NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

ARRON C. BROWN,

Complainant,

v.

MASON TENDERS DISTRICT COUNCIL TRAINING FUND, ALSO KNOWN AS, MASON TENDERS TRAINING FUND,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10116779

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 June 27, 2008, by Lilliana Estrella-Castillo, 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: AUG 0 6 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of ARRON C. BROWN, Complainant, v. MASON TENDERS DISTRICT COUNCIL TRAINING FUND, also known as, MASON TENDERS TRAINING FUND, Respondent.	RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER Case No. 10116779

SUMMARY

The Division does not have jurisdiction over Respondent, a training fund, because it is not an "employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs . . . " Human Rights Law § 296 (1-a) (b) The proper party, with controlling authority, is the Joint Apprenticeship Training Committee (JATC), which makes decisions about whom to admit into the apprenticeship program, makes rules for participation in the program, and decides the circumstances under which one may be dismissed from the program.

PROCEEDINGS IN THE CASE

On March 19, 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 Lilliana Estrella-Castillo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 19, 2008 and March 20, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels. Respondent was represented by the law firm of Proskauer Rose, LLP by Lloyd B. Chinn.

The caption in this complaint was amended to refect Respondent's correct legal name, Mason Tenders District Council Training Fund. (Tr. 436-37)

The parties submitted timely proposed findings of facts and conclusions of law, which were read and considered.

FINDINGS OF FACT

1. Complainant is a "dark brown" African American. (Tr. 40-41)

2. Respondent is a Taft-Hartley, multi-employer, employee welfare benefit plan within the meaning of ERISA. Respondent funds training and related benefits to employees and apprentices within the construction industry pursuant to collective bargaining agreements with employers in the industry. It is funded by contributions received from such employers in accordance with the terms of the applicable collective bargaining agreements. (Respondent's Exhibit 10)

3. Complainant alleged that Respondent unlawfully discriminated against him because of his race when Respondent's apprentice co-coordinator, Timothy Warrington, a Caucasian male,

made the comment "you are all the same" and when Complainant was required to submit a letter explaining the circumstances that led to his missing all the scheduled in-class training. (Tr. 314; ALJ Exhibit 1)

4. Respondent denied unlawful discrimination and argued that the Division does not have subject matter jurisdiction over Respondent. (Tr. 14-17, 19-20; ALJ Exhibit 5)

5. Complainant became an apprentice in June 2005. (Tr. 40, 92, 101-02, 321-23)

6. Upon enrollment, Complainant executed a document entitled "Rules and Standards of the JATC of the Mason Tenders' Training Fund Governing Apprenticeship Program for Skilled Construction Craft Laborer" ("Apprentice Rules"). (Respondent's Exhibit 2) The Apprentice Rules provide that "having one or more unexcused absences from training sessions, you may be suspended from the program. If unexcused absences continue, your apprenticeship may be terminated." (Tr. 332-34; Respondent's Exhibit 2)

7. When Complainant signed the Apprentice Rules, on June 2, 2005, he understood that he agreed to abide by those rules, and complete the course of in-class instruction and on the job work experience established by the JATC. (Tr. 87-88)

8. Complainant understood that training was not optional and that more than three unexcused absences could result in his suspension from the program. (Tr. 88-89, 91, 98)

9. Complainant completed a three weeks unpaid training. (Tr. 331)

10. During the training period Complainant received praise and compliments from Warrington, whom Complainant described as a "pretty nice guy." (Tr. 101-03)

11. After Complainant completed the initial training he was placed on the "out-of-work" list with Local 79, and started to work. (Tr. 335; Respondent's Exhibit 13)

12. Complainant accumulated a total of 1,919 work hours. (Tr. 342; Respondent's Exhibit) Most of Complainant's work hours were accumulated while working for Tri-Line Contracting Corporation, from August 2005 thru October 2006. (Tr. 41, 110-11, 124)

13. Complainant was aware that he had to report to Respondent the number of hours worked, but failed to do so. (Tr. 42, 93, 95) Complainant knew that he had to provide Respondent with his pay stubs on a periodic basis, but failed to do so. (Tr. 338-40)

14. Complainant was aware that he needed the additional classroom hours in order to continue to work, but made no efforts to attend any classes or advise Respondent that he had worked over 1,000 hours. (Tr. 42, 44, 112-14, 117-19)

15. Complainant offered no excuse for not complying with the Apprentice Rules. (Tr. 119-21)

16. October 4, 2006, was Complainant's last date of employment with Tri Line; Complainant resigned. (Tr. 121-25)

17. In October 2006, Complainant contacted Local 79 to place his name on the "out-of-work" list and was told that he could not be placed on the list until he completed a certain amount of classes. (Tr. 51, 130)

18. Complainant did not contact Respondent until January 2007, when he sought reinstatement into the apprenticeship program. (Tr. 134-35, 346) But, by that time, because Complainant failed to keep Respondent informed as to his status, Respondent was under the belief that Complainant had quit the program, and informed Local 79 that Complainant was not allowed on the "out-of work" list. (Tr. 161-62, 344-45, 357-58; Complainant's Exhibit 1; Respondent's Exhibit 14)

19. Warrington, however, allowed Complainant back into the program, and informed Complainant that he was behind in his classes and that he needed to come in and get back on track. (Tr. 137)

20. Complainant was immediately scheduled for classes and was informed of the schedule by phone and by mail. (Tr. 55-56, 134-37; Complainant's Exhibit 2; Respondent's Exhibits 6, 7)

