

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights and
Opportunities, *ex rel.* : CHRO No. 0510486
Florence Evyonne : EEOC. No. 16aa501329
Parker-Bair, Complainant

v.

State of Connecticut, Department of
Motor Vehicles,
Respondent : July 11, 2008

**MEMORANDUM
ON
MOTION TO DISMISS**

The complainant filed an affidavit of illegal discriminatory practice (the complaint) on June 14, 2005, against the respondent (her employer) with the commission on human rights and opportunities (commission or CHRO). Her complaint alleges in 108 paragraphs that she's been employed by the respondent for approximately 10 years and has been denied promotions and appropriate pay increases. The complainant alleges that the respondent's failing to promote and/or pay her appropriately were discriminatory acts based on her race (African-American), gender (female) and maternity status.¹

The complainant, on March 7, 2007, filed an amended complaint which incorporated the allegations of the previous complaint and further alleged that the respondent has

¹ The complainant failed to allege in her complaint and again in her amended complaint the governing statutes of her claims. At this point in the proceedings, I will assume that the complainant's claims are predicated solely under Connecticut's Fair Employment Practices Act (CFEPA), Connecticut General Statutes § 46a-60- et seq.

retaliated against her (presumably for her filing her original complaint dated June 14, 2005)² and caused her to suffer a hostile work environment.

The respondent, on November 15, 2007, filed its answer to the pending amended complaint in which it denied any discriminatory action along with seven affirmative defenses. The respondent on April 28, 2008 filed a motion to dismiss or in the alternative a motion in limine. In its motion to dismiss, the respondent argues that the complainant's amended complaint alleges facts that date far back as 1999 and that any claim of discrimination that occurred more than 180 days prior to filing her initial complaint deprives this tribunal of subject matter jurisdiction to adjudicate those allegations. The respondent additionally argues that the allegations pertaining to denial of promotions or appropriate pay were separate and discrete acts occurring before December 16, 2004 or outside the 180 day filing period and thus, is time-barred. The respondent's motion in limine simply argues that any alleged discrete act of discrimination occurring prior to the 180 day statutory period for filing a claim is irrelevant to any timely filed claim the complainant may have and, as such, no discovery should be allowed in connection with those allegations.

On May 9 2008, the commission filed its objection to the pending motion to dismiss.

² General Statutes § 46a-60 (a) (4) provides in pertinent part. "It shall be a discriminatory practice...[F]or any person, employer... to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint... under §§§ 46a-82, 46a-83 or 46a-84."

The arguments advanced by the commission in opposition to the respondent's motion are: 1) the complaint was timely filed; 2) that by virtue of the continuing violation theory the allegations occurring prior to December 16, 2004 are timely; and 3) even if actions occurring prior to December 16, 2004 while not actionable as being time-barred can still be used as evidence in proving the timely allegations.³

For the reasons set forth below the respondent's motion to dismiss is GRANTED in part and DENIED in part without prejudice to re-file at a later date. The respondent's motion in limine is denied.

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 and every reasonable inference is to be drawn in his favor; *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998); and

³ The commission in footnote 1 of its objection appears to be attempting to enlarge the 180 day filing requirement found in § 46a-82(e) by referring to references made in the respondent's motion to the 300 day filing requirement under federal law. The use of this filing period would result in discriminatory acts occurring prior to August 14, 2004 being time-barred. While the commission seems to want to avail itself to expanding this state's 180 day filing period by virtue of the respondent's comment, I do not see the respondent arguing in any manner for the expansion of the filing period. More pointedly the reference was to highlight the respondent's position that this tribunal has no jurisdiction over federal claims such as Title VII.

“[e]very presumption favoring jurisdiction shall be indulged.” *Conn. Light & Power Co. v. Costle*, 179 Conn. 415, 421 (1980).

