



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

PATRICIA A. LONARDELLI,

Complainant,

v.

**NEW YORK STATE HIGHER EDUCATION
SERVICES CORP.,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10137039

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 April 16, 2012, by Christine Marbach Kellett, 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.

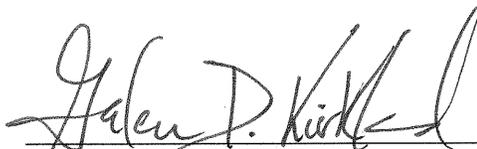
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: 6/5/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

PATRICIA A. LONARDELLI,

Complainant,

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**NEW YORK STATE HIGHER EDUCATION
SERVICES CORP.,**

Respondent.

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

Case No. 10137039

SUMMARY

Complainant charged Respondent with violating the Human Rights Law on the basis of age, race and sex, when it selected another employee for a permanent position. Complainant failed to meet her burdens of proof and the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On October 9, 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").

On August 24, 2010, the Division determined there was no probable cause to believe discrimination had occurred.

Subsequent to the initial determination, the Division reopened the case on its own motion, and returned the case to the regional office for further investigation.

After further investigation, on May 3, 2011, the Division determined it had jurisdiction over the complaint and that there was probable cause to believe discrimination had occurred and referred the case for public hearing.

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 14, 2011.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Donna Fesel, Esq.

At the conclusion of the public hearing the record was left open for the production by Respondents of the time and attendance records for nine (9) provisional employees. This information has been submitted, and is identified and received as ALJ Exh. 4.

Permission to file post-hearing briefs was granted. Timely post-hearing briefs were submitted by counsel for the Division and for the Respondent. These have been duly considered.

FINDINGS OF FACT

1. Respondent hired Complainant on May 31, 2008, as a Student Loan Control Representative 1 (SLCR 1). (Tr. 28-29)
2. The appointment was provisional and subject to competitive examination. (Tr. 30-31)
3. At least thirteen other persons were also appointed provisionally to the SLCR 1 position at or around the same time as Complainant. (Tr. 32-33) These individuals include white males and females, African-American males and females and Hispanic males and females.

(Complainant's Exh. 1) The ages of the provisionally appointed SLCR 1s ranged from 26 through 62. (Complainant's Exh. 1)

4. On January 10, 2009, Complainant took the Civil Service Examination for a permanent SLCR 1 position, and was subsequently notified she had passed the examination with a score of 70 and was placed on a list for permanent appointment. (Tr. 50-51; Complainant's Exh. 4)

5. The parties stipulated Complainant was qualified for the position. (Tr. 36-37)

6. The "reachable score" for permanent appointment was 90. Therefore, Complainant was not reachable for appointment from the list to a permanent competitive position. (Tr. 51)

7. After appointing those individuals either reachable on the SLCR 1 competitive list, or on a SLCR Spanish Speaking list, Respondent had nine of its provisional SLCR 1s remaining. These either could not be reached for the competitive positions, like Complainant, or had failed the examination. (Tr. 236; ALJ Exh. 3; Complainant's Exhibits 1,2,3,4)

8. Of the nine, five had failed the examination: Stanton (African American, female, age 40); Green (African American, female, age 38); Blackmon (African American, female, age 39); Roberts (White, female, age 30); Cuff (White, male, age 62) and four had passed the examination: Complainant (White, female, age 47); Chapple (African American, male, age 39); Holmes (African American, female, age 28) and Lesson (African American, female age 41) (ALJ Exh. 1; Complainant's Exhibits 1, 19)

9. Respondent did have eight available non-competitive SLCR 1 positions, to which it could appoint qualified individuals, including those not reachable on the Civil Service list or who had not passed the examination but had been determined qualified. (Tr. 236; ALJ Exh. 3; Complainant's Exh. 19)

