

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DAVID WALSH,

Complainant,

v.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 1255306

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal (“Recommended Order”), issued on October 27, 2008, 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.

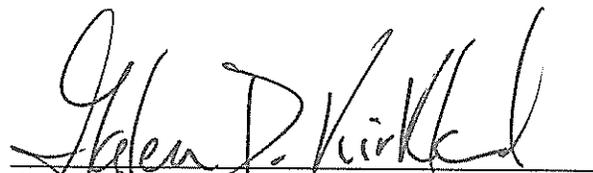
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **JAN 28 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

DAVID WALSH,

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**NEW YORK STATE THRUWAY
AUTHORITY,**

Respondent.

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

Case No. 1255306

SUMMARY

Complainant alleges that he was harassed by his subordinates because of his Irish national origin, in violation of New York State Human Rights Law. His claims lack credibility and, even if one were to credit his allegations, he did not put his employer on notice that he was being discriminated against. As a result, his case must be dismissed.

PROCEEDINGS IN THE CASE

On June 25, 2003, 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 S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing was held on July 9, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Resa Siegel Tanner, Esq.

Permission to file post-hearing briefs was granted. The Division attorney and the attorney for Respondent filed timely submissions.

FINDINGS OF FACT

1. Complainant was born in Ireland; his national origin is Irish. Complainant speaks with an Irish accent or a brogue. (Tr. 8-9)

2. Complainant was hired by Respondent in 1993. Respondent is a governmental authority, responsible for, among other things, maintenance of bridges and highways in New York State. (Tr. 9-10)

3. In 1997, Complainant became a maintenance supervisor. He was responsible for supervising 16 to 18 workers, who performed routine maintenance on the highway system. (Tr. 11-12)

4. Complainant and his subordinates did not get along. His subordinates tended to rebel against his authority. (Tr. 100-02) His subordinates called him a “fucking Irishman” and an “asshole,” though not in Complainant’s presence. Complainant did not allege he heard these comments. (Tr. 103-04, 109)

5. On March 14, 2003, disciplinary charges were brought against Complainant. (Tr. 56)

6. In March of 2003, Complainant found a flier posted in his work site advertising "The Donkey Show." (Tr. 12) Complainant states that he was offended by this because donkey is a derogatory term used to describe Irish-Americans. (Tr. 14-15)

7. Complainant alerted his supervisor, Fabio Amendola, about the flier. (Tr. 17)
Complainant also informed a union representative. (Tr. 19)

8. The history of the word "donkey" as an ethnic slur against the Irish goes back to the 1840's when Irish workers were used, rather than donkeys, to pull coal out of the coal mines in Pennsylvania. (Tr. 15)

9. In April of 2003, Complainant also found a trophy depicting the rear end of a horse with the phrase "David Walsh, employee of the month" taped onto it. (Tr. 31-32) Complainant immediately told Amendola about the trophy. (Tr. 33)

10. Amendola spoke to the crew and warned them that anyone found to be involved would face disciplinary action. The members of the crew then signed a statement indicating that none of them had knowledge of the statue. (Respondent's Exhibit 7; Tr. 126)

11. Amendola's supervisor, Richard Iuele, Tappan Zee Bridge engineer, had heard that Complainant had been seen with the trophy earlier in the week. He considered it "a possibility" that Complainant planted the trophy himself. (Tr. 176)

12. In April of 2003, Complainant found the words "bog donkey dick" scrawled into some dust at his work site. Complainant stated that he took that to be a derogatory slur towards Irish people. He feels that the word "bog" is a reference to Irish bogs where poor Irish people live. (Tr. 21)

13. After seeing this, Complainant states that he “brought it to Mr. Bullock’s attention.” Mr. Bullock was in the room at the time, but Complainant did not ask if Bullock had seen anything or discuss it with Bullock in any way. (Tr. 67)

14. Complainant again told Amendola about the slurs. (Tr. 22) Amendola questioned members of the work crew, but no one had seen the writing. Complainant did not explain the meaning of the phrase to Amendola, nor did he tell Amendola that he felt the slurs were directed towards him. (Tr. 122-23)

