

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**LISA DANIELLE SWANSON,**

Complainant,

v.

**THE CITY OF NEW YORK; ADMINISTRATION  
FOR CHILDREN'S SERVICES,**

Respondent.

**NOTICE OF FINAL  
ORDER AFTER HEARING**

Case No. 2308792

**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 April 25, 2007, 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 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 18th day of May, 2007.

  
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KUMIKI GIBSON  
COMMISSIONER

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

**STATE DIVISION OF HUMAN RIGHTS  
On The Complaint Of**

**LISA DANIELLE SWANSON,**

Complainant,

v.

**THE CITY OF NEW YORK; ADMINISTRATION  
FOR CHILDREN'S SERVICES,**

Respondent

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

Case No: 2308792

**SUMMARY**

Complainant charged Respondent with discrimination in employment on the bases of race/color, the creation of a hostile work environment, and retaliation. Respondent denied unlawful discrimination. Ultimately, Complainant failed to prove her claims. Therefore, the complaint should be dismissed.

**PROCEEDINGS IN THE CASE**

On May 13, 2003, Lisa Danielle Swanson ("complainant") filed a verified complaint with the New York State Division of Human Rights ("Division") charging the City of New York, and the New York City Administration for Children's Services ("respondent"), with an unlawful discriminatory practice 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. Thereafter, the Division referred the cases to a Public Hearing.

After due notice, the case came on for a Public Hearing before Robert J. Tuosto, an Administrative Law Judge of the Division.

A Public Hearing was held on January 8-12, 2007. Complainant appeared at the Public Hearing. Paula Johnson Kelly, Esq., represented complainant. Jennifer Paganucci, Esq., and Susan Starker, Esq., represented respondent.

The parties were granted permission to submit Post-Hearing Briefs. Counsel for both parties timely filed Post-Hearing Briefs.

#### **FINDINGS OF FACT**

1. Complainant, who is biracial and light-skinned, alleged that, while employed by respondent she was the subject of a superior's derogatory comment made in her presence concerning the advancement within the agency of other light-skinned employees. Complainant complained about this comment and further alleged that she suffered retaliation when her superior and coworkers no longer spoke with her, that she had a portion of her pay wrongfully withheld, that she was transferred, that she became the subject of rumors at her new work location, and that she was eventually laid off. (ALJ Exhibit 3; Complainant's Exhibit 3, ¶ 1; Tr. 15)

2. Respondent is a New York City municipal agency whose responsibility extends to, among other things, the maintenance of group homes for some members of its resident population. In its verified Answer, respondent denied unlawful discrimination. (ALJ Exhibit 4; Tr. 388-89)

3. In September, 1999, complainant began working for respondent as a Child Welfare Specialist ("CWS"). Complainant's appointment to this position was "provisional". As such, provisional employees did not have a probationary period or rights during budgetary lay offs. (Tr. 17, 19, 20, 21-22, 252, 253-254, 256, 755, 830, 1079, 1084, 1087)

4. Complainant's first work evaluation for the period September, 1999 to March, 2000, rated her as "good" and recommended her retention. Complainant's second evaluation for the period April, 2000 to March, 2001, rated her as "very good" and also recommended her retention. In March, 2001, complainant was formally commended for her work performance. Complainant's third evaluation for the period April, 2001 to March, 2002, rated her as "outstanding", the highest of six possible ratings; the evaluation also described her as a "model" CWS and a "perfect candidate for promotion". (Complainant's Exhibits 1, 3, 5, 6; Tr. 33, 37, 43, 668, 955)

5. In September, 2000, complainant started attending school while employed by respondent. In early 2001, complainant registered with respondent's Professional Development Program ("PDP") which allowed municipal employees educational release time to attend classes for up to seven hours during work days. Employees were to be recommended and approved for release time by their superiors prior to each semester. (Complainant's Exhibits 10, 11, 12; Tr. 49-55, 56-57, 225, 258, 805, 992)

6. In early 2002, complainant requested a transfer due to travel hardships that she was experiencing. On September 23, 2002, complainant was transferred to respondent's Adult Operated Boarding Home ("AOBH") facility located at 178<sup>th</sup> Street in the Bronx. At that time complainant was registered for college classes. (Complainant's Exhibit 13; Tr. 57-61, 64-65, 70, 226, 259, 669)

