

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**
on the Complaint of

FRIDAY OGBEWELE,

Complainant,

v.

**NEW YORK CITY DEPARTMENT OF
BUILDINGS,**

Respondent.

**and THE CITY OF NEW YORK; NEW YORK
CITY DEPARTMENT OF PERSONNEL, THE
CITY OF NEW YORK; NEW YORK CITY CIVIL
SERVICE COMMISSION, Necessary Parties.**

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 4602515

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 March 28, 2007, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights ("Division").

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, 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, this 25th day of April, 2007.


KUMIKI GIBSON
COMMISSIONER

TO:

Complainant

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

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

FRIDAY OGBEWELE,

Complainant,

-against-

**NEW YORK CITY DEPARTMENT OF
BUILDINGS;**

Respondent,

**NEW YORK CITY CIVIL SERVICE
COMMISSION, and THE NEW YORK
CITY DEPARTMENT OF PERSONNEL,**

Necessary parties.

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

CASE NO. 4602515

PROCEEDINGS IN THE CASE

On December 9, 1994, Friday Ogbewele filed a complaint with the New York State Division of Human Rights against New York City Department of Buildings, as Respondent and against New York City Civil Service Commissioner and The New York City Department of Personnel, as necessary parties. Complainant charged the Respondent with discriminatory practices relating to employment in violation of Executive Law Article 15 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 the Respondent engaged in an unlawful discriminatory practice. The Division then referred the case to a public hearing.

After due notice, the case came on for public hearing before Michael G. Boyajian, an Administrative Law Judge of the Division. On March 13, 2001 and March 15, 2001, a public hearing was held. Thereafter, Judge Boyajian left State service and the case was reassigned to Thomas S. Protano, another Administrative Law Judge of the Division. The public hearing was completed on June 29, 2001.

Complainant and Respondent appeared at the hearing. The Complainant was represented by Schneyer & Shen, PC, by Catherine Paszkowski, Esq. Respondent was represented by the New York City Law Department, by P. Dawn Baker, Esq.

Permission to file post-hearing briefs was granted. Counsel for both parties filed timely briefs.

After the hearing, a Recommended Order was issued. The Deputy Commissioner remanded the case back to hearing for further consideration. The parties were given an opportunity to supplement the record, but declined to add anything further. Exhibits that had been missing from the file were replaced¹ and the entire record was re-evaluated. A severance agreement between Complainant and Respondent that was not marked at hearing, but was identified by Complainant (Tr. 44) has been marked and placed in evidence as ALJ XII. The Remand Order and Recommended Order are collectively marked and placed in evidence as ALJ XIII.

FINDINGS OF FACT

Complainant is black and Nigerian. He was employed by Respondent from 1985 until November of 1994. He alleges that he was harassed while he was employed by

¹ Complainant's Exhibit 13 was missing from the record and was replaced. Joint Exhibits 1, 2 & 3 were incomplete and the missing portions were placed in the record. Joint Exhibits 4 through 57 were never made part of the record (although Judge Boyajian allowed witnesses to be questioned regarding them) and they were segregated from the Joint Exhibits in the record. Joint Exhibits 58 through 64 are in evidence.

Respondent and was ultimately forced to accept a severance package against his wishes, all because of his race and national origin. He further states that white employee, Guy Mangogna, was treated differently than he was. (ALJ Exhibit II)

In 1985, Complainant began working for Respondent, an agency within the government of the City of New York, as an Executive Engineer. He was promoted to Assistant Plan Examiner in 1986 and to Multiple Dwelling Specialist II in 1990. (Tr. 19-20) As a Multiple Dwelling Specialist II, Complainant examined plans and documents submitted by architects to insure that the plans complied with zoning laws and building codes. (Tr. 22)

In 1994, David Sobel became Borough Superintendent of Respondent's Staten Island office, where Complainant worked. Thereafter, Complainant alleges, his duties changed. Instead of examining plans, Complainant claims he was relegated to clerical work such as retrieving files and answering telephones. (Tr. 28-29) Complainant also asserts that Mr. Sobel spoke to him "contemptuously" and made a comment that Complainant was lazy, indicating that Complainant and his like were "all the same." Complainant took that declaration to be a racial epithet. (Tr. 32-33) He said that he had encounters with Mr. Sobel about once a week in which Mr. Sobel would "threaten" him with termination. Complainant alleges that, beginning in about October of 1994, Mr. Sobel threatened Complainant by telling him he had "until the 18th". Complainant said he did not understand that at the time, but eventually he understood what this meant. (Tr. 33, 35) Complainant has not alleged that he was demoted or suffered a reduction in pay because of the treatment he received.

Complainant alleges that Mr. Mangogna, a co-worker, was treated better than he was. Complainant was counseled about his use of leave time by Nicholas Grecco, his direct supervisor. The counseling consisted of an "informal discussion." (Tr. 83, 92) Complainant asserts other employees used leave time, including Mr. Mangogna. (Tr. 97) Mr. Mangogna was also disciplined for his use of leave time. And, Mr. Mangogna was punished more often than Complainant was for abuse of leave time and other employees were punished more harshly than he was for leave issues. Complainant himself admitted to this. (Tr. 172, 174)

On November 15, 1994, the staff in Complainant's department was told about a severance package, which was offered to reduce the workforce. According to Complainant, after the entire staff was told about the plan, he was called into David Sobel's office and told by Mr. Sobel that he must either take the severance package or be fired. (Tr. 42-43) Complainant agreed to accept the severance package, voluntarily terminating his employment with Respondent. In consideration, he received a lump sum payment of "about \$5,000.00 after tax," and six months medical coverage. (Tr. 45-46) By the terms of the agreement, Complainant had until November 18, 1994 to revoke the agreement. Complainant testified that he felt he was "forced" to sign the agreement, and he did not revoke it. (Tr. 47, 142)

Respondent denied that Complainant was forced to sign the agreement. Complainant said Carlos Fortuno, Director of Human Resources, was present when Complainant accepted his severance agreement. (Tr. 42-43) However, Mr. Fortuno was not at that meeting and did not meet with individual employees regarding the severance program. (Tr. 561, 562-563) He did not threaten or coerce any employees to take the

severance package. (Tr. 562) Complainant alleged that Mr. Fortuno said "he had given out a lot of pink slips." (Tr. 43) Mr. Fortuno never made that statement. (Tr. 563)

Complainant testified at hearing that he heard about the severance program for the first time at the staff meeting on November 15, 1994. However, he swore to an affidavit on March 2, 2001, in which he asserted that he first heard about the severance package on October 26, 1994 when he received a memo outlining the program. (Respondent's Exhibits 1 & 2; Tr. 135)

Complainant was questioned extensively about business interests he maintained outside of his employment with Respondent. Complainant was extremely evasive when he testified about his real estate and mortgage broker businesses. His testimony was vague, and was contradicted by other testimony and documents. His testimony cannot be considered credible. He obtained a mortgage broker's license and a real estate broker's license while working for Respondent in 1994. (Tr. 213, 242) He stated he did not recall whether he conducted business during work hours; however, he asserted that if he did, it was "not extraordinary or different from what other examiners were doing." (Tr. 191) He further stated that he did not intend to leave his employment with Respondent when he received the licenses. (Tr. 203) When asked why he got the licenses if he didn't intend to pursue work in the real estate business, Complainant said he "may have gotten it for the fun of it..." (Tr. 204) When he was asked if he really got the licenses "for the fun of it," Complainant answered "probably so or probably not." (Tr. 204)

Complainant has operated as a mortgage broker and real estate broker. According to his resume, prepared in 1995, he was a self-employed mortgage broker in 1994. (Complainant's Exhibit 1; Tr. 247) He has maintained his real estate license, which must

be renewed annually, since 1994. When he was asked if he had ever used the license, he said he "probably did," but he claimed he had no recollection of when he used it. (Tr. 242-243) He stated in testimony that his employment with Respondent was his only source of income when he left his position. (Tr. 47) His tax returns, however, indicate he was conducting a real estate and mortgage broker business in 1995 and that he neither acquired nor started those businesses during 1995. (Complainant's Exhibit 4; Tr. 375)

OPINION AND DECISION

Complainant has asserted that he was discriminated against because of his race, color and national origin. He further states that he was forced to leave Respondent's employ against his wishes when he accepted a severance package. Respondent denies the charges of discrimination and asserts complainant left of his own accord. For the reasons that follow, I find that complainant has failed to prove his claim of discrimination and the case must, therefore, be dismissed.

