



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PATRICIA GUNNING,

Complainant,

-against-

NEW YORK STATE JUSTICE CENTER FOR
THE PROTECTION OF PEOPLE WITH
SPECIAL NEEDS, NEW YORK STATE,

Respondents.

**CHARGE OF
DISCRIMINATION**

Patricia Gunning, by her attorneys Emery Celli Brinckerhoff & Abady LLP, lodges this Charge of Discrimination against the New York State Justice Center for the Protection of People with Special Needs (“Justice Center”) and New York State for (i) discrimination on the basis of sex by her supervisor, and (ii) retaliation—which culminated in termination—for complaining about that sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*¹ The Justice Center and New York State each employ more than 15 people and are therefore covered by Title VII.

1. **Complainant:** Patricia Gunning

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New York, New York 10020

Telephone: (212) 763-5000 (for Mr. Emery, Mr. Maazel & Ms. Greenberger,
at the law firm)

¹ Complainant may have other claims that have not been asserted here—against the Respondents or other individuals—that she need not exhaust in this forum and over which the EEOC has no jurisdiction, including state causes of action. *See, e.g.*, N.Y. Exec. Law § 296.



2. **Respondents:** Justice Center
 161 Delaware Avenue
 Delmar, New York 12054-1310

 Telephone: (518) 549-0200

 State of New York
 c/o Office of the Attorney General
 The Capitol
 Albany, NY 12224-0341

 Telephone: (518) 776-2000

3. **Description of violations:** Ms. Gunning seeks redress for Respondents’ unlawful and discriminatory treatment due to her gender and Respondents’ retaliation when she complained about discriminatory treatment due to gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Ms. Gunning served as the Special Prosecutor/Inspector General at the Justice Center from 2013 to August 1, 2017. She suffered from a hostile work environment due to the actions of James (“Jay”) Kiyonaga, who served, at various times, as the Acting Executive Director (heading the agency) or the Executive Deputy Director (the second in command). Mr. Kiyonaga fostered a sexualized frat boy culture. During her years at the Justice Center, Ms. Gunning was repeatedly subjected to Mr. Kiyonaga’s sexualized discussions of Justice Center employees and the vulnerable populations it served. Part and parcel of that boys’ club mentality was Mr. Kiyonaga’s sexual favoritism, *i.e.*, his favoring of women he was attracted to and romantically involved with. When she complained about and opposed this unlawful sexual discrimination, he retaliated against her, including by refusing to give her a raise, screaming and cursing at her, and changing her job duties and responsibilities. As part of his retaliatory campaign, Mr. Kiyonaga made false negative statements about Ms. Gunning to the Justice Center’s new Executive Director, which was a cause of her termination. On August 1, 2017, Ms. Gunning was terminated. After being told she needed to resign immediately or face termination, she “resigned,” under duress.

4. **Dates of Violations:** Ms. Gunning faced discrimination on the basis of her gender throughout the time she was employed by the Justice Center, from 2013 to August 1, 2017. She was retaliated against from July 2015 (when she complained about his sexual favoritism) to August 1, 2017.

FACTS²

When James “Jay” Kiyonaga ran the Justice Center, the rules were clear: women were sexual objects. If you were a willing recipient of his sexual advances, he favored and even promoted you. If you were not, your career languished. And if you objected to his preferential treatment, he retaliated. That is what happened to Patricia Gunning.

Mr. Kiyonaga has had a long history of sexism and retaliation at New York State agencies: a retaliation lawsuit at the Division of the Budget, complaints from multiple women about sexual comments at the Division of Criminal Justice Services, formal “counseling” about his “behavior.” Notwithstanding this sordid history, Governor Cuomo appointed Kiyonaga to be Executive Deputy Director of the Justice Center. There, Kiyonaga constantly discussed sex at the office, told Ms. Gunning that a member of her staff was “fucking hot,” apparently had sex with and repeatedly promoted a low-level employee known as “tits,” and distorted Justice Center policy to accommodate his romantic liaison. In 2017, Governor Cuomo then appointed Kiyonaga *again*, this time to the number two position at the Office for People With Developmental Disabilities, one of the largest agencies in New York State. Mr. Kiyonaga remains in this position at OPWDD even today.

In light of the complete failure of the Governor’s office and the State to deal with this serial sexual harasser and discriminator, and because of the discrimination and retaliation she has endured, Ms. Gunning brings this complaint to the EEOC.

Patricia Gunning’s Storied Career

Ms. Gunning was appointed by Governor Cuomo as the Special Prosecutor/Inspector General at the NYS Justice Center for the Protection of People with Special Needs (“Justice

² This statement is not exhaustive of all of the details of all the discrimination suffered by Ms. Gunning.

