

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

OLIVER M. MILLER,

Complainant,

v.

WHITE PLAINS HOSPITAL CENTER,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10116731

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 May 1, 2008, by Thomas S. Protano, 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, ACTING 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,

6/16/08



GALEN D. KIRKLAND
ACTING COMMISSIONER

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

Case No. **10116731**

SUMMARY

Complainant is Jamaican. He alleges that his supervisor, Okeya Ernest, who is St. Lucian, discriminated against him because of his national origin and age and that Norberto Molina, Ernest's supervisor, fired Complainant because of Complainant's national origin and age. Complainant has failed to establish that his national origin or age played any role in the termination of his employment.

PROCEEDINGS IN THE CASE

On March 19, 2007, 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 S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing was held on March 10, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Toni Ann Hollifield, Esq. Respondent was represented by Collazo, Carling & Mish, LLP, by Francis Carling, Esq.

Permission to file post-hearing briefs was granted. Respondent’s attorney and the Division attorney both filed timely briefs.

FINDINGS OF FACT

1. Complainant is Jamaican. His date of birth is July 5, 1964. (ALJ Exhibit 2; Tr. 13, 14)
2. Complainant began working for Respondent in 1992. In 2002 he resigned his employment. Thereafter, in 2003, he sought re-employment and was re-hired by Respondent. (Tr. 48) Complainant was chosen over an African-American candidate when he was re-hired in 2003. (Tr. 50)
3. Complainant’s position was instrument technician, which involved preparing instruments for use during surgery. (ALJ Exhibit 2; Tr. 15)
4. Complainant’s immediate supervisor was Okeya Ernest, surgical services coordinator. Ernest is of St. Lucian national origin. (Tr. 17-18, 107)
5. Ernest was promoted from instrument technician to coordinator in 2005. Prior to his promotion, Ernest and Complainant worked well together. (Tr.18, 88)
6. Ernest had input into Complainant’s evaluations, although he did not write them, and, in 2005, Complainant received a favorable evaluation. (Tr. 63, 104)

7. On February 15, 2007, Complainant and Ernest got into a heated argument. Ernest heard Desmond Roberts, a co-worker, ask Complainant for help in removing a car battery. After that, Complainant was looking through the instrument cabinet when Ernest asked him if he could help. Complainant at first did not answer; then, when Ernest asked again, Complainant told Ernest it was none of Ernest's business. (Tr. 20-21, 109)

8. Complainant continued to get very loud and abusive towards Ernest. Complainant called Ernest an "idiot" and an "asshole." (Tr. 111)

9. In an attempt to put an end to the incident, Ernest then directed Complainant to leave the department and go home. Complainant refused to leave, telling Ernest he had no authority to send Complainant home. (Tr. 24, 113) Eventually, the nursing coordinator and her supervisor had to be called, along with security, in order to remove Complainant from the premises. (Tr. 113-14)

10. After hearing about the incident from Ernest, Norberto Molina, Respondent's materials business manager for surgical services, suspended Complainant the following day, pending and investigation into the incident. (Tr. 27, 124)

11. Thereafter, Molina interviewed Complainant's co-workers who had seen the incident. Molina's investigation corroborated Ernest's charges and Molina determined that Complainant had been abusive towards Ernest and, as a result, should be fired. (Tr. 127-28, 133)

12. At a meeting the following week before Michael Pagliaro, senior vice president for human resources, Molina and Diane Torre, nurse manager, Complainant and Ernest each gave their versions of the incident. (Tr. 28-29, 78-81, 130) Complainant did not complain about discrimination at that meeting. (Tr. 99)

13. After the meeting, Molina recommended to Pagliaro and Torre that Complainant's employment should be terminated. Respondent accepted his recommendation and fired Complainant. (Complainant Exhibit 2; Tr. 131)

14. Molina is a 39-year old Puerto Rican. He does not know how old Complainant is and denies having any ill will towards Jamaicans. (Tr. 132)

15. Complainant offered speculation that Respondent terminated his employment in order to save money on his pension benefits when he retired. He gave no other reason for his belief that his age was a factor in the termination of his employment. (Tr. 57)

16. Complainant indicated that he believed he was discriminated against because Respondent believed "the lies that Mr. Okeya Ernest take." (Tr. 61) He admitted that he had no evidence that Molina harbored any animosity towards Jamaicans. (Tr. 87) He also admitted he knew of no rivalries or animosities between Jamaicans and St. Lucians. (Tr. 85)

17. Roberts, who, like Complainant, is Jamaican, was not fired over the incident. He remains employed by Respondent, and has been for 20 years. (Tr. 92)

OPINION AND DECISION

Complainant charges that Respondent discriminated against him based upon his national origin and age when his employment was terminated after Ernest allegedly fabricated a story about him. In order to prevail, he must first make out a prima facie case for discrimination. To establish a prima facie case of discrimination in employment based upon the Complainant must show (1) that he was a member of a protected class; (2) that he was capable of performing the duties of the job in a reasonable manner; (3); that Complainant suffered an adverse employment action, and (4) that this occurred under circumstances which would lead one to infer that he had

been discriminated against. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Burlington Industries v. New York City Human Rights Commission*, 82 A.D. 2d 415, 441 N.Y.S.2d 821 (1st Dept. 1981), *aff'd*, 58 N.Y.2d 983, 447 N.E.2d 1281, 460 N.Y.S.2d 920 (1983).

Complainant fails to make out a prima facie case of discrimination. The circumstances of his dispute with Ernest and his firing do not lead to an inference that he was discriminated against because of his national origin or his age. Prior to the dispute, Complainant never had any problems with Ernest until after Ernest became his supervisor, which would suggest that Ernest has no animosity towards Jamaicans and Complainant admitted that he had no evidence that Molina had any animosity towards Jamaicans. In addition, Ernest gave his input into a favorable evaluation for Complainant in 2005, which further supports a conclusion that Ernest had no discriminatory intent. There does not appear to be any reason for Ernest to lie about Complainant, and Complainant's co-workers supported Ernest's version of the story. Moreover, the fact that Roberts is still employed by Respondent and has been for 20 years, coupled with the fact that Complainant himself was re-hired in 2003 over an African-American candidate, suggests Respondent did not have any discriminatory animus towards Complainant. "There is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status." *Youth Action Homes v. State Division of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997).

Complainant similarly has offered nothing that would lead one to believe he was discriminated against based upon his age. Molina, who recommended the termination of Complainant's employment, did not even know Complainant's age. His speculation that his pension status might have caused his firing is just that: speculation. He offers no evidence that would support this speculation. As a result, his case must fail.

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 case be, and the same hereby is, dismissed.

DATED: May 1, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read 'Thomas S. Protano', with a long horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge