SHORT FORM ORDER

INDEX No. 09-31995

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12-7-09
ADJ. DATE 6-2-10
Mot. Seq. # 001 - MotD; CASEDISP

LINDA M. SEGRETO,

Plaintiff,

- against -

GLEN COVE CITY SCHOOL DISTRICT, DR. LAWRENCE W. ARONSTEIN, SUPERINTENDENT OF SCHOOLS, AND MS. DEBORAH L. ALBANESE ASSISTANT OF THE SUPERINTENDENT FOR PERSONNEL,

Defendants.

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COPY

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Upon the following papers numbered 1 to 17 read on this motion to dismiss the complaint; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 8 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 9-13 ; Replying Affidavits and supporting papers 14-15 ; Other (Plaintiff's sur reply)16-17; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by the defendants, Glen Cove City School District (hereinafter School District), Dr. Lawrence (sic) W. Aronstein, Superintendent of Schools (hereinafter Aronstein) and Deborah L. Albanese, Assistant to the Superintendent for Personnel (hereinafter Albanese), for an order pursuant to CPLR §3211 (a)(1) and (8) dismissing the complaint is granted and the complaint is dismissed; and the request pursuant to CPLR §3025(b) for an order permitting the defendants to serve an amended verified answer has been rendered academic by dismissal of the complaint and is denied as moot.

The plaintiff's complaint alleges that she was discriminated against by the defendants in violation of the Age Discrimination in Employment Act (hereinafter ADEA) because she had more than 20 years of experience as a teacher, and although hired pursuant to a contract as a substitute teacher for the period from February 6, 2009 to June 30, 2009, she was not hired for the permanent position as Librarian for the following school year. The first cause of action is for alleged breach of an oral agreement with the defendants. The second cause of action is for a claim of breach of implied promise made to her in which she was advised she would continue as Library Media Specialist for the following school year 2009-2010, but was not given the opportunity to interview for that 2009-2010 position and was not given a permanent probationary position leading to a tenured position because her "more advanced age, experience, and education" required that she be paid a much higher salary. The third cause of action is for wrongful termination from her teaching position. The fourth cause of action is for intentional infliction of emotional distress by the defendants. The fifth cause of action is for punitive damages

because the defendants engaged in a fraudulent pattern of age discrimination against her and School District employees who became too expensive to remain on the School District payroll, filled the position of Library Media Specialist at the Glen Cove Middle School with a substitute teacher, and had no intention of hiring her due to her level on the salary scale.

The defendants seek dismissal of the complaint against Aronstein and Albanese for lack of jurisdiction because they were not personally served in this action; the ADEA claims must be dismissed against the individual defendants as there is no individual liability under the ADEA; the breach of contract cause of action must be dismissed as the plaintiff did not serve a Notice of Claim; the alleged agreement is void under the Statute of Frauds; the alleged agreement is too vague and uncertain to be enforceable; the fraud allegations lack merit under New York law; plaintiff's demand for punitive damages fails to state a claim; and that plaintiff's allegations of intentional infliction of emotional distress fail to state a claim.

In support of motion seq. #001, the defendants have submitted a copy of the summons and complaint with annexed exhibits; a copy of the verified answer; and the affidavits of Aronstein and Albanese.

CPLR §3211 (A)(8) AND LACK OF JURISDICTION

Aronstein and Albanese have both stated in their respective affidavits that each was not personally served a copy of the summons and complaint and that they are each aware of this action because the summons and complaint was served upon their employer, the School District.

Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR §308 (***Estate of Edward S. Waterman v Jones,*** 46 AD3d 63, 843 NYS2d 462 [2nd Dept 2007]). CPLR §308(1) requires that service be attempted by personal delivery of the summons to the person to be served. CPLR §308(2) requires service by delivery to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode. Nail and mail service pursuant to CPLR §308(4) may be used only where service pursuant to CPLR §308(1) or (2) cannot be made with due diligence.

The plaintiff has not submitted any affidavits of service or proof of service demonstrating compliance with any section of CPLR §308 and thus has not demonstrated that personal service was made upon the individual defendants. The affidavit of Anthony Segreto, dated December 4, 2009, does not demonstrate compliance or that due diligence was employed to serve the individual defendants personally.

Accordingly, that part of motion (001) for dismissal of the complaint against the individual defendants, Aronstein and Albanese, is granted for lack of jurisdiction.

CPLR §3211(a)(7)

Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs ***(Leon v Martinez***, 84

NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action ***(Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v State Educ. Dept.,*** 116 AD2d 939, 498 NYS2d 516 [3rd Dept 1986]). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (***Rovello v Orofino Realty Co.,*** 40 NY2d 633, 389 NYS2d 314 [1976]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, supra; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Supreme Court of New York, Rensselaer County 1997]). Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (***Logatto v City of New York,*** 51 AD3d 984, 859 NYS2d 469 [2nd Dept 2008]).

Here, the documentary evidence submitted conclusively establishes a defense to the plaintiff's claims as a matter of law, warranting dismissal of the complaint.

FIRST CAUSE OF ACTION

The first cause of action is for an alleged breach of an oral agreement with the defendants because the plaintiff had been on a long-standing job search and accepted the substitute position with the School District, believing that her salary would be negotiated as an experienced teacher and not at the salary for a substitute teacher. She claims that when she signed her appointment notice, she believed she would be able to negotiate her salary and would be hired for a 2009-2010 position to replace the Librarian for whom she was substituting.

Based upon the evidence submitted, the plaintiffs compliant fails to state a cause of action for breach of an oral agreement as a matter of law. The Regular Substitute Appointment Notice, signed by the plaintiff on February 4, 2009, stated her pro-rated salary would be $56,415.00 commencing February 6, 2009 and ending June 30, 2009. Whatever oral discussions the plaintiff may have had with the defendants, the agreement was reduced to writing and evidences the agreement by the parties. The plaintiff signed the appointment and accepted "the appointment under the conditions set forth."

The remainder of the evidentiary submissions annexed to the complaint do not establish that there was an oral agreement to hire the plaintiff for the 2009-2010 school year for the same position she was hired for under the appointment. If the oral agreement is to put in writing a contract which will require more than a year to perform, it is within the Statute of Frauds and no action will lie for its non-performance (***McLachlin v Village of Whitehall,*** 114 AD315, 99 NYS 721 [3rd Dept. 1906]). Here, the alleged oral agreement for the appointment was reduced to writing signed by the plaintiff and indicated the salary and specific duration of employment as a Library Media Specialist. Any oral agreement for the school year 2009 through June 2010, could not be completed within the year from the date the plaintiff was hired on February 6, 2009 and therefore falls within the Statute of Frauds. Parole evidence is not admissible to show prior oral representation contrary to a plain and unambiguous writing. Where the plain writing is

inconsistent with the alleged prior oral agreement, there is no basis for a claim of estoppel (***Ginsberg v Fairfield - Nobel Corporation,*** 81 AD2d 318, 440 NYS2d 222 [1st Dept 1981]).

The evidentiary submissions establish that in fact the plaintiff was offered to interview for a position as Library Media Specialist for the 2009-2010 school year; however, the position was part-time and the plaintiff refused such interview.

A letter, dated January 27, 2009, from Albanese to the plaintiff advised her that her salary would be Step 1 of the MA column of the Teachers' Salary Schedule for her appointment as a Regular Substitute Library Media Specialist commencing February 6, 2009 and terminating June 30, 2009, or sooner at the discretion of the School District Board of Education.

A memo, dated February 2, 2009, from Albanese to the plaintiff advised her that her appointment as a regular substitute would end on June 30, 2009 and that final staffing decisions for September 2009 had not yet been made due to the uncertainty of teachers returning from leaves, additional retirements, new requests for leaves, finalization of student programs and budget determinations. The memo continued that the plaintiff's candidacy would be given every consideration if an appropriate opening should occur. It further added "However, since we cannot assure you now a place on our staff for next year, you may wish to consider other options and we wanted you to have ample opportunity to do so."

Thus, the plaintiff has not established breach of an oral agreement that she would be hired as the full-time Library Media Specialist for the 2009-2010 school year. Such agreement which could not be performed within one year from February 6, 2009 is precluded by the Statute of Frauds. Further, the claim that there was an oral agreement for full-time employment for the 2009-2010 school year is belied by the admissible documentary evidence annexed to the plaintiff's complaint and the letter, dated January 27, 2009, and the memo, dated February 2, 2009, both from Albanese.

Accordingly, the first cause of action is dismissed as a matter of law.

SECOND CAUSE OF ACTION

The second cause of action is for an alleged implied promise that the plaintiff would be hired as a full-time permanent employee for the 2009-2010 school year and that the defendants failed to fulfill that promise.

"Recovery under the theory of promissory estoppel is not dependent on the existence of a contract or the particulars of consideration in the classic sense. A promissory estoppel action arises out of a breached promise in circumstances under which it is fair to hold the promisor to the terms of his promise. The doctrine is often thought of in terms of detrimental reliance, but more recently has been seen as grounded in a theory of promise.... In New York, promissory estoppel has had only tentative application. Promissory estoppel is made out by a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance" (***LAHR Construction Corp. d/b/a LeCesse Construction Company v Kozel & Son, Inc.,*** 168 Misc2d

759 [Supreme Court of New York, Monroe County 1996]). "An estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury; and indeed, a party may not, even innocently, mislead an opponent and then claim the benefit of his deception" (***Hover v Claverack Gange No. 934,*** 46 Misc2d 114 [Supreme Court of New York, Columbia County 1965]). "With respect to the doctrine of promissory estoppel, a promise which is expected to induce action by the promise, and does induce the action, is binding if injustice can be avoided only by enforcing the promise. Such promise may be invoked only where the aggrieved party can demonstrate the existence of a clear and unambiguous promise upon which he or she has reasonably relied, thereby sustaining injury.... Promissory estoppel is available only where a party reasonably relies on the promise, and it would be unconscionable to deny enforcement of the oral agreement" (***Kotlyarsky et al v New York Post et al,*** 195 Misc2d 150 [Supreme Court of New York, Kings County 2003]).

While many exhibits have been attached to the complaint, none of the exhibits states a promise to hire the plaintiff for a full-time position for the 2009-2010 school year. Nor do plaintiff's exhibits establish that she sustained injury by giving up other employment in reliance upon her expectations of the 2009-2010 position as Library Media Specialist.

The exhibits attached include the following:

The letter from Albanese, dated May 29, 2009, stating the plaintiff's attributes and a recommendation for any position for which she is qualified; the letter, dated June 1, 2009, from Craig S, Johnson, Assistant Principal, recommending the plaintiff for employment as a librarian; the evaluation form, dated June 3, 2009, referring to the plaintiff being "commended for her extensive planning and attention to detail in her lesson. I look forward to observing her share her knowledge and skills with the students in the future." ; the Annual Evaluation Report of June 17, 2009, signed by Aronstein, stating, "As we look forward to next year, Ms. Segreto is asked to develop her lessons with current educational theory. Next year, Ms. Segreto will be asked to take a deeper look into her essential and guiding questions throughout her planning.... Furthermore, I look forward to Ms. Segreto implementing specific strategies in her classroom next year...." ; the plaintiff placed a handwritten note under Teacher Comment, "I was so looking forward to returning next year." ; the Observation report of Anael Alston, Principal, dated May 7, 2009, stating "I would like to see you teach library/research skills in the intergraded areas they are working on." ; The memo, dated February 2, 2009, from Albanese to Segreto advising that her appointment as a regular substitute would end on June 30, 2009 and that no final decisions for September 2009 staffing positions had yet been made due to the uncertainty of teachers returning from leaves, etc., (as stated above in the Court's decision on the plaintiff's first cause of action).

The plaintiff does not dispute that she was offered an interview for the part-time position as a Library Media Specialist for the 2009-2010 school year and that she declined the same. None of the writings submitted establish an implied promise invoking promissory estoppel as a matter of law. None of the writings indicate any job offers for the full-time Librarian position which she held as a substitute, and merely demonstrate a willingness to hire the plaintiff for a position for which she was qualified. When offered to interview for the position as a part-time Library Media Specialist, she declined the offer although qualified.

Based upon the exhibits submitted in support of the complaint, the plaintiff has not established that any promises were implied or that a promise was made for her to be hired as the full-time permanent Library Media Specialist for the 2009 through 2010 school year. In fact, the plaintiff's submissions establish that she was not at any time promised a full-time position as a Library Media Specialist position or Librarian.

Accordingly, the second cause of action is dismissed.

THIRD CAUSE OF ACTION

The third cause of action is for a claim of wrongful termination wherein the plaintiff alleges that she was terminated from her position causing her to sustain monetary and non-monetary damages.

Although the plaintiff asserts that she was "terminated" based upon the evidentiary submissions, she was hired for a certain period of time and completed that period of employment as stated in the agreement. There has been no evidence submitted to demonstrate that the plaintiff was hired for a greater period of time and that her employment was terminated prior to the completion of the terms of the agreement.

In a cause of action for breach of contract the plaintiff must allege "(1) formation of a contract between the plaintiff and the defendants; (2) performance by the plaintiff; (3) defendants' failure to perform; and (4) resulting damage.... In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based and the pleadings must be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved as well as the material elements of each cause of action or defense.... Vague or conclusory allegations will not suffice" (***Barker v Time Warner Cable, Inc, et al,*** 24 Misc 3d 1213A [Supreme Court of New York, Nassau County 2009].

Here the plaintiff has submitted "A Regular Substitute Appointment Notice" signed by Janet Bates Wilkins, Clerk, approved by Aronstein and Albanese and accepted by the plaintiff for the period from February 6, 2009 ending June 30, 2009, as a substitute teacher in the position of Library Media Specialist (Reg.). The plaintiff has established an agreement between herself and the defendants for a fixed term of employment ending June 30, 2009. The plaintiff asserts that she completed this term of substitute employment. Therefore, she has not established there was a breach of agreement with regard to her substitute position or that her employment was wrongfully terminated. Nor has she established that there was ever a contract for the full-time 2009-2010 Library Media Specialist position.

Accordingly, the third cause of action for wrongful termination of employment is dismissed with prejudice.

FOURTH CAUSE OF ACTION

The fourth cause of action is for the intentional infliction of emotional distress wherein the plaintiff claims that she has suffered severe emotional trauma based upon the termination of her employment and the actions of the defendants.

The tort of intentional infliction of emotional distress consists of four elements: extreme and outrageous conduct; intent to cause, or disregard of a substantial probability of causing, severe emotional distress; a causal connection between the conduct and injury; and severe emotional distress. Liability has been found for intentional infliction of emotional distress only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (see, ***Andrews v Bruk,*** 720 AD2d 376, 631 NYS2d 771 [2nd Dept 1995]).

The plaintiff has not demonstrated that she was wrongfully terminated or had a contract, either oral or written, for employment which was breached by the defendants. The fact that the plaintiff was offered to interview for a part-time position as a Librarian is not extreme or outrageous, nor does it transcend all possible bounds of decency. The acts of the defendants are not deemed to be atrocious and utterly intolerable. The plaintiff was offered to interview for a part-time position as a Librarian, which position was vacated by the teacher, Carol Gaughran (hereinafter Gaughran), who already had permanent status and was working part-time for 2 years, waiting for a full-time position to open up for her. Gaughran is deemed to have had seniority over the plaintiff who was hired only as a substitute Librarian for a stated period of time. The plaintiff had no prior employment history with the School District and was not a permanent employee. Consequently, the plaintiff has failed to state a cause of action for the intentional infliction of emotional distress.

Accordingly, the fourth cause of action is dismissed.

FIFTH CAUSE OF ACTION

The fifth cause of action is for punitive damages because the defendants engaged in a fraudulent pattern of age discrimination in violation of the ADEA, in that the defendants discriminated against School District employees who became too expensive to remain on the School District payroll, and that the defendant filled the position of Library Media Specialist at the Glen Cove Middle School with a substitute teacher not certified as a Library Media Specialist, paid as a substitute teacher at the rate of $108.00 per day. The plaintiff further alleges that the School District had no intention of hiring her due to her level on the salary scale.

ADEA makes it unlawful for an employer, including a state or political subdivision of a state, to discharge an individual over 40 years of age "because of such individual's age," 29 USC §§623(a), 631(a) (***Savarese, Jr. v Crosson et al,*** 150 Misc2d 180, 573 NYS2d 607 [Supreme Court of New York, Queens County 1991]). The elements of an age discrimination claim under the Human Rights Law, NY Exec. Law §296, and the ADEA are essentially the same and courts apply the same standards for analyzing age discrimination claims under both statutes (***Brannigan et al v Board of Education of Levittown Union Free School District***, 18 AD3d 787, 796 NYS2d 690 [2nd Dept 2005]). To establish a prima facie case of discrimination, plaintiff must show that she is (1) a member of a protected class, (2) was qualified for the position held, (3) suffered an

adverse employment action, and (4) the surrounding circumstances gave rise to an inference of discrimination (***Francis v Elmsford School District et al,*** 2006 US Dist Lexis 32066, 98 Fair Empl Prac Cas [United States District Court for the Southern District of New York 2006]).

To establish a cause of action alleging fraud, a plaintiff must demonstrate (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations; and (4) that the plaintiff was injured as a result of the defendant's representations (***Brannigan et al v Board of Education of Levittown Union Free School District***, supra).

Based upon the plaintiff's complaint and exhibits and affidavits annexed thereto, the plaintiff has failed as a matter of law to state a cause of action for a fraudulent pattern of age discrimination.

The plaintiff has not stated a cause of action for fraud in that the evidentiary submissions establish that the defendant made no material misrepresentations to the plaintiff. The memo, dated February 2, 2009, from Albanese to the plaintiff clearly advised the plaintiff that her appointment as a regular substitute would end on June 30, 2009 and that final staffing decisions for September 2009 had not yet been made. The memo further indicated that staffing would be finalized over the next few months; and that the plaintiff's candidacy would be given every consideration if an appropriate opening should occur. Accordingly, as a matter of law the defendants were not engaged in a fraudulent pattern of making material misrepresentations to the plaintiff.

Further the defendants were not engaged in a pattern of fraudulent discrimination based upon age. The plaintiff's descriptions of others who were in the same situation and were discriminated against refers to Rosina Savarese (hereinafter Savarese), a teacher, who 4 years prior, was not hired back due to her step on the salary scale; and Leslie Jensen (hereinafter Jensen) who worked as a full time substitute teacher for many years without being hired as a probationary teacher due to her step on the salary scale. While these claims may reflect budget matters and salaries, the allegations do not support a claim of age discrimination. In fact, the evidentiary submissions annexed to the plaintiff's complaint reveal that Savarese was first hired as a part-time Special Education teacher in September 2002 and held that position for 3 years, was paid pursuant to the Collective Bargaining Agreement; in the 2005-2006 school year, Savarese was offered the position of a regular substitute at a salary for the substitute position Step 1 of the Master's schedule (same as the plaintiff). However, she declined the position. Jensen is presetly employed by the School District as a tenured teacher, originally hired in January 1999 as a substitute teacher. She was appointed in 2001 as a probationary teacher full time, a permanent teacher subject to 3 years probationary appointment; and is a tenured teacher since 2004 with all the benefits and salary. Jensen was hired at age 49.

Additional evidentiary submissions annexed to the complaint set forth that the School District employs approximately 281 teachers; 60% of those teachers are age 40 or older; 76 teachers are age 40 or older; 61 are age 50 or older; 24 are age 60 or older; and the oldest teacher is 72 years of age. Therefore, the documentary evidence submitted with the plaintiff's

complaint does not establish that the School District engaged in a fraudulent pattern of age discrimination.

The "Action Approving Substitute Teacher Salary Schedule for the 2009-2010 School Year" provided, inter alia, that if a "substitute teaches more than 30 consecutive work days for the same teacher, s/he will be appointed as a regular substitute and placed on step 1 salary." The letter, dated January 27, 2009, from Albanese to the plaintiff advised her that her salary would be Step 1 of the MA column of the Teachers' Salary Schedule for her appointment as a Regular Substitute Library Media Specialist commencing February 6, 2009 and terminating June 30, 2009, or sooner at the discretion of the School District Board of Education. The plaintiff has not asserted that she tried to negotiate her salary before entering into the contract for the substitute position and she signed the agreement without stating reservations concerning the salary at which she was hired or the desire to negotiate the same.

