

CONFIDENTIAL

City of Chicago  
COMMISSION ON HUMAN RELATIONS  
500 N. Peshtigo Court, 6th Floor  
Chicago, IL 60611  
(312) 744-4111 [Voice] / (312) 744-1088 [TDD]

IN THE MATTER OF

Maureen Mark  
COMPLAINANT,  
AND  
Truman Middle College/O'Hale  
RESPONDENT.

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CASE NO. 91-E-7

TO: Sharon Tiller  
City Colleges of Chicago  
226 W. Jackson, Rm. 1447  
Chicago, Ill. 60606

James Potter  
Kinoy, Taren, Geroghty & Potter  
332 S. Michigan, #1705  
Chicago, Ill. 60604

ORDER

THE CHICAGO COMMISSION ON HUMAN RELATIONS HEREBY ORDERS:

That the order mailed on August 26, 1992 in the case captioned above be withdrawn and the Findings of Facts and Conclusions of Law attached hereto be substituted for it. The parties shall have 30 days from the receipt of this order to file a Request for Review, if any.

CHICAGO COMMISSION ON HUMAN RELATIONS

CLARENCE N. WOOD  
Chair/Commissioner

HRU Form 28  
Rev. 6-10-91

Date: September 9, 1992

City of Chicago  
Commission on Human Relations

Maureen Mark, )  
Complainant, )  
v. ) Case No. 91-E-0007  
Truman Middle College )  
and Thomas O'Hale, )  
Respondents. )

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant Maureen Mark is an ethnic Chinese woman. She graduated from the University of Hawaii in 1980 with a degree in ethnic studies. She took a few education courses (3, for 7 credits) in college while majoring in ethnic studies and art. (Tr. 4/8, 15, 19-20, 75-77). She is not a certified teacher.

2. After graduation from college and prior to working for Truman Middle College, Ms. Mark's most relevant experiences included three years as director of a program tutoring athletes at the University of Hawaii and as a part-time ethnic studies lab teacher and teaching English as a Second Language for two months as a volunteer. (Tr. 4/8, 20-28, Jt. Exh. 1)

3. On March 30, 1989, Ms. Mark saw a job announcement for a position as "Career Education Internship Coordinator" at Truman Middle College High School. The full job description included duties such as establishing and monitoring student internships, conducting peer counseling development activities, instructing in career education and other subject areas assigned by the principal, and completing special clerical tasks. However, actually, the school was searching for someone to teach the course in career education for the final quarter of the 1988-1989 school year, to relieve Robert Palagi of the class because of other extensive duties he had to carry out at the school. (Tr. 4/8, 28-29, 33-34, Tr. 4/9, 58-67, Comp. Exh. 2)

4. Ms. Mark personally went to the school on March 30, 1989 in the late afternoon and was immediately interviewed by the principal, Respondent Thomas O'Hale. Mr. O'Hale expressed interest in Ms. Mark and invited her to return the next day to meet the faculty and staff of the school. She was interviewed and offered the position to teach career education as a temporary employee for the final quarter of the school year. Ms. Mark began teaching before her hiring was officially approved by the College's Board of Trustees. Indeed, Ms. Mark was compensated for her preparation to teach career education before she was officially hired at the

school by receiving compensatory time off during the school quarter. (Tr. 4/8, 29-34, 87-92)

5. During the summer of 1989, Mr. O'Hale, as director of a sports program located at the school, hired Ms. Mark to work in the sports program. Her temporary position teaching career education had ended and Mr. O'Hale was happy to find a way to keep Ms. Mark around the school during the summer. (Tr. 4/9, 67)

6. In July, 1989, Mr. Robert Palagi, whose class in career education Ms. Mark had taken over, informed Mr. O'Hale that he would not return for the new school year. While Mr. Palagi had a single job title, Project Career Education Learning Guide, in fact he fulfilled the functions of two positions, as both a teacher and an administrator. Ms. Mark, for the Spring of 1989, and later Ms. Logan for the Fall of 1989 and continuing until the hearing, replaced Mr. Palagi in his role as career education teacher. Ms. Myrtle Rhoden replaced him in his position as guidance counselor/registrar of the school. The replacement staff official job titles were not the same as Mr. Palagi's, however. (Tr. 4/9, 67, Tr. 4/8, 122-126)

