

Commission on Human Rights and Opportunities ex rel.	:	Connecticut Commission on Human Rights and Opportunities
	:	
Betty Gabriel	:	CHRO No. 0620141
	:	EEOC No. 16aa600013
	:	
Rose Ann Carlson	:	CHRO No. 0620142
	:	EEOC No. 16aa600014
v.	:	
	:	
Town of Fairfield	:	December 28, 2009

FINAL DECISION

Preliminary statement

In April 2005, the Town of Fairfield (the respondent) hired a zoning inspector in its planning and zoning department. Betty Gabriel, of Fairfield, Connecticut, and Rose Ann Carlson, of Shelton, Connecticut, (collectively, the complainants) were two of the four applicants (three females and one male) who applied for the position. Neither was hired. Instead, the respondent hired the male applicant for the position.

On September 26, 2005, Ms. Gabriel filed an affidavit of illegal discrimination (affidavit or complaint) with the commission on human rights and opportunities (commission). In her affidavit, she alleged that her sex, female, was a factor in the respondent's hiring decision and that the respondent illegally discriminated against her

in violation of Title VII of the Civil Rights Act of 1964, as amended, (Title VII),¹ and General Statutes §§ 46a-58 (a) and 46a-60 (a) (1).

On September 27, 2005, Ms. Carlson also filed an affidavit with the commission. In her affidavit, she alleged that her sex, female, was a factor in the respondent's hiring decision and that the respondent illegally discriminated against her in violation of Title VII and §§ 46a-58 (a) and 46a-60 (a) (1).

After preliminary investigation of both affidavits, the commission's investigator concluded that there was reasonable cause to believe that unfair practices had been committed as alleged in the affidavits. Upon failure of conciliation, the investigator certified the affidavits to the commission's executive director and the attorney general on August 11, 2008. On August 28, 2008, the respondent filed its post-certification answers to both affidavits denying the allegations of discrimination.

The undersigned was appointed the presiding human rights referee for both cases on August 26, 2008. The two cases were consolidated for the public hearing, which was held on October 27, 28, 29, and 30, and on November 4, 5, 12, and 13, 2009. The record closed on November 13, 2009.

For the reasons set forth herein, it is found that the commission did not establish by a preponderance of the evidence that the respondent discriminated against either Ms. Gabriel or Ms. Carlson on the basis of their sex when it did not hire them for the position of zoning inspector.

¹ 42 U.S.C. 2000e

Findings of fact (FF)

Based upon a review of the pleadings, exhibits and transcripts and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found²:

1. In early 2005, the respondent's then-zoning inspector, Jack Graham, retired, creating a vacancy in that position. The position was in the respondent's planning and zoning department. Tr. 468-69, 471. Prior to his actual leaving, it was general knowledge among the respondent's employees that Mr. Graham would be retiring. Tr. 494-95.
2. The duties of the zoning inspector in 2005 included processing applications, assisting applicants for permits, investigating zoning violations, enforcing zoning regulations, assisting the zoning enforcement officer with enforcement activities, performing field inspections, and responding to requests for information from the public. Tr. 459, 474-78; R 18, 21.

² References to an exhibit are by party designation and number. The commission's exhibits in the Betty Gabriel case are denoted as "CHRO-G" followed by the exhibit number; the commission's exhibits in the Rose Ann Carlson case are denoted as "CHRO-C" followed by the exhibit number. The respondent submitted a single set of exhibits for both cases that are denoted as "R" followed by the exhibit number. Exhibits that were proffered by both the commission and the respondent may be referred to by either designation. References to the transcript are designated as "Tr." followed by the page number.

3. Joseph Devonshuk was the respondent's director of the planning and zoning department. Tr. 451. As director, his responsibilities included hiring Mr. Graham's successor. Mr. Devonshuk was solely responsible for deciding who would be hired to fill the vacancy. Tr. 479, 863, 1025.
4. Mr. Devonshuk contacted Holly Francis, the respondent's director of human resources, to discuss the process for filling the vacancy. Tr. 472.
5. Ms. Francis' duties included administration of employee benefits, labor relations and contracts, risk management, employee labor classification compensation, hiring and general personnel matters. Tr. 938.
6. Ms. Francis explained to Mr. Devonshuk the hiring process, which involved developing a job description and then distributing, or posting, the description in a job vacancy notice pursuant to the applicable collective bargaining agreement. Tr. 950, 1020-21
7. Ms. Francis asked Mr. Devonshuk if the existing job description; R 21; was consistent with the current duties and responsibilities of a zoning inspector. Mr. Devonshuk said that it was and that nothing needed to be added. Ms. Francis then developed the job vacancy notice and posted it. Tr. 473-74, 605, 862, 951-52; R18.
8. The job vacancy notice was posted in March 2005. Tr. 471.
9. Prior to the posting of the job vacancy notice, Jim Wendt, the assistant director of the planning and zoning department, advised Mr. Devonshuk

that Matt Decker had already expressed interest in applying for the position of zoning inspector. Tr. 493-94, 863. Mr. Decker had become interested in the zoning inspector position in late 2004. He spoke with Mr. Wendt about the position to obtain more information. Mr. Wendt gave him a copy of the zoning regulations and the website for an organization that certifies zoning enforcement officials. Mr. Decker read through the regulations and visited the website. Tr. 725-26

10. Mr. Wendt told Mr. Devonshuk that Mr. Decker would be good for the position of zoning inspector and would do a good job based on his experience and training . Tr. 495, 653.
11. It was important to Mr. Devonshuk that Mr. Wendt, as assistant director, thought that Mr. Decker had the ability to do the job and he took Mr. Wendt's opinion into consideration. Tr. 653-54
12. Peter Marsala was the respondent's zoning enforcement officer. The zoning enforcement officer directly supervises the zoning inspector. Tr. 677, 863.
13. Mr. Marsala believed that all of the applicants could perform the job of zoning inspector. CHRO-G 42, p. 1880.
14. Mr. Marsala told Mr. Devonshuk that he could work with any of the four applicants. CHRO-G 42, p. 1880. As Mr. Marsala is the zoning

enforcement officer, his opinion factored into Mr. Devonshuk's hiring decision. Tr. 654-55.

15. After the job vacancy notice was posted, applications were received in Ms. Francis' office. Tr. 953. Ms. Francis then notified Mr. Devonshuk that the applications had been received. Tr. 497, 953.
16. Mr. Devonshuk determined what questions he would ask the applicants during the interview. Tr. 866.
17. Mr. Devonshuk then informed Ms. Francis of the questions he intended to ask the applicants. Ms. Francis believed that the questions, relating to qualifications and desire for the position, were appropriate to ask. Tr. 954, 1021-22.
18. Four people applied for the position of zoning inspector: Ms. Gabriel, Ms. Carlson, Mr. Decker and Josephine O'Halloran, Tr. 50, 286, 497, 954; R 2, 8, 10.
19. At the time of their application, the four applicants were current employees of the respondent. Ms. Gabriel was employed as a secretary A in the conservation department. Tr. 7-8, 941. Ms. Carlson was employed as a secretary A in the finance department. Tr. 275, 946. Mr. Decker was employed as a buyer in the respondent's purchasing department. Tr. 687. Ms. O'Halloran was a secretary to the zoning enforcement officer. CHRO-G 42, p. 1726.

20. Mr. Decker attached a copy of his resume to his application. Tr. 562; R 8.
21. The complainants did not attach copies of their resumes or any other documents to their applications. Tr. 52-53, 532, 562. There was no requirement that applicants include resumes with their applications. Tr. 967.
22. After submitting her application, Ms. Gabriel notified Ms. Francis and Mr. Devonshuk that she was withdrawing from consideration for the position. Mr. Devonshuk explained to Ms. Gabriel that longevity was not the sole criteria for the position and he told her that he felt she had a right to apply. After communicating with Mr. Devonshuk and Ms. Francis, Ms. Gabriel changed her mind and did not withdraw her application. Tr. 555-57, 901-03, 955-56, 962; R 78, 79.
23. Mr. Devonshuk received copies of the applications from Ms. Francis and reviewed them. Tr. 497.
24. Mr. Devonshuk contacted the applicants and scheduled interviews. Tr. 185, 291, 497, 533-34, 558, 582, 730.
25. Mr. Devonshuk interviewed all four applicants. Tr. 864.
26. Mr. Devonshuk conducted the interviews with the complainants and Mr. Decker in the same manner. First, he highlighted the aspects of the zoning inspector position that he believed most important: responding to the public at the front desk, delivering clear and concise directions and advice,

and conducting complete and professional site inspections when doing field work. Next, he asked them if they had any questions about the position. Then he asked each of them the same two questions: “Why do you feel you are suitable for this position?” and “Why do you want this position?” Tr. 534-36, 541-42, 558-59, 582-83, 731, 733, 872-73; R 29.

27. With respect to the job duties highlighted by Mr. Devonshuk, Ms. Gabriel said she could perform those duties and understood the responsibility of signing documents. Tr. 559. In response to the two questions Mr. Devonshuk asked, Ms. Gabriel said that based on her experience and training, she could perform the duties of the position and that she felt it would be great to work in the planning and zoning department. Tr. 559-60. Her interview lasted approximately five minutes. Tr. 55, 600.
28. Mr. Devonshuk did not set a time limit on his interview with Ms. Gabriel and he did not cut her off during the interview. Tr. 591.
29. At the conclusion of her interview, Ms. Gabriel asked Mr. Devonshuk for a copy of the zoning regulations so that she could review and familiarize herself with them. Tr. 55-56.
30. Following the interview, Mr. Devonshuk concluded that Ms. Gabriel did not have sufficient experience and training to meet the requirements to be appointed to the zoning inspector position. Tr. 560-62, 594.

31. Mr. Devonshuk's interview with Ms. Carlson was relatively brief, lasting five to ten minutes. Tr. 292, 534, 543, 600. Ms. Carlson said she could perform the duties that Mr. Devonshuk had indicated were most important. Tr. 539-40. In response to the two questions that Mr. Devonshuk asked, Ms. Carlson answered that she had the ability to do the job; Tr. 540, 541; had attended site inspections with a friend of hers who was an architect; Tr. 291, 541; and that, having previously worked in the planning and zoning department, she wanted to return; Tr. 414, 541.
32. Following the interview, Mr. Devonshuk concluded that Ms. Carlson did not meet the minimum qualifications for the position. Tr. 542, 594.
33. Mr. Devonshuk imposed no limit on the amount of time Ms. Carlson had to answer his two questions. Tr. 542, 591. He did not cut her off during her interview. Tr. 591.
34. In his interview with Mr. Devonshuk, Mr. Decker said he understood the duties of the zoning inspector and would be comfortable performing the duties highlighted by Mr. Devonshuk. Tr. 584-85. In response to the two questions that Mr. Devonshuk asked, Mr. Decker answered that based on his past construction work experience he was familiar with the zoning application process. Tr. 585-86. He discussed his work experience at Marx Living Design and in construction; his general work in the purchasing department relative to the pending town projects requiring planning and

zoning permit; his education at Norwalk Technical School, the architectural courses he had taken, and his internships while in school; his ability to understand site plans; his customer service experience; and his field visits. Tr. 586-90, 598, 730-33, 741-42, 783, 785, 820, 824-29, 832, 838, 869, 872-74.

35. During his interview, Mr. Decker was very enthusiastic and excited about working in the planning and zoning department. Tr. 586, 868-69.

36. Mr. Decker's interview lasted twenty to thirty minutes. Tr. 590, 731.

37. Mr. Decker's interview lasted longer than the interviews of Ms. Gabriel and Ms Carlson because Mr. Decker had more to say. By submitting his resume with his application, he had provided more information than the complainants had provided, and his answers and explanations to questions were more detailed and longer than the complainants' answers. Tr. 590.

38. Based on the applications and interviews, Mr. Devonshuk wanted to hire Mr. Decker for the position of zoning inspector. Tr. 1028-29.

39. Mr. Decker had the training and experience and met the requirements of the zoning inspector position. Tr. 591. His work experience as a project coordinator for Marx Living Designs was very similar to the type of work that a zoning inspector would do. Tr. 586-87, 588. The architectural courses he had taken and his knowledge of design and construction were

relevant to the position. Tr. 587, 588. The town projects that he had been involved in as a buyer in the respondent's purchasing department were important because they were the types of projects that a zoning inspector would be involved in. Tr. 587-89.

40. Prior to making his selection, Mr. Devonshuk did not review the personnel files of the complainants or of Mr. Decker. Tr. 500.
41. Prior to making his selection, Mr. Devonshuk did not speak with the supervisors of the complainants. 600-01, 892.
42. Prior to the posting of the job vacancy notice, Mr. Decker's supervisor, Twig Holland, approached Mr. Devonshuk at Town Hall to tell him that she thought Mr. Decker would do a good job as a zoning inspector. Tr. 875-76, 892.
43. The only documentation that Mr. Devonshuk reviewed in considering the applicants were the applications they submitted and Mr. Decker's resume that he had attached to his application. Tr. 602.
44. The respondent does not have a requirement that Mr. Devonshuk or any department head speak with an applicant's supervisors, review prior job evaluations, or review an applicant's personnel file prior to making a decision to hire. Tr. 500, 601, 967-68.
45. Following the interviews, Mr. Devonshuk met with Ms. Francis. They discussed the information provided by the applicants in their application

and in their interviews and Mr. Devonshuk's desire to hire Mr. Decker. Tr. 963-70.

46. During his meeting with Ms. Francis, Mr. Devonshuk remarked on Mr. Decker's enthusiasm, his experience as a project coordinator and his education. Mr. Devonshuk asked Ms. Francis if Mr. Decker could get the job, and she said yes, as he met the qualifications. Tr. 968-70, 1028, 1032.
47. Prior to hiring Mr. Decker, Mr. Devonshuk had hired nine employees above the rank of secretary. R 38-48. He hired females for four of these positions: shoreline planner (two positions), assistant director, and planning craftsperson. Tr. 453, 596; R 39, 41, 42, 46.
48. The only applicants for the two shoreline planner positions were the female applicants themselves. Tr. 926
49. The applicants for assistant director and planning craftsperson included both males and females. Tr. 926.
50. During the applicable time frame, employees of the respondent were covered by a collective bargaining agreement (CBA) between the respondent and the American Federation of State, County and Municipal Employees (AFSCME) and its local affiliate, the Fairfield Town Employees Local 2849 (THEA). Tr. 38, 41, 939-40, 948; R 19.

51. The CBA assigned a labor grade to the respondent's job classifications. R 19, Appendix D. The labor grades were associated with salary ranges. Tr. 945; R 19, Appendix A, B and C.
52. Ms. Gabriel's position as a secretary A in the conservation department was a labor grade 6. R 19, Appendix D; R 24. Ms. Carlson's position as a secretary A in the finance department was a labor grade 6. Tr. 276, R 19, Appendix D; R 26. Mr. Decker's position as a buyer in the respondent's purchasing department was a labor grade 6. R 19, Appendix D; R 27, 28.
53. The zoning inspector position was a labor grade 7. Tr. 950; R 18.
54. The CBA, specifically § 5.01, also established the procedure for filling vacancies. After the posting of the position, the process has essentially three steps. First, applicants must submit their applications within the time frame set forth in the job vacancy notice. Second, applicants who timely file their applications are evaluated based on their experience and training, demonstrated ability and proficiency, length of service and overall work record. Experience and training are the most important factors. The third step sets forth a priority of selection in specified, limited situations when there are multiple, equally qualified applicants. Priority is given, first, to the senior qualified employee already working in the same department as the vacant position; second, to the senior qualified employee in a labor grade five or lower or for jobs otherwise unfilled; and then, third, at the sole

