

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

BRETT G. DUMAIS,

Complainant,

v.

NEW PROCESS GEAR, INC., JOHN TRIVISON,
AS AIDER AND ABETTOR,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10112963

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 Michael T. Groben, 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.

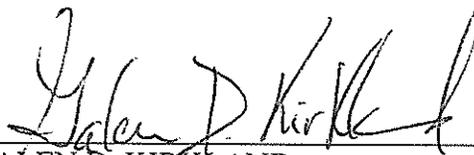
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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 - 9 2008**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

BRETT G. DUMAIS,

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v.

**NEW PROCESS GEAR, INC., JOHN
TRIVISON, AS AIDER AND ABETTOR,**

Respondent.

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

Case No. 10112963

SUMMARY

Complainant charged that he was subjected to discrimination in the workplace due to his sex, and that Respondent employer terminated his employment because he opposed said discriminatory practices. Respondents denied these allegations. The record does not support a finding that Complainant was subjected to harassment because of sex or perceived sexual orientation. The record establishes that Respondent terminated Complainant's employment because Complainant was the aggressor in a physical altercation in the workplace. Accordingly, the complaint must be dismissed.

PROCEEDINGS IN THE CASE

On July 26, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Magna Powertrain, as Respondent, and John Trivison, as aider and abettor, with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law"). On November 2, 2006, the verified

complaint was amended to delete Magna Powertrain as Respondent and to substitute New Process Gear, Inc. John Trivison remained charged as aider and abettor.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents 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 Martin Erazo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on January 16 and 17, 2008.

Complainant and Respondents appeared at the hearing. Complainant was represented by Gilles R.R. Abitbol, Esq. Respondent New Process Gear, Inc. was represented by John T. McCann, Esq. John Trivison was represented by Laurin R. Haddad, Esq.

Permission to file post-hearing briefs was granted. Proposed findings of fact and conclusions of law were timely filed by Complainant and John Trivison. Respondent New Process Gear, Inc. did not file proposed findings of fact and conclusions of law.

The case was then was then assigned to ALJ Michael Groben for decision.

FINDINGS OF FACT

1. Complainant Brett G. Dumais ("Complainant") is a heterosexual male. (ALJ's Exhibit 1; Tr. 227)

2. Complainant was hired as an employee at the assembly plant of Respondent New Process Gear, Inc. ("Respondent") on or about November 9, 1992, and was employed as an assembly line worker in Department 867 (the "Department") of Respondent's plant during the years 2002 through June of 2006. (ALJ's Exhibit 1; Tr. 157)

3. At all times relevant to the complaint, Respondent maintained both a Protocol of Conduct, which addressed proper relations between employees, and a Harassment and Non-Discrimination Policy, for the benefit of its employees. The Harassment and Non-Discrimination Policy specifically noted that same-sex sexual harassment was against company policy.

(Respondent's Exhibit 4, 5)

4. Thomas Delpha, Jr. was Complainant's immediate supervisor from on or about December 2003 to December 1, 2005. (Tr. 402)

5. Michael Simiele ("Simiele") became Complainant's immediate supervisor in January of 2006. (Tr. 381)

6. The Department 867 assembly line (the "Assembly Line") consisted of a moveable conveyor on which were mounted metal work surfaces known as "blocks". Items to be assembled, known as "cases" were placed on these blocks, and would move down the Assembly Line to each assembly line employee's work station for the next stage of assembly. (Tr. 60, 80, 89, 100, 178-79)

7. At the final work station at the end of the Assembly Line, the finished cases would be removed. The blocks would remain in place, and the conveyor line with the blocks would pass down through the floor to a wash station, and then return under the floor to the first work station at the beginning of the line for re-use. (Tr. 80-81, 116, 462)

8. At all times relevant to the complaint, the Assembly Line had approximately 14 assembly line workers on a shift, with each assembly worker's work station being approximately 4 feet wide. The work stations were spaced 3 to 4 feet apart. (Tr. 62-63, 82-83, 387)

9. At all times relevant to the complaint, Respondent John Trivison ("Trivison") was employed as an Assembly Line worker; his work station was generally located at or near the beginning of the Assembly Line. (Tr. 63)

10. At all times relevant to the complaint, Complainant's usual work station was approximately one third down the length of the Assembly Line from the beginning. (Tr. 178)

11. At all times relevant to the complaint, Terry Weir ("Weir") was employed as an Assembly Line worker. (Tr. 17)

12. Christopher Cleary ("Cleary") was employed as an Assembly Line worker from 2004 through 2006. (Tr. 497)

13. While working with Cleary, Complainant slammed a work item down on a table and stated to Cleary that if he had a gun, he would shoot him. Complainant was subsequently disciplined and suspended by Respondent. (Tr. 239-241)

