

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

KENNETH E. SHORTT,

Complainant,

v.

CONGREGATION KTL,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10121739

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 March 16, 2009, by Thomas S. Protano, 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: **MAY 04 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10121739**

SUMMARY

Complainant, an African American, who is 66 years of age, filed a claim for discrimination based upon race and age after he applied for a custodial job with Respondent, and Respondent chose not to hire him. Although he was passed over for a younger Caucasian applicant, there is no evidence to support the claim that Respondent discriminated against Complainant and, as a result, the case must be dismissed.

PROCEEDINGS IN THE CASE

On November 27, 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A Public hearing was held on January 5, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Arlyne R. Zwyer, Esq. Respondent was represented by David M. Heiser, Esq.

Permission to file post-hearing briefs was granted. The Division attorney and the attorney for Respondent both filed timely submissions.

FINDINGS OF FACT

1. Complainant is an African American male born on March 15, 1943. (ALJ Exhibit 2; Tr. 10)
2. Respondent is a synagogue that runs two schools: a religious school and an early childhood program. (Tr. 71, 77)
3. On Monday, November 5, 2007, Complainant answered a newspaper advertisement placed by Respondent for a part-time custodial position. (Joint Exhibit 1; Tr. 10)
4. The duties of the part-time custodian include sweeping, vacuuming, cleaning and stocking the bathrooms, checking that the lights are out and the doors are locked, when appropriate, and performing general maintenance tasks. (Joint Exhibit 4)
5. After Complainant faxed his resume to Respondent, Ed Mulligan, head custodian, called Complainant and scheduled an interview that same day. Complainant’s resume does not list any dates of employment, so one cannot glean Complainant’s age from his resume. (Joint Exhibit 2; Tr. 11-13)

6. During the interview, which lasted about 20 to 30 minutes, Mulligan and Complainant discussed the job description and the hours, as well as Complainant's experience and skills. Complainant also volunteered his age to Mulligan and Rita Unger, synagogue administrator. Complainant volunteered his age because Mulligan and Unger "knew [he] was retired." (Tr. 13-14, 46, 48-49, 98, 75)

7. At the end of the interview, Unger and Mulligan told Complainant that other candidates still had to be interviewed and that they would get back to Complainant. (Tr. 48-49, 98)

8. Unger noted that Complainant's skills included HVAC, plumbing, carpentry, electrical, masonry and plastering and sheetrock. She wondered if Complainant's "substantial skills" would leave him unhappy doing "menial work" and questioned whether Complainant would stay with Respondent if he were hired. (Joint Exhibits 2 & 3; Tr. 76-77)

9. Complainant did not have custodial experience. However, as of November 5, 2007, Respondent "did not have any [other] viable candidates." (Joint Exhibit 2; Tr. 102)

10. The day after Complainant was interviewed, Mulligan and Unger interviewed Brian Dunne. Dunne is Caucasian and was about 54 years of age at the time. (Tr. 94, 102)

11. Dunne had been a custodian for about ten years and had worked as a custodian at a religious school for about five of those ten years. Unger considered him to be "an ideal match." Mulligan concurred that Dunne was the best candidate. (Tr. 76, 101)

12. Dunne's two immediate predecessors as custodian were African American. Their ages were unknown, because they were referred to Respondent by employment agencies. Mulligan's predecessor as head custodian was also African American. He retired in 2002 after working for Respondent for 25 years. (Respondent's Exhibit 1, Tr. 92-94)

13. Complainant's age or race was not a factor in the decision to hire Dunne over Complainant. (Tr. 79, 100)

14. On Friday, November 9, 2007, Unger called Complainant to inform him that he had not been chosen. Unger explained to Complainant that his candidacy was considered a "high second." (Tr. 14, 78)

15. Complainant considered the phrase "high second," to be "very insulting." He called Respondent the following week and informed them that he would be filing a "discrimination lawsuit." (Tr. 14-15)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to refuse to hire an individual because of that individual's age, race or color. Human Rights Law §296.1(a).

In order for a complainant to prevail on a complaint of discrimination he must first make out a prima facie case. To make out a prima facie case of unlawful discrimination for failure to hire under the Human Rights Law, a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was refused employment; and (4) the refusal occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305, 786 N.Y.S. 2d 382, 390 (2004).

If Complainant makes a prima facie case of discrimination, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reasons Respondent has presented were merely a pretext for

discrimination. *Id.*, 3 N.Y. 3d at 305, 786 N.Y.S. 2d at 390. The ultimate burden of proof always remains with Complainant. *Ferrante*, 90 N.Y. 2d at 630, 665 N.Y.S. 2d at 29.

Complainant in the instant case makes out a prima facie case of discrimination for either age or race. He is a member of protected classes and he was qualified for the position he sought. He was refused employment in favor of a Caucasian applicant who was ten years younger. This raises an inference of discrimination when all facts are considered and Complainant has thus met his burden.

Respondent has answered with an assertion that Dunne was simply a more suitable candidate. Complainant was interviewed and, until Dunne showed up, was considered to be a viable candidate. However, Complainant's experience was extensive and his skills far exceeded the requirements of the job he sought. Respondent reasonably wondered if Complainant would be happy in the position and questioned if he would stay in the position if he were hired. When Dunne's experience as a custodian and, in particular, as a custodian in a religious school setting, was considered, Respondent found him to be "an ideal match." Based upon those non-discriminatory reasons, Dunne was hired over Complainant.

By producing legitimate, non-discriminatory reasons for its actions, Respondent has removed the inference of discrimination and placed the burden on Complainant to prove that Respondent's stated reasons for hiring Dunne were a pretext for discrimination. *Id.* Complainant is unable to make such a showing. Complainant has not offered anything that would tie his race or age to Respondent's action. The only reference to Complainant's age, or anyone's age, was made by Complainant, who volunteered the information himself. That fact does not prove Complainant's claim and, given that there is no evidence through which one can find that Respondent was motivated by discrimination based upon age or race, Complainant cannot

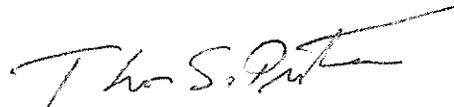
establish that Respondent's stated reason for hiring Dunne was pretextual. Therefore, the case must be dismissed.

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 case be, and the same hereby is, dismissed.

DATED: March 16, 2009
Bronx, New York



Thomas S. Protano
Administrative Law Judge