

FLAVIA ALAYA,
Petitioner,
v.
**RAMAPO COLLEGE OF NEW JERSEY, RAMAPO
COLLEGE TRUSTEES AND GEORGE POTTER,
PRESIDENT,**
Respondents.

Decided February 29, 1980

Initial Decision

SYNOPSIS

Petitioner, a female professor, alleged that she was discriminated against in 1971, when she was hired as an associate rather than a full professor and that the discrimination continued until 1973 when she was promoted to full professor. She further contends that her salary still reflects these acts of discrimination. Although her complaint was filed in 1975, the professor asserted that *N.J.S.A. 10:5-10*, which provided that complaints under New Jersey's Law Against Discrimination must be filed within 180 days of the alleged act of discrimination, was inapplicable since the violations were of a continuing nature. In the absence of applicable New Jersey cases, the administrative law judge examined recent developments under the analogous federal statute. The present complaint was dismissed as barred by *N.J.S.A. 10:5-10*, since the 1975 filing was untimely as to acts occurring in 1971 and 1973 and the complaint did not allege any discriminatory acts occurring within 180 days of the filing of the complaint. Additionally, the complaint, coupled with the agency's investigation, did not indicate that a discriminatory salary or seniority system perpetuated past discriminatory acts. Thus, a motion to dismiss the complaint was granted.

Mumtaz B. Bari, Deputy Public Advocate for Complainant (Stanley Van Ness, Public Advocate of New Jersey, Attorney)

Aron M. Schwartz, Deputy Attorney General for Respondent (John J. Degnan, Attorney General of New Jersey, Attorney)

SAMUELS, ALJ:

On January 2, 1975 the petitioner, Flavia Alaya, filed a complaint with the New Jersey Division on Civil Rights alleging that her employer, Ramapo College of New Jersey, had discriminated against her on the basis

of her sex, in violation of *N.J.S.A.* 10:5-1 *et seq.*, more particularly *N.J.S.A.* 10:5-4 and *N.J.S.A.* 10:5-12(a).

Ms. Alaya was hired by the college in September 1971 as an associate professor. In September 1973 she was promoted to the rank of full professor. In the 1975 complaint Ms. Alaya alleged that, when she was hired as an associate professor in 1971, men with academic credentials no better than hers were hired as full professors. She also charged that, at the time she was promoted to full professor in 1973, a male was promoted to that same rank, with academic credentials that were inferior to hers. She stated that her salary still reflects those acts of discrimination.

The matter was investigated by the Division on Civil Rights, pursuant to *N.J.S.A.* 10:4-15, and in January 1976 the Division returned a finding of probable cause. It was not resolved within the Division by use of the statutory conference and conciliation proceedings.

In July 1979 the Division transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held on August 29, 1979 and a prehearing order, dated September 10, 1979, resulted. The prehearing order identified and limited the issues, fixed the date for hearing and permitted the respondent to move, in advance of trial, to dismiss the complaint based upon a defense that the cause of action was barred by operation of the applicable Statute of Limitations.

After several adjournments, a trial was scheduled for February 13, 14 and 15, 1980. However, on December 20, 1979 the respondent served and filed its prehearing motion, with brief, to dismiss, based upon the bar of the Statute of Limitations. The complainant's brief in opposition was filed on January 21, 1980. Oral argument on the motion was heard on February 13, 1980, in place of the first day scheduled for trial.

The applicable Statute of Limitations is contained in *N.J.S.A.* 10:5-18:

Any complaint filed pursuant to this section must be so filed 180 days after the alleged act of discrimination.

This section is part of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*

Obviously, the complaint was filed by Ms. Alaya in January 1975, far beyond 180 days after she was employed as an associate professor in 1971 and also far beyond 180 days from the time she was promoted to full professor in 1973. However, Ms. Alaya claims a continuing discrimination against her since the initial hiring, by virtue of the ongoing effect of the alleged 1971-73 act of discrimination. She charges that this is reflected in her salary, periodic upgrading and seniority status. The allegation of a continuing violation was referred to in the 1975 complaint: "My salary still

reflects those acts of discrimination.”

