NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

KENNETH RUSSELL,

Complainant,

v.

NEW YORK STATE, STATE UNIVERSITY OF
NEW YORK AT STONY BROOK,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10114977

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 24, 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, 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 29 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10114977**

SUMMARY

Complainant, who is black, alleged that his work environment was permeated with racial hostility and harassment. After he made an internal complaint to Respondent about the harassment, Complainant alleged that he was retaliated against. Respondent argues that it acted to end the harassment when Complainant made them aware of it and denied retaliating against Complainant. Although there is no evidence of retaliation, Complainant's work environment was clearly hostile. Respondent's efforts to investigate the complaint and remediate the harassment dragged on for more than five months and, therefore, cannot be considered prompt. As a result, Respondent is liable to Complainant for damages owing to the emotional distress he suffered as a result of the harassment.

PROCEEDINGS IN THE CASE

On March 22, 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. Public hearing sessions were held on March 19, 2008 and March 20, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Siben & Ferber, by Edward Lehman, Esq. Respondent was represented by Michele J. LeMoal-Gray, Esq., Associate Counsel.

Permission to file post-hearing briefs was granted. Respondent's counsel filed a timely brief.

FINDINGS OF FACT

1. Complainant, a black man, began working for Respondent in March, 2001, as a hospital attendant housekeeper. He was promoted to a plumber & steamfitter in August, 2006, and remains in that position today. (ALJ's Exhibit 2; Respondent's Exhibit 1; Tr. 9, 88)

2. Since 2002, Complainant has been assigned to work at East Campus Physical Plant. Respondent operates a hospital at that location. (Tr. 14-15)

3. The director at physical plant is James Prudenti. (Tr. 14, 260) Walter Doroski was the assistant director and Peter Vitola was Complainant's direct supervisor. Vitola replaced Basil Wattley, who had been Complainant's supervisor until 2006. Prudenti, Vitola and Doroski are white; Wattley is black. Complainant is black. (ALJ's Exhibit 2; Tr. 15, 20)

4. In October, 2006, Complainant made an internal complainant with Respondent's office of diversity and affirmative action ("ODAA") alleging racial discrimination and harassment. (Complainant's Exhibit 2; Tr. 317)

5. Complainant indicated that he had filed the internal complaint in 2004, but records don't support this claim. He alleges that after this 2004 complaint Prudenti began to retaliate against him and his work environment changed. (Complainant's Exhibit 2; Tr. 28, 77)

6. Specifically, Complainant complained about the treatment he received from Doroski, Prudenti and Ronald Brinkman, a co-worker. Complainant charged that he had been the target of racial slurs—he had been repeatedly called a "nigger"—and that he had been falsely accused of theft. (Complainant's Exhibit 2; Tr. 23-24, 318)

7. Other comments were directed at Complainant by Doroski and Brinkman. In addition to calling Complainant a "nigger" Doroski told Complainant that he was "only good for nothing but to clean floors." Doroski also asked Complainant if he was "glad that Lincoln freed the slaves." Brinkman asked Complainant if he had stolen a new engine he had secured for his car. Complainant inferred from that comment that Brinkman was implying Complainant had stolen the digital camera that had been missing. (Tr. 24, 43-44)

8. As a remedy, Complainant asked that "action [be] taken on this immediately." (Complainant's Exhibit 2)

9. Complainant also charged that he had been denied equal treatment because of his union activities, which were unrelated to Human Rights Law violations. (Complainant's Exhibit 2)

10. On March 27, 2007, after investigation, Respondent found Complainant's allegations to be "substantiated." Approximately 25 witnesses were interviewed in the investigation. (Complainant's Exhibit 3) Anne Murphy, associate director of ODAA, who investigated the

complaint along with another employee, determined that Doroski had created a hostile work environment for Complainant. (Tr. 329)

11. Respondent's investigation found that "it was traditionally an accepted practice in the UH Physical Plant for managers, supervisors and staff to converse and make racial and/or ethnic remarks to each other in their shop(s) and amongst themselves at the worksite." The report further stated that "[d]espite training provided on Feb. 9, 2007...many employees feel there is no malice or ill will in the use of profanity or ethnic name calling." (Complainant's Exhibit 3)

12. As a result of the investigation, Brinkman was served with a notice of discipline and Doroski received a "non renewal letter," seeking the termination of his employment. In addition, Vitola was demoted and transferred to another area. (Tr. 325-26) Brinkman and Doroski are still employed by Respondent, despite the fact that Respondent has sought the termination of Doroski's employment. (Tr. 331, 363)

13. The investigation found insufficient evidence to indicate that Prudenti had engaged in discriminatory conduct, but determined that both Prudenti and Doroski had been abusive towards the employees under their direction. (Complainant's Exhibit 3)

14. Shortly after Respondent completed its investigation, in April, 2007, Complainant injured his back while working. He has been out of work and receiving worker's compensation since April 23, 2007. Complainant alleges he was injured because Respondent had asked him to carry a ladder and pull a tool cart through a door by himself. (Tr. 80-82, 142)

15. In addition to the racial comments and false accusations of theft, Complainant alleged that he was denied overtime and additional night differential pay because of his race. (ALJ's Exhibit 2, Tr. 78) Complainant has not established that he was denied overtime and, in fact,

records indicate that he was credited for receiving too much overtime. (Tr. 266, 268) Complainant was not entitled to night differential based on his hours. (Complainant's Exhibit 1)

16. Complainant felt the comments Doroski made regarding slavery were calculated to show that Complainant was "nothing but a loser." Regarding the comments, he stated, "I never believed that I would go through something like that. (Tr. 25) The treatment he received caused him to fell stress and he experienced mood swings. His relationship with his family suffered. (Tr. 38)

OPINION AND DECISION

Complainant alleges that he was unlawfully harassed while working for Respondent. In order to sustain a claim of racial harassment, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant was subjected clearly subjected to a hostile environment of racial harassment. Respondent's own investigation into Complainant's ODAA complaint makes it clear that there was a systemic problem within Complainant's department. The management there, under Prudenti and Doroski's direction, tolerated an environment of ridicule and hostility, which the employees did not recognize was improper. An employer can be held liable for such an environment only if it encourages, condones or approves of such behavior. When an

employer is made aware that a hostile environment exists in its workplace, it is required to take prompt remedial action to end the harassment. The employer's failure to remediate such an environment can constitute condonation. *Grand Union v. Mercado*, 263 A.D.2d 923, 924, 694 N.Y.S.2d 524, 526 (3rd Dept. 1999)

Respondent in the instant case has not made a showing that they acted promptly and appropriately to end the harassment. After Complainant informed ODAA of the hostile environment within his department, Respondent's took five and one-half months to investigate the matter, interview 25 witnesses and take action. A five and one-half month investigation cannot be considered prompt remedial action. Respondent has offered no explanation for the delay and, although Vitola is gone, Brinkman remains as does Doroski. No effort was made to remove these bad actors from the workplace either by transfer or dismissal during the pendency of the investigation. After the investigation, Complainant is out with an injury, while Brinkman, Vitola and Doroski continue to work, as does Prudenti, who failed to make it clear to his staff that racial and ethnic slurs are not to be tolerated. It is for these reasons that Respondent must be held accountable in this case.

As for the retaliation claim, Complainant must first make out a prima facie case by showing that (1) he engaged in activity protected by Human Rights Law § 296, (2) Respondent was aware that he participated in the protected activity, (3) he suffered from a disadvantageous employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing Dortz v City of New York*, 904 F Supp 127, 156 (1995).

After Complainant filed his internal complaint, the systemic harassment against him

continued. There is no evidence though, that this was related to, or in retaliation for, his prior complaint. Rather, it was a continuation of the treatment he had been receiving for several years. Complainant's own testimony, wherein he alleges that the mistreatment began in 2004, well before he filed his internal complaint, refutes any claim of retaliation, since he alleges that the harassment began before he filed his internal complaint.

As a result of the harassment Complainant received, he suffered emotional distress. Complainant experienced mood swings and his relationship with his family suffered. He is entitled be compensated for his distress. I therefore find that an award of $15,000.00 for emotional distress, pain and suffering, humiliation and mental anguish, will effectuate the purpose of the Human Rights Law. *Kowalewski v. New York State Div. of Human Rights*, 26 A.D.3d 888, 809 N.Y.S.2d 347 (4th Dept. 2006); *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (1987).

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 Respondents shall take the following actions to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this order:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent shall establish policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination and harassment policy and a formalized reporting mechanism for employees who believe they have been discriminated against. The policies shall also contain the development and implementation of a training program relating to the prevention of unlawful discrimination in accordance with the Human Rights Law. Training and

a copy of the policies shall be provided to all employees, and the policies shall be posted prominently where they may be viewed by employees in the workplace.

2. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant $15,000 as compensatory damages due to his emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Kenneth Russell, and delivered to his Attorneys, Siben & Ferber, at Staller Office Park, 1455 Memorial Highway, Hauppauge, New York, 11749, by certified mail, return receipt requested. Interest on the award shall accrue from the date of the Commissioner's Final Order until the date payment is made at a rate of nine percent per annum.

3. Respondents shall simultaneously furnish written proof of their compliance with all of the directives contained within this Order to Caroline Downey, General Counsel of the Division at her office address at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondents shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: June 24, 2008
Bronx, New York

Thomas S. Protano
Administrative Law Judge