

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**VICKIE CABLE and DEBORAH A. THOMAS,**  
Complainant,

v.

**NEW YORK CITY DEPARTMENT OF  
CONSUMER AFFAIRS,**  
Respondent.

**NOTICE AND  
FINAL ORDER**

Case Nos. 2308682  
2308684

**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 December 19, 2007, by Lilliana Estrella-Castillo, 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 KUMIKI GIBSON, 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**, this 30th day of January, 2008.



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KUMIKI GIBSON  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**VICKIE CABLE and DEBORAH A. THOMAS**

Complainants,

v.

**NEW YORK CITY DEPARTMENT OF CONSUMER  
AFFAIRS,**

Respondent.

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

Case No. **2308682**  
**2308684**

**SUMMARY**

Complainants, black females, alleged that Respondent unlawfully discriminated against them based on race and sex in connection with their non-selection for certain promotions when the promotions were given to less qualified white males. Complainants further alleged that they were retaliated against for filing complaints with the Division. The complaints are hereby dismissed, because Complainants failed to prove that Respondent's reasons for their non-selection were a pretext for unlawful race and sex discrimination or that Respondent retaliated against them because they filed complaints with the Division.

**PROCEEDINGS IN THE CASE**

On March 4, 2003, Complainants filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on February 5 through 9, 2007, February 12, 2007, and March 6, 2007.

Complainants and Respondent appeared at the hearing. Complainants were represented by Janice Goodman. Respondent was represented by Michael A. Cardozo, Corporation Counsel, by Eric Eichenholtz and Zoe Davidson.

The parties’ timely filed post hearing briefs were received and considered.

### **FINDINGS OF FACT**

1. Respondent is a New York City agency, responsible for licensing over 55 different industries. (Tr. 601-2; Complainants’ Exhibit 44)
2. Deborah A. Thomas (Thomas) is a black female. (ALJ Exhibit VIII)
3. Respondent hired Thomas in April 1987, as an Inspector in the Enforcement Division. (Tr. 171)
4. The Enforcement Division is charged with conducting routine inspections of local businesses to assess compliance with the City’s licensing, weights and measures, and consumer protection laws. The Enforcement Division writes violations against businesses that are not in compliance with the law and then takes appropriate steps to bring such businesses into compliance. (Complainants’ Exhibit 44)
5. An Inspector is an entry-level position. (Tr. 171, 767)
6. In 1993, Thomas was promoted to Inspector 2, also known as Senior Inspector. (Tr. 186, 767, 922)
7. In 1999, Thomas was promoted to Associate Inspector 1, also known as Supervisor, and was in charge of a special unit with seven employees. (Tr. 171, 189, 192-3, 372-3, 767, 922)

8. Vickie Cabble (Cabble) is a black female. (ALJ Exhibit II)
9. Respondent hired Cabble in April 1995, as an Inspector in the Enforcement Division. (Tr. 33)
10. Cabble worked in different units within the Enforcement Division. (Tr. 33, 116)
11. In the middle of 2002, Respondent's administration changed. Gretchen Dykstra, a white female, became the Commissioner and Jonathan Mintz, a white male, became the Deputy Commissioner. (Tr. 108, 109, 610)
12. Mintz appointed Pansy Mullings, a black female, Director of Enforcement. (Tr. 109-10, 611, 905)
13. In July 2002, Mintz authorized the hiring of a Senior Inspector in the Tobacco Squad. (Tr. 47-8, 49; Complainants' Exhibit 3)
14. The Tobacco Squad was created in 1998. Its mission is to conduct inspections and ensure that tobacco retailers are not selling cigarettes to minors. (Tr. 653-4)
15. Cruz Danielson, head of the Tobacco Squad, a black female, who had previously recommended Cabble for a Senior Inspector position in 2000, interviewed Cabble. (Tr. 43-45, 60-61, 116; Complainants' Exhibit 2).
16. Danielson recommended Cabble, Craig Herencia and Erin Moriarty for the Senior Inspector position stating that "[f]rankly, any of the three individuals [...] would make an excellent senior." (Tr. 64, 396, 399, 454-5; Complainants' Exhibit 23).
17. Danielson was familiar with the three candidates because they had worked in the Tobacco Squad. (Tr. 62-63, 64, 117)
18. Herencia, a white Hispanic male, was selected, and "performed well." (Tr. 61, 117, 418, 919-20, 1093, 1096)

