Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of CHRISTINE M. BARKSDALE, Complainant, v. CITY OF ITHACA, POLICE DEPARTMENT, JOHN JOLY, Respondents.	DETERMINATION AND ORDER AFTER INVESTIGATION Case No. 10202017

Federal Charge No. 16GB903807

On 6/14/2019, Christine M. Barksdale filed a verified complaint with the New York State Division of Human Rights ("Division") charging the above-named respondent with an unlawful discriminatory practice relating to employment because of sex, race/color in violation of N.Y. Exec. Law, art. 15 (Human Rights Law).

After investigation, and following opportunity for review of related information and evidence by the named parties, the Division has determined that there is NO PROBABLE CAUSE to believe that the respondents have engaged in or are engaging in the unlawful discriminatory practice complained of. This determination is based on the following:

Complainant, Christine M. Barksdale, began working for the City of Ithaca, Police Department as a Police Officer in October of 1997. Complainant transferred to the Juvenile Investigation Unit in 2006. Lt. John Joly became the Lt. of Investigations in late March of 2019.

Complainant alleges that Lt. John Joly targeted her because she is black and female. She alleges that she was subjected to a hostile work environment, that Lt. Joly disciplined her, and that Lt. Joly demoted her from investigations to patrol because she is black and female.

Complainant alleges that she was subjected to a hostile work environment. Complainant asserts Lt. John Joly was targeting her. As evidence, Complainant cites: (1) Lt. Joly going to her store on May 26, 2019 and asking Complainant to return to the station for a work-related matter, (2) the tone of his emails, (3)the fact that Lt. Joly including DC Nayor on an email, and (4) an email

Lt. Joly sent to the investigation unit that stated investigators were "tasked with follow-ups on many of the cases that Investigator Barksdale failed to complete" as evidence that Lt. Joly was targeting her.

The investigation found no evidence to indicate that the Complainant was subject to unlawful discrimination on the basis of sex or race.

Under the Human Rights Law, harassment consists of words, signs, jokes, pranks, intimidation or physical violence that is directed at an employee because of her membership in a protected class. It also includes workplace behavior that is offensive and based on stereotypes about a particular protected group, or which is intended to cause discomfort or humiliation on the basis of protected class membership. Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment. A hostile work environment exists when 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.

The emails Lt. Joly sent to Complainant do not contain any offensive remarks based on stereotypes about a particular protected group. The emails are directives to Complainant regarding work related matters. Including a supervisor on an email is not harassment. Normal workplace supervision is not harassment, even if it is negative or upsetting to the employee. If a supervisor treats an employee differently because of a protected characteristic with regard to job duties, evaluations, or discipline, then this may be discriminatory. Being yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments do not rise to the level of adverse employment actions. Criticism of an employee in the course of evaluating and correcting her work is not, in itself, a materially adverse employment action.

With respect to Lt. Joly showing up to Complainant store, the investigation revealed that Lt. Joly was not aware that Complainant had rearranged her schedule, therefore, he thought she was on duty and wanted to find her so he could issue her a counseling memo. There does not seem to be evidence supporting Complainant's allegation that Lt. Joly went to her store to harass her.

The investigation revealed that the June 06, 2019 email, in which Lt. Joly stated investigators were tasked with follow-ups on many of the cases that Investigator Barksdale failed to complete, is a true statement. Investigators were assigned cases that Complainant did not complete. It does not seem, therefore, that this statement can be considered harassment or the connection between this statement and Complainant's race and sex.

Complainant did not allege Lt. Joly made any offensive remarks or engaged in any offensive conduct based on stereotypes about a particular protected group. Given this information there does not seem to be evidence to support her claim that she was subjected to a hostile work environment.

Disparate treatment occurs when the employer simply treats some people less favorably than others because of their membership in a protected class. The United States Supreme Court established a tripartite scheme for proving the existence of disparate treatment discrimination. Under this scheme, a complainant must first establish a prima facie case of disparate treatment. The respondent must then articulate some legitimate, non-discriminatory reasons for the

disparate treatment. Finally, a complainant must demonstrate that the legitimate, non-discriminatory reasons advanced by respondent are merely a pretext for unlawful discrimination.

The ultimate burden of proving discrimination always remains with the complainant. The essential element of proof of disparate treatment is some nexus between the complainant's membership in a protected class and her disparate treatment by the respondent. An adverse employment action requires a materially adverse change in the terms and conditions of employment. 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, or significantly diminished material responsibilities. Excessive work, denials of requests for leave with pay and a supervisor's general negative treatment of the employee are not materially adverse changes in the terms, conditions or privileges of employment

While Complainant asserted that she was treated differently because she requested a transfer to Criminal Investigations Unit (CIU) and was never transferred, the failure to transfer Complainant to CIU is not an adverse employment action. As Complainant acknowledged, the investigation units are the same and perform the same tasks; but that investigators, in general, do not like/prefer sex crime cases. That an employee doesn't get a preferred assignment, is not an adverse action under the law.

However, even if the failure to transfer Complainant to CIU can be seen as an adverse employment action, the investigation revealed, and Complainant admitted, that at no time was there an opening in CIU. Complainant stated that before Lt. Joly became Lieutenant of Investigations, the reason she was not transferred to CIU was because there were no openings, not because of her race or sex. Although Complainant told Lt. Joly that she wanted to transfer to CIU, at no time was there an opening in CIU after Lt. Joly became Lt. of Investigations.

While Complainant asserts that Lt. Joly's decision, at one point, not to transfer other investigators from CIU to SIU was because he did not want to create an opening in CIU for Complainant, there is no evidence to support this allegation. Moreover, Complainant stated that she learned there would be no openings in CIU at the same meeting she told Lt. Joly that she did not want to work sex crime cases. At that meeting, Lt. Joly told her he would not assign her new sex crime cases unless it was absolutely necessary, and Complainant could not recall being assigned new sex crime cases. It appears that Lt. Joly was amenable to Complainant's request not to work sex crime cases. Therefore, Complainant provided no evidence that the decision not to assign her to CIU was because of her race or sex.

While Complainant alleges that she was disciplined because she is black and female when she received a counseling memo on May 26, 2019, a counseling memo is not generally categorized as a form of discipline. In fact, the Complainant acknowledged during the investigation that counseling memos are usually not a form of discipline. Complainant argued that her counseling memo was a form of discipline because it said she was guilty of insubordination and because she was reassigned to patrol shortly after receiving the counseling memo.

It is well settled under the law that written counseling of an employee is not an adverse action. Here, the counseling memo given to Complainant specifically states that it is not intended to discipline or punish, but to call attention to a breach of policy. The counseling memo does not state that Complainant is guilty of insubordination. The counseling memo calls attention to an IPD Work Rule that employees are to comply with directives and failure to comply with a directive is considered insubordination. The counseling memo explains the appropriate conduct of investigators and that the failure to follow orders is considered insubordination.

Furthermore, a review of the record revealed that other officers have received counseling memos that similarly reference insubordination. A white male officer received a counseling memo because he failed to follow an order issued to the entire department. The counseling memo cited 1.3 of the Rule and Regulations, which states "Employees shall comply with all lawful orders. Non-compliance shall be considered insubordination."

Complainant alleges that Lt. Joly went to her store on May 26, 2019 to "get her" and that the union president was told Complainant should expect criminal charges. The investigation did not reveal that any criminal charges were brought against Complainant. It was at this meeting that Complainant was told that she was being reassigned.

The investigation revealed that the decision to reassign Complainant, shortly after receiving her counseling memo, was in part because of her reaction to the counseling memo, indicating that the counseling memo itself was not a form of discipline. While her subsequent reassignment may be considered an adverse employment action, receiving a counseling memo is not an adverse employment action.

Further, from the investigation, it appears that a transfer from investigations to patrol is not a demotion because Complainant's title and pay did not change. However, even if the transfer is a demotion, Respondent seems to have provided a legitimate, non-discriminatory reason for transferring Complainant to patrol.
It appears that Complainant had an excessive number of open cases and that she was not following Lt. Joly's directive to close out files and update files every two-weeks. When Lt. Joly issued the counseling memo to motivate Complainant to follow his directive, Complainant did not acknowledge that there was an issue. During the investigation, Complainant admitted that she thought Lt. Joly's directive was arbitrary, and that she did not agree with the system Lt. Joly set up. While she had stated that she would send him an update if she was going to close a case, it seems she never followed through with the updates. While, Complainant stated she was not aware of the policy that she needed to send him updates, it is evident from the documentation that Lt. Joly's request was clear that she update files every-two weeks and that close out old files. The fact that an employee disagrees with her supervisor's directive is not justification for disregarding the directive.

While, Complainant asserted that Investigator McKenna and Investigator Allard were not being similarly transfer out of investigations to patrol for not updating their cases every two weeks, the investigation revealed that Investigators McKenna and Allard had significantly fewer open cases than Complainant. Investigator Allard had 4 open cases and Investigator McKenna had 37 open

cases, of which 22 he could not access to close. In addition, it does seem that Lt. Joly received updates from Investigator McKenna and Investigator Allard.