discretion of management, to the senior qualified employee in the same or higher grade as the vacant position. Tr. 43-45, 283-86, 956-61; R 19, § 5.01.

55. The priority of selection provisions in § 5.01 did not apply in this case because (a) the vacant position, zoning inspector, was in the planning and zoning department and neither the complainants nor Mr. Decker were already employed in that department at the time of their applications; (b) the complainants, Mr. Decker and the position of zoning inspector were not a labor grade five or lower and the position of zoning inspector did not go unfilled; and (c) neither the complainants nor Mr. Decker were already in labor grade seven positions seeking to transfer into the zoning inspector position. Tr. 146-147, 149-51, 960-961.
56. The selection process for the position of zoning inspector complied with the requirements of the collective bargaining agreement. Tr. 970.

Analysis

I

The complainants alleged that the respondent violated §§ 46a-60 (a) (1) and 46a-58 (a) when it failed to hire them for the position of zoning inspector because of their sex. Section 46a-60 provides in relevant part: “(a) It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the

employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex”

Section 46a-58 (a) states: “It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability.” The complainants alleged that the specific law of the United States that the respondent violated was Title VII, which provides in relevant part that “[i]t shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin” 42 U.S.C. § 2000e-2 (a).

Because the complainants' Title VII claim is based on allegations that the respondent failed to hire them on the basis of their sex and sex is enumerated in § 46a-58 (a) as a protected basis, the merits of this claim must also be addressed.

II

A

In a § 46a-60 disparate treatment case, the principal inquiry is whether the complainant “was subjected to different treatment because of his or her protected status.” *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 104 (1996). The analytical “framework for the burden of production of evidence and the burden of persuasion in an employment discrimination case is well established.” *Jacobs v. General Elec. Co.*, 275 Conn. 395, 400 (2005). First, the commission must establish the four elements of a prima facie case of employment discrimination. The elements are: (1) the complainants are in the protected class; (2) the complainants were qualified for the position; (3) the complainants suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Id.* “The establishment of a prima facie case creates a rebuttable presumption of discriminatory intent. . . . The burden of establishing a prima facie case is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. . . . The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff’s favor.” (Citations omitted.) *Craine v. Trinity College*, 259 Conn. 625, 638 (2002).

Once the commission “establishes a prima facie case, the employer then must produce legitimate nondiscriminatory reasons for its adverse employment action. . . .

This burden is one of production, not persuasion; it can involve no credibility assessment.” (Internal quotation marks omitted.) *Jacobs v. General Elec. Co.*, supra, 275 Conn. 400.

After the commission has established a prima facie case and the respondent has produced its legitimate, nondiscriminatory reason for the employment action, the commission “now must have the opportunity to demonstrate that the [defendant’s] proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” (Internal quotation marks omitted.) *Id.*, 401 The “factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required.” (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 706 (2006).

However, “there must be not only sufficient evidence that the employer’s reasons are false (pretextual) but also sufficient evidence that the employer’s reasons were a

pretext for intentional discrimination. Stated another way, there must be sufficient evidence on the record that the . . . protected trait or traits played a role in the decision-making process and actually motivated the employer's decision." (Internal quotation marks omitted.) *Board of Education v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 507 (2003).

"In defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964, the federal statutory counterpart to § 46a-60." *Brittell v. Dept. of Correction*, 247 Conn. 148, 164 (1998).

B

The complainants can establish a violation of § 46a-58 (a) if the commission can demonstrate a violation of Title VII. The analytical framework for an alleged violation of Title VII is similar to the analysis in a § 46a-60 case.

A plaintiff alleging a violation of [Title VII] must establish, by a preponderance of the evidence, a prima facie case consisting of four elements: (1) that plaintiff falls within the protected group, (2) that plaintiff applied for a position for which he was qualified, (3) that plaintiff was subject to an adverse employment decision and (4) that the adverse employment decision was made under circumstances giving rise to an inference of unlawful discrimination. The burden upon the plaintiff to prove a prima facie case is minimal.

Once a prima facie case has been established, the burden of production shifts to the employer who must defeat a rebuttable presumption of discrimination by articulating a legitimate, non-discriminatory reason for the employment decision. If the employer offers, via admissible evidence, a justification of its action which, if believed by a

reasonable trier of fact, would allow a finding of no unlawful discrimination, then the *McDonnell Douglas* framework-with its presumptions and burdens-disappear[s], and the sole remaining issue [is] discrimination *vel non*.

(Internal quotation marks omitted.) *Pippin v. Vernon*, ____ F.Sup.2d ____, United States District Court, Civil Docket No. 3:08cv121 (JBA) (D. Conn. September 21, 2009) (2009 WL 3075335, 7-8).

“If a defendant offers a legitimate, non-discriminatory reason for its actions, the burden shifts back to the plaintiff to fulfill her ultimate burden of proving that the defendant intentionally discriminated against her in the employment action. . . . In order to satisfy this burden, the plaintiff may attempt to prove that the legitimate, non-discriminatory reason offered by the defendant was not the employer’s true reason, but was a pretext for discrimination. . . . Ultimately, a finder of fact may consider the strength of the prima facie case, the probative value that the defendant’s reason is pretextual, and any other evidence presented in the case when determining if the plaintiff has sustained her burden.” (Citations omitted.) *Wood v. Sempra Energy Trading Corp.*, United States District Court, Civil Docket No. 3:03 cv 986 JHC (D. Conn. December 12, 2005) (2005 WL 3416126, 5), *aff’d*, 225 Fed. Appx. 38 (2d Cir. 2007). “The ultimate question is whether the employer intentionally discriminated In other words, [i]t is not enough to . . . disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 146-47 (2000).

Under Title VII, though, “the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer’s reasons are pretexts for discrimination.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 249, 259 (1981); *Komoroski v. Dept. of Consumer Protection*, 300 Fed. Appx. 59, 60 (2d. Cir. Nov. 12, 2008) (2008 WL 4876832, 1).

III

The commission established prima facie cases under § 46a-60 and Title VII for both complainants. Ms. Gabriel and Ms. Carlson are female. They applied for the position of zoning inspector. They were qualified for the position.³ They were not hired and, instead, the respondent hired a male, Mr. Decker, for the position. See [Zimmermann v. Associates First Capital Corp.](#), 251 F.3d 376, 381 (2d Cir. 2001) (“the mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the *prima facie* stage of the Title VII analysis”).

³ Mr. Devonshuk testified that based on his review of the applications prior to the interviews, he believed that the complainants did not possess the minimum qualifications to be zoning inspector but that Mr. Decker did possess the necessary qualifications. Tr. 499-500, 533, 550. Because the complainants were interviewed, because at the prima facie stage the commission’s burden in general and the “qualification” element in particular is minimal, and because the “knowledge and experience” section of the job vacancy notice; R18; is poorly worded and confusing, it will be assumed for purposes of this decision that the complainants satisfied the qualification element of the prima facie case.

In response, the respondent articulated and produced evidence of a legitimate reason for not hiring the complainants: based upon the applications and the interviews, Mr. Decker was the only qualified applicant. Mr. Decker provided more information in his application and especially in his interview regarding his relevant experience and training than the complainants provided.

