NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ANGELA M. KING,

Complainant,

v.

THE SALVATION ARMY, A NEW YORK CORPORATION,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10111501

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 January 30, 2009, by Lilliana Estrella-Castillo, 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 21 2009
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

ANGELA M. KING,

Complainant,

v.

THE SALVATION ARMY, A NEW YORK CORPORATION,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10111501**

SUMMARY

Complainant, a Sabbath observer, alleged that Respondent unlawfully discriminated against her when it asked her whether she could work on her Sabbath. Respondent did not unlawfully discriminate against Complainant when, on one occasion, Respondent asked whether she could work on a Saturday. Complainant also failed to sustain her burden of proof that her performance was unfairly evaluated because of an unlawful discriminatory motive.

PROCEEDINGS IN THE CASE

On May 2, 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 Lilliana Estrella-Castillo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 4, February 5, and May 30, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Molly Doherty, Senior Attorney, of Counsel on February 4 and 5, 2008. The Division was represented by Aaron Woskoff, Senior Attorney, of Counsel on May 30, 2008. Respondent was represented by Schwartz & DeMarco LLP, by Matthew J. DeMarco.

Respondent's submission, proposed findings of fact and conclusions of law, was received, considered, and where appropriate, adopted. The Division did not make a submission.

FINDINGS OF FACT

1. Complainant is African-American and a Seventh-day Adventist. (Tr. 9; ALJ Exhibit 1)

2. Complainant's religion requires that she observe the Sabbath, which begins at sunset on Friday and ends at sunset on Saturday. (Tr. 9)

3. Respondent is a Protestant church engaged in preaching the gospel and doing charitable work. (Tr. 406).

4. On March 10, 1997, Respondent hired Complainant as the Lead Tailor in the Supplies and Purchasing Department. (Tr. 11-12, 15, 305-06)

5. Complainant was interviewed by Penelope DePriest, Merchandise Manager, who recommended that Complainant be offered the position of Lead Tailor, with full knowledge that Complainant was a Sabbath observer and was not available to work on Saturdays, as required by the Lead Tailor position. (Tr. 12, 305-06)

6. DePriest has been Complainant's supervisor during Complainant's entire tenure with Respondent. (Tr. 16) DePriest is not a Seventh-day Adventist and is Caucasian. (Tr. 89)

7. DePriest's immediate supervisor and the head of the Purchasing and Supplies Department was Major James Shotzberger. (Tr. 16) Major Shotzberger is not a Seventh-day Adventist and is Caucasian. (Tr. 405-407)

8. The Purchasing and Supplies Department consisted of three African-Americans, two Caucasians, and one Cuban. (Tr. 124) Complainant was the only Seventh-day Adventist in her department. (Tr. 124-25)

Sabbath Observance

9. Complainant alleged that DePriest unlawfully discriminated against her because DePriest would ask Complainant to work on her Sabbath about one to three times per year. (Tr. 23-24, 103, 105) DePriest never said anything about Complainant's religion, and although they are no longer "close" they continue to share the same lunch table. (Tr. 22-23)

10. On one occasion, Major Shotzberger asked DePriest to ask Complainant whether Complainant would be able to work on a Saturday because the other tailor was in the hospital. (Tr. 335) Complainant said "no" and Respondent did not require that she work, nor was she disciplined. (Tr. 107, 336)

11. When Major Shotzberger became aware that Complainant was a Sabbath observer, Respondent reduced its religious accommodation to Complainant in writing. (Tr. 409-10) On April 25, 2002, Respondent informed Complainant that Respondent will not require her "to work from sundown Friday to sundown Saturday while you are observing your Sabbath. This is an exception to standard operating procedure and is granted to you solely, notwithstanding the Lead

Tailor job description, for the duration of your employment as Lead Tailor [with Respondent]." (Respondent's Exhibit 10)

Personal time Off

12. Complainant presented a total of thirteen requests for personal time off as evidence that she was denied leave approval, while others, not in her protected classes, were freely granted the time requested. (Complainant's Exhibit 3) The forms produced were for the years 1998, 1999, two for 2000, two for 2002, three for 2004, and one for 2005. (Tr. 109-119; Complainant's Exhibit 3)

