NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **SANDRA J. BOWLER,** Complainant, v. **NIAGARA COUNTY,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10116830

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on December 11, 2008, by Thomas J. Marlow, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: JAN 28 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

SANDRA J. BOWLER,

Complainant,

v.

NIAGARA COUNTY,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10116830**

SUMMARY

Complainant alleged that Respondent discriminated against her because of her sex and race and because she opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 23, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 12 and 13, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent was represented by James N. Schmit, Esq.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

FINDINGS OF FACT

1. Complainant is a female member of the Oneida Indian Nation. (Tr. 33-34)

2. In February of 1984, Complainant began her employment with Respondent as a certified nurse's aide at the Mount View Health Facility ("Mount View"). (ALJ's Exhibit 1; Tr. 29-30) In July of 2004, concerned that Mount View might close and desiring a promotion and a raise in pay, Complainant transferred to the Niagara County Parks Department ("Parks Department") and was employed as a groundskeeper in Krull Park. (Tr. 37, 41, 49-50, 52)

3. When Complainant began her employment as a groundskeeper in Krull Park, she worked nights and weekends. (Tr. 40)

4. In 2006, Complainant, although only in the Parks Department for one year, had more seniority based upon time of service with Niagara County ("county seniority") than all but one of the other Parks Department employees. (Complainant's Exhibit 2; Tr. 43-48) In 2006, Complainant was the only female working full time as a groundskeeper in the Parks Department. (Tr. 369-70)

5. After approximately one year as a groundskeeper, Complainant's work shift was changed to working days. (Tr. 55-57)

6. In and between 2004 and 2008, Edward McDonald ("McDonald") was employed by Respondent in the Parks Department at Oppenheim Park as a foreman. (203-04) In and between 2004 and 2008, McDonald was also the president of the local unit of the union that represents Respondent's Parks Department employees, The American Federation of State, County and Municipal Employees ("AFSCME"), local 182. (Respondent's Exhibit 5; Tr. 207-08) Complainant was a member of this AFSCME local. (Tr. 32) McDonald's wife was a friend of Complainant. (Tr. 140, 185-86)

7. In April of 2006, some Parks Department employees requested that AFSCME initiate a grievance claiming that shift preference should be based on seniority determined by the number of years an employee worked in the Parks Department ("department seniority") rather than based on county seniority. (Respondent's Exhibit 5; Tr. 223-28)

8. If this grievance was sustained, Complainant would lose her day shift to an employee with more departmental seniority. (Tr. 229-30)

9. In a friendly conversation, McDonald informed Complainant of the grievance and the likelihood that Complainant would return to working nights and weekends. (Tr. 59-60)

10. In the spring of 2006, Complainant was transferred to work as a groundskeeper in another park of the Parks Department, Oppenheim Park, with McDonald as her supervisor. (Tr. 52-54) Prior to July of 2006, Complainant and McDonald had a good working relationship. (Tr. 247)

11. In July of 2006, AFSCME met with Respondent to discuss the grievance. McDonald argued for county seniority and Jim Ulas ("Ulas"), the vice-president of the local unit of

AFSCME, argued for departmental seniority. An agreement was reached, sustaining the grievance. (Tr. 228-29) The agreement was not formalized in writing until October of 2006. (Respondent's Exhibit 11; Tr. 230)

12. After the abovementioned meeting in July, Complainant and other employees asked McDonald about the result of the meeting. McDonald did not want to discuss the agreement until it was formalized in writing; therefore, he informed Complainant and others that he did not have an answer from Respondent. (Tr. 230-31)

13. While awaiting the result of the meeting, Complainant was worried that the result could mean that she would lose her job. (Tr. 161) In July of 2006, Complainant, having complained to McDonald more than once that she felt she was not being treated fairly, asked McDonald for the phone number for the U.S. Equal Employment Opportunity Commission ("EEOC"). (Tr. 73, 232-34) After the abovementioned agreement was formalized in writing, Complainant filed a charge of discrimination with the EEOC claiming that AFSCME local 182 discriminated against her because of her sex in that it failed to represent her equally with regard to the shift preference grievance. (Respondent's Exhibits 3, 11)

14. When Complainant asked McDonald for the EEOC phone number, McDonald said, "What do you think you are, a fucking nigger." ("first inappropriate comment") (ALJ's Exhibit 1; Tr. 73-74) McDonald then gave Complainant the EEOC phone number. (Tr. 73-74)

15. After McDonald made the first inappropriate comment, Complainant made a complaint about the comment to Patrick Kenney ("Kenney"), a foreman for Respondent to whom McDonald reported. (Tr. 75-76, 296-97)

16. In August of 2006, within a few days of making the complaint, Complainant spoke with Kenney. On that day, Kenney spoke with McDonald who denied making the first inappropriate comment. (Tr. 75-79, 297-99)

