



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JOAN C. ANDRE,

Complainant,

v.

MACY'S RETAIL HOLDINGS, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10162991

Federal Charge No. 16GB303990

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on November 7, 2014, by Robert M. Vespoli, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: **DEC 30 2014**
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

JOAN C. ANDRE,

Complainant,

v.

MACY'S RETAIL HOLDINGS, INC.,

Respondent.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10162991**

SUMMARY

Complainant alleged that Respondent did not select her for full-time associate and supervisor positions because of her age. Because the record does not support Complainant's allegations, the instant complaint must be dismissed.

PROCEEDINGS IN THE CASE

On June 21, 2013, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on June 4, 2014, June 5, 2014, June 26, 2014, and July 2, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Valerie M. Cartright, Esq. and Tracy Auguste, Esq. Respondent was represented by Vicki R. Walcott-Edim, Esq., Steven Gerber, Esq., and Christopher McFadden, Esq.

At the public hearing, the presiding ALJ denied Complainant’s application to introduce evidence of discrete acts of discrimination that were not identified in the instant complaint and occurred outside of the applicable statute of limitations period. (Tr. 11-14) Complainant also moved to include an allegation that Respondent failed to promote her in January 2014 because she filed the instant complaint. Respondent opposed this motion because it did not receive notice of this claim, which is distinct from the claims raised in the instant complaint. Complainant acknowledged that the applicable statute of limitations does not prevent her from filing this charge in a separate complaint with the Division. The presiding ALJ denied Complainant’s motion to amend the instant complaint to include this claim of retaliation. (Tr. 14-17)

Complainant and Respondent filed timely post-hearing briefs which were considered and, where appropriate, adopted.

FINDINGS OF FACT

1. Complainant was born on February 9, 1948. (Tr. 283; ALJ’s Exh. 1)
2. Respondent operates seven retail department stores in its Long Island East District which are designated as follows: (i) Hampton Bays, (ii) Smith Haven, (iii) Smith Haven

Furniture Gallery, (iv) Commack, (v) Walt Whitman, (vi) South Shore, and (vii) Sunrise. (Tr. 569-70)

3. In 2008, Respondent hired Complainant to work in a seasonal, part-time position at its Commack store. (Tr. 284, 289, 427)

4. In 2010, Respondent rehired Complainant to work as a part-time sales associate at the Commack store. (Tr. 289-90)

5. After four months working as a sales associate, Complainant transferred to a part-time administrative support team ("AST") associate position at the Commack store. (Tr. 145, 505-06)

6. Respondent's AST employees perform administrative work which includes clerical, hiring, training, and communication duties. (Tr. 62, 505-06, 573)

7. Each store has an AST supervisor and AST associates. The AST associate positions can be full-time or part-time positions. (Tr. 573-74)

8. The AST supervisor position is a full-time position which involves different skills and greater responsibility than the AST associate position. Interpersonal skills, including delegating, coaching, and giving feedback to AST associates, are a vital component of the AST supervisor position. (Tr. 114)

9. At all relevant times, Deborah Dunne was the manager of the Commack store. (Tr. 51)

10. At all relevant times, Susan Heagney was the AST supervisor at the Commack store. (Tr. 142)

11. The Commack store has one full-time AST associate, Linda Corcoran, and four part-time AST associates. Corcoran has a long tenure with Respondent and is approximately the same age as Complainant. (Tr. 149-50, 228-29, 238, 261, 272)

12. Dunne and Heagney observed that Complainant's demeanor toward her superiors and co-workers was sometimes brusque, aggressive, and discourteous. (Tr. 67, 71-74, 172-73, 177-80, 239, 258-60, 270)

13. On or about June 24, 2012, Complainant sought a sales supervisor position at the Commack store. (Tr. 21, 309)

14. Dunne gave Complainant an interview for this position. (Tr. 80-81, 104, 311) During the interview, Complainant gave "very matter of fact" responses to behavior-based questions that showed inflexibility in her approach to potential subordinates. (Tr. 104-05)

15. Dunne told Complainant that the position was not right for her and gave Complainant feedback to help her improve her interview skills going forward. Dunne explained to Complainant that she needed to soften her approach and show that she had the ability to coach, develop, and provide positive feedback to potential subordinates. (80, 106)

16. Respondent hired Melissa Coughlin, who was born on June 30, 1990, for the sales supervisor position at the Commack store. (Respondent's Exh. 6)

