

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

LORRAINE NEAL,

Complainant,

v.

TOWN OF NORTH HEMPSTEAD,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10102140

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 21, 2007, by Tammy B. Collins, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENT:

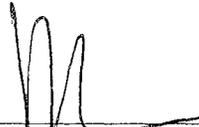
- Complainant’s disparate pay claim is not time-barred. Such claim is a continuing violation, and Complainant’s allegations include instances that occurred within the statute of limitations period. *See Russell Sage College v. State Div. of Human Rights*, 45 A.D.2d 153, 357 N.Y.S.2d 171 (3rd Dept. 1974), *aff’d* 36 N.Y.2d 985;

Mendoza v. State Div. of Human Rights, 74 A.D.2d 508, 424 N.Y.S.2d 447 (1st Dept. 1980). However, Respondent offered a legitimate, non-discriminatory reason for the disparate pay, and Complainant failed to establish that such reason was a pretext for discrimination. As such, the disparate pay claim is dismissed.

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, this 19th day of January, 2008.



KUMIKI GIBSON
COMMISSIONER

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DIVISION OF HUMAN RIGHTS**

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on the Complaint of

LORRAINE NEAL,

Complainant,

v.

TOWN OF NORTH HEMPSTEAD,

Respondent.

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

Case No. 10102140

SUMMARY

Complainant alleged that Respondent discriminated against her because of her race and sex. At hearing Complainant conceded that she no longer wished to pursue her race claim, thus the race claim is dismissed with prejudice. The sex claims based upon disparate pay, failure to promote, failure to train and retaliation are hereby dismissed as untimely.

PROCEEDINGS IN THE CASE

On October 19, 2004, 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 Tammy B. Collins, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on July 16 and 17, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Sanford A. Kutner, Esq. Respondent was represented by Craig L. Olivo, Esq.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

1. Lorraine Neal, also known as Tracy Neal, is an African-American woman. (Tr. 37)

2. In August, 1993, Complainant began working for Respondent, Town of North Hempstead (“Town”), in the Civil Service title of Attendant in the Building Department.

3. In 1999, Complainant began working in her current title, Community Liaison Aide (“Community Liaison”) (Tr. 38-39)

Complainant’s Race Claim Based upon the Conditions of the Satellite Office

4. Complainant charged that since she had become responsible for Respondent’s New Cassel satellite office located in an area with a minority population, Respondent failed to render the same services to her office as they provided to other offices. (ALJ Exh. II, 54-55, 352-54, 357, 359, 361, 368, 383)

5. Complainant withdrew her race claim at the public hearing. (Tr. 134)

Complainant’s Disparate Pay Claim Based upon Sex

6. Complainant charged that Respondent discriminated against her on April 30, 2001 because of her sex, by not compensating her at the same level as Sean Coats, a male employee, though she was responsible for the satellite office and performed tasks beyond her title. (ALJ Exh. II, Jt. Exh. 8, Tr. 49-50, 215-216)

7. Complainant filed a complaint with the Division more than three years after this employment decision. (ALJ Exh. II)

Complainant's Failure to Promote Claim Based upon Sex

8. Complainant charged Respondent with discriminating against her based on sex by failing to promote Complainant to Code Enforcement Inspector ("Inspector") in 1997. (ALJ Exh. II, Complainant's Exhs. 1 and 2)

9. Complainant did not file a complaint with the Division until October 19, 2004. (ALJ Exh. II)

Complainant's Failure to Train Claim Based upon Sex

10. Complainant charged that because of her sex, Respondent did not provide her with the opportunity to receive the same training that Coads, a similarly situated male Community Liaison, received when he was provisionally promoted to Inspector in 1999. (Tr. 73-74, Joint Exh. 8)

11. Complainant has asserted this claim more than five years after Coads' appointment. (ALJ Exh. II)

Retaliation

12. Complainant charged that Respondents discriminated against her in retaliation for having opposed discrimination when Respondent asserted that Complainant had both performance and ethical issues from 2000 to 2002. (ALJ Exh. II)

13. Complainant filed her complaint with the Division on October 19, 2004, at least two years after the alleged unlawful incidences. (Tr. 55)

14. For the first time at the public hearing, Complainant also charged that after she filed the instant complaint Respondent retaliated against her when Neidich, Respondent's Commissioner

for Public Safety, spoke to her rudely and disrespectfully for no reason; Complainant was transferred to the Apex building; and “if she wanted to get something, they treated her entirely different.” (Tr. 55-56, 163-64)

15. On March 14, 2005, Respondent made a decision to consolidate and move the entire Code Enforcement Division (of which Complainant was a part) to the Apex Building. As part of this process, Ms. Neal was transferred to the APEX building from the satellite office. (Tr. 55-56, Kaiman Aff. ¶16, Neidich Aff. ¶27)

16. This retaliation allegation was asserted more than two years after the alleged unlawful act. (ALJ Exh. II)

OPINION AND DECISION

Complainant Withdraws Race Claim at Hearing

Complainant conceded that she no longer wished to pursue her race claim before the Division. Thus, the race allegation is dismissed with prejudice.

