Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JOSE L. CHUMPITAZ,

Complainant,

v.

METROPOLITAN LUMBER, HARDWARE & BUILDING SUPPLIES, INC.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10187187

Federal Charge No. 16GB702145

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 June 2, 2020, by Margaret Jackson, 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 LICHA M. NYIENDO, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENTS:

- Effective October 11, 2019, Human Rights Law § 296.1(h) amended the definition of harassment and the standard applied to such claims. "Harassment is

an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more . . . protected categories." *Id.* This is so "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." *Id*. However, because the allegations which gave rise to the harassment claims in the instant complaint were purported to have occurred prior to the amended law's effective date, it was appropriate to analyze the allegations under the former severe or pervasive standard.

- The analysis in the Recommended Order is not adopted. This case is dismissed because Complainant failed to prove that Respondent created a hostile work environment, denied Complainant a reasonable accommodate for his disability, demoted him or terminated his employment based on his race or disability. In fact, the evidence shows that Respondent accommodated Complainant's disability by allowing him time to attend all of his doctor's appointments. Further, Respondent never demoted him and ultimately terminated his employment because he was insubordinate and engaged in inappropriate workplace behavior. As to Complainant's allegation that he was subjected to a hostile work environment, the evidence shows that while offensive, inappropriate and unprofessional behavior occurred at Respondent's workplace, there is no proof that this behavior was related to Complainant's race or disability or that he was targeted due to his protected class. *See Arcuri v. Kirkland,* 113 A.D.3d 912, 914 (3d Dept. 2014) (If there is to be "a finding of a hostile work environment as a result of . . . harassment, the evidence in the record must establish the pertinent

elements, including proof that the discriminatory conduct occurred due to the complainant's [protected class]"). In addition, here, Complainant voluntarily engaged in similar inappropriate workplace behavior and, in many instances, encouraged and contributed greatly to the unprofessional workplace atmosphere which belies his claim that the behavior was unwelcome. *See Yukoweic v. Int'l Bus. Mach., Inc.*, 228 A.D.2d 775 (3d Dept. 1996) (A prima facie case of workplace harassment entails a showing that the behavior was unwelcome); *see also Erps v. West Virginia Human Rights Comm'n*, 680 S.E.2d 371 (2009) ("[A]uthorities make clear that a plaintiff who initially participates in the allegedly hostile conduct cannot satisfy the "unwelcomeness" prong of a hostile work environment claim, *i.e.* that the complained of conduct was unwelcome, unless evidence is produced that at some point the plaintiff made clear to co-workers and superiors that such conduct would, in the future, be considered unwelcome and the conduct continued thereafter"). Accordingly, the case is dismissed.

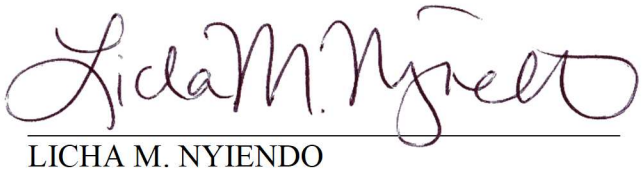
In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

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: **August 16, 2021**
Bronx, New York



LICHA M. NYIENDO
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10187187**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him by denying him a reasonable accommodation and terminating his employment because of his race, color and disability. Respondent denied the allegations. Complainant failed to sustain his burden of proof and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 5, 2017, 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 Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on September 24, 2018 and September 25, 2018.

Complainant and Respondent appeared at the hearing. The Division was represented by Veanka S. McKenzie, Esq., Senior Attorney. Respondent was represented by Alison I. Blaine, Esq.

Permission to file post-hearing briefs was granted. Respondent submitted post hearing findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent is a lumber hardware and building supply company with five stores located throughout New York City. (Tr. 61, 244)

2. Complainant is Hispanic and a person of color (mestizo) who has diabetes. (Tr. 22)

3. In January 2013, Complainant began working for Respondent as a stock person in the plumbing and electrical department of Respondent's Steinway Street store (Steinway street) located in Astoria (Long Island City), New York. (Tr. 23-24, 231)

4. Most of the employees who were employed by Respondent were Hispanic or persons of color. (Tr. 132, 239)

5. Complainant was responsible for ordering and stocking materials, as well as helping customers. (Tr. 180, 231-32)

6. Complainant was the self-appointed supervisor of the plumbing and electrical section. (Tr. 180, 204-05)

7. Tom Larocco was Complainant's supervisor when Complainant began employment. (Tr. 24)

8. Six months after Complainant's hiring, Larocco left the company and Jeffrey Frucht, a white male, became Complainant's supervisor. (Tr. 26, 231-32)

