NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

VERMELL JOHNSON,

Complainant,

v.

DYNAMIC EDUCATIONAL SYSTEMS, INC.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10108012

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 26, 2008, by Robert Vespoli, 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: AUG 0 6 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10108012**

SUMMARY

Complainant alleged that Respondent unlawfully terminated her employment as a career transition specialist because of her race, color and opposition to discriminatory practices. Respondent denied these allegations. The credible record does not support Complainant's allegations of discrimination and retaliation. Accordingly, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 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 Tammy B. Collins, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on August 22 and 23, 2007. The case was subsequently reassigned to Robert M. Vespoli, ALJ.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels, Esq. Respondent was represented by Anne L. Tiffen, Esq.

FINDINGS OF FACT

1. Complainant alleged that Respondent unlawfully terminated her employment because of her race, color and opposition to discriminatory practices. (ALJ's Exh. IV)

2. Respondent denied these allegations. (ALJ's Exh. VI)

3. Complainant is an African American woman. (ALJ's Exh. VI)

4. Complainant was hired on or about April 1, 2003, as a career transition specialist ("CTS") in Respondent's Brooklyn office. Her duties involved placing Respondent's students into city jobs. (Tr. 47-48, 152-54; ALJ's Exh.VI)

5. From December 2004 to March 2005, Brenda Meeker, a Caucasian woman, was employed by Respondent. Her duties included managing outreach and admissions, and overseeing the transition of outgoing students into job placements. (Tr. 419- 20) From December 2004 until mid-January 2005, Meeker was Complainant's direct supervisor. (Tr. 420)

6. During a staff meeting on December 21, 2004, Complainant claimed that Meeker described a student as "that big black . . ." (Tr. 51) Meeker testified that she described the student to a co-worker as "a tall black student" and insisted that her comment was not intended to be disparaging. (Tr. 424, 426, 440)

7. After the staff meeting, Complainant spoke with Sharon Wolf, Respondent's deputy director, and told her that Meeker's comment made her feel uncomfortable. (Tr. 55-56)

8. Wolf subsequently met with Meeker, Complainant and Rebecca Hokien, Respondent's human resources manager, to discuss Complainant's concerns. (Tr. 56, 425-26, 437) At that time, Meeker apologized to Complainant and stated that she did not intend her comment to be offensive. (Tr. 56, 426) There is nothing in the record showing that Meeker made any other comments that Complainant believed to be discriminatory.

9. Gary Crowe, a Caucasian CTS, worked for Respondent from April 2003 to March 2007. (Tr. 323, 335) He testified that he never perceived any racist behavior on the part of Meeker. (Tr. 333)

10. Respondent had established policies and procedures that identified conduct that would result in a warning, such as failure to follow instructions, and conduct that would result in dismissal, including repeated violations of work rules or company policies. (Tr. 484, 489; Respondent's Exh. 1)

11. Meeker testified that while she was Complainant's direct supervisor, Complainant did not respond to many of her phone calls. However, Meeker did not take disciplinary action against Complainant. (Tr. 468- 69)

12. In or about November 2004, Respondent created a coordinator position. (Tr. 421) In January 2005, Akil Bektemba, an African American man, was hired to fill the coordinator position. (Tr. 522, 530-31) This position was created to update placement data, and provide weekly employee performance reports. (Tr. 429) Bektemba became the direct supervisor for both Crowe and Complainant. (Tr. 325-26; Respondent's Exh. 54)

13. On February 4, 2005, Bektemba sent an email to Crowe and Complainant containing an outline of his general expectations. In the email, Bektemba emphasized the importance of both email and telephone communication. (Respondent's Exh. 14) When Complainant failed to respond to his inquiries, either by telephone or by email, Bektemba sent Complainant numerous emails reminding her about the importance of maintaining consistent communication with him. (Respondent's Exhibits 16, 20, 21, 24)

14. Complainant also failed to allow Bektemba to shadow her, attend important functions, and share office equipment. (Respondent's Exhibits 30, 33, 35, 54)

15. On February 15, 2005, Bektemba assigned a task to Complainant via email that had a deadline. Complainant did not meet the deadline. (Respondent's Exhibits 24, 54)

16. On February 22, 2005, Complainant sent an email to Bektemba stating that she would not communicate with him unless her attorney was present. (Respondent's Exh. 26)

17. Bektemba issued numerous verbal warnings to Complainant regarding her conduct. (Respondent's Exh. 54)

18. On or about March 8, 2005, Hokien provided a final warning to Complainant that was written primarily by Bektemba. (ALJ's Exhibits IV, VI; Respondent's Exh. 54) In the final warning, Complainant was disciplined for failing to follow Respondent's established policies and procedures. More specifically, Complainant was disciplined for failing to follow her supervisor's instructions, insubordination, neglecting her duties, refusing to work and making false and misleading statements. (Respondent's Exh. 30)

