

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SUSAN L. B. FINTONIS,
Complainant

v.

Docket No. 99-13-0912

CITY OF LYNN PUBLIC SCHOOLS,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Sheryl M. Bourbeau, Esq., for Complainant
Kenneth W. Terrell, Esq., for Respondents

I. PROCEDURAL HISTORY

On February 26, 1999, Complainant Susan L. B. Fintonis filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against the City of Lynn Public Schools ("Respondent") and a number of individuals employed with the Lynn Public Schools.¹ In her complaint, Complainant alleged that Respondents engaged in unlawful discrimination on the basis of age, in violation of M.G.L. c. 151B, § 4(1C), by failing or refusing to hire her for a number of teaching and administrative positions.

On April 7, 1999, the Commission dismissed all of the named respondents except for the City of Lynn Public Schools and James Mazareas, the

¹ In her original complaint, Complainant named seventeen separate Respondents, including the City of Lynn, the Superintendent and Human Resource Director of the Lynn Public Schools and most of the principals of the public schools in Lynn.

Superintendent of the Lynn Public Schools. On October 22, 2001, the Commission issued a probable cause finding with respect to Complainant's claim. On December 16, 2003, the Commission certified Complainant's claim for a public hearing. On June 28 and 29, 2004, the parties appeared before me for a public hearing in Boston, MA. At the close of the Public Hearing on June 29, 2004, Respondents' Motion to Dismiss James Mazareas as a Respondent was allowed without opposition.

In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Susan L. B. Fintonis, is a woman residing in Nahant, MA. At the time she first applied for various full-time positions with Respondent in February 1998, Complainant was 51 years old (DOB: January 4, 1947).
2. Respondent is a department of the City of Lynn, a municipality in the Commonwealth of Massachusetts. Respondent is a political subdivision of the Commonwealth within the meaning of M.G.L. c. 151B, § 4(1C).

3. As of February 1998, Complainant held a Bachelors of Science degree in Business Education from Salem State College; a Masters of Science in Criminal Justice from Northeastern University; and a Juris Doctorate from New England School of Law. In addition, Complainant had taught at the collegiate level for approximately 27 years, most notably at Endicott College where she obtained the title of Full Professor in Criminal Justice in 1983. Earlier in her career, Complainant taught writing and math to high school students at the Lynn Model Cities program from 1970 to 1972 and mentored middle school girl students through the Girls, Inc. program in the mid-1970's. Complainant also performed eight weeks of "student teaching" at Somerville High School in 1969.

4. As of February 1998, Complainant held Massachusetts teacher certifications in four areas: Business K-12; Social Studies 5-9; Social Studies 9-12; and, Middle School 5-9. In addition, at the time she applied for positions with Respondent in the winter and spring of 1998, her application for certification in Elementary 1-6 was pending with the Mass. Department of Education. She eventually received the Elementary 1-6 certification on June 5, 1998.

5. From January to November 1998, Complainant worked for Respondent as a day-to-day substitute teacher at the elementary level. Complainant testified that during this period, Respondent called her to work as a substitute every day and on each occasion she accepted the work. However, Complainant's employment records for the 1997-1998 school year indicated that Respondent did not call her every day. In addition, on some occasions when Respondent did call her, she refused the assignment for various reasons. More importantly,

Complainant did not work ninety consecutive days with Respondent as a “long-term substitute” teacher, which would have entitled her to a seniority date and, thus, a job preference for open teaching positions.²

6. Complainant testified that she received positive evaluations as a substitute teacher. She also received a letter of recommendation from Raymond Bastarache, the Principal of the Sewell-Anderson Elementary School. I credit Complainant’s testimony on this matter.

7. Between February 18, 1998 and October 29, 1998, Complainant submitted approximately forty-eight separate applications to Respondent for a wide-variety of teaching and administrative positions. Complainant listed the dates of her degrees and certifications on the job applications and resumes and, therefore, I find that Respondent could have discerned that Complainant was over 40 years of age at the time she applied for these positions. It is undisputed that Respondent did not hire Complainant for any position.

