

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

KHADIJA YANNI,

Complainant,

v.

AFFINITY HEALTH PLAN, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10111194

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 9, 2009, by Lilliana Estrella-Castillo, 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 23 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

KHADIJA YANNI,

Complainant,

v.

AFFINITY HEALTH PLAN, INC.,

Respondent.

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

Case No. 10111194

SUMMARY

Complainant charges Respondent with unlawful discrimination based upon her sex when she received a more severe discipline than a male employee for the same incident. Complainant received a higher level of discipline than her male subordinate because she was the most senior employee present during an incident in which several managers and supervisors witnessed an incident of sexual harassment and failed to take any action. Complainant failed to sustain her burden of proof and the complaint must be dismissed.

PROCEEDINGS IN THE CASE

On May 18, 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 23 and 24, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Jane M. Stack, Senior Attorney, of Counsel. Respondent was represented by Jackson Lewis LLP, by Susan M. Corcoran and Matthew H. Woodard.

The parties’ Proposed Joint Stipulation of Facts was accepted into evidence as Joint Exhibit 1.

The parties submitted timely proposed findings of fact and conclusions of law, which were received, considered, and where appropriate, adopted.

FINDINGS OF FACT

1. Complainant is a female. (Tr. 21; ALJ Exhibit 1)
2. Respondent provides comprehensive managed care services to financially disadvantaged adults and children. (Tr. 204-05)
3. Complainant began her employment with Respondent in March 1996, as an Enrollment Consultant. (Tr. 22; Joint Exhibit 1)
4. During Complainant’s employment with Respondent she received several promotions due to her outstanding work performance. (Tr. 22; Joint Exhibit 1; Complainant’s Exhibits 1 and 2)
5. On August 15, 2005, Complainant was promoted to Director of Marketing for the Eastern Region, reporting to Kelbourne Ritter, Vice President of Sales and Marketing. The Eastern Region included Long Island and Queens. (Tr. 22, 27, 141-43; Joint Exhibit 1)

6. Ritter approved Complainant's promotion to Director of Marketing for the Eastern Region. (Joint Exhibit 1)

7. In November 2005, Respondent hired Ruben Quintero, as the new Manager of the Long Island team. (Tr. 99, 212) Quintero was hired to provide daily supervision to the Long Island marketing representatives; he was not considered a senior staff person like Complainant. (Tr. 192) At the relevant time, Quintero was being oriented and supervised by Complainant. (Tr. 99-100)

8. Complainant acknowledged her receipt of Respondent's Employee Handbook on February 25, 2003. (Joint Exhibit 1)

9. Complainant participated in the marketing supervisor training program, including a follow-up refresher, which covered the responsibilities of supervisors and managers, and their obligations regarding harassment and reporting issues (Tr. 189-90)

10. Complainant never complained to Respondent that she received different treatment based upon her sex. (Tr. 194-95)

11. As Director of Marketing, Complainant oversaw approximately 70 employees including managers, supervisors and marketing representatives throughout Long Island and Queens. (Tr. 27)

12. Complainant's responsibilities included overseeing the activities in Long Island as well as Queens, and traveling to the Bronx and Queens as necessary. (Tr. 97-98). Complainant was considered a senior staff person, with primary responsibility for strategic planning and the development and implementation of strategies for the growth of marketing. (Tr. 153-54)

13. Complainant was expected to take a leadership role, even if on vacation. (Tr. 260)
Calling in on vacation was something other managers did, particularly when something important arose. (Tr. 158, 222)

14. On February 16, 2006, Complainant was issued a disciplinary notice as the result of an incident that occurred on December 21, 2005. (Tr. 30)

15. On December 21, 2005, Complainant attended an off-site Holiday dinner at a local restaurant while she was on a scheduled vacation. (Tr. 30) Other members of management were also present at the dinner, Ruben Quintero, Jean Destrade, Nellie Greene, Eric Pena, and Magaly Correa. (Tr. 103)

16. Complainant was the highest management-level employee attending the dinner. (Tr. 102) Madeline Frasier, another employee who reported directly to Ritter, attended the dinner but left before dessert. (Tr. 275-76)

17. Someone informed a waiter at the restaurant that it was Correa's birthday. (Tr. 32) The waiter brought out a cake and balloons. He then blindfolded Correa and placed a dildo with whipped cream in Correa's mouth. (Tr. 34)

18. Correa left the restaurant following the incident, and never returned to work for Respondent. (Tr. 34, 155) Correa felt embarrassed and abandoned by her co-workers and managers because none came to her aid. (Tr. 155)

19. After the incident, Quintero stayed and spoke to the restaurant's manager. (Tr. 34) Complainant stayed and paid the restaurant bill. (Tr. 34-35)

20. Complainant told Quintero to talk to Correa to find out what happened and to then advise Human Resources, if anything happened. (Tr. 36)

21. Complainant continued to be out of the office on her scheduled vacation until the first week of January 2006, and delegated the responsibility of reporting the incident to Quintero, because she “was really on vacation.” (Tr. 37-39)

22. Complainant did not attempt to call Correa and did not contact Human Resources because she expected that Quintero would do so, but did not ensure that he did. (Tr. 36-38, 103-04)

23. Complainant spoke with Quintero several times while she was on vacation, but she did not follow-up on the events of December 21, 2005. (Tr. 36-38, 104)

24. Quintero reported the events of December 21, 2005, on December 29, 2005. (Tr. 38)

25. Human Resources began an investigation immediately upon receipt of Quintero’s memo. (Tr. 247-55)

26. Following the investigation, Complainant and other managers and supervisors were disciplined, not because of what the waiter did, but because they all failed to take any kind of action, relying instead on the next person to do something. (Tr. 218, 257)

27. As the most senior level employee at the dinner, Complainant received the highest form of discipline. (Tr. 102, 216, 260) She received a final written warning, a 30-day suspension, and a demotion to Manager. (Respondent’s Exhibit 6) Complainant’s failure to call Human Resources immediately the next day, was a “dereliction of duty.” (Tr. 216, 260)

28. Quintero, the next highest level employee observing the waiter’s actions, received a final written warning incorporating training as part of the corrective action. (Tr. 162, 226, 276; Respondent’s Exhibit 7)

29. Supervisors Eric Pena, Nellie Greene, and Jean Destrade were also disciplined. They received written warnings along with mandatory training. (Tr. 161-2, 226; Respondent's Exhibits 9 and 10)

30. Ritter made the final decision regarding these disciplines, after discussions with Ann VanEtten, the Human Resources Vice-President. Initially, VanEtten recommended termination for Complainant and Quintero, but Ritter disagreed. Ritter took into account Complainant's long term employment with Respondent and her performance during that time period, and determined that a lesser discipline would be as effective in conveying Respondent's message to all its employees. (Tr. 215-18)

31. On March 28, 2006, Complainant resigned her employment with Respondent. (Tr. 61, 174-75; Joint Exhibit 1)

32. Complainant testified that she was shocked regarding the discipline that Respondent imposed on her and felt like her employment was terminated. (Tr. 45, 48)

33. Almost immediately Complainant started to actively look for alternative employment. (Tr. 105-06) Ultimately, prior to the end of her suspension, Complainant was offered and accepted an equivalent position in Florida at the same level of compensation as her position with Respondent. (Tr. 61-63, 72, 118)

OPINION AND DECISION

The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer "because of . . . sex . . . to discriminate against an individual in compensation or in terms, conditions or privileges of employment."

In addressing the merits of the complaint, Complainant must first make out a prima facie case of unlawful employment discrimination based on sex. *Pace College v. Commission on*

Human Rights of the City of New York, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If Complainant succeeds in establishing a prima facie case, Respondent must then articulate legitimate, non-discriminatory reasons for its actions. If Respondent presents a reasonable, non-discriminatory reason for its employment decision, the burden then shifts back to Complainant, who must then demonstrate that the reasons articulated by Respondent are merely a pretext for unlawful discrimination. *Pace College, supra*. The burden of proof ultimately rests with Complainant, and conclusory allegations of discrimination are insufficient to meet this burden. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Further, an employer may exercise business judgment in making personnel decisions that are poor, unwise, bad, based on erroneous facts or for no reason at all, and such judgment will not be second-guessed as long as the reason is not discriminatory. See, *Visco v. Community Health Plan*, 957 F.Supp. 381 (N.D.N.Y. 1997); *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2nd Cir. 1988); *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992).

Complainant alleges that she was unlawfully discriminated against on the basis of her sex when she received a harsher discipline than Quintero, who is a male. To make out a prima facie case of sex discrimination, Complainant must demonstrate membership in a protected class, that she is qualified to hold the position, and that she was subjected to actions giving rise to an inference of discrimination. See, *Matter of Milonas v. Rosa*, 217 A.D.2d 825, 825-26, 629 N.Y.S.2d 535 (1995), lv. denied 78 N.Y.2d 806, 641 N.Y.S.2d 597 (1996). No inference of discrimination arises unless Complainant is able to demonstrate that a similarly situated male

employee benefited from terms and conditions of employment that were denied to her. *See, Weit v. Flaum*, 258 A.D.2d 286, 685 N.Y.S.2d 654 (1999).

Complainant failed to make out a prima facie case of unlawful sex discrimination because Complainant could not satisfy the fourth element of the prima facie case; Complainant and Quintero were not similarly situated. Complainant was a long term employee of Respondent, who after several promotions was Director of Marketing for the Eastern Region, and was responsible for overseeing the managers, including Quintero, supervisors and marketing representatives throughout Long Island and Queens. Quintero had been employed with Respondent for about one month at the time of the incident and was the Manager of the Long Island office. Complainant was responsible for Quintero's orientation and was his direct supervisor. Complainant was the most senior level employee at the dinner of December 21, 2005; therefore, Complainant received the highest form of discipline, followed by Quintero, and then the supervisors. Therefore, as a matter of law, Complainant failed to make out a prima facie case of sex discrimination.

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 9, 2009
Bronx, New York



Lilliana Estrella-Castillo
Administrative Law Judge