STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 14874-13
DCR DOCKET NO. HD14HM-61307

D.B.,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDINGS, DETERMINATION**
	)	**AND ORDER**
Gloucester City,	)	
	)	
	)	
Respondent.	)	

APPEARANCES:

Iraisa C. Orihuela-Reilly, Esq. (*Disability Rights/New Jersey,* attorneys) for Complainant.

John B. Kearney, Esq. (*Kearney and Associates,* attorneys) for Respondent.

BY THE DIRECTOR:

D.B. (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that Gloucester City denied her request for an accessible parking space in front of her home as a reasonable accommodation for her disabilities, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Gloucester City (Respondent) denied the allegations of discrimination in their entirety. During the course of DCR's ensuing investigation, Complainant's counsel asked that the matter be transmitted to the Office of Administrative Law (OAL) for an administrative hearing, without a probable cause determination. Accordingly, DCR stopped investigating the matter and transmitted the case to the OAL on April 17, 2013, pursuant to N.J.A.C. 13:4-11.1.

On March 24, 2014, Respondent filed a motion for summary decision. On April 9, 2014. Complainant filed a cross-motion for summary decision. Both parties submitted reply briefs.

The ALJ's Decision

On June 17, 2014, an Administrative Law Judge (ALJ) heard oral argument on the motions. The parties submitted post-argument briefs, and the motion record closed on July 29, 2014. On August 19, 2014, the ALJ issued an Initial Decision[1] recommending that the complaint be dismissed as time-barred. (ID11). The ALJ found that the following facts were undisputed.

Complainant is a person with disabilities within the meaning of the LAD. She has herniated spinal discs that cause great pain when she walks, spinal arthritis, high blood pressure, connective tissue disease, and chronic obstructive pulmonary disease, which requires use of an oxygen tank to assist her breathing. (ID2). She has a parking permit and identification card for persons with disabilities issued by the New Jersey Motor Vehicle Commission. (ID2-3).

On July 7, 2008, Complainant filed an application with Respondent for an accessible parking space on the street directly in front of her home as a reasonable accommodation for her disabilities. (ID3). As part of Respondent's process for designating such parking spots, Respondent's police department reviewed her application and the police chief recommended approval of the parking space. (ID3). The next step in the process was to have Complainant's application reviewed by a City Council member from Complainant's ward. That Council member was Complainant's immediate next-door neighbor. On August 4, 2008, Complainant's application was denied at a meeting of the Mayor and City Council, despite the police chief's recommendation. (ID3). After learning of that decision, Complainant attended a September 25, 2008 City Council meeting and requested that her application be re-considered. On October 6,

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1 "ID" refers to the ALJ's initial decision. "C" refers to Complainant's filed exceptions dated August 29, 2014. Exhibits submitted in support of Complainant's motion for Summary Judgment are referred to as "CSJ–Ex.__" "R" refers to Respondent's letter dated September 5, 2014, responding to Complainant's exceptions.

2008, the Mayor and Council again denied her application for designated parking in front of her residence. (ID3).

Respondent asserted that the reviewing Council member found that designating a parking space directly in front of Complainant's residence would "unreasonably negatively impact parking in the area" because parking is permitted only on one side of her street. (ID4). The Council offered an alternative accommodation, i.e., a designated parking spot on a side street approximately sixty feet from her residence. Complainant rejected the proposed alternative accommodation. (ID4).

On or about June 1, 2009, Complainant telephoned the Mayor in an attempt to again appeal the City Council decision. (ID3-4). The Mayor told Complainant that the Council's decision was final. (ID4).

On November 24, 2009, Complainant filed a complaint with the federal office of Housing and Urban Development (HUD). In her complaint, she alleged disability discrimination based on Respondent's refusal to provide her with an accessible parking space in front of her home. (ID4). HUD accepted the complaint on January 20, 2010, and referred the complaint to DCR on January 26, 2010. Respondent responded to the complaint on March 30, 2010, and DCR began an investigation. (ID4). At the request of Complainant's counsel, DCR transmitted the matter to the OAL on April 17, 2013 without a probable cause determination. (ID4).

Subsequently, a new City Council member reviewed Complainant's application and determined that her request could be granted without undue negative impact on parking in the area.[2] (ID4). In the interim between her 2008 application and the 2013 approval, Complainant suffered physical pain and emotional distress due to the parking situation. (ID4).

