



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

MARISOL OROBIO,

Complainant,

v.

LARO SERVICE SYSTEMS INC.,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10130155

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 January 31, 2011, by Lilliana Estrella-Castillo, 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: **MAR 21 2011**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

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on the Complaint of

**MARISOL OROBIO,**

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**LARO SERVICE SYSTEMS INC.,**

Respondent.

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

Case No. 10130155

**SUMMARY**

Complainant alleges that Respondent terminated her employment because of her sex, race, national origin and disability. The complaint must be dismissed because Complainant failed to make out a prima facie case of unlawful discrimination.

**PROCEEDINGS IN THE CASE**

On December 10, 2008, 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on October 13, 2010.

Complainant appeared at the hearing. The Division was represented by Robert Alan Meisels, Senior Attorney, of Counsel. Respondent did not appear and was not represented at the hearing.

After Respondent’s failure to appear was noted on the record, an inquest was held pursuant to the Division’s Rules of Practice, (9 NYCCR §465.12 (b) (3)). (Tr. 4-8, 85; Complainant’s Exhibit 1)

The Division’s application to amend the complaint to add discrimination on the basis of sex and disability was granted. (Tr. 81)

The Division filed timely proposed findings of fact and conclusions of law which were considered and, where appropriate, adopted.

#### **FINDINGS OF FACT**

1. Complainant is a Black Colombian female. (Tr. 13; ALJ Exhibit 1)
2. Complainant has high blood pressure. (Tr. 13-14; ALJ Exhibit 1)
3. On June 17, 2007, Alex Rudas hired Complainant to work as a cleaner. (Tr. 14, 70)
4. While employed by Respondent, Complainant was assigned to work in different locations, and at the relevant time period was working at a “Stop & Shop” store in Brooklyn, New York. (Tr. 14; ALJ Exhibit 1)
5. Complainant’s work shift was from midnight to 7:00 a.m. (Tr. 16-17)
6. On Saturday, December 6, 2008, Complainant was scheduled to work. (Tr. 16-17)

7. Complainant did not report to work at the beginning of her shift because she was in the emergency room due to high blood pressure. (Tr. 15)

8. Complainant did not call Respondent to advise that she would not be reporting to work as scheduled. (Tr. 18)

9. On Sunday, December 7, 2008, at around 1:00 a.m. Complainant received a message on her cellular phone from Rudas, her immediate supervisor. (Tr. 15, 19)

10. Rudas' message to Complainant was that he had been informed that Complainant had not reported to work as scheduled, and that if that was true that she should not return to work again. (Tr. 19)

11. Complainant spoke with Rudas on the telephone on Sunday, December 7, 2008, at 7:00 a.m. and told him that she was still in the emergency room because of her high blood pressure. (Tr. 74-75)

12. Rudas told Complainant to bring him proof that she was in the emergency room. (Tr. 20-21, 76-79)

13. Complainant told Rudas that she would bring him the proof on Monday, December 8, 2008. (Tr. 20-21, 76-79)

14. Rudas agreed to accept the information on Monday, December 8, 2008. (Tr. 20-21)

15. Complainant was discharged from the emergency room that Sunday evening. (Tr. 15)

16. Complainant called Rudas several times on Sunday to tell him that she had the medical proof, but he did not pick up the telephone. (Tr. 20)

17. On Monday, December 8, 2008, Complainant decided not to take the medical excuse to Rudas and never returned to work. (Tr. 78-79) Instead, Complainant decided that Rudas had terminated her employment at 1:00 a.m. Sunday when she received Rudas' message. (Tr. 78-79)

## OPINION AND DECISION

The Human Rights Law prohibits an employer from unlawfully discriminating against an employee because of his or her sex, race, national origin or disability. Human Rights Law §296 (1).

Complainant has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination. To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (1) she is 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 unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

If Complainant is successful in meeting this burden, the burden then shifts to Respondent to put forth a legitimate, nondiscriminatory reason for the employer's challenged action. If the Respondent does so, then the Complainant must show that the proffered reason is a pretext for discrimination. *Pace University v. N.Y. City Comm. on Human Rights*, 85 N.Y.2d 125, 128, 623 N.Y.S.2d 765 (1995); *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999) The ultimate burden of proof always remains with Complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Complainant alleges that Respondent terminated her employment because of her sex, race, national origin and disability. The complaint must be dismissed because Complainant failed to make out a prima facie case of unlawful discrimination. Complainant did not suffer an adverse employment action because she was not terminated; she abandoned her job when she failed to provide Respondent with a medical excuse for her absence and then never returned to

work. Although Complainant is a member of several protected classes because she is a Black Colombian female with a disability and was qualified for her position, Complainant did not suffer an adverse employment action because her employment was not terminated. Rather, she abandoned her job when she failed to provide Respondent with a medical excuse for her absence and then never returned to work. In addition, her separation of employment did not occur under circumstances giving rise to an inference of unlawful discrimination.

The evidence in this case indicates that Complainant voluntarily abandoned her job by choosing not to provide her supervisor with an excuse for her absence and then by never returning to work. The evidence produced by Complainant shows that Complainant did not report to work as scheduled. When her supervisor, Rudas, discovered her absence he called and left her a message telling her not to report to work again if it was true that she was not at work. Complainant called Rudas and explained that she was in the emergency room. Rudas told Complainant to bring him proof that she was in the emergency room. Complainant agreed to do so on Monday, December 8, 2008. Rudas agreed to accept the proof on Monday, December 8, 2008. Complainant then failed to report to Respondent's office or to work on Monday December 8, 2008, or any date thereafter.

**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: January 31, 2011  
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo". The signature is written in a cursive style with a large, sweeping initial "L" and a long horizontal flourish extending to the right.

Lilliana Estrella-Castillo  
Administrative Law Judge