DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MARC W. THOMAS,

Complainant,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10112628

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 29, 2010, by Spencer D. Phillips, 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: MAR 25 2010
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

DAVID A. PATERSON
GOVERNOR

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METROPOLITAN TRANSPORTATION AUTHORITY,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10112628**

SUMMARY

Complainant claims that Respondent unfairly disciplined him, because of his race, for participating in a workplace altercation, and subjected him to a racially hostile work environment.

The discrimination claim is dismissed because Complainant knowingly and voluntarily signed an agreement releasing Respondent from all legal claims arising from the altercation in exchange for, *inter alia*, dismissal of an internal disciplinary charge against Complainant. The agreement is not voidable on grounds of economic duress, and was ratified by Complainant's receipt of the benefits of that agreement. The hostile work environment claim is dismissed because the events upon which the claim is based are time-barred and were not sufficiently severe or pervasive to have altered the conditions of his employment.

PROCEEDINGS IN THE CASE

On July 11, 2006, 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 February 11-12, 2008, August 17-18, 2009, and October 2, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by Norman Siegel, Esq., Rachel Nicotra, Esq. and Steven Hyman, Esq.. Respondent was represented by Stephen A. Fuchs, Esq. and Craig R. Benson, Esq.

Permission to file post-hearing briefs was granted and timely briefs were submitted by both parties.

On November 30, 2009, this case was transferred to ALJ Spencer D. Phillips pursuant to the Division's Rules of Practice, 9 N.Y.C.R.R. §465.12(d)(2).

FINDINGS OF FACT

1. Complainant is African American. (Tr. 27)

2. In July 1999, Respondent hired Complainant as a police officer. Respondent continued to employ Complainant as a police officer at the time of public hearing. (Tr. 27-28, 33-34)

3. Between 1999 and 2003, Respondent imposed disciplinary charges upon Complainant when he failed to report a bank robbery, issued Complainant a non-disciplinary write-up for allowing a cafeteria to become messy, directed Complainant to write a memo detailing the procedures for handling emotionally disturbed persons, and questioned Complainant regarding a robbery by a perpetrator with the same name as Complainant. (Tr. 39, 49-50, 54057, 115-22, 161-62)

4. Between 2000 and 2001, supervisors and coworkers used non-racial profanity and referred to Complainant as a "problem officer" or "black cloud." (Tr. 34-39, 49-51, 76, 106-07, 342)

5. On July 7, 2004, Complainant engaged in a workplace altercation (the "altercation") with a senior supervisor, Sergeant James Quinn ("Quinn"). (Complainant's Exhs. 1, 32,33; Tr. 29-30, 273, 279-80)

6. Complainant's direct supervisor, Sergeant Alexander Lindsay, witnessed the altercation. Lindsey intervened and physically separated Complainant and Quinn. Complainant then reinitiated the altercation by grabbing Quinn's neck and shouting, among other things, "I'm going to kill you." (Complainant's Exh. 32; ALJ's Exh. 1)

7. Sean Montgomery, who is African American, was the captain on duty at the time of the altercation. Montgomery, and two employees from Respondent's Internal Affairs Bureau, were summoned to the scene to take statements from Complainant and Quinn, as participants in the altercation, and from Lindsay, as a neutral witness to the altercation. Quinn and Lindsay gave statements at the scene. (Complainant's Exh. 32; Tr. 31, 270, 844-45, 1110)

8. Complainant's statement was not taken at the scene because a union representative was not immediately available. Complainant offered his statement later that day when he met with

union representative Vinny Provenzano and Blake Willett, Director of the Fraternal Guardians Organization ("Guardians"), an organization of African American police officers. (Respondent's Exh. 2; Tr. 474-80, 845)

9. Respondent suspended Complainant for 30 days pending completion of its investigation, and reinstated Complainant on modified duty at the conclusion of the suspension. (Tr. 845-46)

10. While Complainant was on suspension, Quinn decided to personally file criminal assault/harassment charges against Complainant. Respondent did not encourage, and was not involved in, Quinn's decision to pursue criminal charges against Complainant. (Complainant's Exh. 35; Tr. 1071-73, 1110, 1138-39)

