



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**RUTH MORGAN,**

Complainant,

v.

**VILLAGE OF SPRING VALLEY,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10188584

Federal Charge No. 16GB703197

**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 December 23, 2019, by Alexander Linzer, 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 JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENT:**

- Regarding the retaliation claim related to the disciplinary charges brought against

Complainant, the ALJ need not have considered the issue of temporal proximity given he found the causation element of the prima facie case was established by other means. It is noted, however, that courts “have not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship . . . .” *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009). This has allowed a court “to exercise its judgment about the permissible inferences that can be drawn from temporal proximity in the context of particular cases.” *Id.* at 129. Nonetheless, this claim is properly dismissed because Respondent showed that the disciplinary charges were proper and Complainant failed to demonstrate Respondent’s explanation as pretextual.

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.

**PLEASE TAKE FURTHER NOTICE** that the above stated sixty (60) days to appeal may be affected by Executive Orders 202.8, 202.14 and 202.28 issued by Governor Cuomo. Please see the attached copies of the Executive Orders. If any further Executive Order affecting time to appeal is issued, the Division will post information about the Executive Order on its website, [www.dhr.ny.gov](http://www.dhr.ny.gov).

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **JUN 01 2020**  
Bronx, New York

  
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JOHNATHAN J. SMITH  
INTERIM COMMISSIONER



**Division of  
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**NEW YORK STATE  
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on the Complaint of

**RUTH MORGAN,**

Complainant,

v.

**VILLAGE OF SPRING VALLEY,**

Respondent.

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

Case No. **10188584**

Federal Charge No. 16GB703197

**SUMMARY**

Complainant alleged that Respondent discriminated against her based on her race and retaliated against her for complaining about discrimination. Because Complainant has not met her burden of proof, this case is dismissed.

**PROCEEDINGS IN THE CASE**

On September 28, 2017, 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 Alexander Linzer, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on July 15, 2019, July 16, 2019, and August 23, 2019.

Complainant and Respondent appeared at the hearing. Complainant was represented by Timothy F. Schweitzer, Esq., Hoffman & Schweitzer. Respondent was represented by Michael A. Frankel, Esq., Jackson Lewis P.C.

At the public hearing, Complainant stated that she intended to raise an allegation, which was not included in the verified complaint, that Respondent retaliated against her for filing this complaint by bringing disciplinary charges against her. Respondent did not object and stated that it was prepared to defend against that allegation. (Tr. 6; ALJ's Exhibit 1) Accordingly, pursuant to 9 New York Code of Rules and Regulations (N.Y.C.R.R.) § 465.12(f)(14), with the consent of both parties, the complaint is hereby amended to conform the pleadings to the proof to include Complainant's allegation that Respondent retaliated against her by bringing disciplinary charges against her.

Permission to file post-hearing briefs was granted. Complainant and Respondent timely filed post-hearing briefs, which were adopted where appropriate.

By letter dated October 21, 2019, Respondent's attorney submitted a transcript of Complainant's arbitration hearing on July 18, 2019, which was not available at the time of the public hearing sessions. On the consent of both parties, pursuant to 9 N.Y.C.R.R. § 465.12(f)(4), the July 18, 2019, transcript is admitted into evidence as ALJ's Exhibit 4. (Tr. 332)

### **FINDINGS OF FACT**

1. Complainant is black. (Tr. 14, 33)
2. Respondent is a village located in the towns of Ramapo and Clarkstown in Rockland County, New York. (Tr. 143-44)
3. Respondent has several departments, including a Building Department, Clerk's Office, Police Department, Legal Department, and Community Development Office. (Tr. 144)
4. Until December 2016, Respondent had a Tax Assessor's Office, which was abolished as a cost-saving measure. (Tr. 144-46)
5. Respondent's Board of Trustees is responsible for voting on expenditures, budgets, and approving the hiring of Respondent's employees. (Tr. 142-43)
6. The Rockland County Department of Personnel ("RCDP") governs personnel-related issues for municipalities in Rockland County, including Respondent, in compliance with New York Civil Service Law. (Tr. 149, 254-55)
7. On or about June 2, 2005, Respondent hired Complainant as a clerk-typist (part-time ("PT")) in Respondent's Tax Assessor's office. (Tr. 16, 19; Respondent's Exhibit 5)
8. As a clerk-typist (PT), Complainant worked 17.5 hours per week and earned \$13.14 per hour. (Tr. 17-18; Respondent's Exhibit 5)
9. Complainant's clerk-typist (PT) position was a non-competitive civil service position, meaning Complainant did not have to pass a civil service examination to be appointed to the position. (Tr. 222-23, 264; Respondent's Exhibit 5)
10. Complainant has been a member of the Civil Service Employees Association ("CSEA") since she was hired by Respondent. (Tr. 21; Complainant's Exhibit 4)

11. Effective April 29, 2009, Respondent promoted Complainant to the position of clerk-typist (less-than-full-time ("LTF")) in Respondent's Tax Assessor's office. (Tr. 17-19, 230; Respondent's Exhibit 2)

12. Complainant's hours increased from 17.5 hours per week to 30 hours per week, her hourly rate was increased from \$13.14 to \$15.25, and she became eligible for sick time, vacation time, and medical benefits. (Tr. 18; Respondent's Exhibits 2, 6)

13. Effective October 19, 2012, Respondent appointed Complainant to the position of temporary data entry operator I (LTF) in Respondent's Tax Assessor's office. (Tr. 19-20, 231; Respondent's Exhibit 6)

14. Data entry operator I is a competitive civil service position, which means that to permanently appoint an individual to the position, a civil service examination must be held, a list established, and an appointment to the position made from the list. (Tr. 222-23, 226, 261-62)

15. Pursuant to the New York Civil Service Law, an individual can be appointed to a competitive civil service position provisionally for a period of nine months. (Tr. 226)

16. On January 21, 2013, Respondent provisionally promoted Complainant to the position of data entry operator I (LFT) and increased her hourly rate to \$18.90. (Tr. 231-32; Respondent's Exhibit 7)

17. On or about February 1, 2013, Respondent appointed Maria Smith to the position of clerk-typist substitute, which is a full-time non-competitive position. (Tr. 242-43; Respondent's Exhibit 14)

18. Respondent appointed Smith to fill in for Complainant while Complainant was out on leave for an extended period of time in 2013. (Tr. 28-29)

19. Smith is white. (Tr. 29, 33)

20. Smith initially earned \$15.25 per hour as a clerk-typist substitute. (Respondent's Exhibit 14)

21. Effective October 22, 2014, Respondent appointed Complainant to the position of provisional data entry operator I (full-time ("FT")). (Tr. 25, 232-33; Respondent's Exhibit 8)

22. Complainant's appointment to data entry operator I (FT) was voted on and approved by Respondent's Board of Trustees. (Tr. 67, 147-48)

23. At the time, Respondent's Board of Trustees consisted of Respondent's then-Mayor, Demeza Delhomme, Anthony Leon, Emilia White, Vilair Fonvil, and Asher Grossman. (Tr. 148-49)

24. Mayor Delhomme, Leon, White, and Fonvil are black. Grossman is white. (Tr. 148-49)

25. Effective June 1, 2015, Respondent raised Complainant's salary to \$20.57 per hour. (Respondent's Exhibit 9)

26. Effective June 1, 2015, Respondent raised Smith's salary to \$17.18 per hour. (Respondent's Exhibit 14)

27. On November 1, 2015, Complainant took the civil service examination for the data entry operator I position. (Tr. 68, 249; Respondent's Exhibit 16)

28. Complainant did not pass the exam. (Tr. 25, 67-68; Respondent's Exhibit 16)

29. On January 29, 2016, RCDP commissioner of personnel Joan Silvestri sent a letter to Mayor Delhomme in which she stated that Complainant's provisional appointment to the position of data entry operator I "must be terminated or another provisional appointment given in this title. . ." because she did not pass the civil service examination. (Respondent's Exhibit 10)



30. On or about February 2, 2016, Respondent requested approval from the RCDP to give Complainant a second provisional appointment to the position of data entry operator I (FT). (Tr. 236-37; Respondent's Exhibit 11)

31. On February 19, 2016, RCDP's personnel coordinator, Mary Nulty, issued a memorandum to Respondent, in which she stated:

"We cannot allow a 2<sup>nd</sup> provisional appointment for [Complainant] to the title of Data Entry Operator I. Pursuant to [Civil Service Law §] 52.12, when a non-competitive employee is promoted to the competitive class, a promotional exam as well as an open competitive exam must be held. After the promotional list is exhausted or no promotional list is established, then the open competitive list must be used for one year. Therefore, a PT1 [form] should be submitted to return [Complainant] to her former status of Clerk Typist (PT) by March 29, 2016."

(Tr. 238; Respondent's Exhibit 12)

32. Respondent did not return Complainant to the position of clerk-typist (PT) by March 29, 2016, and continued to contact the RCDP concerning the possibility of giving Complainant a second provisional appointment to the position of data entry operator I. (Tr. 68; Respondent's Exhibit 13)

33. On April 5, 2016, Nulty sent Respondent an email, in which she stated:

"I know that your office has called here a few times yesterday regarding a second provisional appointment for [Complainant] in the title of Data Entry Operator I. Unfortunately, [Complainant] is not eligible for a second provisional appointment at this time. [Complainant] holds permanent status in the non-competitive title of Clerk-Typist (PT) and took the exam for Data Entry Operator I on a promotional basis. Pursuant to Civil Service Law Section 52.12, when a non-competitive employee is promoted to the competitive class, a promotional exam as well as an open-competitive exam must be held. After the promotional list is exhausted or no promotional list is established, then the open competitive list must be used for one year or the position must remain vacant. After one year from the establishment of the Data Entry Operator I list you may, if you choose, offer [Complainant] a second provisional appointment to the position. . . . Therefore, please submit a PT1 to this office returning [Complainant] to her permanently held position of Clerk-Typist (PT)."

(Respondent's Exhibit 13 (emphasis in original))

34. On June 1, 2016, Respondent raised Smith's salary to \$17.51 per hour. (Respondent's Exhibit 14)

35. As of December 6, 2016, Respondent had not returned Complainant to the position of clerk-typist (PT). (Tr. 150-52; Respondent's Exhibit 4)

36. On December 6, 2016, Silvestri sent Delhomme an email, in which she stated:

"... You are in violation of Civil Service Law, Section 65.3 which states, in part, 'A provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions...'. An appropriate eligible list was established on January 29, 2016 and [Complainant] should have returned to former status to the position of Clerk-Typist (PT), which she encumbers, by March 29, 2016.

Please submit a PT1 to this office no later than December 15, 2016 or I will have no other recourse but to follow up this matter with the Rockland County District Attorney's Office as a violation of Section 65 of Civil Service Law."

(Tr. 152; Respondent's Exhibit 4)

37. On December 29, 2016, Complainant hand-delivered a memorandum to Mayor Delhomme, copying the CSEA, seeking compensation for performing work outside of her title.

(Tr. 63-65; Complainant's Exhibit 5)

38. Pursuant to the collective bargaining agreement ("CBA") negotiated between the CSEA and Respondent, if an employee of Respondent is transferred and assigned work to do in another department, and the employee's duties "exceed those contained in the job description for the title," the employee shall be paid a five percent increment. (Tr. 204; Complainant's Exhibit 4, p. 14)

39. In her December 29, 2016, memorandum, Complainant stated:

“Over eleven and half years . . . I have been bringing to the attention of my Supervisor, Mayors, Board of Trustees and the CSEA Union that I have been out of my title and nothing has been seriously done about it.

I have sat down with current board members and forwarded duties that I have been doing out of my title and they have turned a blind eye. It is fortunate for them to have gone out to compensate other employees who have never brought up that they were working out of their titles when they started working for the village, while I being a black woman was overlooked. . . .”

(Tr. 64-65; Complainant’s Exhibit 5)

40. Respondent’s Board of Trustees did not respond to Complainant’s memorandum because Grossman determined that it did not have the authority to determine whether an employee is working out of title, which is a determination made by Respondent in conjunction with the RCDP. (Tr. 24, 66, 155-56, 161-63)

41. Previously, on April 26, 2016, Complainant’s supervisor, Laurence Holland, wrote to Mayor Delhomme and the CSEA and requested an audit of Complainant’s “desk,” because she was working out of her title, and her tasks “far outweigh her job description.” (Tr. 132-33; Complainant’s Exhibit 9)

42. Holland was not aware of whether an audit was performed. (Tr. 132-33)

43. Respondent did not investigate Complainant’s statement that she, “being a black woman was overlooked,” and Respondent did nothing to address her complaint. (Tr. 24, 66, 163, 167-68)

44. To Complainant’s knowledge, other employees of Respondent had received the five percent increase for out of title work in 2014, and none of them were black. (Tr. 23)