9. Frucht had authority to hire and fire employees. (Tr. 260)

10. Without explanation, Complainant believed that he was demoted, and his salary reduced when Frucht became his supervisor. However, Frucht could not reduce an employee's salary. (Tr. 291)

11. During the hearing, Complainant recalled that his salary was not changed by Frucht. (Tr. 29)

12. Most of the employees working in the Steinway Street store were persons of color or Hispanic. (Complainant's Exhibit 1)

13. Mahneswar Mangra was the floor manager and Complainant's immediate supervisor. Mangra supervised all of the stock personnel in the Steinway Street store. (Tr. 176)

14. Complainant ambulated with a cane going to and from work because his diabetic condition caused an ulcer on his foot. Complainant rarely used the cane during the day but he kept it next to a cabinet at the back of an aisle with his other belongings. (Tr. 182, 216)

15. Stockperson Edward Holt would take Complainant's cane and hide it only to bring it back to him after Complainant began searching for it. (Tr.188)

16. Eduardo Pappas, Complainant's co-worker, and Complainant often played around by pulling each other's pants down. (Tr. 209)

17. Pappas also took Complainant's cane and hid it. (Tr. 183)

18. Complainant blamed Holt for taking his cane, but Pappas admitted to Mangra that he took Complainant's cane and hid it many times. (Tr. 182-83, 194)

19. From time to time Complainant complained to Frucht and Mangra that someone was taking his cane. (Tr. 191, 256, 286)

20. Frucht would respond by saying, "whoever took the cane, put it back." Shortly thereafter it would reappear. (Tr. 256)

21. No one was reprimanded for taking the cane. (Tr. 188)

22. Complainant, Ramon Gill, another co-worker, and Holt frequently pushed and shoved each other in the workplace. On one occasion, Complainant broke his hand after a pushing match with Pappas. (Tr. 190, 195)

23. One day, Holt complained to Frucht that Complainant pushed him. (Tr. 192)

24. No one was disciplined. Instead, Mangra, who was the floor manager, gave Complainant and Gill a verbal warning about shoving each other in the store. (Tr. 191)

25. Frucht responded to the complaints by telling all the stockmen to "cut it out" because the store was not a "school yard." (Tr. 256)

26. Sheldon Williamson, who is White, worked in the tool department. Mangra heard Williamson and Complainant get into an argument and Complainant told him that he was going to bring a gun and shoot him. (Tr. 186-87)

27. Mangra heard the argument but no one was disciplined. (Tr. 187)

28. On one occasion, when Complainant returned to work from a medical appointment, Complainant found a doll/mannequin head with a noose around its neck and a tag with his name resting in the section where he worked. (Tr. 34-35)

29. Williamson told Mangra about the doll with the noose that was placed in Complainant's work area, but Mangra did nothing because he did not see it and Complainant did not complain about it. (Tr. 184)

30. Mangra was unsatisfied with Complainant's work performance because Complainant was often sitting around waiting for someone else to do the work. (Tr. 206)

31. Complainant often accepted tips from customers before helping them. (Tr. 206-07)

32. Customers complained about Complainant asking for tips. (Tr. 207)

33. Mangra spoke to Complainant several times about taking tips from customers, but he continued doing it. (Tr. 207)

34. Complainant was not disciplined for taking tips. When he was admonished for doing it Complainant replied, "Okay Buddy, Okay Buddy." But Complainant would continue asking for tips. (Tr. 207)

35. On one occasion during Complainant's employment, Frucht lifted his arms and accidentally hit Complainant on the head. (Tr. 275)

36. Frucht apologized for hitting Complainant. In response, Complainant said he was "Okay." (Tr. 275)

37. Whenever Complainant went on vacation to Canada, Complainant accused Frucht of telling the other employees that Complainant's girlfriend was with other men. Frucht denied the accusation. (Tr. 37, 275-76)

38. Frucht bought a large toilet seat for the ladies' room because the toilet seat in the ladies' room had broken three times. (Tr. 279)

39. Complainant and the other stockmen said that Frucht bought the toilet seat to mock a Hispanic cashier "like she was an elephant." (Tr. 45, 279)

40. Complainant's diabetic condition was exacerbated because he did not eat often. However, other than lunch there were no scheduled breaks. Complainant and the other stock persons could eat a snack and take breaks whenever they wanted as long as the store was covered. Complainant never told Frucht that he was denied a break to eat. (Tr. 265-66)

