



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

FRANCIS PUJOL,

Complainant,

v.

NYU HOSPITALS CENTER,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10151855, 10153963

Federal Charge No. 16GB202194, 16GB200621

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 February 26, 2013, 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 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

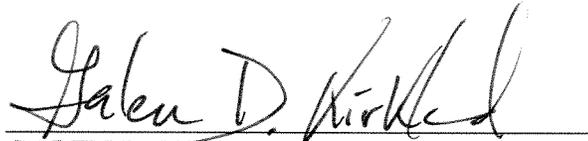
member of the public during the regular office hours of the Division.

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:

4/11/2013
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

FRANCIS PUJOL,

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NYU HOSPITALS CENTER,

Respondent.

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

Case Nos. **10151855 & 10153963**

SUMMARY

Complainant was a pastry chef for Respondent. Complainant alleged that Respondent discriminated against him because of his age, race, national origin and sexual orientation when it warned him and, ultimately, terminated his employment. Respondent has shown that Complainant failed to produce the high quality baked goods they wanted and, therefore, the case must be dismissed.

PROCEEDINGS IN THE CASE

On November 10, 2011, 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").

On March 14, 2012, Complainant filed a second verified complaint with the Division charging Respondent with unlawful discriminatory practices relating to employment in violation of 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.

The cases were joined and, after due notice, the cases came on for hearing before Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on July 2, 2012 and July 3, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Daniel T. Driesen, Esq.

FINDINGS OF FACT

1. Complainant is 61 years of age. He was born on July 3, 1951, in Arieje, France. Complainant describes his race as “European.” (ALJ Exhibit 2; Tr. 23)
2. Complainant is homosexual. (ALJ Exhibit 4)
3. Complainant has more than 40 years experience as a pastry chef. (Respondent Exhibit 3; Tr. 24)
4. Complainant began working for Respondent, a hospital, in its kitchen as an assistant pastry chef in 1997. (Tr. 26)
5. In or about 2006, Complainant became Respondent’s executive pastry chef. (Tr. 27-28)

6. In addition to making pastries for patients in the hospital, Complainant was also required to make pastries for Respondent's catering department. (Tr. 30)

7. For the first several years of Complainant's tenure with Respondent, his superiors were satisfied with the products he produced. Respondent's pastry kitchen came to be known as Patisserie Pujol, after Complainant. (Complainant's Exhibit 2)

8. On September 1, 2010, Betty Perez became Respondent's Senior Director for Food and Nutrition Services. (Tr. 123-24)

9. Perez' mandate, in part, was to improve the food and nutrition services in the hospital. Perez' supervisors were particularly dissatisfied with the catering services and she was tasked with making improvements to catering and patient food services. (Tr. 127-28)

10. To that end, Perez made an evaluation of the existing management team. Perez decided to terminate the employment of Amy Gaffio, sous chef. Gaffio was a 34-year old, heterosexual American. (Tr. 130-31)

11. Perez retained Jonathan Murray, director of patient food and nutrition, a 53-year old homosexual. (Tr. 132)

12. Perez subsequently hired Rose Dering, assistant director of procurement, who is homosexual. Perez knew Dering was homosexual when she hired her, because they had worked together in the past. (Tr. 142)

13. Prior to Christmas 2010, Respondent put on a holiday brunch. As part of the brunch, gingerbread houses were to be assembled to create a gingerbread village. Complainant and the pastry staff were to create the ginger bread houses. (Tr. 161)

14. The night before the brunch, Complainant left without explanation even though the village had not yet been assembled and decorated. Several members of Respondent's staff,

including Perez and Orlando Ramos, executive chef, were forced to stay well past 1:00 a.m. in order to complete the village. (Tr. 161-62, 336)

15. On April 18, 2011, Ronald Brandl became the director of culinary operation for Respondent. (Tr. 244)

16. Almost immediately, Brandl determined that Complainant's performance was not up to the standard he had set. (Tr. 247-48)

17. Specifically, Brandl took exception to Complainant's habit of freezing pastries for future use after he baked them. Freezing pastries lowers the quality of the product. (Tr. 248)