19. In the Fall of 2002, the new administration announced to its employees that it was restructuring the Enforcement Division. (Tr. 618, 626-27, 917-8; Respondent's Exhibit H)

20. As a result, the Enforcement Division was divided into four squads, each headed by a Borough Director, each of whom would be in the title Associate Inspector Level 2. Instead of specialized units, the inspectors would be cross-trained in all areas of Enforcement. (Tr. 614, 616, 617, 626-27, 905, 909-11, 915, 926)

21. Cross-trained inspectors meant that the inspectors would be trained in multiple areas of the Consumer Protection Laws to perform inspections in multiple areas of the Consumer Protection Laws at the same time. (Tr. 946-7; Complainant's Exhibits 40, 45)

22. The idea was to have cross-trained inspectors write any violation, instead of having several inspectors visit one location. (Tr. 927)

23. Most inspectors had cycled through several specialized units and could perform cross trained inspections. (Tr. 286)

24. Mintz and Mullings decided to keep three of the specialized units out of the borough commands. (Tr. 648, 915-6) As a result, Martin Mansil was promoted to Associate Inspector 2, as head of the Test Station in Brooklyn (Tr. 219). Joe Levin was promoted to Associate Inspector 2, as head of the metrologist unit (calibration of scales), and the weights and measures unit. (Tr. 218; Complainants' Exhibit 43) Danielson remained as the head of the Tobacco Squad in the Associate Inspector 2 title, which she held since 1998. (Tr. 218, 377-7, 648, 915-6; Complainants' Exhibits 15 and 43)

25. The Borough Director title was new, but the civil service title, Associate Inspector 2, was not a new title. (Tr. 639, 767, 922) Danielson was already an Associate Inspector 2. (Tr. 155-56, 377, 378)

26. Borough Directors were in charge of a designated geographic area, and managed supervisors and inspectors. They were responsible for meeting with the public to explain Respondent's enforcement policy, and responsible for cross-training inspectors. (Tr. 941; Complainants' Exhibit 15) The Directors themselves did not need to be cross trained, but needed to have the vision and a plan for cross-training Respondent's inspectors. (Tr. 942, 1054)

27. On November 6, 2002, Respondent posted the new positions of Borough Directors, and also posted for the available positions of Senior and Supervisor. (ALJ Exhibit IX; Complainants' Exhibit 5)

28. All promotions would be provisional appointments because there was no current Civil Service list. (Tr. 922-3)

29. Mintz and Mullings agreed to interview all agency employees, as long as they met the minimum qualifications because the Commissioner wanted the best people for the positions, and not necessarily the next in the promotional chain. (Tr. 118-9, 628-9, 700, 928, 1012; Respondent's Exhibit H)

30. Mintz and Mullings did not review prior evaluations nor did they get any feed back from the applicants' supervisors. (Tr. 743, 765) They decided not to look at prior evaluations because employees had complained that prior evaluations were not fair, and that there was no advancement within the Enforcement Division because of cliques. (Tr. 1033)

31. Mintz was looking for a "sparkle" and "out of the box" thinkers because they were aware there would be "grumbling" by the inspectors who would be resistant to the new plan. (Tr. 631-32, 637)

32. Mintz informed the inspectors that “all promotions were based on strong interviews.” (ALJ Exhibit VIII). They were not looking for years of experience, or whether the candidate was cross-trained, they were looking for leadership skills. (Tr. 1020-23)

33. Forty-six candidates were interviewed for the open positions. (Tr. 635, 982) Twenty-one candidates applied and were interviewed for the Borough Director positions. (ALJ Exhibit IX)

