



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CATHERINE A. JINKS,

Complainant,

v.

WAYNE COUNTY,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10143332, 10145146

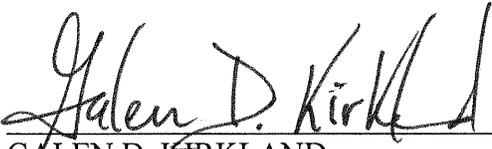
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on April 30, 2012, by Edward Luban, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given 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: 6/14/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case Nos. **10143332, 10145146**

SUMMARY

Complainant alleged that Respondent denied her a promotion because of her age and retaliated against her because she complained about the alleged discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 16 and November 12, 2010, Complainant filed verified complaints 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 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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on January 25, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Daniel C. Connors, Esq.

Permission to file post-hearing briefs was granted. Respondent filed proposed findings of fact and conclusions of law. Neither Complainant nor the Division filed a brief.

FINDINGS OF FACT

1. Complainant was born on December 24, 1956 and is 55 years of age. (Respondent's Exh. 2)
2. Complainant has been employed by Respondent since 1981. From 1981 to 1998, Complainant was a Social Welfare Examiner in Respondent's Department of Social Services ("DSS"). In 1998, Complainant was promoted to Senior Social Welfare Examiner, a supervisory position. (Tr. 18-19, 65; Respondent's Exh. 2)
3. In 1994, Jennifer Weaver began working as a Social Welfare Examiner in DSS. Weaver was born on November 11, 1969 and is 42 years of age. (Respondent's Exh. 3)
4. Respondent's Department of Workforce Development ("WFD") assists public assistance recipients, youth, senior citizens, and other eligible participants obtain employment services and training. (Tr. 163-65)

5. In January 2001, DSS's welfare to work program ("Welfare to Work") was transferred to WFD. Complainant and Weaver moved to WFD with Welfare to Work but kept their DSS job titles. (Tr. 65, 76-79, 165-66; Respondent's Exhs. 2, 3)

6. On March 29, 2002, Complainant's and Weaver's titles were changed to Employment and Training Counselor ("Counselor"). (Tr. 79-80; Respondent's Exhs. 2, 3)

7. In or about 2007, Complainant left Welfare to Work and began working in a WFD youth program. Weaver remained with Welfare to Work. (Tr. 80)

8. In July 2007, Kathleen Templar became the Director of WFD. Templar had previously served as a Senior Employment and Training Counselor ("Senior Counselor") in WFD. Templar is 54 years of age. (Tr. 147-48; Respondent's Exh. 1)

9. Respondent left Templar's Senior Counselor position vacant after she became Director. (Tr. 148)

10. After Templar became Director, tension developed between her and Complainant. Complainant believed that Templar did not give her "the tools I needed to do my job" and that the way Templar ran things "would make me look like a fool." (Tr. 69-73, 84)

11. During Templar's tenure as Director, she and Complainant have had conflicts about trying to stay within the youth program's budget. (Tr. 34-38, 166-68)

12. In March or April 2010, Respondent decided that WFD would take over all the employment programs then handled by DSS. Respondent decided to fill the vacant Senior Counselor position to oversee these programs. (Tr. 149-50)

13. The minimum qualification for promotion to Senior Counselor was one year of permanent competitive class service as a Counselor. (Joint Exh. 1)

14. In April 2010, Templar sent an e-mail message to Complainant, Jody Daniels, Rhonda Halstead, and John Smith, who were Counselors in WFD, advising them that Respondent might fill the Senior Counselor position. Because of an oversight, Templar did not send this e-mail message to Weaver. (Tr. 150-51)

15. In June 2010, Respondent posted the Senior Counselor position. (Tr. 152)

16. Senior Counselor is a position within the competitive class and is governed by the New York Civil Service Law. (Tr. 15, 118-19)

17. At the time Respondent posted the Senior Counselor position, there was no Civil Service eligible list for the position. The last list had expired December 17, 2001. (Tr. 123, 152; Respondent's Exh. 7)

18. Because there was no eligible list, Respondent could fill the position on a provisional basis. However, the person appointed provisionally would have to take a Civil Service examination and be reachable for appointment to retain the position. (Tr. 118, 120, 143)

19. Complainant, Halstead, Smith, and Weaver applied for the Senior Counselor position. All met the minimum requirement for promotion. (Tr. 135, 139, 142, 152, 154)

20. At the time, Complainant was 53 years of age, Halstead was 52 years of age, Smith was 50 years of age, and Weaver was 41 years of age. (Respondent's Exhs. 2-5)

21. Templar eliminated Smith and Halstead from consideration because they had not worked at DSS before coming to WFD. (Tr. 156-57)

22. Templar had worked with Complainant and Weaver for approximately 10 years and had a better relationship with Weaver than with Complainant. Templar had seen Weaver work very closely with DSS. Templar had also been impressed with Weaver's performance at several

trainings conducted by the Office of Temporary and Disability Assistance (“OTDA”). (Tr. 158, 160, 208)

23. Mary Lee Lippert is DSS’s Director of Income Maintenance. Templar asked Lippert for her views about Complainant and Weaver because Lippert had worked with both at DSS. In addition, WFD and the Senior Counselor would have to work closely with Lippert to make the new employment program successful. (Tr. 81, 155, 158-59)

24. Lippert told Templar that DSS staff had difficulty getting along with Complainant but that Weaver got along very well with Lippert and her staff. (Tr. 159, 208)

25. In July 2010, Templar appointed Weaver Senior Counselor provisionally. (Tr. 138, 207; Respondent’s Exh. 3)

26. Respondent notified the New York State Department of Civil Service of the provisional appointment and asked that an examination be scheduled so Respondent could fill the position on a permanent basis. (Tr. 125-26)

27. In July 2010, Respondent hired Candace Matthews as a Counselor in WFD. At the time, Matthews was approximately 58 years of age. (Tr. 161)

28. On August 16, 2010, Complainant filed her first Division complaint and alleged that Respondent denied her the promotion to Senior Counselor because of her age. (Tr. 27; ALJ’s Exh. 1)

29. Respondent was aware of the complaint and participated in the Division’s investigation. (Tr. 131-32)

30. The evidence does not support Complainant’s allegations that after she filed her complaint, Respondent questioned her more often and subjected her to “surveillance, extra surveillance” and monitoring. (Tr. 28, 34)

31. Rebecca Wahl is a clerk in WFD. On one occasion in the fall of 2010, Wahl and Templar were in Complainant's work area trying to hook up a fax machine and copier for Complainant at the same time that Complainant's files were being audited by a representative of another agency. The evidence does not support Complainant's claim that hooking up the fax machine and copier was a "pretense" and that Wahl and Templar were really in her work area to hear what she said to the representative of the other agency. (Tr. 29-32)

32. On October 16, 2010, a Civil Service examination was held for the Senior Counselor position. Based on the examination results, Respondent created an eligible list for the position. (Tr. 127-28; Respondent's Exh. 8)

33. Complainant and Smith received 90, the highest score, on the examination and were both ranked first on the list. Weaver received a score of 80 and ranked third. (Tr. 130-31; Respondent's Exh. 8)

34. Complainant, Smith, and Weaver were all reachable for appointment based on the Civil Service Law "rule of three." (Tr. 131, 209)

35. Templar appointed Weaver because of her strong communication skills, because she was already doing a good job as a provisional appointee, and because DSS's Commissioner was "very pleased" with Weaver's provisional appointment. (Tr. 209; Respondent's Exh. 3)

36. On October 27, 2010,¹ Templar, Weaver, and Amanda Johnson, another Counselor, were in Templar's office discussing "C," a public assistance recipient who worked with Weaver and Complainant.² Because of a lack of communication between Complainant and Weaver, C's

¹ Templar initially testified that this incident occurred on October 19, 2010 and that a subsequent incident occurred on October 26, 2010. Later in the hearing, the Division and Respondent stipulated that these incidents occurred on October 27 and 29, 2010, respectively. (Tr. 195-96)

² The full names of C and "D," another public assistance recipient and WFD participant, have been redacted to protect their privacy. (Tr. 179-80, 211-12)

youth program wages had not been reported to DSS. As a result, Templar was concerned that C might have received an overpayment of public assistance. (Tr. 173-77, 196-97).

37. Complainant entered Templar's office and joined the conversation, which became heated. Weaver said that C could be accused of welfare fraud for not reporting the income she received in the youth program. Complainant was offended by Weaver's mention of fraud. (Tr. 43, 87, 175-77, 198-99)

38. Templar ended the discussion by saying that Weaver, not Complainant would have the primary responsibility for working with C. (Tr. 177, 200)

39. On October 29, 2010, Patricia Rockefeller, WFD Employment and Training Coordinator, was in Templar's office discussing that week's office payroll with Templar. Complainant came into the office and began discussing an unrelated issue about getting an attendance sheet from D's employment file. (Tr. 180-81, 200-02, 206; Respondent's Exh. 6)

40. A heated discussion ensued between Complainant and Rockefeller. Complainant and Rockefeller left Templar's office and continued their argument by Complainant's work area. When Templar heard their voices, she went to the area and Complainant began yelling at her. Complainant accused Templar of retaliating against her because she had filed a suit against Respondent. (Tr. 44-49, 111-14, 182-85, 203-04)

41. In June 2011, Crystal West, a mediator, met with Complainant, Templar, Rockefeller, Weaver, and Joe Mastracci, another youth program employee, to mediate the issues that had arisen between Complainant, Weaver, and Rockefeller. Complainant felt "attacked" and "humiliated," and she felt that the purpose of the meeting was "to get at me again." (Tr. 40-41)

42. Several days after the meeting, Complainant went out on leave pursuant to the Family and Medical Leave Act ("FMLA"). (Tr. 52-53, 91, 171; Respondent's Exh. 2)

43. Before her leave, Complainant's responsibilities included conducting pre-employment skills training in the jail. Smith took over this responsibility while Complainant was on leave.

(Tr. 171)

44. Complainant returned to work in late August 2011. Templar had Smith continue to conduct the jail training for consistency and because "it seemed to be a good fit for him."

Complainant resumed her work with the youth program and took over job clubs and workshops for the DSS program. (Tr. 55, 91, 171-72)

45. The changes in Complainant's duties were not disciplinary or punitive. Complainant was not demoted, and her pay and benefits did not change. Complainant's duties after she returned to work were still within the responsibilities of a Counselor. (Tr. 100, 173, 205-06)

OPINION AND DECISION

Age Discrimination

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of age. Human Rights Law §296.1(a). 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 the 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 Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.*

Complainant is a member of a protected class based on her age. As a Counselor with more than one year of service, Complainant was qualified for promotion to Senior Counselor. Complainant suffered an adverse employment action under circumstances giving rise to an inference of discrimination when Respondent failed to appoint her to this position but appointed Weaver, who was younger than Complainant and the other two applicants. Thus, 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).

However, Respondent has presented legitimate, non-discriminatory reasons for its provisional and permanent appointments of Weaver. Weaver was qualified for the provisional appointment, had experience working in DSS and with DSS staff, and had a better working relationship with DSS and Templar than did Complainant. Templar relied on her own experience working with both applicants and on Lippert’s recommendation in deciding to appoint Weaver. With respect to the permanent appointment, although Complainant was ranked first and Weaver third on the eligibility list, Weaver was reachable for appointment according to the “rule of three.” N.Y. Civil Service Law § 61. In addition, Weaver was already performing well in the position as a provisional appointee.

Complainant failed to show that Respondent’s reasons were a pretext for unlawful discrimination. Complainant did not dispute Weaver’s qualifications, and she did not contradict Templar’s testimony about Complainant’s relationships with Templar, Lippert, and DSS staff. In addition, Complainant presented no evidence that Complainant’s age was a factor in the decision to appoint Weaver or that Respondent bore Complainant any animus based on her age. I note that in the same month that Respondent appointed Weaver provisionally, Respondent hired Matthews, who is several years older than Complainant, as a Counselor.

The ultimate burden of proving unlawful discrimination always remains with Complainant. *Ferrante* at 630, 665 N.Y.S. 2d at 29. Conclusory statements are insufficient to meet this burden. *Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999). Because Complainant failed to sustain this burden, the claim of age discrimination must be dismissed.

Retaliation

It is an unlawful discriminatory practice to retaliate against a person who has filed a complaint under the Human Rights Law. Human Rights Law § 296.7. To prove a prima facie case of retaliation, Complainant must establish that she engaged in protected activity, that Respondent was aware she engaged in such activity, that she suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D. 2d 101, 104, 692 N.Y.S. 2d 220, 223-24 (3d Dept. 1999).

Complainant engaged in protected activity when she filed her first Division complaint in August 2010. Respondent was aware of this complaint. However, Complainant failed to show that she suffered an adverse employment action. In a retaliation case, “an adverse employment action is one which ‘might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Mejia v. Roosevelt Island Medical Assoc.*, 31 Misc. 3d 1206(A), 927 N.Y.S. 2d 817(Table) (Sup. Ct. N.Y. Co. 2011), citing *Burlington Northern & Santa Fe Railway Co. v. White*, 543 U.S. 53, 68 (2006). Complainant alleged that Respondent questioned her more often and subjected her to increased surveillance and monitoring after she filed her Division complaint. The record does not support these allegations.

Templar did modify Complainant’s responsibilities in August 2011, after she returned

from her FMLA leave, but Complainant offered no evidence that this change was connected to the Division complaint she filed approximately one year earlier. Moreover, Complainant presented no evidence that the modification in her responsibilities might have dissuaded her from making a charge of discrimination. (*Compare Brightman v. Prison Health Services, Inc.*, 62 A.D. 3d 472, 878 N.Y.S. 2d 357, 358 (1st Dept. 2009), where the court held that allegations that the plaintiff was given a more onerous workload than her colleagues, was denied the opportunity to work overtime, was not paid when she did work overtime, was denied vacation and holiday pay, was transferred from her preferred workplace to a location where her alleged harasser worked, and was forced to work as a “floater” with no permanent work location stated a claim for retaliation.) Therefore, Complainant failed to establish a prima facie case of retaliation, and this claim must also 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: April 30, 2012
Syracuse, New York



Edward Luban
Administrative Law Judge