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SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (DECEMBER 18, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ZELMA RIVAS,

Plaintiff-Appellant,

v.

NEW YORK STATE LOTTERY,

Defendant-Appellee.

18-833-cv

Appeal from a March 15, 2018 judgement of the United States District Court for the Northern District of New York (Brenda K. Sannes, Judge)

Before: Jose A. CABRANES, Christopher F. DRONEY, and Richard J. SULLIVAN, Circuit Judges

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and hereby is AFFIRMED.

Appellant Zelma Rivas ("Rivas"), pro se, sued her former employer, New York States Lottery ("NYS Lottery"), under Title VII, 42 U.S.C. § 2000e-5 *et seq.*,

alleging discrimination on the basis of race, color, and national origin; hostile work environment; and retaliation. On appeal, Rivas challenges the District Court's dismissal of many of her claims as untimely and her sole timely retaliation claim and her hostile work environment claims pursuant to Federal Rule of Civil Procedure 12(b)(6). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal. We review de novo dismissals for failure to state a claim. *Biro v. Conde Nast*, 807 F.3d 541, 544 (2d Cir. 2015). In reviewing a dismissal for failure to state a claim, we accept all factual allegations as true and draw all inferences in the plaintiff's favor. *Id.*

Rivas first argues that NYS Lottery discriminated against her during her employment there, from 1995 to 2010. We hold that the District Court properly concluded that all of Rivas's discrimination claims against the NYS Lottery are time-barred. Title VII requires individuals aggrieved by acts of discrimination to file a charge with the Equal Employment Opportunity Commission ("EEOC") within the 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Claims falling outside this statute of limitations are time-barred unless they are subject to waiver, estoppel, or equitable tolling, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), or fall within the continuing violation exception to the 300-day rule, *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 220 (2d Cir. 2004). Rivas filed her EEOC charge against NYS Lottery on May 5, 2016. To be timely, the alleged acts of discrimination must have occurred on or after July 10, 2015. Rivas's discrimination claims against NYS Lottery-specifically, that NYS

Lottery failed to promote her, that she experienced unequal terms and conditions of employment, and her hostile work environment claim-occurred before her November 2010 termination from NYS Lottery and are thus time-barred.

Rivas nevertheless contends that the continuing violation doctrine provides a basis for finding all alleged acts of discrimination, retaliation, and hostile work environment timely. Rivas's complaint alleges only one incident of retaliation after July 10, 2015. In October 2015, Roger Kinsey, an Assistant Attorney General who had once represented NYS Lottery against Rivas's first Title VII lawsuit in 2000 (the "2000 Suit"), allegedly had Rivas "stalked and pursued" at her new workplace: the NYS Office of Temporary and Disability Assistant (the "OTDA claim"). Rivas argues that the timely OTDA claim render her otherwise time-barred retaliation claims timely.[1]

Under the continuing violation doctrine, "if a Title VII plaintiff files an (EEOC) charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015) (internal quotation marks omitted). "To trigger such a delay, the plaintiff must allege both the existence of an ongoing policy of discrimination and some non-

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[1] In addition to the 1995 to 2010 NYS Lottery discrimination claims, Rivas also alleges that between 2010 and 2015, Kinsey engaged employees at five separate workplaces to stalk, harass, intimidate, ridicule, and bully her. *See* Appellee App. 44-49 (Rivas Compl.); Appellant Br. 21-22.

time barred acts taken in furtherance of that policy." *Fahs Const. Grp., Inc. v. Gray*, 725 F.3d 289, 292 (2d Cir. 2013) (internal quotation marks omitted). Importantly, the continuing violation doctrine does not apply to discrete unlawful acts, even if the discrete acts were undertaken "pursuant to a general policy that results in other discrete acts occurring within the limitations period." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 157 (2d Cir. 2012). "[A]n employer's failure to promote is by its very nature a discrete act." *Id.* The District Court correctly concluded that Rivas's complaint alleges only a series of discrete acts of retaliation and discrimination. The alleged acts, which include failure to promote, occurred over the course of five years at various workplaces and were separated by many months. Accordingly, the continuing violation doctrine does not revive Rivas's time-barred retaliation and discrimination claims.

II.

The District Court did not err in dismissing Rivas's only timely retaliation claim for failure to state a claim. For a Title Vii retaliation claim to survive a motion to dismiss, the plaintiff must plausibly allege that the employer took an adverse employment action against her because she opposed any unlawful employment practice. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015). A plaintiff may state a claim for retaliation even if she is no longer employed by the defendant company "if, for example, the company 'blacklists' the former employee." *Wanamaker v. Columbia Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). Here, Rivas alleges that Kinsey continually harassed her after she left NYS Lottery by, inter

alia, facilitating hostile work environments at her subsequent jobs and by "blacklisting" her. But Rivas does not allege that NYS Lottery-her former employer and the only defendant in this case-took adverse employment actions against her at her subsequent jobs. Her complaint focuses only on Kinsey and his alleged retaliatory acts. Rivas does not allege that Kinsey was employed by the NYS Lottery, that his actions could somehow be imputed to the NYS Lottery or that NYS Lottery could control his actions. The only alleged relationship between the NYS Lottery and Kinsey is represented NYS Lottery in the 2000 suit. Because Rivas does not allege that her employer, NYS Lottery, took any adverse action against her after her termination, the District Court did not err when it dismissed Rivas's timely OTDA claim for failure to state a claim.

III.

Finally, the District Court did not err in dismissing Rivas's hostile work environment claims for failure to state a claim. Rivas's complaint alleges that Kinsey induced employees to create a hostile work environment at each of her five post-NYS Lottery places of employment. Assuming, arguendo, that the continuing violation doctrine applies to extend the limitations period for Rivas's hostile work environment claims, *see Nat'l R.R. Passenger Corp. v. Morgan*, 536, U.S. 101, 115-18 (2002), Rivas's complaint still fails to state a claim. On a Title VII hostile environment claim, "[I]t is the plaintiff's burden to establish that the discriminatory conduct may be imputed to the employer." *Turley v. ISG Lackawanna, Inc.*, 774, F.3d 140, 153 (2d Cir. 2014). To do so, the plaintiff may demonstrate

either that a "supervisor used his or her authority to further the creation of a discriminatory abusive working environment," or "that the employer knew or reasonably should have known about harassment by non-supervisory co-workers, yet failed to take appropriate remedial action." *Id.* (internal quotation marks and citations omitted).

Rivas does not allege that Kinsey was a supervisor at NYS Lottery other than representing it, as an employee of the New York State Attorney General's office, in past litigation. Nor does she allege that Kinsey had any authority to alter or otherwise control Rivas's employment status at any of her post-NYS Lottery jobs. *See id.* Consequently, Rivas fails to state a plausible hostile work environment claim.

CONCLUSION

We have reviewed all of the arguments raised by Rivas on appeal and find them to be without merit. Accordingly, we AFFIRM the judgement of the District Court.

For the Court:

/s/ Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals
Second Circuit

MEMORANDUM DECISION AND ORDER OF THE DISTRICT COURT (MARCH 15, 2018)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ZELMA RIVAS,

Plaintiff,

v.

NEW YORK STATE LOTTERY,

Defendant.

Case No. 1:16-cv-01031 (BKS/DJS)

Before: Hon. Brenda K. SANNES, United States District Judge.

I. Introduction

Plaintiff Zelma Rivas, who is black and of Hispanic origin, brings this action pro se against Defendant New York State Lottery. (Dkt. No. 1; Dkt. No. 22-1, at 53). Plaintiff alleges that Defendant terminated her employment, failed to promote her, subjected her to unequal terms and conditions of employment and a hostile work environment on the basis of her race or color and national origin, and retaliated against her in violation of Title VII of the Civil Rights Act of

1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17.[1] (Dkt. No. 1, at 2). Presently before the Court is Defendant's motion to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 19). Plaintiff opposes Defendant's motion to dismiss. (Dkt. Nos. 22, 23). For the following reasons, Defendant's motion is granted.

II. Background[2]

A. Employment at NYS Lottery

According to the Complaint, Plaintiff began working for the State of New York in 1981, and in 1995 began working for Defendant New York State Lottery (the "NYS Lottery"). (Dkt. No. 1, at 6). Within three months of beginning work with the NYS Lottery, she was called a derogatory name. (Dkt. No. 1, at 6). In 1996, Plaintiff filed a complaint with the Civil Service Employees Association regarding that event, as well as generalized "discrimination and workplace bullying" by the NYS Lottery management and employees. (*Id.*). After filing this complaint, Plaintiff's "work was denounced and the NYS Lottery management began a relentless pursuit after" her. (*Id.*). According to Plaintiff, NYS Lottery employees, on multiple occasions,

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[1] Plaintiff only cites violations of Title VIII and Title VI of the Civil Rights Act of 1964 in her causes of action. However, Plaintiff indicates that her action is brought pursuant to "Title VII of the Civil Rights Act of 1964" on page two of her Complaint. The Court will consider Plaintiff's claims to be brought pursuant to Title VII for the purposes of this action.

[2] The facts are taken from Plaintiff's Complaint and attachments. Plaintiff's factual allegations are presumed to be true for the purpose of this motion.

poured a clear liquid substance into her coffee shortly after the 1996 complaint. (*Id.*). Plaintiff was subsequently moved to a different unit, in close proximity to the NYS Lottery Director. (*Id.* at 6-7). At Plaintiff's new location, she was harassed, stalked, and discriminated against. (*Id.* at 7). At one point, from 1998 to 2000, Plaintiff was relocated to a booth on the ground floor of Defendant's building and was denied access to any of the floors belonging to Defendant. (*Id.* at 9). Plaintiff was forced to perform her work in isolation and when she completed an assignment Plaintiff would leave it on the security counter and call up to Defendant's offices for someone to pick up the work. (*Id.*). During this period of isolation, Plaintiff was instructed by NYS Lottery management not to speak to any employees or visitors. (*Id.*). Plaintiff was also denied job posting announcements and union membership benefits during her isolation, although she was paying union dues. (*Id.* at 12).

Referenced in the Complaint and attachments is Plaintiff's previous action against Defendant and others alleging, inter alia, that the defendants racially discriminated against her by failing to promote her in violation of Title VII; that action was dismissed and judgment entered for the defendants in March 2002. *Rivas v. N.Y. State Lottery* ("*Rivas I*"), No. 00-cv-746, Dkt. No. 58 (N.D.N.Y. Mar. 26, 2002), *aff'd*, *Rivas v. N.Y. State Lottery*, 53 F. App'x. 176 (2d Cir. 2002). Roger W. Kinsey, an assistant attorney general ("AAG"), represented the state defendants in that case. (*Id.*; *see also* Dkt. No. 1, at 15 (discussing Kinsey's February 2001 deposition of Plaintiff)). Plaintiff alleges that Kinsey "discriminated against [her] and sanctioned the NYS Lottery's decision to deprive [her] of employ-

ment opportunities because of [her] status as a minority, a member of the protected class." (Dkt. No. 1, at 12).

From 2000 to 2010, NYS Lottery management allegedly subjected Plaintiff and her family to harassment, stalking, threats, and intimidation. (Dkt. No. 1, at 7-8). In November 2003, Plaintiff sent a memorandum to the NYS Lottery Director complaining that she was retaliated against and harassed by a supervisor, who called her "incompetent and insubordinate" and accused her of refusing to "speak with a Hispanic lottery customer" even though Plaintiff was "Spanish" and could "speak fluently." (*Id.* at 23). In February 2004, three months after the memorandum, Plaintiff was placed on administrative leave pending a mental health evaluation. (*Id.*).

From 2004 to 2010, Plaintiff maintains that, every time she complained about "discrimination, harassment, intimidation, [or] workplace bullying," she was escorted out of her workplace and sent to be examined by medical professionals, and each time Plaintiff was found fit to perform her employment duties. (*Id.* at 24). Plaintiff alleges she was denied a promotion solely because of her "status as a minority, a member of the protected class." (*Id.* at 31). During this time period, Plaintiff "filed several Complaints with the Division of Human Rights, [U.S. Equal Employment Opportunity Commission ('EEOC')] and the Federal Courts." (*Id.* at 25). Plaintiff also wrote multiple letters detailing her complaints of discrimination to New York State Governors and the U.S. Department of Justice, in addition to submitting complaints to multiple other government entities. (*Id.* at 26, 39-40).

In September 2010, Plaintiff and Defendant entered arbitration after Defendant charged Plaintiff

with misconduct and insubordination stemming from, among other things, Plaintiff's alleged failure to participate in an interrogation. (*Id.* at 26; Dkt. 1-6, at 2-3). According to the Complaint, at the arbitration proceeding, a NYS Lottery attorney suppressed information relating to Plaintiff's job performance and the multiple complaints Plaintiff submitted to Defendant and the Governor of New York about the harassment and discrimination Plaintiff endured throughout her employment. (Dkt. No. 1, at 40). In an Opinion and Award entered on November 29, 2010, the arbitrator found Plaintiff guilty of three of the four charges and imposed the penalty of termination of employment, effective October 18, 2010. (Dkt. No. 1-6, at 21).

Following her termination, Plaintiff litigated before the Unemployment Insurance Appeal Board, which found that there was "no evidence that the claimant was aware that her failure to cooperate in the interrogation would be grounds for dismissal" and concluded that Plaintiff's "actions [did] not rise to the level of misconduct under the Unemployment Insurance Law." (Dkt. No. 1, at 33).

B. Post-NYS Lottery Employment

From July 2010 to March 2011, Plaintiff worked in a temporary position for the New York State Department of Health, HIV, AIDS Institute. (Dkt. No. 1, at 44). Plaintiff claims that she "complained about the years of discrimination" that she was "forced to endure in the NYS Lottery and . . . participated in employment discrimination proceedings," and Kinsey, the AAG who represented Defendant in Plaintiff's prior case, retaliated against her and "pursued" her at the Department of Health. (*Id.*). Plaintiff asserts that

Kinsey "engaged employees" at the Department of Health to "stalk [Plaintiff] to the ladies room, on [her] break, on [her] lunch throughout the day, on a daily basis." (*Id.*). The Department of Health offered other temporary employees permanent positions, but not Plaintiff. (*Id.*).

In August 2011, Plaintiff "applied for an Administrative Assistant position with Homeland Security, FEMA." (Dkt. No. 1, at 44). The employees who interviewed Plaintiff in September 2011 hired her "on the spot." (*Id.*). When Plaintiff arrived in human resources, Plaintiff was told that she "was never supposed to be hired." (*Id.*). Plaintiff "immediately called the NYS Inspector General's Office and explained that the New York State Attorney General's Office and Defendant "were relentlessly pursuing [Plaintiff], monitoring [her movements . . . harassing [her] and [her] family and meticulously thwarting [her] efforts to obtain employment." (*Id.*). Plaintiff claims Kinsey "blacklisted" her. (*Id.* at 45).

In September 2011, Plaintiff was assigned by an employment agency "to work a claims position with M & T Bank." (Dkt. No. 1, at 45). Kinsey "engaged employees" at the Department of Health to "stalk [Plaintiff] to the ladies room, on [her] break, on [her] lunch throughout the day, on a daily basis." (*Id.*). These employees made Plaintiff "a target of daily stalking, relentless . . . workplace bullying, ridicule, intimidation, [and] harassment." (*Id.*). On October 30, 2011 and November 3, 2011, Plaintiff contacted the employment agency and told a representative that she "was being stalked" and was enduring "workplace bullying" at M & T Bank. (*Id.*). Plaintiff also complained to the NYS Inspector General's Office and the "M & T Bank

Whistleblower Hotline." (*Id.*). On November 4, 2011, Plaintiff "was forced to leave M & T Bank." (*Id.*).

On April 10, 2012, Snelling Personnel Services Agency assigned Plaintiff to work for Value Options. (Dkt. No. 1, at 45). Kinsey "engaged employees" at Value Options to "stalk [Plaintiff] to the ladies room, on [her] break, on [her] lunch throughout the day, on a daily basis." (*Id.*). These employees made Plaintiff "a target of daily stalking, relentless . . . workplace bullying, ridicule, intimidation, [and] harassment." (*Id.*). As a result, Plaintiff "was forced to leave Value Options." (*Id.*).

In June 2012, Manpower Employment Agency assigned Plaintiff to work for Lexis Nexis as an editorial assistant. (Dkt. No. 1, at 46). Kinsey "engaged employees" at Lexis Nexis to "stalk [Plaintiff] to the ladies room, on [her] break, on [her] lunch throughout the day, on a daily basis." (*Id.*). These employees made Plaintiff "a target of daily stalking, relentless . . .workplace bullying, ridicule, intimidation, [and] harassment." (*Id.*). Plaintiff "remained at Lexis Nexis until August 31, 2012." (*Id.*).

