Fire Dep't v. Buttaro

OATH Index No. 2430/14 (Jan. 13, 2015)

Petitioner demonstrated that firefighter created a hostile work environment and repeatedly refused to obey orders to wear his uniform. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
THOMAS BUTTARO
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Fire Department ("FDNY" or "Department") pursuant to Administrative Code section 15-113 against firefighter Thomas Buttaro. Petitioner alleges that respondent engaged in conduct meant to create a hostile work environment for firefighters perceived to be in a federal discrimination lawsuit against the FDNY. Specifically, between January and December 2012, respondent failed to wear Department-issued clothing while on and off-duty in the firehouse but instead wore t-shirts that another firefighter told him were offensive. Petitioner further alleges that respondent refused to obey orders to wear only Department-issued t-shirts, asked a civilian visiting the firehouse to wear one of the offensive t-shirts in the presence of the offended firefighter, and was disruptive during a discrimination class taught by the offended firefighter (ALJ Ex. 1). Respondent admits to wearing the t-shirts, denies engaging in misconduct, and alleges that he has a First Amendment right to wear the t-shirts in the firehouse.

A five-day hearing was held between August 4 and October 7, 2014. Respondent's request for an adjournment during the hearing to allow him to substitute counsel was granted. Petitioner presented documentary evidence and four Department witnesses: respondent, Lieutenant Thomas, Captain Washington, and Mr. Acholonu. Respondent also testified

separately on his own behalf, and presented documentary evidence and four Department witnesses: Chief Kelty, Lieutenant Zuhlke, and Firefighters Dombrowsky and Wheeler. The record was held open until December 1, 2014, for respondent's motion to dismiss on First Amendment grounds and closing statements.[1]

Petitioner demonstrated that respondent created a hostile work environment and refused to obey orders to wear only FDNY-issued clothing in the firehouse. Petitioner also demonstrated that the workplace disruption outweighs respondent's First Amendment right to wear unauthorized t-shirts in the firehouse. Respondent should be terminated from his employment.

FACTS

Relevant Background Information

The Department maintains policies to prevent harassment, discrimination, and retaliation in the workplace (ALJ Exs. 2, 5, 6, 8, 9, 10, 11). The "Harassment Discrimination Prevention" bulletin (ALJ Ex. 9) defines discrimination and states that the firehouse is a workplace location. The bulletin and the Department's regulations regarding "General Deportment" (ALJ Ex. 2) notify employees that they must obey applicable federal, state, and local discrimination laws, as well as Department rules, and that the failure to do so will result in discipline.

The Department also has an Equal Employment Opportunity ("EEO") unit that provides mandatory training on an annual basis to educate members and prevent discrimination. The unit allows employees to file a complaint if they believe they have been discriminated against based on their protected category or activity. The complaints are investigated and are either substantiated or unsubstantiated (ALJ Ex. 10; Tr. 397, 402-03).

The Vulcan Society is a recognized fraternal organization of black firefighters that was founded in the 1960's to deal with discrimination and inequalities in the Department (Tr. 204, 278, 476). Almost all of FDNY's black firefighters are members of the Vulcan Society (Tr. 282, 476). In 2002, Captain Washington, as President of the Vulcan Society, filed a complaint with the United States Equal Employment Opportunity Commission alleging that the Department's testing practices for firefighter applicants were discriminatory (Tr. 437-38, 491).

[1] All motions and related rulings are included in the record as ALJ Exhibits 12-15.

In 2007, the United States government acted on the Vulcan Society's complaint and filed a federal lawsuit against the Department and other defendants ("Vulcan Lawsuit"). The Vulcan Society intervened. Plaintiffs alleged that from 1999 to 2007, FDNY's examination for selecting firefighters had a disparate impact on black and Hispanic candidates in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"). Plaintiffs sought injunctive and monetary relief. In granting plaintiffs summary judgment, the Court noted that this was not the first time the Vulcan Society had sued on the same grounds. Despite an earlier finding against it, FDNY continued to appoint fewer minorities than whites even though the number of minorities living in the City of New York ("City") was increasing. The Court held that FDNY's reliance on these examinations constituted employment discrimination in violation of Title VII. *United States v. City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009). Additional liability and remedial rulings followed which resulted in a settlement in March 2014.

Respondent, who is white and lives outside the City, took the examination to become a firefighter in 1992 and was called for the physical exam in 1995. He was not appointed until 1998. Respondent testified that despite getting a perfect score, he had to wait three years to be hired because FDNY was giving five points to applicants who lived in the City. In respondent's view, this was done to give minority candidates preferential treatment. Respondent was part of an unsuccessful lawsuit filed in 1994 opposing this practice (Tr. 160, 557-58, 754-57).

After respondent finished probationary training, he was assigned to Engine 242 and rotated into Ladder 123 which is located in the same firehouse in Crown Heights, Brooklyn, a predominantly minority community. Engine 242/Ladder 123 is part of Battalion 38. Captain Washington has been the commanding officer of the quarters of the firehouse since 2006 and is the highest ranking officer there (Tr. 436-37).

In 2005, then-firefighter Thomas, who is black, transferred into Engine 242 (Tr. 202, 264-66). Firefighters work closely together and generally work eight 24-hour tours a month (Tr. 741). They also sleep and eat together in the firehouse. Shortly after Thomas arrived, he and respondent had a disagreement that resulted in them not speaking except about work issues.

According to respondent, Thomas parked a fire truck improperly at a fire. Various members of the firehouse complained and Thomas blamed respondent for the other firefighters' remarks (Tr. 178-81, 524-27, 698-700). Thomas could not recall what precipitated the situation

but testified that respondent did not know how to speak to him in a respectful manner. Respondent spoke down to Thomas, like he was a child. Thomas told respondent that he did not like the way respondent talked to him (Tr. 210-12, 266-77).

Thomas testified that respondent has a problem with race, is a bigot, does not want to be involved with the community, and has had problems with other black firefighters (Tr. 296-98, 339-44). Respondent testified that he treats everyone with respect and that he does not single anyone out because of a person's race or religion (Tr. 174-75).

Thomas testified that since becoming a firefighter in 2002, he has been a member of the Vulcan Society. He became a board member in 2012 and as such is considered a plaintiff in the Vulcan Lawsuit. Thomas has recruited for FDNY and provided tutorials to minority applicants taking the firefighter examination. Since 2008, Thomas has also been an EEO instructor for the Department (Tr. 204-09, 213, 262-63, 452).

In 2012, there were seven black firefighters in the same firehouse as respondent (Tr. 706). Thomas and Captain Washington testified that it was well-known in 2012 that Thomas was in the Vulcan Society (Tr. 225-26, 450-51). Respondent denied knowing Thomas was in the Vulcan Society or involved in the Vulcan Lawsuit. He claimed that he first learned this when he was interviewed by the Department on January 29, 2013, about these disciplinary charges (Tr. 54-58, 136-38, 185-86, 556).

Around 2010, the Vulcan Lawsuit started to gain traction in the newspapers (Tr. 213, 293) and by 2012, "lines had been drawn" within the Department (Tr. 496, 566). Respondent disagreed with the lawsuit (Tr. 553) and attended a hearing on October 1, 2012, in federal court (Tr. 189). Respondent stated that in light of the Court's remedial rulings, including using different passing scores for black and Hispanic applicants, several advocacy groups formed "for the mutual aid and protections of various people with vested interests" (Pet. Ex. 9; Tr. 765).

Merit Matters, one of these advocacy groups, sided with the FDNY in the Vulcan Lawsuit and filed an amicus brief in January 2012. According to respondent, Merit Matters wanted FDNY's testing standards to be applied equally to all races to ensure that the most qualified applicants are chosen and that the test for firefighters is not "watered down" (Pet. Ex. 9; Resp. Ex. I; Tr. 59-60, 85, 186-88, 557, 567). Respondent is a member of and the Battalion 38 representative for Merit Matters (Pet. Ex. 9).

Another advocacy group that formed in opposition to the Vulcan Lawsuit was "Minorities Against Dumbing Down the Fire Department" ("MADD") (Pet. Ex. 9). According to respondent, MADD stands for the proposition that not all minorities think FDNY's testing procedures are discriminatory (Tr. 64, 66).

Both Merit Matters and MADD have t-shirts that are the same color blue as the FDNY regulation t-shirt (Tr. 568). The Merit Matters t-shirt has a Maltese cross, the symbol of fire departments. Inside the top and bottom of the cross are "Merit" and "Matters" and on the sides are a hook/ladder and a fire hydrant. The back of the t-shirt has the following excerpt from FDNY's EEO statement: "The Fire Department is firmly committed to maintaining fair employment practices for its employees and applicants and ensuring that employment decisions are made without regard to . . . color . . . gender . . . race . . . religion . . ." (Resp. Exs. A, B).

