

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ALICIA S. HUMIG,

Complainant,

v.

**NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES,**

Respondent.

**and NYS OFFICE OF THE STATE
COMPTROLLER, NYS DEPARTMENT OF CIVIL
SERVICE, Necessary Parties.**

**NOTICE AND
FINAL ORDER**

Case No. 7905228

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 September 12, 2007, by Martin Erazo, Jr., 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 11th day of October, 2007.


KUMIKI GIBSON
COMMISSIONER

TO:

Complainant

Alicia S. Humig
1040 Elmwood Ave.
Buffalo, NY 14222

Respondent

New York State, Department of Correctional Services
Attn: Charlie R. Harvey, Director
The Harriman State Campus - Bldg. 2
1220 Washington Ave.
Albany, NY 12226-2050

Respondent Attorney

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New York State, Department of Correctional Services
Office of Counsel
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Necessary Party

New York State, Office of the State Comptroller
Attn: Ms Elaine Penn, Director
Department of Audit & Control
Attn: Celia M. Gonzalez, Ed.D.
Director of Affirmative Action
110 State Street, 12th Floor
Albany, NY 12236

Necessary Party

New York State, Department of Civil Service
Attn: Stella Chen Harding of Counsel
Office of Counsel,
James S. Hennessey, Counsel
State Campus Building 1, Room 266
Albany, NY 12239

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

One Fordham Plaza, 4th Floor
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Martin Erazo, Jr.
Administrative Law Judge

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ELIOT SPITZER
GOVERNOR

KUMIKI GIBSON
COMMISSIONER

September 12, 2007

Re: Alicia S. Humig v. New York State Department of
Correctional Services; and NYS Office of The State
Comptroller, NYS Department of Civil Service
Case No. 7905228

To the Parties Listed Below:

Enclosed please find a copy of my proposed Recommended Findings of Fact, Opinion and Decision, and Order. Please be advised that you have twenty-one (21) days from the date of this letter to file Objections.

Your Objections may be in letter form, should not reargue material in the Record, and should be as concise as possible. Copies of your Objections must be served on opposing counsel, including Division counsel, if any, and on the Deputy Commissioner for Enforcement of the Division of Human Rights. Objections provide the parties with an opportunity to be heard on the issues in the case before the issuance of a final Order of the Commissioner. See Rules of Practice of the Division of Human Rights, 9 NYCRR § 465.17(c).

No extensions of time to file Objections will be granted, except for good cause shown, by written request to the Order Preparation Unit. The Objections must be filed by October 3, 2007, with the Order Preparation Unit, at the address below.

NYS Division of Human Rights
Order Preparation Unit
One Fordham Plaza, 4th Floor
Bronx, New York 10458

If we do not receive your Objections by the deadline noted above, the Division will assume that you do not object to the proposed order and will proceed to issue the final Order under that assumption.

Please contact Peter G. Buchenholz, Adjudication Counsel, at (718) 741-8340 if you have any questions regarding the filing of Objections.

Very truly yours,

A handwritten signature in cursive script that reads "Martin Erazo, Jr." The signature is written in black ink and is positioned to the right of the typed name.

Martin Erazo, Jr.
Administrative Law Judge

TO:

Complainant

Alicia S. Humig
1040 Elmwood Ave.
Buffalo, NY 14222

Respondent

New York State Department of Correctional Services
Attn: Charlie R. Harvey, Director
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Albany, NY 12226-2050

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Matthew Menes, Esq.
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ALICIA S. HUMIG,

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**NEW YORK STATE DEPARTMENT OF
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Respondent,

and **NYS OFFICE OF THE STATE
COMPTROLLER, NYS DEPARTMENT OF
CIVIL SERVICE,** Necessary Parties.

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

Case No. **7905228**

SUMMARY

Complainant, a gay female, alleged that she was a victim of sexual harassment. The Division finds that Respondent discriminated against Complainant. Further, the Division finds that Respondent retaliated against Complainant after she complained of sexual harassment. Complainant is entitled to relief in the form of an award for mental anguish.

PROCEEDINGS IN THE CASE

On March 5, 2003, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 10-12, 2006.

