

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ISABELLE N. DOSSANTOS,

Complainant,

v.

SEARS, ROEBUCK AND CO.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10101894

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 16, 2007, by Tammy B. Collins, 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 17th day of December, 2007.

KUMIKI GIBSON
COMMISSIONER

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ISABELLE N. DOSSANTOS,

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Respondent.

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

Case No. **10101894**

SUMMARY

Complainant alleged that Respondent discriminated against her based upon her race and national origin when she attended an interview for a sales position and Respondent offered her a different position than the one for which she interviewed. Complainant's claim must be dismissed because she failed to prove that Respondent's reasons for the employment decision were a pretext for unlawful discrimination.

PROCEEDINGS IN THE CASE

On October 6, 2004, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with an unlawful discriminatory practice 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 Tammy B. Collins, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on June 12-13, 2007 and July 9, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Christopher Knauth, Esq. Respondent was represented by Thomas J. Rattay, Esq.

Permission to file post-hearing briefs was granted. Both Complainant and Respondent filed timely briefs.

On the first day of hearing the caption was amended to reflect the legal name of the respondent which was Sears, Roebuck & Co.

FINDINGS OF FACT

1. Complainant is a black woman of West African descent who moved to the United States in 2002. (Tr. 81)
2. Complainant speaks with an accent. (Tr. 32)
3. Complainant has a two year degree in Business Administration. (Tr. 81)
4. On September 13, 2004, Complainant applied online for a sales position at Respondent, Sears, Roebuck & Co. (“Sears”), at the Green Acres Mall (“Green Acres”). (Tr. 84-85, 92, 94)
5. Later that day, Complainant called to confirm her appointment since it had been automatically scheduled online. (Tr. 97)
6. Complainant was scheduled for an interview on September 14, 2004 at 10 a.m. (Tr. 86, Complainant’s Exh. 2)
7. Respondent begins their annual hiring for the holiday season during the months of September and October. (Tr. 28)

8. During this season, Respondent interviews 25 to 30 individuals per day. (Tr. 30)

9. Respondent hires between 95 and 125 seasonal employees annually. (Tr. 29)

10. Respondent's workforce was made up of in excess of 85 percent black employees.

(Respondent's Exh. C)

11. Respondent assert that many of the black employees speak with an accent. (Tr. 217)

12. On the morning of the interview, Complainant went to Sears and approached Isabella Onesto, Respondent's human resources manager. Onesto rudely stated to Complainant, "You can't just walk in the store here and ask for an interview . . . the person who interviews is not here. . ." Eventually, Onesto told Complainant that she should come back the next day at 2:00 p.m. Complainant indicated she would do so. This exchange lasted about 10 minutes. (Tr. 18-19,98-99)

13. Onesto is of Italian national origin and speaks with an accent. (Tr. 32, 34)

14. Onesto admits that she did not review Complainant's application at that time. (Tr. 52, 99-100)

15. At 2:00 p.m., on September 15, 2007, Complainant returned to Respondent's Human Resources Office at Sears at 2:00 p.m. (Tr. 100)

16. Onesto and Marianne Macunso, Respondent's employee, were sitting nearby. (Tr. 100)

17. Everyone in the office at that time was white. (Tr. 101)

18. Complainant introduced herself and the reason for her second visit and Complainant was asked to wait. In the meantime, Macunso and Onesto had a conversation. Complainant waited almost one hour. Complainant was then told to write her social security number down and she refused. Complainant waited for 30 to 40 minutes and had to postpone her next interview. (Tr. 102)

19. Finally, Maria Santana, the Assistant Store Manager, entered the store and Macunso indicated that Santana would conduct the interview. (Tr. 103)

20. Santana is of Dominican national origin and speaks with an accent. (Tr. 361)

21. The interview commenced and Santana indicated that the only position they had available was a Merchandising Customer Associate (“MCA”) position. The MCA position entails packing and putting items together in the store, cleaning up and keeping the sales floor ready at all times. (Tr. 103, 107)

22. Santana indicated that Complainant must start from the bottom in the MCA position as would most new hires. (Tr. 104, Respondent’s Exh. C)

23. Thereafter a discussion ensued about Complainant having originally applied for a sales position. (Tr. 102-104)

24. Santana offered Complainant the MCA position. Complainant rejected the offer because it was not the job for which she applied. (Tr. 110, 170, 179)

25. Onesto conceded that sales associate, MCA, commission sales, cashier and receiving positions are always available at that time of year. (Tr. 59, 182)

