

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

SIDNEY G. BROWN,

Complainant,

v.

CITY OF NEW YORK, CITY OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10108972

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 March 6, 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: **MAY 04 2009**  
Bronx, New York

  
\_\_\_\_\_  
GALEN D. KIRKLAND  
COMMISSIONER

State Division of Human Rights  
Enforcement Unit  
Sharon J. Field, Director of Prosecutions  
One Fordham Plaza, 4th Floor  
Bronx, New York 10458

Bellew S. McManus  
Senior Attorney

Christine Marbach Kellett  
Chief Administrative Law Judge

Thomas S. Protano  
Administrative Law Judge

Sara Toll East  
Chief, Litigation and Appeals

Caroline J. Downey  
General Counsel

Peter G. Buchenholz  
Adjudication Counsel

Matthew Menes  
Adjudication Counsel

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**SIDNEY G. BROWN,**

Complainant,

v.

**CITY OF NEW YORK, CITY OF NEW  
YORK DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,**

Respondent.

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

Case No. 10108972

**SUMMARY**

Complainant, who is black, alleges that he was harassed and fired because of his race. The record shows that he was not harassed. In addition, he failed to make any connection between the termination of his employment with Respondent and his race. Therefore, the case must be dismissed.

**PROCEEDINGS IN THE CASE**

On November 23, 2005, 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. A public hearing was held on December 16, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Pinar Ozgu, Esq.

Permission to file post-hearing briefs was granted. Respondent’s attorney filed a timely submission.

### **FINDINGS OF FACT**

1. Complainant is black. He began working for Respondent in 2002 as a construction laborer. (Tr. 9)
2. As a construction laborer, Complainant is responsible for working on fire hydrants, water mains and sewers for the city of New York. (Tr. 10-11)
3. From the time of his hiring, Complainant served an apprenticeship that lasted two years. (Tr. 15)
4. At the conclusion of his apprenticeship, Complainant was appointed to a provisional position as a construction laborer. His duties and Responsibilities remained the same. (Tr. 15)
5. Complainant took a civil service exam for construction laborer at the end of his apprenticeship. He passed the exam and was hired as a probationary construction laborer on December 1, 2004. (Respondent’s Exhibit 1; Tr. 14)
6. In August of 2004, Complainant was assigned to Respondent’s repair yard known as Brooklyn Repairs on Remsen Avenue in Brooklyn, New York. (Respondent’s Exhibit 1; Tr. 15)

7. Ralph DiMeglio was the superintendent of Brooklyn Repairs. He was not Complainant's direct supervisor; he was responsible for the entire repair yard. (Tr. 13, 169)

8. Complainant worked in Brooklyn Repairs for about 13 months. During that period, Complainant estimates that he saw DiMeglio "seven or eight times" and only spoke to DiMeglio four times. (ALJ Exhibit 2; Tr. 36)

9. During those four encounters, DiMeglio yelled at Complainant over work related issues, including Complainant's attendance problems, but did not refer to race or make any race related comments. (Tr. 37)

10. Complainant's direct supervisor at Brooklyn Repairs was James Jefferson. Jefferson is African American. (Tr. 15, 84)

11. Within two weeks after being transferred to Brooklyn Repairs, Complainant received a warning memo from Jefferson for lateness. (Respondent's Exhibit 2; Tr. 83-84)

12. On December 22, 2004, Complainant received a warning memo from DiMeglio for lateness on one occasion and, on another occasion, for failing to provide a doctor's note when absent. Complainant was charged with being absent without leave ("AWOL"), for failing to provide the note and was warned that further incidences of AWOL would result in disciplinary charges. He was also warned that he had to improve his time and attendance record.

(Respondent's Exhibits 2; Tr. 86-88)

13. Respondent's employees are required to provide doctor's notes within five days after they call in sick. (Tr. 182, 221)

14. On January 4, 2005, Complainant was scheduled to take a class taught by Con Edison. Complainant did not appear for the class. (Tr. 92, 95, 183-84)

15. For missing the class, Complainant was again charged with AWOL. Complainant said he “couldn’t make it [because he] worked overtime” the previous night. (Tr. 95, 97)

16. On January 7, 2005, Complainant received a job evaluation. The overall rating was “good,” but it contained the following statement: “Mr. Brown needs to make a stronger effort to be at work and ready to work on time.” A later version noted that Complainant had been warned about his lateness but, despite the fact that the later version contained Complainant’s signature, Complainant claimed he hadn’t seen it. (Complainant’s Exhibit 7; Respondent’s Exhibit 6; Tr. 154-55)

17. Complainant was AWOL again on May 31, 2005 for failing to provide a doctor’s note. On June 7 and 8, 2005, he was again charged with being AWOL. For June 7 and 8 he provided a doctor’s note on July 1, 2005. According to Respondent’s rules, that was too late. (Respondent’s Exhibit 7 & 8; Tr. 103, 106)

18. On July 25, 2005, Complainant received a warning memorandum about repeatedly being AWOL. The memo indicated that any further AWOL’s would result in “termination with D.E.P.” (Respondent’s Exhibit 9)

19. In September of 2004, Complainant sought a transfer out of Brooklyn Repairs. There is a long waiting list for transfers, which Complainant admitted was “a couple of years.” Complainant made another request in March, 2005. His first choice on the March, 2005 request was Manhattan Repairs, where his mother works. (Respondent’s Exhibit 10 & 11; Tr. 30, 32, 112-13)

20. DiMeglio approved Complainant’s September, 2004 request but did not approve the March, 2005 request because at Manhattan Repairs Complainant’s mother would be responsible for tracking Complainant’s time and attendance. Nevertheless, the transfer request was approved

by DiMeglio's superiors and Complainant was again placed on a list. (Respondent's Exhibit 10 & 11)

21. Complainant asserts that white employees were allowed to transfer and he was not. When questioned, Complainant could not provide the names of any white employees who were transferred. (Tr. 117-18)

22. On July 25, 2005, DiMeglio recommended that Complainant's employment with Respondent be terminated because of Complainant's poor attendance record. DiMeglio listed Barry Alexander, district supervisor, as a witness to Complainant's poor attendance. (Respondent's Exhibit 18; Tr. 174)

23. Alexander is African American. DiMeglio appointed Alexander to the district supervisor position. (Tr. 171)

24. On August 8, 2005, Complainant was arrested. He called in and requested a personal day, which was denied by Alexander. Complainant did not tell Alexander he had been arrested and Alexander informed Complainant that if he did not come to work he would be considered AWOL. (Tr. 101, 120, 127-28)

25. Complainant was released from custody on August 12, 2005. He was AWOL from August 8, 2005 until August 15, 2005. During that period, he did not call in to notify anyone he would be absent but, instead, let his parents call in for him, in violation of Respondent's procedures. (Respondent's Exhibit 19; Tr. 128, 195-96)

26. In accordance with Respondent's requirements, an employee must notify Respondent of an arrest within three days of the arrest. Complainant reported his arrest after seven days, upon his return to work on August 15, 2005, when he wrote a statement detailing his arrest. (Respondent's Exhibits 13 & 15; Tr. 128-32)

27. From July 20, 2005 through August 15, 2005, Complainant's Commercial Driver's License ("CDL") was suspended. During that period, Complainant failed to notify Respondent that his CDL was suspended and continued to drive vehicles for which a CDL was required. (Respondent's Exhibit 19; Tr. 159)

28. On August 19, 2005, Michael Schneider, Director of Management Services, acting on DiMeglio's recommendation, requested permission to terminate Complainant's employment from Michael Krysko, Director of Field Operations. In addition to Complainant's numerous AWOL's, Schneider noted Complainant's failure to inform Respondent about his arrest and the suspension of Complainant's CDL. (Respondent's Exhibits 17 & 19; Tr. 204)

29. Krysko, in turn, recommended to Zoe Campbell, Assistant Commissioner for Human Resources, that Complainant's employment be terminated. Campbell concurred with the recommendation and sought final approval from Deputy Commissioner Dana Reed. (Respondents Exhibit 21)

30. Complainant's employment with Respondent was terminated effective August 31, 2005. (Respondent's Exhibit 1)

31. During DiMeglio's tenure at Brooklyn Repairs, at least five African American employees successfully completed their probationary periods. DiMeglio recommended that they pass their probationary periods. (Tr. 175-77) In addition, in or about 1994, Complainant's mother sought re-employment after she had left Respondent's employ. It was DiMeglio who recommended that she be re-hired. Complainant's mother is black. (Tr. 173)

### **OPINION AND DECISION**

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

discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's race or color. *See* Human Rights Law § 296.1(a). Complainant in the instant complaint alleges that he was harassed and ultimately fired from his job because of his race.

In order to sustain a claim of racial harassment, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination.

*Father Belle Community Ctr. v. N.Y. State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant here has not made such a showing. Complainant accuses DiMeglio of harassing him. During a 13 month period, Complainant saw DiMeglio only seven or eight times and spoke to DiMeglio only four times. This is not enough to constitute harassment. Moreover, the evidence shows that DiMeglio expressed dissatisfaction with Complainant's work performance during those encounters but did not make any statements that could have created a hostile racial environment. Complainant also takes issue with the fact that he was never transferred, but the transfer was approved. As Complainant acknowledged, there was a waiting list and he lost his job before he could be transferred.

With respect to the termination of Complainant's employment, Complainant must first make out a prima facie case of discrimination in order to prevail. To make out a prima facie case of unlawful discrimination under the Human Rights Law a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he 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 Association*, 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).

Complainant is unable to establish a prima facie case for discrimination. He clearly establishes the first three prongs of the test, but cannot show that his termination occurred under circumstances that would give rise to an inference of discrimination. Complainant's work record was quite poor. He had been AWOL numerous times, including one instance when he was supposed to receive training from Con Edison. Based upon that, DiMeglio and Alexander felt Complainant should not be retained. Thereafter, Complainant was arrested and failed to timely notify Respondent; he was considered AWOL for the period during which he was in custody; and it was discovered that Complainant failed to report that his CDL had been suspended. As a result, Schneider, Krysko, Campbell and Reed all evaluated Complainant's record and approved the recommendation made by DiMeglio and Alexander that Complainant's employment should be terminated. Given the fact that Complainant's performance was inadequate and six persons reviewed his record and came to the same conclusion, there can be no inference drawn that Complainant was discriminated against, particularly when no connection between Complainant's race and any action taken against him was made. Finally, it should be noted that DiMeglio promoted Alexander, recommended that Complainant's mother be rehired and recommended that at least five African American employees pass their probationary periods during his tenure in Brooklyn Repairs. In light of those facts, one cannot draw an inference that DiMeglio harbored any racial animosity against Complainant.

In sum, Complainant has made no connection between his race and the treatment he received while working for Respondent. He is unable to make out a prima facie case of discrimination and his case 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 case be, and the same hereby is, dismissed.

DATED: March 6, 2009  
Bronx, New York



Thomas S. Protano  
Administrative Law Judge