

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MAE C. BYNUM,

Complainant,

v.

**HOUCHENS INDUSTRIES, INC. D/B/A/ SAVE -A-
LOT,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10106684

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 October 29, 2007, by David Wm. Bowden, an Administrative Law Judge (“ALJ”) 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

CORRECTION:

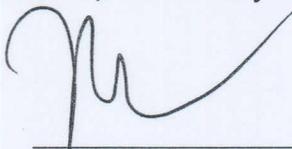
- The ALJ’s findings regarding Respondent’s corporate headquarters’ knowledge of Complainant’s race is irrelevant in light of the fact that Starkey, Complainant’s supervisor, terminated her employment.

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 27th day of November, 2007.



KUMIKI GIBSON
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

MAE C. BYNUM,

Complainant,

v.

**HOUCHENS FOOD GROUP, INC. D/B/A/
SAVE -A-LOT,**

Respondent.

**AMENDED
RECOMMENDED ORDER
OF DISMISSAL**

Case No. **10106684**

SUMMARY

Complainant alleges that Respondent unlawfully discriminated against her in employment, on the basis of her race and gender, in violation of Article 15 of the Executive Law. Complainant did not prove that race or gender was a factor in her loss of employment. Complainant did not prove a prima facie case of illegal discrimination. The complaint is dismissed on the merits.

PROCEEDINGS IN THE CASE

On 7/8/2005, 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. Executive. 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. By stipulation, the caption was amended to show Houchens Food Group, Inc. d/b/a Save-A-Lot as the Respondent.

The case was assigned to David Wm. Bowden, an Administrative Law Judge of the Division. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Bell, Orr, Ayers & Moore, Esqs, Timothy L. Edelen, Esq., of counsel.

FINDINGS OF FACT

1. Complainant Mae Bynum is an African-American female.
2. Complainant began to work for Respondent in October of 2000, as a cashier. (Tr. 30)
3. Complainant's last day of work for Respondent was May 4, 2005. (Tr. 30-1) She clocked in at 11:20 AM. (Tr. 79) On May 4, 2005, Complainant took a break between 1:57 PM and 2:08 PM, as indicated by her cash register tape. Complainant agrees with this. (Tr. 52-3) She clocked out at 4:06 PM. (Tr. 54)
4. On that day, Complainant's cash register was found to be \$144.87 short at the end of her shift. (Tr. 37) The Complainant does not dispute the deficit. (Tr. 55, 107) The Complainant was discharged from her employment the next day because of that shortage. (Tr. 31, 43)
5. Respondent's policy was to discharge cashiers with deficits of \$25 or more. (Tr. 62, 98) Complainant was aware of this policy, during her employment with Respondent. (Tr. 61-2)
6. This deficit was reported to Respondent's corporate headquarters, which decided to fire Complainant the next day. Complainant was so informed when she called. (Tr. 31)
7. Complainant alleges that Respondent's Manager Starkey had a Caucasian employee named Justin Bartoszek operate her cash register from 1:57 PM to 2:08 PM that day, when she took a break. It is the Complainant's position that Bartoszek should also have been discharged because of the financial shortage, in addition to herself. (Tr. 32, 34-5, 44, 46-7, 69)
8. Complainant's testimony is ambivalent and speculative as to whether she complained to Respondent of Bartoszek having operated her cash register on May 4, 2005. (Tr. 44, 46-8, 59)

9. She testified that she asserted this objection to Respondent, but she subsequently speculated only that she "might have" or "I may have not" made a statement to some of Respondent's personnel regarding Bartoszek operating her cash register. (Tr. 44, 46-9, 59)

10. Complainant offers no proof that she complained that Bartoszek used her register.

11. The record contains no evidence that Respondent's corporate headquarters had notice of the instant allegation that Bartoszek had operated her cash register on May 4, 2005

12. The record contains no evidence that Respondent's corporate headquarters considered Complainant's race in deciding whether to fire her, nor that it knew her race

13. The record contains no evidence that Respondent's corporate headquarters had notice or knowledge of Complainant's race when it decided to discharge her from employment.

14. Complainant alleged that another cashier, named Arlene Gordon, was short by \$25 that day and was not fired. (Tr. 46) Gordon is also an African-American. (Tr. 47). The record indicates that the missing \$25 was found before the Complainant called the next day. (Tr. 39)

15. Complainant's "main complaint" is not that she got fired, but that her fellow employees Gordon and Bartoszek did *not* get fired. (Tr. 46-7)

16. Complainant admits that she did not call the Respondent's corporate office to complain of discrimination. There is a telephone number in her Employee's Manual, but she did not think of calling that number. Complainant did not wish to call because it was out of town. (Tr. 64-5)

17. Complainant received an Employee Handbook from Respondent. (Tr. 62) Complainant testified: "After I got fired I skimmed through the book...." (Tr. 64) Complainant went on to testify a moment later that: "After hearing Corporate said I was fired, I didn't pick up that manual and look at it. I looked in that manual when we signed the piece of paper [referring to Respondent's Exhibit 4 dated "3/19/05"] we just gave him. I looked in that manual when I first got hired."

(Tr. 65) This testimony is inconsistent and is not credible. Taken together with her testimony first that she *did* complain of Bartoszek having operated her cash register and not been fired, and then speculatively stating that she may or may not have done so, (Tr. 44, 47-8) Complainant's credibility has been cast into a questionable light.

18. Rosemary Ingram testified for Complainant that she saw Bartoszek use Complainant's cash register, but she admitted "probably" to being there between 10 AM and 12:30 PM on May 4, 2005. I do not credit this testimony inasmuch as Complainant's break was from 1:57 PM to 2:08 PM.

19. Respondent denies that race was involved in the decision to fire Complainant. (Tr. 96)

20. Mark Starkey is the store manager who hired Complainant. (Tr. 60, 73-4, 95)

21. Starkey did not put Bartoszek on Complainant's cash register on May 4, 2005. (Tr. 81)

22. No one used Complainant's cash register during her break on May 4, 2005. (Tr. 85)

23. Starkey had the cash registers in his personal observation from 9 AM until about 3 PM, as he worked at one of those cash registers. (Tr. 81, 87)

24. Starkey went home at about 3 PM and was told of the shortage by telephone. (Tr. 91)

25. Efforts were made to double check figures to reconcile Complainant's shortage. (Tr. 91)

26. The following morning, Complainant called Starkey and he fired her. (Tr. 94)

27. Starkey did not desire to discharge the Complainant from her employment. (Tr. 95)

28. Firing Complainant entailed additional work from Starkey. (Tr. 95)

29. This magnitude of shortage left Starkey no choice but to fire the Complainant. (Tr. 95)

30. Complainant did not tell Starkey that Bartoszek had operated her cash register. (Tr. 94)

31. Starkey replaced Complainant with another African-American female. (Tr. 96)

32. Bartoszek testified that he did not serve as a cashier from Complainant's cash register on May 4, 2005. (Tr. 122-3) I credit the testimony of Bartoszek and Starkey.

OPINION AND DECISION

In order to prove a prima facie case of unlawful discrimination Complainant must show that: (1) she was a member of a protected class; (2) she was qualified to do the job, (3) she suffered an adverse employment action and (4) that adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Complainant has the burden of proof. *Schwaller v. Squire Sanders & Dempsey* 249 A.D.2d 195; 671 N.Y.S.2d 759 (1998)

There is nothing in the record to indicate that Respondent's corporate headquarters, which made the decision to discharge Complainant, the day after her financial shortage, knew the race of the Complainant, nor is there any evidence whatsoever that it was interested in criteria of race nor of gender in its labor force. The Complainant was replaced by another African-American female, who was hired by the same manager who both hired and fired Complainant. This is undisputed.

It is conceded by the Complainant that her employer had an established policy of firing cashiers whose daily revenues, delivered by those cashiers to the employer at the end of the day, fell short of what was due, according to their recorded cash register tapes, and it is further conceded that she did indeed have such a deficit on her final day of work, May 4, 2005.

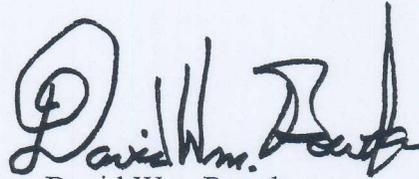
I found Complainant to be speculative and evasive in her testimony concerning whether she complained of Bartoszek having used her cash register on the day in question. By admitting existence of the deficit, denying that she took any money, and alleging that Bartoszek also ran her cash register on the day in question, the clear implication seems to be that Bartoszek caused the deficit that brought about the end of her employment. However, Complainant only speculates as to whether she may have mentioned this matter to her employer when Respondent was deciding whether or not to fire her. This strains credulity. Complainant does not allege that Respondent's corporate headquarters had knowledge of her allegation that Bartoszek had used her cash register.

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 dismissed on the merits.

DATED: October 29, 2007
Bronx, New York

A handwritten signature in black ink, appearing to read "David Wm. Bowden". The signature is stylized with large, overlapping loops and a prominent vertical stroke at the end.

David Wm. Bowden
Administrative Law Judge