



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

BEATRICE LOZADA,

Complainant,

v.

**ELMONT FIRE DEPARTMENT TRUCK
COMPANY #1,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. **10146997**
10147297

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on November 25, 2014, by Matthew Menes, Adjudication Counsel, after a hearing held before Robert J. Tuosto, 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 Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, 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: **JAN 16 2015**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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BEATRICE LOZADA,

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v.

**ELMONT FIRE DEPARTMENT TRUCK
COMPANY #1, ELMONT HOOK AND LADDER
COMPANY NUMBER 1**

Respondents.

**ALTERNATIVE
PROPOSED ORDER**

Case Nos. **10146997**
10147297

SUMMARY

Complainant, a former volunteer firefighter, alleged that she was unlawfully discriminated against based on her race, sex and marital status, and that she was unlawfully retaliated against. Complainant has not shown that any unlawful discriminatory actions occurred within the statute of limitations and, therefore, the case is dismissed.

PROCEEDINGS IN THE CASE

On January 21 and February 23, 2011, Complainant filed verified complaints with the New York State Division of Human Rights (“Division”), charging Respondent with unlawful discriminatory practices relating to volunteer firefighters in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

After investigation, the Division found that it had jurisdiction over the complaints 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 Robert J. Tuosto, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on April 16, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by The Law Office of Steven A. Morelli, Garden City, New York, by Steven A. Morelli and Anabia Hasan, Esqs. Respondent was represented by Siler & Ingber, Mineola, New York, by Jeffrey B. Siler, Esq.

During the public hearing, the caption was amended to add Elmont Hook and Ladder Company Number 1 as a Respondent pursuant to 9 N.Y.C.R.R. § 465.4(c).

On July 23, 2014, ALJ Tuosto issued a recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”). Respondent filed Objections to the Recommended Order with the Commissioner’s Order Preparation Unit.

FINDINGS OF FACT

1. Respondent, as a separate legal entity from the Elmont Fire Department, owns the firehouse where it is located. (Tr. 248, 265, 267)
2. In 2006, Complainant joined Respondent as a probationary volunteer firefighter. (Tr. 11, 48-49)
3. Complainant described the environment at Respondent’s firehouse as a “boys’ club” or a “fraternity.” It was not unusual to walk into the backroom at Respondent’s firehouse and see pornographic images displayed on the television. (Tr. 49-50)

4. Starting in 2007, Complainant had various unwelcome interactions with Second Lieutenant Anthony Rizzo. Rizzo regularly made sexual comments to Complainant. Rizzo would come up behind Complainant and put his arms around her. Rizzo slapped Complainant's buttocks so often that she was afraid to walk in front of him. (Tr. 50-60, 159-60)
5. Sometime during 2007, Rizzo forcibly sexually assaulted Complainant. (Tr. 53-59)
6. Seven or eight of Complainant's fellow firefighters occasionally gathered and put their hands down their pants, touched their genitalia and then tackled a firefighter and touched him or her. Complainant was victimized in this way on at least one occasion. (Tr. 60-61)
7. Complainant conceded that she never made a complaint to anyone in the firehouse regarding these interactions. (Tr. 26, 40, 59, 61, 130, 139-40, 147, 282)
8. From February 2008 to February 2009, Complainant was on maternity leave. (Tr. 126, 133-34)
9. At some point in 2009 or 2010, Complainant was at a meeting at the firehouse when she received an unsolicited text message reading "I want to eat your pussy." The individual sending the text message was eventually identified as a fellow firefighter who was later suspended for sending the text. (Tr. 62, 110, 119, 160, 179, 253-54, 306)
10. In November 2009, Complainant completed officer training. (Tr. 16, 18, 21, 262)
11. Complainant's brother, Frank Lozada, was also a volunteer firefighter with Respondent from 2009 to 2010 and again from 2011 to 2013. In late 2009, Frank Lozada nominated Complainant when she sought election as an officer. Complainant lost the election by four votes. (Tr. 30-31, 157-58, 168-70, 180, 262)
12. On January 21, 2011, Complainant filed her first Division complaint (case number 10146997). Just before filing her Division complaint, Complainant applied for "chauffeur

training” in order to operate Respondent’s fire trucks. Complainant did not receive chauffeur training but did receive different training for the operation of Respondent’s smaller trucks. (ALJ Exh. 4; Tr. 36, 136, 272-74, 308)

13. After filing her Division complaint, Complainant had service credit wrongfully taken from her by her Captain, though the credit was eventually reinstated after she brought the issue to the attention of Respondent’s personnel. (Tr. 79-81, 86-87)

14. In 2011, Complainant and her brother were subjects of several news stories alleging unlawful discrimination by Respondent, including an interview in the Spanish language newspaper *El Diario*. The *El Diario* article accused Respondent of allowing unlawfully discriminatory acts against certain individuals. (Tr. 15-20, 70-72, 77, 169, 176, 242)

15. In February 2011, an emergency meeting was held at the firehouse in order to discuss the *El Diario* article. Copies of the article, which contained the names of those alleged to have engaged in unlawful discrimination, were made available to the membership. Complainant alleged that at the meeting she was cursed at and threatened. (Tr. 69-74, 174, 179, 204, 215, 242-43, 294-97)

16. On February 6, 2011, Complainant transferred to Emergency Medical Services (“EMS”) as an Emergency Medical Technician. (Tr. 65, 67-68, 95, 266, 269)

