

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

KATHLEEN E. MAGEE,

Complainant,

v.

**BOARD OF COOPERATIVE EDUCATIONAL
SERVICES (BOCES), NASSAU,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10116473

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 July 14, 2008, 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.

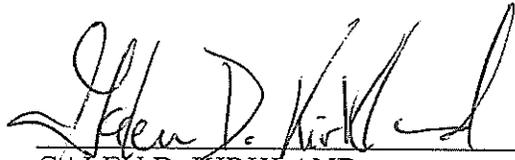
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **SEP - 9 2000**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

KATHLEEN E. MAGEE,

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v.

**BOARD OF COOPERATIVE
EDUCATIONAL SERVICES (BOCES),
NASSAU,**

Respondent.

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

Case No. 10116473

SUMMARY

Complainant alleged that Respondent discriminated against her by terminating her employment as a teacher's aide because of her age, race and color. Complainant also alleged that Respondent terminated her employment because she filed a prior complaint with the Division. Respondent denied these allegations. The credible record does not support Complainant's allegations of discrimination and retaliation. Accordingly, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 8, 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 12 and 13, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondent was represented by Susan E. Fine, Esq.

The parties submitted timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant alleged that Respondent discriminated against her by terminating her employment as a teacher's aide because of her age, race and color. (ALJ's Exh. 1) Woskoff set forth the Division's position that there is no probable cause to substantiate Complainant's allegations of discrimination based on age, race and color. Therefore, the Division did not present evidence in support of these charges. (Tr. 7) Complainant also alleged that Respondent terminated her employment because she filed a prior complaint of discrimination with the Division. (ALJ's Exh. 1)

2. Respondent denied Complainant's allegations. (ALJ's Exh. 2)

3. In Division Case No. 10115810, Complainant alleged that Respondent unlawfully discriminated against her in the workplace. (ALJ's Exh. 1) The Division takes official notice of this prior complaint which was filed with the Division on January 23, 2007.

4. Respondent appointed Complainant to work as a teacher's aide at its Eagle Avenue Middle School on February 27, 2006. (Tr. 10; Respondent's Exh. 1)

5. Complainant was qualified to work as a teacher's aide. (Tr. 10) As a teacher's aide, Complainant worked under the direct supervision of classroom teachers and was responsible for assisting the teachers with classroom instruction, performing clerical work, assisting students throughout the school day and the like. (Respondent's Exh. 5)

6. Complainant began working as a one-to-one teacher's aide with a student identified as S.B. in the classroom of Mrs. Cincatta. (Tr. 154-56) Generally, a one-to-one teacher's aide is assigned to a specific student for that student's tenure at the school if they establish a positive relationship. (Tr. 161-62, 284)

7. In June 2006, Complainant received a satisfactory performance rating. (Complainant's Exh. 1) However, on graduation day that year, an incident occurred between Complainant and S.B. that caused S.B. to become upset and agitated. (Tr. 157-60) S.B.'s parents brought this incident to the attention of Sandra Tedesco, the assistant principal for Respondent. (Tr. 150-51, 157, 160, 284-85)

8. Although Complainant was not formally disciplined for this incident, Respondent assigned Complainant as a one-to-one teacher's aide for a different student, C.C., in Rosemary Lombardi's classroom the following school year. (Tr. 162-63, 284-85, 360) Complainant failed to employ Respondent's established positive behavioral model during her daily interaction with C.C., a student who suffered from an anxiety disorder and had difficulties communicating. (Tr. 163, 285-87) Lombardi observed that Complainant spoke harshly to C.C. in the classroom and did not sit near C.C. during classroom instruction. (Tr. 362-63) Whenever Lombardi attempted to correct Complainant's behavior, Complainant became insubordinate, angry and, on one

occasion, left the classroom. (Tr. 166-67, 362-67) Lombardi noted that C.C. was very anxious under Complainant's supervision and that C.C. cried one day because Complainant called him names. (Tr. 368) C.C.'s parents complained to Tedesco that Complainant was not an effective teacher's aide and that Complainant's conduct was detrimental to C.C.'s emotional well-being. (Tr. 165-66)

9. Although Tedesco, Lombardi and the school psychologist met with Complainant to address this problem, Complainant's conduct did not improve. (Tr. 163, 173)

10. In or about November 2006, Respondent reassigned Complainant to another student, M.C., in Jennifer Kaden's classroom. (Tr. 173-74, 209; Respondent's Exh. 14) M.C. was a student with an anxiety disorder who was assigned a specific behavioral intervention plan that needed to be followed by the teaching staff. (Tr. 174-76, 210, 295) Although Kaden and others reviewed this plan with Complainant, Complainant frequently failed to follow the plan. (Tr. 174-76, 211-14, 295-99) Complainant exceeded her authority by sending M.C. to the "thinking room" without authorization from the teacher or school psychologist. (Tr. 176-77, 210-12; Respondent's Exh. 9) On other occasions, Complainant told M.C. to stop rocking and threatened to send him to the "thinking room" which directly contravened M.C.'s behavioral intervention plan. (Tr. 178-79, 212-13, 221; Respondent's Exh. 9) Kaden also observed that Complainant sometimes ignored M.C., did not sit near him during classroom instruction and told M.C. to leave her alone. (Tr. 214-15; Respondent's Exhibits 12, 13)