Complainant and Respondent appeared at the hearing. The Division was represented by former General Counsel, Gina Lopez Summa, Paul Crapsi, Jr., of Counsel. Respondent was represented by Anthony J. Annucci, Deputy Commissioner, Benjamin H. Rondeau, of Counsel.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

Parties

1. Complainant is a gay female. (Tr. 239) Complainant worked for Respondent as a corrections officer since August 15, 1983. (Tr. 239) Complainant is still employed by Respondent. Complainant’s primary duty as a corrections officer was the “care, custody and control of the inmates” in her unit. (Tr. 241) Complainant was stationed at Respondent’s Wende Correctional Facility (“Wende”). (Tr. 239) Respondent’s evaluation of Complainant’s work was consistently “above average.” (Tr. 241)

2. Complainant’s sexual orientation was “common knowledge.” (Tr. 27, 54, 73-4, 93, 240) Complainant was also the only female officer in “D” block. (Tr. 96, 245)

3. Officer Jim Wright (“Wright”) was Complainant’s co-worker (Tr. 242-43).

Complainant's Allegations

4. Complainant alleged Wright sexually harassed her by subjecting her to sexually offensive comments and threats of physical harm. (Tr. 101, 257, 260-61, 265, 272-73, ALJ Exhibit I) Complainant also complained of sexually offensive drawings and written comments, in Complainant's work area, specifically directed at her. (ALJ Exhibit I)

5. Complainant alleged that she reported Wright's sexually offensive activity to Respondent and Respondent did not correct the offensive behavior. (ALJ Exhibit I)

6. Complainant also alleged that Respondent retaliated against her after she filed written charges of harassment in September of 2002 and June 2003. (Tr. 66, 70, 291-2, 294, 315-16, 334)

Respondent's Position

7. Respondent denied violating the Human Rights Law. Respondent admitted that Complainant filed a complaint with Captain Kearney ("Kearney"). Respondent asserted that it responded to Complainant's allegations and found that Complainant was "not sexually harassed." (ALJ Exhibit III) Respondent's investigation found that officer Wright acted "negatively towards Complainant" and formally counseled him. (ALJ Exhibit III)

Sexual Orientation and Sexual Harassment Policies

8. Respondent has sexual orientation and sexual harassment policies. Both policies state "...any employee who believes he or she is being ...harassed should make a complaint to his or her supervisor or anyone in a management level position within the facility or work unit. An employee may also file a complaint directly with the Office of Diversity Management..." (Complainant's Exhibit 5, 6) The policies also states that "...once a supervisor or anyone in management has heard or received a complaint of harassment, that person has an obligation to report the complaint to the Office of Diversity Management." (Complainant's Exhibit 5, 6)

Wright's Sexually Offensive Language

9. In July of 2002, Wright made false allegations that Complainant had an improper relationship with a male inmate. Wright specifically asked Kearney for the removal of the inmate from Complainant's control because Complainant was "too close" to that inmate. (Tr. 243-44, 250)

10. After Complainant challenged Wright's unfounded allegations, Wright began calling Complainant "cunt," "fucking dike," "lesbian," "dike bitch," on a daily basis. (Tr. 59, 75-6, 96-7, 242-44, 250) Wright's name calling was "relentless" and "did not stop." (Tr. 242) Wright repeatedly told Complainant, "bitch, I'm running this block and I can do what I want to." (Tr. 244) Wright repeatedly told Complainant to leave her "fucking job." (Tr. 80-1, 248, 251)

Notice of Offensive Language

11. Complainant reported Wright's behavior to their immediate supervisor, Sergeant Lambert ("Lambert"). (Tr. 264-65) Lambert stated that "he didn't want to hear it" and told Complainant to speak with Kearney. (Tr. 264)

12. Complainant reported Wright's statements to Kearney on a total of "five or six" occasions during July 2002 and August 2002. (Tr. 117, 242-43) Complainant told Kearney, "Captain, he's harassing me." (Tr. 254, 257) Complainant told Kearney that Wright's offensive actions were because Complainant is female and gay. (Tr. 255-58)

13. Kearney told Complainant, on several occasions, "I'll speak with him" or "[I'll] look into it." (Tr. 247, 252, 272) In one particular instance, Kearney promised to send a sergeant to speak with Wright. (Tr. 259) Wright's offensive actions did not stop.

