



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

GERARDO FIGUEROA,

Complainant,

v.

TRI-CITY HIGHWAY PRODUCTS, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10147084

Federal Charge No. 16GB102070

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on April 24, 2012, by Thomas J. Marlow, 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”) WITH THE FOLLOWING AMENDMENT:

- The recommendation to dismiss the complaint is hereby adopted, but the analysis

in the Recommended Order is not. Had Complainant proved that Respondent's failure to provide the employment verification form to CPG was, in fact, the reason Complainant was not hired, those facts might have been sufficient to prove retaliation. *See, e.g., Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 100-01 (2d Cir. 2001) (“[A]dvice of counsel affords no defense ... The retaliatory finding rests on cause and effect, regardless of whether [Respondent] acted out of animus and revenge or on the advice of counsel. We need not decide whether there are circumstances where the advice of counsel could constitute or assist a defense to a claim of retaliation”). According to the record, however, the regulation at issue requires a response to an employment verification request within 30 days. (Respondent's Ex. 2 (see 291.23(g)); Tr. 64-65) Though Respondent initially declined to provide the requested information, it eventually did provide the information within 30 days. Thus, Respondent's failure to initially provide the employment verification was not the reason Complainant was not hired by CPG. CPG ceased considering Complainant's application less than 30 days from its request. Accordingly, the instant claim is hereby dismissed.

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

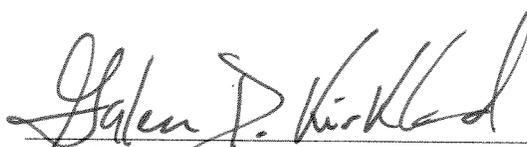
from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be 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:

2/27/2013

Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

GERARDO FIGUEROA,

Complainant,

v.

TRI-CITY HIGHWAY PRODUCTS, INC.,

Respondent.

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

Case No. **10147084**

SUMMARY

Complainant alleged that Respondent retaliated against him because he opposed unlawful discrimination. Because the evidence does not support the allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 1, 2011, 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 Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on January 13, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Stephen O’Hanlon, Esq., of The O’Hanlon Law Firm, P.C. Respondent was represented by Patrick J. Fitzgerald, Esq., of Girvin & Ferlazzo, P.C.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the public hearing date.

FINDINGS OF FACT

1. Prior to May of 2010, Complainant had been employed by Respondent as a driver. Prior to May of 2010, Complainant had accused Respondent of unlawful discrimination, had filed complaints with the Division alleging unlawful acts of discrimination by Respondent, and had initiated litigation in federal court alleging unlawful acts of discrimination by Respondent. As of May of 2010, the litigation in federal court was still pending.

(ALJ’s Exhibit 1; Respondent’s Exhibit 5; Tr. 107-11, 190-91, 248-51, 263-64, 269-70)

2. In May of 2010, Complainant applied to ContainerPort Group (“CPG”) to be a driver for an independent contractor that does work for CPG. (ALJ’s Exhibit 1; Complainant’s Exhibit 1; Tr. 32, 75-78, 111-12)

3. As of May of 2010, CPG had a verification policy and process with regard to the prior employment of someone seeking to be a driver for an independent contractor. Without receipt of information sought from former employers during the verification process, CPG would not consider a person qualified to be a driver for an independent contractor. It was CPG’s policy that

its Fleet Resources Department handled that process. (ALJ's Exhibit 10; Tr. 28-32, 59-60, 64, 82-83)

4. On May 14, 2010, in an effort to verify Complainant's former employment with Respondent, Pam Mazzola ("Mazzola"), an employee of CPG's Fleet Resources Department, sent to Respondent, via facsimile ("May 14 facsimile"), a facsimile cover sheet ("May 14 cover sheet"), an employment verification form ("May 14 verification form"), and a release regarding drug and alcohol testing records ("May 13 release") signed by Complainant. The May 14 cover sheet contained the address of CPG and the facsimile number for CPG; it did not contain a name of a department of CPG or a name of an employee of CPG. The May 14 cover sheet gave no instructions regarding acceptable methods of response, i.e., by facsimile, by mail, or by other means. (ALJ's Exhibit 1; Complainant's Exhibit 2; Respondent's Exhibit 3; Tr. 34-43, 92-93)

5. In May of 2010, Debra Roseboom ("Roseboom") was the Director of Human Resources ("DHR") for Lancaster Development ("Lancaster"), a company with owners who also owned Respondent. As the DHR for Lancaster, Roseboom also assumed the responsibility of handling employment verification requests received by Respondent. By May of 2010, Scott Quesnel ("Quesnel"), the attorney for Respondent who was representing Respondent with regard to the litigation initiated by Complainant in federal court, had instructed Roseboom to inform him if she received any correspondence regarding Complainant. Roseboom received the May 14 facsimile and informed Quesnel and Martin Galasso, Jr. ("Galasso"), Respondent's owner. Quesnel told Roseboom not to return the May 14 verification form and Galasso told Roseboom to follow the advice of counsel. Because of this legal advice, Roseboom did not return the May 14 verification form. (Respondent's Exhibits 3, 5; Tr. 43-44, 189-94, 223-27, 237-40, 248-50, 263-68, 303-05)

6. On May 24, 2010, continuing her efforts to verify Complainant's former employment with Respondent, Mazzola sent to Respondent, via facsimile ("May 24 facsimile"), another facsimile cover sheet ("May 24 cover sheet"), another employment verification form ("May 24 verification form"), and, again, the May 13 release. The May 24 cover sheet contained the same address of CPG and the same facsimile number for CPG that was on the May 14 cover sheet; as with the May 14 cover sheet, the May 24 cover sheet also did not contain a name of a department of CPG or a name of an employee of CPG. Further, the May 24 cover sheet gave no instructions regarding acceptable methods of response, i.e., by facsimile, by mail, or by other means. (Complainant's Exhibit 3; Respondent's Exhibit 4; Tr. 72, 194)

7. On several occasions between May 14, 2010, and May 27, 2010, Mazzola contacted Respondent, either about the May 14 verification form or the May 24 verification form. Roseboom informed Mazzola that, on advice of counsel, Respondent would not respond. On May 27, 2010, when Mazzola called Respondent to inquire about the May 24 verification form, Roseboom again informed Mazzola that, on advice of counsel, Respondent would not respond. As of May 27, 2010, CPG ceased its efforts to verify Complainant's employment with Respondent. (Complainant's Exhibit 3; Respondent's Exhibit 5; Tr. 44-47, 59-60, 76-77, 92-98, 201-05)

8. On May 28, 2010, Rich Curtain, a representative of the New York State Department of Transportation ("NYSDOT") called Roseboom ("the Curtain conversation") and informed her that the regulations of the U.S. Department of Transportation required that Respondent respond to CPG's employment verification requests. On May 28, 2010, Roseboom discussed the Curtain conversation with Quesnel, received further legal advice from Quesnel, filled out portions of the May 24 verification form ("partially completed May 24 verification form") in accordance with

the Curtain conversation and the additional legal advice given by Quesnel, and mailed the partially completed May 24 verification form to CPG at the address listed on the May 24 verification form. (Tr. 186-89, 197-200, 205-17, 277-82; Respondent's Exhibits 2, 5, 6, 7)

9. CPG's Fleet Resources Department never received the partially completed May 24 verification form sent by Roseboom on May 28, 2010. With regard to not receiving mail, Amy Jantz, the Director of CPG's Fleet Resources Department, credibly testified that, "Occasionally we find that somebody said they sent something and it's not received, you know, but I don't know that it's a big problem. I mean, it's not the first time that we've had mail that doesn't come – go to the right person or doesn't – you know, doesn't show up."

(ALJ's Exhibit 1; Complainant's Exhibit 3; Tr. 29, 32-34, 59-60, 62-63, 75-76, 97)

10. Roseboom and Galasso gave consistent, straightforward testimony that the only reason Respondent did not respond to the employment verification requests prior to May 28, 2010, was the legal advice it received from Quesnel. Questioning of Roseboom and Galasso at the public hearing failed to establish any inconsistency or evasiveness in their testimony or any change in their demeanor. (Tr. 185-261)

11. Quesnel gave consistent, straightforward testimony that his legal advice with regard to the employment verification requests was consistent with directions he has given to clients involved in litigation. The concern regarding the possibility of further litigation, and, in particular, the concern of the possibility of a claim of defamation with regard to responses to employment verification forms is the reason for this advice. According to Quesnel, because of these concerns, "it's a no comment situation about any litigant when you're involved in litigation." Questioning of Quesnel at the public hearing failed to establish any inconsistency or evasiveness in his testimony or any change in his demeanor. (Tr. 261-306)

12. Roseboom also credibly testified that, in May of 2010, it was Respondent's practice to send employment verification forms by mail unless otherwise requested.

(Respondent's Exhibits 3, 5, 6, 7, 8; Tr. 190-218, 223-29, 232-34, 237-39)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law § 296.7.

A claim of retaliation also can be based on the actions of a former employer. *See Yanai v. Columbia University*, 2006 N.Y. Misc. LEXIS 2407; *Landwehr v. Grey Advertising, Inc.*, 211 A.D.2d 583, 622 N.Y.S.2d 17 (1st Dept. 1995); *Gonzalez v. City of New York*, 354 F.Supp.2d 327 (SDNY 2005).

Complainant alleged that Respondent, his former employer, retaliated against him by refusing to respond to a request for employment verification. Complainant contends that Respondent refused to respond because Complainant had filed Division complaints and had initiated litigation in federal court alleging unlawful discrimination by Respondent.

The credible evidence established that Complainant engaged in protected activity by raising claims of unlawful discrimination and that Respondent was aware of Complainant's protected activity when it received requests for verification of his former employment. The credible evidence further established that, prior to May 28, 2010, Respondent refused to respond to the request because of advice it received from the attorney representing it with regard to the litigation initiated by Complainant in federal court.

In *Pace v. New York City Comm. on Human Rights*, 85 N.Y.2d 125, 128, 623 N.Y.S.2d

765, (1995), the New York State Court of Appeals held that “[a] prima facie case of retaliation requires evidence of a subjective retaliatory motive . . .” Quesnel credibly testified that his advice was consistent with advice he has given to his clients who are involved in litigation and was based on the concern of the possibility of further litigation, and, in particular, the concern of the possibility of a claim of defamation. Roseboom and Galasso credibly testified that the only reason for the refusals to respond to the request prior to May 28, 2010, was the advice of counsel. Roseboom further credibly testified that, on May 28, 2010, pursuant to the legal advice of counsel, she mailed the partially completed May 24 verification form to CPG. There is no proof that, when it refused to respond to the requests, Respondent intended to adversely affect Complainant’s chances of employment because he had accused Respondent of unlawful discrimination. Therefore, there is no proof that the advice was given or was followed with a subjective retaliatory motive because of Complainant’s protected activity. *Id.*; *Milonas v. Rosa*, 217 A.D.2d 825, 629 N.Y.S.2d 535 (3d Dept. 1995).

When a complainant raises an issue of unlawful discrimination, he has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997). In all cases involving allegations of unlawful discrimination, conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that Complainant has failed to meet the burden of showing that conduct attributed to his former employer constituted unlawful discrimination in violation of the

Human Rights Law. See *Ferrante*, 90 N.Y.2d at 630; *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). Therefore, the complaint 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 complaint be, and the same hereby is, dismissed.

DATED: April 24, 2012
Bronx, New York

A handwritten signature in cursive script, appearing to read "Thomas J. Marlow".

Thomas J. Marlow
Administrative Law Judge