11. Whenever Tedesco, a classroom teacher, or Robert Lombardi, the school principal, attempted to correct Complainant's behavior toward a student, Complainant often reacted in an insubordinate and defensive manner. (Tr. 167-69, 183-84, 214-16, 290, 362-63, 365) ~~This was~~

corroborated by Nancy Voetsch, an experienced teacher's aide who was also Complainant's union representative during the relevant time period. (Tr. 397-98, 401-04)

12. In her prior complaint, Complainant alleged that Respondent gave her disciplinary warnings regarding her substandard performance on October 16, 2006, November 20, 2006 and January 8, 2007 as a means of terminating her employment. (Respondent's Exhibits 7, 8, 9)

13. On February 2, 2007, Complainant exceeded her authority by speaking publicly to the parent of a student about the student's behavior in school that day. (Tr. 116, 146, 181-82, 338-39; Complainant's Exh. 6) As a result of Complainant's intervention, the parent publicly rebuked the student. (Tr. 147, 181; Complainant's Exh. 6) Several staff members reported this incident to school administrators. (Tr. 339; Complainant's Exh. 6)

14. On February 5, 2007, Complainant met with Principal Lombardi, Tedesco and Voetsch to discuss the February 2 incident. (Complainant's Exh. 6) After the meeting, Complainant was upset that certain staff members reported the incident to school administrators. (Tr. 138) Complainant publicly told Richardean Gould, a teacher's aide, that "those bitches" were "going to get theirs." (Tr. 138-39) That same day, Complainant also entered the classroom of teacher Mary Murphy and angrily told Mrs. Marshall, a teacher's aide in Murphy's classroom, that Complainant was "going to get those bitches." (Tr. 125-27) Complainant was pointing at Kaden's classroom when she made this comment. (Tr. 126)

15. When Marshall informed Kaden about Complainant's threats, Kaden was concerned for her safety. (Tr. 222-23)

16. Complainant did not deny making these threats. (Tr. 118-19)

~~Principal Lombardi~~ Principal Lombardi was concerned when he learned about Complainant's menacing behavior and promptly reported the threats to Respondent's central office. (Tr. 309-10, 312)

18. By letter dated February 9, 2007, Gary M. O'Connor, Respondent's executive director of human resources, informed Complainant that she was administratively reassigned to her home until further notice. (Respondent's Exh. 2)

19. Complainant's threatening behavior coupled with her inability to successfully relate to the students in her charge caused Principal Lombardi to conclude that Complainant could not function effectively as a teacher's aide for Respondent. (Tr. 312-15, 355-56)

20. Voetsch agreed that Complainant was not an effective teacher's aide during her employment with Respondent. (Tr. 404-05)

21. Respondent terminated Complainant's employment on March 14, 2007. (Tr. 10)

OPINION AND DECISION

The Division did not present evidence supporting Complainant's allegations of age, race and color discrimination. Accordingly, those charges are dismissed. For the reasons discussed more fully below, Complainant's remaining charge of retaliation is also dismissed.

Complainant alleged that Respondent terminated her employment because she filed a prior complaint with the Division. It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed discriminatory practices. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was 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, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in

support of its 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 not established a prima facie case of retaliation. Although Complainant has met the first three elements of her prima facie case, she did not show that her discharge was causally related to her prior complaint. Complainant did not produce any evidence of subjective retaliatory motive on the part of anyone associated with Respondent.

Complainant attempted to establish causation by showing that her discharge occurred less than two months after she filed her prior complaint with the Division. However, any inference of retaliation based on temporal proximity is nullified where discipline occurred prior to the protected activity and where Complainant was aware that her job was in jeopardy. *See Saunders v. McDonald Investments, Inc.*, 2004 U.S. App. LEXIS 16236, at *6 (2d Cir. Aug. 6, 2004). This is precisely what occurred in the instant case. In her prior complaint, filed on January 23, 2007, Complainant alleged that Respondent gave her disciplinary warnings regarding her substandard performance on October 16, 2006, November 20, 2006 and January 8, 2007 as a means of terminating her employment.

Even if Complainant successfully established a prima facie case of retaliation, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent established that Complainant was discharged because she engaged in threatening behavior on school premises and consistently failed to relate to the students in her charge. Although Respondent attempted to assist her, Complainant often responded in a defensive and insubordinate manner and was unable to improve her performance. Respondent presented

credible evidence from several witnesses in support of its position, including Complainant's union representative who was also an experienced teacher's aide.

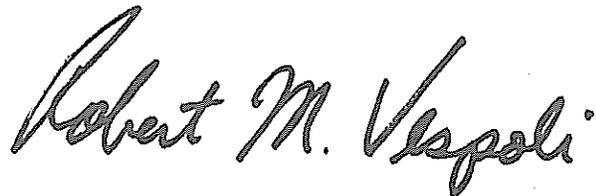
The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful retaliation. Complainant's conclusory allegations cannot satisfy this burden. *See Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

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: July 14, 2008
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge