NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

TRINA COOK,

Complainant,

v.

FAIRPORT CENTRAL SCHOOL DISTRICT, SHANTA SHRESTHA AS AIDER AND ABETTOR,

Respondents.

NOTICE AND FINAL ORDER

Case No. 10111697

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 July 31, 2008, by Michael T. Groben, 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: SEP - 9 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

TO:

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FAIRPORT CENTRAL SCHOOL DISTRICT, SHANTA SHRESTHA AS AIDER AND ABETTOR,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10111697**

SUMMARY

Complainant alleges that Respondent discriminated against her on the basis of sex and disability, and retaliated against her for opposing discriminatory acts in the workplace by terminating her employment. Complainant failed to sustain her burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On May 31, 2006, 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. Exec. Law, art. 15 ("Human Rights Law").

After investigation, on September 29, 2006 the Division found that there was no probable cause to believe that Respondents had engaged in unlawful discriminatory practices. The Division, on its own motion pursuant to Rule 20(a) of its Rules of Practice, subsequently

reviewed that determination, and on December 14, 2006, the proceeding was re-opened and remanded to the Regional Director. On August 16, 2007, after review and investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 17, March 18, and May 30, 2008.

Complainant and Respondents appeared at the hearing. The Division was represented by Anton Antomattei. Respondents were represented by Frank W. Miller, Esq. At the hearing, Respondents made an oral motion to dismiss the complaint on the basis that the Division did not have jurisdiction to re-open the original determination of no probable cause.

Permission to file post-hearing briefs was granted, and recommended findings of fact and conclusions of law were submitted by Respondent.

FINDINGS OF FACT

1. Complainant is a female. (Tr. 25) She was hired as a food service worker in 2001 for the 2001-2002 school year by Respondent Fairport Central School District (the "District"). (Tr. 26) Complainant worked in Respondent District's school cafeterias, and her job duties included cleaning, washing dishes, serving food, and operating the cash register. (Tr. 26, 389-90) Complainant generally worked three hours per day, five days per week. (Tr.111)

2. For each school year following her initial hiring, Complainant received a re-appointment letter, which she would sign and return to Respondent District. (Tr. 27)

Complainant was employed by the District in subsequent years, including the 2005-2006 school year. (Joint Exhibit 1; Tr. 105-06)

3. Respondent Shanta Shrestha ("Shrestha") was hired as a food service worker for the District in September 2005, and he and Complainant worked together in the District's high school cafeteria during the 2005-2006 school year. (Tr. 27, 662-63)

4. Sylvia Hause ("Hause") was the cook manager of Respondent's Food Service department during the 2005-2006 school year, and was the immediate supervisor of Complainant and Shrestha. (Tr. 33, 56, 388, 663).

5. Beth Krause ("Krause") has been employed as the Food Service Director for the Respondent District since 2001. (Tr. 486) Her duties include the hiring and supervision of employees. (Tr. 487)

6. Barbara Gregory ("Gregory") is the assistant superintendent of Human Resources for Respondent District, and has held that position for approximately 10 years. Her duties include recruitment, hiring and disciplinary proceedings. (Tr. 678)

7. On or about January of 2006, Respondent District posted notice to its employees of the availability of an on-line computer course regarding sexual harassment, including instructions on how to file a sexual harassment complaint. All employees were required to take the course. (Tr. 503-04)

8. Complainant testified at the public hearing that Shrestha had harassed her on a daily basis during the 2005-2006 school year, by making sexual remarks, touching her back and shoulder, rubbing the front of his body against her buttocks, and grabbing her buttocks on a number of occasions. Complainant alleged that there was an incident in September of 2005 in a kitchen walk-in cooler in which Shrestha had grabbed her buttocks, and that a further incident

occurred in which Shrestha sexually harassed her by rubbing the front of his body against her. Complainant stated that he she had reported these incidents to Hause. (Tr. 33, 36-40) Hause credibly denied having received any such reports. (Tr. 416)

9. Complainant testified that while she was cleaning a kettle after a staff meeting in December of 2005, Shrestha had grabbed her buttocks, and further, that this incident had been witnessed by a number of her co-workers. (Tr. 28, 32-33, 45-46, 55)

10. Deanna Dement ("Dement") is a friend of the Complainant. She was employed by Respondent as a kitchen aid during the 2005-2006 school year, and worked together with Complainant and Shrestha. (Tr. 343, 363)