8. In her complaint, Complainant stated that she “was NEVER interviewed, called, nor questioned by any Lynn School Administrator or Principal for any teaching or administrative position whatsoever to the present time.” Contrary to her allegations, however, Complainant admitted at the public hearing that she

² “Long-term substitutes”, under Art. III(G) of the applicable collective bargaining agreement (Ex. 34), are substitute teachers who have worked twenty-one days in one assignment. Art. III(G) further states, “Long-term substitutes shall not receive a seniority date until he/she has been teaching ninety (90) days in succession and at that time his/her seniority date shall be deemed retroactive to the first day of said ninety (90) day period.” Art. III(Q), titled “Job Preference”, states in pertinent part, “Seniority based on consecutive years of experience in the Lynn School Department, certification, and ability to perform shall govern all assignments.” Complainant admitted that she never worked as a “long-term substitute” for Respondent.

was interviewed on two occasions for two different teaching positions.

Specifically, Complainant admitted to being interviewed by Janet Birchenough for an English as a Second Language position at the Thurgood Marshall Middle School; and, by Mary Jane Mulholland for an English teacher position at the Lynn Vocational Technical Institute (“LVTI”).

9. Complainant also testified that during the spring or fall of 1998, after she had completed a substitute assignment at Respondent’s Aborn School, she had a conversation with Thomas Fogerty, the principal of the school, regarding Respondent’s hiring process. According to Complainant, Fogerty stated to her, “If you’re young and just out of college, you would be considered.” She also claimed that he told her, “it would be like banging your head against the wall for you to get hired [for a teaching position in Lynn]” and further stated that she could not be hired because “they will hire young people.” Respondent offered no evidence to rebut Complainant’s testimony regarding Fogerty’s statements on this matter and, therefore, I credit her testimony. However, Complainant did not offer any credible evidence that Fogerty participated in the hiring process for employees other than at his own school.³ Complainant also failed to establish that Fogerty had sufficient or first-hand knowledge about the hiring practices for administrative positions or jobs at other schools. Furthermore, Complainant did not introduce any specific credible evidence that Fogerty had refused to hire Complainant for any position at the Aborn School for which she was qualified.

³ Generally, under Massachusetts law, principals are the appointing authority for teachers working in their building, subject to the approval of the Superintendent.

A. Administrative Positions

10. Career Specialist. On February 12, 1998, Complainant sent an application for the position of Career Specialist at the LVTI to Beth Doiron, the Director of Operations at Jobs For Bay State Graduates, Inc. According to Complainant, the Principal at LVTI, Al Malagrifa had referred her to Doiron, upon the belief that Doiron was the hiring agent for Respondent. The application and documentation submitted by Complainant to Doiron clearly stated that she was applying for a job with “Jobs for Bay State Graduate, Inc.,” as opposed to a position with Respondent. For example, on the application, Complainant indicated that she had not “been previously employed by our organization”, although she was working at that time as a substitute teacher for Respondent. On February 25, 1998, Complainant received a letter from Doiron that stated:

Thank you for interviewing for the Career Specialist position with Jobs for Bay State Graduates at [LVTI]. While we were impressed with your past work experience, another candidate whose experience more closely matches the position and the population to be served has been chosen.

With respect to this position, Complainant testified that Malagrifa told her that Doiron was “going to hire someone who does not even have their bachelor’s degree.” Respondent did not offer any evidence to rebut Complainant’s testimony that Malagrifa made these comments and, therefore, I credit Complainant’s testimony. However, given the hearsay nature of the testimony, I refuse to accept these remarks for the truth of the matters asserted therein. In particular, Complainant has failed to offer sufficient credible evidence regarding the nature of the relationship between Respondent and Jobs for Bay State Graduates, Inc, from which I can draw the inference that Doiron served as Respondent’s hiring

agent. Moreover, Complainant has not presented any credible evidence that Respondent's employees were in any way involved in the hiring decision with respect to this position. To the contrary, Malagrifa's comments suggest that Jobs For Bay State Graduates, Inc., as opposed to Respondent, made the hiring selection with respect to this position.

11. Director of Employee Relations. On May 6, 1998, Complainant submitted a cover letter and resume to Superintendent James Mazareas in application for the position of Director of Employee Relations. Patricia Libby, the Human Resources Manager for Respondent at all relevant times hereto, testified credibly that no such position existed with Respondent.

12. Director of Security and Internal Affairs. On June 18, 1998, Complainant submitted a cover letter and resume to Superintendent Mazareas in application for the position of Security Chief. At the time Complainant submitted her application, no such position existed. Five months later, however, on November 4, 1998, Respondent posted an opening for "Director of Security and Internal Affairs." The qualifications for the position listed on the posting included "a minimum of five years experience in law enforcement or security work, preferably at the supervisory level in either a civilian, military, or paramilitary capacity." According to Libby, Complainant had no such law enforcement or security experience and, therefore, was not qualified for the job. On December 14, 1998, Respondent hired David McCoy for the position. Libby testified credibly that McCoy meet all of the qualifications for the position including seventeen years of

law enforcement experience as a police officer. At the time Respondent hired McCoy, he was 44 years old. I credit Libby's testimony.

13. Dean of Students at LVTI. On June 18, 1998, in response to a posting, Complainant submitted an application to Libby for the position of Dean of Students at LVTI. The minimum qualifications for the position included five years teaching experience in a shop or related vocational school. In her cover letter, Complainant wrote that she had more than seven years experience. At the public hearing, however, Complainant admitted that she did not even have five years of experience or otherwise meet the qualifications for the job. On October 19, 1998, Respondent hired Generoso Gallo for the position. Libby testified credibly that Gallo met all of the minimum qualifications for the position including sixteen years of experience teaching at vocational high schools. At the time Respondent hired Gallo, he was 48 years old.

14. Elementary and Middle/Secondary Facilitator. On June 25, 1998, in response to two postings, Complainant submitted a cover letter and resume to Libby for the positions of "Middle/Secondary Facilitator or Lead Instructional Facilitator." Both positions required a "minimum of five years of successful teaching experience in the classroom" at the relevant level. Complainant admitted that she did not have five years teaching experience at any of the relevant grade levels. Libby testified that all twenty-four individuals hired by Respondent for the Facilitator positions met the requirements listed in the posting, including the qualification that applicants have a least five years experience. In addition, all but one of the twenty-four persons hired had been

teaching in the Lynn Public Schools for at least seven years. The one exception, Elisa Torstensson Green, had only one year of experience teaching for Respondent, but had five years of elementary school teaching experience at other public schools. The average age of the twenty-four persons hired for these positions was 48 years old. In particular, twenty-one (88%) of the persons hired for these positions were over the age of 40; eleven (46%) of the individuals hired were over the age of 50; and, seven (29%) of the persons hired were older than Complainant.

15. Dean of Students at Thurgood Marshall Middle School. On September 24, 1998, in response to two postings, Complainant submitted a cover letter and resume to Libby in application for the positions of Dean of Students at the Thurgood Marshall Middle School. The minimum qualifications for the positions included five years of Middle School teaching experience. In her cover letter, Complainant indicated that she had over five years teaching experience at the Middle School level. But at the public hearing, Complainant admitted she had never taught at a middle school and her only experience teaching children in that age group consisted of her two years of volunteer work for the Girls, Inc. mentoring program in the mid-1970's. Respondent hired Edward Toner and Carol Wright for the positions. At the time of their appointments, Toner and Wright were, respectively, 52 and 46 years old. In addition, Toner had taught in the Lynn Public Schools for more than seven years, including five years at the Thurgood Marshall Middle School. Wright had worked as a teacher for

Respondent for more than twenty-one years and had ten years of experience at the Middle School level.

16. Guidance Counselor at Thurgood Marshall Middle School. On October 29, 1998, in response to a posting, Complainant applied for the position of Guidance Counselor at the Thurgood Marshall Middle School. The qualifications for the position included a master's degree in education, certification as a guidance counselor, and a minimum of five years teaching experience at the secondary level. Complainant admitted that at the time she applied for the job, she did not have a master's degree in education, a certification as a guidance counselor, or five years of teaching experience at the secondary level. On November 16, 1998, Respondent hired John Marsh for the position. Libby testified credibly that at the time of his appointment, Marsh met all of the requirements for the position including twenty-three years of public school teaching experience and five years of employment as a half-time guidance counselor. Marsh was 57 years old at the time of the appointment.

B. Teacher Positions

i. Elementary Level

17. On March 16, 1998, Complainant submitted cover letters and resumes to the principals of seventeen different elementary schools in the Lynn Public Schools in application for a full-time elementary school teacher. In each of her resumes, Complainant claimed to be certified in elementary education. However, she admitted at the public hearing that she was not certified in elementary

education at the time she applied for these positions and did not obtain this certification until June 5, 1998.