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[2] Although the ALJ wrote that the new Council member reviewed Complainant's request on August 15, 2013, minutes of the June 20, 2013 City Council meeting indicate that her request was approved on that date.

The ALJ noted that the question of whether the complaint was time-barred needed to be resolved before any substantive merits of the summary decision motions could be addressed. The ALJ found that Complainant had timely filed her discrimination complaint with HUD on November 24, 2009, as that date was "only 176 days after the alleged discriminatory act [of June 1, 2009]." (ID7). Although HUD referred the complaint to DCR two months after the 180-day deadline, the ALJ also found the complaint timely filed with DCR. (ID8). She reasoned that because Respondent had not asserted any prejudice from the delay, the DCR filing date related back to the HUD filing date. (ID8).

After concluding that the complaint would be timely based on Complainant's June 2009 telephone conversation with the Mayor, the ALJ considered Respondent's argument that the last alleged act of discrimination actually occurred eight months earlier, with the City Council's decision of October 6, 2008. Respondent argued that on that basis, the complaint was not timely filed. The ALJ noted that in discrimination cases, the statutory limitations period generally begins to run when the victim had notice of the adverse action giving rise to the claim. (ID8). The ALJ acknowledged that statutory filing deadlines are "subject to waiver, estoppel, and equitable tolling" (ID7), including the "continuing violation" doctrine, which in some cases permits earlier acts to be actionable as part of a continuing pattern of unlawful conduct. (ID8-9).

The ALJ distinguished between the "continuing effects" of prior discriminatory conduct and "continuing violations." The ALJ concluded that in this case, "the effect of being without accessible parking is not a discriminatory act, but rather, a discriminatory effect, which is not relevant in determining whether her complaint was timely." (ID10).

The ALJ found that the operation of the statute of limitations and continuing violation doctrine turns on the question of whether the June 1, 2009 telephone conversation was an act of discrimination. (ID9). The ALJ compared Complainant's phone call to the Mayor to an employee's repeated unilateral requests for reinstatement, and concluded that the phone

conversation with the Mayor did not constitute an act of discrimination by Respondent. For that reason, the ALJ concluded that the phone call did not bring the earlier application denials within the filing period. (ID9). The ALJ noted that Complainant waited eight months after the last City Council decision to call the Mayor, waited another five months before filing with HUD, and did not provide a reason for her delay. (ID10-11).

The ALJ rejected Complainant's argument that Respondent waived its right to assert the statute of limitations defense by waiting until the 2014 summary decision motion to raise it. The ALJ concluded that Respondent properly raised the defense in its motion, and that Complainant's submissions on the cross-motions did not show that she was prejudiced by Respondent's failure to assert the defense in its initial answer. (ID10). The ALJ dismissed Complainant's complaint as time-barred without reaching the substantive merits of the competing motions for summary judgment.

The Director's Decision

After independently evaluating the record including the parties' and exceptions and replies, the Director finds that the ALJ's factual findings are supported by substantial credible evidence and, except as noted in the discussion below, adopts them as his own.

The Director finds that the ALJ correctly reasoned that the statute of limitations issue turns on three questions: (a) When was the complaint filed? (b) What was the most recent act of alleged discrimination? and, if the most recent act was beyond the limitations period, then (c) Has Respondent waived the statute of limitations defense? As set forth below, the Director concurs with the ALJ's outcome on the first two issues but respectfully disagrees with her conclusions on the third.

a. When was the complaint filed?

Respondent objects to the ALJ's finding that Complainant filed her complaint with HUD on November 24, 2009. (R2) It argues that Complainant's handwritten date on the complaint is insufficient to prove that it was filed on that date. It points to the January 26, 2010 letter from HUD stating that the complaint was accepted under the Fair Housing Act, 42 U.S.C.A. 3601 et seq., on January 20, 2010. (Ibid.). However, DCR's pre-interview form shows that HUD referred Complainant to DCR on or before January 19, 2010. (CSJ - Ex. K). HUD's January 26, 2010 letter, which shows that HUD evaluated Complainant's complaint for substantial equivalence with the LAD before referring it to DCR, (CSJ - Ex. L), and accompanying pre-interview form support the conclusion that HUD received Complainant's complaint prior to the "acceptance" date. Thus, the Director finds sufficient evidence to support the ALJ's finding that the complaint was filed with HUD on November 24, 2009.