Petitioner takes the position that the 180-day Statute of Limitations is no bar to her action because the discrimination is continuing to the present day. No specific data was presented to support the allegation of a continuing and present differential in salary and status. However, it is assumed that the College has a salary guide that is at least partially based upon annual incremental steps for its employees; and that an employee’s position on the guide or entitlement to increment depends to some extent upon the number of years he or she has been employed in a particular position. Therefore, subject to adjustments for other factors, a person who has been an associate professor for two years and a full professor for eight years is at a lower position on the full professor’s incremental salary guide and has less seniority status as such than a person who has been a full professor for ten years. This situation is acknowledged by respondent in its brief, which stated:

Even though she was promoted to full professor effective September 1973, had she been hired originally as a full professor, she would have commenced employment at a higher range on the faculty salary schedule than where she began as associate professor. Pursuant to the normal course of advancement through those ranges (and steps) fixed for full professors, she would be further along on them (i.e., at a higher salary) than where she is as a result of her having been promoted in 1973.

The single issue to be decided is whether the 180-day Statute of Limitations in *N.J.S.A. 10:5-18* bars the action, or whether the Statute is inapplicable due to continuing acts of discrimination after the initial 1971-73 acts, up to the 1975 filing date.

Only one reported case in New Jersey has addressed the time limitation imposed by the Statute: *Decker v. Board of Education of the City of Elizabeth*, 153 N.J. Super. 470 (App. Div. 1977), where the complaint was filed but not verified within the 180-day statutory period. The court would not bar the action, holding that verification of the complaint related back to its date of filing. The discrimination alleged in *Decker* consisted of paying a lower salary to the complainant than was paid to a male employee performing the same function. Without discussing the continuing violation question, the court summarily held that every paycheck constituted a new violation of the Statute. In that case, there is little question that the employer continued to discriminate on each payday by paying an unequal wage for equal work. However, little or no assistance was provided on the issue before us, where complainant does not allege a discriminatory pay scale *per se* or unequal pay for equal work.

Title 7 of the Civil Rights Act, 42 U.S.C.A. 2000 e-5(e) is analogous to the New Jersey Statute, and there are numerous federal cases that discuss the continuing violation theory. Under Title 7, a complaint must be filed with the Equal Employment Opportunities Commission (E.E.O.C.) within 180 days following the alleged act of discrimination. In some cases, the federal courts have recognized that a complaint may be timely, even though some acts fall outside the statutory period, where acts of continuing discrimination occurring within 180 days of filing are alleged.

In analyzing situations that might lead to a finding of continuing violation, the courts have focused on the nature of the acts or conduct that are alleged to grow out of or continue from the initial discriminatory event or act. In most of these cases, complainants have charged that, by virtue of a discriminatory act at the time of initial hiring, promotion, placement on seniority list or entry into a pension system, they have thereafter suffered continuous and ongoing losses or damages because of the adverse effect of the initially improper act; which act placed them at a lower salary scale, seniority rating or promotional step. In such cases, it has been claimed that each subsequent paycheck or pension check received constitutes a separate violation because its amount is less than would have been paid if the initial discrimination did not take place.

A continuing discrimination claim was recently dealt with by the United States Supreme Court in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). A female flight attendant was compelled to resign in 1968 because of the airline's "no marriage" rule. She was rehired as a new employee in 1972, but United refused to give her seniority credit for the prior period of employment. One year later, in 1973, Evans filed a charge with the Equal Employment Opportunity Commission alleging that the airline discriminated and continued to discriminate against her because she is a female. She had not initiated any proceeding in 1968 by filing a charge with the E.E.O.C. within the statutory time limitation following her separation, and any claim based solely on that discrimination was barred. However, in 1973 she contended that United was guilty of a present, continuing violation which rendered her claim timely. The issue considered by the Court was whether United's refusal to credit the complainant with seniority prior to 1972 constituted a second or continuing violation of Title 7.

Ms. Evans did not allege that any other rehired employees were given credit for prior service, but she advanced two reasons for holding that United's seniority system illegally discriminated against her:

1. That she was treated less favorably than males who were hired after her termination in 1968 and prior to her re-employment in 1972; and
2. That the seniority system gave present effect to the past illegal act, and

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therefore perpetuates the consequences of a forbidden discrimination.

As for the first contention above, the Court noted that the system did not treat the complainant less favorably than men, because any person, male or female, hired after her termination and before reemployment would possess greater seniority.

Regarding the second contention, the Court looked at the nature of the seniority system itself and found it to be neutral and unbiased in its operation. It was then held that a neutral seniority system, that gives present effect to a past discriminatory act, which past act is not the subject of a timely complaint, does not constitute a continuing violation. Because it was barred by the time limitation, the past discriminatory event (wrongful termination in 1968) was of no present legal significance. Therefore, a challenge to a facially neutral system could not be predicated upon the past event of no present legal significance. Justices Brennan and Marshall filed a dissent, arguing that treating the complainant as a new employee in 1972 was a current violation, even though she was wrongfully forced to resign four years earlier; and that such violation continues to this day.