10. Respondent's staff, consisting of Elsa Magee, then Vice-President and now Acting President; Linda Dillon, then the Director of Human Resource Management and now retired, and Joseph Catalano, then Assistant Vice-President, Collections and Default Management, discussed how to select the eight individuals for the available non-competitive SLCR 1 positions from the nine remaining provisional SLCR 1s. (Tr. 187-89, 236-238)

11. Magee rejected Catalano's proposal to use performance because only a portion of the provisional employees worked in a unit that measured performance automatically. (Tr. 187-190, 208-09)

12. Magee also rejected using the scores from the Civil Service test as many of the individuals who were viewed as high performers either had failed the examination or had scored low on the examination. She was also aware that some Civil Service tests such as the battery examinations, had been found discriminatory. (Tr. 200-01, 203-5)

13. Ultimately Magee, who would be the final decision maker, determined that the standard to be used was whether or not there had been any discipline or counseling memos in a provisional employee's personal file. (Tr. 189-190)

14. After diligent search, Complainant's file was the only provisional SLCR 1 file found to have a counseling memo. (Tr. 191-192, 238-40, 254) Complainant had received a formal counseling memo from her supervisor, Christine Marshall, and her manager, Michael Verreau, on July 2, 2009, for time and attendance issues, adherence to schedule and inaccurate timesheet records. (Complainant's Exhibits 6, 7)

15. On August 14, 2009, Respondent notified Complainant she was going to be terminated. (Tr. 50) On September 11, 2009, Respondent sent Complainant a formal termination letter. (Tr. 54-55; Complainant's Exh. 12)

16. The successful candidates for the eight non-competitive SLCR 1 positions included six females and two males; there were six African Americans and two whites among the successful eight candidates. (Complainant's Exhibits 1, 19)

17. Mary Ann Wilson, also known as Mary Ann Casey, was Respondent's Assistant Director of Human Resources, and she shared a house with Complainant. (Tr. 55-56, 100-101; 157-59)

18. When Complainant told Wilson she was being terminated, Wilson felt bad. (Tr. 165-166) Initially Complainant thought she had been fired because she had angered "people in power" by being successful and outspoken, and had done poorly on the examination. (Tr. 164-167)

19. Wilson had recused herself from all the discussions regarding selection of the candidates due to her relationship with Complainant. (Tr. 56-57; 103-04; 160-61) She had not participated in the discussions regarding criteria and due to her recusal no one approached her regarding the SLCR 1 selection or the search of personnel files that accompanied the selection process. (Tr. 174, 241-242).

20. However, Wilson knew she herself had inquired of Dillon in June 2008 what to do about two provisional employees who were exhibiting problems. One of these employees, identified as an African American female, had performance, time and attendance issues. The other, first identified as white but later self-identified as Asian or Pacific Islander female, had been sleeping during the training sessions. (Tr. 172-173; Complainant's Exh. 18) The response to Wilson's inquiry as to what to do about these two individuals who were still in training had included coaching and counseling them. (Complainant's Exh. 18)

21. Only the African American female remained in the Respondent's employee and was one of the individuals being appointed to a non-competitive position. (Tr. 129-132, 169-70; Complainant's Exhibits 18, 19)

22. The parties stipulated at the public hearing that Respondent's application of the Civil Service Rules regarding the selection of candidates was not discriminatory. (Tr. 59)

23. Complainant's union challenged the selection process on her behalf. (Tr. 98-99) The grievance was determined unfounded. (Tr. 112-13).

24. Complainant filed an internal claim of unfair and discriminatory treatment in connection with non-competitive SLCR 1 positions. On October 2, 2009 Respondent's Director of the Office of Affirmative Action Programs advised Complainant there were no findings to support her claim of discrimination. (Complainant's Exh. 13)

25. On October 9, 2009 Complainant filed with the Division alleging age, race and sex discrimination. (ALJ Exh. 1)

26. During the initial investigation, the Respondent had asserted Complainant was the only provisional SLCR 1 with a counseling memo. (Respondent's Exh. 1).

27. About a year later, on October 7, 2010, Complainant filed a request under the Freedom of Information Law (FOIL) for copies of the time and attendance records, as well as copies of any counseling memos for 26 provisional SLCR 1s. (Complainant's Exh. 8)

28. This time, more than 15 months after the selection process had been determined and after yet another diligent search, Respondent found that in fact one of the other SCLR 1s had had a counseling memo: Holmes, African American, female and at the time of her selection, age 28. (Tr. 72-73; ALJ Exh. 3;)

29. Holmes' counseling memo had been issued on June 9, 2008 by Ernest Lupe with a copy to Crystal Furbert. (Complainant's Exh. 10)

30. Upon locating the Holmes counseling memo, Respondent notified the Division; the Division reopened the case.

31. At the public hearing Dillon described the conditions inside the Human Resources Management offices as chaotic in 2008-2009. Staff changes were occurring; the office was short-handed; and "things piled up," with filing a constant struggle. (Tr. 229, 233-234, 274) She had had the SLCR 1 files reviewed at least three times by staff members but only Complainant's file had contained a counseling memo at the time of the searches in 2009. (Tr. 229, 233-234, 274)

32. Complainant did not refute that at the time the decision maker McGee made her decision, only one provisional SCRL 1 had been identified as having a counseling memo: the Complainant. (Tr. 193-194; 196-97; 222, 244)

33. Complainant argued that Magee should have known about Holmes's counseling memo as she had been copied in on a series of emails regarding both Holmes and another trainee. Magee remembered she had been advised of a problem with two trainees in 2008; she did not recall being advised of the subsequent counseling memo and she had no memory of Holmes being given a counseling memo. (Tr. 185-186)

34. Magee is not specifically copied in on either the Holmes or the Complainant's counseling memos. (Complainant's Exhibits 6,10)

35. Although Complainant argued that everyone had poor time and attendance and she was just doing what everyone was doing (Tr. 38, 41-44, 45-47), the time cards contradict this, including with regard to comparator Holmes. (Complainant's Exhibits 6, 11) For the time period for which Complainant was counseled, April 16-June 24, 2009, Complainant's time and

attendance was worse than Holmes'. For the pay period April 16 - April 29, 2009, Complainant charged time on seven days; Holmes charged time on two days. For the pay period April 30 - May 13, 2009, Complainant charged time on six days; Holmes charged on three days. For the pay period May 14 - May 27, 2009, Complainant charged time on seven days; Holmes charged on six days. For the pay period May 28 - June 10, 2009 Complainant charged time on five days; Holmes charged time on four days; for the time period June 11 -June 24, 2009, Complainant charged time on six days; Holmes charged time on three days. (Complainant's Exhibits 6, 11). Over the same period of time, Complainant charged time on 31 different days while Holmes charged time on 18 different days. (Complainant's Exhibits 6, 11)

36. Complainant also argued that Magee, who is an African American, was biased toward African Americans and had an agenda of employing or increasing Respondent's employment of African Americans. (Tr. 140-144, 147-148,)

37. Magee is committed to diversity. She did not make hiring decisions or termination decisions regarding these provisional SLCR 1s on the basis of race. (Tr. 217-219)

38. Complainant herself failed to appreciate the importance of time and attendance: she indicated in her verified complaint that her time and attendance had always been satisfactory when the reality is that she had been coached and counseled regarding her time and attendance. (ALJ Exh. 1; Complainant's Exhibits 5, 6)

OPINION AND DECISION

Complainant charged the Respondent with violating Human Rights Law section 296.1 (discrimination on the basis of age, race and sex) when she was not appointed permanently to the position of SLCR 1. Respondent admitted it had misplaced a counseling memo given to another provisional SLCR 1. Ultimately Complainant failed her burdens of proof as she was unable to

establish the error Respondent acknowledged making was a pretext for illegal discrimination. The complaint should be dismissed.

To make out a prima facie case of unlawful discrimination under the N.Y. Exec. Law, art. 15 (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).

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. *Id.*, at 305. The ultimate burden of proof always remains with the complainant. *Ferrante*, at 630. .

Discrimination based on age

Complainant fails to make a prima facie case of discrimination based upon her age. Complainant was in a protected category in that she has a chronological age, she was qualified for the position for which she applied, and she suffered an adverse employment action when she was not appointed to the position.

However, under the circumstances as described by Complainant, an inference of discrimination based upon age does not arise. Although the comparator, to whom Complainant references, Holmes, was indeed younger than Complainant, there were in fact eight successful candidates with chronological age ranging from Holmes's age of 28 to Cuff's age of 62. With the successful candidates' ages ranging from 28-62, Complainant's age of 47 at the time falls

somewhere in the middle. No inference of age discrimination arises from this range of ages. The complaint based on age discrimination should be dismissed.

Discrimination based on Race

Complainant established a prima facie case of discrimination based upon race. She has a race (is white), she was qualified for the position, she suffered the adverse employment action of not being appointed to the position, and the circumstances under which she was not appointed give rise to an inference of discrimination. Although there is another white female (Roberts) in the group of 9 and Roberts is appointed to the non-competitive position, Holmes, an African American candidate also had a counseling memo. As to the two candidates with counseling memos, one is African American and one is white, and only the white candidate's counseling memo was brought to the attention of the decision maker.

In explaining its actions, Respondent acknowledged a filing error occurred and a mistake made. It failed to locate the earlier counseling memo given to Holmes during the decision making time frame. The Respondent denied that the mistake was intentional or deliberate: and characterized it as plain error.

The ultimate questions here are classic ones: what did the decision maker know at the time of the decision and why did the decision maker not know what she should have known. This complainant never established any nexus between her own race (white) and the misplacement of the Holmes counseling memo. Complainant never established any nexus between Holmes' race (African American) and the misfiling of the Holmes counseling memo. Simply put, Respondent's decision maker Magee did not know of the Holmes counseling memo at the time of the decision to terminate Complainant. At the time of that decision the only counseling memo the decision maker knew of belonged to Complainant.

Complainant's friend, Wilson, had removed herself from any discussions regarding the SCLR 1 position. That she may have known, or suspected, the existence of another counseling memo becomes immaterial: as she had been totally separated from, and ignorant of, any decision making discussion regarding the SCLR 1 selection process. Her suspected information does not change what the decision maker Magee actually knew at the time of Magee's decision.

The successful candidates included both African Americans and whites. It is only the presence of the counseling memo that determined which of the nine candidates would not be selected. The counseling memo in and of itself is race neutral. Complainant fails to establish that the Respondent's explanation for its action: that an error had occurred in the Human Resources Management offices was a pretext for illegal discrimination. As she fails to meet her burden of proof, the complaint alleging race discrimination should be dismissed.

Discrimination based on Sex (Gender)

Complainant fails to make a prima facie case of discrimination based upon her sex. Complainant has a sex (female gender), she was qualified for the position for which she applied, and she suffered an adverse employment action when she was not appointed to the position. However, under the circumstances as described by Complainant, an inference of discrimination based upon her sex (gender) does not arise. Complainant was one of nine candidates, and each of those candidates was either male or female. With the successful candidates in both genders, Complainant's own description of events fails to give rise to an inference of discrimination based upon gender. The comparator to whom Complainant draws the most attention, Holmes, is the same gender as Complainant. The complaint based on sex (gender) discrimination should be dismissed.

As Complainant fails to meet her burdens of proof under each of the three theories

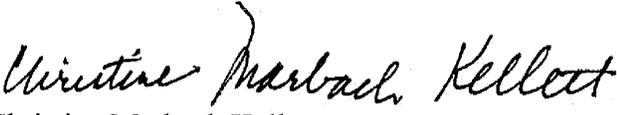
proffered, the complaint should be dismissed.

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 the same hereby is, dismissed.

DATED: April 16, 2012
Bronx, New York


Christine Marbach Kellett
Administrative Law Judge