

State of Connecticut

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May 23, 2014

David Kaplan
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Sal Luciano, Executive Director
AFSCME Council 4, AFL-CIO
44 East Main Street
New Britain, CT 06051

David Kent, Esq.
CHRO
25 Sigourney St., 7th fl.
Hartford, CT 06106

RE: CHRO ex rel. David Kaplan v. AFSCME Council 4, AFL-CIO, CHRO No. 1210003.

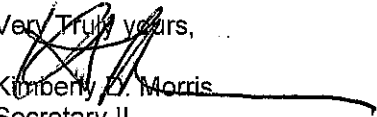
FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by certified mail, return receipt requested to the complainant and the respondent. The return post office receipt shall be proof of such service.

Very Truly yours,


Kimberly D. Morris
Secretary II

cc.

Ellen E. Bromley, Presiding Human Rights Referee
J. William Gagne, Esq.

Certified No. 7011 2000 0002 0985 5615 (D. Kaplan)
Certified No. 7011 2000 0002 0985 5622 (S. Luciano/AFSCME)

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and
Opportunities, ex rel. David Kaplan,
Complainant

CHRO No. 121000

v.

AFSCME Council #4, Respondent

May 22, 2014

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Procedural History

On July 5, 2011, David Kaplan (Complainant) filed a complaint with the Commission on Human Rights and Opportunities (the Commission or CHRO) alleging that in February 2011, Respondent of the American Federation of State, County and Municipal Employees (AFSCME) (Respondent) denied him a position as a Legislative Field Organizer because of his age in violation of Conn. Gen. Stat. § 46a-60(a)(1); and the Age Discrimination in Employment Act of 1967 (ADEA).

The Commission investigated the charges in the complaint and issued a finding of reasonable cause. Following unsuccessful attempts at conciliation, on November 6, 2012 the complaint was certified in accordance with Conn. Gen. Stat. § 46a-84(a) and § 46a-54-77(d)(2)(C) of the Regulations of Connecticut State Agencies (the Regulations). The undersigned Human Rights Referee was assigned to act as presiding referee on November 29, 2012 and proper notices for public hearing were issued to all parties.

On December 21, 2012, Respondent filed an answer and defense to the complaint, denying all discrimination charges and claiming that Complainant had failed to state a claim upon which relief could be granted.

I presided over a public hearing at the Office of Public Hearings (OPH), 25 Sigourney Street, Hartford, Connecticut, on January 14, 2014. Attorney David Kent (25 Sigourney Street, Hartford, Connecticut 06106) appeared on behalf of the Commission and Attorney J. William Gagne (Gagne and Associates, 15 North Main Street, West Hartford, Connecticut 06107) represented the Respondent. The parties filed post hearing briefs as per scheduling orders and the record closed on April 14, 2014.

Preliminary Statement

This forum has no jurisdiction over Complainant's ADEA claim.¹ Further, for the reasons set forth hereinafter, I find that Complainant has failed to prove that Respondent

¹ In *Trimachi v. Conn. Workers Comp. Comm.*, 2000 WL872451 (Conn. Supr. Ct, June 14, 2000), the Connecticut Superior Court construed Conn. Gen. Stat. § 46a-58(a) as transforming provisions of federal employment discrimination law into Connecticut law for the protected classes listed in that subsection - religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability - to the extent that federal law protects these specified classes. But age is not an enumerated class for which § 46a-58(a) offers protection. Because age is not one of the protected classes listed in § 46a-58(a), the provisions of the ADEA

discriminated against him in violation of Conn. Gen. Stat. § 46a-60(a)(1). Judgment is entered in favor of Respondent. The complaint is dismissed.

Findings of Fact

The following facts are derived from the pleadings, the parties' stipulations of fact, the exhibits admitted into evidence and the testimony of witnesses at the public hearing. References to exhibits are identified by introducing party: Complainant ("C") or Respondent ("R") followed by the applicable number. Stipulations of fact are identified as "SOF" followed by the applicable number. References to the hearing transcript are identified by "Tr." followed by page number(s). Only those facts deemed necessary to an understanding of the issues raised at the public hearing and discussed in this decision are set forth herein.

1. All statutory and procedural prerequisites to the holding of the public hearing have been met and the case is properly before the Presiding Referee for hearing and decision. (SOF-1).
2. Complainant, who was 59 years old in February of 2011, is a practicing attorney with an interest in labor and union work. (Tr. 9-10; SOF-3).
3. Respondent, Connecticut's largest AFL-CIO union, represents approximately 35,000 employees in state and local government, boards of education and the private sector. (R-2).
4. Sal Luciano (Luciano) has been Respondent's Executive Director since 2001. (Tr. 65).
5. Luciano was 53 years of age in the summer of 2010. (Tr. 14, 65).
6. Luciano has final authority over all of Respondent's personnel decisions. (Tr. 66).
7. Peter Thor (Thor) has been Respondent's Director of Policy and Planning since 2002. (Tr. 85).
8. Thor was 70 years of age in the summer of 2010. (Tr. 85).
9. Thor is responsible for the direction of many small departments within Respondent, including its Political Department. (Tr. 86).
10. In 2010, among other responsibilities, Thor was responsible for supervising the full-time employees in Respondent's Political Department. (Tr. 86).
11. Thor's authority with respect to personnel decisions (hiring, firing, disciplining, transferring, etc.) is limited. In instances where he conducts or oversees hiring processes, for example, he is charged with making recommendations, but not decisions. His recommendations are respected, but all hiring decisions, including those involving temporary positions, must ultimately be authorized by Luciano. (Tr. 66-67).
12. Thor reports directly to Luciano. (Tr. 65).

are not transmuted into that section. See *CHRO ex rel. Patricia Robinson v. State of Conn. Dept. of Mental Health & Addiction Servs.*, CHRO No. 0630292 (Ruling on Motion to Dismiss, dated March 26, 2008) (citing *Poeta-Tisi v. Griffin Hosp.*, 2006 WL1494078, *8 (Conn. Super.); *CHRO ex rel. Ramseur v. Colonial Chimney & Masonry, Inc.*, 2005 WL 4828677 (CHRO No. 0440130, November 28, 2005); and *CHRO ex rel. Crebase v. Procter & Gamble Pharms. Inc.*, 2006 WL 4844064 (CHRO No. 0330171, July 12, 2006).