41. Complainant accused Frucht of not giving him holiday pay. However, Respondent's policy mandated that in order to be paid for a holiday, an employee must work the day before and the day after the holiday. Complainant was paid for every holiday that he worked the day before and the day after. (Tr. 272-73)

42. Complainant also accused Frucht of treating him badly and cursing at him, but Mangra and Ramon Romero, another employee, testified that Frucht did not curse in the store. (Tr. 277-78)

43. At least ten times during the course of his employment, Complainant told Frucht that he needed an accommodation to go to the doctor for treatment of his diabetic condition. (Tr. 298-99)

44. Frucht liberally granted Complainant time to leave for his diabetic doctor appointments. (Tr. 279-80, 282-283)

45. In the beginning of March 2017, Kevin Rega, a white male, was hired to work in the same section as Complainant. (Tr. 240-42)

46. On March 8, 2017, Complainant reported to work at 7:00 a.m. and was talking near the time clock. Complainant was scheduled to start working at 8:00 a.m. Frucht told Complainant to go in the back until it was time for him to start working. Complainant refused to leave the area. Romero, told Frucht that Complainant was blocking the path of customers going to the cashier and he was not scheduled to start work until 8:00 a.m. Frucht told Complainant to leave the area

or go home. Complainant refused to leave the area and Frucht told him, "You do not have a job here anymore, you are fired." (Tr. 242-243; ALJ's Exhibit 1)

47. Human Resources disseminates the policies regarding discrimination and harassment to each employee when they are hired. (Tr. 274)

48. Complainant never complained to Mangra that he was being discriminated against. (Tr. 202)

49. Carmelo Mejias, Complainant's co-worker, told Complainant to leave the store or the police would be called. (Tr. 316-17)

50. Complainant called Frucht's boss, Milton Molinas, who hired employees and worked as a customer service representative in the Manhattan flagship store. (Tr. 61)

51. Molinas agreed with Frucht's decision and told Complainant that Frucht was the boss. (Tr. 59, 88-90)

52. Several Hispanics and people of color continued to work at the store after Complainant's employment was terminated. (Tr. 199-202)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee "because of an individual's race…color [or] disability… to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a).

Complainant has the initial burden to prove a prima facie case of unlawful discrimination. He must show that he is a member of a protected class; that he was qualified for the position; that

he suffered an adverse employment action; and the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

If a complainant makes out a prima facie case of unlawful discrimination, the burden shifts to the respondent to present a legitimate, independent, and non-discriminatory reason for its actions. *Id.* If the respondent does so, the complainant must show that the reasons presented were merely a pretext for unlawful discrimination by demonstrating both that the respondent's stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The ultimate burden of proof always remains with the complainant. *See Stephenson v. Hotel Employees and Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant is a Hispanic person of color (mestizo), and he is thus a member of a protected class. Complainant had been employed as a stockperson for approximately four years, and he was qualified for the position. Complainant suffered an adverse employment action when Respondent terminated Complainant's employment after Complainant refused to step away from the time clock. Complainant did not present any evidence of racial animus against him. Complainant failed to present credible evidence that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Thus, Complainant failed to establish a prima facie case of racial discrimination based on Respondent's termination of his employment.

Complainant further alleged that he was subjected to a hostile work environment because of his race/color when he discovered the doll/mannequin head with a noose around its neck. In order to sustain a claim of discrimination based on a hostile work environment, Complainant

must demonstrate that he was subjected to conduct that produced a work environment permeated with unlawful discriminatory intimidation, ridicule, and insult that was 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. *See Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50-51, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

In the instant matter, while finding a doll head with a noose and one's name on it is reprehensible, the evidence does not show that Respondent acquiesced to or condoned the conduct. Complainant did not report the isolated incident to his supervisor or Respondent and there is no evidence that Respondent had reason to be aware of or believe that the incident occurred because the stock people in the store were always shoving each other, hiding Complainant's cane and pulling each other's pants down. Because Respondent was unaware of the doll/mannequin incident and did not acquiesce in or condone the behavior, and because Respondent did not have a race-based animus toward Complainant, the hostile work environment claim must fail.

