

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

KENNETH A. HERNANDEZ,

Complainant,

v.

**NEW YORK STATE, STATE UNIVERSITY OF
NEW YORK AT STONY BROOK,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10117046

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 July 30, 2008, 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

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

Case No. **10117046**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him based on his race, color and national origin by refusing to promote him. Respondent denied these allegations. The credible record does not support Complainant's allegations of discrimination. Accordingly, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 17, 2007, 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 April 7 and 8, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Edward C. Lehman, Esq. on behalf of the law firm Siben & Ferber. Respondent was represented by Michele J. Le Moal-Gray, Esq., Associate Counsel, State University of New York, Stony Brook.

Respondent filed a timely post-hearing brief. Complainant did not file a post-hearing brief.

FINDINGS OF FACT

1. Complainant alleged that Respondent unlawfully discriminated against him based on his race, color and national origin by refusing to promote him. (ALJ's Exh. 1)
2. Respondent denied these allegations. (ALJ's Exh. 2)
3. Complainant began working for Respondent as a hospital attendant one (Grade SG-5) on August 17, 2000. (Tr. 7) Respondent subsequently hired Complainant into three other positions prior to the filing of the instant complaint. From November 17, 2005 until the filing of the instant complaint, Complainant worked as a full-time cleaner (Grade SG-5) in Respondent's Maintenance Department. (Tr. 7-9)
4. Since 2001, Complainant applied for many different higher paying positions with Respondent, but was not hired. (Tr. 19-20, 86; ALJ's Exh. 1) During that time period, Complainant was interviewed by at least three different people for these positions. (Tr. 21)

5. On April 11, 2006, Complainant applied for the position of maintenance helper (Grade SG-6), a labor class position. (Tr. 150; Respondent's Exhibits 2, 3) This position required plumbing experience. (Tr. 206, 208, 234)

6. In or about May 2006, Complainant was interviewed for this position by Edward Byrne, assistant director of residential operations for Respondent. (Tr. 22, 31, 63, 84, 151, 201-02, 205, 207) Denise Bugge, a human resources secretary for Respondent, also participated in this interview. (Tr. 151, 230, 232, 234) Complainant was interviewed by Byrne for other positions in the past, but was not selected. (Tr. 22-23, 202)

7. Byrne did not select Complainant for the maintenance helper position. On or about May 31, 2006, Byrne selected Adam Orrach, a white male who had less seniority than Complainant, to fill this position. (Tr. 34-35, 38, 212; Complainant's Exh. 7; Respondent's Exh. 6) Byrne chose Orrach over other candidates because Orrach articulated superior plumbing skills. (Tr. 212-13; Respondent's Exh. 6)

8. When asked about his plumbing experience at the interview, Complainant merely stated that he could cut pipe and that he loaded trucks for a plumbing contractor in the past. (Tr. 209, 224, 237; Respondent's Exh. 6)

9. Bugge, who had participated in at least seven of Complainant's prior interviews, corroborated Byrne's testimony. (Tr. 231, 239) After the interviews were concluded, Bugge concurred with Byrne's conclusion that Orrach was the best candidate for the position. (Tr. 237)

10. Chrisoula Cantone-Stadier, supervisor of classified appointments for Respondent, participated in some of Complainant's prior interviews. (Tr. 139-41) Cantone-Stadier recalled that Complainant consistently had difficulty articulating responses to interview questions. (Tr. 147) Bugge also testified that Complainant had difficulty expressing himself during interviews.

(Tr. 239, 252) Cantone-Stadier had spoken to Complainant, on more than one occasion, about his need to improve his interviewing skills. (Tr. 154-55)

11. All applicants who are invited to interview for an open position are deemed to be qualified for the position. (Tr. 144-45) They are asked a fixed set of questions, which are pre-screened by Cantone-Stadier, tailored to the particular job opening. (Tr. 143-44, 203-04)

12. Complainant claimed that he should have received a hiring preference over Orrach because of his seniority. (Tr. 82) Respondent presented evidence showing that seniority is not a factor in hiring for labor class positions. (Tr. 150, 153, 195-96; Respondent's Exh. 5)

13. On June 9, 2006, Complainant filed an internal complaint with Respondent's Office of Diversity & Affirmative Action ("ODAA") alleging that Respondent failed to hire him because of his race and color. (Tr. 58, 268; Respondent's Exh. 1) Antonio Ferrantino, a management intern for Respondent at the time, met with Complainant and investigated the complaint. (Tr. 57, 266; Respondent's Exh. 1)

14. As part of his investigation, Ferrantino interviewed Cantone-Stadier and Byrne. He also reviewed the hiring packet for the position. (Tr. 273-76, 280; Respondent's Exh. 8)

15. Cantone-Stadier explained to Ferrantino that Complainant was not chosen for the position because he did not interview well and stated that he possessed only rudimentary plumbing skills. (Tr. 280-81) Byrne also told Ferrantino that Complainant did not elaborate on his plumbing skills at the interview and articulated little relevant experience. (Tr. 282)

16. After reviewing all pertinent information, Ferrantino concluded that candidate interviews played the most significant role in the selection process for this position and that Complainant simply did not interview as well as Orrach. (Tr. 282-83) By letter dated August

24, 2006, Ferrantino notified Complainant that his investigation revealed that Complainant's allegations of discrimination were unsubstantiated. (Tr. 283; Complainant's Exh. 2)

17. As a result of his own interactions with Complainant, Ferrantino noted that Complainant exhibited evident deficiencies in his oral communication skills. (Tr. 294-95) When Ferrantino spoke to Complainant about the results of his investigation, he referred Complainant to resources available to help him improve his interviewing skills. (Tr. 287-89; Complainant's Exh. 2; Respondent's Exh. 9)

18. On September 11, 2007, Respondent hired Complainant into his current position as a grounds worker (Grade SG-6). (Tr. 51-52)

OPINION AND DECISION

The Division finds that Respondent did not discriminate against Complainant on the basis of his race, color and national origin in violation of the N.Y. Exec. Law, art. 15 ("Human Rights Law").

Complainant alleged that, since 2001, Respondent failed to promote him on many occasions because of his race, color and national origin. 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." 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 the filing of the instant complaint are time-barred.

Complainant alleged that Respondent unlawfully discriminated against him based on his race, color and national origin by not selecting him for the maintenance helper position in May 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 race, color or national origin. 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).

Since Complainant did not show that Respondent's failure to hire him was related to his race, color or national origin, the complaint must be dismissed. Complainant did not show that Byrne, or anyone else associated with Respondent, acted with discriminatory animus. Complainant's conclusory allegations that he should have received a preference over Orrach because of his seniority are not supported in the record. Respondent presented evidence showing that seniority was not a factor in labor class hiring decisions. This evidence is not credibly refuted in the record.

Although Orrach and Complainant were both qualified for the position, the credible

record establishes that Respondent did not select Complainant because he did not interview as well as Orrach. The record is replete with credible testimony describing Complainant's evident deficiencies in his oral communication skills. Respondent's internal review of the hiring process in question supported this conclusion. Respondent subsequently referred Complainant to resources available to help him improve his interviewing and oral communication skills

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against him. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant's conclusory allegations are insufficient to satisfy this burden. *See Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

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: July 30, 2008
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge