

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ELLEN M. HALE,

Complainant,

v.

ONONDAGA COMMUNITY COLLEGE,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10112137

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 September 4, 2009, by Michelle Blackman, 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.

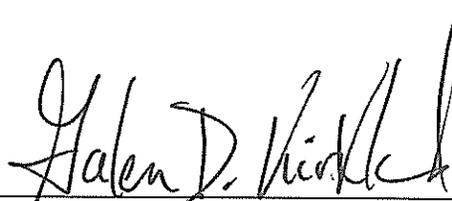
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **NOV 4 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

ELLEN HALE,

Complainant,

v.

**COUNTY OF ONONDAGE, ONONDAGA
COMMUNITY COLLEGE,**

Respondent.

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

Case No. 10112137

SUMMARY

Complainant alleges that Respondent discriminated against her on the basis of disability and age by eliminating her position. Complainant further alleges that the Respondent retaliated against her. Complainant failed to sustain her burden and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On 6/27/2006, 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.

On 2/28/2007, Complainant amended her complaint to include Onondaga Community College as a Respondent.

After due notice, the case came on for hearing before Michael Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 22 and 23, 2008.

Complainant and Respondent appeared at the hearing. Karen DeCrow, Esq. represented the complainant. Michael J. Gauzza, Esq. represented the respondent.

Permission to file post-hearing briefs was granted.

The case was re-assigned to Administrative Law Judge, Michelle Blackman.

FINDINGS OF FACT

1. Complainant, Ellen Hale was born on October 29, 1948, and is a cancer survivor. (ALJ's Exh. 1)
2. Complainant is an employee of Respondent, Onondaga Community College (OCC) in Syracuse, County of Onondaga, New York. (Tr. 11; ALJ's Exh. 1) She has been an employee at OCC since August 1990. (Tr. 11)
3. In May 1992, Complainant was diagnosed with breast cancer and underwent a mastectomy, chemotherapy and reconstructive surgery, all of which concluded in April 1993. (Tr. 18, 57) Complainant was an adjunct professor at OCC at that time. (Tr. 57) Complainant informed her supervisors and co-workers at OCC of her illness. (Tr. 19) Complainant missed a total of three and one half days of work in 1992 due to her illness. (Tr. 20)
4. In August 2002, Barbara Risser, the Vice President for Students and Academic Services, hired Complainant as an Instructor's Assistant in Reading to coordinate the Study Skills Center (SSC). (Tr. 58, 164-65) Complainant was qualified for this position. (Tr. 19-20,

225) The Instructor's Assistant position was a full time position. (Tr. 20; Complainant's Exh. 13)

5. Faculty members at OCC who are employed full time for at least five consecutive years are entitled to lifetime medical insurance coverage upon retirement. (Tr. 27-28)

6. In 2005, Complainant developed Lymph Edema, which required Complainant to attend two eight-week sessions of physical therapy, two to three days per week. (Tr. 18) Complainant did not miss any work days related to this condition. (Tr. 20)

7. In the fall of each year, the chairperson in each academic department submits budget requests and supporting justifications to the Associate Vice President for Academic Services and the Vice President for Students and Academic Services. (Tr. 166, 183)

8. On October 20, 2005, the chairperson of the English Department submitted a budget request for an upgrade from the Instructor's Assistant in Reading position, which was Complainant's position at that time, to a full-time faculty position. (Tr. 184-85; Respondent's Exh. 9) The request indicated that the Department's needs could be better met by hiring a full time faculty member to run the SSC on release time, which was how the SSC was managed prior to 2002. The letter explained that the Instructor's Assistant position was less advantageous to the English Department, less cost effective, and posed a number of managerial difficulties due to the limitations of the Instructor's Assistant's role. (Respondent's Exh. 9)

9. Until 2002 when Complainant was hired as an Instructor's Assistant to coordinate the SSC, the SSC had been managed by a full time faculty member using "release time." Release time reduced the full time faculty member's course load by three credit hours and applied that time, approximately seven to eight working hours per week, to running the SSC. (Tr. 185-87)

