



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CORINNE ZAJAC,

Complainant,

v.

**SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) LOCAL 200 UNITED,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10158225

Federal Charge No. 16GB300386

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 29, 2014, 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 HELEN DIANE FOSTER, 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 30 2014**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

CORINNE ZAJAC,

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**SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) LOCAL 200 UNITED,**

Respondent.

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

Case No. **10158225**

SUMMARY

Complainant alleges that she was subjected to discrimination in employment due to age, and that Respondent retaliated against her for opposing discrimination by terminating her employment. Respondent denies the allegations. Complainant has failed to sustain her burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 24, 2012, 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. The public hearing was held on May 8 and 9, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn and Charles L. Miller II, Esqs. Respondent was represented by Mairead E. Connor, Esq.

Permission to file post-hearing briefs was granted, and both parties filed proposed findings of fact and conclusions of law. Complainant's brief was filed one day late. After a telephone conference with counsel, ALJ Groben accepted the brief.

FINDINGS OF FACT

1. Respondent is a union local which negotiates collective bargaining agreements (“CBA”) for its members, administers these CBAs through grievance procedures, and participates in labor-management committees. Respondent also conducts political activities on behalf of its members. (Tr. 152-53, 159)

2. Respondent has jurisdiction throughout the State of New York, except for Long Island and New York City. It maintains offices in Buffalo, Rochester, Syracuse, Albany and Kingston, staffed with its employees, who number approximately 24 in total. (Tr. 153, 155)

3. Respondent employs 12-13 union representatives (also known as business representatives), whose duties include negotiation of CBAs with employers, and filing and pursuing grievances on behalf of Respondent's members. (Tr. 9-10, 154-55, 159-60)
4. Union representatives are also responsible for getting Respondent's members involved in politics and obtaining contributions for political activity. (Tr. 159-60)
5. From October 22, 2003, through October 12, 2012, Complainant was employed by Respondent as a union representative. During the time relevant to the complaint, she worked out of the Buffalo and Rochester offices. (Tr. 9-10, 11)
6. Complainant was born January 21, 1953. (Tr. 18)
7. Respondent's employees refer to a group of union members governed by a CBA as a "division" or "unit." (Tr. 10, 160)
8. During the time relevant to the complaint, Complainant was assigned to work with approximately 12 to 14 units. (Tr. 34-35)
9. At the time relevant to the complaint, Respondent's Buffalo office had a staff of approximately four to five employees, including union representatives and a clerical employee. (Tr. 11-12, 153-54)
10. The Rochester office staff included union representatives, a member organizing department, and Respondent's communications person. (Tr. 11, 154)
11. The Syracuse office staff included union representatives, support staff, a communications person, and a political organizer. (Tr. 154-55)
12. Scott Phillipson ("Phillipson") has been Respondent's elected president since May 2013. (Tr. 149, 150)

13. During the time relevant to the complaint, Phillipson served as Respondent's executive director, working out of the Syracuse office. (Tr. 149-50, 154)

14. Phillipson was appointed executive director by resolution of Respondent's executive board. His duties as executive director included supervision of Respondent's employees, hiring and firing employees, and monitoring Respondent's various offices. (Tr. 150, 155, 243)

15. As executive director, Phillipson also ran "strategic campaigns" (also known as "public campaigns") to pressure employers during contract negotiations. A public campaign could involve activities such as circulating a petition to students at a college which employed Respondent's members. (Tr. 157-59, 249-50)

16. Prior to his appointment as executive director, Phillipson was the assistant to Respondent's president from 2005 to 2009. (Tr. 149-50)

17. Elizabeth Golombeski ("Golombeski") is Respondent's secretary-treasurer. In 2012, she was employed at the Syracuse office as Respondent's executive vice president. (Tr. 10-11, 154-55)

18. Shelley Ceravalo ("Ceravalo") has been Respondent's director of member strength since July, 2012. Among her other duties, at the time relevant to the complaint, Ceravalo supervised an organizer, Calvin Ott ("Ott"). Contrary to Complainant's claim, Ceravalo was not Complainant's supervisor. (Tr. 19-20, 63, 156, 269-70)

