



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JACKLYN LISI,

Complainant,

v.

**NEW YORK STATE UNIFIED COURT SYSTEM,
OFFICE OF COURT ADMINISTRATION,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10200882

Federal Charge No. 16GB902904

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 June 4, 2021, 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.

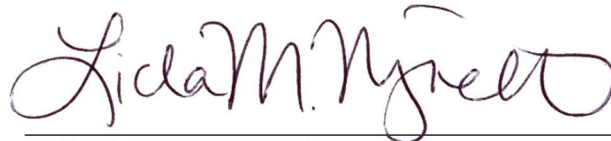
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE LICHA M. NYIENDO, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **July 21, 2021**
Bronx, New York

A handwritten signature in cursive script, reading "Licha M. Nyiendo". The signature is written in dark ink and is positioned above a horizontal line.

LICHA M. NYIENDO
COMMISSIONER



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on the Complaint of

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v.

**NEW YORK STATE UNIFIED COURT
SYSTEM, OFFICE OF COURT
ADMINISTRATION,**

Respondent.

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

Case No. **10200882**

Federal Charge No. 16GB902904

SUMMARY

Complainant alleged that Respondent subjected her to unlawful retaliation by failing to promote her because she filed a prior complaint of discrimination. Because the record does not support Complainant's allegations, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 9, 2019, 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 virtually on January 20, 2021, and January 21, 2021.

Complainant and Respondent appeared at the hearing. Complainant was represented by Peter J. Famighetti, Esq. Respondent was represented by Jessica Cherry, Esq., Assistant Deputy Counsel.

Permission to file post-hearing briefs was granted. The parties filed timely post-hearing briefs, which were considered and, where appropriate, adopted.

FINDINGS OF FACT

1. In 1987, Complainant became a freelance court reporter. (Tr. 21)
2. On or about March 3, 2011, Respondent hired Complainant as a provisional court reporter; she was assigned to work in Kings County Supreme Court. (Tr. 24)
3. In or about June 2011, Complainant’s employment with Respondent ended as a result of a reduction in force. (Tr. 25-26)
4. In the summer of 2011, Complainant took the civil service test for the court reporter position and the senior court reporter position. (Tr. 26)
5. The court reporter position and the senior court reporter position are competitive titles under the New York State Civil Service Law. (Tr. 170)

6. At the end of 2014, Complainant received canvass letters seeking to determine whether she was interested in interviewing for open court reporter positions in Nassau County District Court and Suffolk County District Court. (Tr. 26-27)

7. Complainant was interested in these positions, and she interviewed for both positions. (Tr. 27)

8. After receiving an offer of employment, Complainant began working for Respondent as a court reporter, civil service grade 24, in Suffolk County District Court on January 15, 2015. (Tr. 21, 27-28)

9. At the time of the public hearing, Complainant continued to be employed as a court reporter in Suffolk County District Court. (Tr. 21)

10. Since Complainant began working for Respondent as a court reporter, it has been her goal to obtain a promotion to the senior court reporter position, civil service grade 27, so she could earn more money. (Tr. 29, 100; Complainant's Exh. 11)

11. In June 2015, Complainant took a civil service promotional test for the senior court reporter position. Complainant received a score of 89.10 on the test and was ranked number 37 in the state on the civil service list of qualified applicants. (Tr. 30-31)

12. In or about March 2016, Complainant received a canvass letter for open senior court reporter positions in Suffolk County Supreme Court. (Tr. 32-35)

13. Complainant was interviewed by Michael Scardino, chief clerk of the Suffolk County Supreme Court, and another individual from the Suffolk County Court. (Tr. 33-34)

14. Complainant was not hired for these positions. (Tr. 35)

15. In October 2017, Complainant interviewed with Scardino and other individuals for three open senior court reporter positions in Suffolk County. (Tr. 35-39)

16. Complainant was not hired for these positions. (Tr. 39-40)

17. In or about June 2018, Complainant interviewed for open senior court reporter positions in Nassau County. (Tr. 42-44)

18. Complainant was not hired for these positions. (Tr. 45)

19. On June 22, 2018, Complainant filed Case No. 10195374 with the Division. In that complaint, Complainant alleged that Respondent interviewed her in October 2017 and June 2018 and did not hire her for open senior court reporter positions because of her age, sex, and in retaliation for opposing discriminatory practices. (ALJ's Exh. 5)

20. On February 15, 2019, the Division determined that there was no probable cause to support the allegations contained in Case No. 10195374. (ALJ's Exh. 5)

21. On August 22, 2018, Complainant interviewed for two open senior court reporter positions in Nassau County. (Tr. 52, 57, 111; Complainant's Exh. 3)

22. The members of the Nassau County interview panel consisted of Lisa Porteous, principal court reporter, Kathryn Hopkins, chief clerk, and Janine Krebs, senior court reporter. (Tr. 52-53, 277-78, 324; Complainant's Exh. 3)

23. The Nassau County interview panel interviewed five candidates for the open senior court reporter positions. The five interviewees appeared on the Nassau County appointment list as follows: Complainant (rank number 1 – score 89.10), Nowal Schmidt (rank number 2 – score 86.90), Ellen Kahen (rank number 4 – score 81.10), Patricia Reed (rank number 5 – score 80.20), and Corinne Barone (rank number 6 – score 79.80). (Complainant's Exh. 3)

24. A candidate's civil service rank is only one factor to be considered in the hiring process. (Tr. 305, 334, 360-61)

25. The Nassau County interview panel considers the interview process to be an integral part of the hiring process for the senior court reporter position. (Tr. 280, 328)

26. During the interview process, each candidate was asked the same format of questions. (Tr. 283, 333)

27. When making a hiring recommendation, an interviewer considers several factors, such as the candidate's experience in the court system, interpersonal skills, letters of recommendation, membership in professional organizations, appearance and demeanor at the interview, and the interviewer's familiarity with the candidate from prior work interactions. (Tr. 279, 284, 317, 334-35)

28. The Nassau County interview panel selected Schmidt and Kahen to fill the open senior court reporter positions. (Complainant's Exh. 3)

29. Porteous selected Schmidt because she was familiar with her work and believed that she "would be a good fit" for the senior court reporter position. (Tr. 334-35)

30. Porteous selected Kahen because she made a good impression at the interview and received an impressive recommendation from her supervising judge. (Tr. 335)

31. Krebs selected Schmidt and Kahen because they made exceptionally positive impressions during their interviews, and they both had extensive experience working in the court system. (Tr. 284, 300-02, 317)

32. Krebs also was influenced by the distinguished reference Kahen received from her supervising judge. (Tr. 284-85)

33. The record does not show that anyone on the Nassau County interview panel was aware of Complainant's prior complaint in Case No. 10195374 during the decision-making process. (Tr. 281-82, 291-92, 332-33, 338)

34. The record does not show that anyone on the Nassau County interview panel was coerced to deny Complainant a promotion to the senior court reporter position. (Tr. 282, 291, 337-38)

35. Shortly after Complainant's August 22, 2018, interview, the previous civil service promotional test expired. (Tr. 73-75)

36. In March 2018, Complainant took the next civil service promotional test for the senior court reporter position; the list of scores for that test came out in September 2018. (Tr. 74-75)

37. On the March 2018 civil service promotional test, Complainant received a score of 86.20 and was ranked number 47 in the state. (Tr. 76-77; Complainant's Exh. 6)

38. On November 26, 2018, Complainant interviewed for open senior court reporter positions in Suffolk County. (Tr. 78-79, 86; Complainant's Exh. 6)

39. The members of the Suffolk County interview panel consisted of Scardino, Kenneth Sasso, deputy chief clerk, and Sandra Gaskin, principal court analyst. (Tr. 79, 162, 172-73, 246, 251-52; Complainant's Exh. 6)

40. The Suffolk County interview panel interviewed eleven candidates for two open senior court reporter positions. (Complainant's Exh. 6)

41. Complainant was ranked number 7 on the Suffolk County appointment list. (Tr. 77-78; Complainant's Exh. 6)

42. The Suffolk County interview panel considers the interview process to be an integral part of the hiring process for the senior court reporter position. (Tr. 173, 181, 253)

43. During the interview process, each candidate was asked the same format of questions. (Tr. 176, 207-08, 255-56)

44. At her interview, Complainant appeared “annoyed,” did not respond to questions, showed “very little interest in the position,” initiated an unsolicited “speech” about her prior Division complaint, and complained that she was passed over for previous opportunities for promotion. (Tr. 174, 178-79, 202, 231, 253-54, 258-59; Complainant’s Exh. 6)

45. The panel did not ask Complainant about her prior Division complaint. (Tr. 175, 254-55)

46. Several times during Complainant’s interview, she asked the panel, “Are we done?” Complainant also ended the interview before it was completed. (Tr. 174, 220, 230-32, 265)

47. The panel selected Lorianne Tominey, ranked number 4 on the Suffolk County appointment list, and Linda Cipriano, ranked number 6 on the Suffolk County appointment list, to fill the open senior court reporter positions. (Tr. 179-80, 259-60; Complainant’s Exh. 6)

48. The panel selected Tominey and Cipriano because they were well-qualified, answered the interview questions well, conducted themselves appropriately during their interviews, and were able to be selected based on their rank. (Tr. 180-84; Complainant’s Exh. 6)

49. Complainant was not reached by rank because each of the individuals selected for the positions held a higher rank than Complainant. (Tr. 182-84, 195-97, 209; Complainant’s Exh. 7)

50. The record does not show that anyone on the Suffolk County interview panel was coerced to select Tominey and Cipriano instead of Complainant for the open senior court reporter positions. (Tr. 181, 260)

51. The fact that Complainant filed Case No. 10195374 played no role in the Suffolk County interview panel’s decision to select Tominey and Cipriano instead of Complainant for the open senior court reporter positions. (Tr. 181-82, 260-61)

OPINION AND DECISION

On June 22, 2018, Complainant filed Case No. 10195374 with the Division. In that complaint, Complainant alleged that Respondent interviewed her in October 2017 and June 2018 and did not hire her for open senior court reporter positions because of her age, sex, and in retaliation for opposing discriminatory practices.

On February 15, 2019, the Division determined that no probable cause existed to support the allegations contained in Case No. 10195374.

In the instant case, Complainant alleged that Respondent denied her a promotion to the senior court reporter position on two occasions: after the August 22, 2018, Nassau County interview and after the November 26, 2018, Suffolk County interview. Complainant alleged that Respondent did not promote her on both occasions because she filed Case No. 10195374 with the Division.

It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed unlawful discriminatory practices. N.Y. Exec. Law, art.15 (“Human Rights Law”) § 296.7.

To make out a prima facie case of retaliation, a complainant must show that 1) he or she engaged in activity protected by the Human Rights Law, 2) the respondent was aware that the complainant participated in the protected activity, 3) he or she suffered an adverse employment action, and 4) there is a causal connection between the protected activity and the adverse employment action. *Adeniran v. State of New York*, 106 A.D.3d 844, 844, 965 N.Y.S.2d 163, 164-65 (2d Dept. 2013).

In a retaliation context, an adverse employment action is one which “might have

dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Mejia v. Roosevelt Is. Med. Assoc.*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), *aff’d*, 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed*, 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013) (citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006)).

If a complainant makes out a prima facie case of retaliation, the burden shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its actions. If the respondent does so, the complainant must show that the reasons presented by the respondent were merely a pretext for discrimination. *Adeniran* at 845, 965 N.Y.S.2d at 165.

Complainant has established a prima facie case of retaliation for both of the promotional opportunities. Complainant engaged in protected activity when she filed Case No. 10195374 with the Division. By the time Complainant had her Nassau County interview on August 22, 2018, Respondent had general institutional knowledge that Complainant filed Case No. 10195374 two months earlier. This is sufficient to establish the knowledge requirement of Complainant’s retaliation claim. *See Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000) (evidence of general corporate knowledge is sufficient to meet the second element of a retaliation claim). With regard to the November 26, 2018, Suffolk County interview, Respondent had institutional knowledge of the prior filing. Moreover, Complainant informed the Suffolk County interview panel about the prior Division complaint when she initiated an unsolicited discourse about that complaint. Complainant suffered an adverse employment action when Respondent did not promote her to the senior court reporter position on both occasions.

The record contains no direct evidence of retaliatory animus on the part of anyone on the Nassau County interview panel, the Suffolk County interview panel, or anyone else involved in

Respondent's decision-making process. However, causation can be presumed in the absence of retaliatory animus if there is sufficient temporal proximity between the protected activity and the adverse employment actions. *See Calhoun v. County of Herkimer*, 114 A.D.3d 1304, 1307, 980 N.Y.S.2d 664, 667 (4th Dept. 2014). After Complainant filed Division Case No. 10195374 on June 22, 2018, the first opportunity Respondent had to consider a promotional opportunity for Complainant occurred after she interviewed with the Nassau County interview panel on August 22, 2018. After a new list of scores came out in September 2018, the next chance Respondent had to consider a promotional opportunity for Complainant occurred after the November 26, 2018, Suffolk County interview. Based on the facts of this case, the temporal proximity between the protected activity and the adverse employment actions is sufficient to create an inference of causation. *See Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months). Therefore, Complainant has established a prima facie retaliation claim.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

The interview process is a vital part of the hiring process for the senior court reporter position. The Nassau County interview panel interviewed all eligible candidates and asked them the same format of questions. The Nassau County interview panel selected Schmidt and Kahen because they felt they were the best candidates. In addition to their own tangible individual strengths, both candidates made exceptionally positive impressions during their interviews and had extensive experience working in the court system. After the interviews were completed, the

Nassau County interview panel concluded that Schmidt and Kahen were the best fit for the open positions.

The Suffolk County interview panel interviewed eleven candidates and asked the same format of questions to each candidate. Complainant did not do well during her interview. At her interview, Complainant appeared annoyed, disinterested, and impatient. She used the interview process as a forum to express her grievances and abruptly ended the interview. The Suffolk County interview panel selected Tominey and Cipriano because they were well-qualified, answered the interview questions well, conducted themselves appropriately during their interviews, and were able to be selected based on their rank. Ultimately, Complainant was not reached by rank because each of the selected candidates held a higher rank than Complainant.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet this burden.

Inherent in the selection process is the rejection of other candidates. When one person is chosen over another, it is inevitable that there will be differences between the candidates regarding their protected characteristics. *See DiLegge v. Gleason*, 131 F. Supp. 2d 520, 526 (S.D.N.Y. 2001). Complainant's subjective, conclusory assertions that she should have received these promotions over the other candidates are insufficient to establish pretext. All of the chosen candidates were qualified for the senior court reporter position. Both of the interview panels conducted proper interviews and chose the candidates they believed were the best fit for the positions.

The focus of the inquiry here is not whether Respondent acted with good judgment in selecting other candidates over Complainant, but whether those selections were based on unlawful retaliatory animus. Respondent is entitled to rely on subjective factors in judging

which applicants to appoint from the civil service list of qualified applicants. *See DiLegge*, 131 F. Supp. 2d at 526. The record does not support a finding that Complainant's prior Division complaint played any role in Respondent's decision-making process.

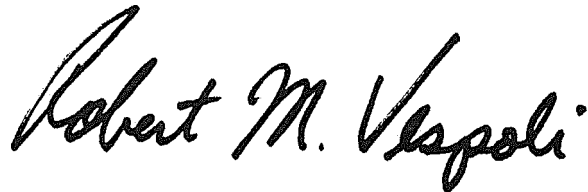
Accordingly, Complainant's retaliation claim must be dismissed.

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 instant complaint be, and the same hereby is, dismissed.

DATED: June 4, 2021
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli
Administrative Law Judge