21. Although Complainant was scheduled for classes, he did not attend any classes in 2007. (Tr. 62-63, 193, 207, 347, 354, 366-67, 421-22)

22. Complainant recalls missing only three classes. According to Complainant he was not allowed to take the first class because he arrived late. (Tr. 154, 167)

23. Complainant missed the second class, February 12, 2007, because his friend was stabbed in Complainant's car the night before and Complainant could not make the class the next day. (Tr. 53, 167-68, 182-86, 354) Complainant did not call to excuse his absence. (Tr. 355)

24. The next class that Complainant was scheduled to attend, March 15, 2007, he missed because he showed up for the class a day late. (Tr. 55, 206, 369)

25. When Complainant showed up the day after the class started, Warrington asked Complainant what was he doing there and Complainant responded that he was there to attend the class. Warrington advised Complainant that the class started the day before and Complainant started to argue with Warrington that it had not, and that he had the schedule to prove it. When asked to produce the schedule Complainant started to search his pockets, and Warrington told him "you're embarrassing yourself." (Tr. 371-72)

26. Complainant alleged that during this interaction Warrington made a racist remark which caused Complainant great offense. (Tr. 208, 210, 251, 255, 259-60, 267)

27. According to Complainant, while he and Warrington were engaged in conversation, Complainant's cell phone rang and Complainant proceeded to answer it, and, according to Complainant, Warrington stated, to no one in particular, "they are all the same." (Tr. 52) Complainant later changed his testimony and stated that Warrington said "you are all the same" which Complainant interpreted to mean "all black people are the same." (Tr. 58-59)

28. Warrington denied making the statement "you are all the same." (Tr. 375-78)

29. Complainant never heard any other derogatory comment, nor any other comment that he felt was derogatory directed towards him. (Tr. 105)

30. Complainant returned to Respondent's offices the following day and met with Warrington, at which time Warrington informed Complainant that if he wanted to continue in the program he had to write a letter explaining why he should be allowed to continue in the program, given his repeated failure to attend classes. (Tr. 63-64) Warrington used this technique in the past with success as a way of refocusing people. (Tr. 373, 375)

31. Complainant was never told that he could not return to the program. (Tr. 215-16)

32. Complainant never wrote the letter because he felt that Warrington did not have the authority to make such a request, and he never returned to the program because he felt he had been insulted by Warrington the day before. (Tr. 218-19, 222-23, 225, 277-80)

OPINION AND DECISION

Respondent argued that the Division does not have jurisdiction over Respondent, a training fund, because it is not an "employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs . . . ." Human Rights Law § 296 (1-a) (b) Respondent argued that the proper party, with controlling authority, is the JATC, which is composed of trustees who jointly make decisions about whom to admit

into the apprenticeship program, make rules for participation in the program, and decide the circumstances under which one may be dismissed from the program. Respondent argued that it does not make those decisions; it merely pays for the program. (Tr. 316-17, 431-32; Respondent's Exhibit 10) Respondent further argued that it funds an apprenticeship training program that is administered by a "joint labor-management committee," but it is not such a committee. (Tr. 314, 317, 432; Respondent's Exhibit 10) According to Respondent, it has no discretion or authority for decisions relating to the selection, admittance, or participation of persons with regard to the apprenticeship program.

The Division failed to address this argument during the hearing or in its post-hearing submission.

Based on the submissions and evidence presented at the hearing, Respondent, a training fund, is not an "employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs . . . ," therefore the Division does not have jurisdiction over Respondent.

But, even assuming that the Division had jurisdiction over Respondent, Complainant failed to meet his burden of proof. Complainant failed to show that he suffered an adverse action because the evidence shows that he voluntarily quit the apprenticeship program by failing to comply with the Apprenticeship Rules, and by later refusing to write a letter, explaining why he should be permitted to continue in the program given his repeated failure to attend classes. Clearly, writing a letter was no more than a mere inconvenience and cannot be considered an adverse action since it did not materially alter the terms and conditions of his apprenticeship. Moreover, the request was intended to help Complainant refocus on the program and not to degrade him. Warrington had used this method before, and was encouraged to continue to use it

because it had been successful in the past.

Furthermore, Respondent offered a legitimate, non-discriminatory reason for asking Complainant to attend the mandatory classes and to write the letter. As the facts revealed, Complainant had repeatedly failed to meet the expectations of the program. Complainant had not taken any classes after his initial training, although he was fully aware of his obligation to do so, and he also failed to submit his pay stubs to keep Respondent abreast of the number of hours that he had worked. Furthermore, Complainant was reinstated and scheduled to attend classes which he failed to attend.

Complainant offered absolutely no evidence that Respondent's proffered justification for its action was a mere pretext for race discrimination, other than the fact that Complainant is African American, and that allegedly Warrington made a single remark that Complainant construed as racist. Warrington denied making the statement, and denied having any racial animus towards Complainant. Moreover, Warrington is the same individual that recruited Complainant into the program, allowed Complainant to miss a class while still in the initial training without any repercussions, and was the same person who praised and complimented Complainant in front of the class, and ultimately reinstated Complainant back into the program. Therefore, creating a strong inference that discrimination was not a motivating factor in Warrington's request that Complainant write a letter if he wished to continue in the program. See, *Campbell v. Alliance Nat'l Inc.*, 107 F.Supp.2d 234 (S.D.N.Y. 2000) (Same actor inference affects the weight to be given to the proffered non-discriminatory reason for the adverse action by creating a "powerful inference" that discrimination did not motivate the employer).

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: June 27, 2008
Bronx, New York

Lilliana Estrella-Castillo
Administrative Law Judge