

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**WANDA JOHNSON,**

Complainant,

v.

**CORNELL UNIVERSITY AND DAVID SHAW,  
AIDER & ABETTOR,**

Respondent.

**NOTICE OF FINAL  
ORDER AFTER HEARING**

Case No. 6871069

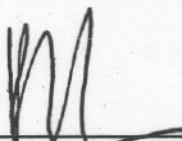
**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on January 24, 2007, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights ("Division").

**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 25th day of April, 2007.

  
\_\_\_\_\_  
KUMIKI GIBSON  
COMMISSIONER

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STATE OF NEW YORK  
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS  
on the Complaint of

WANDA JOHNSON,

Complainant,

-against-

CORNELL UNIVERSITY AND DAVID SHAW,  
AIDER & ABETTOR,

Respondent.

RECOMMENDED FINDING  
OF FACTS, DECISION AND  
OPINION, AND ORDER

Case No.  
6871069

PROCEEDINGS IN THE CASE

On September 11, 1995, Complainant filed a verified complaint with the State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of the Human Rights Law of the State of New York.

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 Thomas S. Protano, an Administrative Law Judge of the Division. Public hearing sessions were held on May 17, 2004, May 18, 2004, May 19, 2004 and July 19, 2005.

Complainant and Respondent appeared at the hearing. Complainant was represented by James N. McCauley, Esq. Respondent was represented by Wendy E. Tarlow, Esq., University Counsel. The aider and abettor, Mr. Shaw was never served with a complaint or a determination or a notice of hearing. There is no evidence that he received notice of a claim against him. The Division never obtained jurisdiction over him.

Permission to file post-hearing briefs was granted. Counsel for both parties filed timely briefs.

### FINDINGS OF FACT

Respondent is a university in Ithaca, New York. Complainant has been a food service worker for Respondent since 1987. David Shaw was a co-worker of Complainant's beginning in 1988. (Tr. 74-75) Together, they worked at Robert Purcell Union Dining Services, on Respondent's campus, from 1988 until 1995, when Mr. Shaw's employment was terminated by Respondent after Complainant complained that he had sexually harassed her. (Tr. 260, 268)

Mr. Shaw has been described by various parties as "slow" and "retarded." (Tr. 50, 288, 341) He had serious problems getting along with co-workers, primarily because of his temper. He sometimes cursed and called other people names. He was often missing from his work station and he often threw objects, such as dishes and trays, while working. He was reprimanded and written up numerous times for his transgressions. (Complainant's Exhibit 10; Tr. 32, 38, 51, 70, 471, 485)

Complainant alleges that Mr. Shaw sexually harassed her repeatedly and continuously from 1991 until 1995. She also alleges disparate treatment based upon sex. (ALJ Exhibit II; Tr. 74-264) Respondent denies the claim of discrimination and asserts that Complainant failed to make complaints of harassment and, on the few occasions when she did complain of harassment, in 1991 and again in 1995, Respondent took reasonable actions to end the harassment. Respondent has a written sexual harassment policy which it distributes to its employees and periodically conducts mandatory sexual harassment training for all of its employees, including Complainant. The policy provides employees with avenues to complain if anyone feels he or she is being harassed. (Respondent's Exhibits A, B; Tr. 147-150, 201-202, 593)

In 1991, Complainant received an evaluation that indicated she met or exceeded her

position requirements, "with some improvements needed". (Respondent's Exhibit A) In her handwritten comments on the evaluation, Complainant said that she "had a lot of personal problems" and that "all of my problems are at work—through sexual harassment." It was the first time she mentioned any problems with sexual harassment. (Respondent's Exhibit A; Tr. 415)

Roger Morehouse was Complainant's supervisor at the time. He felt that Complainant's work performance had been very good from 1987 through 1989, but he noticed a change in her attitude beginning in 1990. As a result, he downgraded her evaluation in 1991 from "meets or exceeds expectations" to a lower rating. Mr. Morehouse said that Complainant's performance was "between below acceptable and...meets or exceeds. She was...in between." (Tr. 412-414) Complainant did not immediately comment on the evaluation. Instead, she signed the evaluation when it was presented to her and left. Later, she came back to Mr. Morehouse and indicated that she disagreed with the evaluation and asked him if she could write her comments. Mr. Morehouse allowed her to comment and Complainant made her allegations of sexual harassment. Mr. Morehouse had never heard any complaint of sexual harassment prior to this, and wrote on the bottom of the evaluation that "this is the first time that the sexual harassment has been brought to my attention." (Complainant's Exhibit A; Tr. 415)

Complainant told Mr. Morehouse that Mr. Shaw had been grabbing her and trying to kiss her. In response, Mr. Morehouse alerted his supervisor, Barbara Romano, and warned Mr. Shaw against any further harassment. Mr. Shaw denied the allegations. Mr. Morehouse then told Complainant to let him know if any further harassment occurred. Mr. Morehouse never heard another complaint of harassment from Complainant. (Tr. 416-417) Complainant received annual evaluations from 1992 through 1995, but she did not make any notations about sexual

harassment on those evaluations, even though she claims Mr. Shaw's harassment was ongoing.  
(Complainant's Exhibits F, G, H; Respondent's Exhibit 11)

Complainant never complained about Mr. Shaw again until 1995. By then, her supervisor was Patrick Gonta. In February of 1995, Mr. Gonta disciplined Complainant by issuing her a counseling notice. Mr. Gonta faulted Complainant's work pace and productivity and stated she showed "very little enthusiasm in her work." (Complainant's Exhibit 5) After that, Complainant once again complained about being harassed by Mr. Shaw. She spoke first to Harry Evans, her union representative, Ann Walton, her shop steward and live-in companion, and then to Mr. Gonta. (Tr. 104) Complainant alleges that by this time, Mr. Shaw's behavior had become worse. Complainant claims that Mr. Shaw routinely commented on the size of her breasts and told her he wanted to have sex with her. She also said he grabbed her and pinned her against a wall and had twice grabbed her hand and forced her to touch his penis. (Tr. 103, 120, 227) Complainant said that Mr. Evans advised her to keep a log, but she did not recall if he advised her to do anything else. (Tr. 227-228)

Neither Mr. Evans nor Ms. Walton remembered the specifics of the allegations that were made by Complainant in February of 1995. Ms. Walton recalls that Mr. Shaw was "bothering" Complainant and "putting his hands on her." (Tr. 373) Mr. Evans said that he recalled that there "were beginning to be touchy, feely type of things" and stated that he told Complainant to go to management with her complaints. He described the touching as "touching her breasts, grabbing her about the back, around the shoulder, trying to kiss her, that type of stuff." (Tr. 274, 316) He did not recall any allegation that Mr. Shaw had put Complainant's hand on his penis. (Tr. 316) Mr. Evans further said that if he had heard such an allegation he would have "immediately" gone to Respondent's Office of Equal Opportunity (OEO). (Tr. 317) Mr. Evans had been aware of

OEO as a resource for sexual harassment complaints since 1981. (Tr. 299)

Mr. Gonta stated that the complaints were about the behavior of Mr. Shaw, but were not related to sexual harassment. A meeting was held on March 1, 1995 between Complainant, Mr. Gonta and Ms. Walton. Ms. Walton and Complainant assert that they made allegations of sexual harassment at this meeting, but Mr. Gonta denied that such a complaint was made. Ms. Walton's notes from the meeting do not mention sexual harassment. Instead, it says that Mr. Shaw was "following [Complainant] in the morning when she's trying to get beverage set up."

(Complainants' Exhibit 7)

On March 15, 1995, another meeting was held. This time, Complainant, Mr. Gonta, Mr. Evans, Union Steward Lisa Gentile (now known as Lisa Dean) and Roxanne McHugh, general manager at Robert Purcell Union, were present. (Respondent's Exhibits R & X; Tr. 116) At this meeting, Complainant alleged that she told Ms. McHugh that she was being sexually harassed by Mr. Shaw. (Tr. 236) Ms. McHugh denied hearing any allegations of sexual harassment. Although she admitted that there were complaints that Mr. Shaw had been touching Complainant, she said there were no allegations that the touching was sexual in nature. (Tr. 669-671) Ms. McHugh had received training in responding to sexual harassment allegations and stated that if Complainant had made such an allegation she would have taken the matter to Human Resources and ensured that the allegations were investigated. (Tr. 671-672) Ms. Gentile also stated that no allegations of sexual harassment were made at this meeting. She, too, stated she would have gone to Human Resources if she had heard any such allegations. (Respondent's Exhibit X) And Complainant's own notes on the meeting make no mention of a sexual harassment complaint. (Respondent's Exhibit Q)

On April 20, 1995, Complainant met with Ms. McHugh once again. This time, they

discussed a grievance filed by Complainant demanding a written apology from Mr. Gonta because he had raised his voice when she tried to pick up her pay check. Complainant alleges that other male employees had picked up their checks but Mr. Gonta refused to give her check to her, loudly telling her to get back to work. This issue was resolved to the satisfaction of Complainant and her union representative. (Respondent's Exhibit S; Tr. 140, 677) No mention of sexual harassment was made at this meeting. Complainant stated generally that she felt Mr. Gonta treated male employees better than he treated female employees. (Tr. 137-138)

In August of 1995, Complainant made another allegation about Mr. Shaw. This time, Mr. Shaw grabbed her collar and tried to look down her shirt. (Tr. 127) Complainant immediately called Mr. Evans, who arranged a meeting with Mary DeSusso, of OEO (Tr. 128, 283) After Complainant told the story to Ms. DeSusso, Mr. Shaw was suspended and another meeting was arranged with Bryn Kehrli of Human Resources. At this meeting, Mr. Evans made it clear to Mr. Kehrli that the union did not condone Mr. Shaw's behavior and indicated that Mr. Shaw should be fired. (Tr. 283-284) On an internal complaint filed with OEO dated August 2, 1995, Complainant also requested Mr. Shaw's termination. (Respondent's Exhibit T)

Mr. Kehrli then met with Mr. Evans and Mr. Shaw the following week. At this meeting, Mr. Kehrli explained the complaint to Mr. Shaw and asked him if he understood the accusations. Mr. Shaw said he understood and admitted that he had committed the acts. (Tr. 288) Mr. Kehrli then consulted with his supervisor and, thereafter, decided to terminate Mr. Shaw's employment. Mr. Shaw never returned to work for Respondent after he was suspended in early August of 1995. (Tr. 610-612) His record prior to this incident shows no propensity towards, or incidents of, sexual harassment. (Complainant's Exhibit 10)

Based upon the evidence presented, I cannot find Complainant's claims that she was

sexually harassed prior to August of 1995 credible. The discrepancies in the record refute any notion that Complainant was subjected to an ongoing and continuous pattern of harassment as she insists. Because of that, I do not credit any of her claims other than her allegation that Mr. Shaw pulled down her shirt in August of 1995.

Complainant asserts that she made numerous complaints to her direct supervisors about harassment between 1991 and 1995. However, Mr. Morehouse and Mr. Gonta both stated that they did not receive those complaints, other than the 1991 Complaint made after receiving a less than satisfactory evaluation. Interestingly, Mr. Shaw, whose mental capacity was apparently limited, denied those allegations, but he readily admitted the August 1995 allegations. (Tr. 288, 416)

If, as Complainant asserts, her complaints really went unaddressed, she offers no explanation for failing to complain to Human Resources or to OEO or to Ms. McHugh, despite the fact that she knew the complaint process and received sexual harassment training and despite the fact that Mr. Evans claimed he told her to go to management. (Tr. 274) In fact, Complainant claimed she did not remember anything about the sexual harassment training she received in January of 1994, other than the fact that Respondent's employees considered the training to be "a big joke." (Respondent's Exhibit P; Tr. 201-202) Complainant retained nothing from her sexual harassment training, other than her perception that the training was considered "a big joke," even though she claims that she was, at that time, a victim of an ongoing and continuous pattern of sexual harassment.

Complainant, along with Mr. Evans and Ms. Walton, also claimed that they complained about sexual harassment on March 1, 1995 and again on March 15, 1995. Mr. Gonta, who was at the March 1 meeting, and Ms. McHugh, who was at the March 15 meeting, both said no one

mentioned sexual harassment at these meetings. The notes of these meetings, written by Ms. Walton (March 1) and Complainant (March 15) make no mention of sexual harassment. And Ms. Gentile, Complainant's union steward, also denied that Complainant made any allegations of sexual harassment. Ms. Walton, who was Complainant's witness, vaguely testified that Mr. Gonta was told that Mr. Shaw was "following [Complainant] around" on March 1, but offered no specifics about what exactly was discussed, beyond what she wrote in her notes. (Tr. 378)

Mr. Evans' testimony was not credible either. He first said that Mr. Shaw had touched Complainant's breast and that the harassment "had been going on for a while," but he said he did not know at the time that it had been going on for four years. (Tr. 316, 318) He stated that if he had known Complainant had repeatedly complained to her supervisors, he "would have been on the phone with [Bryn Kehrli] and OEO and said, hey, this is wrong, you haven't done your job..." (Tr. 329) Yet Complainant had claimed that Mr. Shaw's harassment had become so relentless by February of 1995, she felt compelled to call Harry Evans after repeatedly complaining to her supervisors hadn't stopped the harassment. (Tr. 103) And, as noted above, there is some disagreement between Mr. Evans and Complainant about whether Mr. Shaw had placed Complainant's hand on his penis. Finally, Mr. Evans said that when Mr. Shaw grabbed Complainant's shirt in August of 1995, he immediately went to OEO. Yet, when he heard Mr. Shaw had repeatedly tried to grab her and touch her breasts in February and March, he "didn't think it was serious enough" to go to OEO "out of respect for the department." (Tr. 322) Regarding the August 1995 incident, Mr. Evans said that "any time a man is putting his hand inside a person's blouse to touch her breasts...it's a lot different than somebody who might come up to somebody and just touch somebody." (Tr. 325) So, even Mr. Evans' testimony (*i.e.*, that Mr. Shaw was "just touch[ing]" Complainant) suggests that there was no sexual harassment until

August of 1995.

Complainant was well versed in Respondent's complaint processes. She filed grievances at least three times between 1991 and 1995 but never filed a complaint of sexual harassment. (Respondent's Exhibits I, J & K) On March 17, 1995, Complainant filed a grievance that was the subject of the April 20, 1995 meeting discussed above. The paycheck incident had been discussed two days before, but, apparently, was not resolved to Complainant's satisfaction. (Respondent's Exhibits R & S) After her supervisor raised his voice to her, Complainant thought it was serious enough to file a grievance, but Complainant filed no charges of sexual harassment while, she claims, she was being harassed repeatedly and her immediate supervisor did nothing to stop it. And, on April 20 1995, she never mentioned that Mr. Shaw was still harassing her. In fact, the only time Complainant made any complaints about Mr. Shaw, including her complaint in August of 1995, was immediately after her performance was criticized by her supervisors.

#### OPINION AND DECISION

Complainant claims that respondent unlawfully discriminated against her in employment by failing to address her claims of sexual harassment and by treating her differently than similarly situated male employees, in violation of the Human Rights Law. It is my decision that Respondent did not discriminate against Complainant in violation of the Human Rights Law. I find that Complainant did not meet her prima facie burden in either case for the reasons that follow.

In order to prevail on a charge of sex discrimination by reason of sexual harassment creating a hostile work environment, Complainant bears the burden of first establishing a prima facie case of sexual harassment. To do so, she must establish that (1) she belongs to a protected

group, (2) she was the subject of unwelcome sexual harassment, (3) the harassment was based on her gender, (4) the sexual harassment affected a term, condition or privilege of employment and (5) the employer knew or should have known of the harassment and failed to take remedial action. Pace v. Ogden Services Corporation et al., 257 A.D.2d 101, 103, 692 N.Y.S. 220, 223 (3<sup>rd</sup> Dept., 1999).

