

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JENNIE VASQUEZ,

Complainant,

v.

**CITY OF PEEKSKILL, DEPARTMENT OF PARKS
AND RECREATION, GARY CAHILL,**

Respondents.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 114791

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 19, 2007, by Thomas S. Protano, 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 25th day of May, 2007.


KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JENNIE VASQUEZ,

Complainant,

v.

CITY OF PEEKSKILL DEPARTMENT OF
PARKS AND RECREATION and GARY
CAHILL,

Respondents.

RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 114791

SUMMARY

Complainant alleges the Respondent harassed her during her term of employment and, ultimately, terminated her employment because of her Hispanic national origin. Respondent denied all allegations of discrimination. For the reasons that follow, I find that Complainant has proven her claim of harassment, but fails to show that her termination was discriminatory.

PROCEEDINGS IN THE CASE

On October 14, 1986, 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 the Human Rights Law of the State of New York.

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

After due notice, the case came on for public hearing before Patricia Moro, an Administrative Law Judge of the Division. A Public Hearing was held on June 19, 2001 and June 22, 2001. The case was then transferred to Thomas S. Protano, Administrative Law Judge, and the hearing continued on October 3, 2001 and November 20, 2001.

After the hearing, a Recommended Order was issued by ALJ Protano, finding for Complainant and recommending an award of \$5,000.00. The case was subsequently remanded back to hearing so that additional information regarding the termination of Complainant's employment could be received. According to the Order the "findings made with regard to the hostile work environment claim are not to be disturbed." (*See*, ALJ Exhibit V) Respondent then filed an Article 78 proceeding to prohibit the Division from proceeding further. The Respondent's petition was unsuccessful and the case was remanded back to the Division. Additional hearing sessions were held on June 21, 2005, February 7, 2006 and October 31, 2006.

Complainant and Respondent appeared at the hearing. Complainant was represented by David M. Rosoff, Esq.. Respondent was represented by Joseph A. Stargiotti, Esq.

Permission to file post-hearing briefs was granted. Counsels for both parties filed post-hearing briefs.

FINDINGS OF FACT

1. Respondent is an agency of the city of Peekskill, which administers the city's recreation programs and park maintenance. Complainant worked for Respondent from 1984 until October of 1986. She was hired initially as a provisional civil service employee. (Complainant's Exhibits 1 & 17)

2. Complainant worked for Respondent as an account clerk. Her responsibilities included meeting the public, registering them for recreation programs, accepting fees from the registrants and accounting for the money collected. She also did some light typing. (Tr. 6/19/01, pp. 14-16) Her supervisor was James Madaffari, assistant city manager, who oversaw the operations of the parks and recreation department. However, his office was at a different location and he rarely appeared at the parks and recreation office. The day-to-day operations in Complainant's office were supervised by Gary Cahill. (Tr. 6/19/01, p. 16; 6/22/01, p. 200)

3. Cahill denied having any supervisory authority over the parks and recreation office. He stated he took his directions from Madaffari, who, according to Cahill, ran the day-to-day operations of the department, even though he was not present in the office. (Tr. 11/20/01, p. 589) Cahill testified that he was responsible for providing information regarding the office's operation to Madaffari. (Tr. 11/20/01, p. 619) His testimony directly contradicts Complainant, who identified Cahill as the office supervisor. It also conflicts with the testimony of Joanne Hayes, who was a clerk in the parks and recreation office in 1984. Hayes also identified Cahill as the recreation supervisor, and stated she remembered seeing Madaffari just three times during the four-month period in which she and Complainant worked together. (Complainant's Exhibit 1; Tr. 6/22/01, pp. 199, 200)

4. Because of that discrepancy, I find that Cahill was the office supervisor. He has been identified as such by two witnesses, and his description of an office hierarchy in which Madaffari ran the day-to-day operations without ever observing his subordinates in action is implausible and unworthy of credit.

5. While Complainant was employed with Respondent, she was subjected to harassment by Cahill. Cahill often mimicked Complainant's Spanish accent. (Tr. 6/19/01, 57; 6/22/01, p.

208) In addition to mimicking Complainant, Cahill berated Complainant for mispronouncing names and made unspecified "derogatory remarks", which would often reduce Complainant to tears. Hayes witnessed these actions. (Complainant's Exhibit 19; Tr. 6/22/01, pp. 211-212)

6. In 1984, when a bag of money was lost, Cahill accused Complainant of losing it. Complainant testified that Cahill screamed at her in front of her co-workers and others who were visiting the parks and recreation office. The bag was ultimately found in Cahill's car. (Tr. 6/19/01, pp. 61-62; 6/22/01, 216-217) Cahill denied harassing Complainant. (Tr. 11/20/01, p. 631)

7. Complainant went to Madaffari and complained about Cahill's harassment on more than one occasion. Madaffari failed to end the harassment of Complainant. (Tr. 6/19/01, pp. 105-108)

8. Complainant had served as a provisional employee. She took several tests in an effort to receive a civil service appointment. Eventually, Complainant's employment with Respondent was terminated when she did not pass the required civil service exam. Her last day of work for Respondent was October 14, 1986. (Tr. 6/19/01, p. 148)

9. In April of 1986, Westchester County Personnel, which administers civil service tests for the Respondent, notified Respondent that a list had been proffered for exam no. 85-004. Complainant was not on that list. As a result, she was no longer eligible for continued provisional employment. (Complainant's Exhibit 16)

10. Thereafter, on May 15, 1986, Respondent notified Complainant that she was not eligible for provisional employment and allowed her to continue her employment as a temporary employee, giving her an opportunity to pass the required exam. (Complainant's Exhibit 8)

Linda David, assistant to the City Manager for Respondent, then sent the civil service list back to Westchester County Personnel without filling the position. (Complainant's Exhibit 16)

11. According to Complainant, Respondent changed the job title and duties of her position in order to remove her, because of her national origin. Complainant's position was actually re-classified after a desk audit was done by the County of Westchester. After the duties of the position were evaluated, it was determined that the position should be re-classified and upgraded. (Tr. 10/31/07, p. 10) After the re-classification, the position was changed to intermediate account clerk/typist on June 1, 1984. (Tr. 10/31/06, p. 16, 17)

12. Complainant never passed a civil service exam that would have qualified her for a position as an account clerk/typist. She failed exams in 1984 and 1985. (Tr. 10/31/06, p. 35, 37) She was replaced by Victoria Picariello, a non-Hispanic who was hired from a civil service list. (Tr. 10/31/06, p. 11)

13. After Complainant failed her examination, she was not eligible to serve in a provisional title. When a civil service test is administered for a given position, a provisional employee in that position must pass the exam and be among the top three scorers in order to be hired. Because Complainant failed, she could not remain in a provisional position unless all of the top three finishers declined the position. (Tr. 37-38)

14. William Acosta is a friend of the Complainant who works as a counselor for Peekskill High School. He testified that he counseled Complainant in 1986. He described that Complainant as "very emotional", "distracted" and "very upset". He stated that Complainant felt she had gotten a "raw deal" by Respondent. (Tr. 6/19/01, pp. 66-68)

OPINION AND DECISION

An employer may not discriminate against an employee or applicant because of her national origin. 18 Executive Law §296.1(a). In order to establish a prima facie case of discrimination in employment Complainant must show that she is a member of a protected class, that she was qualified for the position she held or sought and that she was denied certain terms and conditions of employment under circumstances which would lead one to infer that she had been discriminated against. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999), citing *Dortz v City of New York*, 904 F Supp 127, 156 (1995).

Complainant has not established that she was removed from her position because of her national origin. After the job was re-classified, the Westchester County Personnel department sent a list to Respondent in order to fill Complainant's position permanently. This happened before Respondent advised Complainant her employment was to be terminated. She was then given five months to pass the necessary exam, while she remained on the payroll as an employee. During this time, Respondent did not replace Complainant with a candidate from the civil service list, although they could have under civil service regulations. In order to credit Complainant's claim that she was fired because of her national origin, one would have to find that the office of Respondent's city manager and the parks and recreation department worked in concert with Westchester County Personnel to re-classify Complainant's position and deprive her of the new, reclassified position. There is no evidence to support this allegation. Since passing the civil service exam was a requirement for continued employment in the position Complainant held, she was not qualified for the permanent position she sought. Therefore, she cannot make out a prima facie case.

Complainant also argues that she was harassed because of her Hispanic national origin. In order to find that such harassment existed, Complainant must show that Respondent engaged in "behavior that is so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 1003 (1998), citing *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S.Ct 2399 (1986). In addition the objective severity of harassment must be "sufficiently continuous and concerted" and should be judged from the perspective of a reasonable person in the plaintiff's position, considering the totality of circumstances. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D.2d 44, 50-51, 642 N.Y.S.2d 739 (4th Dept. 1996).

In this case, the Complainant and her witnesses make it clear that Mr. Cahill harassed her because of her national origin. Mr. Cahill mimicked her and made fun of her accent. His harassment was constant and ongoing, and it was severe enough to bring Complainant to tears. The treatment she received made her upset and she sought counseling from a friend. As a result of the harassment she received, Complainant is entitled to compensatory damages for her emotional distress in the amount of \$5,000.00. This award will effectuate the purpose of the Human Rights Law. *New York City Transit Authority v. State Division of Human Rights*, 78 N.Y.2d 207, 577 N.E.2d 40, 573 N.Y.S.2d 49 (1991); *Consolidated Edison Co. of New York, Inc. v. New York State Division of Human Rights*, 77 N.Y.2d 411, 570 N.E.2d 217, 568 N.Y.S.2d 569 (1991); *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (2d Dept. 1987).

ORDER

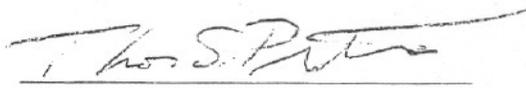
On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within 30 days of the receipt of this Order, Respondent shall pay to the Complainant the sum of \$5,000.00 without any withholding or deductions, as compensatory damages for mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful act of discrimination.
2. The aforesaid payment shall be in the form of a certified check made payable to the order of Complainant and delivered to the Complainant's Attorney, David M. Rosoff, Esq., by registered mail, return receipt requested.
3. Respondent shall furnish written proof of the payment to Caroline Downey, Acting General Counsel of the Division.
4. Respondent shall cooperate with the Division during any investigation into its compliance with the directives contained in this Order.

DATED: April 19, 2007
Bronx, New York



THOMAS S. PROTANO
Administrative Law Judge