

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS

On the complaint of

TRAVIS KNIGHT,

Complainant,

-against-

KELLY SERVICES, INC.,

Respondent.

**NOTICE OF ORDER
AFTER HEARING**

CASE No. 7-E-RV-04-7905792-E

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by the Hon. Edward A. Friedland, Executive Deputy Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Lilliana Estrella-Castillo. 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, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE ALSO TAKE NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice which 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 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 days after service of this Order. The Petition and Notice of Petition must also be served on all parties, including the Division of Human Rights.

DATED: FEB 27 2007

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

A handwritten signature in cursive script, appearing to read "Edward A. Friedland", written over a horizontal line.

EDWARD A. FRIEDLAND
Executive Deputy Commissioner

To.

Travis Knight
114 Sturges Street
Jamestown, New York 14701-3457

Connell Foley, LLP
85 Livingston Avenue
Roseland, New Jersey 07068
Attention John K. Bennett, Esq.

Paul Crapsi, Jr. Esq.
Walter J. Mahoney State Office Building
65 Court Street
Suite 506
Buffalo, New York 14202

Caroline J. Downey, Acting General Counsel
State Division of Human Rights
One Fordham Plaza
Bronx, New York 10458

Hon. Andrew Cuomo
General Counsel
120 Broadway
New York, New York 10271
Attention Civil Rights Bureau

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS

On the complaint of

TRAVIS KNIGHT,

Complainant,

CASE No. 7-E-RV-04-7905792-E

-against-

KELLY SERVICES, INC.,

Respondent.

Complainant alleged that he was discriminated against based on his conviction record and his race when Respondent failed to hire him as a substitute teacher. The credible evidence shows that Respondent did not discriminate against Complainant and thus, his claims are dismissed.

PROCEEDINGS IN THE CASE

On April 24, 2004, Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights ("Division") charging Respondent with an unlawful discriminatory practice in violation of the Human Rights Law of the State of New York.

On June 2, 2004, the complaint was amended to correctly name Respondent, Kelly Services, Inc., as reflected above. (ALJ's Exhibit II)

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that Respondent engaged in an unlawful discriminatory practice. Thereafter, the Division referred the case to public hearing.

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge (“A.L.J.”) of the Division. A hearing was held on October 12 and 13, 2005.

The complaint was represented by the Division through Paul Crapsi, Jr., Esq., of Counsel. Respondent was represented by the law firm of Connell Foley, LLP, by John Bennett of Counsel.

Respondent and the Division filed timely post-hearing briefs.

Complainant claimed that he was unlawfully discriminated against in employment by Respondent on the basis of his race and criminal conviction when Respondent failed to offer him employment as a substitute teacher. Respondent denied unlawful employment discrimination. (ALJ’s Exhibits I, II, and V).

On November 6, 2006, ALJ Estrella-Castillo issued a recommended Findings of Fact, Opinion, Decision and Order (“Recommended Order”) for the Commissioner’s consideration. Objections to the Recommended Order were received by the Order Preparation Unit by Division Counsel dated November 21, 2006.

FINDINGS OF FACT

1. Complainant is African American and has a conviction record. (Tr. 34-36; ALJ’s Exhibit I, Complainant’s Exhibit 1). Complainant’s conviction resulted from a domestic dispute which occurred on June 18, 1997. Complainant was charged with felony assault in the second degree, for assaulting his nineteen year-old sister with a baseball bat. (Tr. 144, 146; Respondent’s Exhibit D). Complainant was thirty-two years old at the time of the assault. (Tr. 134). On September 10, 1997, Complainant accepted a plea bargain and was convicted of third degree assault, a misdemeanor. (Tr. 34; ALJ’s Exhibit I; Complainant’s Exhibit 1; Respondent’s

Exhibit D). As a result, complainant received a one year conditional discharge and a ninety dollar fine. (Tr. 149-150; Complainant's Exhibit 1).

2. Since his conviction, Complainant returned to school and received a Bachelor of Science degree in early childhood education in 2003. (Tr. 44-45, 154-156; Complainant's Exhibit 4). Complainant is currently working on obtaining a Masters degree in special education. (Tr. 65). On February 1, 2004, complainant received a provisional public school teacher certificate. (Tr. 53-54; Complainant's Exhibit 4). While working towards his degree, Complainant worked with children at the elementary school level in after-school programs. During the Fall of 2002 and the Spring of 2003, Complainant did his student-teaching in the Jamestown School District. (Tr. 50-52, 86; Complainant's Exhibit 3). After graduation, complainant worked in the Jamestown School District as a substitute teacher beginning in May of 2003. (Tr. 63). These positions required that complainant be cleared for employment by the State of New York Education Department. (Tr. 63, 66-69, 74-75, 77; Complainant's Exhibit 5).

3. Respondent is an international staffing service business that employs temporary employees throughout the world. (Tr. 215; Complainant's Exhibit 17). As part of those staffing services, Respondent recruits, screens, and trains qualified teachers. (Tr. 304). Respondent assumes all employer obligations related to a school's substitute teacher program. (Tr. 216). Respondent has a policy in place for dealing with New York applicants with criminal convictions. (Tr. 217, 265; Complainant's Exhibit 18). When handling a New York applicant with a criminal conviction, the applicant is initially advised that the criminal conviction does not disqualify the applicant from employment. The applicant is then required to fill out additional paperwork, and required to produce copies of the criminal complaint and the disposition records from the court. (Tr. 219; Complainant's Exhibit 19). Those documents, along with the

employment application are forwarded to Respondent's corporate office where they are reviewed and a recommendation is made regarding whether or not to offer employment. (Tr. 218-219; Complainant's Exhibit 19). As part of that review, Respondent takes certain factors into consideration, including the nature of the conviction, the time that has lapsed since the conviction, the age of the applicant at the time of the conviction, the relation between the crime and the job and the risk to its customers. (Tr. 225-226, 250).

4. In January of 2004, the Jamestown School District was experiencing a shortage of certified substitute teachers. It had only forty percent of the substitute teachers it needed. (Tr. 303). In response to this situation, it entered into a contract with Respondent whereby Respondent would supply the district with qualified short-term substitute teachers for instructional services. (Tr. 302-303, 160-161). The Jamestown School District had previously hired all of its short-term substitute teachers directly and continued to directly hire long-term substitute teachers. Respondent, thereafter, invited the district's substitute teachers to apply for employment with Respondent. (Tr. 308). It was anticipated that after the teachers applied and were interviewed, they would be transitioned over to Respondent as substitute teachers. (Tr. 308).

5. On January 22, 2004, Complainant applied with Respondent for a short-term substitute teacher position believing that it was a pro forma process and that he would be able to start a seven week position that was available beginning on February 23, 2004. (Tr. 81-82). Complainant completed Respondent's employment application and disclosed that he had a misdemeanor conviction within the last seven years. (Complainant's Exhibit 2). Complainant described the event that led to his conviction as: "I had a fight with a sibling (sic). She called

the police and pressed charges. I plead guilty not knowing how serious the charges were.” (Tr. 125-126; Complainant’s Exhibit 2).

6. Patricia Bora, Respondent’s manager in its Jamestown office, advised Complainant during the interview that since he responded “yes” regarding the criminal conviction, he had to complete additional paperwork. (Tr. 309-310). Complainant then completed Respondent’s “Interview Guide for Applicants with Convictions or Charges Pending” and responded to questions regarding the behavior that led to the conviction. (Tr. 128, 309; Respondent’s Exhibit A). Complainant explained that he was visiting his mother when his sister attacked him with a bat, and he defended himself by taking the bat away from his sister. (Tr. 129-130; Respondent’s Exhibit A). Bora explained to Complainant that Respondent’s process required that he provide copies of the court’s disposition of the criminal matter and that this information and his application would be forwarded to respondent’s Human Resources Department for review. (Tr. 129-130, 310). Bora’s explanation to Complainant is consistent with Respondent’s policy for dealing with applicants with criminal convictions in New York.

7. Complainant complied with Bora’s request and provided the documentation requested, and included a copy of the police department’s Domestic Incident Report. (Tr. 142; Respondent’s Exhibits B, C, D). Complainant admitted that this was the first time that anyone requested he provide any independent information regarding his prior criminal conviction. In other words, his explanation had always been sufficient. The Domestic Incident Report contains a narrative of the incident which provided a different version of the events that lead to Complainant’s conviction, and is, therefore, relevant:

Victim, Tara Avery, states she and her brother Travis Knight were playing around and Knight suddenly punched her in the face with a closed fist. Victim was afraid at that point and swung a bat she had at Knight, offender above. Victim did not hit offender, but fell

down. Offender then took the bat from victim and hit her in the head while she was still on the ground. Victim said she was able to get up and offender then attempted to strike her in the stomach with a broken off sharp end of the bat. Victim and offender's brother Shawn Avery took the bat away from offender. Victim went into her house to call the police and offender left the scene with Shawn Avery. Victim complained of pain to her mouth and jaw and had a small cut on her right bicep.

8. Bora forwarded all the documents to David Roraff, Respondent's Human Resources Manager. (Tr. 214, 354; Respondent's Exhibits B, C, D). Roraff testified that as part of his duties he reviews the applications and documentations provided by applicants in the states of New York and Wisconsin, after an applicant discloses a criminal conviction. (Tr. 217, 265). After reviewing the information, Roraff makes recommendations on behalf of Respondent as to whether or not an applicant should be hired. (Tr. 217). After reviewing Complainant's information, Roraff recommended to Bova that complainant not be hired. (Tr. 219-221, 263; Complainant's Exhibit 2; Respondent's Exhibits A, B).

9. In making his recommendation, Roraff reviewed Complainant's application package and took into consideration numerous factors. (Tr. 225-226). He considered the public policy of the State of New York to encourage the employment of persons previously convicted of a criminal offense, and agreed that this factor worked in Complainant's favor. (Tr. 226, 270). He considered the specific duties and responsibilities relating to the employment sought as a substitute teacher in the client's public schools. He took into consideration that as "substitute teacher you are mostly unsupervised throughout the day with children. . . . I didn't want to have a substitute teacher in there who had a past history of behavior that -- where he lost emotions and - - and was turned into a physical act." (Tr. 227-228). He considered the relation between the assault and Complainant's fitness or ability to perform, because of his admission that he allowed his "emotions [to] run very high" and engaged in behavior where he lost control and it "turned

into a physical act.” (Tr. 227-228; Respondent’s Exhibit B). This factor was balanced against Complainant. (Tr. 271). That nearly seven years had elapsed since the occurrence of his criminal offense, was a factor mitigating in the Complainant’s favor. (Tr. 228-229, 270). That Complainant was thirty-two years old at the time he committed the criminal assault weighed against Complainant because Roraff felt that as an adult he “should have had control of his emotions at that age.” (Tr. 229). The seriousness of the Complainant’s underlying criminal conduct, in which he punched his younger sister in the face, wielded a bat against her, and fled the scene, was “very serious.” (Tr. 229-230, 272). Though given several opportunities to explain his conduct or refute the allegations to which he plead guilty, Complainant produced nothing to Respondent indicating that the conduct alleged did not occur. Roraff made his decision by relying on the police report, and weighing the conduct versus the safety and welfare of the students, and felt that there was too great a risk to the students, teachers and other parents. (Tr. 231). Roraff’s fear was that Complainant would engage in some sort of physical, combative, or inappropriate behavior. (Tr. 267). Finally, Roraff balanced everything with Respondent’s legitimate interest in protecting the safety and welfare of the students, other teachers and other people within the Jamestown public schools, with whom Complainant could possibly have a disagreement. (Tr. 231-232).

10. Roraff communicated his decision to Bova, and instructed her to inform Complainant that they were not able to offer him employment based on his admitted behavior of assault. (Tr. 232). On February 23, 2004, Bova called Complainant at home and advised him of Respondent’s determination not to offer him employment at that time. (Tr. 79, 84, 120).

11. Complainant also alleged a claim for racial discrimination. Complainant alleged that the Jamestown School District had only three African-American teachers at the time. (Tr. 110-

111; ALJ's Exhibit I). He alleged they were the only ones not hired. (Tr. 178). Complainant did not produce any evidence to support this allegation.

12. Bova testified, without contradiction, that in total there were two employees that were not offered employment from Complainant's transitional group, one was Complainant and the other was a white female. The white female was not hired because she did not do well during the interview process; she did not have a conviction record. (Tr. 338, 347, 356, 387-388, 448, 390). Respondent identified two African-American females, Margaret Anderson and Margaret Potter, both of whom were hired. (Tr. 326-328). Complainant then identified another African-American female by the name of "Marcy" without any last name, as being one of the African-American females not hired. (Tr. 177-178). None of Respondent's witnesses could recall "Marcy."

DECISION AND OPINION

Complainant alleged unlawful discrimination on the basis of his criminal record and race. The Division finds that Complainant has failed to show that he was discriminated against. Accordingly, his complaint is dismissed.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to deny any individual employment because he has been convicted of a criminal offense when such denial is in violation of Article 23-A of the Correction Law. Human Rights Law § 296.15. Article 23-A of the Correction Law was enacted to "...eliminate the effect of bias against ex-offenders which prevented them from obtaining employment." *Bonacorsa v. Lindt*, 71 N.Y.2d 605, 611, 528 N.Y.S.2d 519 (1988). Correction Law Article 23-A, does not impose on an employer a duty to give ex-convicts preferred treatment. The law's intent is to remove the prejudice that exists

against former criminals obtaining jobs or licenses. See *Pisano v. McKenna*, 120 Misc.2d 536, 466 N.Y.S.2d 231 (1983).