Center”). Prior to her appointment, she had a long career as a prosecutor, first at the Kings County DA’s office, and then as the Chief of the Special Victims Unit in the Rockland County DA’s office.

In June 2013, Ms. Gunning joined the Justice Center as one of its top officials. As the Justice Center’s Special Prosecutor, she supervised the prosecution of a number of cases statewide, maintaining a conviction rate of over 80%. She also worked with law enforcement and prosecutors statewide to enhance their investigations and prosecutions. As Inspector General, she oversaw a large team reviewing non-criminal abuse and neglect cases and oversaw three units designed to ensure the quality of care in facilities under the Justice Center’s jurisdiction. Her supervisor was Jay Kiyonaga, then the Executive Deputy Director of the Justice Center.

Mr. Kiyonaga’s History of Workplace Misconduct in New York State Agencies

Though Ms. Gunning did not know Mr. Kiyonaga prior to 2013, she has since learned that he repeatedly mistreated female employees during his extensive history in state employment, leaving a trail of employee complaints in his wake.

From 2002 to 2008, Mr. Kiyonaga was the principal Budget Examiner at the Division of the Budget. One of his employees, Lynn Rowe, sued, alleging that that Mr. Kiyonaga discriminated against her, made offensive remarks, and excluded her from necessary meetings. When she complained, he retaliated: according to her lawsuit, he falsely claimed that she caused a data loss when he knew the data was not lost. Mr. Kiyonaga was nonetheless promoted.

From 2011 to 2012, Mr. Kiyonaga was Deputy Commissioner of the Division of Criminal Justice Services (“DCJS”). According to press reports, Mr. Kiyonaga was the ringleader of sexualized conversations in his corner office among male employees about

“genitalia grooming” and “strip-club outings.”³ Women complained. A state investigation concluded that “Mr. Kiyonaga’s behavior needed to be addressed” and he needed to be “counsel[ed].” DCJS purportedly placed a record in his personnel file.

But nothing substantive was done. Instead, DCJS sidelined the investigation by ordering the affirmative action officer charged with investigating Mr. Kiyonaga to stop investigating, according to press reports. In 2013, despite this sordid history, Governor Cuomo appointed Mr. Kiyonaga to become the Executive Deputy Director at the Justice Center.

Mr. Kiyonaga Fosters a Sexualized, Frat-Boy Atmosphere and Privileges Women He Finds Attractive

At the Justice Center, Mr. Kiyonaga fostered a sexualized, male-dominated workplace culture. He frequently discussed women’s bodies and sex in the office. Nearly every day that Ms. Gunning saw Mr. Kiyonaga, he injected some inappropriate sexualized statement about Justice Center employees or the vulnerable population it serves. This course of conduct continued until Ms. Gunning’s termination on August 1, 2017.

By way of example, Mr. Kiyonaga repeatedly told Ms. Gunning that she hired “hot” employees. He repeatedly rated the attractiveness of Ms. Gunning’s staff and commented on hires he did not find attractive. When he learned that one of Ms. Gunning’s direct reports is bisexual, he told Ms. Gunning that it is “fucking hot” that the employee was “bi.” On another occasion he discussed whether he would “get laid” by his wife after she went to see “Fifty Shades of Grey” without him.

When Ms. Gunning prosecuted offenders who sexually assaulted children or the disabled, Mr. Kiyonaga obsessed about the offender’s sexual proclivities. He asked Ms. Gunning, again

³ Brendan Lyons, *Pattern of protection in state’s handling of harassment complaints*, Times Union (May 13, 2018), <https://www.timesunion.com/news/article/Pattern-of-protection-in-state-s-handling-of-12910609.php>.

and again, what makes an offender “get off” on someone who is a minor or disabled. Ms. Gunning would have to change the subject. Mr. Kiyonaga repeatedly asked groups of those women employees whom he found attractive out for drinks.

Mr. Kiyonaga also apparently began a romantic relationship with an employee, Dee Levy. Consistent with the frat boy atmosphere that he fostered, Mr. Kiyonaga did not try to be discreet. Nor did he stop his male employees from openly referring to Ms. Levy as “tits.” Mr. Kiyonaga and Ms. Levy stayed in his office together, for hours, with the door closed, with no other employees present. Mr. Kiyonaga told Ms. Gunning that nothing would happen to him, and that he had had similar relationships at previous state agencies where he worked—including dating, then marrying, his subordinate—with no repercussions.