### Complainant's Transfer to the AOBH

7. Complainant testified that on her first day of work at the AOBH she overheard her immediate supervisor engaged in a conversation with another person while all three were in a common area of the facility. During the conversation the supervisor, Julie-Ann Harris, allegedly made a comment to Program Reviewer Beverly Mathieu that respondent's light-skinned employees were being promoted because of their lighter skin color. Both Harris and Mathieu credibly denied that this comment was made. (Complainant's Exhibit 42; Tr. 74-78, 228, 265, 271, 273, 275, 335, 361-62, 547-48, 613, 644, 1063-64, 1069)

8. On September 27, 2002, complainant made a formal complaint concerning Harris to respondent's Office of Equal Employment Opportunity ("OEEO"). Specifically, complainant referenced the alleged comment concerning lighter-skinned employees, and a purported instruction by Harris to AOBH staff that they not speak to complainant. Complainant was directed to discuss this matter with her supervisors in an attempt to resolve it at that level. (Complainant's Exhibits 15, 18, 42; Tr. 78, 79-80, 84-85, 88-89, 239, 271)

9. Rather than conduct casework, complainant's work responsibilities at the AOBH consisted of cleaning, preparing meals and escorting residents. Harris, in response to complainant's request for cases, replied that complainant was to "*follow behind*" other CWS's, and that everyone in the AOBH was expected to clean and cook. CWS Supervisor David Reznik undertook an investigation of the matter which revealed that Harris' position was that complainant needed to get to know cases better before being allowed to act on her own. Harris also denied the racial comment, and the allegation that she directed others not to speak or cooperate with complainant. Other employees and residents at the AOBH corroborated Harris' denial. Reznik found that it was standard operating procedure for complainant not to receive

cases as a way for her to get a feel for the AOBH. Moreover, the period in question was a slow period with six CWS's servicing just four residents. (Tr. 80, 91, 101, 275-76, 280-81, 282, 487, 532, 591, 592, 610-11, 613, 617, 619-20, 637, 644, 679, 811-12)

10. Reznik was made aware of tension and personality conflicts in the AOBH between complainant and Harris, and that complainant misinterpreted the comment by Harris that others in the AOBH shouldn't talk with her. Harris informed Reznik that complainant did not listen to her, and that she would not cooperate with coworkers. Reznik concluded that complainant and Harris just could not get along. (Tr. 461-65, 466-68, 477, 480-81, 483, 484-88, 489, 490-92, 493, 494-95)

11. On October 17, 2002 and October 23, 2002, Reznik and Harris admonished complainant for going outside the chain of command when transmitting correspondence to those other than her immediate supervisor. Reznik interpreted this act by complainant as a resistance to supervision. (Complainant's Exhibits 16, 17; Tr. 95-98, 233-34, 279, 452-58, 470, 471, 492, 499, 633, 639, 815-16, 1106-24, 1132, 1142-43)

12. On November 2, 2002, Harris marked complainant "AWOL" for having not worked even though she had started school on that day. Complainant was docked one day's pay, filed an internal complaint with timekeeping, grieved this issue, and was eventually reimbursed in May, 2003. (Complainant's Exhibits 21, 22, 26, 27, 28, 29, 30, 31, 32; Tr. 124-26, 131-33, 148, 149, 151, 152, 155, 158-63, 245, 284, 448-52, 594-96, 627, 769, 770, 807-11, 862-900, 992-95)

13. On November 8, 2002, complainant met with William Fletcher, the former Borough Director for Bronx Congregate Care, to complain about her treatment when Harris did not grant her release time, the status of her OEEA complaint, and not having been assigned cases. In

response to his inquiry, Reznik informed Fletcher that although complainant had not been assigned any cases at the AOBH, everyone there denied the alleged discriminatory statement by Harris. (Tr. 901, 968-76)

14. On November 18, 2002, complainant wrote a memo to the former Chief of Staff to the Director of Congregate Care Services, Julie Zuckerbraun, in which she complained of an “*unwarranted hostile work environment*”, “*harassment*” and an “*abuse of power*” concerning her experiences at the AOBH. Zuckerbraun informed complainant that she needed to go through her chain of command in addressing this problem. Ultimately, Zuckerbraun concluded that complainant was a “*difficult*” employee. (Complainant’s Exhibit 21; Tr. 118-26, 1010-12, 1023-27, 1030, 1038)

#### **Complainant’s Transfer to Crossroads**

15. On December 3, 2002, complainant had a meeting with respondent’s Deputy Director, Lorna Phoenix, in which she was told that she was to be transferred from the AOBH to respondent’s Crossroads Group Facility (“Crossroads”) located at 229<sup>th</sup> Street in the Bronx, effective December 8, 2002. The transfer was designed for the complainant to “*start over*” and “*resolve the problems*” at the AOBH. Complainant had requested a transfer to this facility in April, 2002. (Complainant’s Exhibits 13, 25; Tr. 139-46, 163-64, 179, 248, 251, 287, 288, 446, 682, 826-28, 920-28)

