

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS

On the complaint of

GEORGE OCKIMEY,

Complainant,

-against-

**TOWN OF HEMPSTEAD,
DEPARTMENT OF SANITATION,**

Respondent.

**NOTICE OF ORDER
AFTER HEARING**

CASE No. 3503690

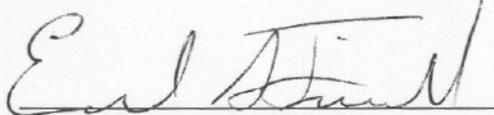
PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by the Hon. Edward A. Friedland, Executive Deputy Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Robert M. Vespoli. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE ALSO TAKE NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice which 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 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 days after service of this Order. The Petition and Notice of Petition must also be served on all parties, including the Division of Human Rights.

Notice of Order After Hearing
SDHR Case No. 3503690
George Ockimey v. Town Of Hempstead, Department Of Sanitation

DATED: FEB 27 2007
BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND
Executive Deputy Commissioner

Notice of Order After Hearing
SDHR Case No. 3503690
George Ockimey v. Town Of Hempstead, Department Of Sanitation

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**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

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On the complaint of

GEORGE OCKIMEY,

Complainant,

-against-

**TOWN OF HEMPSTEAD,
DEPARTMENT OF SANITATION,**

Respondent.

CASE No. **3503690**

Complainant alleged that he was retaliated against for having filed a previous Division complaint. Because he was unable to prove retaliation, this complaint is dismissed.

PROCEEDINGS IN THE CASE

On January 31, 1997, 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 the Human Rights Law of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division then referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge ("A.L.J.") of the Division. A public hearing was held on December 1, 2, 8 and 9, 2004, and on October 18, 19 and 20, 2005.

Complainant and Respondent appeared at the hearing. Complainant was represented by Frederick K. Brewington, Esq. Respondent was represented by Francesca M. Capitano, Esq.

Complainant and Respondent filed timely post-hearing briefs.

On November 22, 2006, A.L.J. Vespoli issued a recommended Findings of Fact, Opinion, Decision and Order ("Recommended Order") for the Commissioner's consideration. No Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Although the complaint alleged disability as a basis for discrimination, Complainant stipulated that no allegations of disability discrimination would be presented during the hearing. (Tr. 6-7; A.L.J.'s Exhibit III). The remaining allegations in the complaint charged that Respondent retaliated against Complainant in the terms of his employment as a result of participating in protected activity. (A.L.J.'s Exhibit III).

2. Respondent denied these allegations. (A.L.J.'s Exhibit IV).

3. Complainant was first employed by Respondent on July 27, 1989, as a Seasonal Laborer I. (Complainant's Exhibit 1). Respondent terminated Complainant's employment on December 8, 1995, citing poor attendance record. (Respondent's Exhibit C-1). As a result of the termination, Complainant filed two complaints with the Division against Respondent. These claims were settled on July 5, 1996. As a result of a conciliation agreement, Complainant was reinstated on July 8, 1996. (Complainant's Exhibit 13). Complainant, however, did not return to work until July 15, 1996. (Respondent's Exhibit L).

4. Sometime between July 19 and 22, 1996, shortly after Complainant's reinstatement, he fractured his arm in an off-the-job automobile accident causing him to miss work from July 22,

1996, until on or about September 24, 1996. (Tr. 195; Respondent's Exhibit L). Complainant claimed he began being treated unfairly by his superiors when he returned to work in September of 1996. (Tr. 205-07).

5. Complainant alleged that Respondent retaliated against him by requiring him to submit two doctor's notes to return to work; by denying him the use of Respondent's vehicles; by subjecting him to racially derogatory comments and abusive behavior; by subjecting him to disparate treatment; and by providing him a negative job reference.

6. After fracturing his arm, Complainant alleged he returned to work with a doctor's note allowing him to return to full duty. He claimed that he was not, however, permitted to return to work and that he was required to get an additional doctor's note. (A.L.J.'s Exhibit III; Tr. 201-03, 331-32, 857-58). Complainant's timesheet illustrates that he returned to full-duty on September 25, 1996, the same date that appears on the doctor's note. (Complainant's Exhibit 8; Respondent's Exhibit L). There is no credible evidence of the existence of any prior doctor's note. The ALJ did not credit Complainant's claim that he was required to produce two doctor's notes.

7. Complainant alleged that Respondent retaliated against him by denying him the privilege of driving Respondent's vehicles. (A.L.J.'s Exhibit III). These allegations are not supported in the factual record.

8. Driving was not part of Complainant's job description and a driver's license was not required for the position of Laborer I (seasonal or full-time). (Complainant's Exhibit 7). Complainant's New York State driver's license was revoked on or about September 10, 1994. (Respondent's Exhibit G). On November 6, 1993, Complainant received a valid Georgia State driver's license. (Respondent's Exhibit E). This license expired on January 9, 1998, and his

New York State driver's license was not reinstated until April 9, 1999. (Complainant's Exhibit 4; Respondent's Exhibit G).

9. Complainant alleged that prior to 1994, when he worked under John Casalino, a supervisor in field services, he was allowed to drive without a driver's license. (Tr. 142-43). The record establishes that Complainant's New York State driver's license was revoked in or about September of 1994. (Respondent's Exhibit G). Complainant also testified that he was allowed to drive on Respondent's property without a New York State driver's license prior to the 1995 termination of his employment. (Tr. 142-43). While this testimony is not corroborated by any other evidence in the record, it is possible that Complainant indeed drove without a New York State driver's license for a short period of time between September of 1994, when his New York State driver's license was revoked, and the termination in December of 1995. However, Complainant has not established that Respondent was aware that Complainant had lost his New York State driver's license or knowingly allowed him to drive on its property with only a Georgia driver's license during that relatively short time period.

10. Complainant testified that Ernie Pastor, a superintendent for Respondent, and Paul Poster, a safety supervisor, allowed him to drive on the base in 1994 and 1995, when he presented an abstract of his Georgia driver's license. The A.L.J. did not credit this testimony. The record clearly establishes that Respondent only allowed employees with a valid New York State driver's license to operate its vehicles. (Complainant's Exhibit 4; Tr. 143-147, 156).

11. Complainant's allegations that Respondent retaliated against him by not allowing him to drive when he was reinstated in July of 1996, are also unsubstantiated in the record. Poster testified that there was one occasion when Complainant drove in September of 1996. A supervisor needed someone to clean up an off-site hydraulic spill and asked Complainant to

perform this task. Before he drove off, Poster asked Complainant if he had a "valid license." He answered "yes" and went to clean up the spill. (Tr. 556-58). The next day Poster asked Complainant to give him a copy of his driver's license for the safety department file, as was required of all employees who drove town vehicles. Complainant produced a paper driver's license from Georgia. (Respondent's Exhibit E; Tr. 559-60).

12. Poster credibly testified that it was a mistake for him not to check Complainant's driver's license before letting him drive and if he had known that Complainant had an out-of-state driver's license, he would have sent someone else to clean up the spill. (Tr. 560). This testimony is consistent with Respondent's policy allowing only employees with a valid New York State driver's license to operate its vehicles.

13. Poster testified that between September of 1996 and December 5, 1996, Complainant continued to ask him why he was no longer allowed to drive. Poster contended he always told Complainant that he would be allowed to drive as soon as he obtained a valid New York State driver's license in compliance with Respondent's established policy. (Tr. 576).

14. Several of Respondent's employees testified to the existence of an established, unwritten policy requiring a valid New York State driver's license for any employee seeking to operate a town vehicle. Richard Ronan, the Commissioner of the Sanitation Department, Poster, John Guerrera, Poster's co-safety supervisor, Militrano, Pastor, and Steven Pepe, another superintendent, all credibly testified that it was Respondent's customary policy to allow only employees with a valid New York State driver's license to drive town vehicles. (Tr. 560-61, 645-46, 693, 835, 943-45). Militrano and Pastor testified that when Complainant presented a Georgia driver's license, they conferred with the safety department before telling Complainant

he could not drive. (Tr. 835). Poster testified that he instructed Pastor not to let Complainant drive until he obtained a valid New York State driver's license. (Tr. 574-75).

15. Poster testified that when he saw Complainant's Georgia driver's license in September of 1996, he called Norm Murray, who was in charge of the town's insurance, and Doug McCloud from the town's civil service commission. Both Murray and McCloud told Poster that all employees needed to possess a valid New York State driver's license in order to drive any vehicle owned by Respondent. (Tr. 560-61, 574). Commissioner Ronan also explained that the New York State driver's license requirement was necessary to ensure that no employee was driving with a suspended license. Respondent was able to receive updates from the New York State Department of Motor Vehicles regarding the status of employees' New York State driver's licenses. This safety measure could not be applied to out-of-state licenses. (Tr. 948-51).

16. Complainant alleged that Respondent retaliated against him in an incident that occurred on December 5, 1996, when Complainant confronted Poster and asked him to explain why he was not allowed to drive. (A.L.J.'s Exhibit III; Tr. 161). Complainant testified that when he approached Poster, he immediately started to yell at Complainant. (Tr. 160-61). Complainant further testified that he told Poster he already had his New York State driver's license on file with Respondent. (Tr. 161). However, the record clearly establishes that Complainant's New York State driver's license was revoked in or about September of 1994 and was not reinstated until in or about April of 1999. (Respondent's Exhibit G). Complainant alleged that Guerrero then came over and began to scream and act aggressively toward him. He also testified that both Guerrero and Poster stated to one another "I will be a witness for you." (Tr. 162-64). Complainant believed that these statements were references to the fact that he had previously filed charges with the Division. (Tr. 161-62). This claim is not supported in the factual record.

17. Guerrero's and Poster's testimony confirm that a heated exchange occurred on December 5, 1996, regarding Complainant's driving privileges. Both testified that they were frustrated that Complainant continuously complained about not being allowed to drive since all he needed to do was obtain a valid New York State driver's license. (Tr. 576, 646). However, Militrano denied that either of them stated that they would be a witness for the other and stated that Complainant initiated the aggressive tone of the conversation. (Tr. 578-79, 610-11). All three men testified that, although the conversation was tense, the situation was diffused before any violence occurred. This meeting seemed to upset Complainant greatly and led him to file a complaint with his union representative Santo Sayer. (Complainant's Exhibit 11; Tr. 150). However, this incident did not lead to any changes in Complainant's working conditions or responsibilities.

18. Complainant alleged that when he returned to work in September of 1996, Militrano and Maffei made racially derogatory comments in front of him. However, only one instance is supported in the record. Complainant and Militrano both testified that one morning while Complainant was going to get coffee, Maffei stated, "I like my coffee black and sweet just like my black women." (Tr. 362). Complainant's other allegations of Militrano and Maffei using racial slurs in reference to him are unsubstantiated in the record and the A.L.J. found them to have been credibly denied by Militrano. (Tr. 875-76, 880).

19. Complainant alleged that Militrano and Maffei made derogatory statements about him in July of 1996 regarding the fact that he had filed a complaint with the Division. (Tr. 890). Militrano admitted that Maffei said to him that if Complainant's, "t's aren't crossed and his i's aren't dotted to send him home." (Tr. 875). He also admitted that Maffei said, "we have this piece of shit George Ockimey that's going to come work with us." (Tr. 875). Militrano admitted

that he called Complainant an "asshole" but testified that he called many other coworkers asshole as well. Further he testified that everyone in the group, including Complainant, cursed at one another. (Tr. 849, 879).

20. Complainant alleged that after he was sent home from work one day in or about September of 1996, Militrano said to Delewin, "that he had gotten rid of that asshole for today, and hopefully he won't be here tomorrow." (A.L.J.'s Exhibit III; Tr. 309).