18. Respondent's records indicate that forty out of the fifty-one candidates hired for the elementary teaching positions during this time period had the requisite certifications. With respect to the eleven individuals hired by Respondent who did not possess the required certifications, three individuals were hired to work the area of Special Needs;⁴ and, seven individuals were hired to work in the areas of Transitional Bilingual Education, Language Support, or English as a Second Language.⁵ Complainant had no relevant experience or background in these areas. In addition, of the eleven persons hired without certifications, four were over 40 years of age.⁶

ii. Middle and High School Level

19. On May 6, 1998, Complainant submitted three separate letters with attached resumes to each of the five principals of Respondent's Middle and High Schools regarding available teaching positions in the areas of Social Studies, Business Education, and Business Law. On the same date, Complainant also submitted cover letters and resumes to Superintendent Mazareas for the same positions. Respondent does not dispute that Complainant met the necessary

⁴ Mary Jane Maher, Ruth Silva Girard and S. Kay Davis. Maher and Girard held certifications in Special Needs PreK -9.

⁵ Jaime Bell, Myrna Ocasio, Wirston Ocasio, Laura Shea, Shelby Rodriguez, Dulce Reynoso, and Maria Koutroubis. Documents from the DOE introduced by Complainant indicated that a shortage of certified teachers in these subject areas existed in the Lynn Public Schools and many of the certification waivers submitted by Respondent pertained to these positions.

⁶ Ruth Girard (50), Kay Davis (48), Myrna Ocasio (45), and Wirston Ocasio (48).

qualifications for the jobs and held the requisite certifications. However, in her resumes submitted to Respondent regarding these positions, Complainant indicated that she had performed substitute teaching at the K-12 level, even though she never worked as a substitute teacher in the middle or high schools.

20. Between May 6, 1998 and February 26, 1999, Respondent hired six applicants in these subject areas. Three of the six applicants hired (50%) were older than Complainant. Each of the six appointments shall be discussed separately.

a. Daniel Dufour. On September 9, 1998, Respondent hired Dufour to teach Social Studies at the Thurgood Marshall Middle School. At the time of the appointment, Dufour held certifications in Social Studies 5-9 and Social Studies 9-12; and, according to Libby, met the qualifications for the job. Although Dufour is younger than Complainant and under 40 years of age, he had been employed as a teacher at Respondent's English High School since March 1998. Libby testified that as a result of his current employment with Respondent, Dufour had a seniority date and thus a "job preference" for open positions pursuant to the applicable provisions of the teacher's collective bargaining agreement.

According to Libby, all currently employed teachers with Respondent are considered for open positions before any other applicants. I credit Libby's testimony.

b. Kevin Driscoll. On September 9, 1998, Respondent appointed Driscoll to teach Business at English High School. Libby testified credibly that Driscoll had the necessary qualifications and certifications for the position.

Although Driscoll was younger than Complainant and under 40 years of age, Driscoll had been employed as a teacher at English High School since April 1998. Libby testified that similar to the situation with Dufour, Driscoll had a contractual job preference for the position given his current employment with Respondent at the time he applied for this position. I credit Driscoll's testimony.

c. Diana Brandi. On September 9, 1998, Respondent hired Brandi to teach LS Social Studies/Spanish at English High School. Brandi was not certified to teach either Social Studies or Spanish. However, Brandi was 55 years old at the time of her appointment.

d. Lawrence McManus. On October 23, 1998, Respondent hired McManus to teach Social Studies at the Skills Development School. Complainant never specifically applied for any position at the Skills Development School. Notwithstanding, McManus was 71 years old at the time of his appointment.

e. Arthur Akers. On January 11, 1999, Respondent appointed Akers to teach Social Studies at the Skills Development School. Complainant never specifically applied for any position at the Skills Development School. Akers was 39 years old at the time of his appointment.

f. John Fisher. On February 4, 1999, Respondent hired Fisher to teach Social Studies at English High School. Fisher was 57 years old at the time of his appointment.

iii. English Teacher at LVTI

21. On September 24, 1998, Complainant submitted an application to Mary Jane Mulholland, Chair of the English Department at LVTI, for an English teacher's position. Complainant admitted that on the same date, Mulholland interviewed her for the job. Respondent ultimately never filled the position. However, two weeks prior to Complainant's interview, Respondent had hired Gertrude O'Connell for another English teacher's position. O'Connell was 51 years old at the time of her appointment.