In arguing that the respondent's reason is pretextual and that its hiring of Mr. Decker must have been discriminatory, the complainants contend that they had extensive experience in the respondent's process for issuing various land use permits; in assisting the public in the permitting process; in reading maps and surveys; and in dealing with applicants, contractors and attorneys. According to the complainants, Mr. Decker would not have performed these duties as a buyer in the purchasing department and he did not have the experience or the seniority that they had. Tr. 76-78, 295, 299. Also, although Mr. Devonshuk understood their work experiences to be clerical and secretarial; Tr. 533, 547, 549, 665; they had extensive job duties. Further, Mr. Devonshuk did not review their personnel files nor discuss their job performances with their supervisors. They also found their interviews to be disconcerting and brief, and that Mr. Devonshuk seemed uninterested in what they had to say and asked few, if any, questions during their interviews. Tr. 55, 61, 63, 65-66, 291-92.

For several reasons, the commission failed to show that the respondent's articulated reason for hiring Mr. Decker was a pretext for discrimination. First, the complainants' criticisms of Mr. Decker's experience are based on his experience as a

buyer for the respondent. His experience and training, however, are not limited to his duties as a buyer. In his resume and in his interview, Mr. Decker detailed how his overall work and educational experiences, both prior to and while employed by the respondent, qualified him for the position. FF 34, 39 Also, the duties of a zoning inspector are not limited to involvement in the issuance of land use permits. FF 2. Mr. Decker was also sufficiently qualified that he had the support of Mr. Wendt, the assistant director, and Mr. Marsala, the zoning enforcement officer and supervisor of the zoning inspector, whose opinions Mr. Devonshuk considered in his selection. FF 9, 10, 13, 14.

Second, Mr. Devonshuk's hiring process was consistent for the complainants and Mr. Decker: he did not review any personnel files, he did not discuss job performance with any supervisors, and he asked them the same questions during the interview. FF 26, 40, 41, 42, 43. Also militating against discrimination are Mr. Devonshuk's action in encouraging Ms. Gabriel not to withdraw her application and his appointment of two females, from an applicant pool of males and females, to significant job positions in the planning and zoning department. FF 22, 47, 49.

Third, even prior to applying for zoning inspector, Mr. Decker evidenced considerable enthusiasm for and interest in the position. He spoke with the assistant director of the planning and zoning department, Mr. Wendt, to express his interest in the position of zoning inspector should it ever become available and obtained the zoning regulations and a website for certification. FF 9. Ms. Gabriel, on the other hand,

seriously considered withdrawing her application and asked for a copy of the regulations as she was leaving her interview. FF 22, 29.

Finally, and more importantly, the commission fails to establish pretext because it fails to show that the respondent's explanation for hiring Mr. Decker instead of the complainants is false. This case ultimately hinges on what happened during the interviews, and I find credible Mr. Devonshuk's testimony that Mr. Decker provided more information as to his qualifications than the complainants provided, and that Mr. Devonshuk did not cut short the complainants' opportunity to make their case. FF 26, 27, 28, 31, 33, 34, 35, 36, 37. The difficulty for the commission is that while the testimonies of the complainants at the public hearing detailed their job duties and why they believed they were qualified for the position of zoning inspector, in their interviews with Mr. Devonshuk they did not provide such extensive information.

Ms. Gabriel and Ms. Carlson may have expected a different, more interactive interviewing technique whereby Mr. Devonshuk would ask questions to elicit information. However, in his interview with the complainants and Mr. Decker, the two questions Mr. Devonshuk asked were open-ended, and the format was self-directed by interviewee; their responses would provoke additional questions from Mr. Devonshuk. The complainants' minimal answers to Mr. Devonshuk's questions offered no new information than the limited information in their applications and what Mr. Devonshuk already believed to be their job duties; FF 27, 31; thus prompting no follow-up questions from Mr. Devonshuk. Even though Mr. Devonshuk believed, based on the applications,

that the complainants did not have the training and experience for the position; Tr. 499-500, 533, 550-51; he nevertheless interviewed them. He interviewed all the applicants to give them the opportunity to explain any inconsistencies and to present their experiences and training. He also interviewed them all to give himself the opportunity to observe their enthusiasm for the position, to observe their reactions to questioning, and to gain a little understanding about them. Tr. 599-500, 567-68. Although the interviews gave the complainants the opportunity to expound on their experience and training, they did not provide detailed information as to how their experience and training made them qualified for the position. FF 27, 31.

Mr. Decker, though, used the open-ended questions to actively promote himself. He explained that he understood the duties of the zoning inspector and that he would be comfortable performing the duties highlighted by Mr. Devonshuk. He indicated that because of his past construction work experience he was familiar with the zoning application process. He discussed his work experience at Marx Living Design and in construction; he explained his education at Norwalk Technical School, the architectural courses he had taken and his internships while in school; and his involvement as a buyer in the respondent's purchasing department with significant town projects requiring planning and zoning permits. He explained his ability to understand site plans, his customer service experience and his field visits. Mr. Decker was very enthusiastic and excited about working in the planning and zoning department. FF 34, 35, 36, 37, 39, 46. He explained his abilities for the position.

The testimonies of the complainants and Mr. Decker, taken in a light most favorable to the complainants, support, at best, the conclusion that at the time Mr. Devonshuk decided to hire Mr. Decker, he was choosing from among a number of applicants, none of whom had qualifications far stronger than the others. The “court must respect the employer’s unfettered discretion to choose among qualified candidates.” (Internal quotation marks omitted.) [Byrnie v. Cromwell, 243 F.3d 93, 103 \(2d Cir. 2001\)](#).

Because the commission did not proffer “sufficient evidence to find that the employer’s asserted justification is false;” *Reeves v Sanderson Plumbing Prods., Inc.*, *supra*, 530 U.S. 148; the affidavits are dismissed.

Conclusions of law

1. With respect to Ms. Gabriel’s § 46a-58 (a) claim, the commission established a prima facie case; the respondent articulated a non-discriminatory reason for its failure to hire her; and the commission did not meet its burden of persuasion to establish by a preponderance of the evidence that the respondent’s decision not to hire her for the position of zoning inspector was the result of deprivation of rights secured and or protected by Title VII.
2. With respect to Ms. Gabriel’s § 46a-60 (a) (1) claim, the commission established a prima facie case; the respondent articulated a non-discriminatory reason for its failure to hire her; and the commission did not

meet its burden of persuasion to establish by a preponderance of the evidence that the respondent's articulated reason was false and actually a pretext for intentional discrimination.

3. With respect to Ms. Carlson's § 46a-58 (a) claim, the commission established a prima facie case; the respondent articulated a non-discriminatory reason for its failure to hire her; and the commission did not meet its burden of persuasion to establish by a preponderance of the evidence that the respondent's decision not to hire her for the position of zoning inspector was the result of deprivation of rights secured and or protected by Title VII.
4. With respect to Ms. Carlson's § 46a-60 (a) (1) claim, the commission established a prima facie case; the respondent articulated a non-discriminatory reason for its failure to hire her for the position of zoning inspector; and the commission did not meet its burden of persuasion to establish by a preponderance of the evidence that the respondent's articulated reason was false and actually a pretext for intentional discrimination.

Order

1. Commission on Human Rights and Opportunities ex rel. Betty Gabriel v. Town of Fairfield, Docket No. 0620141, is dismissed.

2. Commission on Human Rights and Opportunities ex rel. Rose Ann Carlson v. Town of Fairfield, Docket No. 0620142, is dismissed

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Ms. Betty Gabriel
Ms. Rose Ann Carlson
Cheryl A. Sharp, Esq.
Robin B. Kallor, Esq.