

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

GARY THOMPSON,

Complainant,

v.

**OTSEGO COUNTY, DEPARTMENT OF
HIGHWAYS, FORESTRY & PARKS,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10106444

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 October 22, 2007, 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 KUMIKI GIBSON, 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, this 15th day of November, 2007.

KUMIKI GIBSON
COMMISSIONER

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**OTSEGO COUNTY, DEPARTMENT OF
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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10106444**

SUMMARY

Complainant charged Respondent with discrimination based upon age when it 1) appointed a younger applicant to the position of Working Sign Shop Supervisor in May of 2004, 2) failed to appoint Complainant when the same position became vacant in August of 2004, and 3) transferred his assignment from the sign shop to road crew work in April of 2005. Complainant did not establish that his age was a factor in the decisions made by Respondent. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On July 11, 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. 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 an unlawful discriminatory practice. 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 August 6 and 7, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Christopher R. Knauth. Respondent was represented by Rodney L. Klafehn, County Attorney and by Steven Ratner, of counsel to the County Attorney’s Office.

FINDINGS OF FACT

1. Complainant charged Respondent with discrimination based upon age in violation of the Human Rights Law when Respondent 1) appointed a younger candidate to the position of Working Sign Shop Supervisor (“Supervisor”); 2) failed to appoint him to the same position when it became vacant four months later; and 3) reassigned him to road crew work. (ALJ’s Exh.

1)

2. Respondent denied the charges. (ALJ’s Exh. 3)

3. Complainant Gary Thompson was born June 22, 1949. (Joint Exh. 1)

4. Complainant was hired by Respondent on June 3, 1974 as a Machine Operator 1 in the Highway Department. (Joint Exh. 1)

5. Respondent first assigned Complainant to the Sign Shop on June 1, 1980. (Joint Exh. 1)

6. Complainant worked as Sign Shop Assistant (“Assistant”) for over 25 years, although his civil service title remained Machine Operator 1. (Joint Exh. 1; Tr. 72-73)

7. For years the Sign Shop has only two employees, Orrin Mele (“Mele”), the Supervisor and Complainant, the Assistant. (Joint Exh. 1)

8. When Mele was on vacation or away, Complainant was paid at the Supervisor salary rate. (Joint Exh. 1)

9. When Mele retired in 2002, Complainant was offered the Supervisor position by Ronald Tiderencel (“Tiderencel”), the Highway and Parks Superintendent. (Joint Exh.1; Tr. 73)

10. Complainant declined as he was considering retirement. (Joint Exh.1; Tr. 73)

11. At Complainant’s suggestion, his neighbor, Kevin Flint (“Flint”) became Supervisor, while Complainant remained functioning as the Assistant. (Joint Exh. 1; Tr. 73)

12. In August 2003, the Supervisor position again became available when Flint became deputy Highway Superintendent. (Joint Exh. 1; Tr. 74-75)

13. Although he was approached by Tiderencel and Flint to apply for the Supervisor position, Complainant was initially unsure of whether or not to apply as he still had retirement plans. (Joint Exh. 1; Tr. 147)

14. However, as Complainant’s personal circumstances changed due to divorce and remarriage, he decided to apply for the Supervisor position vacated by Flint. (Joint Exh. 1; Tr. 20, 238-40)

15. The Civil Service exam for the Supervisor position was given on January 24, 2004. (Joint Exh. 1)

16. The top three candidates based on the exam test were Todd Vanderwerker (“Vanderwerker”), ranked first, Mary Beggs who ranked second and Complainant who was ranked third. (Joint Exh. 1)

17. After interviewing the three top candidates including Complainant, Tiderencel recommended Vanderwerker for appointment to the Supervisor position on May 24, 2004. (Complainant’s Exhibits 3, 5; Tr. 27, 53, 146, 152)

18. Vanderwerker was in his thirties and younger than Complainant. (Tr. 26)

19. Although Complainant had been training Vanderwerker in the operational duties in the Sign Shop since 2001, he believed Vanderwerker unqualified to be Supervisor. (Complainant's Exh. 10; Tr. 35-36)

20. Complainant's union filed a grievance on Complainant's behalf over the Vanderwerker appointment but this grievance was denied. (Complainant's Exhibits 3, 4; Tr. 29)

21. Complainant was bitter and told Vanderwerker on more than one occasion that he felt Vanderwerker had stabbed him in the back. (Tr. 34-39, 76)

22. The working relationship between Vanderwerker and Complainant became increasingly tense and unpleasant. (Tr. 34-39)

23. Ultimately Vanderwerker asked Complainant to stop making so many negative comments, including derogatory comments about another worker, but Complainant told Vanderwerker all he had was negativity and ceased speaking to Vanderwerker except for what was necessary for sign shop business. (Tr. 36, 63-64, 224-25)

24. Vanderwerker told Tiderencel and Flint that Complainant was calling him names and being mean. (Tr. 38, 158-59)

25. When questioned by Tiderencel about this, Complainant told Tiderencel he had told Vanderwerker that he was a backstabber, and if Vanderwerker thought he indeed was a backstabber that was "his problem." (Tr. 38)

26. In August 2004, Vanderwerker stepped down from the Supervisor position and Complainant again filled in as Acting Supervisor, including being paid at the supervisor rate. (Tr. 30, 34, 39, 160)

27. The demand for signage varied from year to year, with some years requiring only 50 signs. (Tr. 79)

28. In the summer of 2005, Tiderencel decided to close the formal Sign Shop operations, and reassigned Complainant to road crew work. (Tr.32, 42, 77)

29. As Complainant's title had remained Machine Operator 1 throughout his service as Assistant, the road crew assignment was consistent with his job duties and at the same level and pay grade. (Tr. 41-43)

30. When Complainant asked why he was being reassigned to road crew duties and not being appointed to the Supervisor position, Flint may have informally commented that they were looking for somebody "with more time." (Tr. 32, 53)

31. But Flint and Tiderencel had never discussed Complainant's age. (Tr. 157-58)

32. Complainant himself acknowledged that Tiderencel opposed his appointment to the Supervisor position because Complainant had challenged Tiderencel's decision to require commercial driver's licenses ("CDLs") for Highway Department drivers including Complainant. (Tr. 91-95)

33. Complainant also challenged Tiderencel's decisions regarding posting the Supervisor position. (Tr. 95-96)

34. Complainant had further challenged Tiderencel's decision to wait for the exam results before appointing the Supervisor. (Tr. 91-92)

35. Complainant had then challenged the salary set for the Supervisor position. (Tr. 93-94)

36. Complainant had a series of run-ins with the public. (Tr. 153-54)

37. Complainant had challenged assignments he considered unsafe. (Tr. 165-67, 177, 201-06, 210-13)

38. Both the Supervisor position and the Assistant position remained vacant from April 2005 until March 2007. (Tr. 39, 161)

39. The union advised Complainant it was management's prerogative not to fill the positions. (Tr. 81-82, 84)

40. In March of 2007, after a series of disastrous floods and road destruction throughout the county required major re-signage, Respondent appointed Complainant to the Supervisor position and reopened the Sign Shop for daily work. (Tr. 42, 44, 162, 178-79)

41. Complainant agreed that the factors described by Flint as used by the Respondent in its decisions regarding the Supervisor position and the Sign Shop, such as communications and cooperation skills with superiors, with one's co-workers and with the general public, the ability to coordinate and implement seemingly unrelated tasks occurring within the same work day; the known history and experience, and willingness to perform tasks; willingness to learn new skills, and previous rejection of the position were relevant considerations. (Complainant's Exh. 1; Tr. 153-56, 163, 167, 169, 174, 177, 252-56)

OPINION AND DECISION

Complainant charged Respondent with age discrimination in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law")§ 296.3-a (a) in connection with three distinct acts: 1) failure to appoint him in May of 2004 to the position of Sign Shop Supervisor on May 24, 2004; 2) failure to appoint him in August of 2004 to the position of Sign Shop Supervisor; and 3) reassigning him in April 2005 back to road crew duties. The May 2004 charge is barred by the applicable statute of limitations. Complainant failed to establish that Respondent's explanations for its actions in August 2004 or in April 2005 were a pretext for illegal discrimination. The complaint should be dismissed.

The statute of limitations for complaints filed with the Division is one year. Human Rights Law §297.5. Complainant filed his complaint challenging the May 24, 2004, appointment

of Vanderwerker on July 11, 2005, more than one year after Vanderwerker's appointment. That charge is time barred. The complaint was filed more than one year after the alleged discrimination. In connection with the charges of age discrimination in August 2004 and April 2005 contained in the complaint filed on July 11, 2005, the complaint is timely filed.

It is an unlawful discriminatory practice for an employer to discriminate against an employee in promotion, or in the terms, conditions or privileges of employment on the basis of that individual's age. Human Rights Law § 296.3-a (a). To make out a prima facie case of unlawful discrimination under the Human Rights Law, 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. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471, 479, 399 N.E.2d 880, 885-886(1975), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 668 (1973).

If complainant establishes a prima facie case of discrimination, respondent must articulate a legitimate, non-discriminatory business reason for its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L. Ed. 2d 407(1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed. 105 (2000).

Upon respondent's production of a legitimate, non-discriminatory business reason for its actions, the burden of proof requires complainant to show Respondent's reason is a pretext for illegal discrimination. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25 (1997).

Age refers to chronological age measured from birth. In August 2004 and in April 2005,

Complainant was over the age of eighteen and in a protected class. He was qualified for the position to which he applied. Complainant was not appointed to the position, although he had worked in the Sign Shop for more than twenty years, and had served as Supervisor on many occasions, and was again serving as Supervisor and being paid for it. When Complainant asked his friend Flint as to why he was not being appointed to the vacant position, Complainant believed Flint told him Respondent wanted some one with more time. Complainant interpreted this comment to reflect on his age. This circumstance gives rise to an inference of age discrimination. Complainant established a prima facie case of discrimination based upon age.

Respondent described the considerations which went into its evaluation of Complainant's application including communication and cooperation skills with one's supervisor's, one's coworkers and the general public; the ability to coordinate and implement tasks within the same work day; the known work history and experience, including rejection of the position previously; and the willingness of the applicant to perform tasks and learn new skills. Complainant admitted that the criteria used by Respondent were valid criteria. He admitted he had challenged Tiderencel, the Highway Superintendent about Tiderencel's decision to require CDL licenses, about how the position was posted and filled and about the salary. These factors are unrelated to Complainant's chronological age.

Complainant failed to establish that there was any connection to Complainant's age in its decision either to leave the position empty in August 2004 or to close the shop in April of 2005. The burden of proof in a discrimination complaint belongs to the complainant. The complainant has failed to meet that burden. The complaint should 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 complaint be and the same hereby is dismissed.

DATED: October 22, 2007
Bronx, New York

A handwritten signature in cursive script that reads "Christine Marbach Kellett".

Christine Marbach Kellett
Administrative Law Judge