10. In response to the English Department's October 20, 2005 budget request, Risser eliminated the Instructor's Assistant in Reading position and recommended that the Department reassign one of its four full time professors to run the SSC on release time. The Department followed the recommendation and in May 2006, appointed Pamela Mullan, a full-time faculty member of the English Department, to manage the SSC on release time. (Tr. 188)

11. Mullan is eighteen years younger than Complainant. (Tr. 22) Mullan has no known medical history of illness or disability. (Tr. 27)

12. Risser notified Complainant about the elimination of the Instructor's Assistant position in a letter dated January 12, 2006, which explained that the position was being eliminated due to restructuring in the English department and that Complainant's performance was not in question. (Complainant's Exh. 15) At that time, Complainant was 56 years old and had accrued four consecutive years of full time employment with OCC. (Tr. 28; ALJ's Exh 1)

13. On January 28, 2006, Theresa Mohamed, Chairperson of the English Department, and Deborah Irwin, Coordinator of Reading, wrote to Risser urging her to reconsider the elimination of the Instructor's Assistant position in light of the hardships that would come to Complainant and the Department. (Complainant's Exh. 20)

14. In a memo dated February 2, 2006, Risser informed Mohamed and Irwin that due to the financial constraints that OCC was facing and the information provided in the English Department's October 20, 2005 request, it was in the best interest of the Department to eliminate the position and the decision could not be delayed for one year. (Tr. 192; Complainant's Exh. 20)

15. By absorbing the management of the OCC into Mullan's duties under a release time schedule and eliminating the full time Instructor's Assistant position in Reading, OCC saved

money. (Tr. 198, 232) By February 2006, such monies had been allocated to other departments for hiring and the process for hiring new faculty was already underway. (Tr. 194)

16. In the 2006-2007 academic year, the English Department was the only unit to lose an Instructor Assistant position. (Tr. 190) Only the English Department has a Study Skills Center. (Tr. 190) The following year, an Instructor's Assistant was hired in the Chemistry Department to replace a retiring professor, which also reduced costs for OCC. (Tr. 190)

17. Complainant believed that because Risser and OCC administrators knew about her past experience with breast cancer, the possibility that her cancer may recur, and her 2005 episode of Lymph Edema, they concluded that she could become a financial and medical liability. It is her belief that they sought to eliminate her employment with OCC before she was eligible to retire with lifetime medical benefits. (Tr. 35; ALJ's Exh. 1)

18. At the time Ms. Risser eliminated the Instructor's Assistant position, she did not believe Complainant to be disabled. (Tr. 197) Complainant admitted that she did not know whether Ms. Risser or OCC administrators thought of her as disabled at the time her position was eliminated. Complainant also admitted that she did not think that she was removed from the SSC because she was thought to be disabled. (Tr. 35-36)

19. On May 8, 2006, Complainant filed a complaint alleging age discrimination with the Human Resources Department at OCC on the basis that she had been relieved of her position and replaced by Mullan who was eighteen years her junior. (Respondent's Exh. 4)

20. On May 18, 2006, Robert Jokajtys, Vice President of Human Resources, wrote to Complainant informing her that he had conducted an investigation into her May 8 complaint and the reasons for which he did not find probable cause to substantiate her complaint of age discrimination. (Respondent's Exh. 5)

21. OCC's employee handbook contains its anti-discrimination policy. (Tr. 138; Respondent's Exh. 13) This policy is also accessible online through OCC's open folders. (Tr. 138) OCC's Human Resources Department provides a formal process for complaining about harassment and discrimination, which Complainant used in May 2006. (Tr. 139; Respondent's Exh. 4)

22. Complainant testified that in the spring of 2008, Mullan and Irwin improperly denied her the opportunity to teach courses she was entitled to teach under her contract with OCC in retaliation for Complainant's filing a complaint with the Division on June 27, 2006, which was served on Respondent on March 1, 2007. (Tr. 50-53; ALJ's Exh. 1; Respondent's Exh. 7) Specifically, Complainant had seniority in course selection and thought that she should have had the option to choose to teach three courses instead of two based on the erroneous belief that there were nine courses available to adjuncts such as Complainant that semester. (Tr. 53, 64; Respondent's Exh. 7)