The federal courts have since followed *Evans*, for the most part, in dealing with the issue of continuing violations, attempting to find a present violation rather than merely acknowledging the present effects of a past act. Where the courts have found a past act which does not occur within the permissible period of time for filing, and no present violation within the period of limitation, they have generally denied application of the continuing violation theory.

In *Alston v. Allegheny Ludlum Steel Corp.*, 465 F. Supp. 171 (W.D. Pa. 1978) aff'd 594 F. 2d 854, (3d Cir. 1979), the *Evans* theory was applied to a barred claim of a discriminatory refusal to promote. The plaintiff later claimed that his lower salary resulted in smaller pension payments. The court found the pension system to be facially neutral, and since plaintiff did not timely challenge the discrimination in promotion, he was barred from challenging its effect. See, *Goldman v. Sears Roebuck & Co.*, 607 F. 2d 1014 (1st Cir. 1979).

A similar decision resulted in *Freude v. Bell Telephone Co.*, 438 F. Supp. 1059 (E.D. Pa. 1979), where it was alleged that pension checks derived from a sexually discriminatory salary scale constituted a continuing violation. The court dismissed, holding that receipt of payments from a neutral pension plan did not constitute a continuing violation solely because the amounts were derived from a discriminatory salary scale, which was unchallenged within the period of limitations.

See also, *Martin v. Georgia-Pacific Corp.*, 568 F. 2d 58 (8th Cir. 1977); *Fowler v. Birmingham News Co.*, 608 F. 2d 1055 (5th Cir. 1979); *Carter*

v. *Delta Airlines*, 441 F. Supp. 808 (S.D.N.Y. 1977).

Generally, allegations of discrimination in hiring an employee at a lower rank, thereby subsequently affecting his salary and raises, have been dismissed when no timely charge is filed as to the discriminatory hiring. *Presseisen v. Swarthmore College*, 442 F. Supp. 593, 602 (E. D. Pa. 1979), *aff'd* 582 F. 2d 1275 (3rd Cir. 1978).

A Florida case, *Jacobs v. Board of Regents*, 473 F. Supp. 663 (S.D. Fla. 1979) did accept the continuing violation theory (with receipt of each paycheck) and allowed the claim in similar circumstances, but the finding was based upon the receipt of each paycheck. The weight to be accorded this decision is, therefore, questionable.

The courts have been somewhat more receptive to allegations of continuing discrimination in class actions challenging systematic and pervasive discriminatory practices. *Guardians Assn. v. Civil Service Commission*, 466 F. Supp. 1273, 1200 (S.D. N.Y. 1979); *White v. City of Suffolk*, 460 F. Supp. 516 (E.D. Va. 1978); *Ridgeway v. International Brotherhood of Electrical Workers*, 466 F. Supp. 595 (N.D. Ill. 1979); *Wilson v. Allied Chemical Corp.*, 456 F. Supp. 249 (E.D. Va. 1978).

Therefore, since *Evans* it appears that a single employee charging a continuous violation must show either (1) a consistent discriminatory pattern with some of the illegal acts falling within the 180-day period, or (2) a second charge, which is timely, as to subsequent discriminatory conduct. *See, Smith v. American President Lines, Ltd.* 571 F. 2d 102, 105 (2d Cir. 1978).

In the case at hand, *Evans* is clearly applicable. The alleged act of discrimination took place in 1971 and may have continued until the complainant was promoted to full professor in 1973. No challenge was raised until 1975, and an action based solely upon the 1971-73 charge is barred by the Statute of Limitations. The salary increment system under which complainant receives reduced payments (due to the alleged 1971-73 discrimination) is a facially neutral system. The petitioner has not charged any separate violations or discriminatory acts, not predicated on the past act that themselves fall within 180 days of filing. Her sole claim to a continuing cause of action is predicated upon the present effects of the past act in 1971-73. The petitioner's arguments do not essentially dispute this. A careful reading of all papers filed in this matter clearly indicates Ms. Alaya's contention that the effects of her wrongful treatment in the hiring process are reflected in her salary increments and seniority status; but she fails to charge any conduct by the respondent that would demonstrate separate discriminatory acts beyond 1971 through 1973. There was only a bare contention in oral argument that facts would come out at trial to show

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separate, later discrimination, but no such allegations were suggested or proffered in any of the papers on file, in the briefs or argument, or in the investigative summary contained in the Division's finding of probable cause.

No attack is made by the petitioner against the neutrality of the separate salary guide or seniority system. Ms. Alaya claims that her complaint should not fall, despite the lack of such allegations, because of the federal court's liberality towards the breadth usually accorded to charges pleaded by complainants in Civil Rights matters. *Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455, 466 (5th Cir. 1970); *Willis v. Chicago Extruded Metals Co.*, 375 F. Supp. 362, 365 (N.D. Ill. 1974); *Scott v. University of Delaware*, 385 F. Supp. 937 (D.C. Del. 1974); *E.E.O.C. v. Raymond Metal Products Co.*, 385 F. Supp. 907 (D.C. Md. 1974). It is true that, in reviewing the scope of E.E.O.C. charges, the courts have accepted issues expanded beyond the four corners of the complaint, and have included agency investigation which can reasonably be expected to grow out of the charges initially pleaded.

In the case at hand, this court has reviewed the Division on Civil Rights' investigation, as contained in their finding of probable cause; and nowhere in that investigation is there any allegation from which an inference of an attack upon the neutrality of the salary guide or seniority system can be drawn. All of the papers on file, in addition to the complaint, the Division's finding of probable cause, and the briefs, have been considered as part of the record, with similar negative results. Therefore, even accepting the standards in *Sanchez*, *Scott* and *Raymond*, an expansion of the scope under which the charges in the complaint are stated does not produce an attack on the neutrality of the salary or seniority systems, beyond the original acts alleged in 1971-73. There has been no showing whatsoever of any genuine issue of material fact that might lead to any inference to the contrary.

The petitioner has even further suggested that this court, in its trial processes, should additionally investigate the current practices of the respondent, beyond the investigation already conducted by the Division; perhaps because the Division's investigators were not sufficiently skilled. Such a suggested perversion of the court's function is totally without merit and requires no further comment.

Having reviewed and considered the complaint, the finding of probable cause, the parties' briefs and all of the papers filed in this matter; and having heard the argument of counsel, the court makes the following findings of fact and law.

1. The foregoing discussion is incorporated herein by reference.
2. Petitioner, Flavia Alaya, was employed by the respondent, Ramapo

College of New Jersey, in July 1971 as an associate professor.

3. The petitioner was promoted by the respondent to the position of full professor in September 1973.

4. The petitioner is a female.

5. The respondent is an employer subject to the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*

6. The applicable Statute of Limitations is *N.J.S.A.* 10:5-8, which provides that a complaint must be filed within 180 days after the alleged act of discrimination.

7. The complaint in this matter was filed with the Division on Civil Rights on January 2, 1975, substantially beyond 180 days after the petitioner's initial hiring in 1971 and her promotion to full professor in 1973.

8. In the complaint, Ms. Alaya alleged an illegal act of discrimination by the respondent against her on account of her sex, claiming that she should have been employed initially as a full professor in 1971; and that such discrimination continued until she was promoted in 1973.

9. The complainant additionally charges that the discrimination continued further and still continues to date, because of her lower position on the full professors' salary guide and her lesser seniority status, due solely to the effects of the alleged 1971-73 discrimination.

10. The petitioner alleges generally that, by virtue of the foregoing, her complaint should be removed from the operation of the bar imposed by the 180-day Statute of Limitations because of continuing acts of discrimination, arising out of the 1971-73 acts.

It is, therefore, **CONCLUDED** that:

A. The alleged acts of discrimination in 1971 through 1973, relating to complainant's hiring and delay in promotion, are barred by the applicable 180-day Statute of Limitations. *N.J.S.A.* 10:5-18. Those acts are of no present legal significance because of such bar.

B. There has been no substantial allegation or charge of any separate and distinct act of discrimination by the respondent against the petitioner after her promotion to full professor in 1973. The petitioner has only alleged continuing or present effects of the past 1971-73 acts, without any attempt to challenge facially neutral salary and seniority systems, in and of themselves.

C. No separate act of discrimination is charged within 180 days prior to the filing of the complaint, and the action is, therefore, barred in full by operation of the Statute of Limitations contained in *N.J.S.A.* 10:5-18. All of the allegations of continuing violations after 1973 are totally predicated upon past events of no present legal significance.

D. Since the action is barred in full, any further trial or proceeding would

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be extraneous, because the statutory bar constitutes a fatal jurisdictional defect.

Based upon the foregoing, it is, therefore, **ORDERED** that the respondent's motion is granted and the complaint is **DISMISSED**.

After reviewing this Initial Decision, the Division on Civil Rights on April 1, 1980 issued the following Final Decision:

After careful and independent consideration to the entire record, including the transcript of the hearing, the respondent's brief and petitioner's brief in opposition, and the cases cited as authority this Initial Decision and the Order of Dismissal are **ADOPTED**.