13. Respondent denied only three of the thirteen requests submitted. During the course of Complainant's employment, she submitted other requests that were granted. (Tr. 108) Other employees, not in her protected classes, were denied time off for similar reasons. (Tr. 119)

Docking of pay for Lateness

14. Complainant alleged that on February 23, 2001, her pay was docked because she was three and one half hours late, but that a co-worker, not in her protected classes, was not docked pay for a similar lateness on that same day. (Tr. 48-51; Joint Exhibit 14) However, the evidence produced indicated that both employees were docked pay for being late on February 23, 2001. (Tr. 231-34, 244; Respondent's Exhibit 5)

Granting of Vacation

15. Complainant also alleged that another employee, David Vanderweele, who was not in her protected classes, received favorable treatment when he was allowed to take vacation during Respondent's "black out" period. (Tr. 59-60, 136) The black out periods were dates between September 15 and December 15, during which employees are not approved for vacations.(Tr. 59)

16. Complainant was treated more favorably than Vanderweele. (Respondent's Exhibits 3 and 4) Both were married during a black out period, Complainant in October 2001, and Vanderweele in October 2005, Complainant was approved for three weeks, while Vanderweele was approved for one week. (Tr. 134-36, 226-29, 346-47; Respondent's Exhibits 3 and 4)

Annual Evaluations and Merit Based Wage Increases

17. Complainant alleged that her performance, time and attendance were all satisfactory and she had no disciplinary write-ups against her. (ALJ Exhibit 1) Complainant further alleged that when she received an unsatisfactory performance evaluation in 2006, which resulted in no merit salary increase, it was the result of unlawful employment discrimination. (ALJ Exhibit 1)

18. DePriest was responsible for preparing all of Complainant's performance evaluations since March 1998. (Tr. 33, 312; Joint Exhibits 4 through 12)

19. Complainant does a "wonderful job" as a tailor. (Tr. 221) Therefore, it was not the quality of her work that affected her evaluations, it was her attitude. (Tr. 384)

20. Complainant's performance evaluations show that starting with her second year of employment she developed a pattern of argumentative behavior with her supervisor and customers. (Joint Exhibits 4 through 12) Complainant has also been issued written and verbal warnings which Complainant refused to acknowledge. (Tr. 66-67, 71-78, 90-91, 93-97; Respondent's Exhibits 1, 15, 16)

21. Complainant's argumentative behavior was noted in all her performance evaluations, including the 2004 evaluation, in which DePriest recommended that Complainant's employment be terminated commenting that Complainant's "hostility, arrogance and verbal abuse towards Supervisor continues despite on-going reviews noting this unacceptable behavior." (Joint Exhibit 6)

22. Complainant's lateness was also noted in Complainant's evaluations as well. (Joint Exhibits 4-12)

23. In 2006, Complainant's performance was rated unsatisfactory and, once again, DePriest recommended that Complainant's employment be terminated. (Joint Exhibit 6) Complainant was also not awarded a merit increase. (Joint Exhibit 6)

24. Complainant did not receive a merit increase as a result of the unsatisfactory evaluation. Similarly, in 2003, when Complainant was rated unsatisfactory in two areas, marginal in other areas, she did not receive a merit increase. (Joint Exhibit 7)

25. Major Shotsberger did not accept DePriest's recommendations that Complainant's employment be terminated in 2004, nor in 2006. (Tr. 431-32)

26. Complainant based her allegation that the evaluation in 2006 was based on unlawful discrimination because Major Shotzberger was present when DePriest presented her with the 2006 evaluation, and he looked at Complainant "real mean and nasty." (Tr. 40-41)

27. DePriest asked Major Shotzberger to be present during the evaluation because she did not want to be verbally abused by Complainant and felt that Complainant would refrain from such behavior if Major Shotzberger was present in the room. (Tr. 41, 310, 419).

28. Other employees, not in Complainant's protected classes, were also denied merit increases during Complainant's employment with Respondent as a result of their performance evaluations. (Respondent's Exhibit 6)

29. Complainant did not rebut Respondent's evidence, but countered that those employees did not receive merit increases because of "concocted charges." (Tr. 86-87, 107, 137) Complainant did not produce any proof to support this allegation.