21. Complainant alleged that he and other minority workers were given less favorable work assignments than white workers within his unit. (Tr. 392). This allegation is not supported in the record. Complainant and Fowler testified that white workers were given easier assignments, such as driving, while non-white workers were forced to mow lawns and perform other less desirable tasks. (Tr. 290, 346, 392). However, the record establishes that these workers, such as Delewin, were employed at a higher civil service grade than Complainant and Fowler, who were seasonal employees at the time. Further, they possessed New York State commercial driver's licenses which enabled them to perform tasks that Complainant was not qualified to perform. Fowler credibly testified that Militrano, their foreman, often mowed the lawn with the rest of his crew and often did work along side both black and white laborers while working in the field services unit. (Tr. 179, 290-91). Complainant also admitted that Militrano and other white workers would go out and work in the field. (Tr. 383).

22. Complainant testified that when he was in field services he was given assignments outside of his job responsibilities and that often the entire crew would go out and clean up vacant lots. (Tr.383). Complainant also testified that he was forced to change partners for work assignments more frequently than other workers. (Tr. 398-99). These allegations are unsupported in the factual record. The record establishes that all workers in field services

received varying assignments based on the amount of work to be done and which workers were available. Militrano credibly testified that all members of his unit, including Complainant and Fowler, as well as white workers such as Delewin, Danny Marshall and Jerry Calise, were all occasionally assigned to snow duty. (Tr. 902-04). Complainant testified that the decision regarding who to send for a particular job was based on the number of people needed to complete the task. (Tr. 383).

23. Before Complainant was reinstated in July of 1996, he began to look for a new job. (Tr. 204). Complainant alleged that he was denied employment at A. Holly Patterson Geriatric Center due to unfair, negative employment reference forms filled out by Steven Reichert, Respondent's personnel director. (A.L.J.'s Exhibit III). The first employment reference form filled out by Reichert on August 9, 1996, gave Complainant a rating of fair for his attendance, performance and appearance. (Complainant's Exhibit 9).

24. Complainant testified that when the nursing home received the first employment reference form, a woman in its personnel department, "called him down" and told him that she, "could not take this upstairs and try to get [him] employment" because they would not hire someone with an employment reference form containing all fair ratings. He testified that the woman circled the three Xs on the employment reference form designating him as fair and told him she would send Respondent a new employment reference form to complete. (Tr. 215, 222-24).

25. The rating scale for the employment reference forms contained five rating categories: excellent, very good, good, fair and poor. (Complainant's Exhibit 9).

26. The first employment reference form stated that Complainant was reinstated on July 8, 1996. (Complainant's Exhibit 9). Reichert submitted a second employment reference form sent

to Respondent by the nursing home and again rated Complainant fair in all three categories. (Complainant's Exhibit 10). Complainant testified that the woman in the personnel department at A. Holly Patterson received the second employment reference form. She then called Complainant and said that she could not take this to her supervisor and that they could not hire him with an employment reference form rating his performance as fair in all three categories. (Tr. 222-24). After this meeting, Complainant did not have any more contact with anyone from A. Holly Patterson.

27. Complainant testified that these employment references were the only obstacle preventing him from being hired by the nursing home. (Tr. 450). However, there is no other evidence in the record to corroborate this allegation. The record shows that the woman he dealt with at A. Holly Patterson was not the final decision maker in the hiring process. (Tr. 215, 222-24, 453). Further, Complainant did not present any witnesses to corroborate the claim that he would have been hired if he had a more favorable employment reference form. He did not introduce any documents showing that he was an applicant and that he was denied employment. (Tr.447-48, 451). Finally, Complainant failed to identify the woman he claimed to have dealt with at the nursing home. (Tr. 451).

28. Reichert testified that he gave Complainant a fair rating regarding his appearance because Complainant often appeared disheveled. Though Reichert admitted that he did not often see Complainant. When he did see him, it was at the end of his shift. (Tr. 787-88). Reichert was justified in rating Complainant's attendance as fair. Complainant's attendance records show that, excluding the time he was absent due to workers' compensation matters, he had five unexcused absences between July of 1995, and September 27, 1995. After being informed that his attendance was unacceptable, Complainant had another five unexcused absences between

September 27, 1995, and November 28, 1995, when Complainant was informed that he would be terminated. (Respondent's Exhibits C-1, I, K; Tr. 780-783). While Reichert was unable to state a basis for his rating of fair with regard to Complainant's performance, there is no evidence that he was motivated by any retaliatory animus. (Tr. 785-86). During this time period, Respondent had no formal evaluation policy for any of its employees and no policy on filling out employment reference forms for employees seeking new jobs. (Tr. 759).

29. Though the A.L.J. found dubious Reichert's testimony that he was unaware of Complainant's previous claims with the Division at the time he filled out the employment reference forms because he testified that the conciliation agreement should have been in the file he used to fill out the forms, it is not clear from the record, that the conciliation agreement was indeed in the file. (Tr. 753-55, 758, 766). The A.L.J. ultimately determined that the record lacks any credible evidence to support the claim that Complainant was not hired to work at A. Holly Patterson as a result of the employment reference forms submitted by Reichert.

DECISION AND OPINION

In as much as Complainant did not present any evidence supporting allegations of discrimination based on disability, those charges are dismissed. For the reasons discussed below, the remaining charges in the complaint alleging retaliation for opposing discriminatory practices are also dismissed.

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 has failed to demonstrate that Respondent retaliated against him for filing previous complaints against it.

The ALJ did not find credible Complainant's claim that he was required to produce two doctor's notes after he was out of work on disability. The record supports the conclusion that once Complainant submitted a proper doctor's note, he was allowed to return to work immediately.

The record shows that between 1994 and 1999, Complainant possessed only a Georgia State driver's license and that Respondent only permitted employees with New York State driver's licenses to drive their vehicles. In only one instance does Respondent admit that it permitted Complainant to drive a vehicle to go and clean up a spill. After that instance, Poster credibly testified that had he been aware that Complainant only possessed a Georgia State license, he would not have permitted him to drive. Furthermore, driving was not a part of Complainant's job duties and thus, it is not clear that prohibiting Complainant from driving would be considered an adverse job action in support of his retaliation complaint.

Complainant alleged that Maffei made a racially derogatory comment in his presence, though it was not directed at Complainant. Complainant also alleged that Maffei referred to Complainant as a piece of shit and as an asshole and stated that he hoped he would not return to work. The record shows, however, no connection between Maffei's inappropriate behavior and Complainant's protected activity. Moreover, Maffei admitted that he referred to many coworkers as asshole and that all of the employees, including Complainant cursed in front of one another.

The record does not support Complainant's assertion that he was treated disparately when he and other minority workers were given less favorable work. The record shows that work was assigned appropriate to each employee's title. Furthermore, Militrano, Complainant's foreman, often mowed the lawn with the rest of his crew and often did work along side both black and

white laborers while working in the field services unit. Complainant, in fact, admitted that Mitrano and other white workers would go out and work in the field.

Lastly, there is no evidence linking the job reference Complainant received and his protected activity. The eight month gap between the date of Complainant's protected activity and the date of the reference is too attenuated to establish a causal link between the two events. *See Payne v. MTA N.Y. City Transit Auth.*, 349 F.Supp2d 619, 629 (E.D.N.Y. 2004) (stating that a three month period is insufficient to establish causation).

Accordingly, Complainant has failed to demonstrate by credible proof in the record that Respondent retaliated against him and this complaint is dismissed.

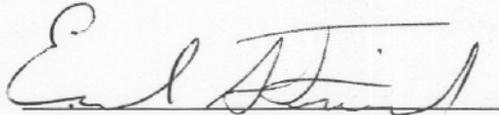
ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision and pursuant to the provisions of the Human Rights Law, it is

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

DATED: FEB 27 2007
BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS


EDWARD A. FRIEDLAND
Executive Deputy Commissioner