11. Dement testified that she had observed Shrestha rub Complainant's shoulder in September of 2005, and grab Complainant's buttocks on two occasions, the first between September and December of 2005, and the second in December of 2005 after a staff meeting. (Tr. 344-358) Dement testified that on this second occasion after the staff meeting, co-workers Margaret Hall and Ronald Courtney had witnessed Shrestha grab Complainant's buttocks. Dement further testified that these persons would be "lying" if they denied having observed Shrestha grab Complainant. (Tr. 368-69)

12. Margaret Hall ("Hall") and Ronald Courtney ("Courtney") are both food service workers employed by the Respondent District. (Tr. 372-73, 381) Both Hall and Courtney testified credibly that they had never seen Shrestha touch Complainant in an inappropriate manner or make inappropriate remarks to her. (Tr. 376-78, 382-84)

13. The day of the above-noted incident after the staff meeting, Complainant complained to Hause that Shrestha had grabbed her. Hause questioned all co-workers named by Complainant as witnesses. Hause testified credibly that all of these witnesses denied having seen anything

inappropriate, including Dement. (Tr. 419-20) Hause informed Complainant that the charge was not substantiated. She further advised Complainant to take the online sexual harassment course and file a written complaint, and to speak to Krause about her concerns. (Tr. 420-22, 654, 685)

14. Prior to the time of the incident after the staff meeting, Complainant had not made any complaints to Hause regarding sexual harassment by Shrestha. (Tr. 492)

15. During meetings between Krause and Complainant on March 16 and 17, 2006, Complainant complained of sexual harassment by Shrestha. (Tr. 505) She was again advised to take the online sexual harassment course and make a written complaint. (Respondent's Exhibit 25; Tr. 197-98)

16. Complainant filed a written complaint of sexual harassment in May of 2006. (Tr. 686) This complaint was investigated by Gregory, who met with Complainant on May 31, 2006 and interviewed the witnesses cited by Complainant, including Dement. Dement again denied that she had observed Shrestha sexually harassing Complainant. Gregory determined that the complaint was unfounded. (Tr. 688-90)

17. Shrestha testified credibly that although he had accidentally bumped Complainant on one occasion, to which she apparently took offense, he had not grabbed her, touched her in a sexually harassing manner, or used sexually suggestive or offensive language to her. (Tr. 663-666, 670-74)

18. Christina Reale ("Reale") was employed in Respondent District's food service department during the 2005-2006 school year, and worked with Complainant and Shrestha. At the public hearing, Reale was proffered by Complainant as a witness to Shrestha's sexual harassment of Complainant. In her testimony, Reale denied that she had seen Shrestha touch the Complainant. (Tr. 733-746)

19. I find that above-noted incident involving Complainant and Shrestha occurred after a staff meeting in December 2005 or January 2006, during which Shrestha touched Complainant in a cafeteria kitchen passageway, and that Complainant took offense to this contact and loudly complained. (Respondent's Exhibit 17; Tr. 28-30, 374-78, 663-66) The employees cited by Complainant as witnesses to this event who testified at the public hearing, with the exception of Dement, did not support Complainant's assertion that Shrestha had grabbed her buttocks. (Tr. 376-78, 382-84, 736-738)

20. In the verified complaint, and also in her testimony at the public hearing, Complainant maintained that she had been disciplined by Respondent District on or about March 16, 2006 for cursing at Shrestha when he had grabbed her buttocks. Complainant denied that the reason for said discipline was her use of foul language against co-workers other than Shrestha, and further denied that she had directed foul and abusive language against her co-workers. (ALJ's Exhibit 1; Tr. 46-47, 56-57, 219-25)

21. Complainant frequently used foul and abusive language to her co-workers in the workplace, and there were several complaints brought against her by co-workers for the use of foul and abusive language, resulting in the aforementioned March 16, 2006 discipline and the issuance of a counseling memorandum. (Complainant's Exhibit 4; Respondent's Exhibit 14, 18, 19, 20, 21, 22, 30; Tr. 515-20, 530-34, 550-52, 570-78) I find that this discipline was not an act of retaliation against Complainant.

22. In November of 2005, Complainant applied for a position which would permit her to work five hours per day, instead of the three hours per day she had been working. (Tr. 111) Complainant's application was denied due to her history of absenteeism, and the availability of a more qualified candidate for the position. (Tr. 404, 635-36, 648)

23. Complainant became pregnant in January 2006. (Tr. 86) At the public hearing, Complainant produced a doctor's note dated April 5, 2006, which stated that Complainant could continue work, subject to a 20 pound lifting restriction. Complainant testified that on April 5, 2006, she had presented that note to Hause. (Complainant's Exhibit 10; Tr. 87).

24. On or about April 6, 2006 Complainant met with Hause and Krause regarding an accommodation in her work duties due to her pregnancy. Hause and Krause both testified credibly that as of that date, Complainant had not submitted any written documentation regarding a lifting restriction, and that Complainant had reported to them at the April 6 meeting that she was subject to a lifting restriction of 10 1/2 pounds. (Tr. 442-43, 446, 454, 578-81) Krause testified credibly that the April 5 doctor's note had never been presented to the Respondent District's food service department or personnel office, and that a diligent search had been made for that document, with negative results. (Complainant's Exhibit 10; Tr. 586-87)

25. The essential job activities of a food service worker employed by Respondent District include washing dishes and heavy pots, and lifting and carrying pails of water, containers of food, loaded food trays, and cases of produce, many of which are well in excess of 10 pounds in weight. (Tr. 211-12, 443-45, 455, 580-81)

26. Following the April 6 meeting, Krause determined that Complainant could not reasonably perform the duties of a food service worker with a 10 1/2 pound lifting restriction, and advised Complainant on April 7, 2006, both verbally and in writing, that she would have to take a leave of absence until such time as the 10 1/2 pound lifting restriction was lifted. (Respondent's Exhibit 25; Tr. 444-45, 450, 582)

27. Complainant acknowledged receiving said letter, but did not respond to correct Krause's understanding of the weight restriction. (Tr. 209-10)

28. On April 21, 2006, Complainant sent Respondent District a doctor's note permitting her to return to work. (Complainant's Exhibit 14; Respondent's Exhibit 26) On May 2, 2006, Complainant met with Krause and Gregory to discuss her return to work. At that meeting, Complainant was advised that she could return to work at Respondent District's Northside School. However, despite repeated inquiries by Respondent District as to when Complainant would report for work at Northside, she did not report for work. (Respondent's Exhibit 10, 27; Tr. 201, 257, 699-701, 704-06) Instead, Complainant responded to these inquiries with a letter in which she repeated her claim that she was under a lifting restriction. (Complainant's Exhibit 17)

29. On May 31, 2006 Gregory wrote to Complainant's doctor and inquired whether or not there were any restrictions on her ability to work. On June 8, Complainant's doctor advised that Complainant was under a 20 pound lifting restriction. (Respondent's Exhibit 8, 29; Tr. 705)

30. Because Respondent District determined that accomodation could be made for a 20 pound lifting restriction, Complainant was called back to work by Respondent District at the high school. Complainant worked at the high school on June 12, 13, and 14, 2006. (Respondent's Exhibit 31; Tr. 206, 588, 682-83, 709)

31. In June of 2006, Respondent District sent Complainant her reappointment letter for the 2006-2007 school year. (Tr. 599-600) Despite repeated inquiries by telephone and in writing, the Respondent District did not receive any reply throughout the summer, nor did Complainant report for work for the in 2006-2007 school year. (Respondent's Exhibit 28, 4; Tr. 600-03, 711)

32. On or about September 6, 2006, a telephone call was placed to Respondent District advising that Complainant had given birth. (Respondent's Exhibit 5; Tr. 606-07, 711) In response, Respondent District requested medical documentation regarding the birth of the child, an estimated return to work date, and a formal request for an unpaid leave of absence.

(Respondent's Exhibit 5, 6) Both Krause and Gregory credibly testified that Respondent District never received the requested documentation. (Tr. 607-08)

33. At the hearing, Complainant proffered two documents which she claimed had been sent to Respondent District in response to the District's inquiries: a handwritten note in which Complainant stated that she would be "out of work" until January, and a doctor's note stating that Complainant had suffered complications fronm the birth of her child. (Complainant's Exhibit 16, 21) Krause credibly testified that she had never seen those documents, and Complainant submitted no evidence indicating that such documents had been received by Respondent District. (Tr. 619-20)

34. Respondent District continued its attempts to contact Complainant through the fall and winter of 2006; however, receiving no response, it terminated Complainant for abandonment of her position, by letter dated December 1, 2006. (Respondent's Exhibit 12, 13, 33, 7; Tr. 711-22)

OPINION AND DECISION

Respondent District did not unlawfully discriminate against Complainant on the basis of gender or disability. Complainant also failed to prove that Respondent District retaliated against her for opposing discrimination in the workplace.

