



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JEREMY WARNEKE,**

Complainant,

v.

**BRONX COMMUNITY BOARD 11,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10204502

Federal Charge No. 16GC000361

**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 May 11, 2023, by Thomas S. Protano, 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 MARIA L. IMPERIAL, 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: September 14, 2023  
Bronx, New York



MARIA L. IMPERIAL  
COMMISSIONER



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**JEREMY WARNEKE,**

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v.

**BRONX COMMUNITY BOARD 11,**

Respondent.

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

Case No. **10204502**

Federal Charge No. 16GC000361

**SUMMARY**

Complainant alleged that Respondent denied him equal terms conditions and privileges of employment base on his age, sex (sex stereotyping) and familial status, and retaliated against him for having complained of discrimination. Complainant has failed to prove his claims and the case is dismissed.

**PROCEEDINGS IN THE CASE**

On December 2, 2019, Complainant filed a 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held, via videoconference, on December 1, 2021, December 2, 2021, and July 11, 2022.

Complainant and Respondent appeared at the hearing. Complainant was represented by Thomas J. Lamadrid, Esq. Respondent was represented by Cynthia C. Weaver, Esq., and Daniel R. Whitman, Esq., Assistant Corporation Counsel. At the hearing, the caption was amended to reflect Respondent’s correct name, Bronx Community Board 11.

#### **FINDINGS OF FACT**

1. Complainant is a male, born on May 9, 1980. (ALJ Exhibit 2; Tr. 143)
2. Complainant is a caregiver for his two children. (Tr. 16)
3. Complainant is not married; he has a domestic partner, Theresa Matos. (Tr. 16)
4. Respondent is a community board, which plays an advisory role for local government officials in its designated geographical area. (Tr. 17)
5. A community board is comprised of a group of volunteers who appoint a district manager. The volunteers on the board are appointed by the borough president. (ALJ Exhibit 5; Tr. 17)
6. In May of 2019, Respondent consisted of 42 volunteers. (Complainant’s Exhibit 27)
7. Respondent is led by an executive board, which includes a chair, vice chair, secretary, treasurer, and sergeant at arms. (ALJ Exhibit 5)

8. Respondent's geographical area encompasses the Bronx neighborhoods of Allerton, Indian Village, Morris Park, Pelham Garden, Pelham Parkway, and Van Nest, among other areas. (ALJ Exhibit 5; Complainant's Exhibit 2)

9. Complainant has been employed as Respondent's district manager since January 31, 2011. (ALJ Exhibit 5; Tr. 14)

10. Respondent employed three staff members in addition to the district manager in 2018 and 2019. (Tr. 27)

11. As district manager, Complainant supervises the staff members, does administrative work, consults with the board, attends meetings, and interacts with constituents and city agencies. (Tr. 23-24)

12. Personnel matters related to staff, such as pay raises and terminations, are decided by a vote of the full board. (Tr. 273)

13. The board chair is the district manager's direct supervisor. (Tr. 274-75)

14. Anthony Vitaliano was the chair of the board from 2012 until June 30, 2018. He was first vice chair from 2018 to June 23, 2020. (ALJ Exhibit 5)

15. In 2016, Vitaliano, as chair, had asked Chris Kirka, a staff member of Respondent, "Who is the bread earner in your house, you or your wife?" when Kirka took a day off to bring his son to the doctor because his wife was not comfortable driving in a snowstorm. (Tr. 325-26)

16. Albert D'Angelo has chaired the board since July 2018. (ALJ Exhibit 5)

17. Frano Zagreda served as sergeant at arms for Respondent from 2014 until March 31, 2021. (ALJ Exhibit 5)

18. Complainant has had "issues with punctuality," while working for Respondent. (Tr. 140)

19. Vitaliano, when he was chair, offered Complainant the option of changing his work hours, such that Complainant was allowed to come into the office at 10:00 a.m. (Tr. 141)

20. D'Angelo found that Complainant adequately coordinates, monitors, and evaluates effective delivery of municipal services within the district. (Tr. 277)

21. D'Angelo faulted Complainant for not communicating with community groups or following up on complaints and questions. (Tr. 280-81)

22. D'Angelo stated that Complainant's completion of paperwork was "lacking," and faulted Complainant's inability to be punctual. (Tr. 282)

23. Zagreda found that Complainant was not always available when he called Respondent's office, stating that "sometimes" he could reach Complainant, but "quite a few times, no." (Tr. 197)

24. On January 18, 2019, during a phone conversation between Complainant and Vitaliano, Vitaliano took Complainant to task for not being present in Respondent's office. (Complainant's Exhibit 8)

25. During the call, Complainant noted that he "didn't have a life," and he "lived in the office" before he had children, and implied things had changed. (Complainant's Exhibit 8)

26. Vitaliano replied that Complainant should speak with Matos to arrange childcare. He further stated Complainant should take his allotted leave time but arrange the staff schedules to make sure the office was staffed while he is away. (Complainant's Exhibit 8)

27. On January 28, 2019, Respondent's executive board held a meeting. (Complainant's Exhibit 8)

28. At the meeting, one topic for discussion was whether to allocate the salary of a staff member who was leaving among the three remaining employees, or to hire a part-time employee. (Complainant's Exhibit 9)

29. It was decided at the meeting that Kirka should be recommended for a 12 percent raise, because he would be taking over much of the duties that the departing employee performed. (Complainant's Exhibit 9)

30. At the January 28, 2019, meeting, during a discussion about the hours Complainant was expected to work, Vitaliano said of Complainant, "He revolves this job around his family life." (Complainant's Exhibit 9)

31. Joann Rubino, a board member, then replied, "Like he's the mom," to which Vitaliano said, "No, he's the mom, but if the kids get sick ..." Vitaliano later added, "I am very sympathetic to that." (Complainant's Exhibit 9)

32. In February of 2019, each member of the executive board completed a performance evaluation of Complainant. (Tr. 287)

33. D'Angelo and Zagreda rated Complainant 2.45 and 2.33, respectively, on a scale of five. Those numbers ranged between "marginal" and "satisfactory." (Joint Exhibit 1)

34. Rubino rated Complainant 4, or "good." Vitaliano rated Complainant 2, or "marginal." (Joint Exhibit 1)

35. On March 12, 2019, Complainant filed a complaint with the Bronx Borough President's office alleging discrimination based on age, caregiver status, familial status, and gender (including gender identity and gender expression) against Vitaliano and Zagreda. (Complainant's Exhibit 16; Tr. 78-79)

36. Complainant complained about the January 28, 2019, meeting as well as his interaction with Vitaliano on January 18, 2019. Complainant also complained about an incident in 2016, during which Vitaliano had cleaned out Complainant's office while Complainant was on leave. (Complainant's Exhibit 16)

37. After an investigation by Vivian Velez, EEO officer, the Borough President's office determined that the allegations of discrimination were unsubstantiated. (Joint Exhibit 1; Tr. 290)

38. In May of 2019, Respondent redid Complainant's evaluations. D'Angelo chose two additional board members, who were not on the executive board, to participate in the evaluation process. The members D'Angelo chose were "friendly toward [Complainant] so it didn't sound like it was being prejudicial." (Tr. 290-91)

39. The second round of evaluations was conducted in a manner similar to the first round, but Complainant's ratings were somewhat higher. (Tr. 291-92)

40. On May 13, 2019, Complainant sent an email to Respondent's employee relations committee members, advocating for a significant raise of up to 12 percent for himself. He also indicated that it was "not in our interest" to make Harriet Lasky, one of his part-time staffers, a full-time employee, which was being considered. (Complainant's Exhibit 22)

41. Later that evening, the board unanimously passed resolutions to make Lasky a full-time employee and to give Kirka a new job title and a raise. In addition, a motion to give Complainant a 3.5 percent raise failed, but a motion to give Complainant a five percent raise passed. (Complainant's Exhibit 23)

42. The employee relations committee met again later that month, to allocate more of the salary budget to the staffers. The resolution to make Lasky a full-time employee passed as did a



resolution to give Kirka a salary increase and a new title. Complainant was also recommended to receive a 6.2 percent salary increase. (Tr. 241-44)

43. Later that evening, the full board met, and Complainant received a 6.2 percent raise as the employee relations committee recommended. (Complainant's Exhibit 26; Tr. 244)

44. D'Angelo voted in favor of Complainant's raise, as did Rubino. Vitaliano did not vote, and Zagreda abstained. The vote for Complainant's raise was 26 in favor, with one abstention. (Complainant's Exhibit 28)

45. Complainant's new salary was then \$89,754.00 per year, effective April 28, 2019. He received another raise in October of 2019 to \$92,447.00. (Respondent's Exhibit 3)

### **OPINION AND DECISION**

It is an unlawful discriminatory practice to deny an employee equal terms, conditions, or privileges of employment because of that employee's age, sex, or familial status. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.

