

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS

on the Complaint of

DON A. MCLAUGHLIN,

Complainant,

v.

WHITE PLAINS BOARD OF EDUCATION,

Respondent.

NOTICE OF FINAL
ORDER AFTER HEARING

Case No. 1253670

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 February 7, 2007, by Patricia L. Moro, an Administrative Law Judge of the New York State Division of Human Rights ("Division").

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 26th day of Month, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

Don A. McLaughlin
PO Box 1964
White Plains, NY 10602

White Plains City School District
Attn: Superintendent
Education House, 5 Homeside Lane
White Plains, NY 10605

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ELIOT SPITZER
GOVERNOR

KUMIKI GIBSON
COMMISSIONER DESIGNATE

February 7, 2007

Re: Don A. McLaughlin v. White Plains Board of Education
Case No. 1253670

To the Parties Listed Below:

Enclosed please find a copy of my proposed Recommended Findings of Fact, Decision and Opinion, and Order. Please be advised that you have twenty-one (21) days from the date of this letter to file Objections.

Your Objections may be in letter form, should not reargue material in the Record, and should be as concise as possible. Copies of your Objections must be served on opposing counsel, including Division counsel, if any, and on the General Counsel of the Division of Human Rights. Objections provide the parties with an opportunity to be heard on the issues in the case before the issuance of a final Order of the Commissioner. See Rules of Practice of the Division of Human Rights, 9 NYCRR § 465.17(c).

The Objections must be filed by February 28, 2007, with the Order Preparation Unit, at the address below.

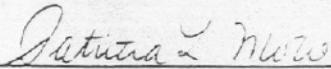
NYS Division of Human Rights
Order Preparation Unit
One Fordham Plaza, 4th Floor
Bronx, New York 10458

If we do not receive your Objections by the deadline noted above, the Division will assume that you do not object to the proposed order and will proceed to issue the final Order under that assumption.

Notice of Recommended Order
SDHR Case No. 1283670
Don A. McLaughlin v. White Plains Board Of Education

Please contact Peter G. Buchenholz, Adjudication Counsel, at
(718) 741-8340 if you have any questions regarding the filing of
Objections.

Very truly yours,



Patricia L. Moro
Administrative Law Judge

Notice of Recommended Order
SDHR Case No. 1253670
Don A. McLaughlin v. White Plains Board Of Education

TO:

Complainant

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Respondent

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Chief Calendar Clerk

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

DON A. McLAUGHLIN,

Complainant,

-against-

WHITE PLAINS BOARD OF EDUCATION

Respondent.

RECOMMENDED FINDINGS OF
FACT, DECISION AND OPINION,
AND ORDER

CASE NO: 1253670

PROCEEDINGS IN THE CASE

On February 9, 2000, Don A. McLaughlin (Complainant) filed a verified complaint with the State Division of Human Rights (Division) charging Respondent with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

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 a public hearing.

After due notice, the case came on for hearing before Patricia L. Moro, an Administrative Law Judge (ALJ) of the Division. A public hearing was conducted on June 7, 2005. Complainant and Respondent appeared at the hearing. The Division appeared and presented the case in support of the complaint by Gina M. Lopez Summa, General Counsel of the Division, by Bellew McManus, Esq., of counsel. Respondent was represented by Ingerman Smith, L.L.P., by Anna M. Scricca, Esq. Counsel for the Respondent filed a post-hearing brief.

FINDINGS OF FACT

1. The Complainant, who is a black, African-American man of the Islamic faith, alleged, in his complaint, that, in June, 1999, he "forwarded [his] ... resume to respondent to be placed on the substitute teacher list;" that he was "known to respondent because [he] ... formerly taught there;" and that he was "turned down for employment" on the basis of his race, color, national origin, creed and sex. (Complainant also alleged "retaliation for filing an earlier complaint" but, at the hearing, offered no testimony or other evidence as to that claim.) (ALJ Exhibit I).

2. In its answer to the complaint, the Respondent denied Complainant's allegations and affirmatively alleged that its actions toward Complainant "were at all times reasonable, appropriate and based on legitimate, non-discriminatory reasons." (ALJ Exhibit III).

3. Complainant worked for Respondent school district as a substitute teacher from approximately 1985 to 1989. (Respondent's Exhibit A; Tr. 12, 18, 51-52, 98-99). His evaluations show that his performance was satisfactory. (Complainant's Exhibits 1, 2, 3; Respondent's Exhibits G, I, J).