34. Ultimately, Craig Herencia, Marc Mancusi, Joe Martino and Richard O’Hara, all white males, were selected to be Borough Directors. (Tr. 218, 223-4, 227-8, 291, 300, 648, 773, 778, 785; Complainants’ Exhibits 41)

#### **Debra Thomas’ Complaint**

35. Thomas applied for the Borough Director positions, was interviewed, but was not selected. (Tr. 201-02, 203-06; Complainants’ Exhibits 15 and 16)

36. Thomas believed that she was more qualified than the selected candidates, and was not selected because she is a black female. (Tr. 291-300, 302, 304, 305-6, 347; ALJ Exhibit VIII; Respondent’s Exhibit B)

37. Respondent denied the allegation.

38. Mintz and Mullings felt that Thomas did not display the leadership skills that they were seeking during her interview. (Tr. 641-2, 643)

39. Thomas did not offer any new ideas for running the boroughs and when given an opportunity to ask questions regarding the new position, the only question she asked was whether she would be able to continue to earn over-time. (Tr. 206, 207, 641, 949)

40. Mintz found the question shocking and was disappointed that she had no interesting questions about the job or his expectations. (Tr. 643)

41. Mullings felt that others were more qualified than Thomas because, although Thomas was an “excellent employee,” she lacked vision and a plan. (Tr. 944, 953) Mullings’ impression of Thomas was that she was “very good” at cross-training, but was not capable of “stepping up and doing” the job of a borough director. (Tr. 944-6, 948-9)

42. After the promotions were announced, Mullings told Thomas that she did not get the position because “we didn’t think you were ready for a borough yet.” (Tr. 222, 948). During that same conversation, Mullings told Thomas that Respondent planned to promote Thomas into Danielson’s position, which was the same grade as the Borough Director. (Tr. 222)

43. According to Mullings, Thomas was right for the position and liked to do the work (Tr. 1125).

44. Thomas felt “enthused” about the possible promotion. (Tr. 222)

45. After the reorganization, Thomas chose to transfer to the Bronx Borough Command where Herencia was the Borough Director. (Tr. 233, 300, 312, 319)

46. Thomas alleged that once she arrived, Herencia retaliated against her by treating her less favorably than others, and isolated her, because he knew that she filed a discrimination complaint alleging that she was more qualified than him. (Tr. 223-4, 227, 300, 315-6; Complainants’ Exhibit 41).

47. Thomas alleged that she was not allowed to go to community board meetings, and Herencia would not talk directly to her. (Tr. 237-8). However, Thomas also testified that she and Herencia went in the field together, he would ask her assistance to cross-train inspectors, and would also ask her expertise in areas of Enforcement with which he did not have familiarity. (Tr.)

48. As a result of what Thomas described as “intolerable” work conditions, Herencia criticized her judgment regarding a community outreach program, and rated her performance as “good,” Thomas was granted a transfer out of the Bronx Borough Command in October 2003. (Tr. 234-36, 237, 240, 278, 321; Complainants’ Exhibit 17; Respondent’s Exhibit C).

49. Thomas had received a “good” evaluation in 2000 from another supervisor. (Complainants’ Exhibit 21)

50. Danielson’s position became available on January 31, 2007, when she retired. (Tr. 256, 366; Complainants’ Exhibit 20)

51. In January 2007, Thomas interviewed, was offered and accepted the position in the Tobacco Squad which was equivalent to the Borough Commander positions. (Tr. 257)

### **Vickie Cabble’s Complaint**

52. Cabble applied for and was interviewed for all the positions. (Tr.77-8, 119, 120, 928) She was not selected for any of the positions. (Tr. 64-5, 69, 120, 928; Complainant’s Exhibits 5, 6 and 29)

53. Mintz felt that Cabble needed more experience before she could be promoted. (Tr. 645, 706-7; Complainants’ Exhibit 29)

