Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

EDWIDGE JOSEPH,

Complainant,

v.

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondent.

Federal Charge No. 16GB901020

NOTICE AND FINAL ORDER

Case No. 10198418

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 December 26, 2023, 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 DENISE M. MIRANDA, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENT:

- The analysis relating to the hostile work environment claim on Pages 8 and 9 of

the Recommended Order is not hereby adopted. Instead, Complainant's harassment claim is sustained because the behavior to which he was subjected in the workplace (as detailed in the Recommended Order) was sufficiently severe and pervasive to alter the conditions of his employment and create an abusive work environment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310 (2004) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Complainant subjectively perceived the conduct as abusive and the environment was objectively one that a reasonable person would deem hostile. *See Id.* And because Defrancis held the in-house title and position Chief of Patrol, a high-level supervisory role for Respondent, and because Defrancis' conduct was responsible for creating the hostile work environment, Respondent is liable for the harassment. *See Franco v. Hyatt Corp.*, 189 A.D.3d 569 (1st Dept. 2020) (an employer may be held liable in instances where the discriminatory conduct is perpetrated by a high-level managerial employee or someone sufficiently elevated in the employer's business organization). All other aspects of the Recommended Order are hereby adopted.

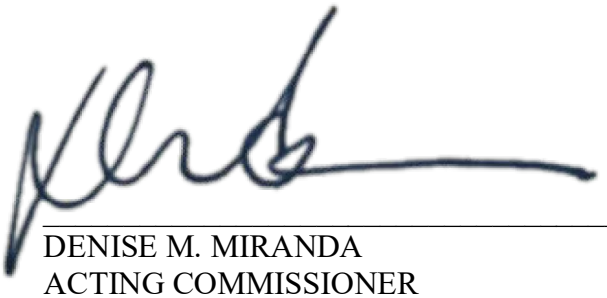
In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

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: 12/19/2024
Bronx, New York



DENISE M. MIRANDA
ACTING COMMISSIONER

Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

EDWIDGE JOSEPH,
Complainant,

v.

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,
Respondent.

Federal Charge No. 16GB901020

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10198418**

SUMMARY

Complainant alleged that Respondent, his employer, discriminated against him based upon age, creed, and race, and retaliated against him for having filed a previous complaint of discrimination. Complainant has shown that he was harassed based upon his race and creed. Complainant is awarded damages owing to harassment. Civil fines and penalties are assessed against Respondent.

PROCEEDINGS IN THE CASE

On October 22, 2018, Complainant filed a 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 session was held, via videoconference, on May 1, 2023.

Complainant and Respondent appeared at the hearing. Complainant was represented by Hugo Ortega, Esq. Respondent was represented by Carolyn Wolpert, Esq.

FINDINGS OF FACT

1. Complainant is a Black male, 57 years of age, who is married to a Jewish woman. (ALJ Exhibits 2 & 5)

2. Complainant observes Jewish holidays with his wife. (Tr. 34)

3. Complainant began working for Respondent, a New York City agency that regulates livery vehicles, in October of 1988. (Tr. 10)

4. Complainant began working for Respondent as an inspector. His duties as inspector were akin to police work. He was not armed, but did traffic stops, and made arrests as necessary. (Tr. 10-11)

5. Complainant was promoted to lieutenant in 2007; he was promoted to captain in 2011. (Tr. 12-13)

6. In 2014, Complainant was promoted to deputy chief. (ALJ Exhibit 7; Tr. 15)

7. In 2016, Complainant filed a complaint with the Division (Case no. 10182121, filed June 6, 2016) against Respondent, alleging discrimination. It was dismissed in December 2016 for lack of probable cause. (ALJ Exhibit 2; Tr. 48)

8. From December of 2017 until March of 2018, Complainant was assigned to oversee six squads, two of which were assigned to the overnight tour. (ALJ Exhibit 5)

9. In or about April of 2018, Joseph Defrancis was hired as a deputy chief. (ALJ Exhibit 5; Tr. 17)

10. Defrancis is a white male, approximately two years and eight months younger than Complainant. (ALJ Exhibit 5; Respondent's Exhibit 1; Tr. 17, 59)

11. Defrancis had not previously been employed by Respondent. He had worked for the New York Police Department for "a significant number of years." (Tr. 17)

12. In August of 2018, Defrancis was appointed chief of department, supervising Complainant and the other deputy chiefs. (ALJ Exhibit 5; Tr. 21-22)

13. When Defrancis learned that Complainant observed Jewish holidays, Defrancis began calling Complainant "Sammy Davis, Jr.," and asked Complainant if he wore a yarmulke. (Tr. 35)

14. Defrancis repeatedly called Complainant Sammy Davis, Jr., although Complainant told him not to. (Tr. 35)

15. Defrancis made the comments both as deputy chief and as chief of department. (Tr. 34-35)

16. Complainant told Defrancis "numerous times" that he found his comments to be offensive, both before and after Defrancis' promotion to chief of department. (Tr. 36)

