

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

RENEE FRANCIS,

Complainant,

v.

WILLIAMSBRIDGE NAACP EARLY
CHILDHOOD EDUCATION CENTER,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10115963

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 December 10, 2008, by Thomas J. Marlow, 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.

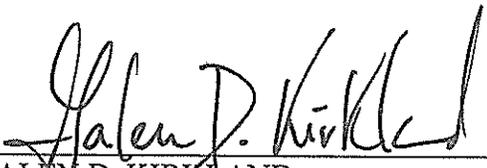
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **JAN 22 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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RENEE FRANCIS,

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**WILLIAMSBRIDGE NAACP EARLY
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Respondent.

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

Case No. 10115963

SUMMARY

Complainant alleged that Respondent discriminated against her because of her disabilities. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 5, 2007, 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 Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 3 and 4, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondent was represented by David H. Diamond, Esq.

After the conclusion of the public hearing, the Division filed proposed findings of fact and conclusions of law. Respondent filed a written closing statement in lieu of proposed findings of fact and conclusions of law.

For consistency, all exhibits marked "Division's Exhibits" have been marked "Complainant's Exhibits."

FINDINGS OF FACT

1. On February 4, 2003, Complainant began her employment with Respondent as a teacher aide on a temporary basis, as needed. (Respondent's Exhibit 2; Tr. 9, 331-33, 338)
2. Complainant has cerebral palsy and is classified as learning disabled. (ALJ's Exhibit 1; Complainant's Exhibit 6; Tr. 12, 312-13)
3. Respondent was aware that Complainant had some physical limitations due to cerebral palsy. Respondent was never informed and was not aware that Complainant had a learning disability. (Respondent's Exhibit 1; Tr. 291, 293, 312-14, 365, 371) I do not credit Complainant's testimony that she informed Cheryl DeWitt ("DeWitt"), the Executive Director of Respondent, of her learning disability. (Tr. 163-64)
4. As part of the job requirements, Respondent required teacher aides to possess either a high school diploma or a general equivalency diploma ("G.E.D."). (Tr. 339, 438) Since Respondent expects a teacher aide to assist in the teaching process, it determined that this requirement objectively established a minimum level of demonstrated proficiency. (Tr. 439)

5. For its permanent teacher aides, Respondent maintained proof of a diploma or G.E.D. on file. Respondent did not require such proof from its temporary employees, and thus had not requested such from Complainant at the start of her employment. (Tr. 343) When Complainant commenced her employment with Respondent, she provided a copy of her resume which indicated that she was educated at Walton High School. (Respondent's Exhibit 3; Tr. 94) When DeWitt hired Complainant, after reviewing her resume, she assumed that Complainant had graduated from Walton High School and had a high school diploma. (Tr. 331-32, 339)

6. DeWitt has been Respondent's Executive Director since 2000. She has never made an exception to the requirement that teacher aides possess a diploma or G.E.D. and she has never knowingly hired someone as a teacher aide who did not meet this qualification. (Tr. 339-40)

7. Although Complainant's position was temporary, as needed, DeWitt made efforts to ensure that Complainant had many opportunities for overtime. (Tr. 112-14)

8. In or around September of 2004, DeWitt changed Complainant's position from temporary to part-time permanent teacher aide and introduced Complainant at a meeting of parents and teachers. (Tr. 24-25, 103-07, 340-43)

9. In accordance with its policy, Respondent requested that Complainant provide documentation that she has a high school diploma. (Tr. 35-36, 343-45)

10. Complainant never provided the requested documentation. (Respondent's Exhibit 8; Tr. 362) Indeed, Complainant did not possess a high school diploma or a G.E.D. She only attended two years of high school in special education. She stopped going to school after being involved in a car accident. (Complainant's Exhibit 6; Respondent's Exhibit 7; Tr. 20-21, 159-61)

11. On August 9, 2005, after receiving documentation that Complainant only attended high school from 1978 to 1980, Respondent informed Complainant that if she did not provide

documentation of a G.E.D. by August 26, 2005, her employment would be terminated.

(Respondent's Exhibits 7, 8, 9; Tr. 172-73, 350-54)

12. Complainant did not provide the requested documentation and her employment was terminated. Complainant then filed a grievance with her union concerning the termination. On November 14, 2005, Respondent entered into an agreement with Complainant allowing her to return to work on November 21, 2005, provided she enroll in a course to prepare for a G.E.D. test, and successfully obtain her G.E.D. by December 31, 2006. Pursuant to the agreement, Complainant's failure to obtain her G.E.D. by December 31, 2006, would result in the termination of her employment. (Respondent's Exhibit 11; Tr. 173-76)

13. On December 27, 2006, Complainant requested, in writing, an additional six months to obtain her G.E.D. (Complainant's Exhibit 5; Tr. 371, 376-77) In this writing, it was revealed that Complainant was not in a G.E.D. preparatory class, but in a class that preceded the G.E.D. class. There was no mention of a disability or request for an accommodation for a disability. It was further revealed that Complainant was not ready to take the test. (Complainant's Exhibit 5)

14. Respondent denied Complainant's request and terminated her employment as of December 28, 2006, because she had not met the job requirements. (Respondent's Exhibit 13)

15. Complainant again filed a grievance with her union concerning the termination and, on July 31, 2007, Respondent entered into an agreement with Complainant whereby Complainant was permitted to resign her position as teacher aide, effective December 31, 2006, in lieu of the termination, and Respondent agreed to rehire Complainant should she obtain her G.E.D. within three years. (Respondent's Exhibit 14; Tr. 215-20)

16. In or around April of 2007, Complainant was informed by a licensed psychologist, after a psychological evaluation, that, due to visual spatial problems, she is unable to develop the skills needed to pass the math section of the G.E.D. test. (Complainant's Exhibit 6; Tr. 48-49)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability and to refuse to provide a reasonable accommodation to an employee's disability. *See* Human Rights Law § § 296.1(a), 296.3(a).

Complainant alleges that Respondent discriminated against her based on her disabilities when it terminated her employment. After considering all of the evidence presented, and evaluating the credibility of the witnesses, I find that the credible evidence does not support this allegation. The credible evidence establishes that Complainant did not meet the qualifications for the position. Teacher aides were required to possess a high school diploma or a G.E.D. Complainant possessed neither. Complainant was afforded a reasonable opportunity to become qualified and was unable to do so.

Complainant further alleges that Respondent discriminated against her by refusing to provide a reasonable accommodation to her learning disability. The credible evidence establishes, however, that Respondent was never put on notice that Complainant had a learning disability that required a reasonable accommodation.

Complainant has the burden to establish by a preponderance of the evidence that discrimination occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326,

763 N.Y.S.2d 518 (2003). Complainant has failed to meet this burden; therefore, the 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 complaint be, and the same hereby is, dismissed.

DATED: December 10, 2008
Bronx, New York



Thomas J. Marlow
Administrative Law Judge