Respondent objects to the ALJ's conclusion that the filing with DCR relates back to the HUD filing date. Ibid. HUD took jurisdiction over Complainant's complaint under the Fair Housing Act on January 20, 2010. See 42 U.S.C. § 3610(f); 42 U.S.C. 3535(d), 3610(f) (allowing HUD referrals to state agencies responsible for enforcing similar non-discrimination statutes). The Director takes notice of the fact that pursuant to the Fair Housing Act and a federal/State work-sharing agreement, HUD reviews Fair Housing Act complaints filed by New Jersey residents and, if the corresponding section of the LAD is substantially equivalent to the applicable section of federal fair housing law, HUD refers the case to DCR for formal filing of a LAD complaint and investigation. In this case, HUD determined that Complainant's complaint met the criteria for referral to DCR, and notified Complainant of the referral in the January 26, 2010 letter. The referral to DCR simply reflects the controlling statutory scheme and the contract between the federal and State agencies whereby complaints that fall under both

agencies' jurisdiction are referred to DCR for investigation. Under the normal procedures for referral of cases, the filing with DCR by referral properly relates back to November 24, 2009.

Complainant objects to the ALJ's statement that her complaint "may not have been filed with the appropriate entity." (ID8). The use of the conditional "may" indicates that the ALJ did not actually decide whether it was appropriate for Complainant to file her complaint with HUD. The Director finds that HUD was an appropriate entity for filing of Complainant's complaint and that the DCR filing relates back to the HUD filing date.

b. What was the most recent act of alleged discrimination?

In light of the November 24, 2009 filing date, the 180-day statute of limitations would normally operate to bar acts of discrimination that occurred before May 28, 2009. N.J.S.A. 10:5-18; N.J.A.C. 13:4-2.5.

Phone Call with Mayor. Complainant takes exception with the ALJ's finding that the Mayor's June 2009 telephone conversation, which occurred within the 180 day period, was not a "discriminatory act by the City." (ID9). In so doing, Complainant rejects Respondent's argument that a municipality can act only at an advertised public meeting, and she points to the mayor's duties and statutory powers to ensure the council's actions are lawful. (C4).

Neither party explained what form of government Respondent has adopted, which might provide a clearer explanation of the scope of the Mayor's authority. However, regardless of the scope of the Mayor's authority, the Director concludes that it was not unreasonable to conclude based on the record that Complainant's request to the Mayor was merely a unilateral renewal of her request for the same relief that Respondent had previously denied. Although Complainant's certification submitted in support of the motion includes information regarding the deterioration of her health and her need to use oxygen, neither her certification nor any other evidence in the

record shows that when she called the Mayor to ask him to take action, she notified him of any changed circumstances regarding her disability.[3]

Complainant argues that until she spoke to the Mayor on June 1, 2009, she had no notice that the Council decisions were final. (C4-7). However, the record supports the ALJ's conclusion that Complainant received notice of the August 2008 Council vote to deny her application by way of letter dated August 14, 2008. That official denial was not made conditional in any way, and Complainant was sufficiently informed to request reconsideration of that denial in September 25, 2008. Although the record does not contain a similar letter informing Complainant of the reconsideration decision denying her application on October 6, 2008, the minutes of the Council's October 2008 meeting state that Complainant's application was "denied again." (CSJ - Ex. F). Moreover, Complainant admits she was aware of both denials when they occurred. (C8). The Director finds no basis in the record to overturn the ALJ's finding that the telephone call was not a new, separate act of discrimination, but merely a verbal confirmation that the status quo was still the status quo. As the ALJ correctly noted, to hold otherwise would allow a complainant to "reset" the statute of limitations *in perpetuum* simply by continually calling to see if the decision would be reconsidered. (ID9).

The Continuing Violation Argument. Complainant argues that although the events in August, September, and October 2008 occurred before May 28, 2009, they are exempted from the statute of limitations under the "continuing violations" doctrine.

The continuing violation doctrine states that "[w]hen an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999). The

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[3] Nothing in this decision should be construed as holding that an applicant who has previously been denied a disability accommodation is barred from making a new application based on medical evidence of a new or significantly worsened disability. A municipality or any other public accommodation must consider a new or renewed request based on changed circumstances.

continuing violation doctrine "provides an exception to the LAD statute of limitations period." Shepherd v. Hunterdon Develop. Ctr., 174 N.J. 1, 18 (2002), but is restricted to situations involving repeated actions where the individual occurrence "may not be actionable on its own." Amtrak v. Morgan, 536 U.S. 101, 115 (2002).[4] Moreover, a plaintiff "may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct." Id. at 117-18. One court explained the underlying rationale:

> Morgan held simply that causes of action that can be brought individually expire with the applicable limitations period. By contrast, the "hostile workplace environment" theory is designed explicitly to address situations in which the plaintiff's claim is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant. In such cases, obviously the filing clock cannot begin running with the first act, because at that point the plaintiff has no claim; nor can a claim expire as to that first act, because the full course of conduct is the actionable infringement.
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> [O'Connor v. City of Newark, 440 F.3d 125, 128 (3d Cir. 2006)].

Here, the ALJ found that the statute of limitations began to run when Complainant received notice that Respondent had denied her application and reconsideration, i.e., on October 6, 2008. The Director concludes that the denials at issue (on August 4, 2008 and October 6, 2008) were actionable on their own and, therefore, the continuing violation theory is not applicable. Amtrak, supra, 536 U.S. at 115. Each was a discrete adverse decision, and in each case, Complainant received clear notice of the denial at the time it was made. (ID9). Thus, it would have been reasonable for her to understand that she could file a complaint alleging a LAD violation. Accordingly, even if the Mayor's statement in June 2009 could

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[4] Morgan involved a discrimination case brought under federal Title VII. The United States Court of Appeals for the Third Circuit has applied Morgan to cases brought under the ADA in at least three unpublished, non-precedential decisions. See Zankel v. Temple Univ., 245 Fed. Appx. 196, 198-99 (3d Cir. 2007), Zdziech v. DaimlerChrysler Corp., 114 Fed. Appx. 469, 471 (3d Cir. 2004), and Shenkan v. Potter, 71 Fed. Appx. 893, 895 (3d Cir. 2003).

somehow be deemed to be a discrete adverse action, it still would not operate to make the 2008 denials timely under a continuing violations theory. (ID8-9).

Complainant takes exception to the ALJ's statement that she failed to explain the reason for the eight-month gap between the October 2008 denial and her June 2009 phone call to the Mayor. Complainant notes that her certification states that during that time, she had surgery, physical therapy, and her condition worsened to the extent that she needed to use an oxygen tank. (CSJ - Cert. of DB, undated, ¶ 11) Although the certification explains her inactivity during that those eight months, it does not change the fact that the 2008 denials were discrete, actionable adverse actions. Nor does it change the fact that the Mayor's response in June 2009 was a restatement of the status quo, rather than an actionable adverse action.

The Cumulative Effect Argument. The ALJ cited Alliance for Disabled in Action v. Renaissance Enters., Inc., 371 N.J. Super. 409, 420 (App. Div. 2004), where the plaintiff alleged that a building was not accessible for people with disabilities. There, the court held that the limitations period begins to run when construction is completed, rather than when the defect deprived a particular plaintiff of equal access due to disability.

Complainant takes exception to the ALJ distinguishing between continuing *violations* and continuing *effects* of discrimination, and the ALJ's conclusion that the latter are not actionable. (ID9). Complainant also argues that the ongoing failure to provide accessible parking from 2008 through 2013 is a continuing violation rather than a continuing effect. (C9-11.)

The Director is not persuaded by the authority upon which Complainant relied. For example, Complainant cited United States v. Gorman Towers Apartments, 857 F. Supp. 1335 (W.D. Arkansas 1994), where the court found that a complaint alleging denial of accessible parking was timely even though the complaint alleged that the plaintiffs were denied accessible parking for over 18 months, i.e., beyond the applicable 12-month statute of limitations. The

court found the complaint to be timely because a property manager met with the plaintiffs within the statute of limitations and refused their accommodation request. The court wrote:

> As plaintiff points out, the complaint also alleges that on or about September 15, 1992, Robert Gregory and Helen Gregory had a conference with Donna Sexton, property manager of Gorman Towers, at which time the complainants asked for a designated parking place. This request was refused. The refusal is alleged to constitute discrimination in refusing to make reasonable accommodation in rules, policies, practices, or services, when such accommodation is necessary to afford the complainants equal opportunity to use and enjoy the apartment complex. . . . Clearly the September,1992, refusal, if a refusal occurred, occurred within one year of the filing of the complaint with HUD.
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> [Id. at 1340 (emphasis added).]