45. However, on May 24, 2016, Respondent’s Board of Trustees approved a resolution granting retroactive compensation to three of Respondent’s employees who, after RCDP audits,

were determined to have been working out of title, including personnel clerk Martine Narccise, who is black.<sup>1</sup> (Tr. 113-15, 259-60, Complainant's Exhibit 10)

46. In January 2017, Respondent returned Complainant to the position of clerk-typist (PT) in Respondent's Community Development Office. (Tr. 27, 68-69, 152-53)

47. Complainant's hourly rate remained \$20.57, but her hours were reduced from 35 hours per week to 17.5 hours per week. Complainant also lost her medical, dental, and optical benefits. (Tr. 27)

48. The CBA between Respondent and the CSEA provides that:

"Any reduction in work force affecting non-competitive and labor class employees shall be in inverse order of seniority among those employees affected.

A displaced non-competitive or labor class employee may bump an employee who has less seniority . . . first in the same title, or if none in the same title then in the same grade, then in the successive lower grades of titles for which such employee qualifies with [Respondent]."

(Complainant's Exhibit 4, p. 23)

49. Complainant did not have the right to "bump" Smith from her position as full-time clerk-typist substitute because Complainant was not removed from her position of data entry operator I (FT) because of a reduction in work force. (Tr. 201-02, 211-12, 214; Complainant's Exhibit 4, p. 23)

50. On or about January 6, 2017, the RCDP determined that Complainant was eligible for a provisional appointment to the position of senior clerk typist, which is a competitive civil service position. However, the RCDP stated that, "Any approval of an application . . . does not imply that the individual concerned may now be appointed. . . ." (Respondent's Exhibit 17)

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<sup>1</sup> In the transcript, Martine Narccise is incorrectly referred to as "Marteen Martiz." (Tr. 260)

51. Respondent's Board of Trustees met various times in 2017, including on February 14, February 28, April 11, April 25, May 9, May 23, June 27, September 19, October 10, and November 28. (Complainant's Exhibit 12; Respondent's Exhibit 18)

52. During this period, Respondent's Board of Trustees consisted of Mayor Delhomme, White, Fonvil, Grossman, and Trustee Sherry McGill. (Respondent's Exhibit 18)

53. At those meetings, the agenda, which was set by Mayor Delhomme, included deciding whether to appoint Complainant provisionally to the position of senior clerk typist or receptionist typist, which were full-time positions. (Tr. 176-82; Complainant's Exhibit 12; Respondent's Exhibit 18)

54. The clerk-typist full-time position is a competitive position, which would require Complainant to take and pass a civil service exam. (Tr. 122)

55. Respondent's Board of Trustees did not vote to appoint Complainant to the position of senior clerk typist, or any other full-time position, at those meetings. (Tr. 153, 176, 183; Complainant's Exhibit 12; Respondent's Exhibit 18)

56. Grossman did not vote to approve Complainant for a full-time position because the RCDP had specifically directed that she was to be returned to the position of clerk-typist (PT). (Tr. 192-93)

57. Grossman also did not want to approve Complainant to another provisional position that she might have to be removed from and wanted to wait for Complainant take and pass the civil service exam. (Tr. 190-91)

58. On April 11, 2017, Complainant took the civil service exam for senior clerk typist/senior typist but did not pass it. (Tr. 74-75; Respondent's Exhibit 16)

59. On June 1, 2017, Respondent raised Smith's salary to \$17.86 per hour. (Respondent's Exhibit 14)

60. Effective November 2, 2017, Respondent transferred Smith to the position of office service aide, which is a non-competitive position. (Tr. 243-44; Respondent's Exhibits 14, 15)

61. Complainant testified that Smith was an office service aide as of January 2017. I do not credit Complainant's testimony in this regard, because it was contradicted by Smith's RCDP employee roster card and Respondent's personnel transaction form which documented Smith's transfer to the position of office service aide. (Tr. 29; Respondent's Exhibits 14, 15)

62. Smith's hourly rate as an office service aide was \$17.85 per hour. (Tr. 244-43; Respondent's Exhibit 14)

63. On or about December 4, 2017, Alan Simon became Respondent's Mayor. (Tr. 297)

64. On February 21, 2018, Respondent appointed Nida Sharif to the position of director of community development. (Tr. 286-87, 300)

65. Sharif supervised Complainant. (Tr. 287)

66. On August 9, 2018, Sharif met with Mayor Simon concerning Complainant after two employees complained about Complainant's conduct at a job fair that day, including that she had "growled" at them. Sharif had previously met with Mayor Simon about Complainant's conduct, after Sharif raised concerns that Complainant had cancelled a garden event without her permission on May 19, 2018. (Tr. 294, 297-99; Complainant's Exhibit 1)

67. Mayor Simon told Sharif that she needed to "write up" Complainant in connection with the complaints. (Tr. 299)

68. Respondent suspended Complainant as of August 9, 2018. (Tr. 16, 77-78)

69. On August 17, 2018, Respondent issued 20 charges of insubordination and misconduct against Complainant based on:

- allegations by Sharif that:
  - in March and April 2018, Complainant refused to provide Sharif with her work hours;
  - on several occasions between April and August 14, 2018, Complainant “advised that she will bring her son into the Village to ‘take care’ of what is being done to her,” which caused Sharif to feel “intimidated and fearful”;
  - on May 19, 2018, Complainant cancelled a garden event without Sharif’s permission;
  - on June 6, 2018, Complainant refused Sharif’s directive to cover the front desk; and
  - on August 9, 2018, Complainant abandoned her position and did not follow Sharif’s directive to do an assignment;
- allegations by Respondent employees Meagan Izquierdo and Joseph Chabot that, at the job fair on August 9, 2018, Complainant photographed them using her cell phone and “grunted” or “growled” at them; and
- allegations by Nalia Booth, department head of Respondent’s Section 8 office, that “over the years,” she was subjected to improper and abusive commentary by Complainant, including “growling.”

(Tr. 288-99; Complainant’s Exhibit 1)

70. Respondent’s August 17, 2018, charges, were the first time that Respondent had brought disciplinary charges against Complainant. (Tr. 33-34, 39)

71. Complainant disputed Respondent’s charges, which were the subject of an arbitration. Arbitration hearings took place on April 22, 2019, and July 18, 2019. (Tr. 36; Complainant’s Exhibit 2; ALJ’s Exhibit 4)

72. Respondent did not pursue the charges concerning Booth’s allegations at Complainant’s arbitration because Booth was not available to testify. (Tr. 326-327)

73. As of the dates of the public hearing, no decision had been issued by the arbitrator. (Tr. 331-32; ALJ's Exhibit 4, pp. 365-66)

## **OPINION AND DECISION**

### **Statute of Limitations**

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 297.5 provides, "Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." This provision acts as a mandatory statute of limitations in these proceedings.

*Murphy v. Kirkland*, 88 A.D.3d 267, 273, 928 N.Y.S.2d 333, 337 (2d Dept. 2011). Accordingly, to the extent Complainant's claims arise out of events which occurred before September 28, 2016, they are time barred. However, Complainant's claim that she was denied a five percent wage increase for out-of-title work prior to September 28, 2016, is timely, because disparate pay based on discriminatory reasons is a discriminatory practice "of a continuing nature . . .

[Accordingly,] 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." *Russell Sage College v. State Div. of Human Rights*, 45 A.D.2d 153, 155, 357 N.Y.S.2d 171 (3d Dept. 1974) (citing 9 N.Y.C.R.R. § 465.3(e)), *aff'd*, 36 N.Y.2d 985 (1975).

### **Discrimination**

To make out a prima facie case of unlawful discrimination in the employment context, Complainant must show (1) Complainant is a member of a protected class; (2) Complainant was qualified for the position; (3) Complainant suffered an adverse employment action or was terminated from employment; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for*



*the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If Complainant makes out a prima facie case of unlawful discrimination, the burden of production shifts to Respondent to present a legitimate, independent, and non-discriminatory reason for its actions. *Id.* If Respondent does so, Complainant must show that the reasons presented by Respondent were merely a pretext for the unlawful discrimination by demonstrating both that the Respondent's stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The "burden of persuasion of the ultimate issue of discrimination always remains" with Complainant. *Stephenson v. Hotel Employees and Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant alleged that Respondent discriminated against her based on her race: when it did not provide her with a five percent increase in salary for out of title work; when it removed her from the position of data entry operator I (FT) and returned to her underlying position of clerk-typist (PT); when it did not "bump" Smith from her full-time position of clerk-typist substitute and give the position to Complainant; when it transferred Smith to the position of office service aide; and when it did not provisionally appoint Complainant to a full-time typist position in 2017.

