



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

May 2, 2013

Patrick M. Phelan
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Re: Notice of Findings
[REDACTED] v. Up2Us (13-OCR-100)

Dear Mr. Phelan:

Thank you for the March 21, 2013, Position Statement and supporting documentation that you submitted to the Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) on behalf of your client, Up2Us, in response to the administrative Complaint that [REDACTED] has filed against Up2Us. In her Complaint, the Complainant alleges that Up2Us discriminated against her during the course of her employment, created a hostile work environment, and terminated her employment based on race (African American).

The OCR has the administrative responsibility for ensuring that recipients of financial assistance from the OJP, the Office of Community Oriented Policing Services, and the Office on Violence Against Women comply with federal civil rights laws prohibiting discrimination on the basis of race, color, national origin, religion, sex, or disability in the delivery of services and employment practices. According to our records, Up2Us receives federal financial assistance from the OJP and is subject to the OCR's enforcement authority.

The OCR has completed our review of the documentation provided by the Complainant and by Up2Us and has determined that there is insufficient evidence of a violation of the civil rights laws that we enforce. Our findings are set forth below for your review.

I. Factual Background

A. Alleged Disparate Treatment and Hostile Work Environment During the Complainant's Employment

On August 1, 2012, the Complainant began working for Up2Us as the Director of Training for the Up2Us Center for Sports-Based Youth Development. According to the

position description that the Complainant provided to the OCR, the Director of Training is responsible for overseeing all aspects of Up2Us' training program, including developing and implementing training modules for Up2Us' flagship program Coach Across America (CAA) and collaborating with the CAA program team. The Complainant asserts that when she was hired, Up2Us Executive Director [REDACTED] (Caucasian) told the Complainant that she would be part of Up2Us' management team and would be participating in executive decision-making related to training along with the management team's weekly telephone calls and the annual manager's retreat in Barbados, and that she would be traveling to major cities to represent the organization. Pursuant to the Complainant's July 30, 2012, written offer of employment, the Complainant was initially assigned to work in Up2Us' office in Boston, Massachusetts under the supervision of [REDACTED] (Caucasian), Director of the Center for Sports-Based Youth Development, and the Complainant was expected to relocate to Up2Us' headquarters in New York City in the late fall or early winter "unless a compelling circumstance arises which indicates that remaining in Boston is in the best interest of Up2Us organization-wide."

The Complainant contends that a few weeks after she began her employment, [REDACTED] told the Complainant that [REDACTED] and Director [REDACTED] decided that the Complainant would not be participating in manager-level meetings and retreats and would continue to report to [REDACTED] indefinitely. In response, in Up2Us' Position Statement, it states that each department within Up2Us only sends one representative who is at a director level to managers meetings to avoid excessive use of staff time. Up2Us provided the OCR with a September 14, 2012, email exchange between Up2Us' Managing Director and the Complainant in which the Managing Director apologized for mistakenly including the Complainant on an email about a managers meeting and explaining that one person per department participates in these meetings, and the Complainant replied, "[n]o worries, I figured my inclusion on the email was a mistake or just a head's up it was happening" Up2Us asserts that [REDACTED] followed up with the Complainant regarding this issue during a subsequent meeting, and that the Complainant voiced no objection.

The Complainant alleges that soon after her hire, [REDACTED] began to exclude the Complainant from training-related matters and meetings and failed to share pertinent information with the Complainant related to the Complainant's job responsibilities, resulting in a hostile environment. For example, the Complainant alleges that at a September 2012 training for the Crim Fitness Foundation that Up2 Us conducted in Flint, Michigan, [REDACTED] did not inform the Complainant of a meeting she was conducting with the Crim Fitness Foundation to discuss training logistics, and when the Complainant discovered the meeting [REDACTED] told her very rudely that she did not need to be there and should go help others stuff bags. In its Position Statement, Up2Us states that there was a very short timeframe to prepare for the training and that as [REDACTED] was the only Up2Us employee who had experience conducting prior trainings in Flint she met with the Crim Fitness Foundation, and that all other members of the training team were asked to assemble bags of training materials. The Complainant also asserts that [REDACTED]

██████████ met without the Complainant with the University of Connecticut, with Edgework Consulting, and with some companies in Seattle to discuss training initiatives and did not inform the Complainant of the substance of these meetings, even after the Complainant inquired whether there was any information related to training that she should be aware of. In response, Up2Us states that ██████████ had a preliminary meeting with the University of Connecticut that focused on strategy and exclusivity rights partnerships and did not involve a discussion of training; that the meetings with Edgework Consulting focused on measuring outcomes and on broad partnership developments with Up2Us and did not concern training; and that when ██████████ was in Seattle for the University of Washington's Center for Leadership in Athletics Annual Forum, she met with staff from the Center and local Up2Us members and discovered that training local Up2Us members was a high priority, and that as soon as she returned to Boston she informed the Complainant about the training issues discussed during the meetings. The Complainant also alleges that on another occasion, ██████████ and another Up2Us employee, ██████████ (Caucasian), Assistant Director for CAA, met with an individual to discuss facilitating a training in New York City and did not include or inform the Complainant of this discussion; in its Position Statement, Up2Us states that ██████████ has no record of such a meeting occurring.

Additionally, the Complainant believes that ██████████ gave important assignments to ██████████ and other Caucasian employees that were more appropriate for the Complainant based on her responsibilities. The Complainant states that she was initially assigned to conduct trainings in Miami in October 2012 and in New Orleans in November 2012, but that ██████████ subsequently informed her that Up2Us did not have the budget to send the Complainant to the trainings. Instead, according to the Complainant, ██████████ and ██████████ conducted the training in New Orleans and ██████████, ██████████, and ██████████ (Caucasian), the Program Coordinator for CAA, planned and conducted the training in Miami. The Complainant requested that ██████████ include her in planning meetings leading up to the trainings and provide feedback following the trainings, but ██████████ did not do so. In response, Up2Us states that the trainings in Miami and New Orleans were for CAA coaches and host-site supervisors, and that as Assistant Director of CAA, ██████████ attended the trainings consistent with her role to oversee the professional development of CAA coaches and host-site supervisors. Up2Us notes that this has been the case since ██████████ began her employment with Up2Us in November 2010. As for ██████████ attendance, Up2Us states that it only had the budget to send two staff members to these trainings, that ██████████ attended the trainings in lieu of the Complainant because they were Up2Us' first trainings in vitally important markets, and that in previous trainings the Complainant

¹ In an April 29, 2013, email to OCR attorney Shelley Langguth, you stated that ██████████ is supervised by ██████████, the Director of CAA.

² It is the OCR's understanding that ██████████, as the Program Coordinator for CAA, is also supervised by ██████████.

had demonstrated a lack of professionalism through chronic tardiness and had failed to perform well when leading group sessions.³

The Complainant also asserts that Up2Us notified other Up2Us employees that it would be terminating the Complainant and replacing her with ██████████ prior to notifying the Complainant of her termination on December 20, 2012, which contributed to a hostile environment. The Complainant states that on December 18, 2012, while she was still employed as the Director of Training, she discovered budget documents on Up2Us' interoffice computer system which listed ██████████ as the Training Director. Specifically, the Complainant alleges that on November 28 and December 4, 2012, the Regional Coordinators of Up2Us' Los Angeles Regional Initiative office and Chicago Regional Initiative office, respectively, posted on Up2Us' internal Dropbox account budget documents listing the positions of CAA National Director, Evaluation Director, CAA Project Coordinator, Center Project Coordinator, Training Director, Evaluation Director, Regional Director, and Regional Coordinator and indicating the name of the employee in each position; in both documents, ██████████ is listed as the Training Director. The Complainant also indicates that on December 12, 2012, ██████████ posted on the Dropbox account PowerPoint slides that she developed entitled "Strategy December 2012" discussing staffing roles of four positions within Up2Us and listing "Training Events" and "Training Delivery" among the duties of ██████████, and "Training Videos/E-learning" among the duties of "New Person-Program Coordinator." The Complainant asserts that these were her duties, and that she is not mentioned in this strategic plan. In Up2Us' Position Statement, it contends that, "Up2Us has never listed ██████████ on any grant budgets as a 'Training Director,' and she has not been hired into the Training Director position." According to Up2Us, it has no plans to hire a new Training Director, as Up2Us has entered into a new partnership with Edgework Consulting involving research, evaluation, and training that has resulted in Edgework Consulting assisting with many of the tasks previously handled by the Complainant; ██████████ has assumed many of the Complainant's training responsibilities; and ██████████ continues to participate in CAA training events and training strategy development as the Assistant Director of CAA.

B. Alleged Discriminatory Termination of the Complainant

On December 20, 2012, the Complainant sent ██████████ an email expressing concern that ██████████ has not been inviting the Complainant to meetings discussing training initiatives nor informing her of training developments as to allow the Complainant to be successful in the Director of Training position. During a telephone conversation later that day, ██████████ told the Complainant that Up2Us was terminating the Complainant's employment. According to the Complainant, ██████████ informed her that she was being terminated due to the fact that the Complainant was not a good fit and was unprofessional because she had been late to some trainings, and that ██████████ had

³ Based on the contradictory information provided by the Complainant and Up2Us regarding how many employees traveled to each training, it is unclear whether ██████████ also attended the training in Miami.

been excluding the Complainant from various opportunities as a “professional penalty” for being late to these trainings. The Complainant also states that [REDACTED] told her that she did not trust the Complainant because she discovered that the Complainant had spoken to Director [REDACTED] on December 7, 2012, to request a transfer to another position, and because she had socialized on vacation with individuals with whom Up2Us had conducted business without notifying [REDACTED] as was required by agency policy. Later that day, the Complainant sent [REDACTED] an email stating, “[a]s I stated earlier, I am willing to own my part in the breakdown of this working relationship but I believe we mutually contributed to this fit not working out and feel I am being unfairly penalized by facing unemployment, as a result of the sole responsibility placed on me.”

In Up2Us’ Position Statement, it states that at UP2Us’ annual strategic retreat in early December 2012, the Up2Us management team decided to terminate the Complainant due to her poor performance, including her lack of professionalism and her failure to meet the performance expectations for her position. Up2Us asserts that showing up for work on time is a fundamental job requirement and that the Complainant was repeatedly late for important meetings and training events, noting that the Complainant was more than one hour late to her first meeting with the Up2Us management team in New York City on August 1, 2012. Up2Us states that even more troubling, the Complainant consistently arrived late to external events. According to Up2Us, the Complainant arrived late to all three days of the Up2Us Training Institute in Boston on September 5-7, 2012, and that as Training Director, the Complainant had specific roles and responsibilities at the Training Institute that other employees were forced to perform because of her late arrival. Up2Us notes that prior to the training, [REDACTED] offered the Complainant the opportunity to stay in the hotel where the training participants were staying so that she could avoid traffic, but the Complainant declined the offer. Up2Us states that the Complainant was given a verbal warning for her repeated tardiness. Up2Us further states that two weeks later the Complainant missed her flight to a training event in Flint, Michigan, and consequentially she arrived several hours late and missed a number of the meetings and events on her itinerary. Up2Us provided the OCR with an Employee Written Warning Notice for tardiness that [REDACTED] had prepared on September 19, 2012, which states that, “[e]mployee was late in arriving to the airport, causing her to miss a flight and arrive late to a sponsored training in a key market. While not deleterious to the event, this incident closely followed a verbal warning for tardiness at the 2012 Training Institute.” According to Up2Us, in lieu of providing the Complainant with this written notice, [REDACTED] decided to counsel the Complainant personally and spoke to her about the critical importance of arriving on-time to all meetings and trainings. Up2Us states that despite the verbal warnings the Complainant’s performance did not improve, and she was again late to an external CAA coach training in New York City on December 8, 2012.

In support of its allegations that the Complainant failed to meet the performance expectations for her position, Up2Us asserts that Up2Us management had serious concerns about the Complainant’s ability to lead and manage group training activities, and that for example, the training activity that the Complainant led in Flint was not successful and the Complainant repeatedly told a colleague that the session was not going

well. Up2Us also states that the Complainant did not make progress on other tasks assigned to her; for example, Up2Us notes that developing educational training videos was the Complainant's highest priority project, and that the Complainant did not reach an agreement with a firm to start working on the videos until late December.

According to Up2Us, the Complainant also failed to find new training partners for Up2Us and to expand Up2Us and CAA training initiatives to new markets and participants; made little progress in designing innovative content for the existing training modules; made no effort to work with Up2Us members to identify their training needs; and did not take advantage of opportunities to learn more about the industry and did not attend a single external, non-Up2Us training event, resulting in inadequate work product. As an example, Up2Us states that when the Complainant drafted grants in support of the Up2Us training program, [REDACTED] consistently had to correct the content because the Complainant lacked the necessary knowledge of the Center for Sports-Based Youth Development. Additionally, Up2Us states that when the Complainant submitted two draft coach certification programs [REDACTED] provided feedback noting that the proposals were not consistent with what Up2Us offers, the wide variety of needs among Up2Us members and CAA coaches, and benchmarks in the field. According to Up2Us, when [REDACTED] provided the Complainant with feedback on a pricing schedule accompanying the draft certification programs the Complainant became defensive and said she did not have the information she needed to complete the assignment; Up2Us notes that Up2Us did not have this information and the point of the assignment was for the Complainant to conduct research. Up2Us asserts that when [REDACTED] discussed the Complainant's subpar performance with her during weekly meetings, the Complainant accepted and agreed with the criticism.

In regard to the Complainant's accounting of her December 20 telephone conversation with [REDACTED] and her assertion that [REDACTED] stated that she did not trust the Complainant, Up2Us indicates that [REDACTED] expressed concern that the Complainant considering a hypothetical job transfer without first discussing it with her supervisor did not engender trust between a staff member and her supervisor; however, Up2Us asserts that [REDACTED] explained to the Complainant that her failure to notify other staff of an upcoming trip to Miami was not the Complainant's fault, as she could not have known about the practice of informing other departments of trips to key markets. Up2Us denies that [REDACTED] told the Complainant that her exclusion from training events was a "professional penalty."

The Complainant believes that Up2Us' proffered reasons for terminating her employment are pretextual, and that the real reason is due to the Complainant's race and [REDACTED] desire to push the Complainant out of her position and replace her with [REDACTED]. In regard to the training in Boston, the Complainant acknowledges that she was late on two days due to traffic, but disputes that she was late on the third day. The Complainant notes that Director [REDACTED] was late in giving his opening remarks, and that a Caucasian guest speaker was also late on one day but was told that she could return to the training next year. The Complainant also asserts that [REDACTED] and [REDACTED] were over one

hour late to a meeting with the Complainant during this training; in response, Up2Us contends that [REDACTED] was never late to a meeting with the Complainant during this training. As for being late for the training in Flint, the Complainant acknowledges being late due to missing her flight, but asserts that she did not miss any scheduled meetings or fail to perform any of her duties. The Complainant notes that [REDACTED] missed her connecting flight to Flint and also arrived later than expected, and contends that Up2Us has treated her differently than the Caucasian individuals who were late for these two trainings. In regard to the training occurring in New York City on December 8, 2012, the Complainant denies that she was late to the training.

As for Up2Us' allegations that her performance did not meet expectations, the Complainant also believes that these allegations are false. In regard to the training that the Complainant led in Flint, the Complainant denies Up2Us' assertion that it did not go well and provided the OCR with an email that she received from an attendee stating that he thoroughly enjoyed participating in the training. The Complainant also states that she asked [REDACTED] and [REDACTED] for feedback on ways to make adjustments as the participants were not properly dressed for one of her planned training activities, and neither [REDACTED] nor [REDACTED] provided any assistance or feedback. As for Up2Us' allegation that the Complainant did not make much progress in developing training videos, the Complainant asserts that in September 2012 she began asking [REDACTED] for access to video footage and for information on the budget for the video project, but [REDACTED] did not provide her with the video footage until October 9 and with the budget until November 1; the Complainant provided the OCR with emails that she exchanged with [REDACTED] supporting this assertion. The Complainant states that the videographer with whom she had been working was waiting for the budget information, and by the time [REDACTED] provided her with this information the videographer could no longer complete the video and the Complainant had to start searching for a new videographer. Regarding Up2Us' allegation that she failed to find new training partners and to expand Up2Us' training initiatives, the Complainant asserts that she did pursue potential training partners, which is documented by emails that she provided to the OCR, but that when she proposed potential new training partners to [REDACTED] or Director [REDACTED] she was often met with resistance to or refusal of her proposals. The Complainant believes that [REDACTED] resistance to her proposed new training partners stemmed from [REDACTED] desire to continue delivering training in partnership with [REDACTED].

The Complainant also contends that Up2Us' assertion that she made little progress in designing innovative training content is false, and states that she submitted several proposals to [REDACTED] and never received feedback, which slowed her progress. For example, the Complainant states that she submitted an email to [REDACTED] on October 23, 2012, proposing new content for the "Co-Authorizing Conversations with Youth" program and on November 6, 2012, containing a draft of a coaching certification program, and never received any feedback from [REDACTED]. The Complainant also asserts that she attempted to be included on content development meetings with [REDACTED] and external partners such as Edgework Consulting, but that [REDACTED] did not allow her to attend these meetings. The Complainant also disputes Up2Us' contention

that she made no effort to identify training needs for Up2Us members, stating that she did reach out to members to see how she could support them; as evidence, she provided the OCR with November 2 and November 8, 2012, emails that she sent to [REDACTED] asking if [REDACTED] would like her to follow up with member organization Crim Fitness Foundation and potential member organization En-Lighten Up Foundation. The Complainant also provided the OCR with an email that she sent to Up2Us member [REDACTED] offering research assistance and emails that she sent to site supervisors of member programs in Miami to schedule meetings with them. Additionally, the Complainant disputes Up2Us' contention that she did not take advantage of opportunities to learn more about the industry, stating that she was only provided with one opportunity to attend an internal training event, that she did not require a tutorial on the industry as she had extensive education and field experience in positive youth development research, and that [REDACTED] failed to include her in outside activities and trainings that affected her duties. As for the Up2Us' assertion that [REDACTED] discussed the Complainant's subpar performance with her during weekly meetings, the Complainant states that she did not have any regularly scheduled or conducted meetings with [REDACTED] due to travel and scheduling conflicts.

In further support of her allegations of discrimination, the Complainant asserts that Up2Us is treating her differently than Caucasian Up2Us employees who have had performance issues but were provided the opportunity to improve their performances prior to termination. The Complainant states that she learned from Director [REDACTED] that he once told [REDACTED] that she was being terminated for not meeting performance goals, but then he allowed her to "state her case" and he agreed to continue her employment. The Complainant also states that [REDACTED] told her that Caucasian employee [REDACTED] had performance issues but was provided a second chance to improve her performance before she was ultimately terminated. In response to these allegations, Up2Us contends that [REDACTED] did not tell the Complainant that [REDACTED] was provided a second chance to improve her performance, because that is not true.

II. Legal Analysis

The Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), under which Up2Us receives DOJ funding, prohibits discrimination in the delivery of services and employment practices based on race, color, national origin, sex, or religion. 42 U.S.C. § 3789d(c)(1). In matters involving employment discrimination, the OCR will interpret these laws consistent with Title VII of the Civil Rights Act of 1964 (Title VII).⁴ To prove disparate treatment under Title VII, the evidence must demonstrate that: 1) the complainant belongs to a protected class; 2) the complainant is qualified for the position; 3) the complainant experienced an adverse employment action; and 4) the action occurred under conditions creating an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006). An adverse action is a "materially adverse change in the terms and conditions of

⁴ 28 C.F.R. § 42.203(c).

employment [that] is more disruptive than a mere inconvenience or an alteration of job responsibilities.” *Demoret*, 451 F.3d at 151 (quoting *Fairbrother v. Morrison*, 412 F.3d 39, 56 (2d Cir. 2005)). “Examples of materially adverse changes include 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.” *Id.* (quoting *Fairbrother*, 412 F.3d at 56).

In regard to the fourth element of a prima facie case, an inference of discrimination is raised if, following an employee's termination, an employer continued to seek applicants to fill the position or systematically transferred the discharged employee's duties to other employees. *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996). An inference of discrimination may also be created if the employer treated the employee differently than "similarly situated" individuals. *Shumway v. United Parcel Serv.*, 118 F.3d 60, 64 (2d Cir. 1997). To be similarly situated, the individuals must be similarly situated to the complainant "in all material aspects." *Id.* (finding that the alleged comparators were not similarly situated where the individuals had different supervisors than the complainant and did not engage in the same misconduct as the complainant, and where the complainant had no personal knowledge of the alleged violations but heard about them because they were "common knowledge"). If a complainant is alleging disparate treatment in regard to discipline, to be similarly situated in all material aspects, the complainant and the other individuals must be subject to the same workplace standards and must have engaged in conduct of comparable seriousness. *Graham v. Long Island Rail Road*, 230 F.3d 34, 40 (2d Cir. 2000).

Once the evidence demonstrates a prima facie case of disparate treatment discrimination, the employer must articulate a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the employer can do so, the evidence ultimately must demonstrate that the proffered reason is pretext for discrimination. *Id.* at 804. Pretext may be demonstrated by a showing that the employer treated similarly situated employees outside of the complainant's protected class more favorably than the complainant. *Graham*, 230 F.3d at 43.

In order to establish a hostile environment claim under Title VII, the evidence must prove that the workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986)). The conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the complainant must subjectively perceive the environment to be abusive. *Id.* Whether an environment is hostile or abusive is determined by looking at all of the circumstances, such as the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 23. Isolated acts, unless very serious, are not sufficiently severe or pervasive to create a hostile environment. *Alfano v. Costello*, 294 F.3d 365,

374 (2d Cir. 2002). An employer's actions of depriving an employee of necessary training can directly interfere with an employee's ability to do his or her job and contribute to a hostile work environment. *Gregory v. Daly*, 243 F.3d 687, 693 (2d Cir. 2001). However, in *Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d 712, 724 (2d Cir. 2010), the court found that a hostile environment was not created where a complainant was not invited to at least two trainings that co-workers were invited to and a co-worker was assigned to work with a supervisor who was better qualified than the complainant's supervisor, stating that "these sporadic events, none of which was personally abusive, as a matter of law do not amount to a series of abusive and pervasive incidents of discrimination, nor do they include a single extraordinary one." Ultimately, the evidence must demonstrate that the conduct underlying the hostile environment occurred because of the complainant's protected class. *See Alfano*, 294 F.3d at 374.

Based on the OCR's thorough review of the information that has been submitted by both the Complainant and Up2Us, the OCR finds that the evidence is insufficient to demonstrate that Up2Us' actions in regard to the Complainant constitute disparate treatment or a hostile work environment under the law. As for her allegations of disparate treatment, the Complainant alleges that she experienced disparate treatment when Up2Us did not allow her to attend managers meetings, excluded her from training-related meetings and events, did not share pertinent information with her related to her job responsibilities, gave important assignments to Caucasian employees that were more appropriate for the Complainant, and ultimately terminated her employment. The evidence provided by the Complainant establishes that she is a member of a protected class and appears to have been qualified for her position, satisfying the first two prongs of a prima facie case of disparate treatment discrimination.

As for the third prong which requires that a complainant experienced an adverse action, termination is clearly an adverse action. While it is less clear whether the other actions rise to the level of a "materially adverse change in the terms and conditions of employment," for purposes of analysis the OCR presumes that the remaining actions qualify as significantly diminished material responsibilities or other indices of materially adverse changes. In regard the fourth prong of a prima facie case, the fact that Up2Us transferred the Complainant's duties to [REDACTED] and Edgework Consulting raises an inference of discrimination in regard to the Complainant's termination. It is less clear whether Up2Us' alleged actions of excluding the Complainant from managers meetings, excluding her from training-related meetings and events, and failing to share pertinent information with the Complainant occurred under conditions creating an inference of discrimination. While the Complainant alleges that Up2Us treated Caucasian females more favorably in regard to the New Orleans and Miami training assignments, these employees are not "similarly situated" to the Complainant in that [REDACTED] and [REDACTED] had a different supervisor than the Complainant and different job responsibilities, and [REDACTED] also reported to a different supervisor and has management authority over the Complainant and the Center for Sports-Based Youth Development. Therefore, it does not appear that the evidence establishes a prima facie case of discrimination in regard to alleged exclusion from training-related meetings and events.

Even assuming, *arguendo*, that the evidence establishes a prima facie case of disparate treatment in regard to the actions occurring during the Complainant's employment, Up2Us has articulated a legitimate, nondiscriminatory reason for each action. The Complainant explicitly accepted her exclusion from the managers meetings, stating in an email that she assumed her invitation to a managers meeting was a "mistake." Up2Us also provided legitimate reasons for why the Complainant was not included in the referenced meetings that [REDACTED] had with external agencies, and why she could not travel to the trainings in Miami and New Orleans. The evidence is insufficient to demonstrate that the proffered reasons are pretextual. As discussed above, while the Complainant alleges that Caucasian females received more favorable job assignments, they are not similarly situated to the Complainant. Accordingly, the evidence is insufficient to demonstrate that Up2Us discriminated against the Complainant due to her race in regard to the alleged exclusion from meetings and trainings.

In regard to the Complainant's termination, as discussed above, the evidence demonstrates a prima facie case of disparate treatment. Up2Us has articulated legitimate, nondiscriminatory reasons for her termination, namely that the Complainant was unprofessional due to chronic tardiness and that her work performance did not meet the expectations of her position. While the Complainant disputes that she was late on all of the occasions that Up2Us alleges, she admits to being tardy on several of the occasions. The evidence is insufficient to demonstrate that this proffered reason is pretextual, particularly in light of the fact that [REDACTED] prepared a written warning following the second incident and counseled the Complainant verbally regarding her tardiness. While the Complainant alleges that [REDACTED] herself was late to one of the trainings, along with Director [REDACTED] and a guest speaker, these individuals are not similarly situated to the Complainant. The Complainant also disputes many of Up2Us' specific examples of when her work performance did not meet expectations and provides several illustrations in rebuttal; however, the evidence is insufficient to demonstrate that Up2Us did not legitimately believe that the Complainant's overall work product and progress on assignments was below expectations. The Complainant herself explicitly acknowledges some responsibility in her employment not working out, stating in an email to [REDACTED] that, "[a]s I stated earlier, I am willing to own my part in the breakdown of this working relationship but I believe we mutually contributed to this fit not working out"

Additionally, while the Complainant also asserts that two Caucasian employees, [REDACTED] and [REDACTED], were provided with the opportunity to improve their performance prior to termination, it is unclear exactly what their performance issues were and whether they engaged in conduct of comparable seriousness to the Complainant's conduct, and [REDACTED] at least reported to a different supervisor and was not similarly situated to the Complainant. Additionally, Up2Us disputes that [REDACTED] received a second chance to improve her performance prior to termination, and the Complainant has no personal knowledge of [REDACTED] alleged violations. Based on the foregoing, the evidence is insufficient to demonstrate that Up2Us discriminated against the Complainant due to her race when it terminated her.

The Complainant further alleges that Up2Us created a hostile work environment by excluding her from training-related meetings and events, not allowing her to attend managers meetings, not sharing pertinent information with her related to her job responsibilities, and informing other Up2Us employees of her pending termination. However, it does not appear that these incidents are sufficiently severe or pervasive to create an abusive work environment, particularly in light of the fact that the alleged conduct was not personally abusive or contained racial enmity. Additionally, as discussed above, Up2Us provided legitimate reasons as to why the Complainant was not included in managers meetings and the referenced meetings that [REDACTED] had with external agencies and why she could not travel to the trainings in Miami and New Orleans.

As for Up2Us allegedly notifying other employees of the Complainant's pending termination, it is unclear why the Regional Coordinators listed [REDACTED] as "Training Director" on budget documents, such as whether they were referring to her training-related duties as Assistant Director of CAA or were referring to the position that the Complainant held, and whether they had knowledge that the Complainant was going to be terminated. One of these documents was created prior to Up2Us' strategic retreat when, according to Up2Us, Up2Us management decided to terminate the Complainant. It is also unclear what [REDACTED] intended by the PowerPoint slides that she developed and posted. Up2Us states that it has not replaced the Complainant with [REDACTED] as the Director of Training for the Center for Sports-Based Youth Development, and that it does not intend to hire anyone into that position. Regardless of whether the documents intended to convey the fact that the Complainant would no longer be serving as the Director of Training for the Center for Sports-Based Youth Development, the OCR finds that the posting of these documents along with the other above-referenced actions are insufficient to create an environment permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."⁵ Moreover, for the reasons discussed above in analyzing the Complainant's disparate treatment claims, the evidence is insufficient to demonstrate that the conduct was ultimately based on the Complainant's race.

Based on all of the information discussed above, the OCR finds that there is insufficient evidence to demonstrate that Up2Us intentionally discriminated against the Complainant based on race in violation of the Safe Streets Act. Therefore, we are closing the administrative Complaint filed by the Complainant.

⁵ While the meaning and intent behind the budget documents posted on Up2Us' internal Dropbox account is unclear, Up2Us should ensure that it is not publicly revealing personnel matters concerning individual employees through verbal conversations or agency documents. Publicly revealing such information to other employees may result in the perception that Up2Us is engaging in unequal treatment of employees, is creating a hostile environment, or is violating the privacy rights of employees.

Patrick Phelan
May 2, 2013
Page 13

Sincerely,
/s/

Michael L. Alston
Director