Thus, even assuming the opinion had some precedential effect here, it is factually distinguishable from the instant case because here, the ALJ has found, and the Director concurs, that there was no persuasive evidence of a discrete discriminatory act occurring within the statute of limitations.

On the other hand, there is sufficient case law construing the federal ADA and the Rehabilitation Act in accommodation cases that supports the conclusion that the ongoing failure to provide accessible parking was the continuing effect of the council's 2008 denial, rather than a continuing violation. (ID 9). See, e.g., Hill v. Hampstead Lester Morton Court Partners, 2014 U.S. App. LEXIS 15046, *8-*9 (4th Cir., Aug. 5, 2014) (holding continuing violation theory did not apply to apartment complex's ongoing failure to provide wheelchair ramp or apartment transfer); Elmenayer v. ABF Freight Sys., 318 F.3d 130, 135 (2d Cir. 2003) (finding that employer's continued failure to accommodate employee's religious practices, after explicitly rejecting the accommodation request, did not give rise to a continuing violation); Mercer v. Southeastern Pa. Transit Auth., 2014 U.S. Dist. LEXIS 83355, *17-18 (E. D. Pa., Jun. 18, 2014) (finding employer's refusal to accommodate bus driver's disabilities was an adverse action akin to wrongful termination or failure to hire, and not subject to continuing violation theory, even where employee renewed the requests periodically and the effects of lack of accommodation

were ongoing). In view of the above, the Director finds no basis on which to reject the ALJ's conclusion that the continued lack of accessible parking was a continuing effect of the prior City Council decision, rather than a continuing violation.

c. Has Respondent waived the statute of limitations defense?

The statute of limitations is an affirmative defense. R. 4:5-4; Dynasty Bldg Corp. v. Ackerman, 376 N.J. Super. 280, 286 (App. Div. 2005) ("[T]he running of the statute of limitations is an affirmative defense that must be raised in the defendant's answer."). It is "well settled that an affirmative defense is waived if not pleaded or otherwise timely raised." Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986).

Thus, an otherwise meritorious defense can be stricken in the interests of equity when asserted too late. Mill Race Village v. Main & Glen Assoc., 2012 N.J. Super. Unpub. LEXIS 915 *23 (Apr. 25, 2012. App. Div.), certif. den., 212 N.J. 287 (2012) (citing Fees v. Trow, 105 N.J. 330, 335 (1987)) ("Waivers have been found where a party raises a meritorious defense prior to trial, but the defense is nevertheless asserted in an untimely fashion."); see, e.g., White v. Karlsson, 354 N.J. Super. 284, 290-92 (App. Div. 2002), cert. denied, 175 N.J. 170 (2002) (holding that the defendant was barred from relying on the statute of limitations because of her unreasonable delay in moving for summary judgment after the parties expended time, energy, and money in preparing for trial).

Our Supreme Court has warned that the "[u]nswerving, mechanistic application of statutes of limitations" is counterproductive because it can "inflict obvious and unnecessary harm upon individual plaintiffs without advancing [its] legislative purposes." Galligan v. Westfield Ctr. Serv., 82 N.J. 188, 192-93 (1980). The Court explained that those legislative purposes are to "induce litigants to pursue their claims diligently so that answering parties will have a fair opportunity to defend" and "to spare the courts from litigation of stale claims." Id. at 192 (noting "once memories fade, witnesses become unavailable, and evidence is lost, courts

no longer possess the capacity to distinguish valid claims from those which are frivolous or vexatious.") The Court wrote:

> On numerous occasions we have found "such particular circumstances as to dictate not the harsh approach of literally applying the statute of limitations but the application of the more equitable and countervailing considerations of individual justice." . . . A "just accommodation" of individual justice and public policy requires that "in each case the equitable claims of opposing parties must be identified, evaluated and weighed." . . . Whenever dismissal would not further the Legislature's objectives in prescribing the limitation, the plaintiff should be given an opportunity to assert his claim.
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> [Ibid. (citations omitted) (emphasis added)].

In White, supra, the defendant in an automobile personal injury case filed an answer on July 12, 2000, specifically listing the statute of limitations as an affirmative defense. 354 N.J. Super. at 287. In January 2001, while the case was in the discovery phase, the matter went to mandatory arbitration pursuant to R. 4:21A-1(a)(1), during which her attorney did not reiterate that the action was barred by the statute of limitations. Ibid. When the arbitration failed to resolve the matter, the parties continued to engage in discovery. On February 12, 2001, defendant answered plaintiffs' interrogatories, including the question: "If you intend to rely on any statute . . . state the exact title and section." Defendant responded by citing the Motor Vehicle Code. Ibid. The next day, defense counsel deposed plaintiff "without making any inquiry respecting a matter that might be relevant to a statute of limitations defense." Ibid. In March 2001, defense counsel filed a motion to extend the time for discovery and to adjourn the trial date. Id. at 288. Plaintiff's attorney joined in the motion. The motion was granted, which extended discovery to June 15, 2001, and set the trial for June 25, 2001. On June 18, 2001, defense counsel moved for summary judgment based on the statute of limitations. Ibid. The trial court granted the defendant's motion and dismissed the case.

The Appellate Division reversed. It held that the defendant was not entitled to rely on the statute of limitations because her conduct throughout the sixteen months was "inconsistent with maintenance of the position that the action was barred by the statute of limitations" and "led

plaintiffs to the reasonable conclusion that defendant had no objection to continuation of the case." Id. at 289 (citing Zaccardi v. Becker, 88 N.J. 245, 257-58 (1982)). The Court reasoned, "[A] defendant's conduct is relevant to the availability of a statute of limitations defense . . . Here defendants added to the delay while plaintiffs acted under the reasonable misapprehension that the defendants had agreed to the continuation of the case." Id. at 289 (quoting Zaccardi, supra, 88 N.J. at 257-58 (ellipse in original)). Following the Supreme Court's lead, the Appellate Division reiterated that a "court should not apply strictly and uncritically a statutory period of limitations without considering conscientiously the circumstances of the individual case." Id. at 292 (quoting Kaczmarek v. NJ Turnpike Author., 77 N.J. 329, 338 (1978)). Thus, finding that the "equities clearly weigh" in the plaintiffs' favor, the Appellate Division remanded the case for a trial on the merits. Ibid.

In this case, Respondent answered the complaint on March 30, 2010, and presumably, conducted a good faith inquiry reasonable under the circumstances as to the accuracy of the asserted allegations before filing its answer. Nowhere in that answer or in any follow-up responses was there any hint of a statute of limitations concern. Nor did Respondent raise the issue at any point in its interactions with DCR during the ensuing investigation or while participating in the agency's attempts to negotiate a settlement between the parties. On April 17, 2013, DCR informed the parties that it was transmitting the matter to OAL for a hearing. There is no indication that Respondent raised the issue at any time before, during, or after, the change of venue until March 24, 2014, when it moved for summary judgment. Thus, it can fairly be said that Respondent's conduct over the years was "inconsistent with maintenance of the position that the action was barred by the statute of limitations" and led Complainant to the "reasonable conclusion that defendant had no objection to continuation of the case." White, supra, 354 N.J. Super. at 289.

Indeed, the circumstances in this case are arguably more extreme than those deemed to be offensive in White, supra. For instance, the defendant in White was found to have waived her right to rely on a statute of limitations even though she expressly articulated that affirmative defense in her answer to the complaint. Here, Respondent did not even do that. In White, the court found it significant that the defendant waited sixteen months after complaint was filed before moving for summary judgment based on the statute of limitations. Here, Respondent waited for over four years.

Respondent provided no reasonable justification for why it waited more than four years to raise the defense. It argued that it had no reason to do so until 2013, when it was first put on notice that Complainant was alleging a denial of reasonable accommodation. After all, Respondent argued, Complainant did not plead a failure to accommodate claim in her complaint. (R 5). In particular, Respondent wrote:

> There is absolutely no notice that this complaint was not really a claim of discrimination but in reality a claim of failure to make a reasonable accommodation . . . It was not until 2013 that it was made clear that this was not a discrimination claim but rather a reasonable accommodation claim.
>
> (R 5-6).

