

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

BRUCE E. SIMMONS,

Complainant,

v.

SUFFOLK COUNTY COMMUNITY COLLEGE,

Respondent.

**NOTICE AND
FINAL ORDER**

Case Nos.

6841964

6842536

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 15, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”), WITH THE FOLLOWING AMENDMENT:

- Within sixty days of the date of this Final Order Respondent shall promulgate policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting

mechanism for employees who believe they have been aggrieved, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. A copy of the policies and procedures and the training program shall be provided to all employees.

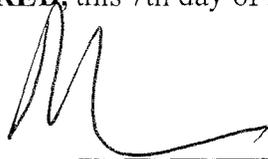
- A copy of the policies and procedures and the training program shall be produced within sixty days of this Order to Caroline J. Downey, General Counsel of the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458.
- Respondent shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights Is...") in places on Respondent's premises where employees are likely to view it.
- The Recommended Order is otherwise herein adopted and approved in full.

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 7th day of February, 2008.

A handwritten signature in black ink, appearing to be 'M' followed by a long horizontal stroke.

KUMIKI GIBSON
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

BRUCE E. SIMMONS,

Complainant,

v.

**SUFFOLK COUNTY COMMUNITY
COLLEGE,**

Respondent.

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

Case Nos. **6841964 and 6842536**

SUMMARY

Complainant has filed two complaints against Respondent. He alleges in the first complaint that he was harassed and discriminated against because of his race, sex and disability. In his second complaint, he alleged that the racial harassment had continued and that he was retaliated against and denied a promotion for having filed the first complaint. His claim of harassment is found to have merit and is sustained. The remaining claims are dismissed.

PROCEEDINGS IN THE CASE

On July 9, 2002, 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"). On June 22, 2004, Complainant filed a second verified complaint with the Division charging Respondent with unlawful discriminatory practices relating to employment in violation of 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 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 August 8, 2007, August 9, 2007, September 5, 2007, September 6, 2007 and November 13, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented at the August 8, August 9, September 5 and September 6 hearing sessions by Arlyne Zwyer, Esq. Bellew McManus, Esq. represented the Division at the November 13, hearing session. Respondent was represented by Suffolk County, Department of Law, Jennifer K. McNamara, Esq.

Permission to file proposed findings of fact and conclusions of law was granted. Respondent’s counsel filed a timely submission.

FINDINGS OF FACT

1. Complainant is an Afro-American black man, who has diabetes. He has been employed by Respondent since 2000. His current job title is auto equipment operator. (Tr. 10)
2. Complainant works in Respondent’s grounds and maintenance department, which employs 12 to 15 male employees. Complainant is currently the only black member of the department. There had been another black member, Darren Harding, but his employment was terminated. (Tr. 15-16)
3. Complainant alleges that he has suffered numerous instances of harassment over this seven year tenure with Respondent. Beginning in November 2000, Al Pirro, a co-worker,

threatened to “fuck [Complainant] up the ass.” (Tr. 27) After Complainant complained about the comment to Chris Kielty, the assistant director of the department, Complainant often heard Pirro muttering incoherently whenever Complainant passed by. (Tr. 28-32)

4. Richard Burrows and Kevin Casey also threatened to “fuck [Complainant] up the ass,” in 2002. Casey made these statements more than once to Complainant. (Tr. 33-34)

5. On another occasion, when Casey and Complainant were shoveling snow, Casey noticed that Complainant was shoveling fast and nicknamed Complainant “big shovel cock.” Complainant believed this was a racial comment (Tr. 35, 38)

6. Complainant reported all of these statements to Kielty, who said he “would take care of it.” The comments did not stop after he spoke to Kielty. (Tr. 36, 40)

7. On December 17, 2001, Casey, Bill Jones and Complainant were removing leaves from Respondent’s grounds. While Complainant was standing in the bed of a truck, Casey jerked the truck forward in a manner that nearly caused Complainant to fall out of the truck. Complainant was able to grab the railing of the truck to keep from falling as Casey laughed at him. (ALJ Exhibit III; Tr. 57)

8. In 2003, Complainant and some of his co-workers were cleaning out a room in the student union. Complainant found a board with a hole cut in it, which he threw into the dumpster. Carmine Gambale saw the board, looked at Complainant and said they would use the board to “stick the monkey’s head in and cut his head off.” Complainant believed Gambale was talking about him. Steve Durkel, the foreman, was present, but took no action. (Tr. 43-45)

9. Durkel also made offensive comments towards Complainant. In May of 2001, he stated, in Complainant’s presence, that as a youth he would hang out in a place called “nigger ditch.” (Tr. 97)

10. Jones often called Complainant "Brucie boy." Despite Complainant's repeated protests, Jones persisted in calling Complainant Brucie boy. (Tr. 100)

11. In 2003, Complainant's car was vandalized while it was parked in Respondent's lot. As Complainant drove home, he discovered that the exhaust fumes were being directed inside his car. Complainant reported this incident to a security guard who took no action. (Tr. 103-04)

12. On January 17, 2003, Complainant was injured in a work related accident. During a snow storm, Complainant was putting gas into a salt spreader in the early morning. As he poured the gas in, the cover to the spreader fell on his nose. The resulting wound required 20 stitches. (Tr. 62)

13. Complainant believes that Robert Delina, a co-worker, pushed the cover down, causing it to fall on his nose, although he did not see Delina push the cover. Complainant admits that he did not properly secure the cover before he started pouring the gas. Respondent investigated that matter and determined that it was an accident. (Tr. 61-62, 76, 173)

14. Twice during his tenure with Respondent, Complainant has sought to have his job classification upgraded. The process involves filing an application with Suffolk County's Civil Service Department. Each time, Civil Service denied the request, because Complainant does not supervise other employees and, in order to be upgraded, Complainant would have had to supervise others. (Tr. 130, 165-66)

15. In January of 2004, Complainant found a noose hanging in the maintenance warehouse. Complainant did not report it immediately, but took a photo of it and waited for about a month until Harding, who had been out, returned to work. (Complainant's Exhibits 18 & 19; Tr. 108)

16. On February 8, 2004, Complainant showed the noose to Harding and they reported the incident to John Williams, Respondent's director of security. (108-09)

17. Williams called the Suffolk County police, who sent two detectives to the scene. (Tr. 213, 256) The Suffolk County police did not classify the incident as a crime and merely filed a report. (Tr. 214)

18. Williams did not conduct any investigation into the incident because he felt it was a police matter. (Tr. 259)

19. Complainant found the noose to be “very offensive,” he felt he was “hallucinating” and said, “I never in my life thought I’d see something like this in the warehouse where we work.” (Tr. 108)

20. Complainant reported every incident of alleged harassment to Respondent, including the truck incident and the incident in which Gambale said he would “cut the monkey’s head off.” Respondent listened to Complainant every time he made a complaint, but the harassment did not stop. (Tr. 45, 58, 177)

21. The comments and events made Complainant feel “degraded” and “uncomfortable.” He considered it “unprofessional” and “shocking” and he “couldn’t believe that people would act like this on the job.” (Tr. 37, 38, 139)

22. Complainant sought psychiatric counseling for his trauma and was diagnosed with post-traumatic stress disorder (“PTSD”). His trauma resulted primarily from the incident of January 17, 2003, when the salt spreader fell on his nose. Complainant stated that he felt the need for professional counseling specifically because of that incident. (Tr. 141, 143-44, 160, 464)

OPINION AND DECISION

“Nigger ditch.” “Brucie boy.” “Big shovel cock.” “Cut the monkey’s head off.” Vandalism to Complainant’s car. Jerking a truck forward while Complainant was in its bed. Threats to “fuck Complainant up the ass.” A hangman’s noose. These are the incidents and

comments Complainant has been forced to endure while working for Respondent.

Complainant alleges in both of his complaints 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 is 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). The Complainant here has made such a showing.

The comments directed at Complainant while on the job can be construed to reflect stereotypes and long held prejudices about African-American men in this country. They clearly affected the Complainant's ability to do his work and it's evident that they were ongoing and pervasive. The incidents such as the vandalism to his car, the truck incident and the noose incident were threatening to Complainant, caused damage to his property and had the potential to harm him physically and emotionally. Despite the fact that Complainant complained repeatedly about the behavior of his co-workers, their behavior did not change. The Complainant has been a victim of racial harassment while in Respondent's employ.

As for the retaliation claim, Complainant must show 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 initial complaint with the Division, the 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. He also charges in his second complaint that Respondent failed to upgrade his position. The upgrade was rejected by the Department of Civil Service, not the Respondent. Complainant has not shown that there was any reason to believe that he was denied this upgrade because of his race or in retaliation for his complaints of discrimination.

Finally, Complainant charges in his first complaint that he was subjected to unlawful discrimination because of his sex and because of diabetes, which is a disability under Human Rights Law. See, *Nowak v. EGW Home Care, Inc.*, 82 F.Supp.2d 101, 111 (W.D.N.Y., 2000), citing, *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106, 480 N.E.2d 695 (1985), and *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998). In order to establish a prima facie case of discrimination in employment based upon disability the Complainant must show (1) that he was a member of a protected class; (2) that he was capable of performing the duties of the job in a reasonable manner; (3); that Complainant suffered an adverse employment action, and (4) that this occurred under circumstances which would lead one to infer that he had been discriminated against. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Burlington Industries v. New York City Human Rights Commission*, 82 A.D. 2d 415, 441 N.Y.S.2d 821 (1st Dept. 1981), *aff'd*, 58 N.Y.2d 983, 447 N.E.2d 1281, 460 N.Y.S.2d 920 (1983).

Complainant here has not shown that he suffered an adverse employment action owing to his diabetes. He remained in the same job title, with the same pay and the same benefits

throughout the period in question. There is no evidence of any disability or sex discrimination.

As a result of the harassment Complainant received, he suffered emotional distress. He was forced to seek professional counseling, but not as a result of the harassment. Complainant stated that he received counseling and was diagnosed with PTSD because of the accident that occurred on January 17, 2003. Nevertheless, he did suffer emotional distress because of the other events, which were harassing and discriminatory. As a result of those incidents, he felt shocked, degraded and uncomfortable. He found them to be beyond belief. His physical safety was threatened as well. He is entitled to be compensated for his distress. I therefore find that an award of \$50,000.00 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 Respondent and its agents, representatives, employees, successors and assigns shall cease and desist from discriminating in employment in violation of the Human Rights Law; and it is further

ORDERED, Respondent shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within 60 days of the receipt of the Final Order of the Commissioner, respondent shall also pay to the Complainant \$50,000.00 as compensatory damages for mental anguish and humiliation suffered by complainant as a result of respondent's unlawful discrimination. Interest

on the compensatory damages award shall accrue at a rate of nine per cent per year from the date of the Final Order of the Commissioner, until said payment is made.

2. The payments shall be made by respondent in the form of certified checks made payable to the order of Complainant and delivered by certified mail, return receipt requested, General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

3. Respondent shall furnish written proof of its compliance with the directives herein contained to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York, 10458.

4. Respondent shall cooperate with representatives of the Division during any investigation into the compliance with the directives of this Order.

DATED: January 15, 2008
Bronx, New York



Thomas S. Protano
Administrative Law Judge