



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

COLEEN ANN VISCO,

Complainant,

v.

**BRENTWOOD UNION FREE SCHOOL
DISTRICT,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10134042

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 May 30, 2012, 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: 7/25/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

TO:

Complainant

Coleen Ann Visco
182 Woodlawn Avenue
Ronkonkoma, NY 11779

Complainant Attorney

Michael M. McClellan, Esq.
Lefkowitz & Poulos
1770 Motor Parkway, Suite 300
Hauppauge, NY 11749

Respondent

Brentwood Union Free School District
52 Third Avenue
Brentwood, NY 11717

Respondent Attorney

Thomas J. Spellman, Jr., Esq.
Devitt, Spellman, & Barrett, LLP
50 Route 111
Smithtown, NY 11787

Hon. Eric T. Schneiderman, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

Christine Marbach Kellett, Chief Administrative Law Judge
Robert M. Vespoli, Administrative Law Judge
Sara Toll East, Chief, Litigation and Appeals
Caroline J. Downey, General Counsel
Melissa Franco, Deputy Commissioner for Enforcement
Peter G. Buchenholz, Adjudication Counsel
Matthew Menes, Adjudication Counsel



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on the Complaint of

COLEEN ANN VISCO,

Complainant,

v.

**BRENTWOOD UNION FREE SCHOOL
DISTRICT,**

Respondent.

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

Case No. **10134042**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her based on her age when it failed to hire her for probationary teaching positions. Complainant also alleged that Respondent retaliated against her after she complained about unlawful discrimination. Complainant's age discrimination claims are time-barred, and the record does not support Complainant's claim of retaliation. Accordingly, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On July 10, 2009, 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 January 30 and 31, 2012,¹

Complainant and Respondent appeared at the hearing. Complainant was represented by Michael M. McClellan, Esq. Respondent was represented by Kelly Wright, Esq.

Respondent moved to dismiss the complaint on the grounds that Complainant’s claims are barred by the statute of limitations. (Tr. 5-6) The presiding ALJ reserved decision on the motion. (Tr. 7-8)

Complainant and Respondent filed timely proposed findings of fact and conclusions of law which were considered and, where appropriate, adopted.

FINDINGS OF FACT

1. Complainant was born on July 1, 1957. (Tr. 35)
2. In September 1994, Complainant began working for Respondent as a special education teacher assistant. (Tr. 36)
3. In 1997, Complainant began to pursue academic qualifications to become a teacher. (Tr. 37)
4. In 2004, Complainant received her undergraduate degree. (Tr. 37-38)

¹ The portions of the public hearing transcripts showing that the public hearing occurred in the year 2010 are incorrect.

5. In June 2004, Complainant resigned from her teacher assistant position and began working for Respondent as a substitute teacher. (Tr. 36)
6. In September 2004, Complainant worked for Respondent as a substitute teacher covering a special education class for a teacher who was out on maternity leave. (Tr. 42, 91)
7. From January 2005 until June 2005, Complainant worked for Respondent as a permanent substitute in general education at North Elementary School (“North”). (Tr. 43, 92-93)
8. In 2005, Complainant obtained a master’s degree in general education and special education. (Tr. 37-38)
9. In the spring of 2005, Complainant met with Robert Bronzo, Respondent’s former Director of Special Services, and told him that she preferred to teach in the area of special education. (Tr. 44, 101)
10. In the summer of 2005, Complainant called Special Services to see if there were any permanent substitute teacher assignments in special education that were available for the upcoming school year. Victoria Regan, Respondent’s Assistant Director of Special Services at that time, told Complainant that no such assignments were available. (Tr. 47-48, 101-02, 197)
11. Complainant began the 2005-06 school year working for Respondent as a permanent substitute in general education. (Tr. 52, 103)
12. Effective September 1, 2005, Complainant received her New York State certificates to teach childhood education, grades one through six, and students with disabilities, grades one through six. (Respondent’s Exh. 1)
13. Complainant was qualified for the position of teacher, grades one through six, and special education teacher for students with disabilities, grades one through six. (Tr. 11)

