

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**BRIAN SIMPSON,**

Complainant,

v.

**XEROX CORPORATION,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10124241

**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 July 8, 2009, 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: **SEP 14 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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

Case No. 10124241

**SUMMARY**

Complainant alleged that Respondent subjected him to unlawful discrimination because of his gender when it suspended him for two weeks after an incident with a female co-worker. Because the evidence does not support the allegations, the complaint should be dismissed.

**PROCEEDINGS IN THE CASE**

On March 25, 2008, 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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on May 7, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Trent M. Sutton, Esq.

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

### **FINDINGS OF FACT**

1. Complainant is a male and has been employed by Respondent for nearly 20 years. Complainant is currently a D 13 mix room operator in Respondent's Building 213 in Webster, New York. (Tr. 94-95, 117, 133)

2. David Burggraf is Complainant's supervisor. Burggraf reports to Alfred Willnow, operations manager for Building 213. (Tr. 116-17, 132-33)

3. During the relevant time period, Kenneth DaRin, Respondent's Human Resources/Industrial Relations Operations Manager, advised management on disciplinary procedures, participated in investigations, and recommended disciplinary actions. Management retained the responsibility to impose discipline. (Tr. 66, 72-74; Respondent's Exh. 6)

4. Respondent has established Rules of Conduct ("Rules") for its Monroe County facilities, including Building 213. Violations of the Rules may result in warnings or in a Labor Report ("Report"). Reports range from A, the lowest level, to E, which is a ground for discharge. A and B Reports remain active in an employee's personnel file for 18 months. After that time, the Reports are purged if the employee receives no other Reports during that period. Respondent considers C and D Reports, which provide for suspensions of up to three days and two weeks, respectively, to be "serious offenses." C and D Reports remain in the employee's personnel file indefinitely. (Tr. 68-70; Respondent's Exh. 5)

5. The consequence for violating Rule 15, "Harassment, intimidation, creating an undue disturbance or using abusive language to supervisors or other personnel," ranges from a B Report to discharge, depending on the offense. (Tr. 69; Respondent's Exh. 5)

6. In 1993, Respondent issued Complainant a D Report and a 40-hour suspension without pay for violating Rule 15. (Tr. 30; Respondent's Exhs. 9, 12)

7. In 1997, Respondent issued Complainant another D Report and a 40-hour suspension without pay for violating Rule 15. Respondent subsequently offered to reduce Complainant's suspension to 20 hours in settlement of a grievance filed by Complainant's union. (Tr. 30; Respondent's Exh. 11)

8. On June 29, 2004, Robert Conger, a supervisor, reported that Complainant was "belligerent, combative [sic], a teamless player, and . . . disruptive with all of his fellow employees." (Respondent's Exh. 7)

9. Brenda Romilly, a female, is also employed by Respondent as a D 13 mix room operator in Building 213. Romilly works with Complainant. (Tr. 134)

10. Beginning in 2007, Complainant complained to Burggraf at least ten to twelve times about Romilly's workmanship. During the same period, Romilly complained to Burggraf at least ten to twelve times that Complainant belittled her abilities. On November 13, 2007, Burggraf counseled Complainant and Romilly to conduct themselves in a businesslike manner. (Tr. 25, 117-19, 121; Respondent's Exh. 13, 15)

11. On February 14, 2008, Complainant was assigned to work in the upstairs mix control room ("room"). Romilly was assigned to work downstairs that day, but she came to the room to get her respirator. At approximately 8:00 a.m., Complainant entered the room and saw Romilly

holding a work shirt he believed was his. An argument ensued between Complainant and Romilly. (Tr. 13-15, 39)

12. Complainant paged Burggraf. Burggraf arrived in the room three or four minutes later and heard "heated words." Burggraf separated Complainant and Romilly, and he directed Romilly to return to her work station downstairs. (Tr. 16-17, 121-22; Respondent's Exh. 14)

13. Burggraf interviewed Complainant and Romilly, then contacted Willnow and Verdell Lane, Complainant's and Romilly's union representative. Later that morning, Burggraf, Willnow, and Lane together interviewed Complainant and Romilly. (Tr. 18, 122-25; 134-40)

14. On February 15, 2008, Burggraf and Willnow discussed the previous day's incident with DaRin. Because a union representative was not available that day, Willnow sent Complainant and Romilly home with pay until the following Monday, February 18. (Tr. 19, 66, 80-81, 144)

15. Willnow and DaRin began a formal investigation of the incident. They interviewed Complainant, Romilly, and 15 to 20 of their co-workers, both union and non-union employees. The co-workers reported that over a sustained period of time, Complainant had picked on Romilly, had belittled her, and had made derogatory comments to her. They also reported that Complainant was mean at times, bullied his co-workers, and made them feel uncomfortable. No employee who was interviewed reported similar conduct by Romilly. (Tr. 82-83, 85-86, 136, 140, 142-43, 145-48, 150; Respondent's Exh. 20)

16. Had DaRin considered only the February 14 incident, he may have recommended only warnings to both Complainant and Romilly. However, based on the reports about Complainant's behavior for the previous year, as well as Complainant's two previous Rule 15 violations, DaRin

recommended that Complainant receive a D Report and that he be suspended for ten days. (Tr. 87-90, 93-96, 108, 110-11)

17. Willnow accepted DaRin's recommendation, issued Complainant a D Report, and suspended him for ten days. Willnow found that during the past year, Complainant "created a hostile work environment" toward Romilly by humiliating her verbally, accusing her of not doing her job to his satisfaction, and, at times, touching her or grabbing her arm "even after her emphatic requests not to do so." Willnow also found that Complainant's behavior had "been disruptive and confrontational for the others in the group." (Tr. 26, 150, 157; Respondent's Exh. 16)

18. Respondent did not discipline Romilly for the February 14, 2008 incident. (Tr. 23; ALJ's Exh. 1)

19. Willnow and other supervisors have issued D Reports to female employees for violating Rule 15. On June 12, 2007, Respondent issued a female employee a D Report and a two-week suspension without pay for a Rule 15 violation. On January 10, 2008, Respondent issued another female employee a D Report and a one-week suspension without pay for a Rule 15 violation. (Tr. 96, 153; Respondent's Exh. 18)

### **OPINION AND DECISION**

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms or conditions of employment on the basis of sex. Human Rights Law § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show 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 employment 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); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). 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 reasons Respondent has presented were merely a pretext for discrimination. *Forrest* at 305, 786 N.Y.S. 2d at 390. The ultimate burden of proof always remains with Complainant. *Ferrante* at 630, 665 N.Y.S. 2d at 29.

Complainant has established a prima facie case. As a male, he is a member of a protected class. Complainant was qualified for his position, and he suffered an adverse employment action when Willnow suspended him without pay for ten days after the altercation with Romilly. Willnow did not discipline Romilly. This difference in treatment permits an inference of discrimination.

However, Respondent has presented a legitimate, non-discriminatory reason for suspending Complainant. Respondent did not determine whether Complainant or Romilly was at fault for their altercation, but it found that Complainant had engaged in hostile and abusive conduct toward Romilly for a lengthy period of time. It was that course of conduct, not the altercation with Romilly, that was the basis for Complainant's suspension. Complainant also had a prior history of difficulty getting along with co-workers, including two previous suspensions for violating Rule 15.

Complainant failed to prove that Respondent's explanation for his suspension was a pretext for discrimination. Complainant did not rebut the evidence about his conduct toward Romilly. In addition, Complainant presented no evidence that Respondent discriminates on the



basis of sex in employee discipline. On the contrary, the record shows that Respondent has also suspended female employees for violating Rule 15.

Complainant did not sustain his burden of proof. Therefore, the 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: July 8, 2009  
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban  
Administrative Law Judge