



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**ANNE SULLIVAN,**

Complainant,

v.

**ADIRONDACK BANK,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10148543

Federal Charge No. 16GB103123

**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 December 31, 2012, by Michael T. Groben, 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.

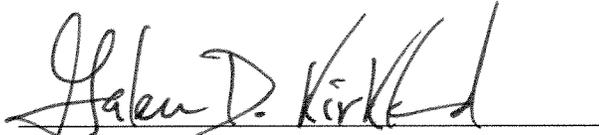
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: 2/7/2013  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

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DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**ANNE SULLIVAN,**

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v.

**ADIRONDACK BANK,**

Respondent.

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

Case No. **10148543**

**SUMMARY**

Complainant alleges that she was subjected to unlawful discrimination in employment because of age and sex. Respondent denies these charges. Complainant has failed to prove her case, and the complaint must be dismissed.

**PROCEEDINGS IN THE CASE**

On May 10, 2011, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on April 2, 3, and 24, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Raymond Shanley, Esq. Respondent was represented by Saunders Kahler, L.L.P., by Merritt S. Locke, Esq., of counsel.

Permission to file post-hearing briefs was granted, and both parties timely filed proposed findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Complainant, a woman, was born in June, 1960. At the time of the public hearing, she was 51 years old. (Tr. 13-14)
2. Robert Clark ("Clark") has been Respondent's senior vice president for retail banking and manager marketing since September, 2010. (Tr. 383-84)
3. Debra Sainsbury ("Sainsbury") is Respondent's branch operations manager. Clark is her immediate supervisor. Sainsbury oversees branch operations, and among her other duties, acts as Clark's contact with Respondent's branch managers regarding day-to-day operations of the various branches. (Tr. 270-73, 325, 388, 391, 453-54, 498-500, 505-06)
4. At the time of the hearing, Sainsbury was 59 years old. (Tr. 131, 565)
5. Robert Brenchley ("Brenchley") is the regional manager of Respondent's Mohawk Valley region. He was 57 years old at the time of the public hearing. (Tr. 110, 357, 367-68)
6. Deanna Stublely ("Stublely") is the manager of Respondent's Ilion branch. She was 48 years old at the time of the public hearing. (Tr. 108, 326, 353, 356)

7. Patrick Runyon ("Runyon") was employed by Respondent from November, 2010 through November, 2011. (Tr. 109, 231, 238)

8. Kimberly Lynch ("Lynch" was the branch manager of Respondent's Boonville branch from October, 2003 to May, 2011. She was in her mid-40s at the time she left Respondent's employ. (Tr. 309-310, 325-26)

9. Shelby Ford ("Ford") was employed by Respondent as branch manager of Respondent's Mohawk branch until April, 2011, when his employment was terminated. Ford was in his mid-30s when his employment was terminated. (Tr. 111, 164, 463-64, 487, 493)

10. Diane B. King ("King") is Respondent's director of human resources. (Tr. 523, 570)

**Complainant is Hired by Respondent**

11. In October, 2010, Complainant applied for a position as a branch manager at Respondent's bank. (Respondent's Exhibits 1, 2, and 3; Tr. 15-17, 95-98)

12. Complainant's prior employment experience included approximately 20 years in sales, including experience selling business loans, mortgages, and personal loans at another bank. (Respondent's Exhibits 2 and 3; Tr. 14-15)

13. Complainant interviewed with Clark and Sainsbury. Because Clark had planned a greater emphasis on sales as a part of Respondent's banking business, he was impressed by Complainant's sales background. Effective on or about November 15, 2010, Clark hired Complainant as branch manager of Respondent's South Utica branch, in the process relocating the male branch manager of the South Utica branch to another location. (Respondent's Exhibit 20; Tr. 17-22, 106, 122, 195, 385-88, 389-93, 424-25, 434, 500-05, 550-51, 576-77, 583-87, 612)

14. Clark hired Complainant for the position in preference over a male candidate. (Tr. 387, 391-92)

15. Complainant's predecessor at the South Utica branch manager position had been a woman. (Tr. 573-74, 602-04, 607)

16. Complainant's immediate supervisors were Sainsbury and Clark. (Tr. 132) Complainant was considered a probationary employee for the first 90 days of her employment. (Joint Exhibit 1 [p. 3]; Tr. 441)

### **Training Program**

17. After Complainant started work, Respondent informed her that she was required to attend and complete a schedule of training in various skills needed for the branch manager position. Although Complainant commenced the training, she did not complete all of the required training sessions, including a course on how to prepare and complete loan files. Clark, King, and Sainsbury were informed of this. Complainant claimed to Sainsbury that she had, in fact, completed all the training. (Tr. 392-93, 400-01, 450-52, 506-08, 541-50, 574-75)

18. In her testimony at the public hearing, Complainant claimed that she had completed the training. (Tr. 106-07) Complainant's testimony on this issue was not credible.

### **Complainant's Job Performance**

19. During the training period, three of Complainant's subordinates at the South Utica branch complained to Anthony Zamiello, one of Respondent's branch managers, that Complainant was often not present at the branch. Zamiello also received complaints about Complainant from customers of the South Utica branch. (Tr. 23, 213-16, 334-37, 342-48)

20. In or about December, 2010, these employees then relayed the same concerns to Sainsbury. (Tr. 206-09, 508-10) Sainsbury directed Complainant to be present at the branch a sufficient amount of time each day in order to properly perform her duties as branch manager. (Respondent's Exhibit 13; Tr. 510-14)

21. On January 14, 2011, Sainsbury sent an e-mail message to Complainant which, in pertinent part, listed documents or information missing from various accounts which had been opened in Complainant's branch. It was Complainant's responsibility to make sure that these files were complete. Although both Sainsbury and Respondent's deposit service manager instructed Complainant on how to perform this function properly, Complainant continued to have difficulty with this aspect of her job. (Respondent's Exhibit 14; Tr. 449-50, 453, 524-34)

22. On February 4, 2011, Clark advised Complainant that her sales reports were incomplete, and directed her to complete them. (Respondent's Exhibit 12; Tr. 468-69, 481)

**Complainant's Age**

23. After Complainant began working for Respondent, she mentioned to Clark at a meeting that she was 50 years old and about to become a grandmother. Complainant testified that Clark had believed her to be in her "late 30s", and that he was "surprised" to learn her true age. (Tr. 39-40, 168-69)

24. During the period of December, 2010, through January, 2011, Complainant observed that the contractor hired by Respondent to shovel and plow snow and ice at the South Utica branch was not performing these tasks, and that ice was forming at the bank's drive-through area. When Complainant notified Sainsbury of the problem, she was directed to resolve it herself as branch manager, either by hiring additional help or by having bank employees assist. During that discussion, Complainant stated to Sainsbury that "at 50 years old" she was unable to shovel snow or spread rock salt. (Tr. 37-39, 112-117, 128-29, 168, 407-08, 514-15)

25. Complainant believed that after she volunteered her age to Clark and Sainsbury, she was treated "differently" by Respondent. (Tr. 67-68, 117-18, 169, 191-95)

26. Complainant alleged that this different treatment took the form of a refusal on the part of Respondent to assist Complainant in resolving the snow and ice problem at the South Utica branch. This testimony was credibly contradicted by Clark and Sainsbury. (Tr. 119, 407-08, 514-15) Complainant's testimony on this issue was not credible.

27. Complainant also alleged that this different treatment included a refusal by Clark to permit Complainant to offer loan customers a certain advantageous loan rate for financing home improvements, which would have been of benefit to Complainant, and also that Clark refused to place Complainant in charge of a particular loan program which she wished to supervise. (Tr. 119-21, 170-72, 183-84)

28. Complainant could not cite any facts which would indicate that this different treatment by Respondent had been due to her age or sex. (Tr. 118, 121-22)

29. Complainant's resume, submitted to Respondent as part of her employment application, indicated that she had been in the workforce for at least 20 years after college. Thus, the fact that she was over 40 years old would have been apparent to Clark and Sainsbury at the interview. In addition, Clark had known Complainant for many years prior to her application, and was well aware of her true age. (Respondent's Exhibit 3; Tr. 17, 98-101, 167-68, 388-89, 424)

30. Clark once referred to a group of female employees as "dinosaurs" in Complainant's presence, stating that he would be willing to terminate the employment of those who would not support the sales program. Complainant inferred that in describing those employees as "dinosaurs," Clark was referring to their age, rather than the length of their service for Respondent. (Tr. 25-26, 136-37) Complainant submitted no proof that this interpretation was correct, other than her own opinion.

