

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ANGEL M. LOPEZ,

Complainant,

v.

SIDS HARDWARE & HOME CENTER,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10107856

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 April 16, 2008, by Rosalie Wohlstatter, 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, ACTING 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.

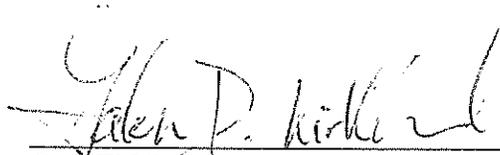
PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

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:

6/17/08



GALEN D. KIRKLAND
ACTING COMMISSIONER

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on the Complaint of

ANGEL M. LOPEZ,

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SIDS HARDWARE & HOME CENTER,

Respondent.

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

Case No. 10107856

SUMMARY

Complainant alleged that Respondent discriminated against him on the basis of age when it terminated his employment when Complainant was 69 years old. Because the record does not support the allegations in the complaint, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 19, 2005, 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. Executive Law, art. 15 ("Human Rights Law").

On September 29, 2006, after investigation, the Division found that it had jurisdiction over the complaint and that no probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. On December 14, 2006, the Division, upon its own motion, pursuant to Rule 20(a) of the Rules of Practice of the State Division of Human Rights, 9

NYCRR §465.20 (a), reviewed the determination and found that the proceeding should be reopened and remanded. On January 11, 2007, after further investigation, the Division found that it had jurisdiction, and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices.

After due notice, the case came on for hearing before David W. Bowden, formerly an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on October 22, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Christopher R. Knauth, Esq. Respondent was represented by Michael S. Gold, Esq.

Permission to file post-hearing briefs was granted.

ALJ Bowden thereafter left the Division, and the case was reassigned to ALJ Rosalie Wohlstatter.

FINDINGS OF FACT

1. Complainant charged Respondent with unlawful discriminatory practices in relation to employment by terminating Complainant’s employment on August 26, 2005. (ALJ’s Exh. 1)
2. Respondent denied the charges. (ALJ’s Exh. 2)
3. At the time of his termination, Complainant was 69 years old.(Tr. 19)
4. Complainant began working for Respondent sometime around August 6, 1980. (Tr. 12)
5. When he had started working for Respondent, Complainant was a sales clerk.. On August 26, 2005, the date of his termination, Complainant was a supervisor for Respondent’s paint department. (Tr. 13)

6. Complainant supervised two employees: Arnold and Mohammed. (Tr. 18)
7. For approximately 25 years, the owner of Respondent was Avi Erdos. (TR. 20-1)
8. On August 1, 2005, Michael Gold became owner of Respondent. (Tr. 25-6)
9. On August 23, 2005, Complainant's wife was informed that her son had died in the Philippines. (TR. 30-1)
10. On August 24, 2005, Complainant arrived at work ten minutes late and told Mr. Gold that his wife's son had died. (ALJ Exh. 2; Tr. 36)
11. Complainant informed Gold that he would have to make travel arrangements. (TR. 36)
12. At approximately 10 A.M., on August 24, 2005, Complainant left the Respondent's paint department. (ALJ Exh. 1; Tr. 39)
13. On August 25, 2005, when Complainant arrived at work to retrieve his paycheck, Gold informed him that his employment was terminated because he had left the paint department the day before without informing anyone in management. (ALJ Exh. 2)
14. Complainant had once overheard Erdos refer to another employee as "this old man." (Tr. 107)
15. Prior to 1992, Complainant was a participant in Respondent's pension plan. (Respondent's Exh. 1)
16. On October 2, 1992, Complainant signed documents acknowledging receipt of \$5, 882.85 and renouncing his interest in the pension plan. (Respondent's Exhibits 1, 2)

OPINION AND DECISION

Section 296 (1) of the Human Rights Law prohibits an employer from discriminating against an employee because of that employee's age. In the absence of any direct evidence,

Complainant may establish that he was the subject of discrimination by using the burden-shifting analysis adopted by the New York Court of Appeals in *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 377 N.Y.S. 2d 472 (1975). In this analysis, the Complainant must first make out a prima facie case by showing that he is a member of a protected class, that he was qualified for the position he held, and that he was the subject of an adverse employment action under circumstances giving rise to an inference of discrimination. *Pace College*, 38 N.Y. 2d at 39-40.

If Complainant establishes a prima facie case, the burden of production shifts to Respondent, which then must come forward with an explanation of its action. *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 120 S.Ct. 2097, 147 L.ED. 105 (2000). In order to prevail, Complainant must then show that the proffered explanation was a pretext for unlawful discrimination. *St. Marys Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)

Complainant in this case has not established a prima facie case of age discrimination. The record does not show that there were any circumstances giving rise to an inference that Respondent's termination was discriminatory. Complainant's claim that he was promised a pension when he reached age 70 is not credible: the record shows that Complainant had elected to receive a lump sum payment in 1992 in lieu of any benefits upon his retirement. The characterization by Respondent's former owner of another employee as "this old man." is insufficient to give rise to an inference of discrimination in Complainant's case.. Since there were no circumstances allowing for such an inference, Complainant has not established all the elements of a prima facie case.

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: April 16, 2008
Bronx, New York



Rosalie Wohlstatter

Administrative Law Judge