7. When she heard that Mr. Palagi would not return, Ms. Mark asked to be allowed to teach career education for 1989-1990. Mr. O'Hale told her that he wanted a certified teacher to teach the course. Ms. Mark claims that Mr. O'Hale insisted that he wanted a teacher certified to teach secondary education. Mr. O'Hale claims that he wanted a certified teacher, although he would have preferred one certified for secondary education. There were several conversations between them during July and August, 1989. The discussions culminated with a conversation in mid-August, 1989, just before Ms. Mark left for vacation. Ms. Mark remembers the conversation to include a promise from Mr. O'Hale to allow her to teach career education for the fall, 1989 quarter, after which time she would be shifted to a different job if a qualified teacher was found for that course. (Tr. 4/8, 43-44). Mr. O'Hale remembers the conversation to include his saying that Ms. Mark could teach the course if he didn't find a certified teaching by the time the new school year began. (Tr. 4/9, 75-76). Regardless of which version is in fact correct, no binding contract was created by the conversation.

8. None of the course of events through mid-August, 1989 establish discrimination on the basis of national origin by Mr. O'Hale or Truman Middle College against Ms. Mark. (Tr. 4/8, 44, 97, Tr. 4/9, 75-76)

9. During the conversations discussed in finding 7, above, Mr. O'Hale proposed to Ms. Mark that she remain at the school working as the coordinator of tutoring for the GED-equivalency test. Mr. O'Hale guaranteed Ms. Mark that she would have that job for the 1989-1990 academic year, but also warned that the position was dependent on a grant which might not be renewed after the 1989-1990 academic year. Ms. Mark, although preferring the career

education job, accepted the position, either to begin in September, 1989 at the start of the school year (Mr. O'Hale's version) or in December, 1989 at the start of the second quarter of the year. (Ms. Mark's version) (Tr. 4/8, 43-45, Tr. 4/9, 71-76)

10. During the period of July, 1989 through August 15, 1989, when Ms. Mark went on vacation, Mr. O'Hale consistently told Ms. Mark that he wanted to hire a certified teacher for the career education position. The statements were not a sham excuse by Mr. O'Hale or Truman College to avoid hiring Ms. Mark. Through mid-August, when Ms. Mark left for vacation, Mr. O'Hale and other members of the staff of Truman College were unaware of the possibility that Ms. Meredith Logan would apply for a position at the school. Mr. O'Hale did not have a discriminatory intent or purpose in posting a job announcement and doing a search for a career education teacher. He was not discriminating against Ms. Mark because of her national origin in his actions or decisions. Indeed, he had hired Ms. Mark for the temporary position as career education teacher, had given her a summer job for the summer of 1989, and had guaranteed her a job at the school for the 1989-1990 school year. Mr. O'Hale may have been motivated positively toward Ms. Mark at least in part by a desire to have a staff or faculty member at the school who was of Asian ancestry. (Tr. 4/8, 28-45, Tr. 4/9, 58-77, 97)

11. In mid-August, 1989, Ms. Meredith Logan applied for the position as a teacher at the school. While her first preference was to teach English (a position which was also open), she also applied for the position of career education teacher. She became aware of the availability of the positions by seeing them posted at Truman College, according to her testimony. Ms. Mark however, claims that Ms Logan became aware of the positions because Diane Wiese, the dean of administration at the College, telephoned Ms. Logan. (Tr. 4/10, 71-74, 4/8, 48-49).

12. Ms. Mark testified that Ms. Logan stated in early September, 1989 that Ms. Wiese had called Ms. Logan about the availability of two positions at the school. (Tr. 4/8, 48-49). Even if that testimony were uncontested, it is not in itself evidence of national origin discrimination against Ms. Mark.

13. Ms. Logan previously had worked at Truman College as an instructor/tutor and director of the Institute for Native American Development (INAD) for several years. She had worked with Mr. O'Hale placing Native American high school dropouts into the school. Mr. O'Hale had a high opinion of Ms. Logan from his previous work with her. (Tr. 4/10, 54-57, 74-76, Tr. 4/9, 80-86, Jt. Exh. 5).