14. George Leija ("Leija") was employed by Respondent and worked on the Assembly Line until his retirement in 2006. Leija testified that he often saw notes being sent down the Assembly Line written on pieces of cardboard and also directly on the blocks, in ink and in marking pen. (Tr. 94, 107, 95) These notes would say e.g., "Brett is a fag", "George is a(n) asshole", "Tim's gay". (Tr. 96) Leija did not know who wrote these notes. (Tr. 100-01)

15. Daniel Weisbrod ("Weisbrod"), worked on the Assembly Line in various positions for approximately 5 years until his retirement in January of 2004, and was situated at a permanent workstation on said line during the last year of his employment. (Tr. 67, 71, 73) Weisbrod testified that he watched both Weir and Trivison write notes inside the cases or on the blocks which referenced Complainant's relatives or referred to Complainant by name as "gay" or

“queer” approximately 3 to 4 times per week, that only Weir and Trivison wrote notes, and that all were in reference to Complainant. (Tr. 57-60, 63-66, 72-75)

16. The record establishes that the use of the Assembly Line to pass notes which addressed both work-related and non-work-related issues, was a practice among workers on the Assembly Line, and was not limited to Weir and Trivison. (Tr. 47, 279, 372-79, 441, 446-47, 451, 503-04) A note written on a block could proceed through the washer without being washed off, and thus the note could be viewed by Complainant if written by someone whose work station was down the line from that of Complainant, or even if it had been written by a worker on a previous shift. (Tr. 120-21, 312-13, 460-63)

17. Weisbrod’s permanent work station on the Assembly Line was located about 40 feet distant from that of Trivison, with approximately 5 to 6 work stations between them. (Tr. 62-63, 84) The Assembly Line moved rapidly, with each worker having approximately 2 minutes to complete his stage of assembly, and with an overall performance quota of 600 pieces per day. The pay of each Assembly Line worker was dependant on fulfilling this quota. (Tr. 84-86, 501-03) Weisbrod’s testimony that he was able to make the observations of Trivison he claimed to have made on a daily basis under these conditions was not credible.

18. Weisbrod testified that he was a friend of Complainant, but claimed that he had never discussed the the notes he saw on the Assembly Line with Complainant during his employment with Respondent. Weisbrod further maintained that his sole discussion with any person regarding his testimony for the public hearing, since his retirement, was a brief verbal response to a question from Complainant, in which he advised Complainant that he would “say what (he) saw”. (Tr. 68, 72, 77-79) However, of the persons who Weisbrod worked with on the Assembly Line for 5 years, Weisbrod could remember the full names of only Complainant, Weir, and

Trivison. (Tr. 69-71, 75-76) Weisbrod's assertion that he had not discussed his testimony with anyone, except as stated, was not credible.

19. Both Complainant and Trevison acknowledged in testimony that the beginning of their adverse relationship was an incident that took place in 2003, when Complainant and a fellow worker were involved in horseplay throwing a balled-up pair of rubber gloves at each other. (Tr. 174, 229, 437, 440) The gloves landed at Trevison's work station, and he attempted to join in the horseplay by throwing them at Complainant. Complainant was struck in the chest by the gloves, accused Trevison of attempting to injure him, and followed Trevison to his locker following the incident, stating that Trevison would "pay for that one". (Tr. 174)

20. In 2004, Complainant, believing that Trivison had written a message and a drawing of a map on the Assembly Line implying that Complainant and a friend were both "fags", drove to Trivison's house to confront him, and left a note stating, inter alia, that now he (Complainant) had a map, and that he would "be back". Complainant had not seen Trivison write the message, but assumed that he had done so. (Tr. 286-87)

21. Trivison asked Delpha not to take any action against Complainant because he was afraid of Complainant. (Complainant's Exhibit 2, Tr. 165, 207, 300, 402-06, 487-88)

22. Subsequent to that incident, Delpha called a meeting of the entire Department, spoke regarding Respondent's Harassment and Non-Discrimination Policy, and read the policy verbatim to the attendees, of whom Complainant was one. (Tr. 111, 249-50, 408-10)

23. John Keller ("Keller, Sr.") was the head of security for Respondent in 2005. (Tr. 21)

24. Leonard Smorol ("Smorol") was an employee assistance representative with Complainant's union, and became familiar with Complainant in 2003. (Tr. 16) Complainant approached him, alleging that he was being harassed by Weir. (Tr. 24) Smorol, Keller, Sr., and

