



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**LINDA F. EVANS,**

Complainant,

v.

**NEW YORK STATE, DEPARTMENT OF  
CORRECTIONAL SERVICES,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10135652

**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 January 14, 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.

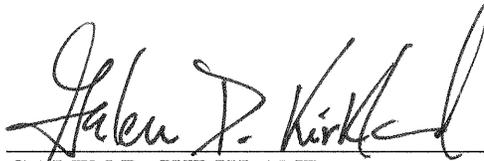
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: MAR 13 2012  
Bronx, New York



GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**LINDA F. EVANS,**

Complainant,

v.

**NEW YORK STATE, DEPARTMENT OF  
CORRECTIONAL SERVICES,**

Respondent.

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

Case No. **10135652**

**SUMMARY**

Complainant alleges that Respondent discriminated against her in employment on the basis of sex and race/color. Respondent denies the allegations. Complainant has not sustained her burden of proof, and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On August 12, 2009, 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 session was held on September 14, 2011.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by A. Edel Groski, Esq.

At the hearing, Respondent moved to dismiss the complaint. Decision on the motion was reserved.

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 is an African-American woman. She has been employed by Respondent as a corrections officer for approximately 28 years, and has held the rank of sergeant since 2007. Complainant works at Respondent's Wende maximum security facility located in Erie County, New York. (ALJ's Exhibits 1, 2, and 3; Tr. 29-30, 77, 89-90)
2. Martin H. Kearney (“Kearney”) is now retired. At all time relevant to the complaint, he was employed as a captain of corrections officers at the Wende facility. (Tr. 159-62) I observed that Kearney is African-American.

3. While at Wende, Kearney had been a mentor to Complainant and other minority corrections officers, aiding them in taking promotional exams in order to increase racial diversity among the ranks of supervisors at Wende. (Tr. 175-76)

4. Thomas J. Sticht ("Sticht") has worked for Respondent as a corrections officer for approximately 29 years. He has been a deputy superintendent at the Wende facility since 2007. (Tr. 42-43, 76-78)

5. Robert A. Kirkpatrick ("Kirkpatrick") is now retired. At all times relevant to the complaint, he was the superintendent of the Wende facility. (Tr. 142, 144-45)

6. Paul Lippert ("Lippert") is a corrections officer at Wende and a member of Respondent's crisis intervention unit. (Tr. 86-88, 188-89)

7. Robert W. Schroder, Jr., ("Schroder") was employed as a lieutenant at the Wende facility from 2007 until 2011. (Tr. 117)

8. Steven Fallon ("Fallon") is a lieutenant at the Wende facility. (Tr. 178-79)

9. I observed that Sticht, Kirkpatrick, Lippert, Schroder and Fallon are Caucasian men.

10. Michael Washington ("Washington") is assistant director of Respondent's office of Diversity Management. (Tr. 207) I observed that he is African-American.

11. Respondent's office of Diversity Management, located in Albany, is responsible for investigating complaints including, but not limited to, those regarding sex and race discrimination. (Tr. 104, 213-14, 218-19)

12. Respondent maintains an anti-discrimination policy and an employee manual, both of which are distributed to its employees. (Respondent's Exhibit 4; Tr. 212-17)

The Family Day Event

13. On June 20, 2009, Complainant was assigned to supervise a “family day” event in the gymnasium of the Wende facility. Family day was an opportunity for inmates to meet and dine with their families. (Respondent's Exhibit 6; Tr. 32, 34, 83-85, 118-21, 127-28, 164) This was the first time that Complainant had supervised such an event. (Tr. 57, 70)

14. The visitor’s entrance to the Wende facility is referred to as “Locked Gates” (or, in the alternative, as the “truck trap”). When members of an inmate's family arrive at the Wende facility for a family day event, the officers at Locked Gates are normally responsible for notifying officers at the cellblock to release the inmate to the family day event. (Tr. 35-36) For the June 20, 2009, family day event, officers Williams and Lippert were assigned to Locked Gates. (Tr. 57-58, 189)

15. Kearney had erroneously advised officer Williams that Locked Gates would not be responsible for notifying officers at the cellblock to release inmates to the gymnasium for the family day event. This caused confusion and delays in releasing inmates. (Respondent's Exhibit 15 and 16; Tr. 126-27, 145-48, 162-64, 196-97)

16. Complainant noticed that inmates were not being released to the gymnasium. She called Williams and directed her to call back when Williams ascertained the problem. (Tr. 34) At the public hearing, Complainant testified that Williams did not disobey her order. However, Complainant admitted that she subsequently issued a counseling memo to Williams for failure to obey her order at the June 20, 2009 family day event. (Respondent's Exhibit 18 [p. 2]; Tr. 57-60, 173-74) I did not credit Complainant's testimony on this issue.

