



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

COURTENEY BUCHINGER,

Complainant,

v.

CANISTEO POLICE DEPARTMENT,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10147926

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 8, 2012, by Lilliana Estrella-Castillo, 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: 7/19/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. **10147926**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her when it removed her from the work schedule because she was pregnant, and that Respondent then unlawfully retaliated against her by interfering with her ability to become employed by another police department. However, Complainant failed to meet her burden, and the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On April 11, 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on February 15, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by David G. Wallace, P.C. by Mary Theresa Northrup, Esq. Respondent was represented by Davidson & O’Mara, P.C. by Pamela Doyle Gee, Esq.

Pursuant to The Division’s Rules of Practice (9 N.Y.C.R.R. § 465.4), the complaint was amended at the public hearing to change Complainant’s name from Courteney Kilmer to her married name: Courteney Buchinger. (Tr. 8) The complaint was also amended to add retaliation as a basis. (Tr. 10)

The parties submitted timely proposed findings of fact and conclusions of law which were considered, and where appropriate, adopted.

FINDINGS OF FACT

1. Complainant is a female. (ALJ Exhibit 1)
2. Respondent is located in the Village of Canisteo, New York. The village has a population of about 3,000. (Tr. 68, 236)
3. Respondent’s police department currently has two full-time police officers and four part-time police officers. (Tr. 68)

4. Shifts are covered by one police officer at a time. (Tr. 66) If a police officer needs backup during a shift, the officer would get back-up from the New York State Troopers or from a nearby sheriff's department, which could take up to 25 minutes to arrive. (Tr. 67)

5. The duties of Respondent's police officers involve public service and protection, including traffic stops, traffic control, curfew enforcement, and other behavior like criminal mischief, domestic violence calls, disturbance complaints, and drunk and disorderly calls. (Tr. 65, 237-38)

6. Police officers provide their own guns, belts and pants. (Tr. 68) Respondent provides them with a shirt, badge, radio and keys to the station house and car. (Tr. 68-69)

7. Because Respondent's part-time police officers also work part-time for other police departments, they advise Respondent ahead of time as to their availability, and based on the hours Respondent has available, it tries to match their availability to the schedule. (Tr. 62, 181, 219, 256)

8. Respondent prepares its work schedule at least one month in advance. (Tr. 61-62, 185, 203, 242, 244) This allows Respondent, as well as some of the other police departments, to accommodate its part-time employees juggling more than one job. (Tr. 62, 109, 180, 185, 193, 203)

9. Part-time employees are not guaranteed any set number of hours. (Tr. 60, 184, 193, 203, 242, 244)

10. On May 18, 2009, Respondent hired Complainant as a part-time police officer. (Tr. 20-22, 60; Complainant's Exhibit 1)

11. Complainant worked five part-time positions. (Tr. 91) She worked for Respondent, Nunda Police Department, North Hornell Police Department, Andover Police Department, and BK's Florist. (Tr. 30, 31, 62)

12. Complainant made herself available to work for Respondent on Saturdays and Sundays. (Tr. 22, 61-62; Respondent's Exhibit 10)

13. In February 2010, Complainant found out that she was pregnant. (Tr. 70)

14. On March 29, 2010, Complainant stopped working for the Nunda Police Department because the commute was too long and she was working too many hours. (Tr. 72, 73; Respondent's Exhibit 7)

15. In May 2010, Complainant advised Respondent's Officer-In-Charge David Crosby that she was pregnant and that the child was due in November 2010. (Tr. 23, 219)

16. Crosby was supportive of Complainant's pregnancy, just as he had been of Jennifer Bulkley, a former employee who became pregnant while employed by Respondent. (Tr. 209, 219; ALJ Exhibit 1; Respondent's Exhibit 4)

17. Crosby advised Complainant that she "called the shots" and she could work as long as she felt comfortable. (Tr. 23, 219, 245, 254-55)

18. In June 2010, Complainant advised Crosby that her uniform was tight. He responded that she could wear whatever made her feel comfortable. (Tr. 24, 70-71, 223)

19. Complainant's grandmother adjusted Complainant's pants and belt, and Complainant purchased a white polo shirt which she wore when working in the various police departments. (Tr. 74, 94, 98) Complainant had a removable patch for each of the police departments which she wore on the polo shirt. (Tr. 74)

20. Neither Respondent nor any of the other police departments reimbursed Complainant for the uniform alterations. (Tr. 95, 98) Complainant never asked any of her employers to reimburse her for any of the alterations to her uniform. (Tr. 95, 98)

21. July 4, 2010, was Complainant's last day of work for the Andover Police Department. (Tr. 72, 105, 110).

22. Complainant voluntarily stopped working for the Andover Police Department because of her pregnancy. (Tr. 106)

23. July 30, 2010, was Complainant's last day of work with the North Hornell Police Department, despite her testimony that she worked until the middle of August 2010. (Tr. 72; Respondent's Exhibit 8)

24. Complainant was on Respondent's schedule to work on August 1, 15, 22, and September 1, 2010. (Tr. 220; Respondent's Exhibit 9)

25. Complainant worked for Respondent on August 1, 2010, and then went on a one week vacation. (Tr. 24, 75; Respondent's Exhibits 9, 10)

26. Complainant did not work for Respondent after she returned from vacation. (Tr. 220)

27. When Complainant returned from vacation she told Crosby that she was feeling "uncomfortable" on the job, and he noticed that she was "starting to struggle." (Tr. 220-21, 246) At that time, Crosby also expressed his concern for her safety because she was getting bigger and was "out there by herself." (Tr. 25, 246)

28. Complainant agreed to call Crosby when she was ready to be placed back on the schedule. (Tr. 221)

29. Sometime in August 2010, Crosby asked Complainant to return her radio, badge and keys. (Tr. 27, 236, 238-40) Crosby requested these items back from Complainant because

Respondent did not have enough to go around, and had hired another part-time officer to work Complainant's hours. (Tr. 235, 240; ALJ Exhibit 1)

30. In October 2010, Respondent posted a full-time position that became available when David Updyke transferred to the Steuben County Sheriff's Department. (Tr. 197, 241, 273)

31. Complainant applied for the full-time position with Respondent, but was not selected. Alan Burchard applied for and was hired as a lateral transfer from the Steuben County Sheriff's Department. (Tr. 241; ALJ Exhibit 1)

32. Because Burchard was a lateral transfer Respondent did not canvass from the current civil service list where Complainant was not reachable. (Tr. 242, 243, 272)

33. Respondent hired Burchard full-time in January 2011, and as a result was able to cut the part-time hours in half, resulting in the need to cover only one eight hour shift a week. (Tr. 185, 192, 243, 272, 275)

34. On October 20, 2010, Complainant gave birth to her daughter. (Tr. 28, 69)

35. On December 10, 2010, Complainant contacted Crosby and told him that she was ready to return to work. (Tr. 28, 78) Complainant also advised Crosby that she wanted her regular hours back. (Tr. 249)

36. At the time that Complainant called Crosby, the December and January schedules were already done. (Tr. 79, 248)

37. When Crosby told Complainant that the schedules were already done, Complainant asked Crosby to contact the police officers assigned and ask them to give up their hours or alternatively share the hours with her. (Tr. 28, 29, 255)

38. Things between Complainant and Crosby were left “up in the air.” (Tr. 255)
Complainant never called Crosby again after December to express her availability, and Crosby did not put her back on the schedule. (Tr. 80, 248-49, 255)

39. Although Complainant was aware that when she called the schedules were already made for December and January, she did not call Crosby again because she “sensed” from her conversation with him that he was not making any efforts to talk to “the other guys to figure out what would be good for all of us.” (Tr. 80)

40. Respondent never terminated Complainant’s employment; she remains on Respondent’s list of part-time employees. (Tr. 77-78; Respondent’s Exhibit 1)

41. In August 2011, Complainant was hired as a full-time peace officer by Alfred University. (Tr. 41-42) Complainant’s hourly wages are higher than when she was employed by Respondent. Complainant also gets benefits, such as medical, dental and retirement, which she did not receive while employed by Respondent. (Tr. 39-42, 50, 59-60, 88-89)

Retaliation Claims

42. In February 2010, Complainant applied for a part-time police officer position with the Village of Bath Police Department (“Bath Police Department”). (Tr. 80-81)

43. When Complainant applied for the part-time position, she had to fill out a lengthy employment application and consent to a background check. (Tr. 82, 115, 117, 126)

44. In March 2010, Complainant asked the Bath Police Department to table her application until after the birth of her child. (Tr. 84, 116, 137, 138)

45. In April 2011, David Rouse, the Chief of the Bath Police Department, reached out to Complainant and asked Complainant whether she was still interested in the part-time position.

(Tr. 84, 129, 138) He then asked Complainant whether anything had changed since she initially filled her application and asked her to update her application. (Tr. 84, 118, 138)

46. Complainant did not disclose that she had filed a complaint against Respondent on April 11, 2011. (Tr. 143; ALJ Exhibit 1) This information, along with some derogatory comments about Complainant, was revealed during her background check. (Tr. 120-21, 121-23, 141)

47. Rouse called Crosby and asked whether it was true that Complainant had initiated litigation against Respondent, and Crosby responded in the affirmative. (Tr. 142-43, 150, 225)

48. In late April 2011, Rouse rescinded the offer of employment with the Bath Police Department, not just because Complainant failed to disclose the litigation against Respondent, but because of other things that came up during Complainant's background investigation. (Tr. 124-25, 140, 148-49, 152)

49. Subsequent to Complainant filing her complaint with the Division, Complainant's then boyfriend, Michael Buchinger, who is a State Trooper, was making inquiries at the Canisteo Village clerk's office as to why Complainant had not been interviewed by Respondent for the full-time position, and also appeared with Complainant at the Division's office during a conference. Both acts raised concerns because they gave the appearance that Buchinger was using his position as a State Trooper to gather information or influence the outcome of the investigation. (Tr. 160, 161-63, 228)

50. As a result, Buchinger's supervisors spoke to him about the public perception of his actions while on and off duty. (Tr. 164, 166-67, 177, 228) The discussion was not documented and did not result in any disciplinary action against Buchinger. (Tr. 175, 230-31)

OPINION AND DECISION

The Human Rights Law § 296.1 states, “[i]t shall be an unlawful practice ... [f]or an employer ... because of the ... sex ... of any individual, to ... discharge from employment such individual or to discriminate against such individual” Pregnancy discrimination is a form of sex discrimination. *Mittl v. New York State Div. of Human Rights*, 100 N.Y. 2d 326, 763 N.Y.S. 2d 518 (2003); *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 N.Y. 2d 211, 597 N.Y.S. 2d 617 (1993); *Brooklyn Union Gas Co. v. New York State Human Rights App. Bd.*, 41 N.Y. 2d 84, 390 N.Y.S.2d 884 (1976).