Plaintiff began working from the NYS Office of Temporary and Disability Assistance ("OTDA") in December 2012. (Dkt. No. 1, at 46). Kinsey "engaged employees" at OTDA to "stalk [Plaintiff] to the ladies room, on [her] break, on [her] lunch throughout the day, on a daily basis." (*Id.*). These employees made Plaintiff "a target of daily stalking, relentless . . . workplace bullying, ridicule, intimidation, [and] harassment." (*Id.*). On January 17, 2014, Plaintiff complained to Jessica Vaughn, an OTDA affirmative action officer, that she was being stalked and subjected to workplace bullying. (*Id.*). Vaughn told Plaintiff that

"in her investigation she found out [Plaintiff] was being harassed and bullied by employees on the 15th floor." (*Id.* at 46). The next week, Plaintiff had a meeting with Eleanor Cowan, who was "OTDA personnel." (*Id.*). Cowan asked Plaintiff "for the names of the employees involved in the workplace bullying." (*Id.*). Plaintiff responded that "employees of all grades and titles were involved" but did not provide the names of the employees because she "was not yet permanent" and believed that Kinsey "would use the situation as an opportunity to have [her] terminated." (*Id.*). "Cowan conferred with the Personnel Director and told me the Personnel Director said they would not assist [Plaintiff] unless [she] provided the names of the employees involved," which Plaintiff declined to do because she was concerned that Kinsey would "use [her] complaint to have [her] fired." (*Id.* at 50). On January 12 and 13, 2015 and May 20, 2015, Plaintiff complained to the NYS Inspector General's Office about the harassment, and workplace bullying. (*Id.* at 46). For "some time" after her May 20, 2015 complaint, Plaintiff "stopped using the ladies room bathroom on the 15th floor and started using the ladies room bathrooms on other floors." (*Id.* at 51). Kinsey, however, had Plaintiff's "movements meticulously monitored" and she was "stalked when she use[d] the ladies room on other floors." (*Id.*).

On May 13, 2015, an Associate Personnel Director for OTDA told Plaintiff that an employee who worked on the 15th floor "reported to her that [Plaintiff] closed the elevator in her face." (*Id.*). Plaintiff asserted that it was "very upsetting to be falsely accused especially given the dangerously painful workplace bullying [she] was forced to endure on the 15th floor." (*Id.* at 50).

Under the heading "October, 2015," the Complaint alleges that Kinsey had Plaintiff "stalked and pursued in [her] present employment" at OTDA. (*Id.* at 49). Plaintiff asserts that Kinsey continued to have her "stalked, discriminated against, harassed, blacklisted, targeted and meticulously with precision sabotages [Plaintiff's] efforts to concentrate on work and frustrates [her] efforts to remain employed." (*Id.*).

On May 5, 2016, Plaintiff filed an EEOC charge of discrimination against Defendant alleging retaliation and that the "discrimination took place" between December 1, 2012 and January 28, 2016. (Dkt. No. 1-1, at 4). In it, Plaintiff alleges:

> I worked from the Respondent from on or about 1995 to 2010
>
> When I was employed by the Respondent I protested employment practices and policies that were prohibited by employment discrimination statutes.
>
> Since on or about December 2012, I believe that the Respondent has been retaliating against me by engaging a third governmental entity to stalk and bully me at my new place of employment.
>
> I believe I am being subjected to these actions in willful violation of Title VII of the Civil Rights Act of 1964, as amended.

(Dkt. No. 1-1, at 4). On or about May 24, 2016, the EEOC issued a right-to-sue letter. (Dkt. No. 1-1, at 3). Plaintiff commenced this action on August 23, 2016.

In her First Cause of Action, Plaintiff alleges that Defendant discriminated against her throughout

her employment at the NYS Lottery. (Dkt. No. 1, at 52). In her Second Cause of Action, Plaintiff alleges that, ever since she "filed a complaint with the Defendant," Defendant "began relentlessly pursuing" her, and that Kinsey "condoned the actions of the Defendants and participated in the harassment on the basis of her status as a minority," permanently impacting her "working conditions" at the OTDA, her current place of employment. (*Id.* at 53). In her Third Cause of Action, Plaintiff alleges that, in retaliation for her complaints of race discrimination, Defendant continues to stalk and harass her. (*Id.*). Additionally, Plaintiff alleges that Defendant has "stalked and pursued her children near her residence." (*Id.*). In her Fourth Cause of Action, Plaintiff alleges that Defendant, through Kinsey, created a hostile work environment at the Department of Health, M & T Bank, Value Options, Lexis Nexis, and OTDA, in retaliation for her complaints of race discrimination, and interfered with her hiring at Homeland Security. (*Id.* at 55-56).

III. Standard of Review

To survive a motion to dismiss, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must provide factual allegations sufficient "to raise a right to relief above the speculative level." *Id.* (quoting *Bell*, 550 U.S. at 555). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See E.E.O.C. v. Port Auth.*, 768 F.3d 247, 253 (2d Cir. 2014) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir.

2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint that has been filed pro se "must be construed liberally with 'special solicitude' and interpreted to raise the strongest claims that it suggests." *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013) (quoting *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011)). "Nonetheless, a pro se complaint must state a plausible claim for relief." *Id.*

IV. Discussion

Defendant seeks dismissal of the Complaint, which alleges four causes of action for discrimination and retaliation in violation of Title VII, on the grounds that: (1) the Complaint is untimely; (2) Plaintiff's charge to the EEOC was untimely; (3) Plaintiff failed to exhaust her administrative remedies; and (4) the Complaint fails to state a prima facie case of retaliation. (Dkt. Nos. 1, 19, 19-1).

A. 90-Day Filing Deadline

Defendant asserts that the Complaint is untimely because Plaintiff failed to file it within 90 days of her receipt of the EEOC's right-to-sue letter. "In order to be timely, a claim under [Title VII] must be filed in federal district court within 90 days of the claimant's receipt of a right-to-sue letter from the EEOC." *Tiberio v. Allergy Asthma Immunology of Rochester*, 664 F.3d 35, 37 (2d Cir. 2011) (citing 42 U.S.C. § 2000e-5(f)(1)). "There is a . . . presumption that a mailed document is received three days after its mailing." *Id.* Here, the EEOC right-to-sue letter is dated May 24, 2016; thus,

adding three days for mailing,[3] to be timely, the Complaint must have been filed on or before August 25, 2016. As Plaintiff commenced this action on August 23, 2016, (Dkt. No. 1, at 1; Dkt. No. 1-1, at 1), the Complaint is timely.

B. Exhaustion of Administrative Remedies

Defendant seeks dismissal on the basis that Plaintiff failed to timely exhaust her administrative remedies. "As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC." *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2d Cir. 2018) (quoting *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003)); *see also* 42 U.S.C. § 2000e-5(e), (f). "Title VII requires that individuals aggrieved by acts of discrimination file a charge with the EEOC within . . . 300 days 'after the alleged unlawful employment practice occurred.'" *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 78-79 (2d Cir. 2015) (quoting 42 U.S.C. § 2000e-5(e)(1)). The Title VII exhaustion requirements, and their filing deadlines, operate as an affirmative defense. *Hardaway*, 879 F.3d at 491. "[T]he burden of pleading and proving Title VII exhaustion" therefore "lies with defendants." *Id.*

"Statute of limitations defenses are affirmative defenses, which normally cannot be decided on a motion to dismiss." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 287 (S.D.N.Y. 2009). Additionally, "filing

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[3] Plaintiff asserts that she received the right to sue letter on May 28, 2016. (Dkt. No. 22, at 6). If the Court credits this assertion, Plaintiff had until August 26, 2016 to file a complaint.

a timely charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Dismissal may be appropriate, however, "where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading.'" *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 287.

Plaintiff filed her EEOC charge on May 5, 2016. (Dkt. No. 1-1, at 4). To be timely, therefore, the alleged discriminatory acts must have taken place within the 300-day time period preceding May 5, 2016. In other words, they must have occurred on or after July 10, 2015. Plaintiff's employment with Defendant ended, at the latest, on November 29, 2010. Plaintiff filed her EEOC charge more than 1,900 days after her termination; therefore, all acts that occurred during her employment at the NYS Lottery, including the alleged discriminatory failure to promote, unequal terms and conditions of employment, and hostile work environment, are time-barred. Further, Plaintiff does not contend, nor do her submissions suggest, that equitable tolling, waiver, or estoppel would excuse the untimely filing in this case. Plaintiff contends instead that the continuing violation doctrine provides a basis for finding "all acts and incidents of discrimination, retaliation, and hostile work environment" claims timely. (Dkt. No. 22, at 7).

"It has been the law of this Circuit that '[u]nder the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of

discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone.'" *Chin v. Port Auth.*, 685 F.3d 135, 155-56 (2d Cir. 2012) (quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993), *abrogated on other grounds by Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011)). "To trigger such a delay, the plaintiff 'must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy.'" *Fahs Constr. Grp., Inc. v. Gray*, 725 F.3d 289, 292 (2d Cir. 2013) (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)).

1. Retaliation

The Complaint alleges one incident of retaliation after July 10, 2015; Plaintiff alleges that in "October, 2015," Kinsey had Plaintiff "stalked and pursued in [her] present employment" at OTDA, and "continues to have her . . . discriminated against, harassed, blacklisted, targeted and meticulously with precision sabotages [Plaintiff's] efforts to concentrate on work and frustrates [her] efforts to remain employed" in retaliation for her complaints of race discrimination. (Dkt. No. 1; at 49). Plaintiff argues that this timely act renders all of her retaliation claims timely. This includes allegations that during her July 2010 to March 2011 employment at the Department of Health, Kinsey retaliated against her for her previous complaints of discrimination at the NYS Lottery, by engaging employees at the Department of Health to stalk, harass, intimidate, and bully her. (*Id.*). In August 2011, Plaintiff was offered a position with "Homeland Security, FEMA," but because Kinsey had "blacklisted" her, the offer was immediately withdrawn.

(*Id.* at 44-45). From September 2011 to November 2011, Plaintiff worked at M & T Bank, where employees, at Kinsey's instruction, stalked, bullied, harassed, and intimidated Plaintiff. (*Id.* at 45). In October and November 2011, Plaintiff complained to her employment agency, the NYS Inspector General's Office, and M & T Bank, but was forced to leave her employment on November 4, 2011. (*Id.*). Plaintiff experienced the same sort of harassment at Lexis Nexis, where she worked from June to August 2012. (*Id.* at 46). After Plaintiff began her employment with OTDA in December 2012, Kinsey engaged employees OTDA employees to stalk, intimidate, and harass Plaintiff. (*Id.*). In January 2014, Plaintiff complained to the OTDA affirmative action officer and personnel director about "workplace bullying" but did not want to identify the involved employees because she feared Kinsey would have her fired. (*Id.* at 50). Plaintiff complained to the NYS Inspector General's Office about the harassment and workplace bullying in January and May 2015. (*Id.* at 46). Plaintiff alleges that in October 2015, Kinsey continued to "have her stalked, discriminated against [and] blacklisted," but provides no specific factual allegations. (*Id.* at 49).

To the extent Plaintiff alleges Kinsey engaged in these actions in retaliation for her filing *Rivas I* in 2000 and complaining about discrimination to Defendant, her subsequent employers, and others, the alleged acts are discrete and, even if Kinsey undertook them pursuant to a general policy, do not extend the limitations period. Indeed, the majority of the incidents were separated by many months and occurred at different places of governmental and private employment. There is, therefore, no plausible basis for applying

the continuing violation doctrine to the discrete acts of discrimination or retaliation alleged in this case. *Chin*, 685 F.3d at 157 ("Discrete acts . . . which fall outside the limitations period, cannot be brought within it, even when undertaken pursuant to a general policy that results in other discrete acts occurring within the limitations period."). Accordingly, Defendant's motion to dismiss all discrete acts of discrimination and retaliation—including allegations that Defendant failed to promote Plaintiff, *see Chin*, 685 F.3d at 157 ("[A]n employer's failure to promote is by its very nature a discrete act.")—occurring prior to July 10, 2015, is granted.[4]

2. Hostile Work Environment

Plaintiff further alleges that she was subject to a hostile work environment at each of her five places of employment, including at OTDA, where it continued into the 300-day limitations period. "The 'continuing violation' doctrine extends the 300 day filing period in cases alleging a hostile work environment because '[h]ostile work environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.'" *Szuszkiewicz v. JPMorgan Chase Bank*, 12 F. Supp. 3d 330, 338 (E.D.N.Y. 2014).

Assuming the continuing violation doctrine applies in this case, and extends the filing period to claims of hostile work environments at five different employers, as Defendant notes, the Complaint "does not contain a single allegation of an unlawful employment practice . . . taken by Defendant" after Plaintiff's termination

[4] As Plaintiff has not alleged any facts in support of her unequal terms and conditions claim, it is dismissed.

in 2010. (Dkt. No. 19-1, at 6 n.3 (emphasis added)). Under Title VII, "[f]or an employer to be held liable for a hostile work environment, the plaintiff must demonstrate either that 'a supervisor used his or her authority to further the creation of a discriminatorily abusive working environment, or that the employer knew or reasonably should have known about harassment by non-supervisory co-workers, yet failed to take appropriate remedial action.'" *Ward v. Shaddock*, No. 14-cv-7660, 2016 WL 4371752, at *9, 2016 U.S. Dist. LEXIS 106438, at *32 (S.D.N.Y. Aug. 11, 2016) (quoting *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 153 (2d Cir. 2014)). The Complaint does not allege that Kinsey was, at any point, Defendant's employee, and contains no allegations connecting Kinsey to Defendant, other than Kinsey's representation of Defendant in 2000 in *Rivas I*. Nor are there any allegations suggesting that Kinsey, as an AAG, had the authority to alter Plaintiff's employment status with any of Plaintiff's governmental or private employers or that Defendant had any ability to control Plaintiff's working conditions once she left its employ. *See Ward v. Shaddock*, No. 14-cv-7660, 2016 WL 4371752, at *10, 2016 U.S. Dist. LEXIS 106438, at *37 (granting motion to dismiss hostile work environment claim, explaining that liability may be imputed to an employer "only if it were 'negligent in controlling working conditions'" and the complaint "failed to plausibly allege vicarious liability for" the other employee's actions or the employer's "negligence in allowing the hostile workplace environment to persist" (quoting *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013))); *see also Dabney v. Christmas Tree Shops*, 958 F. Supp. 2d 439, 460 (S.D.N.Y. 2013) (concluding that an individual did not qualify as a supervisor under *Vance* because the plain-

tiff failed to "allege[] any facts suggesting . . . that he had the authority to significantly change Plaintiff's employment status" (internal quotation marks omitted)), *aff'd sub nom. Dabney v. Bed Bath & Beyond*, 588 Fed. App'x 15 (2d Cir. 2014).

C. Retaliation

The Complaint arguably alleges a single timely claim of retaliation. Plaintiff contends that, in October 2015, in retaliation for her complaints of race discrimination, Defendant, through Kinsey, harassed her continually after she left the NYS Lottery by creating hostile work environments at her subsequent jobs and "blacklisting" her in order to hinder her efforts to secure employment. In some instances, an employer's post-employment conduct toward a former employee may fall within the scope of Title VII. "A negative reference or similar actions taken with respect to a new prospective employer can be considered an adverse action and therefore provide support for a retaliation claim." *Shakerdge v. Tradition Fin. Servs., Inc.*, No. 16-cv-01940, 2017 WL 4273292, at *5, 2017 U.S. Dist. LEXIS 157346, at *13-14 (D. Conn. Sept. 26, 2017); *see also Silver v. Mohasco Corp.*, 602 F.2d 1083, 1090 (2d Cir. 1979) (post-employment blacklisting falls within the scope of retaliatory provisions of Title VII), *rev'd on other grounds*, 477 U.S. 807, 814 n.17 (1980); *Patchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (finding that Title VII "prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct"); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("[P]laintiffs may be able to state a claim for retaliation, even though

they are no longer employed by the defendant company, if, for example, the company 'blacklists' the former employee, wrongfully refuses to write a recommendation to prospective employers, or sullies the plaintiff's reputation.").

For a Title VII retaliation claim to survive a motion to dismiss, "the plaintiff must plausibly allege that: (1) defendants discriminated—or took an adverse employment action—against h[er], (2) 'because' [s]he has opposed any unlawful employment practice." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015). To plead causation, the plaintiff must allege that the retaliation was the "but-for" cause of the employer's adverse action, *i.e.*, that "the adverse action would not have occurred in the absence of the retaliatory motive." *Id.* at 90-91 (quoting *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013)).

Here, Plaintiff fails to allege facts from which a plausible inference could be drawn that Defendant—NYS Lottery—took an adverse employment action against Plaintiff. There is nothing in the Complaint alleging a connection between Kinsey and Defendant, other than his representation of Defendant in *Rivas I* approximately fifteen years ago. *Cf.*, *Diana v. Schlosser*, 20 F. Supp. 2d 348, 352 (D. Conn. 1998) (denying summary judgment in Title VII action where the defendant "had significant control over [the plaintiff's] ability to maintain a substantial employment opportunity, even though she was not an employee of" the defendant).

Accordingly, Plaintiff's retaliation claim, even if timely, fails to state a claim for relief that is plausible on its face.

V. Amended Complaint

While the Court is cognizant of Plaintiff's status as a pro se litigant, *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) ("Certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated."), the Court concludes that an amendment of the employment discrimination claims in the Complaint would be futile as Plaintiff alleges no facts in any of her submissions suggesting a timely or viable claim against Defendant.

VI. Conclusion

For these reasons, it is hereby

ORDERED that Defendant's motion to dismiss (Dkt. No. 19) is GRANTED in its entirety; and it is further

ORDERED that the Complaint (Dkt. No. 1) is DISMISSED with prejudice; and it is further

ORDERED that the Clerk is directed to close this case.

IT IS SO ORDERED.

/s/ Brenda K. Sannes
U.S. District Judge

Dated: March 15, 2018

DECISION OF THE ADMINISTRATIVE LAW JUDGE CHARLES ESSEPIAN (AUGUST 23, 2010)

STATE OF NEW YORK
UEMPLOYMENT INSURANCE APPEAL BOARD
ADMINISTRATIVE LAW JUDGE SECTION

IN THE MATTER OF:

ZELMA RIVAS,

v.

NEW YORK LOTTERY,

A.L.J. Case No. 110-06541

Department of Labor Office: 831
Hearing Requested: June 09, 2010

Before: Charles ESSEPIAN,
Administrative Law Judge

Issues: Loss employment through misconduct.

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits effective April 2, 2010, on the basis that the claimant lost employment through misconduct in connection with the employment and holding that the wages paid to the claimant by the employer prior to April 2, 2010 cannot be used toward the establishment

of a claim for benefits. The claimant requested a hearing.

A hearing was held at which testimony was taken. There was an appearance by the claimant.

Finding of Fact:

The claimant was employed for a New York State Department as a secretary for approximately 14 and one-half years until February 1, 2010. The claimant worked full time and was a member of a union with contractual relations with the employer.

Over the course of the claimant's employment, the claimant reported several incidences that she believed violated her human rights, civil rights, employee rights and rights that she had through her union. On January 23, 2010, the claimant wrote a letter to her employer notifying them that her complaints have gone unanswered and that there are continuing acts by the employer causing her and her family to suffer. The claimant cited specific acts of what she believed were violations of her rights, discrimination, harassment among other things. As a result of the letter, the employer suspended the claimant without pay beginning February 2, 2010, and required her to get a mental health evaluation to see if she was fit for work. The claimant complied with the employer's directive and after undergoing her evaluations was found to be fit for work. By Confidential Memorandum dated March 26, 2010, the claimant was ordered to return to the work site on April 1, 2010, where she would undergo an interrogation by the employer. The memorandum notified the claimant that "Your participation in the interrogation is mandatory; failure to appear may result in disciplinary action against

you, including termination of your services." No other instructions or warnings were provided to the claimant.

On April 1, 2010, the claimant reported to the interrogation and was represented by two union officials. At the interrogation the human resource manager for the department for whom the claimant worked as the claimant a series of questions about statements and accusation made in her January 23, 2010. The claimant replied to all questions asked of her except one "No comment". The claimant was subsequently discharged for failing to cooperate in the interrogation process on April 1, 2010.

Opinion:

Pursuant to Labor Law § 593 (3), a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with that employment. Pursuant to Labor Law § 527, the wages paid in such employment cannot be used to establish a future claim for benefits.

The credible evidence establishes that the claimant was discharged for failing to cooperate in an interrogation with her employer on April 1, 2010. Based on the testimony and evidence before me, I find that there is no evidence that the claimant was aware that her failure to cooperate in the interrogation would be grounds for dismissal. Significantly, the claimant was only placed on notice by letter dated March 26, 2010, that her participation at the interrogation was mandatory. Furthermore, the transcript from the interrogation on April 1, 2010, is devoid of warning to the claimant that her failure to cooperate or failure to answer questions could or would result in her dismissal. Accordingly, I find that the claimant's

actions do not rise to the level of misconduct under the Unemployment Insurance Law.

Decision:

The initial determination is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

/s/ Charles Essepian
Administrative Law Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING (JANUARY 29, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ZELMA RIVAS,

Plaintiff-Appellant,

v.

NEW YORK STATE LOTTERY,

Defendant-Appellee.

Docket No. 18-833

Before: Jose A. CABRANES, Christopher F. DRONEY, and Richard J. SULLIVAN, Circuit Judges

Appellant having filed a petition for panel rehearing and the panel that determined that appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:

/s/ Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals
Second Circuit

SECTION 72 EVALUATION BY DR. JOHN HARGRAVES, ASSOCIATE PHYSICIAN, EMPLOYEE HEALTH SERVICE (OCTOBER 15, 1997)

STATE OF NEW YORK,
DEPARTMENT OF CIVIL SERVICE,
THE STATE CAMPUS, ALBANY NEW YORK

(EXAMINATION BEFORE TRIAL (EBT) OF PLAINTIFF, ZELMA RIVAS. REFER TO PAGE: (A-393) AND (A-394))

TO: FOR THE RECORD

FROM: Dr. John Hargraves

SUBJECT:

Name: Zelma Ely (Rivas)
Age: 35
Social Security Number: 063-50-4885
Referring Agency: NYS Lottery
Title: Secretary I
Agency Employed: NYS Lottery
Employed By NYS: 15 years

Reason for Referral:

A Section 72 evaluation. See referral letter dated September 22, 1997 and its attachments for further information.

Summary:

Ms. Ely (Rivas) states that she is currently working on a half-time basis alternating 2 days per week with 3 days per week. She switched to the half-time position

over a year ago because she chose to spend more time at home with her two pre-school children. She denies any active health problems and feels fully capable of continuing to perform her full duties. She denied any significant past medial history. She had her tonsils removed as a child and had uncomplicated child birthing for both children. She does not use alcohol or psychoactive drugs.

Ms. Ely (Rivas) notes that she has had a satisfactory job performance evaluation as recently as June, 1997 which is also enclosed with the referral letter. Ms. Ely (Rivas) states that she has attempted to get along with her co-workers and supervisors, but states that approximately 2 years ago she had been harassed at work because she is a black, Hispanic female and has spoken up for herself which she states is unusual in her Agency. She even states that death threats were made against her in April, 1997 and she reported this to the Albany Police and states that this was recently found out by her Agency and believes that this may her precipitated her referral to the Employee Health Service.

Physical Examination:

Is deferred as there are no physical health complaints, and in my opinion a physical examination is not indicated given the nature of the referral. Mental status showed Ms. Ely (Rivas) to be alert and oriented with no evidence of any overt psychosis, depression, or anxiety.

Conclusion:

Ms. Ely (Rivas) is to see Dr. Andrus, our psychiatric consultant, later this afternoon for psychiatric con-

sultation, and I asked Ms. Ely (Rivas) to discuss in more detail the stresses and harassments at work with Dr. Andrus. At this point no medical information is developed that would suggest that she is unable to continue to perform her full duties. I will await Dr. Andrus' recommendation before sending a final letter to the Agency.

/s/ Dr. John Hargraves
Associate Physician
Employee Health Service

JH:pl

SECTION 72 EVALUATION BY DR. PETER ANDRUS, EMPLOYEE HEALTH SERVICE (OCTOBER 15, 1997)

STATE OF NEW YORK,
DEPARTMENT OF CIVIL SERVICE,
THE STATE CAMPUS, ALBANY NEW YORK

(EXAMINATION BEFORE TRIAL (EBT) OF PLAINTIFF, ZELMA RIVAS. REFER TO PAGE: (A-395) AND (A-397))

TO: FOR THE RECORD

FROM: Dr. Peter Andrus

SUBJECT:

Name: Zelma Ely (Rivas)
Age: 35
Social Security Number: 063-50-4885
Referring Agency: NYS Lottery
Title: Secretary I
Agency Employed: NYS Lottery
Employed By NYS: 15 years

Reason for Referral:

A Section 72 evaluation. See referral letter dated September 22, 1997 and its attachments for further information.

Summary:

Past history includes several notations forwarded by the Agency that Ms. Ely (Rivas) has engaged in what they have described as bad behavior and has been disruptive at work.

She has also been accused of insubordination because she was asked to do something politely and she did not wish to execute it. She states that she is "simply standing up for her rights". She also states that she received .threatening phone calls from individuals at work, at home, and at other places.

It appears from review of the material enclosed that much of the friction described, both by Ms. Ely (Rivas) and those at work, is between members of her and the office. In Ms. Ely's (Rivas's) previous employment with the State during the 14 years that she was employed with the state Health Dept. she apparently had no difficulty there, for no such problems are documented in her chart.

Mental Status Examination:

Revealed an individual who is polite, courteous, although mildly seductive during the examination. She seemed poised as if ready to defend herself should I become aggressive during my examination as she thought I might. She felt that I was another State employee.

In spite of this there was no evidence of any psychosis and there was no evidence of any paranoid trends. She gave no evidence of any break from reality.

Her general emotional tone, her mood, and her affect were all reasonable except for a defensive posture which she maintained throughout the course of the examination. This was understandable in view of the fact that she feels herself under attack by the Agency.

Recent and remote memory functioning as well as her cognitive functioning in general appeared to be

good and above average. She appeared in fact to be using words that placed her as having some form of college education, and she agreed that she had some college education but has not completed it.

Insight into her problems appear to be good although she seemed to lay much of the blame on the Agency involved. Insight, as noted, was fair and judgement was good.

Conclusion:

In summary Zelma Ely (Rivas) appears to be a somewhat defensive individual who may be modestly paranoid to any injustice occurring at the present time, but this seems to be due to situational factors. All thing being equal in spite of the information supplied by the Agency, it appears this is a conflict between Ms. Ely (Rivas) and other members in that particular department. I cannot make a good psychiatric diagnosis of Ms. Ely (Rivas).

SECTION 72 EVALUATION BY DR. JOHN HARGRAVES, ASSOCIATE PHYSICIAN, EMPLOYEE HEALTH SERVICE (MAY 21, 1998)

STATE OF NEW YORK,
DEPARTMENT OF CIVIL SERVICE,
THE STATE CAMPUS, ALBANY NEW YORK

(EXAMINATION BEFORE TRIAL (EBT) OF PLAINTIFF, ZELMA RIVAS. REFER TO PAGE: (A-398) AND (A-400))

TO: FOR THE RECORD

FROM: Dr. John Hargraves

SUBJECT:

Name: Zelma Ely (Rivas)
Age: 35
Social Security Number: 063-50-4885
Referring Agency: NYS Lottery
Title: Secretary I
Agency Employed: NYS Lottery
Employed By NYS: 16.5 years

Reason for Referral:

A Section 72 evaluation. See referral letter dated May 6, 1998 and its attachments for further information.

Summary:

(See the previous "For The Record" by myself and Dr. Andrus from October 15, 1997. Also see "For The Record" from Mr. Williams dated December 2, 1997 and

previous referral letter from the NYS Lottery dated September 22, 1997).

Ms. Rivas states that she was recently arrested by the Albany Police. She believes that date was two days prior to her getting a letter from her Agency advising her to stay out of work because of harassment and intimidation of co-workers. She therefore, dates her arrest to be approximately May 3, 1998, although according to the Agency referral letter it was April 19, 1998. Ms. Rivas states that her boyfriend told the police that she had assaulted with a knife but states this was not true. She states that he tore up his own clothing so that it would appear that she was the aggressor and she states that the police advised her that they had to arrest someone because of the new domestic laws that someone of the person most like to be the aggressor would have to face charges given the presence of young children in the home. Ms. Rivas states that she has a daughter, age 3, and a son, age 4, who were living with them at the time. She states that all the charges were dismissed by the Court in Albany, NY and she has since moved out of her boyfriend's house and moved in with her mother in Ghent, NY.

Ms. Rivas states that she is not under a physician's care and is feeling well both mentally and physically She states that she is a regular church goer. She is not in any counseling and denies any mental health stress or concern beyond the fact that she feels harassed by her Agency and states that she is on-going litigation with the Div. of Human Rights against her Agency with a possible hearing date this Summer. She believes that this is the real reason why her Agency has placed her out of work. She states that the only example she

can think of where she was thought to harass or intimidate the co-worker was that a student intern at work alleged that she had sworn at him but this was untrue. She is on no medication. She is in the process of quitting cigarette smoking from ½ pack per day to now 2 cigarettes per week. She rides a bicycle regularly for excise and brought a carriage attachment to pull her children along behind her bicycle when she exercises. She denies any medical health problems since she was last evaluated and has not been under medical care or sought medical attention since that the. She states she has never been hospitalized except for child birth and a tonsillectomy.

Physical Examination:

Was deferred as there are no physical health complaints and it is not indicated at this time. Mental status showed her to be alert and oriented but I will defer complete evaluation to Dr. Andrus' psychiatric evaluation later this afternoon. There was no evidence of any overt depression or mania.

Conclusion:

From a physical health standpoint Ms. Rivas is clearly able to perform the full duties of a Secretary I at this time. I will defer to Dr. Andrus' psychiatric evaluation with regards to the present mental fitness to return to full duty.

/s/ Dr. John Hargraves
Associate Physician
Employee Health Service

JH:pl

SECTION 72 EVALUATION BY DR. PETER ANDRUS, EMPLOYEE HEALTH SERVICE (MAY 21, 1998)

STATE OF NEW YORK,
DEPARTMENT OF CIVIL SERVICE,
THE STATE CAMPUS, ALBANY NEW YORK

(EXAMINATION BEFORE TRIAL (EBT) OF PLAINTIFF, ZELMA RIVAS. REFER TO PAGE: (A-401), (A-402) AND (A-403))

TO: FOR THE RECORD

FROM: Dr. Peter Andrus

SUBJECT:

Name: Zelma Ely (Rivas)
Age: 35
Social Security Number: 063-50-4885
Referring Agency: NYS Lottery
Title: Secretary I
Agency Employed: NYS Lottery
Employed By NYS: 15 years

Reason for Referral:

A Section 72 evaluation.

Summary:

Past history reveals that this individual was previously seen on at least one other occasion on October 15, 1997, again, for Section 72 evaluation.

Past history is essentially the same as that noted in that previous examination. There are several further

notations made by her Agency that Ms. Ely (Rivas) has engaged in what they have described as atypical or bizarre behavior and has been disruptive at work.

She has also again been accused of insubordination and states to me that she has a Human Rights suit pending against her Agency.

She feels that she is simply standing up for her "rights", and she sees nothing wrong with what she is doing.

She has previously been employed with the State Health Dept. for 14 years prior to her employment with the NYS Lottery. It was apparent during the review of her folder on previous examination that for those 14 years no such difficulty has been documented in her chart.

Mental Status Examination:

Reveals an individual who was polite, courteous, again, mildly seductive, and again slightly defensive during the examination.

There was no evidence of psychosis, or paranoia, or hallucinations or delusions.

Her emotional tone, mood, and affect were all modulated and reasonable except for mildly defensive posture which she maintained. This was, again, understandable in view of the fact that she feels herself discriminated against by the Agency by virtue of her Race and her color and also feels that this is an attempt to get back at her for her Human Rights suit.

Recent and remote functioning as well as cognitive functioning in general was good and she appeared to be above average in intelligence.

Insight appeared to be good, although some projection was used in laying the entire blame with her Agency, and judgement apparently was good.

Conclusion:

In summary Zelma Rivas-Ely, who states that her name change was done through divorce, continues to be defensive and mildly paranoid, but there was no overt signs of psychopathology. In view of the fact that her Agency has taken the initiative this time and told her to stay away from work on Section 72 and be paid for her time away until this issue can be mitigated, it is felt that psychological testing is necessary in order to further delineate whether there are, in fact, psychiatric-psychological problems in this person.

Hence, I can make no further or firm determinations to whether she is fit for duty or return to work until I complete psychiatric-psychological testing.

/s/ Peter F. Andrus, M.D.
Diplomate, American Board of
Psychiatry and Neurology

PFA:pl

PSYCHOMETRIC TESTING PURSUANT TO FURTHER EXAMINATION UNDER SECTION 72 BY DR. PETER ANDRUS (MAY 27, 1998)

STATE OF NEW YORK,
DEPARTMENT OF CIVIL SERVICE,
THE STATE CAMPUS, ALBANY NEW YORK

(EXAMINATION BEFORE TRIAL (EBT) OF PLAINTIFF, ZELMA RIVAS. REFER TO PAGE: (A-404), (A-406) AND (A-407))

TO: FOR THE RECORD

FROM: Dr. Peter Andrus

SUBJECT:

Name: Zelma Ely (Rivas)
Age: 35
Social Security Number: 063-50-4885
Referring Agency: NYS Lottery
Title: Secretary I
Agency Employed: NYS Lottery
Employed By NYS: 14 years

Reason for Referral:

Psychometric testing pursuant to further examination under Section 72.

Summary:

Zelma Rivas was examined on May 27, 1998 with a series of psychometric tests. They included as follows: The Rey-Osterrieth test, the Bender-Gestalt test, the

Draw-A-Person test, the Shipley Institute Scale, the Rorschach test, and the MMPI-2.

Both the Rey-Osterrieth and Bender-Gestalt tests were drawn with good accuracy and showed no evidence of any organic factors. There was a tendency to enlarge the figures drawn showing some tendency to project some inflationary sense of ego onto the outside world, but otherwise the figures were unremarkable.

The Draw-A-Person test was drawn showing a woman with a smile and dots for eyes with short hair and a moderately long dress with fee pointed in opposite directions. The hands were drawn with somewhat stubby fingers. The figure drawing is compatible with a projection of the self and shows a somewhat happy, contented individual, although with some ambivalent feelings, but otherwise, "self-satisfied".

The Shipley Scale revealed a total WAIS estimated IQ of 110 which bordered on the above average to superior range. Her conceptual quotient or CQ was borderline but enough to establish that she was able to abstract in the normal realm and thus was not psychotic.

The MMPI-2 revealed a basically 5-4 code type. This is a rather infrequent code type for a woman to display. It is usually in the small numbers with women that are studied found to be equated with satisfaction with the self and with overt behavior. There tends to be a defensiveness and guardedness about the relationships and this is mirrored in the inverted carrot of the validity scales where K is at T equal to 72. This individual is reporting very little emotional distress. She reports that she thinks clearly, rationally, and feels that she has good insight into her behavior. She

can be unconventional, she may challenge and defy rules and regulations, but feels that when she does so she is doing so in an acceptable manner and in a sense is being progressive.

The Rorschach test revealed a total of 50 responses to the 10 blots, a somewhat unusually high number but actually more in the normal range in a person who is not being defensive on such a test. There was an adequate number of M responses commensurate with an IQ WAIS of 110 as reported earlier, there were some small detail responses and two responses to the white spaces in the blot or S responses which signify mild tendencies to be oppositional. However, there were at least 4 or 5 original responses to areas in the blots which mark the uniqueness of this individual in her ability to invoke new ways of perceiving the outside world.

In summary the psychometric testing of this individual, Zelma Rivas, reveals in individual of above average to superior intelligence who is open and forthright and strong in her sense of both self and her willingness to stay with what she thinks is correct or what she believes in. It is easy to see that such an individual with some narcissistic traits, I would describe them, would run into difficulty with an Agency or Corporation whose intent is to maintain uniformity and conformity within the ranks.

Other than these observations there is no indication in any of the testing done that here is any psychosis or other significant psychopathology. The worst descriptor one could use of this individual is that she is narcissistic, however, she does not even really fit the total description of a narcissistic personality.

In either event there is no indication to see Ms. Rivas as unfit. She is hence fit to perform her duties.

Addendum:

During the course of the testing she, again, displayed and verbalized her dissatisfaction with the Agency with which she is now working. She was counseled to seek transfer to another Agency with which she would be more compatible since she had worked previously with the NYS Dept. of Health for at least 12 years without any significant problems.

Again, in conclusion Ms. Rivas is fit for duty with no significant psychopathology.

/s/ Peter F. Andrus, M.D.
Diplomate, American Board of
Psychiatry and Neurology

PFA:pl [. . .]

Addendum:

In spite of the above summary I would state to the Agency concerned, namely the NYS Lottery, that they continue to keep a supervised but distant watch on Zelma Rivas because of a noticed borderline tendency on one of her psychological tests, namely the MMPI-2. Although this does not correlate with the reminder of her psychological testing, it is important enough for her to be watched, although my basic tenant is that she is still capable and fit for duty.

/s/ Peter F. Andrus, M.D.
Diplomate, American Board of
Psychiatry and Neurology

RESPONSE FROM THE EMPLOYMENT LITIGATION SECTION (NOVEMBER 6, 2009)

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
EMPLOYMENT LITIGATION SECTION-PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530
www.usdoj.gov

Case No. JG:DLE:BGM:ssj.DJ 170-50-0

Ms. Zelma Rivas
P.O. Box 4478
Clifton Park, New York 12065

Dear Ms. Rivas:

Your letter to the Department of Justice dated August 31, 2009 has been referred to the Employment Litigation Section of the Civil Rights Division of the Department of Justice for consideration and response. Please excuse our delay in responding.

In your letter, you allege that your employer, the New York State Lottery ("NYSL") has committed a series of personal violations against you, including attempts to set you up to be arrested. You believe that these actions are a "violation of the Civil Rights Act of 1964." You further allege a number of criminal actions taken against you by NYSL employees, including obtaining your personal information via illegal means, and stalking you. It appears that you are requesting the Department of Justice's assistance with respect to your allegations.

Title VII of the Civil Rights Act of 1964, as amended, 42. U.S.C. § 2000e, et. Seq. ("Title VII") prohibits discrimination in employment on the basis of race, sex, national origin and religion. Title VII also prohibits an employer from retaliating against an individual for opposing any employment practice that would violate Title VII, for filing a discrimination charge, or for assisting in the investigation of such a charge. Congress has designated the Equal Employment Opportunity Commission ("EEOC") as the federal agency responsible for investigating individual charges of discrimination under Title VII. If you believe that you have been discriminated against in violation of Title VII, you should, if you have not done so, contact the EEOC to find out whether you may file a charge. The EEOC may be called toll-free at 800-669-4000, which will connect you to the EEOC office nearest you, or you may write to the following EEOC office:

Equal Employment Opportunity Commission
Buffalo Local Office
6 Fountain Plaza
Suite 350
Buffalo, NY 14202

It is important that a charge be filed with the EEOC as soon as possible, because a discrimination charge must be filed within a certain time period after the alleged discriminatory act occurred in order to be considered timely.

The Department of Justice has authority to pursue an individual charge of discrimination against a state or local government employer under Title VII only after the EEOC has determined that reasonable cause exists to believe a violation of Title VII has occurred, conciliation fails, and the EEOC refers the charge to

us. When the EEOC refers charges to us, we give them careful consideration.

If you believe that federal criminal laws have been violated, you may wish to bring your objections to the attention of the local United States Attorney's Office.

You may also wish to consult with a private attorney of your own choosing and at your own expense to determine what other remedies, if any, may be available to you. If you are unable to afford a private attorney, you may desire to contact a local legal aid agency to find out whether may be able to assist you.

Sincerely,

John M. Gadzichowski
Chief Employment Litigation Section

By: /s/ Brian McIntire
Senior Trial Attorney
Employment Litigation Section

LETTER FROM THE INVESTIGATOR, DAVID GING (APRIL 9, 2013)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO LOCAL OFFICE
6 Fountain Plaza, Suite 350
Buffalo, NY 14202
(716) 551-3035

Zelma Rivas
1516 Huntridge Drive
Clifton Park, NY 12065

Re: Your inquiry 525-2012-00733 against NYS Lottery

Dear Ms. Rivas:

I have reviewed the information which you recently send to this office. It appears that you do not have sufficient basis for filing a charge of discrimination with the Equal Employment Opportunity (EEOC). This decision is based on the information you provided.

Please be aware the EEOC protects individuals from discrimination based on race, color, sex, age over 40, national origin, religion and disability. Moreover, the EEOC has a 300-day timely limit, which means we can only investigate allegations of discrimination that occurred within the last 300 days from the date a charge is filed.

I have reviewed the investigative folder 525-2011-00284 (previously filed by you) and I have spoken with the investigator who was assigned to that case.

I learned that the NYS Lottery made the initial decision to fire you years ago and never changed its position. The 300-day clock is not stopped while you exhaust appeals. The decision has still been made. Whether you win or lose any appeals NYS Lottery's decision was made. In addition, you have had your chance to have NYS Lottery's actions investigated. You previously filed an EEOC charge of discrimination regarding this issue. The fact that you did not agree with EEOC's decision in that case does not mean that you can keep applying for more administrative investigations.

For these reasons it is unlikely we would conduct an investigation into your complaint if you were to go forward with filing a formal charge of discrimination. Nevertheless, if you choose to, you may still file a charge of discrimination. Though it is likely that the EEOC will dismiss your charge without investigation, the fact that you have filed a charge of employment discrimination with us may protect your right you have to file an employment discrimination lawsuit in court.

If you choose to file a formal charge of discrimination, the EEOC must provide notice of the charge to the employer or union or referral agency you are filing against. While there is always some risk of retaliation by an employer, such retaliation would violate federal discrimination laws. If the employer did retaliate, you could amend your charge to include an allegation of retaliation.

If, after reading this letter, you still wish to file a charge of discrimination, you should send a letter to us including the following information:

+ Your full name, address, telephone number, date of birth, race and national origin;

+ The full name, address, and telephone number of the employer you are complaining about;

+ A statement of each specific harm you have suffered and the date on which each harm occurred;

+ For each harm, a specification of the act, policy, or practice that is alleged to be unlawful; and for each act, policy, or practice that you allege to have harmed you, the fats that lead you to believe that the act, policy, or practice is discriminatory. Relevant information would include, but certainly would not be limited to:

  - your date of birth, race and national origin; and
  - your basis for alleging that you were discriminated against based on genetic information.

/s/ David Ging
Investigator

LETTER FROM THE WILLIAM A. HERBERT, DEPUTY CHAIR AND COUNSEL (SEPTEMBER 9, 2013)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
60 Wolf Road, Suite 500
Albany, New York 12205-2656
(518) 457-2614
www.perb.ny.gov

Zelma Rivas
P.O. Box 4478
Clifton Park, New York 12065

Dear Ms. Rivas:

Chairperson Lefkowitz has referred your September 3, 2013to me for a response. In your letter, you state that you are appealing the opinion and award by Arbitrator Allen C. DeMarco issued on November 29, 2010. In the opinion and award, Arbitrator DeMarco found you guilty of three disciplinary charges issued by the New York State Lottery, and sustained that agency's proposed penalty of termination.

Following a review of your letter and the attachments, please be advised that the Public Employment Relations Board (PERB) does not have jurisdiction to review an arbitrator's opinion and award. As a result, we do not have legal authority to consider your appeal of the arbitration award. A party to an arbitration award, however, does have the right to seek an award by commencing timely legal proceeding in New York Supreme Court.

In our letter, you express dissatisfaction with the representation that you received during and after the arbitration from the attorney assigned by your union. PERB does have jurisdiction to receive, process and determine an improper practice charge alleging that a union breached its duty of fair representation. An individual seeking to file such a claim must file the charge with PERB within four (4) months of the alleged the actions pursuant to our Rules of Procedure (Rules), which together with the requisite improper practice charge form, is accessible at our website: http:// www.pestime rb.ny.gov. However, the content of your letter strongly suggests that the union's actions you seek to challenge took place well over two years ago, and therefore, an improper practice charge filed at this time is likely to be found untimely under our Rules.

If you have any questions, please do not hesitate to contact my office.

Very truly yours,

/s/ William A. Herbert
Deputy Chair and Counsel

SECOND LETTER FROM THE WILLIAM A. HERBERT, DEPUTY CHAIR AND COUNSEL (SEPTEMBER 10, 2013)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
60 Wolf Road, Suite 500
Albany, New York 12205-2656
(518) 457-2614
www.perb.ny.gov

Zelma Rivas
P.O. Box 4478
Clifton Park, New York 12065

Dear Ms. Rivas:

Public Employment Relations Board (PERB) Chairperson has asked me to respond to your September 9, 2013 handwritten letter that enclosed a copy of the transcript of an examination before trial on February 21, 2001 in the lawsuit entitled *Rivas* v. *New York State Lottery, et. Al.*

As I explained in my previous letter, PERB does not have jurisdiction to review Arbitrator DeMarco's opinion and award. As a result, we do not have legal authority to consider your appeal.

To the extent you believe that the transcript of the examination before trial constitute proof that your union breached its duty of fair representation, our Rules of Procedure (Rules) allow for the assertion of duty of fair representation claim through the filing of an improper practice charge with PERB within four (4) months of the alleged actions that form the basis

of the charge. The requisite improper practice charge form is accessible at our website: http://www.perb.ny.gov. However, an improper practice charge alleging acts that took place over a decade ago is likely to be found untimely under our Rules.

If you have any questions, please do not hesitate to contact my office.

Very truly yours,

/s/ William A. Herbert
Deputy Chair and Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DISMISSAL AND NOTICE OF RIGHTS ISSUED BY THE DISTRICT DIRECTOR (FEBRUARY 18, 1999)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
7 World Trade Center, 18 Floor
New York, New York 10048-1102
(212) 748-8500

To: Zelma Rivas
P.O. Box 284
Ghent, NY 12075

Charge No. 16G-98-5816

The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

On behalf of the Commission

/s/ Spencer H. Lewis, Jr.,
District Director

February 18, 1999

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DISMISSAL AND NOTICE OF RIGHTS ISSUED BY THE DISTRICT DIRECTOR (APRIL 20, 2000)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
7 World Trade Center, 18 Floor
New York, New York 10048-1102
(212) 748-8500

To: Zelma Rivas
16 Old Talerico Rd., PO Box 284
Ghent, NY 12075

Charge No. 16GA05852

The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

On behalf of the Commission

/s/ Spencer H. Lewis, Jr.
District Director

April 20, 2000

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DISMISSAL AND NOTICE OF RIGHTS ISSUED BY THE LOCAL OFFICE DIRECTOR (MAY 24, 2016)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO LOCAL OFFICE
6 Fountain Plaza, Suite 350
Buffalo, New York 14202
(716) 551-4444

To: Zelma Rivas
EEOC Charge No. 525-2016-00031
EEOC Representative:
Beth Anne Breneman
Investigator Support Assistant

The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

On behalf of the Commission

/s/ John E. Thompson, Jr.
Local Office Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DISMISSAL AND NOTICE OF RIGHTS ISSUED BY THE EEOC REPRESENTATIVE FOR THE DIRECTOR (MAY 24, 2016)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO LOCAL OFFICE
6 Fountain Plaza, Suite 350
Buffalo, New York 14202
(716) 551-4444

Zelma Rivas
PO Box 4478
Clifton Park, NY 12065

Re: EEOC Charge No. 525-2016-00031
Zelma Rivas v. New York State Lottery

Dear Ms. Rivas:

The Equal Employment Opportunity Commission (hereinafter referred to as the "Commission"), has reviewed the above-referenced charge according to our charge prioritization procedures. These procedures, which are based on a reallocation of the Commission's staff resources, apply to all open charges in our inventory and call for us to focus our limited resources on those cases that are most likely to result in findings of violations of the laws we enforce.

In accordance with these procedures, we have evaluated your charge based upon the information and evidence submitted. In the initial documentation that you sent the Commission you stated that the Respondent is stalking you at your current place of employ-

ment. The Respondent has engaged a third governmental agency to harass you during the work day. You allege that you have been subjected to these actions in retaliation for filing a charge of discrimination against them in the past in willful violation of Title VII of the Civil Rights Act of 1964, as amended.

Based upon an analysis of the information submitted to us, the Commission is unable to conclude that the information establishes a violation of Federal law on the part of Respondent. This does not certify that Respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge. If you have any questions, please feel free to call Beth Anne Breneman, Investigator Support Assistant, at (716) 551-4444.

Sincerely,

/s/ Beth Anne Breneman
for John E. Thompson, Jr.
Director, Buffalo Local Office

Encl: Dismissal and Notice of Right to Sue

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DISMISSAL AND NOTICE OF RIGHTS ISSUED BY THE EEOC REPRESENTATIVE (MAY 24, 2016)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO LOCAL OFFICE
6 Fountain Plaza, Suite 350
Buffalo, New York 14202
(716) 551-4444

Respondent: New York State Lottery
EEOC Charge No. 525-2016-00031
FEPA Charge No.:

Dear Ms. Rivas:

This is to acknowledge receipt of the above-numbered charge of employment discrimination against the above-named respondent. Please use the "EEOC Charge No." listed above whenever you call us about this charge. The information provided indicates that the charge is subject to: Title VII of the Civil Rights Act of 1964 (Title VII).

You need do nothing further at this time. We will contact you when we need more information or assistance. A copy of the charge or notice of the charge will be sent to the respondent within 10 days of our receipt of the charge as required by our procedures.

Please be aware that we will send a copy of the charge to New York State Division of Human Rights Federal Contract Unit, One Fordham Plaza, 4 Fl. Bronx, NY 10458 as required by our procedures. If

the charge is processed by that agency, it may require the charge to be signed before a notary public or an agency official. Then the agency will investigate and resolve the charge under their statute. If this occurs, section 1601.76 of EEOC's regulations entitles you to ask us to perform a Substantial Weight Review of the agency's final finding. To obtain this review, a written request must be made to this office within 15 days of receipt of the agency's final finding in the case. Otherwise, we will generally adopt the agency's findings as EEOC's.

The quickest and most convenient way to obtain the contract information and the status of your charge is to use EEOC's Online Charge Status System, which is available 24/7. You can access the system via the link (https://publicportal.eeoc.gov/portal) or by selecting the "My Charge Status" button on EEOC's Homepage (www.eeoc.gov). To sign in, enter your EEOC charge number, your zip code and the security response. An informational brochure is enclosed that provides more information about this system and its features.

While your charge is pending, please notify us of any charge in your address, or where you can be reached if you have any prolonged absence from home. Your cooperation in this matter is essential.

Sincerely,

/s/ Beth Anne Breneman
Investigator Support Assistant
(716) 551-4444
Office Hours: Monday-Friday,
8:30 a.m.-5:00 p.m.
www.eeoc.gov

CHARGE OF DISCRIMINATION

NEW YORK STATE DIVISION OF HUMAN RIGHTS
EEOC 525-2016-00031

Ms. Zelma Rivas
(518) 605-4386

Named is the employer that I believe discriminated against me:

NEW YORK STATE LOTTERY
One Broadway Center, Schenectady NY 12301

No. Employees, Members: Unknown
Phone # (518) 388-3360
Discriminated based on Retaliation.
Date(s) Discrimination Took Place:

Earliest 12/1/2012; Latest 1/28/2016;
Continuing Action.

The particulars are:

I worked for the Respondent from on or about 1995 to on or about 2010. When I was employed by the Respondent, I protested employment practices and policies that were prohibited by employment discrimination statutes.

Since on or about December 2012, I believe that the Respondent has been retaliating against me by engaging a third governmental entity to stalk and bully me at my new place of employment.

I believe I am being subjected to these actions in willful violation of Title VII of the Civil Rights Act of 1964, as amended.

/s/ Zelma Rivas

LETTER TO THE ARBITRATOR
(NOVEMBER 16, 2010)

CSEA, INC.
143 Washington Avenue, Capitol Station Box 7125
Albany, New York 12224-0125
(518) 257-1000

Allen C. DeMarco
Arbitrator
8 Edge of Woods
Latham, New York 12210

Re: CSEA (Zelma Rivas) and
NYS Division of the Lottery
DPA Case No. 10-DIS-206
CSEA Matter No. 10-0591

Dear Arbitrator De Marco:

This constitutes the Grievant's closing argument in the above referenced arbitration.

Preliminary Statement

The Grievant, Zelma Rivas, is an employee of the New York State Division of the Lottery ("Lottery") where her job is Secretary I. Ms. Rivas has worked for the Lottery since 1995, starting as a part-time employee and then going full-time around June 30, 2005. Ms. Rivas started her career with the State of New York in 1981. Ms. Rivas has worked with the Teacher Retirement System and the Department of Health.

The Grievant has no prior disciplinary record.

In this matter, the Grievant is charged with four counts of misconduct. The first two charges relate to a letter Ms. Rivas sent to the U.S. Department of Justice, Civil Rights Division on January 23, 2010. She also sent a copy of the letter to Governor David Paterson. The second two charges related to the Grievant's conduct at the interrogation conducted by Lottery management on April 1, 2010 regarding the above-mentioned letter.

In Charge #1 the Lottery states that the letter constitutes misconduct because it supposedly violates Lottery Policy 4F-111, "Code of Ethics for Lottery Employees," in that Ms. Rivas was dishonest with respect to what she stated in the letter. Specifically, the charge states, in part, "you falsely stated in the letter that the Lottery attempted to cause physical harm to you, your children and other people".

Charge #2 alleges that the Grievant also violated § 74(3)(h) of the Public Officers Law by sending the letter. Specifically, the charge states, in part, that the Grievant failed "to pursue a course of conduct which will not raise suspicion among the public that she is likely to be engaged in acts that are in violation of the trust placed in such employee by the public." The Lottery claims that the Grievant falsely stated that the Lottery committed criminal acts against her, her family and other people and therefore, she violated the trust placed in her as a Lottery employee.

Charge #3, states the Grievant was insubordinate because she "failed to obey a direct verbal order to cooperate in answering questions." Specifically, the Lottery claims that, despite being informed that the failure to answer questions would be considered

misconduct, the Grievant repeatedly responded to numerous questions with the answer "no comment".

Charge #4 alleges the Grievant "interfered with the Lottery's ability to conduct the interrogation and an appropriate investigation" when she refused to answer questions.

Ms. Rivas denies she violated either the Code of Ethics for Lottery Employees or the Public Officers Law when she wrote the letter to the U.S. Department of Justice on January 23, 2010, with a copy to Governor Paterson. The Grievant contends she was acting consistent with the directive from the Lottery and the State Inspector General's office that she report wrongdoing within a State agency. She also asserts that she had a legal right under the U.S. Constitution and State Law to write a letter about being discriminated against because of her race and national origin. Therefore, she did not engage in misconduct with respect to writing the letter but was engaged in protected activity.

In addition, Ms. Rivas denies she engaged in misconduct by answering "no comment" to various questions at the interrogation about the letter. In fact, during the interrogation Ms. Rivas never denied or evaded the question of whether she authored the letter, signed it and sent it. Moreover, because the writing and sending of the letter constituted protected activity, the employer was not entitled to ask her questions about the underlying facts of her complaint.

Stipulated Issues

1. Is the Grievant guilty of any of the charges contained in the Notice of Discipline, dated April 7, 2010?
2. If so, is the penalty of termination appropriate?
3. If not, what shall the penalty be?
4. Was there probable cause to suspend the Grievant prior the hearing?

Statement of Facts

The parties stipulated to the following:

(1) The Grievant has no prior disciplinary record.

(2) The Grievant's date of hire with the Lottery is November 13, 1995.

(3) The Grievant has been a State employee since December 17, 1981.

(4) The Grievant's current job title with the Lottery is Secretary I, Grade 11.

The Grievant worked in the Press and Community Relations department of the Lottery for approximately 10 years. The Grievant's job evaluations for the last several years were rated "satisfactory". (Joint Ex. 2). On December 21, 2005, the Grievant received a letter of recommendation from the Lottery's then Director of communications, Jennifer Mauer. (Ex. G-3).

On January 23, 2010, the Grievant wrote a letter to the U.S. Justice Department chronicling her 15-year experience of being stalked; threatened with

bodily harm and murder; having her children threatened with the same including kidnapping; being run off the road while driving; observing Lottery employees engage in illegal activity with impunity; as well as other nefarious acts by agents of the Lottery. (Joint Ex. 5). In the year prior to being suspended, the Grievant testified that she had been stalked, run off the road, and harassed.

The Grievant stated that she was compelled to write the letter because it was her responsibility as a Lottery employee to report wrongdoing. Also, she was afraid of what might happen to her and her family so she felt she needed to take her concerns to a higher authority. She stated that in the past her efforts to get relief from the abuse she received, such as being placed in an isolation room around 1998, fell on deaf ears when she complained to management at Lottery. In a letter to the New York State Office of the Inspectors General ("IG"), the Grievant characterized her letter as "whistleblowing". (Ex. G-4). She further stated in the letter that she is being punished by the Lottery for reporting "what looks wrong" and the agency was eradicating her First Amendment rights. *Id.* This is not the first letter the Grievant wrote to the Justice Department, other New York governmental agencies, officials like the Governor, the New York State Inspector General's Office or New York State Division of Human Rights. (*See* Exhibits G-3 to G-7).

In the Lottery's letter to the New York State Employee Health Service regarding Ms. Rivas on February 1, 2010, it stated that "Ms. Rivas has a history of alleging many different things she imaged had been done to her in the past by the New York Lottery" and essentially, the Lottery believed the

January 23, 1010 letter was an extension of her irrational behavior. It then proceeded to list all the matters and disputes raised by the Grievant since 1997. (Joint Ex.2).

Kevin Brannock, the CSEA Local President at the Lottery testified. Brannock has been the local union President for 10 years. He testified that there is much "mistrust" of management among his members. He witnessed how the Grievant has been treated over the years. He indicated he understood why she was frustrated and wrote the letter to the U.S. Justice Department.

On April 1, 2010, the Grievant was interrogated by the Lottery regarding the letter she sent to the Justice Department. (Joint Ex.3). Specifically, the Grievant was told that the interrogation would "center on" the letter, that she had to answer questions "truthfully and honesty," and that a failure to answer a question at all "could be perceived as misconduct for each one". (Joint Ex. 3, at pg. 1). In the interrogation the Grievant readily admitted that she wrote the January 23, 2010 letter and signed it. (Id. at 2 & 5). The Grievant was asked to explain what criminal activity she was referring to, specifically naming the perpetrators and the dates of the events. She responded "no comment.". (Id. at 2). She was asked to name employees who she claimed were "afraid to speak-out" and she answered "no comment". She was asked who at the Lottery had chosen her for "extermination," as she alleged in her letter and she responded "no comment". She was asked who gave false testimony about her and she responded "no comment." She was sked whom she told about the alleged incidents described in her letter and she said "no comment."

The Grievant was asked a multitude of questions about what was contained in her letter to the federal government to which she responded "no comment." However, when asked if she enjoyed working at the Lottery, the Grievant responded "yes."

At the hearing, the Grievant stated that she typed the letter at home. She also stated that she sent a copy of her letter to the New York State Office of the Inspector General.

The Lottery called Lisa Fitzmaurice as a witness. She is the Director of Human Resources and has been in the position for six-years. Prior to working with the Lottery, she was with the Division of Budget and Civil Service.

Fitzmaurice stated that the Code of Ethics policy applies to all employees and it requires employees to be "truthful" and act with "integrity."

Fitzmaurice went through the Grievant's letter in her testimony and denied the allegations the Grievant had made in the letter about Lottery. She stated that Lottery had no knowledge of many of the incidents described in the letter. Once Lottery obtained a copy of the letter, it placed Ms. Rivas on leave and sent her to the Employee Health Service (EHS), on February 1, 2010. On March 23, 2010, EHS found that the Grievant was fit for work. After receipt of the letter, the Grievant was interrogated on April 1, 2010 and suspended without pay the same day. The NOD was issued on April 7, 2010.

Fitzmaurice stated that the Lottery is seeking termination of employment because it was determined that the Grievant cannot effectively perform her job; she is no longer trustworthy; she would interfere

with operations; and, the letter demonstrates that she lacks integrity to be a Lottery employee. However, Fitzmaurice acknowledged that Ms. Rivas has a right to report wrongdoing at the Lottery directly to the Inspector General's office and other authorities without first having to go through Lottery management.

The Lottery also called Jennifer Givner, the Director of Communications for Lottery as a witness. Givner was a new employee to the Lottery. She started in February 2009 and prior to this position she worked in the Governor's press office for Public Safety. Givner wanted to *see* the Grievant removed from her job because she was not happy with Ms. Rivas' work performance. Givner claims she kept a journal on Ms. Rivas from June 2009 until the Grievant's suspension (approximately nine months) which amounted to 17 pages. The journal was not put into evidence, nor was it made available at the hearing. It must be kept in mind that the Grievant is not charged with poor work performance.

Argument

I. The Grievant Is Not Guilty of Violating Either the Lottery's Ethics Policy or the Public Officers Law Because of the Letter She Sent to the U.S. Department of Justice

There can be no dispute that the Grievant has a right to write a letter to the U.S. Department of Justice. The First Amendment of the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

> dom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (emphasis added)

The U.S. Supreme Court has held that "every citizen has the right to petition the Government for a redress of grievances." U.S. Const. amend. I. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983).

Ms. Rivas testified about why she wrote the letter and stated that she, in fact, believed people associated with the Lottery have tried to harm her and her family for several years. In fact, the New York State Inspector General's office issued a press release on February 2, 2010 that it had concluded that a former Public Information Officer of Lottery, John Carlson had, after he was fired, improperly eavesdropped and accessed the Lottery's computer network in an attempt to retaliate against his former bosses. (Ex. G-1) The Grievant worked under Carlson before he retired and sent a letter to the IG about him on January 10, 2008. (Ex. G-4). Apparently, the Grievant had good cause to be concerned about what Carlson was capable of.

In any event, whatever one may think of Ms. Rivas' letter, its mailing to the U.S. Justice Department and Governor Paterson does not violate either the Lottery Code of Ethics or the Public Officers Law.

The Code of Ethics is clearly aimed at corruption within the agency where an employee is profiting or attempting to profit from his/her position in dealings with outside entities. It is also intended to minimize conflicts of interest by employees. The purpose clearly states that in conducting the business of the Lottery,

employees are in contact with consultants, contractors, agents, individuals who participate in Lottery games, and the general public. Therefore, the public "must be free from improper influence or favoritism;" employees must perform a full day's work for a full day's pay in an efficient manner; employees must be "honest and above reproach" and avoid activity that is unethical and illegal. (State Ex. 1, pp.1-2). Employees must avoid "conflicts of interest," such as engaging in outside employment which would compromise their duty to the Lottery; refrain from disclosing confidential lottery information; and not accept privileges, money or give the impression that they can be bribed or compromised. An employee must also avoid certain outside political activities that compromise their duty to the Lottery. There are restrictions on the personal use of Lottery property which an employee must avoid. Significantly, a lottery employee must report fraud, corruption, criminal activity and wrongdoing to the New York State Office of the Inspector General.

Clearly, the ethics provision is not intended to prevent employees from writing letters to the U.S. Department of Justice, nor can it since all employees and citizens have that right.

In addition, § 74(3)(h) of the Public Officers Law cannot prohibit the writing of such a letter for the same reason. The section states, in pertinent part, that an employee "should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust." Again, the provision is intended to prevent corruption and conflicts of interest by public employees. *See* § 74(2) of the Public Officers

Law ("No . . . employee . . . should have an interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of duties in the public interest"). Again, writing a letter to a government agency about what the employee perceives as criminal activity is not what this statute is intended to address.

II. The Grievant Is Not Guilty of Misconduct for Answering Many of the Questions in the Interrogation of April 1, 2010, with the Response "No Comment" Because the Questions Related to Her Communication with the Federal Government and the Information Sought Was Privileged

The questions that were asked of the Grievant during her interrogation dealt with the content of her letter to the U.S. Justice Department, Civil Rights Division. The letter was a privileged communication between the Grievant and her government. Moreover, the interrogation was improper because, as noted in Point I, the writing and sending of the letter did not constitute misconduct and therefore, the Lottery should not have been questioning the Grievant about the content of the communication in the first place.

The Lottery gained possession of the Grievant's letter, which made accusations of wrongdoing by the agency, from the Governor's office. At that point there existed an adversarial relationship between the Grievant and the Lottery because the Grievant was seeking legal representation by the Civil Rights Division; she believed she was being abused because she is a "black Hispanic" woman. (Joint Ex. 5). In a

prior letter to the Justice Department, the Grievant alleged that the Civil Rights Act of 1964 was being violated by the Lottery in its treatment of her. (Ex. G-5). In other words, this matter is similar to a situation where an employee files a complaint of discrimination or improper practice charge with a governmental agency like the New York State Division of Human Rights or the Public Employment Relations Board.

In such a situation, a State agency cannot use the interrogation process to probe the merits of an employee's claim of discrimination or improper practice, no matter how outlandish the claim. In other words, if an employee filed a complaint of sexual harassment with the State Division of Human Rights stating that the Lottery allowed senior employees to sexually harass lower level employees with impunity, the Lottery would be able to summon the employee to an interview without counsel, question her on the merits of her accusation, and then charge her with a disciplinary infraction because she refused to answer the questions. The employee has the right to file a complaint and once she does, a legal civil proceeding exists between the parties. The right to send a letter to the Justice Department is similarly privileged and the employer cannot use the interrogation process as a discovery mechanism to probe the merits of the complaint.

It should also be noted that Julie Barker, an attorney for the Lottery was also present during the interrogation. Therefore, since the Grievant was unrepresented by counsel she had a right to refuse to answer questions about her complaint. Consequently, the Lottery cannot engage in an improper interrogation and then turn around and accuse an employee of

misconduct because she refused to answer questions in the interrogation. The Lottery, if it did not like what the Grievant alleged in her letter could have sued her for defamation or obtained a restraining order but it cannot make a matter of free speech and convert it into a disciplinary action.

III. There Is No Probable Cause to Suspend the Grievant

The Grievant did not have to be suspended because there was no evidence that she was a danger to herself or others, or that she would interfere with operations, as required by Article 33.3(g). In fact, the Employee Health Service had previously examined the Grievant before the interrogation and the charges were issued, and found she was fit for work. The Lottery presented no objective evident that the Grievant, subsequent to the sending of her letter, demonstrated behavior that was detrimental to her work performance or threatened other employees. Thus, there was no probable cause to suspend the Grievant pending the outcome of this proceeding. Therefore, she should be retroactively restored to the payroll to the date of her suspension. April 1, 2010, regardless of the ultimate decision on the merits of this disciplinary proceeding.

IV. If the Grievant Is Found Guilty, the Penalty of Termination Is Too Severe for the Infraction That Was Committed

Progressive discipline is appropriate in this case because the Grievant is a long-term State employee with no prior disciplinary record.

The IG's Office found, in another matter, that the Lottery may have improperly completed certain

Civil Service Department documents in conjunction with the hiring of an attorney at the agency, (Ex. G-2). In response to this matter, the Director of the Lottery, Gordon Medenica, stated in a letter dated December 11, 2009, to Joseph Finch, Inspector General that "possible disciplinary action" might result and that at least there would be "counseling" on the proper application of Civil Service rules. *Id.* Medenica further explained that "in this case, the lack of assurance that the [management] staff members who prepared the position profile did not *see* the list of qualifications for [the applicant] submitted to the Department made it impossible to avoid the appearance of impropriety." *Id.*

The above-described incident could be characterized as a breach of the Ethics Policy, but yet no one was disciplined. The Grievant's letter, while characterized by the Lottery as "outlandish" and "outrageous," did no more harm to the Lottery then the above-described incident. The Grievant is a lay person, not a lawyer and therefore, her letter should not be judged from a technical perspective. Clearly, it entailed an outpouring of emotional perception.

If the Grievant is found guilty of any charge she should not be terminated given her long years of service to the State and her unblemished disciplinary record. To terminate the Grievant would violate the principle of progressive discipline. As a consequence, a penalty that is less than discharge and that fits the offense is the only appropriate penalty.

Under the CBA, Article 33.4(f)(5) the Arbitrator has broad authority to fashion a remedy. The Arbitrator may "devise an appropriate remedy . . . [and] direct referral to a rehabilitative program in addition to a

penalty." Thus, if the Arbitrator believes that the Grievant needs counseling or other rehabilitative services he can direct such as a condition of reinstatement. This option should be seriously considered given the devastating effect loss of employment can have on an individual and her family.

Conclusion

For the above stated reasons, the Grievant should either be found not guilty of all the charges, or if found guilty of any of the charges, she should not be terminated from employment. Furthermore, it should be found that there was no probable cause to suspend the Grievant pending a decision on the merits of the case and back pay should be restored.

Respectfully submitted,

/s/ Miguel G. Ortiz
Senior Counsel

Cc: Julie Barker, Esq.
(Via Email, jbarker@lottery.state.ny.us)

NOTICE OF CONFERENCE AND PRODUCTION OF RECORDS (JANUARY 17, 2006)

STATE OF NEW YORK, EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
Empire State Plaza, Agency Building 2, 18th Floor
P.O. Box 2049, Albany, NY 12220
(518) 474-2705

Zelma Rivas,

Complainant,

v.