19. Complainant identified Kenneth Kreidell, a Caucasian food service supervisor for Respondent, as a comparator. (Tr. 114-16, 283-85, 567) Complainant alleged that Respondent suspended Kreidell and allowed him to correct his misconduct. (Tr. 115)

20. Respondent produced evidence showing that Kreidell received a final warning, but did not receive a disciplinary suspension. (Tr. 566)

21. Complainant did not change her behavior to meet the expectations outlined in the final warning. (Respondent's Exhibits 33, 34) On or about March 14, 2005, Respondent gave Complainant a letter of termination. (Respondent's Exh. 34) The stated reason for her discharge was her failure to comply with Respondent's established policies as stipulated in the final warning. (Respondent's Exhibits 33, 34, 54)

22. Respondent formally terminated Complainant's employment on March 21, 2005. (Tr. 103; ALJ's Exh. VI)

OPINION AND DECISION

The Division finds that Respondent did not discriminate against Complainant on the basis of her race or color. Moreover, Respondent did not retaliate against Complainant for opposing discriminatory practices.

It is unlawful for an employer to discriminate against an employee on the basis of race or color. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See Ferrante v.*

American Lung Ass'n, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

In the instant case, Complainant has not demonstrated a prima facie case of discrimination based on race or color. Complainant has met the first three elements of her prima facie case. However, Complainant did not establish that her discharge was causally related to her race or color. The record does not establish that Respondent acted with discriminatory animus. Complainant did not show that Meeker's statement on December 21, 2004 was made with discriminatory intent. Moreover, a stray offensive remark with a minimal connection to Complainant's dismissal does not raise an inference of discrimination, even when made by a decision maker. *See Hansberry v. Father Flanagan's Boys' Home*, 2004 U.S. Dist. LEXIS 26937, at *20 (E.D.N.Y. Nov. 2, 2004).

Furthermore, Complainant did not establish that she was treated differently than similarly situated Caucasian employees. Complainant identified Kreidell as a comparator. However, Complainant and Kreidell were not similarly situated. Complainant did not identify any similarly situated Caucasian employees who received disciplinary warnings or corrections. Nevertheless, the record shows that both Complainant and Kreidell were issued final disciplinary warnings. Although Complainant alleged that Kreidell was suspended and allowed to correct his behavior, this allegation is not supported in the record.

Even if Complainant successfully established a prima facie case of discrimination, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent established that it terminated Complainant's employment because she refused to adhere to her supervisor's performance requirements. She repeatedly failed to follow Bektemba's instructions, and consistently failed to communicate with him. Despite prior warnings, Complainant did not change her behavior to meet Bektemba's explicit expectations.

Pursuant to its established policies and procedures, Respondent terminated Complainant's employment.

The burden then shifts back to Complainant to show that this reason is a pretext for unlawful discrimination. Complainant's conclusory allegations are insufficient to meet this burden. *See Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

Complainant also alleged that Respondent terminated her employment because she complained about Meeker's statement on December 21, 2004. The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

Complainant has not established a prima facie case of retaliation. Although Complainant has met the first three elements of her prima facie case, she did not show that her discharge was causally related to her complaint about Meeker. Complainant did not produce any evidence of subjective retaliatory motive on the part of Meeker, Bektemba or anyone else associated with Respondent.

Causation can be presumed in the absence of retaliatory animus if there is sufficient temporal proximity between the protected activity and the adverse action. *See Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002). In the instant complaint, Respondent terminated Complainant's employment roughly 3 months after she complained about Meeker's December 21, 2004 statement. Without any additional evidence of causation, the temporal relationship is too remote to sustain this claim of retaliation. *See Pace* at 105, 692 N.Y.S.2d at 225 (finding no causal connection for alleged acts of retaliation following a complaint made two months prior to dismissal).

Even if Complainant established a prima facie case of retaliation, Respondent successfully articulated a legitimate, nondiscriminatory reason for terminating Complainant's employment.

The burden then shifts back to Complainant to show that this reason is a pretext for unlawful retaliation. Complainant has failed to meet her burden.

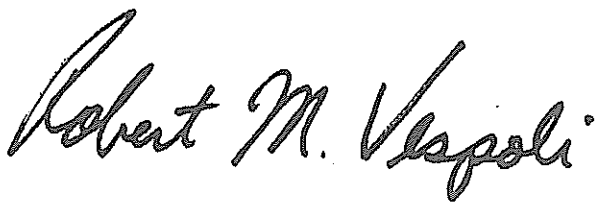
The ultimate burden of persuasion lies at all times with Complainant. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to establish that she was the subject of retaliation or that Respondent treated her in an unlawful manner because of her race or color.

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 instant complaint be, and the same hereby is, dismissed.

DATED: June 26, 2008
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge