

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JOAN LEVY,**

Complainant,

v.

**NASSAU COUNTY, CLERK'S OFFICE,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10112687

**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 30, 2009, 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.

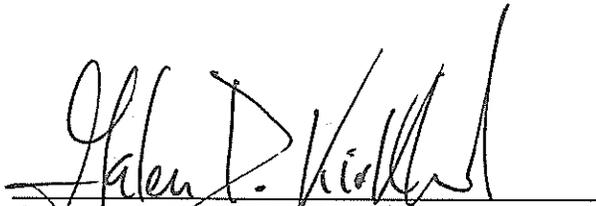
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **JUL 31 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**JOAN LEVY,**

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**NASSAU COUNTY, CLERK'S OFFICE,**

Respondent.

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

Case No. **10112687**

**SUMMARY**

Complainant alleged that Respondent unlawfully terminated her employment on the basis of her age and religion then retaliated against her for filing a complaint with the Nassau County Equal Employment Office. The evidence does not support the allegations and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On July 11, 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 26, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Sandra S. Oneil, Esq. Respondent Nassau County, County Attorney's Office was represented by, Nayana Kulkarni, Esq. and Michelle Farci, Esq., Assistant County Attorneys.

Permission to file post-hearing findings of fact and conclusions of law was granted. Respondent submitted post-hearing findings of fact and conclusions of law. Neither Complainant nor Division counsel submitted post-hearing findings of fact or conclusions of law.

#### **FINDINGS OF FACT**

1. Complainant was born on June 9, 1945. (Tr. 40, ALJ Exhibit 1)
2. Complainant is a Catholic woman whose husband is Jewish. (Tr. 25)
3. On November 2, 2005, Complainant began working for Respondent as a Clerk I in the records department. Complainant was hired as a probationary employee. After satisfactory completion of a six month probationary period, Complainant would obtain permanent status. (Tr. 6, 9)
4. At the commencement of Complainant’s employment she was given a memo outlining departmental procedures. (Tr. 95)
5. As outlined in the departmental procedures, Complainant was responsible for managing blocks of property records. Complainant was required to pull blocks of cards, give the entire block of cards to members of the public, and make sure that no ink was used on the cards. She

was also responsible for mailing mortgage satisfaction letters and assisting with copying deeds and mortgages. (Tr. 6-7, 93)

6. Complainant was given probation performance reviews on a biweekly basis by her supervisor, Linda Kosotan. (Tr. 9,171)

7. Kim Cervo, the County Clerk's Record Manager, was the liaison between Complainant's supervisor and the County Clerk. Cervo obtained employee reviews from all of the County Clerk's department supervisors and submitted them to the County Clerk. (Tr. 140-41)

8. Initially, Complainant's performance reviews ranged from below average to average. Complainant refused to sign her second review and argued with Kosotan about her assessment. Kosotan informed Cervo about the incident. Cervo relayed the information from Kosotan to the County Clerk. (Tr. 13-15, 17-22, 108-9)

9. On another occasion, Complainant was reprimanded for allowing people to walk away with property cards. (Tr. 16, 66)

10. Complainant constantly pulled single cards instead of blocks of cards, misdirected the public and gave out wrong information. Members of the public also registered complaints about Complainant with Kosotan and Cervo. (Tr. 145, 162-64, 173-74, 182)

11. Complainant often used work phones to make personal calls. Complainant left long lines of people waiting for help while she talked on the telephone. (Tr. 70-1)

12. Whenever Kosotan attempted to correct Complainant, she would cry and tell Kosotan that she was picking on her and stressing her out. (Tr. 66, 156)

13. Cervo recommended to the County Clerk that Complainant did not belong in a public office and was not a good fit within the department. (Tr. 153)

14. In order to obtain permanent status an employee must receive an above average rating while on probation. Overall, Complainant was given eleven performance reviews but never received an above average review during her entire probation. (Tr. 10-11, 19-22, 101-2)

15. On March 9, 2006, Complainant requested time off to observe Passover on April 12, 2006. She completed a leave slip requesting part of that day off and indicated that she would deduct compensatory time. Complainant did not indicate on her leave slip that she was requesting time off for religious observance. Nevertheless, Complainant was granted leave as requested. (Tr. 23-4, 26-7)

16. Shortly thereafter, the office vacation schedule was circulated. Complainant questioned Kosostan about why she was the last person to receive the schedule. Kosostan explained to Complainant that vacations were granted based on seniority and by receiving the schedule last she could avoid being bumped by a more senior person. Complainant refused to accept this explanation and called the Nassau County Equal Employment Office on March 10, 2006. Complainant spoke with the director, Mary Elisabeth Ostermann, about being discriminated against and her fear of getting bumped on her vacation request for April 12, 2006, which was submitted for religious observance. (Tr. 27-9, 58)

17. Ostermann contacted Respondent and investigated Complainant's allegations. Ostermann learned that Complainant's request for leave had already been approved. Ostermann determined that there was no discrimination and that there must have been a miscommunication because Kosostan had already granted her leave request. (Tr. 29-30)

18. Most of the employees at the Clerk's office were within five to ten years of Complainant's age or older. Two employees were over seventy years of age. All of Complainant's co-workers had over twenty years experience with the County. Complainant was

the only probationary employee in the department. No one in the Clerk's Office had their employment terminated in the three years preceding Complainant's employment. (Tr. 95, 114-15, 167)

19. On April 20, 2006, Complainant's employment was terminated based on unsatisfactory conduct, capacity and fitness during her probation. (Tr. 34, Complainant's Exhibit 5)

### OPINION AND DECISION

It is unlawful discrimination for an employer to discriminate against an employee "in compensation or in terms, conditions or privileges of employment" based on the employee's religion (N.Y. Exec. Law, Article 15 [Human Rights Law] § 296 [1] [a]). An employer may not "impose upon a person as a condition of obtaining or retaining employment, . . . any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion . . ." (Human Rights Law § 296 [10] [a]). Also, an employer may not retaliate against any employee "because he has opposed any practices forbidden under this article or because he filed a complaint . . . under this article" (Human Rights Law § 296 [1] [e]).

#### Religious Discrimination

The law is clear that "while an employer must accommodate an employee's observance of the Sabbath, there is no duty to accommodate the religious practices of the employee's spouse." *Engstrom v. Kinney System, Inc.*, 241 A.D.2d 420, 422, 661 N.Y.S.2d 610, 613 (1<sup>st</sup> Dept. 1997), leave to appeal denied 91 N.Y.S.2D 801, 666 N.Y.S.2d 563. *See also, Eastern Greyhound Lines Division of Greyhound Lines, Inc. v. New York State Division of Human Rights*, 27 N.Y.S.2d 279, 283-284 (1970). Respondent granted Complainant time off without question. Complainant never indicated on her leave request that she was requesting time off for

religious observance. Complainant therefore, was not discriminated on the basis of her religion and cannot sustain her complaint on that basis.

### Retaliation

Complainant's additional complaint that she was terminated from employment in retaliation for filing a complaint with the Nassau County Equal Employment Office, is also without merit. Complainant alleges that after she complained about discrimination, Respondent retaliated against her. Human Rights Law §296.7 states in pertinent part that "it shall be an unlawful discriminatory practice...for any person engaged in any activity to which this section applies to retaliate or 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."

In order to establish a prima facie case of retaliation, Complainant must show that she engaged in protected activity, that Respondent was aware that she had engaged in the protected activity, that Complainant suffered an adverse action, and that there is a causal connection between Complainant's engagement in the protected activity and her adverse treatment by Respondent. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3rd Dept. 1999). "A prima facie case of retaliation requires evidence of a subjective retaliatory motive" for the adverse employment action. *Pace University v. New York City Commission on Human Rights*, 85 N.Y.2d 125, 128. Complainant was granted leave by Kosostan before she learned the underlying reason for the leave request. Complainant alleged that she was not given leave for religious observance. The complaint was investigated and because leave had in fact been approved for Complainant it was determined that there must have

been a misunderstanding. There being no motive or nexus between Complainant filing a complaint and her termination, Complainant has failed to make a prima facie case of retaliation.

### Age Discrimination

Complainant further alleged that Respondent discriminated against her based on her age. It is settled that in discrimination cases, it is the Complainant who has the burden of proof and who must establish a prima facie case of age discrimination.

To make a prima facie case of age discrimination under the Human Rights Law, (N.Y. Exec. Law §296(1)(a)), Complainant must show that (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of age 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), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also, Byrnie v. Town of Cromwell Board of Education*, 243 F. 3d 93, 101 (2d Cir. 2001)

If Complainant establishes a prima facie case of discrimination, then Respondent must produce evidence showing that its action was non-discriminatory and for a legitimate business reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The employer need not conclusively establish the validity of its proffered reason, 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*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Once the employer has articulated a legitimate non-discriminatory reason for the adverse employment decision, the burden shifts back to the complainant to put forth “adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee’s disability was the reason for the [adverse decision].” *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2d Cir. 1996), *cert. Denied*, 520 U.S. 1228, 117 S. Ct. 1819, 137 L.Ed.2d 1027 (1997).

Complainant has not made out a prima facie case of age discrimination. Although Complainant is a member of a protected class and suffered an adverse employment action, she was not qualified for the position because she did not pass probation and she failed to show any nexus between her age and Respondent’s decision to separate her from employment.

Complainant was among a group of employees who were within five to ten years of Complainant’s age or older. Respondent has articulated a legitimate non-discriminatory reason for the adverse employment action. Respondent’s witnesses credibly testified that Complainant failed to perform her duties satisfactorily as evidenced by never achieving an above average evaluation.

Complainant failed to prove that age was the motivating factor in eliminating her position. See, *H. Montana v. First Federal Savings and Loan Association of Rochester*, 869 F.2d 100 (2<sup>nd</sup> Circuit 1989).

Complainant has failed to meet her burden on any basis and has therefore, has not proven that Respondent unlawfully discriminated against her. As a probationary employee, she was lawfully separated from employment. *Matter of York v. McGuire*, 63 N.Y.2d 760, 761 (1984).

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: April 30, 2009  
Hempstead, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Margaret A. Jackson  
Administrative Law Judge