



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

MICHELE DZIEDZIC,

Complainant,

v.

NEW YORK STATE, STATE UNIVERSITY OF
NEW YORK, STATE UNIVERSITY COLLEGE AT
OSWEGO, MARTA SANTIAGO, AS AIDER &
ABETTOR, MARY DEPENTU, AS AIDER &
ABETTOR, MICHAEL IZYK, AS AIDER &
ABETTOR,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10129633

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 August 31, 2010, 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: **FEB 04 2011**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



DAVID A. PATERSON
GOVERNOR

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DIVISION OF HUMAN RIGHTS**

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**NEW YORK STATE, STATE UNIVERSITY
OF NEW YORK, STATE UNIVERSITY
COLLEGE AT OSWEGO, MARTA
SANTIAGO, AS AIDER & ABETTOR, MARY
DEPENTU, AS AIDER & ABETTOR,
MICHAEL IZYK, AS AIDER & ABETTOR,**

Respondents.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10129633**

SUMMARY

Complainant alleges that Respondents unlawfully discriminated against her in employment because of sex and disability. Complainant also alleges that Respondents retaliated against her when she opposed said discriminatory practices. Complainant has failed to sustain her burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On November 19, 2008, 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, 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. A public hearing session was held on July 7, 2009. The case was noticed for additional public hearing sessions to be held January 26-27, 2010, to be tried in conjunction with another Division complaint involving Respondents and additional persons alleged to be aiders and abettors, which Complainant had filed after the instant matter, under Division Case Number 10131903. (ALJ's Exhibit 6) Prior to the January 26-27, 2010 hearing date, Complainant made application for a dismissal of Case Number 10131903 for administrative convenience in order to proceed in federal court. That application was granted by Notice and Final Order of Commissioner Galen D. Kirkland dated December 21, 2009. Additional hearing sessions were held in the instant case on January 26-27, 2010.

Complainant and Respondents appeared at all hearing sessions. Complainant was represented at the July 7, 2009 hearing session by O'Hara, O'Connell & Ciotoli, by Stephen Ciotoli, Esq. After that session, Mr. Ciotoli ceased representing Complainant, and between August 25 and September 30, 2009, Division Senior Attorney Lawrence Zyra, Esq., was assigned to present the complaint. Following a substitution of counsel, Complainant was represented at the January 26-27, 2010, hearing sessions and subsequent proceedings by her new attorneys, Smith, Sovik, Kendrick & Sugnet PC, by Suzanne K. Lehman, Esq. Respondents were represented throughout the proceedings by Joseph Storch, Esq.

Notices of hearing for two hearing sessions, adjourned due to the substitution of Complainant's counsel, are received in evidence as ALJ's Exhibits 9 and 10.

Following the final public hearing session of January 27, 2010, Respondent requested that the record be reopened in order to receive testimony regarding possible witness tampering and intimidation by Complainant. A telephone conference was held between the presiding ALJ and both counsel on March 11, 2010. Respondent submitted its written application to reopen the record dated March 12, 2010, which application was denied by the presiding ALJ by letter dated March 24, 2010. (ALJ's Exhibit 7)

A post-hearing deposition of Respondent's witness John A. Burke was delayed due to Complainant's illness. The deposition was taken on March 25, 2010. Complainant and both counsel were present for that deposition. The transcript of the deposition is received in evidence as ALJ's Exhibit 8.

Both parties timely filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant first began work for Respondent State University of New York at its Oswego campus as a cleaner in 1998. In April, 2005, she transferred to the paint crew of Respondent's physical plant department as a temporary maintenance assistant, and in March 2006 she completed her probation, becoming a permanent employee. (Respondent's Exhibits 1, 5, 6, 7; Tr. 8-10, 12 -13, 15-16, 18, 117-18, 171-72, 320, 322, 331-38, 341) At the time of the public hearing, Complainant had been reassigned to Respondent's plumbing department. (Tr. 191, 223)

2. Complainant's paint crew was headed by Respondent Michael Izyk ("Izyk"), a grade 12 painter who directed the Complainant and another assistant in their work. (Tr. 13-14, 16, 171-72,