17. Complainant believes the reference to Sammy Davis Jr. was made because Complainant is a Black, male Jew. (Tr. 37-38)

18. Other members of the department, subordinate to Defrancis, began calling Complainant Sammy Davis, Jr., as well. (Tr. 37)

19. Complainant was told by a co-worker that Defrancis "always" referred to Complainant as "Sammy Davis, Jr." (Tr. 39)

20. When Defrancis learned that Complainant's wife's last name was Miller, he questioned Complainant about that, inquiring why her name was not "Steinberg," or "Green" or "Stein." (Tr. 37)

21. Defrancis also questioned whether Complainant was a "real Jew" because he came to work on a Jewish holiday. (Tr. 35)

22. Complainant felt Defrancis' comments were "really offensive" and they "really hurt" him. (Tr. 35)

23. Complainant was aware of Respondent's complaint procedures for discrimination and/or harassment. (Tr. 59)

24. Complainant did not complain about Defrancis, fearing "retaliation" if he complained. (Tr. 59)

25. Complainant also feared that assistant commissioner Pennetti was Defrancis' "good friend" and that "if you talked bad about [Defrancis], the repercussions would not be good." (Tr. 40)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee because of that employee's age, creed, or race and color. N.Y. Exec. Law, art. 15

("Human Rights Law") § 296.1(a).

Complainant makes several allegations of unlawful discrimination. First, he alleges that the promotion of Defrancis to chief of department was discriminatory. To prevail, Complainant must first make out a prima facie case of discrimination. To do so, Complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action or was terminated from employment; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

Complainant in this case has established the first three prongs of this prima facie test. He was a member of multiple protected classes; he was qualified for the chief of department position, and he was not promoted to chief of department. Complainant, however, has not established the fourth prong of the test. Nothing in the record indicates that Complainant should have received the promotion over Defrancis, other than Complainant's conclusory argument that he should have received the promotion. Defrancis is not significantly younger than Complainant and there is no indication Defrancis was not qualified for the position. Finally, nothing in the record raises an inference that race, creed, or age factored into the decision.

With respect to Complainant's claim that he was discriminated against when he was assigned to six squads, he has not established an adverse employment action. An adverse employment action requires a showing of a "materially adverse change" in employment status, such as "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material

responsibilities, or other indices unique to a particular situation." *Messinger v. Girl Scouts of the U.S.A.*, 16 A.D.3d 314, 315, 792 N.Y.S.2d 45 (1st Dept. 2005). Complainant did not suffer a materially adverse change in his position. His job title and salary did not change; he has not identified any opportunity, such as promotional opportunities or loss of overtime, that he may have lost.

Complainant further alleges Respondent retaliated against him for having filed a previous complaint of discrimination. It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed unlawful discriminatory practices. Human Rights Law § 296.7.

To make out a prima facie case of retaliation, Complainant must show that 1) he engaged in activity protected by the Human Rights Law, 2) Respondent was aware that the complainant participated in the protected activity, 3) he suffered an adverse employment action, and 4) there is a causal connection between the protected activity and the adverse employment action. *Adeniran v. State of New York*, 106 A.D.3d 844, 844, 965 N.Y.S.2d 163, 164-65 (2d Dept. 2013).

In a retaliation context, an adverse employment action is one which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Mejia v. Roosevelt Is. Med. Assoc.*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), *aff'd.*, 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed,* 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013), citing *Burlington Northern & Santa Fe Railway Co. v. White,* 543 U.S. 53, 68 (2006).

In this case, Complainant has not shown any causal connection between his previous complaint, two years prior, and the promotion of Defrancis. As noted above, there has been no

evidence presented that would lead one to believe Complainant should have received the promotion over Defrancis. In addition, while the assignment of extra work can be considered an adverse employment action for the purposes of retaliation, no connection can be inferred between that assignment and the Complainant's prior complaint. Complainant's retaliation claims fail.

Complainant also alleged that Respondent subjected him to a hostile work environment because of his race and creed. To sustain this claim, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment.[1] The Division must examine the totality of the circumstances and the perceptions of both the victim and a reasonable person in making its determination. *See Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50-51, 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 must also show that the discriminatory conduct occurred because of his protected class membership. *See Arcuri v. Kirkland*, 113 A.D.3d 912, 914, 978 N.Y.S.2d 439, 441 (3d Dept. 2014).

"[A]n employer cannot be held liable for an employee's discriminatory act unless the

[1] Effective October 11, 2019, Human Rights Law § 296.1(h) amended the definition of harassment and the standard applied to such claims. "Harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more . . . protected categories." *Id.* This is so "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." *Id.* However, because the allegations which gave rise to the harassment claims in the instant complaint occurred prior to the amended law's effective date, Complainant's allegations are analyzed under the former severe or pervasive standard.

employer became a party to it by encouraging, condoning, or approving it."[2] *Medical Express Ambulance Corp. v. Kirkland*, 79 A.D. 3d 886, 887, 913 N.Y.S. 2d 296, 298 (2d Dept. 2010), *lv. den.*, 17 N.Y. 3d 716, 934 N.Y.S. 2d 374 (2011), quoting *Matter of State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y. 2d 684, 687, 496 N.Y.S. 2d 411, 412 (1985). "Only after an employer knows or should have known of the improper conduct can it undertake or fail to undertake action which may be construed as condoning the improper conduct." *Medical Express Ambulance Corp.* at 887-88, 913 N.Y.S. 2d at 298.

An employer that seeks to avail itself of this defense, however, must demonstrate that is has procedures in place by which a victim of harassment can make a complaint. It is an affirmative defense that Respondent in this case failed to plead or prove. In a harassment case, no liability attaches where the employer can show it "exercised reasonable care to prevent . . . discriminatory conduct . . . such as by promulgating an antidiscrimination policy with complaint procedure, and that the plaintiff unreasonably failed to take advantage of . . . corrective opportunities . . . or to otherwise avoid harm." *Forrest*, at 312. Respondent has not established that it had a complaint procedure. Respondent did not place any procedure in the record and offered no testimony regarding any such procedure.

Defrancis made religious and racial comments to Complainant. Defrancis called Complainant "Sammy Davis, Jr." and wondered why his wife's name did not include a "Green" or a "Stein." Defrancis questioned Complainant's commitment to Judaism and asked if he wore a yarmulke. Defrancis' comments were frequent enough such that other employees of Respondent began calling Complainant "Sammy Davis, Jr." Defrancis' conduct had the effect of creating a hostile environment for Complainant.

---

[2] This requirement was abrogated by the amendments that took effect on October 11, 2019.

Complainant, though, took no action to make a complaint. However, Complainant's failure to complain cannot be considered unreasonable because Respondent has not established that there was an avenue for Complainant to put Respondent on notice of the harassment. Complainant has, therefore, established his claim of harassment based upon creed. Moreover, Respondent can be liable if Defrancis, through his actions, "used his actual or apparent authority to engage in the harassment." Complainant "need only establish a nexus between the harasser's supervisory authority and the acts of harassment." *Father Belle Community Center*, at 52. In this case, Defrancis, as chief of department, repeatedly made offensive comments to Complainant, after which, Complainant's coworkers began following Defrancis' lead. Based on this, it can be said that Defrancis used his authority to engage in the harassment. Simply by continuing to make offensive comments after Complainant asked him to stop, Defrancis encouraged others, subordinate to him, to do the same.

As a result of the harassment he suffered, Complainant is entitled to an award of damages owing to his emotional distress, which can be based solely on Complainant's testimony. *See Matter of Cosmos Forms v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). Complainant was offended by Defrancis' remarks, which, he stated, "really hurt." Under the circumstances, an award of $10,000.00 for the mental anguish and suffering described by Complainant is consistent with the goals and objectives of the Division and prior awards of the Commissioner. *See Poslett v. ATA Freight Line, LTD.*, DHR Case No. 10202025 (August 16, 2022) ($10,000.00 mental anguish award where Complainant's employment was terminated because of her age, and she was the subject of an inappropriate age-based comment causing her to be "shocked and upset.")

Pursuant to Human Rights Law § 297.4(c)(vi), the Division may assess civil fines and

penalties,

> in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.

Pursuant to Human Rights Law § 297.4(e), "[a]ny civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of Respondents' culpability; any relevant history of Respondents' actions; Respondents' financial resources; and any other matters as justice may require. *See Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd, Sherwood Terrace Apartments v. State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *119-121 East 97th Street Corp. v. New York City Comm'n on Human Rights*, 220 A.D.2d 79, 88-89, 642 N.Y.S.2d 638, 644 (1st Dept. 1996).

The record does not include any information concerning the relevant history of Respondents' actions, Respondents' financial resources or other matters as justice may require. Therefore, Respondents are ordered to pay a civil fine to the State of New York in the amount of $10,000.00. *See Oz Trucking & Rigging Corp. v. New York State Div. of Human Rights*, 178 A.D.3d 935, 937, 116 N.Y.S.3d 52, 55 (2d Dept. 2019) (affirming a civil penalty of $10,000 against respondents where the complainant was subjected to "constant sexual badgering and inappropriate behavior."); *Benjamin v. Nissan of New Rochelle*, Case No. 10205839 (November 16, 2023)($10,000.00 civil fine and penalty assessed for workplace harassment).

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 take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to Complainant $10,000.00 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Order until payment is made by Respondent.
2. The aforesaid payment shall be made in the form of certified check, made payable to the order of Edwidge Joseph, and delivered by certified mail, return receipt requested, to Hugo Ortega, Esq., 299 Broadway, 17th Floor, New York, NY 10007.
3. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to the State of New York $10,000.00 as a civil fine and penalty for their violation of the Human Rights Law. Payment shall be made in the form of a certified check payable to the order of the State of New York and delivered by certified mail, return receipt requested, to General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Order until payment is made by Respondent.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall promulgate an anti-harassment policy, which includes reasonable complaint procedures. Respondent shall provide proof of such policy to Caroline Downey, General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458.
5. Respondent will cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: December 22, 2023
Bronx, New York

Thomas S. Protano
Administrative Law Judge