Complainant did not establish a prima facie claim of discrimination concerning compensation for out of title work. Complainant is black and is therefore a member of a protected class. Complainant worked as a provisional data entry operator I for over a year and was qualified for the position prior to failing the civil service exam, and Complainant is qualified for the position of clerk-typist (PT). Complainant also established that she suffered an adverse

employment action because she did not receive additional compensation despite Holland's April 26, 2016, letter stating that she was performing work outside of her title.

However, Complainant failed to establish that Respondent did not provide her with compensation for out of title work under circumstances giving rise to an inference of discrimination. The only evidence offered by Complainant to establish that Respondent did not provide her with out of title compensation because of her race was her testimony that she was aware that some employees of Respondent had received a five percent increase for working out of title in 2014, and that none of them were black. Complainant did not identify who those employees are or the circumstances under which they were given a five percent increase.

Respondent also presented evidence that it provided out of title compensation to three employees in May 2016, one of whom is black. Further, Complainant's allegation that Respondent discriminated against her because of her race is undermined by evidence that Respondent promoted Complainant several times during the eleven-year period during which she claimed that she was denied compensation for performing out of title work, including to provisional data entry operator I (FT), in October 2014.

Thus, Complainant did not establish a prima facie claim of unlawful discrimination based on race and this claim must be dismissed.

Complainant did not establish a prima facie claim of discrimination in connection with Respondent removing her from the position of data entry operator I (FT), because Complainant did not establish that she was qualified for the position. Respondent provisionally promoted Complainant to the position of data entry operator I (FT) on October 22, 2014. However, Complainant did not pass the civil service exam for the position, and Respondent returned

Complainant to her underlying title of clerk-typist (PT) at the direction of the RCDP. Thus, Complainant was not qualified for the position of data entry operator I (FT).

Even if Complainant was able to establish that she was qualified for the position, she failed to show that Respondent removed her from the position under circumstances giving rise to an inference of discrimination. For approximately one year, Respondent failed to comply with RCDP's repeated directives to return Complainant to the title of clerk-typist (PT), and Respondent only did so after RCDP threatened it with a criminal referral. Complainant did not offer any evidence to establish that Respondent returned her to her underlying title because of her race. Thus, Complainant failed to establish a prima facie claim of unlawful discrimination, and this claim must be dismissed.

Complainant also did not establish a prima facie claim of discrimination in connection with her claim that Respondent discriminated against her when it did not "bump" Smith from her full-time position as clerk-typist substitute and give the position to Complainant, who is senior to Smith. Complainant is qualified for the position of clerk-typist substitute because she worked for Respondent as a clerk-typist for several years. Complainant established that she was subjected to an adverse employment action, as she was removed from her position as data entry operator I (FT) and returned to clerk-typist (PT), instead of a full-time position.

However, Complainant failed to establish that Respondent did not give Smith's position to Complainant under circumstances giving rise to an inference of discrimination. Complainant argued that, because she is senior to Smith, she had the right to "bump" Smith from her full-time position as clerk-typist substitute when Complainant was removed from her position as data entry operator I (FT). However, under the CBA, a senior employee has "bumping rights" when there is a "reduction in work force." Complainant was not removed from her position as data

entry operator I (FT) because of a reduction in work force. Therefore, Complainant did not establish that Respondent had a duty under the CBA to “bump” Smith for Complainant. Because Complainant did not offer any evidence that Respondent was motivated by discriminatory animus when it did not give Smith’s position, which Smith had held for several years, to Complainant, she has not established a prima facie claim.<sup>2</sup>

Finally, Complainant failed to establish a prima facie claim of discrimination in connection with Respondent transferring Smith to the position of office service aide. Complainant did not offer any evidence that she was qualified for the position of office service aide. Complainant also did not establish that she was subjected to an adverse employment action when Smith was transferred from the position of clerk-typist substitute to the position of office service aide. An adverse employment action requires “a materially adverse change in the terms and conditions of employment.” *Forrest*, 3 N.Y.3d at 306, 786 N.Y.S. 2d at 391. This may be shown by “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.” *Id.*, quoting *Galabya v. New York City Board of Education*, 202 F.3d 636, 640 (2d Cir. 2000) (abrogated on other grounds). There is no evidence that Smith’s transfer to the position of office service aide in November 2017 benefitted Smith at Complainant’s expense. Both clerk-typist substitute and

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<sup>2</sup> Pursuant to the unambiguous language in the CBA, “bumping rights” apply when there is a “reduction in work force.” Accordingly, this claim is not preempted by Labor Management Relations Act (LMRA) § 301, which preempts applications of state law that require “the interpretation of a collective-bargaining agreement.” *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S. Ct. 1877, 1885 (1988); see also *Langford v. Int’l Union of Operating Engineers, Local 30*, 765 F. Supp. 2d 486, 506 (S.D.N.Y. 2011) (holding that a claim of discrimination under the New York State Human Rights Law was not preempted by LMRA § 301 as “[t]he right to be free from such discrimination arises from state law, not from the CBA, and it is a non-negotiable right.” quoting *Bryant v. Verizon Commc’ns, Inc.*, 550 F. Supp. 2d 513, 529 (S.D.N.Y. 2008)).

office service aide were full-time positions and Smith's hourly rate did not increase when she became an office service aide. Further, Smith's hourly rate as an office service aide was less than Complainant's hourly rate as a clerk-typist (PT). Thus, Complainant failed to establish that Respondent subjected her to an adverse employment action.

Even if Complainant was able to establish that she was qualified for the position and suffered an adverse employment action, she did not establish that Respondent's transfer of Smith to the position of office service aide occurred under circumstances giving rise to an inference of discrimination. Complainant offered no evidence concerning the circumstances of Smith's transfer in November 2017, and, in fact, incorrectly believed that Smith was an office service aide in January 2017, when Complainant was returned to the position of clerk-typist (PT). This claim is dismissed.

#### Retaliation

Complainant alleged that Respondent subjected her to unlawful retaliation. It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed unlawful discriminatory practices. Human Rights Law § 296.7.

To establish a prima facie claim of retaliation, Complainant must establish that she engaged in activity protected by the Human Rights Law, that Respondent was aware she engaged in the protected activity, that she suffered an adverse employment action based on her protected activity, and that there was a causal connection between the protected activity and the adverse employment action. *Adeniran v. State of New York*, 106 A.D.3d 844, 844-45, 965 N.Y.S.2d 163, 164-65 (2d Dept. 2013). If Complainant meets this burden, Respondent must present legitimate, independent, and non-discriminatory reasons to support its action. *Id.*, 106 A.D.3d at 845, 965 N.Y.S.2d at 165. If Respondent does so, Complainant must show that the reasons Respondent

has presented were merely a pretext. *Id.*

In a retaliation case, “an adverse employment action is one which ‘might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Mejia v. Roosevelt Island Med. Assoc.*, 31 Misc. 3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)), *aff’d*, 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *leave to appeal dismissed*, 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013).

Complainant alleged that Respondent retaliated against her in the following respects: that Respondent did not investigate Complainant’s allegation of discrimination in her December 29, 2016, memorandum; that Respondent removed her from the position of data entry operator I (FT) in retaliation for her December 29, 2016, complaint; that Respondent did not appoint her to a full-time position in 2017 in retaliation for her December 29, 2016, complaint; and that Respondent initiated disciplinary proceedings against Complainant on August 17, 2018, in retaliation for filing the instant complaint.

Complainant did not establish a *prima facie* claim in connection with Respondent’s failure to investigate Complainant’s December 29, 2016, complaint. Complainant engaged in protected activity, as she complained that she had been treated differently because she is black and female. Respondent was aware of Complainant’s complaint, as she sent her memorandum containing the complaint to Respondent’s Board of Trustees. However, Complainant did not establish that Respondent’s failure to investigate her complaint constituted an adverse employment action.

Respondent ignored Complainant’s memorandum and did not investigate her complaint that she was treated differently because she is a black female. However, the failure by

Respondent to investigate or respond to Complainant's complaint does not, on its own, rise to the level of an adverse employment action, as it would not have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Mejia*, 31 Misc. 3d 1206(A), 927 N.Y.S.2d 817 ("Reassignment, enhanced scrutiny and negative evaluations of work performance which had no tangible consequences do not constitute adverse employment actions in a retaliation context."). Complainant also failed to establish causation, as she did not offer any evidence that Respondent's failure to investigate her complaint was motivated by retaliatory animus, as opposed to Grossman's determination that Respondent's Board of Trustees was not able to address Complainant's concerns about compensation for performing out of title work.

Thus, this claim must be dismissed.

Complainant established a prima facie claim that Respondent retaliated against her when it removed her from the position of data entry operator I (FT). Complainant engaged in protected activity when she complained on December 29, 2016, and Respondent subjected Complainant to an adverse action when she was removed from her position in January 2017. Complainant was removed from her position less than a month after her complaint, and therefore Complainant established causation. *See Calhoun v. County of Herkimer*, 114 A.D.3d 1304, 1307, 980 N.Y.S.2d 664, 667 (4th Dept. 2014) (holding that a causal connection between the protected activity and an adverse employment action may be established by close temporal proximity).

However, Respondent presented a legitimate, independent, and nondiscriminatory reason for removing Complainant from the position of data entry operator I (FT). Respondent was directed to remove Complainant, under threat of criminal referral, by the RCDP, after Complainant did not pass the civil service exam. Complainant failed to establish that this reason

was pretext, and therefore this claim is dismissed.

Complainant also established a prima facie claim of retaliation in connection with Respondent not appointing her to a provisional full-time position as senior clerk typist or receptionist typist. Complainant's December 29, 2016, memorandum was protected activity, and Respondent's Board of Trustees was aware of Complainant's memorandum. Complainant also suffered an adverse employment action when she was not appointed to a provisional full-time position. Complainant established a causal connection because Respondent's Board of Trustees had several opportunities to vote to approve Complainant to a provisional full-time position less than two months after she complained, but did not do so.

However, Respondent presented a legitimate, independent, and nondiscriminatory reason to support its actions; RCDP threatened Respondent with a criminal referral if it did not return Complainant to the title of clerk-typist (PT), and Respondent's Board of Trustees was concerned about not complying with RCDP's directive. Further, Grossman did not want to appoint Complainant to a provisional full-time position when there was a risk that Respondent would have to remove her from the position if she did not pass the civil service exam. Complainant took the civil service exam for the position in April 2017, and did not pass it.

Complainant did not establish that Respondent's reason was pretext, and therefore this claim must be dismissed.

Complainant also established a prima facie claim of retaliation in connection with the disciplinary charges brought against her by Respondent. Complainant engaged in protected activity when she filed the instant complaint, and Respondent was aware of this complaint. Complainant suffered an adverse employment action when Respondent brought disciplinary charges against her. Complainant also established a causal connection. The approximately ten-



month period between the filing of the instant complaint and Respondent's disciplinary charges is insufficiently temporally proximate, on its own, to find causation. *See Bantamoi v. St. Barnabas Hosp.*, 146 A.D.3d 420, 44 N.Y.S.3d 398, 399 (1st Dept. 2017) (five months between filing of discrimination complaint and adverse employment action was insufficient to establish causal connection). However, the absence of temporal proximity will not defeat a claim where there are other facts supporting causation. *Harrington v. City of New York*, 157 A.D.3d 582, 586, 70 N.Y.S.3d 177, 181 (1<sup>st</sup> Dept. 2018). Given that Complainant worked for Respondent since 2005 without ever being subjected to disciplinary charges, and that, on August 17, 2018, Respondent charged her with 20 counts of misconduct and insubordination, there is sufficient evidence to support an inference that the disciplinary charges were retaliatory.

Respondent provided a legitimate, nondiscriminatory reason for bringing disciplinary charges against Complainant. Complainant's supervisor, Sharif, and other employees of Respondent complained to Respondent about Complainant, including her alleged conduct at a job fair on August 9, 2018. Complainant failed to establish that Respondent's reason was pretext. Complainant disputes Respondent's charges and attacks the reliability of Respondent's evidence. However, the critical inquiry is Respondent's motivation in bringing the charges against Complainant; not the truth of the underlying allegations. *See McPherson v. New York City Dep't of Educ.*, 457 F.3d 211, 216 (2d Cir. 2006). Complainant offered no evidence that any of the employees who complained about her were involved in her discrimination complaint or motivated by retaliatory animus. Further, at the time Complainant filed this case, Sharif, who drafted the disciplinary charges, was not an employee of Respondent, and Mayor Simon, who told Sharif to "write up" Complainant, was not yet Respondent's Mayor.

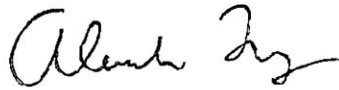
Accordingly, this claim must be dismissed.

**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 hereby is dismissed.

DATED: December 20, 2019  
Bronx, New York

A handwritten signature in black ink, appearing to read 'Alexander Linzer', with a stylized flourish at the end.

Alexander Linzer  
Administrative Law Judge