General Statutes § 46a-82(e) requires that any complaint of discrimination must be filed within 180 days of the alleged act of discrimination. The respondent argues that failing to file a discrimination complaint within this prescribed period deprives this tribunal of subject matter jurisdiction. This statutory filing period has however been found not to be jurisdictional but comparable to a statute of limitations and subject to waiver and equitable tolling. *Williams v. Commission on Human Rights and Opportunities*, 257 Conn. 258, 277 (2001). This determination is not limited to this state’s courts but is found in decisions of the United States Supreme Court in addressing the time filing requirement under the federal counterparts to our state’s discrimination laws. *National Railroad Passengers Corp. v. Morgan*, 536 U.S. 101, 113 (2002) which held that “the time period for filing a charge is subject to equitable doctrines such as tolling or estoppel; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) holding that the filing, a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit... but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling.”

In addition to the equitable doctrines of waiver, equitable tolling and estoppel the continuing violation theory has been used as a mechanism to extend the filing period so as to bring into the charging period discrete acts or acts that if standing alone would be untimely provided one of the acts occurred in the filing period. *Quinn v. Green Tree*

Credit Corp., 159 F.3d 259, 765 (2nd Cir. 1998). Examples of separate and actionable acts are failure to promote, denial of transfer and a retaliatory adverse employment decision. *National Railroad Passengers Corp. v. Morgan*, supra at 114.

The *Morgan* decision however “constrained the use of the continuing violation theory. According to [this decision] (along with the myriad federal and Connecticut cases following *Morgan*), under Title VII, each discrete act of discrimination or retaliation constitutes a separate actionable incident and an employee cannot proceed on claims based on discrete acts occurring beyond the appropriate time period, even if they are related to acts alleged in a timely manner ... [Id 113-14] ; see also *Patterson v. County of Onieda*, 375 F3d 206, 220 (2nd Cir. 2004) (Title VII precludes recovery for discrete acts of discrimination that occurred outside of the statutory period, even if other related acts occurred within the time period); *Commission on Human Rights and Opportunities ex rel. Magda v. Diego North America, Inc.*, 2006 WL 2965493 (CT Civ. Rts.) (CHRO No. 0420213, Ruling on Motion to Dismiss, March 16, 2006). Discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period; *National Railroad v. Morgan*, supra at 112. One exception to this tenet ... may occur in a situation involving a hostile work environment. *Darling v. Potter*, 2005 WL 2045951, *4.” *Samson v. State of Connecticut, Department of Public Safety*, 2008 WL 2683294.

In carving out the hostile work environment exception, the *Morgan* decision reasoned that the very nature of a hostile work environment involves repeated conduct. The “unlawful employment practice therefore cannot be said to occur on any particular day.

It occurs over a series of days or perhaps years, and in direct contrast to discrete acts.”
National Railroad Passengers Corp. v. Morgan, supra at 114.

In applying the aforementioned court holdings to the respondent’s motion to dismiss, I first conclude that any argument relating to lack of subject matter jurisdiction that would support a motion to dismiss fails and the motion is DENIED. As to the respondent’s argument that the individual and discrete acts alleged to have occurred prior to December 16, 2004, I find are time-barred and are hereby dismissed. I temper this ruling with the caveat that these alleged acts which cannot form a basis for liability can be utilized as background evidence to support a timely claim. *National Railroad Passengers Corp. v. Morgan*, supra at 113. As such, I am denying the respondent’s motion in limine.

While the complainant has raised the specter of a hostile work environment by simply stating in her amended complaint that she charges the respondent with “...making my work environment hostile...” I find that the use of this term alone to be insufficient to establish a claim of hostile work environment. However, rather than dismiss this claim I order that the complainant amend the pending complaint within 20 days of this ruling and state facts which if proven would establish that the complainant as a consequence of her protected basis was subjected to a workplace “permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the [complainant’s] employment and create an abusive working environment...” *Brittel v. Department of Correction*, 247 Conn. 148, 166-167 (1998).

Failure to file a timely amended complaint will result in the dismissal of any claim related to being subjected to a hostile work environment.

As to the act of retaliation, if the respondent's motion to be directed to this claim it is DENIED as it appears that this claim is within the 180 day filing period.

The motion in limine is hereby DENIED. I, however, deny the motion without prejudice to re-file at a later date after the record has been more fully developed or should sufficient other grounds be found.

The complainant is further ordered to file with this tribunal within 20 days of this order a an amended complaint alleging the pertinent statutes for her discrimination claim.

It is so ordered this 11th day of July 2008.

Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.

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