

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & ANNE V. MONDESIR,
Complainants

v.

DOCKET NO. 09-BEM-01334

BOSTON PUBLIC SCHOOLS,
Respondent

Appearances:

Caitlin A. Sheehan, Esquire, Commission Counsel

Shane P. Early, Esquire and Shannon T. Phillips, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 8, 2009, Complainant Anne V. Mondesir filed a complaint with this Commission charging Respondent Boston Public Schools with discrimination in employment on the basis of race and color, black and Hispanic, in violation of M.G.L.c.151B, sec. 4(1). The Investigating Commissioner issued a probable cause finding. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on November 4, 5 and 6, 2014. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Ann V. Mondesir is an Afro-Latina woman who was born in the Dominican Republic and is fluent in Spanish. Complainant is currently a school social worker at the Mildred Avenue School in Mattapan. Tr. 21-22, 51.

2. Complainant received a bachelor's degree in human services and sociology from Simmons College in 1997 and a master's degree in social work from Simmons College in 2000. She possesses an L.I.C.S.W., the highest licensure for social workers in Massachusetts. Tr. 23, 27-8; Jt. Ex. 4.

3. Respondent, Boston Public Schools, is a department within the City of Boston, a municipal body organized under the laws of the Commonwealth of Massachusetts. Respondent's administrative offices are located at 2300 Washington St., Roxbury MA. English High School ("English High") is a large high school within the Boston Public School system whose student population was predominantly Hispanic and African-American.

4. Jose Duarte was the Headmaster at English High during the 2007-08 and 2008-09 school years. Duarte is of Cape Verdean national origin.

5. English High has a hiring committee, of which Duarte was a member. The hiring committee, which was composed primarily of people of color, interviewed job candidates and made hiring recommendations; however, Duarte had the ultimate authority to hire and fire employees. Tr. 182.

6. Duarte testified that 2007 was a challenging time for English High. Because of the school's failure to achieve its goals regarding MCAS results, it was designated it as a Pilot School by the state Department of Education, which partnered with the school and developed a

plan to improve student learning. As a result, there was pressure on the administration, staff and students to improve student performance and meet established goals. Tr. 182-3.

7. In accordance with the plan, in 2007, English High School was divided into two “smaller learning communities” (“SLCs”) of approximately 400 students each. One SLC was located on the fourth floor (“SLC four”) and another was located on the fifth floor (“SLC five”).

8. As a result of the Department of Education plan, the school determined that it needed to develop a stronger student support group. To that end, it was decided that the school would fund two social worker positions for the 2007-08 school year. Previously, the school did not have social workers on staff. Tr. 186-7. The two social worker positions were identical but were assigned to different SLCs. Tr. 185-186.

9. Duarte and the hiring committee wanted social worker candidates to mirror the largely Hispanic and African-American student population and for this reason they considered the applicants’ race in making hiring decisions; applicants of color and those who spoke Spanish were considered favorably in choosing the candidates for the positions. Tr. 50-51; 172; 189-191; 255-256; 394.

10. Duarte testified that the social workers’ primary responsibility was to support their small learning group, bolster the students’ social and emotional needs, work with families and the community at large and network with community based agencies. They were also to work closely with the assistant head masters to help them implement and develop methods to support families. Tr. 192-3.

11. For the first three years of employment Respondent’s social workers and teachers are “provisional employees,” meaning that they work under a one-year contract which is subject to renewal every year. They become permanent, tenured employees at the end of their third year.

12. After an interview with the hiring committee, Complainant was hired as the social worker for SLC four for the 2007-08 school year. Tr. 145, 191.

13. Sophia Viglas¹, who is white and speaks conversational Spanish, was hired as a social worker for SLC five for the 2007-08 school year. At the time, Viglas had an L.C.S.W. license and had graduated from social work school more recently than Complainant.

14. At all times relevant to this matter, English High had two Assistant Headmasters. Christophe Teulet-Cote was the assistant headmaster for SLC four and was Complainant's direct supervisor during the 2007-08 and 2008-20 school years.

15. Valerie Spencer was the assistant headmaster for SLC five and was Viglas' direct supervisor during the 2007-08 school year. Karen Maund was the assistant headmaster for SLC five and was Viglas' direct supervisor during the 2008-09 school year.

16. Complainant testified that her duties included risk assessment of troubled students; for example, if a student reported suicidal ideation, she would assess the student, contact the family, determine whether emergency services were required and on occasion, accompany students to the emergency room. Tr. 49.

17. In addition, students who had classroom issues were sent to her office by teachers for counseling. She helped immigrant families navigate the school system and referred them to outside agencies when necessary. She stood outside her office during transitions between classes and cleared the hallway. She and Teulet-Cote also managed the cafeteria during lunchtime to make sure the hallways were clear. Tr. 52-3.

18. Complainant's and Viglas' supervisor with respect to clinical issues such students' home life, mental health concerns and referrals to resources was the student support coordinator.

¹ Then known as Sophia Andriotis.

19. During the school year 2007-08, Complainant's brother died and she became the primary source of emotional support to her mother. Thereafter, Duarte and Complainant had an understanding that, with notice to him, she could take time off as needed to care for herself and her mother. Duarte did not document his concerns on those occasions when Complainant failed to notify him of her absences. Tr. 203. There were numerous emails from Complainant in 2008 and 2009 informing the school that she was taking time off. Exs. 18-26.

20. At the end of the 2007-08 school year, Complainant received a positive review from Teulet-Cote and he recommended her for re-hire for the 2008-09 school year. Tr. 143, 344-6; Jt. Ex. 33. Complainant received a letter of "reasonable assurance" that she would be returned to her same position for the following school year. Tr. 195-6.

21. Viglas received a positive review from Spencer at the end of the 2007-08 year and was also offered reappointment for the 2008-09 year. Her supervisor for the 2008-09 school year was Karen Maund.

22. During the 2008-09 school year at English High School, Complainant and Viglas were still provisional employees, meaning that they were again on one-year contracts and had no guarantee of future employment.

Social work positions are eliminated for the 2009-10 school year

23. In January 2009, the school's governing board recommended that four positions, including the two social worker positions, be eliminated from the 2009-10 school year for budgetary reasons. Duarte then notified Complainant and Viglas that their positions were to be "excessed" for the following school year. Tr.112-3; Ex. C-8.

24. Complainant testified that she felt sad and worried about losing her position for the following school year and she began to search for positions in and around Boston. Tr. 96-97.

25. Teulet-Cote testified credibly that during the 2008-09 school year, he told Duarte that Complainant was not engaged with the students, families or staff. As the year went on he complained to Duarte about her poor attendance. Tr. 196-7.

26. Duarte also observed that in her second year, Complainant had not developed as he had expected her to, was not as engaged, and began to develop attendance issues. Tr. 197-8.

27. Duarte testified credibly that Complainant was not stationed outside her office during transition times between classes or her door was closed. At times staff members could not locate her. Tr. 198. Duarte stated that he addressed these problems with Complainant throughout her second year. Tr. 19-32.

28. Teulet-Cote testified credibly that Complainant's performance suffered significantly in the latter half of her second year. He stated that she became disengaged from the school community and her performance worsened after her position was eliminated. She arrived late, left early, and instead of engaging with the students, would sit alone in her office with the door closed. Tr. 348-9.

29. By the latter half of her second year Complainant's attendance issues became more frequent. Duarte believed that Complainant had begun to abuse their agreement from the previous year that allowed her to take time off when necessary for family matters. Tr. 203-204, 300.

30. It was important for Complainant to be present, and to interact with and observe the students in order to identify any issues or problems they might be encountering. Tr. 205-206. As the second year progressed, Complainant was less involved with students and student support services and, according to Duarte, did the "bare minimum" amount of work. Tr. 206-7.

31. In the 2008-09 school year, Viglas ran for and was elected to the school's governing board. In addition she spent the 2008-09 school year organizing, planning and fund-raising for a student service trip to New Orleans during April vacation, where students helped with the rebuilding efforts after Hurricane Katrina. Tr. 309-311; 321-324.

Social work positions are restored for the 2009-10 school year

32. In March 2009, English High School received additional funding and the school restored the two social worker positions for the 2009-10 school year. Tr. 213-214; Ex. C-8. Complainant and Viglas were required to re-apply for their positions, which were open to outside candidates and were posted on the Boston Public Schools website. Tr. 101.

33. At the same time the student support coordinator was retiring and her position became available for the 2009-10 school year. Complainant and Viglas each applied for that position as well, although it was a "reach" for each of them.

34. Duarte coordinated the hiring committee, screened resumes, selected the questions for applicants and conducted interviews for the social worker positions. Prior performance was an important consideration in whether to re-hire Complainant and Viglas. Tr. 216. Duarte advised the hiring committee against re-hiring Complainant based on her previous year's performance and Teulet-Cote's recommendation to not re-hire her.

35. Teulet-Cote testified credibly that when the social work position was reinstated he recommended against re-hiring Complainant because of her performance problems. Teulet-Cote stated that while Complainant was a nice person, she was not self-motivated, an attribute which was necessary in the crisis environment at Boston English. Tr. 351.

36. Sandra McIntosh, who is African-American, has been the Family Liaison for English High School since 2007. During the school year 2008-09 she was a member of the hiring committee and was involved in hiring decisions for the 2008-09 school year. Tr. 384, 387.

37. McIntosh testified credibly that prior to interviewing for the social work positions, she learned that Assistant Headmaster Maund was recommending re-hiring Viglas and Teulet-Cote was recommending against re-hiring Complainant. She had also heard from co-workers that Complainant's performance had declined. Tr. 387-390.

38. Based on Viglas' performance, Assistant Headmaster Karen Maund and Duarte recommended re-hiring her as the social worker for SMC five for the 2009-10 school year. Tr. 217.

39. In April 2009, Viglas interviewed simultaneously for her social worker position and the student support coordinator position. She was rehired for the social worker position in April, 2009, but was not offered the position of student support coordinator.

40. Complainant interviewed for the social worker position and the hiring committee did not raise any concerns regarding her work performance. Tr. 106.

41. When Complainant learned that Viglas had been re-hired and had also interviewed for the student support coordinator position, she was concerned and requested an interview for the student support coordinator.

42. Duarte then arranged to meet at Complainant's office where he and a school volunteer informally interviewed her for the position. Tr. 112.

43. After Complainant interviewed for the social worker position, she followed up numerous times with Teulet-Cote, who told her that he believed the hiring committee was interested in someone else.

44. On June 1, 2009, Complainant wrote to then superintendent of schools Johnson to express her concern that Viglas had been treated more favorably than she with respect to the interview process. Ex. C-1.

45. On June 8, 2009, Complainant received a letter from Teulet-Cote stating that she had arrived late for work without informing him in advance, something he had addressed with her previously. (Jt. Ex. 30) Complainant testified that she had never before received any oral or written reprimand with regard to her attendance. Tr. 81, 92.

46. Complainant learned that she was not being re-hired via an email from the human resources department stating that the position she applied for had been filled. Tr. 116.

47. Teulet-Cote and Duarte testified credibly that they recommended a black Hispanic male candidate (“the candidate”) who is fluent in Spanish for the social worker position because he had previously worked at English High as an intern peer mediator and had developed a good rapport with students. Subsequently while attending social work school, he had worked with neighborhood agencies and received positive references. Tr. 220-221, 268.

48. McIntosh testified credibly that the hiring committee recommended the candidate to fill the open social work position. She stated that he exceeded the qualifications for the position and had previously worked at English High as a peer mediator and had developed a strong bond with many of the students. Ex. C-8; Tr. 389-90.

49. Prior to the candidate being formally hired, a tenured, permanent white, male social (“the tenured worker”) in the Boston School system was “excessed” from his position at Burke High School on March 30, 2009. Tr. 275; Ex. 50. Union rules mandated that the tenured worker who was “excessed” be given first priority for the job of social worker ahead of any provisional employees, such as Complainant.

50. On April 24, 2009, the tenured worker was invited to bid on the “excess pools” that were taking place on May 4, 5 and 6. He could bid on up to three positions within his field. He bid on the social work job at English High School based on his seniority and on June 5, 2009 he was notified that he had been assigned the position formerly held by Complainant. Tr. 278-80; Jt. Ex.51; 52; Ex. 1.

51. The hiring committee at English High had no say in the hiring of the tenured worker. The decision was made by the Boston Public Schools human resources department pursuant to union rules. Tr. 281.

52. Respondent subsequently rehired Complainant at another school and she continues to work for Respondent.

III. CONCLUSIONS OF LAW

M.G.L. c.151B §4(1) prohibits discrimination in employment on the basis of race and color. Complainant alleges that Respondent discriminated against her based on her race and color by subjecting her to disparate treatment by failing to re-hire her for a social worker position which she had held for two years. In order to establish a prima facie case of race and color discrimination, Complainant must show that she was a member of a protected class, that she was qualified for and applied for an open position and that she was not hired for the position and similarly situated employees not in her protected class were hired. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976).

Complainant meets the first element of a prima facie case because of her race and color, Hispanic and black. Complainant met the qualifications for the social work position by virtue of

her education, experience and licensure and her two years of experience in the social work position at English High School. Complainant was one of two social workers who re-applied for their positions at the school. Complainant was not re-hired for her position and the other social worker, who is white, was re-hired for her position. Complainant's position was filled by a white male social worker. Thus, she was treated differently from similarly situated persons not of her protected class. I therefore conclude that Complainant has established a prima facie case of discrimination on the basis of her race and color.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian, supra.; Wheelock College, supra.; Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986).

Respondent's legitimate, non-discriminatory reasons for not re-hiring Complainant for a social worker position were her poor attendance, lack of availability and lack of engagement with the students and involvement in the school during the previous school year, all of which led the assistant headmaster and headmaster to recommend against re-hiring Complainant for the 2009-10 school year. Respondent re-hired the white social worker, Viglas, because she had excellent attendance, was involved with the school and in addition to her social work duties, was engaged in voluntary activities such as organizing a service trip to New Orleans. She was also involved with school government and received the positive recommendation of her assistant headmaster and the headmaster.

Respondent further asserts that the hiring committee had recommended hiring a black, Hispanic, Spanish-speaking male social worker for the position at issue. However, Respondent's human resource department was required pursuant to union rules to permit a white social worker with seniority and tenure who had been excessed from his position at another school to successfully bid on Complainant's position. The union rules required Respondent to hire him over any provisional employee. I conclude that Respondent has articulated legitimate, non-discriminatory reasons for not re-hiring Complainant.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. Ultimately, Complainant must show that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 503 (2001)

As grounds for her assertion that Respondent's articulated reasons are a pretext for unlawful discrimination, Complainant asserts that there was no documented evidence of her poor performance other than Duarte's and Teulet-Cote's testimony and affidavits. However, their testimony, if believed, can constitute credible evidence and I credit the testimony of Duarte and Teulet-Cote regarding Complainant's lack of presence and lack of engagement in the job.

Complainant also claims that she was never counseled about poor performance or attendance. Respondent acknowledged that there was no contemporaneous documentation of the problems with Complainant's performance. This may be in part because Respondent initially sympathized with Complainant's loss and grief over her brother's death or Respondent may simply have been lax in articulating its concerns or hesitant to confront Complainant and mete out discipline. This is not an uncommon phenomenon in many workplaces. The only documentary evidence of Complainant's poor attendance was a letter from Teulet-Cote dated

June 8, 2009, reprimanding Complainant for failing to properly “call in.” Since this letter came a week after Complainant wrote to the Superintendent of schools complaining about the hiring process, she suggests that it was an after the fact justification for failing to rehire her.

Complainant also asserts that Respondent’s contention that Viglas was a better candidate is unsupported by the evidence, and thus further evidence of pretext. Complainant had a higher degree of social worker licensure than Viglas, had more years of experience as a social worker and was fluent in Spanish, whereas Viglas was not. While Complainant does not dispute that Viglas was a good social worker, her second year evaluation notes that she should improve her Spanish and Respondent admits this was important because of the high percentage of Spanish-speaking students and parents at the school.

Complainant further challenges Respondent’s claim that it sought to hire a Hispanic male for the social worker position she held. She claims that the only documentary evidence Respondent submitted regarding his credentials was an affidavit from Respondent’s Human Resources department that he was an intern. She asserts he was facially unqualified for the position.

Despite these assertions, I am not persuaded that Respondent was motivated by discriminatory intent, motive or state of mind related to her race and color when it refused to rehire Complainant. Respondent’s witnesses testified credibly that that Respondent had legitimate concerns about Complainant’s lackluster performance, absenteeism and tardiness. In addition to the credible testimony regarding the decline in Complainant’s performance and issues with poor attendance there is some evidence of emails between Complainant and Respondent regarding her incorrect reporting of tardiness or absenteeism. Despite the lack of more specific documentation on this issue, I found most credible the testimony that Complainant failed to be

engaged in her job, did not foster relationships with the students, was often not physically present and showed no enthusiasm for the job. It is clear that whatever the reason for her failure to be engaged in her job, Complainant's performance declined in ways that Viglas' did not, despite that fact they both were noticed that their positions were excised.

While Complainant asserts that she was objectively more qualified than Viglas in terms of her years of experience, level of licensure and fluency in Spanish, these objective qualifications did not translate to a superior performance in the judgment of her supervisors. In contrast to Complainant, Viglas was highly regarded and recommended for re-hire by her supervisors because of her superior performance, attitude, and initiative in engaging with the students and school community. While praising Complainant as a nice person, Teulet-Cote believed she was not suited to the crisis atmosphere at Boston English, where support staff needed to be self-motivated, present and engaged in order to deal with students' myriad issues.

Contrary to Complainant's claim that the hiring committee's recommended candidate, a black Hispanic male, was not qualified, there was credible testimony that he was a former intern who had performed well at English High and subsequently obtained a social work degree and certification. I find that he met the qualifications for the job, but was not placed in the position because of union rules requiring a tenured social worker who was excised to bid for and fill the position.

Finally, while not dispositive of the issue of discriminatory animus, it is difficult to conceive that the very same people who hired Complainant and who considered her race, color and fluency in Spanish to be assets in a predominantly black and Hispanic school were subsequently motivated by discriminatory animus based on her race and color in deciding to not re-hire her two years later.

While Complainant was shocked and disappointed at not being rehired in part because of the lack of warning that her performance failed to meet expectations, the facts and circumstances do not indicate that Respondent's decision to not re-hire her was motivated by discriminatory animus. There is insufficient evidence that Respondent's articulated reasons were a pretext for unlawful discrimination or were not the real reasons for its actions, or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 503 (2001). Therefore, I conclude that Respondent did not engage in unlawful discrimination and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 29th day of July, 2015


JUDITH E. KAPLAN
Hearing Officer