30. Complainant continues to be employed by Respondent. (Tr. 10)

OPINION AND DECISION

It is an unlawful discriminatory practice for any employer "to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath. . . ." Human Rights Law § 296.10.

Complainant is a Seventh-day Adventist and a Sabbath observer. When Respondent hired Complainant it was aware of Complainant's Sabbath obligations and agreed to accommodate her religious obligations, although the Lead Tailor position required some work on Saturdays. Respondent did not violate the Human Rights Law when it asked Complainant once whether she would work on a Saturday. Complainant said that she would not, and Respondent did not require that she work, nor was Complainant disciplined. On the contrary, in an effort to avoid a similar incident in the future, Respondent made its religious accommodation to Complainant in writing.

The Human Rights Law § 296 (1) (a) makes it an unlawful discriminatory practice for an employer "because of . . . race . . . creed . . . to discriminate against an individual in compensation or in terms, conditions or privileges of employment." Such claims, to be actionable, must be filed with the Division "within one year after the alleged unlawful discriminatory practice." Human Rights Law § 297 (5); *Matter of Queensborough Community Col. of City of N.Y. v. State Division of Human Rights Appeal Bd.*, 41 N.Y.2d 926 (1977). However, "if the alleged unlawful discriminatory practice is of a continuing nature, the date of its occurrence shall be deemed to be any date subsequent to its inception, up to and including the

date of its cessation." 9 NYCRR § 465.3 (e)

All the claims that arose prior to May 2005, are time barred, and are not actionable because Complainant failed to file a complaint within the required statutory period and are not of a continuing nature. Therefore, the only claim that is properly before the Division is the allegation dealing with the 2006 performance evaluation.

In addressing the merits of the complaint, Complainant must first make out a prima facie case of unlawful employment discrimination. *Pace College v. Commission on Human Rights of the City of New York,* 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If Complainant succeeds in establishing a prima facie case, Respondent must then articulate legitimate, non-discriminatory reasons for its actions. The burden then shifts to Complainant, who must then demonstrate that the reasons articulated by Respondent are merely a pretext for unlawful discrimination. *Id.*.

To make out a prima facie case of unlawful employment discrimination, Complainant must demonstrate membership in a protected class, that she is qualified to hold the position, and that she was subjected to actions giving rise to an inference of discrimination. *Matter of Milonas v. Rosa,* 217 A.D.2d 825, 825-26, 629 N.Y.S.2d 535 (1995), *lv. denied* 78 N.Y.2d 806, 641 N.Y.S.2d 597 (1996).

Complainant made out a prima facie case of unlawful employment discrimination. Complainant is a member of two protected groups; she is a Seventh-day Adventist and African-American. Complainant was qualified to hold the position of Lead Tailor, and was subjected to actions giving rise to an inference of discrimination when, as a result of a bad evaluation, she did not receive a merit increase.

Respondent however, demonstrated that it had a legitimate non-discriminatory reason for

evaluating Complainant as it did in 2006. Respondent came forward with proof that similar employees, not Seventh-day Adventist and not African-American were similarly evaluated, and when their performance was less than "meets standards" they too did not receive a merit raise.

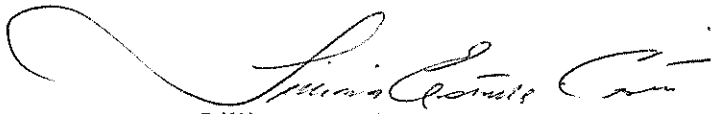
Complainant failed to come forward with any proof of pretext. Complainant's sole response that other employees, not in her protected classes, had been similarly evaluated and similarly did not receive a merit raise, was that they had also been unfairly evaluated on "trumped up charges." However, Complainant failed to produce any proof to support this allegation. Complainant's conclusory allegations without more are not enough for Complainant to sustain 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 complaint be, and the same hereby is, dismissed.

DATED: January 30, 2009
Bronx, New York



Lilliana Estrella-Castillo
Administrative Law Judge