14. Despite his high opinion of Ms. Logan, Mr. O'Hale selected another candidate for the position of English teacher because of her superior credentials (a masters degree in reading). He selected Ms. Logan for the position of career education teacher because of

her superior credentials and experience. This selection was not based on an intent to discriminate against Ms. Mark on the basis of national origin, but was based upon the superior credentials of Ms. Logan compared to Ms. Mark regarding training in education courses, experience as a teacher, and work with students similar to those at the school. In addition, Ms. Logan possessed a teaching certificate for elementary teaching, which allowed Mr. O'Hale to report Ms. Logan as a certified teacher, albeit not certified for the high school level as stated in the posted job description. (Tr. 4/9, 80-82, Tr. 4/10, 55-58, Jt. Exh 5 and 6).

15. Ms. Mark worked as the coordinator of tutoring for the GED-equivalency exam program during the 1989-1990 academic year, although she filled salary lines with two different job titles (Career Education Internship Coordinator (first quarter) and Project Tutor Aide (rest of the school year)). Because her second job title used the term "aide" rather than "coordinator", Ms. Mark did not carry out all functions of the position. In particular, Ms. Mark did not carry through on searching for new funding to continue the tutoring program until late in the academic year. Further, although responsible for budget management for the grant that was paying her salary, she did not inquire concerning problems with accounting for the program even after direct instructions to do so. She also had personality conflicts with the two part-time tutors and asserted to Mr. O'Hale that one tutor must have been hired regardless of competence because that tutor was a Native American. (Tr. 4/9, 46-49, 101-104; 4/8, 102-104)

16. Because of the exhaustion of the Chicago Tribune grant money paying Ms. Mark's salary, she was terminated in August, 1990. This termination was not due to national origin discrimination against Ms. Mark, but due to a failure of funding. Ms. Mark partially bears the blame for that failure because she did not effectively seek out or find other funding with which to continue payments. Ms. Mark did not work with the grant writer for the school as effectively as possible. Unknown to the staff at Truman Middle College, the Chicago Tribune Charities had a policy of not providing grants for more than three years for a particular program. (Tr. 4/10, 103-104, Tr. 4/9, 8-9, 12-13, 46-49, 102-104, Comp. Exh. 18 and 19)

#### CONCLUSIONS OF LAW

17. This is an employment discrimination case claiming disparate treatment because of national origin against Complainant Maureen Mark by Respondents Truman Middle College and Thomas O'Hale. In fact, although not specifically articulated, Complainant actually is claiming two discriminatory chains of events: one, the failure to hire Complainant as the permanent career education teacher and the hiring of Meredith Logan instead, and, second, the placing of Ms. Mark in and then termination of Ms. Mark's position as GED tutor/coordinator at the end of the academic year 1989-1990.

18. The Chicago Human Rights Ordinance states: "No person shall directly or indirectly discriminate against any individual in hiring, ... discharge, ... or other term or condition of employment because of the individual's ... national origin ...." (Section 2-160-030). Section 270.160 of the Rules and Regulations of the Commission provides that "the Commission shall look to decisions interpreting other relevant laws for guidance."

19. Following state and federal law to establish her case regarding the chain of events here, Complainant bears the overall burden of proof of showing that she was discriminated against because of national origin. The U.S. Supreme Court has stated:

"The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (emphasis added).

20. First, Complainant must establish a prima facie case that: (a) she belongs to a protected class; (b) that she applied for and was qualified for a job for which the employer was seeking applicants; (c) despite her qualifications, she was rejected; and (d) after the rejection, the employer continued to search for applicants with complainant's qualifications. See McClinton v. Antioch Haven Homes, CCHR No. 91-FHO-45-5627 (2-26-92) (setting forth standards in a housing matter) and Castro v. Georgopoulos, CCHR No. 91-FHO-6-5591 (12-18-91) (same).