17. On or about September 8, 2012, Complainant sought the position of AST supervisor at the Smith Haven store. (Tr. 21, 314)

18. Complainant did not receive an interview for this position. (Tr. 315)

19. The sales volume at the Smith Haven store is significantly larger than the sales volume at both the Walt Whitman and Commack stores. Heagney did not recommend Complainant for the AST supervisor position at the Smith Haven store because she believed that it was "too large a volume store" for Complainant. (Tr. 391; Joint Exh. 2)

20. Respondent hired Kelly Christou, who was born on December 26, 1972, for the AST supervisor position at the Smith Haven store. (Respondent's Exh. 6)

21. In or about October 2012, Dunne and Heagney became aware of a temporary opening for an AST supervisor at the Walt Whitman store. That position was a temporary opening because Susan Johnson, the AST supervisor at that time, was out on maternity leave. (Tr. 22, 87-88, 169, 319-20, 507)

22. Dunne and Heagney wanted Complainant to apply for the temporary AST supervisor position at the Walt Whitman store because it provided an excellent opportunity for Complainant to obtain supervisory experience. Moreover, Complainant had shown some improvement in her interpersonal skills. (Tr. 87-88, 169-70)

23. Heagney told Complainant that she should apply for this temporary position because it would be a good opportunity for her. (Tr. 170, 321, 390)

24. In or around October 2012, Complainant applied for the temporary AST supervisor position at the Walt Whitman store. (Tr. 22)

25. Dunne called Jeffrey Miller, the manager of the Walt Whitman store, and advised him of Complainant's strengths, particularly in the administrative area. Dunne also informed Miller about the weakness in Complainant's communication skills, but she told him that Complainant had shown improvement in that area and that she could "get the job done." (Tr. 89-91, 547)

26. Miller interviewed Complainant and hired her for the temporary AST supervisor position. (Tr. 321, 547)

27. Complainant held this position from October 2012 until January 2013, when Johnson returned from maternity leave. (Tr. 22, 388, 402, 507, 525-26)

28. Complainant supervised six employees during her tenure as the temporary AST supervisor at the Walt Whitman store. (Tr. 324)

29. Shortly after Complainant began working in this position, Miller became aware of Complainant's brusque style of management. The AST associates working under Complainant complained to Miller that Complainant "belittled" them, "ridiculed" them, and treated them like they were insignificant. (Tr. 508-10)

30. Some AST associates were very upset about Complainant's management style. Although Miller attempted to assuage their concerns, the complaints continued. One AST associate was so upset with Complainant's conduct that she threatened to resign. (Tr. 509, 511-12)

31. Miller attempted to coach Complainant on several occasions. Miller encouraged Complainant to refrain from focusing on the faults of the AST associates and the techniques Johnson had used to manage them. Miller also encouraged Complainant to use team building and interpersonal skills to rally the AST associates to create a more positive work environment. (Tr. 512, 523-24, 533)

32. In January 2013, after her maternity leave had expired, Johnson returned to the AST supervisor position at the Walt Whitman store. Johnson worked in this position for a brief period of time and then resigned due to childcare issues. (Tr. 22, 402, 507, 525-26)

33. By that time, Complainant had returned to her previous position at the Commack store. (Tr. 22, 404, 525)

34. In or about January 2013, after Johnson's resignation, Miller interviewed several candidates, including Complainant, for the AST supervisor position at the Walt Whitman store. (Tr. 22, 526-27)

35. Miller did not hire Complainant for this position because he wanted someone with "more leadership skills than just technical [knowledge] of the job." Miller felt that Complainant

was not suited for the job because she “managed mostly through a position of power.” (Tr. 528-29)

36. Miller hired Nancy Chabria, an existing employee who was born on April 7, 1968, for the AST supervisor position at the Walt Whitman store. Miller hired Chabria because she interviewed well and demonstrated the desired blend of technical knowledge and leadership abilities. (Tr. 526, 529, 553, 557; Respondent’s Exh. 6)

37. On or about May 20, 2013, Complainant applied for an AST supervisor position at the South Shore store. (Tr. 23, 336)

38. At that time, the South Shore store was a new store that was set to open in August 2013. (Tr. 336-37, 575-76)

39. From May 2013 until February 2014, Lauren Leace was the manager of Respondent’s Human Resources Department (“HR”) at the South Shore store. (Tr. 569) During this time period, Leace was responsible for hiring the AST staff for the South Shore store. (Tr. 576-77, 590)

40. The AST employees in a new store face much greater responsibilities and challenges than the AST staff in an existing store. The AST staff at the South Shore store was responsible for training, hiring, and processing 300 employees in roughly six weeks. Leace believed that all AST staff members in a new store needed to have effective team building skills, strong communication skills, and the ability to overcome obstacles. (Tr. 116, 576-77)

41. Leace reviewed Complainant’s application for the AST supervisor position at the South Shore store. Leace noticed that the application was incomplete because Complainant’s supervisor, Heagney, and the HR manager at the Commack store, Katherine Heinowitz, did not sign the career interest form on the application. (Tr. 590-91)

42. Leace then contacted Heagney and Heinowitz and explained the nature of Complainant's incomplete application. Both Heagney and Heinowitz explained to Leace that Complainant had "leadership deficiencies" that prevented them from recommending her for that position. (Tr. 591-92)

43. Leace hired Tricia Keller for the AST supervisor position at the South Shore store. Keller, who was born on January 13, 1968, was an AST associate at the Walt Whitman store before she was hired by Leace. (Tr. 213, 593; Respondent's Exh. 6)

44. Leace hired Keller because she demonstrated the desired blend of strong administrative, leadership, and communication skills required for the position. (Tr. 517-18, 593)

45. On or about June 10, 2013, Complainant applied for the full-time AST associate position at the South Shore store. (Tr. 23)

46. Leace interviewed three candidates, by telephone, for this position: Complainant, Johnson, and Luciana Maneri. (Tr. 579-80)

47. The interview with Complainant lasted approximately twenty to thirty minutes. (Tr. 580)

48. During her interview, Complainant acknowledged that her communication skills needed improvement. (Tr. 586; Respondent's Exh. 3)

49. Leace believed that resiliency, strong communication skills, and positive team building skills were particularly important for the AST staff in a new store. Leace did not hire Complainant for the position because she believed that Complainant's deficient communication skills would hinder the development of the new AST staff at the South Shore store. (Tr. 586-88)

50. Leace hired Maneri, a part-time associate at the Walt Whitman store who was born on July 11, 1962, for the position because she interviewed well and showed a "high level" of

communication skills, team building skills, and experience that would help her thrive in the new store. (Tr. 588-90; Respondent's Exh. 6)

51. Respondent's internal job posting policies did not apply to Maneri's hiring because her hiring was actually a transfer, not a promotion. (Tr. 408-09, 452, 589-90; Complainant's Exh. 17; Respondent's Exhibits 1, 4)

OPINION AND DECISION

Complainant alleged that Respondent failed to hire her for sales supervisor, AST supervisor, and full-time AST associate positions on different occasions because of her age. The Human Rights Law provides that, "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." N.Y. Exec. Law, art. 15 ("Human Rights Law") § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *See Queensborough Cmty. College v. State Human Rights Appeal Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

Because Complainant's allegations that Respondent failed to hire or promote her are deemed to be discrete acts, the continuing violation doctrine does not apply. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Therefore, any claims that Respondent failed to hire or promote Complainant accruing more than one year prior to June 21, 2013, the date of filing of the instant complaint, are time-barred.

The record identifies five positions that Complainant sought during the actionable statute of limitations period: (1) the June 2012 sales supervisor position at the Commack store, (2) the September 2012 AST supervisor position at the Smith Haven store, (3) the January 2013 AST supervisor position at the Walt Whitman store, (4) the May 2013 AST supervisor position at the

South Shore store, and (5) the June 2013 full-time AST associate position at the South Shore store.

It is unlawful for an employer to discriminate against an employee on the basis of age. Human Rights Law § 296.1(a). To establish a prima facie case of discrimination, Complainant has the burden of showing that she is a member of a protected group, that she was barred from a position for which she was qualified, and the existence of circumstances giving rise to an inference of unlawful discrimination. *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 242, 764 N.Y.S.2d 675, 681 (1st Dept. 2003) (citations omitted). Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. *Id.* The burden then shifts to Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

After considering all of the evidence presented and evaluating the credibility of the witnesses, I find that the record does not support a finding that Respondent acted in an unlawful manner.