Moreover, the investigation revealed that Complainant was apparently reassigned to patrol, in addition to the number of open cases she had, because of the lack of investigation into her cases, and her unwillingness to comply with Lt. Joly's new policy. While Complainant asserts that sex cases are different and cannot be closed as easily as other cases, Investigator Allard, who started working in JIU with Complainant in the spring of 2018 only had four open cases; Complainant had 117 open cases by her own count. It seems that even after being told to prioritize closing and updating cases, Complainant was still only able to close a smaller amount of cases as compared to her colleagues. While Complainant took time off during the two months, that was by her own choice

The investigation revealed that Complainant believes Lt. Joly to be racist and sexist, which is why, in general, she believes she was reassigned. It seems that Complainant came to this conclusion because of a 2012 transcript involving another officer and a 2017 incident involving Complainant and a state trooper.

In 2012, Lt. Joly acted a witness in a complaint where another officer, who is White, felt he was denied certain promotions because of his race. In the transcript of the proceedings, Lt. Joly stated that he thought minorities received more favorable treatment in the department. It also became known that Lt. Joly may read/be involved in websites where other individuals were known to make racist comments. The investigation, however, was unable to reveal a nexus between Lt. Joly's participating in the 2012 proceedings and the Complainant's reassigned.

Regarding the 2017 trooper incident, the investigation revealed that Lt. Joly received a phone call from a trooper who complained about Complainant's behavior during a traffic stop. The trooper felt that Complainant, who identified herself as a police officer, had been rude. During the investigation Complainant acknowledged that she made have made some sarcastic remarks to the trooper. It is clear, however, that Lt. Joly did not reach out to the trooper, rather that the trooper reached out to him. It appears that Lt. Joly only wanted to make the proper parties aware of the situation and did so. Ultimately no action was taken against the Complainant.

Moreover, it seems that another decision maker, not Lt. Joly, was the person who approved Complainant's reassignment to patrol. Complainant acknowledged that there was no reason to think that D.C. Nayor discriminated against her because of her sex or race.

Finally, Complainant alleged that she had previously complained to the Director of Human Resources, Shelley Michelle-Nunn, after the 2017 trooper incident; and again, when she was reassigned to patrol. Complainant alleged that she informed Ms. Michelle-Nunn that Lt. Joly was sexist and racist in 2017 and that in 2019 she felt discriminate against by being reassigned. However, the investigation revealed that, while it seems Complainant went to Ms. Michelle-Nunn, she seemed to have complained about interpersonal conflicts with Lt. Joly. There are no records, including Ms. Michelle-Nunn's recollection or her notes, that demonstrate Complainant reported discrimination based on sex or race.

While Complainant's burden at this stage is considered de minimis, she must produce some evidence, beyond conclusory assertions, showing circumstances sufficient to support an inference of discriminatory intent. Other than making conclusory allegations, Complainant failed to produce any evidence to support this claim. Complainant's own subjective belief, absent further proof, is insufficient to support a finding of discrimination. Respondents articulated legitimate non-discriminatory reasons for their actions and said reasons have not been shown to be a subterfuge for unlawful discriminatory practices under the New York State Human Rights Law.

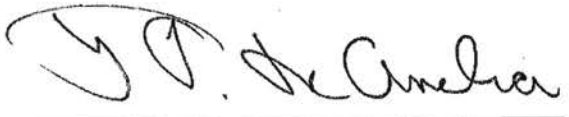
The complaint is therefore ordered dismissed and the file is closed.

PLEASE TAKE NOTICE that any party to this proceeding may appeal this Determination to the New York State Supreme Court in the County wherein the alleged unlawful discriminatory practice took place by filing directly with such court a Notice of Petition and Petition within sixty (60) days after service of this Determination. A copy of this Notice and Petition must also be served on all parties including General Counsel, State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. DO NOT FILE THE ORIGINAL NOTICE AND PETITION WITH THE STATE DIVISION OF HUMAN RIGHTS.

Your charge was also filed under Title VII of the Civil Rights Act of 1964. Enforcement of the aforementioned law(s) is the responsibility of the U.S. Equal Employment Opportunity Commission (EEOC). You have the right to request a review by EEOC of this action. To secure review, you must request it in writing, within 15 days of your receipt of this letter, by writing to EEOC, New York District Office, 33 Whitehall Street, 5th Floor, New York, New York 10004-2112. Otherwise, EEOC will generally adopt our action in your case.

Dated: December 10, 2019
Binghamton, New York

STATE DIVISION OF HUMAN RIGHTS

By: 

Victor P. DeAmelia
Regional Director