4. In June, 1989, Complainant accepted Respondent's offer to continue as a per diem substitute teacher for the 1989-1990 school year. (Respondent's Exhibit N; Tr. 142). Sometime during that school year, Complainant admittedly told Respondent's substitute caller that he could not accept any more per diem assignments as he was leaving town. (Tr. 109-110). After a trip of several months to California, Complainant returned to White Plains, New York and went to work for the Board of Cooperative Educational Services (BOCES) in Valhalla, New York for approximately four years (1989 to 1993). (Complainant's Exhibit 4; Tr. 110-112). At the hearing, Complainant could not recall whether he ever told Respondent about his BOCES employment but testified that he considered that fact none of Respondent's business. (Tr. 113-115).

5. Dr. Linda Ochser, Respondent's Assistant Superintendent for Human Resources, started her employment with Respondent in July, 1989 as Director of Personnel. (Tr. 134-135). During the 1989-1990 school year, Ochser supervised the appointment of substitutes and would speak to Marsha Doherty, the district's substitute caller, and would review her logs to keep informed as to the availability of needed substitute teachers. (Tr. 139, 141, 171-173). A per diem substitute teacher was expected to be available if and when called. (Tr. 140-141). The Respondent's practice was to remove from the substitute list anyone who rejected an assignment three or more times. (Tr. 143-144).

6. During the 1989-1990 school year, Doherty complained to Ochser about Complainant's lack of availability and told Ochser that her "unique arrangement" with the Complainant was that he would call her instead of she calling him as she would any other needed substitute on the list. (Tr. 139-140, 143). Ochser concluded that Complainant was unavailable and unreliable. (Tr. 173).

7. Notwithstanding Complainant's lack of availability in 1989-1990, Respondent continued to place him on its substitute teacher list for a period beyond the 1989-1990 school year. (Tr. 144-145). By memos dated June 13, 1991, and June 1, 1993, Ochser so advised Complainant and indicated that unless it heard to the contrary, the school district would assume his availability for the forthcoming school year. (Respondent's Exhibits K, L). Although employed elsewhere (BOCES) at the time, Complainant did not respond to either memo. (Tr. 114, 145).

8. In May, 1999, Complainant sent a resume to the Respondent seeking placement on its substitute teacher list. (Complainant's Exhibit 4; Tr. 25-28, 116).

9. Ochser reviewed Complainant's resume (one of many she received) and remembered him from his previous service. (Tr. 145-146, 148). The resume itself did not mention Complainant's prior service with the Respondent. (Complainant's Exhibit 4). Ochser testified credibly that at the time she reviewed resumes in 1999, she was looking for candidates with a master's degree, recent experience with school-age children, State certification, and qualities such as dependability and reliability. (Tr. 146-148).

10. Complainant's resume did not show that the Complainant had a master's degree or recent experience with school-age children. (Complainant's Exhibit 4; Tr. 146-149). It did reveal experience with adult education from 1989 to 1997 (first with BOCES, then with Second Circle, Inc.) but shows no work experience at all after 1997. Furthermore, the resume fails to show New York State certification even though Complainant had received provisional New York State certification in September 1994 for "Social Studies 7-12." (Complainant's Exhibit 4; Respondent's Exhibit C).

11. By letter dated May 12, 1999, Ochser informed Complainant that Respondent had received numerous resumes and that his qualifications were not "best suited to the needs" of the school district. (Complainant's Exhibit 5; Tr. 149-150).

12. After he received Ochser's letter, Complainant called Respondent's office seeking an explanation. (Tr. 118). According to Complainant, who could recall at the hearing neither the person with whom he spoke nor exactly what was said, no explanation was provided to him over the phone. (Tr. 119-121). According to Ochser, who testified that she spoke to Complainant, she offered him an explanation in terms of her criteria (such as recent experience with school-age children). (Tr. 150-151).

13. In June 1999, Respondent accepted as substitute teachers a dentist, Dr. Allen Moss, and a former social worker, Carol Ziff, both of whom, apparently, had no recent experience with school-age children. (Complainant's Exhibits 6, 7; Tr. 163-167). Ochser explained that Respondent at the time was conducting an experimental program to encourage retired persons to enter substitute teaching, and that, unlike her prior experience with the Complainant, she had had no previous experience of a negative nature with either Moss or Ziff. (Tr. 169-170).

14. When asked at the hearing why he thought Respondent's rejection of his application in 1999 was discriminatory, Complainant testified that there were "very few" African American males in Respondent school district and that he was open about his Islamic faith but "there was this prejudice about people who were Muslim." (Tr. 38-44).

15. Ochser testified credibly that she did not know the Complainant was Muslim. (Tr. 151-152). She further testified that since the commencement of her employment in 1989 she has worked, pursuant to Respondent's affirmative action policy, for greater diversity among the staff hired, her efforts including the recruitment of candidates outside Westchester County and from black colleges. (Tr. 152-154).

16. I find, based on the previous findings and all the credible evidence of record, that Respondent rejected Complainant's application for employment as a substitute teacher in 1999 because he did not meet its criteria and his past record with the district showed that he was not reliable in terms of his availability, an important qualification for substitute teachers. The record does not show that Respondent took any action with respect to Complainant for a discriminatory reason in violation of the Human Rights Law.

DECISION AND OPINION

The Human Rights Law prohibits an employer from discriminating against an applicant for employment on the bases alleged by the Complainant, a black African-American male who is Muslim. Human Rights Law Sec. 296.1(a). In the instant case, the Division finds that the Respondent did not discriminate against Complainant in violation of the Human Rights Law.

It is well settled that Complainant has the burden of proof and initially must establish a prima facie case by showing that he is a member of a protected class, that he applied for and was qualified for the job in question, and that he was denied the job under circumstances giving rise to an inference of discrimination. Upon such a showing, the Respondent must then articulate a legitimate, non-discriminatory reason for its action. At that point, the Complainant must then establish that the proffered reason is merely a pretext for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Pace College v. Commission on Human Rights of the City of New York, 38 N.Y. 2d 28, 377 N.Y.S. 2d 471 (1975); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In this case, Complainant is a member of a protected class and was denied a job for which he was at least minimally qualified. However, the evidence does not show the required nexus or connection between membership in a protected class and the adverse action taken by Respondent.

In May, 1999, Complainant submitted a resume to Respondent seeking placement on its substitute teacher list. He had previously worked for Respondent as a substitute teacher (1985-1989). Thus, as he alleges in his complaint, Complainant was "known to respondent." During his prior service, he had received satisfactory evaluations. He also had provisional State certification (as of 9/94), although this was not shown by his resume. Complainant was arguably qualified for the position sought. On the other hand, the resume submitted to Respondent on its face appears

deficient and incomplete. It did not show any recent experience with school-age children but rather adult education experience between 1989 and 1997. Furthermore, the resume did not show any work experience at all between 1997 and 1999, the year Complainant applied to Respondent for reemployment.

Respondent's letter of May 12, 1999 informed Complainant that his qualifications were not "best suited" to the needs of the school district. Upon receiving the letter, Complainant called Respondent's office and spoke to someone whom he could not recall. Although he also could not recall the details of the conversation, Complainant insists that no explanation was offered for the rejection of his application. (This testimony was contradicted by Ochser, who recalls speaking to Complainant.) When asked at the hearing why he thought the rejection was discriminatory, Complainant referred in general terms to prejudice against Muslims and to Respondent's employment of "very few" African-American males. Complainant's testimony in this regard is so conclusory and subjective as to be devoid of any evidentiary value.

It appears that the adverse action taken by Respondent with respect to Complainant was not under circumstances justifying an inference of discrimination. Thus, Complainant did not make out a prima facie case. In any event, assuming arguendo that Complainant made out such a case, Respondent offered a legitimate, non-discriminatory reason for its action. Dr. Ochser testified credibly that Complainant had previously proven to be an unreliable employee. As Complainant alleged, he was "known to respondent" by virtue of his previous employment. Curiously, Complainant made no mention of such prior work history in his resume. If such prior service had been such as to recommend his reemployment by Respondent, one would have expected Complainant to include it in the resume. It should have been included if only to make his work history complete. The reason for the omission is clear. Complainant had not been a reliable

substitute teacher in terms of his availability for work. In fact, he had admittedly told Respondent's substitute caller during the last school year that he worked for Respondent that he was no longer available for per diem assignments. Despite this, Respondent continued to place Complainant on its substitute list for a period, but he did not respond to the school district's written communications. What the Respondent did not know at the time was that Complainant was employed elsewhere and therefore content to let Respondent infer that he was no longer available or interested in subbing for the district.

When Ochser reviewed Complainant's incomplete and less than sterling resume in May, 1999, she remembered the district's prior negative experience with him. Clearly, he had been an employee whose availability could not be relied upon. He was also lacking in terms of the district's other criteria for employment. Respondent thus had good reason not to reemploy him. The proffered reason has not been shown to be a mere pretext for unlawful discrimination. In the absence of such discrimination, it is not for the Division to second guess an employer or substitute its judgment for that of the employer. Anderson v. Stauffer Chemical Company, 965 F. 2d 397 (7th Cir. 1992).

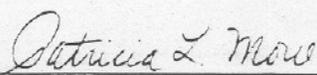
ORDER

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 instant complaint be, and the same hereby is, dismissed.

Dated: February 7, 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



Patricia L. Moro
Administrative Law Judge