13. In July 2010, Thor held a meeting with the following members of his staff: Joyce Evoy, Matthew Brokman, Dennis O'Neil, Richard Sivel and Larry Dorman. The purpose of the meeting was to discuss planning for the upcoming state elections, including possible plans for Respondent to hire political regional field organizers (PFOs) on a short term basis. The PFOs would be responsible for targeting Respondent's membership in a 'get out the vote' effort. (Tr. 89-91).
14. The meeting had not gone smoothly. Joyce Evoy (Evoy) mentioned that she had a friend who might be interested in becoming a PFO. Matthew Brokman (Brokman) said that Respondent would attract young applicants for the below entry level, temporary positions that involved weekend and night work. Evoy, who testified that she was "obviously not a younger person," said she "flipped out" at what she took to be Brokman's discriminatory comment. (Tr. 52-53, 90-92, 119).
15. After the meeting, as she had previously planned, Evoy had lunch with Complainant who was, in fact, the friend she had referenced. During lunch she shared her interpretation of what had transpired at the meeting with Complainant. (Tr. 53).
16. Ultimately, the consensus among the meeting's attendees had been to recommend that Respondent hire five PFOs. (Tr. 92).
17. Thor took this recommendation to Luciano who approved hiring five (5) PFOs, for three month tenures, at \$3,000.00 per employee, per month. (Tr. 92).
18. Both Evoy and Brokman were employed as field representatives. Field representatives are responsible for mobilizing collective action. They act as liaisons between Respondent and its local affiliates, other unions, and community and political organizations. (R-1).
19. Field representatives do not have the authority to hire, fire, discipline, demote, take action affecting employee benefits, assign work, or even recommend any of these actions concerning other employees. (Tr. 88-89; R-1).
20. In July 2010, Evoy had been employed by Respondent for approximately nine years. (Tr. 88).
21. Brokman, a recent college graduate, had begun working for Respondent in May, 2010, approximately two months before the July meeting. (Tr. 116).
22. After Thor had received approval from Luciano to hire the PFOs, he asked Brokman to assist in drafting a job description for the positions. (Tr. 121).
23. In July 2010, Brian Anderson (Anderson) was a Legislative and Political Representative at Respondent. He was 42 years old and, at that point, had been employed by Respondent for nine (9) years. (Tr. 147, 149).
24. Dennis O'Neil (O'Neil) was Respondent's Political and Legislative Coordinator in July 2010. He was approximately 54 years of age. (Tr. 86, 150).
25. After he drafting an initial PFO job description and getting input from O'Neil and Anderson, Brokman brought the draft to Thor for approval. (Tr. 70, 121; R-2).
26. Thor directed Brokman to post the PFO job description at an online site used by people seeking employment in political campaign positions. (Tr. 122).
27. Respondent did not post the PFO openings internally because they were not bargaining unit positions, and only temporary. (Tr. 122).
28. Thor assigned Brokman the administrative tasks relating to the PFO hiring process, including collecting resumes, calling selected applicants, and scheduling interviews. He appointed O'Neil and Anderson to conduct the interviews. (Tr. 93, 122).

29. As the positions were short-term and related to the upcoming election season, the online job posting did not include a closing date for applications because Respondent wanted to be able to move forward with the hiring process as soon as it had qualified applicants. (Tr. 123).
30. Respondent received twenty seven (27) applications and resumes for the PFO positions. Brokman photocopied and distributed copies of these to O'Neil, Anderson, and Thor. (Tr. 123-24).
31. Thor then instructed Brokman, Anderson, and O'Neil to look through the applications, pick out the ones they thought looked promising, and then to have Brokman call the selected candidates and ask them the following four questions:
 - i. Do you have a cell phone?
 - ii. Do you have a valid driver's license?
 - iii. Do you have a car?
 - iv. If you don't live in Connecticut, would you be willing to move to Connecticut for the balance of this short term? (Tr. 96).
32. Anderson and O'Neil screened the applications for relevant experience. Thor instructed Brokman to telephone apparently qualified applicants to schedule interviews with those candidates who had answered the four screening questions in the affirmative. (Tr. 96, 150).
33. O'Neil and Anderson conducted the interviews -- some in person and some over the phone. Brokman was present as well. (Tr. 96, 125).
34. After Anderson and O'Neil had completed the interviews and discussed the candidates' qualifications, they made hiring recommendations to Thor. Thor also reviewed the resumes, qualifications and information obtained at the interviews of each recommended candidate. (Tr. 152).
35. After he had conducted his review, Thor selected four applicants and recommended to Luciano that he approve their hiring for PFO positions. (Tr. 97).
36. Complainant was one of the four candidates selected. He was 59 in the fall of 2010 when Respondent hired him. (Tr. 98).
37. The ages of the other individuals Respondent hired for PFO positions in the fall of 2010 were: 36, 24, 27, 59 and 43. (SOF-8).
38. Respondent did not send letters or otherwise notify the unsuccessful applicants, including those who had been interviewed but not chosen, that they had not been selected for PFO positions. (Tr. 138).
39. Respondent had never intended or discussed lengthening the terms of the PFO positions or making them permanent. At the conclusion of the three month employment period, the PFO's were let go. (Tr. 98).
40. In the spring of 2011, Luciano asked Thor to come up with a plan to hire temporary legislative field organizers (LFOs) to assist the Political Department in the upcoming legislative session. (Tr. 72).
41. Luciano authorized Thor to fill four LFO positions as per the job description set forth at R-5, which was approved by Luciano. (Tr. 73-74).
42. The LFO positions were three-month temporary jobs, paying \$3,000 per month. (R-5).
43. The hiring committee and hiring process for these positions was exactly the same as it had been in the fall of 2010. O'Neil and Anderson conducted the interviews, Brokman assisted administratively by contacting applicants and setting up interviews,

- recommendations were made to Thor, and final approval was obtained from Luciano. (Tr. 99).
44. Brokman, at Thor's direction, posted the openings online on a website for individuals seeking temporary field political positions. (Tr. 130).
 45. The LFO positions were not posted internally at Respondent, because they were not bargaining unit positions, and because they were temporary. (Tr. 79-80).
 46. Thor again appointed O'Neil and Anderson to identify and vet candidates and provide him with their recommendations for the position. He assigned Brokman to handle the administrative tasks relating to the process, including collecting resumes, calling selected applicants, and scheduling interviews. (Tr. 93, 122).
 47. The LFO positions were short-term and related to the upcoming legislative session. The online job posting did not include a closing date; Respondent wanted the flexibility to be able to move forward with the hiring process as soon as it had qualified applicants. (Tr. 131; R-5).
 48. As had been the case with the PFO hiring process the previous fall, after Respondent had received a critical mass of applications and resumes for the LFO positions, Brokman photocopied them and distributed the copies to O'Neil, Anderson, and Thor. (Tr. 132).
 49. Anderson and O'Neil reviewed the applications, identified applicants who had the basis of experience they were seeking. (Tr. 150).
 50. Thor instructed Brokman to schedule interviews with those applicants who answered the following four questions in the affirmative:
 - i. Do you have a cell phone?
 - ii. Do you have a valid driver's license?
 - iii. Do you have a car?
 - iv. If you don't live in Connecticut, would you be willing to move to Connecticut for the balance of this short term? (Tr. 132:6-11).
 51. All but one of Brokman's brief initial calls to schedule interviews with apparently qualified applicants were made on February 9, 2011. (R-19).
 52. On February 10, 2011, Brokman emailed Thor, Anderson and O'Neil to inform them that he had scheduled interviews with potential LFOs the next day, Friday, February 11th from 11:30-3:00, and on the following Monday, February 14th. (R-8).
 53. Anderson and O'Neil interviewed a total of ten LFO candidates on February 11 and 14, 2011. They conducted an additional interview, their final one, on February 16, 2011. Brokman was present at the interviews. (Tr. 132-133, 140-142; R- 20).
 54. On the afternoon of February 16, 2011, O'Neil and Anderson discussed the candidates and then approached Thor with hiring recommendations for the LFO positions. Thor agreed with their recommendations. (Tr. 101-103).
 55. On Feb. 17, 2011, Complainant emailed Brokman, Thor and Evoy. He attached his resume and asked to be considered for an LFO position. (R-9)
 56. Brokman took no administrative action after receiving Complainant's application because "there was nothing to do. We had made our recommendation to Peter and Peter was the boss and he was cc'd on it and he saw it and if he wanted me to do something he would have told me to do something". (Tr. 136).
 57. Respondent received another application for the LFO position on February 21, 2011. Again, Brokman took no administrative action as Respondent "had already selected

- the candidates that they intended to hire for the 2011 positions by the time this application was received." (Tr. 114, 137).
58. Thor emailed Luciano on February 18, 2011 letting him know that he, O'Neil and Anderson had identified "four organizers we want to offer temp jobs to." He reported that all were experienced and said that if Luciano wanted to follow-up in person, he could get the candidates' telephone numbers from Brokman. (R-10)
 59. On February 22, 2011, Brokman emailed Thor, seeking an update on the status of notifying the selected applicants that they had been chosen. He said that he wanted to give Thor "a heads up" that he'd been getting calls and emails from the potential hires asking when Respondent would be making a decisions. He said that he'd been putting them off, but it would be good to give them an answer tomorrow if possible." (R-12).
 60. Thor followed up with another email to Luciano on February 23, 2011. Luciano approved the hiring of the four recommended candidates. (Tr. 107).
 61. Each of the applicants Respondent ultimately selected for an LFO position had a background and experience relevant to political campaign work and field organizing. (Tr. 105-106).
 62. Terence Schroeder's resume listed previous positions as field organizer for Ned Lamont's gubernatorial campaign and a Kentucky senate campaign. He was 23 years old. (R-6; SOF-7).
 63. Dana Walton's resume listed previous positions as a campaign manager for a representative and a field organizer for Turner for Congress. She was 23. (R-6; SOF-7).
 64. Christopher Mosley's previous positions included work on President Obama's 2008 campaign. Mosley was 43. (R-6; SOF-7).
 65. Amy Donovan was hired due to her experience as a project director, canvas director, field manager and community organizer. Thor described these as "exactly what we were looking for." She was 44. (Tr. 106, R-6; SOF-7).
 66. As had been the case for PFO positions, Respondent did not notify or otherwise advise the unsuccessful candidates for LFO positions as to the status of their applications. (Tr.138-139).
 67. The LFO's were terminated at the conclusion of their three month employment periods. (Tr.135).

Discussion

Complainant has charged that Respondent discriminated against him when it failed to select him as a Legislative/Political Field Organizer (LFO) due to his age. When a plaintiff claims disparate treatment the case is governed by the tripartite shifting burdens set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Accordingly, Complainant must establish a prima facie case by demonstrating that (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was subjected to an adverse employment action; and (4) the adverse employment action occurred under circumstances that permit an inference of discrimination. See *Jacobs v. General Electric Co.*, 275 Conn. 395, 400-01 (2005).

Complainant easily satisfied three elements of his prima facie case. He is a member of a protected class, and he suffered an adverse employment action when Respondent failed

to select him as an LFO -- a position for which he was qualified. Although I do not believe that his failure to make it into the applicant pool pursuant to which Respondent selected viable candidates occurred under circumstances which, if left unexplained, raise an inference of discrimination, because the burden of establishing a prima facie case is one of production, not proof, (*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000)), and is generally understood not to be onerous, I am going to grant arguendo that Complainant has met that de minimus standard and analyze and decide this case accordingly. See *CHRO ex Rel. Samuel Andoh v. Southern CT State University*, CHRO No. 0630311 (2011).

Once a complainant has established a prima facie case, the burden of production shifts to the respondent who must overcome the rebuttable presumption of discriminatory intent established thereby by articulating (again, it is not necessary to prove) a legitimate, non-discriminatory reason for its employment decision. See *McDonnell Douglas* at 802.

Respondent disputes neither Complainant's protected class status (age), his qualifications or its adverse employment action. It nevertheless met its production burden, successfully rebutting Complainant's prima facie case, by offering evidence of its legitimate business reason for not considering Complainant's application. That is, the fact that it had completed the process of selecting finalists for the LFO position prior to the time it received Complainant's application.

If his claim is to prevail, Complainant must prove that Respondent's proffered reason was not the true reason for its employment decision and that he has been the victim of intentional discrimination. Evidence of discriminatory statements, discriminatory treatment or unequal applications of Respondent's policy may enable him to succeed either directly, by persuading the court that a discriminatory motive more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

At a staff meeting in July of 2010, during a discussion about Respondent's plans to hire temporary political regional field organizers (PFOs), Joyce Evoy, one of Respondent's long term employees, had mentioned that she had an old friend who was looking for such a job. The friend to whom she referred was Complainant. Hearing that, Matthew Brokman, a new employee (Brokman had begun working for Respondent that May) who, like Evoy was a field representative with no authority for making hiring recommendations, much less hiring decisions, had stated that Respondent was looking to hire younger people for the PFO positions because they work longer and harder. (Tr. 52).

