

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

NORMAN MARBLEY,

Complainant,

v.

ALBANY COUNTY, DEPARTMENT OF  
GENERAL SERVICES,

Respondent.

and CIVIL SERVICE EMPLOYEES  
ASSOCIATION INC., LOCAL 1000, AFSCME,  
AFL-CIO, Necessary Party.

NOTICE AND  
FINAL ORDER

Case No. 10116644

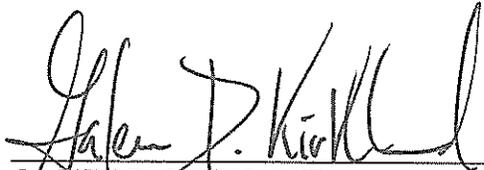
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on January 28, 2009, by Christine Marbach Kellett, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity 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: **MAR 23 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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Necessary Party

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

Case No. **10116644**

**SUMMARY**

Complainant charged respondent with unlawful discriminatory practices in employment based on race and in retaliation for filing a prior complaint when his job title was changed, he was assigned menial tasks, and his line item received a lower bump up in pay. Respondent denied the charges. Complainant failed to meet his prima facie burden with respect to either claim and the complaint should be dismissed.

**PROCEEDINGS IN THE CASE**

On March 15, 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 Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on March 10, 11, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence Zyra, Esq. Respondent was represented by David J. Wukitsch, Esq.

Permission to file post-hearing briefs was granted. Post hearing briefs were timely received from counsel.

### **FINDINGS OF FACT**

1. Complainant charged Respondent with unlawful discriminatory practices in employment based upon race and in retaliation for filing a previous complaint with the Division. The unlawful practices included placing him in a different job title, assigning him to menial tasks, and denying him a bump up in base salary. (ALJ Exh. 1)
2. Respondent denied the charges. (ALJ Exh. 3)
3. Complainant is an African-American. (ALJ. Exh.1; Tr. 14)
4. Complainant began working for Respondent in 2001 as a Utility Laborer assigned to a County office building located at 162 Washington Avenue, Albany, New York. (Tr. 13, 60)
5. On or about April 9, 2004, Complainant filed a complaint with the Division against the Respondent in 2004 alleging unlawful discriminatory practices in employment based upon race when he allegedly supervised seven other part-time employees while in a Utility Laborer title.

On or about January 20, 2005, Complainant withdrew this complaint as part of a settlement with the Respondent in a related union grievance for out-of-title work. (ALJ Exh. 1; Joint Exh. 1; Tr. 14)

6. The settlement provided in part that Complainant's title would remain as "utility laborer" and that he would be relocated to another building. (Tr. 15-16)

7. Subsequent to the settlement, and consistent with Complainant's understanding that he would be transferred, on or about March 31, 2006, Respondent transferred Complainant's work site from the Washington Avenue building to 112 State Street, the County's principle office building. (ALJ Exh. 1; Joint Exh. 3; Tr. 18-19, 47-48)

8. At the same time, the Respondent's Civil Service Department reclassified Complainant's position to that of Building Maintenance Helper, a position at the same salary as the Utility Laborer position and in the same Labor classification. (Joint Exh. 3; Tr. 3, 48-49, 51, 173)

9. At the same time as Complainant's position was reclassified, the title of another Utility Laborer, a white male assigned to a different department, was reclassified to Machine Operator. (Joint Exhibits 4,5; Tr. 174-176, 204)

10. Complainant is the only County employee in the Building Maintenance Helper title at the 112 State Street location. (Tr. 200)

11. The position of Building Maintenance Helper calls for unskilled manual labor "connected with the operation, maintenance and cleaning of buildings..." (Joint Exh. 7; Tr. 120-21)

12. This is in contrast with the Utility Laborer position, whose job description involves the semi-skilled operation of small hand or machine tools, power equipment and is more suited to a sewer district employee. (Joint Exh. 2,; Tr. 62, 107, 119, 177)

13. Complainant admitted he never performed the duties of a Utility Laborer. (Tr. 119-120)
14. Respondent employs four other individuals in the Building Maintenance Helper title at locations including the Sheriff's Department and the County Nursing Home. (Tr. 276-77)
15. While Complainant is the only Building Maintenance Helper assigned to 112 State Street, there are four Building Maintenance Mechanics assigned there during the day and no daytime custodial staff. (Tr. 70, 81-82)
16. All the Building Maintenance Mechanics are white males. (Tr. 70, 110)
17. Building Maintenance Mechanics are classified as non-competitive and considered semi-skilled, while the Building Maintenance Helper position is classified as Labor and considered an unskilled position. (Joint Exh. 6,7; Tr. 111, 178)
18. Complainant gets along well with the Building Maintenance Mechanics and feels they respect him and his work. (Tr. 70-71)
19. Complainant reports there are no racially derogatory remarks at the workplace. (Tr. 112)
20. However, Complainant often found his duties at the 112 State Street location demeaning. Examples of the alleged demeaning work included sweeping the front sidewalk to remove cigarette butts, cleaning the elevator door tracks, and doing custodial work such as emergency cleaning. (ALJ Exh. 1; Complainant's Exh. 1; Respondent's Exh. 3; Tr. 20-22, 28, 62-65, 75 )
21. The Custodial Worker job description includes cleaning work, and is routine manual labor. (Respondent's Exh. 3)
22. Custodial Workers are paid more than Building Maintenance Mechanic Helpers. (Respondent's Exh. 2)

23. Complainant admitted that those duties he found demeaning were included in the generalized duties for a Building Maintenance Helper. (Joint Exh. 7; Tr. 62-65, 75)

24. As Complainant's witness, Dale Johnson ("Johnson,") who is employed by Respondent as a Building Maintenance Mechanic, confirmed, Building Maintenance Mechanics were assigned to the same tasks as sweeping, cleaning, and emergency custodial work before Complainant came to the building. (Tr. 138-40, 142, 145)

25. The Building Maintenance Mechanics had complained when assigned to the tasks about which Complainant also complained, as their job duties did not contain cleaning or custodial type duties. (Joint Exh. 6; Tr. 82-83, 139, 152, 215, 227)

26. When Johnson reviewed the job duties for a Building Maintenance Helper he agreed the tasks included sweeping, cleaning and emergency custodial work. (Tr. 158-59)

27. Even Complainant's supervisor would sweep or wipe down bins. (Tr. 81)

28. Complainant also charged that retaliation occurred when the Respondent negotiated a new collective bargaining agreement with his union, Civil Service Employees Association (CSEA), that provided only a \$500 bump-up in base pay for the title of Building Maintenance Helper, while the Building Maintenance Mechanic position got a \$1500. (Joint Exh. 8; Respondent's Exh. 2)

29. CSEA and Respondent signed the employment agreement on May 14, 2007. (Respondent's Exh. 2)

30. Three titles under the negotiated contract received a so-called bump-up: Building Maintenance Mechanic, Senior Building Maintenance Mechanic, and Building Maintenance Mechanic Helper.<sup>1</sup> (Respondent's Exh. 2; Tr. 85, 262-63, 266-67)

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<sup>1</sup> The parties used the title Building Maintenance Mechanic Helper and Building Maintenance Helper to refer to Complainant. The title used in the union

31. Complainant admitted that as a Building Maintenance Helper he received the \$500 for the Building Maintenance Mechanic Helper position, but as a Utility Laborer he would not have received any bump-up, and that therefore the change in title had a positive impact for him. (Tr. 287-288)

32. Complainant also reported that shortly after he arrived at 112 State Street, his supervisor, Brian McCarville, made a discriminatory remark to him to the effect that the supervisor had been told to treat Complainant "like the plague" so there would be no further complaints. (ALJ Exh. 1; Tr. 24-25, 72, 75-78, 109-10)

33. No one else ever referenced Complainant's prior discrimination complaint. ( Tr. 112-13)

34. Complainant, though he claimed to be humiliated and shocked by what he perceived to be a negative reference to his prior discrimination complaint, never reported this remark to anyone. (Tr. 26-26, 125-27)

### OPINION AND DECISION

#### Discrimination claim based upon race

Human Rights Law §296.1(a) provides in pertinent part that it shall be an unlawful discriminatory practice for an employer to discriminate against an employee on the basis or race. N.Y. Exec. Law §296.1(a)

The elements of a prima facie case of discrimination are 1) that the complainant is in a protected class; 2) that he is qualified for the position; 3) that he is treated differently than similarly situated employees or suffers an adverse employment action; 4) under circumstances that give rise to an inference of discrimination. *See: Ferrante v. American Lung Ass'n*. 90

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contract is Building Maintenance Mechanic Helper; the title for Civil Service purposes is Building Maintenance Helper.

N.Y.2d 623, 665 NYS2d 25 (1997)

Complainant charged he was the victim of racial discrimination when, as a Building Maintenance Helper, he was assigned by Respondent to the least desirable duties such as sweeping up cigarette butts, and completing the night cleaner assignments, while Building Maintenance Mechanics were also on the premises and could also perform these duties.

Complainant satisfies two of the four factors to consider in a prima facie case, in that he is in a protected class and he was qualified for his position. However, the record fails to support or establish the other two prongs of the prima facie case. Complainant compared himself with employees in a higher level position than his. Complainant's job duties contained these tasks while the higher position's job duties did not. And, as even his own witness acknowledged, even the Building Maintenance Mechanics and the supervisors performed those duties when needed. Complainant thus failed to establish the third prong for a prima facie case of discrimination: that he was treated differently than others not in his protected class, or suffered an adverse employment action in the assignment of the tasks.

Historically one form of invidious racial discrimination was accomplished by limiting minority employment to the lowest level or most menial of positions. Complainant wants to articulate this pattern as he views himself as a person capable of a supervisory level position; he had complained about supervising others when employed as a Utility Laborer and after complaining, he had been transferred to a higher profile building to perform menial tasks. However on the record presented here, the circumstances do not support an inference of racial discrimination from the assignments given Complainant. These were assignments within his job duties, and were ones also been given to others not in his job title but in higher job titles and in a different racial protected class. Complainant's own witness reported he himself had cleaned the

front of the building of cigarette butts, and performed other custodial or cleaning type tasks, testimony which contradicted Complainant's report that such task had not been performed before he came. Complainant fails to make a prima facie case of discrimination based upon his race and the complaint should be dismissed.

Discrimination based upon retaliation

Human Rights Law §296.7 provides that it shall be an unlawful discriminatory practice to retaliate against any person because said person filed a complaint with the Division. N.Y.

Executive Law §296.7

Complainant charged Respondent with retaliation when his title was changed from Utility Worker to Building Maintenance Helper, and when the Building Maintenance Helper received only a \$500 so called bump-up while the Building Maintenance Mechanic title received a \$1500 bump-up.<sup>2</sup>

In order to establish a prima facie case of discrimination based upon retaliation, a complainant must establish that 1) he engaged in a protected activity; 2) that the employer knew he engaged in the protected activity; 3) that he suffered an adverse employment action; and 4) that there is a nexus between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3<sup>rd</sup> Dept., 1999)

Complainant failed to make a prima facie case of discrimination based upon retaliation. While he established the first two prongs for a case of retaliation in that he engaged in the protected activity of filing a complaint with the Division and his employer knew he had engaged in the protected activity, there is no showing of an adverse employment action. Complainant

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<sup>2</sup> In cases challenging the negotiated bargaining agreement, both parties to the agreement, the union and the employer should be named as Respondents. In this case, the union, CSEA, is a necessary party, was not named in the

presented no evidence that connected his change in title to his filing a complaint. Complainant's title was changed as part of a clean-up of the titles used by the Respondent. Complainant admits was not doing Utility Laborer work. At least one other individual in the title of Utility Laborer also had their title changed at the same time as Complainant's title was changed.

Complainant failed to establish the third prong of prima facie case of discrimination in that he failed to show he suffered an adverse employment action. Placing Complainant in the title of Building Maintenance Helper was beneficial to Complainant as it made him eligible for a bump-up in salary. That title was one of only three out of thirty odd titles to receive any sort of bump-up under the contract, and Complainant's placement in the position of Building Maintenance Helper permitted him to receive monies which had he remained in the Utility Laborer title he would not have received.

There were at least four other individuals in the tile of Building Maintenance Helper who also benefitted. From this set of facts, no inference of discrimination based upon retaliation arises.

The burden of proof rests with a complainant. Having failed to establish a prima facie case under either theory of discrimination presented, this complaint should be dismissed.

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complaint. Therefore, as part of this order, the complaint is amended to add the union as a necessary Party.

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 is amended to add the Civil Service Employees Union (CSEA), Local 1000 AFSCME, AFL-CIO as a Necessary Party; and it is hereby

Ordered that the complaint be, and the same hereby is, dismissed.

DATED: January 28, 2009  
Bronx, New York



Christine Marbach Kellett  
Administrative Law Judge