

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

GERALD GILLY,

Complainant,

v.

NYP HOLDINGS, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10118139

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 April 2, 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: **MAY 28 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10118139**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his age. Because the evidence does not support the allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On May 23, 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 July 23 and 24, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Tracey S. Bernstein, Esq., of Himmel & Berstein, LLP. Respondent was represented by Alison Gooding, Esq., and Kevin G. Chapman, Esq.

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

FINDINGS OF FACT

1. Complainant was born on February 18, 1943. (ALJ's Exhibit 1; Tr. 15)
2. Complainant has been a member of the Paper Handlers Union, Local 1 for approximately 40 years, working as a paper handler in different positions, often as a foreman. (ALJ's Exhibit 1; Tr. 16-17, 57-60) Once, as a foreman, Complainant helped John Griffin ("Griffin") by getting him work so he could get his "union book." (Tr. 22-23)
3. In 1995, Griffin was working for Respondent. Griffin called Complainant and told Complainant that he should "come on over to the Post," saying, "You did me a favor, I'll do you a favor." (Tr. 22-23) Complainant followed Griffin's advice and, in 1995, Complainant began his employment with Respondent as a substitute paper handler. (ALJ's Exhibit 1; Tr. 17, 22-23) In his first year of employment with Respondent, Complainant was 52 years old and Griffin was approximately 37 years old. (ALJ's Exhibit 1; Tr. 15, 23, 399)
4. Complainant first worked for Respondent at a facility ("Manhattan facility") in Manhattan and Griffin was his foreman. In 1997, Complainant became a full-time paper handler for Respondent. Within a year after Complainant became a full-time paper handler, Griffin promoted Complainant to the position of assistant foreman. (Tr. 19-22, 699-701)

5. As an assistant foreman in the Manhattan facility, Complainant was gruff with other employees. (Tr. 700-01)

6. In 2000 or 2001, Respondent moved the Manhattan facility to a location (“Bronx facility”) in the Bronx. At the Bronx facility, Griffin held two positions, general foreman and day foreman. Griffin promoted Complainant to the position of night foreman. (Tr. 21-22, 26-32, 688-90)

7. Terry Connolly, a paper handler who worked for Respondent in the Manhattan facility, went to the Bronx facility and became a night foreman with Complainant. Complainant was the senior night foreman. Connolly was born in August of 1948. (Tr. 688-90, 699-700)

8. The Bronx facility was more sophisticated than the Manhattan facility, with modern equipment including robots. Complainant utilized a computerized system (“the system”) to monitor the work from his office. (Tr. 22, 25, 38-42, 99-100)

9. At times while working with the modern equipment in the Bronx facility, Complainant appeared nervous and his gruffness with other employees became more pronounced. (Tr. 692, 701)

10. In or about 2001, Damian Broussard (“Broussard”) was hired by Respondent as a substitute paper handler in the Bronx facility. Broussard worked as a substitute paper handler for approximately four years and then a full time paper handler for approximately two years. (Tr. 220) Complainant and others trained Broussard in the use of the system for approximately two years. (Tr. 224, 230) Broussard’s date of birth is November 29, 1975. (Tr. 219) Broussard has a bachelor’s degree in industrial training and technology, a bachelor’s degree in studio art, and a master’s degree in graphic design. (Tr. 219)

11. In January of 2002, Kris Socia ("Socia") became Vice President of Production for Respondent, responsible for the operation of the Bronx facility. Socia was either 30 or 31 years old when he was hired by Respondent. (Tr. 639)

12. Since 2002, Socia received complaints from employees that Complainant was abrasive. Socia told Griffin to talk to Complainant about his behavior toward other employees. (Tr. 614, 639, 641-42)

13. In late 2004 or early 2005, Socia demoted Griffin from general foreman and day foreman to full time paper handler and Connolly became the day foreman. (Tr. 47-48, 641-43, 689-90)

14. On February 28, 2005, Lisa Lehrman ("Lehrman") was hired to take over the general foreman duties, overseeing the paper handling department, purchasing, and budget as the production news print materials manager. (Tr. 51-52, 314-15) Lehrman was 37 years old when she was hired. (Tr. 424)

15. From the start of her employment, Lehrman observed that Complainant was loud and aggressive with his subordinates and was rude, aggressive, and dismissive in his interactions with her. (Tr. 315-17) Complainant was condescending toward Lehrman and did not show her respect. (Tr. 563, 695)

16. Complainant thought Lehrman didn't understand how the paper handling department operated and thought that he understood the department better than Lehrman. (Tr. 138) About the employees Complainant supervised as night foreman, Complainant said, "These are blue-collar workers, you can't coddle these men." "So you got to be a little rough and tough with these guys. These are not mamby-pamby type of guys. If you back off on them, they're going to take advantage of you." "So I'm loud, I'm strict, I'm fair." (Tr. 82-83)

17. Socia and Lehrman discussed Complainant's behavior and Lehrman told Socia that she was not satisfied with Complainant's behavior. Socia told Lehrman to give Complainant the opportunity to improve his behavior. (Tr. 584-85, 626-27, 653-54)

18. From 2005 to 2007, Lehrman let Complainant know that he had work performance issues that he needed to correct and that he had to improve what she considered to be his unprofessional behavior with other employees. (Complainant's Exhibit 2; Tr. 103-05, 107-09, 137-40, 321-24, 338-39, 343-44, 675, 727-29)

19. Around October of 2006, Lehrman invited Broussard to participate in new production meetings. Lehrman invited Broussard because she was impressed with his educational background, his positive attitude, and his demonstrated learning aptitude. Lehrman did not say to another employee that she wanted "young blood" at the meetings. (ALJ's Exhibit 1; Tr. 384-86, 555, 667)

20. In late 2006, Connolly reported to Lehrman that employees were continuing to complain to him about Complainant's unprofessional behavior. (Tr. 348, 696-98) After speaking with Connolly, Lehrman was concerned about the morale of Respondent's employees. (Tr. 600-04)

21. Prior to February 12, 2007, Socia demoted Connolly from day foreman to full time paper handler. (Tr. 220-23, 630-31) Lehrman promoted Broussard to the day foreman position. (Tr. 66-67, 220-23, 389)

22. On February 12, 2007, Lehrman demoted Complainant from night foreman to full time paper handler. Although she expressed concerns with his work performance, a main reason for the demotion was his unprofessional behavior with other employees. Griffin replaced

Complainant as night foreman. (Tr. 56-57, 146, 383, 391, 399) Lehrman did not consider Complainant's age in making this decision. (Tr. 400, 553, 638)

23. The demotion cost Complainant approximately \$25,000.00 per year in salary which was approximately 25 per cent of his salary. (Tr. 126-27, 445-446)

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 age. *See* Human Rights Law § 296.1(a).

Complainant raised an issue of unlawful discrimination, alleging that Respondent unlawfully discriminated against him in the terms, conditions, and privileges of employment because of his age. Complainant alleged that Respondent's failure to invite Complainant to participate in the new production meetings around October of 2006, Respondent's failure to offer the day foreman's position to him in February of 2007, and Respondent's demotion of Complainant were acts of unlawful discrimination because of his age. Complainant has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. To meet this burden, Complainant must initially show by a preponderance of the evidence that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997).

When Complainant was demoted on February 12, 2007, he was 63 years old. Therefore, he is a member of a protected class. He had been the night foreman for approximately seven

years, so he was qualified for his position. He was demoted by someone younger than he and replaced by someone younger than he. The evidence does not establish that the qualifications of the person who replaced Complainant were substantially better than those of Complainant. His demotion cost him approximately \$25,000.00 in salary which was approximately 25 per cent of his salary. Complainant's demotion, with its resulting decrease in salary, constituted an adverse employment action, a materially adverse change in the conditions of Complainant's employment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 306, 786 N.Y.S.2d 382, 391 (2004). The evidence, however, does not support the contention that Respondent's failure to invite Complainant to participate in new production meetings nor Respondent's failure to offer the day foreman's position to Complainant constituted adverse employment actions. These actions by Respondent did not result in a materially adverse change in the terms, conditions, or responsibilities of Complainant's employment. *Id.* at 306.

Complainant's demotion under these circumstances gives rise to an inference that he was demoted because of his age. Under the facts of this case, therefore, Complainant has established a prima facie case, the burden of which has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998). Because Complainant has established a prima facie case of discrimination, the burden shifts to Respondent to establish that the demotion was motivated by a legitimate nondiscriminatory reason. *See Ferrante*, 90 N.Y.2d at 629.

Respondent has rebutted the inference of discrimination by presenting evidence that it demoted Complainant for legitimate nondiscriminatory reasons. A main reason presented by Respondent for Complainant's demotion was what Respondent considered to be Complainant's unprofessional behavior toward other employees. Respondent has presented credible evidence

that Lehrman had personally experienced Complainant's rudeness and lack of respect at the workplace. Another witness credibly testified that Complainant did not show Lehrman respect. Lehrman often informed Complainant that his unprofessional behavior toward other employees needed to change. Despite these warnings, the credible evidence establishes that Respondent received a report in late 2006 that Complainant continued his unprofessional behavior toward other employees. This report, coupled with Complainant's history of what was considered to be unprofessional behavior, gave Respondent a legitimate, nondiscriminatory reason for Complainant's demotion.

Once Respondent articulates a legitimate, nondiscriminatory reason for its actions, Complainant has the burden to prove that the reason proffered by Respondent was merely a pretext for unlawful discrimination. *See Ferrante*, 90 N.Y.2d at 629-30. Complainant conceded that he was a little rough and tough with the employees he supervised as night foreman but contended that he was fair. Complainant considered the employees he supervised as the type that you couldn't coddle. Indeed, he acknowledged that Lehrman told him his behavior toward other employees had to change. Complainant effectively challenged Lehrman's claims that Complainant's work deficiencies warranted a demotion. However, no credible evidence was presented to prove that Complainant's demotion because of unprofessional behavior toward other employees was a pretext for unlawful discrimination. I have considered that Griffin, the person who replaced Complainant as night foreman, is younger than Complainant. However, the evidence also establishes that Griffin was employed by Respondent before Complainant, had previously supervised Complainant, and had approximately five years of experience not only as day foreman but also as general foreman at the time he replaced Complainant.

After considering all of the evidence presented, and evaluating the credibility and

demeanor of the witnesses, I find that the evidence does not prove that any conduct of Respondent was prompted by the age of Complainant and, therefore, the complaint that Respondent unlawfully discriminated against Complainant in the terms, conditions, or privileges of employment because of age must be dismissed. *Id.* at 630.

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: April 2, 2009
Bronx, New York



Thomas J. Marlow
Administrative Law Judge