State of New York, New York State Lottery and Executive Department, Division of the Lottery, Nancy A. Palumbo, Director, Susan Miller, Assistant and Acting Director, Gerald Woitkowski, Lisa Fitzmaurice, Caroline Haperman, Mark Messcarolli, James Murphy and Matt Raddler, As Aiders and Abettors, Respondents, and, New York State, Department of Audit and Control, New York State Department of Civil Service, NYS Civil Service Commission and George C. Sinnot, President of NYS Civil Service Commission and Department as Aides and Abettors; and, Necessary Parties.

Case No. 10104008

Federal Charge No. 16GA501892

To: Zelma Rivas
16 Old Talerico Rd, PO Box 284
Ghent, NY 12075

You are hereby notified to appear and attend before Rey F. Torres, the Regional Director of the New York State Division of Human Rights, or the duly designated representative, Daniel Reisman, Human Rights Specialist I, at the Division offices located at: Corning Tower, 25th Floor, Empire State Plaza, P.O. Box 2049, Albany, New York, on Wednesday, February 8, 2006, at 10:00 AM, for a conference in connection with the investigation in the above-captioned proceeding with respect to a charge that the Respondent violated §296 of the Human Rights Law. You may bring a lawyer if you desire, but it is not necessary for you to do so However, the other side has also been so advised.

Please bring with you all other witnesses, books, records, papers, and documents pertaining to this matter, including:

NOTE: Due to security restrictions, it is absolutely essential that all parties attending this conference bring photo ID, such as a driver's license. Also, if you are bringing anyone other than listed below, please advise Daniel Reisman (Investigator) at 518-474-1497 as to their names as soon as possible.

Complainant is requested to bring the following:

(1) Names and daytime phone numbers of witnesses to the alleged discriminatory acts, and the specific incidents they will testify about, including dates.

(2) NOTE: Owing to the one-year statute of limitations, only items referenced in Com-

plaint Allegations No. 33 and following be addressed in this conference.

Respondent is requested to bring the following persons: (1) Liza Fitzmaurice (2) Caroline Haperman, Supervisor (3) Mark Messcarolli (4) Matthew Raddler (5) Nancy A. Palumbo, Director (6) Susan Miller, Assistant and Acting Director.

Please contact Daniel Reisman, Human Rights Specialist I, at (518) 474-1497 within five business days of receipt of this notice, to confirm that you will be attending the conference. NOTE: No adjournments will be granted unless requested within five business days of receipt of this notice, with suggested alternate dates provided. Please address all requests, questions, and other communication to Daniel Reisman, Human Rights Specialist I, at the above number.

State Division of Human Rights

By: /s/ Rey F. Torres
Regional Director
Tel: (518) 474-2705
Fax: (518) 473-3422

Dated: January 17, 2006
Albany, New York

LETTER FROM THE REGIONAL DIRECTOR REY F. TORRES (FEBRUARY 8, 2006)

STATE OF NEW YORK, EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
Empire State Plaza, Agency Building 2, 18th Floor
P.O. Box 2049, Albany, NY 12220
(518) 474-2705

Did NOC. Set for 2/8 at 10:00
Zelma Rivas 2pc 2/8/06 at 10:00 Conducted by DXR.
Present:

Zelma Rivas, Cpt. 388-3330
Gregg T. Johnson, Rsp. Atty 462-0300
Carolyn Hapeman, Supervisor 388-3360
Lisa Fitzmaurice, Director of HR Mgt. 388-3360
Mark Messercola, MVD 388-3453

Complainant's attorney did not show or call. I tried to call his office, but recording said the machine is not receiving any more calls. Owing to the fact that Complainant is represented by counsel, she will not participate, but may take notes. I will conduct this conference with just the Respondents and will send cpt. and her attorney, Robert E. Harris, Esq., a copy of these notes, and 10 business days to respond.

In the beginning, Rps said no conciliation.

Allegation #35: DXR asked Messercola what was his title. He said he was a motor vehicle operator, not a security guard. Complainant did verify that he was the person she was referring to in this allegation. He denied making the alleged comment and denied that he said anything negative to Complainant. {Mr. Mes-

sercola then left} DXR said that if Complainant has any witnesses in this alleged encounter, she and her attorney are requested to furnish him with this information. DXR mentioned the statute of limitations and stated that the investigation and this conference would cover only the period of 2/3/04 to 3/3/05. Anything prior to 2/3/04 would be barred by the statute of limitations.

Allegation #33: Fitzmaurice said this is false, she denied referring to the incident. DXR stated that if Complainant has any witnesses to this alleged incident, she and her attorney are requested to furnish him with this information.

Allegation #34: Hapeman denied saying this. She said that she said "Welcome back." DXR stated that if Complainant has any witnesses to this alleged incident, she and her attorney are requested to furnish him with this information.

Allegation #36: DXR asked: Who gave the evaluation? Hapeman said she, and it was a total, annual evaluation. Her evaluation said she was performing up to standard for the job. There were problems, however, with #8 as to certain mistakes Complaint had made as to info on winning tickets, where the drawings were, how much money, the winner. Was important. This category failed because Hapeman said she had to constantly change Complainant's information to correct it. She said she talked to Cpt, and Cpt. was always receptive. This pertains to press releases.

Allegation #37: NOTE: Complainant is still employed by Respondent. DXR asked Rsps: What is Cpt's status now? Fitzmaurice said that on 6/30/05

she became full-time at her request. She has full-time tenured position now. DXR asked what she had at the times she filed her complaint. Fitzmaurice said she was tenured, had full-time item, but not elect to work full-time.

Allegations 38, 39, 40—not evidentiary to present facts.

Allegation #41: Fitzmaurice said the Complainant is in full-time competitive position. Cpt. when hired was full-time. She later elected part-time If part-time, they sign agreement which says the Lottery and require you to come back full-time, or she can decide no longer to be part-time—if full-time position is available.

Johnson said that Exhibit 9 has the agreement and approval to go part-time—8/1/96. Fitzmaurice said cpt. stayed part-time till 6/30/05. She made the request in May 2005. With full-time employees, they usually hold that item.

Allegation #42, not evidentiary to present facts.

Allegation #43 Cpt. is now full-time, with tenure.

DXR asked Rsps: Was cpt ever out any money because of what happened? Fitzmaurice said no.

WHEREFORE:

Fitzmaurice said cpt. was treated fairly. DXR asked Fitzmaurice: Has Cpt. complained to you about anything since the filing of her complaint? Fitzmaurice said yes, recently alleged issue that is being investigated at this point-under category of harassment. She complained about January. 17, 2006. Is the only complaint.

REPLY BRIEF OF APPELLANT, ZELMA RIVAS (OCTOBER 9, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ZELMA RIVAS,

Plaintiff-Appellant,

v.

NEW YORK STATE LOTTERY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of New York.

Zelma Rivas, Pro Se
Post Office Box 4478,
Clifton Park, New York 12065.
(518) 605-4386.

PRELIMINARY STATEMENT

The plaintiff commenced this action on August 23, 2016 by a filing of a complaint with the U.S. District Court for the Northern District of New York. The complaint named the plaintiff's employer, the NYS Lottery. The complaint alleged discrimination, harassment, retaliation, hostile work environment, deprivation of property interest and liberty interest in violation of the First and Fourteenth Amendments,

Title VII of the Civil Rights Act of 1964, 42 USC § 2000e.

The Defendants motioned to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The District Court (Brenda K. Sannes) granted the Defendants motion and dismissed the case. The plaintiff appealed. Plaintiff asserts the District Court abused its discretion. Discretion exercised to an end not justified by the evidence, a judgement that is clearly against the logic an effect of the facts as are found. Plaintiff asserts the continuing violation exception to the Title VII limitation period. If a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an on-going policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone. The plaintiff alleges both the existence of an ongoing policy of discrimination and some non-barred acts of discrimination taken in furtherance of that policy. The Court is asked to re-examine the averments of the plaintiff in their entirety, and to find that she established a prime facie case of racial discrimination, harassment, retaliation, hostile work environment under Title VII as timely and plausible.

STATEMENT OF THE CASE

A. Plaintiff's Employment

This action is brought on by, Zelma Rivas, a career civil servant who began her career for the Employer in 1981, to redress grievances based on racial harassment, retaliation, deprivation of property interest and liberty interest, permitting and allowing a hostile

work environment, the denial of due process and, other rights. Plaintiff states the deprivations and menacing began immediately after she complained of discrimination and harassment to the New York State Lottery (NYS Lottery)[1] management. These deprivations and menacing have not ceased.

In 1996, the plaintiff complained to Lottery management and her union and advised them she was subjected to discrimination and harassment by her supervisor. In October 1997, the plaintiff filed a complaint with the NYS Division of Human Rights and, she filed another complaint with the Lottery. In response to her complaint, Lottery management ordered the plaintiff to be examined by the NYS Dept. of Civil Service, Employee Health Service (EHS). On October 15, 1997, Dr. Peter Andrus, NYS Dept. of Civil Service, Employee Health Service (EHS) states:

> "It appears from review of the material enclosed that much of the friction described, both by Mrs. Ely (Rivas) and those at work, is between members of her and the office. In Mrs. Ely's (Rivas) previous employment with the State during the 14 years that she was employed with the State Health Dept. she apparently had no difficulty there, for no such problems occur as documented in her chart" (Page 5).

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[1] On February 1, 2013, the New York Division of the Lottery was merged into the New York State Gaming Commission, which thereby assumed its functions, powers and duties. *See* L. 2012, c. 60, part A; N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 117, 120, 121, 122 and 125; N.Y. Tax Law §§ 1602, 1603.

In April 1998, the plaintiff filed another complaint with the Lottery and advised them she was facing reprisal for her previous complaint because her co-workers were harassing, bullying and mobbing her in the hostile work environment. In retaliation for her complaint, Lottery management, again, ordered the plaintiff to be examined by the (EHS). Every time the plaintiff complained her co-workers harassed, discriminated and bullied her, Lottery management responded by publicly berating her, escorting her out of the Lottery building and ordering her to be examined by the (EHS). Lottery management used the NYS Dept. of Civil Service, Employee Health Service (EHS), as a means of punishment against the plaintiff.

On May 27, 1998, Andrus, changed his viewpoint, and states:

> "Again, in conclusion Mrs. Ely (Rivas) is fit for duty with no significant psychopathology. Addendum: In spite of the above summary I would state to the Agency concerned, namely the NYS Lottery, that they continue to keep a supervised but distant watch on Zelma Ely (Rivas) because of a noticed borderline tendency on one of her psychological tests, namely the MMPI-2. Although this does not correlate with the remainder of her psychological testing, it is important enough for her to be watched, although my basic tenant is that she is still capable and fit for duty" (Page 5).

Andrus identified the problem at the Lottery as friction between the plaintiff and the employees. However, six-months later, Andrus, retaliated against the plaintiff and directed that the Lottery manage-

ment to keep the her under surveillance and monitor her because of his interpretation of the results of the MMPI—2. A questionnaire many argue is valid for people who are English speaking people of European descent and not valid across cultural, ethnic and language barriers. Andrus's directive that the plaintiff be kept under surveillance and monitored by Lottery management, injured the plaintiff's professional reputation, deprived her of liberty, her freedom and a due process right to a hearing. Plaintiff alleges the Defendant's violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution "nor shall any State deprive any person of life, liberty, or property, without due process of law".

B. EEOC Charge

Plaintiff's complaint and attachments refers to her discrimination action against the Lottery management and Lottery employees. Assistant Attorney General ("AAG") Roger W. Kinsey represented the Defendants in that action. On February 21, 2001 at the U.S. District Court of the Northern District of New York, Examination Before Trial (EBT) of Plaintiff, Zelma Rivas, held at the State Office of Attorney General, The Capitol, Albany New York. *See Rivas v. N.Y. Lottery*, No. 00-cv-746, Dkt. No. 58 (N.D.N.Y. Mar 26, 2002), aff'd, *Rivas v. N.Y. State Lottery*, 53 F. App'x. 176 (2d Cir. 2002). Kinsey states:

> "Why don't we do this: Why don't you draw the booth for me. And we'll stipulate on the record that this will not be to scale, but is simply representation so we know what we're talking about. Plaintiff: Is this going

> to be used? Kinsey: Yes, I'm going to have it marked?" . . . (Page (A-191))

Kinsey harassed the plaintiff and used her drawing to evoke contemptuous laughter during the proceeding. Harassment is a form of employment discrimination, a violation of Title VII of the Civil Rights Act of 1964. Kinsey attached a map of the Lottery building with the exact dimensions of the isolation room, where the plaintiff was held, as an Exhibit in his Reply. Kinsey states:

> "the office area is fifteen feet by nine and one half feet and has immediate access to the security desk" (Page (A-112)). " . . . Now, let's go back to the booth, ma'am. What was your function in the booth?" Plaintiff: "My function in the booth? They brought down work and left it on the security table for me to get. And I had to type it up and leave it on the security table and call on the phone and let them know when the work was done . . . " Kinsey: "I didn't ask you about the work station. I said, during-at any time during your placement with the Lottery, was there information available on how to file a Civil Rights claim or grievance? Plaintiff: You said on the bulletin board? Kinsey: Yes, on the bulletin board. Plaintiff: I had no access to a bulletin board during that time. Kinsey: You certainly had access prior to the 20 months you went into that . . . " (Page (A-207), (A-208)).

Kinsey confirms the plaintiff was kept in an isolation room, specifically constructed to confine her, by the Defendants, from July 20, 1998 thru March 6, 2000.

During this period of isolation, the plaintiff, a union member paying dues, was denied access to the agency bulletin board. The board posted union information, promotional opportunities, job vacancies, agency events and various announcements. The plaintiff alleges she was denied promotional opportunities because of her status as a minority and her complaints of discrimination and harassment.

The plaintiff could not be seen by any employees or visitors because the isolation room was hidden from sight. The plaintiff was situated behind a door used only by non-lottery security personnel who had to walk past the plaintiff to get to the lobby desk. Plaintiff was instructed by Lottery management to leave her completed work assignment on the lobby desk, call the Marketing office, located on the 5th floor and, a Lottery employee would pick up her work from the lobby desk. Plaintiff was denied access to all Lottery offices. When Lottery management wanted to meet with the plaintiff, the plaintiff was escorted by a Lottery employee to the 5th floor and, when the meeting was over, she was escorted back to the isolation room. The plaintiff was humiliated and treated like a criminal. As a result of the forgoing, the plaintiff filed a complaint regarding the violation of her Civil Rights and disparate treatment with the NYS Division of Human Rights and subsequently, the EEOC and the U.S. District Court.

Kinsey violated Title VII unlawful employment practices which prohibits employment discrimination on the basis of race, color, religion, sex or national origin when he asked the Plaintiff to answer questions that violate Title VII of the Civil Rights Act of 1964. Kinsey asks the plaintiff:

"Kinsey: Are you married? Plaintiff: I'm divorced. Kinsey: Children? Plaintiff: Yes. Kinsey: How many? Plaintiff: Two. Kinsey: Boy and a girl. Two boys. Two girls? Plaintiff: A boy and a girl. Kinsey: And, ma'am, your ethnic background? Plaintiff: Hispanic. Kinsey: And are you a citizen of the United States? Plaintiff: Yes, I am. Kinsey: Naturalized or born here? Plaintiff: Born here. Kinsey: And where were you born? Plaintiff: I was born in New York City. Kinsey: And do you have other family in New York City? Plaintiff: Yes, I do. Kinsey: Do you have other family here in the area? Plaintiff: Yes, I do. Kinsey: Where do you currently reside, ma'am? Plaintiff: I reside in Ghent, New York. Kinsey: And that is at 16 Old . . . Plaintiff: Talerico. Kinsey: Thank you. Road? Plaintiff: That's correct. Kinsey: Okay. And it's T-A-L-E-R-I-C-O Road? Plaintiff: That's correct. Kinsey: Okay. And how long have you been living there? Plaintiff: Three years. Kinsey: Do you own or rent? Plaintiff: I just live there. Kinsey: Does the house. belong to a relative? Plaintiff: Yes, it does . . . Kinsey: Are you currently being treated by a psychologist or psychiatrist? Plaintiff: No, I'm not. Kinsey: Have you ever been treated by a psychologist or psychiatrist? Plaintiff: NYS Health—I need a moment please. No. Kinsey: You've never been treated—Plaintiff: No. Mr. Harris (plaintiff's attorney):

"Just for appoint of clarification, the health —CSEA did have the health department

examine, but it's not treatment." . . . (Pages (A-120), (A-121), (A-122), (A-124)). Mr. Harris (plaintiff's attorney): "I'm sorry, Civil Service Department, not CSEA." Kinsey: Maybe I can clarify this. Ma'am, you were examined by a Civil Service Health Services doctor by the name of Dr. Andrus? Plaintiff: That's correct. Kinsey: And that would have been in October 15th, 1997? Plaintiff: I'm not sure of the date. I'd have to look that up for you. Kinsey: And again, a second time he examined you on or about May 21st, 1998? Plaintiff: He examined me a second time, but I'm not sure of the day. I'll also have to look that up. Kinsey: Can you tell us, ma'am, when your last physical examination occurred? Kinsey: Could you clarify exactly what type of physical—just a regular physical exam? Plaintiff: Just a regular physical examination? Mr. Harris (plaintiff's attorney): "Just an overall general health exam?" Kinsey: "Yes." Plaintiff: I'm not sure of the date, but it was within a year. Kinsey: Okay. And that was not for a specific problem, medical or-. Plaintiff: Just a general exam. Kinsey: And you have no current medical problems? Plaintiff: No, I do not. Kinsey: Any past medical problems? Plaintiff: No. Excuse me, I had my tonsils removed. . . . Kinsey: And no past history of emotional or psychological problems? Plaintiff: No. Kinsey:— beyond the examinations order by Civil Service. Plaintiff: No. Kinsey: Okay. Any past problems with memory loss? Plaintiff: No. Kinsey: Any current problems with memory

loss? Plaintiff: No . . . .". (Pages (A-125), (A-126)).