A complainant may establish a prima facie case of discrimination because of pregnancy by demonstrating that she is a member of a protected class, that she satisfactorily performed her job duties, and that she was discharged under circumstances which give rise to an inference of discrimination. *Anthony v. Nemec*, 225 A.D. 2d 883, 884, 638 N.Y.S. 2d 529 (3d Dept. 1996). If the complainant establishes a prima facie case, the burden shifts to the respondent to articulate a legitimate non-discriminatory reason for its actions. Thereafter, the complainant must demonstrate that the reasons offered by the respondent are merely a pretext for unlawful discrimination. *Ferrante v. American Lung Ass’n*, 90 N.Y. 2d 623, 665 N.Y.S. 2d 25 (1997).

Complainant has failed to meet her prima facie burden because she did not suffer an adverse employment action.

Complainant’s testimony was not credible regarding her allegation that Crosby removed her from the August schedule because she was pregnant. For example, Complainant initially testified that she worked all her part-time positions during her entire pregnancy, and that she would have therefore continued to work for Respondent but for Crosby taking her off the schedule. This testimony was not true. Complainant stopped working for the Nunda Police

Department on March 29, 2010. Her last day of work for the Andover Police Department was July 4, 2010. Complainant's last day of work with the North Hornell Police Department, despite Complainant's testimony that she worked until the middle of August 2010, was July 30, 2010. Furthermore, Complainant's testimony that although she worked for Respondent on August 1, 2010, she did not realize that she was not on the August schedule until after she returned from vacation is not credible. Complainant's own testimony, and that of her own witnesses, was that the schedule was always prepared one month in advance. Therefore, Crosby's testimony is more credible when he testified that Complainant was on the schedule for August, when she returned from vacation she told him that she felt uncomfortable, he then expressed his concerns for her wellbeing and removed her from the schedule.

Complainant's other allegations regarding the uniform and being asked by Crosby to return Respondent's equipment while she was out waiting for the birth of her child, are not adverse employment actions. When Complainant advised Crosby that the uniform was tight, he told her to wear whatever made her comfortable. Her grandmother adjusted Complainant's uniform which she used for her other part-time positions as well. And, while it is true that Respondent did not reimburse Complainant for the modifications to the uniform, Complainant also never requested reimbursement from Respondent or from any of the other police departments. Crosby also credibly testified that because Respondent is a small department, its supply of equipment is limited and he asked Complainant for her equipment back because it was needed for the officers that were currently working. It did not make sense for Complainant to hold on to department equipment while she was not working pending the delivery of her child.

Complainant also alleged that she was not placed back on Respondent's schedule after the birth of her child. However, when Complainant called to advise Crosby that she was ready to

return to work, the schedules for December and January were already set and other part-time officers were scheduled for the available hours. Complainant never called again to advise Crosby that she was available after December 2010, and Complainant failed to show that Respondent had a duty to remove the other officers from the schedule in favor of Complainant.

In order to establish a prima facie case of retaliation, a complainant must show that (1) she engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that she participated in the protected activity; (3) she suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D. 2d 101, 103, 692 N.Y.S. 2d 220, 223 (3d Dept. 1999) (citing *Fair v Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 A.D. 2d 631, 636 (3d Dept. 1996).

Complainant participated in protected activity when she filed a complaint with the Division, against Respondent. Respondent was served with the complaint, and was therefore aware that Complainant filed a complaint with the Division. However, Complainant failed to show that she suffered an adverse employment action.

Complainant alleges that she suffered an adverse employment action when Crosby responded truthfully when asked by Rouse whether Complainant had initiated a complaint against Respondent. However, Crosby did not discuss Complainant's performance with Rouse, he simply responded that it was true that Complainant filed a complaint against Respondent and that it was a discrimination complaint. It is not clear how responding truthfully to this question was retaliatory. Complainant also seems to imply that the adverse employment action was the lack of an employment offer by the Bath Police Department, a decision that was completely out of Respondent's control. This, coupled with Rouse's credible testimony that he made the

decision not to hire Complainant due to other things found in her background that caused him concerns, works against Complainant.

Complainant also alleged retaliation because her then boyfriend was spoken to about the public's perception of his actions while off duty. There is nothing in the record to indicate that Buchinger was disciplined or that he suffered any harm as a result of the discussion that his supervisor had with him regarding the public's perception of his actions.

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 8, 2012
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Lilliana Estrella-Castillo
Administrative Law Judge