STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 12010-14
DCR DOCKET NO. EN28RE-62954

Wayne Spells,	)	
	)	
Complainant,	)	
	)	
v.	)	**FINDINGS, DETERMINATION**
	)	**AND ORDER**
Matawan-Aberdeen Regional	)	
School District,	)	
	)	
Respondent.	)	

Wayne Spells ("Complainant" or "Spells") is a tenured principal and the director of special programs at Cambridge Park School in Matawan-Aberdeen Regional School District ("Respondent" or the "District"). (ID2.)[1] On March 1, 2012, he filed a verified complaint with the Division on Civil Rights ("DCR") alleging that the District discriminated against him based on race, in violation of the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49. Spells, who is African-American, alleged that because he made mistakes when administering mandatory State tests, the District withheld his salary increment for the 2008-2009 school year. He alleges that Caucasian employees who committed similar violations in 2010, were not similarly disciplined.

The District responded to the DCR complaint on August 7, 2012, arguing in part that Spells' complaint was time-barred under N.J.S.A. 10:5-18, because it was filed more than 180 days after the increment withholding. DCR treated the response as a motion to dismiss, and on June 5, 2013, DCR denied Respondent's motion. In a written decision, DCR concluded that more information was needed to determine when Complainant discovered—or should have discovered with reasonable diligence—that race may have played a role in the Board's adverse action against him. Before DCR finalized its investigation into that issue, Complainant requested that the case be transmitted to the Office of Administrative Law ("OAL"), where it was filed on September 19, 2014.

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[1] For the purposes of this decision, "ID" refers to the ALJ's February 19, 2016 initial decision, "T:" refers to the transcript of the November 5, 2015 hearing, and "CE" refers to Complainant's February 26, 2016 exceptions to the initial decision.

On January 15, 2015, Respondent filed a motion in the OAL for summary decision, again arguing that the DCR complaint was time-barred. In a March 13, 2015 written decision, Chief Administrative Law Judge Laura Sanders denied Respondent's motion and ordered that the matter be scheduled for a Lopez hearing to ascertain whether fairness demanded that the Court apply the "discovery rule." See Lopez v. Swyer, 62 N.J. 267 (1973) (requiring a judge to determine, usually by conducting a preliminary hearing, whether employing the discovery rule to toll the limitations period is equitable in a given case). Spells was the only witness to testify at the November 5, 2015 Lopez hearing. Based on his testimony and the record before her, Judge Sanders issued an initial decision on February 19, 2016, dismissing Complainant's action under the LAD as time-barred. Complainant filed exceptions to the initial decision on February 26, 2016, and Respondent filed a reply on February 29, 2016.

For the reasons discussed below, the Chief ALJ's initial decision is affirmed.

THE ALJ'S DECISION

It is undisputed that on May 19, 2008, the District decided to withhold Complainant's salary increment for the 2008-2009 year, and that he appealed that decision to the Commissioner of the New Jersey Department of Education ("DOE") on August 14, 2008. (ID3.)[2] On June 28, 2010, Complainant met with an investigator at DCR to discuss a potential claim of race discrimination. Ibid.

Complaints must be filed with DCR within 180 days of the alleged act of discrimination. N.J.S.A. 10:5-18. (ID7.) The ALJ noted the parties' disagreement about when the 180-day period started. (ID3.) Respondent argues that the 180-day period should be measured, at the latest, from August 14, 2008, i.e., the date Complainant appealed that decision to DOE.[3] Complainant argues that the time for filing his complaint should be measured from the date he learned that Caucasian teachers committed testing infractions in 2010, but were not

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[2] In his appeal to the DOE, Complainant argued that the District had failed to follow its own procedures when it elected to withhold his increment. See Spells v. Bd. of Edu. of the Matawan-Aberdeen Reg. Sch. Dist., OAL Dkt. No. EDU 11499-08. In a January 19, 2011 initial decision, Chief ALJ Sanders upheld the decision. The DOE Commissioner adopted ALJ Sanders' decision on April 21, 2011, and it was affirmed by the Appellate Division on February 27, 2012. Spells v. Board of Educ., 2012 N.J. Super. Unpub. LEXIS 406 (App. Div. 2012).

[3] Although the Board voted to deny his increment on May 19, 2008, the record is silent as to when Complainant first received notice of that decision.

disciplined. (Ibid.)[4] In so arguing, Complainant relied on the discovery rule, which in appropriate cases provides that the limitations period begins to run when "the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." See Lopez, supra, 62 N.J. at 272. (ID7-8.)

Judge Sanders' disposition turned on Spells' testimony when questioned by the District's attorney at the Lopez hearing:

> Mr. Rubin: Alright, so let – let's – let's back up. When you say you spoke to the board in 2008, did you express to the board in 2008 your belief that your race had something to do with their decision?
>
> Mr. Spells: I did inform the board I was being tree – treated unfairly because of my race and no else that was white that was involved in the testing was treated the same.
>
> [T: 37-13 to -20.]
>
> Mr. Rubin: Okay. It is your testimony that at some time before 2008 was even over, you informed [sic] the impression that your race had something to do with the board's decision and told the board that? Is that your testimony?
>
> Mr. Spells: In 2008, I believe the meeting I had with the board is – was in June, and I informed them that, you know, that I believe that you're making this decision because of my race and you're not holding anybody else responsible that was involved in the testing.
>
> Mr. Rubin: Okay. And you told the board that because you believed in June of 2008 that your race was at least

[4] As noted above, the DCR complaint was not filed until March 1, 2012. As the events that led to the delay in filing the DCR complaint have been discussed in the ALJ's initial decision and DCR's June 5, 2013 motion decision, there is no need to repeat them here. (See ID3-4.) In brief, due to DCR's administrative delays, Complainant's June 28, 2010 contact with DCR is deemed the complaint-filing date for the purposes of this decision.

a factor that motivated their decision. You believed that, right?

Mr. Spells: Yes.

[T: 38-17 to 39-6.]

Based on Complainant's hearing testimony, Judge Sanders found as follows:

> While the allegations concerning the 2009 and 2010 test breaches, if true, would enhance the support for a new discrimination claim, the problem is that the complained-of-injury was obvious and occurred in 2008 . . . Here, the discrete act was the increment withholding, which was clearly identifiable, and occurred in August 2008. While he lacked the additional potential evidence that the later breaches provided, Complainant believed at the time that he had been the victim of racial discrimination, took preliminary steps toward filing a claim, and then used a different procedural avenue to redress his loss. . . . Further, while Complainant's account indicates that the current matter grows out of the Division on Civil Rights' second nontimely response to him, he was represented by counsel in 2008, and he did appeal the increment withholding, albeit on procedural unfairness grounds through the Commission of Education, rather than on discrimination grounds through the Division.

(ID9.) Noting that Spells' testimony was credible, Judge Sanders wrote:

> I FIND that Complainant believed at the time of the withholding in 2008 that he was being subjected to racial discrimination, that he was not so misled by the Board as to its actual rationale that he was deluded into inaction, that he took several affirmative steps to press his belief that he was the victim of discrimination, that for whatever reason he ceased to pursue what was apparently an unsuccessful effort to involve the Division on Civil Rights, and that, finally, he utilized a different avenue to seek redress.

(ID10-11.) Judge Sanders concluded that the discovery rule was inapplicable, and that the action was time-barred, having been filed well over 180 days after the withholding of Complainant's increment. (ID11.)

THE DIRECTOR'S DECISION

In his exceptions, Complainant argues that he "exercised due diligence in pursuing his complaint," relying on his June 2010 visit to DCR and the administrative delay in filing his complaint after that visit. (CE4.) However, Complainant's exceptions do not address the testimony from the Lopez hearing that Judge Sanders found to be dispositive. Specifically, the ALJ cited and relied on Complainant's hearing testimony that in 2008, he believed that race was a factor in the decision to deny him an increment, and actually raised race discrimination as an issue with the District before the end of 2008. (ID6,8-9.) Neither Complainant's exceptions nor any other evidence in the record contradicts his hearing testimony on this point.

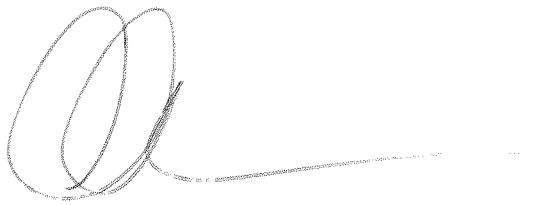
Complainant specifically testified that he knew in 2008 that the Board withheld his increment because he committed a testing error, and he knew in 2008 that the Board did not discipline the Caucasian high school testing coordinator, Michelle Ruscavage, who was also involved in the same testing error. (ID5; T: 12-19 to 13-9; T: 14-24 to 15-3.) That was sufficient evidence to present a *prima facie* case of race discrimination, as he was aware of evidence that Respondent treated an employee of another race more favorably. See Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 304-05 (App. Div. 2000) (stating that plaintiff's *prima facie* case required showing that he was (1) a member of a protected class; (2) there was a company practice for the activity for which he was disciplined; (3) non-minority employees who did not follow the company practice were treated more leniently; and (4) the minority employee was disciplined more harshly for violating the same practice).

Complainant also takes exception to the ALJ's reference to potential prejudice to the Respondent because the three superintendents involved in the events, as well as three other witnesses, are no longer employed by the District. (ID10.) Complainant argues that Respondent was not unduly prejudiced, and cites his hearing testimony demonstrating that many of the necessary witnesses still live in New Jersey and, therefore, could testify in a hearing on the merits of the case if necessary. (CE4.)

The issue of potential prejudice to the opposing party would only become relevant if the evidence at the Lopez hearing demonstrated "that a 'reasonable person' could not have previously discovered a basis for a cause of action with the exercise of 'ordinary diligence' and intelligence." Henry v. New Jersey Dept. of Human Services, 204 N.J. 320, 336 (2010) (quoting Savage v. Old Bridge-Sayreville Med. Group, 134 N.J. 241, 248 (1993)). Based on Complainant's uncontroverted testimony that he believed in 2008 that race may have motivated the Board's adverse action, it is not necessary to reach the issue of whether any potential difficulty in contacting witnesses would prejudice the adverse party. Although the ALJ addressed the

evidence in the record by noting that six witnesses had left the District's employ, there is no need to weigh any potential prejudice because the testimony shows that Complainant was aware that he had a cause of action under the LAD in 2008. Stated differently, even assuming that Respondent would not be prejudiced by application of the discovery rule, the facts do not support applying the discovery rule in this case.

In sum, Complainant testified that: (1) he believed in 2008 that the Board's action might have been the result of discriminatory animus; and (2) he said as much to the Board in June 2008. That evidence is sufficient to preclude use of the discovery rule in this case. Based on the above analysis and an independent review of the record, including Complainant's exceptions, the Director adopts Judge Sanders' decision to dismiss the complaint as time-barred.



DATE: 3-14-16

Craig Sashihara, Director
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