Timothy Connick, Esq., representing the Civil Service Employees Association (CSEA), also in attendance at the (EBT) and, a mandated reporter, sanctioned the Title VII of the Civil Rights Act of 1964, violations. According to the EEOC, questions regarding a person's marital status, the number and/or ages of children, are frequently used to discriminate against women and is viewed as non-job-related and problematic under the Civil Rights Act of 1964—Title VII. Plaintiff alleges Kinsey and Connick used the legal proceeding as a means to perform illegal actions.

Prior to commencing a Title VII action in federal court against a defendant, a plaintiff must file a charge with the EEOC or the New York State Division of Human Rights naming that defendant. *See Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991) (citing 42 U.S.C. § 2000e-5(e)). Plaintiff did not charge Defendant CSEA in her EEOC and Division of Human Rights Complaint. "So as to not frustrate Title VII's remedial goals [,] . . . courts have recognized an exception to the general rule that a defendant must be named in the EEOC complaint." *Id.* (citation omitted); *see also Gilmore v. Local 295, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 798 F. Supp. 1030, 1038 (S.D.N.Y. 1992). This exception, referred to as the "identity of interest" exception, "permits a Title VII action to proceed against an unnamed party where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge". *Johnson*, 931 F.2d at 209 (citations omitted).

The Third Circuit in *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977), set out a four-part test, which the Second Circuit adopted in Johnson, to determine whether an "identify of interest" exists, thereby excusing a plaintiff's omission of a defendant from her EEOC charge.

The four factors are:

> "1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named [party] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; [and] 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party".

Johnson, 931 F.2d at 209-10 (quoting *Glus*, 562 F.2d at 888).

In a letter dated April 9, 2013 addressed to the plaintiff from David Ging, Investigator, U.S. Equal Employment Opportunity Commission (EEOC), Buffalo Local Office, Ging states:

> "I have reviewed the investigative folder 525-2011-00284 (previously filed by you) and I have spoken with the investigator who

was assigned to that case. I learned that the NYS Lottery made the initial decision to fire you years ago and never changed their position" (Page 4).

In response to the plaintiff's complaint, Ging, states he spoke to the investigator assigned to her case and learned the NYS Lottery made a decision to fire her (years ago) and never changed their position. This decision is why Lottery management targeted the plaintiff and commenced a series of continuous and protracted acts of discrimination, harassment, workplace bullying, workplace mobbing, workplace humiliation, degradation, devaluing, discrediting and annoyance with the purposeful intent of terminating the plaintiff's employment or forcing the her to quit and/or commit suicide.)

Plaintiff was excessively monitored, kept under constant surveillance, subjected to pressure, tension, ostracized and rebuffed by her superiors and fellow employees. Plaintiff was repeatedly falsely charged with misconduct and made the object of numerous baseless disciplinary proceedings. The plaintiff maintains the invidious motivation for the on-going discrimination, retaliation and harassment is retaliation for her complaints to her Employer, law enforcement, various NYS Agencies and the EEOC. The Defendants conduct demonstrates their furtherance of the on-going policy of discrimination, retaliation and hostile work environment(s).

Lottery management filed numerous false instruments in state and federal courts. For example, while the plaintiff was in the isolation room, Lottery management specifically constructed to confine her, Lottery management submitted documents that gave the

appearance the plaintiff worked in an office with other employees. On March 3, 2000, Lottery management presented the plaintiff with an evaluation for the period May 19, 1998 to May 19, 1999. The plaintiff refused to sign the evaluation because the evaluation gave the appearance she worked in an office with other Lottery employees during the time she was confined in the isolation room. (Page 24, Page 25).

On March 6, 2000, the day before a NYS Division of Human Rights hearing, the Lottery Attorney and Affirmative Action Officer, moved the plaintiff into the Press and Community Office. On March 7, 2000 at the NYS Division of Human Rights hearing, Lottery management were asked to provide a "list of all employees in the office in which Complainant works, to include, in chart form, name, date of hire, and race" (Page A-309). Lottery management employees did not disclose the egregious fact that the plaintiff was forced to remain in an isolation room, they specifically constructed to confine her in, for almost two years. Plaintiff alleges the Defendants used the isolation room as a means to force her to quit her job, commit suicide or terminate her employment. Lottery management's decision to fire the plaintiff is confirmed by Ging's (EEOC) response to the plaintiff's complaint.

On February 8, 2006, at a NYS Division of Human Rights hearing, Assistant Attorney General ("AAG") Gregg T. Johnson, appeared for the Defendant and said he would not conciliate with Zelma Rivas, the plaintiff. Johnson's refusal to conciliate was documented in writing by the NYS Division of Human Rights employee, appearing for the Agency. The plaintiff filed a timely complaint with the EEOC;

However, Johnson's refusal to conciliate hindered the plaintiff's ability to comply with the precondition to filing a Title VII claim in federal court, to pursue available administrative remedies. The plaintiff was again denied the opportunity to negotiate or resolve the issue before proceeding to court. As a result, the plaintiff could not initiate the prescribed administrative procedure, pursue them to their appropriate conclusion and await the final outcome before seeking judicial intervention. Johnson, in his refusal to conciliate, acted in an arbitrary manner and failed in his duty to serve as the "People's Lawyer". The guardians charged with the statutory and common law powers to protect the civil rights of all New Yorkers and promote equal justice under law. The Defendants conduct confirms the furtherance of the on-going policy of discrimination, retaliation and hostile work environment(s). Plaintiff is entitled to the benefit of the continuing violation exception, which provides that, "if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone (internal quotation marks omitted)". *Chin v Port Auth. of N.Y. & N.J.,* 685 F.3d. 135, 155-156 (2d Cir. 2012). (quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993), *abrogated on other grounds by Kasten v Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1(2011). "To trigger such a delay, the plaintiff 'must allege both the existence of an ongoing policy of discrimination and some non-time barred acts taken in furtherance of that policy.'" *Fahs Constr. Grp. Inc. v Gray,* 725 F.3d 289, 292 (2d Cir.

2013) (quoting 2013) (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)).

Plaintiff's complaint alleges sufficiently that the Defendant's conduct was part of a discriminatory policy and/or mechanism. Plaintiff establishes and alleges the incidences of discrimination, retaliation and hostile work environment occurred within the limitation period. As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC". *Hardaway v. Hartford Pub. Works Dep't,* 879 F.3d 486,489 (2nd Cir. 2018).

C. Plaintiff's Post-2010 Allegations

On February 1, 2010, Lottery, personnel director, Lisa Fitzmaurice, and members of Lottery management, in front Lottery employees, hand delivered a letter to the plaintiff and ordered her to be examined by the NYS Dept. of Civil Service, Employee Health Service (EHS); and, escorted her out of the Lottery building. Fitzmaurice sent the plaintiff a letter dated March 26, 2010 and states:

> "... this is to confirm that the Employee Health Service has advised us that based upon their medical evaluation of February 24 and March 17, 2010 as pursuant to Section 72 of the Civil Service Law, it is their considered medical opinion that you are able to perform the full duties of your position at this time. Therefore, this is to advise you that effective April 1, 2010, at 11:00 a.m. you should return to work and report to the Lottery Guard Station at Lottery Central at 11:00 a.m." (Page 26).

As instructed, the plaintiff reported to work and was interrogated. Lottery management commenced with an interrogation proceeding against the plaintiff to secure her constructive dismissal because they were not able to discharge her from employment on medical grounds by means of the repeated use of the NYS Department of Civil Service, Employee Health Service (EHS). An unlawful pattern of practice, Lottery management exploited for years.

On August 23, 2010 Unemployment Insurance Appeal Board, Administrative law Judge, Charles Essepian, states:

> "Over the course of the claimant's employment, the claimant reported several incidences that she believed violated her human rights, civil rights, employee rights and rights that she had through her union. On January 23, 2010, the claimant wrote a letter to her employer notifying them that her complaints have gone unanswered and that there are continuing acts by the employer causing her and her family to suffer. The claimant cited specific acts of what she believed were violations of her rights, discrimination, harassment among other things. As of the result of the letter, the employer suspended the claimant with pay beginning February 2, 2010, and required her to get a mental health evaluation to see if she was fit for work. The claimant complied with the employer's directive and after undergoing her evaluations was found to be fit for work. By Confidential Memorandum dated March 26, 2010, the claimant was ordered to return to the work

site on April 1, 2010, where she would undergo an interrogation by the employer. The memorandum notified the claimant that "Your participation is mandatory, failure to appear may result in disciplinary action against you, including termination of your services. No other instructions or warnings were provided to the claimant. On April 1, 2010, the claimant reported to the interrogation and was represented by two union officials. At the interrogation the human resource manager for the department for whom the claimant worked as the claimant a series of questions about statements and accusation made in her January 23, 2010. The claimant replied to all questions asked of her, except one "No comment". The claimant was subsequently discharged for failing to cooperate in the interrogation process on April 1, 2010. Opinion: Pursuant to Labor Law Section 593(3), a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with employment. Pursuant to Labor Law Section 527, the wages paid in such employment cannot be sued to establish future claim for benefits. The credible evidence establishes that the claimant was discharged for failing to cooperate in an interrogation with her employer on April 1, 2010. Based on the testimony and evidence before me, I find that there is no evidence that the claimant was aware her failure to cooperate in the interrogation would be grounds for dismissal. Significantly, the

> claimant was only placed on notice by letter dated March 26, 2010, that her participation at the interrogation was mandatory. Furthermore, the transcript from the interrogation on April 1, 2010 is devoid of warning the claimant that her failure to cooperate or failure to answer questions could be or would result in her dismissal. Accordingly, I find that the claimant's actions do not rise to the level of misconduct under the Unemployment Insurance Law" (Exhibit H).

Essepian states the testimony and evidence of the transcript of the interrogation is devoid of warning the plaintiff that her failure to cooperate or failure to answer questions could result in her dismissal. Essepian found the plaintiff's refusal to participate in the interrogation on April 1, 2010 did not rise to the level of misconduct under the Unemployment Insurance Law" (Exhibit H).

In a letter dated October 12, 2010 addressed to the plaintiff from Mike G. Ortiz, Senior Counsel, CSEA, he states:

> "I am in receipt of your correspondence dated October 8, 2010. While I understand your decision not to accept the award, I want to remind you that the arbitrator indicated at the end of the hearing that there is a possibility he will terminate you from state service. It appears that the arbitrator may believe you fabricated these stories for some ulterior purpose and, therefore, you were dishonest and tried to bring disrepute on the agency. I urge you to give this settlement one more thought and to please call

> me upon receipt of this letter to advise of your final decision. I must give the arbitrator your decision by close of business on October 10, 2013. If I do not hear from you by 4:00 p.m, I will have no choice but to advise him that you have decided not to accept the award. Thank you for your attention to this matter" (Page 29).

Ortiz urged the plaintiff to resign and accept the consent award from the Defendants. The "consent award" states:

> "This case was heard September 21, 2010 at Latham, New York before Allen DeMarco, Arbitrator. In full resolution of the Notice of Discipline dated April 4, 2010: (1) The Grievant will voluntary resign from her position as a Secretary 1, salary grade 11, with the Employer, effective COB on December 31, 2010. A copy of her resignation letter is attached as Appendix A to this agreement. The Grievant's resignation shall be irrevocable and her employment shall not extend beyond such date for any reason. The Grievant's use of her leave accruals prior to May 1, 2010 shall remain unchanged and shall not be affected by this award. The Grievant shall be placed on administrative leave effective from May 1, 2010 through and including December 31, 2010 and shall be paid the salary due to her as a Secretary 1, Grade 11 during such period. (5) The Grievant agrees that she will neither seek nor obtain employment with the employer at any future time. (6) No aspect of this Award

> may be used as a precedent for, or introduced in any current or future disciplinary action taken against another employee. This Award has been made in accordance with Section 33.4(f) of the CSEA/ASU State Contract. Allen DeMarco, Arbitrator" (Page 32).

The "consent award" demanded the plaintiff agree never to work for her Employer, the State of New York. This demand deprived the plaintiff of her liberty and denied her equal opportunity for employment. As evidenced by the documents the plaintiff submitted with her complaint, DeMarco and the Defendants falsely charged the plaintiff with misconduct and terminated her employment because she refused to accept their "consent award" and resign. Furthermore, had the plaintiff succumbed to the duress forced upon her by the Defendants and resigned, her right of eligibility to claim unemployment insurance benefits would have been forfeited and she and her children would have been forced into homelessness.

Lottery attorney, Julie Barker, in her Post Hearing Statement dated November 15, 2010 states:

> ". . . Charge #1 Code of Ethics for Lottery Employees . . . "Grievant violated this violated this policy when she wrote and sent the letter to the Department of Justice and the Governor of the State of New York". . . . Charge #2 Public Officers Law Section 74(3)(h) requires a public employee to endeavor to pursue a course of conduct that will not raise suspicion among the public . . . "The letter falsely stated that the Lottery committed criminal acts against the Grievant, her family and other people" . . . . Charge #3 Griev-

> ant failed to obey a direct verbal order to cooperate in answering questions during the Interrogation conducted by the Lottery . . . . Charge #4 Grievant interfered with the Lottery's ability to conduct the Interrogation and any appropriate investigation . . . .".

Plaintiff maintains that the evidence provided, herewith, negates the validity of the false charges imposed by Lottery management and refutes their allegations in its entirety. It is inconceivable Lottery management would offer the plaintiff a "consent award" if the allegations levied against her were true. This is further evidence that the charges against the plaintiff are false and proof that Lottery management fabricated the charges against the plaintiff in order to terminate her employment.

At the Arbitration, the plaintiff testified, under oath, she was confined in an isolation room at the Lottery for more than 20 months. Kevin Brannock, CSEA, local president, testified, under oath, that the plaintiff was confined in an isolation room at the Lottery for more than a year. Lottery Attorney, Julie Barker and Personnel Director, Lisa Fitzmaurice, testified under Oath, that the plaintiff was never in an isolation room and, "it never happened". Bannock's testimony that the plaintiff was confined in an isolation room for more than a year was omitted from the Opinion and Award signed and dated September 21, 2010 by Arbitrator, Allen DeMarco (Page 21). Barker and Fitzmaurice's false testimony was also omitted from the Opinion and Award. The omission of the false Oath by Barker and Fitzmaurice contributed to the assurance that the outcome of the Arbitration was affirmed in the Lottery's favor. Supervisor,

Jennifer Givner, testified under Oath, that she kept a daily diary on the plaintiff. When asked by CSEA attorney, Mike Ortiz to produce the diary, Givner refused. Givner's admission of maintaining a daily diary on the plaintiff and her refusal to produce the diary was also omitted from the Opinion and Award.

At the arbitration, plaintiff submitted police reports, letters of complaints addressed to her Employer; law enforcement; the US Dept. of Justice; the US Dept. of Justice, Civil Rights Division; various NYS Agencies, *i.e.*, NYS Lottery, NYS Inspector General's Office, NYS Dept. of Labor, NYS Attorney General's Office, EEOC and other government agencies. The plaintiff's documents describe years of suffering while enduring workplace mobbing and workplace bullying; harassment and stalking at work and out of the workplace; and, numerous attempts made on her life and the lives of her children. The plaintiff testified under Oath that the menacing began immediately after she complained of discrimination and harassment to Lottery management in 1996. Plaintiff's documents, submitted at Arbitration, corroborated her testimony.

After the plaintiff's wrongful termination from NY Lottery, she was hired as a temporary employee at the following jobs. Identical to the mistreatment she suffered at the NY Lottery, plaintiff was targeted, stalked, harassed, mobbed and bullied.

- July 2010, Kelly Services assigned the plaintiff work as a Secretary for the NYS Department of Health, HIV, Aids Institute, Empire State Plaza, Corning Tower, 3rd Floor, Albany, New York. Plaintiff was one more than a dozen temporary employees hired to work for

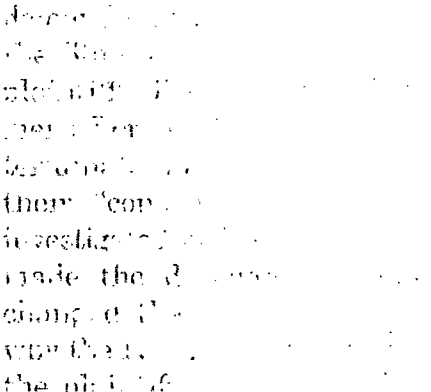
Agency. Plaintiff was the only employee not offered a permanent position.

