

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CARMEN E. BURGOS,

Complainant,

v.

**NEW YORK STATE, CITY UNIVERSITY OF NEW
YORK, LEHMAN COLLEGE,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10117342

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 February 17, 2009, by Thomas J. Marlow, 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: **JUL 21 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

State Division of Human Rights
Enforcement Unit
Sharon J. Field, Director of Prosecutions
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Toni Ann Hollifield
Senior Attorney

Christine Marbach Kellett
Chief Administrative Law Judge

Thomas J. Marlow
Administrative Law Judge

Sara Toll East
Chief, Litigation and Appeals

Caroline J. Downey
General Counsel

Peter G. Buchenholz
Adjudication Counsel

Matthew Menes
Adjudication Counsel

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

CARMEN E. BURGOS,

Complainant,

v.

**NEW YORK STATE, CITY UNIVERSITY OF
NEW YORK, LEHMAN COLLEGE,**

Respondent.

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

Case No. **10117342**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her because of her disabilities, race, and color and because she opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 19, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

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

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 28 and 29, 2008.

Complainant and Respondent appeared at the hearing. On April 28, 2008, the Division was represented by Aaron Woskoff, Esq. On April 29, 2008, the Division was represented by Toni Ann Hollifield, Esq. Respondent was represented by Kristen Bowes, Esq.

The Division and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

For consistency, all exhibits marked “Division’s Exhibits” have been marked “Complainant’s Exhibits.”

FINDINGS OF FACT

1. Complainant is Black and Hispanic. (ALJ’s Exhibit 1; Tr. 53) In January of 1994, Complainant began her employment with Respondent in the library in Lehman College. In August of 1994, Complainant became a College Office Assistant (“COA”) for Respondent in its Circulation Department. Complainant was responsible for maintaining the stacks of books in the library. COA is a clerical position. (ALJ’s Exhibit 1; Tr. 60, 513-14)
2. In September of 2003, Complainant had knee surgery and was out of work until August of 2004. (ALJ’s Exhibit 1; Tr. 66-68)
3. Between August of 2004 and April of 2007, Complainant had physical disabilities, including arthritis and rotator cuff tendinosis. (Complainant’s Exhibit 1; Tr. 53-56)
4. Complainant alleged that, when she returned to work in August of 2004, Respondent began to unlawfully discriminate against her because of her disabilities, her race, and her

color. (ALJ's Exhibit 1; Complainant's Exhibit 13; Tr. 24, 69, 71-94, 107-10, 116-20, 141, 178, 289-92, 565-66)

5. Complainant alleged that, between August and October of 2004, Respondent made it difficult for her to go to physical therapy after work. In fact, Complainant was allowed to leave early to attend physical therapy. (Tr. 72-94, 560)

6. In October of 2004, Complainant had surgery related to an ovarian cyst and was out of work until January of 2005. (Complainant's Exhibits 4, 5; Tr. 98, 106)

7. Complainant alleged that, when she returned to work in January of 2005, Respondent began significantly reducing the number of hours that she could assign to students assisting her in maintaining the stacks of books. Respondent reduced the number of hours assigned to students because of budget cuts. Although Complainant was allotted fewer hours for student assistance, she had more than anyone else. Often, Complainant did not use all of the hours available to her. (Respondent's Exhibit 7; Tr. 116-20, 141, 289-91, 380-81, 444-66, 476-93, 504-05)

8. Complainant also alleged that, when she returned to work in January of 2005, Respondent changed her work responsibilities. (ALJ's Exhibit 1; Complainant's Exhibit 9; Tr. 107-09) However, when Complainant returned to work in January of 2005, Respondent was involved in a major relocation project in the library that required new tasks appropriately assigned to the COA responsible for maintaining the stacks of books in the library. (Complainant's Exhibits 9, 16)

9. Complainant further alleged that, when she returned to work in January of 2005, Respondent tried to change her work location in the library. In fact, due to the major relocation

project, Respondent intended to move Complainant's work location closer to the proposed central collection location for books to be reshelved. (Tr. 508-10)

10. In January of 2005, Complainant spoke with Dawn Morgan ("Morgan") from Respondent's Affirmative Action office and complained about the proposed change in work location and work responsibilities. In her testimony, Complainant did not indicate that she complained that Respondent was unlawfully discriminating against her. (Tr. 153, 307-09) In March of 2005, Complainant met with Morgan and Rona Ostrow ("Ostrow"), who was, at that time, Respondent's Chief Librarian and supervisor to Complainant's immediate supervisor. In this meeting, Complainant's complaints were discussed. (Tr. 72, 159-60, 307-09)

11. Respondent never insisted that Complainant change her work location. (Tr. 151-52).

12. In a performance evaluation for the period of time from March 15, 2004 through March 15, 2005, Complainant received a satisfactory rating from her immediate supervisor. However, Ostrow added to the evaluation that Complainant's "refusal to relocate her desk" was an act of insubordination and disruptive to the library reorganization and that Complainant was not recommended for promotion. (Complainant's Exhibit 11)

13. In August of 2005, Complainant interviewed for a COA position in the financial aid office, a lateral transfer with the same title, but did not get the position. (Complainant's Exhibit 15; Tr. 179-83, 334-37) Complainant presented no evidence to establish who, if anyone, was selected for the position or why Complainant was not selected for the position.

14. Complainant alleged that she ranked second on the Administrative Assistant test ("the CAA test") that she took in 2005. Complainant also alleged that Respondent, rather than promote Complainant, promoted several employees who scored lower than Complainant on the CAA test. (ALJ's Exhibit 1; Complainant's Exhibit 20) In fact, six other people had the same

rank as Complainant. (Complainant's Exhibit 20) Those who scored at least 70 on the test were put on a list ("the CAA list") of those eligible to be considered for a position as a College Administrative Assistant ("CAA"). When such a position became available, Complainant, who scored 90, was notified. (Tr. 406-08)

15. Twice Complainant was notified of a position available to those on the CAA list, but Complainant did not apply. (Tr. 221-22, 336, 356, 411-12)

16. In March of 2006, Complainant received a satisfactory rating from her immediate supervisor for her performance evaluation for the period of time from March 14, 2005 through March 15, 2006. Her supervisor commented that Complainant did a very good job working on a major library project of shifting books but noted that "she took a lot of time out for her work compensation time." (Complainant's Exhibit 17) Complainant objected to this and other comments in the evaluation. (Complainant's Exhibit 18) However, after this objection, Ostrow, created a new evaluation for this period, in which Ostrow praised Complainant's work during this time period, acknowledged Complainant's score on the CAA test, and praised Complainant as an excellent candidate for promotion. (Complainant's Exhibit 19)

17. In August of 2006, a CAA position became available in the Office of the Dean in the Division of Education. The position involved communication with outside agencies and required good computer skills. Complainant interviewed for the position but Melitza Ledesma, who also scored 90 on the CAA test, was selected for the position. Ledesma had experience with Respondent acting as a liaison between Respondent and outside agencies and had "documented experience in using software, including Windows EX, and Microsoft Word and Excel." When testifying about her computer skills, Complainant conceded, "I'm okay. I'm not going to say I'm

strong, but okay, you know.” (Complainant’s Exhibit 21; Respondent’s Exhibit 6, 9; Tr. 212-17, 341)

18. Complainant testified that Ostrow told Complainant that Nancy Buckley (“Buckley”), a CAA in the Periodicals Department, was retiring. According to Complainant’s testimony, Ostrow promised Complainant that, after Buckley’s retirement, Ostrow would have Buckley’s position transferred to the Circulation Department and given to Complainant. (Tr. 209-12)

19. No employee of Respondent had the authority to promise a CAA position to another employee. After the CAA list was created, and a position became available, employees on the CAA list would be notified and interviewed. Thereafter, the successful candidate would be chosen. (Tr. 588-89)

20. In fact, Buckley was a CAA before she took the position in the Periodicals Department. The position she took in the Periodicals Department was a COA position but Buckley retained her CAA title when she accepted the position. Buckley was a CAA working in a COA position. Respondent considers this position a COA position. (Tr. 470-74)

21. On April 19, 2007, when Complainant learned that she was not going to get Buckley’s former position as a CAA, she decided to bring her complaint to the Division claiming that Respondent had unlawfully discriminated against her since August of 2004. (Tr. 575-76)

22. In August of 2007, Complainant went on disability leave. In September of 2007 Complainant had shoulder surgery. Complainant has since applied for “retirement because of disability.” (Tr. 369-71)

23. Complainant’s testimony was evasive and contradictory. I do not find Complainant’s testimony credible. (ALJ’s Exhibit 1; Complainant’s Exhibit 20; Tr. 71-94, 150-52, 206-12, 235-37, 284-85, 328-32, 333-34, 357, 365, 560-62, 565-69, 573, 575-77)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability, race, or color, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Respondent unlawfully discriminated against her in the terms, conditions, and privileges of employment because of her disability, race, and color when she returned to work in 2004. When Complainant returned to work in 2004, however, the work environment had changed. Respondent was involved in a major relocation project in the library that required new tasks appropriately assigned to the COA responsible for maintaining the stacks of books in the library. At this time, Respondent also experienced budget cuts that affected Complainant as well as other employees of Respondent. These budget cuts necessitated the reduction in the number of hours that Complainant could assign to students assisting her in maintaining the stacks of books. Complainant experienced changes when she returned in 2004, but the credible evidence shows that the changes had nothing to do with her disabilities, race, or color.

Complainant also alleged that Respondent, rather than promote Complainant, promoted several employees who scored lower than Complainant on the CAA test. On two occasions, however, Complainant was notified of a position available to those on the CAA list, but Complainant did not apply for those positions. When Respondent selected Ledesma for the CAA position in the Office of the Dean in the Division of Education, it selected a candidate who had the same score as Complainant on the CAA test, had experience with Respondent acting as a

liaison between Respondent and outside agencies, and had “documented experience in using software, including Windows EX, and Microsoft Word and Excel.” The position involved communication with outside agencies and required good computer skills. The credible evidence establishes that Complainant’s disabilities, race, or color were not factors in Respondent’s selection. Complainant presented no evidence of an occasion where Respondent, rather than promote Complainant, promoted another employee who scored lower than Complainant on the CAA test.

Complainant presented no credible evidence to support the contention that she suffered any adverse employment action, such as termination or demotion, which would amount to a materially adverse change in the terms and conditions of her employment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). Her assignments were tasks appropriately assigned to the COA responsible for maintaining the stacks of books in the library and she often did not utilize the number of hours that she had available to assign to students assisting her in maintaining the stacks of books. Complainant presented no evidence to show that the reduction in the number of hours for student assistance was not a legitimate business decision necessitated by budget cuts. *See Pace v. Ogden Services Corporation*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999). Further, the record is devoid of evidence that Complainant was denied a promotion because of her disabilities, race, or color. Even if any employment action that Complainant experienced was considered adverse, there is no evidence that Respondent’s actions occurred under circumstances giving rise to an inference of discrimination.

To the extent that Complainant alleged that Respondent created a hostile work environment at her place of employment and that it existed because of her disabilities, race, or color, consistent with the abovementioned analysis, the record is devoid of credible evidence that

the Complainant's work place was "permeated with discriminatory intimidation, ridicule, and insult." *See Forrest, 3 N.Y.3d* at 310.

Complainant also raised an issue of unlawful discrimination by alleging that Respondent retaliated against her because she opposed unlawful discrimination. Complainant did establish that she complained to Morgan from Respondent's Affirmative Action office about the proposed change in work location and work responsibilities. Thereafter, Ostrow did add to Complainant's yearly evaluation that Complainant's "refusal to relocate her desk" was an act of insubordination and disruptive to the library reorganization and that Complainant was not recommended for promotion. Further the evidence shows that, in August of 2005, Complainant interviewed for a COA position in the financial aid office, a lateral transfer, but did not get the position. Complainant presented no evidence, however, to establish that she complained of unlawful discrimination when she complained to Morgan, that Ostrow's comments were made in retaliation for Complainant complaining to Morgan about unlawful discrimination, or that Complainant failed to get the COA position in retaliation for complaining about unlawful discrimination. Further, no evidence was presented to establish who, if anyone, was selected for the COA position or why Complainant was not selected for the position. Complainant, therefore, has presented no credible evidence to support the contention that when she complained to Morgan she engaged in a protected activity. Further, even if Complainant's complaint to Morgan constituted a protected activity, Complaint presented no proof of a causal connection between the protected activity and either Ostrow's comments or the failure to get the COA position. *See id.* at 312-13.

After considering all of the evidence presented and evaluating the credibility of the witnesses, I find that the credible evidence does not support a finding that Respondent engaged

in unlawful discrimination. All of Complainant's claims of unlawful discrimination are unsubstantiated. When Complainant was questioned at the hearing, she was evasive and contradictory. I do not credit Complainant's claims that Respondent's actions occurred because of Complainant's disabilities, race, or color, or because Complainant opposed 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 burden to establish by a preponderance of the evidence that discrimination occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). Since Complainant has failed to meet this burden, the complaint 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 complaint be, and the same hereby is, dismissed.

DATED: February 17, 2009
Bronx, New York



Thomas J. Marlow
Administrative Law Judge