

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHERRY THOMAS,

Complainant,

v.

**G. B. H. INTERNATIONAL CORPORATION
(NICK GENENDER),**

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 2301410

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on March 22, 2007, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Lilliana Estrella-Castillo, an Administrative Law Judge of the New York State Division of Human Rights ("Division").

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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 2nd day of May, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

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Jersey City, NJ 07305

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Chief Calendar Clerk

STATE OF NEW YORK
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS

on the Complaint of

CHERRY THOMAS,

Complainant,

-against-

G. B. H. INTERNATIONAL CORPORATION and
NICHOLAS GENENDER,

Respondents.

ALTERNATIVE
PROPOSED ORDER

Case No.

1A-E-R-92-2301410

Complainant alleged that Respondents subjected her to a hostile work environment because of her race and then retaliated against her for opposing discrimination. The evidence demonstrates that Complainant was discriminated against but not retaliated against. She is awarded \$15,000 in mental anguish damages.

PROCEEDINGS IN THE CASE

On March 9, 1992, Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights ("Division") charging Respondents with an unlawful employment practice in violation of the Human Rights Law of the State of New York.

On May 6, 1994, the complaint was amended to correctly name G.B.H. International Corporation. (A.L.J.'s Exhibit II). On April 27, 2004, the complaint was again amended to correctly name Nicholas Genender and to add a charge of retaliation. (Tr. 6-10).

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that Respondents had engaged in an unlawful employment discriminatory practice. Thereafter, the Division referred the case to public hearing.

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge ("A.L.J.") of the Division.

A hearing was held on April 27, 28, and November 8, 2004. The complaint was represented by the Division through Veanka McKenzie, Esq., of Counsel. Respondent Genender was represented by Elliot H. Fuld, Esq. Respondent G.B.H. International Corporation stopped doing business in 1994 and was dissolved by proclamation on December 27, 2000. (A.L.J.'s Exhibit VIII). It did not appear at the public hearing and did not file an answer to the complaint and, therefore, is in default. (Tr. 301).

Post-hearing briefs were timely filed by the Division and on behalf of Nicholas Genender on January 31 and February 1, 2005, respectively.

On June 20, 2006, ALJ Estrella-Castillo issued a recommended Findings of Fact, Opinion, Decision and Order ("Recommended Order") for the Commissioner's consideration. Objections to the Recommended Order were filed by Division Counsel dated July 10, 2006.

FINDINGS OF FACT

1. Complainant, an African-American woman, alleged that Respondents discriminated against her in employment based on her race when Respondent Nicholas Genender subjected her to a hostile work environment and that thereafter, Respondent retaliated against her for opposing the alleged discrimination by reducing her salary and then terminating her employment. (A.L.J.'s Exhibit I).
2. Respondent Genender denied discrimination. (A.L.J.'s Exhibits II, V.) Respondent G.B.H. International Corporation did not submit an answer and is in default.

3. Respondent G.B.H. International Corporation ("GBH") was a sportswear clothing wholesaler and importer. (Tr. 207). Respondent Genender was a principal of Respondent GBH. (Tr. 22, 241).

4. Complainant is African American. (A.L.J.'s Exhibit I; Tr. 87). She worked in the fashion industry for almost twenty years before being hired by Respondents. Initially, she was a fashion model. She then worked in retail and then wholesale. (Tr. 22-25). In 1990, Complainant was recommended by Michelle McKinley, a friend, and Respondent Genender's girlfriend, to GBH for a sales position. (Tr. 25-26, 32, 270). McKinley was already an employee of Respondent. Complainant interviewed for the position with the principals of the company, Respondent Genender and Geoffrey Hunter, both of whom are Caucasian. (Tr. 207, 230, 241-242, 270-271, 297). Complainant was hired as a salesperson at a salary of \$50,000.00. (Tr. 22, 27, 88, 90-91, 207, 244). Complainant's duties while employed by Respondents were to make sales from an existing list of buyers and develop her own client list by cold-calling. (Tr. 22, 28-29, 245).

5. Respondent GBH employed three salespersons, and each was hired to sell to a different market. Complainant was hired to sell for juniors and ladies. (Tr. 22, 269). Michelle McKinley sold for children and kids, and was also in merchandizing. (Tr. 269). Margaret York, who was a short-term employee, was employed to explore a new men's market. (Tr. 157-158). Jane Geogham was employed by an affiliated company, State of the Art, and sold to all markets. (Tr. 174, 196).

6. All of the salespersons worked more or less the same hours and worked through lunch, with the employer paying for lunch on most days. (Tr. 28-29, 104-105, 218, 248). Maggie Warren, testified that, "we were like a family" and it was a normal day to make "Irish or black jokes or Jewish jokes." (Tr. 173, 178).

7. Complainant credibly testified that on three occasions, Respondent Genender used the word nigger in her presence. On one occasion, in June of 1991, a temporary receptionist was listening to rhythm and blues music on the radio. Respondent Genender walked by and commented, "I wish they would stop playing that nigger music." Complainant did not say anything about that incident at that time. (Tr. 50, 69, 136).

8. On another occasion, on December 12, 1991, a group of African-American potential buyers had come to the showroom. Complainant went into Genender's office to get him to meet with the buyers when he commented that "all niggers look alike." He then failed to come out and meet with the potential buyers. (Tr. 45-46, 51-52, 110). On this occasion, Complainant asked Respondent Genender to refrain from using that language. He just stared at her in response. (Tr. 54-56).

9. On a third occasion, on January 7, 1992, Complainant overheard Respondent Genender comment to Geogham, "So I heard there was (sic) a slew of niggers here last night." This comment was made after a group of African-American buyers had been in the showroom the previous evening. (Tr. 56-57, 110).

10. Hunter testified that Respondent Genender made "off color jokes," but he never heard him use the term "nigger" or any other racial slur. (Tr. 214, 230). McKinley testified that nothing was done to her or to anyone in her presence that was unprofessional. (Tr. 276).

11. Warren testified that she never heard Respondent Genender make any offensive comments. (Tr. 179-180). However, an April 15, 1994, Division investigation report indicates that Warren told the Division investigator that Respondent Genender was an "ignorant individual" and that she heard him refer to people as "niggers, white trash [and], kikes." She also indicated that she was aware of Respondent Genender's comment that there were a "slew of niggers here last night."

The report indicates that according to Warren, Respondent Genender “would make derogatory comments against any group.” (Complainant’s Exhibit 2).

12. At the hearing, Warren denied that she made those statements. Nor could she recall having been present for the Division investigation. (Tr. 180, 202). It is not apparent why she would deny the statements, however, there is no reason to doubt the credibility of the investigation report made in the ordinary course of the Division’s business and contemporaneously with the investigation conference. (Complainant’s Exhibit 2; Tr. 247).

13. The ALJ cites the testimony of Tyrone Christopher Ross, Complainant’s brother, that he accompanied Complainant to the two party-conference and testified that someone named “Maggie” was at the conference. However, he identified Maggie as Caucasian, while the Maggie Warren that appeared and testified at the hearing was African-American. (Tr. 166, 324-325). This, however, is not persuasive of the fact that the Maggie Warren who testified at the hearing was not the Maggie Warren who participated in the investigation conference. It was a two-party conference and surely Respondent would have indicated to the Division investigator that the Maggie Warren who was there was not its employee had that been the case. Accordingly, Warren’s statements made at the investigation conference are credited. Moreover, Warren testified at the hearing that Irish, black and Jewish jokes were indeed made in the office, only lending further credence to Complainant’s claims. (Tr. 173, 178).

14. York, a Caucasian salesperson also testified to a time when Respondent Genender entered the office and said, “turn that *schvarta* music off.” (Tr. 146). York testified that he made such comments on more than one occasion. (Tr. 155).

15. As to the racially derogatory comments, Complainant credibly testified that she found them offensive. (Tr. 55). She found it difficult to face an African-American buyer “and I am to say,

yes, you should buy from us because we have got the product, but my boss back there is calling you nigger.” She felt like she was not viewed as a professional, that all Respondent Genender saw in her was a stereotype. She felt dehumanized and belittled. She stated that it hurt her psyche. “It killed my self-esteem to have to walk back out there and stand there and try to do a job that I was so pressured to do, while just a minute ago my boss was telling me that all niggers look alike.” (Tr. 52-53). She testified that her self-esteem “was pretty much broken and torn.” (Tr. 64). She actually felt relieved when her employment was terminated because she felt she could move on after going “through a whole year of being dehumanized ...” (Tr. 62). She also, however, felt depressed about the prospect of looking for a new job in that industry and ultimately decided not to return to the business. (Tr. 71-72, 75). She spent a lot of time in her apartment and did not want to come out. She felt angry and bitter. (Tr. 76). York testified that she observed Complainant’s confidence decline over the course of time. She stated, “I saw a breakdown of a person,” referring to how the work environment effected Complainant. (Tr. 150). She observed that Complainant was sad. (Tr. 151).

16. On June 14, 1991, Complainant’s salary was reduced to \$40,000. Complainant alleged that her salary was reduced as a result of her complaint to Respondent Genender about his use of the word nigger, and not because her sales “were not good” as Hunter told her. (Tr. 48-49, 105, 307). She stated, “The salary reduction came once I had spoken to Nick about the racial slurs.” (Tr. 50). However, Complainant contradicted her own testimony, because she testified that she did not complain to Respondent Genender until December of 1991, six months after her salary had already been reduced. (Tr. 105, 307).

17. Hunter and Respondent Genender testified in connection with the yearly sales volume for each of the sales personnel. Complainant’s annual sales were \$163,099.55. (Tr. 260-262).

McKinley's annual sales were between two and three million dollars, and Geogham's were between five and ten million dollars. (Tr. 249, 279). McKinley's and Geogham's annual salaries were \$80,000.00 each. (Tr. 298). Complainant did not rebut this testimony, although she produced a list of the accounts she purportedly serviced. Complainant's list shows a sales total of \$637,285.00 for the same time period. (Complainant's Exhibit 1; Tr. 77-78). Complainant agreed that not all the accounts on her list were hers, which is consistent with Respondents' witnesses' testimony. For example, the "kids and children" accounts appearing on the list actually belonged to McKinley. (Tr. 132, 209-210, 279, 311-320). A review of the list reveals that Complainant made duplicative entries. For example, on page 5, line 39, a sale was recorded to Charming on October 17th in the amount of \$11,700. Then, the same sale is recorded on page 6, line 29, to Charming on October 17th for the same amount, \$11,700. (Complainant's Exhibit 1). Thus, Complainant's list is unreliable and, therefore, of no probative value. Therefore, it is probable that Respondents' sales total is more accurate than Complainant's. It is noted that Complainant failed to produce any relevant concurrent documents to support her allegations. (Tr. 314-317).

18. Hunter testified that on June 14, 1991, because GBH's financial backers were unhappy with Complainant's sales, Hunter was told to either put pressure on Complainant to improve or terminate her services. Hunter reduced Complainant's salary to \$40,000 and gave her six months to improve her sales or look for another job. (Tr. 48, 105, 252, 254-255, 291, 307). Complainant denied that she was told she had six months to look for another job but agreed that she was told her sales were not sufficient and "that it wasn't working out." (Tr. 105, 307). Six months later, on January 11, 1992, Hunter terminated Complainant's employment because Complainant showed no improvement. (Tr. 61, 256, 260-262, 291).

19. During the time that Complainant was employed by Respondents there were four other African-American employees. Complainant was the only African-American salesperson. (Tr. 125, 166-168, 179, 185-188, 217). According to Complainant because she was the only African-American salesperson, she did not receive the support that she needed in order to do her job, and was "obstructed" and "sabotaged" in her sales to big accounts, such as J.C. Penney and Eddie Bauer. (Tr. 36-42, 45, 99-100, 115-116).