16. At first, Complainant had limited work responsibilities while at Crossroads but then she eventually received a full caseload. Additionally, employees at Crossroads accused complainant of causing problems at the AOBH, and some coworkers chose not to talk with her. One coworker labeled complainant a “*troublemaker*”. Complainant credibly testified to having

problems with coworkers at Crossroads and complained about one incident in a memo to her superior. Reznik recognized that there were personality conflicts between complainant and employees at Crossroads. Moreover, complainant's supervisor at Crossroads also testified that complainant had personality differences with several coworkers. (Complainant's Exhibit 49; Respondent's Exhibit A; Tr. 165, 167, 169-70, 171, 172, 173, 496, 497-99, 717, 722, 750-51, 753, 1091-94, 1095-98)

17. On December 10, 2002, complainant's OEEO complaint was closed with a finding that, "...a negative employment action (demotion, termination, etc.) that would have adversely affected Ms. Swanson...did not occur." (Complainant's Exhibit 42)

#### **Complainant is Laid Off**

18. As a result of fiscal constraints, nearly one half of all workers in Bronx Congregate Care were laid off. Additionally, several residences were also closed. (Tr. 831, 1013-14)

19. Prior to the lay offs, respondent instituted a plan to minimize the disruption to its residents by retaining those workers who could effectively perform as part of a "skeleton crew". The selection of provisional employees that were to be laid off was considered in light of labor relations criteria and civil service practice. (Complainant's Exhibit 33; Tr. 937, 1013-15)

20. In May, 2003, Complainant was one of twelve employees at Crossroads laid off due to budgetary cutbacks. The lay offs included three out of the four people in complainant's unit. All provisional employees were eligible to be laid off, and complainant was chosen to be laid off because, in addition to her failure to obey the chain of command, she was thought to be "difficult", "quite resistant to supervision", and "not a team player". Employee work

evaluations were not considered in the decision concerning lay offs. (Complainant's Exhibits 33, 34; Tr. 175-76, 180, 248-49, 650, 683, 725, 753, 829-33, 840-46, 847, 855, 935-46, 957, 958, 959, 960, 962, 965, 966, 983-84, 987, 997, 999, 1002)

### DECISION AND OPINION

Complainant asserted that respondent unlawfully discriminated against her on the bases of race/color, retaliation and creating a hostile work environment. Respondent denied engaging in unlawful discrimination.

For the reasons which follow, I find that complainant failed to prove her case.

Human Rights Law § 296 (1) (a) and (e), states, in pertinent part, that it shall be an unlawful discriminatory practice for an employer, "...because of the race...of any individual...to discriminate against such individual in compensation or in terms, conditions, or privileges of employment." or, "...to otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."

In discrimination cases a complainant has the burden of proof and must, at the outset, establish a prima facie case of unlawful discrimination. A complainant's burden in establishing a prima facie case has been found to be 'de minimis'. Schwaller v. Squire Sanders & Dempsey, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1<sup>st</sup> Dept., 1998). Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and non-discriminatory. Should a respondent articulate a legitimate, non-discriminatory reason for its actions, 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 Servs. Corp., 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept., 1999).

**Complainant's Discrimination Claim Based on Race/Color**

Complainant cannot prevail on this claim.

In a "mixed motive" case, the burden is on a complainant to show that an illegitimate factor played a motivating or substantial role in a respondent's employment decision. If a complainant presents sufficient evidence to support an inference of impermissible discrimination, the burden shifts to the employer to overcome the prima facie case by showing that the employment decision would have been reached in the absence of that impermissible motive. Allen v. Domus Development Corp., 273 AD2d 891, 709 NYS2d 776, 777 (4<sup>th</sup> Dept 2000), quoting Michealis v. State of New York, 258 AD2d 693, 694, 685 NYS2d 325, 326 (3d Dept 1999), lv denied 93 NY2d 806.

Complainant argued at both the Public Hearing and in her 'Post Hearing Memorandum' that her lay off was impermissible given that another similarly-situated CWS's outside of her protected class were not so treated.

However, respondent proffered several reasons in overcoming the prima facie case which allowed respondent to permissibly seek complainant's lay off. Respondent's intent in effectuating the lay off was to have the least amount of disruption to its resident population by retaining those employees with a demonstrated ability to work cooperatively. By contrast, the record revealed that complainant was admonished for having gone outside the chain of command, and nonetheless continued this behavior despite the admonition. Complainant was also viewed as a difficult employee who was resistant to supervision. As a result, respondent

chose not to retain complainant in order to best service its resident population in the wake of the  
layoff.