23. Irwin emailed Complainant on January 18, 2008, to give Complainant first choice of classes to teach in the spring term. Complainant chose two reading classes in section 140 that met on Mondays, Wednesdays and Fridays. Complainant received the classes she requested and taught both 140 sections on Mondays, Wednesdays and Fridays during the spring semester in 2008. (Tr. 63-64; Respondent's Exh. 1)

24. Complainant filed a grievance with her union in early 2008, alleging that she was improperly denied the opportunity to teach a third course. The union's investigation, memorialized in a letter addressed to Complainant dated February 12, 2008, revealed that there were eight courses available for adjuncts to teach that semester. Had there been a ninth course available to adjuncts, Complainant would have had seniority to choose to teach that course and

bring her total course load to three that semester. As such, David Abrams, the union's grievance officer, found that Complainant's grievance lacked merit. (Respondent's Exh. 7)

OPINION AND DECISION

The Human Rights Law makes it unlawful for an employer to discriminate against an employee on the basis of age or disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the burden of establishing a prima facie case of discrimination by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondents' actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondents to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for their employment decision. The ultimate burden rests with Complainant to show that Respondents' proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

In the instant case, Complainant has established a prima facie case of age discrimination. At 56 years old, Complainant is a member of a protected class. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). Complainant was qualified for the position she held as the Instructor's Assistant in Reading. When Risser, the Vice President for Students and Academic Services at Onongada Community College (OCC), decided to eliminate Complainant's position, the Complainant suffered an adverse employment action. Finally, Complainant was replaced by someone eighteen years her junior with less seniority giving rise to an inference of discrimination. Therefore, Complainant has established a

prima facie case of age discrimination. The burden then shifts to the Respondent to articulate legitimate, nondiscriminatory reasons for its employment decision. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Here, Respondent has met its burden and has established through the evidence presented a nondiscriminatory basis for the elimination of Complainant's position. The Respondent eliminated Complainant's position due to Department re-structuring and fiscal limitations. The record provides that in the fall of each semester, the Department chairpersons submit budgetary requests for additional faculty positions within their Departments. On October 20, 2005, the chairperson of the English Department submitted such request to Risser asking for an upgrade of the Instructor's Assistant position to a full-time faculty position. The rationale was that due to limitations of the Instructor's Assistant title, the SSC could be more effectively managed by a full-time faculty member using "release time", which would also be more cost efficient for the English Department. Prior to 2002, when Complainant was hired as an Instructor's Assistant, the SSC was managed by a full-time faculty member using "release time," meaning, that a faculty member would reduce his or her teaching schedule by three credit hours and apply that time toward the management of the SSC.

The October 2005 request proposed a reversion back to the original system of managing the SSC. Risser considered the English Department's request and the financial burdens OCC was facing that year and decided to eliminate the Instructor's Assistant position. She recommended that the English Department select a full-time faculty member from its current faculty members to manage the SSC using release time.

On January 12, 2006, Risser notified Complainant about the elimination of the Instructor's Assistant position and explained that the position was being eliminated due to

budgetary constraints as well as restructuring in the English department and that Complainant's performance was not in question. On January 28, 2006, Theresa Mohamed, Chairperson of the English Department, and Deborah Irwin, Coordinator of Reading, wrote to Risser urging her to reconsider the elimination of the Instructor's Assistant position in light of the hardships that would come to Complainant and the Department. Risser responded on February 2, 2006 and informed Mohamed and Irwin that due to the financial crisis OCC was facing and the information provided in the English Department's October 20, 2005 request, it was in the best interest of the department to eliminate the position and the decision could not be delayed for another year. In fact, the money OCC saved by eliminating the Instructor's Assistant position had been allocated elsewhere within OCC and the process for hiring new faculty was already underway.

The ultimate burden rests with Complainant to show that Respondents' proffered explanations are a pretext for unlawful discrimination. See *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997). Although Complainant attempted to show pretext, she has not met her burden. The record established that English Department was the only department that lost an Instructor's Assistant position in the 2006-2007 academic year and an Instructor's Assistant was hired in the Chemistry Department the following year. However, these facts do not support Complainant's position that Respondents' explanation was a pretext. The Respondent has established through credible evidence and testimony that the Complainant's position was eliminated due to financial constraints and department re-structuring. Complainant has not shown that Respondent was motivated by a discriminatory animus. Therefore, the Division finds that Complainant's allegations of age discrimination are unsubstantiated and this claim is dismissed.

Furthermore, Complainant has also failed to establish a prima facie case of discrimination on the basis of disability. The record establishes that Complainant was qualified for the position she held when her position was eliminated and she was disabled under the law. Complainant is a cancer survivor and developed Lymph Edema in 2005. However, the record does not support the premise that Complainant suffered an adverse employment action under circumstances giving rise to discrimination on the basis of her disability.

Complainant believed that because Risser and OCC administrators knew about her past experience with breast cancer, the possibility that her cancer may recur and her 2005 episode of Lymph Edema, they concluded that she may become a financial and medical liability, and thereby sought to eliminate her employment with OCC before she was eligible to retire with lifetime medical benefits. But, there is no credible evidence in the record to substantiate Complainant's allegations.

Complainant was diagnosed with cancer in May 1992. Her surgeries and treatment concluded in April 1993. Risser hired Complainant as the Instructor's Assistant in Reading in August 2002, with full knowledge that Complainant had previously been diagnosed with breast cancer and had undergone surgery and treatment. Although these facts fall outside the one year statute of limitations, they are relevant in as much as they show that Risser had at one time hired Complainant with the knowledge that Complainant had previously experienced a disability. *See, Youth Action Homes, Inc. v. State Division of Human Rights*, 659 N.Y.S.2d 447, 452 (1st Dept. 1997) ("there is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of that protected status.")

Complainant admitted that neither the Lymph Edema nor the physical therapy interfered with her work at OCC in any way, and she did not take any days off related to this condition.

Complainant further admitted that she did not know whether Risser or the administrators at OCC knew she had Lymph Edema in 2005. Complainant testified that she did not believe that her position as an Instructor's Assistant was eliminated because she was disabled. Furthermore, in her formal complaint to OCC's Human Resources Department, dated May 8, 2006, Complainant did not allege disability discrimination as an unlawful basis for the elimination of the Instructor's Assistant in Reading position. Finally, Risser provided un rebutted testimony that she was unaware of Complainant's Lymph Edema when she made the decision to eliminate the Instructor's Assistant position following the submission of the English Department's budget proposal in October 2005. Therefore, the Division finds that Complainant has failed to show that her position was eliminated under circumstances giving rise to discrimination on the basis of disability and the claim is dismissed.

Complainant also alleged that Irwin and Mullan retaliated against her for filing her complaint with the Division by denying her the opportunity to teach a third course in violation of her employment contract with OCC. Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondents were aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondents have the burden of coming forward with legitimate, nondiscriminatory reasons in support of their actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

Complainant has failed to establish a prima facie case of retaliation. The record shows that Complainant engaged in protected activity when she filed her complaint with the Division

on June 27, 2006, which was served on Respondents on March 1, 2007. Complainant alleged that retaliation took place in January 2008, when Irwin denied her the opportunity to teach two classes instead of three classes that semester. Under the law, temporal proximity between the events may give rise to an inference of causation. *See Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months). Here, more than a year had transpired since Complainant filed her complaint with the Division when the alleged retaliatory actions occurred. Moreover, the record is devoid of evidence showing that there were any retaliatory or discriminatory actions involved in the course selection for the fall 2007 semester, which followed the March 1 service of Complainant's lawsuit on Respondents. Therefore, record does not support temporal proximity between the alleged retaliation and the proceedings in Complainant's lawsuit.

Therefore, the Division finds that Complainant failed to establish a case of retaliation and this claim 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 case be, and the same hereby is, dismissed.

DATED: September 4, 2009
Bronx, New York



Michelle Blackman
Administrative Law Judge