A substitute teacher is one who is employed in place of a regularly appointed teacher who is absent but is expected to return (***DiPiazza v Board of Education of the Comsewogue Union Free School District,*** 214 AD2d 729, 625 NYS2d 298 [2nd Dept 1995]). A regular substitute is one who takes over the class of another teacher on a permanent basis, that is, under circumstances where the regular teacher has been given a definite leave of absence (***Axel et al v Board of Education of the City of New York et al,*** 56 AD2d 598, 391 NYS2d 457 [2nd Dept 1977]). A school board is free to determine whether to appoint a particular person to a particular position, and it is under no obligation to appoint a substitute teacher employed in the district to a regular position simply because that teacher subsequently is licensed as a regular teacher, except insofar as such appointment may be mandated by contract or some other provision of law (***Ricca v Board of Education of the City School District of the City of New York et al,*** 47 NY2d 385, 418 NYS2d 345 [1979]). In the instant action, the plaintiff's claims, and documentary submissions do not establish that the School District had to appoint her as mandated by contract or law. There was no existing contract for the plaintiff to continue teaching upon the completion of her term of appointment on June 30, 2009.

The plaintiff's complaint and annexed exhibits reveal that the plaintiff completed her temporary employment as an appointee substitute teacher (Library Media Specialist) through June 30, 2009. There were no other agreements pending. Thereafter, she was not offered the permanent full-time position as a Library Media Specialist, which position was given to another teacher with permanent status and seniority. The submissions reveal she was offered to interview for a part-time position as a Library Media Specialist. The documentary exhibits annexed to the complaint reveal that the person hired for the 2009-2010 school year as a Library Media Specialist was Gaughran, who was already employed by the School District as a permanent employee, part-time media specialist, for 2 years prior to the opening for the position the plaintiff claims she was denied. Neither the plaintiff nor Gaughran were interviewed for the position. Gaughran was selected for the position as she had seniority over the plaintiff. The plaintiff was invited to interview for Gaughran's part-time position which provided benefits. However, she declined and was thereafter given a letter of recommendation for obtaining employment elsewhere.

The plaintiff's submissions do not support that she was discriminated against based upon her age as she was offered an interview for Gaughran's prior position and refused the same.

Gaughran was offered the full-time position based upon having seniority as a permanent employee employed as a Library Media Specialist. There is nothing in the record to establish that the plaintiff was terminated or not offered the position due to her age,[1] or that her employment as a substitute teacher from February 6, 2009 through June 30, 2009 gave her seniority over Gaughran. In fact Education Law §2509 1. (a) provides in pertinent part that "Teachers and all other members of the teaching staff... shall be appointed by the board of education, upon the recommendation of the superintendent of schools for a probationary period of three years, except that in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years and has been appointed to teach the same subject in day schools on an annual salary, the probationary period shall be limited to one year...." In the instant action, the plaintiff was appointed to work pursuant to the contract from February 6, 2009 to June 30, 2009 (see, ***Robbins v Blaney et al,*** 87 AD2d 39, 451 NYS2d 853 [3rd Dept 1982]). Unlike a regular teacher, a substitute teacher has no vested right to continued employment, but is entitled to the protection of the Human Rights Law (***Roslyn Union Free School District et al v State Division of Human Rights, et al,*** 72 AD2d 808, 421 NYS2d 915 [2nd Dept 1979]; see, ***Axel et al v Board of Education of the City of New York et al,*** *supra*, wherein it was stated that by statute, the abolition of a teaching position compelled the layoff of the teacher having the least seniority in the system within the tenure of the position abolished.

Therefore, as a matter of law, the complaint fails to state a cause of action for a fraudulent pattern of age discrimination in violation of the ADEA.

Accordingly, the fifth cause of action is dismissed and the complaint is dismissed in its entirety.

LEAVE TO AMEND ANSWER

The defendants seeks to serve an amended answer pursuant to CPLR §3025 (b) which provides that leave shall be freely given permitting a party to amend or supplement a pleading (***Llama v Mobile Service Station,*** 262 A.D.2d 457, 692 N.Y.S.2d 987 [2nd Dept 1992]). Here, the defendants have failed to submit a copy of the proposed amended answer with an affidavit of merit or evidentiary proof. However, in light of dismissal of the complaint, the application to amend the answer is rendered academic.

Accordingly that part of motion (001) which seeks leave to serve an amended answer is denied as moot.

Dated: October 21, 2010

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

[1] The plaintiff was born July 2, 1948.