The MADD t-shirt has a Maltese cross on the front. Inside the top and bottom of the cross are "M.A.D.D." and "FD" and on the sides are a hook/ladder and a fire hydrant. Below the cross it says, "Minorities Against Dumbing Down the Fire Department" with the first letter of the first four words highlighted in red. The back of the t-shirt has the FDNY patch logo. Above the patch it says, "GETTING THIS THE OLD FASHIONED WAY" and below it, "EARNING IT!" (Pet. Exs. 1, 2).

Respondent testified that the back of the MADD t-shirt refers to FDNY "watering down" the physical examination for firefighters, which is a bad idea. He believes that there should be one set of rules for everyone but that FDNY created two different testing standards and that not everyone was earning the firefighter position "the old fashioned way" (Tr. 67-68, 77, 79-80, 791). Captain Washington testified that the reference to "dumbing down" the Department is linking a lack of intelligence with minorities (Tr. 464-65, 499).

FDNY has a uniform policy setting forth approved Quartermaster clothing (ALJ Ex. 3) which includes a golf shirt, a job shirt, short and long sleeve shirts, and a blue t-shirt. Respondent is aware of the uniform policy (Tr. 42). It was undisputed that firefighters often wear other t-shirts in the firehouse which include 9/11 related shirts or memorial shirts for fallen firefighters (Tr. 122, 165, 333, 444-45, 827, 892-93).

Some firefighters, including respondent, started wearing the Merit Matters and MADD t-shirts on and off-duty in the firehouse in 2011 (Tr. 543, 829). Respondent acknowledged that the t-shirts are not authorized under the uniform policy (Tr. 73, 85).

Captain Washington and Thomas testified that they found the Merit Matters and MADD t-shirts offensive and inflammatory but initially ignored them. Black firefighters felt that Merit Matters was a racist organization and were not happy that it opposed integration in the FDNY (Tr. 216-17, 293-94, 310-11, 384, 464-65, 467, 503). Washington testified that black firefighters had expressed concern about the t-shirts. He felt that they could lead to a lack of cohesion in a group that works together (Tr. 466-67). Chief Kelty and Lieutenant Zuhlke testified that they did not find the t-shirts offensive (Tr. 644-45, 829-31). They also testified that wearing them under a golf shirt or off-duty in the firehouse is not a violation of FDNY rules (Tr. 645-51, 834).

The charges arise out of a series of events between respondent and Thomas and orders regarding the Merit Matters and MADD t-shirts starting in May 2012. Thomas testified that prior to this time, tensions were building in the firehouse. Some members in the firehouse did not want Captain Washington there because of what he stood for in the Vulcan Society. Someone took down Washington's photograph. Thomas said if the picture of Washington, who is black, is down then everyone's picture is down. Thomas took down everyone's picture and there was animosity towards him for doing so (Tr. 217-18, 351-54).

Except where noted the facts are not in dispute.

May 6, 2012 kitchen incident

On May 6, 2012, respondent was wearing the MADD t-shirt on-duty in the firehouse kitchen. Also present were other firefighters including Thomas and Dombrowsky. Respondent was not part of the conversation between Thomas and the other firefighters (Tr. 73).

According to Thomas, Dombrowsky said, "You're famous now," referring to a news video that Thomas was in about a Vulcan Society tutorial for minority applicants preparing for the firefighter exam. There was a court order in the Vulcan Lawsuit to release the names of perspective candidates who were black and Hispanic. Merit Matters obtained the list and sent people to protest the tutorial. The situation got "ugly" and the tutorial was cancelled. The firefighters also spoke about Merit Matters and Thomas said that the process for getting into

FDNY's Special Operations Command ("SOC") was not based on merit but on who you know. Respondent interjected himself into the conversation and started screaming that Thomas was trying to bait him and that Thomas, the Vulcan Society, and EEO were "full of shit." Respondent also called Thomas a "whiny cunt" (Tr. 218-22, 301-04, 312-24; Pet. Ex. 9).

Thomas testified that he had never seen the MADD t-shirt before this interaction but that he found it offensive. It indicated that the Vulcan Society was trying to circumvent the rules. Also, respondent, who is not a minority, was trying to antagonize the situation and make a statement. When respondent refused to back down, Thomas told respondent to take off the t-shirt because it was "highly offensive." Thomas said that "all the air got sucked out of the room" because Thomas had "crossed an invisible line." Respondent said he was not taking off the t-shirt and walked out of the kitchen (Tr. 221-24).

Thomas testified that people were immediately talking about the incident. Later that day, Thomas went on an emergency run with respondent who was still wearing the MADD t-shirt. When they returned, Thomas saw Lieutenant Zuhlke and asked him to have respondent remove the t-shirt because he found it offensive. Zuhlke was taken aback but agreed. Later Thomas saw respondent wearing the Merit Matters t-shirt. Thomas told respondent and Zuhlke that he had a problem with that t-shirt but respondent continued to wear it (Tr. 227-30, 325-27).

Respondent testified that he was by the sink and overheard Thomas say that SOC does not want people like Thomas. Respondent denied hearing the earlier part of the conversation about the Vulcan Society tutorial (Tr. 726). According to respondent, Thomas was trying to race bait the firefighters and when Dombrowsky told Thomas that he knew other black firefighters in SOC, Thomas yelled, "That's what you guys think about me it's always a black issue with me, ha ha, I baited you." Respondent admitted stating that Thomas did not get into SOC not because he is black but because he is a "whiny fucking cunt." At that point, Thomas started "playing the victim" and said he did not like respondent's t-shirt and "stormed" out of the kitchen (Tr. 73-76, 121, 573-76, 580, 720-21).

Respondent testified that Lieutenant Zuhlke came into the kitchen and said that there was a firefighter who did not like the way respondent had spoken to him and did not like respondent's t-shirt. Respondent said he would change. Respondent insisted that at no time did Zuhlke give him an order to change his t-shirt. Respondent testified that he thought Thomas was

being "childish" and that he changed into the Merit Matters t-shirt to "appease" Thomas (Tr. 82-84, 576-79, 716). Respondent believed Thomas was retaliating against him and that Thomas's statements were "outlandish." Respondent did not believe that Thomas was offended by the t-shirts but that he complained because respondent had put him "in his place for race baiting" (Tr. 619, 714). According to respondent, Thomas "needed to be corrected" and "scolded" for race baiting (Tr. 722-23).

Dombrowsky testified that he heard about Thomas being involved in the tutorial (Tr. 973). When Thomas said something about SOC not taking people like him, Dombrawsky asked Thomas what he meant. Respondent called Thomas a "whiny bitch." Thomas told respondent that he did not like his t-shirt and left the kitchen. Lieutenant Zuhlke ordered respondent to take off the t-shirt. Respondent complied and changed into the Merit Matters t-shirt (Tr. 949-52). Thomas was also insulted by that t-shirt but nothing happened (Tr. 954). Dombrowsky did not think the MADD t-shirt was offensive (Tr. 951) but thought Thomas was sincere about being offended (Tr. 972).

Lieutenant Zuhlke testified that Thomas told him he found respondent's MADD t-shirt offensive and Zuhlke asked respondent to change his t-shirt. Respondent changed into the Merit Matters t-shirt. Zuhlke did not think respondent's actions were harassing (Tr. 835-36).

Thomas testified that there was a lot of tension in the firehouse as a result of this incident. When he came back to work, some of respondent's supporters mocked him about "crying" and said, "We can't wear this shirt now . . . . You're going to hurt someone's feelings." Thomas told them that they could not wear the t-shirts because he found them offensive. One of these firefighters wore the Merit Matters t-shirt two days later and Thomas asked him not to wear it (Tr. 231-32, 330-31, 335). Thomas testified that he was not just standing up for himself. Even though he was being ridiculed, Thomas was concerned about new firefighters who would be unable to voice their opinions about the offensive t-shirts (Tr. 238-39).

Firefighter Wheeler acknowledged that he heard talk about the incident and knew that Thomas was offended by the Merit Matters t-shirt (Tr. 918-22, 926-27, 930-31). Respondent testified that this incident was not disruptive to the firehouse (Tr. 795-96).

May 16, 2012 incident with civilian

On May 16, 2012, a firefighter invited a civilian to lunch in the firehouse. Respondent testified that the civilian had recently taken the firefighter exam and that respondent asked whether it required applicants to identify their race and gender. The civilian confirmed this and stated that he had previously taken exams that had been thrown out due to the Vulcan Lawsuit. Respondent told him about Merit Matters being concerned about this and the civilian said he knew the group. Respondent asked the civilian if he would like a Merit Matters t-shirt and went to get a new one from the locker of another firefighter who had purchased 20 t-shirts for friends taking the test. Respondent gave the civilian a t-shirt and the civilian put it on. Upon seeing the civilian in the Merit Matters t-shirt, Thomas said that he found it offensive and asked the civilian to take it off. Respondent said that the civilian's dress could not be regulated and that he had the right to self-expression. The civilian complied with Thomas's request and removed the t-shirt but the "mood definitely changed in the firehouse." Respondent testified that he felt bad for the civilian whose tests results had been thrown out, not Thomas who was lashing out to cover his race baiting (Pet. Ex. 9; Tr. 87-98, 144-45, 581-85).

Thomas testified that he had no problem with the civilian staying for lunch but that when he saw him in the Merit Matters t-shirt he asked him to take it off because it was insulting. Respondent went "crazy" and told the civilian not to take it off. The civilian took the t-shirt off. Everyone sat down to eat but there was a lot of tension in the room (Tr. 234-36, 346-51, 355-57).

Thomas testified that another firefighter subsequently complained that he was getting calls about the incident and asked why Thomas was dragging a civilian into the middle of his nonsense with respondent. Thomas said that someone had given the civilian the t-shirt to stir up trouble and that everyone was ostracizing him and defending respondent (Tr. 236-37).

May 21, 2012 EEO training incident

Thomas testified that on May 21, 2012, he got a call from the EEO unit asking if he could fill in that day as one of the instructors for the annual course. When he walked into the EEO classroom he saw respondent and Firefighter Wheeler. Thomas asked the other instructors, Deputy Director Damus and Lieutenant Mendez, to stay in the room because he had been having problems with a firefighter in the class and did not know what would happen. As the class was

beginning, Thomas heard someone say, "Stop looking at me." It was respondent. Everyone was caught off guard and people started looking around. Damus stopped speaking and asked if there was a problem. Respondent said that Thomas "knows what the problem is" and that Thomas should not be teaching because "there's a conflict of interest." Damus asked respondent to step outside and Thomas continued to teach. Respondent came back inside and Damus resumed teaching. When Damus gave a scenario about dating a coworker respondent kept asking questions. Thomas found it embarrassing and tuned out respondent.

Thomas testified that at the end of the class, people he knew would not make eye contact with him or were shrugging their shoulders. When he got back to the firehouse no one said anything and he felt that he was working in a hostile environment. Thomas testified that it was a "miserable situation" because the firehouse was no longer an enjoyable place and that respondent had taken their situation outside the firehouse (Tr. 239-44, 358-66).

Respondent testified that he was required to attend a mandatory EEO training and that Thomas, knowing respondent was going to be present because the information is posted, came to teach the class on overtime to interfere with his "goal" to ask about his rights to wear the t-shirts (Tr. 108-12, 591-98, 601-07, 782-83; Resp. Exs. M, N). When Thomas came in he stood behind the other instructors and was smirking and mouthing words at respondent "like a child would antagonize" a brother behind a parent's back. Respondent raised his hand and asked if Thomas had anything to say. Thomas pretended not to know what was going on. Respondent said there was a conflict with Thomas giving the class while on overtime (Tr. 106-12, 602-03).

Respondent testified that the instructors walked out of the classroom. When they came back in they called for a fire marshal to intimidate respondent. When respondent said that no marshal was needed, Damus asked respondent to step outside. Respondent explained that Thomas scheduled himself to get overtime knowing that respondent would be there for the training. Respondent wanted to ask about his rights to express his "creed" at work. Damus told respondent that he could speak to a chief and get an accommodation to come back for another class on his own time. Respondent said he should not be pushed out of the class and was allowed back inside. The class ended shortly thereafter (Tr. 105-18, 603-08).

Firefighter Wheeler testified that he was sitting with respondent. When Thomas walked into the classroom, he gave respondent an "I got you" smirk. Respondent asked Thomas, "What

are you looking at?" One of the instructors asked what was going on and respondent said, "Isn't this a conflict of interest?" The instructor asked respondent to step outside and someone asked if one of respondent's commanding officers was present and Wheeler said no (Tr. 899-902, 912-17). Respondent returned and the class continued without disruption (Tr. 905).

Chief Kelty testified that an instructor asked whether anyone had a problem with the instructor giving the class. A firefighter raised his hand and was asked to step outside. Kelty testified that while the firefighter did not cause a commotion, he did not return which left a question as to what had occurred (Tr. 639-42).

The next day Thomas filed an EEO complaint because he was afraid that respondent would tarnish his record as he was waiting to be promoted to lieutenant (Tr. 244-49, 337, 368). The complaint described the May 6, 16, and 21 incidents and alleged that respondent was retaliating against him (Pet. Ex. 7).

In 2012, other EEO complaints were filed by black fighters regarding Merit Matters and MADD (Tr. 399, 413).

Subsequent orders

Captain Washington testified that in the spring of 2012, he saw respondent wearing a Merit Matters t-shirt before roll call and told him not to wear it in the firehouse (Tr. 458, 474). Around this time, Washington gave an order at roll call that Merit Matters and MADD t-shirts could not be worn in the firehouse because they could cause dissension (Tr. 458, 476, 500-01).

Respondent testified that around early August Captain Washington saw him wearing the Merit Matters t-shirt before his tour in the firehouse and mentioned in passing that he should not wear it. Respondent asserted that Washington's statement was not an order, was insincere, and did not have anything to do with him being offended by the t-shirt. According to respondent, Washington was always trying "to control people's speech, people's thoughts, people's political ideas" (Tr. 102-05, 126-29, 131-33, 785-86, 807; Pet. Ex. 5 at 122).

Respondent, Lieutenant Zuhlke, and Firefighters Wheeler and Dombrowsky denied hearing Captain Washington issue an order about the t-shirts at roll call (Tr. 545, 832, 891, 945).

Captain Washington testified that after he issued orders to stop wearing the Merit Matters t-shirt, respondent was the only firefighter who continued to wear it (Tr. 481-82). Thomas

testified that after he made it known that he found the Merit Matters and MADD t-shirts offensive, all firefighters except respondent ceased wearing them (Tr. 297, 390).

On May 30, 2012, Fire Commissioner Cassano and Chief of the Department Kildoff, issued Department Order No. 37, stating in relevant part:

> **WORK DUTY UNIFORMS – REMINDER**
> Members are reminded that only official work duty uniforms issued by the Quartermaster may be worn when on-duty. Uniforms shall be worn in accordance with procedures outlined in Chapter 29 of the Regulations.

(ALJ Ex. 4).

On June 14, 2012, the Commissioner and the Chief of the Department issued Supplement No. 32 to Department Order No. 41, stating that the Department is committed to "encouraging a work environment that appreciates and respects differences among our employees," and:

> Fire Department policy strictly prohibits any Department employee from retaliating against individuals who have filed (or who are believed to have filed) a complaint with the Fire Department's EEO Office or who have participated in any way in any internal EEO investigation or any federal or state lawsuit or administrative action concerning discrimination or EEO matters. No one who objects to prohibited harassment, discrimination, or conduct, makes a good faith complaint, or assists in an investigation will be subjected to punishment, coercion, intimidation or retaliation. . . . Any employee who engages in retaliation will be disciplined . . . which may include . . . termination or any other measures necessary to prevent or deter retaliation or any other unlawful and inappropriate employee conduct.

(ALJ Ex. 5).

On June 28, 2012, the Commissioner and the Chief of the Department issued Supplement No. 35 to Department Order No. 45, regarding the Vulcan Lawsuit, stating in relevant part:

> And while there are many different viewpoints on the litigation and the multiple issues it presents, I want to emphasize that behavior that disrupts or is likely to disrupt FDNY operations will not be tolerated. Nor will we condone any act of retaliation against anyone who is party to or part of the DOJ/Vulcans case, or who interacts with our EEO office. *We recently reinforced the importance of strictly complying with Department rules and regulations pertaining to wearing only Department-issued clothing*

> *in the firehouse*, and prohibiting the posting of anything other than Department-issued material on firehouse bulletin boards and walls. We will strictly enforce all of these rules and anyone who violates them will be subject to Departmental discipline.

(ALJ Ex. 6) (emphasis added).

