STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

OFFICE OF PUBLIC HEARINGS

Muriel Magda, Complainant	:	CHRO No. 0420213
v.		
Diageo North America, Inc., Respondent	:	March 16, 2006

RULING ON MOTION TO DISMISS

On November 7, 2003, the complainant filed an Affidavit of Illegal Discriminatory Practice ("complaint") against the respondent (her former employer), alleging, among other things, that on May 15, 2003, portions of her job as an administrative assistant were eliminated and, consequently, she was terminated.[1] Although she applied for numerous other open positions with the respondent, she claims the respondent filled many of the positions with younger, less qualified individuals. She further alleges that the respondent's decisions were motivated by her age, and she identifies two younger individuals who assumed her former duties.

On January 17, 2006 the respondent filed a motion to dismiss as untimely those portions of the complaint alleging that it failed to provide training and failed to provide

[1] The extant record is not clear whether her employment ended on that date or whether the respondent merely informed her on that date of her impending termination. Under the leading case of *Delaware State College v. Ricks*, 449, U.S. 250 (1980), the filing limitation is triggered when the respondent's decision is communicated to the employee. See also *Vollemans v. Town of Wallingford*, 2006 Conn. Super. LEXIS 41, 14-16.

the complainant with several salary increases, including an increase when she was promoted to work for a vice-president. The commission filed an objection to the motion on February 14, 2006 and the respondent filed a reply to the objection on February 27, 2006.

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622, 624 (1983). The motion admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corp*., 44 Conn. App. 446, 451-52, cert. denied, 241 Conn. 906 (1997). In evaluating the motion, the complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant; every reasonable inference is to be drawn in her favor; *New England Savings Bank v. Bedford Realty Corp*., 246 Conn. 594, 608 (1998); and "[e]very presumption favoring jurisdiction shall be indulged." *Conn. Light & Power Co. v. Costle*, 179 Conn. 415, 421 (1980). After review of the parties' written arguments, along with the cases, pleadings, and other supporting materials referenced therein or attached thereto, I hereby deny the motion to dismiss for the reasons set forth below.

The respondent incorrectly asserts that the complainant never raised these two matters until the commission's investigation pursuant to General Statutes § 46a-83(c). The first page of a commission complaint comprises a "boilerplate" checklist, wherein a complainant may check sections that refer to alleged discriminatory acts, various protected classes within which a complainant may fall, and applicable state and federal

statutes. Even though the narrative portion of the complaint does not address the two matters, the complainant indicated in the checklist, under oath, that, in addition to her termination and denial of a new position, she was "less trained" and was "denied a raise."

According to the respondent's motion, these two allegations were addressed during the commission's investigation (conducted pursuant to General Statutes § 46a-83(c)) and the investigator concluded that any failure to train or to provide raises occurred more than 180 days before the complainant filed her complaint, and therefore they were time-barred. The respondent submitted no documents or affidavits supporting its position; rather, it simply quoted a portion of the July 9, 2005 Reasonable Cause Finding, but neither that document nor, more important, the evidence underlying the investigator's findings is part of this adjudicative record.

When an investigator certifies a complaint to public hearing, it is the entire complaint, and not merely portions thereof, that is certified. See, e.g., *Commission on Human Rights and Opportunities ex rel. Perry v. City of Ansonia*, CHRO No. 9730481 (Ruling on Motion to Dismiss, December 20, 1999); *Commission on Human Rights and Opportunities ex rel. Lange v. Kelly Temporary Services*, CHRO No. 9210246 (March 18, 1998); but see, contra, *Commission on Human Rights and Opportunities ex rel. Okonkwo v. Bidwell Healthcare Center*, CHRO No. 9940144 (Ruling on Motion to Dismiss, February 5, 2001) (dismissing portion of complaint for which investigator did not find reasonable cause). Thus, for the purposes of this adjudication, the investigator's conclusions regarding the raises and training were essentially nullified by virtue of her

September 7, 2005 certification, which (without identifying any exceptions) reiterated her overall finding of reasonable cause and certified the entire complaint to public hearing.

Furthermore, once the case has been certified to public hearing, the presiding human rights referee must conduct a "de novo proceeding on the merits of the complaint." General Statutes § 46a-84(b). This proceeding is not an appeal or review of what occurred prior to certification; the parties must raise issues and present evidence anew to the referee. The investigator's individual findings are not binding upon the referee, although the referee, of course, may address the same issues based on the evidentiary record established here and may reach the same conclusions as the investigator. See, e.g., *Commission ex rel. Perry v. City of Ansonia*, supra, 4-7. In the present matter, the parties have not supplemented their written arguments with any supporting documents or affidavits beyond the original pleadings. Lacking a meaningful factual framework within which to analyze the motion to dismiss, I cannot grant the motion.

