

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

SUSAN RAYAM,

Complainant,

v.

HAMMER PACKAGING COMPANY,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10112740

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 June 30, 2008, 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: **SEP - 9 2008**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. 10112740

SUMMARY

Complainant alleged that her employer subjected her to an unlawful denial of promotion because of her race. Complainant failed to show that Respondent's legitimate, non-discriminatory reasons for the employment action were pretext for unlawful discrimination. Therefore, the complaint must be dismissed.

PROCEEDINGS IN THE CASE

On July 20, 2006, 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.

6. From 2004 to August 25, 2006, Patti Cross worked as the 3rd Shift group leader.

(Tr. 193-94, 205-06, 662)

7. Between 2004 and January 2006, Emma Jackson filled in as a backup group leader when Cross was absent from work. (Tr. 195-96, 410-11, 564)

8. In January 2006, Jackson relinquished her role as backup group leader. Cross recommended to Finishing Department Manager Larry Ockenden that Hall serve as the backup group leader. Cross made this recommendation based on her personal knowledge of Hall's work performance, his strong organizational skills, and her understanding that Hall had extensive supervisory experience at a prior job. (Tr. 413-15, 658-59, 673-74)

9. In February, 2006, Hall began serving as the backup group leader. (Tr. 415, 513-14)

10. In June, 2006, Cross advised Ockenden that she would be voluntarily leaving Respondent's employ on August 25, 2006. (Respondent's Exh. 7; Tr. 416)

11. Ockenden recommended to Chief Operating Officer Pat Oliveto that Hall and Complainant be considered for the group leader position, as both individuals had previously expressed interest in the position. (Tr. 420-21, 425-26, 516)

12. The group leader position supervises Finishing Department employees working on the 3rd shift and is responsible for resolving employee disputes. (Tr. 198, 562, 404-05, 656-57)

13. To successfully perform the group leader position, an individual must be even tempered, work well with other employees, and be respected by other shift employees. (Tr. 407)

14. While employed by Respondent, Complainant caused or engaged in numerous disruptive workplace confrontations with her coworkers, including: sending her boyfriend to confront a co-worker who cursed at Complainant; threatening that Complainant's daughter would come to work to "jump" a co-worker and "beat everyone up"; threatening that

Complainant's daughter would assault a co-worker at a company picnic; calling a co-worker's husband and accusing that co-worker of having sexual relations with Complainant's boyfriend; repeatedly using vulgar and foul language when angry with co-workers; and slapping a co-worker. (Respondent's Exh. 6, 8, 9, 11, 12, 14, 15, 16, 17, 19; Tr. 113, 206-11, 236, 240-54, 328-29, 378-80, 438-39, 441-43, 459, 592-93, 599, 621-22, 624, 626-29, 640)

15. Hall and Complainant each took and passed the "Forecaster" test which Respondent administers to all individuals seeking employment in supervisory positions. (Tr. 467-68, 775-77, 820)

16. Hall and Complainant were each interviewed for the group leader position by Oliveto and by Jim Hammer, Respondent's President. (Tr. 819-20, 828)

17. Hall had 15 years of supervisory experience prior to his employment with Respondent. During his interview for the group leader position, Hall provided details regarding this supervisory experience, and Respondent subsequently verified this experience. (Tr. 539-40, 509, 772-73, 822)

18. Complainant claimed to have one year of supervisory experience prior to her employment with Respondent. During her interview for the group leader position, she could not remember the name of her former manager and was unable to provide any contact information. Hence, Respondent was unable to verify Complainant's prior supervisory experience. (Tr. 176-77, 266-68, 773-74, 822-23)

19. In August, 2006, while being considered for the group leader position, Complainant had incurred 7.5 points under Respondent's attendance policy, sufficient to warrant a written warning. When Cross told Complainant that she needed to speak with Ockenden regarding her attendance points, Complainant told Cross that she "doesn't give a damn about this place

anymore.” At this point in time, Hall had only incurred 1.5 points, which level did not warrant a written warning. (Respondent’s Exh. 22, 23)

20. In September, 2006, Ockenden recommended to Oliveto that Hall be placed in the group leader position, based upon Hall’s successful performance as the backup group leader. (488-89)

21. Ockenden did not recommend that Complainant be placed in the Group Leader position because she had a long history of confrontations with her co-workers and because she had ongoing attendance problems. (Tr. 489-90)

22. Oliveto chose Hall as the new group leader, based upon Hall’s verified supervisory experience and his work performance while employed by Respondent. (Respondent’s Exh. 24; Tr. 551, 828-30, 833, 852)

23. Oliveto did not choose Complainant as the new group leader because of her history of confrontations with coworkers, lack of verifiable supervisory experience, and because as the group leader, she would have been responsible for supervising her boyfriend. (Complainant’s Exh. 4; Tr. 200-01, 222-24, 824, 830-31)

OPINION AND DECISION

It is a violation of the Human Rights Law for an employer, “...because of the race...of any individual, to...discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law §296.1(a). In a discriminatory denial of promotion case, a complainant has the burden of proof and must, at the outset, establish a prima facie case by showing that: (1) she is a member of a protected class; (2) she applied for and was qualified for the job; (3) she was rejected for the position; and (4) the position remained open

and the employer continued to seek applicants having plaintiff's qualifications, or the position was filled under circumstances giving rise to an inference of discrimination. *Wright v. Eastman Kodak Co.*, 2008 U.S. Dist. LEXIS 22509, *15 (April 23, 2008); *McDonnell Douglas Corp. v. Green*, 441 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 668; *Petrosino v. Bell Atlantic*, 385 F.3d 210, 226 (2d Cir. 2004); *McCluskey v. County of Suffolk*, 2005 NY Slip Op 51420U; 9 Misc. 3d 1106A; 806 N.Y.S.2d 446 (July 5, 2005).

Once complainant establishes a prima facie case of unlawful discrimination, respondent must produce evidence showing that the challenged employment action was legitimate and non-discriminatory. Should respondent articulate a legitimate and non-discriminatory reason for its action, complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

Complainant satisfied her prima facie burden by establishing that (1) she belongs to a protected class, (2) she applied for the group leader position and was qualified for that position, (3) she was rejected for the position, and (4) the position was filled by someone outside of her protected class who had been working for Respondent for two years less than Complainant.

Respondent articulated several legitimate, non-discriminatory reasons for the challenged action. Hall had fifteen years of verified supervisory experience prior to his employment with Respondent. Complainant's one year of alleged supervisory experience could not be verified. Hall was respected by the employees that he would be supervising as group leader. Complainant had a long history of causing and engaging in confrontations with those employees. Hall had previously and successfully served as a backup group leader for Respondent. Complainant had

no such previous experience. Hall was a dependable employee who seldom missed work. Complainant's frequent unexcused absences rose to a level warranting a written reprimand.

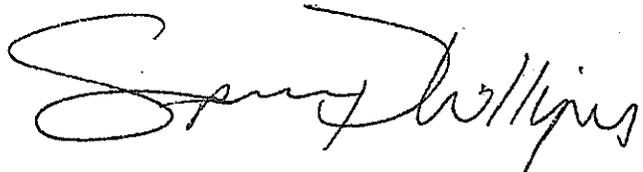
Complainant failed to show that Respondent's articulated reasons for placing Hall in the group leader position were mere pretext. Indeed, she "proffered nothing beyond bare, unsubstantiated assertions of animus toward her because of her race." *Jordan v. Am. Int'l Group, Inc.*, 283 A.D.2d 611, 725 N.Y.S.2d 232 (2001). Therefore, Complainant's discrimination claim fails and her 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: June 30, 2008
Rochester, New York



Spencer D. Phillips
Administrative Law Judge