To make out a prima facie case of unlawful discrimination in the employment context, a complainant must show (1) complainant is a member of a protected class; (2) complainant was qualified for the position; (3) complainant suffered an adverse employment action or was terminated from employment; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If Complainant makes out a prima facie case of unlawful discrimination, the burden of production shifts to Respondent to present a legitimate, independent, and non-discriminatory

reason for its actions. *See Id.* Respondent need only articulate a legitimate, non-discriminatory reason for its actions. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If Respondent does so, Complainant must show that the reasons presented by Respondent were merely a pretext for the unlawful discrimination by demonstrating both that Respondent's stated reasons were false and that the real reason was unlawful discrimination. *See Id.* at 305, 786 N.Y.S.2d at 391. The "burden of persuasion of the ultimate issue of discrimination always remains" with Complainant. *Stephenson v. Hotel Employees and Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant here fails to make out a prima facie case of unlawful discrimination. The circumstances surrounding Complainant's evaluations and raise do not give rise to an inference of discrimination. Complainant argues that Vitaliano made decisions about Complainant based on Complainant's status as a father. Complainant wanted a larger raise than the 6.2 percent he received and alleges that this was discriminatory. He cites statements Vitaliano made, as well as his low evaluation rating from Vitaliano as evidence of bias. However, Vitaliano was just one of 42 board members. The full board voted to give Complainant his raise, and Vitaliano did not vote. Moreover, it was not Vitaliano who raised the idea that Complainant was "the mom." Rubino first made that comment and Vitaliano repeated it. Rubino then gave Complainant the highest rating on his evaluation. With respect to the Complainant's raise, it is significant that Kirka, who was also a father who had been criticized by Vitaliano over childcare issues, received a 12 percent raise and a title change. Kirka's familial status did not prevent him from receiving a larger raise.

The record contains no evidence that Complainant's status as a father, or his age, his sex, or sex stereotyping had any role in the decision to evaluate his performance or give him a salary

increase. This claim must be dismissed.

Complainant alleged that Respondent subjected him to a hostile work environment because of his familial status. To sustain this claim, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment.<sup>1</sup> The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *See Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50-51, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). Complainant must also show that the discriminatory conduct occurred because of his protected class membership. *See Arcuri v. Kirkland*, 113 A.D.3d 912, 914, 978 N.Y.S.2d 439, 441 (3d Dept. 2014).

Complainant has not shown himself to be a victim of harassment. In 2019, Vitaliano made a comment about Complainant at a meeting and told Complainant he needed to coordinate his childcare and homelife schedules with his domestic partner. These comments do not constitute harassment such that his work environment was permeated with intimidation, ridicule, and insult. The fact that Vitaliano had made a comment to a co-worker previously and had cleaned out Complainant's office three years earlier do not raise the 2019 incidents to a level of

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<sup>1</sup> Effective October 11, 2019, Human Rights Law § 296.1(h) amended the definition of harassment and the standard applied to such claims. "Harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more . . . protected categories." *Id.* This is so "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." *Id.* However, because the allegations which gave rise to the harassment claims in the instant complaint occurred prior to the amended law's effective date, Complainant's allegations are analyzed under the former severe or pervasive standard.

harassment that can be considered actionable. Moreover, the borough president's office considered the allegations and did not consider them to be discriminatory. The incidents Complainant complains of are simply not enough to be considered harassment as the law existed in 2019. Complainant's charges of harassment must be dismissed.

Complainant also alleged that Respondent subjected him to unlawful retaliation. It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed unlawful discriminatory practices. Human Rights Law § 296.7.

To make out a prima facie case of retaliation, a complainant must show that 1) he engaged in activity protected by the Human Rights Law, 2) the respondent was aware that the complainant participated in the protected activity, 3) he 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).

If Complainant makes out a prima facie case of retaliation, the burden shifts to Respondent to articulate a legitimate, independent, and non-discriminatory reason for its actions. If Respondent does so, Complainant must show that the reasons presented by Respondent were merely a pretext for discrimination. *Id.* at 845, 965 N.Y.S.2d at 165.

Complainant fails to make out a prima facie case of retaliation. Complainant made a complaint with the borough president's office. However, thereafter, he was re-evaluated by Respondent, and received better scores than he had previously. He then received a raise, followed by a second raise, all within less than nine months after he complained to the borough president. So, after Complainant complained about his employer, it then bestowed greater benefits upon him. One simply cannot conclude that Complainant was retaliated against from

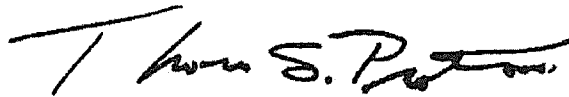
this set of facts, just because Complainant wanted more. His claim of retaliation is dismissed.

**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 case be dismissed.

DATED: May 11, 2023  
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is written in a cursive, flowing style.

Thomas S. Protano  
Administrative Law Judge