NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **CLYDE DARGAN,** Complainant, v. **PROMESA SYSTEMS, INC.,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10107455

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 January 13, 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: FEB 13 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 **CLYDE DARGAN,** Complainant, v. **PROMESA SYSTEMS, INC.,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10107455**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his color. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 24, 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 J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 5 and 6, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield, Esq. Respondent was represented by Epifanio Castillo, Jr., Esq.

At the public hearing session held on March 5, 2008, on the record, the complaint was amended to reflect the correct name of Respondent: Promesa Systems, Inc.

The Division and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

For consistency, all exhibits marked "Division's Exhibits" have been marked "Complainant's Exhibits."

FINDINGS OF FACT

1. Complainant is Black. Complainant began his employment with Respondent as a building superintendent on July 22, 1996. (ALJ's Exhibit 1; Tr. 21)

2. In 2000, Complainant became the superintendent for 946 Anderson Avenue ("946 Anderson") in the Bronx and lived there. (ALJ's Exhibit 1; Tr. 37)

3. In December of 2004, Complainant requested five days of vacation between December 23 and December 30, 2004. Respondent denied this request because it expected a building inspection during this time period and wanted him available, as needed. (Complainant's Exhibit 3; Tr. 41-42, 89-90)

4. It was not unusual for vacations to be denied for an event such as an impending building inspection. (Tr. 233-34, 287-88)

5. In 2005, Complainant was the only Black person who worked for Respondent as a superintendent. (Tr. 30-33, 38, 80)

6. In 2005, Respondent acquired new properties and required Complainant, in addition to his responsibilities at 946 Anderson, to assist another superintendent, Ulysses Liriano ("Liriano"), at 1074 Summit Avenue ("1074 Summit") in the Bronx. Liriano is Hispanic. (Tr. 29-30, 44-45, 59, 214-16, 309-10)

7. It was not unusual for Respondent's superintendents to have responsibilities for more than one building. (Tr. 61, 215-16)

8. In the summer of 2005, Complainant requested 10 days of vacation between June 20 and July 1, 2005. (Complainant's Exhibit 4) Respondent denied this request as were all vacation requests from Respondent's superintendents for this time period as Respondent was opening new buildings and wanted all superintendents available, as needed. (Tr. 308-09)

9. In July of 2005, Liriano complained to Respondent that, on one occasion, Complainant did not do the necessary cleaning of 1074 Summit. On July 29, 2005, Complainant went to 1074 Summit and, while tenants were present, argued with Liriano and called him a "lying mother-fucker." (ALJ's Exhibit 1; Complainant's exhibit 5; Tr. 66-69) Respondent viewed Complainant as the aggressor in this situation because he went to 1074 Summit to confront Liriano. Therefore, Respondent gave Complainant a written warning for his behavior. (Complainant's Exhibit 5; Tr. 324) Although Liriano wasn't viewed as the aggressor, Respondent gave him an oral warning because he engaged in the argument when confronted by Complainant. (Tr. 324)

10. On August 12, 2005, Jose Alves ("Alves"), the Director of Housing for Respondent who had supervisory responsibility over Complainant, received complaints from tenants of 1074 Summit indicating that the building was dirty. Alves went to 1074 Summit, observed that it was dirty, and made a telephone call to Complainant. Complainant told Alves that he had already cleaned 1074 Summit. Alves told Complainant that it was dirty and that Complainant had to

come and clean it. Complainant cursed at Alves and refused Alves' direction to come to 1074 Summit and clean it. (Complainant's Exhibit 6; Tr. 74, 314-16)

11. Complainant was suspended for five days, starting August 22, 2005, for his abovementioned behavior with Alves on August 12. (Complainant's 6)

12. During his suspension, Complainant filed his complaint with the Division claiming that Respondent had unlawfully discriminated against him because of his color. (ALJ's Exhibit 1; Tr. 108)

