ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **PAULA KRUPP,** Complainant, v. **HAHN ENGINEERING,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10131894

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 August 11, 2011, by Robert J. Tuosto, 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") WITH THE FOLLOWING AMENDMENT:

- The record demonstrates that though Complainant's employment was ultimately terminated after she made a derogatory comment to Hahn, her superior,

Complainant was initially fired because Hahn felt her work was below his professional standards and Complainant, on that last day, acted with disrespect and disdain. (Tr. 154-58, 648-60, 841-44, 880-83, 982-84). Complainant failed to show this was pretextual and thus, the complaint is properly dismissed.

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: 1/23/12
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

PAULA KRUPP,

Complainant,

v.

HAHN ENGINEERING,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10131894**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her due to her sex, exposed her to a hostile work environment, and engaged in retaliation. However, Complainant has failed to prove her case and the complaint is hereby dismissed.

PROCEEDINGS IN THE CASE

On February 27, 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 Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 30-31, 2011, and June 1, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by William D. Frumkin, Esq., of the law firm Sapir & Frumkin, White Plains, New York. Respondent was represented by Edward J. Phillips, Esq., of the law firm Keane & Beane, White Plains, New York

Permission was granted to file post-hearing briefs and both sides so filed.

FINDINGS OF FACT

1. Complainant alleged that Respondent unlawfully discriminated against her due to her sex, exposed her to a hostile work environment, and engaged in retaliation. (ALJ Exhs. 1, 2)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exhibit 4)

The Parties

3. Complainant, a female, graduated college in 1997 and subsequently held either staff or assistant engineer positions for several employers. (Tr. 38, 64-75, 298, 496)

4. Respondent is an environmental and civil engineering firm in business since 1980 and, at the relevant time, had approximately 10-12 employees. Respondent specializes in urban engineering and is the consulting engineering firm for three municipalities in Westchester County, New York. (Complainant's Exhs. 2, 15; Tr. 35-36, 98-99)

January, 2006--Respondent Hires Complainant

5. On January 16, 2006 Complainant began working as a full-time engineer with Respondent after answering an advertisement for an "Engineer & CAD[1] Designer". Complainant was the only female engineer among Respondent's employees and was its only non-licensed engineer. (ALJ Exhibit 1; Complainant's Exhs. 1, 2, 3, 4; Tr. 32-33, 36, 38, 78, 82, 89, 93, 104, 129, 280, 467, 540-42, 603, 642-44, 646, 992)

6. Complainant's hire was conditioned on a six month probationary period during which time, among other things, she was not permitted to take a vacation. Several of Respondent's male employees took vacations in their first six months of employment. (Tr. 42, 47-48, 92-93, 106-07, 584, 609, 949)

7. Complainant received a raise approximately 18 months after being hired, and a second raise approximately six months after that. (Tr. 34, 112, 469-70, 518, 694)

8. Complainant's duties included drainage design, project reviews, creating a subdivision plan, performing calculations and writing grants. Unlike Respondent's male engineers, Complainant was not allowed to work independently. However, Respondent's male engineers were both licensed engineers and more experienced; additionally, Complainant never independently managed engineering projects prior to joining Respondent. Complainant also did not have direct client contact but conceded that such a thing was only appropriate for management personnel. (Tr. 33, 38, 93-94, 126-27, 243, 274-78, 318-24, 543-45, 824-26)

9. Complainant was occasionally excluded from meetings with her superiors, not given survey training and not included in the distribution of engineering bulletins. (Tr. 40, 47, 130-35, 520-21)

10. As with several of Respondent's male employees, Complainant did not have a copy of Respondent's computer billing program ("the program") on her work computer. Respondent purchased only five software licenses for the program. A separate computer with a license was available for those employees who did not have the program on their work computers. (Tr. 113-15, 499, 847-51, 921)

