NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

EMMA T. AMPUERO, MARIA M. SALAS,
BERTHA ORTIZ, CONSUELO MILLER,
ELVA C. OLAYA

Complainants,

v.

NEW YORK MARRIOTT MARQUIS HOTEL,

Respondent.

NOTICE AND FINAL ORDER

Case Nos. 10119832, 10119417, 10120352, 10119911, 10119797

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 August 6, 2009, by Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

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

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

ADOPTED, ISSUED, AND ORDERED.

DATED: SEP 16 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Nos. **10119832, 10119417, 10120352, 10119911, 10119797**

SUMMARY

Complainants, employees and former part-time banquet servers for Respondent, alleged that they were discriminated against on various bases, including age, national origin, race/color and sex[1], when not given more advantageous work assignments. However, Complainants have not proven their respective cases and their complaints are dismissed.

PROCEEDINGS IN THE CASE

Between August 6, 2007 and September 24, 2007 Complainants filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent with

[1] While two of five Complainants filed complaints alleging unlawful discrimination on the basis of marital status, the proof adduced at the public hearing primarily concerned the above-mentioned bases. Therefore, these two complaints are hereby amended to conform the pleadings to the proof. 9 NYCRR 456.12(f)(14).

unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on June 17, 2009.

Complainants and Respondent appeared at the public hearing. The Division was represented by Aaron Woskoff, Esq. Respondent was represented by Michael J. Volpe, Esq., of the law firm Venable, L.L.P., New York, N.Y.

Permission to file post-hearing briefs was granted. Counsel for Respondent filed a post-hearing brief.

FINDINGS OF FACT

1. Complainants, employees and former part-time banquet servers for Respondent, alleged that they were discriminated against when not given more advantageous work assignments. (ALJ Exhs. 1, 3, 5, 7, 9)

2. Respondent denied unlawful discrimination in its verified Answers. (ALJ Exhs. 12, 13, 14,15, 16)

Background

3. Complainants are referred to by Respondent as "associates". All Complainants are female, Hispanic, and range in age from 48 to 64 years. Complainants Ampuero and Miller have

been employed by Respondent since 1991. All Complainants, in addition to their regular duties, also worked as part-time banquet servers prior to 2007. (Joint Exh. 1; Tr. 24, 84)

4. Respondent operates the New York Marriott Marquis ("MM"), a hotel located in midtown Manhattan. (Joint Exh. 1)

The Reorganization of Respondent's Banquet Server Lists

5. In 2007, Respondent reorganized its banquet server lists. Prior to 2007, Respondent used five lists to assign approximately 150 associates to its banquets. This consisted of a list of approximately 50 "core" full-time associates, as well as four other lists of part-time associates who were called when needed: a list of priority part-time associates, a list of part-time "A" associates, a list of part-time "B" associates, and a list of part-time "C" associates. Only full-time associates received employee benefits. After the reorganization this was changed to three lists for the same number of employees: an "A" list, a "B" list, and a "C" list. Employees on the "A" list received first preference for banquet work, followed by "B" and "C" list employees; "A" list associates were compensated slightly more advantageously but employee benefits were the same as for those on the "B" list. Associates primarily employed at another Marriott property other than the MM were automatically placed on the "C" list, as were those associates who did not apply to be on either the new "A" or "B" lists; those on the "C" list would get benefits from the Marriott property which was considered their "home base". (Joint Exh. 1; Tr. 32, 54-59)

6. After announcing the reorganization Respondent asked all interested employees to submit applications and transfer requests, and take part in panel interviews. Transfer requests were to be submitted by those associates who would transfer to the MM from another Marriott property if the employee became a full-time "A" or "B" list employee after the reorganization. The panels included two Hispanic female human resources personnel members who asked

questions of each of the Complainants. The panels inquired of associates to test their knowledge of banquet functions, as well as their ability to respond to different scenarios that might occur at a banquet; the panels also reviewed each associate's past job performance, reliability, availability for functions, disciplinary record and seniority. (Joint Exh. 1; Tr. 26, 34, 63, 70-71, 85)

7. Of the original 54 "A" list positions, Respondent created two additional "A" list positions for a total of 56 such positions. Previous full-time associates were not required to reapply and were automatically "grandfathered" onto the new "A" list. An Hispanic female over the age of 40 and a non-Hispanic over the age of 40 were chosen for the two newly-created "A" list positions. There were a total of 36 "B" list positions which were also full-time positions with benefits. Associates were ranked on all three lists based on seniority. (Joint Exh. 1; Tr. 33, 44-45, 49, 59-65, 66, 68, 73-74, 78-79)

The Makeup of the New "A" List

8. Twelve and one half percent of the "A" list positions (seven of 56 associates) were occupied by females. One hundred percent of the "A" list positions were held by associates over the age of 40 years. Approximately seventeen percent of associates were identified as Hispanic. (Joint Exh. 1)

The Makeup of the New "B" List

9. Thirty three percent of the "B" list positions (12 of 36 associates) were occupied by females. Ninety-one percent (33 of 36 associates) of the "B" list positions were held by those 40 years of age or older. Approximately forty-one percent of associates were identified as Hispanic. Eighty-six percent (13 of 15 associates) of females whose home base was the MM were selected for the "B" list. Seventy-six percent (16 of 21 associates) who were Hispanic were selected for the "B" list. (Joint Exh. 1)

The Makeup of the New "C" List

10. The "C" list consisted of 59 associate positions of which nearly half were occupied by females. Of the 34 associates on the "C" list identified by age and ethnicity who were not primarily employed at another Marriott property, all but three were over 40 years of age; additionally, approximately forty-four percent (15 of 34 associates) were identified as Hispanic. Thirty-four of 59 "C" list associates did not apply for the "A" or "B" lists, including Complainant Ortiz. Twenty-five of 59 "C" list associates worked full or part-time at another Marriott location, including Complainants Salas and Olaya. (Joint Exh. 1)

Adjustment Subsequent to Reorganization

11. After the reorganized lists were first announced and some associates questioned their ranking on the lists due to seniority-related concerns, Respondent undertook research to ascertain exact seniority dates and adjusted the lists accordingly. Complainant Ampuero brought up a seniority issue and, as a result, was raised from eighteenth to seventh on the "B" list. (Joint Exh. 1; Tr. 31)

The Complainants and the New Lists

12. Complainants Ampuero and Miller are listed as seventh and thirty-fourth, respectively, of the 36 associates on the "B" list; both were not selected for the "A" list because the two additional individuals who made that list outperformed them in the panel interview. Complainant Salas and Olaya are on the "C" list as, at the time of the panel interviews, both were primarily employed at another Marriott property. Complainant Ortiz is on the "C" list as she did

not apply for a position on either the "A" or "B" lists. (Joint Exh. 1; Tr. 25, 28, 31, 36, 38, 47, 70, 74, 83, 108)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "because of the age...[or] sex...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1(a).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.,* 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

To make out a prima facie case of unlawful discrimination predicated on protected class membership under the Human Rights Law, a complainant must show that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n.,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305, 786

N.Y.S.2d 382, 390 (2004). A complainant's burden in establishing a prima facie case is 'de minimis'. *Schwaller v. Squire, Sanders & Dempsey,* 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998).

Complainants Salas, Olaya and Ortiz

Complainants Salas, Olaya and Ortiz make out the first prong of the prima facie test insofar as they are members of several protected classes given their respective ages, ethnicities and genders. However, each fails to make out the second prong of the test as they were not qualified to be on either of the full-time lists. All three Complainants defaulted to the "C" list precisely because they were primarily employed at another Marriott property or, in the case of Ortiz, did not formally apply to be on either the "A" of "B" lists.

Therefore, these complaints must be dismissed.

Complainants Ampuero and Miller

Complainants Ampuero and Miller each make out prima facie cases. First, each was a member of several protected classes given their respective ages, ethnicities and genders. Second, each was qualified for inclusion on the "A" list in light of the fact they were interviewed and considered for the two additional "A" list positions, as well as for "B" list positions. Third, after the reorganization each was classified in such a way as to deny them the premium employment work benefits associated with being on the "A" list. Finally, Respondent's reorganization inferred unlawful discrimination because at least one of the additional "A" list positions was filled by someone outside of Complainants' protected classes, *i.e.,* a non-Hispanic male.

However, Respondent put forth legitimate, nondiscriminatory reasons for the placement of Complainants Ampuero and Miller on the reorganized lists that went unrebutted: both were found by panel interviewers (two of whom were Hispanic females) to be qualitatively inferior to

the two associates selected for the "A" list because the successful candidates outperformed them. Ultimately, the makeup of the "A", "B" and "C" list employees suggest that the protected class memberships of Complainants Ampuero and Miller were an entirely neutral factor, and that the disagreement both had with the conclusion that they gave relatively poor interview performances does not equate to a showing of pretext. *See Marlow v. Office of Court Admin. of State of N.Y.*, 820 F. Supp. 753 (S.D.N.Y. 1993)(age discrimination plaintiff unable to show pretext given number of protected class applicants hired, as well as failing to prove that allegation of poor job interview performance was unworthy of belief).

Therefore, these complaints must be dismissed.

ORDER

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

ORDERED, that the complaints be, and the same are, dismissed.

DATED: August 6, 2009
Bronx, New York

Robert J. Tuosto
Administrative Law Judge