18. Brandl met with Complainant and explained his preference for serving fresh baked products rather than frozen. Brandl said that freezing products after they have been made "didn't make sense" because "you don't produce something and then you put it in the freezer and then you take it out. You [lose] a lot of flavor...and the quality is going down." (Tr. 250)

19. Brandl directed Complainant to "either...buy frozen and serve it frozen...or we buy it fresh and make it fresh, but don't put it in the freezer." (Tr. 265)

20. Brandl also noticed that sanitary conditions in the Complainant's pastry area were not up to standard. Complainant and his staff failed to properly label and date foods in the refrigerator, which could lead to contamination and spoilage. (Respondent's Exhibit 24; Tr. 254-56)

21. In addition, Complainant allowed non-food items to be kept with food items and failed to properly clean all of the equipment he used. (Complainant's Exhibit 24)

22. Complainant also overproduced some of the products he made, causing Respondent to waste food. (Tr. 256-57)

23. Brandl also found fault with the lack of variety of the products Complainant produced. To remedy that problem, Brandl gave Complainant several new recipes and asked him to come up with new creations of his own. (Respondent's Exhibit 25; Tr. 270)

24. Complainant did not use any of the recipes Brandl gave him. When Brandl asked Complainant why he was not using any of the new recipes, Complainant indicated he was too busy. (Tr. 274)

25. In response to Complainant's concerns, Brandl tried save to labor and ease the pressure on Complainant by purchasing pre-made cookie dough, which only needed to be baked. (Tr. 274)

26. When Complainant began producing cookies with pre-mixed dough, Respondent removed the Patisserie Pujol labels from the cookie boxes because Brandl felt it was dishonest to continue to place the labels on the boxes. (Tr. 275)

27. After Brandl was hired, he changed the manner in which food orders were placed. Previously, individual chefs placed their orders with the suppliers. Brandl changed the system so that suppliers would come to him. (Tr. 259-62)

28. In order to better control food costs, chefs were then instructed to make their needs known to the assistant purchasing director. (Tr. 263)

29. Complainant had been placing orders with Paris Gourmet, which Brandl determined was too expensive. Brandl compared the price and quality to other vendors and ultimately chose U.S. Foods. Complainant felt that this act was discriminatory, but failed to state why it was so. (ALJ Exhibit 2; Tr. 263-64)

30. On June 16, 2011, Complainant was expected to prepare key lime pie for a luncheon that was to be attended by all of Respondent's senior executive leaders. Brandl gave Complainant a recipe to follow. (Respondent's Exhibit 10; Tr. 268)

31. Instead of making pies, Complainant made a large sheet cake. The sheet cake turned out burned and broken. (Respondent's Exhibit 11; Tr. 268-69)

32. Respondent was unable to serve the sheet cake and had to purchase prepared key lime pies for the event. (Respondent's Exhibit 10; Tr. 278)

33. Complainant was subsequently put on a performance improvement plan ("PIP"). (Respondent's Exhibit 11; Tr. 268-69)

34. Complainant also failed to follow a recipe Brandl gave to him on another occasion. Brandl gave Complainant a recipe for virgin gorda coconut cakes, which called for a sprinkling of alcohol. Instead of sprinkling the alcohol on the cake, Complainant soaked the cake with alcohol. (Respondent's Exhibit 11; Tr. 276)

35. Despite the PIP, Complainant failed to improve his performance. On August 12, 2011, Perez felt the need to send Complainant an email taking him to task for the lack of variety and cleanliness in the pastry shop. She noted that there had been complaints about stale products and indicated that other chefs did not feel they could rely on Complainant. The email informed Complainant that if he no longer felt his job was 'the right fit...you can resign.' (Respondent's Exhibit 11)

36. Brandl knew that Complainant was gay. Brandl does not recall when he learned of Complainant's sexual orientation. Brandl did not take any disciplinary actions against Complainant because of Complainant's sexual orientation. (Tr. 284, 287)

