NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

EVELYN RODRIGUEZ,

Complainant,

v.

BATTERY PARK HOTEL MANAGEMENT, LLC
D/B/A EMBASSY SUITES HOTEL, NEW YORK,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10114811

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 5, 2009, 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: APR 15 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **EVELYN RODRIGUEZ,** Complainant, v. **BATTERY PARK HOTEL MANAGEMENT, LLC D/B/A EMBASSY SUITES HOTEL, NEW YORK,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10114811**

SUMMARY

Complainant, who is bisexual, alleges that she was harassed and ultimately fired from her employment with Respondent because of her sexual orientation. She has not proven her charges of harassment or unlawful termination and, therefore, her complaint must be dismissed.

PROCEEDINGS IN THE CASE

On November 14, 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 Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on July 14, 2008, November 12, 2008 and November 13, 2008.

Complainant and Respondent appeared at the hearing. At the July 14, 2008 hearing session, the Division was represented by Jane M. Stack, Esq. At the November 12 & 13, 2008 sessions, Complainant was represented by Zafer A. Akin, Esq. Respondent was represented by Lois M. Traub, Esq.

At the hearing, the caption was amended on the record to properly reflect the name of the Respondent.

Permission to file post-hearing briefs was granted. The attorneys for both Complainant and Respondent filed timely submissions.

FINDINGS OF FACT

1. Complainant was employed by Respondent from June 20, 2005 through October 26, 2006 as a mini-bar attendant. (ALJ Exhibit 2; Tr. 51-52, 68)

2. Respondent is a hotel located in New York, New York. (Tr. 16)

3. Complainant is bisexual. (Tr. 16, 54)

4. Glenda Diaz, a suite keeper, was a co-worker of Complainant. Diaz is represented by a union, the New York Hotel and Motel Trades Council, Local 6. In addition to her duties as a suite keeper, Diaz was a union assembly delegate. (Tr. 276, 460, 464-65)

5. Complainant alleged that, while at work, Diaz would often make offensive comments about Complainant's sexual orientation. For example, Diaz called Complainant a "dyke" who "likes to eat girls." (Tr. 55-56)

6. Marta Bustillo, a co-worker, heard Diaz call Complainant "bad words" and stated that Complainant "likes women." (Tr. 156-58)

7. Ricardo Roldan, a bellman who is homosexual, stated he heard employees in the cafeteria calling Complainant a "carpet muncher," but he was unable to say who made the comments or when they were made. (Tr. 177) Roldan never made a complaint about the comments. (Tr. 189-90)

8. Complainant has maintained a romantic relationship with Frankie Bones, a bellman for Respondent, since Fall, 2005. Bones is a male. (Tr. 222, 231)

9. In September, 2005, Complainant complained to Dana Sholl, director of human resources, about Diaz. Complainant alleged that Diaz and two other co-workers were gossiping about her and giving her dirty looks. Diaz admitted to Sholl that she had engaged in gossip about Complainant and Bones. Complainant did not allege that Diaz, or anyone else, had harassed her or discriminated against her because of her sexual orientation. (Tr. 281-83)

10. Sholl directed Diaz and the others to stop engaging in gossip, reminded them that Respondent has a harassment-free policy and gave them a copy of the policy. Sholl then wrote up her findings in a letter to Complainant and invited her to contact Sholl if there were any further problems. (Respondent's Exhibit 2; Tr. 284)

11. Respondent had a formal anti-harassment policy of which Complainant was aware. (Respondent's Exhibit 1; Tr. 94)

12. Complainant never brought any further complaints of harassment or discrimination to Sholl. Complainant never complained specifically about sexual orientation discrimination and Sholl was unaware of Complainant's sexual orientation. (Tr. 286, 288)

13. Alexandra Rampersad is a bisexual employee of Respondent. Rampersad remains employed by Respondent and has not been discharged. (Tr. 115)

14. During Sholl's tenure with Respondent, she has only received one complaint of sexual orientation harassment or discrimination. In 2003, a bellman called a co-worker a "fucking faggot" and threatened to "break his fucking legs." The perpetrator was fired for his comments. (Tr. 289)

15. On October 24, 2006, Complainant and Diaz got into a physical altercation in the employees lunchroom. Diaz had gotten into a dispute with some co-workers and Diaz indicated that she wanted Bones, a union delegate, to get involved. When Diaz mentioned Bones' name, Complainant questioned why she had to involve him. Thereafter, an argument and a physical altercation ensued between Diaz and Complainant. (Tr. 65-66)