17. On February 23, 2011, Complainant filed her second Division complaint (case number 10147297). (ALJ Exh. 1; Tr. 36)

18. Complainant believed she was being harassed when her co-workers told her she was ineligible to be an officer. (Tr. 36) When testifying about this alleged harassment, Complainant failed to name any comments or acts of a sexual nature. (Tr. 68, 147, 150) Neither of Complainant’s instant complaints contained allegations of sexual harassment. (ALJ Exhs. 1, 4)

19. When asked to name the most recent sexual comment directed at her, Complainant was unable to do so. (Tr. 63-64) The closest Complainant came to specifying a date of a sexual comment directed to her during the statutory time period was when she asserted that some of the offensive comments were an “ongoing thing with the Fire Department” without specifying what the comments were, who made them or where they occurred. (Tr. 65)

20. Phillip Price (“Price”) testified on Complainant’s behalf. Price worked for Respondent from 1994-2012 and saw the offensive text message that was sent to Complainant. (Tr. 107, 110) Price testified that other than the text message, he never witnessed any sexual comments directed towards Complainant. (Tr. 116)

21. Frank Lozada, Complainant’s brother, testified on her behalf. His testimony failed to specify any discriminatory comments or acts which occurred in the statutory time period. (Tr. 156, 164, 171, 173)

22. Ruben Cuenca (“Cuenca”) testified on Complainant’s behalf. Cuenca started working with Respondent as a firefighter in 2008 and continued working in that position through the date of the hearing. He likewise failed to specify discriminatory comments or acts which occurred in the statutory time period. (Tr. 196, 200)

23. Christine Revie (“Revie”), Complainant’s friend, testified on Complainant’s behalf. Revie testified that sometime in 2007 Complainant’s demeanor changed, she became more withdrawn and sometimes cried, had outbursts and did not want to be touched. When asked how long this behavior continued, Revie indicated it did not last past 2009. (Tr. 222-225)

24. In November 2013, Complainant left EMS and is no longer employed by Respondent. (Tr. 13, 94, 130, 255)

OPINION AND DECISION

Any complaint filed pursuant to the Human Rights Law must be filed within one year of the alleged unlawful discriminatory practice. *See* Human Rights Law § 297.5. In this case, any claim which had its origin prior to January 21, 2010, is time-barred unless Complainant can show a continuing violation. A continuing violation exists where there is proof of specific ongoing discriminatory practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory practice. *See Clark v. State of New York*, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dept. 2003). *See also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). However, such claims will be time-barred if the acts are not part of the same unlawful employment practice or if none of the acts occurred within the statutory time period. *See Id.* at 122.

Here, the acts that occurred in the early part of Complainant's tenure with Respondent (including pornography in the workplace, sexual comments, unwanted sexual touching and sexual assault) clearly constituted a hostile work environment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). However, Complainant failed to allege or establish with any specificity that any of these acts occurred after January 21, 2010. During the hearing, Complainant was given multiple opportunities to state specifics and dates concerning alleged subsequent incidents of discrimination and failed to do so. For this reason, she cannot prevail. *See Harrington v. County of Fulton*, 153 F.Supp.2d 164, 169 (N.D.N.Y. 2001)

Numerous witnesses testified on Complainant's behalf, and similarly failed to establish that any discriminatory actions took place within a year prior to the filed complaints. Without one act falling within the statutory time period, a continuing violation cannot exist. Accordingly, any discriminatory hostile work environment that may have existed is not actionable here.

Human Rights Law § 296.9(a) makes it an unlawful discriminatory practice for any fire department or fire company to discriminate against any volunteer member because of the race, sex or marital status of such individual.

For claims under this section, the burden of persuasion regarding the ultimate issue of unlawful discrimination remains with the complainant. *See Stephenson v. Hotel Employees and Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 811 N.Y.S.2d 633 (2006).

Here, Complainant has failed to meet this burden.

Complainant alleged disparate treatment and harassment. However, Complainant failed to show that any action taken by Respondent was related to her race, sex or marital status.

Therefore, these claims are dismissed.

Human Rights Law § 296.7, makes it an unlawful discriminatory practice to retaliate or discriminate against any person because he or she has opposed any practices forbidden under the Human Rights Law or filed a complaint under the Human Rights Law.

In order to make out a prima facie case of retaliation, a complainant must show: she engaged in protected activity; the respondent was aware that she engaged in protected activity; she suffered an adverse employment action; and a causal connection between the protected activity and the adverse employment action. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

Complainant alleges that she was retaliated against in two instances: when she was denied chauffeur training and when she was temporarily deprived of service credit. As both acts could be considered adverse employment actions, and both occurred closely following the filing of the instant complaints, Complainant has made out all of the elements of the prima facie case. *See Calhoun v. County of Herkimer*, 114 A.D.3d 1304, 980 N.Y.S.2d 664 (4th Dept. 2014).

However, Respondent showed legitimate, nondiscriminatory reasons for its actions which were not proven by Complainant to be pretexts for unlawful discrimination. The record shows that Respondent's denial of chauffeur training was reasonably related to the fact that Complainant became eligible for different training upon her transfer to EMS. In addition, Respondent's denial of service credit was shown to be an oversight which was immediately remedied.

Therefore, this claim is 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 dismissed.

DATED: November 25, 2014
Bronx, New York



Matthew Menes
Adjudication Counsel