13. In his complaint, Complainant alleged that the written warning, the suspension, the denial of vacation in 2004 and 2005, and the denial of assistance to accomplish work that was beyond his normal duties were the bases of his claims of unlawful discrimination. (ALJ's Exhibit 1)

14. Complainant testified that there were occasions when he requested that Respondent provide him with assistance to do certain work but those requests were denied. (Tr. 56-58) Complainant was aware that Respondent had a procedure whereby Complainant could file a grievance with Respondent if he thought he was being discriminated against by not being provided such assistance, but Complainant never filed such grievance. (Tr. 121) Complainant provided no documentation to support his testimony that such requests for assistance were made.

15. Respondent makes it a practice to provide assistance to superintendents when needed and is not aware of any request by Complainant that was not honored. (Tr. 225-27, 329-31)

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. *See* Human Rights Law § 296.1(a).

Complainant raised an issue of unlawful discrimination in the terms and privileges of employment because of color. Complainant has the burden to establish by a preponderance of the evidence that such discrimination occurred. To meet his burden to establish that unlawful discrimination occurred, Complainant must initially show by a preponderance of the evidence that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305.

Complainant is Black. Complainant has been employed as a superintendent by Respondent since 1996, establishing that he is qualified for his position. Complainant received a written warning for a work-related incident while an Hispanic employee involved in the same incident only received an oral warning. Therefore, Complainant has established a prima facie case, the burden of which has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998) Because Complainant has established a prima facie case of discrimination, the burden shifts to Respondent to establish that its actions were motivated by legitimate, nondiscriminatory reasons. *See Forrest,* 3 N.Y.3d at 305.

Respondent has rebutted the presumption of discrimination by presenting evidence that the actions it took with regard to Complainant were taken for legitimate, nondiscriminatory reasons. Both employees involved in the incident on July 29, 2005 were disciplined. The incident would not have happened, however, if Complainant didn't go to 1074 Summit and instigate it. Therefore, Respondent has established a legitimate, nondiscriminatory reason for

giving Complainant a written warning while giving Liriano an oral warning.

With regard to suspending Complainant for five days for his behavior with Alves on August 12, 2005, again, Respondent has presented evidence of a legitimate, nondiscriminatory reason for its action. Respondent considered Complainant's cursing at a supervisor and refusing to follow a direction from a supervisor to perform work to constitute insubordination, warranting a five-day suspension.

The evidence also establishes that Respondent had legitimate, nondiscriminatory reasons for the denial of the two vacations in question. First, it was not uncommon for a vacation to be denied if an inspection was expected and an employee's assistance may be needed. Also, the evidence established that, in the summer of 2005, when Respondent was opening new buildings it had a legitimate business interest for denying all vacation requests from Respondent's superintendents so that its superintendents would be available, as needed.

Once Respondent articulates legitimate, nondiscriminatory reasons for its actions, Complainant has the burden to prove that the reasons proffered by Respondent were merely a pretext for unlawful discrimination. *Id.* at 305. Complainant has presented no credible evidence to prove that Respondent's claims of legitimate nondiscriminatory reasons for its actions were pretextural.

With regard to Complainant's claim that there were occasions when he requested that Respondent provide him with assistance to do certain work but those requests were denied, I credit Respondent's testimony that it makes it a practice to provide assistance to superintendents when needed and is not aware of any request by Complainant that was not honored. Respondent had a procedure in place whereby Complainant could have filed a grievance with Respondent if he thought he was being discriminated against by not being provided such assistance, but

Complainant never filed such grievance. Further, Complainant failed to provide any documentation to support his testimony that such requests were made, and, therefore, I do not credit his testimony.

Ultimately, Complainant has the burden of proving that Respondent unlawfully discriminated against him. *See Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO,* 6 N.Y.3d 265, 811 N.Y.S.2d 633 (2006) Complainant has failed to meet this 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: January 13, 2009
Bronx, New York

Thomas J. Marlow
Administrative Law Judge