- August 2011, plaintiff applied for an Administrative Assistant(AA) position with Homeland Security, FEMA in Albany, New York. In September 2011 plaintiff was interviewed by Mark Sooy (571) 405-1921 and another Homeland Security employee and, hired. Homeland Security employee Wendy Laundri, Internal Affairs (540) 220-2069 was asked to escort the plaintiff to Human Resources (HR) so she could complete paperwork and get fingerprinted. Laundri, advised Natalie from (HR) the plaintiff was hired for the position. Natalie advised Laundri the plaintiff should not have been hired and, she would send other candidates to be interviewed that could be hired for the position. Plaintiff left Homeland Security and immediately called the NYS Inspector General's Office (IG). Plaintiff spoke with an (IG) employee and explained to her that the NYS Attorney's General's Office employees and the NYS Lottery management were relentlessly pursuing her and deliberately thwarting her efforts to obtain employment and remain employed.
- September 2011, Kelly Services Employment Agency, 125 Wolf Road, Albany New York, assigned the plaintiff to work a claims position with M & T Bank, 313 Ushers Road, Ballston Lake NY 12019. Plaintiff was targeted and harassed. The relentlessly harassment forced the Plaintiff to resign on 11/4/11.

- April 2012, Snelling Personnel Services Agency assigned plaintiff to work at Value Options, 12 British American Boulevard, Latham, New York. Plaintiff was targeted. The relentless harassment forced plaintiff to resign.
- June 2012, Manpower Employment Agency, 1450 Western Avenue, Albany NY assigned the plaintiff to work as an Editorial Assistant, at Lexis Nexis, Broadway, Albany New York. Plaintiff 's employment ended on August 31, 2012.
- December 2012, NYS Office of Temporary and Disability Assistance (OTDA). Plaintiff was targeted, stalked, bullied and harassed.

Plaintiff alleges facts that lend conclusory contentions that the harassing conduct was carried out by employees from the NYS Attorney's Office and the NYS Lottery management. For example, at the (EBT), ("AAG") Kinsey, harassed the plaintiff throughout the proceeding, a violation of Title VII of the Civil Rights Act of 1964. Kinsey, violated Title VII unlawful employment practices which prohibits employment discrimination when he asked the Plaintiff to answer questions that violate Title VII of the Civil Rights Act of 1964. Timothy Connick, Esq., representing the Civil Service Employees Association (CSEA), also in attendance at the (EBT) and, a mandated reporter, sanctioned the Title VII Civil Rights violations. Kinsey, sanctioned the Defendants discriminative action to isolate the plaintiff for almost two years in a room specifically constructed to confine her, with the purposeful intent of terminating her employment or forcing the her to quit and/or commit

suicide. Kinsey, sanctioned the Defendants actions to deny the plaintiff access to the agency bulletin board that posted union information, promotional opportunities, job vacancies, agency events and various announcements; a violation of Title VII of the Civil Rights Act of 1964. Kinsey, sanctioned the Defendants action to monitor the plaintiff and keep her under constant surveillance, in violation of the First and Fourteenth Amendments. ("AAG") Johnson, refused to conciliate with the plaintiff at the NYS Division of Human Rights hearing. Johnson's refusal to conciliate hindered the plaintiff's ability to comply with the precondition to filing a Title VII claim in federal court, to pursue available administrative remedies. (CSEA), Senior Counsel, Ortiz urged the plaintiff to resign and accept a consent award from the Defendants demanding she agree never to work for her Employer, the State of New York. A demand that deprived the plaintiff's liberty and equal opportunity for employment. Lottery management fabricated false charges to terminate plaintiff because she refused to accept their "consent award" and resign. (EEOC) Ging, investigated and learned the NY Lottery management made the decision to fire the plaintiff and never changed their position. This decision is the reason why the NY Lottery management aggressively attacked the plaintiff with the inevitable goal of terminating her employment. After management took aim at the plaintiff, the workforce joined in the aggression. Management formed a workplace mobbing environment when they took action and publicly warned, criticized and suspended the plaintiff. These actions alerted the workforce that management wanted the plaintiff out of the Agency. Management shared their concerns with the employees by suggesting that opportunities



for advancement and better working conditions would ensue after the plaintiff was terminated. This collective bullying has had a devastating impact on the plaintiff's life and career, as she, to date, continues to fight to remain employed. Plaintiff contends that it is improbable, if not impossible, that the identical targeting, on-going discriminative, harassing, mobbing, bullying, retaliatory, adverse employment actions deliberately initiated by the Defendants at the NY Lottery are mere coincidences occurring at her present employment with the (OTDA).

STANDARD OF REVIEW

To survive a motion to dismiss, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp v. Twombly,* 550 U.S. 544, 570 (2007). The plaintiff provides factual allegations sufficient "to raise a right to relief above the speculative level."

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgement that is clearly against the logic an effect of the facts as are found". *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); *see also In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir.2011). The District Court does not apply the right law or rests its decision on a clearly erroneous finding of a material fact. *See Jeff D. v Otter*, 643 F.3d 278 (9th Cir.2011) (Citing *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)).

The plaintiff provides factual allegations enough to raise a relief above the speculative level. In deciding a motion for summary judgment, the facts must be read in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254,* 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

The plaintiff provides enough facts to state a claim to relief that is plausible on its face. The plaintiff pleads and establishes sufficient facts to make out a prime facie case under Title VII and Sections 1981 and 1983. The court does not evaluate the plaintiff's likelihood of success; instead, it only determines whether the plaintiff has pleaded a legally cognizable claim. (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987, F.2d 429, 431 (7th Cir. 1993).

SUMMARY OF ARGUMENT

Plaintiff establishes proof of causation through direct evidence of retaliatory animus directed against her by the Defendants. For example, at the NYS Division of Human Rights hearing, the Defendants, concealed the fact that the plaintiff was in an isolation room for 20 months; and, plaintiff was moved her out of the isolation room into an office with other employees, the day before the hearing. NYS Lottery management and Arbitrator DeMarco concealed the information that the plaintiff complained to Lottery management that for years she was repeatedly harassed in the Office by numerous NYS Correction Officers with inmates in their care.

Plaintiff asserts DeMarco's suppression of critical information from the Arbitration, suggests he and the Defendants, had previously conspired to termin-

ate the plaintiff's employment. Plaintiff asserts that all the acts of discrimination, retaliation and workplace harassment she experienced during her employment with the NY Lottery, and thereafter, were intentional and motivated by a prohibited invidious discriminatory animus and are in violation of 42 USC Section 2000e, Title VII.

Plaintiff asserts the District Court abused its discretion. The discretion exercised to an end not justified by the evidence submitted by the plaintiff in her Complaint. A judgement that is clearly against the logic an effect of the facts as are found.

ARGUMENT

Plaintiff asserts the targeting, hostile work environment, harassment, extreme workplace mobbing and bullying the plaintiff suffered at the NY Lottery; at various temporary jobs, after her wrongful termination from NY Lottery, and at her current employment (OTDA), are not mere coincidences or discrete acts. *Chin*, 685 F.3d at 157 ("Discrete acts . . . which fall outside the limitation period . . . "). Plaintiff contends these on-going discriminative, retaliatory, adverse employment actions are deliberately initiated by the Defendants. Title VII retaliation causes of action may be based upon actions taken against a former employee following his or her termination from employment with Defendant. The evidence provided herewith, provides definitive evidence that these adverse employment actions did not exist prior to the plaintiff's employment with the NY Lottery. Plaintiff alleges, the Defendants conspired to deprive her of equal protection under law, privileges, and in furtherance of the conspiracy, injury in the form of

Constitutional deprivations flowing from the acts. To establish a claim under § 1985, Plaintiff must prove the Defendant engaged in (1) a conspiracy, (2) for the purpose of depriving Plaintiff of equal protection under the law or equal privileges and immunities, (3) acts in furtherance of the conspiracy, and (4) injury in the form of a Constitutional deprivation flowing from such acts. *See Mian*, 7F.3d at 1087-88 (citing *United Bhd. Of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 3356, 77 L.Ed.2d 1049 (1983).

Plaintiff asserts that NY Lottery management and ("AAG") employees continued to harass the her after 2010; actions, that justifies applying the continuing violation doctrine which provides that a claim alleging a pattern of ongoing discrimination "is timely so long as one act contributing to the claim occurred within the statutory period". *Patterson v. County of Oneida*, 375 F.3d 206, 220 (2d Cir 2004). The plaintiff provides factual allegations enough to raise a relief above the speculative level.

CONCLUSION

I, therefore, respectfully ask that this Court reverse the judgement of the district court with finding in favor of the plaintiff-appellant. In the alternative, the Court should remand the case for a fair and impartial trial before an unprejudiced jury on proper evidence and under correct instructions as just and proper.

EXAMINATION BEFORE TRIAL (EBT) OF PLAINTIFF, ZELMA RIVAS (JULY 24, 2001)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ZELMA RIVAS,

Plaintiff,

v.

NEW YORK STATE LOTTERY.

Page (A-1) to (A-421)

Before Brenda J. O'Connor, a Shorthand Reporter and Notary Public in and for the State of New York.

Referenced Pages: (A-191), (A-207), (A-208), (A-112), (A-120), (A-121), (A-122), (A-124), (A-125) and (A-126).

Kinsey states: "Why don't we do this: Why don't you draw the booth for me. And we'll stipulate on the record that this will not be to scale, but is simply representation so we know what we're talking about. Plaintiff: Is this going to be used? Kinsey: Yes, I'm going to have it marked?" . . . (Examination Before Trial (EBT) of Plaintiff, Zelma Rivas. Refer to Page: (A-191)).

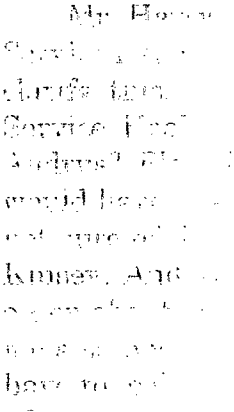
Kinsey states: "the office area is fifteen feet by nine and one half feet and has immediate access to the security desk" (Examination Before Trial (EBT) Page A-112). " . . . Now, let's go back to the booth,

ma'am. What was your function in the booth?" Plaintiff: "My function in the booth? They brought down work and left it on the security table for me to get. And I had to type it up and leave it on the security table and call on the phone and let them know when the work was done . . . " Kinsey: "I didn't ask you about the work station. I said, during-at any time during your placement with the Lottery, was there information available on how to file a Civil Rights claim or grievance? Plaintiff: You said on the bulletin board? Kinsey: Yes, on the bulletin board. Plaintiff: I had no access to a bulletin board during that time. Kinsey: You certainly had access prior to the 20 months you went into that . . . " (Examination Before Trial (EBT) of Plaintiff, Zelma Rivas. Refer to Page: (A-207) and (A-208)).

Kinsey asks the plaintiff: "Kinsey: Are you married? Plaintiff: I'm divorced. Kinsey: Children? Plaintiff: Yes. Kinsey: How many? Plaintiff: Two. Kinsey: Boy and a girl. Two boys. Two girls? Plaintiff: A boy and a girl. Kinsey: And, ma'am, your ethnic background? Plaintiff: Hispanic. Kinsey: And are you a citizen of the United States? Plaintiff: Yes, I am. Kinsey: Naturalized or born here? Plaintiff: Born here. Kinsey: And where were you born? Plaintiff: I was born in New York City. Kinsey: And do you have other family in New York City? Plaintiff: Yes, I do. Kinsey: Do you have other family here in the area? Plaintiff: Yes, I do. Kinsey: Where do you currently reside, ma'am? Plaintiff: I reside in Ghent, New York. Kinsey: And that is at 16 Old . . . Plaintiff: Talerico. Kinsey: Thank you. Road? Plaintiff: That's correct. Kinsey: Okay. And it's T-A-L-E-R-I-C-O Road? Plaintiff:

That's correct. Kinsey: Okay. And how long have you been living there? Plaintiff: Three years. Kinsey: Do you own or rent? Plaintiff: I just live there. Kinsey: Does the house belong to a relative? Plaintiff: Yes, it does. . . . Kinsey: Are you currently being treated by a psychologist or psychiatrist? Plaintiff: No, I'm not. Kinsey: Have you ever been treated by a psychologist or psychiatrist? Plaintiff: NYS Health—I need a moment please. No. Kinsey: You've never been treated—Plaintiff: No. Mr. Harris (plaintiff's attorney): "Just for appoint of clarification, the health—CSEA did have the health department examine, but it's not treatment." . . . (Examination Before Trial (EBT) of Plaintiff, Zelma Rivas. Refer to Page: (A-120), (A-121), (A-122) and (A-124)).

Mr. Harris (plaintiff's attorney): "I'm sorry, Civil Service Department, not CSEA." Kinsey: Maybe I can clarify this. Ma'am, you were examined by a Civil Service Health Services doctor by the name of Dr. Andrus? Plaintiff: That's correct. Kinsey: And that would have been in October 15th, 1997? Plaintiff: I'm not sure of the date. I'd have to look that up for you. Kinsey: And again, a second time he examined you on or about May 21st, 1998? Plaintiff: He examined me a second time, but I'm not sure of the day. I'll also have to look that up. Kinsey: Can you tell us, ma'am, when your last physical examination occurred? Kinsey: Could you clarify exactly what type of physical—just a regular physical exam? Plaintiff: Just a regular physical examination? Mr. Harris (plaintiff's attorney): "Just an overall general health exam?" Kinsey: "Yes." Plaintiff: I'm not sure of the date, but it was within a year. Kinsey: Okay. And that was not for a specific problem, medical or—. Plaintiff: Just a general exam.



Kinsey: And you have no current medical problems? Plaintiff: No, I do not. Kinsey: Any past medical problems? Plaintiff: No. Excuse me, I had my tonsils removed. . . . Kinsey: And no past history of emotional or psychological problems? Plaintiff: No. Kinsey:—beyond the examinations order by Civil Service. Plaintiff: No. Kinsey: Okay. Any past problems with memory loss? Plaintiff: No. Kinsey: Any current problems with memory loss? Plaintiff: No . . . .". (Examination Before Trial (EBT) of Plaintiff, Zelma Rivas. Refer to Page: (A-125) and (A-126)).

/s/ Roger W. Kinsey
Assistant Attorney General,
appearing for the Defendants.

Dated: July 24, 2001
Albany, New York

CONSENT AWARD ISSUED BY THE ARBITRATOR, ALLEN C. DEMARCO (OCTOBER 13, 2010)

IN THE MATTER OF THE DISCIPLINARY ARBITRATION BETWEEN CIVIL SERVICE EMPLOYEES UNION ASSOCIATION, INC.

ZELMA RIVAS,

Grievant,

v.

STATE OF NEW YORK (DIVISION OF THE LOTTERY),

Employer.

Case#10-DIS-206

Before: Allen DeMARCO, Arbitrator

The New York State Division of the Lottery (the "Employer"), Zelma Rivas (the "Grievant") and CSEA, Inc. (the "Union"), through their counsel, having stipulated to the entry this Award; and the parties having freely consented to all of the provisions contained in this Award; and the Arbitrator being duly advised, such consent not having been induced by fraud, duress or any other undue influence:

NOW THEREFORE, IT IS HEREBY AWARDED:

In full resolution of the Notice of Discipline dated April 1, 2010:

(1) The Grievant will voluntarily resign from her position as a Secretary I, salary grade 11, with the Employer, effective close of business on December 31, 2010. A copy of her resignation letter is attached as Appendix A to this agreement. The Grievant's resignation shall be irrevocable and her employment shall not extend beyond such date for any reason. The Grievant's use of her leave accruals prior to May 1, 2010 shall remain unchanged and shall not be affected by this award. The Grievant shall be placed on administrative leave effective from May 1, 2010 through and including December 31, 2010 and shall be paid the salary due to her as a Secretary 1, December 11 during such period.

(2) The Grievant and the Union shall withdraw any and all grievances filed in this matter, subject to compliance with the previsions of this Award. The Employer shall withdraw the Notice of Discipline dated April 1, 2010 retroactive to April 1, 2010, subject to compliance with the provisions of this Award.

(3) Upon the effective date of the Grievant's resignation, the Grievant shall receive all benefits and leave accruals to which she is entitled under the CSEA/ASU State Contract and State and federal law.

(4) The Grievant shall direct all inquiries from a prospective employer to the Lottery's Director of Human Resources Management, Lisa

A. Fitzmaurice. The employer agrees that in response to any inquires by a prospective employer regarding the Grievant's employment with the agency, the employer shall only supply the following information: dates of employment, title and her final salary and the fact that she resigned effective December 31, 2010 close of business.

(5) The Grievant agrees that she will neither seek nor obtain employment with the employer at any future time.

(6) No aspect of this Award may be used as precedent for, or introduced in any current or future disciplinary action taken against another employee.

(7) The Grievant acknowledges that she understands the contents of this Award and has consented to it, and that she has discussed the contents of this award with her Union representative and that she has been fully represented in this matter.

(8) This Award represents the full, final and complete resolution of this matter.

This Award has been made in accordance with Section 33.4(f) of the CSEA/ASU State Contract. The required opportunity for representation was offered and no threats of reprisals or promises of special consideration were made by the agency representatives as an inducement to consent to this Award.

Allen DeMarco,
Arbitrator

Dated: _____

RESIGNATION LETTER OF ZELMA RIVAS (SEPTEMBER 2010)

Lisa A. Fitzmaurice
Director of Human Resources Management
New York Lottery
One Broadway Center
Schenectady, New York 12305

Re: Resignation Letter

Dear Ms. Fitzmaurice:

I, Zelma Rivas, hereby resign from my position as a Secretary I, salary grade 11, with the New York Lottery effective December 31, 2010, close of business.

Very truly yours,

Zelma Rivas