Complainant fails in the instant case because she has not made a credible case that Mr. Shaw harassed her on an ongoing basis as she asserts. Although she does belong to a protected group, the other prongs of the test set forth in Pace present a problem that is fatal to her case. She has failed to establish that she was harassed on an ongoing and continuous basis because her actions, when taken in light of the conflicting and inconsistent testimony, do not present a credible case

She asserted that she continuously complained about her circumstances to her immediate supervisors, but her immediate supervisors deny her claims. She said that on March 1, 1995 and on March 15, 1995, she complained about sexual harassment, but Mr. Gonta, Ms. Gentile and Ms. McHugh all deny those allegations. And the two people who support her, Mr. Evans, the union representative, and her live-in companion, Ms. Walton, were either vague or contradictory when they testified at hearing. The fact that they failed to take action prior to August of 1995, suggests that they did not think Complainant was being sexually harassed prior to that incident either. And if they did believe that Complainant had been sexually harassed, they failed to take proper action when they did not put Respondent on notice. Thus, the allegations cannot be considered credible. And, Complainant's own conduct, including her failure to go to OEO or to Human Resources or even to Ms. McHugh, despite the fact that she received sexual harassment training and knew how to respond to harassment, undermines her case.

In the final analysis, Complainant made complaints whenever she herself was the subject of disciplinary warnings or counselings. In 1991, she received a less than satisfactory evaluation and complained about sexual harassment. In 1992, she filed a grievance after being cited for a cash draw discrepancy. (Respondents' Exhibit I; Tr. 174) In February of 1995, Complainant was disciplined and, right after that, complained again about Mr. Shaw and also made a complaint about Mr. Gonta. Even her August 1995 complaint came shortly after she was counseled for failing to "respond appropriately to...[her] job duties," on July 26, 1995 and for not punching in and out during her break time on July 5, 6, 7 & 8, 1995. (See, Respondent's Exhibit M & O) It seems as though Complainant was using the Respondent's complaint processes, with which she was fully familiar, to respond to performance issues raised by her superiors.

With respect to her disparate treatment claim, the Complainant must first make out a prima facie case by showing that she is a member of a protected class, she was capable of performing the duties of the job in a reasonable manner and Respondent took some adverse employment action under circumstances that could lead one to infer that she had been discriminated against. Pace College v. Commission on Human Rights of the City of New York, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 93 S.Ct. 1817 (1973).

Complainant cannot make a prima facie case, because she did not suffer an "adverse employment action" when Mr. Gonta raised his voice to her. An adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be more than a mere inconvenience. Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, 306, 786 N.Y.S.2d 382 (2004).

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Complainant did not suffer a demotion or a reduction in pay or any type of loss in benefits or privileges. She was yelled at by her supervisor, who, she alleges, liked male employees better than female employees. She doesn't allege to have suffered an adverse employment action as the courts have defined it. Messinger v. Girl Scouts of the U.S.A., 16 A.D. 3d 314, 315, 44 N.Y.S. 849 (1<sup>st</sup> Dept., 2005).

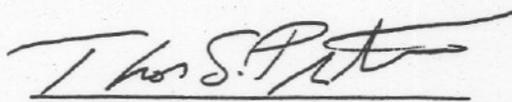
Mr. Shaw has no liability as an aider-and-abettor under the Human Rights Law. Executive Law section 296(6) makes it an unlawful discriminatory practice "for any person to aid, abet incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." Under this theory, liability against the employer is a requisite for finding liability of an aider-and-abettor. When a case of discrimination against an employer is dismissed, the corresponding case against the aider-and-abettor must also be dismissed. Yerrv v. Pizza Hut of Southeast Kansas, 186 F.Supp.2d 178 (N.D.N.Y., 2002); Wynn v. National Broadcasting Co., Inc., et al., 251 A.D.2d 469, 471-472, 674 N.Y.S.2d 415, 417 (2d Dept., 1998).

ORDER

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

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

DATED: January 24, 2007  
Bronx, New York

  
THOMAS S. PROTANO  
Administrative Law Judge