



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

NESTOR MACHIN,

Complainant,

v.

SNAPPLE DISTRIBUTORS, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10130501

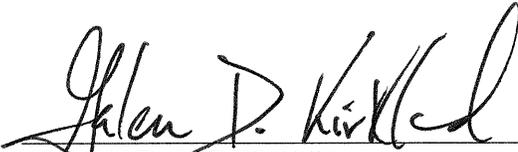
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on June 17, 2011, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given 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 6 2012**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. **10130501**

SUMMARY

Complainant, an employee of Respondent, alleges that he was harassed by his supervisor because of his race and national origin. Although Complainant's supervisor was abusive and inappropriate, he did not harass Complainant based upon Complainant's race or national origin. Therefore, the case must be dismissed.

PROCEEDINGS IN THE CASE

On December 29, 2008, 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. Public hearing sessions were held on February 9, 2011, February 10, 2011, February 24, 2011 and February 25, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by Paul Saqqal, Esq. Respondent was represented by Stanley J. Brown, Esq.

FINDINGS OF FACT

1. Complainant is a Hispanic of Dominican national origin. (ALJ Exhibit 2; Tr. 207)
2. Complainant began working for Respondent, a beverage distributor, in 2006. Initially, Complainant worked for Respondent through a temporary employment agency. In 2007, Respondent hired Complainant as a marketer. (Tr. 200-01)
3. As a marketer, Complainant’s duties include selling the Respondent’s products to retail outlets such as supermarkets, delicatessens, bodegas and pizza shops. Complainant also introduced new products and attended promotional events. (Tr. 201-02)
4. When Respondent hired Complainant, Complainant’s supervisor was Scott Munz. Complainant worked in Respondent’s offices in Pelham, New York. (Tr. 200)
5. In 2008, Respondent moved its Pelham operations to Elmsford, New York. Complainant’s work location moved to Elmsford as well. (Tr. 485)

6. Complainant alleged that on his first day at the Elmsford location, Billy Byron, branch general manager, warned Complainant and Norm Patterson, an African American co-worker of Complainant, that Elmsford was Byron's "domain" and things would be done Byron's way.

Byron is Caucasian. (Tr. 204-05)

7. Byron never issued such a warning to Complainant. Byron and Patterson both denied that the conversation took place. (Tr. 384-85, 486)

8. In September of 2008, Respondent undertook a project to identify all of Respondent's coolers and vending machines that were used by retailers to sell Respondent's products. The project was known as Project Cobra. (Tr. 486-87)

9. Marketers, including Complainant, were assigned to Project Cobra to effect the goals of the project by going to the retailers' locations and identifying each machine. Byron was the coordinator of the project, which meant that Byron was supervising Complainant on this particular project. (Tr. 488-90)

10. Byron felt that Complainant performed "poorly" on Project Cobra. Complainant consistently failed to properly fill out the paperwork required for the project. Byron repeatedly spoke to Complainant about his problems. In addition, Henry Rosario, vending market manager, took Byron to task for Complainant's failures and told Byron to "get [Complainant] to do a better job." (Tr. 491-93)

11. Orlando Rivera is a sales representative for CO Beverages, which sells and distributes products for Respondent. (Tr. 798)

12. In October of 2008, while arguing with Rivera, Byron called Rivera a "stupid spic." Although Byron and Rivera denied that the incident occurred, other employees heard the comment. (Tr. 40, 59, 548, 801)

13. On another occasion, Byron told Complainant to “go back to school.” (ALJ Exhibit 2; Tr. 62, 212)

14. At the public hearing, Complainant alleged that when Byron told him to go back to school he also called Complainant a “dumb Dominican.” However, Byron denied making this statement and George Irizarry, an employee of Respondent who was present, said that Byron called Complainant a “dummy” but he did not hear Byron call Complainant a “dumb Dominican.” Rather, Irizarry claimed Byron made reference to “your kind,” when referring to Complainant. Complainant did not allege that he was called a dumb Dominican in his verified complaint. Because of those discrepancies, I do not find that Byron called complainant a dumb Dominican. (ALJ Exhibit 2; Tr. 62, 212)

15. Byron did call a subordinate a “dummy” on at least one occasion. He called Shameek Cook, a marketer, a dummy. Cook later filed an internal complaint with Respondent’s human resources department alleging Byron practiced favoritism towards another employee. Cook, who is African American, did not charge Byron with racial discrimination. (Tr. 423, 579-80)

16. On January 8, 2008, Byron received the “Most Likely to Go Native Award” from Respondent “for consistently blurring the line between management and [Independent Operators].” (Respondent’s Exhibit 11) The award was intended to be a humorous reference to Byron’s penchant for protecting his customer base by assisting them against the wishes of his superiors. It was unrelated to race, ethnicity or Native Americans. (Respondent’s Exhibits 11 & 24; Tr. 557-58)

17. Byron was known to be belligerent. He once challenged Irizarry to a fight while the two were engaged in a verbal disagreement. (Tr. 96)

18. On another occasion, Byron engaged in a physical altercation with another employee of Respondent, David Vasquez, during work hours. At a promotional event, Vasquez took a photo of Byron drinking a product that is sold by one of Respondent's competitors. Byron grew angry and reached for Vasquez's camera and, when Vasquez did not give him the camera, he put Vasquez in a headlock. Irizarry broke up the altercation and made sure that the photograph was deleted from the camera. (Tr. 68-69, 524-25)

19. At a marketing meeting during the presidential campaign in 2008, Byron suggested that Respondent use Barack Obama to endorse one of Respondent's products known as Venom Black Mamba. Byron suggested this because of the similarity between Obama's name and the name of the product. (Tr. 555)

20. Complainant stated that he feared Byron would transfer him to a less convenient location, because Byron had "always threatened" Complainant in that manner. Byron did not make any such threats towards Complainant, because he had no authority to transfer Complainant. (Tr. 253, 554)

21. Omeeka Johnson, office manager, also complained about Byron's attitude. In July of 2007, she complained internally to Respondent that Byron had been disrespectful towards her and cited several incidents. Johnson is African American. Johnson did not allege that Byron's behavior was racially motivated. (Complainant's Exhibit 5; Tr. 416)

22. Respondent has a hotline for receiving employee complaints. In early December 2008, Complainant made complaints about Byron in writing and by telephone to Respondent's hotline. Complainant discussed his complaint with the hotline investigator for more than five hours during two phone conversations. (Respondent's Exhibits 9, 10 & 24; Tr. 264, 699, 706)

23. Complainant also called Pam Duncan, Respondent's human resources administrator, to complain about Byron. Complainant alleged that Byron was discriminating against him.

(Complainant's Exhibit 1; Tr. 407)

24. In accordance with Respondent's policy, the human resources department is required to "conduct a complete, timely, objective, and confidential investigation of any harassment charges." (Respondent's Exhibit 20)

25. Curtis Briggs, human resources manager, conducted an investigation into Complainant's charges. Briggs interviewed Byron, Irizarry and Vasquez. (Respondent's Exhibits 1, 21 & 22; Tr. 695-96)

26. Respondent's investigation of Byron revealed no evidence of discrimination. The final report noted that although Byron had been "offensive," Complainant "readily acknowledges that Billy has never been explicitly discriminatory toward him." (Respondent's Exhibits 23 & 25)

27. Respondent found that although there was no evidence of discrimination, Byron's behavior was "unprofessional, inappropriate and unbecoming a leader." Respondent issued a warning memo to Byron on December 17, 2008. (Respondent's Exhibit 23)

28. Duncan felt that although Byron had "some managerial problems," none of the charges "had anything to do with discrimination." (Tr. 426)

29. Complainant is still employed by Respondent. He has not worked since he was involved in a car accident while using Respondent's van in April of 2010. He has been receiving worker's compensation since then. (Respondent's Exhibit 4; Tr. 325)

OPINION AND DECISION

It is unlawful for an employer to harass or discriminate against an employee on the basis of race and national origin. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a). In order to sustain a claim of harassment, Complainant must demonstrate 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. 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 Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant has not established that he was unlawfully harassed. Byron’s management skills are, based on Respondent’s own documents, worthy of criticism. However, there is no evidence that his treatment—or mistreatment—of any of his subordinates was motivated by unlawful discrimination. Respondent properly investigated all of the allegations against Byron and came to the same conclusion. Byron’s actions, though certainly inappropriate for a supervisor, did not create an environment of hostility based upon race or national origin that was so severe as to alter the working conditions of Complainant. *Id.*

Although Byron did direct a derogatory ethnic slur towards Rivera, this one incident is not sufficient to make a claim of harassment under Human Rights Law. See, *Forrest v. Jewish Guild for the Blind*, 3, N.Y.3d 295, 326, 819 N.E. 2d 998, 1022, 786 N.Y.S. 382, 406 (2004). In every other case, Byron’s use of offensive words and phrases and belligerent behavior was unrelated to race, national origin or any other protected category under Human Rights Law. His actions, therefore, do not constitute unlawful harassment and leave Complainant unable to make

a claim for harassment and the case 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 case be, and the same hereby is, dismissed.

DATED: June 17, 2011
Bronx, New York

A handwritten signature in black ink, appearing to read 'T. S. Protano', is written over a faint, illegible stamp or watermark.

Thomas S. Protano
Administrative Law Judge