### **Complainant's Discrimination Claim Based on a Hostile Work Environment**

Complainant cannot prevail upon this claim.

To prevail on a hostile environment claim, complainant must show that: 1) the workplace was permeated with discriminatory intent, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment; and 2) a specific basis exists for imputing the conduct that created the hostile environment to respondent. Kodengada v. International Business Machines Corp., 88 F. Supp.2d 236 (2000). In the end, determining whether work place harassment was severe or pervasive enough to be actionable depends on the totality of the circumstances. Novak v. Royal Life Ins. Co. of New York, 284 A.D.2d 892, 726 N.Y.S.2d 784 (3d Dep't., 2001).

Here, complainant testified to a series of events including Harris' alleged statement, lacking cooperation from coworkers, failing to receive cases, and being transferred to Crossroads. Additionally, complainant also testified that she was the subject of rumors and further uncooperative treatment by coworkers at Crossroads.

The record shows that complainant had repeated personality conflicts with coworkers. Further, even if one were to assume that these conflicts were directed at complainant because of her race and color, there can be no recovery under a hostile environment theory. Under the totality of the circumstances, complainant was exposed to, at best, petty and annoying conduct in the form of uncooperative and/or rumor-mongering coworkers. Additionally, I conclude that the comment by Harris--which supposedly triggered subsequent events--did not happen. Finally, there were entirely plausible explanations for both the complainant not receiving cases, as well

as her transfer to Crossroads. Ultimately, the work environment to which complainant was exposed may not have been perfect but it did not constitute one that was hostile.

### **Complainant's Discrimination Claim Based on Retaliation**

Complainant makes out a prima facie case.

To make out a prima facie case, complainant must show that: 1) she engaged in protected activity protected by statute; 2) respondent was aware she engaged in the protected activity; 3) she suffered an adverse employment action based upon her activity; and 4) there is a causal connection between the protected activity and the adverse employment action. Pace, 692 N.Y.S.2d 220.

Complainant engaged in protected activity of which the respondent was aware when she filed her OEEEO complaint in September, 2002; complainant suffered an adverse employment action when having her pay wrongfully withheld; and there was a causal connection between the filing of the complaint and her pay being wrongfully withheld some two months later.

Respondent showed that the wrongful withholding of complainant's pay was a bureaucratic oversight rather than a product of discriminatory animus. Complainant was eventually paid the one day's deduction in pay.

In response, complainant was unable to prove that the real reason for the withholding of her pay was, in fact, a product of unlawful discrimination.

Complainant's transfer and her eventual lay off cannot be considered in this analysis since too much time has elapsed between the filing of her OEEEO complaint (September, 2002), and the date of the transfer (December, 2002) or lay off (May, 2003). Id. at 225 (in which an absence of evidence that alleged retaliatory acts took place within two months of complaint was deemed not proximate enough to establish the causal connection element).

Neither the lack of cases received while at the AOBH nor the uncooperativeness of

coworkers at that facility constituted adverse employment actions. To sustain an adverse employment action a complainant must "endure a 'materially adverse change' in the terms and conditions of employment". Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir., 2001). In order for the actions to be "'materially adverse', a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l. Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7<sup>th</sup> Cir., 1993). In short, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir., 2002).

Therefore, complainant cannot prevail upon this claim.

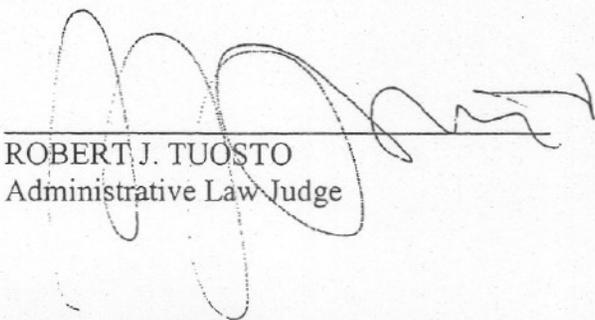
In conclusion, most of complainant's complaints against respondent appeared to be rooted in personality conflicts with coworkers. The Human Rights Law, as with its Title VII federal analogue, does not set forth a "general civility code for the American workplace." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998); see B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "snubbing" by supervisors and coworkers are not actionable). Complainant cannot prevail in the absence of proof that the conduct in question rose to the level of unlawful discrimination.

### ORDER

Based on 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 complaint be, and the same hereby is, dismissed.

Dated: April 25, 2007  
Bronx, New York

  
ROBERT J. TUOSTO  
Administrative Law Judge