14. In or about January 2006, Regan called Complainant and offered her the opportunity to work as a substitute teacher in special education. (Tr. 53, 103-04)

15. At that time, Regan told Complainant that Rebecca Simnowitz-Rodriguez was already working for Respondent as a permanent substitute in special education. (Tr. 105)

16. Complainant accepted the offer and began working as a per diem substitute in special education. (Tr. 105-06)

17. In June 2006, Respondent assigned Complainant to work as a permanent substitute in special education for the 2006-07 school year. (Tr. 111; Respondent's Exh. 3) Complainant worked for Respondent in this capacity for the 2006-07 school year. (Tr. 114-15)

18. In June 2007, Complainant met with Regan to discuss an opening for the 2007-08 school year. Complainant referred to this end of the school year meeting as an "interview." (Tr. 55-56, 116-17, 138-40) At this meeting, Regan told Complainant that there was an opening in a Level 4 special education class because a teacher had left the department. (Tr. 56-57, 125)

19. On July 1, 2007, Regan became Respondent's Director of Special Services. (Tr. 197)

20. In July 2007, James Gesseck became Respondent's Assistant Director of Special Services. (Tr. 445)

21. In August 2007, Gesseck called Complainant and offered her the opportunity to teach the Level 4 class. (Tr. 127-28)

22. At that time, Complainant believed that Respondent was offering her a probationary teaching position. (Tr. 56-58, 128-29)

23. In September 2007, Regan informed Complainant that this assignment was a six month leave replacement contract and not a probationary teaching position. (Tr. 59, 128-30; Respondent's Exh. 9)

24. Complainant accepted the offer and taught the Level 4 class during the entire 2007-08 school year. (Tr. 60, 130)

25. In May or June 2008, Complainant met with Regan. (Tr. 63; ALJ's Exh. 1) Regan told Complainant that she had done a "wonderful job" teaching the Level 4 class that year. However, Regan also told Complainant that she had "absolutely nothing" available for Complainant for the following school year. (Tr. 62-64, 67)

26. The Level 4 class that Complainant taught during the 2007-08 school year was assigned to Simnowitz-Rodriguez for the 2008-09 school year. (Tr. 63) Simnowitz-Rodriguez had been appointed to a probationary teaching position on June 27, 2007, by Respondent's Board of Education ("BOE"). Her probationary period extended from January 17, 2006, to January 17, 2009. (Respondent's Exh. 8)

27. Probationary teachers hold a priority over substitute teachers for receiving available teaching assignments. (Tr. 245)

28. In July 2008, Complainant called Gesseck regarding available teaching assignments. Gesseck told Complainant that nothing was available at that time. (Tr. 64)

29. Complainant then expressed her disappointment to Gesseck. She told him that she concluded that Respondent did not appoint her to a probationary teaching position because of her age. (Tr. 64-65, 449-50, 452)

30. Gesseck assured Complainant that her age had nothing to do with her concerns. (Tr. 65, 452)

31. Shortly thereafter, Regan called Complainant and offered her a substitute teaching assignment at Northeast Elementary School ("Northeast") beginning in September 2008. Regan

told Complainant that this assignment would likely become a one year leave replacement contract. (Tr. 65, 142, 320)

32. Regan did not tell Complainant that this assignment was an offer for a probationary teaching position. (Tr. 66)

33. Complainant initially refused Regan's offer. (Tr. 65, 142) Regan called Complainant the day before the start of the 2008-09 school year and presented the same offer. Complainant accepted the assignment and went to work at Northeast the next day. (Tr. 65-66, 142-43)

34. Kevin McWhirter has been the principal at Northeast since 2005. (Tr. 483-84)

35. In September 2008, Complainant was assigned to teach a Level 4 classroom that is located across from McWhirter's office. (Tr. 487-88) Due to behavioral and supervisory concerns associated with this student population, McWhirter moved this classroom close to his office at the beginning of the 2006-07 school year. (Tr. 488-89)

36. For similar reasons, McWhirter has made it a regular practice to visit this classroom two to four times per day. McWhirter instituted this practice before Complainant began her assignment at Northeast in September 2008, and he continued this practice throughout the 2008-09 school year. (Tr. 489-90)

37. On or about September 10, 2008, McWhirter spoke to Complainant in his office about an incident that occurred in Complainant's classroom. (Tr. 79, 146, 495-96, 505) McWhirter told Complainant that he saw her holding a student's wrist in one hand and a book bag in the other. (Tr. 496, 501) Complainant explained that she was attempting to prevent the student from throwing his back pack at another student. (Tr. 158)

38. At the meeting, McWhirter addressed the school's established "hands-off practices" and discouraged Complainant from using her hands when disciplining students. (Tr. 490-91, 497)

39. This meeting was not a form of reprimand or discipline. (Tr. 157-59, 497-98)

40. Complainant did not report to work again after her September 10 meeting with McWhirter. (Tr. 160-61, 505) She formally resigned on September 15, 2008. (Tr. 78-79, 160)

41. Complainant identified several alleged younger, less qualified, similarly situated comparators who were hired by Respondent for probationary teaching positions. (Tr. 162-65; ALJ's Exh. 1; Respondent's Exh. 8) The record shows that all of these comparators, with the exception of Kiera Talley, were appointed to probationary teaching positions more than one year prior to the filing of the instant complaint. (Tr. 288; Respondent's Exh. 8)

42. Marissa Tamburro was the last of these comparators to be appointed to a probationary teaching position. She was appointed on November 15, 2007. (Respondent's Exh. 8)

43. Talley was never appointed to a probationary teaching position. (Tr. 288; Respondent's Exh. 8)

44. Complainant could not identify anyone who was hired by Respondent during the summer of 2008 to a probationary teaching position for elementary school special education. (Tr. 137)

OPINION AND DECISION

Complainant alleged that Respondent failed to hire her for a probationary teaching position on several 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.

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 her are deemed to be discrete acts, the continuing violation doctrine does not apply. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Therefore, any claims that Respondent failed to hire Complainant accruing more than one year prior to July 10, 2009, the date of filing of the instant complaint, are time-barred.

Complainant's discrimination claims began to accrue when she knew or should have known that she suffered an injury. *Braxton v. Erie County Dist. Attorney*, No. 06-CV-311A, 2008 WL 4426021, at *5 (W.D.N.Y. Sept. 25, 2008). Any assertion that Complainant did not have actual or constructive knowledge that Respondent did not hire her for positions she claims to have interviewed for until after July 10, 2008, is self-serving and belied by the record.

The comparators identified by Complainant were appointed to probationary teaching positions well before July 10, 2008. Moreover, the record does not identify any probationary teaching positions for which Complainant was qualified that were available and filled by Respondent during the limitations period.

Because the record does not establish that any alleged acts of age-based discrimination occurred within the statute of limitations time period, Complainant's failure to hire claims are time-barred and must be dismissed.

Complainant also alleged that Respondent retaliated against her for opposing discriminatory practices. Although this appears to be a timely claim, it cannot be sustained.

The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. 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. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

Complainant alleged that Respondent retaliated against her because she told Gesseck that she believed that Respondent discriminated against her based on her age. Complainant has not established a prima facie retaliation claim. She did not show that McWhirter's conduct toward her was related in any way to retaliatory animus. The location of the Level 4 class at Northeast was established well before Respondent assigned Complainant to teach that class in September 2008. Similarly, McWhirter's frequent visits to that class and the school's "hands-off practices" were part of a pattern of administration established by McWhirter before September 2008.

