

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JUANA MORALES,

Complainant,

v.

**CITY OF NEW YORK, DEPARTMENT OF
JUVENILE JUSTICE,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10119719

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 April 23, 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: **JUL 01 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**CITY OF NEW YORK, DEPARTMENT OF
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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10119719**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her because of her race and national origin and because she opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 15, 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 J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on July 2 and August 15, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels, Esq. Respondent was represented by Andrea O’Connor, Esq., Assistant Corporation Counsel, and Russell Steinberg, Esq., Deputy General Counsel, Department of Juvenile Justice.

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

FINDINGS OF FACT

1. Complainant is Hispanic of Puerto Rican national origin. (ALJ’s Exhibit 1; Tr. 32)
2. In August of 2005, Complainant began her employment with Respondent as a Special Officer at Crossroads Juvenile Detention Center (“Crossroads”). (Tr. 32-33)
3. Since August of 2005, Senior Special Officer Diane Martinez (“Martinez”) has been a supervisor of Complainant. (Tr. 33, 424) Like Complainant, Martinez is Hispanic of Puerto Rican national origin. (Tr. 468) For Complainant’s performance evaluation for 2006, Martinez rated Complainant’s behavior toward other officers as unsatisfactory. (Respondent’s Exhibit 3) In April of 2007, Martinez informed Complainant that Complainant continued to be unprofessional toward other officers and that her behavior was disruptive to the effective operation of the facility. (Respondent’s Exhibit 3)
4. Complainant’s regular work schedule, from August of 2005 through August of 2007, was Wednesday through Sunday, from 9:00 a.m. to 5:00 p.m. (Tr. 34, 91-92) Complainant

understood that Respondent had the authority to require Complainant to work overtime.

(Tr. 88, 516)

5. Since August of 2005, Senior Special Officer Cynthia Mickens (“Mickens”) has been a supervisor for Respondent at Crossroads for the tour of duty from 5:00 p.m. to 1:00 a.m. Mickens is Black. (Tr. 34, 511-13, 579) Mickens was a supervisor of Complainant when Complainant worked overtime. (Tr. 34, 520) Mickens agrees with Martinez’s assessment of Complainant’s behavior and considers Complainant unprofessional in the way she relates to other officers. (Tr. 521)

6. The fact that Martinez is Hispanic did not have an effect on Mickens’ relationship with Martinez. Martinez never heard Mickens say anything derogatory about Hispanics.

(Tr. 464, 468)

7. Shiron Vick was a supervisor of Martinez and Mickens.

(Complainant’s Exhibit 10; Tr. 40, 71, 428, 437, 554)

8. On January 26, 2006, Complainant completed an incident report regarding a Crossroads key taken home by an employee. Mickens was displeased with what Complainant put in the report. Ultimately, Mickens was disciplined because she allowed an unauthorized person to return the key. (Complainant’s Exhibit 8; Tr. 36-51, 552-57, 598-600)

9. Before Complainant completed the incident report on January 26, Complainant had no complaints regarding the behavior of Mickens. (Tr. 35-38) After Complainant completed the incident report on January 26, she wrote at least 10 more incident reports over the next year claiming that Mickens had a “vendetta” against Complainant and was picking on Complainant. Complainant claimed that, pursuant to this “vendetta,” Mickens’ conduct toward Complainant was “very unprofessional, rude, very disrespectful.” This conduct included making Complainant

use a particular bathroom, refusing to answer questions, answering questions in a nasty manner, making Complainant work overtime, attempting to give Complainant “write-ups,” and pushing Complainant on one occasion. Complainant contended, however, that Mickens was not consistently acting unprofessionally toward her and, at times, Mickens acted decently toward Complainant.

(ALJ’s Exhibit 1; Complainant’s Exhibit 8, Tr. 55, 60, 64, 137-38, 151-52, 158-60)

10. Complainant also claimed that, when Mickens learned that the father of Complainant’s children is African American, Mickens made a comment indicating that Mickens disapproved of African American men dating Hispanic women. Mickens credibly denied making such a statement. (Tr. 71-74, 552) Complainant further claimed that Mickens forced Complainant to work overtime in place of a Black employee. Mickens had directed Complainant to work overtime when it was not her turn and has issued such directives to other Special Officers as well. Mickens credibly testified that her directions to Complainant to work overtime were based on organizational needs and not based on race or national origin.

(Tr. 110-11, 113-15, 514-20, 524, 573-78)

11. In February of 2006, Vick met with Complainant, Martinez, and Mickens to discuss Complainant’s complaints regarding Mickens. Vick spoke with Complainant several times thereafter and with Mickens several times thereafter regarding how they related with each other.

(Complainant’s Exhibit 8, 10; Tr. 428-30, 437, 566, 569-70)

12. On December 6, 2006, Martinez informed Complainant that Complainant was being investigated for hindering an investigation by influencing another employee to write a false statement about an incident. (Respondent’s Exhibit 1)

13. On December 20, 2006, Complainant contacted the Office of Inspector General (“OIG”) for Respondent and alleged that she was wrongfully accused of influencing a temporary worker of Respondent to change an incident report, that Vick failed to stop Mickens’ harassment of Complainant because Vick was having a romantic relationship with Mickens, and that Mickens was selling body care products at work while working. (Complainant’s Exhibit 10)

14. On January 11, 2007, Complainant entered into a Stipulation of Settlement with Respondent and accepted a disciplinary penalty of a five day suspension without pay to settle the abovementioned accusation of hindering an investigation. (Respondent’s Exhibit 2)

15. On July 20, 2007, after conducting an investigation into all of Complainant’s allegations, OIG reached two recommendations and a conclusion. OIG recommended that the complaint regarding the sale of body products be closed as substantiated and referred to Respondent’s Disciplinary Affairs Unit. OIG also recommended that, since it had received memoranda from Respondent that Vick had reprimanded Mickens for her unprofessional demeanor, the complaint regarding Vick’s failure to appropriately respond to Complainant’s complaints of harassment be closed as unsubstantiated. Finally, since Complainant agreed to a five day suspension without pay for her involvement in the incident report of the temporary worker, OIG concluded that no further action was required regarding her claim that she was falsely accused. (Complainant’s Exhibit 10)

16. On August 15, 2007, Complainant filed her complaint with the Division alleging that Mickens was unlawfully discriminating against her. (ALJ’s Exhibit 1)

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 race or national origin, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Mickens, a supervisor of Complainant when Complainant worked overtime, picked on Complainant after Complainant completed an incident report regarding a Crossroads key taken home by an employee. The record, however, is devoid of any credible evidence to establish that Complainant suffered an adverse employment action, one that resulted in a materially adverse change in the terms, conditions, or responsibilities of Complainant's employment, such as termination or demotion.

Complainant contends that Mickens told Complainant that Complainant had to use a particular bathroom on one occasion, that Mickens at times would not respond to Complainant or would respond in a nasty fashion, that Mickens would make Complainant work overtime, that Mickens pushed Complainant, that Mickens made Complainant work overtime instead of a Black employee, and that Mickens made a comment indicating that Mickens disapproved of African American men dating Hispanic women when she learned that the father of Complainant's children is African American. Complainant's allegations, however, whether evaluated separately or collectively, do not rise to the level of a materially adverse change in the terms, conditions, or responsibilities of Complainant's employment.

Also, there is no credible evidence to support the contention that any actions taken by Respondent occurred under circumstances giving rise to an inference of unlawful discrimination. On the contrary, the evidence may give rise to an inference that Mickens had a “vendetta” against Complainant because of the incident report Complainant made. This would be an inference of animosity on the job. Although animosity on the job is an unpleasant experience, the conduct experienced by Complainant does not constitute unlawful discrimination and is not actionable. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Further, there was no credible evidence presented to establish that Complainant experienced a hostile work environment that existed because of her race or national origin. In evaluating a work environment to determine if it was hostile, the totality of the circumstances is considered from both a reasonable person’s standpoint as well as from the Complainant’s subjective perspective. Then a determination is made as to whether the workplace was permeated with discriminatory intimidation, ridicule, or insult sufficiently severe or pervasive enough to alter the conditions of employment. *Id.* at 310-11. Although Complainant alleged various instances of unprofessional conduct by Mickens, the evidence does not establish a hostile work environment. Complainant’s allegation that Mickens made a comment that Complainant considered discriminatory was not credible. When the other actions that Complainant attributes to Mickens are considered as a whole, they are not severe or pervasive enough to alter the conditions of employment. *Id.* at 310-11. Complainant, therefore, has failed to prove, as required by law, that her working environment was an abusive one that was caused by her race or national origin. *Id.* at 310-11.

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support a finding that

Respondent engaged in unlawful discrimination. I do not credit Complainant's claims that Respondent's actions occurred because of Complainant's race or national origin, or because Complainant opposed unlawful discrimination. Conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995). Complainant has the burden to establish by a preponderance of the evidence that discrimination occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). Since Complainant has failed to meet this burden, the complaint must 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 the same hereby is, dismissed.

DATED: April 23, 2009
Bronx, New York



Thomas J. Marlow
Administrative Law Judge