20. Complainant failed to articulate why Respondents would sabotage her sales. As a salaried employee, Respondents would be the only ones to benefit from Complainant's sales. (Tr. 99-100, 122). Thus, common sense dictates against such sabotage. Respondent Genender testified that they would have offered Complainant assistance in acquiring a large account, because it would have benefited Respondents, but did not recall that Complainant was trying to acquire a J.C. Penney account. (Tr. 267, 272). Hunter testified they would not have assisted Complainant in acquiring the Eddie Bauer account because Respondents' financial backers had told them that the account was off limits to Respondents. (Tr. 210-211).

21. Complainant claimed that she was excluded from meetings, but Complainant and York could only point to one meeting that Complainant was not invited to attend. (Tr. 48, 158). The meeting was called at York's request and, according to York's testimony, did not concern Complainant. Therefore, there was no reason for Complainant to be there. (Tr. 141-142, 144-146, 157-158). York also agreed that there were meetings in which York, who is Caucasian, was not invited to participate. (Tr. 159).

DECISION AND OPINION

Complainant alleged that Respondents unlawfully discriminated against her by subjecting her to a hostile work environment based on her race in violation of the Human Rights Law. Complainant

also alleged that Respondent retaliated against her for opposing discriminatory practices. The Division finds that Respondent did discriminate against Complainant by subjecting her to a hostile work environment, but did not retaliate against her.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual because of her race. Human Rights Law §296.1(a).

“It is an unlawful discriminatory practice to discriminate against an individual because of race or national origin in the ‘terms, conditions or privileges of employment’ . . . including where, as here, an employee is the victim of racial or ethnic insults and harassment.” *Broad Elm Auto Ctrs., Inc. v. New York State Div. of Human Rights*, 159 A.D.2d 978, 552 N.Y.S.2d 763 (4th Dept. 1990).

“A ‘hostile work environment’ exists when, as judged by the reasonable person, it is permeated with ‘discriminatory intimidation, ridicule, and insult’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the [complainant’s] employment.’” *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d at 802. Whether a workplace may be viewed as hostile or abusive, from both a reasonable person’s standpoint as well as from the victim’s subjective perspective, can be determined only by considering the totality of the circumstances. *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996), *appeal denied*, 647 N.Y.S.2d 652 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). *See also*, *Harris v. Forklift Systems*, 510 U.S. 17, 114 S. Ct. 367 (1993) and *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986).

In the instant case, Respondents subjected Complainant to a hostile work environment when over the course of a year, Respondent Genender repeatedly used the incredibly offensive term “nigger” in Complainant’s presence even after she requested that he stop. His actions were both severe enough and pervasive enough to constitute a hostile work environment. As a result of his behavior, the

conditions of Complainant's employment were altered because she found it difficult to face an African-America buyer "and . . . say, yes, you should buy from us because we have got the product, but my boss back there is calling you nigger." She felt like she was not viewed as a professional, that all Respondent Genender saw in her was a stereotype. She felt dehumanized and belittled. She stated that it hurt her psyche. "It killed my self-esteem to have to walk back out there and stand there and try to do a job that I was so pressured to do, while just a minute ago my boss was telling me that all niggers look alike." She testified that her self-esteem "was pretty much broken and torn." She actually felt relieved when her employment was terminated because she felt she could move on after going "through a whole year of being dehumanized . . ." York testified that she observed Complainant's confidence decline over the course of time. She stated, "I saw a breakdown of a person," referring to how the work environment effected Complainant. She observed that Complainant was sad.

Complainant is entitled to compensatory damages for the mental anguish she suffered as a result of Respondent Genender's harassment. Human Rights Law § 297. "[A]n award of . . . damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish." *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). Such compensation may be based solely on a complainant's testimony. *Id.* at 442; *see also Cullen v. Nassau County Civil Serv. Comm'n*, 53 N.Y.2d 492, 442 N.Y.S.2d 470 (1981). It must, however, be reasonably related to Respondent's discriminatory conduct. *Quality Care v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept. 1993); *School Bd. of Educ. of the Chapel of the Redeemer Lutheran Church v. N.Y.C. Commission on Human Rights*, 188 A.D.2d 653, 591 N.Y.S.2d 531 (2d Dept. 1992). In addition to what is detailed in the previous paragraph, Complaint also felt depressed about the prospect of looking for a new job in that industry and ultimately decided not to return to a

business she had been in for twenty years. She spent a lot of time in her apartment and did not want to come out. She felt angry and bitter. In consideration of the fact that she suffered humiliation for just over a year, that she left an industry she had been in for over twenty years and in light of the severity of the discrimination, \$15,000 is sufficient to effectuate the purposes of the Human Rights Law. *New York State Dep't of Correctional Servs. v. State Div. of Human Rights*, 215 A.D.2d 908, 626 N.Y.S.2d 588 (3rd Dept. 1995) (\$15,000 where complainant, as a result of race discrimination was caused to feel "victimized, ambushed and abandoned" and was caused to withdraw from relationships with his friends and family).

Complainant also alleged that she was retaliated against for opposing a discriminatory practice when she asked Respondent Genender to refrain from saying nigger.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an individual for opposing discriminatory practices. Human Rights Law § 296.7.

Complainant failed to show that she was retaliated against. Complainant alleged that in June of 1991, her salary was reduced because she objected to Respondent Genender's use of the word nigger in the work place. However, based on Complainant's testimony she did not object to his use of the word until December of 1991, some six months after her salary had already been reduced and she had been told that she was not working out.

Complainant alleged that the actions taken by Respondents against her were because of her race and that similarly-situated Caucasian employees were treated differently. Complainant alleged that she was the only African-American salesperson, and that her sales were "obstructed" and "sabotaged" and she did not receive the assistance that she needed to do her job and that she was excluded from office meetings. The record reveals that Complainant did not get the help that she needed to acquire the Eddie Bauer account because that account was off limits. Further, there is no

evidence that she ever worked on a J.C. Penny account. Complainant offered no explanation for why Respondents would obstruct a sale to an account for which only Respondents would stand to benefit. The record also does not support Complainant's allegation that she was excluded from office meetings because of her race, since she and her witness were only able to recall one meeting the subject of which did not involve Complainant.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that Complainant's complaint regarding retaliation be and hereby is dismissed; and it is further

ORDERED that Complainant's claim regarding race discrimination be and hereby is sustained; and it is further

ORDERED that Respondents, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating in employment based on race in violation of the Human Rights Law; and it is further

ORDERED that Respondents, their agents, representatives, employees, successors and assigns shall take the following affirmative action to effect the purposes of the Human Rights Law:

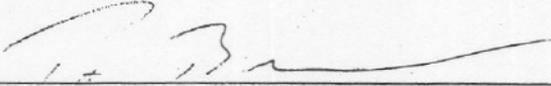
1. Within sixty days from the date of the Final Order, Respondents shall pay to Complainant compensatory damages for mental anguish and humiliation, without any deductions or withholding whatsoever, in the amount of \$15,000.00. Interest at a rate of nine percent per annum shall be awarded from date of this order until the date payment is made.

2. The aforesaid payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Cherry Thomas, and delivered to the Complainant at her address of: 148 Arlington Avenue, Jersey City, New Jersey 07305, by registered mail, return receipt requested.

3. Respondent shall simultaneously furnish written proof of the aforesaid payments to the Acting General Counsel of the Division, Caroline Downey, Esq., at her office address of One Fordham Plaza, 4th Floor, Bronx, New York 10458, and shall cooperate with the representatives of the Division during any investigation into their compliance with the directives contained in this Order.

DATED: **MAR 22 2007**
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



PETER G. BUCHENHOLZ
Adjudication Counsel