

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

PHYLLIS KIRKWOOD,

Complainant,

v.

NEW YORK STATE, DIVISION OF PAROLE,
Respondent.

and NEW YORK STATE, DEPARTMENT OF
CIVIL SERVICE, NEW YORK STATE, OFFICE
OF THE STATE COMPTROLLER, Necessary
Parties.

NOTICE AND
FINAL ORDER

Case No. 10117323

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 13, 2008, by Spencer Phillips, 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: **OCT 02 2008**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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OFFICE OF THE STATE COMPTROLLER,**
Necessary Parties.

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

Case No. 10117323

SUMMARY

Complainant asserts that she was subjected to unlawful discrimination when she failed to receive a workplace promotion and that she was subjected to a hostile work environment because she received a disappointing performance evaluation and because her job-related authority was purportedly undermined. Claimant has failed to establish a prima facie case for either of these claims and her complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 18, 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 Spencer D. Phillips, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 14, 15 and 24, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent was represented by Elliot McIntosh, Esq., Assistant Counsel, State of New York, Division of Parole.

Permission to file post-hearing briefs was granted and timely briefs were received from each party.

FINDINGS OF FACT

1. Complainant, a female, has worked for Respondent since February, 1984. Complainant has held various job titles, including Parole Officer (“PO”), Field Parole Officer (“FPO”), Senior Parole Officer (“SPO”), and Area Supervisor (“AS”). (Tr. 207-09)

2. Eugenio Russi, a male, has worked for Respondent since May, 1986. Russi has known Complainant throughout his employment with Respondent. (Tr. 361-62)

Facts Relevant to Complainant’s Failure to Promote Claim

3. Complainant was promoted from SPO to Buffalo AS in 2004 and remained in that title until 2005, at which time she chose to resign and “retreat” to her previous SPO title despite Respondent’s written intention to keep Complainant permanently in the Buffalo AS title. (Respondent’s Exh. 13; Tr. 209)

4. At Russi's request, Complainant served as Acting Buffalo AS from July, 2005 to June, 2006, performing the duties of the position on a temporary or "Acting" basis only. (Tr. 485)
5. For the remainder of 2006, Respondent's management directed that the Acting Buffalo AS duties be performed by various SPO's on a rotating basis. During this brief period of time, Complainant did not serve as the Acting Buffalo AS. (Tr. 248)
6. The Buffalo AS position again became vacant in the winter of 2006-2007. (Tr. 425-26)
7. At an unspecified time after the Buffalo AS position became vacant, Russi commented that persons interested in filling the vacancy had to have "cojones" because, in his experience and opinion, Buffalo was a difficult office to supervise. Russi used this term as slang for "guts, grit, courage." (Tr. 280-81, 446-47)
8. Complainant heard Russi's comment, but made no complaint. Complainant was well aware of Respondent's anti-discrimination policy and procedure for reporting suspected discrimination in the workplace. (Tr. 236-38, 281)
9. Interviews for the Buffalo AS position were conducted by a three-member panel. Russi was one of the panel members. (Tr. 427)
10. Complainant applied for the Buffalo AS position, and was interviewed on or about January 4, 2007. (Tr. 426, 430-31)
11. Alpina Taylor, a female, also applied for the Buffalo AS position after Russi encouraged her to apply, and was interviewed on January 4, 2007. (Tr. 288-92, 426-27)
12. Prior to Complainant's interview, Russi viewed Complainant as one of the top three contenders for the Buffalo AS position among a field of two females and four males. (Tr. 428-31)

13. Complainant was argumentative with the panel members during her interview. (Tr. 271, 318, 434-35)

14. Complainant failed to bring a resume with her to the interview; all other applicants brought resumes. (Tr. 435)

15. Complainant came to the interview dressed in casual clothes; all other applicants appeared in business attire. (Tr. 439)

16. At the end of her interview, Complainant did not leave but stayed in her chair and accused the panel of having previously made up their minds not to choose her for the position. (Tr. 435-36)

17. None of the panel members recommended that Complainant be hired, and all agreed her performance during the interview was poor. (Respondents' Exh. 24, 34-35, 37; Tr. 434-36, 276)

18. The panel chose Taylor, a female, as their first choice to fill the Buffalo AS vacancy, and submitted her name to Respondent's Central Office for appointment. However, Taylor was not appointed because the applicable Civil Service rules prevented her appointment. (Respondents' Exh. 1, 2; Tr. 293-94, 439-41)

19. The individual ultimately appointed to the Buffalo AS position, Donald Snyder, had an outstanding employment record with Respondent and was unanimously viewed by the panel as having performed well during his interview. (Respondents' Exh. 23, 34-35, 37; Tr. 434)

Facts Relevant to Complainant's Hostile Work Environment Claim

20. In 2005, Respondent's Executive Director traveled from Albany to the Buffalo area for a meeting with senior managers of the Buffalo Police Department. Complainant made the necessary arrangements for the meeting, but did not receive an invitation to attend the meeting because her attendance was not required. (Tr. 223-26)

21. In April, 2006, Regional Director Mark Manthei and SPO Lawrence Weaver went for a walk together, gathering information about parking lot fees in lots around the construction site of one of Respondent's future offices, stopping for coffee and talking about hockey. This was a social encounter between two individuals who had been friends for nearly 18 years, not an official business meeting. (Respondents' Exh. 37; Tr. 56-59, 227-31, 530-36)

22. In September 2006, Complainant became aware that \$1,450.00 was missing from the Division's safe. Complainant hid this knowledge from her supervisor for more than two weeks. Complainant received a counseling memorandum from her supervisor when he learned of the missing money. (Respondents' Exh. 18-22; Tr. 398-402, 404)

23. Issuance of a counseling memorandum is not a disciplinary action, and Complainant received no discipline as a result of receiving the memorandum. (Tr. 411)

24. In January, 2007, Russi and Manthei attended an FBI Task Force meeting in Buffalo to discuss a proposed wiretap operation which would require extensive overtime hours from Respondent's employees. Russi and Manthei attended the meeting because they had authority to authorize the necessary overtime hours. Complainant was not invited to attend the meeting because she held no authority to authorize overtime hours. (Tr. 447-49)

OPINION AND DECISION

Discrimination – Failure to Promote

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

To establish a prima facie case of discrimination, Complainant must demonstrate 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 employment action occurred under circumstances giving rise to an inference of unlawful discrimination because of her status as a member of a protected class. *See Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997).

Complainant is a female, and therefore belongs to a protected class. Complainant applied for the Buffalo AS position, and suffered an adverse employment action when she was not hired for that position. However, Complainant failed to establish any circumstances giving rise to an inference of discrimination.

Complainant alleges that Russi's "cojones" comment was evidence that gender-based discriminatory animus influenced the interview and appointment process for the Buffalo AS position. Russi's statement was neither directed at Complainant nor used in a sexual manner, but was used as slang for "guts, grit, courage" based on Russi's opinion that the Buffalo office was difficult to manage. Indeed, Merriam-Webster's Spanish-English dictionary states that the term may be translated into English as "guts [,] courage." *See Merriam-Webster's Spanish-English Dictionary. 11th ed. Springfield, MA: Merriam-Webster, 2008.* Furthermore, because Russi was a single member of a three-member panel, he had no power to unilaterally award or deny the Buffalo AS position to anyone. Finally, the undisputed fact that the panel unanimously chose Taylor, a female, as their first choice to fill the vacancy negates any lingering possibility that gender-based discrimination influenced the interview and appointment process.

The proof amply demonstrates that Complainant was one of six qualified candidates interested in filling the vacancy. Presented with more than one qualified candidate for the

vacancy, “[t]he court must respect the employer’s unfettered discretion to choose among qualified candidates.” *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001); *Western Union Int’l, Inc. v. City of New York, Commission on Human Rights*, 128 Misc.2d 217, 489 N.Y.S.2d 665 (1985). The individual ultimately chosen to fill the vacancy, Snyder, had an outstanding employment record with Respondent and was unanimously viewed by the panel as having performed well during his interview. His appointment to fill the vacancy was a reasonable business decision devoid of any unlawful discriminatory influence.

Because Complainant has demonstrated no facts giving rise to an inference of discrimination, she has failed to establish a prima facie case of discriminatory failure to promote and her claim must be dismissed.

Discrimination – Hostile Work Environment

Complainant also claims that she was subjected to a hostile work environment because of her gender, based upon her receipt of a disappointing performance evaluation and her perception that her authority was occasionally undermined.

In order to establish a prima facie case of discrimination based upon a hostile work environment, Complainant must show that the workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and thereby create an abusive working environment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d295, 786 N.Y.S.2d 382 (2004); *see also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993), *quoting Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2405 (1986).

Complainant presented no proof of severe, humiliating or physically threatening conduct by Respondent. Rather, Complainant merely demonstrated the following: (1) she received a

2005 performance evaluation recommending that she be permanently retained in the Buffalo AS position, which she believed was written by senior management rather than her immediate supervisor; (2) she was not invited to a meeting in 2005 where a topic in her area of responsibility was discussed, and was not invited to a meeting in 2007 which she claims she wanted to attend; (3) she was not invited to go on an afternoon walk with a subordinate and a Regional Director to gather parking lot fee information; and (4) she received a non-disciplinary counseling memo from her supervisor for failing to report her knowledge that money was missing from the Respondent's safe.

Each of Complainant's allegations, viewed individually and collectively, fall far short of the "severe or pervasive" threshold necessary to establish the existence of an abusive working environment. Furthermore, Complainant's failure to make any formal internal complaint after each of these acts demonstrates that she held no genuine, subjective belief that she was suffering from unlawful discrimination. Indeed, Complainant "ha[s] done little more than cite to [her alleged] mistreatment and ask the court to conclude that it must have been related to [her gender]. This is insufficient." *See Lizardo v. Denny's, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001).

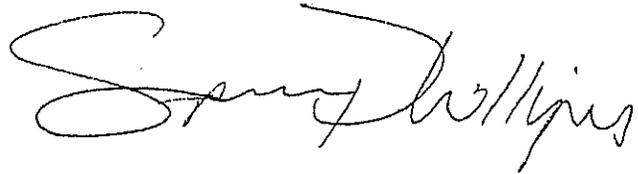
Because Complainant has failed to demonstrate the occurrence of any severe or pervasive conduct in Respondent's workplace, or a subjective belief that she was suffering from unlawful discrimination, she has failed to establish a prima facie case of unlawful discrimination based on a hostile work environment. Therefore, 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: August 13, 2008
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer Phillips". The signature is written in a cursive style with a large, looping initial "S".

Spencer Phillips
Administrative Law Judge