Hostile Work Environment

Pursuant to the Human Rights Law, it is an unlawful discriminatory practice for an employer "because of the...sex... of any individual to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.Y. Exec. Law art. 15, § 296.1 (a). One form of unlawful discrimination occurs when an employee is subjected to a hostile work environment because of that person's gender.

A complainant may establish a hostile work environment violation by proving that the discrimination was sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile or abusive working environment.

In order to sustain a claim of sexual harassment based on a hostile work environment, complainant must show that she is a member of a protected group, she endured unwelcome sexual harassment based on her gender, the unwelcome sexual harassment altered the terms and conditions of her employment, and that respondent had actual or constructive knowledge of the sexual harassment and failed to take the appropriate corrective action. *Pace v. Ogden Services Corp.*, 257A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3rd Dept. 1999)

In the instant case, the record establishes that Complainant is a member of a protected

class because she is female. However, Complainant failed to establish by a fair preponderance of the evidence that she had been subjected to sexual harassment in the workplace.

Because Complainant did not prove her claims as against Respondent District, the claims against Shanta Shretha as aider and abettor must also fail. It is the employer's participation in the discriminatory practice that serves as the predicate for the imposition of liability on others for aiding and abetting. *Murphy v. ERA United Realty et al.* , 251 A.D.2d 469, 674 N.Y.S.2d 415 (2d Dept. 1998).

Disability

The Human Rights Law declares it to be an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to the known disabilities of an employee. N.Y. Exec. Law art. 15, § 296.3

The statute defines "disability" as a physical or medical impairment, a record of such impairment or a condition regarded by others as an impairment. The term "disability" is limited to those disabilities, which, upon the provision of reasonable accommodations, do not prevent complainant from performing in a reasonable manner the activities involved in the job. N.Y. Exec. Law art. 15, § 296.21

A reasonable accommodation is an action taken which permits an employee with a disability to perform in a reasonable manner the activities involved in the job; provided that such action does not impose an undue hardship on the business of the entity from which action is requested. N.Y. Exec. Law art. 15, § 296.21-e

The Complainant alleges that she sought a reasonable accommodation from Respondent, which was wrongfully denied, resulting in her unemployment. The record does not support Complainant's allegations. Complainant was aware that Respondent believed her to be under a

10 1/2 pound lifting restriction, and did not seek to correct Respondent's understanding of that restriction. Respondent evaluated the feasibility of a reasonable accommodation on that basis, and determined that Complainant could not reasonably perform the essential job functions of a food service worker while subject to a 10 1/2 pound lifting restriction. Once Complainant's status was clarified by her doctor, Respondent promptly offered her the opportunity to return to work.

Retaliation

The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposing discriminatory practices in the workplace. Human Rights Law § 296.7.

A complainant bears the burden of establishing a prima facie retaliation claim by showing that: "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 313, 786 N.Y.S.2d 382, 396 (2004).

The record does not support Complainant's claim that Respondent denied her the opportunity to work 5 hours per day, or that it terminated her employment, in retaliation for opposing discrimination. Complainant did complain of harassment in the workplace, and her protected activity was made known to her employer. However, Complainant failed to establish any connection between her discharge and her protected activity.

Respondent District made numerous, well-documented attempts to contact Complainant regarding her employment status for the 2006-2007 school year. Complainant failed to make

reasonable efforts to contact Respondent District and to provide it with the requested information. Respondent District terminated Complainant for abandoning her position. Complainant failed to prove that said termination was in retaliation for Complainant's complaints of discrimination.

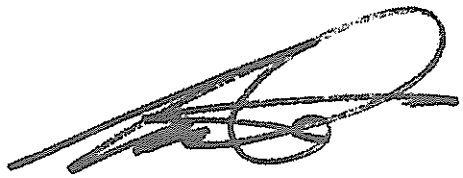
ORDER

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 hereby is dismissed, and it is further

ORDERED, that Respondent's motion to dismiss the complaint is denied as moot.

DATED: July 31, 2008
Bronx, New York



Michael T. Groben
Administrative Law Judge