



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

KATHLEEN TRUMBACH,

Complainant,

v.

DAYSTAR OF BINGHAMTON, INC. D/B/A
UNIVERSITY CAB,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10148188

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 July 13, 2012, by Thomas J. Marlow, 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”), WITH THE FOLLOWING AMENDMENT:

- To the extent the record raises an issue of unlawful retaliation, Complainant has

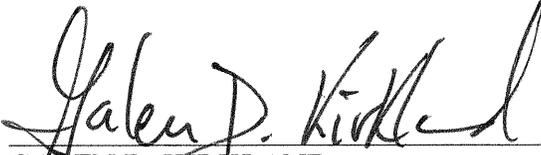
established a prima facie case. Her employment was terminated shortly after she complained about Cox's behavior. The causation element of the prima facie case may be established through evidence that an adverse action followed in close temporal proximity to a protected activity. *See Ibok v. Sec. Indus. Automation Corp*, 2010 WL 808065 (2d Cir. 2010) (short period of time between protected activity and adverse action sufficient to establish causation element); *see also Torres v. Gristede's Operating Corp.*, 628 F.Supp.2d 447, 473 (S.D.N.Y. 2008). Nevertheless, in the instant case, the evidence shows that Respondent terminated Complainant's employment because she was insolent and not in retaliation. Accordingly, this claim is properly dismissed.

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: 8/15/2012
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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KATHLEEN TRUMBACH,

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v.

**DAYSTAR OF BINGHAMTON, INC. D/B/A
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Respondent.

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

Case No. **10148188**

SUMMARY

Complainant alleged that Respondent discriminated against her because of her sex. Complainant's allegations also raised an issue of unlawful retaliation. However, because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 26, 2011, 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 Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on March 6, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Kevin F. Guyette, Esq. Respondent was represented by Kurt Schrader, Esq., of Pope & Schrader, LLP.

FINDINGS OF FACT

1. In or around December of 2009, Respondent opened for business as a taxicab company providing transportation services in Broome County, New York. When Respondent opened for business it had four taxicabs. When Respondent opened for business, it was owned and operated by Gerald J. Devine, Jr. (“Devine”), and Jon E. Martin (“Martin”). Neither Devine nor Martin had experience in providing transportation services before opening Respondent. (Tr. 10, 83-87, 96-97, 143-44, 168)

2. In August of 2010, Respondent hired Complainant as a dispatcher and she mainly worked the 10:00 PM to 6:00 AM shift. Respondent preferred to employ four or five dispatchers to cover the 168 hours of operation per week. A dispatcher receives calls from people needing a taxicab to transport them and then assigns these calls to the taxicab drivers who are out on the road. (Tr. 27-28, 48, 53, 86-87, 94, 101, 140, 192)

3. By November of 2010, Respondent had hired Jimmy Ostrander (“Ostrander”) to manage the business. In November of 2010, Respondent terminated the employment of Complainant based on the recommendation of Ostrander. In Ostrander’s opinion, Complainant’s customer service skills were insufficient. According to Devine, “[Complainant] was still very angry all the time, yelled at our customers, yelled at our drivers and pretty much was just an angry woman.” (ALJ’s Exhibit 1; Tr. 10, 52, 95-99)

4. In February of 2011, Respondent was in need of another dispatcher. Devine, Martin, and Ostrander discussed the known candidates, and Devine and Ostrander wanted to give Complainant another chance. Martin was against rehiring Complainant. According to Martin, “[Complainant] was too volatile a person. Whether you call it yelling or talking in an abrasive tone of voice, that’s how it was, and that’s not what my perception was that we wanted on the dispatch board. Because they’re on the radio, customers in the car can hear that.” In February of 2011, over Martin’s objection, Complainant was rehired. (ALJ’s Exhibit 1; Tr. 100-02, 174-76, 192)

5. On April 23, 2011, Darin A. Cox (“Cox”) started driving one of Respondent’s taxicabs at 11:00 AM. In the early morning hours of April 24, 2011, Cox called the dispatch board to report that he was finished driving and was returning his taxicab. Complainant was the dispatcher on duty and was upset that Cox was finishing driving and that he was returning his taxicab. Complainant was concerned about having enough drivers for customers who had a contract with Respondent. From what Complainant said over the radio, Cox could tell Complainant was upset. When Cox returned his taxicab, he handed his radio to Complainant. Complainant, sitting in the dispatcher chair and still upset, threw the radio on the desk. Cox, upset, threw his lease for the use of the taxicab and a pen down and left. Complainant testified

that the pen hit her on one of her arms. Complainant is not certain that Cox intended to hit her with the pen. Prior to April 24, Complainant had worked as a dispatcher on several occasions when Cox was driving one of Respondent's taxicabs and never had any problems with him.

