ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **ROSALYN ROSA-HAMDJA,** Complainant, v. **JOSEPH SERRANO, CITY OF NEW YORK, POLICE DEPARTMENT,** Respondents.	**NOTICE AND FINAL ORDER** Case No. 10166543

Federal Charge No. 16GB401306

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 June 8, 2015, by Robert J. Tuosto, 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") WITH THE FOLLOWING AMENDMENT:

- The interactive process is not "required" by the Human Rights Law as stated in the Recommended Order. Pursuant to 9 N.Y.C.R.R. § 466.11(j)(4), an employer

is required "to move forward to consider accommodation once the need for accommodation is known or requested." However, the employer's decision to engage in or forgo an interactive process is but one factor to be considered in deciding whether a reasonable accommodation was available for the employee's disability at the time the employee sought accommodation. *See Jacobsen v. New York City Health and Hosp. Corp.*, 22 N.Y.3d 824 (2014).

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the Division's offices 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: JUL 22 2015

Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ROSALYN ROSA-HAMDJA,
Complainant,

v.

JOSEPH SERRANO, CITY OF NEW YORK, POLICE DEPARTMENT,
Respondents.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10166543**

SUMMARY

Complainant alleged that she was unlawfully discriminated against based on sex and disability. Complainant also alleged that she was exposed to a hostile work environment and suffered retaliation. However, Complainant has failed to prove her claims and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On January 9, 2014, 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 unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

On January 13, 2014, the Division amended the complaint to reflect the correct name of the Respondents as the "City of New York Police Department, Joseph Serrano." (ALJ Exh. 2)

On June 18, 2014, Complainant amended her verified complaint to re-allege the allegations in her original complaint and served same upon the correctly named Respondents. (ALJ Exh. 3)

After due notice, the case came on for Public Hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 23-24, 2015.

Complainant and Respondents appeared at the hearing. Complainant was represented by Richard V. Rappaport, Esq. of Richard V. Rappaport & Associates. Respondents were represented by Eileen Flaherty, Esq. of the Legal Bureau, City of New York Police Department.

FINDINGS OF FACT

1. In 2008, Complainant was appointed a police officer for Respondent City of New York Police Department ("N.Y.P.D."). (Tr. 24)

2. Respondent Serrano started working as Complainant's supervisor several years after she was hired by the N.Y.P.D. (Tr. 32, 149, 234, 256)

3. In June 2013, Complainant requested medical leave due to pregnancy. On June 20, 2013, Complainant's personal physician, Joan S. Haselkorn-Lomarsky, M.D., gave her a doctor's

note which stated that Complainant was pregnant and required bed rest "until further notice." (Complainant's Exh. 3; Tr. 51, 151)

Complainant Makes an Internal Complaint Against Respondent Serrano

4. On June 25, 2013, Complainant orally made an internal complaint with Respondent N.Y.P.D.'s Office of Equal Opportunity ("OEO"). (Tr. 26-27, 194)

5. Complainant complained that, starting in approximately 2011, she had been previously "harassed" by Respondent Serrano when he sent her text messages during off duty hours, brushed up against her rear end, made comments suggesting that she wear tighter clothing, and requested that they date and that she have sex with him. (Tr. 27-31, 46, 51, 152, 190-91)

6. I do not credit Complainant's allegation of sexual harassment against Respondent Serrano. The credible testimony was that Respondent Serrano occasionally socialized with Complainant and other coworkers, and both he and his subordinates had each other's cell phone numbers in order to make contact while in the field. (Tr. 153, 237-38, 264)

7. On that same day, Complainant had called Respondent Serrano on his cell phone to confront him with the fact that she had heard a rumor from a coworker, Detective Edwin Bruno, that Respondent Serrano had falsely bragged about having sex with her. (Tr. 34, 38-40, 45-46, 193)

8. Complainant and Bruno had previously been in an intimate relationship. (Tr. 155-56, 163-64, 169-70)

9. Respondent Serrano "angrily" denied to Complainant that he had spread such a rumor. (Tr. 47, 241)

10. Respondent Serrano immediately reported Complainant's phone call to his superior who directed him to write down his recollection of the phone conversation. (Tr. 245, 250-51)

11. Respondent's superior was unable to address this incident with Complainant because Complainant was out on sick leave until the following month, and was required to maintain bed rest due to her pregnancy. (Tr. 51, 249-50, 288)

12. In September 2013, OEO closed its investigation of Complainant's complaint without talking any action against Respondent Serrano. This was done because, after both parties were interviewed, there was no corroborating evidence of Complainant's allegations. (Tr. 189, 192)

Complainant is Alleged by Her Employer to be Absent Without Leave ("A.W.O.L.")

13. In July 2013, the N.Y.P.D.'s District Surgeon told Complainant that she needed more paperwork to justify maintaining bed rest. (Tr. 92-96)

14. On July 9, 2013, Dr. Haselkorn-Lomarsky wrote a doctor's note regarding Complainant's medical condition stating that "Patient is pregnant with bleeding and threatening to miscarry. She requires bed rest until further notice." (Complainant's Exh. 4, Tr. 51, 75, 91)

15. On July 15, 2013, Complainant was seen at South Nassau Communities Hospital for a gynecological procedure in response to a pregnancy miscarriage. (Complainant's Exh. 5; Respondent's Exh. 1; Tr. 119)

16. On July 25, 2013, Complainant was seen in the N.Y.P.D.'s Medical Division and cleared to return to her employment on full duty status. (Complainant's Exh. 6; Tr. 125)

17. On July 26, 2013, Complainant called in sick because her doctor had not authorized her to return to work. (Tr. 125)

18. On July 28, 2013, Complainant was erroneously thought to be A.W.O.L. That same day the N.Y.P.D.'s Medical Command withdrew Complainant's erroneous A.W.O.L. designation after its personnel realized that she was listed on a different computer screen. (Tr. 100-101)

19. Complainant did not suffer any repercussion as a result of being erroneously thought to be A.W.O.L. (Tr. 99-101)

Complainant Voluntarily Agrees to go to Respondent N.Y.P.D.'s Psychological Services Unit

20. On July 30, 2013 Complainant voluntarily agreed to go to Respondent N.Y.P.D.'s Psychological Services Unit after she had asked for police personnel to come to her home because she was "very upset" and not feeling well due to her pregnancy miscarriage, and because of the stress caused by her fiancée and Bruno. (Tr. 72-74, 76-77, 175)

21. As a result of the events of July 30, 2013, Complainant was placed on restricted duty and her firearms were taken from her. (Tr. 82, 167-68, 201, 207)

22. Complainant was seen by both police psychologists and by her own private psychologist from July 30, 2013, through August, 2014. (Tr. 84-88)

Complainant is Again Alleged by Her Employer to be Absent Without Leave ("A.W.O.L.")

23. On August 16, 2013 Complainant was interrogated by N.Y.P.D. for being A.W.O.L. on August 8-16, 2013. Complainant was notified that she was considered A.W.O.L. for the time period August 8-16, 2013 as a result of having missed an appointment with a police psychologist on August 7, 2013. (Complainant's Exh. 2; Tr. 36-37, 53-54, 56-57, 59, 117, 197, 210)

24. Complainant was not paid for one week's salary which was the result of a mistake made by the N.Y.P.D.'s Payroll Department. (Tr. 109-10, 133)

25. Both sides stipulated at the public hearing that Complainant had seen a police psychologist on August 7, 2013. (Tr. 114-15)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer,

"...because of an individual's...sex [or] disability...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a). The Human Rights Law also makes it an unlawful discriminatory practice for an employer to, "...discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law § 296.1(e).

In discrimination cases a complainant has the burden of proof, and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

Sex Discrimination

In order to establish a prima facie case of employment discrimination based on protected class membership, a complainant must show: 1) membership in a protected class; 2) that she was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

The record shows that the first two prongs of the test have been met. Complainant, due to her sex, is a member of a protected class. Second, Complainant is qualified as a police officer. However, Complainant cannot make out the third prong of the test because her being required to

seek further medical documentation to justify her continued absence from work does not rise to the level of being an adverse employment action. An adverse employment action is one which is significantly injurious or harmful to the employee. *See Messinger v. Girls Scouts of the U.S.A.*, 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dept. 2005) (adverse employment action found to be a materially adverse change in circumstances such as termination, decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices…unique to a particular situation.)

Therefore, this claim must fail.

Disability Discrimination

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) the employee was an individual who had a "disability" within the meaning of the Human Rights Law; 2) the employer had notice of the disability; 3) with reasonable accommodation the employee could perform the essential functions of the position; and 4) the employer refused to make such accommodations. *Abram v. New York State Div. of Human Rights,* 71 A.D.3d 1471, 1473, 896 N.Y.S.2d 764 (4th Dept. 2010).

Pregnancy-related physical impairments, although temporary, are "disabilities" within the meaning of the Human Rights Law. *See* Human Rights Law § 292.21; *see also New York City Transit Auth. v. State Div. of Human Rights (Nash),* 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991). Employers "have a duty to reasonably accommodate known disabilities, where the need for the accommodation is known." 9 N.Y.C.R.R. § 466.11(j)(3). Adjustments to work schedules are recognized under the law as a reasonable accommodation for employees with temporary disabilities. *See* 9 N.Y.C.R.R. § 466.11(i)(3).

Here, Complainant did not make out a prima facie case as she failed to show that Respondent did not accommodate her temporary disability. Complainant sought from her employer the reasonable accommodation of bed rest, as per her physician's directive. The record shows that the N.Y.P.D., after having received Complainant's June 20, 2013 doctor's note, requested another doctor's note justifying the specific request of bed rest. On or about July 9, 2013, it received a second doctor's note which described Complainant's condition and justified the request for bed rest. As a result, N.Y.P.D. granted Complainant's accommodation request. N.Y.P.D.'s request for additional medical documentation was not a denial of the aforementioned accommodation but, instead, an example of the legally required interactive process required by the Human Rights Law. Such a process envisions both an employer and an employee working together to assess whether the employee's disability can be reasonably accommodated. *See Romanello v. Intesa Sanpaolo, S.p.A.*, 97 A.D.3d 449 at 451, 949 N.Y.S.2d 345 (1st Dept. 2012).

Therefore, this claim must be dismissed.

Hostile Work Environment

In order to establish a prima facie case of hostile work environment, 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*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), *quoting Harris v. Forklift Sys., Inc.* 510 U.S. 17 (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." *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. *See id.* at 21.

Here, Complainant alleged that Respondent Serrano committed several unwelcomed acts after he became her superior including that she had been previously "harassed" by him when he sent her text messages during off duty hours, that he brushed up against her rear end, that he made comments suggesting that she wear tighter clothing, and that he requested that they date and that she have sex with him. However, Complainant's allegations were credibly denied by Respondent Serrano. The record shows that there were credible reasons for any contact outside of work between both, namely, that Respondent Serrano occasionally socialized with Complainant and other coworkers, and he and his subordinates had each other's cell phone numbers in order to make contact while in the field. Further, Respondent Serrano's denial was corroborated by N.Y.P.D.'s internal OEO investigation which ultimately took no action against him after having interviewed both parties. Finally, consistent with Respondent Serrano's denial, the record shows that he immediately brought to the attention of his superior the rumor that he supposedly bragged about having sex with Complainant once she confronted him about this on June 25, 2013.

Therefore, this claim must be dismissed.

Retaliation

In order to make out a prima facie case of retaliation, a complainant must show that: 1) she engaged in protected activity; 2) the respondent was aware that she engaged in protected activity; 3) that she suffered and an adverse employment action; and 4) a causal connection

between the protected activity and the adverse employment action. *Pace*, 692 N.Y.S.2d at 223, 224.

Complainant makes out the first two prongs of the test. Complainant engaged in protected activity when she filed her internal OEO complaint with the N.Y.P.D. on June 25, 2013. The issue becomes whether being exposed to the interrogation or accused of being A.W.O.L rises to the level of being adverse employment actions in the retaliation context.

In the retaliation context, an adverse employment action has been found to be one which would be materially adverse to a job applicant or employee. Specifically, the phrase "materially adverse" has been found to mean any action "which could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Mejia v. Roosevelt Island Med. Assoc.*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup Ct. N.Y. Co. 2011), *citing Burlington v. Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), *aff'd.* 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed*, 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013).

Here, Complainant's claim of retaliation as to her interrogation was based on her belief that this occurred because of her OEO complaint or because she was abusing the directive that she be allowed to maintain bed rest. Such allegations cannot meet this prong of the prima facie test. However, this is not true of Complainant's claim that she was retaliated against by being accused of being A.W.O.L. Complainant attended the August 7, 2013 appointment with the police psychologist but was nonetheless subsequently docked one week's pay. Therefore, Complainant has made out a prima facie case as to this claim given that this occurred approximately six weeks after her OEO complaint.

The record shows that the unrebutted reason for the docking of Complainant's pay was not a product retaliation but was instead the result of a mistake made by the N.Y.P.D.'s Payroll

Department.

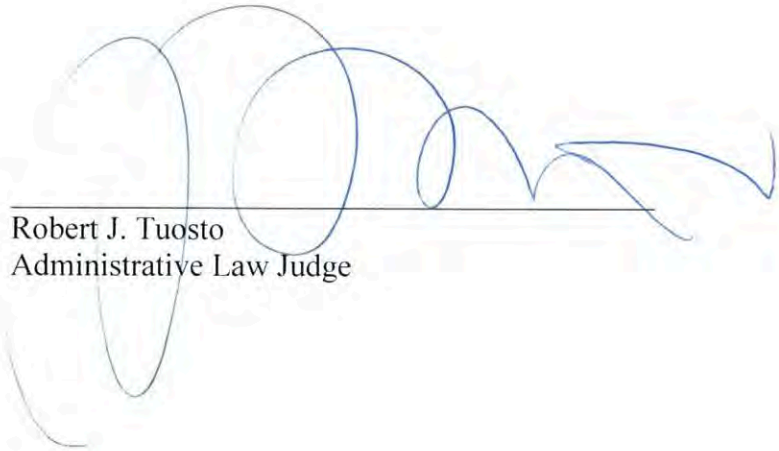
Therefore, the complaint must be dismissed.

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: June 5, 2015
Bronx, New York



Robert J. Tuosto
Administrative Law Judge