16. Complainant and Diaz have differing versions of the altercation. Complainant asserted that Diaz threw the first several punches and Complainant sought to defend herself. Diaz said that Complainant threw the first punch and hit her in the face. (Tr. 66, 463-64)

17. A witness to the altercation, Maysoon Nasharty, said Complainant started the fight when she "snuffed" Diaz by pushing Diaz backwards a few steps with her fingers. (Tr. 373-74)

18. In response to the fight, Respondent suspended both Complainant and Diaz pending an investigation into the altercation. After the investigation was completed, Geoffrey Mills, managing director of the hotel, decided that both Complainant and Diaz, who is not known to be bisexual, should be fired. (Tr. 438-39)

19. Respondent has a zero tolerance policy regarding physical violence in the work place. (Tr. 437)

20. When Mills made the decision to fire Complainant and Diaz, Mills did not know Complainant's sexual orientation. (Tr. 439)

21. After the investigation into Complainant's fight with Diaz, Complainant's employment was terminated immediately. (Tr. 68)

22. Because Diaz was a union delegate, she could not be fired immediately. Instead, pursuant to the terms of the collective bargaining agreement, Respondent must propose the termination of a delegate's employment. Thereafter, an arbitrator determines if termination is warranted. (Tr. 440)

23. Respondent proposed the termination of Diaz' employment. Prior to the hearing, Respondent and Diaz agreed to a settlement. Respondent agreed to the settlement because Respondent could not show that Diaz was the aggressor in the altercation, she was a union delegate and an assembly delegate and Diaz had worked at the hotel since its opening in 2000. (Tr. 440-41)

24. Under the terms of the settlement, Diaz was reinstated. The termination was converted to a suspension without pay through November 3, 2006, and Diaz' status as a delegate was removed. In addition, Diaz was given a final warning, such that any further infraction of Respondent's rules or policies would result in the termination of her employment. (Respondent's Exhibit 12; Tr. 442)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of his or her sexual orientation. Human Rights Law § 296.1(a).

Complainant in the instant complaint makes the argument that she was harassed and

eventually fired because of her sexual orientation.

To sustain her claim that she was fired unlawfully, Complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was qualified for the position held, that she suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. If Respondent can do that, the ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant fails to establish a prima facie claim. She does not show that she was treated any differently than Diaz, who is not bisexual. Respondent sought to terminate the employment of both of the participants in the fight. It was only after Diaz and her union instituted grievance procedures that Mills relented and settled the charges so that Diaz could retain her employment. Diaz was retained because she had a union behind her and the grievance process gave her some leverage to retain her job. Complainant did not have that leverage. Moreover, Mills made the decisions to seek termination for both employees and agreed to a settlement with Diaz without knowing Complainant's sexual orientation. Therefore, Mills could not have been acting out of any animosity against Complainant because of her sexual orientation.

With respect to Complainant's charge of harassment and hostile environment owing to her sexual orientation, she must show that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to

alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

If Complainant can meet this standard, she must then show that Respondent had knowledge of the harassing behavior and either acquiesced in the discriminatory conduct, or failed to take remedial action. *Id.*, at 54; *Vitale v. Rosina Food Products, Inc.*, 283 A.D.2d 141,142 (4th Dept. 2001). An employer may "disprove condonation by showing that it reasonably investigated complaints of discriminatory conduct and took corrective action." *Father Belle Community Ctr.*, at 54. *See also, Hendricks v. 333 Bayville Avenue Restaurant Corp.*, 260 A.D.2d 545, 688 N.Y.S.2d 593 (2d Dept. 1999)

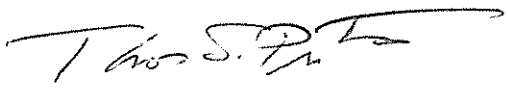
The Complainant here cannot show that Respondent condoned the alleged harassment of Complainant by Diaz. Complainant made an internal complaint to Sholl, but did not mention any sexual orientation harassment. Rather, she charged that her co-workers were gossiping about her and giving her dirty looks. Sholl investigated anyway and instructed Complainant to let her know if she had any more problems. Although Complainant was aware of Respondent's complaint procedures and had made use of them in the past, she never again complained to Sholl or anyone else. Thus, based upon the evidence presented at hearing, Complainant cannot show that Respondent had knowledge of the alleged harassment or condoned it in any way.

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 5, 2009
Bronx, New York



Thomas S. Protano
Administrative Law Judge