15. Iuele did not know that the word donkey was considered to be a slur against Irish people. (Tr. 171)

16. In addition to the above, Complainant alleges he heard his subordinates say the words “hee-haw” when communicating on Respondent’s work radio. (Tr. 26)

17. Complainant again found the fliers that said “The Donkey Show.” He complained to another supervisor, Andrew Scarpulla. He alleges in his testimony that this occurred in May of 2003. (Tr. 28)

18. Complainant believed his subordinates were responsible for placing the offensive material in the work place. He did not question any of his subordinates regarding these incidents. (Tr. 64) He directed Respondent’s traffic controller to address the “hee-haw” chants over the radio, but never mentioned that these were ethnic slurs to anyone. Instead, he considered this a safety issue because they were “an unwanted intrusion to my conversation.” (Tr. 70)

19. As a supervisor, Complainant received training on how to handle complaints of discrimination, but he never brought his complaints to Respondent’s Office of Equal Opportunity (“OEO”). (Tr. 71-72)

20. In 2003, one of Complainant's subordinates was wearing a T-shirt with a picture of a drunken leprechaun on it. (Tr. 74) Amendola directed the employee to change his shirt and the employee complied. (Tr. 129) Complainant placed the date of this incident on June 10, 2003 in his verified complaint. At hearing, he alleged it occurred "around Saint Patrick's day" in 2003. (Tr. 38, 74)

21. On another occasion, Complainant wore a T-shirt that Amendola found to be offensive. Complainant, however, resisted when Amendola told him to change his shirt. As a result, Complainant was counseled for his actions. (Tr. 131, 133)

22. In his verified complaint, Complainant alleges that the incidents he complains of began "on or about March 31, 2003," when "bog donkey dick" was scrawled into the dust. The fliers appeared a few days later, according to the complaint. (ALJ Exhibit 2) In his testimony, Complainant states that the fliers appeared before the offensive words were scrawled into the dust. (Tr. 12, 20-21)

23. In his complaint, Complainant alleged that the ethnic slurs began after the words were written into the dust on March 31, 2003. In his testimony, he indicated they began in "February, March 2003." (Tr. 56-57)

OPINION AND DECISION

Complainant alleges that he was harassed by his subordinates because of his national origin. It is unlawful to discriminate against an employee in the terms conditions and privileges of his employment because of his national origin. Human Rights Law § 296.

In order to establish a claim of discrimination based upon harassment, Complainant must show that he was subjected to a work environment permeated with discriminatory intimidation,

ridicule and insult that is sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. *Pace v. Ogden Services Corporation*, 257 A.D.2d 101, 103 (3rd Dept. 1999). The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant in the instant case presents no credible evidence that he was harassed by his crew as he alleges. His testimony at trial conflicts with his verified complaint in that all the dates and the sequence of events he alleges are different. The conflicting testimony was not simply incidental or minor—all of the dates and sequences are in conflict. The slur, “donkey”, is an obscure one, at best, with applications dating more than 150 years ago. It is curious that his crew chose a slur from the 1840’s with which to harass their supervisor. The entire crew signed a statement indicating that no one had any knowledge of the harassment after the trophy incident and Complainant himself was apparently seen with the trophy prior to the incident. Because of the discrepancies and the fact that Respondent clearly had reason to suspect that Complainant planted the trophy himself, along with the fact that the alleged harassment of Complainant began only after disciplinary charges were brought against Complainant, the allegations cannot be credited.

Moreover, even if one were to credit Complainant’s assertions, he did not take the proper steps to end to harassment. Complainant did not explain to either Amendola or Luele that the term donkey is a derogatory slur against Irish men and neither Amendola nor Luele were familiar with the slur. Complainant never went to Respondent’s OEO. His failure to place Respondent on notice that he was being harassed means Respondent could not act to end the harassment. In such a case, Respondent cannot

be held liable for conduct it neither condoned, encouraged, approved nor had knowledge of. See, *Hendricks v. 333 Bayville Avenue Restaurant Corp.*, 260 A.D.2d 545, 688 N.Y.S.2d 593 (2d Dept. 1999)

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 case be, and the same hereby is, dismissed.

DATED: October 27, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", with a long, sweeping horizontal line extending to the right.

Thomas S. Protano
Administrative Law Judge