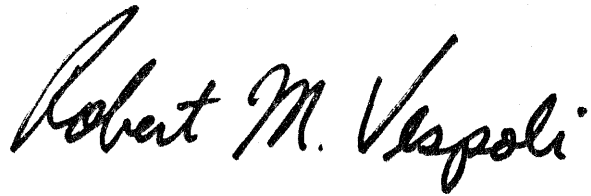
Finally, Complainant cannot show that Respondent constructively discharged her when she resigned on September 15, 2008. The record does not show that Complainant was the victim of discrimination or retaliation and, therefore, cannot support a finding that Complainant "was compelled to quit her job as a result of the employer's discriminatory conduct." *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 78, 436 N.Y.S.2d 231, 234 (1980).

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 has failed to meet her burden.

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: May 30, 2012
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive style with a large, stylized initial 'R'.

Robert M. Vespoli
Administrative Law Judge



NEW YORK STATE
DIVISION OF HUMAN RIGHTS
ONE FORDHAM PLAZA, FOURTH FLOOR
BRONX, NEW YORK 10458

(718) 741-8400
Fax: (718) 741-3214
www.dhr.ny.gov

ANDREW M. CUOMO
GOVERNOR

GALEN D. KIRKLAND
COMMISSIONER

Dear Division User:

In an effort to improve the quality of the services we offer, the Division of Human Rights is conducting a Customer Satisfaction Survey to measure the overall satisfaction of complainants, respondents, and counsel with the Division's process and personnel. You can participate in the Survey by visiting our website, at: www.dhr.ny.gov/survey.html.

Please take a few moments and share your thoughts and ideas by completing our online Customer Satisfaction Survey. Your feedback is critical to ensuring that the Division continues to improve and operates in the most professional, fair, and efficient manner as possible. We thank you for helping in that effort.

Sincerely,

Galen D. Kirkland
Commissioner

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF
HUMAN RIGHTS on the Complaint of

COLEEN ANN VISCO,

Complainant,

v.

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Respondent.

AFFIDAVIT OF SERVICE

Case No.

10134042

STATE OF NEW YORK)
COUNTY OF BRONX) SS:

Angel L. Ponce, being duly sworn, deposes and says, that he/she is over the age of 18 years; that he/she is employed by the New York State Division of Human Rights; that on July 25, 2012, he/she served the within ORDER AFTER HEARING upon:

Complainant

Coleen Ann Visco
182 Woodlawn Avenue
Ronkonkoma, NY 11779

Complainant Attorney

Michael M. McClellan, Esq.
Lefkowitz & Poulos
1770 Motor Parkway, Suite 300
Hauppauge, NY 11749

Respondent

Brentwood Union Free School District
52 Third Avenue
Brentwood, NY 11717

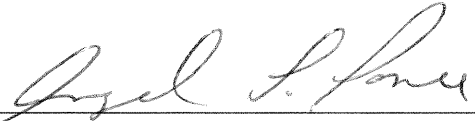
Respondent Attorney

Thomas J. Spellman, Jr., Esq.
Devitt, Spellman, & Barrett, LLP
50 Route 111
Smithtown, NY 11787

Hon. Eric T. Schneiderman, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

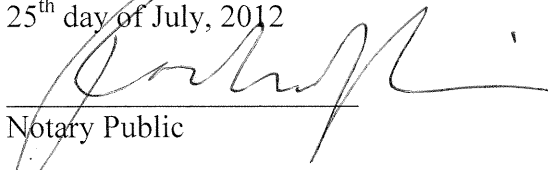
by personally placing true copies of the same, securely enclosed in postpaid wrappers in the post office box/depository under the exclusive care and custody of the United States Postal Service at One Fordham Plaza, Bronx, New York.

Dated: July 25, 2012
Bronx, New York



Angel L. Ponce
Administrative Aide

Sworn before me this
25th day of July, 2012



Notary Public

ROCKWELL J. CHIN
Notary Public in the State of New York
No. 31-4765403
Qualified in New York County
Commission Expires December 31, 2010
2014