21. If Complainant establishes her prima facie case, then the Respondent bears the burden of articulating one or more legitimate, nondiscriminatory reasons for its actions. Respondent need not prove the legitimacy of its reasons to the same level of proof that Complainant must prove her case. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

22. If Respondent articulates one or more legitimate, nondiscriminatory reasons, then the burden shifts back to Complainant and she must establish that the legitimate reason or reasons are not the true reasons and are a pretext for intentional discrimination. See Burnham City Hospital v. Human Rights Commission, 81 Ill. Dec. 764, 126 Ill. App. 3d 999, 1002, 467 N.E.2d 635 (4th Dist. 1984); Shah v. Illinois Human Rights Commission, 139 Ill. Dec. 310, 192 Ill. App.3d 263, 548 N.E.2d 695, appeal denied, 142 Ill. Dec. 888, 131 Ill.2d 567, 533 N.E.2d 402 (1st Dist. 1989); St. Mary of Nazareth Hospital v. Curtis, 114 Ill. Dec. 398, 163 Ill. App.3d 566, 516 N.E.2d 813, appeal denied, 119 Ill. Dec. 398, 119 Ill.2d 575, 522 N.E.2d 1257 (1st Dist. 1987); Pioneer Life Insurance Co. of Illinois v. Woodward, 105 Ill. Dec. 361, 152 Ill. App.3d 236, 504 N.E.2d 230 (2nd Dist. 1987).

23. Overall, as part of her case, Complainant must establish

that the events and her treatment were due to national origin and not simply events that happened to someone who was a minority person. Holder v. City of Raleigh, 867 F.2d 823 (4th Cir. 1989) and Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557 (7th Cir. 1987).

#### A. Complainant's Prima Facie Case

24. In this case, Complainant barely makes out a prima facie case concerning the hiring of Ms. Logan for the position of career education teacher. First, it is clear that Ms. Mark is a Chinese woman, and so is a member of a protected class. Second, it is not certain that Ms. Mark meets the requirements for the position involved. Even ignoring the requirement that she have a teaching or counseling certificate (which she did not), Ms. Mark brought little teacher training or experience to the position. She probably was not qualified when she was hired to teach as a temporary substitute. However, for purposes of our analysis, and given that Respondent does not argue that she was not qualified (only less qualified than Ms. Logan), we will find that Ms. Mark was qualified for the position of career education teacher, at least after having taught for one quarter. Third, although she may not have made a formal application, Ms. Mark was rejected for the position. A formal application is not necessary when there is substantial conversation concerning the position with the supervisor who will select the candidate to fill the position. Wagner v. G.A.Gray Co., 872 F.2d 142 (6th Cir. 1989) and Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985). Finally, the position remained open in the sense that there was a period of time during which Ms. Mark asked to be allowed to teach career education in the 1989-1990 school year and was not hired to do so. Thus, Complainant has satisfied the fourth element of her prima facie case regarding Respondent's failure to hire her as a career education teacher.

25. However, Ms. Mark does not make out a prima facie case of national origin discrimination as a result of her termination at the end of the 1989-1990 school year. She has not shown that another position was available, or that the school or Mr. O'Hale acted improperly in placing her in the position that relied on grant money. She has not shown that there was an improper refusal to help her try to find additional grant funds to continue or that grant funds would have been available had the school acted differently. All of these variant showings would make out a prima facie case according to Burdine, but none has been made.

#### B. Respondent's Defense

26. Once Complainant has made out a prima facie case, Respondent can rebut that case with evidence of one or more legitimate, nondiscriminatory reasons for the decision. Here, Respondent offers as the primary reason that it did not hire Ms. Mark for the career education position that a substantially better qualified applicant was available. "[T]he relative superiority of the person selected over a plaintiff applicant ... is a legitimate,

nondiscriminatory reason ...." Employment Discrimination Law: Cases and Materials, by Player, Shoben and Lieberwitz, citing Jalil v. Avdel Corp., 873 F.2d 701, 707 (3rd Cir., 1989); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 671-72 (4th Cir., 1983); and Hawkins v. Anheiser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983). Even given that Ms. Mark was a qualified candidate, employment discrimination law does not require the hiring of one qualified candidate over a better qualified candidate. Ms. Logan had much better teacher training education, substantially greater experience with teaching, and superior experience working with high school students. She had a long track record of excellent achievements at the institution of which the Middle College is a part. She had worked before with the principal, and impressed him with her ability and dedication. The comparative evaluation of candidates, especially when the successful candidate is also a minority candidate, is a legitimate, non-discriminatory justification for a decision-maker. Further, even if the decision-maker is incorrect in assessing the comparative qualifications of the candidates, it is not a violation of anti-discrimination law to make a mistake, unless the reason is discriminatory. See Pollard v. Rea Magnet Wire Company, Inc., 824 F.2d 557 (7th Cir. 1987).

27. A second legitimate reason offered by the Respondents for the decision to hire Ms. Logan was his desire to have a certified teacher take the position because the school looks better with more certified teachers and is concerned with its accreditation status. This is a legitimate reason which could justify the hiring of one candidate over another. As discussed in finding 14 above, Complainant had no teaching or counselling certificate and Ms. Logan had a teaching certificate, albeit not for secondary education.

28. A third reason offered by O'Hale was that he felt Ms. Mark was better suited to a tutorial role rather than a classroom teaching role. Such an evaluation by Mr. O'Hale, especially where he did not terminate Ms. Mark but shifted her to another position, is also a legitimate reason for his decision.

### C. Complainant's Proof that Defense is a Pretext

29. Even where Respondent has asserted legitimate, nondiscriminatory reasons, Complainant still has the opportunity to prove that the reasons are pretextual, that "the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Burdine, 450 U.S. at 256.

30. Ms. Mark offers as her claim of pretext that Ms. Logan was hired, at least in part, because she is a Native American. She also claims that Ms. Logan is not more qualified for the position than she was and that there was no basis for Mr. O'Hale to shift her to the tutoring position. The Commission only needs to address Ms. Mark's first argument, as it has previously found that Ms. Logan was better qualified. See supra ¶26.



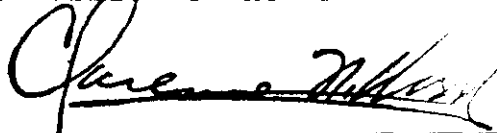
31. A major part of Complainant's case was directed towards proving that Ms. Logan was hired instead of Ms. Mark because Ms. Logan was a Native American with a close relationship with Ms. Wiese, Mr. O'Hale's supervisor and the head of personnel for the school. There was testimony from Ms. Mark and three other staff members (Ms. Rhoden, Ms. Khadra and Ms. Cunningham-Powell) to one or more conversations where Ms. Logan is alleged to have stated that she was hired because she was a Native American, and that she had been told to apply for the job by Ms. Wiese. However, Ms. Logan denies making that statement and Ms. Wiese denies calling Ms. Logan to apply for the position. (Tr. 4/8, 63-66, 145-147, 159-163; Tr. 4/10, 77-79, 81, 99).

32. The Commission need not decide which of these witnesses was more credible because, even if Ms. Logan made a statement such as "it was a case of an Indian helping an Indian," the Commission finds that it was at most an expression of her own belief. More likely, it was one in a series of comments made by Ms. Logan to other teachers to exaggerate her status and importance. Indeed, there is testimony that Ms. Logan gave inflated reports of her salary to the same teachers as well. (Tr. 4/8, 152). Accordingly, no element of improper motive or action will be attributed to Mr. O'Hale, who hired Ms. Logan, to Ms. Wiese or to Truman College from the statement of Ms. Logan. For Ms. Mark to prevail, she must establish a discriminatory motive or intent of the alleged discriminators. She has failed to carry that burden.

33. In sum, Ms. Mark has failed to meet her final burden. She has shown that she was shifted from one job to another, but not that national origin was a factor in the events. She has failed to meet her burden of proof that the failure to make her the permanent career education teacher was a decision based on her national origin. Similarly, she has not established that the decisions to move her to the tutorial position and to terminate her when the funding ended for that program were motivated by her national origin.

34. As a result, Ms. Mark cannot recover from Truman Middle College or Mr. O'Hale. The complaint is hereby dismissed.

COMMISSION ON HUMAN RELATIONS



Clarence N. Wood, Chair/Commissioner

Dated: August 26, 1992