



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

DEBBIE ALLEN,

Complainant,

v.

ERIE COUNTY LEGISLATURE, BARBARA  
MILLER WILLIAMS,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10151452

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on June 9, 2014, by Martin Erazo, Jr., an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **SEP 16 2014**  
Bronx, New York

  
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HELEN DIANE FOSTER  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
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on the Complaint of

**DEBBIE ALLEN,**

Complainant,

v.

**ERIE COUNTY LEGISLATURE,  
BARBARA MILLER-WILLIAMS,**

Respondents.

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

Case No. 10151452

**SUMMARY**

Complainant alleged Respondents subjected her to a hostile work environment, and terminated her employment, based on age and color. Complainant failed to establish that Respondents unlawfully discriminated against her. Accordingly, this matter is dismissed.

**PROCEEDINGS IN THE CASE**

On October 21, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

On April 2, 2012, after investigation, the Division found that it had jurisdiction over the complaint and that no probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. (ALJ Exh. 4; Respondents Exh. 25)

On October 10, 2012, after Complainant's appeal of the Division's no probable cause, the New York State Supreme Court annulled the Division's determination and remanded this matter to the Division for further proceedings. (ALJ Exh. 4)

On January 25, 2013, the Division issued a probable cause determination. (ALJ Exh. 3)  
The Division thereupon referred the case to public hearing.

On August 19, 2013, after due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. On August 20, 2013, ALJ Erazo amended the complaint to add Barbara Miller-Williams ("Miller-Williams") as an individually named Respondent and an amended Notice of Hearing was served on the parties. (ALJ Exh. 5)

Public hearing sessions were held on October 9-10, November 11, December 16-17, 2013. Complainant and Respondents appeared at the hearings. Complainant was represented by Harvey P. Sanders, Esq. Respondents Eric County Legislature ("Legislature") and Miller-Williams were represented by Michelle Parker, Esq.

On March 17, 2014, ALJ Erazo received into evidence, as stipulated by the parties, documents relating to Complainant's unemployment benefits. (Complainant Exh.18; Tr. 731-32; 1039-40)

## **FINDINGS OF FACT**

### **Parties**

1. Complainant's date of birth is December 1, 1961. (ALJ Exh. 3, p. 3)

1. Complainant is African American and describes her skin tone as darker in complexion as compared with Miller-Williams. (Tr. 374)
2. Miller-Williams' date of birth is April 1, 1956. (Tr. 856)
3. Miller-Williams is African-American and described her skin tone as a medium shade of brown. (Tr. 747-48)
4. In 2007, Miller-Williams was appointed to serve the remainder of a vacant position on the Legislature. (Tr. 190, 769-70)
5. In September 2009, Miller-Williams interviewed Complainant for the position of legislative aide. (Tr. 387)
6. During the September 2009 interview, Complainant volunteered her age. (Tr. 387)
7. From September 2009 to October 2009 Complainant worked as a volunteer at Miller-Williams' legislative district office. (Tr. 76-77)
8. On October 1, 2009, Miller-Williams hired Complainant as a legislative aide in her district office. (Respondents Exh. 6; Tr. 76-77)
9. The Legislature approves the salaries for the district office personnel and has direct control over a legislator's staff. (Tr. 272-73)
10. The Legislature's chairperson, in consultation with other legislators, also hires the legislative staff that works for the Legislature at its central offices located in downtown City of Buffalo ("Buffalo"). (Tr. 293-94)
11. The Legislature's chief of staff was responsible for "just about every single thing that involved" the Legislature, coordinating the flow of legislation, and "directly responsible for" both the central office and the district office staff. The chief of staff regularly advised district office staff how to handle a variety of situations. (Tr. 654-55, 659-60)

12. All of the legislative employees, whether hired to work in a district or central office, receive compensation and benefits that are managed through the Erie County's ("County") personnel department. (Tr. 286, 687-88, 691)

13. The Legislature's chief of staff or clerk of the Legislature informs the County's personnel department of any dismissals. (Tr. 690, 708)

14. In January 2010, Miller-Williams was elected to a two-year term as a legislator and also became the Legislature's chairperson. (Tr. 191, 774)

15. Given the demands on Miller-Williams' time as chairperson, she was often in central office and could not spend time in her own district office. (Tr. 774-75, 781)

16. Miller-Williams initially hired Complainant to work on a part time basis of 20 hours a week but then increased Complainant to 40 hours a week. (Tr. 78)

17. A legislative aide was expected to be "like an ambassador" of the legislator for whom they worked. (Tr. 134-35)

18. A legislative aide was expected to work independently and take the initiative on a variety of work duties in the district office. (Tr. 774-75, 781)

19. A legislative aide managed a variety of duties in staffing the district office that ranged from responding to constituent needs to planning community events. (Tr. 778)

20. A legislative aide was required to respond to the needs of the legislator's constituency. (Tr. 123)

21. Complainant worked in Miller-Williams' district office except on Thursdays when the Legislature was in session. On Thursdays, Complainant was expected to be in the central office. (Tr. 84, 774)

### Alleged Color Comments

22. Miller-Williams was a member and president of an organization called the Harriet Tubman 300, Inc., whose purpose was to remember the thousands of people freed from slavery through the Underground Railroad. (Tr. 510, 821-22)

23. Miller-Williams held an annual fall event where the members wore clothing and made food that was typical of individuals that were slaves during the relevant time-period. (Tr. 821-22, 865) Members working the food line would be dressed more as a field slave; people who hosted or took tickets at the door would be dressed more like a slave in domestic service. (Tr. 516-17)

24. During the years 2010, 2011 and 2013, Miller-Williams dressed as a field worker because she worked the event's food lines. (Tr. 551)

25. Miller-Williams spoke with Complainant about the fall event. (Tr. 865)

26. Complainant is simply not credible that Miller-Williams allegedly stated, in the fall of 2009, "[Complainant] would have been in the fields working if we lived during the days of slavery." (ALJ Exhibit1, p.5; Tr. 374) Complainant's versions of the "slavery" allegation varied in its inflammatory tenor.

27. Complainant reported to one of her witnesses that Miller-Williams said a dark person would be a field "n word" and a light person would be a house "n word." (Tr. 185-89)<sup>1</sup>

28. Complainant then conveyed to another witness a different version, "if we were still in slavery, you would be a field hand because of your color and I would be in the house because of my color." (Tr. 277)

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<sup>1</sup> The witness testified that he did not "want to use foul language" but made clear that the "n word" referred to offensive language used towards African Americans. (Tr. 186, 189)

29. Complainant's allegation, at the public hearing, that Miller-Williams made negative comments about darker-skinned African American politicians in the Buffalo area, is not credible. During the testimony, Complainant initially appeared reluctant to make the claim and gave the clear impression of a recent fabrication. When Complainant finally made the claim, she was evasive and provided contradictory details about the allegation. Complainant could not explain when or where the alleged comment or comments occurred. Subsequently, Complainant then sought to change the subject by interrupting the proceeding and indicating that someone in the hearing room was using a cell phone. (Tr. 380-87)

30. Complainant is simply not credible when she alleged at the public hearing, that Miller-Williams made negative comments about African American constituents, on a daily basis, such as, "black people are always looking for a hand out." (Tr. 376, 378-79) Complainant never said anything this incendiary to the Division investigator and never placed the allegation in her complaint. (ALJ Exh. 1, pp.5-7; Respondent Exhibit 25, p.6; Tr. 449-50, 456-57)

31. Most significantly, Complainant is not credible with respect to any of her color-based allegations as she told the Division investigator, in 2010 "no other racial remark was made except the one related to slavery" as alleged in the Division complaint. (Respondent Exhibit 25, p.6; Tr. 449-50, 456-57)

#### Alleged Age Comments

32. Complainant is not credible that Miller-Williams allegedly stated, in June or July of 2010, that Miller-Williams needed "young, sexy women for her to pull in the men for her fundraisers." (ALJ Exh. 1; Tr. 388) Complainant reported other substantially different versions of the same allegation to one of her own witnesses: "[Complainant] was overweight and she needs to lose weight because when [Miller-Williams] holds a fund raiser, she'd need to have

people there who would come, because they would be able to attract a higher attendance.” (Tr. 276) “If I get some young people working for me, it would bring more people into my fundraisers.” (Tr. 285)

33. Miller-Williams rarely held fundraisers. She had one in her two-year term. (Tr. 820)

34. Miller-Williams’ fundraisers were attended primarily by women who supported her and, as a result, the fundraisers were directed toward them. (Tr. 820)

35. Miller-Williams did not make the age comment as alleged by Complainant. (Tr. 820)

36. Complainant also alleged that Miller-Williams made other unspecified age-related comments on a daily basis. (ALJ Exh. 1, 5) Complainant provided no proof in support of this generalized allegation.

#### Other Alleged Workplace Harassment

37. Complainant alleges Miller-Williams treated her differently when Miller-Williams had asked her to pick up her granddaughter. (Tr. 393) However, Rebecca Brooks (“Brooks”), Complainant’s own witness, and Miller-Williams’ prior legislative aide, also had picked up Miller’s granddaughter. (Tr. 158, 898)

38. Miller-Williams concedes that she had asked Complainant during non-work hours, to pick up her granddaughter, because Miller-Williams was running late. (Tr. 826, 898)

39. Complainant alleges that Miller-Williams denied her the use of accruals as “guaranteed by the County.” However, not all County employees are similarly situated. The rights of a particular County employee may depend on the particular job and whether or not there is a union contract. (ALJ Exhs. 1, 5; Tr. 829-31, 833)

40. For example, legislative aides in a district office may have to “march in a parade” on Independence Day while other County workers are not working. (Tr. 830)

41. Miller-Williams did not deny Complainant use of her accruals. (Tr. 831, 833)

42. Complainant alleges that Miller-Williams treated her differently when she was asked to be a treasurer on her political account; however, Brooks, Complainant's own witness, had also performed those duties during the time-period she was a legislative aide for Miller-Williams. (Tr. 162)

43. Neither Complainant nor Brooks performed treasurer duties while on County time. (Tr. 825)

44. Complainant claims Miller-Williams singled her out when asked to review the outside conditions of properties while Miller-Williams made bids at Buffalo auctions. (ALJ Exhs. 1,5) However, Miller-Williams did not go to auctions for herself but rather to help constituents whose properties had been lost due to non-payment of tax liens. (Tr. 828)

45. Miller-Williams concedes she asked Complainant not to wear clothing that was revealing because that was unprofessional. (Tr. 992)

46. Miller-Williams did not ask Complainant to pick up clothes at the cleaners or pick up a fur coat. (Tr. 897-98)

47. Miller-Williams did not ask Complainant to attend a legislative caucus event in Albany at Complainant's expense. With the exception of meals and entertainment expenses, Miller pays for the hotel and transportation costs of legislative assistants that attend that function. (Tr. 834)

#### Complainant's Work Performance

48. Complainant's witnesses testified that Complainant had problems at work as early as two weeks after she was hired (Tr. 264); that Complainant "basically seemed to be frustrated at what she was expected to do" (Tr. 121); that Complainant wanted to have work demands similar

to legislative aides in suburban districts (123); and that Miller-Williams was also demanding with other staff. (Tr. 197)

49. Miller-Williams received constituent complaints about Complainant's lack of response to their concerns. (Tr. 778)

50. Complainant demonstrated an unwillingness to plan and involve herself in community events as expected. (Tr. 778, 783)

51. Miller-Williams had an office folder of various types of proposed community events varying from community clean-up events to showing constituents how to receive services. Complainant was not able to initiate or complete any of these events. (Tr. 779)

52. Miller-Williams repeatedly found errors in Complainant's professional writing. (Respondents Exh. 5; Tr. 67, 489-90)

53. Complainant conceded that her writing skills did not meet Miller-Williams' expectations. (Tr. 494)

54. Complainant conceded that Miller-Williams met with her several times regarding her work performance. (Tr. 588)

55. Complainant testified that a Caucasian co-worker, Charlotte (last name unknown), quit because "things were difficult here and she told me...if I was smart I wouldn't work there." (Tr. 78-79)

56. On May 24, 2010, Miller-Williams placed Complainant on an initial 30-day review period to see if she would improve her work performance. (Respondents Exh. 9; Tr. 781-82)

57. Miller-Williams attempted to improve Complainant's work performance by having her complete daily activity reports in order to understand how Complainant used her time when Miller-Williams was not in the district office. (Tr. 781)

58. Miller-Williams attempted to improve Complainant's skills by encouraging her to take computer classes, improving her education and attending the Adult Learning Center. (Tr. 780)

59. From May 2010 to September 2010, Miller-Williams required Complainant to submit daily activity reports every 30 days in order to improve Complainant's work performance. (Tr. 801-02)

60. In October 2010, Miller-Williams decided, "things were not working out." (Tr. 803)

61. Complainant was not able to properly keep Miller-Williams' schedule; deliver telephone messages to Miller-Williams in a timely manner; properly take messages; draft and respond to correspondence; and adequately supervise interns. (Tr. 1007)

#### Complainant's Dismissal

62. On November 1, 2010, Miller-Williams wrote a note to Complainant, as treasurer of her political campaign, in order transfer the account information in her possession because Complainant "was no longer going to be a legislative assistant." (Respondents Exh. 14; Tr. 804, 995, 1010)

63. On December 3, 2010, Miller-Williams terminated Complainant's employment in a letter dated November 26, 2010. December 3, 2010 was the postmark date on the envelope containing the letter. (Complainant Exh. 6)

64. Complainant was not dismissed on earlier dates as Miller-Williams testified. (Tr. 806-07) As recent as December 1, 2010, Complainant's physician, George Matthews, M.D., spoke with Miller-Williams and understood that Complainant was a current employee. (Complainant Exh. 19; Tr. 222, 248-49)

65. In December 2010, after Complainant's dismissal, Miller-Williams hired TuWanner Cleveland ("Cleveland") as a legislative aide. (Tr. 499-500) Cleveland is younger and has a

lighter skin tone as compared with Complainant. (Tr. 553) However, Cleveland's age was not established at the public hearing. (Tr. 388)

#### Complainant's Last Check

66. Miller-Williams did not "hold back" Complainant's last paycheck covering the two-week period from Saturday, November 20, 2010 to Friday December 3, 2010, as Complainant alleged. (ALJ Exhs. 1,5; Tr. 700)

67. Historically there has been a delay in transmitting information from the Legislature to the County's personnel office. It is typical for an individual to "be gone a week or two" before the personnel office is notified. (Tr. 702, 711-12)

68. All final checks are issued in the form of a paper check requiring former employees to pick them up in person and return County property such as keys and identification cards. (Tr. 689, 699)

69. When the County's personnel office became aware of Complainant's employment termination, it reversed the last electronic payroll deposit made to her account on December 10, 2010. (Complainant's Exh. 15; Tr. 696) Instead, the County's personnel department issued Complainant a paper check on December 10, 2010 so she could retrieve it in person directly from the Legislature. (Tr. 698-99)

### **OPINION AND DECISION**

#### Employment Relationship

The Legislature argues that Miller-Williams was Complainant's employer, in a district office, and therefore, the Legislature is not liable for any of the workplace harassment allegations raised by Complainant.

N.Y. Exec. Law, art. 15 (“Human Rights Law”) defines an “employer” in Section 292.5, by making reference only to the number of persons in its employ. It does not offer a definition that would give insight into whether an employer-employee relationship exists. There are four elements that should be considered in determining if such a relationship exists: (1) selection and engagement of the employee; (2) the payment of salary or wages; (3) the power of dismissal; and, (4) the power or control over the employee’s conduct. *State Div. of Human Rights (Emrich) v. GTE Corp.*, 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dept. 1985). The key element is the fourth element, in that an employer-employee relationship can be found based upon evidence that the employer exercised “control over the results produced or over the means used to achieve the results.” *Scott v. Massachusetts Mutual Life Ins. Co.*, 86 N.Y.2d 429, 433, 633 N.Y.S.2d 754 (1995) (quoting *Matter of Ted is Back Corp.*, 64 N.Y.2d 725, 726, 485 N.Y.S.2d 742 (1984)).

Under the Human Rights Law, the Legislature and Miller-Williams were both Complainant’s employers. Complainant may have an employment relationship with more than one entity. One relationship does not preclude the existence of another. It is true that Miller-Williams selected, hired and controlled many of Complainant’s daily activities as a legislative aide. Yet, it is also true, based on the facts in this record, that the Legislature controlled Complainant’s salary and shared authority over Complainant’s activities as an employee. Therefore, the Legislature can be liable for harassment charges raised by a district office employee.

#### Hostile Work Environment

Complainant argues that Miller-Williams created a hostile work environment based on her color and age. Under Human Rights Law §296.1(a), it is an unlawful discriminatory practice

for an employer "because of the ... age...color ... of any individual to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

In order to sustain a claim of harassment on the basis of age or color, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Complainant must subjectively view the conduct as unwelcome that creates a hostile environment. In addition, a reasonable person must objectively view the conduct as severe or pervasive enough to create an abusive environment. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept., 1996), *leave to appeal denied*, 89 N.Y.2d 809, 716 N.Y.S.2d 533 (1997). When assessing claims of hostile environment and its pervasiveness, the ultimate decision depends on the totality of the circumstances. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D. 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 713 N.E.2d 418 (1999), *leave to appeal denied*, 94 N.Y.2d 753 722 N.E.2d 507 (1999).

Complainant established that she worked in a very difficult and demanding work environment. However, Complainant did not establish that her challenging workplace conditions were due to her age or color. Complainant was not credible that Miller-Williams made any color-based or age-based comments. Complainant did not establish that any of Miller-Williams' workplace directives or decisions were motivated by Complainant's age or color.

#### Dismissal

Complainant alleged that Miller-Williams dismissed her because she is an older, darker skinned African American. It is an unlawful discriminatory practice for an employer to

discriminate against an employee in the terms and conditions of employment on the bases of age and color. Human Rights Law § 296.1(a).

Complainant has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). In all cases involving allegations of unlawful discrimination, conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondents to present a legitimate, non-discriminatory reason for its employment action. If Respondents do so, Complainant must show that the reason Respondents have presented was merely a pretext for discrimination. *Id.*

Complainant established a prima facie case of unlawful discrimination against Miller-Williams. Complainant is in a protected class based on age and color. Complainant was qualified to work as a legislative aide. In October 2009, Miller-Williams hired her. Complainant suffered an adverse employment action that occurred under circumstances giving rise to an inference of discrimination. In December 2010, Miller-Williams dismissed Complainant and replaced her with a younger, lighter skinned African American.

However, Miller-Williams presented legitimate, non-discriminatory reasons for its decision to dismiss Complainant. Complainant had a history of poor work performance as a

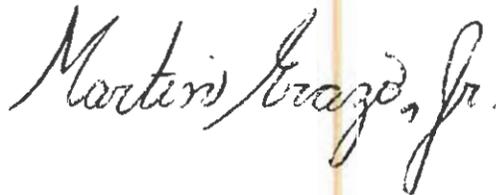
legislative aide. Complainant did not show that Miller-Williams' reasons were a pretext for unlawful discrimination. Furthermore, Miller-Williams' actions were consistent with an employer who wanted to secure Complainant's employment. First, it is implausible that Miller-Williams hired Complainant, and then dismissed her, because of her age and color. Miller-Williams was aware of Complainant's age and color when she hired Complainant. Second, Miller-Williams made several efforts to improve Complainant's work performance before dismissing her. Under these circumstances, one can infer that discrimination was not the reason for the adverse action. *Dickerson v. Health Mgmt. Corp. of America*, 21 A.D.3d 326, 329, 800 N.Y.S. 391, 394 (1st Dept. 2005). "There is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status." *Youth Action Homes v. State Div. of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997).

**ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be and the same hereby is dismissed.

DATED: June 9, 2014  
Buffalo, New York



Martin Erazo, Jr.  
Administrative Law Judge