Wright's Threatened Complainant's Physical Safety

14. Wright's actions placed Complainant in danger. (Tr. 101) Wright degraded Complainant in front of other officers and in front of inmates. (Tr. 28, 253, 257, 260-61, 265) Wright discussed with inmates that Complainant was gay. (Tr. 258) Wright told Complainant, "you are not going to be here much longer." (Tr. 272-73) Wright accused Complainant of drug use with an inmate, in front of approximately twenty inmates and several officers. (Tr. 270) Wright threatened other corrections officers if they supported Complainant. (Tr. 37-9, 84-5)

Notice of Threats to Physical Safety

15. Complainant conveyed to Kearney that Wright's actions in Complainant's cell block were very dangerous. Complainant explained "that it was a very unhealthy situation." (Tr. 256)

16. Another corrections officer was sufficiently concerned about the workplace danger that he told Kearney about Wright's offensive behavior toward Complainant. (Tr. 59) Kearney stated that he "didn't want to hear it." (Tr. 60-1)

Shared Employee Work Calendar

17. The corrections officers shared a wall calendar ("calendar") that contained the vacation days, schedules, and other related items. (Tr. 86) The calendar was in a "very public" first floor area. (Tr. 32)

18. In July 2002, offensive written comments about Complainant appeared on the calendar. (Tr. 242) The comments were about "offensive things about [Complainant] being gay," "lesbian jokes," and insinuations about Complainant having a sexual relationship with a male inmate. (Tr. 31, 60, 97) At one point, the calendar stated, "the lesbian's on vacation." (Tr. 61)

19. Corrections officers corroborated the offensive language written on the calendar. (Tr. 30-1, 60, 87-8, 98-9) The handwriting on the calendar belonged to officer Wright. (Tr. 99)

Notice of Offensive Calendar Comments

20. Corrections officers corroborated that supervisors could clearly see the offensive comments about the Complainant on the employee calendar. (Tr. 32-3, 62-4, 88-9) "Everybody saw it." (Tr. 33) "Some would laugh, some would not laugh. Everybody was aware of it pretty much in the whole jail." (Tr. 33)

Sexually Offensive Drawings

21. In the common work area, several officers have pictures of motorcycles they own. (Tr. 76-7, 287) Starting in July of 2002, drawings of penises began to appear on Complainant's motorcycle. (Tr. 97-8, 287) Each penis had the name of a male inmate. (Tr. 287) Every time the penis was erased, it would reappear. (Tr. 287, 289)

Notice of Offensive Drawings

22. Corrections officers corroborated that supervisors could clearly see the offensive drawings. (Tr. 32, 62-4, 88-9) The offensive drawings were up for weeks, in plain view of several supervisors. (Tr. 42-7, 90, 107) These supervisors included a sergeant, lieutenant, captain, and the Deputy of Security. (Tr. 43)

23. Complainant first informed Kearney of the drawing in October of 2002. (Tr. 290) Kearney responded that he "would look into it." (Tr. 290) Kearney never took action to correct this issue.

24. A male corrections officer testified that when he complained about the defacement of his motorcycle picture, Respondent took immediate action. Respondent had pictures taken of the defacement. (Tr. 36)

September 2002 Written Complaint

25. Complainant placed her complaints in a written document dated September 4, 2002, because Wright's offensive activities did not stop. (Tr. 275, 278, Complainant's Exhibit 7) Wright's behavior escalated. (Tr. 255-56) Wright continued to make offensive and threatening comments "whenever he wanted." (Tr. 261) Kearney admitted receiving the written document. (Tr. 132)

26. Kearney admitted that he did not consider Complainant's document to be "a formal complaint about sexual harassment." (Tr. 133-34) Kearney specifically stated that Wright's actions were not sexual harassment. (Tr. 137)

27. Kearney ordered Sergeant Pomietlacz ("Pomietlacz") to speak with Complainant and Wright. (Tr. 281, 282-85) When Pomietlacz attempted to resolve the matter, Wright stated "fuck that bitch." (Tr. 284-85) After Wright's response, Respondent told Complainant that her formal complaint would be processed. (Tr. 285) Kearney gave the September 4, 2002 complaint to his superior, Deputy Moynihan. (Tr. 132, 137-9)

Retaliation in September 2002

28. Wright's actions and comments continued after the September 2002 written complaint. (Tr. 286, Complainant's Exhibit 7) In response to the written complaint, Wright engaged in a campaign to create false accusations against Complainant. (Tr. 290, 292) Wright was the catalyst for several false accusations made by male corrections officers and one male inmate in Complainant's cell block. (Tr. 292-93)

29. Kearney admitted that Wright's actions of collecting negative statements from male corrections officers were wrong and inappropriate. (Tr. 151-52) Complainant was upset because Kearney had not investigated her charges, yet Wright's charges were pursued. (Tr. 293) Kearney told Complainant that "it's just bullshit anyway, but [Wright] filed a complaint and we have to investigate." (Tr. 293)

September 2002 Complaint Ignored

30. Frank Annarino (“Annarino”), from Respondent’s Inspector General Office, pursued the false complaint by inmate “Velasquez.” (Tr. 294-95, 298) During Annarino's investigation of inmate Velasquez’s complaint, Annarino discovered that Kearney had not pursued Complainant’s September 2002 complaint. (Tr. 296-97, Complainant’s Exhibit 13) Annarino referred Complainant’s charges to Respondent’s Office of Diversity Management (“Diversity Management”). (Tr. 302)

31. In January of 2003, Respondent's Office of Diversity Management began its investigation of Complainant's September 2002 written complaint. (Tr. 300) In February 2003, Mary Mayville (“Mayville”), from Diversity Management, finally interviewed Complainant. (Tr. 303, Complainant’s Exhibit 14, Respondent’s Exhibit B)

Wright Received a Reprimand in July 2003

32. In June 2003, Respondent’s Superintendent Zon (“Zon”) informed Complainant that Diversity Management’s investigation had concluded. Wright was given a formal counseling dated July 2003 in response to Complainant’s September 2002 complaint. (Tr. 304-06, Respondent’s Exhibit A)

Wright’s Actions Continued in June and July 2003

33. Wright persisted in his offensive activity during and after Diversity Management’s investigation. (Tr. 307-08) Wright continued his attempts to have other officers bring false charges against Complainant. (Tr. 307, 310) Wright continued to threaten Complainant. Wright continued to verbally harass and humiliate Complainant on a daily basis. (Tr. 307-09)

June 2003 Written Complaint

34. Complainant made additional verbal complaints to Kearney about Wright. (Tr. 310-11) Kearney sent Sergeant Zydell ("Zydell") to investigate. (Tr. 310-11) Since Zydell's investigation did not stop Wright's offending activity, Complainant filed with Kearney a written complaint dated June 18, 2003. (Tr. 312-13, Complainant's Exhibit 9)

35. The June 2003 written complaint confirmed that as early as May 2003, Complainant had verbally informed Kearney of Wright's new harassment tactic. (Complainant's Exhibit 9) Wright was encouraging any inmate to file false grievances against Complainant. (Complainant's Exhibit 9) Kearney did not file Complainant's June 2003 complaint with Diversity Management.

Retaliation in July 2003

36. In July of 2003, Kearney ordered a search of Complainant's locker. (Tr. 66, 315-16, 334) Various "items" were removed from Complainant's locker. (Tr. 69, 316) One officer witnessed that "they took [Complainant's] microwave and refrigerator and threw it out and all her food." (Tr. 70) Kearney did not search the locker of any other officer in Complainant's block. (Tr. 316, 334)

Wright Leaves in July 2003

37. Wright's harassing activity towards Complainant ended in July 2003 when Wright "decided to leave the block." (Tr. 314)

Damages

38. Complainant credibly testified that she was “in fear” of her life. (Tr. 261)

Complainant’s demeanor at public hearing reflected terror, when she recounted that Wright’s actions exposed Complainant to a dangerous situation with inmates. (Tr. 262) Complainant was clearly upset and shaken as she described the effects of Wright’s activity. (Tr. 262) Other correction officers “didn’t speak with her” because she complained about Wright. (Tr. 67) After Complainant complained to Kearney, Complainant was perceived as a “snitch” for complaining about Wright. (Tr. 67, 266-68) Complainant believed she would not receive assistance from fellow officers if an “inmate was assaulting an officer” or an “inmate [was] assaulting another inmate.” (Tr. 267-68)

