

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

BARBARA E. POWERS,

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. 10121888

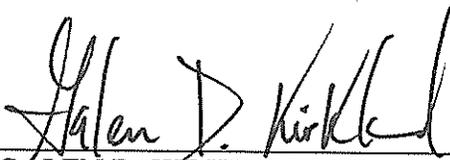
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on September 17, 2009, by Spencer D. Phillips, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity 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 20 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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

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

Case No. 10121888

**SUMMARY**

Complainant claims that Respondent subjected her to unlawful discrimination on the bases of sex and race. Complainant failed to satisfy her prima facie burdens and her complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On December 3, 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. A public hearing session was held on July 28, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Elliott A. McIntosh, Esq..

Permission to file post-hearing briefs was granted and timely briefs were received from the Division and Respondent.

#### **FINDINGS OF FACT**

1. Complainant is a Caucasian female. Complainant resides near Buffalo, New York. (ALJ Exhs. 1, 2; Tr. 6-7, 10-11)
2. On February 2, 2006, Respondent hired Complainant as a Parole Officer Trainee. Complainant immediately joined Respondent’s mandatory, eight-week training academy. (Tr. 12, 85, 132)
3. All Parole Officer Trainees, including Complainant, have a two-year probationary period. Complainant’s probationary period began February 2, 2006 and ended February 2, 2008. (Tr. 13, 36, 49, 74, 87, 123)
4. Respondent places newly-trained employees in various regional offices according to operational needs. These initial assignments are often in locations far away from the employees’ homes. (Tr. 59-60, 85-88, 115-17)

5. In April 2007, Respondent sent Complainant to work in the Rochester office following completion of her academy training. Respondent's Rochester office is 78 miles from Complainant's home. Respondent's Buffalo office is 9 miles away from Complainant's home. Complainant drove between her home and the Rochester office each work day. (Tr. 13, 15-16, 24, 28)

6. Respondent allows employees to request reassignment from one office to another office. Reassignments are made based upon the seniority and probationary status of employees seeking reassignment. Respondent's reassignment policy generally requires employees to complete their probationary periods of service prior to receiving a reassignment, but allows for exceptions to be made as necessitated by operational needs. (Respondent's Exh. 1; Complainant's Exh. 2; Tr. 67, 74, 101-04, 111-12, 115-16, 137-38)

7. Shortly after beginning her work in Rochester, Complainant placed her name on a reassignment list indicating her desire to be reassigned to the Buffalo office. Several of Complainant's coworkers also had their names on the list for reassignment to the Buffalo office, including Mark Schuler, a male with more seniority than Complainant, and Melissa Himmelsbach, a Caucasian female who was hired the same day as Complainant. (Tr. 20-24, 61, 140)

8. In September 2007, Respondent needed additional staff in the Buffalo office. Respondent reassigned Schuler from the Rochester office to the Buffalo office. (ALJ Exh. 1; Tr. 20, 140)

9. In November 2007, Respondent again needed additional staff in the Buffalo office. Respondent placed Lasonya Spearman, an African-American female in the training academy, in the Buffalo office as her initial assignment. (Tr. 41, 43) Respondent then reassigned

Himmelsbach to the Buffalo office. Complainant conceded that Himmelsbach was entitled to reassignment before Complainant, pursuant to Respondent's "third letter of the last name" seniority tie-breaking mechanism. (Tr. 23, 37-38, 134-37, 146)

10. Complainant alleges that Respondent discriminated against her on the basis of sex when it reassigned Schuler to the Buffalo office, and discriminated against her on the basis of race when it placed Spearman in the Buffalo office. (ALJ Exh. 1; Tr. 20, 140)

11. Complainant testified that she believed she was entitled to be reassigned to the Buffalo Office in November 2007. Complainant offered no explanation for this belief. (Tr. 33-35)

12. In February 2008, after Complainant completed her two-year probationary period, Respondent reassigned Complainant to the Buffalo office. (Tr. 27-29, 34, 58)

#### **OPINION AND DECISION**

The Human Rights Law prohibits employers from discriminating against employees in the terms, conditions or privileges of employment, on the basis of sex and race. Human Rights Law §296(1)(a).

Complainant alleges that Respondent discriminated against her, because of her sex and race, when it failed to reassign her to the Buffalo office in November 2007. To proceed on this claim, Complainant must satisfy her prima facie burden by showing that (1) she is a member of a protected class; (2) she was qualified for her 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).

Complainant is a Caucasian female, and therefore, is protected from discrimination on the basis of sex and race. Complainant was qualified for her position, as evidenced by her successful completion of the probationary period of service in February 2008. Complainant claims that she suffered an adverse employment action when Respondent reassigned Schuler to the Buffalo office in September 2007, and when Respondent placed Spearman in the Buffalo office in November 2007, thereby requiring Complainant to continue her daily commute between her home near Buffalo and her work assignments in Rochester.

Complainant testified at the public hearing that she believed, albeit erroneously, that she became eligible for reassignment in November 2007, two months after Schuler's reassignment. Therefore, Respondent's decision to reassign Schuler had no adverse impact upon the terms or conditions of Complainant's employment. Spearman, as new employee in academy training awaiting her first work assignment, was not subject to the seniority and probationary status considerations within Respondent's reassignment policy. Therefore, Spearman's placement in the Buffalo office did not adversely impact Complainant's terms and conditions of employment. *Messinger v. Girl Scouts of the U.S.A.*, 16 A.D.3d 314, 792 N.Y.S.2d 56 (1<sup>st</sup> Dep't. 2005) (explaining that "an adverse employment action requires a materially adverse change in terms and conditions of employment").

Complainant alleges that Respondent subjected her to unlawful sex discrimination by reassigning Schuler, a male, to the Buffalo office in September 2007 instead of Complainant. Again, Complainant clearly testified at the public hearing that she did not believe she was entitled to reassignment until November 2007. Complainant also failed to demonstrate that Respondent placed any male employees in the Buffalo office between November 2007 and the time Complainant was reassigned to the Buffalo office at the conclusion of her probationary

period of service in February 2008. Therefore, Complainant's sex discrimination claim fails and must be dismissed.

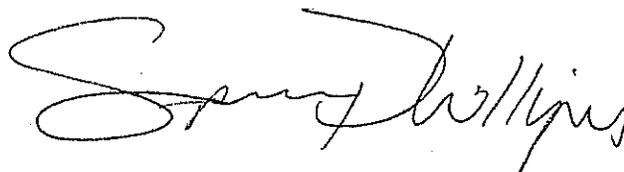
Complainant also alleges that Respondent subjected her to unlawful race discrimination by placing an African American employee in the Buffalo office in November 2007 instead of Complainant. The proof demonstrates that Respondent placed two employees – Himmelsbach (Caucasian) and Spearman (African American) – in the Buffalo office in November 2007. Complainant conceded that Himmelsbach was entitled to reassignment before Complainant. Spearman, as described above, was not subject to Respondent's reassignment policy, which applies only to employees who have received their first assignment and desire to be reassigned to a different office. Respondent was therefore free to place Spearman in the Buffalo office despite the fact that seasoned employees, including Complainant, were awaiting reassignment to the Buffalo office. Complainant also failed to demonstrate that Respondent reassigned any similarly situated non-Caucasian employees to the Buffalo office between November 2007 and February 2008. Therefore, Complainant's race discrimination claim fails and 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: September 17, 2009  
Rochester, New York



Spencer D. Phillips  
Administrative Law Judge