17. After McDonald spoke with Kenney, McDonald was in his office and observed Complainant drive by the window of his office on a riding mower. It appeared to McDonald that Complainant took a picture of him with her cell phone camera. (Tr. 254) Complainant had taken a picture of McDonald in the past using her cell phone camera. (Tr. 89-90) McDonald left his office, drove in his truck, found Complainant, and told her that if she took another picture of him with her cell phone he'd stick it up her ass ("second inappropriate comment"). (Tr. 80-82; 254)

18. On the same day McDonald made the second inappropriate comment, Complainant reported this incident to Kenney. Kenney immediately reported this incident to Robert DeVoe ("DeVoe"), a Deputy Commissioner responsible for the Parks Department, and it was decided that Complainant would be transferred back to Krull Park so that she and McDonald would be separated while the incidents were investigated. Complainant was so advised on the same day. (Tr. 84, 300-02)

19. Peter Lopes ("Lopes"), a Human Resources Director for Respondent, conducted the investigation into these incidents. After interviewing Complainant, McDonald, and others, Lopes concluded that personality clashes had arisen as a result of a union issue concerning seniority and shift preference. It was determined that McDonald should be counseled with regard to the appropriateness of comments made to employees and that the transfer of Complainant to Krull Park should be a permanent transfer. (Tr. 346-58)

20. In her testimony, Complainant did not complain about the transfer to Krull Park. Complainant wanted to be separated from McDonald and the transfer reunited her with Ulas, her first foreman who considered her his "best mower." (Tr. 50, 101-02)

21. On March 5, 2007, Complainant's EEOC charge of discrimination was dismissed by the EEOC. (Respondent's Exhibit 4) On March 23, 2007, Complainant filed her complaint with the Division alleging that Respondent discriminated against her because of her sex and race and because she opposed unlawful discrimination. (ALJ's Exhibit 1)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the conditions of employment because of that individual's sex or race. Human Rights Law § 296.1(a)

Complainant raised an issue of unlawful discrimination in the conditions of employment because of sex and race. Complainant can sustain her burden of proving unlawful discrimination in the conditions of employment because of sex or race by showing that there was a hostile work environment at her place of employment and that it existed because of her sex or race.

To establish that a hostile work environment existed, Complainant must show that she is a member of a protected class, that the conduct or words upon which the claims of discrimination are based were unwelcome, that the conduct or words were prompted because of her sex or race, that the conduct or words were "sufficiently severe or pervasive to alter the conditions of the victim's employment," and that Respondent is responsible for the conduct or words. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997);

McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup. Ct. N.Y. County 1997), *appeal dismissed,* 256 A.D.2d 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed,* 93 N.Y.2d 919, 691 N.Y.S.2d 383 (1999), *lv. to appeal denied,* 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999). In evaluating a work environment to determine if it was hostile, one must consider the totality of the circumstances from both a reasonable person's standpoint as well as from the Complainant's subjective perspective. *See Father Belle,* 221 A.D.2d at 51.

In evaluating the evidence presented, I find it insufficient to prove that Complainant was subjected to any conduct or words that were sufficiently severe or pervasive to alter the conditions of her employment. Complainant had a good working relationship with McDonald before the issue of seniority and shift preferences arose and before McDonald made the first inappropriate comment. Complainant presented no testimony of any conduct or words that occurred at the workplace for nearly two years prior to the first inappropriate comment by McDonald that could be considered sufficiently severe or pervasive to alter the conditions of her employment. McDonald's two inappropriate comments amount to isolated remarks and, when considered with Complainant's testimony of her experience at the workplace after they were made, do not support a finding of a hostile work environment. *Id.* at 51. Lopes accurately concluded that personality clashes had arisen because of a union issue and animosity was the result. Animosity on the job, however, absent a showing of a hostile work environment, is not actionable. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 298, 786 N.Y.S.2d 382, 385 (2004).

Complainant also raised an issue of discrimination in that Respondent retaliated against her because she opposed unlawful discrimination. The Human Rights Law further makes it an

unlawful discriminatory practice for any employer to retaliate against any person because she opposed unlawful discrimination. *See* Human Rights Law § 296.7. Complainant has the burden to establish by a preponderance of the evidence that such retaliation occurred. To meet this burden, Complainant must initially show by a preponderance of the evidence that she engaged in protected activity, that her employer was aware that she engaged in the protected activity, that she suffered an adverse employment action based on her activity, and that there is a causal connection between the protected activity and the adverse action. *Id.* at 312-13.

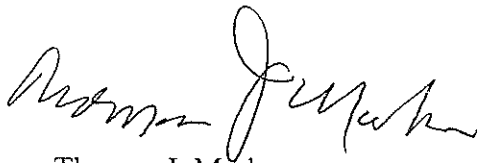
Although Complainant has established that she reported McDonald's first inappropriate comment after she inquired about the EEOC, the record is devoid of any evidence to establish that any actions attributable to Respondent, after this reporting, constituted an adverse employment action. An adverse employment action would require a materially adverse change in the conditions of Complainant's employment, such as termination of employment, demotion, or diminished responsibilities, and there is no evidence of such a change. *Id.* at 306.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same hereby is dismissed.

DATED: December 11, 2008
Bronx, New York



Thomas J. Marlow
Administrative Law Judge