

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**SAJI GEORGE,**

Complainant,

v.

**JACOBI HOSPITAL MEDICAL CENTER,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10122561

**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 May 20, 2009, by Robert J. Tuosto, 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.

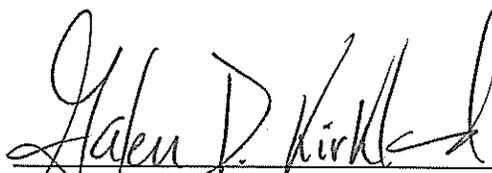
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **JUL 03 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

State Division of Human Rights  
Enforcement Unit  
Sharon J. Field, Director of Prosecutions  
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**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10122561**

**SUMMARY**

Complainant alleged that he was unlawfully discriminated against on account of his national origin when not chosen by Respondent for an Operating Room nurse position. However, Complainant has failed to prove his case and his complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On January 8, 2008, 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 J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on April 13-14, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by Emanuel R. Gold, Esq. Respondent was represented by the N.Y.C. Department of Law by Assistant Corporation Counsels Jane Andersen, Esq. and Robyn Silvermintz, Esq.

Permission to file post-hearing briefs was granted. Each side timely submitted post-hearing Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. Complainant alleged that he was unlawfully discriminated against on account of his national origin when not chosen by Respondent for an Operating Room (“OR”) nurse position. (ALJ Exh. 1)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 3)

3. Both sides stipulated that Complainant is a member of a protected class, and that he had rendered acceptable job performance while employed by Respondent. (Complainant’s Exhs. 1, 2, 3, 4, 5; Tr. 6-7)

#### **Background**

4. In 1999 Complainant, an individual of Indian national origin, began his career as an OR nurse with Respondent. (Tr. 153-54)

5. Respondent is a private hospital maintained under the auspices of the N.Y.C. Health and Hospitals Corporation (“HHC”). (Respondent’s Exh. 15; Tr. 45)

6. In 2006, Complainant transferred from the OR to the Intensive Care Unit. (Tr. 155)

#### **Complainant Applies to Return to the OR**

7. In 2007, Complainant applied, in writing, to return to the OR as a staff nurse. There

were multiple openings for this position. The posting for this position stated that the minimum qualifications were that an applicant be authorized to practice as a registered professional nurse in New York State, and have a demonstrated commitment to continued professional development. Complainant met the minimum qualifications. (Respondent's Exhs. 14, 16; Tr. 12, 14-15, 32, 71, 156-57, 183)

8. Respondent's Associate Director of Perioperative Services, Jacqueline King, was charged with the responsibility of filling OR nurse vacancies. King had been hiring nurses since approximately 1998. King intended that her hiring decisions would change the culture in the OR which had previously been "festering with...bullying and intimidation..." (Tr. 44, 101, 105-06, 183)

9. In March 2007, Complainant was interviewed for the position by King. At some time prior to the interview, Complainant was intimidating and threatening towards King when inquiring about the availability of a locker ("the locker incident"). I do not credit Complainant's self-serving denial concerning this incident especially given several previous interpersonal conflicts with hospital personnel, including one which involved the filing of a 'Crime and Incident Report' by the HHC Hospital Police. King described these interpersonal conflicts by Complainant as "lateral violence" or bullying. (Respondent's Exhs. 1, 2, 3, 4, 5; Tr. 8-10, 13, 17-19, 21-23, 47, 51-52, 64, 107, 160, 162, 167, 171, 183, 189-91, 195-96, 201, 203, 205-06)

Complainant Is Not Selected

10. On April 27, 2007 Complainant was informed in writing that he was not selected for the position. (Respondent's Exh. 6; Tr. 15, 66, 159)

11. King decided that, although Complainant had the technical skills for the position, he

lacked the interpersonal component required for the job; King conceded that the locker incident also played a part in her decision not to offer the position to Complainant. Complainant was the only person not hired of all those interviewed by King (Tr. 17, 66, 90, 104, 229)

12. Six other individuals were hired for the position; one of the six was of Indian national origin. Of the six individuals hired for the position, all met the minimum qualifications but some did not have the OR experience of Complainant. King defended this by stating that she was looking for “new blood”, *i.e.*, people that could be trained. King did not want to hire Complainant and risk perpetuating the preexisting culture of the OR. (Respondent’s Exhs. 8, 9, 10, 11, 12; Tr.74-78, 93-97, 100-101, 105-06, 198)

### **OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer, because of the “...national origin...of any individual, to refuse to hire or employ...or to bar... from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law §296.1(a).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep’t.,

1999).

To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination.

*Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Here, Complainant makes out a prima facie case. Complainant was a member of a protected class given his Indian national origin. Complainant met the minimum qualifications for the OR nurse position. Complainant did not receive the position in question. Finally, Respondent's employment action inferred unlawful discrimination as Complainant was the only applicant not hired, and some of those hired had less OR experience.

Respondent put forth two reasons as legitimate, nondiscriminatory justifications for its employment action: Complainant lacked the interpersonal skills it believed were necessary for the position given the desire to change the OR. Also, King had directly experienced a previous interpersonal conflict with Complainant which was consistent with multiple complaints by hospital personnel that he lacked interpersonal skills.

In response, Complainant failed to show that the reasons given for Respondent's employment action were a pretext for unlawful discrimination. Complainant engaged in self-serving denials of the incidents concerning interpersonal conflicts which involved hospital personnel, one of whom was the decision maker in this matter. In sum, Respondent wished to change the culture of the OR and believed it would risk perpetuating its preexisting culture by hiring Complainant. In attempting to realize this objective Respondent was free not to hire

Complainant for any reason or for no reason just as long as it did not violate the Human Rights Law. *Heffernan v. Colonie Country Club, Inc.*, 160 A.D.2d 1062, 553 N.Y.S.2d 544 (3d Dept. 1990). Based on this record I conclude that it did not.

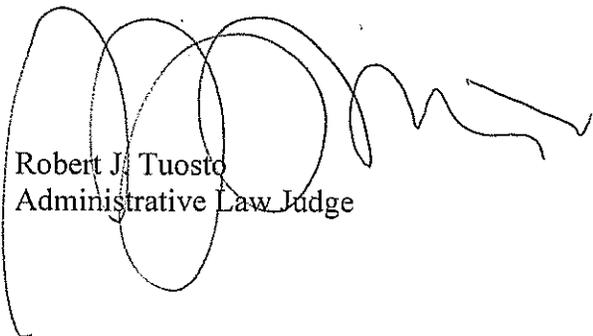
Therefore, the complaint must be dismissed.

**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: May 20, 2009  
Bronx, New York



Robert J. Tuosto  
Administrative Law Judge