Mr. Kiyonaga then changed Justice Center policy and procedure to benefit Ms. Levy at the expense of other employees, including Ms. Gunning. He repeatedly promoted Ms. Levy—a social worker with little on-the-ground experience when she joined the Justice Center—to a high-level union position (Level 27) with a commensurate pay raise, which is generally reserved for those with over 20 years of state service or a doctorate degree. Though that Level 27 position was allocated to Ms. Gunning’s unit, Mr. Kiyonaga refused to let her fill it and instead gave that valuable position to Ms. Levy.

In July 2015, Mr. Kiyonaga also sought an unprecedented change to the agency’s reporting structure to benefit Ms. Levy and expand her role. Without Ms. Gunning’s knowledge or input, Mr. Kiyonaga sought to change agency policy to require Ms. Gunning to update Ms. Levy about Ms. Gunning’s staff’s ongoing prosecutions.

Mr. Kiyonaga's favoritism of Ms. Levy became so notorious that Justice Center employees would request to add Ms. Levy to their team simply to obtain resources from Mr. Kiyonaga for their project.

Mr. Kiyonaga also forced himself on another Justice Center employee—he tried to kiss her at a bar without her consent. When that employee resisted, Mr. Kiyonaga retaliated, *inter alia*, excluding that employee from high-profile projects. Mr. Kiyonaga's conduct was clear to Ms. Gunning and other Justice Center employees: women were treated well only if they agreed to Mr. Kiyonaga's romantic advances; women's chief value lay in whether they were attractive to him.

Mr. Kiyonaga Retaliates against Ms. Gunning

Ms. Gunning opposed Mr. Kiyonaga's unlawful sexual discrimination and complained about his attempt to inject his sex life into the Justice Center's policies. Specifically, after Mr. Kiyonaga sought to require Ms. Gunning to provide updates to Ms. Levy in July 2015, Ms. Gunning complained. In a July 2015 in-person meeting with Mr. Kiyonaga, at which Ms. Levy was also present, Ms. Gunning told Mr. Kiyonaga that the personal relationship between him and Ms. Levy is not a basis to make policy. She said his "personal life" should not be injected into the workplace. She also complained to the then-Executive Director (Jeff Wise), citing legal precedent that such a reporting structure would undermine criminal prosecutions.

Before her complaint, Ms. Gunning and Mr. Kiyonaga had a decent working relationship. After her complaint, that all changed. Mr. Kiyonaga's retaliation constituted a continuous course of conduct until Ms. Gunning's August 1, 2017 termination.

After Ms. Gunning complained, Mr. Kiyonaga stopped Ms. Gunning from obtaining a raise. When Mr. Wise ran the Justice Center, he had agreed to seek a 10% raise for Ms.

Gunning. But after Mr. Wise had to take a medical leave, Mr. Kiyonaga became Acting Executive Director. Kiyonaga ignored Ms. Gunning's repeated requests to process the promised raise. He claimed it was "not a good time" to process the raise, even as he gave raises to other Justice Center employees, including Ms. Levy.

After Ms. Gunning complained, Mr. Kiyonaga repeatedly harassed Ms. Gunning. He repeatedly excluded her from meetings squarely within her job responsibility. He made repeated changes to her staff without consulting her. He threatened to take away her staff's offices. He shut down, without basis, an important Justice Center project she spearheaded to protect the disabled from strangulation, though the agency had invested significant staff and outside consultant resources.

After Ms. Gunning complained, Mr. Kiyonaga repeatedly belittled her. This culminated in a June 8, 2016 incident where Mr. Kiyonaga entered Ms. Gunning's office, thrust his finger in her face, screaming repeatedly, words to the effect: "You fucking work for me; You're going to fucking do what I say." He then slammed her office door. Over 20 people heard him. Multiple members of Ms. Gunning's staff were frightened and concerned.

Ms. Gunning Files a Complaint, Which Launches a Whitewashed Investigation, and the Retaliation Worsens

When Ms. Gunning sought advice from the New York State Employee Assistance Program about Mr. Kiyonaga's misconduct, the staffer suggested counseling and warned that any complaint would "risk her career." That proved true.

On June 9, 2016, Ms. Gunning reported Mr. Kiyonaga's retaliatory conduct to the Justice Center's General Counsel, Robin Forshaw, and its Ethics Officer, David Cochran. She complained about Mr. Kiyonaga's conduct on June 8, complained that the reason for Mr. Kiyonaga's uncontrolled conduct was retaliation against Ms. Gunning for her complaint that he

was involved in an inappropriate relationship with a female subordinate, engaging in sexual favoritism, and distorting Justice Center policy as a result of his office sex life.

This internal Justice Center investigation was a whitewash from the start. It focused only on the June 8, 2016 cursing and screaming incident. The Justice Center did not investigate Ms. Gunning's complaint that Mr. Kiyonaga retaliated against her. It did not investigate her allegations about the hostile work environment caused by Mr. Kiyonaga's favoritism of Ms. Levy. The Justice Center interviewed only two people, to Ms. Gunning's knowledge, though her fellow coworkers privately contacted her to reaffirm that their experiences mirrored hers. The investigation violated large portions of the state's required 10-step internal complaint investigative process. (In contrast, an investigation of a claim against another Justice Center employee for an unrelated matter included more than a dozen interviews and culminated in a fulsome report, a formal reprimand, and sanctions against the employee.) Though state procedure requires affirmative action officers to investigate complaints by state employees, the Justice Center's affirmative action liaison apparently did not become involved until Ms. Gunning specifically requested that she do so.

Though the Justice Center's investigation confirmed that Mr. Kiyonaga swore and screamed at Ms. Gunning, the Justice Center did nothing to help Ms. Gunning or to prevent further retaliation. It did not terminate Mr. Kiyonaga, or even discipline him. The Justice Center did not require him to apologize for his screaming and cursing with any of the staff who heard it. The Justice Center did not place anything in his personnel file. The Justice Center did not report the misconduct to anyone outside the Justice Center.

The only consequence to Mr. Kiyonaga—to Ms. Gunning's knowledge—was that he was told to “watch it” regarding his treatment of Ms. Gunning and was told to “be much more

careful” regarding his open relationship with a subordinate as it “does leave the impression that he does favor her.”

Mr. Kiyonaga Retaliates Further Against Ms. Gunning and Ultimately Helps Get Her Fired

After Ms. Gunning complained to the General Counsel and Ethics Officer, Mr. Kiyonaga’s retaliation worsened. In October 2016 he removed from her jurisdiction her entire Audit and Review unit, which is an essential part of the Inspector General role.

Mr. Kiyonaga then barred Ms. Gunning from speaking to agencies or groups that had invited her to speak about the Justice Center, though she had made such speeches during the entirety of her tenure at the Justice Center.

In May 2017, to escape from Mr. Kiyonaga’s ongoing abuse and retaliation, Ms. Gunning transferred to New York City. Mr. Kiyonaga then directed staff not to provide Ms. Gunning with an office in Albany, even though she often travelled to Albany and other senior leadership who spent time in Albany had offices. He refused to let Ms. Gunning use her old Albany office, even as it sat empty. Instead, Mr. Kiyonaga had a member of his staff instruct Ms. Gunning to sit in a cubicle. The staff member who delivered the news apologized and said the reason was “whatever you have going on with Jay.”

Mr. Kiyonaga also badmouthed Ms. Gunning to the new Executive Director, and falsely claimed Ms. Gunning exceeded her statutory authority by exercising job responsibilities that she had long performed.

On August 1, 2017, Ms. Gunning was terminated. Told she had 5 minutes to resign or be fired, Ms. Gunning submitted her resignation under duress. There was no basis to terminate Ms. Gunning. Mr. Kiyonaga’s actions were a proximate cause of Ms. Gunning’s termination on August 1, 2017.

Governor Cuomo Again Appoints Kiyonaga to a Position of Power, This Time at OPWDD

By September 2017, Mr. Kiyonaga's 15 years in state employ had a consistent pattern: He fostered a boys' club atmosphere in the agencies where he worked. He favored women he found attractive. He retaliated against women who complained. Multiple women complained. One filed a lawsuit. DCJS found that his behavior "needed to be addressed." The Justice Center confirmed he screamed and cursed at his female subordinate, Mr. Gunning.

Despite all this, in September 2017, Governor Cuomo appointed Mr. Kiyonaga to be the Executive Deputy Commissioner of the Office for People with Developmental Disabilities. OPWDD is one of the state's largest agencies, coordinating services for more than 130,000 New Yorkers with intellectual and developmental disabilities. The Executive Deputy Commissioner position is the number two position in that important office. Now it is filled by a man with a long history of treating female employees as sexual objects and retaliating against those who complain.

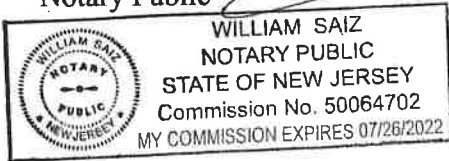
I, Patricia Gunning, swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Dated: May 23, 2018
New York, New York

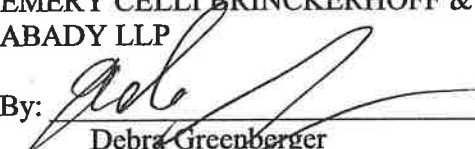
By: 
Patricia Gunning, Complainant

Sworn to before me this day of May 23, 2018


Notary Public



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