Complainant’s Disparate Pay Claim is Time-barred

It is unlawful for an employer to discriminate against an individual in compensation or in terms of conditions or privileges of employment on the basis of their sex. N.Y. Exec. Law , art. 15 (“Human Rights Law”) § 296.1(a). However, complaints of discrimination must be filed with the Division within one year from the date of the alleged unlawful discriminatory practice. Human Rights Law § 297(5).

For the purpose of determining whether a respondent’s discriminatory conduct occurred within the statute of limitations period, discrete acts and continuing violations must be distinguished. *Plant v. Deutsche Bank Securities, Inc.* 07 Civ. 3498, 2007 U.S. Dist. LEXIS 55100, at *6 (S.D.N.Y. July 23, 2007). Failure to compensate adequately is a discrete act. *Id.*

(citing *DeJesus v. Starr Tech. Risks Agency, Inc.*, No. 03 Civ. 1298, 2004 U.S. Dist. LEXIS 19213, 2004 WL 218403 (S.D.N.Y. September 27, 2004).

Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. *National Railroad Passengers Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061, 2072, 153 L.Ed. 2d 106, 122 (2002).

A continuing violation, by contrast, typically comprises a succession of harassing acts, each of which may not be actionable on its own. *Id.* (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2175, 167 L.Ed.2d 982, 998 (2007) (internal quotations omitted).

Here, Complainant argued in her post-hearing brief that she suffered a hostile work environment as a result of the alleged pay difference. Such an argument was an attempt to establish that there was a continuing violation which somehow overcame the statute of limitation problem which was fatal to Complainant's claim.

Moreover, Complainant alleged that Coads, a similarly situated male co-worker, was paid more than Complainant when he was demoted back to the Community Liaison title on April 30, 2001. As a result of the employment decision the time to file a complaint based upon these actions began to run on April 30, 2001. Complainant filed her complaint challenging the April 30, pay decision on October 19, 2004, more than three years after Respondent placed Coads in the Community Liaison position. Thus, the disparate pay claim must be dismissed.

All other allegations in connection with the 2001 employment decision, *i.e.* failure to train and failure to increase pay are also time barred for the above reasons.

Complainant's Failure to Promote Claim is also Time-barred

Complainant charged Respondent with discriminating against her when Respondent did not promote Complainant to an Inspector position in 1997. It is unlawful for an employer to

refuse to promote an individual on the basis of their sex. Human Rights Law § 296.1(a).

The above analysis of the continuing violation theory versus discrete acts also applies to Complainant's failure to promote claim. Failing to promote an employee is a discrete act. *Plant v. Deutsche Bank Securities, Inc.* 07 Civ. 3498, 2007 U.S. Dist. LEXIS 55100, at *6.

Complainant applied to take the Civil Service test in 1997 and was denied the opportunity. Complainant filed her claim with the Division in 2004, six years later. Thus, Complainant's failure to promote claim is dismissed as untimely.

Complainant's Retaliation Claims are also Time-barred

2000-2002

It is unclear when exactly Respondent allegedly retaliated against Complainant thereby subjecting her to claims of performance and ethical issues. The complaint lacks specificity as to the date the alleged acts occurred and the record is devoid of a stated timeframe.

Assuming that the alleged retaliatory acts occurred sometime between the years 2000 to 2002, as evidenced by the affidavits of Respondent's witnesses, Brown and Hyman, Complainant failed to file a complaint within the one year statute of limitation period. Since, the allegation of retaliation was not filed until October 19, 2004, the Division lacks jurisdiction over the claim.

March 24, 2005

For the first time, at the public hearing Complainant alleged that Respondent's decision to transfer her to the Apex building was discriminatory. The act of transferring Complainant is a discrete act which began the running of the statute of limitation period. *See Obelinsky v. New York State Division of Human Rights*, 687 A.D.2d 1069; 413 N.Y.S.2d 788, 789; 1979 N.Y. App. Div. LEXIS 10884, *2 (App. Div. 1979) (finding that the act of giving petitioner notice that he

would not be reappointed started the running of the limitation period . . .)

Here, Respondent transferred Complainant on March 14, 2005. Complainant asserted the allegations for the first time at the public hearing on July 16, 2007. The time to file the complaint began to run on March 14, 2005. This allegation was not timely since it was raised in 2007 which is more than one year after the alleged unlawful act. The Division lacks jurisdiction over the claim. Thus, the retaliation claim must be dismissed. All other allegations connected to these alleged events are also dismissed as untimely.

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: December 21, 2007
Bronx, New York



Tammy B. Collins
Administrative Law Judge