Under Title VII and its state counterpart, General Statutes §§ 4-60 et seq., each discrete act of discrimination constitutes a separate, actionable incident and an employee can only file a charge to cover discrete acts that occurred within the appropriate time period. (Quotations omitted.) *Boxill v. Brooklyn College*, 115 Fed. Appx. 516, 517 (2nd Cir. 2004), citing *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114 (2002); see also *Patterson v. County of Oneida*, 375 F.3d 206, 220 (2nd Cir. 2004) (Title VII precludes recovery for discrete acts of discrimination that occurred outside of the statutory time period, even if other acts occurred within the time period). Accordingly,

claims of discriminatory employment practices (such as these) brought under § 46a-82 "must be filed within one hundred and eighty days after the alleged act of discrimination . . ." The complainant was terminated on May 15, 2003 and she filed her complaint on November 7, 2003. Thus, under a literal reading of the statute, any other action or incident occurring before May 11, 2003 would be time-barred.

The 180-day filing period is not jurisdictional, but is comparable to a statute of limitations; *Williams v. Commission on Human Rights and Opportunities*, 257 Conn. 258, 277-78 (2001); and, accordingly, exceptions exist to mechanical application of the otherwise mandatory rule. For example, under the "continuing violation" exception to this requirement, "if a plaintiff has experienced a continuous practice or policy of discrimination, . . . the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." (Emphasis added; citations omitted.) *Boxill v. Brooklyn College*, supra. In such case, the otherwise untimely discrete acts might be considered part of a continuing violation, provided sufficient evidence demonstrates not only that at least one of the series of related incidents is timely, but also that the "incidents of discrimination resulted from an underlying policy or mechanism of discrimination." *Alungbe v. Board of Trustees of the Connecticut State University System*, 283 F.Supp.2d, 674, 681 (2003); *Mills v. State of Connecticut, Judicial Department*, 2003 U.S. Dist. LEXIS 5664, 10 (the continuing violation exception applies only where there is evidence of specific discriminatory practices and a relationship between such practices and an invalid, underlying policy).

Nothing in the record identifies the dates associated with the training or the raises the complainant desired, including the date she was promoted (without a commensurate raise) to work for one of the respondent's vice-presidents. If, as the respondent urges, none of these denials occurred within the 180-day period, they would indeed be time-barred. Conversely, any denial of training and/or salary increase within the 180 days preceding the filing of this complaint (specifically, within the window of May 11 through May 15, 2003) would be timely. Were that the case, according to the commission, the complainant should also be afforded the opportunity to demonstrate that the earlier denials should be considered under the continuing violation doctrine and not merely viewed as discrete incidents.

On the scant record before me, and given the miniscule time frame, it is unlikely that the complainant can identify any denial of a raise or of training that would form the basis for either a timely claim or a "continuing-violation" argument. Certainly, she has identified no pertinent dates for the alleged incidents and has provided no affidavit or supporting documentation to refute the respondent's assertions. On the other hand, the respondent also has provided no dates or other pertinent information beyond a quotation from the investigator's report. Absent more information, I cannot ascertain that all of the alleged denials are untimely, and thus I cannot determine with confidence that the complainant should be precluded from arguing, with appropriate testimony and documentary evidence, that she was victimized by a continuing violation. Under the applicable case law, this may prove to be difficult, but lacking conclusive evidence at this time, I must afford the complainant this opportunity.

Ultimately, if the denial of raises and training all predated May 11, 2003, this tribunal would lack the jurisdiction to adjudicate those allegations. However, given the slight possibility that at least one such denial may have occurred between May 11 and May 15, 2003, the complainant may wish to argue that the "continuing violation" doctrine applies, thus allowing me to consider all of the alleged denials of training and salary increases. Lacking the pertinent information, I am disinclined to dismiss at this time the allegations that the complainant was denied raises and not given appropriate training. These allegations can be addressed fully during the public hearing. Accordingly, the motion to dismiss is hereby denied without prejudice.

_____ _____

Date David S. Knishkowy
Human Rights Referee

c: S. Horner, Esq.
M. Debiak, Esq.
M. Nurse-Goodison, Esq.