NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MADELEINE CHAPIN,

Complainant,

v.

SECURITY AND LAW ENFORCEMENT EMPLOYEES COUNCIL 82,

Respondent.

NOTICE AND FINAL ORDER

Case No. 1250285

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 October 25, 2007, by David Bowden, 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 KUMIKI GIBSON, 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, this 18th day of December, 2007.

_____
KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the complaint of

MADELEINE CHAPIN
Complainant

-against-

THOMAS A. COUGHLIN III, STATE OF NEW YORK; NYS DEPARTMENT OF CORRECTIONAL SERVICES; and SECURITY & LAW ENFORCEMENT EMPLOYEES COUNCIL 82 and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, NEW YORK STATE OFFICE OF THE STATE COMPTROLLER

Respondents

AMENDED RECOMMENDED ORDER OF DISMISSAL

CASE NUMBERS:
125O284
125O285

SUMMARY

Complainant alleged that Respondents unlawfully discriminated against her in employment because of gender, disability and retaliation. She settled her case against her employer. Her case against Respondent union was dismissed on jurisdictional grounds. That case was reversed as to pre-emption and remanded for acceptance of additional exhibits and of testimony. Complainant's case against the Respondent union is now dismissed for failure to prove a prima facie case.

PROCEEDINGS IN THE CASE

On 5/31/91, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Executive. Law, Art. 15 ("Human Rights Law").

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

The case was assigned to David William Bowden, an Administrative Law Judge of the Division and tried on May 9, 10, 2002, October 3, 4, 2002, September 9, 10, October 9, 2003, January 7, and June 3, 2004. The Division was represented by Gina M. Lopez Summa, Esq. General Counsel by Marilyn Balcacer, Esq., of counsel. After the case was remanded, another day of trial was held on July 19, 2007. The Division was represented by Joshua Zinner, Esq., Deputy Commissioner for Enforcement, by Albert Kostelny, Jr., Esq, of counsel. The Respondents Thomas A. Coughlin III, and the State Of New York Department Of Correctional Services were represented by Patrick D. Gill, Esq. The Respondent Security & Law Enforcement Employees Council 82 has been represented by Maria B. Morris, Esq. The case against the Complainant's employer has already been settled**;** thus, the employer was not represented on July 19, 2007. The case against Respondent Council 82 was dismissed for lack of jurisdiction. It was subsequently remanded, being reversed as to jurisdiction, and for receipt into evidence of some Complainant's exhibits and for additional testimony. The Prosecutor's motion to admit Exhibits 23, 24, 25 was granted. He then declared that he did *not* have those exhibits. (Tr. 1102) They were not submitted. Hence, my ruling as to those exhibits is reversed. The Prosecutor and the Complainant applied for a two week adjournment to study their case before testifying. I offered a recess to allow Complainant time to confer with the Prosecutor, in support of her testimony to be rendered. The Prosecutor and the Complainant refused to offer testimony after the remand, unless that adjournment were granted. The case was not adjourned. The Commissioner amended the caption as indicated above. A copy of the said remand order is hereunto annexed.

FINDINGS OF FACT

1. Complainant Madeleine Chapin began to work as a corrections officer in the employ of Respondent State Of New York Department of Correctional Services in April of 1982. (Tr. 68)

2. On September 13th, 1984, complainant sustained personal injuries on the job, while breaking up a fight among prisoners. (T. 58)

3. As a result of these injuries, Complainant submitted a Workers' Compensation claim and she was absent from work on numerous occasions resulting in lost wages. (Tr. 67, 73-4)

4. Disputes arose between complainant and her employer, inasmuch as some of her loss of time was charged against her sick time and vacation time. (Tr. 74, 598-9)

5. Complainant was also alleged to have been absent without leave. (T. 103-4)

6. Complainant reported a fellow corrections officer for inebriation on the job. (Tr. 396-7) He allegedly incited inmates to beat her up, although this did not occur. (Tr. 597)

7. Complainant received negative evaluations for poor work relations, because of her conflict with that officer. Complainant alleged sexual harassment by fellow officers, who drew pornographic pictures of her in the bathroom. (Tr. 596; ALJ Exhibit 1)

8. Complainant alleged a continuing hostile work environment, resulting from her Workers' Compensation claims, absences from work, union grievances of related matters (T. 595) and her report of the inebriated officer. (Tr. 597)

9. In approximately June of 1990, (T. 561) the complainant witnessed a disturbance, apparently involving a fight. Complainant asserted that this was a "defining moment." (T. 542)

10. Complainant then realized that she could no longer do her job.(T. 537)

11. After that day, Complainant never returned to work, knowing that she could not do her job and that lives were at stake. (T. 543-4)

12. After Complainant was absent from work for a year, she was dismissed. (Tr. 599)

13. The Complainant's case against her employer has been settled.

14. Complainant has alleged that the union has failed to assist her, based upon disability, gender and retaliation, with her grievances, and in failing to arbitrate them. (ALJ Exhibit 1)

15. Those grievances were predominantly concerned with disputes as to her vacation and sick time being charged for absences resulting from her injury on the job, of which she had made her Workers' Compensation claim. Complainant admitted that local union staff were sympathetic to her, helping her with some grievances. (T. 456)

16. Complainant alleged that she filed a grievance with Respondent Council 82 of her performance evaluation dated 5/14/88 (Tr. 151) but she admitted to working with local union representatives as to her other grievances. (Tr. 624-5) No proof was offered of vicarious liability in Respondent Council 82 for the errors or any illegal discrimination of Complainant's local union.

17. There is no evidence that Complainant filed any grievances with the Respondent Council 82 within a year of her filing the instant complaint. Complainant did not claim to have grieved her dismissal with Respondent Council 82.

18. Complainant rendered the following explanation of the reason for the instant complaint against the union**:**

> I felt very strongly that the one tool that I had at my disposal to help me as far as what I felt was harassment from my administration for speaking up -- for speaking up over my compensation case and demanding my entitlements, I felt that the one tool I had was the union and I felt that they let me down, that there was a lot of things that if -- I saw other situations where the union defended other officers and I felt that they were not taking what I was saying seriously and that -- and that I was not being represented well by my own union. As a matter of fact, I felt so strongly about it that that is why I included them in this complaint.

DECISION AND OPINION

§297.5 of the Human Rights Law provides that: "Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice."

In order to prove a prima facie case of unlawful discrimination Complainant must show that: (1) she was a member of a protected class; (2) she was qualified to do the job, (3) she suffered an adverse employment action and (4) that adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Complainant has the burden of proof. *Schwaller v. Squire Sanders & Dempsey* 249 A.D.2d 195; 671 N.Y.S.2d 759 (1998)

Complainant has proven that she is a member of a protected class (gender), that she was qualified to do her job, up until, but not beyond her last day of work, when she could no longer do her job, and that she suffered an adverse employment action from her employer. She did not prove that Respondent Council 82 inflicted an adverse employment action upon her, by act nor omission. There is no evidence indicating that Respondent Council 82 was interested in Complainant's gender. There is nothing in the record indicating that Respondent Council 82 had ill will toward union members with imperfect states of health. There is no evidence in the record that Council 82 would have done something differently if Complainant were male, healthy or if she had not complained about lost vacation time, or about the inebriated officer. There is no evidence in the record that the Respondent Council 82 had any notice or knowledge of any grievance concerning Complainant within a year of her filing the instant complaint. Complainant has not proven that within a year before filing this complaint, she asked Council 82 to do anything on her behalf.

If either Complainant's local union or Respondent Council 82 had gotten Complainant reinstated into her job, she still would not be able to return to work. She could not do that work. Accordingly, grievance of her dismissal because of a year's absence would have been pointless.

To prove a prima facie case of retaliation, complainant must show: 1. involvement in protected activity 2. that Respondent knew of that activity 3. that she was the victim of adverse employment action 4. that the protected activity caused that adverse employment action. *Forrest v. Jewish Guild for the Blind* 3 NY 3d 295; 786 NYS 2d 382 (2004) A "prima facie case of retaliation requires evidence of a subjective retaliatory motive for the termination" *Pace Univ. v. NYC Commission of Human Rights* 85 NY 2d 125; 623 NYS 2d 765 (1995) Complainant has not proven that, by act nor omission, Respondent has caused any adverse employment action. If the Complainant's local union, or if Respondent Council 82, failed to take the Complainant sufficiently seriously, or if either of them, or both of them had failed to represent Complainant's interests with sufficient zeal, such failures did not necessarily result from Complainant's status in any protected group. The record does not prove that either of them did. There is no proof that Respondent Council 82 discriminated nor retaliated against Complainant.

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 case be dismissed on the merits.

DATED: October 25, 2007
Bronx, New York

David Wm. Bowden
Administrative Law Judge

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ELIOT SPITZER
GOVERNOR

KUMIKI GIBSON
COMMISSIONER

March 16, 2007

Re: MADELEINE CHAPIN v. THOMAS A. COUGHLIN III, STATE OF NEW YORK; NYS DEPARTMENT OF CORRECTIONAL SERVICES;, and SECURITY & LAW ENFORCEMENT EMPLOYEES COUNCIL 82 and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, NEW YORK STATE OFFICE OF THE STATE COMPTROLLER
Case Nos. 1250284
1250285

To the Parties Listed Below:

PLEASE TAKE NOTICE that pursuant to Rule 20(a) of the Rules of Practice of the State Division of Human Rights, 9 NYCRR §465.20(a), the Commissioner, on her own motion and in the interests of justice, hereby reopens the hearing record in the above-referenced case, for the purpose of returning the case to the Administrative Law Judge for further proceedings in accordance with the items set forth below:

1. The ALJ dismissed Complainant's claim against the union asserting that the Division is preempted because Complainant's claim implicates the union's duty to fairly represent its members. A claim by a union member against a union for its discriminatory failure to file a grievance, though related to the union's duty of fair representation, is separately cognizable. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617 (1987) (Holding that a union member's claim against his union for failure to file a grievance is a cognizable claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.1). Because the facts and circumstances which gave rise to a Human Rights Law claim may also give rise to a duty of fair

1 The Human Rights Law discrimination prohibition against labor organizations essentially mirrors that of Title VII which provides, "[i]t shall be an unlawful employment practice for a labor organization . . . to discriminate against any individual because of his race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(c). The same standard of proof applies to both Human Rights Law claims and Title VII claims. *Pace v. Ogden Svcs. Corp*., 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999).

representation claim, it does not follow that the Human Rights Law claim cannot stand on its own.

2. Significantly, in *Goodman*, the United States Court of Appeals for the Third Circuit determined that the union members' discrimination claims against their unions under Title VII, based on the union's failure to file certain grievances, "violated the duty of fair representation owed to their members . . . *also* violated the duty to enforce the collective bargaining agreement … [and] *also* violated § 703(c)(1) of Title VII because [the unions] discriminated against the victims who were entitled to representation." (emphasis added and citations omitted) *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 127 (3rd Cir. 1985). In affirming that decision, the Supreme Court noted that the unions "faulted [the Court of Appeals] for stating that the Unions had violated their duty of fair representation, which the Unions [in that case] assert[ed had] no relevance . . ." The Court went on to hold, ". . . we do not understand the Court of Appeals to have rested its affirmance on this ground, for as indicated above, it held that the Unions violated § 703 [of Title VII]." *Goodman v. Lukens Steel Co.*, 482 U.S. at 667. Thus, it is clear that while a union member's discrimination claim against its union may present a duty to represent claim, this does not make the separate discrimination claim under Title VII non-cognizable.

3. Likewise, the Court rejected a union's argument "that as a matter of law it should not be subject to liability under Title VII in a situation, such as this, where some but not all culpable employees are ultimately discharged on account of joint misconduct, because in representing all the affected employees in their relationship with the employer, the union may necessarily have to compromise by securing retention of only some." In so doing, the Court explained, "[t]he same reasons which prohibit an employer from discriminating on the basis of race among culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII, race may not be among them." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 284-285, 96 S.Ct. 2574 (1976); *see also Alexander v. Gardner-Denver Co.*, at n. 19 (". . . [A] breach of the union's duty of fair representation may prove difficult to establish. In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers" (citations omitted)).

4. In a recent decision, the Southern District made clear that the holding relied on by the ALJ in *Snay v. U.S. Postal Serv.*, 31 F.Supp.2d 92 (N.D.N.Y. 1998) (holding that a Human Rights Law claim by a member against her union is pre-empted), "conflicts with the Supreme Court's determination in *Goodman* that fair representation claims are actionable under Title VII. The Supreme Court reached its decision in *Goodman* after its recognition in *Vaca v. Snipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) that the duty of fair representation includes a prohibition against discrimination. Clearly, then, *Vaca* does not dictate that the existence of a generalized obligation not to discriminate under the duty of fair representation results in the preemption of all other discrimination claims. To hold otherwise would render *Goodman* meaningless, since Title VII claims – which by definition invoke rights that also exist under the duty of fair representation – would be preempted in every case." *Parker v. Metropolitan Transportation Auth.*, 97 F.Supp.2d 437, 448-449 (S.D.N.Y. 2000). The similar holding in *Rodolico v. Unisys Corp.*, 96 F.Supp.2d 184 (E.D.N.Y. 2000) also relied on by the ALJ likewise conflicts with the Supreme Court's decision in *Goodman*.

5. It is also noted that in enacting Title VII, Congress created a scheme that encouraged, not limited, state enforcement. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101, 103 S.Ct. 2890 (1983) ("State laws obviously play a significant role in the enforcement of Title VII"); *see also New York Telephone Co. v. New York Dept. of Labor*, 440 U.S. 519, 536, 99 S.Ct. 1328 (1979) (holding in the context of a local unemployment compensation law that "the federal statute authorizing the subsidy provides additional evidence of Congress' reluctance to limit the State's authority in this area."); *American Red Cross v. State Div. of Human Rights*, 118 A.D.2d 288, 291-292, 504 N.Y.S.2d 882 (4th Dept. 1986) (". . .the federal Civil Rights Act both permits and contemplates the enforcement of state employment discrimination law."); *see also Alexander v. Gardner-Denver Co., supra*, at 50 (In determining that arbitration does not preclude a Title VII action, the Court noted that ". . . the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each.")

6. Furthermore, the New York Court of Appeals, relying on *Vaca v. Snipes*, has held that just because an unfair representation claim may also be an unfair labor practice under the NLRA, New York Courts "are not ousted of their

jurisdiction in this field." *Phelan v. Theatrical Protective Union*, 22 N.Y.2d 34, 290 N.Y.S.2d 881 (1968), *cert. denied Theatrical Protective Union v. Phalen*, 393 U.S. 1000 (1968). The Court in *Phelan*, moreover, remanded the matter before it to the lower court to allow the petitions to replead their complaint. In so doing, the Court acknowledged, pursuant to New York authority under the Human Rights Law, that "Special Term is fully competent to devise an adequate and proportionate remedy for petitioners should their charges of discrimination be sustained." *Id.* at 42 (*citing State Comm. for Human Rights v. Farrell*, 43 Misc.2d 958, 252 N.Y.S.2d 649 (N.Y. Cty 1964)).

7. Other New York Courts have held that under New York Law, "[i]t is settled that a union has the obligation to represent its members fairly and impartially and may not discriminate on the basis of race or sex." *United Teachers of Seaford v. New York State Human Rights Appeal Bd.*, 68 A.D.2d 907, 414 N.Y.S.2d 207 (2d Dept. 1979) (*citing Union Free School Dist. v. New York State Div. of Human Rights*, 43 A.D.2d 31, 349 N.Y.S.2d 757 (2d Dept. 1973), *appeal dismissed* 33 N.Y.2d 975 (1974) (stating ". . . the [bargaining] agent must neither discriminate racially in the making of an agreement nor in the performance of a nondiscriminatory agreement. We think that the obligation of the agent is equally as broad in refraining from entering into labor contracts which discriminate on account of sex. The same statute and the same public policy apply to both racial and sexual discrimination (Executive Law, §§ 290, 296)." (citations omitted). *Id.* at 11)); *see also State Div. of Human Rights v. Sweet Home Cent. Sch. Dist.*, 73 A.D.2d 823, 423 N.Y.S.2d 748 (4th Dept. 1979) (confirming Division determination of liability against labor organization for sex discrimination).

8. Ultimately, the question of preemption boils down to one of Congressional intent. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904(1985). Significantly, "the language of § 703(c)(3) [the provision of Title VII barring discrimination by unions] is taken in haec verba from § 8(b)(2) of the National Labor Relations Act." (dissenting opinion) *Goodman* at 688. Surely, Congress did not enact Title VII with the intent that it be unenforceable.

9. Because the instant claim is one that lies on independent rights derived from New York's Human Rights Law, the Division is not preempted.

10. It is further noted that the caption was never properly amended to reflect the necessary parties. Accordingly, the

amendment is herein made as reflected above.

11. Additionally, Division Counsel objects to the ALJ's failure to admit certain evidence and allow certain testimony based on purely technical reasons, having nothing to do with relevance, thus violating the mandate in the Division's Rules of Practice that "[t]he administrative law judge, in conducting the hearing, should utilize any procedures consonant with due process to elicit evidence concerning the ultimate issues." 9 NYCRR § 465.12(e). Because these documents appear to be significant to Complainant's case, the ALJ is directed to admit the relevant documents and hear the related testimony and give such the appropriate weight each merits.

Accordingly, this matter is returned to the Hearings Unit to complete the record.

KUMIKI GIBSON
Commissioner

By: _____
Peter G. Buchenholz
Adjudication Counsel