

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ROBERTO CASTRO,

Complainant,

v.

TOM MITCHELL, CUSTODIAL ENGINEER,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10112046

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 18, 2008, 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: **SEP 30 2000**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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on the Complaint of

ROBERTO CASTRO,

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THOMAS MITCHELL, CUSTODIAN ENGINEER,

Respondent.

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

Case No. 10112046

SUMMARY

Complainant alleged that Respondent allowed his supervisor to create a hostile work environment because of his age, race and national origin. Complainant failed to meet his burden. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On June 5, 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 March 31, 2008 and April 1, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield. Respondent was represented by Spivak Lipton LLP, by Lydia Sigelakis and Gillian Costello.

On March 31, 2008, the caption was amended pursuant to the Division's Rules of Practice (9 NYCRR § 465) to reflect Respondent's correct legal name and title, Thomas Mitchell, Custodian Engineer. (Tr. 5)

The parties were granted permission to file proposed findings of fact and conclusions of law. Both parties made timely submissions, which were read and considered.

FINDINGS OF FACT

1. Complainant, whose date of birth is December 7, 1954, is Hispanic of Dominican national origin. (Tr.10; ALJ Exhibit 1)
2. Complainant began his employment as a cleaner at Public School 173 in September 1999. (Tr. 14-15, 51)
3. In 2000, Respondent was hired as Custodian Engineer, and became responsible for the day to day maintenance of the building. (Tr. 14, 175-77)
4. Respondent hired Complainant as a cleaner and at all relevant times Complainant worked the night shift, from 3:00 p.m. to 12:00 a.m. (Tr. 14-15, 51, 180-81; Respondent's Exhibit 6)
5. The cleaning staff had a written work schedule which outlined their daily cleaning duties and provided an allotment of time every day to complete additional assignments. (Tr. 167; Respondent's Exhibit 6)

6. Complainant often did not have enough time to complete his daily assignments, and complained that he was given too much work. (Tr. 25, 81, 113-14, 117; Respondent's Exhibits 4, 5)

7. In July 2005, Respondent hired David Rodriguez ("Rodriguez") as Fireman, a supervisory position. Rodriguez worked the 6:00 a.m. to 4:00 p.m. shift. His shift overlapped with Complainant's by one hour. (Tr. 18, 166, 180-81)

8. Rodriguez is Hispanic and of Puerto Rican national origin. (Tr. 166)

9. Rodriguez's duties included supervising the night crew and assigning them work in Respondent's absence. (Tr. 166-67, 178-79)

10. Rodriguez often assigned work that was not on the cleaner's schedule in order to cover the work of employees who were on vacation or out sick or in case of emergency, such as snow removal. (Tr. 167)

11. Before Rodriguez was hired, the cleaners worked in a relaxed environment. Maximo Salvador ("Salvador"), the previous Firemen, would often complete the work left undone by the cleaners and did not complain about the staff. (Tr. 117-18, 121, 129) Rodriguez's supervisory style was different, and he owed no alliance to any of the workers. Salvador, however, was in the unenviable position of supervising his mother-in-law and father-in-law, both of whom were cleaners, and this, according to one witness, allowed the staff to "get away with a lot." (Tr. 88-89, 118, 121)

12. Complainant alleged that after Rodriguez was hired everything changed. Rodriguez assigned him more work and would follow Complainant around, thus creating a hostile work environment based on age, race and national origin. (Tr. 18-19, 24, 41, 50; ALJ Exhibits 1, 2)

13. Complainant alleged that Rodriguez used profanity when referring to his national origin and called him old. (Tr. 24)

14. Rodriguez and Respondent denied the allegations. (Tr. 170-71; ALJ Exhibit 5)

15. Respondent acknowledged that he received complaints that Rodriguez worked the staff too hard, but denied any discrimination complaints. (Tr. 80, 84-85, 93, 183-84, 185)

16. Complainant did not complain to Respondent about Rodriguez. Complainant complained to Lydia Rivera ("Rivera"), who was the shop steward and the mother-in-law of the prior Fireman, that Rodriguez was giving him too much work. (Tr. 27-28, 54)

17. Rivera agreed that Complainant's jobs many times were not done. (Tr. 81)

18. Rivera felt that Rodriguez was racist because Rodriguez called the staff by their nationality instead of their names, and that applied to the cleaners that were Puerto Rican as well. In general, Rivera agreed that they were not assigned more work by Rodriguez. (Tr. 71, 76-77, 86)

19. The allegations in this complaint arise out of an incident that occurred on May 9, 2006, which were precipitated by events that occurred the day before. (Tr. 25)

20. On May 8, 2006, Rodriguez assigned Complainant the additional duties of cleaning the bathrooms and the lunchroom. Complainant told Rodriguez that he would try, but that he did not believe that he would have enough time to complete the assignment. (Tr. 25)

21. Complainant did not complete the tasks assigned. (Tr. 25)

22. The following day, May 9, 2006, Respondent temporarily reassigned Complainant to clean the lights on the fifth floor, and reassigned Complainant's duties to another cleaner to evaluate the time needed to complete Complainant's tasks. (Tr. 25, 171-73)

23. Complainant became very upset and angry at Rodriguez, believing that Rodriguez was behind the reassignment. (Tr. 171-72)

24. Complainant alleged that Rodriguez “told [him] fucking Dominican, go clean the lights” and threatened to terminate his employment if he did not comply. As a result, Complainant became so nervous that three hours later he experienced chest pains and was removed from the school by ambulance. (Tr. 25-26)

25. Complainant never returned to work with Respondent and has since been declared disabled and unable to work. (Tr. 35-38, 42, 44, 63-64)

26. Complainant was diagnosed with depression and anxiety disorder, and takes medication prescribed by his psychiatrist. (Tr. 44-45)

27. Although Complainant attributed his depression and anxiety to the alleged hostile work environment, having denied a diagnosis of depression prior to May 9, 2006, his medical records indicate that he was diagnosed with depression and had been prescribed Zoloft prior to meeting Rodriguez in 2005. (Tr. 55-57, 62; Respondent’s Exhibits 1, 2)

28. Complainant had problems completing his daily assignments, and had been warned regarding this deficiency in the past. (Tr. 112-13, 117, Respondent’s Exhibits 4, 5)

29. Complainant alleged that he was the oldest employee employed by Respondent and supervised by Rodriguez. However, Rudolph Grant (“Grant”), who is black and was born on January 20, 1947, is older than Complainant and continues to be employed by Respondent and was recently promoted from cleaner to handyman, and denies hearing any age-related remarks by Rodriguez. (Tr. 125-26, 129, 134)

30. Complainant alleged that he was the only person of Dominican national origin working for Respondent. However, Gilberto DeJesus (“DeJesus”) and Jason Osorio (“Osorio”), are both

of Dominican national origin, and testified that they worked with Rodriguez without incident. (Tr. 142, 144, 155-60, 163)

OPINION AND DECISION

The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer to discriminated against an individual in compensation or in terms, conditions or privileges of employment because of age, race and national origin.

Complainant alleged that he was followed around and given more work assignments because of his age, race and national origin. In order to establish a claim of age, race and national origin discrimination, Complainant must first make out a prima facie case. See, *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. Complainant must then demonstrate that the reasons articulated by Respondent are merely a pretext for unlawful discrimination. However, conclusory allegations are not enough for Complainant to meet his burden. *Pace College, supra*.

Complainant failed to make out a prima facie case of age, race or national origin discrimination.

Complainant alleged that Respondent unlawfully discriminated against him on the basis of age because he was the oldest employee employed by Respondent. The record, however, showed that Grant was seven years older than Complainant, continued to be employed by Respondent and had recently been promoted from cleaner to handyman, and denied ever hearing any ageist comments.

Complainant alleged that Respondent unlawfully discriminated against him on the basis of his national origin, Dominican, and race, Hispanic. Complainant alleged that Rodriguez, who is Hispanic, of Puerto Rican national origin, discriminated against him by giving him more work. However, the record showed that Complainant was not the only Hispanic of Dominican national origin employed by Respondent and supervised by Rodriguez. The record also showed that Complainant was not the only employee that complained that Rodriguez assigned him more work. Rivera testified that as shop steward she also complained about the amount of work that Rodriguez assigned to her; she is Hispanic of Puerto Rican national origin. Furthermore, Complainant's allegation that his duties were taken away and given to a younger Puerto Rican cleaner on May 9, 2006, fails because his duties were not taken away, they were temporarily reassigned to evaluate whether another employee could perform Complainant's duties within the allotted time.

Complainant also failed to make out a hostile work environment claim. To satisfy a claim of hostile work environment a complainant must produce evidence that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Forrest & Jewish Guild for the Blind*, 3 N.Y.3d 295, 394 (2004) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

The only evidence that Complainant produced of hostile work environment were two comments, which, even when taken together, do not amount to a hostile work environment. He also alleged that he was given more work and followed by Rodriguez. Complainant alleged that Rodriguez told him that he was old and called Complainant a "fucking Dominican." I don't find that these comments, which were said to Complainant once, are enough to sustain a claim of hostile work environment based on age, race and national origin discrimination. Furthermore,

because Complainant never complained to Respondent about these comments and Rodriguez denied making the comments Respondent could not be held liable unless he became a party to it by encouraging, condoning, or approving it. See, *Forrest*, 3 N.Y.3d at 311; *Totem Taxi, Inc. v. New York State Human Rights Appeal Bd.*, 65 N.Y.2d 300, 305-306, 491 N.Y.S.2d 293, 295-296 (1985).

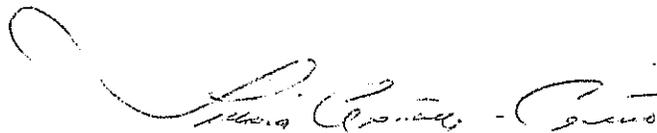
Complainant's complaint must therefore be dismissed for Complainant's failure to meet his burden.

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 18, 2008
Bronx, New York



Lilliana Estrella-Castillo
Administrative Law Judge