

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JOHN FRITTITA, JR.,

Complainant,

v.

MT. ST. MARY'S HOSPITAL,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10111716

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal ("Recommended Order"), issued on December 15, 2008, by Edward Luban, 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.

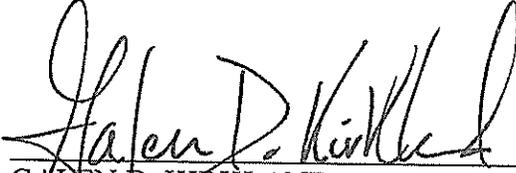
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **JAN 23 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

JOHN FRITTITA, JR.,

Complainant,

v.

MT. ST. MARY'S HOSPITAL,

Respondent.

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

Case No. 10111716

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him on the basis of sex, by changing the requirements on a job announcement to exclude him and other males from applying for the position. Because Complainant failed to meet his burden of proof, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On May 12, 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 Edward Luban, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on October 15, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq. Respondent was represented by Michael R. Moravec, Esq.

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

FINDINGS OF FACT

1. Complainant is a male. (ALJ Exh. 1)
2. Complainant is a New York State licensed radiologic technologist. (Complainant’s Exh. 1) Since April 10, 2000, Complainant has worked for Respondent as a Radiologic Technologist I. (Tr. 7, 49; Respondent’s Exh. 4)
3. Deborah O’Grady has been Respondent’s Director of Diagnostic Imaging for approximately eight years. (Tr. 56-57) The Diagnostic Imaging Department (“Department”) has 65 employees and four radiologists. (Tr. 57) The Department performs CAT scanning, MRI, ultrasound, nuclear medicine, interventional radiology, mammography, and routine radiology. (Tr. 57 ; Joint Exh. 1-2)
4. As of January 2006, the Department had only one manager, Deborah Novak. (Tr. 58) O’Grady and Gary Tucker, Respondent’s Chief Operating Officer, decided to create another managerial position because the Department was expanding. (Tr. 58)
5. O’Grady wanted the new manager to be a registered technologist, to have quality control experience, to have mammography certification, and to be a good communicator. (Tr. 59) Mammography certification was important because the mammography department had an

overflow of patients. O'Grady needed someone available to help with mammography so patients would not leave before their procedures were done. (Tr. 62, 92-93)

6. On January 24, 2006, O'Grady prepared a requisition form for Respondent's Human Resources Department ("HR") for a new full-time Manager of Diagnostic Imaging. (Tr. 60; Respondent's Exh. 3) O'Grady listed the job qualifications as "Quality control experience, current mammography certification, excellent interpersonal skills." (Respondent's Exh. 3)

7. On January 31, 2006, at 4:00 p.m., HR posted an announcement for the new managerial position. (Joint Exh. 4) Employees who were interested in applying for the position were to submit a Job Request Form ("bid") to HR by February 6, 2006. (Joint Exh. 4)

8. O'Grady first saw the posting at approximately 9:00 a.m. on February 1, 2006. She noticed that the posting was different from what she requested in that it did not include the requirement of mammography certification. (Tr. 65-66)

9. O'Grady called Kathy Richardson, an HR employee, and told her the requisition form had said mammography certification was necessary. Richardson said she would re-post the position. (Tr. 66-67)

10. On February 1, 2006 at 8:55 a.m., Complainant saw the first posting and submitted a bid to HR. (Tr. 11-12, 51; Respondent's Exh. 2)

11. On February 1, 2006, at 10:00 a.m., HR re-posted the managerial position. (Tr. 67; Joint Exh. 5). The second posting included in bold face, "Quality control experience and current Mammography certification required." (Joint Exh. 5). In all other respects, the second posting was the same as the initial posting. (Joint Exh. 4, 5)

12. At the time O'Grady asked Richardson to re-post the position, O'Grady did not know if anyone had bid on the position. (Tr. 67) All bids are submitted to HR. (Tr. 64-65) HR does not tell O'Grady about bids until the posting comes down. (Tr. 65)

13. Complainant and five other Department employees bid on the managerial position. (Tr. 67) Four of the applicants were female, and two were male. Three of the females had mammography certification; the fourth female and the two males, including Complainant, did not. (Tr. 68)

14. O'Grady and Novak interviewed all six applicants. (Tr. 61, 68) They selected Pamela Whitehead, now known as Pamela Wishowski, for the position. (Tr. 74) Whitehead had mammography certification, had good interpersonal skills, was highly motivated, was detail oriented, worked well with everyone both inside and outside the hospital, had no discipline or attendance issues, did all the Department's quality control for several years as a volunteer, and donated her time to Respondent's mission organization. (Tr. 68, 73, 75-77)

15. The American Registry of Radiologic Technologists ("ARRT") issues certification in various disciplines of radiologic technology, including mammography. There are no gender restrictions for mammography certification. (Respondent's Exh. 6)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to refuse to hire, or to discriminate against, an employee in the terms and conditions of employment on the basis of sex. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a).

Complainant alleged that Respondent rescinded the original posting for the managerial position and added the requirement of mammography certification to prevent him and other

males from applying for the position. However, the evidence clearly shows that O'Grady determined that mammography certification was a requirement for the position before Respondent first posted the position. The position was re-posted not to add a new requirement but to correct the omission of mammography certification from the initial posting. Moreover, Complainant failed to prove that a requirement for mammography certification discriminates against males. ARRT does not prohibit males from obtaining mammography certification.

Complainant has the burden of proof to show that sex discrimination occurred. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 630, 665 N.Y.S. 2d 25, 29 (1997). Complainant has failed to meet this burden. 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: December 15, 2008
Syracuse, New York



Edward Luban
Administrative Law Judge