NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of EUGENIA C. JOYNER, Complainant, v. FEDEX EXPRESS CORPORATION, Respondent.	**NOTICE AND FINAL ORDER** Case No. 10110793

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, 2008, by Thomas S. Protano, 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: JUL 01 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

EUGENIA C. JOYNER,
Complainant,

v.

FEDEX EXPRESS CORPORATION,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10110793**

SUMMARY

Complainant, an African-American former employee of Respondent has alleged that she was discriminated against and harassed because of her race, retaliated against after she complained and, ultimately, forced to retire early because of the discrimination. Respondent denied all allegations of discrimination and retaliation. Complainant has failed to prove her claim and the case must be dismissed.

PROCEEDINGS IN THE CASE

On March 20, 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.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 3, 2008 and March 4, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Ross P. Solomon, Esq. Respondent was represented by Terrence O. Reed, Esq.

Permission to file post-hearing briefs was granted. Attorneys for Complainant and Respondent filed timely submissions.

FINDINGS OF FACT

1. Complainant is African-American. She was hired by Respondent in 1985. (ALJ Exhibit 2; Tr. 7) From 2003 through December 31, 2006, she worked at Respondent's Newburgh, New York location. (Tr. 25)

2. Complainant was a customer service agent. Her duties included assisting customers with their packages and processing and routing the packages. (Tr. 8)

3. When Complainant moved to Respondent's Newburgh location in August 2003. she had difficulty adjusting to her new work location. She received a 5.0 rating on her 2004 evaluation. It was the lowest rating Complainant had ever received. (Complainant Exhibit 1; Tr. 159-60)

4. Complainant improved in 2005 and received a 5.7 rating. In 2006, she received a 6.2 rating. (Complainant Exhibit 1; Tr. 159-60)

5. Based upon her evaluation ratings, Complainant received three per cent raises in 2005, 2006 and 2007, which was the maximum allowable wage increase for an employee in Complainant's job title and salary level. (Tr. 584-86)

6. In or about July 2005, the uniform of Captain Eric Brown, of West Point, was brought to Respondent's Newburgh station to be shipped to Capt. Brown's hotel in Washington, D.C. The package was received by Complainant. (237-37)

7. Respondent subsequently lost Capt. Brown's package. When Caron Hadge, senior manager, asked Complainant if she new anything about the package, Complainant became upset. She felt that Hadge discriminated against her, even though Hadge simply asked Complainant about the lost package. After Complainant accused Hadge, Hadge reported the complaint to Jack Mackin, human resources manager. Complainant was never blamed for the loss of the package and was not disciplined in any manner. (Tr. 238-39, 370, 452)

8. Complainant further accused Hadge of calling one of Complainant's co-workers, Dominick Lucera, a "Nazi Guinea." (ALJ 2; Tr. 412) Hadge did not make the comments. She denied the allegations and Lucera denied hearing the comment, although Complainant claimed Lucera was present when the comment was made. (Tr. 219, 263)

9. In 2003, Complainant alleges, Lucera said anyone who can't speak English should leave the country. Lucera credibly denied making the remark. (Tr. 31, 263)

10. Complainant also alleged that other co-workers made offensive remarks. She asserted that Joann Mendola called a Jewish customer "Eli" or "Moishe." Mendola denied making any such statements. Although Complainant asserted Mendola was present when Hadge allegedly called Lucera a "Nazi Guinea," Mendola said she never heard the phrase. (Tr. 549-50) Complainant also claimed that in 2003 another co-worker said "those people" who live on a particular street "don't answer their doors." Complainant was offended by that statement. (Tr. 117) Complainant further accused a co-worker, Shane Ferreira, of calling an Asian customer a "chink," but Ferreira credibly denied the allegation. (Tr. 411, 485)

11. Complainant never complained about the comments or harassment to Respondent's human resources department or management, other than the verbal complaint she made to Hadge. Respondent has an internal complaint process, with which complainant was familiar. (Tr. 219, 423-24, 573-75) In fact, no one has ever complained to human resources about discrimination or harassment at Respondent's Newburgh location. (Tr. 567)

12. During her tenure at the Newburgh station, Complainant did not get along with her co-workers. Her co-workers found her to be uncooperative and they noted that when they asked Complainant for help, she generally ignored their requests and began singing "The Itsy-Bitsy Spider." (Tr. 28, 226, 266, 292)

13. Customers also complained about Complainant. They said Complainant was rude, unprofessional and uncooperative. (Complainant Exhibit 14; Tr. 226, 264, 365)

14. Irene Cooper, an African-American customer service agent, found her white co-workers were helpful to her. (Tr. 203) She did not have any problems with Hadge or with Michalene Lucas, operations manager. (Tr. 209)

15. In 2005, Complainant was counseled for a clerical error, known to Respondent as a "batch error." She asserts that white employees were not counseled for batch errors, but produced nothing to substantiate that claim. (Tr. 466-67) In fact, white employees were counseled for batch errors. (Tr. 553-54) Respondent does not consider a counseling to be disciplinary in nature. (Tr. 570)

16. Prior to a scheduled audit in 2005, Hadge changed the passwords of several employees who had access to Respondent's network, so that the passwords would comply with Respondent's criteria. Complainant's password was one of those changed. Hadge changed all passwords that were non-compliant, without giving the users prior notice. Hadge chose

ODETTA for Complainant's password because Hadge said she and Complainant had discussed the folk singer, Odetta. Complainant denied discussing Odetta with Hadge and felt "insulted" by this incident. (Tr. 240-41, 400)