Respondent acknowledged that the orders pertained to him and needed to be followed. He did not follow the first order because the uniform policy was "lax" (Tr. 121-26). With regard to the second order, respondent denied that wearing t-shirts that Thomas told him were offensive was harassing conduct even though Thomas works in the EEO office (Tr. 138-39, 143). With regard to the third order, respondent testified that the reference to "wearing only Department-issued clothing in the firehouse" refers to on-duty conduct and that the "poorly worded" order is open to interpretation. Moreover, prohibiting the t-shirts off-duty in the firehouse was "ridiculous" and would require having lockers outside the firehouse (Tr. 140-43, 794-95).

Subsequent events relating to respondent's wearing of the disputed t-shirts in the firehouse

Lieutenant Zuhlke testified that on August 3, 2012, he called the EEO unit to get clarification because in addition to Thomas, another black firefighter in the firehouse complained that respondent's t-shirts "could cause a problem" (Tr. 838). Zuhlke asked EEO whether a firefighter could wear the Merit Matters t-shirt when coming to work and after finishing a tour. Zuhlke was told that a firefighter could wear the t-shirt in the firehouse off-duty. Zuhlke testified that the EEO opinion was "binding" and overrode all recent orders (Tr. 839-41, 851-60, 880).

Lieutenant Zuhlke acknowledged that he made the call anonymously and spoke to an attorney but never got his name. Moreover, he never explained that two black firefighters had complained about the t-shirt or that there had been an incident about it. Zuhlke never told his commanding officer about the second complaint or that he called EEO (Tr. 841-47, 865, 873).

Respondent testified that Lieutenant Zuhlke told him that he spoke to EEO and that firefighters were not allowed to wear the Merit Matters t-shirt on-duty but that wearing the t-shirt off-duty in the firehouse was not regulated (Tr. 534).

Thomas testified that one Sunday in late August/early September 2012, he was on-duty and respondent came in early wearing the Merit Matters t-shirt to cook pork for dinner. Thomas does not eat pork and felt that respondent was letting it be known that he was excluding Thomas from the meal. He did not participate in the meal and no one said anything (Tr. 249-50, 370-74). Captain Washington thought this was done purposely to isolate and annoy Thomas (Tr. 502-03).

Respondent testified that he came in before his tour, wearing one of the t-shirts, to make a red pork sauce for dinner. He knew that Thomas did not eat pork but did not know that Thomas would be working. Thomas chose not to come to the meal (Tr. 146-47, 739, 784-85).

On September 21, 2012, Thomas was on-duty and took a photo of respondent wearing the Merit Matters t-shirt while he was off-duty eating breakfast (Tr. 147, 154-56, 545; Pet. Ex. 3). Thomas was annoyed and thought respondent was wearing it to aggravate him. When respondent realized that Thomas was taking a picture he made a comment like, "Oh, somebody's taking pictures" and asked Lieutenant Zuhlke to get in the picture with him. Zuhlke walked out of the room (Tr. 251-52, 375-78).

Respondent testified that on October 8, 2012, Thomas took a photo of him wearing the MADD t-shirt in the firehouse. Thomas asked him to take it off and respondent refused saying he was leaving shortly (Tr. 70, 150-55; Pet. Ex. 4). Firefighter Wheeler testified that initially he was annoyed because he thought Thomas was trying to take a picture of him (Tr. 906-07). Thomas testified that he took the picture because he was upset that he was on-duty and respondent was not. Respondent's presence in the MADD t-shirt set the tone for the day. He told Captain Washington that he wanted to file another EEO complaint because respondent was wearing the t-shirt (Tr. 254-56, 378-80, 461-62; Pet. Ex. 8).

On October 12, 2012, respondent was notified that he was being investigated by the EEO unit for creating a hostile work environment (Resp. Ex. O; Tr. 44). Respondent testified that he did not know Thomas was the complainant until January 2013 (Tr. 542, 623) and that he continued to wear the t-shirts in the firehouse (Tr. 736).

Respondent also acknowledged that he continued to wear the t-shirts in the firehouse despite the three Departmental orders, Captain Washington telling him not to wear them, Lieutenant Zuhlke telling him to remove the MADD t-shirt on May 6, and Thomas saying that he

found them offensive (Tr. 87, 144, 748-50, 753, 793). He asserted that when a firefighter goes to work he "does not check his First Amendment rights at the front door" (Tr. 613, 617).

Respondent gave a variety of answers to questions about wearing the t-shirts in the firehouse in 2012. Respondent testified that he wore the MADD t-shirt a couple times in May, June, and August while on and off-duty (Tr. 731-33, 751-52). He further testified that he wore either the Merit Matters or the MADD t-shirt about 50 to 75 times but wore the Merit Matters more often than the MADD t-shirt (Tr. 60-61). He explained that even though he wore a t-shirt continuously, he counted wearing it to work, while on-duty, and after he was off-duty as three separate times (Tr. 63, 808-09). Respondent also testified that he wore the Merit Matters t-shirt between five and 20 times while on-duty (Tr. 718). Respondent further stated that he never wore the MADD t-shirt out in the open while on-duty after the May 6 incident but wore it to and from work and underneath his polo shirt (Tr. 577-78). Respondent testified that after speaking with Lieutenant Zuhlke in August, he wore the t-shirts while off-duty as well as to and from work and on-duty under his polo shirt (Tr. 99-102, 123-34, 165-69, 194-95, 544, 569-71).

Respondent also admitted to wearing the t-shirts while interacting with the public, going on runs from the firehouse, when entering and leaving the firehouse, parking in the firehouse parking lot, and when the community came to open houses. Respondent testified that the community recognized him as a firefighter but that he never thought about what an average member of the community would think about his t-shirts. He wanted people to understand his belief that no one should get preferential treatment and that lowering testing standards to increase diversity in the Department was a bad idea (Tr. 772-81, 787-88, 791-92).

On January 29, 2013, respondent appeared with union counsel and was interviewed regarding Thomas's EEO complaint pursuant to Mayoral Executive Order 16 ("MEO-16") (Pet. Ex. 5).[2]

On June 3, 2013, respondent filed a complaint with the New York State Division of Human Rights ("DHR") against the Department alleging discrimination based on his creed in

[2] The transcript of respondent's interview was admitted into evidence over respondent's objection because the procedures under MEO-16 were followed and respondent made the statements voluntarily (Tr. 48-15). *See Fire Dep't v. Harper*, OATH Index No. 503/14, mem. dec. at 8 (Jan. 21, 2014). However, it was not considered in this decision. The MEO-16 interview is the subject of a pending grievance alleging that petitioner failed to notify him of his right to a union representative during the interview. *Fire Dep't v. Buttaro*, OATH Index No. 2430/14, mem. dec. at 3-4 (July 17, 2014).

that he belongs to Merit Matters, a group that opposes bias in FDNY's firefighter exam. In the complaint, respondent reiterated his factual allegations regarding Thomas and claimed that he was being retaliated against for wearing the disputed t-shirts (Pet. Exs. 9, 10). DHR dismissed the complaint finding that respondent's membership in Merit Matters does not assign him to a protected class and that wearing t-shirts in violation of the Department policy and in a manner that creates a hostile workplace is not a protected activity (Pet. Ex. 11).

Respondent testified that since January 2013, he has not worn either t-shirt at the firehouse (Tr. 157) but wore his Merit Matters t-shirt to and from work (Tr. 542). However, Thomas testified that he was promoted to lieutenant in 2013, and that on his last day in the firehouse in late July the firefighters asked him what he was going to give them since it is tradition for the out-going person to give a gift. Thomas told them his gift was that he was leaving. Many seemed happy that he was going. Respondent was there wearing the Merit Matters t-shirt and had a big smile on his face (Tr. 257-58).

The EEO complaint filed by Thomas was substantiated and formed the basis for this complaint that was served on respondent on November 8, 2013 (ALJ Ex. 1).

ANALYSIS

Respondent's motion to dismiss the charges should be denied

Respondent argues that the charges should be dismissed because he has a First Amendment right to wear the disputed t-shirts. Petitioner argues that respondent does not have a right to wear the t-shirts in the firehouse because they do not constitute speech on a matter of public concern and are disruptive to the workplace.

Public employees do not relinquish their First Amendment rights to comment on matters of public interest by virtue of their government employment. The courts have sought to balance a public employee's interest in engaging in constitutionally protected speech with the government's interest in ensuring that the speech does not adversely affect its ability to provide services to the public. *Pickering v. Bd. of Education*, 391 U.S. 563 (1968). This right, however, is not unqualified. "[T]he First Amendment does not guarantee an absolute right to anyone to express their views any place, at any time, and in any way they want;" such speech is "subject to

reasonable time, place and manner restrictions to further significant government interests." *Oliveri v. Ward*, 801 F.2d 602, 605 (2d Cir. 1986) (citations omitted).