39. Complainant was stressed to the point where she “couldn’t sleep, couldn’t eat, up all night, nose bleeds...upset physically mentally emotionally.” (Tr. 303) The credible evidence supported that starting in the summer of 2002, due to the interactions with Wright, Complainant came “home from work upset, crying, irritated, started having bloody noses due to stress...” (Tr. 349-51) Complainant was “upset, hurt, stunned” by Wright’s offensive language. (Tr. 245)

40. Barbara Levy Daniels (“Daniels”) is a psychotherapist and licensed clinical social worker. (Tr. 196, Complainant’s Exhibit 11) Complainant received counseling from Daniels on several occasions including February 11, 2003, February 25, 2003, April 8, 2003 and April 29, 2003. (Tr. 205, 303, 352, Complainant’s Exhibit 12)

41. Complainant sought Daniels's assistance because Complainant was "stressed out" due to the "work situation." (Tr. 206) Daniels diagnosed Complainant with an "adjustment disorder with depressive mood" based on the parameters found in the Diagnostic and Statistical Manual III ("DSM") (Tr. 226-30) Daniels concluded that Complainant's mental health condition was a direct result of the "harassment going on at work that made [Complainant's] stress level increase tremendously on a daily basis." (Tr. 208) Daniels noted that Complainant's increased stress level manifested itself in "insomnia, headaches," and concern "about her safety because some of the harassment occurred in front of other inmates." (Tr. 208-09)

42. Daniels determined that that Complainant had no prior history of receiving psychological treatment. (Tr. 207-08) Complainant was a person that typically "doesn't allow stress to get to her." (Tr. 207) The credible testimony supported that Complainant "normally doesn't get stressed about life." (Tr. 349) Individuals that knew Complainant considered her a "strong woman" and "out of character" to see a counselor. (Tr. 353)

OPINION AND DECISION

Respondent discriminated against Complainant by denying her equal terms, conditions and privileges of employment, by subjecting her to a hostile work environment, because she is gay and female. Respondent also retaliated against Complainant for having filed a written complaint of discrimination. The complaint is amended to properly add retaliation as a basis to Complainant's verified complaint. The amendment conforms the pleadings to the proof. 9 N.Y.C.R.R. §465.12(f)(14).

Hostile Working Environment

Under the Human Rights Law §296.1(a), it is an unlawful discriminatory practice for an employer "because of the ... sexual orientation ...sex... of any individual to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

One form of unlawful discrimination occurs when an employee is subjected to a hostile work environment because of that person's gender or sexual orientation.

A complainant may establish a hostile 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.

A complainant must subjectively view the conduct that creates a hostile environment as unwelcome. In addition, a reasonable person must objectively view the conduct as severe and pervasive enough to create an abusive environment. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, 716 N.Y.S.2d 533 (1997).

Complainant described offensive conduct that was sufficiently severe and pervasive to sustain her claim of harassment because of her sexual orientation and gender. Complainant is a gay female. The credible evidence established numerous incidents of verbal harassment and threats to Complainant's physical safety.

Wright subjected Complainant to a daily, relentless regimen of humiliating insults directed at Complainant's sexual orientation and gender. Complainant endured these insults from July of 2002 until July of 2003.

Complainant's co-workers also placed Complainant's life in danger. Wright frequently humiliated Complainant in front of inmates. Wright also succeeded in isolating Complainant

from her fellow male corrections officers. Wright convinced other corrections officers not to speak or cooperate with Complainant. Wright delighted in making sure that inmates knew that Complainant was gay. In one egregious instance, Wright accused Complainant of engaging in drug use in front of at least twenty inmates. Any objective observer appreciates the extremely serious and dangerous situation that Complainant found herself given the potential risks associated guarding male inmates in a prison setting.

A respondent cannot escape liability merely by claiming that it had sexual orientation and sexual harassment policies in place. *Polodori v. Societe Generale Groupe*, 39 A.D.3d 404, 835 N.Y.S.2d 80 (1st Dept. 2007) An effective anti-harassment policy gives any respondent adequate notice to correct workplace harassment. The adequacy of Respondent's policies in this matter is not at issue, but rather Respondent's failure to stop the harassment. Respondent's entire behavior in this matter has been nothing short of outrageous.

Officers of various ranks personally heard Wright's statements, viewed the sexually offensive drawings, and viewed the sexually offensive written comments on the employee calendar. In addition, Complainant personally informed Captain Kearney on numerous occasions of Wright's offending activity. Most disturbing was Kearney belief that Wright's conduct did not constitute harassment on the basis of sexual orientation or gender. Kearney made some ineffective attempts at addressing the situation. Other officials, in Kearney's chain of command, such as Deputy Moynihan and Superintendent Zon, also became aware of Wright's harassing behavior and did not stop it.

Complainant filed a formal written complaint of harassment in September 2002. Kearney did not forward any of the verbal or written complaints to Diversity Management, in violation of Respondent's own reporting rules. Respondent's Inspector General, Annarino, found

Complainant's September 2002 written complaint by pure accident and brought the matter to the attention of Respondent's Diversity Management. Incredibly, the Diversity Management office also found that Wright's actions were not sexual harassment but simply found that Wright acted improperly. Respondent merely gave Wright a formal counseling in July 2003 in response to the September 2002 complaint. The counseling did not slow any of Wright's seriously offensive conduct. Wright persisted during and after Diversity Management's investigation.

Complainant made additional verbal complaints in May 2003 and an additional written complaint in June 2003. Wright had engaged in a new harassment tactic of encouraging any inmate to file false grievances against Complainant. Again, Kearney did not forward the additional complaints to Diversity Management, in violation of Respondent's own reporting rules. Wright's seriously offensive conduct did not stop

Retaliation

Respondent retaliated against Complainant after she filed written complaints in September 2002 and June 2003. The Human Rights Law §296.7 states in pertinent part that "it shall be an unlawful discriminatory practice...for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he...has opposed any practices forbidden under this article or because he...has filed a complaint, testified or assisted in any proceeding under this article."

In order to establish a prima facie case of retaliation, Complainant must show that she engaged in protected activity, that Respondent was aware that she had engaged in the protected activity, that Complainant suffered an adverse employment action, and that there is a casual connection between Complainant's engagement in the protected activity and her adverse

treatment by Respondent. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3rd Dept. 1999).

Complainant established a prima facie of retaliation.

Complainant engaged in protected activity. Complainant filed written complaints in September 2002 and June 2003.

Complainant suffered adverse employment actions when she engaged in the protected activity.

Respondent ignored Complainant's written complaints about Wright. Instead, within a few days of Complainant's September 2002 written complaint, Respondent chose to launch a full investigation against Complainant based on Wright's false allegations he coordinated with various corrections officers and an inmate. Kearney specifically testified that Wright's actions of soliciting negative statements from officers and inmates against Complainant were "wrong." Yet, Kearney deliberately chose not to pursue Complainant's written complaints against Wright.

In addition, after Complainant filed her June 2003 complaint about Wright, Kearney specifically targeted Complainant's locker for a search and discarded several of Complainant's belongings. Kearney did not similarly search the locker of other officers in Complainant's work area.

This case reflects the most disturbing nightmare that any employee could find herself. Complainant followed all of Respondent's rules and respect for chain of command. Complainant gave Respondent's process the benefit of the doubt. Respondent did not reciprocate with any sense of responsibility. Respondent willfully permitted a work environment to flourish where the credible evidence showed the Complainant could have been killed because she is a gay female. The very best Respondent had to offer was a wholly ineffective investigation by its

Diversity Management unit that concluded Wright's conduct was not sexual harassment.

Diversity Management's internal investigation resulted in a meaningless formal counseling that did not stop Wright's threatening behavior.

The harassment stopped only when Wright decided to leave Complainant's work place in July of 2003. Tragically, Respondent's management, Respondent's harassment policies, and Respondent's procedures, failed Complainant. Throughout Respondent's entire process, Respondent's management took the willful and deliberate position to ignore the obvious harassment. Instead, Respondent twice retaliated when Complainant placed her plea for help in writing.

Damages

The Human Rights Law attempts to restore a complainant to a situation comparable to the one she would have occupied, had no unlawful discrimination occurred. Complainant is entitled to compensatory damages for emotional distress and humiliation.

Over a period of a year, Complainant was subjected to a relentless, daily regimen of both mental and physical threats. Wright called Complainant "cunt," "fucking dike," "lesbian," "dike bitch." Wright's name calling was "relentless" and "did not stop." Complainant was "upset, hurt, stunned" by Wright's offensive language.

Complainant also feared for her life. Wright had successfully isolated Complainant from other corrections officers and humiliated Complainant in front of inmates. Complainant credibly testified that she would not receive assistance from fellow corrections officers if she found herself alone confronting inmates. Wright often told Complainant, "bitch, I'm running this block and I can do what I want to" and "you are not going to be here much longer." Complainant's fear was physically manifested by her inability to sleep, eat, frequent nose bleeds, and required

Complainant to seek the services of a counselor. Complainant was diagnosed with adjustment disorder with depressive mood as a result of the harassment at work

Complainant was a successful 20 year corrections officer with Respondent with no history of any mental health concern. Complainant was considered a very strong woman by those who knew her. This lends credibly to the position that Complainant's reaction to the situation at work was not exaggerated, feigned, or a result of some other scenario outside of work.

Wright humiliated and abused Complainant until he left Complainant's cell block in July 2003.

This case shocks the conscience. Complainant's life was placed in grave danger solely because of her sexual orientation and gender. No monetary value can be placed on the humiliation and mental torture that Complainant endured at the hands of Wright, which was allowed to go unfettered by Respondent. However, New York courts have given guidance in response to this kind of extreme harassment. Given the severity of Respondent's conduct, the daily threats to Complainant's physical safety during the period of a year, the degree and length of time Complainant endured the suffering, and the fact that these feelings continue to manifest themselves today, an award of \$850,000 for emotional distress is appropriate. This award is reasonably related to Respondent's discriminatory conduct and will effectuate the purposes of the Human Rights Law of making Complainant whole. *N.Y.C. Transit Auth. v. N.Y. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 577 N.E.2d 40, 573 N.Y.S.2d 49 (1991) (*Commissioner's award confirmed; Nash awarded \$450,000 for mental anguish. Nash was a victim of shocking abuse because of her gender.*) *Kondracke v. Blue*, 277 A.D.2d 953, 716 N.Y.S.2d 533 (4th Dept. 2000) (*Commissioner's award unanimously confirmed; Kondracke awarded \$400,000 for mental anguish and Burgos awarded \$350,000 for mental anguish. Complainants were subjected to a*

hostile work environment with numerous and continuous incidents of harassment and discrimination throughout their employment.) Hempstead v. N.Y. State Div. of Human Rights (Lyons), 233 A.D.2d 451, 649 N.Y.S.2d 942 (2nd Dept. 1996), lv. denied 89 N.Y.2d 1029, 680 N.E.2d 617, 658 N.Y.S.2d 243 (1997) (Commissioner's award confirmed; Lyons awarded \$500,000 for mental anguish. Lyons was a victim of pervasive and relentless sexual harassment.)

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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment because of sexual orientation and gender; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$850,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.
2. Payment shall be made by Respondent in the form of a certified check, made payable to the order of Alicia S. Humig and delivered by certified mail, return receipt requested, to Caroline

Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

3. Within sixty days of the Final Order, Respondent shall establish policies regarding the prevention of unlawful discrimination because of sexual orientation and gender. These policies shall include the formalization of a reporting mechanism for employees in the event of discriminatory behavior or treatment. The policies shall also contain the development and implementation of a training program in the prevention of unlawful discrimination in accordance with the Human Rights Law. Training shall be provided to all employees. A copy of the policy shall be provided to Caroline Downey, General Counsel of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: September 12, 2007
Buffalo, New York

	
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Martin Erazo, Jr.
Administrative Law Judge