54. Jack Arroco, white male, and Brenda Waller, a black female, were selected for the supervisor positions. (Tr. 120-121, 651)

55. Waller declined the position, and Cathy Moss, black female, was selected. (Tr. 122, 651, 715, 994, 1074)

56. Cabble is not challenging the promotions of those black females to the supervisor positions. (Tr. 13, 65, 119, 928)

57. Twenty-five qualified candidates were identified for the two senior positions. (ALJ Exhibit III)

58. Demba Sanyang, black male, and Anthony Gangemi, a white male, were selected for the senior positions. (Tr. 69-70, 653, 1064)

59. When Gangemi was interviewed, he was really interested in the Borough Director positions, but because of his experience was considered for the senior position. (Tr. 729-30)

60. Demba Sanyang accepted the position and then later declined it because of the pressure he received from co-workers, because as a result of the promotion, he skipped one level. (Tr. 653, 716-7, 804, 806, 996, 1070)

61. As a result, Edwin Garcia, Hispanic white male, was then selected for the senior position. (Tr. 64-5, 68, 785; Complainants' Exhibits 5 and 29)

62. Gangemi was selected because he was "very enthusiastic," had a broad background, and was not concerned with grievances. (Tr. 730-35)

63. Garcia was selected because he was enthusiastic and confident about the changes and had a "spark." (Tr. 719; Complainant Exhibit 30) Thomas agreed that Garcia was "good" (Tr. 195).

64. Cabble next applied in January 2004 for the position of senior inspector. Twenty-four qualified candidates were interviewed by Troy Nelson, Joseph Martino, Marc Mancusi, Craig Herencia, and Richard O'Hara. (Tr. 931)

65. After every interview, the panel discussed the candidate's responses and each member of the panel independently rated the candidate as strong, moderate or weak. The six strongest candidates for the two positions were identified and interviewed by Mullings and Joseph Kennelly, who, together, made the final determination. (Tr. 931; ALJ Exhibit III)

66. Cabble was not recommended for the senior inspector position. (Tr. 932)

67. The interview panel consisted of at least two of Cabbie's prior supervisors; Troy Nelson, black male, and Joe Martino, white male. (Tr.123, 124, 153, 931-2)

68. Martino was familiar with Cabbie and had rated her "conditional" in her performance evaluation (Tr. 126-27; Respondent's Exhibit A). This evaluation was signed by Martino, Nelson and Mullings. (Tr. 128, 147-50)

69. In March 2004, Cabbie again interviewed and was not selected for senior inspector. (Tr. 75)

70. Moses Layne, black male, and Solly Corrado, white male, were promoted. (Tr. 75, 128; ALJ Exhibit IV, Complainants' Exhibits 9, 50)

71. Early in 2005, thirty-five candidates were interviewed, including thirty males and five females for the Senior Inspector and Supervisor positions that were posted by the Department for the Enforcement Division in late 2004. One of the female candidates withdrew her name from consideration before the interview process began. Among the female candidates, only Cabbie applied for the supervisory positions. Interviews of all the remaining candidates were conducted by Troy Nelson, Joseph Martino, Marc Mancusi, Craig Herencia and Richard O'Hara. Four of the candidates were rated as "strong" for the two Supervisor positions. Complainant was not among them. Both inspectors that were promoted were black male. No one was promoted to the senior position. (ALJ Exhibit III)

72. In May 2005, Cabbie was interviewed by Danielson and Cathy Moss, for a senior inspector position in the Tobacco Squad. (Tr. 130)

73. Three people, two of whom are females applied for a posted Senior Inspector opening in the Tobacco Squad. Danielson and Moss graded the answers given by each of the candidates to each of the questions on a scale of one to five. On the basis of the candidates' cumulative scores,

Cable was given an 18 out of a possible 30 points. Danielson recommended that the other female candidate, who had scored 22 points, be promoted. (ALJ Exhibit III).