The first question is whether the employee is speaking as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. If the answer is yes, the burden shifts to the employer to demonstrate that potential workplace disruption outweighs the value of the speech. If the government makes such a showing, it may take action against the public employee. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

Matters of public concern relate "to any matter of political, social or other concern to the community . . . ." *Connick v. Meyers*, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

Here, respondent was speaking as a citizen on a matter of public concern when he wore the Merit Matters and MADD t-shirts. First, respondent was not taking a stance pursuant to his official duties as a firefighter. *Garcetti*, 547 U.S. at 421 ("when public employees make statements pursuant to their official duties . . . . the Constitution does not insulate their communications from employer discipline"). Second, whether FDNY is changing testing standards for firefighter applicants to increase minorities in the Department touches on an issue of public concern. Indeed, the testing standards were being contested in the Vulcan Lawsuit and were the subject of much public discourse, including in the media. The Merit Matters t-shirt suggests that there is an issue concerning merit in the FDNY and the MADD t-shirt suggests that the FDNY is "dumbing down" the Department.

Thus, the burden shifted to petitioner to show that the potential workplace disruption outweighs the value of the speech. Pertinent factors include: whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties, or interferes with the regular operation of the enterprise. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Actual disruption is not necessary. Rather, employers may discipline public employees for speech not only upon a showing of actual disruption of the workplace but also upon a showing of potential disruption. *Waters v. Churchill*,

511 U.S. 661, 680-81 (1994); *see also Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (rejecting any actual disruption requirement, proper inquiry is into "potential disruptiveness").

An employer may also take into account the public's perception of employees whose jobs necessarily bring them into extensive public contact. *Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006); *Melzer v. Bd. of Education*, 336 F.3d 185, 198-99 (2d Cir. 2003). Specifically, "the Government may, in some circumstances, legitimately regard as 'disruptive' expressive activities that instantiate or perpetuate a widespread public perception of . . . firefighters as racist." *Locurto*, 447 F.3d at 178. The Supreme Court has said, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 151-52.

As discussed in more detail below, respondent's wearing of the Merit Matters and MADD t-shirts caused actual workplace disruption. Respondent's speech created a hostile work environment for at least one black firefighter and disrupted harmony among the firefighters who live and work together in the firehouse. Respondent's refusal to cease wearing t-shirts that Thomas told him were offensive and that supervisors ordered him not to wear, respondent calling Thomas a "whiny fucking cunt," and respondent's efforts to recruit a civilian and a supervisor to join in the harassment of Thomas, resulted in Thomas feeling unwelcome and harassed in the workplace. Moreover, respondent's speech-related actions disrupted a Department-wide EEO training.

Petitioner also demonstrated that respondent's speech created potential workplace disruption. Thomas credibly testified that the t-shirts had the potential to create a hostile work environment for newly hired black firefighters who may not have felt able to object to them.

Respondent's t-shirts also had the potential to disrupt FDNY's core mission of responding to life-threatening emergencies. The Department's "Harassment Discrimination Prevention" bulletin states:

> From the moment a member enters the Department, the member is educated in the importance of teamwork and how it, together with perseverance and know-how, helps to save lives quickly and safely. Anything that disrupts this teamwork lowers effectiveness

> and can endanger the members in the field. Harassment/Discrimination on the basis of race . . . is detrimental to teamwork and productivity. It is also against the law. To avoid such problem officers and members must understand their responsibilities to prevent and eliminate harassment, discrimination and retaliation in the Fire Department.

(ALJ Ex. 9).

While there was no evidence that firefighting operations were impaired, Captain Washington and Lieutenant Zuhlke testified that several black firefighters in the firehouse expressed concern that the t-shirts worn by respondent could cause problems. Moreover, Washington felt that they could lead to a lack of cohesion amongst a group that must work together. After the May 2012 incidents, the Commissioner issued supplemental orders stating that only Department-issued t-shirts could be worn in a firehouse and that while there are many viewpoints about the Vulcan Lawsuit, behavior that disrupts or compromises "the fulfillment of the FDNY's critical public safety mission" will not be tolerated (ALJ Exs. 4, 6).

As discussed more fully below, respondent's repeated refusal to obey legal orders to wear only Department-issued t-shirts in the firehouse was insubordination. Respondent's flagrant insubordination, by itself, threatened the good order and discipline of a para-military organization where strict obedience is the expected norm. *Dep't of Correction v. Roberts*, OATH Index No. 1048/95 at 6-7 (May 31, 1995); *Fire Dep't v. Rivera*, OATH Index No. 106/80 at 81 (May 6, 1980). Moreover, the Department's assertion that respondent's continued wearing of the offensive t-shirts could threaten fellow firefighters' ability to respond to emergencies as a team was reasonable. *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 26 (2d Cir. 1979) (abrasive conduct has no place in a fire department that depends upon common loyalty and harmony among coworkers).

Finally, the Merit Matters and MADD t-shirts could create a perception that the Department and its firefighters are racist. Respondent wore the t-shirts while interacting with the public, including going on emergency runs and when the community came to open houses. He acknowledged that the community the firehouse serves is predominantly a minority one and that members recognized him as a firefighter when they saw him. Respondent never gave any thought to how the minority community would view the t-shirts. Thomas and Captain

Washington credibly testified that the t-shirts indicated that Merit Matters opposed integration in the FDNY and that MADD linked a lack of intelligence to minorities. Notably, the t-shirts are the same blue as the regulation t-shirt, they bear the Maltese cross, the traditional symbol of firefighters, and in the case of the MADD t-shirt, it also bears the FDNY patch. The Department's concern that the public, and in particular minorities who are seeking to join the FDNY, would think that FDNY endorsed the views on the t-shirts is legitimate.

There is no doubt that the Department has the authority and a duty under federal, state, and city discrimination laws and its own EEO policies to eliminate unwelcome and harassing conduct in the workplace. Since the actual and potential disruption to the workplace and FDNY's concern of maintaining the trust of the public it serves outweigh respondent's First Amendment rights, petitioner may discipline respondent for his speech. *Human Resources Admin. v. Small*, OATH Index No. 241/01 (May 10, 2001), *modified on penalty*, Comm'r Dec. (June 11, 2001), *aff'd*, 299 A.D.2d 238 (1st Dep't 2002) (discipline of respondent for unprofessional and disruptive speech not inconsistent with constitutional mandates). The motion to dismiss should be denied.

The Charges

Petitioner has the burden of proving its case by a preponderance of the credible evidence. *Dep't of Correction v. Hall,* OATH Index No. 400/08 at 2 (Oct. 18, 2007). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." *Richardson on Evidence* § 3-206 (Lexis 2008) (citations omitted); *see also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011). In order to sanction an employee for misconduct, there must be some showing of fault on the employee's part, either that he acted intentionally or negligently. *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 at 3 (Dec. 1, 2006).

To the extent resolution of these charges relied on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience in determining

credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

The record supports a finding by a preponderance of the evidence that respondent intentionally engaged in misconduct in violation of the Department's rules with regard to creating a hostile work environment, insubordination, and failing to wear a proper uniform.

A. Respondent engaged in conduct meant to create a hostile work environment

Respondent is charged with conduct meant to create a hostile work environment and/or to harass and/or to retaliate against other firefighters that were believed to be part of the Vulcan Lawsuit or other EEO matters in violation of Supplement No. 32 to Department Order No. 41 and Department rules, sections 25.1.1 (requiring members to obey all laws, rules, and orders) and 25.1.3 (prohibiting conduct unbecoming) (ALJ Ex. 1).

Supplement No. 32 to Department Order No. 41, reiterating FDNY's commitment to preventing harassment in the workplace and stating that the Anti-Retaliation Policy extends to persons perceived to be involved in the Vulcan Lawsuit or who have participated in an EEO complaint, was issued shortly after the three incidents in May 2012. In *Petties v. New York State Department of Mental Retardation*, 93 A.D.2d 960 (3d Dep't 1983), the Court held that sexual harassment is a form of discrimination that constitutes misconduct even in the absence of a specific agency rule prohibiting such conduct. While the identified order did not exist for a portion of the misconduct charged, the Department had other regulations prohibiting harassment including the Anti-Retaliation Policy referred to therein. Following post-trial submissions, the tribunal requested the Anti-Retaliation Policy which was provided by petitioner (ALJ Ex. 11). Respondent's objection to consideration of this policy is overruled as it is relevant to these proceedings. *See* 48 RCNY § 1-48(b) (Lexis 2014) (official notice may be taken of "regulations . . . that are lawfully applicable to the parties").