17. Kearney then spoke to Complainant, advised her of his error, and stated that Locked Gates would be responsible for notifying the cellblock officers to release inmates. (Tr. 34-35, 36-37, 57-59, 164)

18. Respondent maintains an investigatory body known as the office of the Inspector General. (Tr. 111) Previous to the June 20, 2009, family day event, the office of the Inspector General had received information that drugs would be smuggled into the Wende facility by visitors during the event. Personnel from the state police, the Inspector General's office, and certain corrections officers, including Lippert, were participating in identifying and detaining drug smugglers. (Tr. 88-89, 121-23, 189-90)

19. Complainant phoned Lippert at Locked Gates, and ordered him to report immediately to the gymnasium. Lippert refused. (Tr. 37, 59, 62) Complainant did not go to Locked Gates to ascertain why Lippert had refused. (Tr. 65-66, 192)

20. Complainant was unaware that at the moment she called Lippert, he was in the immediate presence of the visitors suspected of drug smuggling, who were about to be arrested. As a result, he was unable to explain why he was unable to report to the gymnasium. (Tr. 70, 191-92, 122, 200-02, 204)

21. After these visitors were taken into custody, Lippert reported to the gymnasium. (Tr. 192-93) He did not tell Complainant why he had been delayed. (Tr. 202-03)

22. Lippert and Complainant then argued, and Complainant stated to Lippert that "your golden boy days are over." Complainant made this statement because she believed that Lippert had been given preferential treatment by Respondent. (Tr. 63-65, 193-94, 203)

23. Both Complainant and Lippert complained to Schroder about each other's behavior. Complainant stated that she wished to formally counsel Lippert. Schroder directed them to each send him a memo regarding their concerns. (Tr. 37-38, 60-62, 123-27, 164-65)

24. Respondent's response to Complainant's request to counsel Lippert was delayed by various supervisors going on vacation during the weeks following the June 20, 2009 event. Complainant became impatient, believing that Respondent would not permit her to exercise her authority to counsel Lippert. (Tr. 129-30, 132-33, 136, 141-42, 169-70)

Respondent's Counseling and Disciplinary Procedure

25. Pursuant to Respondent's procedure for counseling corrections officers, a sergeant is required to obtain approval from his supervisor prior to counseling an officer. It is customary for the supervisor to receive and review a short memorandum (known at the Wende facility as a "to-from") from each involved person prior to making a decision. The supervisor may decide that counseling is not required, or approve either an informal verbal counseling, or a formal written counseling. In the alternative, the supervisor may decide that a Notice of Discipline ("NOD") is appropriate, and request the issuance of same from Respondent's office of Labor Relations in Albany. (Tr. 42, 95-98, 100-01, 125, 128-29, 166-67)

26. One purpose of this procedure is to ensure fair treatment of officers in the counseling and disciplinary process. (Tr. 170-171)

27. Pursuant to the collective bargaining agreement in effect for corrections officers at the Wende facility, counseling is not considered a form of discipline. (Respondent's Exhibit 3; Tr. 98-100, 167)

28. Respondent's counseling procedures do not set forth any specific time within which a counseling memo must be issued. (Tr. 100, 169)

Counseling Regarding the June 20, 2009 Family Day Event

29. On or about July 9, 2009, Sticht became aware of the problems at the June 20, 2009 family day event. His preliminary investigation indicated that Williams and Lippert had both failed to follow Complainant's orders on the day of the event, and he suggested an "intervention" meeting with Lippert and Complainant. (Respondent's Exhibit 8; Tr. 91-94)

30. By memo dated July 14, 2009, Sticht advised Kirkpatrick of his findings regarding the family day event and recommended that Lippert be issued a formal counseling. (Respondent's Exhibit 8; Tr. 92-98)

31. On July 14, 2009, Complainant met with Schroder, Kearney, and Lippert regarding the family day event. Kearney admitted that he had caused confusion at the event by giving incorrect orders. Complainant did not believe that the meeting was productive, and she left the meeting. (Respondent's Exhibit 11; Tr. 41-42, 44, 45, 67-70, 129-32, 134, 167-69)

32. Shortly after the July 14th meeting, Complainant received a counseling memo from Schroder for her failure to properly supervise the family day event, and for her comment to Lippert regarding "golden boy days." Complainant believed that this counseling was given to her in retribution because she had walked out of the July 14, 2009 meeting. However, Complainant did not file a grievance or otherwise contest the counseling memo. (Respondent's Exhibit 12; Tr. 43-45, 47-48, 132-35, 136, 148, 154-56, 158-59)

33. On July 26, 2009, Complainant met with Fallon, Lippert, and union representative officer McKeel. The meeting was not productive, and Fallon concluded that Complainant had displayed a "negative attitude" during the meeting. (Respondent's Exhibit 19; Tr. 180-82)

