

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JOY EYVONNE SOMMERSETT,

Complainant,

v.

CITY OF NEW YORK, DEPARTMENT OF
PROBATION,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10109209

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 April 28, 2008, 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.

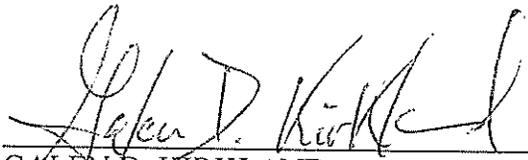
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been 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,

6/16/08



GALEN D. KIRKLAND
ACTING COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

JOY EYVONNE SOMMERSETT,
Complainant,
v.

**CITY OF NEW YORK, DEPARTMENT OF
PROBATION,**
Respondent.

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

Case No. **10109209**

SUMMARY

Complainant alleged that she was discriminated against by Respondent on the basis of age, and retaliated against for having complained about discrimination in 1991. It is recommended that the complaint be dismissed. Most of Complainant's allegations are time barred, and those that are not time barred are found not to be discriminatory.

PROCEEDINGS IN THE CASE

On December 12, 2005, 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. A public hearing session was held on December 5, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Scott S. Gale. Respondent was represented by Ivan Mendez, Jr. and Eric Eichenholtz.

The parties received permission to file proposed findings of fact and conclusions of law. Respondent and Complainant timely filed their submissions and were considered.

Complainant's attorney did not file any submissions.

FINDINGS OF FACT

1. Complainant alleged that she was discriminated against by Respondent on the basis of age, and retaliated against for having complained about discrimination. (ALJ Exhibits 1, 2)
2. Complainant became employed by Respondent as a Probation Officer on April 16, 1984. (Tr. 17; ALJ Exhibits 1, 2, 5 and 6)
3. Complainant was born on August 29, 1945. She is 63 years old. (ALJ Exhibit 1)
4. Complainant filed a discrimination complaint with the Division in 1991, as a result of being called a derogatory word by her now deceased supervisor, Arthur Levitt. (Tr. 22, 26; ALJ Exhibits 1, 2)
5. The 1991 complaint was settled by the parties on December 13, 2003. (Tr. 39; Respondent's Exhibit 1)
6. The 1991 complaint did not name any of Complainant's current supervisors. (Tr. 49, 70-73)
7. Respondent denied all allegations of age discrimination and retaliation. (ALJ Exhibits 5 and 6)

Complainant's Age Discrimination Allegations

8. Complainant alleged that on September 14, 2004, a co-worker made what Complainant interpreted to be an ageist comment about a dress Complainant was wearing. (Tr. 27-28, 81, 132-136; Respondent's Exhibit 2)

9. Complainant complained about the comment to Respondent's Equal Employment Opportunity Office. (Tr. 29-30, 86-88, 152; Respondent's Exhibit 3)

10. Respondent immediately investigated Complainant's complaint and determined that the complaint had no merit. (Tr. 29-30, 86-88, 137-138, 152; Respondent's Exhibit 3)

11. This allegation happened outside the statute of limitations.

12. As further evidence of age discrimination, Complainant alleged that in 2005 her supervisor, Debra Booker, who was 51 years old, stated, "We are just waiting for [Complainant] to retire." (Tr. 30-31, 41, 166, 169, 192)

13. This statement was made by Booker, while she and Complainant were discussing all the employees that had retired. (Tr. 32) There was no one else present and no other comment was made. (Tr. 31-32)

Complainant's Retaliation Allegations

14. Complainant alleged that in retaliation for filing a complaint in 1991, she was not promoted to Supervising Probation Officer in 1991 and 1999. (Tr. 64)

15. The allegations regarding the alleged promotional opportunities are time barred.

16. Complainant alleged that sometime in 2004, Reva Moten, a co-worker, said to Complainant, "I don't see how a person could sue the City of New York and remain on their payroll." (Tr. 23-24, 61-63; ALJ Exhibits 1, 2)

17. Complainant then alleged that as a result of her prior complaint she was treated less favorably by Respondent because her work was scrutinized and criticized, and she was nicknamed a “trouble maker” by her co-workers. (Tr. 40; ALJ Exhibits 1 and 2)

18. The record does not support Complainant’s claims of retaliation.

19. Complainant’s performance problems have been documented for years. For example, Complainant was disciplined in 1999 and 2000. (Tr. 92-93)

20. Complainant was also brought up on disciplinary charges in June 2000. Those charges were resolved by Stipulation of Settlement, wherein Complainant acknowledged that her performance was not satisfactory for the period 1998 through 2000, and she agreed to accept the penalty of ten days lost pay. (Tr. 93-93, 96; Respondent’s Exhibit 5)

21. Complainant’s performance did not improve, and on September 20, 2003, Booker once again addressed Complainant’s performance issues with her. (Tr. 172-174, 186; ALJ Exhibits 1 and 2; Respondent’s Exhibit 8) Complainant’s probation reports were found to be seriously deficient. (Tr. 183) Complainant had probationers that had not reported anywhere between six months to three years. (Tr. 170-171) Complainant had no verification that the probationers were complying with treatment programs, and had not taken any action against the non-compliant probationers. (Tr. 170-171).

22. Complainant also required “intense daily supervision to complete tasks.” (Respondent’s Exhibit 8) Which required that Booker spend between two and three hours a day counseling and supervising Complainant. (Tr. 197) And, yet, Complainant continued to make the same mistakes, even after the reports were returned to her three and four times for corrections. (Tr. 185-186)

Complainant's Amended Complaint

23. Complainant alleged that she was unlawfully discriminated against because Respondent did not investigate a complaint she made relative to an incident that occurred on April 13, 2006, wherein an individual unknown to her, but who displayed a badge which read "New York City Department of Probation Supervising Probation Officer Clemente" was attempting to gain entrance into Respondent's office building and Complainant did not open the door for him. (Tr. 33-35, 82; ALJ Exhibit 2) When he was finally able to gain entrance into the building he told Complainant "When you see this badge you let me in." (Tr. 36)

24. Complainant testified that she felt intimidated by SPO Clemente, and when she reported the incident to Respondent nothing happened. (Tr. 36, 90-91; Respondent's Exhibit 4)

25. Respondent acknowledged receipt of her report regarding the incident with SPO Clemente, but it was not clear to Respondent, nor is it clear now, what the exact complaint was regarding Clemente. Complainant acknowledged that SPO Clemente did not know her, did not know about her prior complaint, made no age comment or any racially derogatory comments, and Complainant has had no other dealings with him. (Tr. 83-84; Respondent's Exhibit 4)

OPINION AND DECISION

Complaints of discrimination must be filed with the Division "within one year after the alleged unlawful discriminatory practice." Human Rights Law § 297 (5). Complainant filed her complaint with the Division on December 12, 2005, therefore all of Complainant's allegations that occurred prior to December 12, 2004, are time barred and must be dismissed. *See, Matter of Atul Patel v. New York State Division of Human Rights, et al.*, 216 A.D.2d 469, 628 N.Y.S.2d 379 (2nd Dept. 1995).

The New York Human Rights Law § 296 (7) makes it an unlawful discriminatory practice “for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.” To make out a prima facie case of retaliatory discrimination, Complainant must show that (1) she engaged in protected activity; (2) Respondent knew that Complainant engaged in protected activity; (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action. *See, Pace v. Ogden Services 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 failed to meet her burden. She failed to show that she suffered an adverse employment action as a result of filing a complaint with the Division in 1991. Complainant alleged that her work was scrutinized and criticized as a result of having complained about discrimination in 1991. However, the record produced supports Respondent’s position that Complainant had performance issues, and had been made aware of these performance issues for years. Complainant acknowledged that she had performance problems and that she had constantly been made aware of these deficiencies. And, although Complainant has been counseled and warned about her performance, Complainant did not suffer an adverse employment action during the statutory period.

Furthermore, Complainant had the burden of showing that there was a causal connection between the filing of the complaint and the alleged adverse action. Complainant cannot make such a showing here. Complainant filed her initial complaint in 1991. The instant complaint was filed nearly 15 years later. By then the supervisor she complained of in 1991 had passed

away, and none of her current supervisors were involved in the 1991 complaint. Therefore, no inference of a causal connection can be made.

Complainant alleged two comments were made regarding her age; one comment was made by her supervisor while they were discussing other retired employees, and the second comment was made by a co-worker who commented on her dress style, which was outside the statutory period. I don't find that these comments, even taken together, show age discrimination. Therefore, Complainant failed to make out a prima facie case of age discrimination.

Complainant also failed to make out a hostile work environment claim. To satisfy a claim of hostile work environment a complainant must produce evidence that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Forrest & Jewish Guild for the Blind*, 3 N.Y.3d 295, 394 (2004) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

The only evidence that Complainant produced of hostile work environment were two comments, which even taken together, do not amount to a hostile work environment. The other comments lacked any specificity. Complainant did not attribute the other comments to any one in particular and did not identify a time period when these comments were made, which rendered her allegations as conclusory, and therefore do not support 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: April 28, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo". The signature is fluid and cursive, with a large initial "L" and "E".

Lilliana Estrella-Castillo
Administrative Law Judge