Complainant met regarding these concerns on or about July 15, 2005, at which time Complainant presented as evidence of the harassment a newspaper clipping which he had obtained in 2004, which contained various references to Complainant, allegedly hand-written by Weir. None of these addressed Complainant's sexuality in any way, and Complainant did not present evidence of sexual harassment at the meeting. (Respondent's Exhibit 1; Tr. 26, 39, 44, 269-74)

25. Complainant's work station was approximately 25 feet away from Trevison's, with several people between them. Complainant testified that he could see Trivison writing while on the Assembly Line, but conceded that it was part of Trevison's duties to mark his work in the cases with a paint pen. The paint pens were easily obtainable by any worker on the Assembly Line. (Tr. 179, 310)

26. Complainant testified that he had seen a number of notes written by Trivison referring to Complainant as a "fag" or "homo" written on the blocks, cases, or on paper or cardboard on the Assembly Line between approximately 2003 and 2006, however, no such notes or depictions of same were introduced into evidence at the hearing. (Tr. 165-67)

27. Complainant complained to Delpha about harassing notes written by Weir; however, Complainant did not supply any of the notes to Delpha, nor did he allege to Delpha that either Weir or Trivison sexually harassed him. (Tr. 411-14) Delpha did not have any indication that Complainant was homosexual. (Tr. 418)

28. Complainant complained to Simiele on more than one occasion regarding notes written on blocks or on paper on the Assembly Line, but never complained to him regarding a specific individual, or made a complaint of sexual harassment. On each occasion, Simiele investigated, found no substantiation of Complainant's concerns, and so advised Complainant. (Tr. 382-84)

29. Thomas Albanese ("Albanese") has been employed as Manager of Labor Relations at Respondent's plant since 2005. (Tr. 519)

30. In or about February of 2006, Complainant was involved in a dispute with fellow employee Joe Martinez ("Martinez"). When Martinez complained to management, both he and Complainant were disciplined. Albanese then met with Complainant regarding this incident, and Complainant was provided with a notice of discipline (referred to as an "AVO"), and a copy of Respondent's Harrassment and Non-Discrimination Policy. (Respondent's Exhibit 3, 5; Tr. 525-27). Complainant did not complain at any time during this meeting that he had been sexually harrassed or called names by fellow employees. (Tr. 528)

31. John Keller, Jr. ("Keller, Jr.") was employed on the Assembly Line from 1999 through June of 2007. Until 2005, Keller Jr.'s workstation was located immediately before that of Complainant on the Assembly Line; subsequently, Keller Jr.'s workstation was located farther down the Assembly Line. Keller Jr. acknowledged that notes were sent down the Assembly line, however, he never observed any notes that referred to Complainant by name, or referred to him as being a homosexual. Keller Jr. did not believe that Complainant was a homosexual. (Tr. 365-369, 375)

32. At the public hearing, Complainant introduced into evidence a document known as a "change sheet", which contained what appeared to be two or more words or markings which had been scribbled over, rendering them illegible. (Complainant's Exhibit 1) Complainant testified that he had first observed this document on June 15, 2006, on or near the Assembly Line, that the scribbled-over portions of the change sheet had contained writing stating "Leave you homo" when he first saw it, and that he had recognized the handwriting as Trivison's. Complainant offered no proof of the content and origin of this writing at the hearing other than his own

observation and opinion, and at the hearing Trivison denied writing any notes referring to Complainant as gay, a fag, or a homo. (Complainant's Exhibit 1; Tr. 177-78, 479-83) The change sheets were available to any worker on the Assembly Line. (Tr. 261, 478)

33. Following his observation of the change sheet on June 15, 2006, Complainant asked Keller Jr. whether he had observed Trivison writing on a change sheet, and stated that Trivison would not stop until "someone kicked his ass". (Tr.370, 376-77)

34. Complainant then entered the men's room and fought with Trivison. Donald Miles ("Miles"), a fellow employee, entered the men's room and heard Trivison state "I didn't write anything." Miles also observed that Complainant "would not quit" fighting Trivison, and that he was on top of Trivison. (Tr. 345-350) This latter observation was also made by fellow employee, David Guido. (Tr. 358)

35. Trivison's fellow employees observed red marks and scratches on his neck following the fight. (Tr. 351, 371, 474-75, 387) Trivison immediately stated to Keller Jr. that Complainant had "jumped" him in the bathroom, a statement he repeated to Simiele upon being questioned. (Tr. 371, 387) Complainant was also questioned in Simiele's presence; he initially denied that there had been any problem in the bathroom. (Tr. 387-89) Both Complainant and Trivison were suspended after the fight. (Tr. 538)

36. Trevison had had surgery for brain cancer and returned from disability leave a few months before the fight. Complainant was aware of this before the fight. (Tr. 187, 444)

