ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JENNIFER COLEMAN,

Complainant,

v.

COLD SPRING HARBOR CENTRAL SCHOOL DISTRICT,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10166091

Federal Charge No. 16GB401003

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 March 3, 2015, by Margaret A. Jackson, 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") WITH THE FOLLOWING AMENDMENTS:

- The sentence in the Recommened Order which reads, "Complainant's 2009

Complaint is time-barred and cannot now be revived as the basis of the instant retaliation complaint," is not hereby adopted. Complainant's retailation claim is dismissed because the evidence does not demonstrate that Respondent retaliated against her. It is noted, however, that had the evidence shown that Respondent took an adverse action against her within the statute of limitations period because of her 2009 Complaint, the instant Complaint would be sustained. Though the time between the 2009 Complaint and any timely alleged adverse action would be too attenuated to establish the causation element of the prima facie case based on temporal proximity, there are other means of establishing causation. *See Calhoun v. County of Herkimer,* 114 A.D.3d 1304, 1307, 980 N.Y.S.2d 664, 667 (4th Dept. 2014) ("With respect to the element of a causal connection, we note that such element 'may be established either '*indirectly* by showing that the protected activity was followed closely by [retaliatory] treatment, . . . or *directly* through evidence of retaliatory animus directed against a plaintiff by the defendant.'"") (Emphasis in the original; citations ommitted).

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: APR 13 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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DIVISION OF HUMAN RIGHTS

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JENNIFER COLEMAN,

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COLD SPRING HARBOR CENTRAL SCHOOL DISTRICT,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10166091**

SUMMARY

Complainant alleges that she was unlawfully discriminated against on the basis of her gender, and that she was retaliated against after she wrote a letter of complaint in 2009. Complainant has failed to present any evidence from which one can infer that she was either unlawfully discriminated against or retaliated against. Therefore, the case must be dismissed.

PROCEEDINGS IN THE CASE

On December 6, 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 Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on November 5 and November 6, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Paul H. Senzer, Esq. Respondent was represented by Cruser Mitchell & Novitz, LLP, by Rondiene E. Novitz, Esq.

FINDINGS OF FACT

1. Respondent is comprised of schools that include: Cold Spring Harbor Junior and Senior High Schools; Sachem School and Lloyd Harbor School. (Tr. 11-12)

2. Since 1999, Complainant worked for Respondent as a substitute custodian in the Cold Spring Harbor school district. (Tr. 6-7)

3. Complainant is called to work when a full time custodian calls in sick or additional help is needed in any of the four schools. (Tr. 158, 330)

4. Frank Channing is Complainant's supervisor and the head custodian at the Cold Spring Harbor High School. (Tr. 361)

5. In 2009, Channing told Complainant that she was not being called to work as a substitute because she is a woman. (Tr. 20)

6. In April 2009, Complainant told the superintendent of Respondent's schools, Judith Wilansky, about Channing's comments. Complainant then began receiving more assignments. (Tr. 19-21)

7. In May of 2009, Channing called Complainant to ask her if she would accept an eight hour assignment moving desks. He did not tell her that there were one hundred and five desks and that she would be working alone. (Tr. 22, 159)

8. Complainant accepted the assignment. (Tr. 24)

9. Complainant did not complete the assignment and left before her eight hour shift was completed. (Tr. 27, 376)

10. Another custodian, who is male, Dinoe Wilson, completed the assignment. (Tr. 376-77)

11. Complainant learned about a videotape of her moving the desks and the offensive language that was used to describe her to other custodians in 2011. (Tr. 55-56)

12. Complainant also alleged that in 2009 Channing referred to her as a "cunt" and a "twat" when speaking with custodians who viewed the videotape. (Tr. 58-59)

13. Complainant did not complain to anyone about the videotape or the offensive language. (Tr. 58)

14. On or about May 11, 2009, Complainant wrote a letter to the Assistant Superintendent for Business, Dr. William Bernard, stating that she was unfairly being called to work. (Complainant's Exhibit 2)

15. Complainant spoke to Bernard, and told him that she was not being called for assignments. (Tr. 63)

16. Bernard responded to Complainant's letter by instituting a new procedure requiring all head custodians to call the substitutes on a rotating basis. (Tr. 42, 462-64)

17. Complainant provided a list of dates with her availability on a weekly basis because she had personal obligations. Complainant was called for assignments in accordance with the dates that she provided. (Tr. 157-58)

18. On each occasion that Complainant alleged she was not being called fairly, Bernard investigated her complaints by reviewing the logs and payroll records. Bernard found that Complainant was actually being called more often than the other male or female substitute custodians. (Tr. 471; Respondent's Exhibit 14)

19. A review of Complainant's time sheets between 2012 and 2014 show Complainant was called to work as a substitute predominantly by Channing. (Respondent's Exhibits 15 and 16)