74. Danielson selected Erin Moriarty, white female, for promotion. (Tr. 76, 131, 132; ALJ Exhibit II; Complainants' Exhibit 9, 50)

75. Both, Cable and Moriarty were assigned to the Tobacco Squad at the time of the promotion. (Tr. 76, 129, 131)

76. After the reorganization, Cable was assigned as an inspector to the Manhattan Squad. In 2003, Cable asked for a transfer out of the Manhattan Squad because she did not like the borough director, Martino. (Tr. 80-1, 82)

77. In October 2003, Cable was transferred into the Tobacco Squad. (Tr. 83, 134, 933; Complainants' Exhibit 10)

78. Cable alleged retaliation because she asked to be transferred out of the Manhattan Squad, and specifically asked not to be transferred into the Tobacco Squad, because their schedule did not allow her to work overtime, which she depended on as a single parent. (Tr. 82, 84, 133)

79. Danielson was the only director that wanted Cable. (Tr. 934) The other directors either had a problem with Cable, such as Troy Nelson who complained that Cable did not submit her paperwork timely which in turn delayed his reports, or they did not need another inspector in their unit. (Tr. 937)

80. It appeared that the common theme regarding Cable, was that "Vickie does when Vickie wants to do." It was a struggle to get her to do what she did not want to do. (Tr. 938)

81. Cable again asked for a transfer in February 2004. (Tr. 85, 104, 105; Complainants' Exhibit 7)

82. Mullings responded to Cabble's request for a transfer by telling her that unless someone asked to be transferred into Tobacco, she was not taking anyone out. (Tr. 87) The transfer was not granted because "Tobacco was where she was needed" and Danielson was happy with her. (Tr. 105, 535, 939)

83. In any event, Cabble was transferred out of the Tobacco Squad in November 2006. (Tr. 88)

### **OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer "because of . . . race . . . sex . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a)

In order to establish a claim of race and sex discrimination, Complainants must first make out a prima facie case by showing that they are members of a protected class; they were qualified for the position they sought; and there was an adverse employment action which occurred under circumstances that gave rise to an inference of discrimination. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

If Complainants succeed in establishing a prima facie case, Respondent must then articulate legitimate, non-discriminatory reasons for its actions. Complainants must then demonstrate that the reasons articulated by Respondent are merely a pretext for unlawful discrimination. *Pace College, supra*.

In evaluating an employer's actions in the context of a discrimination claim, the Division "does not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7<sup>th</sup> Cir. 1986). "A business decision need not

be good or even wise. It simply had to be nondiscriminatory....” *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 20 (7<sup>th</sup> Cir. 1987)(cited in *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988)). See, *Visco v. Community Health Plan*, 957 F.Supp. 381, 388 (N.D.N.Y.1997) (“an employer may exercise business judgment in making personnel decisions as long as they are not discriminatory.”)

Complainants made out a prima facie case of unlawful race and sex discrimination.

Complainants alleged that Respondent unlawfully discriminated against them because they are black females, when they were denied certain promotions which were allegedly given to less qualified white males. Both Complainants offered that they were as qualified, if not more qualified, than the males that were selected to fill the positions.

Respondent denied unlawful discrimination, and offered that two of the three decision makers in the initial promotion process were females and one of those females is black. Respondent also argues that its Commissioner was a female, its Deputy Commissioner was a Caucasian male, and all three of its Assistant Commissioners, including its General Counsel, were females. One of those Assistant Commissioners identifies herself as a black Hispanic. Also at the time of the initial interview and promotion process, the head of the Enforcement Division, which is, by far, Respondent’s largest Division and is the Division to which the Complainants were assigned, was a woman who identifies herself as Black.

### **Debra Thomas**

Thomas alleged that she did not get one of the borough director positions because she is a black female. She also alleged that she was as qualified, and in the case of Herencia, more qualified than the white males that were selected for the borough director positions.

Respondent denied unlawful discrimination, and offered that although Thomas was an

excellent employee, there were other candidates that were more qualified. Everyone knew that the positions were going to be awarded based on the candidates' interview. Thomas acknowledged that all the inspectors were encouraged to apply, and told that experience and seniority would not be the deciding factors. Respondent was not impressed with Thomas' interview. Thomas did not ask any questions and did not offer any insight into how she would run a new unit. Thomas was asked about the failed drug prescription survey, and felt that it was unfair for Respondent to ask her questions regarding the project.

Respondent offered that it was looking for individuals that were enthusiastic about the new direction that the agency was heading, and also for leaders that would make the agency's vision a reality. They were looking for individuals that would take on the leadership role and head the agency in the new direction. Thomas' interview did not convince Respondent that she was what they were looking for in a borough director.

Thomas failed to show that Respondent's selection of the successful candidates was motivated by race or sex discrimination. It is not enough for Thomas to show that the successful candidates were white males, she had to show that the reason Respondent did not select her was because she is a black female.

Another hurdle for Thomas, was the fact that one of the two interviewers was in the same protected class, black female, as Thomas. There is substantial evidence that Mullings, who considered Thomas an excellent employee, was not impressed with Thomas' interview, and did not feel that Thomas was ready to take on the position of borough director. Mullings candidly told Thomas that she was not ready for the position. The fact that one of the two interviewers is a member of the same protected class weakens any inference of discrimination. *See, Rooks v. Girl Scouts of Chicago*, 1996 U.S. App. LEXIS 20389, No. CIV.A.95-3516, 1996 WL 459941,

at \*3 (7<sup>th</sup> Cir. Aug. 9, 1996) (“There can be no compelling inference of age discrimination because [the decision maker] herself is also in the protected category.”); *Marlow v. Office of Court Admin. Of State of N.Y.*, 820 F. Supp. 753 (S.D.N.Y. 1993), *aff’d*, 22 F.3d 1091 (2d Cir.), *cert. denied*, 130 L.Ed. 2d 173, 115 S. Ct. 252 (1994) (pointing out that because some of the decision makers were members of the same protected age group as plaintiff, plaintiff’s ability to raise an inference of discrimination was hampered), *see also*, *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1002 (5<sup>th</sup> Cir.), *cert. denied*, 502 U.S. 868, 116 L.Ed.2d 158, 112 S.Ct. 198 (1992) (“[In] a Title VII case alleging discrimination because of race, proof that all of the decision makers were members of the same race as the complaining employee would considerably undermine the probability that race was a factor in the employment decision.”)

Complainants also argue that the subjective interview process was discriminatory. However, courts have held that the use of subjective employment criteria is not unlawful per se, and their relevance to proof of a discriminatory intent is weak. *See*, *Mrintunjoy Sengupta v. Morrison-Knudsen Company, Inc.*, 804 F.2d 1072, 1075 (9<sup>th</sup> Cir. 1986)

### **Vickie Cabble**

Cabble alleged that she was not promoted because of her race and sex, however, the evidence produced showed that not only were the interviews conducted by a black female, but two candidates selected for promotion to the Supervisor position, were black females, one of whom turned the position down, and another black female was the selected. Cabble, however, does not challenge these promotions. Cabble challenged the promotion to the Senior positions because two white males were selected.

The promotion decision for the senior inspector was not between Cabble and another candidate. There were twenty-five qualified candidates that were interviewed for the two

available positions. Only two candidates were selected, Sanyang (black male) and Gangemi (white male). As a result of Sanyang withdrawing, Garcia (White Hispanic Male) was selected.

Cabble then applied for other promotions and was not the strongest candidate. When Cabble was interviewed by the interview panel, which was headed by Troy Nelson, (black male), who had supervised Cabble before and had complained about her performance, Cabble was not selected. When Cabble interviewed for the senior position in Tobacco, she was interviewed by Cruz Danielson (black female), and was not selected because she was not the strongest candidate. Neither, Complainant produced any evidence to show that the reasons offered by Respondent for their non-selection of Complainants were a pretext for discrimination. There is no evidence that Complainants were not promoted because they are black females or because Respondent harbored some racial animus towards Complainants. It is not disputed that the decision not to promote Complainants in 2002 was made by Mintz and Mullings, but there is no evidence that their decision was made because Complainants are black females, or because Mintz and Mullings harbored any racial animus towards Complainants. There were no prior complaints made by Complainants against Mintz and/or Mullings, or any other manager, and Complainants admit that they did not complain of discrimination prior to filing these complaints with the Division. Complainants point to no derogatory statement, or any other evidence of discrimination or racial animus by Mintz and Mullings, or any other decision-maker. In fact, Complainants did not testify or produce any evidence that they or anyone else ever heard Mintz or Mullings say anything discriminatory.

As a matter of fact, Cabble participated in four selection processes, and was not selected for promotion because other candidates were found to be better candidates for promotion than Cabble. In late 2002, Cabble was one of twenty-three applicants who did not get either of the

positions at that time. Twenty-four applied for the position that became available in early 2004, Cabbie was one of twenty-two applicants who did not get either of those positions. In early 2005, Cabbie was one of thirty-four candidates who participated in a third selection process, and was one of thirty-two candidates not promoted. In Mid-2005, Complainant was one of the three applicants for the job, and did not get the position.

As to Complainants' allegations of retaliation, I find those to be without merit. Under the New York Human Rights Law §296(7) it is unlawful discriminatory practice for an employer to discriminate against an employee because the employee filed a complaint under this statute. To make out a prima facie case of retaliatory discrimination, Complainants must show that (1) they engaged in protected activity; (2) Respondent knew that Complainants engaged in protected activity; (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action. *See, Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing, Dortz v. City of New York*, 904 F.Supp. 127, 156 (1995).

Complainants failed to meet their burden regarding retaliation. Although both Complainants filed complaints with the Division, and Respondent was aware that Complainants made such complaints, Complainants did not suffer adverse employment action.

Cabbie and Thomas also alleged retaliation as a result of filing complaints with the Division. Cabbie alleged that as a result of her initial complaint she was transferred into a unit that she specifically told Respondent she did not want to be transferred into. Thomas alleged retaliation because her supervisor treated her less favorably than her colleagues, in that she was isolated, never sent to community board meetings, and finally received an evaluation of "good." She alleged that she had never received a "good" evaluation. However, the evidence produced

showed that Thomas and Herencia worked together, he relied on her to cross-train inspectors in his squad who were not cross-trained and relied on her when he had questions regarding areas of the Consumer Protection Laws that he was not familiar with. As to the community board meetings, if Thomas wanted to go, she could have asked, but she never did. The record also showed that this was not the first “good” evaluation that Thomas ever received. The record also shows that she did not suffer any repercussions as a result of the “good” evaluation; she did not lose any pay nor was her ability to be promoted hindered as evidenced by her promotion in 2007.

Cable alleged that as a result of her complaint Respondent retaliated against her by transferring her into a unit that she had specifically requested not to be transferred into. In 2003, when Cable asked for a transfer out of the Manhattan Squad because she did not like the Borough Commander, she was transferred into the Tobacco Squad, because Danielson liked her and because the other boroughs had a full complement of inspectors or because the other unit commanders did not want to have Cable in their squad. Cable sought a transfer again in 2005 and was denied because no one else sought to replace her in the Tobacco Squad. Cable was finally transferred out of the Tobacco Squad in November 2006.

Cable alleges that keeping her in the Tobacco Squad was retaliatory, yet, she sought several promotions within the Tobacco Squad, while she was seeking to transfer out of the Squad.

The Complainants failed to produce evidence sufficient to prove that Respondent’s stated reasons for their non-selection for promotion were a pretext for unlawful race and sex discrimination.

**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 complaints be, and the same hereby are dismissed.

DATED: December 19, 2007  
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo", with a large, sweeping flourish on the left side.

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Lilliana Estrella-Castillo  
Administrative Law Judge