

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS  
on the Complaint of

FRANCESCO S. CASIGLIA,

Complainant,

v.

SUFFOLK COUNTY, DEPARTMENT OF SOCIAL  
SERVICES,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10115141

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 February 20, 2009, by Robert M. Vespoli, 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.

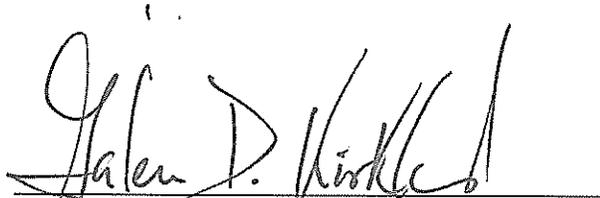
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **MAY 01 2009**  
Bronx, New York

  
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COMMISSIONER

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on the Complaint of

**FRANCESCO S. CASIGLIA,**

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v.

**SUFFOLK COUNTY, DEPARTMENT OF  
SOCIAL SERVICES,**

Respondent.

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

Case No. 10115141

**SUMMARY**

Complainant alleged that Respondent failed to promote him and subjected him to a hostile work environment because of his sex. Since the credible record does not support Complainant's allegations, the instant complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On December 7, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 27 and 28, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Sandra S. O’Neil, Esq. Respondent was represented by Assistant County Attorney Samantha McEachin, Esq.

Respondent filed a timely post-hearing brief.

### **FINDINGS OF FACT**

1. Complainant is a male who began working for Respondent on September 25, 1978, as a support collector. (Tr. 7-8, 28)
2. On January 1, 1987, Complainant’s position was reclassified to child support specialist I (“CSS I”). Complainant was permanently appointed to CSS II on May 31, 1999. (Tr. 8)
3. During the relevant time period, Complainant worked in Respondent’s Child Support Enforcement Bureau (“CSEB”). (Tr. 208, 368) Karen Ostermann, currently an assistant division administrator in CSEB, testified that roughly 13% of the employees in CSEB are male. (Tr. 408, 415)
4. As a CSS II, Complainant was an assistant supervisor, and his duties included performing investigations and collecting child support payments. (Tr. 14; Joint Exh. 1)
5. Joan Rafferty, a female CSS III, was Complainant’s direct supervisor during the relevant time period until her retirement in July 2006. (Tr. 30-31, 98) After Rafferty retired, Christa Higgins, a female CSS III at that time, became Complainant’s direct supervisor. (Tr. 42, 370)

6. In 2004, Complainant took the promotional civil service examination to become a CSS III. (Tr. 18) A CSS III is a supervisory position that includes responsibility for the overall functioning of a unit. (Joint Exh. 2) On this test, 3 females scored a 95 and were ranked first on the civil service list of qualified applicants. Complainant and 10 other individuals received a score of 90, the next highest grade on the test. Of the 11 people who scored a 90 on the test, only Complainant and James Elwood are male. (Complainant's Exh. 2)

7. In August 2004, Complainant was interviewed for a promotion to CSS III by Carol Hulley and Sharon Nocelty. (Tr. 20-21) Respondent did not select Complainant for the position. (Tr. 21) Respondent also did not select Kathleen Roach and Janet Lamoureux, 2 of the 3 female candidates who scored a 95, and Caroline Baisley, the other candidate who scored a 95, declined the position. Respondent selected 2 females for this position who received a score of 90 on the test. (Tr. 21, 23; Complainant's Exh. 2)

8. In or about September 2005, Complainant applied for another CSS III opening. (Tr. 24, 27-28, 229) Complainant was interviewed by Diana Arnhold, a CSS IV, and Complainant was not selected. (Tr. 27, 227, 229, 231) The civil service list of qualified applicants was the same list described above with 3 females who scored a 95. (Tr. 24; Complainant's Exh. 4) Of the remaining 9 individuals on the list who scored a 90, only Complainant and James Elwood are male. (Tr. 30) Respondent did not select Roach or Lamoureux, and Baisley did not respond. (Tr. 173-76; Complainant's Exh. 4) Respondent selected Susanne Jusino, a female, who scored a 90 on the test. (Tr. 27-28; Complainant's Exh. 4)

9. In 2006, Complainant took another civil service examination for the CSS III position and scored a 95, the highest score on the test. Roach, Lynda Basilius and Celeste Lobo, all

females, also scored a 95. 3 females scored a 90, the next highest score on the test. Of the 12 individuals who scored an 85 on the test, Elwood is the only male. (Complainant's Exh. 5)

10. On September 20, 2006, Complainant interviewed for a promotion to CSS III with Arnhold, who also interviewed the other eligible candidates. (Tr. 8, 284-85)

11. Arnhold testified that she was looking to hire supervisors who possessed good judgment, leadership and morale boosting skills. (Tr. 229-30, 233) She asked all interviewees similar hypothetical questions and evaluated their answers, giving more weight to criteria that could not be improved with training. (Tr. 229-33, 287) In making her ultimate hiring recommendations, Arnhold also considered her familiarity with each candidate from prior work interactions. (Tr. 232, 235, 286-88)

12. Arnhold did not make the ultimate hiring decisions. (Tr. 254, 289) She made recommendations to Hulley and Paula Grant, the director of the Bureau, to hire Roach and Basilius because she felt they were the best candidates. (Tr. 234, 253-55, 289) Respondent hired Roach and Basilius into the CSS III positions in October 2006 based on Arnhold's recommendations. (Tr. 9, 286, 289; Complainant's Exh. 5)

13. Arnhold did not recommend Complainant for the promotion because Arnhold determined that Roach and Basilius showed the most aptitude in the areas of judgment and leadership, the most important criteria for the CSS III position. (Tr. 234-35, 287-92) Arnhold cited some of Complainant's strengths as a CSS II, but she believed these qualities were not comparable to the skills needed for the supervisory CSS III position. (Tr. 330, 345-47)

14. Complainant alleged that he should have received this promotion because he had more experience and seniority than both Roach and Basilius. (Tr. 36-37; ALJ's Exh. 1) Traci Barnes, an assistant commissioner for Respondent in charge of human resources, testified that seniority is

not a factor in hiring for this promotional title. (Tr. 161, 168) Barnes also testified that the interview process is vital in determining the best candidate from the civil service list of qualified applicants. (Tr. 162-65)

15. Complainant alleged that Arnhold directed Higgins to complete his employee evaluation by September 19, 2006, even though it was not due at that time. (ALJ's Exh. 1) However, the record shows that Complainant's evaluation was due at this time because the anniversary date of Complainant's hire is September 25. (Tr. 7, 401) Higgins testified that several weeks earlier, Arnhold directed her to complete the timely evaluations of Complainant and several other employees. (Tr. 400-01) Higgins was familiar with Complainant's work product having been a supervisor in his unit and having had regular meetings with Rafferty, his previous supervisor. (Tr. 374-77, 398) Higgins's evaluation of Complainant was based on her familiarity with Complainant's work product and was largely consistent with previous evaluations performed by Rafferty. (Tr. 370-81, 388-99; Complainant's Exhibits 1, 3, 6)

16. Complainant also alleged that, in 2005, Arnhold restricted the number of overtime hours that he and other male CSS II's could work. (Tr. 76-78; ALJ's Exh. 1) Complainant testified that Respondent lifted these restrictions in or about August 2005. (Tr. 78-79)

17. Complainant alleged that Arnhold constantly referred to him as "Frankie boy" but did not refer to female co-workers in a similar fashion. (Tr. 80; ALJ's Exh. 1) Arnhold testified that she often expressed her fondness for certain employees, both male and female, in this manner. (Tr. 245-48, 329-30) Complainant admitted that he heard Arnhold refer to another employee as "Kimmie girl." (Tr. 81)

18. Complainant testified that he never protested or complained when Arnhold referred to him in this manner. (Tr. 81)

19. Complainant also alleged that Arnhold once observed Complainant at a urinal in the men's bathroom when the door was opened and subsequently stated to him, "how intimate we have become." (Tr. 82; ALJ's Exh. 1) Complainant admitted that he joked about the comment and did not protest or complain. (Tr. 82) Ostermann, a CSS IV at the time, was present during this incident and testified that such innocuous, humorous repartee was commonplace between Complainant and Arnhold. (Tr. 409, 416-17)

### OPINION AND DECISION

Complainant alleged that Respondent failed to promote him on different occasions because of his sex. The Human Rights Law provides that, "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." N.Y. Exec. Law, art. 15 ("Human Rights Law") § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Cmty. College v. State Human Rights Appeal Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

Since Complainant's allegations that Respondent failed to promote him are deemed to be discrete acts, the continuing violation doctrine does not apply. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Therefore, any claims that Respondent failed to promote Complainant accruing more than one year prior to December 7, 2006, the date of filing of the instant complaint, are time-barred.

Complainant alleged that, in 2005, Arnhold restricted the number of overtime hours that he and other male CSS II's could work because of their sex. Complainant testified that Respondent lifted these restrictions in or about August 2005. This claim is time-barred because it occurred more than one year prior to the filing of the instant complaint.

Similarly, Complainant's unsuccessful attempts to secure a promotion in August 2004 and September 2005 are time-barred and are not actionable. These claims may be considered as background evidence to the extent Complainant establishes a timely claim. *See id.* at 113. However, these allegations provide little historical support for Complainant's case. Complainant was listed among many individuals who were reachable from the civil service list of qualified applicants. The overwhelming majority of these individuals are female, and Respondent ultimately selected females from this list who received the same score as Complainant on the civil service examination. Of the 3 females who obtained the highest score on the test, Roach and Lamoureux were not selected, and Baisley either declined the position or did not respond.

Complainant also alleged that Respondent unlawfully discriminated against him based on his sex by not promoting him to a CSS III position in September 2006. Although this is a timely claim, it cannot be sustained.

It is unlawful for an employer to discriminate against an employee on the basis of sex. Human Rights Law § 296.1(a). Complainant has the burden of establishing a prima facie case by showing that he is a member of a protected group, that he was qualified for the position he held, that he suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant has established a prima facie case. He is a male, he was reachable on the civil service list of qualified applicants and Respondent did not select him for promotion to the CSS III position. Finally, Respondent selected 2 females for the open CSS III positions with less seniority and experience than Complainant.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

Arnhold testified that she was looking to hire supervisors who possessed good judgment, leadership and morale boosting skills. Arnhold interviewed all of the eligible candidates and asked them similar hypothetical questions. She evaluated their answers and gave more weight to criteria that could not be improved with training. In making her ultimate hiring recommendations, Arnhold also considered her familiarity with each candidate from prior work interactions.

An overwhelming majority of the eligible candidates were female. Arnhold recommended that Respondent hire Roach and Basilius, each of whom achieved the same test score as Complainant, because she felt they were the best candidates. Arnhold did not recommend Complainant for the promotion because he did not interview as well as Roach and Basilius. While Arnhold recognized some of Complainant's strengths as a CSS II, she believed these qualities were not comparable to the skills needed for the supervisory CSS III position.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet his burden.

The mere fact that females were selected over Complainant does not establish that Respondent acted with a discriminatory motive. Inherent in the selection process is the rejection of other candidates. When one person is chosen over another, it is inevitable that there will be

differences between the candidates regarding sex, religion, race and other factors. *See DiLegge v. Gleason*, 131 F. Supp. 2d 520, 526 (S.D.N.Y. 2001). While this may be sufficient to establish a prima facie case, it is not automatically enough to show that Respondent's legitimate, non-discriminatory reason was a pretext for discrimination. *See id.*

The focus of the inquiry here is not whether Respondent acted with good judgment in selecting Basilius and Roach over Complainant, but whether this decision would not have been made but for a discriminatory motive. *See Ioele v. Alden Press, Inc.*, 145 A.D.2d 29, 36, 536 N.Y.S.2d 1000, 1004 (1<sup>st</sup> Dept. 1989).

Complainant's conclusory allegations that he should have received a promotion over Roach and Basilius because of his seniority and experience are not supported in the record. Respondent presented evidence showing that seniority is not a factor in hiring for this promotional title, and the interview process is vital in determining the best candidate for the position. Roach and Basilius were clearly reachable on the civil service list of qualified candidates for the CSS III position. Arnhold conducted the interviews and concluded that they were the best candidates. Respondent is entitled to rely on subjective factors in judging which applicants to appoint from the civil service list of qualified applicants. *See DiLegge*, 131 F. Supp. 2d at 526. The record evidence does not support a finding that Respondent acted with discriminatory animus.

Complainant's claim that Arnhold directed Higgins to complete his employee evaluation by September 19, 2006, does not support a showing of pretext. The record establishes that Higgins was Complainant's direct supervisor, and Complainant's evaluation was due at that time. Higgins's evaluation of Complainant was based on her familiarity with Complainant's work product and was largely consistent with previous evaluations performed by Rafferty,

Complainant's previous supervisor. Moreover, there is nothing in the record showing that this evaluation played any role in Respondent's decision making process.

Complainant also alleged that Arnhold subjected him to a hostile work environment based on his sex. In order to sustain such a claim, Complainant must show that he is a member of a protected group, he endured unwelcome harassment based on his sex, the unwelcome sexual harassment altered the terms and conditions of his employment, and that Respondent had actual or constructive knowledge of the sexual harassment and failed to take appropriate corrective action. *See Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999).

The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *See Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 51, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant alleged that Arnhold constantly referred to him as "Frankie boy" but did not refer to female co-workers in a similar fashion. However, the record firmly establishes that Arnhold referred to both male and female employees this way, and Complainant did not object to these comments. Complainant further alleged that Arnhold once observed Complainant at a urinal in the men's bathroom when the door was opened and subsequently directed an inappropriate comment to him. Complainant admittedly did not object to this comment and joked about the incident with Arnhold and Ostermann.

Accordingly, Complainant's hostile work environment claim must 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 instant complaint be, and the same hereby is, dismissed.

DATED: February 20, 2009  
Hempstead, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive style with a large, sweeping initial 'R'.

Robert M. Vespoli  
Administrative Law Judge