C. Applications for "Any Teaching Position" and "Teacher Aide" Jobs.

22. On May 16, 1998, Complainant sent a cover letter to Superintendent Mazareas asking to be considered for any teaching or administrative educational position. On September 8, 1998, Complainant sent another cover letter to Mazareas asking to be considered for any positions at any level. Mazareas testified that he had no direct involvement in the hiring process for teachers. I credit Mazareas' testimony.

23. During the 1998-1999 school year, Respondent hired two hundred new teachers and teacher aides. Of these two hundred new employees, sixty persons (30%) were over the age of 40; nineteen (9.5%) of the new employees were over 50 years of age; and, sixteen (8%) were older than Complainant. With respect to the individuals hired by Respondent for the twenty-nine administrative positions during the 1998-1998 school year, twenty-six (89.6%) of the new

administrators were over the age of 40; thirteen (44.8%) were over the age of 50; and, nine (31%) were older than Complainant.

24. Complainant introduced substantial evidence that many of the newly hired employees did not possess any certifications or only possessed certifications as teacher aides. Libby testified credibly that the overwhelming majority of the applicants hired without certifications were employed as teacher aides.

According to Libby, teacher aide positions did not require that the applicants possess teacher certifications. In fact, Libby testified that none of the individuals hired for the teacher aide positions held a teacher certification. I credit Libby's testimony.

25. With respect to the teacher's aide positions, Libby testified credibly that an individual must go to the personnel department and complete an application in order to be considered for a teacher's aide job. According to Libby, Complainant never completed an application for a teacher's aide position and, therefore, Respondent did not consider her for this position. Libby testified that when she looked at the numerous applications she received from Complainant, and reviewed her credentials, experience, and teacher's certificates, she believed Complainant was looking solely for a teaching or administrative position. I credit Libby's testimony.

D. Particular Candidates.

26. Complainant argued that Respondent's hiring of the following individuals supports her contention that it subjected her to age discrimination. Each individual's appointment shall be addressed separately.

a. Marianne Conlon. On September 8, 1998, Respondent hired Conlon to teach English at Thurgood Marshall Middle School. At the time of her appointment, Conlon was 21 years old and not certified. Libby testified credibly that Respondent hired Conlon because her father was the Director of LVTI. Complainant did not introduce any credible evidence that she applied for this position or met the qualifications for the job. Moreover, although nepotism may not be a laudable or excusable practice, Complainant offered no evidence that Conlon's age or the age of any other non-selected applicant played a factor in Conlon's appointment.

b. Elana Barnett. On September 9, 1998, Respondent hired Barnett as an Itinerant Resource teacher. Barnett was under 40 years of age. According to Libby, this was a "special needs" position. At the time of her appointment, Barnett held a certification in early childhood education. Barnett had also indicated in her application that she was seeking a special education position and currently enrolled in a master's degree program in special education. Complainant did not have certifications in either special education or early childhood education and had no experience in working with children with disabilities. Complainant also did not introduce any credible evidence that she

specifically applied for this position or met the qualifications for the job. I credit Libby's testimony.

c. Brian Barrett. On September 9, 1998, Respondent hired Barrett to teach science/resource at English High School. At the time of his appointment, Barrett was 25 years old and not certified to teach High School science. But Barrett did hold a certification in Spanish. Libby testified credibly that Respondent has a very high Spanish-speaking population and, therefore, it considered Barrett's Spanish-speaking ability as a valuable asset. According to Libby, one-third of all the certification waivers issued to Respondent pertained to hiring individuals with spanish-speaking ability to teach English as a Second Language or for Language Support positions. Complainant also did not introduce any credible evidence that she specifically applied for this position or met the qualifications for the job. I credit Libby's testimony.

E. Complainant's Damages

27. In September 1999, Complainant was hired by the Chelsea Public Schools to teach special education at a salary of \$45,000. She was subsequently promoted to the position of District-Wide Academic Tester. Complainant claimed that as a result of Respondent's wrongful failure to hire her, she sustained lost wages in the amount of \$61,146.12, front pay or loss of future earning in the amount of \$34,500.48, and loss of pension benefits in the amount

of \$36,472.43.⁷ Complainant has not provided any credible evidence of sustaining any emotional distress.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, § 4(1C) prohibits discrimination against an individual on the basis of age by the Commonwealth or any of its political subdivisions, by itself or through its agents. The term "age", pursuant to M.G.L. c. 151B, § 1(8), refers to persons over forty years of age. Complainant has alleged that Respondent engaged in unlawful age discrimination when it refused to hire her for numerous positions during the period of February to November 1998.

A. Direct Evidence of Discrimination

Complainant has argued that Principal Fogerty's comment that Respondent only hired "young people" constituted "direct evidence" of discrimination. Direct evidence is evidence, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000), *quoting*, Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991); *see also*, Chief Justice for Administration and Management of the Trial Court (CJAM) v. MCAD, 439 Mass. 729, 732, n. 11 (2003) (typically, direct evidence consists of statements of discriminatory intent attributable to an employer). In a direct evidence case, a complainant does not have to adhere to the three stage burden shifting paradigm because he or she does not need the

⁷ The calculations are based on the differences between her salary and benefits in her present position and the salaries and benefits set forth in the collective bargaining agreement between the City of Lynn School Committee and the Lynn Teachers Union.

benefit of an inference. Rather, a mixed motive analysis is applied. Pursuant to this analysis, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000). If Complainant produces credible direct evidence of age discrimination, then the burden of persuasion shifts to Respondent to show that it would have made the same decision absent the illegitimate motive. Wynn & Wynn, PC, 431 Mass. at 667, *citing*, Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). The appropriate question is then whether Respondent's "proffered legitimate reason also motivated the employment decision, and if so to what extent." Wynn & Wynn, PC, 431 Mass. at 667, *citing*, Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 301, *quoting*, Price Waterhouse, 490 U.S. at 252. As stated by the Supreme Judicial Court in CJAM v. MCAD, "Because hiring decisions are seldom made for a single reason, discriminatory and nondiscriminatory hiring motives may coexist in the mind of a decision maker. Thus, even when nondiscriminatory reasons play some role in a decision not to hire a particular applicant, that decision may still be unlawful if discriminatory animus was a 'material and important ingredient' in the decision-making calculus." 439 Mass. at 735, *citing*, Lipchitz v. Raytheon Co., 434 Mass. 493, 506 n.19.

In this case, Complainant has not presented any direct, credible evidence of age discrimination. Although I credited Complainant's testimony that Fogerty made these remarks, his comments were vague, general, and should be construed as a "stray remarks." See, Wynn & Wynn, 431 Mass. at 667 (stray

remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision-makers unrelated to the decisional process itself do not suffice to satisfy the plaintiff/s threshold burden). Although Fogerty had the authority to hire individuals at the Aborn School, Complainant failed to establish that Fogerty had sufficient or first-hand knowledge about the hiring process for administrative positions or jobs at other schools. Furthermore, Complainant did not introduce any specific credible evidence that Fogerty had refused to hire Complainant for any position at the Aborn School for which she was qualified.

Notwithstanding, even if we assume, *arguendo*, that Complainant had produced credible direct evidence of discrimination, Respondent established that it would have made the same decisions absent the illegitimate motive. Wynn & Wynn, PC, 431 Mass. at 667, *citing*, Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). As discussed in detail below, Complainant was not qualified for most of the positions for which she applied. Moreover, in the few cases where she was qualified, Respondent hired individuals that either had a hiring preference pursuant to the terms of the applicable collective bargaining agreement, or hired persons older than Complainant.

B. Indirect Evidence of Discrimination.

In the absence of any direct evidence of discrimination, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn, 431

Mass. at 665-666; Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). In order to establish a prima facie case of age discrimination in a failure to hire case, Complainant must establish that (1) she is a member of the class by virtue of her being over 40 years of age; (2) she was qualified for the jobs in question; (3) she was rejected for the jobs; and, (4) the jobs were filled by one or more similarly situated persons who were not members of Complainant's protected class. Mitchell v. TAC Tech. Servs. Inc., 50 Mass App. Ct. 90, 92 (2000); Tardanico v. Aetna Live & Cas. Co., 41 Mass. App. Ct. 443, 447 n.4 (1996). Lopilato v. Boston Public Schools, 26 MDLR 46, 50 (2004). With respect to the “pivotal” fourth element, Complainant must demonstrate that the successful candidate was at least five years younger than she was or present other evidence that her failure to get hired occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. Knight v. Avon Products, Inc., 438 Mass. 413, 425 (2003), Lopilato, 46 MDLR at 50.

If Complainant establishes a prima facie case of discrimination, then the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with discriminatory intent, motive, or state of mind. Lipchitz, 434 Mass. at 504; see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that “one or more of the reasons advanced by the employer for

making the adverse decision is false.” Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent’s adverse actions were the result of discriminatory animus. *Id.*; Abramian, 432 Mass at 117.

It is uncontested that Complainant is a member of a protected group by virtue of her being 51 years of age at the time she applied for these positions. However, with respect to most of the positions Complainant applied for, she failed to establish that she was qualified and/or rejected for these positions. Complainant clearly did not possess the qualifications for the administrative positions of Director of Security and Internal Affairs, Dean of Students at LVTI, Elementary and Middle/Secondary Facilitator, Dean of Students at Thurgood Marshall Middle School, and Guidance Counselor at Thurgood Marshall Middle School. In regard to her application for the Director of Employee Relations, I credited Libby’s testimony no such position or vacancy existed. Furthermore, although Respondent interviewed Complainant for the position of English teacher at LVTI, Libby testified credibly that Respondent never filled that position. Additionally, I find that Complainant has failed to produce sufficient credible evidence regarding the nature of the relationship between Respondent and Jobs for Bay State Graduates, Inc., pertaining to her application to the latter for the Career Specialist position. She also failed to present any credible evidence that Respondent’s employees were in any way involved in the decision with respect to the Career Specialist job. With respect the elementary teaching positions, Complainant admitted at the public hearing that she was not certified in elementary education at the time she applied for these positions. Although

Respondent hired some non-certified individuals for certain elementary teacher positions, unlike almost all of these individuals, Complainant did not possess the relevant experience, skills or background in the areas of Special Needs, Transitional Bilingual Education, Language Support, or English as a Second Language. Lastly, I credited Libby's testimony that Complainant never formally applied for any teacher's aide position.

Complainant has established, however, that she was qualified for and rejected for teaching positions in the areas of Social Studies, Business Education, and Business Law at the Middle School and High School levels. Complainant has also proved that Respondent hired some similarly situated persons under 40 years of age these positions (Dufour, Driscoll and Akers). Complainant has, therefore, established a prima facie case of age discrimination with respect to her rejection for these positions.

Since Complainant has established a prima facie case, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Respondent has met its burden. With respect to the hiring of Dufour and Driscoll, Libby testified credibly that both had the necessary qualifications and certifications for the positions and had been teaching in the Lynn Public Schools at the time they applied for these jobs. Furthermore, as stated above, currently employed teachers who possessed the required certifications and abilities had a "job preference" for open positions pursuant to the terms of the teacher's collective bargaining agreement. In regard to Ackers, Libby testified credibly that

Respondent hired him on January 11, 1999, to teach Social Studies at the Skills Development School. I also credited Libby's testimony that Complainant never specifically applied for this position and was, therefore, not considered for the job. Complainant did not produce any credible evidence to the contrary.

Lastly, Complainant failed to show that one or more of the reasons advanced by Respondent for making its hiring decisions were false. In particular, although I credited Complainant's testimony that Fogerty stated Respondent only hired "young people", the statistical evidence strongly contradicts the truth of his comments and undermines Complainant's assertion that Respondent had a bias against hiring or promoting persons over 40 or 50 years of age. For example, in regard to positions that Complainant was qualified for (Social Studies, Business Education, and Business Law teaching positions), three of the six individuals hired were older than Complainant. In addition, of the two hundred new teachers or teacher's aides hired during the 1998-1999 school year, sixty persons (30%) were over the age of 40; and, nineteen (9.5%) of the new employees were over 50 years of age. With respect to the twenty-nine individuals hired for administrative positions, nearly 90% of the new administrators were over the age of 40, and almost half (44.8%) were over the age of 50. In summary, I find that these numbers seriously undermined Complainant's contention that Respondent's hiring process was biased against persons over 40 or 50 years of age and contradicted her assertion that Respondent acted with discriminatory intent, motive, or state of mind when it failed to hire her for a position.

Consequently, Complainant has failed to establish that Respondent engaged in unlawful age discrimination in violation of G.L. c. 151B, § 4(1C).

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 8th day of November, 2006.

Edward R. Mitnick,
Hearing Officer