(ALJ's Exhibit 1; Tr. 17-18, 29, 33-34, 128-33, 227-29, 265, 269-70)

6. On April 24, 2011, Complainant spoke with Devine and told him what had happened with Cox and that the pen hit her on one of her arms. Complainant told Devine that she was going to call an attorney if Devine didn't fire Cox. (Tr. 121-24, 152)

7. On April 24, 2011, Respondent had a "camera system" that was operating in the dispatch area. Devine told Complainant that he would review what was captured by the "camera system" and speak further with her; but, he also told Complainant that, if she felt threatened, then maybe she should find another job or consider unemployment. (Tr. 125)

8. On April 24, 2011, Devine reviewed what was captured by the "camera system" and observed Cox throwing the lease and pen but did not observe the pen hitting Complainant. It appeared that the pen and lease were thrown in a downward direction away from the area of the dispatcher's chair where Complainant was sitting. From what Devine observed, it appeared that Cox had no intention to throw the lease and pen at Complainant; rather, he threw them in a downward direction and left the building. (Tr. 33, 128-33)

9. On April 24, 2011, after viewing what was captured by the "camera system," Devine called Complainant and asked her to come to the office on April 25, 2011, to discuss what had happened. (Tr. 126)

10. On April 25, 2011, Complainant came to Respondent's place of business. Devine was in the dispatch area with several employees. When Complainant approached Devine, she appeared upset and was screaming that she wanted to meet with him and demanding that her son

be present as a witness to what was going to happen. Experiencing Complainant's insolent behavior in front of other employees, Devine immediately fired Complainant. (126-27, 148-50, 163)

11. On April 26, 2011, Complainant filed the instant complaint (Case No. 10148188) with the Division, alleging that Respondent unlawfully discriminated against her because of her sex. In the complaint, Complainant indicated that she experienced sexual harassment and physical abuse as an employee of Respondent. In her description of the discrimination, Complainant included the following: that drivers would get angry with her when she caught them "shorting" the gas tank and told them that they had to "regas" the taxicab; that Martin would get upset with her when she called him with her concerns; that a driver, Steve Crampton ("Crampton"), was upset one night about the money he made and "grabbed himself in the private area" acting "like he was shaking it at [Complainant];" that Cox hit her with the pen; and that her employment was terminated when she complained about Cox. (ALJ's Exhibit 1)

12. Devine and Martin gave consistent, straightforward testimony at the public hearing. Although Devine and Martin worked between the hours of 6:00 AM and 11:00 PM, on several occasions, Complainant called either Devine or Martin between 3:30 AM and 5:30 AM about matters that could wait for discussion during normal business hours. Martin told Complainant to stop these early-morning calls that did not require immediate discussion, but Complainant continued the calls. Complainant did not have the responsibility to check the taxicabs when drivers returned them to determine whether the drivers filled the gas tanks. Complainant had no authority to make a driver continue to work when that driver wanted to return the taxicab and stop working. When Complainant complained about Crampton's behavior, Devine left Crampton a telephone message saying that Crampton would not be allowed to drive a taxicab of

Respondent until he met and spoke with Devine. Crampton never spoke with Devine and never again drove a taxicab of Respondent. When Complainant complained about drivers getting upset when they did not make enough money, Devine called the drivers to calm them down.

Questioning of Devine and Martin at the public hearing failed to establish any meaningful inconsistency or evasiveness in their testimony or any change in their demeanor. (Tr. 17, 48, 69, 100, 103-08, 113-15, 117-18, 148-153, 161, 164-65, 177-81, 186-89)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's sex, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Respondent discriminated against her because of her sex. Complainant alleges that, because of her sex, she was harassed and physically abused at the workplace. The termination of Complainant's employment shortly after she complained about the behavior of Cox also raises an issue of unlawful retaliation.

When a complainant raises an issue of unlawful discrimination, she has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

After considering all of the evidence presented, and evaluating the credibility and demeanor of the witnesses, I find that the evidence does not support a finding of unlawful

discrimination in violation of the Human Rights Law. *Id.*

I credit the testimony of Devine, and find that he properly handled Complainant's complaint regarding the inappropriate behavior of Crampton. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

I also find that the evidence presented does not establish that Complainant's workplace was permeated with discriminatory intimidation, ridicule, or insult that altered the conditions of Complainant's employment. *Id.* "The laws prohibiting discrimination do not prohibit ordinary rudeness or create a code of civility." *Raisley v. First Manhattan Co.*, 4 Misc.3d 1022(A), 798 N.Y.S.2d 347 (Sup. Ct. New York Co. 2004); *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 309, 786 N.Y.S.2d 382, 394 (2004).

Further, I find no causal connection between Complainant's complaints, and the termination of her employment. *Id.* Complainant's employment was terminated because of her insolence.

Complainant has failed to meet the burden of showing that any conduct attributed to Respondent constituted unlawful discrimination in violation of the Human Rights Law. 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 be, and the same hereby is, dismissed.

DATED: July 13, 2012
Bronx, New York

A handwritten signature in cursive script, appearing to read "Thomas J. Marlow".

Thomas J. Marlow
Administrative Law Judge