The short answer is that a failure to accommodate claim is a type of disability discrimination. N.J.A.C. 13:13-4.11. Whether the complaint says "failure to accommodate" or "disability discrimination," it triggers the identical statue of limitations. N.J.S.A. 10:5-18. Even assuming for the moment, that a significant distinction could somehow be drawn for statute of limitations purposes between disability discrimination on the one hand, and failure to accommodate on the other, the operative reality is that the 2010 verified complaint specifically alleged a failure to accommodate. See Complaint, ¶4 ("Complainant alleges . . . that her reasonable accommodation request to have a designated parking space in front of her house was denied."). Under the circumstances, including Respondent's failure to provide a legitimate

explanation, the Director finds the length of the delay to be unreasonable. The question becomes whether that delay caused Complainant to suffer any undue prejudice.

The ALJ found that it did not. (ID10) (noting "[Complainant] has not indicated how the City's failure to assert the defense in its initial answer prejudiced her in any way."). To assess the reasonableness of that conclusion, an understanding of the filing rules is helpful.

LAD claims can be filed with the DCR within 180 days after the alleged act of discrimination, N.J.S.A. 10:5-18, or in Superior Court within two years after the alleged act of discrimination. Montells v. Haynes, 133 N.J. 282, 292 (1993). A plaintiff is not required to exhaust administrative remedies prior to filing in Superior Court. Moreover, a matter filed with DCR may be withdrawn at any time before a ruling is issued, N.J.A.C. 13:4-8.1, and an action can be filed in Superior Court for the same claims. Henry v. New Jersey Dept. of Human Services, 204 N.J. 320, 324 (2010).

Here, Respondent's unreasonable delay lulled Complainant into a false sense of security that her complaint would be addressed on the merits, not dismissed on a procedural basis, more than four years later. Had Respondent raised the limitations defense at a more reasonable time, Complainant would have been able to withdraw her DCR complaint and pursue the matter in Superior Court. Instead, it foreclosed her right to seek redress under the LAD in the courts. Moreover, there is no allegation that the timing of the complaint somehow rendered Respondent without a "fair opportunity to defend" or that its dismissal would "spare the courts from litigation of stale claims." Galligan, supra, 82 N.J. 188, 192. Thus, enforcing the statute of limitations in this case would not further the underlying legislative goals. Ibid. (declaring, "Whenever dismissal would not further the Legislature's objectives in prescribing the limitation, the plaintiff should be given an opportunity to assert his claim.")

In view of the above, the Director finds that the prejudice suffered by Complainant (i.e., being denied the opportunity to file suit in Superior Court and have her discrimination claims addressed on the merits), coupled with Respondent's unreasonable explanation for the delay (i.e., its meritless assertion that it had no notice of the existence of the claim until 2013) warrants striking the statute of limitations defense.

Elsewhere in her exceptions, Complainant claimed that there were typographical errors in the Initial Decision (C1), which Respondent did not dispute. (R1). Accordingly, the Director finds that Complainant filed her initial application with Respondent on July 7, 2008, and that the correct citation for the statute of limitations section of the LAD is N.J.S.A. 10:5-18.

Complainant also took exception to the ALJ's characterization of the process for designating accessible parking spaces as "undisputed." (C2; ID8). She argues that she neither admitted nor denied Respondent's description of the process for designating accessible parking spots, and that Respondent did not provided proof of the procedure. (C2). In response, Respondent states that the process for designating accessible parking spaces was set forth in its answers to interrogatories, that Complainant never previously raised any dispute as to that process, and that the characterization of the process as "undisputed" is appropriate. (R1). The Director concludes that the parking application procedures are not material to any issue decided on this motion. Because this matter is being remanded for consideration of the merits, the Director concludes that this process was not "undisputed," and leaves the parties to their proofs on remand regarding any aspects of the process that may be relevant.

ORDER

The Director takes no position as to the ultimate merits, if any, of Complainant's underlying cause of action. However, the Director strikes Respondent's statute of limitations defense and remands this matter for consideration of the remaining arguments on the parties' cross motions for summary judgment, and if the motion decision warrants, for a hearing.

DATE: 11-17-14

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS