



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**DANIEL BUTLER,**

Complainant,

v.

**NEW YORK INSTITUTE OF TECHNOLOGY,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10192374

**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 November 19, 2020, by Margaret A. Jackson, 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.


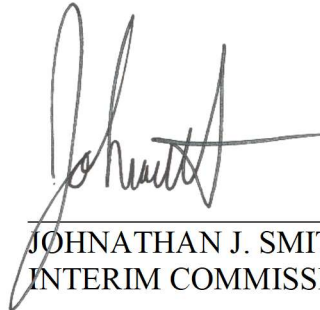
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order 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: **February 4, 2021**  
Bronx, New York



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JOHNATHAN J. SMITH  
INTERIM COMMISSIONER



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on the Complaint of

**DANIEL BUTLER,**

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**NEW YORK INSTITUTE OF  
TECHNOLOGY,**

Respondent.

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

Case No. **10192374**

**SUMMARY**

Complainant alleged that Respondent unlawfully discriminated against him because of his conviction record. Because the evidence does not support Complainant's allegations the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On November 27, 2017, 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on November 26-27, 2018.

Complainant and Respondent appeared at the hearing. Complainant was represented by Thomas R. Price, Esq. Respondent was represented by Stefanie R. Munsky, Esq.

Permission to file post-hearing briefs was granted. Both parties submitted post hearing findings of fact and conclusions of law which were considered and, where appropriate, adopted.

### **FINDINGS OF FACT**

1. Complainant has a conviction record. (ALJ Exhibit 1)
2. On June 2, 2010, Complainant pled guilty to a felony charge for sending an inappropriate picture of his penis to a thirteen-year-old female student at the school where he taught at the time. (Tr. 42)
3. As a result of his guilty plea, Complainant was found guilty of a felony and sentenced to four months of weekend detention and ten years’ probation. Complainant was also required to register as a Level 1 sex offender and attend weekly psychotherapy sessions. Subsequently the sessions were reduced to every other week. (Tr. 48)
4. Respondent is a nonprofit private institution of higher learning located in Old Westbury, New York. (Complainant’s Exhibit 15)

5. In September 2012, Complainant was hired by Respondent as an adjunct instructor. (Tr. 9, 13; Complainant's Exhibit 1)

6. Complainant was not asked to submit to a background check, nor was he asked any questions about his criminal record when Respondent initially hired him. (Tr. 12).

7. In or about July of 2016, Complainant accepted Respondent's offer of employment as its academic advisor/coordinator of the Interdisciplinary Studies department. (Tr. 19)

8. Complainant was not required to submit to a background check as part of the hiring decision for the position. (Tr. 21)

9. During the fall 2016 semester, Complainant was informed by his new supervisor, Sherry Kelleher, the Assistant Dean of his department, that there was an opening in the Interdisciplinary Studies department for an administrative assistant. (Tr. 23)

10. On October 30, 2016, Complainant sent an email to Kelleher containing his cover letter and resume as an application for the position of administrative assistant. (Tr. 83; Respondent Exhibit 1)

11. On October 31, 2016, Kelleher forwarded Butler's email from Judith Roback, Respondent's Human Resource Specialist. (Tr. 123)

12. Immediately thereafter, Complainant was interviewed by Kelleher and Laura Wyrick, Kelleher's secretary, and then by Lou Reinisch, the interim Provost of NYIT. (Tr. 25)

13. On December 21, 2016, Complainant received an email from Respondent's Human Resource Specialist Judith Roback asking him to complete an employment application for the administrative assistant position. (Tr. 27; Respondent's Exhibit 2)

14. An administrative assistant is responsible for being a liaison between the department and the students, attending department meetings and regularly interfacing with young adults and students in the Interdisciplinary Studies department. (Tr. 25, 137; Complainant's Exhibit 15)

15. On January 3, 2017, Complainant received a letter from Roback formally offering him the position. (Tr. 27; Complainant's Exhibit 3)

16. Complainant accepted the position pending verification of his eligibility to work in the United States, verification of his qualifications and completion of a background check. (Tr. 30; Complainant's Exhibit 3)

17. On January 6, 2017, Complainant met with Roback and provided her with his signed background check authorization. (Tr. 38)

18. At the meeting, Complainant informed Roback that he had a criminal record on his background. (Tr. 38)

19. In response, Roback said, "Let's see what comes back first and then we'll go from there." (Tr. 39; Complainant's Exhibit 14))

20. The background check revealed that in 2009, Complainant was arrested and charged with one count of disseminating indecent material to minors in the 1<sup>st</sup> degree. (Complainant's Exhibit 14)

21. On or about January 10, 2017, Carol Jablonsky, Executive Director of Human Resources at Respondent, met with Catherine Flickinger, Esq., Respondent's General Counsel and Vice President for Human Resources to review, New York Correction Law and Public Policy as it applied to Complainant. Thereafter, Jablonsky contacted Complainant about the results of his background check and told Complainant to "remain off campus until we look into this matter further." (Tr. 51)

22. On January 11, 2017, Jablonsky sent Complainant a letter which included a copy of the report containing the results of Complainant's background check and notifying him that if the information received was accurate, it might negatively affect his future employment. The letter further stated, "If we do not hear from you, we will assume the information is correct as reported and contact you regarding your employment." (Tr. 59)

23. Complainant immediately contacted Jablonsky and requested a meeting to discuss information that might be revealed on the background check report. (Tr. 59)

24. In response, Jablonsky told Complainant to wait until the report was returned. (Tr. 59)

25. On January 18, 2017, Complainant met with Jablonsky and Katherine Zuliani, another Respondent Human Resources employee. At the meeting, Jablonsky reviewed the background check results as well as New York Corrections Law Section 752, Art. 23-A. with Complainant, who attempted to explain the circumstances surrounding his conviction. (Tr. 60)

26. Complainant explained that he was an adult instructor attending a Bible College graduation where he met the thirteen-year-old student and her aunt. Complainant gave the aunt his telephone number and began receiving telephone calls, text messages and illicit pictures. (Tr. 43, 158)

27. When Complainant learned that the calls and messages were coming from the minor student and not the aunt, he did not report the student to the school, her aunt or authorities. Instead, he began exchanging illicit photos and messages with the student. (Tr. 45)

28. The report revealed that Complainant's sentence was four months in jail, ten years on probation, and eight years of a final order of protection with respect to the minor student. (Complainant Exhibit 1)

29. Complainant began rehabilitation by attending community service. (Tr.165)

30. On January 9, 2017, Complainant was placed on a paid suspension from both his adjunct instructor and administrator assistant positions. (Tr. 242, 270)

31. On January 10, 2017, Jablonsky spoke with Complainant and informed him that someone from Respondent's Human Resources department would contact him to review its contents. (Tr. 50)

32. During the conversation with Jablonsky, Complainant made a plea to Jablonsky offering proof of his rehabilitation by confirming that he was attending therapy and community outreach activities and the court had assigned him a Level 1-low/no risk status. (Tr. 61, 261)

33. After the conversation, Jablonsky determined that Complainant was being evasive when answering her questions. (Tr. 242, 258-61, 276)

34. On January 20, 2017, Jablonsky considered Complainant's job duties, the nature of his conviction and the factors set forth in Correction Law Section 753, Art. 23-A and determined that Complainant's sexual offense was directly related to the responsibilities of the administrative assistant position because he would be interacting with minors. As a result, Jablonsky informed Complainant that based on his conviction record, his employment with Respondent was terminated. (Tr. 65, 290, 298)

35. In accordance with New York State's public policy, Respondent hired multiple individuals with conviction records. (Tr. 163, 204-206, 295)

### **OPINION AND DECISION**

N.Y. Exec. Law art. 15 (the "Human Rights Law") §296.15, makes it unlawful discriminatory practice for an employer to deny employment to any individual because that



individual has been convicted of a criminal offense, when such denial is in violation of N.Y. Correction Law Article 23-A. Article 23-A of the Correction Law was enacted to “eliminate the effect of bias against ex-offenders which prevented them from obtaining employment,” and imposed “an obligation on employers . . . to deal equitably with ex-offenders while also protecting society’s interest in assuring performance by reliable and trustworthy persons.” (internal citations omitted). *Bonacorsa v. Lindt*, 71 N.Y.2d 605, 611, 528 N.Y.S.2d 519 (1988); Correction Law §§ 752, 753.

Under the provisions of Article 23-A of the Correction Law, an employer may not refuse to hire an individual by reason of his prior criminal conviction unless it is shown that there is a direct relationship between the criminal offense and the employment sought, or there would be an unreasonable risk to property or the safety and welfare of specific individuals, or the general public. Correction Law §752. The Correction Law provides that, in making such a determination, the employer “shall” consider the following eight factors:

- (a) The public policy of this state . . . to encourage the . . . employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the . . . employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the . . . employer in protecting property, and the safety and welfare of specific individuals or the general public.

N.Y. Correction Law § 753(1). See also *Matter of Acosta v. New York City Dept. of Educ.*, 16 N.Y.3d 309, 316, 921 N.Y.S.2d 633, 635 (2011) (A failure to consider each of the factors “results in a failure to comply with the Correction Law’s mandatory directive”).

Complainant alleged that Respondent unlawfully terminated his employment because of his conviction record. After completing the background check, Complainant attempt to notify Roback that he had a conviction record. Complainant requested a meeting to discuss the information that might be revealed on the background check report. In response, Jablonsky, the Executive Director of Human Resources at Respondent, met with Complainant and advised him that he should wait until the report was returned. On or about January 10, 2017, Jablonsky contacted Complainant about the results of his background check and told Complainant to “remain off campus until we look into this matter further.” She further informed Complainant that depending on the information contained in the report, Complainant’s employment with Respondent might be negatively affected. Complainant immediately requested a meeting with Jablonsky. At the meeting, Jablonsky reviewed the background check results as well as each element of New York Corrections Law Section 752, Art. 23-A. with Complainant before determining that Complainant was disqualified from his position.

Specifically, Respondent questioned whether there was a direct relationship between Complainant’s prior conviction and his positions with Respondent and whether employing him in those positions would involve an unreasonable risk to the safety or welfare of Respondent’s students. Respondent determined that it did. Respondent also considered Complainant’s specific duties and responsibilities as well as the relationship of the criminal offense to the responsibilities because Complainant would be working in a position similar to the position he held when convicted. Respondent further considered the time that elapsed, the age of the student

at the time of the offense, thirteen years old, the seriousness of the offense, the evidence of rehabilitation and good conduct and the legitimate interest of Respondent in protecting the safety and welfare of the students. Although Complainant appeared to be rehabilitating himself, Jablonsky was legitimately interested in protecting the safety and welfare of the students and the general public and decided not to continue Complainant's employment.

In conclusion, Jablonsky considered New York's public policy to encourage employment of individuals previously convicted of crimes and noted that Respondent had hired multiple individuals with conviction records.

After considering the nature of Complainant's conviction and each of the eight factors set forth in Correction Law Section 753, Art. 23-A, Jablonsky determined that there was a direct relationship between the offense and the specific employment sought and that continuing Complainant's employment would involve an unreasonable risk to property, safety or welfare of specific individuals or the general public. Accordingly, the complaint is 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: November 19, 2020  
Hempstead, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive, flowing style with a large, sweeping flourish at the end.

Margaret A. Jackson  
Administrative Law Judge