Evoy testified that "obviously, I'm not a younger person, so I kind of flipped out. I don't believe that being a Union we should ever have anything that's discriminatory coming out of our mouths, whether it's kidding or not kidding or whatever. So I got very vocal and very upset by this comment and responded to him that I would work rings around him, longer and hard than he could ever work." (Tr. 52-53).

In uncorroborated testimony, Evoy claimed that nobody at the meeting responded to the fact that she was so upset about what Brokman had said that "there was steam coming out of my ears." (Tr.52-53). However, Peter Thor, Respondent's Director of Policy and Planning, who had called the meeting and was responsible for supervising both Evoy and Borkman, testified that he had stopped the meeting to explain that Brokman hadn't intended any offense by his remark, and only resumed its business when he was certain that Evoy had calmed down. (Tr. 92). Brokman said that he too had responded to Evoy's concern and had explained that in his mind young people are the ones who you typically find doing long days in short term, low paying, low status, temporary positions. (Tr. 120).

In fact, in due course, after the PFO openings had been advertised and applicants had been screened and interviewed, Respondent's Executive Director, who has sole final authority for all hiring decisions, on Thor's recommendation, had selected Complainant for one of the openings. After the PFO position ended, Complainant expressed his interest in similar future job openings to Brokman, who had had a role in supervising the PFOs and had played an administrative role in the hiring process.

In the spring of 2011, Respondent again had occasion to hire several employees for a similar short term assignment. Complainant, however, didn't become aware of the new opportunity until after Respondent had selected four applicants to fill the positions. Complainant had met Brokman at a conference several days before Respondent began advertising the availability of these new (LCO) positions. Although he mentioned his interest in future job openings to Brokman at that time, Brokman had not told him about the upcoming positions. Complainant claimed that Brokman intentionally withheld this information from him because Brokman "clearly did not want older candidates such as Complainant applying." (Complainant's Brief, p. 14) and bootstrapped his discrimination charge to the thoughtless statement Brokman, an employee several rungs down the chain of command from those with hiring authority, had made at a staff meeting months earlier. In light of the fact that the Respondent hired the Complainant only a few months prior, I find his evidence of discrimination to be tenuous, at best.

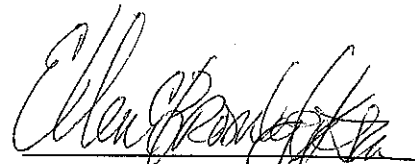
Brokman's comment lacks the specificity necessary to establish discriminatory motive or intent with direct evidence. *Getschmann v. James River Paper Co., Inc.*, 822 F. Supp 75, 78 (D. Conn. 1993) (supervisor's remark that "it sometimes is difficult to teach an old dog new tricks," "too slender a reed to carry the weight of the charge" in ADEA case where employer presented overwhelming evidence of non-discriminatory reason), *aff'd*, at 7 F.3d 221 (2d Cir. 1993). Evidence is considered to be direct if "it consists of statements by a decision maker that directly reflect the alleged animus and bear squarely on the contested employment decision. *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000).

Complainant offers no additional evidence of discrimination. While I do not doubt his personal conviction that the failure to hire him was ill advised, for his discrimination claim to be viable the record must either contain evidence sufficient to prove that Respondent harbored and acted with discriminatory animus, intentionally taking Complainant's age into account in failing to consider him for an LFO position, or evidence of pretext. Dated emails

indicating that Respondent had all but made its hiring selections for the LFO openings by the time Complainant applied for the position, effectively overcome such a claim.

Accordingly, the complaint is DISMISSED.

It is so ordered this 22nd day of May 2014.

A handwritten signature in cursive script, appearing to read "Ellen E. Bromley". The signature is written in black ink and is positioned above a horizontal line.

Ellen E. Bromley,
Presiding Human Rights Referee

cc.

David Kaplan
Sal Luciano/AFSCME
Attorney J. William Gagne, Jr., Esq.