Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

YANIRA PULIDO,

Complainant,

v.

POLLOS MARIO RESTAURANT CORPORATION,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10171505

Federal Charge No. 16GB500103

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 25, 2015, by Monique Blackwood, 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 HELEN DIANE FOSTER, 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: OCT 27 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10171505**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her based on her disability and pregnancy when her employment was terminated. Complainant also alleged that Respondent harassed her and failed to provide her with a reasonable accommodation for her disability. Respondent denied the allegations. Complainant failed to meet her burden of proof on all her claims. Therefore, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 22, 2014, 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 Monique Blackwood, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on August 17-18, 2015.

Complainant and Respondent appeared at the hearing. Complainant was represented by Make the Road New York by Elizabeth Sprotzer, Esq., Staff Attorney and Elizabeth Joynes, Esq., Supervising Attorney. Respondent was represented by Miriam Janicki-Crespo, Esq.

FINDINGS OF FACT

1. Complainant is a female. (ALJ's Exhibit 1)

2. Respondent is a restaurant located in Jackson Heights, New York. (ALJ's Exhibit 1)

3. On June 18, 2014, Respondent hired Complainant to work as a cashier. (Tr. 13-14, 29-30)

4. Complainant's duties included taking food orders over the telephone and from the fax machine, and using the cash register to process payments. (Tr. 33, 135)

5. Complainant's manager was Carlos Lopez. (Tr. 14)

6. Four to five days after Complainant began working for Respondent, Carlos Lopez told her to pay attention to her job because customers complained that their delivery food orders were incorrect. (Tr. 134-35) On June 25, 2014, Carlos Lopez told Complainant to stop sending text messages from her cell phone while working. (Tr. 138-39)

7. Carlos Lopez told Complainant to work faster when customers wanted to pay for their orders. (Tr. 137-38)

8. Complainant acknowledged using her cell phone while at work, but said it happened occasionally. (Tr. 33)

9. In the beginning of July 2014, Carlos Lopez hired Laura Posada, a new cashier, to fill in for employees who were on vacation. Complainant trained Posada. (Tr. 24, 94, 97-99)

10. Prior to July 28, 2014, Complainant told Posada that she might be pregnant but did not want to inform the managers about this until she knew for sure that she was pregnant. (Complainant's Exhibit 1; Tr. 94, 102-03)

11. Complainant confirmed her pregnancy to Posada by text message on July 28, 2014. (Complainant's Exhibit 1, Tr. 94, 100-01)

12. On one occasion, Natalia Ramirez, a customer who visited the restaurant two to three times per week, heard Carlos Lopez yell at Complainant in front of customers. (Tr. 74, 76)

13. Carlos Lopez was on vacation from July 27, 2014 to August 8, 2014. (Tr. 115, 167)

14. Complainant did not tell Carlos Lopez that she was pregnant while she was working for Respondent. (Tr. 114)

15. When Carlos Lopez returned from vacation, he inquired of other employees at the restaurant regarding Complainant's performance in his absence. (Tr. 131-33, 169-71)

16. They responded by stating Complainant continued to use her cell phone while working, made errors with food orders, and was slow in processing customer payments at the cash register. (Tr. 169-71)

17. On August 9, 2014, Carlos Lopez met with Complainant and during this meeting he terminated Complainant's employment. (Tr. 25, 121-22)

18. Carlos Lopez told Complainant that her employment was terminated because he did not have an available shift for Complainant to work. (Tr. 25)

19. During that meeting, Complainant told Carlos Lopez, for the first time, that she was pregnant and asked for her job back. (Tr. 25, 121-22)

20. On August 12, 2014, Complainant returned to the restaurant to pick up her last paycheck and spoke with Raul Lopez, a supervisor. (ALJ's Exhibit 3; Tr. 45, 177)

21. During this meeting, Complainant told Raul Lopez that she was pregnant and asked for her job back. (Tr. 45, 177) This was the first time Raul Lopez heard of Complainant's pregnancy. (Tr. 189-90)

OPINION AND DECISION

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a) states that it shall be "…an unlawful practice … [f]or an employer … because of the … sex … of any individual, to … discharge from employment such individual or to discriminate against such individual …"

Pregnancy discrimination is a form of sex discrimination. *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 N.Y.2d 211, 597 N.Y.S.2d 617 (1993); *Brooklyn Union Gas Co. v. New York State Human Rights App. Bd.*, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976).

A complainant may establish a prima facie case of discrimination by demonstrating that: (1) she is a member of a protected class; (2) she was qualified for her job; and (3) respondent terminated her employment, (4) under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997).

Complainant has not established a prima facie case of unlawful sex discrimination. Complainant, a female who was pregnant during her employment with Respondent, is a member

of a protected class. Complainant was qualified for her position as a cashier. Respondent terminated Complainant's employment on August 9, 2014. The termination of Complainant's employment did not occur under circumstances that give rise to an inference of unlawful discrimination because Respondent was not aware that Complainant was pregnant at the time her employment was terminated.

Harassment

In order to establish a prima facie case of hostile work environment under N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a), a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 310, 786 N.Y.S.2d 382, 394 (2004), quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993). Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Forrest* at 311, 786 N.Y.S.2d at 394, quoting *Harris,* at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *Forrest* at 311, 786 N.Y.S.2d at 395, quoting *Harris*, at 21.

Complainant has offered no evidence at the public hearing that could lead one to infer that Respondent harassed her or created a hostile work environment based on her sex, pregnancy or disability. Therefore, Complainant failed to meet her burden on this claim.

Disability

In order to make out a prima facie case on the basis of disability discrimination based upon an employer's failure to provide a reasonable accommodation, a complainant must show that: (1) complainant was an individual who had a "disability" within the meaning of N.Y. Exec. Law, art. 15 ("Human Rights Law") § 292.21; (2) respondent had notice of the disability; (3) with reasonable accommodation complainant could perform the essential functions of the position; and (4) respondent refused to make such accommodation. *Abram v. New York State Div. of Human Rights*, 71 A.D.3d 1471, 1473, 896 N.Y.S.2d 764, 767 (4th Dept. 2010).

In her complaint, Complainant alleged that Respondent did not allow her to take breaks when she felt sick or give her time off when she had a doctor's appointment. At the public hearing Complainant provided no evidence to substantiate these allegations. Complainant failed to provide evidence of a disability, that Respondent had notice of her disability, that she requested a reasonable accommodation, and that Respondent denied her request.

Complainant has failed to meet her burden of proof on all her claims. Therefore, the complaint is dismissed.

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: September 25, 2015
Bronx, New York

Monique Blackwood
Administrative Law Judge