Complainant further alleges that Respondent terminated his employment because Respondent had a pattern and practice of terminating Hispanic and African-American employees, and he is Hispanic. Complainant alleged that he was subjected to disparate treatment because a white male, Rega, was hired a few days before Complainant's employment ended allegedly to replace him. Complainant failed to demonstrate that Rega or anyone was insubordinate and/ or received more favorable treatment than Complainant. The evidence also demonstrates that many of the employees who were employed by Respondent were Hispanic or

persons of color before and after Complainant's employment terminated. Further, throughout the course of Complainant's employment, none of the stockpersons were disciplined for pushing and shoving each other, pulling each other's pants down or hiding Complainant's cane irrespective of their race. Respondent thereby demonstrated that there was no pattern of discrimination against Hispanics, persons of color or African Americans. Complainant failed to rebut Respondent's proof, and this claim is also dismissed.

In order to establish a prima facie case of unlawful disability discrimination a complainant must demonstrate that: (1) he meets the definition of an individual with a disability; (2) his disability did not prevent him from performing his duties in a reasonable manner with or without a reasonable accommodations; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Thide v. New York State Dep't. of Transp.*, 27 A.D.3d 452, 811 N.Y.S.2d 418 (2d Dept. 2006). Complainant has failed to establish a prima facie case of disability discrimination.

A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.,* 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant's diabetic condition is a disability as that term is defined in the Human Rights Law. At the time of his discharge, Complainant possessed the minimum qualifications to

work as a stock person, a job that he had been performing for Respondent for several years. Complainant's diabetic condition did not prevent him from performing his job duties. Complainant suffered an adverse employment action when Respondent terminated his employment on March 8, 2017, and the termination did not give rise to an inference of discrimination. Therefore, Complainant did not make out a prima facie case of discrimination.

"If the complainant succeeds in establishing a prima facie case, the burden of proof shifts to the respondent to demonstrate that the disability prevented the employee from performing the duties of the job in a reasonable manner or that the respondent's action was motivated by legitimate, nondiscriminatory reasons." *Thide* at 453.

If the respondent successfully establishes that it had valid nondiscriminatory reasons for its action, the burden shifts back to the complainant to raise a plausible issue of fact as to whether the stated reasons were pretextual. *Thide* at 453; (see *Cooks v. New York City Tr. Auth.*, 289 A.D.2d 278, 734 N.Y.S.2d 207 (2d Dept. 2001)).

On March 8, 2017, Complainant reported to work at 7:00 a.m. and stood by the time clock which is located near the front counter preventing customers from paying for items. Complainant was not scheduled to report to work until 8:00 a.m. that day and refused to leave the area. Complainant was insubordinate to his supervisor by refusing to step away from the time clock. As a result, Frucht warned Complainant that if he did not leave the area his employment would be terminated. Complainant refused to step away from the time clock and Frucht terminated his employment.

Respondent has met its burden of presenting legitimate, nondiscriminatory reasons in support of its decision to terminate Complainant's employment. Respondent's burden here is one of production only; it does not involve any evaluation of credibility. *See Stephenson v. Hotel*

Employees and Rest. Employees Union Local 100 of the AFL-CIO, 6 N.Y.3d 265, 270-71, 811 N.Y.S.2d 633, 636 (2006), citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. To show pretext, it is not enough for Complainant to show that Respondents' explanations are not persuasive. *See Ferrante* at 630, 665 N.Y.S.2d at 29. Complainant's termination did not give rise to unlawful discrimination. To succeed, Complainant must establish that Respondents intentionally discriminated against him because of his protected classes. Complainant has not made a prima facie case of disability discrimination and this claim must also be dismissed.

Under the Human Rights Law, an employer is obligated to provide reasonable accommodations for an employee's known disabilities. Human Rights Law § 296.3(a). In order to establish a prima facie case based on an employer's failure to provide a reasonable accommodation, Complainant must demonstrate that he suffered from a disability and he could perform the essential functions of the position with a reasonable accommodation. Complainant requested time to attend his doctor appointments as an accommodation. Respondent liberally granted Complainant time to attend his doctor appointments. Thus, Respondent did not refuse to make such accommodation. *See County of Erie v. New York State Div. of Human Rights,* 121 A.D.3d 1564, 1565, 993 N.Y.S.2d 849, 850 (4th Dept. 2014

Under the circumstances of this case, Complainant has not shown that Respondent failed to provide a reasonable accommodation for his disability.

Therefore, Complainant's claim that Respondent failed to provide a reasonable accommodation must also 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 hereby is, dismissed.

DATED: March 9, 2020
Hempstead, New York

Margaret A. Jackson
Administrative Law Judge