

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MICHAEL GREENE,**

Complainant,

v.

**NETSMART TECHNOLOGIES, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10124077, 10116278

**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 September 8, 2009, 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 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: **OCT 09 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
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**MICHAEL GREENE,**

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**NETSMART TECHNOLOGIES, INC.,**

Respondent.

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

Case Nos. **10116278**  
**10124077**

**SUMMARY**

Complainant failed to sustain his burden that he was unlawfully discriminated against by Respondent and then retaliated against for having filed a complaint with the Division. Therefore, his complaints should be dismissed.

**PROCEEDINGS IN THE CASE**

On April 20, 2007, and March 6, 2008, respectively, Complainant 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 scheduled for September 17 and 18, 2008.

On September 15, 2008, Complainant requested that the Division grant him an administrative convenience dismissal to pursue his claims in federal court. (ALJ Exhibit 2) On September 16, 2008, Respondent objected to Complainant's request for an administrative convenience dismissal. (ALJ Exhibit 3) On September 16, 2008, Complainant's request was denied, because "it is an abuse of process to make your request on the eve of the scheduled hearing." (ALJ Exhibit 4) On September 16, 2008, Complainant requested reconsideration of the determination, stating that Complainant was confused as to his rights in electing his remedies under the Human Rights Law, and that to "punish Complainant for making this late request, due solely to the fact that he, as a layperson, was confused as to his rights, would be unjust." (ALJ Exhibit 5) On September 16, 2008, Complainant's request for reconsideration was granted, and a recommended order was issued dismissing the complaints for administrative convenience. (ALJ Exhibit 6)

On October 9, 2008, Respondent objected to the dismissal for administrative convenience. (ALJ Exhibit 10) On November 10, 2008, the Commissioner denied Complainant's request for an administrative convenience dismissal and ordered the matter returned to public hearing "in the interests of justice." (ALJ Exhibit 11)

On December 11, 2008, Complainant filed a complaint in the United States District Court, Eastern District of New York, captioned, *Michael Greene v. Netsmart Technologies, Inc. and Wendy Smith* 08 CV 4971 (TCP) (AKT)

On February 24, 2009, Complainant entered into a Stipulation of Dismissal with Prejudice dismissing the Human Rights Law claims from the federal action. The matters pending before the Division relate solely to Respondent's alleged violations under the Human Rights Law. (Tr. 10-13)

After due notice, the cases came on for hearing before Lilliana Estrella-Castillo, an ALJ of the Division. Public hearing sessions were held on April 6 and 7, 2009, and May 26, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by Leeds, Morelli & Brown, P.C., by Thomas Ricotta, Esq. Respondent was represented by Epstein, Becker & Green, P.C., by Brian G. Cesaratto, Esq.

The parties filed proposed findings of fact and conclusions of law, which were considered, and where appropriate, adopted.

### **FINDINGS OF FACT**

1. Complainant is Black. (ALJ Exhibits 17 and 18)
2. Respondent provides software applications to health care providers. (Tr. 23, 27, 428-29, 551-52)
3. In May 2000, Respondent introduced Avatar. (Tr. 182, 424-25, 551-53) This new product has a uniform set of programming codes and uses the same platform for multiple clients. (Tr. 424-25, 551-53) This move required that the employees in the Support Department have more technical skills and a thorough understanding of the Avatar application and technology. (Tr. 558)
4. In January 1997, Respondent hired Complainant as a Support Analyst in the Support Department. (Tr. 23, 54, 201-02) Complainant's duties and responsibilities included learning and understanding the product in order to assist the customers. (Tr. 26, 29)
5. In 2001, Respondent separated the Support Department into three separate groups: state support, community based support and methadone support. (Tr. 29- 30)
6. Complainant was promoted to the position of State Support Supervisor in the State Support Department. (Tr. 29-30) Complainant's duties and responsibilities were the same as the

duties he performed as a support analyst, and included the supervision of three to five customer support analysts. (Tr. 33, 35-36, 201-02, 431, 435-36) Complainant's responsibilities were to train his staff, oversee client issues and ensure that the issues were actually being followed up and completed in a timely manner. (Tr. 190, 432-33)

7. Complainant's performance reviews were due in January of every year, but Complainant received his performance review between February and May of the year in which they became due. (Tr. 291, 445; Complainant's Exhibits 1, 2, 3, 10; Respondent's Exhibits 1, 2, 3, 4, 5, 21, 29)

8. Complainant's performance was rated as "good" in the years 2001, 2002, 2003 and 2004. (Tr. 39-43)

9. Complainant's performance reviews contained the same general theme regarding Complainant's need to learn the-Avatar product by attending training, giving training and using a hands on approach. (Tr. 40-41, 186-87, 191; Respondent's Exhibits 1, 2)

10. In 2002, Respondent hired John Marnell as the Manager of the Quality Control Department. (Tr. 421)

11. In 2004, Respondent terminated the employment of Complainant's supervisor for poor performance, and replaced her with Marnell. (Tr. 48, 194, 427, 438, 561) As a result, Marnell became Complainant's direct supervisor. (Tr. 192, 201, 431)

12. Upon taking over, Marnell discovered that the State Support Department was "very disorganized." (Tr. 436-37, 522) Complainant, as supervisor, was responsible for all the state accounts, and also had direct day-to-day responsibility over the accounts for the State of Connecticut, the State of Colorado, and the State of Arkansas. (Tr. 194, 210-12, 435-36)

13. On March 19, 2004, Marnell provided Complainant with performance goals for 2004, but did not provide Complainant with a performance review because he did not supervise Complainant in 2003. (Tr. 57, 195, 199, 203-05, 438-39, 514-16; Respondent's Exhibit 3)

14. Marnell's goals for Complainant were similar to prior goals, "improve overall comprehension of the Avatar suite of products. Improving your overall comprehension of the product suite will allow you to provide superior supervisor support to your staff." Marnell also directed Complainant to get involved with his staff's calls and require all staff to conduct presentations and training every three months to help them better learn the product. (Tr. 203-05, 439, 440-43, 453-54; Respondent's Exhibit 3)

15. On April 28, 2005, Marnell provided Complainant with a performance review with an overall rating of "good," and set goals for 2005. (Tr. 43, 57, 444, 446, 528; Complainant's Exhibit 1; Respondent's Exhibits 4 and 5)

16. The goals for 2005 were a reiteration of the "old" goals, but made the goals more specific, such as update the HEAT call at least once per week, communicate with the client weekly, and directed that Complainant provide training based on a schedule outlined by Marnell. Marnell directed the training to ensure that Complainant learned the Avatar product. (Tr. 57, 209-17, 488, 451; Complainant's Exhibit 1; Respondent's Exhibit 4)

17. Complainant never provided the training and never directed his staff to conduct the training. (Tr. 259-60, 321-23; Respondent's Exhibit 4)

18. Under Marnell's supervision Complainant's performance did not improve. (Tr. 552-53) Marnell tried to coach Complainant into supervising the accounts by sitting-in on all the calls, instead of handling the accounts himself, but Complainant did not do this. (Tr. 464-65, 545)

State of Arkansas Account

19. In 2005, the State of Arkansas, an account that Complainant worked on directly left Respondent for another company because they had the same unresolved issues for two years and did not want to deal with Complainant anymore. (Tr. 468-70, 546)

State of Connecticut Account

20. In 2005, Henry Jovanelly from the State of Connecticut account (Respondent's largest biller) expressed to Marnell that "absolutely nothing is getting done" and complained about Complainant missing phone calls. (Tr. 457, 462) Jovanelly asked Marnell whether Complainant was "on drugs" complaining that "I'm getting the same answer every single week and [Complainant] acts as if it is the first time he ever heard the question I'm asking him. He says the same thing every single week . . . and something has got to be done . . . ." (Tr. 457-58) Jovanelly was "irate" and conveyed to Marnell that Complainant was impacting his ability to bill. (Tr. 458-59)

21. Marnell advised Complainant of Jovanelly's comments and discussed with Complainant the need to resolve the issues on the account because the client was threatening to take its business elsewhere. (Tr. 220-21, 460; Respondent's Exhibit 6)

22. On May 20, 2005, Marnell identified immediate steps to be taken to improve communication with the State of Connecticut. The steps outlined in the email were the same items that were outlined in Complainant's previous performance review. (Tr. 462; Respondent's Exhibit 6)

23. Complainant did not implement the plan, and Jovanelly continued to complain. (Tr. 463-54) Jovanelly complained that on November 22, 2005, and again on December 8, 2005,

Complainant informed Jovanelly that he could not make the scheduled conference calls. (Tr. 235; Respondent's Exhibit 9)

