woman, a seemingly African American man and an Hispanic man speaking in a stereotypical fashion. There was also a reference about a gay man. Complainant found the pictures offensive. (Tr. 736, Complainant's Exhibit 1 and ALJ Exhibit 2)

24. However, the pictures were posted for a brief period of time and had been removed from the bulletin board before Natole was asked to take them down. (Tr. 89-90)

25. Before the pictures were removed, Complainant took pictures of the drawings with her cell phone and filed another complaint with Patton because Natole was not disciplined for posting the pictures. (Tr.175-76, 219-20)

26. Complainant also told Patton that Respondents were discriminating against her on the basis of her race and gender because she overheard conversations between fellow employees that included derogatory comments about women. She also overheard a supervisor talking about "13year olds in the projects having babies" and she had her child when she was 13 years old and had been raised in the projects. (Tr. 246, 249-50)

27. After registering her complaints with Patton, Complainant went on vacation from February 6, 2006 through February 13, 2006. On February 16, 2006, Complainant went to her supervisors Rathbone and DuBourg and asked for her W-2. (Tr. 257)

28. Rathbone told Complainant that he would help her print a copy of the W-2 from the computer system. (Tr. 604)

29. While Rathbone was showing Complainant how to work the system, a loud discussion ensued between Rathbone, Duborg and Complainant. Duborg told Complainant that she had 30 seconds to get her W-2 and go back to work. (Tr.439-41)

30. Complainant did not leave and Rathbone suspended Complainant for the day. Complainant's shop steward and building security responded to the commotion. Complainant refused to lower her voice and leave the premises. The police were called and Complainant was escorted out of the building. (Tr. 442-46, 608-09)

31. The following day, Rathbone told Complainant that she was suspended indefinitely. (Tr.680-82)

32. On March 9, 2006, Boraz sent Complainant a letter advising her that her employment was subject to termination if he did not receive medical documentation related to her September 5, 2005 absence. (Tr.505-05, 682, Respondents' Exhibit 15)

33. On April 3, 2006, Respondents sent Complainant a second letter advising her that she was suspended for ten days pending termination. (Complainant's Exhibit 14)

34. On April 14, 2006, Respondents notified Complainant that it had removed her from the payroll as a result of multiple violations of its Code of Business Conduct. (Tr. 490, 611-12, Complainant's Exhibit 15)

35. On June 21, 2006, Complainant filed the instant complaint alleging that she was terminated on the basis of her race and gender and in retaliation for reporting alleged discriminatory activities within the company. (ALJ Exhibit 1)

OPINION AND DECISION

Complainant asserts that Respondents discriminated against her in violation of the New York State Human Rights Law (NYSHRL), which provides in pertinent part, that "[i]t shall be an unlawful discriminatory practice...[f]or an employer ...because of the...race...color...of an individual... to discriminate against such individual in compensation or in terms, conditions or privileges of employment. N.Y.S. Human Rights Law Sec. 296.

In order to prove a prima facie case of unlawful discrimination Complainant must show that: (1) she was a member of a protected class; (2) she was qualified to do the job, (3) she suffered an adverse employment action and (4) that adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Complainant has the burden of proof, *Schwaller v. Squire Sanders & Dempsey* 249 A.D.2d 195; 671 N.Y.S.2d 759 (1998).

Once a complainant establishes a prima facie case of unlawful discrimination, respondents must produce evidence showing that its action was legitimate and non-discriminatory. Should respondents articulate a legitimate and non-discriminatory reason for its actions, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 1010, 692 N.Y.S.2d 220 (3d Dep't., 1999).

It has been proven that the Complainant, an African American female, is a member of a protected class, she was qualified to do the job, and she suffered an adverse employment action. It has not been proven that this occurred under circumstances that give rise to an inference of unlawful discrimination.

Respondents had a race/gender neutral requirement that medical documentation could be requested for employee absences and after investigation; an employee could be terminated for absence fraud. Complainant was repeatedly asked for medical documentation to explain her absence and conflicting medical notes, however, she never produced a note to explain her absence on September 5, 2005. As a result her pay was suspended, an absence fraud investigation ensued and Complainant's employment was terminated.

Complainant asserts that she was unlawfully discriminated against because she was constantly harassed by Respondents for medical documentation while other employees were allowed to post sexually offensive pictures and hold conversations that were derogatory to women. In sum, Complainant asserts that Respondents sexually harassed her by creating a hostile work environment.

Complainant may establish a hostile work environment violation by proving that the discrimination was sufficiently severe or pervasive to alter the conditions of the employment and create a hostile or abusive working environment. A complainant must subjectively view the conduct as unwelcome that creates a hostile environment. In addition, a reasonable person must objectively view the conduct as severe and pervasive enough to create an abusive environment. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, *716 N.Y.S.2d 533* (1997). When assessing claims of hostile environment and its pervasiveness, the ultimate decision depends on the totality of the circumstances. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup.Ct. N.Y.Co. 1997), *aff'd in relevant part*, 256 A.D. 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *lv. denied* 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999).

Complainant failed to show that a reasonable person could objectively view the offending conduct as sufficiently severe and pervasive to create a hostile work environment. Complainant alleges that Respondents took no action in response to her complaints about conversations that she overheard on two separate occasions. Complainant admits that she was not part of the conversations. Therefore, she does not know the context in which the statements were made. Further, the bulletin board pictures that she found offensive were removed shortly after posting and the letters requesting medical documentation for her September 5, 2005 absence were not being sent as a form of harassment. Even collectively, a reasonable person could not find that these isolated incidents altered the terms and conditions of Complainant's employment necessary for a sexual harassment finding. *Father Belle, supra; Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

In summary, Complainant failed to establish that she was subjected to a hostile work environment or unlawful discriminatory treatment based on her race or gender.

As to Complainant's retaliation complaint, under the New York Human Rights Law §296(7) it is unlawful discriminatory practice for any person to discriminate against another because she filed a complaint under this statute. To make a prima facie case of retaliatory discrimination, Complainant must show that (1) she engaged in a protected activity; (2) Respondents knew that complainant engaged in protected activity; (3) complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action. See, *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999), citing *Dortz v. City of New York*, 904 F.Supp. 127, 156 (1995).

Complainant failed to prove a prima facie case of retaliation. Although Complainant engaged in protected activity when she filed her complaint with the Respondents' EEO/ Ethics

office, Complainant did not suffer an adverse employment action because of her complaints. The record is clear that Complainant's employment terminated because she failed to produce medical documentation related to her September 5, 2005 absence.

Finally, having considered all of Complainant's allegations; it is my opinion and decision that Complainant did not suffer an adverse employment action in violation of the Human Rights Law.

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 dismissed.

DATED: May 8, 2008
Bronx, New York

Margaret A. Jackson
Administrative Law Judge