

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ERIC MARCUS,

Complainant,

v.

SCHOOL OF VISUAL ARTS,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10115999

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 19, 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, ACTING 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,

6/16/08



GALEN D. KIRKLAND
ACTING COMMISSIONER

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ERIC MARCUS,

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SCHOOL OF VISUAL ARTS,

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RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 10115999

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him on the basis of age and gender, because a younger female was hired instead of Complainant. Respondent did not discriminate against Complainant when he was not considered for the position of Director of Career Development. Complainant did not apply for the position properly; he did not include a cover page or an introduction, which led Respondent to conclude that he did not qualify for the position.

PROCEEDINGS IN THE CASE

On February 6, 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. A public hearing session was held on February 13, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels. Respondent was represented by Proskauer Rose, LLP, by John Barry and Alychia L. Buchan.

The parties timely filed proposed findings of fact and conclusions of law which were reviewed and considered.

FINDINGS OF FACT

1. Complainant alleged that he was unlawfully discriminated against by Respondent on the basis of his age and gender because he was not selected for an interview and a younger female was interviewed and selected for employment. (ALJ Exhibits 1, 2)
2. Complainant, a male, was born on January 26, 1958. (Tr. 10) Complainant was 49 years old at the time he applied for a position with Respondent. (ALJ Exhibit 1)
3. Respondent is a four year college of art and design. (Tr. 87; ALJ Exhibit 1)
4. In June 2006 Respondent posted to fill the position of Director of Career Development. (Tr. 142-143; Respondent’s Exhibit 9)
5. Respondent sought an applicant to “provide services and programs that meet the career development and employment needs of the [Respondent’s] students and recent graduates, as well as the staffing needs of potential employers.” (Respondent’s Exhibit 4)

6. An important part of the job was “to counsel students and recent graduates in all aspects of obtaining employment including employment research; resume, portfolio and reel preparation; interview and presentation; employment etiquette and business practices.” (Tr. 95)

7. Susan Modenstein, Respondent’s Executive Director of External Relations, who was 54 years old at the relevant time period, looked to fill the position with a candidate who had experience in career services, and management skills. (Tr. 88, 106, 116)

8. Modenstein reviewed between 50 and 60 resumes for the posted position. Any resume received without a cover page or some kind of an introduction, raised a “flag” that indicated that the candidate did not know how to apply appropriately, and was not considered. (Tr. 106, 129-130, 135)

9. On January 22, 2007, Complainant applied for employment with Respondent via Creative Hotlist website. (Tr. 10; ALJ Exhibits 1, 4)

10. Complainant applied for the position of Director of Career Development by submitting a resume with no cover page or introduction. (Tr. 11-13, 53-62, 108-109; ALJ Exhibit 1; Complainant’s Exhibit 1)

11. Complainant was not contacted for an interview. (Tr. 16, 18)

12. Complainant was aware that the duties of the position required assisting students in seeking employment. (Tr. 72)

13. Complainant knew that a cover page was important when applying for a job, but testified that he was unable to attach a cover page thru the website. However, other applicants, including the successful candidate, Jennifer Phillips, a 32 year old female, included a cover page or introduction along with their resume using the same website. (Tr. 21-23, 53-62, 81-82, 102; Complainant’s Exhibit 2)

14. Complainant also explained that Respondent's "line of thinking shows a remarkable ignorance about the online, web-apply environment that is the rule, not the exception. In this era of Timing-Out of Websites, Sites whose Functions don't Work as Advertised, Sites where you take two steps back for every step forward, and some that crash for no reason at all it doesn't surprise me that the position has gone unfilled since June 2006. The Respondent sort a 20th Century response with a 21st Century technology. A testament to just how out of touch the respondent is. That I didn't attach a Cover Letter when I applied is that that function didn't work on the computer I was using." (Reproduced as written) (Respondent's Exhibit 1)

15. The two finalists for the position were Jennifer Phillips, a 32 year old female, and Garrison Botts, a male in his 50's. (Tr. 21-23, 102, 122-124; Respondent's Exhibit 8)

16. The successful candidate was Phillips. (Tr. 21-23, 102)

17. Modenstein found Phillips' cover page well written and succinct, and her resume listed the relevant experience Modenstein was seeking. She was called for an interview, and ultimately hired. (Tr. 110-112; Complainant's Exhibit 2)

18. Complainant argued that he had more experience than Phillips because his resume was longer, but agreed that he did not indicate that he had any relevant experience. (Tr. 62, 64-65; Respondent's Exhibits 1, 2)

19. Complainant did not know the sex or age of the successful candidate at the time that he filed his complaint with the Division, but was sure that the reason he did not get the position was based on some discriminatory purpose. (Tr. 18-20, 22; Respondent's Exhibit 1)

20. Complainant also filed five other discrimination complaints with the Division alleging discrimination against other employers because he did not receive a call after submitting his

resume on a website. The Division found no probable cause in four of those complaints. (Tr. 48-49, 75-77)

OPINION AND DECISION

To establish a prima facie case of unlawful discrimination under the Human Rights Law, §296 (1) (a), Complainant must show that (1) he was a member of a protected class; (2) he was qualified for the position he sought; (3) he was not hired; and (4) the circumstances under which he was not hired gave rise to an inference of unlawful discrimination. *Pace College v. Commission on Human Rights of the City 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).

If Complainant establishes a prima facie case of discrimination, then Respondent must produce evidence showing that its action was non-discriminatory and for a legitimate business reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Respondent need not conclusively establish the validity of its proffered reason; rather, it merely must show that such reason, "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the [adverse] employment action." *St. Mary's Honor Ctr.*, 509 U.S. at 507.

Once Respondent has articulated a legitimate non-discriminatory reason for the adverse employment decision, the burden shifts back to the Complainant to put forth "adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's [protected class] was the reason for the [adverse decision]." *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2d Cir. 1996), cert. denied, 520 U.S. 1228 (1997).

Complainant did not make out a *prima facie* case of employment discrimination based on age or gender. Although Complainant was a member of a protected group, and he was not

selected for the position for which he applied, Complainant failed to show that the circumstances under which he was not selected raised an inference of discrimination.

In January 22, 2007, Complainant applied for the position of Director of Career Development with Respondent via the internet. Complainant provided Respondent with a copy of his resume, but did not include a cover page or any introduction. Complainant, as a professional, was aware of the importance of including a cover page or introduction when seeking employment. The omission was made worse by the fact that the duties of the position required that he guide students on job searches. Complainant's excuse for not including the cover page was not credible in light of the fact that other applicants included a cover page or introduction using the same web site.

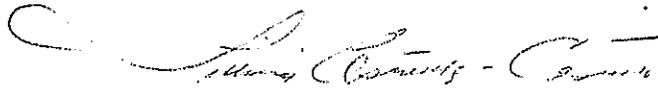
But, even assuming that Complainant made a prima facie case of discrimination, Respondent showed that it had a legitimate non-discriminatory reason for not selecting Complainant for an interview; it had a policy of not interviewing applicants who do not know how to properly apply for employment. Respondent's witness credibly testified that applicants that submit resumes without a cover page or introduction are not considered.

Complainant presented absolutely no evidence to counter Respondent's reason for his non-selection for an interview. Complainant simply relied on the fact that a younger female was selected for the position. The law is clear that conclusory allegations are not enough for Complainant to meet his burden. *See, Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept., 1999).

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: May 19, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Lilliana Estrella-Castillo
Administrative Law Judge