Petitioner's post-trial motion to amend the pleadings to conform to the proof is also granted to include violations of the Department's anti-discrimination regulations existing at the time of the alleged misconduct. Administrative pleadings serve a notice-giving function. *Dep't of Citywide Admin. Services v. Phillip*, OATH Index No. 114/10 at 4-5 (Sept. 10, 2009). So long as the charges apprise the party of the conduct at issue, so as to enable him to adequately prepare

and present a defense, the due process requirements of notice are satisfied and the pleadings will be deemed adequate. *Dep't of Correction v. Lee*, OATH Index No. 284/88 at 5 (Dec. 2, 1988). When a party has not had sufficient opportunity to address and fully litigate an issue, conforming charges is not appropriate, and will not be permitted. *See Matter of Ruffalo*, 390 U.S. 544 (1968); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130 (2d Cir. 1990).

The petition placed respondent on notice that he was being charged with engaging in discrimination, harassment, and retaliation from January through December 2012. Respondent defended against these allegations at the hearing and in his post-hearing submissions. Indeed, respondent provided several FDNY orders setting forth the Department's EEO policies and the need for members not to violate them (ALJ Exs. 8, 9, 10; Tr. 508-09). Since respondent is required to adhere to all Department regulations and discrimination laws, and he was on notice of the charges, he cannot be heard to complain that the petition does not contemplate holding him accountable to applicable rules and laws in effect at the time. *See Taxi & Limousine Comm'n v. Kollaris*, OATH Index No. 746/90 at 3-4 (Aug. 2, 1990) (variance between the charge and the proof of little import because the original charge put respondent on notice of the rule allegedly violated, as well as the general charge that his hack license was invalid).

Turning to the merits, FDNY has multiple rules setting forth the general proposition that members shall not engage in discrimination (ALJ Exs. 2, 5, 6, 8, 9, 10, 11). The "Harassment Discrimination Prevention" bulletin provides the following relevant definitions:

> 1.1 Discrimination - Disparate treatment of a person or group (Either intentional or unintentional) listed on the F.D.N.Y. Equal Opportunity Employment Policy Statement dated 10/10/96 which adversely affects employment and retention in service.
>
> 1.2 Harassment - Unwelcome verbal . . . conduct which has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, or offensive working environment.

(ALJ Ex. 9). Examples of discrimination and harassment in the bulletin include: excluding persons from meals, employee isolation as a weapon of hostility or intimidation, commenting or

suggesting that individuals are less able to do the job or are less intelligent or are unwelcome, and displaying t-shirts with a discriminatory or harassing message in the workplace (ALJ Ex. 9).

The EEO complaint process further provides that "discrimination" includes the "illegal treatment of a person or group (either intentional or unintentional) based on the person's protected category which adversely affects employment . . . ." (ALJ Ex. 10).

The Anti-Retaliation Policy states: "It is unlawful and a violation of this policy to retaliate against or harass any person for . . . opposing discrimination . . . ." (ALJ Ex. 11).

FDNY's discrimination policies are interpretations of Title VII and the New York State and New York City Human Rights laws. These policies are consistent with section 8-107 of the Administrative Code of the City of New York ("HRL") which applies to all city agencies and employees. The HRL prohibits discrimination in the conditions of employment based on race and does not differentiate between hostile work environment and discrimination claims. *Williams v. New York City Housing Auth*., 61 A.D.3d 62, 75 (1st Dep't 2009). HRL section 8-107(7) states that "[i]t shall be an unlawful discriminatory practice for any person . . . to retaliate or discriminate in *any manner* against any person because such person has . . . commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter . . . ." (emphasis added).

This tribunal has rejected the requirement that when an employee is brought up on charges for engaging in discriminatory conduct, petitioner must prove the discrimination under the standards set forth in federal law. *Fire Dep't v. McFarland*, OATH Index No. 230/86 at 11-13 (Aug. 21, 1986) (in a case alleging that firefighter engaged in sexual harassment petitioner need only show respondent engaged in misconduct not discrimination under Title VII). Petitioner has established that respondent engaged in misconduct.

Starting in 2011, respondent and others wore Merit Matters and MADD t-shirts in the firehouse while on and off-duty. The testimony of Captain Washington and Thomas that they found the t-shirts offensive but chose to ignore them until the kitchen incident, while credible, was insufficient to establish that respondent created a hostile work environment prior to May 6, 2012. However, starting on that date, respondent engaged in an intentional pattern of behavior intended to harass Thomas because he objected to respondent's t-shirts.

As a threshold matter the record supports a finding that prior to May 6, 2012, respondent knew Thomas was a member of the Vulcan Society and was involved in the Vulcan Lawsuit. The credible testimony of Captain Washington and Thomas established that in 2012 it was well known in the firehouse that Thomas was a member of the Vulcan Society. Indeed, virtually every black firefighter in the FDNY is a member. It was also undisputed that respondent was opposed to the Vulcan Lawsuit, attended a related hearing in 2012, was a member of and the Battalion 38 representative for Merit Matters, was previously involved in a lawsuit against the Department for allegedly giving preferential treatment to minorities, knew Thomas was an EEO instructor, and knew Washington was the past president of the Vulcan Society. It seems likely that respondent would also know who else in his firehouse was involved in the Vulcan Lawsuit.

Even if respondent did not know about Thomas's status prior to May 6, his claim that he did not hear the conversation that day in the kitchen about Thomas making the news for the Vulcan Society's tutorial was incredible. Merit Matters obtained the list of minority applicants issued pursuant to a court order in the Vulcan Lawsuit and disrupted the tutorial. Respondent heard the firefighters' conversation when it turned to Thomas saying that merit does not matter when a black firefighter applies to get into one of FDNY's special units. It seems more likely than not that respondent also heard their conversation about Merit Matters, a group he was actively involved in, disrupting the tutorial that Thomas was working on. Thus, respondent had actual notice that Thomas was a member of the Vulcan Society and was involved in the Vulcan Lawsuit on that date.

When Thomas mentioned the difficulty for black firefighters to get into SOC, respondent interjected himself into the conversation and told Thomas that the reason he did not get into SOC was not because he is black but because he is a "whiny fucking cunt." Thomas's testimony that respondent also stated that Thomas, the Vulcan Society, and EEO were "full of shit" was credible in light of respondent's lack of regard for Thomas, his opposition to the Vulcan Lawsuit, and his disdain for EEO matters in general. These comments went beyond typical firehouse banter and were hostile and deliberately disparaging to Thomas, Captain Washington, the Vulcan Society, and the Vulcan Lawsuit.

Thomas's testimony that respondent was disrespectful and spoke down to him as if he were a child was corroborated by respondent who testified that Thomas was "childish," smirked

at respondent like a "child," and had to be "scolded" and "corrected" for race baiting. If anyone was engaged in race baiting, it was respondent who was wearing a t-shirt that linked minorities to a lack of intelligence and was verbally abusing Thomas about racial issues.

After respondent made his provocative comments, Thomas told respondent that he found the MADD t-shirt offensive and to take it off. Respondent refused until he was told to do so by a lieutenant. Respondent's hostile intent was made even more evident when he changed into the Merit Matters t-shirt. Contrary to respondent's claims, this was not "to appease" Thomas but to antagonize him further. When Thomas told respondent that the second t-shirt also was offensive, he continued to wear it.

In addition to wearing t-shirts that respondent knew Thomas objected to, ten days later respondent enlisted a civilian to wear a Merit Matters t-shirt during lunch at the firehouse. When Thomas told the civilian that the t-shirt was offensive and to take it off, respondent argued that the civilian could leave it on. The incident fomented a great deal of tension among the firefighters in the room. The misconduct was aggravated by the fact that it occurred in front of a civilian who was seeking to become a firefighter.

Once Thomas made it known that the Merit Matters and MADD t-shirts were offensive, everyone in the firehouse, except respondent, ceased wearing them. Not only did respondent continue wearing them, he disrupted an EEO training because he had a "goal" of announcing his right to do so. Thomas's testimony that at the start of the class respondent loudly stated, "Stop looking at me," was corroborated by Firefighter Wheeler who testified that he heard respondent ask Thomas, "What are you looking at?" Wheeler did not corroborate respondent's claim that Thomas was mouthing words at him like a child. If anyone was being childish, it was respondent who interrupted the class with an unreasonable objection that there was a conflict with Thomas teaching on overtime while he was mandated to be there. This outburst disrupted the class and resulted in respondent being removed from the classroom. Chief Kelty testified that this left a question as to what was going on. It was undisputed that nothing like this had ever occurred in an EEO training before or since. Moreover, respondent's remarks left Thomas embarrassed and humiliated in a public forum. Thomas's testimony that people in the class would not look him in the eye and that he felt badly that respondent had taken their situation outside of the firehouse was credible.