31. Clark did not make any disparaging remarks regarding the age or sex of Respondent's employees, including Complainant. (Tr. 137-38, 190-91, 196-97, 263-64, 266, 565, 578)

32. During her employment, Complainant did not make any complaint to Respondent's human resources department that she was experiencing differential treatment because of her age or sex. (Tr. 133, 576)

**The Sales Program**

33. During the fall of 2010, Clark initiated an incentive program (the "sales program"), pursuant to which Respondent's tellers and other personnel were eligible to receive cash awards for opening new accounts or originating personal loans for customers. Branch managers were given monthly figures reflecting the number of new accounts or loans generated by each employee from each branch. Complainant disagreed with the rules of the program, and believed that the monthly figures generated by Respondent were not accurate. (Tr. 33-34)

34. Complainant made her misgivings regarding the sales program known to both Clark and Sainsbury, separately, on several occasions in January and early February 2011. Both discussed the rationale for cash awards used in the program with Complainant, verified that the monthly figures in question were accurate, and advised Complainant of that fact. Complainant advised Clark and Sainsbury that she refused to implement the program as directed by Respondent. (Complainant's Exhibit 1; Respondent's Exhibit 11; Tr. 34-36, 123-24, 129, 395-96, 434-37, 464-68, 478-80, 482-83, 515-18)

**The February 10, 2011, Meeting**

35. Clark and Sainsbury held monthly meetings with Respondent's branch managers. During her employment with Respondent, Complainant attended three of such meetings, the last being on February 10, 2011. (Tr. 44-47, 393)

36. Just prior to that meeting, Complainant again complained to Sainsbury regarding the accuracy of the monthly figures generated for the sales program. (Tr. 518-19)

37. At the February 10 meeting, the topic of the sales program was discussed. (Tr. 394-95) Complainant again asked Clark to explain the sales program, which he did. (Tr. 437-38)

38. The February 10 meeting was also attended by Brenchley, Sainsbury, Stubbley, Runyon, Ford, Lynch, and other employees. When Clark attempted to continue the meeting, following his set agenda, Complainant continued to complain loudly about the sales program to the other branch managers in attendance, reiterating her refusal to follow the program, and "talking over" Clark when he attempted to resume control of the meeting. (Tr. 234, 322, 355-61, 364-65, 369-72, 374-77, 378-79, 396-98, 439, 454-56, 471-72, 487-88, 501, 519-23, 552-53)

39. Runyon, Ford, and Lynch testified at the public hearing that they did not see or hear Complainant do anything disrespectful at the February 10 meeting. Complainant testified that her demeanor was respectful at all times, and claimed the other branch managers present at the meeting were the ones who continued to talk while Clark was attempting to speak. (Tr. 50-53, 60-61, 322-23, 234-37, 488-89, 491-92) Based on the demeanor and behavior of the witnesses at the public hearing, I do not credit this testimony.

40. Runyon and Lynch also testified that Clark was acerbic at branch manager meetings, and occasionally disrespectful to branch managers. Both acknowledged, however, that Clark did not direct this behavior towards women or older employees. (Tr. 250-52, 261-63, 314, 316, 324-25)

41. At some point during the meeting, Clark became annoyed and told Complainant to "shut up." (Tr. 51, 236-37, 372, 492)

**Complainant is Disciplined**

42. After the February 10 meeting, Clark, Sainsbury and King discussed the situation and decided to issue a written warning to Complainant for her insubordinate behavior at the meeting. (Tr. 522-23, 553-54, 575-76, 600-01)

43. On February 11, Sainsbury and Clark delivered a letter of employee disciplinary action to Complainant at her office. (Respondent's Exhibit 10; Tr. 55-57, 60-62, 399-401, 456-59, 523-24, 554-58, 560, 563-64)

**Complainant's Employment is Terminated**

44. After delivering the letter to Complainant, Clark and Sainsbury again discussed Complainant's job performance. Based on the previous problems with Complainant's performance, as well as new information regarding her failure to correctly open accounts and loan files, Clark and Sainsbury, in consultation with King, decided to terminate Complainant's employment. (Tr. 400-03, 441-42, 459-63, 473, 535-37, 558-60, 562, 564-69, 576-78)

45. Clark terminated Complainant's employment on the afternoon of February 14, 2011. As per Respondent's practice, Complainant was escorted from the premises. (Tr. 63-65, 402-05, 481, 537-39, 560-61, 578, 588)

46. Soon after Respondent terminated her employment, Complainant wrote to Respondent's president, and sent a copy of that letter to a member of Respondent's board of directors, complaining about her termination. In these communications, Complainant did not complain that she had been fired because of her sex or her age. (Complainant's Exhibit 1; Tr. 30-31, 72-79, 132-34, 145-46, 148-49)

47. Complainant then applied for a number of positions with other employers. She was initially unsuccessful, and believed that either certain of Respondent's employees, or members of

Respondent's board of directors, had intervened or otherwise influenced prospective employers to prevent Complainant from obtaining employment. Complainant presented no proof of this other than her own opinion. (ALJ's Exhibit 1; Respondent's Exhibits 5, 6, 7, 8; Tr. 80-85, 150-60, 178-82, 190)

### **Complainant's Sex**

48. At the time her employment was terminated, Complainant did not believe that this decision was made was because of her sex. (Tr. 133)

49. Complainant was replaced by a male branch manager who was younger than Complainant. Besides supervising the South Utica branch, this new branch manager was put in charge of three other branches. (Tr. 175-77, 184-86, 405-07, 539-41, 578-83)

50. During her employment with Respondent, Complainant had made a number of suggestions for improvements to the physical plant and operations of the South Utica branch. After she was replaced by a male, at least one of these suggested improvements was implemented. Complainant believed that Clark refused to implement these improvements while she was employed, because of her sex. Complainant presented no proof of this other than her own opinion. (Tr. 26-28, 128, 169-70, 187-90)

51. Ford, Runyon, and Sullivan all testified that Clark favored his friends, who were male, over other bank employees. However, none of these witnesses credibly identified an act of discrimination by Clark against Complainant because of her sex. (Tr. 177, 241-44, 267-72, 412-93, 496)

### **Respondent's Hiring and Termination Practices**

52. During his tenure with Respondent, Clark terminated the employment of three women, including Complainant. One of those three women was Complainant's immediate predecessor at

the South Utica branch. Clark also terminated the employment of one male employee. That male employee was replaced by a woman. (Tr. 425-27, 432-33, 463-64, 573-74, 602-609, 611)

53. Respondent has a significant number of women in branch manager positions. (Tr. 357-58) During his tenure with Respondent, Clark has hired or promoted a number of employees, including branch managers. These employees include a significant number of women, and persons over 40 years old. (Respondent's Exhibit 15; Tr. 23, 204, 369, 406, 421-24, 496-97, 583, 588-90, 593-600) I find that Respondent's hiring and termination practices did not reveal a pattern of discrimination against women or persons over 40 years old.

### **OPINION AND DECISION**

N.Y. Exec. Law, art. 15 ("Human Rights Law"), § 296 (1)(a) makes it an unlawful discriminatory practice for an employer "because of an individual's age... (or) sex... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

To establish a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show that: (1) she is a member of a protected class; (2) she was qualified for the 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).

If a complainant makes out a prima facie case of discrimination, the burden shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for

discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

In the instant case, Complainant is female and over 40 years old and thus a member of two protected classes. She was qualified for her position and suffered an adverse employment action when her employment was terminated. Complainant's replacement was a younger man, and Complainant's termination followed within a few days of her first written disciplinary notice. Thus, Complainant's termination took place under circumstances permitting an inference of unlawful discrimination. Complainant presented a prima facie case, a burden 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).

In response, Respondent presented legitimate, nondiscriminatory reasons for its termination of Complainant's employment. As a probationary employee, Complainant was on notice that her performance during the first 90 days of her employment would be evaluated by Respondent, and if found unsatisfactory, her employment would be terminated. Complainant's attendance problems, her failure to properly prepare and oversee the preparation of loan and account opening files and sales reports, and Complainant's insubordination regarding Respondent's sales program, exhibited both at the February 10, 2011 meeting and prior thereto, constitute legitimate nondiscriminatory reasons for Respondent's actions.

It is also significant that Complainant was hired and fired by the same individual. When the person or persons who made the decision to hire a complainant is the same individual or individuals who fire the complainant, one can usually infer that discrimination was not the reason for the adverse action. *Dickerson v. Health Management Corp. of America*, 21 A.D.3d

326, 329, 800 N.Y.S.2d 391, 394 (1st Dept. 2005). "There is an inherent implausibility in hiring a member of a protected class and then discriminating against a person on the basis of his or her protected status." *Youth Action Homes v. State Div. of Human Rights* (231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). Clark (with Sainsbury's input) not only hired and fired Complainant, he and Sainsbury spent a considerable amount of time working with Complainant in an effort to improve her job performance. Further, Respondent's record of hiring and firing employees showed no evidence of age or sex discrimination. Complainant failed to demonstrate that Respondent's proffered reasons for her termination were a pretext, and 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 hereby is, dismissed.

DATED: December 31, 2012  
Bronx, New York

A handwritten signature in black ink, appearing to read "Michael T. Groben", with a large, stylized flourish at the end.

Michael T. Groben  
Administrative Law Judge