Correction Law Article 23-A, §752 prohibits discrimination against “persons previously convicted of one or more criminal offenses...” The statute makes it clear that no application for employment shall be denied by reason of the applicant’s previous conviction of one or more criminal offenses, unless: “(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

Correction Law Article 23-A, §753 outlines the factors to be considered in making a determination pursuant to §752:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought.
- (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 the 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 this rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

The evidence produced at the hearing shows that Respondent considered the factors set forth in Correction Law Article 23-A, §753, when making its determination not to offer Complainant employment as a temporary substitute teacher. Roraff’s testimony revealed that he

considered the factors as enumerated in Correction Law Article 23-A, §753, and based on the outcome of that analysis decided not to offer employment.

When balancing the factors enumerated in §753, Roraff decided that there were certain factors which were resolved in Complainant's favor, such as the public policy of the State of New York to encourage the employment of persons previously convicted of a criminal offense and the almost seven years that had elapsed since the occurrence of his criminal offense. However, the other six factors were considered against Complainant, mainly that he was an adult at the time that he attacked his younger sister with a baseball bat, which Roraff considered to be a very serious offense. Based on Roraff's analysis he determined that there was an "unreasonable risk" to Respondent's clients if Complainant were offered employment. *See Arrocha v. Board of Education*, 93 N.Y.2d 361, 369, 690 N.Y.S.2d 503 (1999) (citing *Bonacorsa v. VanLindt*, 71 N.Y.2d 605 (1988) (wherein the Court of Appeals held that "a finding of unreasonable risk depends upon a subjective analysis of a variety of considerations relating to the nature of the . . . employment sought and the prior misconduct."))

Respondent did not automatically deny Complainant employment based on his prior conviction. Respondent reviewed Complainant's employment application in accordance with Correction Law §§ 752 and 753, and determined, based on that review, that Complainant would pose an unreasonable risk to the students, teachers and parents. Respondent has a legitimate interest in protecting the safety of students in a classroom, not only because the statute requires that this factor be considered [§753(1)(h)], but also because the safety and welfare of the children in a classroom are a real concern. *See Arrocha v. Board of Education*, 93 N.Y.2d 361, 690 N.Y.S.2d 503 (1999).

In its Objections to the Recommended Order, the Division argued that Respondent inappropriately focused on the conduct for which Complainant was arrested. The record, however, shows that Respondent focused on the underlying conduct which lead to his guilty plea, which, in this case, was a plea to the charges in the arrest record. The statute neither speaks to arrest nor conviction but authorizes the employer to consider "the seriousness of the offense or offenses" for which the Complainant was convicted. *See* Corr. Law § 753(f). In order to weigh the seriousness (regardless of the degree of the charge or conviction) the conduct which led to the conviction must necessarily be considered. Thus, it is not unreasonable for Respondent to have examined the underlying conduct which gave rise to the conviction. It is noted that there may be instances wherein the basis for the arrest is not the conduct which lead to the conviction, in which case, the basis for the arrest would be irrelevant to any determination of fitness for employment. This, however, is not at issue here. Complainant had several opportunities to dispute that he engaged in the conduct charged, but failed to do so. It is noted that Respondent merely requested the court's disposition of his conviction and it was Complainant who chose to submit his arrest record. The Division's argument that the basis for arrest is not relevant, as a general rule, is correct, however, the argument that there is no basis for "an employer to investigate the underlying conduct of the behavior which led to the criminal conviction," is contradicted by a plain reading of the statute.

The Division's argument that Respondent did not have written proof of its analysis and thus, this suggests such analysis did not occur, is unavailing. The ALJ credited Respondent's witnesses' testimony that such analysis did, in fact, take place. The ALJ's credibility determinations are "entitled to great weight." *Simpson v. Wolansky*, 38 N.Y.2d 391, 394, 380 N.Y.S.2d 630 (1975).

The Division's remaining objections have been considered and are unconvincing. Accordingly, Complainant's claim that he was discriminated against because of his conviction record is dismissed.

As to Complainant's complaint of racial discrimination, Complainant failed to prove discrimination. Complainant alleged that three African-American applicants applied for employment with Respondent and all three were rejected. Other than making this allegation, Complainant offered absolutely no evidence to support his claim. He was not even able to produce the names of the two African-American females who told him that they were not hired. On the other hand, Respondent produced the names of two African-American females that were, indeed, hired. Complainant recalled an alleged African-American applicant named "Marcy," but provided no last name and no other information. None of Respondent's witnesses could recall a Marcy and the credible evidence is that she did not exist.

Accordingly, Complainant's claim of race discrimination is dismissed.

ORDER

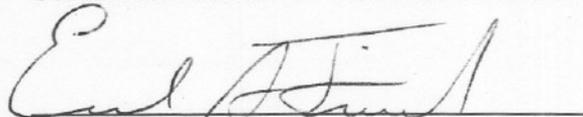
Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that the complaint be, and the same hereby is, dismissed.

DATED: FEB 27 2007

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND
Executive Deputy Commissioner