

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**ROSALIND WOODBERRY,**

Complainant,

v.

**PHELPS MEMORIAL HOSPITAL CENTER,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10117604

**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 April 27, 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.

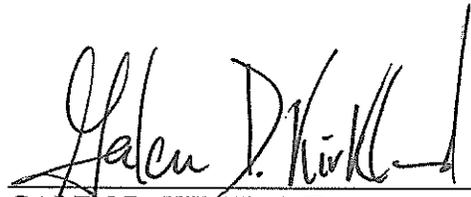
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **JUL 01 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**ROSALIND WOODBERRY,**

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**PHELPS MEMORIAL HOSPITAL CENTER,**  
Respondent.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10117604**

**SUMMARY**

Complainant, who is African American, alleged that Respondent discriminated against her based upon her race when Respondent terminated her employment. Complainant was hired, supervised and fired by the same individuals and, as a result, is unable to establish that the termination of her employment was discriminatory.

**PROCEEDINGS IN THE CASE**

On May 3, 2007, 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 February 4, 2009 and February 5, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by John C. O’Dea, Esq. Respondent was represented by David H. Diamond, Esq.

Permission to file post-hearing briefs was granted. Complainant’s and Respondent’s attorneys filed timely submissions.

### **FINDINGS OF FACT**

1. Complainant is African American. (Tr. 51)
2. In June of 2004, Complainant answered a job advertisement in a newspaper that had been placed by Respondent. Complainant was interviewed for the position but declined because she did not feel she was qualified for the job. (Tr. 8-9, 53)
3. Thereafter, another position, education specialist, was available. Respondent considered Complainant’s experience to be suited for this position and Respondent’s human resources department contacted Complainant to arrange an interview. (Tr. 146)
4. Nancy Fox, Manager of Educational Services, and Phyllis Vonderheide, Director of Educational Resources, interviewed Complainant and hired her in June of 2004. Fox became Complainant’s immediate supervisor. Vonderheide was Fox’s supervisor. (Tr. 9, 146-47)
5. As an education specialist, Complainant, along with other members of Education Services, was responsible for training and orientation of staff, particularly the nursing department. They were also responsible for developing and revising standards and developing all training materials. (Respondent’s Exhibit 6; Tr. 148-49)

6. Complainant served a three-month probationary period. During her first month of employment, Complainant was expected to attend orientation classes. During the second month of her employment, she observed the orientation classes so that by her third month of employment, Complainant would be able to teach the orientation classes. Thereafter, Complainant would be expected to be able to teach orientation classes. (Tr. 149-50)

7. During the third month of her employment, Complainant remained unable to teach the orientation classes. Fox considered extending the probationary period, but Vonderheide felt that with continued support, Complainant would be able to succeed. As a result, Vonderheide gave Complainant a satisfactory evaluation and Complainant passed her probationary period. (Complainant's Exhibit 1; Tr. 150, 304, 310)

8. In August 2005, Respondent instituted a medical documentation system known as Meditech. A team was established to implement the new system and Complainant became the representative from Educational Resources who was responsible for implementing a training program and developing the manual for using the new Meditech system. (Tr. 151)

9. Complainant was sent to Boston for five days of training on the Meditech system and, upon her return, she spent one day per week working with other members of the Meditech team. (Tr. 154)

10. By August of 2005, Fox considered Complainant to be a satisfactory employee, but Complainant's progress was slower than Fox had expected. (Tr. 152-53) Complainant had not become comfortable teaching all of the required classes for Respondent's orientation programs. Fox felt Complainant needed direction and she wanted Complainant to be more active in teaching all of the nursing orientation classes. (Complainant's Exhibit 2; Tr. 155-57)

11. During the spring of 2006, Fox began meeting with Complainant periodically to assess Complainant's productivity and to get her to participate more actively in the education projects. (Tr. 158)

12. Fox noted that during the spring of 2006, Complainant's production was equal to that of each of the two part time educational specialists. Fox felt that as the only full time educational specialist, Complainant should be producing more than the others. (Tr. 158-59)

13. By June or July of 2006, Fox was expecting Complainant to complete the training materials for the Meditech project. Complainant was having trouble with the manual and training materials, and told Fox she needed additional time. (Tr. 165) The Meditech manual had been scheduled for completion in April of 2006. (Tr. 172)

14. Fox shared her concerns about Complainant's performance with Complainant. In response, Complainant told Fox that she did not feel Fox's criticism of her performance was "constructive." (Tr. 47, 119, 165)

15. Complainant had trouble meeting several deadlines and often told Fox and Vonderheide that she needed additional time to do her work. When Complainant did meet deadlines, Fox had to provide direction to assist Complainant. (Tr. 174-75, 313) Complainant's work often contained numerous errors. (Respondent's Exhibits 7-10, 13; Tr. 208-09, 211-12)

16. On September 5, 2006, Complainant was given a performance evaluation in which she was given a 2.9% merit salary increase. Respondent cited several areas in which Complainant needed improvement. (Respondent's Exhibit 3)

17. A typical raise for Respondent's employees was 3%. Vonderheide felt that a 2.9% raise would send a message to Complainant that "improvement is needed without really affecting her raise." (Tr. 317-18)

18. Vonderheide and Fox made efforts to improve Complainant's performance throughout 2006. Fox and Vonderheide met with Complainant, discussed their concerns and pushed deadlines back in order to accommodate Complainant. (Tr. 319-23)

19. Complainant's performance did not improve after she received her evaluation in September of 2006. In February of 2007, Vonderheide gave Complainant a "6 month update review." The update gave Complainant goals to improve her performance. Specifically, the evaluation gave Complainant dates by which she was to complete certain projects. Complainant was also directed to show "evidence of independent practice." Though the evaluation was given and signed by Vonderheide, Fox "always had input into all the evaluations." (Complainant's Exhibit 4; Tr. 316, 327)

20. Complainant was unable to meet the goals established, despite receiving assistance from Fox. In April of 2007, Vonderheide recommended to Respondent's Human Resources department that Complainant's employment be terminated. Human Resources gave Vonderheide permission to terminate Complainant's employment and, on April 13, 2007, Complainant was dismissed. (Tr. 34, 328)

### **OPINION AND DECISION**

The Human Rights Law makes it unlawful to discriminate against anyone with respect to the terms, conditions or privileges of employment because of that person's race. Human Rights Law §296.

In order to prevail on a claim under Human Rights Law, a Complainant must first make out a prima facie case. To do so, she must show (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the

adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

In this case, Complainant cannot make out a prima facie case. Although she was a member of a protected class who was qualified to hold her position and suffered an adverse employment action, she cannot show that the adverse employment action occurred under circumstances from which one can infer discriminatory intent, because she was hired and fired by the same individuals.

When the person or persons who made the decision to hire the complainant are the same individual or individuals who fire the complainant, one can usually infer that discrimination was not the reason for the adverse action. *Dickerson v. Health Mgmt. Corp. of America*, 21 A.D.3d 326, 329, 800 N.Y.S. 391, 394 (1st Dept. 2005). "There is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status." *Youth Action Homes v. State Div. of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). Vonderheide (with Fox's input) not only hired and fired Complainant, she and Fox spent a considerable amount of time working with Complainant in an effort to improve Complainant's performance. Given these facts, there is no evidence that either Fox or Vonderheide was motivated by discriminatory animus when the decision was made to terminate Complainant's employment.

**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: April 27, 2009  
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", with a long horizontal flourish extending to the right.

Thomas S. Protano  
Administrative Law Judge