234-35, 463-63, 496) The third member of the paint crew was Cheryl Masuicca (“Masuicca”), a grade 9 maintenance assistant.¹ (Tr. 13-14, 15, 534)

3. In the summer of 2007, Complainant and Masuicca were upgraded to grade 9 and grade 12 employment status, respectively. (Tr. 40, 171-73)

4. Respondent’s other paint crew consisted of Robert Swann (“Swann”), Patricia Crucetti (“Crucetti”), and Lisette Alvarado (“Alvarado”). (Tr. 15, 436, 443-44, 452-53)

5. The members of both paint crews were under the supervision of Robert Stepien (“Stepien”), a grade 14 employee whose title was Supervisor of Building Trades Services. Stepien has been the Supervisor for 18 years. (Tr. 16, 170, 181, 191)

6. Stepien’s supervisor is Respondent Mary DePentu (“DePentu”), who has served as Respondent’s interim Director of Facilities Maintenance and Operations since February 2008. Respondent's Assistant Directors of Operations, Utilities, and Building Services all report to her. (Tr. 43, 189-90, 229-31) From 2002 to 2008, DePentu had served as Respondent’s Assistant Director of Operations, reporting to George Stooks (“Stooks”), who was then Respondent’s Director of Facilities Maintenance and Operations. (Tr. 224, 571) Because the position of Assistant Director of Operations is presently vacant, DePentu also oversees those responsibilities. (Tr. 191)

7. Respondent Marta Santiago (“Santiago”) has been Respondent’s Human Resources Manager since 1984, and Respondent’s Affirmative Action Officer since 1986. (Tr. 49, 319)

Respondent's sexual harassment and discrimination policies

8. Respondent maintains written policies regarding workplace violence and sexual harassment. (Respondent's Exhibit 3, 4; Tr. 321-29) These policies, inter alia, define and forbid

¹ Cheryl Masuicca is also known as Cheryl Mazzoli, and she is so referenced several times in the hearing transcript. (Tr. 14, 23, 24, 35, 50, 71, 438)

sexual harassment and other forms of discrimination, and provide information about how to report violations. Training is provided for new employees, and every year all employees receive a copy of the sexual harassment policy. (Respondent's Exhibits 4, 15, 16; Tr. 325, 328-29, 383-86, 411-13) Employees are encouraged to report sexual harassment. (Tr. 329-31)

9. It is Respondent's general practice to have employee disputes, such as those involving harassment, resolved at the lowest supervisory level possible, and to refer conflicts to Human Resources if the situation cannot be resolved. (Tr. 225-27, 380-81, 385) If intervention is required, Human Resources personnel will interview the complaining employee, ask the employee to submit a statement in writing in order to ensure that the allegations are recorded accurately, and investigate as necessary. (Tr. 351-52)

10. Respondent has a policy of progressive discipline, in which the first stage is a verbal discussion with the employee, the second stage is a formal counseling letter, and the third stage is a disciplinary proceeding via Notice of Discipline ("NOD"). (Tr. 232-34, 398)

Complainant's 2004 Counseling

11. In February 2004, Complainant stated to Santiago that she had heard another employee make sexually harassing statements. When Santiago requested that Complainant set forth her allegations in writing, Complainant refused. Santiago then issued Complainant a counseling letter. Santiago concluded that Complainant's allegations against the employee had been a fabrication. (Respondent's Exhibit 10; Tr. 153-54, 344-48, 392-94, 413-14)

Complainant's August 2007 Allegations

12. In July or August 2007, Complainant complained to Stepien that Izyk had been using improper language, such as calling her a "squatter." Complainant also had a complaint regarding a student worker named Eric Germain ("Germain"). Complainant did not tell Stepien what

Germain had said or done that she found offensive. (Tr. 173-76) Stepien believed Complainant's claim that Izyk had been using offensive language to her, because he was aware that back in 2000, some seven years prior, another female employee, Sally Grimshaw, had protested that Swann and Izyk had used offensive language to her, such as calling her a "sea hag." (Tr. 290-317) Stooks, who had been Respondent's Director of Facilities Maintenance and Operations during that time, verified that Grimshaw never made a formal complaint, and that Grimshaw and all personnel on her crew, including Izyk, had received verbal counseling regarding the use of inappropriate language. (Tr. 224, 571-76)

13. In August 2007, Stepien attempted to resolve Complainant's concerns by warning Izyk and by meeting with Izyk, Complainant and Masuccia. The meeting resulted in an argument between the three. Stepien then told DePentu of Complainant's allegations at their regular weekly meeting. (Tr. 177-78, 182, 193-94, 222)

14. Later that month, DePentu met with Complainant, who advised her that Izyk had called her a "squatter" and "old squatter." Complainant was highly offended by this, because Germain had advised her that the term was meant as a reference to the posture taken by women when urinating. Germain did not explain the basis for this belief to Complainant. He did not appear at the public hearing. (Tr. 20-21, 43-45, 54, 118, 120, 192-93, 243-45, 246-47, 249, 265)

15. The term "squatter" was used by Izyk and Masuicca, originally in reference to Masuicca herself. Masuicca had commandeered a favored front seat in the van used by the paint crews to travel to different job locations on Respondent's campus, at the time jokingly declaring "squatter's rights." (Tr. 466-68, 497, 501, 543-46)

16. DePentu offered to either handle Complainant's concerns herself, or to bring in Santiago. Complainant agreed to have DePentu deal with her complaints. DePentu encouraged Complainant to speak up if she felt she had been harassed. (Tr. 194-95, 212-13, 245-46, 387)

17. The following week, DePentu confronted Izyk and Masuicca during their work regarding Complainant's allegations. Izyk admitted that he had referred to Complainant as "old squatter" and offered to apologize. (Tr. 46-47, 134, 195-98, 202, 246-49)

18. Both Izyk and Masuicca protested that Complainant had never objected to Izyk's manner of speech, and that she often spoke in a similar manner. (Tr. 196, 250-54) Respondent's employees, including Complainant, occasionally engaged in coarse and comic banter in the workplace. (ALJ's Exhibit 8[p. 582-83]; Tr. 427-34, 481-85, 538-39, 541-42)

DePentu's September 2007 Meeting

19. In or about mid-September, 2007, DePentu presided at a meeting between Complainant, Izyk, and Masuicca. Izyk admitted that he had used crude language in Complainant's presence, including stating that his penis was "no bigger than a pimple", a reference to a joke on the Howard Stern radio show. Izyk told Complainant that he had not realized that his speech offended her, and apologized. DePentu advised all present that there was to be no more name-calling. (Tr. 50, 134-35, 198-202, 204, 254-56, 485-86, 488-90, 500-01, 508)

20. DePentu then issued a letter to Izyk recounting the meeting and Izyk's apology. She neglected, however, to place a copy of that letter in Izyk's personnel file at Respondent's Human Resources Department. (Respondent's Exhibit 2; Tr. 204-08, 235-38, 489, 502, 552-53)

21. DePentu had intended to hold a follow-up meeting with all involved in two weeks; however, this fell through because of scheduling problems. (Tr. 50, 121, 161, 202, 256) Shortly after the day scheduled for that meeting, DePentu encountered Complainant. After stating that

the follow-up meeting had not taken place, DePentu said that she wanted to talk to Complainant about how things were going. Complainant replied: "Mary, it's just beautiful. Thank you very much, it's beautiful." (Tr. 51, 202-03, 208) DePentu, reasonably believing that Complainant was indicating that her problems with Izyk were resolved, advised Complainant of the letter she had issued to Izyk, but did not attempt to schedule another meeting or take further action.

(Respondent's Exhibit 2; Tr. 48, 161, 208, 219, 262-63)

Complainant's Fall 2007 Medical Leave

22. In September 2007, Complainant was diagnosed with breast cancer. She had surgery and was out of work for approximately one month, returning in November 2007. (Tr. 53-55, 133, 218-19) When she returned, Complainant thanked Izyk for encouraging her to visit her doctor. (Tr. 477-78, 550-52) Complainant testified at the public hearing that upon her return she had thanked Izyk "for everything that he did to me" because his objectionable behavior had caused her to visit her doctor in the first place, and denied that he had encouraged her to see her doctor. (Tr. 133, 161-62) I find that Complainant's testimony on this issue was not credible.

23. Complainant made no further complaints until December 2007. (Tr. 186-87, 208-09, 219, 256, 268-70, 403)

Complainant's December 2007 Allegations

24. Timothy Dixon, a general mechanic, has been employed by Respondent for 27 years. (Tr. 416-17)

25. Complainant's paint crew took their breaks in a room which was equipped with a sink. In mid-December 2007, Complainant placed a dirty bowl in the sink, leaving it there for three days. On or about December 18, 2007, Dixon objected to the continued presence of the bowl in

the sink, and he and Complainant argued loudly, both using foul language. (Tr. 56-57, 123-24, 360, 418-20, 424-25, 535)

26. In her testimony at the public hearing, Complainant acknowledged that Dixon had never made any sexual remarks to her. (Tr. 123-25)

27. Complainant then complained to Stepien, who advised DePentu of the incident. DePentu, believing that the incident was minor and unrelated to Complainant's previously expressed complaints regarding Izyk, directed Stepien to resolve the situation on his own. (Tr. 61, 209-11, 260, 267-68, 271-72, 530-31) Stepien did not. (Tr. 425-26)

28. On or about December 19, 2007, another incident occurred which involved Complainant. (Tr. 57) Complainant found a container of "udder cream" (a moisturizer used on cow udders), placed on the table in the room where Complainant and her fellow employees took their breaks, at the location where Complainant generally sat. Complainant moved the udder cream container away, and later found it placed again in the same area of the break table along with a container of hand lotion. Complainant believed that the cream and hand lotion had been placed there by her fellow employees as a deliberately provocative reference to her recent breast cancer, in retaliation for her complaints to DePentu the previous August. (Respondent's Exhibit 12; Tr. 57-59, 160-61, 164-68) Complainant produced no evidence for this except her own belief. (Tr. 65-66, 167-68)

29. Employees generally sat at the same place at the break table each day. However, these places were not assigned to an employee or marked in any way. (Tr. 156-58, 226-27) Painters on Complainant's paint crew often used lotions and moisturizers, including the udder cream, because solvents and paints dried out their hands. (Tr. 124-30, 184-86)

30. Crucetti, a fellow painter, had provided the lotion and udder cream that day to a student worker because his hands were dry. The placement of the cream and lotion at Complainant's area on the break table was inadvertent. (Respondent's Exhibit 12; Tr. 129-30, 445-47, 449-50, 454-55, 458-59, 461-62)

31. That same day, Complainant complained to Stepien about the udder cream and lotion. (Tr. 61) Complainant also contacted Santiago and advised her of the December 18, 2007, incident involving the bowl, and the incident involving the udder cream and lotion. (Tr. 355-60, 387-89, 403-04)

32. Although Complainant advised Santiago at that time that "other stuff" had happened to her, she refused to describe it, despite Santiago's urging. (Tr. 363-64, 395)

33. Santiago then called DePentu and suggested a meeting for the next day, and DePentu advised Santiago, for the first time, of Complainant's complaints regarding Izyk the previous August. (Tr. 210-13, 262, 360) Santiago then obtained a copy of the letter DePentu had issued to Izyk, and placed it in Izyk's personnel file. (Respondent's Exhibit 2; Tr. 389-90, 398-400)

34. The next morning, on or about December 20, 2007, DePentu and Santiago met with both of Respondent's painting crews. Complainant was excused from attending the first part of the meeting. (Tr. 213-14, 360-61, 406-07)

35. Santiago advised those present of Complainant's concerns regarding the udder cream and lotion, and they denied any discriminatory motive. Complainant was then brought into the meeting. Crucetti explained how the cream and lotion had appeared on the break table, and advised Complainant that she had been unaware of Complainant's breast cancer. (Tr. 64-66, 213-18, 361-63, 447-49, 450, 455-57, 462) Complainant did not believe her. (Tr. 65-66, 167-68)

36. After the December 20 meeting, DePentu did not receive any more complaints from Complainant or Stepien. Izyk advised DePentu that he now avoided speaking to Complainant; DePentu agreed that this was the proper course of action. (Tr. 220-22)

37. Just prior to the 2007 office Christmas party, Complainant remonstrated with Izyk and Masuicca because they had been cleaning a garage rather than painting with her. Izyk responded by telling Complainant not to be "an asshole." (Tr. 62-67)

