ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

RAMON SANTIAGO, ENRIQUE CORRALES, SERGIO MARTINEZ, JHONY ORELLANO, MARCO BERRONES, JOSE MAURICIO ORELLANO, HECTOR O. GOMEZ, SEGUNDO S. BORJA, SEGUNDO JAPA,

Complainants,

v.

NORTHEAST SERVICE INTERIORS, LLC,

Respondent.

NOTICE AND FINAL ORDER

Case Nos. 10138992, 10138999, 10138995, 10138997, 10139001, 10139002, 10138998, 10138996, 10139753

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 January 4, 2011, by Robert J. Tuosto, 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"), WITH THE FOLLOWING AMENDMENT:

- With regard to the allegations of retaliation, it is noted that those complainants who filed their complaints on January 25, 2010, have established a prima facie case. Their employments were terminated within days of having filed their complaints. The causation element of the prima facie case may be established through evidence that an adverse action followed in close temporal proximity to a protected activity. *See Torres v. Gristede's Operating Corp.*, 628 F.Supp.2d 447, 473 (SDNY 2008). Nevertheless, in the instant case, because Respondent had legitimate, non-discriminatory reasons to terminate Complainants' employments, and Complainants failed to demonstrate that Respondent's reasons were pretextual, this claim is properly dismissed.

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: MAR 16 2011
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
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RAMON SANTIAGO, ENRIQUE CORRALES, SERGIO MARTINEZ, JHONY ORELLANA, MARCO BERRONES, JOSE MAURICIO ORELLANA, HECTOR O. GOMEZ, SEGUNDO S. BORJA, SEGUNDO JAPA,

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NORTHEAST SERVICE INTERIORS, LLC,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Nos. **10138992, 10138999, 10138995, 10138997, 10139001, 10139002, 10138998, , 10138996, 10139753**

SUMMARY

Complainants alleged that they were unlawfully discriminated against by their employer when they were exposed to a hostile work environment, and both treated differently while on the job and terminated because they were Hispanic. However, Complainants have failed to prove their respective cases and the complaints are hereby dismissed.

PROCEEDINGS IN THE CASE

On January 25, 2010 and February 9, 2010, Complainants filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 19-20, 2010.

Complainants and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Esq., Senior Attorney. Respondent was represented by Stephen D. Hans and Nils C. Shillito, Esqs., of the law firm of Stephen D. Hans & Associates, Long Island City, New York.

Permission to file post-hearing briefs was granted. Counsel for Respondent filed a post-hearing brief.

FINDINGS OF FACT

1. Complainants alleged that they were unlawfully discriminated against by their employer when they were exposed to a hostile work environment, and both treated differently while on the job and terminated because they were Hispanic. (ALJ Exh. 1)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 3)

The Parties

3. Complainants were manual laborers employed by Respondent in various capacities until January, 2010. Pursuant to stipulation between the parties, Complainants were both within a

protected class and qualified for the positions which they held while employed by Respondent. (Respondent's Exh. 2; Tr. 15, 16, 173)

4. Respondent is a corporation located in Maspeth, New York which performs interior building demolitions throughout the greater New York area. (Respondent's Exhs. 1, 2; Tr. 144, 238)

Respondent's Workforce

5. At the relevant time period Respondent's workforce consisted of approximately 21 employees of which approximately 15-16 were Hispanics. The remaining workers were mostly Italian with at least one worker of Polish national origin. The majority of Respondent's work crews were made up of Hispanics. (Tr. 69, 97, 150-51, 160, 170, 245-46, 261, 269)

Complainants' Alleged Treatment While Working for Respondent

6. I do not credit Complainant Gomez' testimony that Respondent's Hispanic workers were treated differently relative to Respondent's Italian workers when they were given more difficult jobs assignments for less pay, not allowed to go to the bathroom, not allowed to drink water, not allowed to smoke, denied sick days, not allowed to leave early at the end of the workday and not allowed to take a break for lunch. Respondent's foreman, Salvatore Vicari, and several of Respondent's employees credibly denied any differential treatment of Complainants. The credible testimony showed that Respondent's workers were paid according to their abilities and the type of jobs they could perform, that several of Respondent's Italian workers had different job responsibilities which dictated different assignments and pay, and that several of Respondent's Italian and non-Italian workers were paid less than some of Complainants. (Respondent's Exh. 3; Tr. 17, 19-21, 26-27, 40, 42, 64-66, 69-70, 72, 94, 121, 123-24, 129, 148-

49, 152-53, 156-57, 161, 166-67, 172, 176, 238-39, 246-47, 252-59, 261, 287-89, 303-04, 306, 310, 317-19)

7. I do not credit Complainant Gomez' testimony that Respondent's Hispanic workers were repeatedly called disparaging names. Vicari and several of Respondent's employees credibly denied this allegation. Vicari admitted that he sometimes screamed at the entire workforce but did not use disparaging names towards the Hispanic workers; Vicari was not familiar with some of Complainants' specific nationalities, and testified incorrectly in this regard as to three of his former subordinates. Vicari testified that another of Respondent's foremen did use such language.[1] (Tr. 41, 45-46, 48, 99, 108, 149-50, 152-56, 165, 169, 174-76, 182, 201-04, 287, 289, 304, 306, 317, 319)

The Events of January, 2010

8. On or about January 10, 2010 Complainants performed a job in Connecticut which, because it was an out of state job, required that a greater amount of taxes be withheld from their paychecks. This fact greatly upset Complainants. (Respondent's Exh. 2; Tr. 82-84, 95, 161-62, 178-180, 256, 292-93)

9. Vicari attempted to deal with this issue on Complainants' behalf by trying to get Respondent's president to arrange to have less taxes withheld from their paychecks. For unknown reasons this was not done and, when subsequent paychecks issued on January 15 showed that the same amount in taxes had still been withheld, Complainants became angry at Vicari. (Tr. 178-79, 292)

10. On Wednesday, January 20, 2010 Complainants, pursuant to prior agreement, decided not to show up for work for a job in Connecticut. Complainants remained in New York and

[1] There is nothing in the record to suggest that either Complainants complained about this person or that Respondent condoned his behavior.

demanded to speak with Respondent's president, Franco E. Caliendo. Caliendo refused to speak with them but offered to do so before or after work hours or when Complainants came to pick up their paychecks. Complainants failed to inform Caliendo that they would not report for work that day and this caused Respondent a substantial hardship. (Tr. 50, 54, 89-91, 158, 162-63, 177, 180-81, 184, 262-63, 263-67, 279-80, 290-91)

11. On Thursday, January 21, 2010 Complainants again failed to report for work. As a result, Respondent hired replacement workers to take their places. Respondent's replacement workers were Hispanic. (Tr. 163-64, 267-68, 270-72, 280, 291-92)

12. Friday, January 22, 2010 was a payday for Complainants. Complainants failed to report to work for a third consecutive day but appeared to pick up their paychecks and complain about Vicari. On this day Complainants were permanently separated from Respondent's employment for having failed to report for work for three consecutive days. (Tr. 51, 54, 178, 237, 269-72, 279-80)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer "...because of an individual's...national origin...to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1.(a).

Complainants alleged that their national origin formed the basis of the unlawful discrimination which they experienced while employed by Respondent. Specifically, Complainants averred that they were exposed to a hostile work environment, and both treated differently while on the job and had their employment terminated solely because they were

Hispanic.

Respondent defends on the ground that Complainants were neither treated differently nor exposed to a hostile work environment; Respondent also averred that the termination of Complainants' employment was a product of their collective failure to report for work when they were scheduled to do so.

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a prima facie case of employment discrimination based on protected class membership, a complainant must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).]

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), *quoting Harris v.*

Forklift Sys., Inc. 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *See id* .at 21.

Hostile Work Environment

As to this claim, Complainants did not establish that they were the victims of pervasive slurs directed against them by Vicari on account of their national origin. The record shows that Vicari and others credibly denied his making such statements. Vicari did admit that, as foreman, he did scream at all of his subordinates. Despite doing so, when considering the totality of the circumstances this conduct did not interfere with Complainants' work performances, constitute a physical threat to them nor impact their psychological well-being. Additionally, during the public hearing Vicari attempted to show that he knew Complainants' national origins but his testimony revealed that he was either mistaken or confused as to the nationalities of three of his former subordinates. (Tr. 174-75) Finally, Vicari unwittingly offered a justification as to why Complainants chose to make this claim: another foreman used such language in the workplace. This fact may have provided a way to buttress the complaint against Vicari for his perceived failure to remedy their objections concerning the additional Connecticut tax which had been withheld from their paychecks.

Accordingly, these claims must be dismissed.

Differential Treatment

As to differential treatment, Complainants claimed that their Hispanic national origin was the basis for such treatment during their tenure with Respondent, as well as the reason their employment was terminated.

As to their treatment during their tenure with Respondent, Complainants fail to make out prima facie cases. While it is true that the first two prongs of the test are met, *i.e.,* pursuant to stipulation all were members of a protected class and qualified for their positions, Complainants could not establish that some of the treatment in question concerning not being allowed to take various types of breaks during the workday--even assuming that this occurred-- rose to the level of being adverse employment actions. *See Messinger v. Girl Scouts of the U.S.A.,* 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dept. 2005)(adverse employment action found to be a materially adverse change in circumstances such as termination, decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation.) Likewise as those claims concerning allegations which did rise to the level of being adverse employment actions, *i.e.,* disparate treatment concerning wages and the denial of sick days. The record shows that this disparity did not infer unlawful discrimination for several reasons: Respondent's workers were each paid an hourly wage which was set according to their respective abilities, some of Respondent's non-Hispanic workers who were purported comparators actually had different and greater job responsibilities which thereby dictated a higher wage, and some of Respondent's Hispanic workers earned more than some of Respondent's non-Hispanic workers. *Ante* at ¶6.

As to their employment terminations, Complainants made out the first two prongs of the

prima facie test, *supra,* and the third prong of the test as these clearly were adverse employment actions. However, the fourth prong of the test cannot be met. The record shows that the employment terminations, coming on the heels of the complaint against Vicari for his perceived failure to remedy the Connecticut tax withholding issue, had nothing to do with unlawful discrimination. Instead, the terminations were a clear response to Complainants' unauthorized absence from work for three consecutive days ending on January 22.

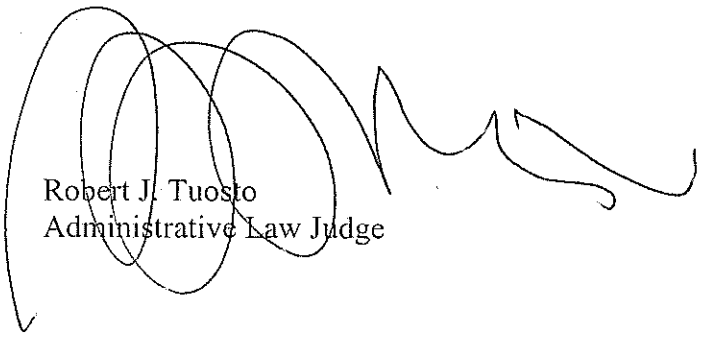
Therefore, the complaints must be dismissed.

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 complaints are, and the same hereby be, dismissed.

DATED: January 3, 2011
Bronx, New York



Robert J. Tuosto
Administrative Law Judge