Similarly, Thomas's testimony that people in the firehouse were talking about these incidents, were mocking him about his objections to the t-shirts, and were complaining to him about dragging a civilian into the mix, logically made Thomas feel miserable, ostracized, isolated, unwelcome, and concerned that the dispute with respondent could affect his promotion to lieutenant. As a result, Thomas filed an EEO complaint alleging a hostile work environment.

Shortly thereafter, three orders from the Commissioner and the Chief of the Department were issued which not only stated that official uniforms must be worn in the firehouse but that retaliation against members involved in the Vulcan Lawsuit or with the EEO office is strictly prohibited. These orders further stated that any employee who engages in retaliation and fails to comply with the uniform policies will be subject to discipline. Despite orders from the highest ranking members of the Department and the threat of discipline, respondent continued to wear the Merit Matters and MADD t-shirts.

Thomas credibly testified that he thought respondent was wearing the t-shirts to aggravate him and that respondent set the tone for the day by doing so. As a result, Thomas photographed respondent wearing the t-shirts to make a record of these malicious acts. Thomas's unrebutted testimony that respondent started mocking him and tried to enlist Lieutenant Zuhlke into posing with him in one of the pictures was credible. Similarly, Thomas's testimony that he felt excluded from a dinner because respondent, while wearing the Merit Matters t-shirt off-duty, cooked pork knowing Thomas would not eat it was believable. Also credible was Thomas's testimony that on his last day in the firehouse respondent was there wearing his Merit Matters t-shirt with a big smile on his face and that Thomas told the firehouse his gift to them was that he was leaving. Notably, this last incident occurred after respondent had been interviewed about Thomas's EEO complaint in January 2013, and was contrary to respondent's testimony that he never wore either t-shirt in the firehouse after this date. Moreover, while the October 2012 EEO notice to respondent did not mention Thomas by name, it seems likely that respondent assumed it was Thomas who had filed a complaint against him.

Respondent failed to put forward any legitimate reason for his repeated wearing of the t-shirts, except his unyielding need to proclaim his "creed" that changing the hiring standards for firefighters to increase diversity was a bad idea. Not only did respondent create disharmony among firefighters in the firehouse, his acts were spiteful and intended to harass and retaliate

against Thomas, a black firefighter who was not only an EEO instructor and an EEO and Vulcan Lawsuit complainant, but was opposed to discrimination in the workplace, a protected activity. Many of respondent's acts fell squarely within the Department's examples of harassment in the Harassment Discrimination Prevention bulletin, including exclusion of Thomas from a meal, making Thomas feel unwelcome and the subject of ridicule, and displaying t-shirts suggesting that minorities are less able to do the job of a firefighter or are less intelligent.

Respondent's intentional conduct was meant to create a hostile work environment and/or to harass and/or to retaliate against Thomas for his protected status and activities, and was in violation of Department orders prohibiting such conduct. Moreover, respondent's conduct was a violation of his oath of office and was conduct unbecoming in violation of Department rules, sections 25.1.1 and 25.1.3.

B. Respondent failed to wear Department-issued clothing and refused to obey orders to do so

Respondent is charged with 20 counts of failing to wear Department-issued clothing in the firehouse and with failing to comply with orders to do so in violation of Supplement No. 35 to Department Order No. 45, Supplement No. 32 to Department Order No. 41, and Department rules, sections 25.1.1, 25.1.3, 29.1.2, and 29.6.3 (ALJ Ex. 1).

Department rule 29.1.2 requires members to wear only uniforms issued by the Quatermaster and rule 29.6.3 lists the articles of approved clothing. Department Order No. 37 issued on May 30, 2012, reminded members that only official work duty uniforms issued by the Quartermaster could be worn when on-duty. Supplement No. 35 to Department Order No. 45 referred back to Department Order No. 37 and stated that only Department-issued clothing could be worn in the firehouse. Supplement No. 32 to Department Order No. 41 prohibited retaliation against other members who have participated in anyway in an EEO matter.

The FDNY is a para-military organization and may restrict a uniformed member's appearance so long as the restrictions are rationally related to the Department's legitimate interests. *Kelly v. Johnson*, 425 U.S. 238 (1976) (county regulation limiting length of patrolmen's hair upheld); *Webb v. City of Philadelphia*, 562 F.3d 256, 261-62 (3d Cir. 2009) (rule against wearing religious garb while in uniform upheld where, as a para-military entity, the

police department requires "a disciplined rank and file for efficient conduct of its affairs"); *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001) (police department cannot be forced to let officers add religious symbols to their official uniforms); *Inturri v. City of Hartford, Conn.*, 365 F. Supp. 2d 240 (D. Conn. 2005) (order that tattoos be concealed while officer is on-duty rationally related to the department's legitimate interest in fostering harmonious race relations both within the department and the community). Here, the Department's decision to enforce its uniform policies in the firehouse was rational.

Respondent admitted that the Merit Matters and MADD t-shirts are not Quatermaster issued clothing and that he wore them in the firehouse in 2012. While petitioner failed to establish how many times respondent wore the t-shirts, it appears that respondent wore them openly multiple times on and off-duty until he spoke with Lieutenant Zuhlke in August 2012. According to respondent, after Zuhlke told him that he could not wear the t-shirts on-duty but that off-duty attire was not regulated, he routinely wore the t-shirts openly off-duty and under his polo shirt while on-duty.

It was undisputed that firefighters often wore unauthorized t-shirts in the firehouse, including the Merit Matters t-shirt, and that prior to May 2012 there were no specific directives issued regarding this practice. Respondent should not be liable for wearing the disputed t-shirts prior to May 6, 2012, under the doctrine of waiver and condonation. *Dep't of Environmental Protection v. Critchlow*, OATH Index No. 709/07 at 12 (Mar. 5, 2007) (agency may not lead employee into believing his conduct will not be considered a rule violation then seek to have the employee disciplined); *Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 362/13 at 5-7 (June 14, 2013) (charge that respondent violated order not to speak to certain employees dismissed where agency condoned such communications).

The issue is whether after May 6, 2012, respondent continued to wear the Merit Matters and MADD t-shirts in violation of orders not to do so. To establish a charge of insubordination, petitioner must prove three elements: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007).

The first order was from Lieutenant Zuhlke who told respondent on May 6, 2012, to remove the MADD t-shirt he was wearing on-duty. Contrary to respondent's testimony that he voluntarily removed the t-shirt to appease Thomas, Zuhlke issued respondent a clear directive to remove the t-shirt because Thomas found it offensive. Respondent followed the order and changed into the Merit Matters t-shirt. It was not until August 2012 that Zuhlke told respondent that he could only wear the t-shirt off-duty in the firehouse.

Another order came from Captain Washington who saw respondent wearing the Merit Matters t-shirt before roll call and told him not to wear it in the firehouse. Respondent admitted that Washington told him not to wear the t-shirt and that this occurred while he was off-duty. Washington's testimony that this was in the spring when the three May incidents occurred and Thomas's EEO complaint was filed was more credible than respondent's testimony that it was in August. In either event, respondent admitted that he disregarded Captain Washington because respondent found him "insincere" and was always trying to "control" people.

Respondent's actions were also in violation of the three orders issued by the Commissioner and the Chief of the Department in May and June 2012. Respondent admitted that he openly wore the MADD and Merit Matters t-shirts on-duty until August in violation of Department Order No. 37. Similarly, he wore the t-shirts on and off-duty in the firehouse before and after August in violation of the more broadly stated prohibition set forth in Supplement No. 35 to Department Order No. 45. Finally, respondent wore the Merit Matters and MADD t-shirts to harass Thomas in violation of Supplement No. 32 to Department Order No. 41. Respondent's explanations that he did not need to follow the orders because the uniform regulations were lax, the orders were open to interpretation, and he was not engaging in harassment are without merit.

Once a directive has been given, an employee must abide by the principle of "obey now, grieve later." This means that an employee is required to obey the order when given and challenge it through formal grievance procedures. *See Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855 (1984); *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 11 (Oct. 17, 2008).

There are a few exceptions to the "obey now, grieve later" principle, including orders: (1) that are clearly in excess of the agency's authority under the collective bargaining agreement; (2) that are unlawful; and (3) that would threaten the health or safety of any person if followed.

Smith, OATH 2019/08 at 4. The burden is on respondent to demonstrate, by a preponderance of the evidence, that an exception to the "obey now, grieve later" principle exempts him from compliance with an agency order. *Health & Hospitals Corp. (Coler-Goldwater Hospital) v. Hinkson,* OATH Index No. 163/04 at 4 (Nov. 21, 2003).

Respondent failed to demonstrate any exception to the "obey now, grieve later" principle and admitted that he ignored the orders because they violated his creed. After the orders were issued, respondent was the only person in the firehouse who continued to wear the Merit Matters and MADD t-shirts. Notably, the orders in dispute were not issued to regulate harmless attire in the firehouse that had been traditionally unregulated. They were issued in the context of colorable assertions of discrimination at a time when the Department had been found liable for discrimination in the Vulcan Lawsuit. As discussed above, the Department has the right to regulate on and off-duty conduct that could cause workplace disruption.

Respondent failed to provide any support for the assertion that orders from the highest ranking members of the Department and the firehouse could be overridden by Lieutenant Zuhlke, a low ranking officer, who supposedly received an unwritten opinion from EEO that off-duty attire in the firehouse could not be regulated. Incredibly, Zuhlke called the EEO unit anonymously, never got the name of the attorney he spoke to, never told the attorney that there had been complaints and disruption caused by the t-shirts in question, and never told anyone in the chain of command about his conversation with EEO.

Similarly, respondent's claim that he is allowed to wear the t-shirts on-duty under his polo shirt as allowed by Department rule 29.6.3 is without merit. That rule requires "Chiefs and Company Officers" to wear "solid white T-shirts under open necked work/duty shirt." This section of the rule does not apply to firefighters.

To the extent respondent is arguing that other members of service wore unauthorized clothing in the firehouse and were not disciplined, this argument is one of selective enforcement. It is well settled that a selective enforcement or retaliation claim is not a proper defense in an administrative proceeding. *See, e.g.*, *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 n.5 (1979) (selective enforcement claim not properly before the administrative tribunal, rather it was "properly brought only before a judicial tribunal"); *Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 2 (Mar. 5, 2010) (OATH does not have jurisdiction to hear retaliation claim).

The charges that respondent repeatedly failed to wear Quatermaster issued clothing and was insubordinate in violation of Department rules should be sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that the potential workplace disruption outweighs respondent's First Amendment right to wear non-Department-issued t-shirts in the firehouse.

2. Petitioner demonstrated that from May 6, 2012 until December 2012, respondent engaged in conduct meant to create a hostile work environment in violation of Department rules.

3. Petitioner demonstrated that respondent repeatedly failed to wear Department-issued clothing in the firehouse and repeatedly disobeyed orders to wear only authorized clothing in the firehouse in violation of Department rules.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's work history for purposes of recommending an appropriate penalty. Respondent has been a firefighter since 1998 and does not have any disciplinary history. Respondent received satisfactory performance evaluations in 2011 and 2013. Respondent also received citations for his work during 9/11, and during Hurricane Sandy, and for successfully resuscitating a patient in cardiac arrest. Respondent's long tenure and personnel record are mitigating factors to be considered.

Respondent has been found guilty of intentionally engaging in a persistent and long-term pattern of harassment and of intentionally engaging in repeated acts of insubordination. Under section 15-113 of the Administrative Code, the permissible penalties for "any offense" are: a reprimand; forfeiture or withholding of pay for a specified period of time; suspension without pay for up to ten days; or termination. Petitioner seeks a recommendation that respondent be terminated from his employment. Case law and the record support this request.

Employees are entitled to work in an environment that is free from abuse and harassment. *Human Resources Admin. v. Reaves-Cain*, OATH Index No. 1718/07 at 13 (Nov. 14, 2007). In some cases, an employee may be terminated for a single act of harassment. *Dep't of Correction v. Rupnarine*, OATH Index No. 522/89 (July 21, 1989), *aff'd*, 169 A.D.2d 545 (1st Dep't 1991).

Absent significant mitigation, repeated acts of harassment usually result in termination of employment. *See Human Resources Admin. v. Allen*, OATH Index No. 212/06 at 38-39 (June 28, 2006) (termination recommended where supervisor engaged in pattern of sexual harassment); *Transit Auth. v. Fedey*, OATH Index No. 633/97 (Mar. 14, 1997), *modified on penalty*, Auth. Dec. (Apr. 21, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. 98-102-SA (Sept. 28, 1998) (termination of employee for pervasive pattern of humiliating, discriminatory conduct involving references to gender, race, and sexual orientation); *Triborough Bridge and Tunnel Auth. v. Roberson,* OATH Index No. 753/94 at 23 (Mar. 13, 1995), *aff'd*, 232 A.D.2d 200 (1st Dep't 1996) (absent strong mitigation, employees who engage in lengthy pattern of sexual harassment should be dismissed); *McFarland*, OATH No. 230/86 at 17-19 (termination for firefighter who engaged in sexual harassment of fellow firefighter). The fact that most of these cases previously heard in this tribunal have involved sexual harassment does not mean that other forms of harassment are any less insidious.

Similarly, in cases involving persistent insubordination, termination has been found appropriate. *See, e.g., Short v. Nassau County Civil Service Comm'n*, 45 N.Y.2d 721, 723 (1978) (termination for employee's "persistent unwillingness to accept the directives of his superiors"); *Health and Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 (Dec. 17, 2009) (termination for employee who refused multiple directives to be trained for a new assignment); *Health and Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsay*, OATH Index No. 1248/05 (Nov. 9, 2005) (maintenance worker terminated for numerous acts of insubordination and discourtesy).

Moreover, prompt obedience to supervisory orders is the quintessential rule in any para-military organization, including the FDNY, which is entrusted with responding to life-threatening emergencies. *Rivera*, OATH 106/80 at 81 (respondent subject to para-military principles of discipline if FDNY is to be capable of responding to whatever emergency situations may arise). As a result, disciplinary penalties for insubordination are sterner in a para-military organization. *Roberts*, OATH 1048/95 at 6-7.

This tribunal has recognized that there are circumstances when an employee should receive a lesser punishment, particularly on the first occasion that misconduct occurs. *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("employees should

have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it"). In addition, a fair penalty must take into account the particular circumstances of the incident and individual mitigating factors, as appropriate. *Dep't of Correction v. Passe*, OATH Index No. 1917/02 at 11 (Jun. 4, 2003), *modified on penalty*, Comm'r Dec. (Sept. 23, 2003) (respondent's 13-year tenure and clean record are mitigating factors which must be taken into account in assessing penalty).

Neither a reprimand nor a ten-day suspension is a sufficient penalty for respondent's intentional and unrelenting insubordination and harassment. Respondent's repeated refusal to obey orders from the commanding officer of his firehouse as well as from the Commissioner and the Chief of the Department to wear only authorized clothing in the firehouse raises serious questions about respondent's ability to follow legal directives that he does not agree with.

Moreover, respondent's harassment caused actual and potential workplace disruption. His malicious actions, that were intended to harass and humiliate a fellow firefighter due to the firefighter's opposition to workplace discrimination, raise legitimate concerns about respondent's ability to work with others who do not share his beliefs. An aggravating factor is that respondent sought to enlist others in his provocation of Thomas, including a civilian and Lieutenant Zulke who both declined to follow respondent's lead. Indeed, once it was known that Thomas objected to the Merit Matters and MADD t-shirts, other firefighters ceased wearing them to avoid disrupting the harmony of the firehouse.

There is also no evidence that a significant pay fine will modify respondent's behavior. Throughout 2012 respondent was given multiple warnings and opportunities to cease his misconduct. He refused to do so because it violated his personal creed. Even after respondent knew he was the subject of an EEO complaint, he continued his course of behavior until Thomas's last day in the firehouse. During the five-day hearing, respondent trivialized his supervisors' orders and his fellow firefighter's concerns by referring to them as "insincere," "poorly worded," "control[ing]," "ridiculous," and "childish." Respondent's lack of remorse or appreciation for how detrimental his conduct was further suggest that he is unlikely and unwilling to change his behavior. *Office of Management & Budget v. Perdum*, OATH Index No.

998/91 at 28 (June 17, 1991) (19-year employee with no prior record terminated for repeated insubordination and incompetence, where he demonstrated no willingness to change).

"The Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring). Viewing respondent's misconduct in its entirety, it is evident that respondent is a liability in a para-military organization that requires following orders, teamwork, and trust. Despite respondent's long tenure and good work record, termination from employment is not so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *See Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974).

Accordingly, I recommend that respondent be terminated from his employment as a firefighter. *Cf. Locurto*, 447 F.3d at 183 (termination of firefighters who participated in racially offensive parade float upheld because the potential workplace disruption outweighed the firefighters' First Amendment interests).

Alessandra F. Zorgniotti
Administrative Law Judge

January 13, 2015

SUBMITTED TO:

DANIEL A. NIGRO
Commissioner

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