

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

CHERRI STANTON,

Complainant,

v.

81ST BROADWAY BEAUTY INC, IVI "DOE",
OMAR "DOE", RANDY "DOE" AS AIDERS AND
ABETTORS,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10113542

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 26, 2009, by Spencer D. Phillips, 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 27 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 10113542

SUMMARY

Complainant claims that Respondents subjected her to a hostile work environment, unlawfully retaliated against her, and forced her to resign her position. Complainant has failed to satisfy the applicable legal burdens and her claims are dismissed.

PROCEEDINGS IN THE CASE

On August 24, 2006, 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.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on May 5-6, 2008. The matter was subsequently reassigned to Spencer D. Phillips, ALJ, for preparation of this Recommended Findings of Fact, Opinion and Decision, and Order.

Complainant and Respondents appeared at the hearing. The Division was represented by Jane M. Stack, Esq. Respondents were represented by Alan Jamnik, Vice President of Respondent 81st Broadway Beauty, Inc.

Permission to file post-hearing briefs was granted. A timely brief was received from the Division; no brief was received from Respondents.

FINDINGS OF FACT

1. Complainant is an African American female. (Tr. 26, 56)
2. Respondents operates eleven retail beauty stores in the New York metropolitan area, including the store where Complainant worked on the corner of 81st Street and Broadway, New York. (Tr. 29-30, 226)
3. In April, 2006 Respondents hired Complainant as a part-time cashier. Complainant worked 4-5 days per week, and her work hours varied weekly according to store needs. (Tr. 41-44)
4. Respondents' cashiers routinely performed cashier, janitorial, customer service and security duties. (Tr. 26-27, 51, 63, 72-73, 150, 339-40)
5. Complainant was disappointed whenever Respondents asked her to perform customer service, cleaning or security duties because she believed her pay rate was not high enough to justify such responsibilities. (Tr. 51, 58-60, 63, 70)

6. Complainant worked with Randy Sokolovsky, Omar Sikder and an employee named "Avi." Sokolovsky and Sikder were store managers. (Tr. 30-32, 283, 335, 337)

7. Complainant frequently operated Respondents' cash register, which is located in the front of the store and is monitored by a video camera. Respondents monitor the video camera, but stores no recording of the same. The walkway behind the cash register is narrow and requires employees passing behind the cashier to make brief physical contact with the cashier. (Tr. 101-02, 133-34)

8. Sokolovsky, Sikder and Avi told racial and sexual jokes in the workplace before and during Complainant's employment. The jokes made Complainant feel "awkward." Complainant asked the employees not to tell racial and sexual jokes in her presence. (Tr. 34, 92-93, 171)

9. Respondents maintain a sexual harassment policy and a separate reporting procedure document which instruct employees to report misconduct to their supervisors or directly to Respondents' owners. Reporting can be made via face-to-face visit, private email, telephone call to owner's private cell phone and personal note in owner's private safe or under his office door. (Respondents' Exh. 3, 5; Tr. 154-160, 316)

10. Complainant was fully aware of Respondents' anti-harassment policy and reporting procedure. Complainant chose not to report the alleged misconduct because she thought "there was really nothing going to come out of it." (Tr. 35, 39, 86-87, 136-37)

11. All racial and sexual jokes ceased immediately after another coworker reported the jokes to Respondents. (Tr. 39, 52, 160-61)

12. A supervisor spoke to Complainant while investigating a coworker's allegation of sexual harassment. Complainant told the supervisor that the coworker's allegations were accurate. (Tr. 90)

13. Most of Complainant's coworkers and supervisors were racial minorities. Complainant testified that she was not subject to any mistreatment because of her race. (Tr. 87-89)

14. In early August, 2006, Respondents assigned Complainant to collect customer bags at the front of the store and place them in a storage area while the customers were shopping. Complainant expressed her displeasure with these assignments by adopting a "very bad attitude" and by withdrawing from her coworkers. (Tr. 39-41)

15. In early August, 2006, Complainant quit her job because she did not like collecting customer bags at the front of Respondents' store and because she did not like the hours which Respondents assigned her to work. (Tr. 27, 45-47, 65-66, 69, 141, 195-98)

OPINION AND DECISION

Hostile Work Environment

The Human Rights Law prohibits an employer from discriminating against an employee, on the basis of race or sex, in compensation or in the terms, conditions or privileges of employment. Human Rights Law § 296.1(a).

Complainant alleges that Respondents subjected her to a hostile work environment because of her race and her sex. To satisfy a claim of hostile work environment claim on the basis of race or sex, Complainant must demonstrate that Respondents' workplace was "permeated with 'discriminatory intimidation, ridicule, and insult,' that is sufficiently severe or pervasive to alter the conditions of [her] employment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993) (quoting *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65, 67, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)); *Father Belle Community Ctr. v. New York State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept 1996).

Complainant claims that she was racially and sexually harassed because of comments and jokes made in the workplace. The proof establishes that jokes of a racial or sexual nature did occur in Respondents' store. When Complainant heard jokes being told to other employees, she had no objection. When jokes were directed toward Complainant, she asked those employees not to joke with her. Complainant was fully aware of Respondents' anti-harassment policy and detailed reporting procedures and she unreasonably failed to report the jokes to Respondents. Furthermore, all jokes ceased immediately after a coworker followed the reporting procedure and complained about the jokes. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 311, 786 N.Y.S.2d 382 (2004) (no liability attaches where employee was aware of employer's antidiscrimination policy and unreasonably failed to report the alleged discrimination).

Complainant also claims that she was sexually harassed when employees would physically touch her while she operated Respondents' cash register. The proof demonstrates that the register is located in the front of the store in full view of all customers and is continuously being monitored by a security video camera. The walkway behind the register is narrow, and employees whose duties required them to pass behind the cash register would, of necessity, physically brush by the employee operating the register.

Complainant has failed to demonstrate that she suffered a single, extraordinarily severe incident or a series of incidents that were "sufficiently continuous and concerted" to have altered the conditions of her working environment. *Father Belle*, 221 A.D.2d 44; *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997), (quoting, *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir. 1989)). Complainant also acknowledged that most of her coworkers were of a racial minority and testified that she did not believe she was subject to any mistreatment because of her race. Therefore, Complainant's hostile work environment claims are dismissed.

Retaliation

The Human Rights Law prohibits an employer from retaliating or discriminating against any person “because said person has opposed any practices forbidden” by that law. Human Rights Law §296.7.

To establish a prima facie case of unlawful retaliation, Complainant must show that (1) she engaged in a protected activity; (2) Respondents knew that she engaged in protected activity; (3) she suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing, Dortz v. City of New York*, 904 F.Supp. 127, 156 (1995).

Complainant has failed to satisfy her prima facie burden of unlawful retaliation. The proof demonstrates that Complainant engaged in protected activity when she told a supervisor that a coworker’s claim of harassment was accurate, and when she told several employees not to joke with her in a sexual or racial manner. However, Complainant failed to demonstrate that she suffered an “action, more than trivial, that would have the effect of dissuading a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

Complainant argues that she suffered an adverse employment action when Respondents scheduled her to work fewer hours than she expected on one particular day in August, 2006. The proof shows that Complainant’s work hours varied according to the store’s weekly or seasonal needs, and that such variation was an expected and regularly-occurring condition of her employment with Respondents. Therefore, Complainant has failed to establish that she suffered an adverse employment action and her unlawful retaliation claim is dismissed.

Constructive Discharge

Complainant claims that Respondents constructively discharged her by reducing her hours and assigning to her the undesirable duty of collecting customer bags at the front of Respondents' store. To prevail on this claim, Complainant must demonstrate that Respondents deliberately made her working conditions so intolerable that she was "forced into an involuntary resignation." *Equal Employment Opportunity Commission v. Die Fliedermaus, L.L.C.*, 77 F.Supp.2d 460 (S.D.N.Y. 1999); *Martinez v. State Univ. of New York*, 294 A.D.2d 650, 741 N.Y.S.2d 602 (3rd Dep't. 2002).

The proof shows that Complainant's work hours varied throughout the course of her employment, and that such variation was a normal and expected condition of her employment. Similarly, collecting customer bags was a normal and expected job duty for Complainant and all other cashier employees. Therefore, Complainant has failed to demonstrate that Respondents deliberately changed her working conditions to any degree, and her constructive discharge claim is dismissed.

Aider and Abettor Liability

Respondents "Ivi" Doe, "Omar" Doe, and "Randy" Doe, identified at public hearing as "Avi" Doe, Omar Sikder, and Randy Sokolovsky, have no liability as aiders and abettors under the Human Rights Law §296.6, which makes it an unlawful discriminatory practice "for any person to aid, abet incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." Under this theory, liability against the employer is a requisite for finding liability of an aider and abettor. Where the case against the employer is dismissed, the case against the aiders and abettors must also be dismissed. *Wynn v. National Broadcasting Co., Inc., et al.*, 251 A.D.2d 469, 471-472, 674 N.Y.S.2d 415, 417 (2d Dept. 1998).

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 26, 2009
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is written in a cursive style with a large initial "S".

Spencer D. Phillips
Administrative Law Judge