26. However, the positions listed on Respondent’s website are not always available because the status of positions can change rapidly. (Tr. 27)

27. Before Complainant left, she spoke with Macunso and told her she was filing a complaint and Macunso attempted to dissuade Complainant. Macunso admitted that they had many positions available and that she did not know that Complainant was interested in a sales position. (Tr. 118)

28. On September 16, 2007, Complainant and her husband went back to Respondent and spoke with Macunso to see if she could still accept the MCA position. Onesto joined the conversation which took place in the hallway of the Human Resources Office. (Tr. 121)

29. Santana joined the group which then consisted of five people. (Tr. 121)

30. Mark Orsini, the security manager, was called to the scene. Orsini gave Complainant his phone number and said to call him on Monday, September 20, 2004. (Tr. 33, 123)

31. Complainant requested an apology. (Tr.123)

32. On that Monday Complainant telephoned and attempted to speak with Orsini. However, he was in a meeting. (Tr. 124, 178)

33. Complainant filed her Complaint with the Division on October 5, 2004. (Tr. 125)

34. No one from Respondent ever called her back. (Tr. 126)

OPINION AND DECISION

Discrimination

Complainant failed to prove that Respondent discriminated against her based upon her race or national origin. It is unlawful for an employer to refuse to hire an individual on the basis of their race or national origin. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a).

In order to substantiate a claim for discrimination, the applicant must prove that she was a member of a protected class, qualified for the position, denied the position and the denial happened under circumstances that give rise to an inference of discrimination. If Complainant is successful, the burden then shifts to the Respondent to establish legitimate non-discriminatory reasons for their decision. Should Respondent state legitimate reasons, the burden shifts back to Complainant to prove that Respondent’s proffered explanations are a pretext for unlawful discrimination. *Pace College v. Commission on Human Rights of the Cty. of New York*, 38

N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975) (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Here, Complainant is black and of African national origin, she was qualified for the position in that she had previous sales experience and had a two year college degree, Respondent denied Complainant a sales associate position and Respondent had sales positions available but did not offer Complainant any of them.

Race

Respondent proffers that the reason that they did not offer Complainant a sales position was that there were no sales positions available. Then Respondent asserts that when Complainant came in for the interview, she asked for an office job and none were available. This assertion cannot stand when Complainant's job application indicated that she in fact applied for a sales position. Although I do not credit this reason it is apparent from the record as a whole that the Respondent offered shifting reasons for not hiring Complainant. Such alternate reasons from Respondent's witnesses show that there was some confusion as to whether there was a sales position available. This confusion, although somewhat detrimental to the hiring process and a bit disjointed, does not amount to a pretext for discrimination. Respondent credibly asserted that during the holiday season the availability of positions shift and change daily depending on whether the candidates selected for employment actually report for duty or take other seasonal jobs. Thus, Respondent established a credible reason for offering Complainant an MCA position instead of a sales position.

Complainant failed to adduce evidence that Respondent's reasons for offering her an MCA position were a pretext for discrimination. At most Complainant relied upon Respondent's treatment of her, the admissions that Respondent had sales positions after the fact and the

transcript of the mostly inaudible tape of Complainant's second visit to the Respondent's store. What is striking about Respondent's undisputed evidence is that black employees represented in excess of 85% of Respondent's workforce. This context must be considered when analyzing a race case. Moreover, Respondent proffered evidence that all of the sales associates hired during the 2004 holiday season were black except for one associate who was Hispanic. Thus, Complainant failed to prove pretext and the race claim must be denied.

National Origin

The above analysis can be applied as well to the national origin portion of Complainant's claim. However, there were two allegations that were unique to national origin discrimination, i.e., Complainant spoke with an accent and asserted that she was from another country, namely Africa. Although Complainant establishes a prima facie case of national origin discrimination, Complainant failed to disprove Respondent's assertions that there were many black employees from various countries who spoke with an accent. Thus, Complainant fails to prove that Respondent's reasons for offering Complainant an MCA position instead of a sales position was a pretext for discrimination. Therefore, the national origin discrimination claim must be denied.

Complainant's remaining arguments alleging that Respondent condoned the alleged discrimination after the fact are without merit in light of Complainant's failure to prove race and national origin discrimination. Any other allegations not specifically addressed here are without merit.

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 is hereby dismissed.

DATED : November 16, 2007
Bronx, New York

Tammy B. Collins
Administrative Law Judge