20. However, Complainant's work was considered substandard. (Tr. 413)

21. Complainant often neglected to clean bathrooms, garbage pails and complete rooms. The head custodian often cleaned up after her. (Tr. 414)

22. On occasion, Complainant left garbage in Channing's room. (Tr. 288, 290)

23. In 2013, Complainant submitted an application for two full time custodial positions with Respondent. (Tr. 332-33)

24. Mark Margolis is Respondent's Director of Buildings and Grounds. (Tr. 328)

25. Margolis conducts pre-interviews to fill vacant custodial positions. Margolis interviewed Complainant and forwarded her resume to be considered in the second round of interviews for each of Complainant's applications. (Tr. 95, 333)

26. The second interview was conducted by head custodian John Genova and the Assistant Principal of the Lloyd Harbor High School, Phillip Gray. (Tr. 95, 408)

27. Complainant was passed to the third interview which was conducted by Principal Massimo. (Tr. 120)

28. Massimo chose a different candidate who had better credentials than Complainant. (Tr. 126)

29. Channing was not involved in the interview process. (Tr. 143, 380)

30. In August 2013, Complainant submitted a third application and she interviewed with Genova and Gray. (Tr. 405)

31. Genova did not pass Complainant through to Massimo because there were other stronger candidates. (Tr. 409, 439)

32. Clarence Powell, another substitute custodian was hired for the position. (Tr. 428)

33. Complainant applied for a fourth position in September of 2013. (Tr. 335-36)

34. Complainant was passed through to the next round of interviews. (Tr. 164)

35. Complainant interviewed with Channing, Margolis and High School Principal Jay Matuk. (Tr. 164)

36. John Burke, who was known to have worked as a head custodian in the South Huntington Schools, was hired to fill the vacancy. (Tr. 337)

OPINION AND DECISION

Any complaint filed pursuant to the Human Rights Law must be filed within one year of the alleged unlawful discriminatory practice. N.Y. Exec. Law, art. 15 (the "Human Rights Law") § 297.5. In this case, any claim which had its origin prior to December 6, 2012, is time-barred unless Complainant can show a continuing violation. A continuing violation exists where there is proof of specific ongoing discriminatory practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory practice. *See Clark v. State of New York,* 302 A.D.2d 942, 754 N.Y.S.2d 814

(4th Dept. 2003). *See also Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002). Such claims will be time-barred if the acts are not part of the same unlawful employment practice or if none of the acts occurred within the statutory time period. *See Id.* at 122.

Here, the acts complained of by Complainant occurred in 2009, four years before Complainant filed a complaint with the Division. When Complainant learned about the videotape in 2011, Complainant did not complain about it. Complainant's only complaint was that she was not getting more assignments. Complainant failed to establish a continuing violation, and the 2009 claims are time barred.

Complainant further alleges that Respondent unlawfully refused to hire her because of her gender. The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer "because of an individual's…sex...to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Complainant bears the initial burden of establishing a prima case of unlawful discrimination. Where the alleged discrimination arises from an employer's alleged refusal to hire, Complainant must show: (1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected; (4) the rejection occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1977); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant is a woman and a member of a protected class. Complainant had a history of poor work performance. However, after applying for a full time custodial position, she was passed on to the third qualifying interview in two instances. Therefore, she was arguably able to

perform the job. However, Respondent chose other applicants that were more qualified. Absent evidence of unlawful discrimination, the Division will not second guess Respondent's business judgment. *Citibank, N.A. v. New York State Division of Human Rights*, 227 A.D.2d 322, 325, 643 N.Y.S.2d 68, 70 (1st Dept. 1996), *lv denied*, 88 N.Y.2d 815, 651 N.Y.2d 815, 651 N.Y.S.2d 17 (1996). Therefore, the rejection did not occur under circumstances giving rise to an inference of discrimination and Complainant has failed to establish a prima facie case of gender discrimination.

Complainant further alleges that she was not hired to a full time custodial position in 2013 because she engaged in protected activity when she complained by letter dated May 11, 2009. Human Rights Law § 296.7, makes it an unlawful discriminatory practice to retaliate or discriminate against any person because he or she has opposed any practices forbidden under the Human Rights Law.

In order to make out a prima facie case of retaliation, a complainant must show: she engaged in protected activity; the respondent was aware that she engaged in protected activity; she suffered an adverse employment action; and a causal connection between the protected activity and the adverse employment action exists. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

In 2009, Complainant complained about Channing's comments and about not receiving as many assignments as she wanted. Complainant was given more assignments after she complained. Complainant's 2009 complaint is time barred and cannot now be revived as the basis of the instant retaliation complaint. In addition, the evidence shows that Complainant received more assignments after her letter of complaint. This is evidence that Respondent did not

have a discriminatory animus. Complainant did not establish a prima facie case based on these facts and her retaliation complaint is 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 complaint be and the same hereby is dismissed.

DATED: March 2, 2105
Hempstead, New York

Margaret A. Jackson
Administrative Law Judge