

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

REVA C. THOMAS,

Complainant,

v.

CITY OF NEW YORK, DEPARTMENT OF
HEALTH & MENTAL HYGIENE,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10115425

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 30, 2008, 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.

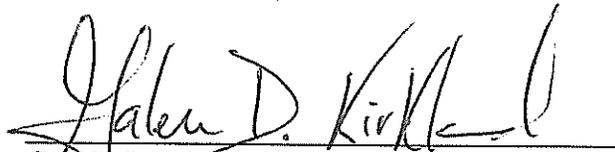
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **AUG 11 2011**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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DIVISION OF HUMAN RIGHTS**

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on the Complaint of

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**CITY OF NEW YORK, DEPARTMENT OF
HEALTH & MENTAL HYGIENE,**

Respondent.

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

Case No. 10115425

SUMMARY

Complainant alleged that she was exposed to a hostile work environment by her superior, and demoted from her civil service position on account of race. However, Complainant has failed to prove her claims and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On January 2, 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 Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on May 7-8, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by David Broderick, Esq., Forest Hills, New York, by Desiree Garber, Esq., of counsel. Respondent was represented by Michael Cardozo, Corporation Counsel of the City of New York, by Robert J. Anderson, Esq., Assistant Corporation Counsel.

Permission to file post-hearing briefs was granted and both sides filed post-trial Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Complainant alleged that she was exposed to a hostile work environment by her superior, and demoted from her civil service position on account of race. (ALJ Exh. 2)
2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 4)

Background

3. In April, 2001, Complainant, who is African-American, was hired by Respondent in the civil service title of Public Health Advisor ("PHA"). (ALJ Exh. 2; Tr. 11, 14)
4. In August, 2005, Complainant was interviewed for the position of Public Health Epidemiologist ("PHE"). I do not credit Complainant's testimony that she was offered this position during the interview, that the offer was rescinded and then renewed after a threat of legal action. (Tr. 19, 20, 23, 25, 28, 30, 31, 391, 392, 394,)
5. In October, 2005, Complainant was promoted to the position of PHE. (Tr. 12, 18, 400, 401, 402)
6. In late December, 2005, Complainant started working in the position of PHE after having been reassigned to another unit for the prior two months. (Tr. 33, 34, 276)

Complainant Begins Work as a PHE Under Barbara Shields

7. Complainant's superior as a PHE was Field Services Manager Barbara Shields. Ms. Shields is Caucasian. (ALJ Exhibit 2; Tr. 34-35, 270)

The March, 2006 Memo From Shields

8. On March 22, 2006, Shields sent Complainant a memo concerning work assignments. The memo stated that a "critical component" of Complainant's primary work responsibilities consisted of analyzing, generating and comparing statistical data; Complainant was to receive additional Excel computer program training to help her in this regard. Additionally, Complainant was expected to keep Shields informed of her activities and inquire of her when issues arose; remain focused and attentive to detail including limiting non-work related activities such as personal telephone calls and e-mails; adhere to her "flex" work schedule arrival time of 8:30-9:00 a.m.; improve in her ability to perform analytic research and make logical conclusions; and meet unit deadlines. (Complainant's Exh. 2; Tr. 295, 295-315)

9. In April, 2006, Complainant received Excel training despite having previously represented on her resume that she was computer literate in several computer programs including Excel, and that "basic" Excel skills were all which was required of her as a PHE (Respondent's Exhs. 1, 2; Tr. 145, 146, 150, 279, 408)

Complainant's April, 2006 Performance Evaluation

10. On April 28, 2006, Complainant received a performance evaluation for the period January 1-April 27, 2006. The evaluation rated her as "Conditional (Needs Improvement)". Complainant agreed with Shields' assessment that her work performance needed improvement. Complainant checked off a box on this form noting that she did not intend to appeal the

evaluation. The justification for this rating by Shields included the comment about Complainant that, "She has been consistently late, despite being offered several times that she could change her flex hours to accommodate her personal needs." Shields chose not to rate Complainant as "Unsatisfactory" because she wanted to give her more time to be able to do the job. (Complainant's Exh. 3; Tr. 143, 144, 244, 294, 316, 317, 336, 337)

11. Complainant conceded that she was late to work approximately ten times during a period of three months. I credit Shields' testimony that lateness was an issue because the unit was small and one late employee impacted another employee's ability to get their work done, and because repeated lateness by one member of the unit sent a different message to others in the unit who were expected to be on time. No one else in Complainant's unit had time and attendance problem despite Complainant being the only one with a "flex" work schedule. (Respondent's Exhs. 3, 4; Tr. 159-67, 237, 246, 285, 286, 290, 343, 450, 452) •

The May, 2006 Memo From Shields to Complainant

12. On May 31, 2006, Complainant received a memo from Shields concerning her work assignments. The memo stated, among other things, that Shields had not seen any improvement in Complainant's work performance despite her having received "...a great deal of..." in-house training, including Excel training. The memo also reminded Complainant to adhere to her stated work schedule; that she should not be sidetracked by socializing, personal e-mails and the use of her computer for non-work related activities; and that failure to improve by the time of her six month evaluation would cause her to be returned to her PHA title. (Respondent's Exh. 8; Joint Exh. 1; Tr. 242, 239, 280, 319, 339)

Complainant's July, 2006 Performance Evaluation

13. On July 7, 2006, Complainant received a performance evaluation for the period March 30-June 30, 2006. The evaluation rated her as "Unsatisfactory". The justification for this rating by Shields included the comment that,

"Ms. Thomas has not demonstrated that she possesses the skills, aptitude, experience or interest in performing up to the level expected of this title, despite numerous opportunities provided to her that would enable her to perform within the tasks and standards of this title. Her analytic skills are lacking, the work performed, including reports, consistently contain errors and the data is not reliable. She is disorganized and unfocused and does not possess the ability to multi-task or adapt to the hectic pace and changing priorities of the unit."

(Complainant's Exh. 6; Tr. 281, 283, 297-98, 306, 308, 309-10, 312, 313, 316, 317, 322, 326, 334, 335, 341, 342)

Complainant is Demoted

14. Complainant's work relationship with Shields was neither a "positive" nor "good" one, and resulted in a breakdown in communications. However, I do not find that Shields was "condescending" on several occasions to Complainant, that Complainant failed to receive both Excel training and tasks and standards for the PHE position, that Shields used inappropriate language in the workplace suggestive of racial animus, that a comparator outside Complainant's protected class was favorably treated, and that Shields was unavailable to Complainant. I also do not find that Complainant's evaluations and subsequent demotion were based on race. (Tr. 35, 41, 43-44, 51, 53-54, 55, 56, 59, 61, 62, 63, 71, 72-75, 77, 78, 79, 82, 88, 115-18, 121, 211, 212, 214, 216, 220, 223, 225, 226, 228, 229, 231, 232, 239, 272, 273, 320, 322, 346, 348, 350, 353, 373, 405, 439-41, 444, 445)

15. On July 10, 2006, Complainant was demoted to her PHA title, with a consequent diminution in her salary; no one replaced her in this position. (Complainant's Exhs. 4, 13; Tr. 99, 123, 235, 244, 428, 430)

Complainant Files Her Division Complaint

16. On January 2, 2007, Complainant filed her Division complaint. (ALJ Exh. 2)

OPINION AND DECISION

The Human Rights Law makes it 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." Human Rights Law § 296.1(a).

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 articulate, via admissible evidence, 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 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 working environment. *Forrest v. Jewish Guild for the Blind*, 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 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 on 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.

In order to establish a prima facie case based on protected class membership in an employment context, a complainant must show: 1) membership in a protected class; 2) that they were qualified to hold the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Ass’n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997).

Here, Complainant failed to prove that her problematic work relationship with Shields rose to the level of a hostile environment. While it is true that Complainant and Shields experienced a personality conflict, such a thing is not the same as being exposed to a hostile environment. For instance, the belief that Complainant was condescended to by Shields--even if true--is not an example of conduct that fits the definition of a hostile environment, i.e., it was neither physically threatening nor abjectly humiliating, did not directly interfere with Complainant’s work performance, and was apparently limited in its frequency and severity.

Thus, this claim must be dismissed.

Likewise, Complainant fails to make out a prima facie case based on race¹. Complainant was clearly a member of a protected class. However, Complainant failed to show that she was qualified to hold the PHE position. The record is replete with examples showing that Complainant's evaluations and subsequent demotion were a result of her inability to do her job, including several work performance shortcomings which she herself conceded. Thus, this claim must also be dismissed.

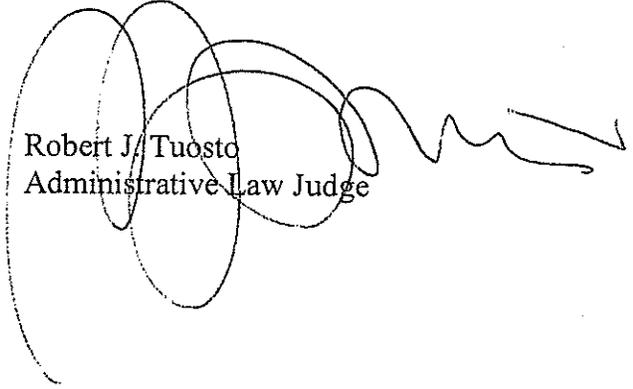
Therefore, the complaint must be dismissed.

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 complaint is, and the same hereby be, dismissed.

DATED: June 30, 2008
Bronx, New York


Robert J. Tuosto
Administrative Law Judge

¹ It should be noted that Complainant's assertion of race discrimination as to the rescission of the PHE position in August, 2005 was a discrete act and, as such, beyond the applicable one year statute of limitation. See Human Rights Law § 297.5.