37. On June 16, 2006, Complainant delivered a letter to Respondent regarding alleged sexual harassment of him by Trivison and Weir. This was the first written notice by Complainant to Respondent of said allegations. (Complainant's Exhibit 2; Tr. 238-39, 242, 252-53)

38. Following an investigation of the fight by Respondent, Albanese determined that Complainant had been the aggressor, based on a number of factors, including Trivison's injuries, the statements of co-workers, and Complainant's denial that there had been a fight at all. (Tr. 530-531) Complainant was terminated from his employment by letter dated June 20, 2006, effective June 15, 2006. (Respondent's Exhibit 8)

39. The termination of Complainant was consistent with Respondent's practice regarding physical altercations in the workplace. A few months prior, Respondent had terminated another employee who Respondent determined had been the aggressor in a fight. (Respondent's Exhibit 9; Tr. 538-541)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of his sex or sexual orientation. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). The term "sexual orientation" includes homosexuality, whether actual or perceived. Human Rights Law § 292.27.

Hostile Work Environment

One form of sexual discrimination occurs when the complainant is subjected to a hostile work environment. A complainant may establish a hostile work environment violation by proving that the discrimination was sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile or abusive working environment. In the instant case, the allegations of the complaint, and the proof adduced at trial by Complainant, present a case for

both discrimination on the basis of Complainant's sex (male), and for discrimination on the basis of perceived sexual orientation.

In order to sustain a claim of sexual harassment based on a hostile work environment, complainant must show that: (1) he is a member of a protected group, (2) he endured unwelcome sexual harassment based on his gender, (3) the unwelcome sexual harassment altered the terms and conditions of his employment, and (4) that respondent had actual or constructive knowledge of the sexual harassment and failed to take the appropriate corrective action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3rd Dept. 1999) The law forbids not only opposite-sex sexual harassment in the workplace, but same-sex harassment as well. *Oncala v. Sundowner Offshore Services*, 523 U.S. 75, 78, 118 S. Ct. 998, 1001 (1998), *Matter of State Division of Human Rights v. Stoute*, 36 A.D.3d 257, 263, 826 N.Y.S.2d 122, 126 (2d Dept. 2006).

Complainant failed to present a prima facie case of same-sex sexual harassment. Although the record established that notes were frequently passed down the Assembly Line, some of a sexual or bawdy nature, Complainant did not establish by reliable testimony or documentary proof that he was the target of harassment so severe and pervasive as to create an abusive environment. Weisbrod's testimony regarding the frequency, authorship, and intended target of these notes, when viewed in its entirety, was unconvincing. I did not find his testimony to be credible.

Further, although Complainant alleged that he had been the subject of these sexually harassing notes for a number of years, he was unable to produce any of said notes at trial, nor was he able to document any complaint he claimed to have made to Respondent regarding same. Complainant was well aware of Respondent's Harassment and Non-Discrimination Policy, and

of his right to pursue a complaint against a person who sexually harassed him. Complainant's supervisors testified credibly that Complainant had not complained to them of sexual harassment by his co-workers, and that any complaints he did make regarding harassment were investigated and found to be unsubstantiated.

The alternative basis for a finding of discrimination against Complainant is that of discrimination due to perceived sexual orientation. Human Rights Law § 292.27.

Complainant failed to present a prima facie case here as well, both for the reasons set forth above, and because none of Complainant's supervisors or co-workers testified that they perceived him to be a homosexual. Complainant himself testified that he was heterosexual.

Retaliation

Complainant also alleges that Respondent retaliated against him because he complained to Delpha and other management personnel regarding the alleged sexual harassment.

The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposing discriminatory practices in the workplace. Human Rights Law § 296.7.

A complainant bears the burden of establishing a prima facie retaliation claim by showing that: "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313, 786 N.Y.S.2d 382, 396 (2004). The record does not establish that Complainant engaged in protected activity. As noted above, Complainant failed to proffer sufficient evidence to prove that he had placed his employer on notice regarding the alleged sexual harassment. Further, Complainant's work history,

including the final incident which precipitated his dismissal, established that Respondent had legitimate, non-retaliatory reasons to terminate Complainant's employment. The termination was consistent with Respondent's previous action regarding another of its employees. Complainant failed to demonstrate that Respondent's reasons for his termination were pretextual.

Because Complainant did not prove his claims as against Respondent New Process Gear, Inc., the claims against John Trivison as aider and abettor must also fail. It is the employer's participation in the discriminatory practice that serves as the predicate for the imposition of liability on others for aiding and abetting. *Murphy v. ERA United Realty et al.*, 251 A.D.2d 469, 674 N.Y.S.2d 415 (2d Dept. 1998).

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 in its entirety.

DATED: July 18, 2008
Bronx, New York



Michael T. Groben
Administrative Law Judge