11. The District Attorney's office prosecuted the matter but Complainant was acquitted. Respondent stayed its internal investigation during the pendency of the criminal proceedings. After the criminal proceedings concluded, Respondent resumed its internal investigation of the altercation. (Tr. 846-47)

12. In January 2006, as a result of its internal investigation, Respondent brought three disciplinary charges against Complainant. (Complainant's Exh. 1)

13. Complainant was represented by his own personal attorney, a union attorney, and a union representative, at all times during the pendency of the disciplinary proceedings. (Respondent's Exh. 2; Tr. 482)

14. Complainant and his representatives engaged in a series of negotiations which resulted in two proposed agreements which Complainant rejected, and a final agreement which Complainant and his representatives found acceptable. The language of the final agreement is clear and unambiguous. (Respondent's Exh. 2; Tr. 482, 491-95)

15. On March 7, 2006, Complainant, Respondent, and Complainant's union representative signed a two-page agreement in which Complainant admitted insubordination and physical misconduct, and forfeited vacation benefits that would have accrued during the 30-day suspension as a penalty for such misconduct. In exchange for Respondent's withdrawal of the third and final disciplinary charge and returning of Complainant to full-duty, Complainant agreed to "release [Respondent] from any and all claims, whether at law, in equity or arising by virtue of contract which they may have or which they may have had heretofore in connection with the underlying disputes in this case." (Complainant's Exh. 2; Tr. 494-98)

16. Complainant and his representatives carefully reviewed the language of the agreement. Complainant fully understood that he was giving up his right to bring a legal claim against Respondent for any matters arising from the altercation. (Respondent's Exh. 2; Tr. 494-98)

17. Complainant conceded that Respondent never threatened that his employment would be terminated if he refused to sign the agreement. (Tr. 496)

18. Complainant acknowledged that he was not forced to sign the agreement, but that he voluntarily did so. Complainant had the option to continue negotiating for a better deal, to proceed with disciplinary proceedings, or to pursue a legal claim against Respondent. (Tr. 495)

19. On July 11, 2006, five months after Respondent withdrew the third disciplinary charge against Complainant as required by the agreement, Complainant filed a verified complaint with the Division alleging that Respondent subjected him to racially unfair discipline because of his participation in the workplace altercation. (ALJ's Exh. 1)

20. Complainant's complaint also contains allegations of systemic discrimination by Respondent against unidentified "black police officers" and asserts that Respondent has "taken little, or no, action" to address Complainant's concerns in this regard. (ALJ's Exh. 1)

OPINION AND DECISION

Race Discrimination Claim

Complainant claims that Respondent subjected him to racially unfair discipline, including unpaid suspension, internal disciplinary charges, and criminal charges following his participation in the altercation.

Following the altercation, Respondent placed Complainant on unpaid suspension for 30 days, and, in January 2006, brought three internal disciplinary charges against Complainant stemming from the altercation. However, the criminal charges were brought against Complainant by Quinn. The record does not show that Respondent encouraged, coerced, or in any other way participated in the filing of criminal charges.

Beginning in January 2006, Complainant engaged in three months of extensive negotiations with Respondent regarding resolution of charges arising out of the altercation. Throughout these negotiations, Complainant had the assistance of his own personal attorney, as well as a union attorney and his union representative.

On March 7, 2006, after rejecting two prior proposed agreements, Complainant signed an agreement with Respondent in which Complainant accepted responsibility for conduct described in the first two disciplinary charges, and agreed to "release [Respondent] from any and all claims, whether at law, in equity or arising by virtue of contract... in connection with the underlying disputes in this case" in exchange for Respondent's withdrawal of the third disciplinary charge.

The language of this contractual provision is clear and unambiguous, precluding, *inter alia*, a claim of racial discrimination under the Human Rights Law. Furthermore, Complainant testified that he was fully aware that by signing the agreement he was giving up all legal claims

against Respondent stemming from the altercation. Accordingly, the proof demonstrates that Complainant knowingly and voluntarily waived his right to bring this claim of race discrimination against Respondent for allegedly unfair discipline stemming from his participation in the workplace altercation. *Skluth v. United Merchants and Manufacturers, Inc.*, 163 A.D.2d 104, 559 N.Y.S.2d 280, 282 (1st Dep't. 1990) (explaining that "a valid release which is 'clear and unambiguous on its face . . . and which it is knowingly and voluntarily entered into will be enforced as a private agreement between parties.").