17. In August of 2008, Complainant received a warning from Lucas for failing to follow her schedule. Complainant alleges her schedule was changed without her knowledge. (Complainant Exhibit 6; Tr. 132, 142-44) Complainant understands that checking her schedule was her responsibility. (Tr. 491) Complainant failed to follow her posted schedule on four consecutive days. (Complainant Exhibit 6)

18. Complainant attempted to contest this warning through Respondent's guaranteed fair treatment (GFT) program, which is similar to a grievance. Complainant filed her GFT beyond the five-day limit and, as a result, her GFT was not considered. (Tr. 144)

19. In December 2005, Complainant alleged that Respondent failed to pay her for overtime she worked. Complainant complained about that but Respondent did not make any adjustments. (Tr. 337-38) Complainant's testimony and the evidence in the record do not establish that this allegation is true. Therefore, this allegation is not supported and cannot be credited. (Complainant's Exhibit 10; Tr. 465)

20. Respondent has a "finders keepers" program that rewards employees who solicit new customers. (Tr. 339-40) Complainant received money for finding new customers for Respondent. (Tr. 341) Karima Blaize administered the program in Newburgh but, when she left Respondent's employ, the program ceased. (Tr. 342) This affected any employee who submitted a lead for a new customer. (Tr. 520)

21. On December 31, 2006, Complainant retired from her employment with Respondent. (Respondent Exhibit 5; Tr. 302, 418) Complainant said she retired because of the stress of

working in Respondent's Newburgh location and would have otherwise continued to work for Respondent until 2009. (Tr. 418-19)

OPINION AND DECISION

Complainant alleges she was denied equal terms conditions and privileges of employment and harassed because of her race while working for Respondent. She also alleges that she was retaliated against for having complained of discriminatory practices.

In order to prove a claim of racial harassment, Complainant must show that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant in this case does not establish a claim for harassment. She makes allegations of a few isolated comments that were not directed towards her or African-Americans in general. They were, for the most part, alleged to have been made more than one year prior to the filing of the instant complaint and are, therefore, time barred. Human Rights Law § 297.5. There is no evidence that these comments are part of a continuing violation that would have continued into the statute of limitations period. Moreover, the allegations have been credibly denied by Respondent's witnesses and there is no reason to credit Complainant's testimony over their testimony. Thus, the Complainant cannot prove that her working environment was so abusive as to alter her working conditions.

In order to prevail on a complaint of race discrimination or retaliation, Complainant must first make out a prima facie case. To establish a claim for race discrimination, Complainant must show (1) that she was a member of a protected class; (2) that she was capable of performing the duties of the job in a reasonable manner; (3); that Complainant suffered an adverse employment action, and (4) that this occurred under circumstances which would lead one to infer that she had been discriminated against. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 28-29 (1997); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Burlington Industries v. New York City Human Rights Commission*, 82 A.D. 2d 415, 441 N.Y.S.2d 821 (1st Dept. 1981), *aff'd,* 58 N.Y.2d 983, 447 N.E.2d 1281, 460 N.Y.S.2d 920 (1983). To establish a claim for retaliation Complainant must show that (1) she engaged in activity protected by Human Rights Law § 296, (2) Respondent was aware that she participated in the protected activity, (3) she suffered from an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing Dortz v City of New York*, 904 F Supp 127, 156 (1995).

Complainant in this case cannot establish a prima facie case for either race discrimination or retaliation because she cannot show that she suffered any adverse employment action. She was disciplined just one time, via warning memo, during her entire tenure in the Newburgh station. A simple warning memo does not constitute an adverse employment action. An adverse employment action requires a showing of a "materially adverse change" in employment status, such as "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Messinger v. Girl Scouts of the*

U.S.A., 16 A.D.3d 314, 315, (1st Dept. 2005); *Feteiha v. NYC HRA*, DHR Case No. 9000615 (May 16, 2006).

Complainant has made no showing that she suffered a materially adverse change in her employment at any time. She was not disciplined for Capt. Brown's uniform; she was not singled to have her password changed; she was never disciplined for any customer or co-worker complaints; and the batch error counseling was not disciplinary. The pay discrepancies she alleges with respect to overtime have not been credited and, even if she had been able to prove them, there is no connection made between these issues and Complainant's race; and the cessation of the finders keepers program affected every employee who entered new leads. Most significantly, Complainant received the maximum allowable raise every year during her tenure in Newburgh. The actions taken by Respondent can hardly be considered to have created a materially adverse change in Complainant's working environment.

Additionally, with respect to retaliation, Complainant did not make a formal internal discrimination complaint during her tenure in Newburgh. Her informal complaint to Hadge was lodged in July 2005. The events that occurred before that date, by definition, cannot be retaliatory. The events that occurred after July 2005 do not constitute retaliation.

Complainant also claims she had to retire because of the stress she felt while working in Respondent's Newburgh location. In order to prevail on a claim of constructive discharge Complainant must present credible evidence that would "compel a finding of deliberate actions...to make her working conditions so intolerable that a reasonable person in her position would feel compelled to resign." *Mountleigh v. The City of New York*, 191 A.D.2d 291, 292, 595 N.Y.S.2d 26, 27 (1st Dept. 1993), *leave to appeal denied,* 83 N.Y.2d 753, 612 N.Y.S.2d 108 (1994). Complainant has not made such a showing. To the contrary, the record shows that

Complainant suffered no discrimination or adverse employment actions; she received maximum salary increases; and her evaluation ratings got progressively better throughout her tenure in Newburgh.

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: May 30, 2008
Bronx, New York

Thomas S. Protano
Administrative Law Judge