11. Respondent's principal, James Hahn, held parties and events after work for the benefit of his employees. Complainant was not invited to several of these parties but did attend company events, holiday parties and one going away party. James Hahn's work communications with Complainant were rare and "curt." (Respondent's Exh. 1; Tr. 40-41, 44, 129-30, 148-49, 256-68, 306-07, 318, 505, 670-72, 989, 993)

Spring, 2007--Douglas Hahn Joins Respondent

12. In or about April or May, 2007 Douglas Hahn, the son of James Hahn, was hired by Respondent as an engineer. Douglas Hahn graduated from college in 2005, received a Master's degree in 2008, and worked as an engineer for another engineering firm for less than two years at the time of his hire. (Tr. 46-47, 441, 940-42, 976)

13. After Douglas Hahn was hired Complainant's work became "less varied." Douglas Hahn was allowed time off within the first three months of his employment, and was allowed to inspect construction sites. Douglas Hahn was also assigned to several projects on which Complainant had performed preliminary work. Complainant testified that Douglas Hahn was allowed to do these things "because he was Jim Hahn's son." (Tr. 47-48, 508-10, 520, 524-25, 952-53, 956)

---

[1] "CAD" is a computer program used by engineers and draftspersons which facilitates the creation of engineering designs in three dimensions. (Tr. 605-06)

14. Complainant did not have an office at Respondent. Douglas Hahn also did not have an office of his own, was not allowed to work independently and did not have direct client contact. (Tr. 368, 947-48)

January/February, 2009--Complainant Threatens to Make a Complaint Against Respondent

15. In or about late January or early February, 2009 Complainant became upset and threatened to quit her job after not being included in a multimillion dollar engineering proposal which the firm was to submit to Putnam County, New York ("the proposal"). At this time Complainant considered filing a Division complaint and expressed her feelings about this to a superior who, in turn, informed James Hahn. Ultimately, another engineer was also not included in the final version of the proposal. (Complainant's Exh. 8; Joint Exh. 1; Tr. 55-59, 137-42, 144-46, 151, 153, 164-68, 184, 242-50, 324-25, 555-60, 565, 570, 578, 580, 596-97, 608-09, 691, 830, 854)

16. I credit the testimony of two of Complainant's superiors that she was not chosen for the proposal because she lacked construction manager engineering experience on multimillion dollar construction projects. The male engineers chosen for the Putnam County proposal had experience in large scale construction management. (Tr. 140, 145-46, 151, 245-50, 357, 608-09, 677, 832-34, 854, 856, 942-44)

February 24, 2009--Complainant's Employment is Terminated

17. In the late afternoon of February 24, 2009, Complainant's employment was terminated by James Hahn when she could not adequately answer questions concerning work that was nearing a deadline for which she was responsible. This occurred after James Hahn met with Complainant about this assignment earlier in the day and was dissatisfied with the answers that she had provided. (Tr. 59, 151, 154-58, 646-51, 654-55, 660, 841-44, 877-83, 983-84)

18. James Hahn experienced second thoughts after informing Complainant that her employment was terminated, and he subsequently made a comment expressing equivocation about his decision. It is unclear from the record whether Complainant heard this comment. Complainant's employment was terminated for a second and final time after she told James Hahn that he was a "cheap fuck". (Tr. 157-58, 214, 651-52, 660-67, 700-02, 843-44, 879, 881-84, 888-89, 919-20, 923)

Post-Termination

19. Subsequent to the filing of Complainant's Division complaint, Respondent never issued her final paycheck. I credit James Hahn's testimony that Complainant did not receive her final paycheck because she failed to input her hours into the program. Complainant's failure to input her hours forced another engineer to spend approximately two weeks of his time doing so. (Complainant's Exh. 14; Tr. 233-34, 238-39, 678-81, 903, 905-08)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of an individual's...age [or]sex...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). The Human Rights Law also makes it an unlawful discriminatory practice for an employer to, "...discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law § 296.1 (e).

In discrimination cases a complainant has the burden of proof and must initially establish

a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.,* 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

Complainant alleged that Respondent unlawfully discriminated against her due to her sex, exposed her to a hostile work environment, and engaged in retaliation. Respondent defends on the grounds that legitimate, nondiscriminatory reasons were the only basis for the actions alleged by Complainant as illegal.

Sex Discrimination

In order to establish a prima facie case of employment discrimination based on sex, a complainant must show: 1) membership in a protected class; 2) that she was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Complainant made out the first two prongs of the test: she is both a member of a protected class and qualified for the position which she successfully held for three years. However, Complainant failed to make out the third prong of the test. This is because none of the acts complained of rise to the level of being adverse employment actions as a matter of law. *See Messinger v. Girl Scouts of the U.S.A.,* 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dep't., 2005) ("To

be 'materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation'"). The record shows that there was never any "materially adverse change in the terms and conditions" of Complainant's employment while she was employed by Respondent. *Galabya v. New York City Bd. of Educ.,* 202 F.3d 636, 640 (2d Cir. 2000). Therefore, this claim must be dismissed.

Hostile Work Environment

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), *quoting Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *See id* .at 21.

Here, Complainant attempted to prove that she was exposed to a hostile work

environment. However, the record shows that Complainant's work environment was never subjectively perceived by her to be hostile until approximately one month before her employment termination when she informed a coworker about possibly filing a Division complaint. Further, considering the totality of the circumstances, Complainant's work environment did not interfere with her job performance as she was steadily employed as an engineer for Respondent for more than three years during which she time she received two pay raises. Finally, Complainant's work environment did not constitute a physical threat to her, nor significantly impact her psychological well-being. Therefore, this claim must also be dismissed.

Retaliation

In order to make out a prima facie case of retaliation, a complainant must show: 1) she engaged in protected activity; 2) the respondent was aware that she engaged in protected activity; 3) an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action. *Pace,* 692 N.Y.S.2d at 223, 224.

Complainant's first retaliation claim concerns her telling a superior that she was considering filing a Division complaint in the wake of her being left off of the proposal which she alleges resulted in her employment termination several weeks later. Complainant makes out a prima facie case in this regard as she engaged in protected activity[2] of which Respondent was aware, and her employment was terminated approximately one month later. However, Respondent produced a legitimate, nondiscriminatory reason for its employment action: Complainant's employment was immediately terminated after addressing her superior with an expletive. Complainant did not establish that Respondent's proffered explanation for the

---

[2] Complainant's threat to file a Division complaint is treated here as fulfilling the first prong of the test. *See Thermidor v. Beth Israel Medical Center,* 683 F. Supp. 403 (S.D.N.Y. 1988)(central inquiry in retaliation claim

termination of her employment was a pretext for unlawful discrimination.

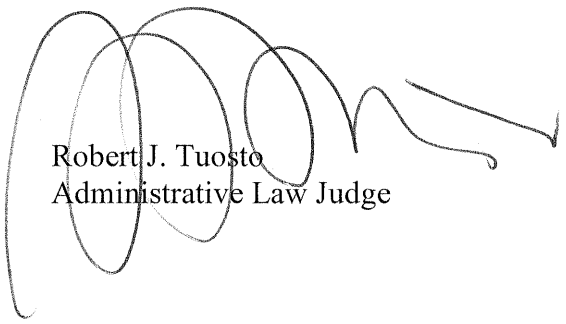
Complainant's second retaliation claim alleges that Respondent retaliated against her by withholding her final paycheck. Complainant once again makes out a prima facie case as she engaged in protected activity of which Respondent was aware upon filing her Division complaint, and her last paycheck was withheld from her soon thereafter. However, once again, Respondent produced a legitimate, nondiscriminatory reason: Complainant did not receive her last paycheck was because she failed to input her hours into Respondent's computer billing program. This was corroborated by the credible testimony of another engineer who was forced to spend approximately two weeks of his time doing so.

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: August 5, 2011
Bronx, New York



Robert J. Tuosto
Administrative Law Judge

---

concerned whether the filing of an E.E.O.C complaint, or the threat to do so, precipitated plaintiff's discharge).