

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

VANESSA OLIVERI,

Complainant,

v.

**MORTGAGE SOURCE INC., RUSSELL EHERNS,
GEORGE MINAESF,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10109967

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 September 19, 2007, by Thomas S. Protano, 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 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 16th day of November, 2007.



KUMIKI GIBSON
COMMISSIONER

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on the Complaint of

VANESSA OLIVERI,

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v.

**MORTGAGE SOURCE INC., RUSSELL
EHERNS, GEORGE MINAESF,**

Respondents.

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

Case No. 10109967

SUMMARY

Complainant alleges that she was subjected to an ongoing and repeated course of sexual harassment while she worked for the Respondent. She further alleges that when she complained to her supervisor, Respondent terminated her employment. Respondent argues that Complainant initiated the offensive comments and asserts that she never complained that she was being sexually harassed. The Complainant's claims of harassment are not credible and her case must be dismissed. Additionally, Respondent has shown that Complainant's employment was terminated because Respondent was unhappy with her performance and not because of any retaliatory motive.

PROCEEDINGS IN THE CASE

On December 30, 2005, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on June 10, 2007 and July 13, 2007.

Complainant and Respondents appeared at the hearing. Complainant was represented by Jason L. Abelove, Esq. Respondents were represented by Sara Wyn Kane, Esq. and Robert Valli, Esq.

Permission to file post-hearing briefs was granted. Both Respondent and Complainant filed timely briefs.

FINDINGS OF FACT

1. Complainant began working for Respondent, a mortgage brokerage business, on November 5, 2004, as a loan processor. She was fired by Respondent on February 9, 2005. (Tr. 6-7, 48)
2. As a loan processor, Complainant was required to process all paperwork related to mortgage loans and submit them to the banks for approval. The loans were initiated by underwriters, or loan officers. (Tr. 7)
3. Complainant’s supervisor was Michelle Millevoy, processing manager. (Tr. 10) Complainant and Millevoy became friends while Complainant worked for Respondent. Complainant and Millevoy often went out to dinner or for drinks together; they spoke to each other on the phone “every day” and spent New Year’s Eve together. (Tr. 10-11, 240)

4. Complainant was often flirtatious while working for Respondent. She lavished particular attention on Charles Margiasso, one of Respondent's loan officers. (Tr. 77, 190, 211)

5. Complainant spent so much time with Margiasso that Millevoy frequently had to direct Complainant to get back to work. (Tr. 245) Millevoy felt that Complainant "wasn't focused" on her work. (Tr. 260)

6. Complainant has alleged numerous instances of sexual harassment. According to Complainant, Russell Eherns, national director of business development, was the worst offender. She alleged that he propositioned her in an elevator shortly after she was hired and once pinched her waist. (Tr. 22, 24) She alleged that he often claimed he was "well hung and packing nine inches," referring to the size of his penis. (Tr. 31) Complainant stated that "the final straw" during her tenure with Respondent occurred when Eherns inquired about Complainant's sexual experiences with a former boyfriend. This allegedly occurred just before Complainant was fired in February of 2005. (Tr. 46) Eherns denied making any of these comments. (Tr. 209-10)

7. Complainant also alleged that Bob Krause, a loan officer, hit her on the buttocks with some papers. (Tr. 92) She alleged that Joel Moskowitz, vice president, asked her if her "carpet matches [her] drapes." Complainant took this to mean that Moskowitz was asking if her eyebrows were the same color as her pubic hair. (ALJ Exhibit III; Tr. 28, 92) Krause and Moskowitz denied these allegations. (Tr. 193, 229)

8. George Minaeff was also alleged to have harassed Complainant. Complainant stated that Minaeff told her he wanted to see "somebody pour water all over" her shirt and let the fan blow her hair. (Tr. 27) She also alleged that he showed her a small football and told her that "if you are not packing down there, you could use this." (Tr. 40-41)

9. Complainant claimed that she reported all of these incidents to Millevoy and that, with the exception of the incident in which Krause allegedly hit her on the buttocks, Millevoy simply told her to ignore them. (Tr. 23, 27, 34, 41) After the Krause incident, Complainant alleges that Millevoy “walked out onto the floor” and loudly yelled that “the touching has to stop.” (Tr. 25) Millevoy denied doing that. (Tr. 236)

10. Tracey Krinsky, who testified for Complainant, worked for Respondent from January 31, 2005 until she was fired by Respondent in mid-February of 2005. Krinsky said she was fired in April of 2005, but Respondent’s records refute this claim. (Respondent’s Exhibit C-1; Tr. 133, 136, 161)

11. Krinsky stated that she was present when Minaeff allegedly made comments about his football. (Tr. 123) Complainant stated that this event occurred prior to Christmas of 2004, which was before Krinsky began working for Respondent. (Tr. 103) Krinsky said Minaeff’s comments were directed at her, not Complainant. (Tr. 137) Krinsky also claimed to have seen the incident in which Krause tapped Complainant on the buttocks and Eherns pinched her waist. (Tr. 128) Complainant indicated that this was early in her tenure with Respondent and specifically said it happened before Christmas of 2004. (Tr. 90-91)

12. In fact, Krinsky worked with Complainant from January 31 through February 4, 2005. Complainant called in sick on February 7 and 8 and was fired on February 9. Thus, Complainant worked five days with Krinsky. (Respondent’s Exhibit C-1 & C-2; Tr. 47-48) Krinsky could not have seen the incidents she claimed to have seen, particularly the ones Complainant placed before Krinsky’s employment.

13. Millevoy never received a complaint from Complainant in which Complainant said she was being sexually harassed. On two occasions, Complainant told Millevoy she was being

“bothered” by a co-worker, but the complaint did not involve sexual harassment. (Tr. 243, 269)
Complainant was not specific about what she meant when she said she was being “bothered.”
(Tr. 275)

14. Complainant never told Millevoy about Eherns’ behavior. She did not tell her Krause had smacked her on the buttocks. She did not tell Millevoy about Moskowitz’ or Minaeff’s behavior. (Tr. 236-37) Millevoy never heard Eherns discuss the size of his penis. (Tr. 238)

15. Neither Millevoy nor Michael Lederman, Respondent’s owner, was pleased with Complainant’s work. Complainant was sometimes late and visited dating websites on Respondent’s computers. Lederman spoke to Complainant about her improper use of Respondent’s computers. (Tr. 152, 155, 240, 248) Millevoy realized Complainant was coming to work late, but did not report Complainant. (Tr. 240)

16. Complainant denied visiting dating websites during working hours. She admitted to using flyguycrew.com during her lunch hours, but stated that it was not a dating website. She compared it to Myspace. (Tr. 42, 72) Flyguycrew.com describes itself as a place to “Rate people, Meet people, Date people, relax and enjoy for FREE!!” (ALJ Exhibit VI)

17. Respondent had a written sexual harassment policy. It was written in January of 2005. Lederman stated that there was no written policy prior to that because when he began the company he was the only employee and the company grew very quickly during the “refinance boom.” Lederman stated that prior to January of 2005 he had an “open door policy,” which he conveyed to all his employees before they were hired. (Tr. 156-57)

18. Millevoy did not substantiate any of Complainant’s claims of harassment. She did, however, indicate that Complainant made frequent sexual references while working for Respondent. Regarding Margiasso, Complainant told Millevoy she wanted to “bang him out,”

meaning she wanted to have sex with him. (Tr. 242) Whenever Complainant saw “guys that she wanted” she said she wanted to “bang them out.” Complainant even said that Lederman was “cute” and that “she wanted to bang him out.” (Tr. 242, 249)

19. On one occasion, Complainant went to Victoria’s Secret during her lunch break and, upon her return to work, displayed a garter she had bought, explaining that she was going to be wearing it for the man she was to be seeing that night. (Tr. 247)

20. On February 7 & 8, 2005, Complainant called in sick. She was not really sick, though. (Tr. 75) Millevoy was on vacation during those two days and, because Complainant was not available to assist her when she was away, it was determined that Complainant had to be fired. Millevoy said that given Complainant’s inability to stay “focused,” her failure to come into work when she was needed was “the last straw.” (Tr. 239, 260)

OPINION AND DECISION

In order to prevail on a charge of sex discrimination by reason of harassment creating a hostile work environment, Complainant bears the burden of establishing that (1) she belongs to a protected group, (2) she was the subject of unwelcome harassment, (3) the harassment was based on her status as a member of a protected group, (4) the harassment affected a term, condition or privilege of employment and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Pace v. Ogden Services Corporation et al.*, 257 A.D.2d 101, 103, 692 N.Y.S. 220, 223 (3rd Dept., 1999). In addition, the Complainant must show that the totality of the circumstances constitutes harassment in the mind of both the victim and a reasonable person. *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).

The Complainant in the instant case fails to establish that she was harassed, because her testimony, and the testimony of her corroborating witness, was not believable. Complainant and Krinsky worked together for only five days. Krinsky said she witnessed incidents that Complainant claims happened well before Krinsky went to work for Respondent. Millevoy denied seeing any of the incidents she was supposed to have witnessed and, significantly, Complainant never told Millevoy, who had become a close friend, about any of the alleged harassment. There is nothing in the record, other than Complainant's and Krinsky's discredited testimony that supports a conclusion that a hostile environment existed in the workplace. Millevoy testified credibly that there was no hostile environment and the alleged harassers all deny the harassing behavior attributed to them. In light of this, Complainant's claim of sexual harassment is without merit.

With respect to her claim of retaliation, Complainant must make out a prima facie case by showing that (1) she engaged in activity protected by Executive Law § 296, (2) Respondent was aware that she participated in the protected activity, (3) she suffered from a disadvantageous employment action after her activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *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 (S.D.N.Y., 1995).

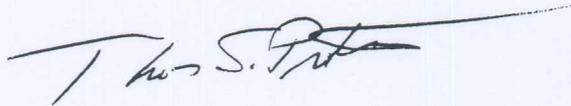
Complainant fails to make out a prima facie case. She did not complain to anyone about sexual harassment. Neither Millevoy nor Lederman received any complaints from her about the incidents she alleges or any other sexually harassing behavior.

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: September 19, 2007
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", with a long horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge