

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

EARL J. CARPENTER,

Complainant,

v.

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION, COLER-GOLDWATER
SPECIALTY HOSPITAL AND NURSING
FACILITY,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10119391

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 July 17, 2009, by Thomas J. Marlow, 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: **SEP 21 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

EARL J. CARPENTER,

Complainant,

v.

**NEW YORK CITY HEALTH & HOSPITALS
CORPORATION, COLER-GOLDWATER
SPECIALTY HOSPITAL AND NURSING
FACILITY,**

Respondent.

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

Case No. 10119391

SUMMARY

Complainant alleged that Respondent discriminated against him because of his color, his race, his national origin, his creed, and because he opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 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 J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 20 and 21, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Arlyne R. Zwyer, Esq. Respondent was represented by Jamie M. Zinaman, Esq., and Danielle Barrett, Esq.

Permission to file proposed findings of fact and conclusions of law was granted. Respondent so filed after the conclusion of the public hearing.

FINDINGS OF FACT

1. Complainant is Black, is Rastafarian, and claims national origins from Africa, Germany, the Cherokee Indians, and the United States of America. (Tr. 26-30, 63)
2. In or around March of 2003, Complainant began his employment with Respondent as a social worker on a provisional basis at Goldwater Hospital (“Goldwater”) on Roosevelt Island in New York City. (Complainant’s Exhibit 14; Tr. 64-65, 642) Geraldine Sanders-Joyner (“Joyner”), Respondent’s Director of Social Work and Discharge Planning, interviewed Complainant and recommended that he be hired. (Tr. 641-42, 725) Joyner is Black from the United States of America. (Tr. 670) Complainant was referred to Joyner by a friend of Joyner. (Tr. 641) Joyner also assisted Complainant in obtaining housing after he was hired. (Tr. 357-58, 687-89) As a social worker working for Respondent, Complainant was a member of the union known to him as DC-37. (Tr. 95)
3. When Complainant began his employment, he was on probation for 18 months. During that time period, Complainant took the test for licensure as a social worker in the state of New

York and failed the test. However, Respondent allowed Complainant to continue to work as a social worker. (Tr. 82-89, 647-48)

4. In March of 2006, Complainant was transferred from Goldwater to Coler Hospital (“Coler”) in response to a complaint from a resident of Goldwater. The resident’s allegations included the following: Complainant had given the resident shirts to sell on the street; Complainant agreed to give the resident a commission for every shirt sold; the police confiscated the shirts; and Complainant was upset with the resident, wanted the resident to give Complainant money for the shirts, and threatened the resident. (Respondent’s Exhibit 1; Tr. 651-52)

Respondent investigated the abovementioned allegations and determined that they could not be substantiated. (Respondent’s Exhibit 1) Complainant did not want to be transferred but Joyner informed him that Respondent had to submit a plan of correction to the Department of Health that would show that the rights of the resident were being protected. Joyner believed that a showing that Complainant and the resident were separated in this fashion would assure that the plan of correction would be accepted by the Department of Health. (Tr. 672, 727)

5. At Coler, Complainant’s immediate supervisor was Dawn King (“King”). (Tr. 128-29) King is Black and is from Guyana. (Tr. 670) Wendell Evans (“Evans”), Associate Director of Social Work, was King’s supervisor and also had supervisory responsibility over Complainant. (Respondent’s Exhibit 2; Tr. 78-79, 128-29) Evans is Black from the United States of America. (Tr. 670) Complainant did not want to work with Evans. Complainant considered Evans a “conservative” and felt that he and Evans had “philosophical differences.” (Tr. 97, 128-31)

6. In April of 2006, due to changes in New York State law regarding the provision of social-work services, Joyner assisted Complainant in obtaining a limited permit that allowed

Complainant both to continue working as a social worker for a period of one year and to further attempt to pass the licensure test while working. (Tr. 86, 642-43, 647-48)

7. On May 12, 2006, Complainant received a memo from Evans indicating that a counseling session was scheduled regarding an allegation that Complainant misrepresented his departure time on a particular day. (Complainant's Exhibit 3; Tr. 133-37, 146-50) Complainant responded to this memo by sending Evans a memo in which Complainant said to Evans, "And try to stay awake at in-service meetings especially when seated at the head of the table directly beside invited speakers, and at unit cultural change meetings conducted by Mr. F. Long, Associate Executive Director. Where you appeared at times to be sliding under the table awaking, with that dumbfounded look on your face, I was embarrassed for the department on both occasions. Make sure your own house is in order before you throw stones." (Respondent's Exhibit 3; Tr. 393-96) Complainant also referred to Evans in the memo as a "Glasshouse dweller." (Respondent's Exhibit 3)

8. In March of 2007, Complainant, again, took and failed the licensure test. (Tr. 82-89) Effective April 5, 2007, since Complainant failed to obtain licensure as a social worker, Respondent demoted Complainant to the level of caseworker. Complainant could have been restored to the level of social worker if he subsequently passed the test. As a caseworker working for Respondent, Complainant was a member of the union known to him as Local 371. (Respondent's Exhibit 5; Tr. 593-94, 647-48)

9. In April of 2007, Complainant applied for the position of Assistant Director of Social Work. Joyner wanted the position filled by a licensed social worker. Complainant confronted Joyner and demanded to know when she was going to interview him for the position. Joyner

informed Complainant that he would not be interviewed because he did not meet the qualifications for the position. (Tr. 657-60, 738-39)

10. On May 14, 2007, Complainant was informed that he was being placed on "Medical Document Requirement" status for six months, requiring Complainant to submit medical documentation for each illness that kept Complainant out of work. This documentation had to be submitted within five days of returning to work. If Complainant did not meet this requirement he would not receive sick leave pay. Complainant was placed on this status because of his excessive use of unscheduled and undocumented sick time since January of 2007. (Complainant's Exhibit 9; Tr. 227-36).

11. In May of 2007, Complainant began conducting a "lunchtime protest" carrying a sign outside of both Goldwater and Coler during his lunchtime that read, "Unfair labor practices in the Social Work Department negatively affect both staff and residents." Complainant conducted his "lunchtime protest" for approximately five to ten days. (Tr. 308-11) Complainant also handed out to his co-workers a list of concerns that indicated that Complainant was "disenchanted about (his) future at Coler/Goldwater." Complainant's list of concerns included his hope for a dialogue to address "Inconsistent treatment of workers department wide" and "Social work administrative mean spirited decision making regarding reasonable workers request." (Respondent's Exhibit 7; Tr. 467-69) Complainant attached to this list a copy of Psalm 55, which includes the following, "Attend to me, and hear me; I am restless in my complaint, and moan noisily . . .;" "Because of the voice of the enemy, because of the oppression of the wicked; for they bring down trouble upon me, and in wrath they hate me . . .;" "Destroy, O Lord, and divide their tongues, for I have seen violence and strife in the city . . .;" "Let death seize them; let them go down alive into hell, for wickedness is in their dwellings and among

them . . .;” and, “But You, O God, shall bring them down to the pit of destruction; bloodthirsty and deceitful men shall not live out half their days; but I will trust in You.”

(Respondent’s Exhibit 7; Tr. 478)

12. Joyner and Evans considered the language of the psalm threatening and were fearful for their safety. They sent Complainant’s list with the attached psalm to the hospital police to alert the police to their concern. (Tr. 676-79)

13. In June of 2007, Complainant made a complaint with Respondent’s Office of Affirmative Action and Equal Employment Opportunity claiming that he had been unfairly treated in various ways, including not being interviewed for the position of Assistant Director of Social Work. Complainant signed the complaint intake form in which he claimed unfair treatment. The form provided Complainant the opportunity to indicate that he felt that he was experiencing discrimination due to race, national origin, color, or religion if any applied to his complaint. Given this opportunity, Complainant signed the form without having the form indicate that he felt that he was experiencing discrimination due to race, national origin, color, or religion. (Complainant’s Exhibits 10, 11, 12; Tr. 275-81)

14. On a number of occasions while working at Coler, Complainant violated Respondent’s time and attendance rules. (Complainant’s Exhibit 6; Tr. 134-37, 176-78, 494, 686)

15. King complained to Joyner about Complainant’s disrespectful behavior on a number of occasions while working at Coler, including calling her “soop” in what she considered a disrespectful manner after Complainant was told to use King’s proper name.

(Tr. 661-68, 740-41, 773)

16. On June 12, 2007, Complainant applied for a temporary position with Respondent as a patient representative. (Respondent’s Exhibits 8, 9; Tr. 482-85)

17. Sometime in 2007, Complainant called Joyner an “Uncle Tom.” (Tr. 661, 739-40) Complainant had also called Evans an “Uncle Tom.” (Tr. 661) Joyner considered this a “slave-oriented term” and an attack on her person. (Tr. 739-40)

18. On June 15, 2007, Respondent terminated Complainant’s employment. (Complainant’s Exhibit 13) Joyner considered Complainant’s disrespectful behavior toward his supervisors and the allegations of his disregard for Respondent’s time and attendance rules in recommending his termination. (Tr. 690-96, 700-01, 723-25)

19. When Complainant’s employment was terminated, Complainant contacted his union claiming that his employment had been unfairly terminated. After speaking with his union, Complainant chose not to have his union pursue his claim of unfair employment termination because he “didn’t want to risk being able to get to arbitration.” (Tr. 593-608)

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 color, race, national origin, or creed, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Respondent unlawfully discriminated against him in the terms, conditions, and privileges of employment because of his color, race, national origin, and creed when it failed to interview him for either the position of Assistant Director of Social Work or the temporary position of patient representative and when it terminated his employment. Complainant was not interviewed for the position of

Assistant Director of Social Work because he did not meet the qualifications for the position. Complainant applied for the temporary position of patient representative just three days before his employment was terminated for reasons that included disrespectful behavior toward his supervisors and allegations of disregard for Respondent's time and attendance rules. The credible evidence shows that Respondent's actions had nothing to do with Complainant's color, race, national origin, or creed.

Complainant also raised an issue of unlawful discrimination by alleging that Respondent retaliated against him because he opposed unlawful discrimination. Complainant did establish that he conducted a "lunchtime protest" alleging "unfair labor practices in the Social Work Department" that "negatively affect both staff and residents" and that he filed a complaint with Respondent's Office of Affirmative Action and Equal Employment Opportunity claiming that he had been unfairly treated in various ways without claiming that he felt that he was experiencing discrimination due to race, national origin, color, or religion. Even if these actions constituted opposition to unlawful discrimination, Complainant presented no proof of a causal connection between any action alleged to have been taken by Respondent and any alleged protected activity by Complainant. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). The credible evidence has established that the actions attributed to Respondent had nothing to do with any engagement by Complainant in a protected activity.

After considering all of the evidence presented and evaluating the credibility of the witnesses, I find that the credible evidence does not support a finding that Respondent engaged in unlawful discrimination. All of Complainant's claims of unlawful discrimination are unsubstantiated. Conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387

(2d Dept. 1995). Complainant has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997). Since Complainant has failed to meet this burden, the complaint 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 complaint be, and the same hereby is, dismissed.

DATED: July 17, 2009
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas J. Marlow". The signature is fluid and cursive, with a large initial "T" and "M".

Thomas J. Marlow
Administrative Law Judge