34. Kearney provided Complainant with a written guide regarding the counseling process. On or about July 27, 2009, prior to approval by Kirkpatrick, Complainant verbally counseled

Lippert and gave him a "draft" counseling memo, which was not Respondent's procedure.  
(Respondent's Exhibit 17; Tr. 101-03, 136-37, 171-72, 194-95)

35. On July 30, 2009, Kirkpatrick reported to work early to meet with Complainant, Kearney, and Fallon regarding the family day event and Complainant's wish to counsel officer Lippert. Kirkpatrick observed that Complainant displayed a poor attitude during the meeting, and she accepted no responsibility for the problems at the family day event. This meeting was also not productive, ending when Complainant placed a complaint letter on Kirkpatrick's desk and walked out. (Tr. 49-51, 148-50, 182-84) As Complainant left, Kirkpatrick stated that Complainant was acting "like a knucklehead," a statement which she heard. (Tr. 50, 66-67, 151-53, 184-85)

36. Complainant's complaint letter alleged unfair practices and retaliation against her by Respondent. On July 30, 2009, that letter was forwarded to the office of Diversity Management, and assigned to Washington for investigation. Washington then requested that Respondent not take any action regarding the proposed counseling of Lippert until Diversity Management had completed its investigation. (Respondent's Exhibit 20; Tr. 103-05, 113, 156-57, 224-26)

37. In March of 2010, the Office of Diversity Management concluded its investigation, finding that the facts did not support Complainant's allegations of discriminatory treatment and retaliation, and recommending that Respondent issue counseling memos to Kearney, Williams and Lippert for their conduct at the June 20, 2009 family day event. (Respondent's Exhibit 13; Tr. 105-06, 110-11, 157-58, 219-24)

38. Lippert received a counseling memo for his failure to obey Complainant's order at the family day event, and a Notice of Discipline for his behavior during the counseling process.

(Tr. 49, 101-02, 197)

39. Complainant did not receive any reduction in her salary, duties, authority, title or other terms and conditions of her employment either as a result of the June 20, 2009, incident or her complaint to Respondent's Office of Diversity Management. (Tr. 45-46, 108, 153)

Complainant Alleges Mistreatment by Fellow Employees

40. Complainant testified that both before and after the incident with Lippert, other sergeants at the Wende facility had not helped or mentored her, and that certain other sergeants had implied that a sergeant who she was friendly with was her "boyfriend." (Tr. 45-46, 48)

Comparator

41. In her verified complaint, Complainant alleged that in July 2009, corrections officer McLean-Mackie, an African-American female, was insubordinate to a Caucasian sergeant, and was disciplined within a few days. Complainant believed that this swift resolution, in contrast with the lengthy delay which occurred before Complainant was finally authorized to counsel Lippert, was evidence of disparate treatment by Respondent. However, Sticht credibly testified that the swift disciplinary action taken against officer McLean-Mackie was necessitated by her repeated and continuing defiance of a direct order. (ALJ's Exhibit 2, Respondent's Exhibit 10, Respondent's Exhibit 20; Tr. 107-08)

**OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer "because of an individual's...race...color...(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.” Human Rights Law § 296.1

(a).

To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (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).

Complainant is an African-American woman and so is a member of a protected class. She is qualified for her position as a sergeant of corrections officers. However, Complainant failed to demonstrate that she suffered an adverse employment action. The counseling memo issued to Complainant was not a disciplinary action, and Respondent took no action to alter any of the terms and conditions of her employment. Complainant did not suffer a loss of pay or benefits, a demotion of title or position, a diminution of workplace responsibilities, or termination of her employment. Rather, Complainant remained employed as a sergeant of corrections officers at all times relevant to this matter, up to and including the date of the public hearing.

Complainant failed to demonstrate animus toward her race or sex on the part of Respondent or its employees. The one isolated remark by Complainant's supervisor that she was a “knucklehead” is not sufficient evidence of bias. Complainant’s testimony regarding her alleged unfavorable treatment by her fellow sergeants was vague and not credible, and Complainant failed to establish that she had ever informed Respondent of her concerns regarding said treatment. Complainant did not offer proof of circumstances which would allow an

inference of discrimination. Respondent's delay in counseling officer Lippert did not raise such an inference, particularly in light of the fact that much of the delay was attributable to an investigation prompted by Complainant. Complainant has failed to establish a prima facie case for either race/color or sex discrimination.

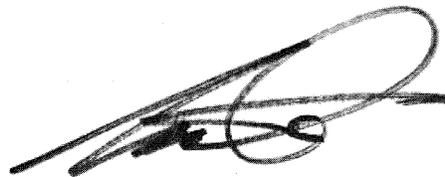
**ORDER**

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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: January 14, 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