In order to prevail on a claim of discrimination, the Complainant must first make out a prima facie case by establishing that he belongs to a protected class, that he was capable of performing in the position he held, and that he suffered an adverse employment action under circumstances that would give rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Ferrante v. American Lung Association*, 665 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25, (1997), citing, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Assuming the Complainant succeeds in establishing a prima facie case, the burden shifts to the Respondent to articulate a legitimate non-discriminatory reason for its actions. Thereafter, Complainant must demonstrate that the reasons offered by Respondent are

merely a pretext for unlawful discrimination. *St. Mary's, supra; Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Complainant argues he was subjected to disparate treatment based upon his race while he worked for Respondent. In support of this, Complainant only argues he was forced to do clerical work, instead of examining plans. He does not allege a loss of pay or a formal demotion. These allegations do not constitute an adverse employment action. Courts have held that underutilization is not an adverse employment action. *Bennett v. Watson Wyatt & Company*, 136 F.Supp. 2d 236, 248 (S.D.N.Y., 2001). Moreover, the criticism and threats Complainant alleges, even if unfair, are not considered an adverse employment action either. *Id.* At 248, citing, *Henriquez v. The Times Herald Record*, 165 F.3d 14, U.S. App. LEXIS 36196 (2nd Cir. 1998) While Complainant may have been counseled for using his leave time, there were no negative results such as loss of pay, demotion or probation. In addition, he admits he was not treated any more severely than other employees with respect to use of leave time. Nothing Complainant alleged can be considered a material adverse change in his employment status that would be considered an adverse employment action under the Human Rights Law. To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). *See also, Feteiha v. City of New York; New York City Human Resources Administration*, Case no. 9000615 (SDHR, May 15, 2006)

In order to prevail on a claim of harassment based on hostile environment, the Complainant must show that the alleged harasser engaged in "behavior that is so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale v.*

Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986). In addition, the "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale*, at 81, citing, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1989). In order to be actionable, the conduct must be pervasive and must permeate the workplace. Isolated remarks are insufficient to establish a claim. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D. 2d 44, 50-51, 642 N.Y.S.2d 739, 744 (4th Dept., 1996), *leave denied*, 89 N.Y.2d 809, 678 N.E.2d 502, 655 N.Y.S.2d 889 (1997). Complainant's allegations of remarks made by Mr. Sobel, if believed, do not rise to the level of hostile environment. Complainant's work place was not permeated with hostility. Even if one assumes Complainant's assertions are true, he alleges that Mr. Sobel made infrequent remarks to which Complainant took offense. And, although Complainant took one of the alleged remarks to be a racial epithet (*i.e.*, that Complainant's kind "all the same"), it isn't certain that it was meant to be a racial epithet and there is no evidence of any other racially motivated comments or actions.

Complainant has also alleged he was forced to resign because of Respondent's actions. In order to establish a claim for constructive discharge, Complainant must establish that the discriminatory acts of the Respondent were so intolerable a reasonable person in his position would have felt forced to resign. *Imperial Diner, Inc. v. State Division of Human Rights Appeal Board*, 52 N.Y.2d 72, 78 (1980); *Forest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Essentially, Complainant argues that, because of his race, color and national origin, he was told he had to resign or face termination. He attributed quotes to Mr.

Fortuno who denied making them. He asserts that Mr. Fortuno threatened him with termination ("he had given out a lot of pink slips"). I credit Mr. Fortuno's testimony over Complainant's because Complainant's testimony was vague, contradictory and evasive. It is not worthy of credit. At the hearing, Complainant claimed that he first heard about the severance package on November 15, 1994, and then immediately was called into Mr. Sobel's office and threatened and coerced into accepting the agreement by Mr. Sobel and Mr. Fortuno. An affidavit Complainant swore to, which was entered into evidence at hearing, contradicts that assertion and indicates that he found out about the package on October 26, 1994. And, as noted above, Mr. Fortuno denied being at that meeting, denied discussing the package with individual employees and denied threatening or coercing Complainant in any way. Finally, it is worth noting that Complainant received consideration for having signed the severance agreement. If Mr. Sobel and Mr. Fortuno were intent on firing Complainant because of his race and national origin, one could wonder why they offered him a severance package including money and extended medical coverage.

There is no evidence that Complainant was forced to sign the agreement because of his race and/or national origin, beyond his bare assertions, which lack any credibility. Therefore, any claim of constructive discharge must fail.

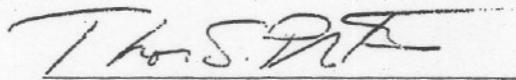
ORDER

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

ORDERED, that the case be, and the same hereby is, dismissed.

Dated: March 28, 2007
BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

A handwritten signature in black ink, appearing to read "Thomas S. Protano", written over a horizontal line.

Thomas S. Protano
Administrative Law Judge