19. During the time relevant to the complaint, Phillipson was Complainant's supervisor. (Tr. 161)

Complainant's Performance

20. Respondent does not conduct formal performance evaluations of its employees. (Tr. 12-13, 117, 129, 242-44)

21. Complainant was never disciplined during her employment with Respondent. (Tr. 12, 245)

22. One of the units represented by Complainant consisted of employees of Sodexo (also known as Sodexo Hobart), a company which provided custodial and food services at Hobart College. (Tr. 30-31, 95, 180-81)

23. Complainant also represented a unit known as ABC Head Start. (Tr.162)

24. The ABC Head Start unit had become a member unit of Respondent (a process also known as being “organized”) in November of 2010. Pursuant to applicable law, Respondent had one year to negotiate the unit’s first CBA from that date, or face the possibility of a petition from the members to decertify Respondent’s representation of the unit. (Tr. 163, 171-72)

25. In or about the spring of 2012, Phillipson became concerned that Complainant had not yet successfully negotiated the first CBA for ABC Head Start. Phillipson participated in negotiations between the unit and the employer, and, believing that he had solved the problem, turned the matter back over to Complainant. (Tr. 163)

26. A few weeks later, Phillipson received complaints from the chair of Respondent’s ABC Head Start unit, Henderson Davis, regarding Complainant’s performance and behavior in negotiations. Davis requested that Phillipson return to help with the negotiations. (Tr. 163-64)

27. Phillipson returned for two more negotiating sessions, during which he received more complaints from members regarding Complainant’s performance. (Tr. 164-67)

28. Phillipson advised Complainant that he would take over the negotiations from her. Phillipson successfully negotiated a CBA. Phillipson then supervised the ratification of the CBA by unit members at a meeting in August, 2012. (Tr. 167-71, 178-79)

29. After the ratification meeting, Phillipson went out to a restaurant with several union members and employees. Complainant was unaware of this gathering. Phillipson credibly denied any intent to exclude Complainant from the gathering. (Tr. 172-74)

30. The prolonged negotiation and ratification process for the ABC Head Start unit CBA had caused dissatisfaction among the unit members, which concerned Phillipson because it could have resulted in a vote by the members decertifying Respondent as their union. (Tr. 171-72)

31. In or about July 2012, Phillipson became aware that there were also problems with Complainant's representation of the Sodexo unit, and that the members had voted down a proposed contract which Complainant had negotiated. Complainant acknowledged these problems in a July 25, 2012 e-mail to Phillipson. (Tr. 95-96, 161-62, 163, 181-83; Respondent's Exhibit 8)

32. Phillipson was not satisfied with Complainant's e-mail, was concerned that the proposed contract negotiated by Complainant compared unfavorably with other contracts negotiated for workers at Hobart College, and believed that a public campaign might be necessary to force Hobart to agree to more favorable terms. (Tr. 191-92)

33. Shortly thereafter, Phillipson received a petition signed by a number of Sodexo members requesting Complainant's removal as their union representative; in response, he sent Ceravalo and Ott to investigate and report back. (Tr. 30-31, 183-84, 188-89; Respondent's Exhibit 9)

34. Complainant again attempted to defend her work at Sodexo to Phillipson in an August 3, 2012 e-mail. In that e-mail, she stated "If in fact you intend to remove me from this group, please do me a favor and do a secret ballot." (Tr. 103-07; Respondent's Exhibit 7)¹

¹ Complainant's Exhibit 8 is a partial copy of Respondent's Exhibit 7. (Tr. 265-66)

35. On August 2, and August 6, 2012, Ceravalo reported to Phillipson that a number of Sodexo members had complained to her about Complainant's behavior, including shouting at and threatening members, failing to effectively convey the terms of the proposed CBA to members, and failing to properly represent the members at CBA negotiations. (Tr. 193-95; Respondent's Exhibits 10 and 11)

36. Phillipson advised Complainant that he would remove her from the Sodexo unit, and that he would have Respondent's attorney negotiate a new CBA. (Tr. 191, 195)

37. Phillipson then became aware that Complainant set up a new bargaining session and negotiated a new CBA, in contravention of his instructions. (Tr. 195-96)

38. Because the new CBA was no more favorable to the members than the previous version, Phillipson instructed Complainant not to try to "sell" the contract to the members, but to allow them to vote it down, and that Respondent would then bring pressure against Hobart College to renegotiate via a public campaign. (Tr. 196)

39. Phillipson then directed Ceravalo to undertake a public campaign against Hobart College by circulating a petition to Hobart's students. Phillipson did not inform Complainant of his directive to Ceravalo. (Tr. 196, 249-50)

40. Instead of following Phillipson's directive, Complainant actively attempted to have the Sodexo members ratify the contract, and took the unusual measure of bringing a federal mediator to the ratification meeting to try to convince the members to ratify the CBA. The CBA was again voted down. (Tr. 100-01, 196-98)

41. On August 28, 2012, Complainant sent an e-mail to Phillipson advising him that she again intended to resume negotiations on behalf of Sodexo members with Hobart, and

complaining about the public campaign Phillipson had directed. (Tr. 197; Respondent's Exhibit 12)

42. By e-mail dated September 1, 2012, Complainant requested that Phillipson replace her as union representative for ABC Headstart, and again stated her intention to resume negotiations with Hobart. (Tr. 175-77, 248; Respondent's Exhibit 5)

43. On September 3, 2014, Phillipson replied "As we discussed previously you are done at Sodexo Hobart." Phillipson was surprised that Complainant continued to discuss her plans for the Sodexo unit in e-mails, in view of his previous instruction to her that Respondent's attorney would take over negotiations. (Tr. 178, 198-99; Respondent's Exhibit 5)

44. On September 17, 2012, Complainant e-mailed the members of ABC Head Start regarding her plans for the unit. Phillipson was concerned because he had already told Complainant that she was no longer representing the unit. He again advised Complainant that she was no longer the union representative at ABC Head Start. (Tr. 179-80; Respondent's Exhibit 6)

45. Complainant testified at the public hearing that she had not requested that she be removed as the representative for ABC Head Start, and that she had not received notice when she was removed. When confronted with evidence to the contrary, Complainant's testimony was evasive and contradictory. (Tr. 87-94; Respondent's Exhibits 5 and 6) Complainant was not a credible witness.

46. Complainant was also the union representative for a unit known as Gateway-Longview. In August 2012, Phillipson received complaints from members of that unit that Complainant had not been attending union meetings as required, and that they did not believe that it was their responsibility to perform the duties of a union representative in interacting with the employer. (Tr. 199-201)

Complainant's Employment Is Terminated

47. In approximately mid-September, 2012, Phillipson decided to terminate Complainant's employment because of the continuing member complaints and difficulties regarding her representation of the Sodexo, ABC Head Start, and Gateway-Longview units. (Tr. 161-63, 201-02)

48. On September 21, 2012, in reply to an e-mail from Complainant complaining that she felt "frozen out" of union business, Phillipson sent an e-mail to Complainant, advising her that he wanted to have a meeting with her and Golombeski at the Buffalo office on October 1. (Tr. 203-06; Respondent's Exhibit 3 [p. 2])

49. Complainant testified that she had felt "frozen out" because she had not been informed by Phillipson that he had ordered the public campaign at Sodexo Hobart before it commenced, and that Ceravalo had also conducted certain other activities at ABC Head Start on Phillipson's orders, without Complainant's advance knowledge of same. Complainant provided no evidence that Phillipson's failure to inform her of Ceravalo's activities was because of Complainant's age. (Tr. 110-13)

50. Complainant testified at the public hearing that she did not recall that Phillipson and Golombeski attempted to meet with her during September. (Tr. 78-79) Based on my observation of the demeanor and behavior of the witness, I find that Complainant's testimony on this issue was not credible.

51. At the proposed meeting, Phillipson intended to inform Complainant that her employment was terminated, and, as was Respondent's occasional practice, to discuss the possibility of entering into a termination settlement agreement with Complainant. Phillipson also

intended to recover Respondent's property in Complainant's possession, including a cell phone, laptop computer, and gas cards. (Tr. 202-03, 205)

52. Phillipson then began preparing documents for a severance agreement and general release for the termination of Complainant's employment. Respondent had entered into similar agreements with other employees terminated for cause. (Tr. 219, 223-24, 252, 254-57; Respondent's Exhibits 16 and 17)

53. By e-mail dated September 22, 2012, Complainant advised that she would be unable to attend the meeting on October 1 because her doctor had taken her out of work for two weeks. In response to Golombeski's request, Complainant then supplied a doctor's note to that effect. (Tr. 24-26, 65-71, 206-07, 245; Complainant's Exhibit 3; Respondent's Exhibit 13)²

54. Complainant returned to work on October 4, 2012, and Golombeski again attempted to set up a meeting with her, for October 8 at Respondent's Syracuse office. Complainant advised that she was unable to travel that far due to her medical condition, and requested a meeting at the Buffalo office. On October 8, Golombeski advised Complainant that the meeting was changed to October 12 at the Rochester office. (Tr. 84-85, 207-10; Respondent's Exhibit 4 [pp. 2-4])

55. By e-mail dated October 9, 2012, Complainant replied "if this is intended to be a termination, just get it over!" Complainant also requested a copy of her personnel file. (Tr. 210-11; Respondent's Exhibit 4 [pp. 1-2])

56. Complainant testified at the public hearing that with the exception of one e-mail dated October 4, 2012 in which she acknowledged her presence back at work, she did not recognize any of the e-mails set forth in Respondent's Exhibit 4, nor had she written any of them. (Tr. 72-

² Respondent's Exhibit 13 is a copy of the doctor's note in the form received by Respondent. (Tr. 213-14)

77; Respondent's Exhibit 4) Based on the demeanor and behavior of the witness, I find that Complainant's testimony on this issue was not credible.

57. Complainant testified at the public hearing that she did not believe, before the proposed October meeting, that the purpose of said meeting was to terminate her employment. (Tr. 79-81) Based on the demeanor and behavior of the witness, I find that Complainant's testimony on this issue was not credible.

58. On October 12, Phillipson and Golombeski traveled to the Rochester office to meet with Complainant. She was not there, and efforts to contact her by telephone were not successful. (Tr. 85-86, 217-18)

59. On October 12, 2012, Golombeski left a message on Complainant's phone advising her of her termination, and mailed written notice of such termination to Complainant. (Tr. 21-23, 162-63, 217-19; Complainant's Exhibit 2, Respondent's Exhibit 15)

Alleged Age Discrimination and Division Complaint

60. Complainant testified that on August 7 or 8, 2012, and again on September 28, 2012, Ceravalo told her that she was old and that she should retire. (Tr. 19-20, 60-61)

61. Ceravalo credibly denied making those remarks. (Tr. 270-71)

62. Phillipson credibly testified that Complainant did not make any complaints of discrimination to Respondent prior to his decision to terminate her employment. (Tr. 215)

63. Complainant claimed that she had repeatedly complained of discrimination to Respondent on unspecified dates via phone calls and e-mails, which were ignored and not answered. Complainant acknowledged that she had not actually sent any e-mails which quoted or described Ceravalo's alleged comments. (Tr. 19-20, 61-62, 64) Complainant's claims on this issue were not credible.

64. On September 28, 2012, Complainant filed her Division complaint number 10157757, alleging therein that Respondent had discriminated against her because of her age by placing a tracking device on Complainant's cell phone, preventing her from properly representing union members, causing or permitting Complainant to be harassed because of her age, and other alleged incidents of discrimination. (Tr. 20, 108-09; Respondent's Exhibit 14)

65. Phillipson first became aware of Complainant's Division complaint number 10157757 when he received a copy from the Division at Respondent's Syracuse office on October 11, 2012. (Tr. 214-17, 250; Respondent's Exhibit 14)

66. Complainant's Division complaint number 10157757 eventually received a determination of no probable cause to support the allegations of the complaint and was dismissed in March, 2013. (Tr. 20-21, 228-29; Respondent's Exhibit 2)

67. Phillipson credibly denied that he had terminated Complainant's employment because of her Division complaint number 10157757. (Tr. 217)

OPINION AND DECISION

The N.Y. Exec. Law, art. 15 ("Human Rights Law") makes it an unlawful discriminatory practice for an employer "because of an individual's age... 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." Human Rights Law § 296.1 (a).

A complainant has the burden of establishing a prima facie case by showing that: (1) she is a member of a protected group, (2) she was qualified for the position held, (3) she suffered an adverse employment action, and (4) the respondent's action occurred under circumstances giving

rise to an inference of discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

If the complainant makes such a showing, the burden shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, complainant must show that the reason presented was 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).

In the instant case, Complainant was nearly 60 years of age during the time relevant to the complaint and therefore she belongs to a protected class. Complainant worked for a number of years as a union representative and she was qualified for that position. Complainant suffered an adverse employment action when Respondent terminated her employment. However, Complainant did not establish that her employment was terminated under circumstances which would permit an inference of discrimination. Complainant failed to produce credible evidence in the record demonstrating that Respondent had any animus against her because of her age, nor did she otherwise establish that her age was connected in any way to the termination of her employment. Respondent, for its part, demonstrated that Complainant's employment was terminated because of her job performance. This claim is dismissed.

Retaliation

It is an unlawful discriminatory practice to retaliate against a person who has filed a complaint under the Human Rights Law. Human Rights Law § 296.7. To prove a prima facie case of retaliation, the complainant must establish that: (1) she engaged in activity protected by the Human Rights Law, (2) the respondent was aware she engaged in protected activity, (3) she suffered an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Svcs. Corp.* 257 A.D.2d

101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999). In a retaliation case, "an adverse employment action is one which 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Mejia v. Roosevelt Island Medical Assoc.*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), citing *Burlington Northern & Santa Fe Railway Co. v. White*, 543 U.S. 53, 68 (2006).

If the complainant meets this burden, the respondent must present legitimate, nondiscriminatory reasons for its action. *Id.* If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. *Matter of Pace University v. New York City Commission on Human Rights*, 85 N.Y.2d 125, 128, 632 N.Y.S.2d 765, 766 (1995).

In the instant case, Complainant engaged in an activity protected by the Human Rights Law when she filed her initial Division complaint. The fact that this complaint was ultimately dismissed by the Division does not negate Complainant's good faith belief that she had been the victim of unlawful age discrimination. Respondent was made aware of that Division complaint one day before it terminated Complainant's employment. Under these circumstances, the close temporal proximity between Respondent's knowledge of the protected activity, and the adverse employment action, is sufficient to establish the fourth prong of Complainant's prima facie case.

However, Respondent presented legitimate, nondiscriminatory reasons for its termination of Complainant's employment. Respondent was concerned about the deficiencies in Complainant's performance months before she filed her Division complaint. The record demonstrates that Respondent found it necessary to reduce Complainant's assignments because of these concerns, and that Respondent determined to terminate her employment several weeks before it became aware of the filed complaint. The record is also clear that, before Complainant

filed her Division complaint, she was well aware that her job was in jeopardy. Respondent attempted to make arrangements to personally meet with Complainant in order to terminate her employment and to recover Respondent's property. Complainant delayed meeting with Respondent, and ultimately Respondent found it necessary to advise her of her discharge in writing. It was because of these delays that Complainant's discharge and the filing of her Division complaint occurred within such a short period of time. Complainant did not demonstrate that Respondent's reasons for the termination of her employment were a mask for unlawful discrimination. This claim is also 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: September 29, 2014
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