Complainant has established a prima facie case of discrimination based on age. Complainant was over the age of eighteen at all relevant times, and she held the minimum qualifications for the positions she sought. Complainant suffered an adverse employment action when Respondent did not select her for these positions. Finally, Respondent selected significantly younger individuals for these positions.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

In June 2012, Respondent did not hire Complainant for the sales supervisor position at the Commack store. During her interview, Complainant provided responses to behavior-based questions that showed inflexibility in her approach to potential subordinates. Dunne explained to Complainant that she needed to soften her approach and show that she had the ability to coach, develop, and provide positive feedback to potential subordinates.

In September 2012, Heagney did not recommend Complainant for the AST supervisor position at the Smith Haven store because she believed that the sales volume at that store was too large for Complainant to handle at that time. However, both Dunne and Heagney encouraged Complainant to apply for the temporary AST supervisor position at the Walt Whitman store. This position presented an excellent opportunity for Complainant to obtain supervisory experience and continue to improve on her interpersonal skills.

Miller hired Complainant for the temporary AST supervisor position at the Walt Whitman store. Complainant demonstrated a brusque, discourteous management style while she worked in this position. This proved to be problematic for Miller and Complainant's subordinates. Although Miller coached Complainant and encouraged her to use team building and interpersonal skills to create a positive work environment, Complainant did not alter her management style. In January 2013, shortly after the conclusion of her temporary AST supervisor assignment at the Walt Whitman store, the AST supervisor position at that store became available. Miller did not hire Complainant for this position because she did not demonstrate the requisite leadership and interpersonal skills.

In May 2013, Complainant sought the AST supervisor position at the South Shore store, which was a new store set to open in August 2013. Leace contacted Heagney and Heinowitz because Complainant submitted an incomplete application. Both Heagney and Heinowitz

explained to Leace that Complainant had demonstrated deficient leadership skills that prevented them from recommending her for the position. Therefore, Respondent did not hire Complainant for the AST supervisor position at the South Shore store.

In June 2013, Complainant applied for the full-time AST associate position at the South Shore store. During her interview with Leace, Complainant acknowledged that her communication skills needed improvement. Leace believed that strong communication and interpersonal skills were particularly important for the AST staff in a new store. Leace did not hire Complainant for the position because she believed that Complainant's deficient communication skills would hinder the development of the new AST staff at the South Shore store.

Respondent is entitled to base its hiring and promoting decisions on subjective criteria. *See Byrne v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001). Therefore, Respondent's clearly stated desire to hire applicants with strong leadership, collaborative, and communication skills satisfies its intermediate burden of production. *See id.*

The burden then shifts to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet her burden.

The record does not show that Respondent discriminated against Complainant based on her age. Respondent initially hired Complainant when she was in her sixties. Corcoran, the full-time AST associate at the Commack store, has a long tenure with Respondent and is approximately the same age as Complainant. Moreover, the record does not establish that Respondent violated its internal job posting policies during the relevant time period.

The mere fact that Respondent selected younger individuals over Complainant does not establish that it acted with an unlawful discriminatory motive. Inherent in the selection process

is the rejection of other candidates. When an employer chooses one candidate over another, it is inevitable that there will be differences between the candidates regarding age, sex, religion, race and other factors. *See DiLegge v. Gleason*, 131 F. Supp. 2d 520, 526 (S.D.N.Y. 2001). While this may be sufficient to establish a prima facie case, it is not automatically enough to show that Respondent's legitimate, non-discriminatory reasons are a pretext for unlawful discrimination. *See id.*

The focus of the inquiry here is not whether Respondent acted with good judgment in selecting the other candidates over Complainant, but whether these decisions would not have been made but for a discriminatory motive. *Ioel v. Alden Press, Inc.*, 145 A.D.2d 29, 36, 536 N.Y.S.2d 1000, 1004 (1st Dept. 1989).

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant cannot rely on supposition and conclusory allegations to satisfy this burden. *Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

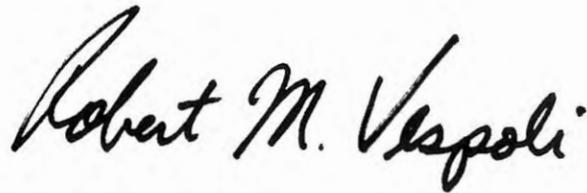
Complainant has failed to meet her burden. Accordingly, the instant complaint must be dismissed.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the instant complaint be, and the same hereby is, dismissed.

DATED: November 7, 2014
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli
Administrative Law Judge