38. Complainant testified at the public hearing that in December 2007, she was informed by Alvarado that Izyk had just taken an offensive photograph of Complainant's buttock area, using Alvarado's camera cell phone. Complainant did not see any such photograph, and Alvarado did not own a camera cell phone at that time. Both Alvarado and Izyk credibly denied that the incident had taken place. (Tr. 34-36, 437-42, 487-88)

39. On December 28, 2007, Complainant complained to Santiago that Izyk had called her names and grabbed the "side fat" on her waist area, and that he had driven the work van in which the crew rode to job sites too quickly and braked too abruptly. Santiago found Complainant's complaints to be vague and without context; she was unable to determine from Complainant's verbal account when the incidents complained of had occurred. Santiago asked Complainant to put her concerns in writing. (Tr. 363-65, 395, 407-10)

40. On or about January 18, 2008, Complainant refused to ride in the work van when Masuicca was smoking. Santiago held a brief meeting with Complainant, DePentu and Masuicca regarding this incident. At that meeting, Santiago again requested Complainant to put the harassment allegations she had made at the December 28 meeting in writing. (Tr. 70-73, 395-96)

Complainant's 2008 Medical Leave

41. Complainant left work early the following day and did not return because she felt ignored by the other painters. (Tr. 73-74)

42. Complainant felt that she was having a nervous breakdown. After a brief stay in a hospital psychiatric ward, Complainant returned home on medical leave and was treated for depression over the next 11 months. (Complainant's Exhibits 1-10; Tr. 74-81, 87-88, 97)

Complainant filed a claim for worker's compensation. (Complainant's Exhibits 13, 14; Tr. 87, 88-89, 91-93, 122-23) She did not return to work until November 19, 2008. (Tr. 97-99)

Complainant's February 2008 Allegations

43. On February 19, 2008, while on medical leave, Complainant sent Santiago a letter in which she complained that she had been subjected to continuous verbal and physical harassment by Izyk since being hired as a painter in 2005, that Germain had harassed her verbally and physically in the summer of 2007, and that employee John A. Burke ("Burke") had made an offensive remark to her later that year. (Complainant's Exhibit 11; Tr. 78-79, 82, 379-80)

Santiago suggested that they meet to discuss Complainant's concerns. (Complainant's Exhibit 12, Respondent's Exhibit 13; Tr. 82-83, 365-67)

44. Santiago then met with Complainant and Complainant's sister. Santiago attempted to question Complainant about her allegations. Complainant was suspicious that Santiago was not going to investigate her complaints in good faith, because Santiago asked questions of Complainant as if she were hearing Complainant's allegations for the first time. (Tr. 85)

Complainant was not responsive to Santiago's questions, and the meeting was not productive. (Tr. 368-69)

45. Complainant and her sister left the meeting and submitted a copy of Complainant's February 19, 2008 letter to Nicholas Lyons, Santiago's supervisor. Lyons, already aware of Complainant's allegations, encouraged Complainant to return to work when she felt better. (Complainant's Exhibit 1; Tr. 85-86, 369, 405, 410)

46. Santiago received no further communication from Complainant until she returned to work in November 2008. (Tr. 369-70, 379-80)

Santiago's Investigation

47. Following the December 28, 2007 meeting with Complainant, Santiago had begun investigating Complainant's allegations by interviewing employees, including Izyk, Masuicca, Dixon, and Burke. (Tr. 369-70, 396-97, 400-02)

48. Santiago met with Izyk on or about March 12, 2008. Based on her discussions with Izyk, Masuicca, Dixon, and Burke, Santiago concluded that Izyk had not repeated his inappropriate behavior towards Complainant since DePentu's meeting with Complainant, Izyk, and Masuicca in mid-September 2007. Santiago summarized her conclusions in counseling letters to Izyk and Masuicca. (Respondent's Exhibits 17, 18; Tr. 502-03, 526-32)

Complainant's February 2008 Allegations

49. Complainant's February 19, 2008 letter set forth a litany of abuse by Izyk, Germain, and Burke. One allegation is that literally every work day since Complainant transferred to the paint crew in 2005, Izyk had announced that his penis was "no bigger than a pimple" and protruded his pelvic area at her, stating "you want my pimple", while she backed away pleading for him to stop. (Complainant's Exhibit 11 [p. 5]; Tr. 30-31, 468-70, 497-99, 502, 546-47) I find that the above-noted allegation is not credible, particularly in the face of Izyk's candid admission that he

had, in fact, made the first of those statements on several occasions, but had stopped when so instructed by DePentu at their mid-September, 2007 meeting.

50. In her February 19, 2008 letter and her verified complaint in the instant case, Complainant alleged that Izyk had deliberately forced his way past her in a doorway with a ladder he was carrying, thus breaking her finger. (ALJ's Exhibit 1, Complainant's Exhibit 11[6]) At the public hearing, Complainant testified only that in 2007 her finger had gotten caught in the ladder and that although she had broken it, she did not take any time off from work or seek Worker's Compensation. Complainant did not testify that this was a deliberate act by Izyk. Complainant failed to establish that this had occurred within one year of the filing of her complaint. (Tr. 135-36, 257)

51. Complainant's February 19, 2008 letter also alleged that Izyk had assaulted her during every year since 2005 by grabbing the "side fat" of her waist. Although she alleged that this had occurred on a weekly basis in 2005, Complainant failed to establish that this had occurred within the limitations period. (Complainant's Exhibit 11[p. 1]; Tr. 26-28, 52-53, 135, 470-71, 548)

52. Complainant's February 19, 2008 letter noted an incident in which Burke, while he and Complainant were in proximity to the employee parking lot, had stated: "Your headlights are on." Complainant believed that this was a reference to her breasts. (Complainant's Exhibit 11[p. 2]) In her testimony at the public hearing, Complainant stated that this incident occurred sometime in November 2007. Burke denied that his remark had any offensive intent. (ALJ's Exhibit 8 [p. 584-89]; Tr. 59-61, 554-57) Because of Complainant's apparent inability to recall on what day the incident occurred, as well as testimony from other witnesses who were present that the incident occurred well before November 2007, I find that she has failed to establish that this occurred within the limitations period.

53. Complainant's February 19, 2008, letter noted an incident in which Complainant, while sitting in the back of the work van, had been thrown to the floor of the van due to Izyk's deliberately reckless driving. Izyk and Masuicca acknowledged that this incident had occurred, but testified credibly that it was an accident. Complainant's own account of the incident placed it sometime in May 2007. (Complainant's Exhibit 11[p. 5]; Tr. 37-40, 155, 492-96, 503-05, 562-63, 566)

54. Complainant also testified that Izyk had called her a "flea bag," and that he had also made offensive remarks to her regarding body odor, a mole on Complainant's face, and about Respondent's female students while he was girl-watching in Complainant's presence. Complainant failed to establish that any of these had occurred within the limitations period. (Tr. 21-22, 25-26, 33-34, 35-37, 40, 475-77, 500, 506-08)

55. Complainant also alleged that Izyk had referred to her as a "psychotic piece of nature," "my bitch," and a "sea hag." Those incidents for which Complainant could recall a specific date occurred outside the limitations period. (Complainant's Exhibit 11[p. 5]; Tr. 23-24, 28-29, 33, 141)

56. Complainant returned to work on November 19, 2008. She filed the instant complaint with the Division the same day. (ALJ's Exhibit 1; Tr. 97-99)

OPINION AND DECISION

Pursuant to the Human Rights Law, it is an unlawful discriminatory practice for an employer “because of an individual's... sex (or) disability... to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” N.Y. Exec. Law art. 15, § 296.1(a).

Statute of Limitations

The Human Rights Law provides that “[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.” Human Rights Law § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Comty. College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

Complainant filed the instant complaint on November 19, 2008. Acts that occurred between November 20, 2007 and November 19, 2008 fall within the statutory time period.

As the record demonstrated, most of the incidents of discrimination alleged by Complainant occurred well beyond the one-year statutory time period. Complainant's claims are only viable to the extent that she can show a continuing violation. 9 N.Y.C.R.R. § 465.3(e).

A continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice. *Clark v. State of New York*, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dept. 2003).

