



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DAVID E. NEWMAN,

Complainant,

v.

VOCAL TECHNOLOGIES, LTD.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10141286

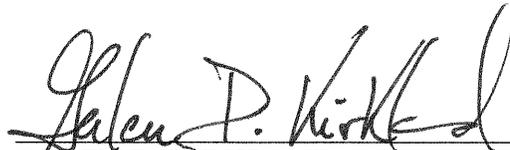
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on December 23, 2011, by Robert J. Tousto, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was 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: MAR 09 2012
 Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10141286**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated on the basis of his age when it failed to hire him. However, Complainant has not proven his case and the complaint is hereby dismissed.

PROCEEDINGS IN THE CASE

On May 11, 2010, 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 Martin Erazo, Jr., an Administrative Law Judge (“ALJ”) of the Division. On October 26, 2011 a public hearing session was held in Buffalo, New York.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq., Senior Attorney. Respondent was represented by David B. Cotter, Esq. of the law firm of Cotter & Cotter, P.C., Williamsville, New York.

This case was subsequently reassigned to ALJ Robert J. Tuosto pursuant to N.Y.C.R.R. § 465.12 (d)(2).

Permission to file post-hearing briefs was granted. Respondent filed a post-trial brief which was untimely and, therefore, not considered.

FINDINGS OF FACT

1. Complainant alleged that Respondent unlawfully discriminated against him on the basis of his age when it chose not to hire him. (ALJ Exh. 1)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 2)

The Parties

3. Complainant, whose date of birth is June 26, 1967, has a Bachelor of Arts degree in computer science and had previous work experience as a software test engineer (“STE”) for several companies. Complainant was not a physicist, mathematician, or hardware engineer. Complainant had not worked as a STE since October, 2006. (ALJ Exh. 1; Tr. 45-46, 73-74, 76)

4. Respondent, a company formed in 1986, presently has nine employees who create computer software for the telecommunications industry. (Tr. 109, 140, 156)

Respondent's Job Advertisement

5. Respondent placed an advertisement ("the ad") on the internet job-posting website "monster.com." The ad was seeking responses from engineers (hardware and software), as well as mathematicians and physicists. The ad read, in pertinent part:

"The positions of software and hardware engineer should interest any candidate desiring to explore the complex world of embedded systems within the field of modern digital/analog telecommunications. VOCAL is among the few companies to handle multi-platform technology. Any related industry experience is considered an asset. UNIX, Linux and or uCLinux system or software development experience is looked upon favorably. Candidates should have or be working towards a degree in Electrical Engineering, Computer Engineering, Software Engineering, Computer Science...or other related discipline and have interest in or have studied course work in the area of communications, signal processing, speech processing and image processing. Experience with SIP controls, networking (TCP/IP), OpenSSL and/or VoIP is a plus."

Under the heading "software engineers", the ad listed six bullet points beneath it which read "DSP software development, embedded software development, assembly language programming, strong C language programming experience, strong Linux and kernel development experience" and "software test engineering and tool development." Complainant, who believed the ad was for a STE, responded and was called in for an interview. (Joint Exh. 2; Tr. 28-29, 43, 78, 100, 102, 211)

April 7, 2010—Complainant Interviews for an Engineering Position with Respondent

6. On April 7, 2010 Complainant interviewed for an engineering position with Respondent. The interview was in two parts. The first part, which lasted approximately 20-25 minutes and only assessed Complainant's temperament as a potential employee, was conducted by John Blume. The second part of the interview, which lasted approximately 15 minutes and only assessed Complainant's technical skills, was conducted by Victor Demjanenko. (Tr. 35, 50, 59, 82, 110, 119, 156-61, 165, 169, 177, 180, 206)

7. Demjanenko, who started with Respondent in 1989-90 and is its chief engineer, holds Bachelor's, Master's and Ph.D. degrees in electrical engineering; Demjanenko also holds an M.B.A. degree and has 20 years of teaching experience at the University of Buffalo. Demjanenko, who describes himself as both a software development engineer and hardware engineer, develops and sells Respondent's software. (Tr. 108, 116, 131-33)

8. Engineers who develop computer software engage in more than just the testing of that software. Respondent did not have a specific job title of STE. The last STE hired by Respondent occurred more than a decade previously. (Tr. 126-28, 130, 137)

9. Demjanenko, given his background, training and experience, could "quickly hone in on the capabilities" of a job applicant. After his portion of the interview Demjanenko surmised that Respondent did not have a use for Complainant's services as he was found to be only a test engineer. Respondent was seeking a software development engineer and wanted an applicant with experience in something other than just software testing. (Tr. 111, 113, 120, 125-26, 133, 141-42, 143, 146)

10. Ultimately, no one was hired by Respondent for the engineering position advertised. (Tr. 142)

OPINION AND DECISION

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

Complainant avers that Respondent's failure to hire him for an engineering position was

due to unlawful age discrimination.

Respondent defends on the ground that Complainant was not hired solely because he failed to meet the minimum qualifications for the engineering position advertised.

In discrimination cases a complainant has the burden of proof and must initially establish a *prima facie* case of unlawful discrimination. Once a complainant establishes a *prima facie* case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a *prima facie* case of employment discrimination based on protected class membership, Complainant must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Here, Complainant fails to make out a *prima facie* case. While Complainant was a member of the protected class on the basis of age, he nonetheless did not establish that he was qualified for the engineering position in question. The record shows that Respondent was specifically seeking someone who had engineering abilities in addition to mere software testing. The ad did not specifically request a STE insofar as software testing only appeared in the ad as part of a larger engineering job title. Complainant apparently proceeded on the mistaken

assumption that his software testing experience alone made him a qualified candidate for the engineering position advertised. However, Demjanenko's portion of the interview quickly uncovered the fact that Complainant's abilities were incompatible with that which Respondent needed in an engineer.

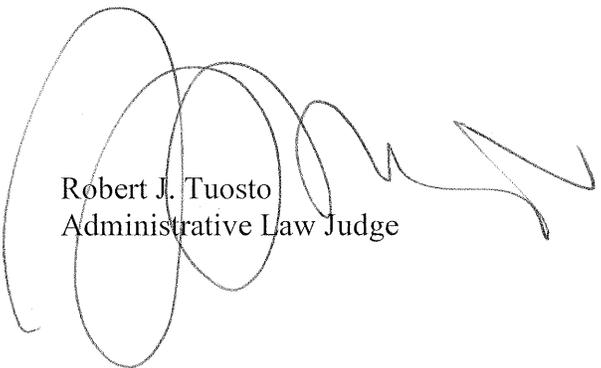
Therefore, the complaint must be dismissed.

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 complaint be, and the same hereby is, dismissed.

DATED: December 23, 2011
Bronx, New York


Robert J. Tuosto
Administrative Law Judge