37. On September 8, 2011, Respondent received a complaint from a customer that a cheese cake was served with mold on it. (Respondent's Exhibit 13; Tr. 182)

38. On September 16, 2011, a retirement luncheon was held in the hospital. The catering department received a complaint afterward about the cake Complainant made for the occasion. The emailed complaint described the cake as "verrrry dry." (Respondent's Exhibit 15; Tr. 182-83)

39. In response to this complaint, Ramos gave Complainant a final written warning on October 14, 2011. In his memo, Ramos stated that "any future occurrences of this nature will result in further disciplinary action which may include your immediate termination from employment..." (Respondent's Exhibit 16)

40. Late in 2011, Complainant filed an internal complaint of harassment in the workplace with Respondent's human resources department. (Respondent's Exhibit 21; Tr. 284)

41. Jacqueline Montero, employee & labor relations manager investigated the charges and determined them to be unfounded. (Respondent's Exhibit 21 & 22; Tr. 214-15)

42. Complainant's performance did not improve, however. On January 26, 2012, Complainant was written up again by Ramos. Ramos noted that Complainant had made some quick breads that were not properly mixed and were cut "in an inconsistent manner with slices varying in size." Complainant was also cited for failing to produce chocolate chip cookies in a timely manner. (Respondent's Exhibit 19; Tr. 208)

43. On March 12, 2012, Perez notified Complainant that his employment was terminated. Perez took this action because she did not see improvement in Complainant's performance since the issuance of the PIP. (Respondent's Exhibit 20; Tr. 212)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of his or her age, national origin or sexual orientation, or in retaliation for having complained previously of discrimination. Human Rights Law § 296.1(a).

In order to prevail, Complainant must first make out a prima facie case of discrimination. To do so, he must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he 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).

In order to establish a prima facie case of retaliation, a complainant must show that (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected activity; (3) he suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v. Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996).

Complainant makes out a prima facie case for both discrimination and retaliation. With respect to discrimination, he has shown that he is a member of protected classes, he was qualified for the position he held for many years and he was warned, written up and fired from his job after new supervisors were hired to replace previous supervisors with whom Complainant enjoyed a solid working relationship. The fact that his working conditions changed so drastically

upon the hiring of new supervisors could lead one to infer that Complainant was victim of discrimination. With respect to his retaliation complaint, Complainant has shown that he was warned and fired shortly after filing both internal and Division complaints of discrimination. That sequence of events could be considered a causal connection.

If a complainant makes out a prima facie case of discrimination, the burden shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Respondent in this case has shown that it acted for legitimate, non-discriminatory reasons. Perez, Brandl and Ramos were dissatisfied with the pastries that Complainant was producing. They were unhappy with the manner in which Complainant operated his kitchen and the cleanliness of his work area. Complainant failed to meet deadlines and could not be counted on when he needed to perform. Numerous incidents during the year-and-a-half Complainant worked under Perez support this. Perez was brought in to make changes and Complainant was unable or unwilling to work within the new order. Brandl immediately noticed that there were problems in Complainant's area. Brandl warned Complainant and tried to assist him by giving him recipes and buying pre-made products, but Complainant could not meet Brandl's standards.

There is no evidence that the Respondent's stated reasons for terminating Complainant's employment were a pretext for either discrimination or retaliation. Respondent has supported its assertion that Complainant failed to perform with documentary evidence and testimony that validates its defense. Complainant, on the other hand, has neither refuted Respondent's

argument that he failed to perform nor provided any evidence of a discriminatory or retaliatory animus. Shortly after being hired with a mandate for change, Perez terminated the employment of a 34-year old heterosexual and retained Complainant as well as another 53-year old staff member. Perez also hired someone she knew to be a homosexual. There is simply nothing in the record to suggest that Perez, Brandl or Ramos harbored any ill will towards Complainant because of his age, race, sexual orientation or national origin. Therefore, the case must be dismissed because Complainant has failed to meet his burden. *Forrest*, at 305.

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: February 26, 2013
Bronx, New York



Thomas S. Protano
Administrative Law Judge