Complainant argues that the agreement is voidable because it was obtained under economic duress. Economic duress exists when a party is compelled to accept the terms of an agreement by means of a wrongful threat that prevents the exercise of free will. *Fruchthandler v. Green*, 233 A.D.2d 214 (1st Dep't. 1996) (citing *Stuart M. Muller Constr. Co. v. New York Tel. Co.*, 40 N.Y.2d 955 (1976). The record does not show that Respondent made a wrongful threat which might have prevented Complainant from exercising his free will in executing the agreement. Rather, Respondent engaged in good faith, ongoing negotiations with Complainant and his representatives until a resolution was reached which was acceptable to all interested parties. Furthermore, a claim of economic duress "necessarily depends on the absence of choice." *Short v. Keyspan Corporate Services, L.L.C.*, 2006 NY Slip Op. 50574U, *5, 11 Misc. 3d 1076A (Sup. Ct. Kings Cty. March 22, 2006). The proof demonstrates that Complainant had at least three alternatives available to him at the time he signed the agreement: continue negotiating for a better deal, proceed with disciplinary proceedings, or pursue a legal claim against Respondent. Finally, because Complainant accepted the benefits of the release prior to commencing this action, he has ratified the release and is barred from alleging economic duress in its execution. *Id.*; *Goldstein Prods. v. Fish*, 198 A.D.2d 137, 138 (1st Dep't. 1993). Therefore,

the agreement which Complainant knowingly and voluntarily signed cannot be voided by reason of economic duress.

Hostile Work Environment Claim

Complainant argues in his post-hearing brief that Respondent subjected him to a racially hostile work environment throughout his tenure as a police officer. "A racially hostile work environment exists 'when 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, 310 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

Complainant relies upon a handful of discrete incidents, occurring between 1999 and 2003, to support his hostile work environment claim. These include imposition of disciplinary charges for failure to report a bank robbery; non-disciplinary write-up for allowing a cafeteria to become messy; non-disciplinary write-up regarding procedures for handling emotionally disturbed persons; and questioning regarding a robbery by a perpetrator with the same name as Complainant. All of these incidents, alleged for the first time at public hearing, are time-barred because they occurred before July 11, 2005. Furthermore, Complainant failed to establish that name-calling, use of non-racial profanity, or any other "act contributing to the claim occur[ed] within the filing period." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Finally, the allegations raised by Complainant in support of his hostile work environment claim are not sufficiently severe or pervasive to have altered the conditions of his employment. Therefore, Complainant's hostile work environment claim fails and must be dismissed.

Pattern and Practice Claim

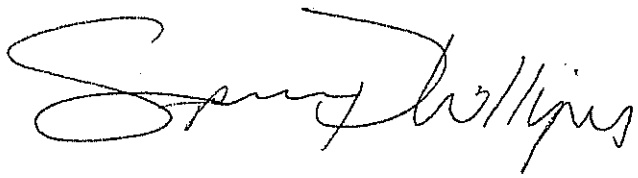
Complainant's complaint before the Division is an individual, disparate treatment complaint, arising from discipline imposed as a result of Complainant's participation in the altercation. To the extent that the complaint can be read to assert a "pattern and practice" claim on behalf of all of Respondent's African American police officers for delayed promotions, unfair job assignments, and missed training and overtime opportunities, such claim must be dismissed because Complainant failed to present specific, corroborating facts to support his conclusory allegations of systemic discrimination. *Patterson v. County of Oneida*, 374 F.3d 206, 219 (2d Cir. 2004) (citing *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), *cert. denied*, 474 U.S. 829 (1985).

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 be, and the same hereby is, dismissed.

DATED: January 29, 2010
Rochester, New York



Spencer D. Phillips
Administrative Law Judge