24. On November 30, 2005, Marnell emailed Complainant regarding the account and the client's concern that the account was not being handled properly. (Respondent's Exhibit 9) Marnell wrote, "I talked to [Jovanelly] yesterday and as you know his feeling is that all estimated dates are being missed or we are not getting the right resources involved to handle his issues. Can you please put together priority one issues that need to be completed for CT DAS. We then need to get SOLID estimated dates on these issues and then follow up on these daily." (Respondent's Exhibit 9)

25. On December 28, 2005, Jovanelly emailed Complainant and Marnell to complain about missed dates by Complainant. (Tr. 34-35; Respondent's Exhibit 9) In the email, Jovanelly states, "In your note, you [Complainant] said 4 items would be delivered on 12/23/2005. None of them have been delivered to date. You recall that this note was the results of our concerns about prior failed delivery dates. How is this any different?" (Respondent's Exhibit 9)

26. On Monday, March 6, 2006, Complainant emailed a project to Jovanelly that was due the prior Thursday without an explanation for the delay, just an apology. (Respondent's Exhibit 9)

27. On March 15, 2006, in response to an email from Complainant to Jovanelly in which Complainant once again was unable to make a conference call, Jovanelly emailed Marnell stating, "This is the second straight day we have been blown off. Monday's afternoon call was pointless." (Respondent's Exhibit 9)

28. The State of Connecticut ultimately requested to have someone other than Complainant run its account. (Tr. 467)

29. Marnell instructed Complainant to assign another customer support representative to the State of Connecticut account. (Tr. 465) Complainant did not follow this directive until months later. (Tr. 465)

State of Colorado Account

30. In mid 2005, Complainant reported to Marnell that Chuck Busch from the State of Colorado had telephoned him and cursed him out, telling Complainant that he did not want to deal with him. (Tr. 470-71) Marnell called Busch, and Busch complained that nothing was getting done in connection with billing issues. (Tr. 471-72) Many of the issues which existed with this account were because Complainant did not understand the capability of the system. (Tr. 472) Busch advised Marnell that Colorado would not continue to do business with Respondent if Complainant continued to be responsible for the account, and asked that someone else be placed on the account. (Tr. 473)

31. On July 6, 2005, Marnell advised Complainant that Colorado did not want him on the account and that he should assign the account to Gillian Hughes. (Tr. 226, 474-75, 547-48; Respondent's Exhibit 7)

32. On January 27, 2006, Complainant emailed Busch advising him that he will need to postpone a meeting because he was involved in another project for another client, and would not be able to meet until the middle of the following week. (Respondent's Exhibit 10)

33. Busch responded to Complainant's email stating that "this is not acceptable to me. I believe we discussed that I had a deliverable due to the Agency Director, one who reports to the Head of the Department of Human Services, and the reason for my request to you was, in part, tied to the lack of timely responses from [Respondent]. Perfect example of the issue above. I

got this email the day this was due and all I get is excuses once again! At least I got an email, that's an improvement." (Tr. 246-51; Respondent's Exhibit 10)

34. On January 30, 2006, Marnell had a conversation with Complainant regarding the missed deadline for the State of Colorado and also told Complainant that he should never tell a client that he cannot make a meeting because he is working for another client and that he should alert Marnell if he cannot make a meeting. (Tr. 251, Respondent's Exhibit 10)

35. On February 11, 2006, Marnell emailed Complainant telling Complainant that he wanted Complainant free of all accounts and wanted Hughes to handle the State of Colorado account. (Tr. 475-76; Respondent's Exhibit 11)

36. Despite this direct order by Marnell, since July 2005, Complainant never assigned Hughes to this account. (Tr. 252-53, 357, 474-77)

#### Supervision of Staff

37. In 2005, Complainant's subordinates were bypassing Complainant by going directly to Marnell with their questions and seeking advice. (Tr. 489) Complainant's staff did not feel comfortable going to Complainant with questions because Complainant did not know the product or would say he would look into the problem and not get back to them for weeks. (Tr. 490, 494; Respondent's Exhibit 20)

38. Marnell asked Complainant on several occasions to assign his accounts to his subordinates so that he could dedicate more time to the supervision of his staff. (Tr. 226-27) On September 2, 2005, Marnell emailed Complainant regarding the State of Arizona account complaint that no one from Complainant's department was responding to his emails. (Tr. 229; Respondent's Exhibit 8) Marnell had to instruct Complainant to assign someone to the account. (Respondent's Exhibit 8)

Wendy Smith's Supervision of Complainant

39. On March 31, 2006, Wendy Smith was promoted to Director of Quality Assurance and State Support, and became Complainant's direct supervisor. (Tr. 587-90; ALJ Exhibit 17)

40. Marnell was promoted to Senior Director of Customer Service, and, as a result, oversaw the State Support and Quality Assurance Departments, and supervised Smith. (Tr. 478-79, 501)

41. Complainant alleged that Smith treated him differently than Caucasian employees, and treated him and his team with contempt. (Tr. 68-70)

42. Complainant also alleged that Smith was dismissive when he asked her how he could help in addressing issues within the department, and criticized the training of his staff. (Tr. 64, 66, 69)

43. When Smith became Complainant's supervisor she immediately became aware of Complainant's performance issues. She was advised by Marnell that Complainant was not performing his supervisory role, and that Complainant's staff was bypassing Complainant and coming to him for answers. (Tr. 591-92, 647)

44. Smith met with Complainant's staff and three of the four staff members told her that they did not feel that Complainant could assist them with program issues because Complainant did not know the product well enough. (Tr. 593-95) And, Hughes complained that Complainant had not provided her with the assistance she needed to learn the product and do her job. (Tr. 354, 595-96) Complainant was responsible for training his staff. (Tr. 71)

45. Smith also became aware of Complainant's problems with the accounts that he was handling, such as the State of Colorado account which had over 50 outstanding issues. (Tr. 597-98) When Smith sat in on the telephone conference with Complainant, the client was "very angry and cursing." (Tr. 598-600)

46. When the State of Colorado informed her that they wanted Complainant removed from its account, Smith decided to give Complainant two weeks to see if things changed with the account. (Tr. 486, 602-03)

47. Things did not change, and on April 29, 2006, Marnell and Smith informed Complainant that he was being removed from the State of Colorado account at the client's request. (Tr. 75-76, 266-67, 546-48, 604; ALJ Exhibit 17)

48. Smith assigned Charlene Hill, a Caucasian employee, to the account. (Tr. 78-79, 480)

49. The client expressed its gratitude to Marnell in an email dated May 16, 2006, in which it states, "Keep up the good work. Yes, Charlie/Charlene and Wendy are continuing to make a difference." (Tr. 482-83; Respondent's Exhibit 18)

#### Complainant's 2006 Performance Review

50. On May 19, 2006, Marnell gave Complainant his performance review for 2005. Marnell rated Complainant "below standards" based on his failure to meet performance goals and his poor job performance. (Tr. 454-55, 480; Complainant's Exhibit 2; Respondent's Exhibit 19)

51. Smith had no input in Complainant's performance review. (Tr. 484)

52. Complainant does not attribute discriminatory animus to Marnell. (Tr. 179, 270)

#### Transfer to Quality Assurance

53. Since Complainant was not learning the product, and his performance was not improving, Marnell together with Smith offered Complainant a transfer to the Quality Assurance Department, which is responsible for ensuring that patches, enhancements and fixes to the software are prepared, tested and returned to Respondent's clients. (Tr. 364-65, 367, 421-23, 499, 503, 606, 642-44)

54. Marnell and Smith met with Complainant and offered him the transfer explaining that it would enable him to improve his product knowledge. (Tr. 501, 543-45, 608-09) Following his reflection on the transfer for a couple of weeks, in May 2006, Complainant willingly accepted the transfer to the Quality Assurance Department as a Quality Assurance Engineer. (Tr. 82, 267-68, 609-10; ALJ Exhibit 17)

55. As a quality assurance engineer, Complainant retained his yearly salary of \$64,500, but no longer had supervisory responsibilities. (Tr. 268-69, 397, 542) Complainant considered it a demotion because he would no longer have client contact or any supervisory role; he was “just a worker.” (Tr. 83, 107, 629, 632)

#### Complainant’s 2007 Performance Review

56. John Robilotta, one of the most experienced quality assurance engineers, trained Complainant in his new role of quality assurance engineer. (Tr. 113-14, 271-73, 372, 395, 737)

57. On May 9, 2007, Complainant received his performance review with an overall rating of “poor.” (Tr. 134-36; Complainant’s Exhibit 3) Barbara Pollina, Complainant’s supervisor prepared the performance review. (Tr. 127, 370-71, 372-73) Pollina is Hispanic. (Tr. 390)

58. Pollina’s observation of Complainant was that “unfortunately the contribution [Complainant] has brought to the QA team has been minimal. There is no sense of urgency to get work completed. This is based on the fact that two new hires who knew nothing about the software have been and continue to get more accomplished (with quality) than [Complainant]. [Complainant] doesn’t seem to want to interact with the rest of the staff.” (Tr. 372-73, 379-82, 386-87; Complainant’s Exhibit 3; Respondent’s Exhibits 46, 47)

### Bonus

59. In 2007, based on his 2006 performance, Complainant received a \$1,000.00 bonus. (Tr. 614)

60. Complainant was not aware of the amount of the bonus, until after he received the bonus. Complainant attributed the fact that he was not timely informed of the amount of the bonus to Smith's discriminatory animus towards him. (ALJ Exhibit )

61. Smith was on vacation when the bonus was approved by her supervisor, therefore, in an attempt to call the employees and advise them of their bonuses she forgot to call Complainant, Bill Kelley and Joe Giachetti, both of whom are White. (Tr. 616-18; Respondent's Exhibit 23)

### Complainant's Request for a Promotion

62. On July 12, 2007, despite Complainant's poor performance rating, Complainant emailed Walt Thomas, his supervisor at the time, requesting consideration for a promotion to Manager of Product Support. (Tr. 146-47; Complainant's Exhibit 6) Thomas responded that neither "past performance as documented in your reviews, or your manager's recommendations makes this a viable option." (Complainant's Exhibit 6)

### Complainant's Internal Discrimination Complainants

63. On February 21, 2007, Complainant filed an internal complaint of race discrimination against Smith. Complainant alleged that the transfer to Quality Assurance, and his prior performance review were the result of Smith's discriminatory animus towards him because he was not aware of any client complaints or any request from clients that he be removed from their accounts. (Tr. 32, 274-76, 277-78, 688; Respondent's Exhibits 14, 32)

64. Complainant's complaint was thoroughly investigated, and Respondent determined that there was no discrimination because the transfer was the result of Complainant's lack of product knowledge and client complaints. (Tr. 32-41, 126-27, 688-713; Respondent's Exhibit 22)

65. In December 2007, after receiving Respondent's determination of no discrimination, Complainant emailed Respondent's CEO and members of the Board of Directors asserting that Respondent turned a "blind eye to discrimination." (Tr. 282-83)

66. At Respondent's CEO's instructions, Respondent's general counsel reviewed Complainant's allegations and reached the same conclusion that no discrimination had occurred. (Tr. 180, 182-83, 717-37; Complainant's Exhibits 7 and 8; Respondent's Exhibits 42, 43 and 44)

#### Discrimination Complaints with the Division

67. Complainant filed a complaint with the Division on April 20, 2007, alleging that Respondent unlawfully discriminated against him because of his race/color by reassigning the State of Colorado's account from his supervision; demoting him from Supervisor of the State Support Services Department to a non-management position; granting him a lesser bonus for 2006 than he expected; and giving him his 2005 annual performance review later than in previous years. (Tr. 717-18; ALJ Exhibit 17)

68. On March 6, 2008, Complainant filed a complaint with the Division alleging that Respondent retaliated against him for filing a complaint of race discrimination with the Division on April 20, 2007, by giving him a negative evaluation in May 2007; and denying him a promotion to a managerial position. (Tr. 280, 718; ALJ Exhibit 18)

### Who Discriminated against Complainant

69. Complainant alleges that Smith was the only individual that discriminated against him, and attributed no discriminatory animus to Marnell, or to the clients that requested that he be removed from their accounts. (Tr. 179, 261; Complainant's Exhibit 2)

### OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual because of race. Human Rights Law §296.1 (a).

To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (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).

If a complainant makes out a prima facie case of discrimination, the burden then shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Complainant alleged that Smith unlawfully discriminated against him because he is Black by reassigning the State of Colorado account from his supervision; demoting him from Supervisor of the State Support Services Department to a non-management position; granting

him a lesser bonus for 2006 than he expected; and giving him his 2005 annual performance review later than in previous years.

Complainant failed to make out a prima facie case of race discrimination regarding the transfer to a non-managerial position. Complainant is a member of a protected class, he is Black. However, Complainant failed to satisfy the other three prongs of a prima facie case.

Complainant was not qualified for the position he held because his performance evaluations indicated that Complainant's performance was lacking. Complainant was made aware that his product knowledge was lacking since 2002; he was made aware that the customers for which he was responsible were complaining about the support he was providing them and wanted him removed from their accounts; and, he was not adequately supervising his staff. Complainant did not suffer an adverse employment action because Respondent did not involuntarily transfer Complainant, instead, Respondent offered Complainant a transfer, Complainant thought about it and voluntarily decided to accept the transfer which was an opportunity for Complainant to better learn the Avatar product. Moreover, Complainant failed to produce evidence that the offer of a transfer occurred under circumstances giving rise to an inference of unlawful discrimination. Complainant indicated that Smith felt contempt for him and his staff, but his staff was not Black. Smith also found that his performance was lacking, but so did his prior and subsequent supervisors, none of whom he attributes any discriminatory animus.

Complainant failed to make out a prima facie case of unlawful discrimination regarding his other allegations as well. Complainant failed to show that he suffered an adverse employment action when he was not told of the amount of his bonus until he actually received it. Complainant also failed to show that he suffered an adverse employment action because he received his performance evaluation in May, because Complainant never received a timely

performance evaluation. Complainant failed to show that he suffered an adverse employment action when Smith reassigned the State of Colorado account from his supervision, to a White subordinate. The record is replete with evidence, including Complainant's own admissions that the State of Colorado had been complaining about Complainant's lack of communication and lack of resolution to their issues which rendered Respondent's software useless to them if they could not bill. The record also shows that Smith made the decision to reassign the account from Complainant's supervision because the client did not want to work with Complainant anymore and asked for another support person. Furthermore, Complainant did not attribute any discriminatory animus to the client's request that the account be reassigned from Complainant.

In order to establish a prima facie case of retaliation, a complainant must show that (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected activity; (3) he suffered an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v. Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v. New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996).

If a complainant can establish a prima facie case of retaliation, the respondent must then articulate a legitimate, non-discriminatory business reason for its actions. If the respondent does so, then the complainant must show that the proffered reason is a pretext for discrimination. *Pace University v. N.Y. City Comm. on Human Rights*, 85 N.Y.2d 125, 128, 623 N.Y.S.2d 765 (1995); *Pace v. Ogden*, at 103.

On March 6, 2008, Complainant filed a complaint with the Division alleging that Respondent retaliated against him for filing a complaint of race discrimination with the Division

on April 20, 2007, by giving him a negative evaluation in May 2007; and denying him a promotion to a managerial position.

Complainant failed to make out a prima facie case of retaliation. Although Complainant engaged in protected activity when he filed a complaint with the Division, and Respondent was aware that Complainant filed the complaint, he failed to show that he suffered an adverse action or that it was causally related to the protected activity.

Complainant provided no evidence that his evaluation constituted an adverse employment action, because he suffered no materially adverse change in the terms, privileges or conditions of his employment, such as demotion, suspension, or loss of wages. *See, McArdle v. Arms Acres, Inc.*, 2009 WL 755287, at \*10, fn. 11 (S.D.N.Y. Mar. 23, 2009). *See also, Gordon v. N.Y. City Bd. Of Educ.*, No. 01 Civ. 9265 (SAS), 2003 WL 1698000, at \*6 (S.D.N.Y. Jan. 23, 2003) (“negative evaluations alone, without any accompanying adverse consequences . . . do not constitute adverse employment actions.”). Complainant’s allegation is further belied by the fact that Complainant had been rated “below standards” by Marnell the year before, and he does not attribute any discriminatory animus towards Marnell, and Complainant was aware that his evaluation was already due when he filed a complaint with the Division.

Complainant failed to make out a prima facie case of retaliation regarding his request to be considered for a promotion to Manager of Product Support in July 2007. Complainant failed to produce any evidence to substantiate his claim that he was not considered for the promotion simply because he engaged in protected activity. The evidence presented demonstrates that Complainant asked to be considered for a promotion when he had recently been effectively demoted, when he was transferred to a position without any supervisory duties, and had been rated “below standards” the year prior and “poor” just two months prior to his request.

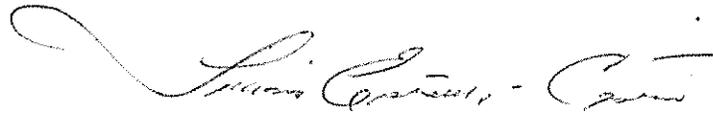
The parties' remaining contentions have been rendered academic by this opinion and decision.

**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: September 8, 2009  
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo". The signature is fluid and cursive, with a large initial "L" and a long horizontal stroke extending to the right.

Lilliana Estrella-Castillo  
Administrative Law Judge