Here, Complainant was able to present proof that four potentially discriminatory

incidents had occurred during the limitations period: the incident with Dixon and the bowl, the incident with the udder cream, the incident in which Izyk called her an “asshole”, and the occasion on which she believed that Izyk had taken an offensive photograph of her with a camera cell phone. All of these occurred in December 2007. With respect to Complainant's other offensive encounters with fellow employees, all of these either took place clearly outside the limitations period, or Complainant was unable to present reliable proof as to when they had occurred. It is noted that each time Complainant made her complaints known to Respondent, it investigated said complaints, and addressed Complainant's concerns. I find no continuing violation by Respondents.

Sexual Harassment-Hostile Work Environment

In order to sustain a claim of sexual harassment based on a hostile work environment, complainant must show that (1) she is a member of a protected group; (2) she endured unwelcome sexual harassment based on her gender; (3) the unwelcome sexual harassment altered the terms and conditions of her employment and (4) respondent had actual or constructive knowledge of the sexual harassment and failed to take the appropriate corrective action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999). Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. New York State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Department 1996), *lv. denied*, 89 N.Y.S.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant is female and thus a member of a protected group, and she presented proof that she had experienced sexual harassment, in the form of the four incidents described above.

However, Respondent was able to demonstrate that the incident with the udder cream was not, in fact, intended as harassment and was the result of an entirely innocent act on the part of Complainant's fellow employees. Complainant's concerns regarding the supposed offensive photograph taken by Izyk were similarly unfounded. With respect to the one offensive remark by Izyk, and Complainant's argument with her fellow employee Dixon over a bowl, there is no doubt that these incidents took place, however I find it these are not sufficiently severe and pervasive by themselves so as to alter the terms and conditions of Complainant's employment. Therefore, this claim is dismissed.

Disability

A disability includes a physical mental or medical impairment resulting from anatomical, physiological, or neurological conditions which is demonstrable by medically accepted clinical or laboratory diagnostic techniques. Human Rights Law § 292.21.

Complainant did not present expert testimony that her psychological difficulties resulted in a disability. However, her hospitalization and treatment for depression, and her surgery for breast cancer and subsequent recovery, present sufficient proof that Complainant was suffering from both mental and physical disabilities. Because Complainant presented no proof that Respondent had discriminated against her because of these disabilities, this claim is dismissed.

Retaliation

In order to establish a prima facie case of retaliation, a complainant must show that (1) she engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that she participated in the protected activity; (3) she suffered from an adverse employment action;

and (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999), citing *Fair v. Guiding Eyes for the Blind*, 742 F. Supp. 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v. New York State Division of Human Rights*, 229 A.D.2d 631, 636, 644 N.Y.S.2d 864 (3d Dept. 1996).

Complainant engaged in protected activity when she alleged discriminatory treatment in 2007, and again in 2008. However, she did not demonstrate that she suffered an adverse employment action. An adverse employment action requires a materially adverse change in the terms and conditions of employment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 306 (2004). Complainant failed to demonstrate any such change. This claim is dismissed.

Aider and Abettor

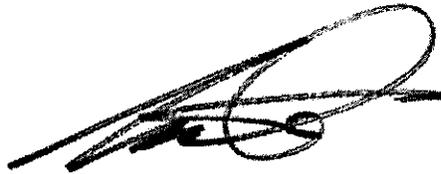
Human Rights Law § 296.6 makes it an unlawful discriminatory practice “for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so.” In order to find an aider and abettor liable, there must first be a finding of liability against the employer. Where the case against the employer is dismissed, the case against an aider and abettor must also be dismissed. *Yerry v. Pizza Hut of Southeast Kansas*, 186 F. Supp. 2d 178 (N.D.N.Y. 2002); *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 247, 764 N.Y.S.2d 675, 685 (1st Dept. 2003). The complaint alleges liability as against DePentu, Santiago and Izyk as aiders and abettors of discrimination by Respondent. The complaint against these persons is also dismissed.

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.,

DATED: August 31, 2010
Bronx, New York

A handwritten signature in black ink, appearing to read 'Michael T. Groben', with a large, stylized flourish at the end.

Michael T. Groben
Administrative Law Judge