NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **ELIZABETH L. WINKLER,** Complainant, v. **FITNESS INSTITUTE AND PILATES STUDIO,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10104760

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 14, 2008, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"), WITH THE FOLLOWING AMENDMENTS:

- The Commissioner does not adopt the conclusion that the behavior about which Complainant complains is insufficent as a matter of law to constitute a hostile work environment.
- The Commissioner finds that the evidence shows that Complainant unreasonably

failed to object to or complain about the alleged behavior at issue, and that she also neglected to take advantage of Respondent's reasonable complaint procedures to address any such objections and/or complaints. (Complainant's Exhibit 5; Tr. 118, 294, 320, 322, 418-25). Thus, the claim is dismissed. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312, 786 N.Y.S.2d 382, 395 (2004) (no liability attaches where the employer can show it "exercised reasonable care to prevent . . . discriminatory conduct . . . such as by promulgating an antidiscrimination policy with complaint procedure, and that the plaintiff unreasonably failed to take advantage of . . . corrective opportunities . . . or to otherwise avoid harm"); *Bartle v. Mercado*, 235 A.D.2d 651, 654, 652 N.Y.S.2d 139, 141 (3d Dept. 1997) ("the gravamen of any sexual harassment claim" is the "unwelcomeness of the alleged sexual advances" and, therefore, a claim fails where the employee "never communicated, by words or behavior, that . . . contacts were uninvited, offensive or unwarranted").

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, this 14th day of March, 2008.

KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ELIZABETH L. WINKLER,
Complainant,

v.

FITNESS INSTITUTE AND PILATES STUDIO,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10104760**

SUMMARY

Complainant alleged that her employer subjected her to a hostile work environment and treated her disparately on account of her age. Respondent denied unlawful discrimination in his verified Answer. Complainant did not prove her case and the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On March 29, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with an unlawful discriminatory practice 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held at the Division's regional offices in Buffalo, New York on July 18-19, 2007, and December 12-13, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq., Buffalo, New York. Respondent was represented by David Gerald Jay, Esq., Budffalo, New York.

Permission to file post-hearing Findings of Fact and Conclusions of Law was granted and both sides made their submissions.

FINDINGS OF FACT

1. Complainant, a female then 49 years old, alleged that Richard W. Williamson, her employer at Respondent, subjected her to both disparate treatment on account of her age and a hostile work environment. (ALJ Exh. 2)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 5)

3. Respondent is a business employing the Pilates Method ("Pilates") for the use of fitness and rehabilitation concepts and techniques for its clients. Williamson is Respondent's owner. In 2000, Williamson became certified to administer the Pilates method. (Joint Exh. 1; Tr. 559, 561)

4. Williamson purchased training materials and held classes for potential employees to become certified in Pilates. These individuals would agree to be employed as trainers for Williamson for a two year period in return for learning Pilates without having to pay tuition. (Complainant's Exh. 4; Tr. 451, 563, 564, 618-622)

5. In 2001, Complainant met Williamson and started taking classes with him in

September of that year. On September 20, 2001, Complainant signed the employment contract and began both her two year commitment and the training of Respondent's clients. In August, 2002, Complainant was placed on Respondent's payroll. In October 2003, Complainant became a certified Pilates rehabilitation practitioner after completing classes and passing an examination. (Complainant's Exhibit 4; Tr. 102-105, 108, 112, 114-16, 348, 349, 361, 402, 422-23, 622, 688)

6. Complainant was the oldest of the six female Pilates trainers in Respondent's employ. Complainant was earning the same hourly wage as other part-time trainers. (Tr. 109, 110, 167, 168, 707)

7. Complainant wanted to become a full-time employee. Several of Respondent's trainers were also unable to achieve full-time hours. Williamson, in response to Complainant's request in this regard, told the office manager to give Complainant priority in scheduling and even asked other trainers if they would be willing to give her some of their clients. As per Respondent's employee manual, an employee was not considered full-time unless they worked 35 hours or more per week. Complainant never received employee benefits as they were only available to full-time employees. (Complainant's Exh. 5; Tr. 118, 311, 334, 369, 374, 389, 390, 543-44, 627, 632, 693)

8. Complainant's clients were assigned to her based on her availability; each trainer gave a schedule to the office manager who would then make assignments. Complainant was unavailable for work on three evenings per week, and weekends. Also, Complainant preferred working with rehabilitation clients rather than fitness clients despite being told by Williamson that she was limiting herself by his preference. The former were generally older and more likely to pay for their services by insurance rather than private payment which made it less likely for Complainant to increase the size of her clientele. Respondent's clientele consisted of

approximately 50 percent rehabilitation clients and 50 percent fitness clients. It was the responsibility of each of Respondent's employees to develop their clientele. (Tr. 94, 157-58, 159, 165, 166, 180-81, 325, 355, 363, 366, 405, 415, 524, 540, 566, 572, 573, 574, 582, 583, 624, 625, 630, 698)

9. Complainant conceded that she never engaged in sales or marketing to increase the size of her clientele despite being urged to do so numerous times. Respondent's employee manual allowed for commissions to employees as a reward for getting client referrals. Complainant never took advantage of this opportunity. Approximately 80 percent of Respondent's clientele came from direct referrals. Complainant attempted to bring in a new client on only one occasion. (Tr. 307, 373, 377-78, 506, 541, 626, 628-29, 685, 699)

10. When clients would cancel an appointment trainers were offered an opportunity to perform cleaning work. Complainant did not always avail herself of this opportunity. (Tr. 382-83)

11. Both Williamson and some clients told Complainant that they wanted her to be a more physically aggressive trainer. A coworker who testified on Complainant's behalf described her as "timid", while a former office manager of Respondent testified that Complainant may not have been as strong as other trainers and was sometimes intimidated by physically larger clients. Complainant conceded that she had a difference in philosophy with Williamson in how to treat rehabilitation clients. Williamson also told other trainers that they were not being aggressive enough. (Tr. 118, 138, 297, 302-03, 323, 371, 411, 412, 414, 427, 545, 567, 584, 587, 634, 695, 696, 700)

12. Throughout her tenure Complainant was the subject of complaints from clients that they

were not progressing fast enough; complaints also came from physicians who had referred clients to Respondent. (Tr. 511-12, 533, 633, 635, 637, 653, 670-71)

13. In Spring, 2004, Complainant became upset when her hours changed after a younger female trainer, Tatianna Matsuo, began working for Respondent. Complainant had been averaging approximately 22 hours of work per week but that was reduced to approximately 12 hours per week after Matsuo's arrival. In addition to Complainant, there were other trainers who did not have 35 hours of work per week. Matsuo was not assigned any of Complainant's clients. Matsuo reached full-time hours in the space of a few months as she was already a certified Pilates trainer upon being hired, was available for work on evenings and weekends, and (unlike Complainant) also accepted fitness clients. (Tr. 306, 310, 313, 317, 333, 344, 348, 372, 397, 406, 408, 415, 508, 509-10, 511, 536, 537, 543, 629, 679, 682, 693, 710)

14. During her tenure with Respondent Complainant alleged that Williamson created a hostile work environment in various ways, namely, having pornography on his work computer, admonishing Complainant not to talk to former employees, discussing inappropriate matters with her, joking about wearing a thong, and repeatedly gyrating his hips in a sexually suggestive way. However, I credit the testimony of Williamson and a former office manager that his computer was used by others and that they could have been responsible for what Complainant saw. Further, I credit Williamson's testimony that he admonished Complainant solely for the purpose of protecting his business interests, that the alleged inappropriate matters he discussed with Complainant were nonetheless business-related, that the joke was a one-time incident, and that the gyrations were to demonstrate a Pilates exercise method known as the "pelvic tilt". (Tr. 320, 324, 350-52, 357, 413, 416-17, 420-421, 421-22, 424, 544, 585, 638, 639, 648-51, 697)

15. On March 29, 2005, Complainant filed her Division complaint. (ALJ Exh. 2)

16. On November 5, 2005, Complainant resigned from Respondent's employ due to insufficient hours and salary. Subsequently, Complainant took a position with one of Respondent's competitors. (Tr. 178, 650, 701-702)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of the age...[or]...sex...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

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 non-discriminatory. Should a respondent articulate a legitimate and non-discriminatory reason for its actions, 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 1010, 692 N.Y.S.2d 220 (3d Dep't., 1999).

Complainant can establish a prima facie case of unlawful discrimination based on age by proving: 1) membership in a protected group; 2) that she was qualified to hold 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,* 309 A.D.2d 546, 765 N.Y.S.2d 326 (2003).

Complainant can establish the existence of a hostile work environment by proving: 1) membership in a protected group; 2) that she was the subject of unwelcome sexual harassment; 3) the harassment was based on her gender; 4) the sexual harassment affected a term, condition or privilege of employment; and 5) the employer knew or should have known of the harassment and failed to take remedial action. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc. 2d 795, 669 N.Y.S.2d 122 (1997), *appeal dismissed,* 256 A.D.2d 269, 682 N.Y.S.2d 167, *appeal dismissed,* 93 N.Y.2d 753, 700 N.Y.S.2d 427. Generally, isolated remarks or occasional harassment will not merit relief under the Human Rights Law. *Harris v. Forklift Sys.,* 510 U.S. 17, 21 (1993).

As to the allegation of age discrimination, Complainant makes a prima facie case: she was within the protected group, she was qualified to hold the position of trainer, she suffered an adverse employment action by way of the diminution in her work hours, and this change occurred at about the time of Matsuo's arrival. However, Respondent offered a host of reasons for this change which were not proven by Complainant to be a pretext for unlawful discrimination. Unlike Complainant, Matsuo did not limit herself to rehabilitation clients, and had a more hospitable work schedule. Additionally, Matsuo was not assigned any of Complainant's clients. Finally, Complainant was both less physically aggressive, and unwilling to develop her clientele. Therefore, given these facts this claim must be dismissed.

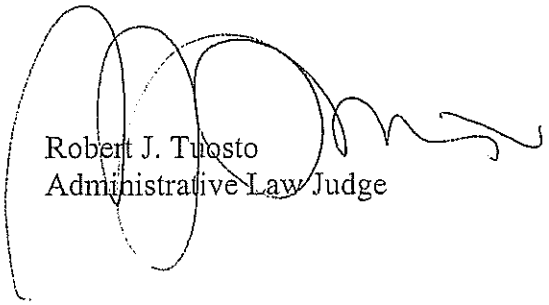
As to the allegation of a hostile work environment, Complainant was clearly in a protected class. However, none of the acts complained of by Complainant rise to the level of creating a hostile work environment. The record shows that Williamson's conduct was either reasonably explained or, as in the case of the joke about wearing a thong, a one-time incident. Therefore, this claim must also 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: February 14, 2008
Bronx, New York



Robert J. Tuosto
Administrative Law Judge