ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **SUSAN O. MILLIMAN,** Complainant, v. **UNITED PARCEL SERVICE, INC.,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10129162

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 June 7, 2011, by Thomas J. Marlow, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: SEP 2 2011
Bronx, New York

First Deputy Commissioner

for

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **SUSAN O. MILLIMAN,** Complainant, v. **UNITED PARCEL SERVICE, INC.,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10129162**

SUMMARY

Complainant alleged that Respondent discriminated against her because of her sex and because she opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 28, 2008, 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 unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 22, October 29, November 17, November 18, December 6, and December 9, 2010, and January 31 and February 1, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by Kevin A. Luibrand, Esq., of the Luibrand Law Firm, PLLC. Respondent was represented by Wendy Johnson Lario, Esq., and Rachel A. Gonzalez, Esq., of Day Pitney LLP.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing. In Complainant's proposed findings of fact and conclusions of law, Complainant moved for an adverse inference for the failure of Respondent to produce notes allegedly taken by Carl Pratt ("Pratt"), Respondent's District Labor Relations Manager in December of 2007 and January of 2008. (ALJ's Exhibit 15) In Respondent's proposed findings of fact and conclusions of law, Respondent opposed this motion. (ALJ's Exhibit 16)

FINDINGS OF FACT

1. In March of 2004, Complainant began her employment with Respondent as a part-time revenue recovery auditor ("RA") at Respondent's facility located in Latham, New York, which was known as the Albany facility. Complainant was scheduled to work three and a half hours per day, Monday through Friday, on the twilight shift, usually from approximately 5:30 pm to approximately 9:00 pm. As an RA for Respondent, Complainant was a member of the International Brotherhood of Teamsters, Local 294 ("the union"). (ALJ's Exhibit 1; Respondent's Exhibits 4, 6; Tr. 31-33, 37-38, 106-09, 125-28, 226-27, 237-38, 380, 705, 939,

968-69, 991-96, 1555, 1563-64, 1571, 1808-09, 1811, 1822, 1971-72, 2039-40, 2044, 2049, 2181, 2191-92, 2207, 2386-89, 2580-82)

2. Complainant's starting salary was $8.00 per hour. Complainant took the job because she wanted the benefits that Respondent provided its part-time employees, which included health insurance and a retirement plan. (Tr. 38, 54, 71-72, 135-36, 274-75, 645-46)

3. As an RA, Complainant worked in the area called the primary, where large tractor trailers were backed up to 18 different doors to deliver packages that would be unloaded, usually placed on conveyer belts, and audited for proper charges. Packages then continued on the conveyer belts, were sorted by destination, and loaded on trucks for final delivery. (Tr. 32, 36-43, 380-81, 386-87, 913, 917-18, 955-58, 1590-91, 1594, 2090, 2137-38, 2588-89, 2600-02)

4. As an RA, Complainant had the responsibility of observing packages to determine if additional charges should be imposed on a customer. In the primary, these observations were usually made when the packages were placed on a conveyer belt at the back of or in one of the tractor trailers. The packages were placed on the conveyer belt by an employee of Respondent ("unloader") who had the responsibility of unloading the packages. (Tr. 36-43, 47-48, 81-82, 92-93, 386-87, 913, 916-17, 956-59, 100-01, 113-14, 2139, 2146, 2158, 2622, 2754)

5. Respondent expected an RA working on the primary during the twilight shift to scan 70 packages per shift that required additional charges. Respondent provided no bonus or extra benefits to an RA who scanned more than 70 packages per shift. (Tr. 69-70, 916-17, 923)

6. The facility's main function was to move packages. Everything else was secondary. The tractor trailers had to be unloaded in a timely fashion since the incoming tractor trailers and the outgoing trucks were all on a schedule. It was common that, to the supervisors of the unloaders, RAs were viewed as a "nuisance," because they weren't "helping to unload trucks."

RAs were "in the way." Friction was common between the RAs, the unloaders, and the supervisors of the unloaders. RAs didn't "get a lot of respect." If you were in the truck and you weren't unloading, you were "slowing the process down." (Respondent's Exhibit 51; Tr. 379, 917-19, 930-31, 1590-91, 1594, 2137-38, 2155-57, 2175-76, 2586-88)

7. The time period between November 1 and January 1 is considered peak season for Respondent, the busiest time of the year. During peak season, the stress felt by the unloaders and their supervisors to move the packages was intense. (Tr. 379, 1594, 2040, 2050) On November 14, 2007, Complainant returned to work after having been on disability leave for nearly six months. (Respondent's Exhibit 3, 76; Tr. 75, 309-10) On November 29, 2007, Jeff Pisani ("Pisani") was a full time supervisor of the unloaders on the twilight shift. Pisani was one of Respondent's "most productive, aggressive, get-the-most-out-of-their-employees" supervisors working the primary. Pisani's management style was "very intense;" at times, he yelled and used inappropriate language. (Respondent's Exhibit 55; Tr. 1593, 2141, 2221-23)

8. On November 29, 2007, after the twilight shift had begun and the conveyer belts were moving, Pisani spoke, via walkie-talkie, with Keron Williams ("Williams"), a part-time supervisor of the unloaders, and instructed him to determine why packages were not moving out of a particular tractor trailer onto the conveyer belt. Williams went to the tractor trailer and observed the unloader with Complainant next to him and further observed that the unloader wasn't doing his work of unloading packages. As soon as Williams spoke to the unloader, the unloader started doing his work. A short while later, Pisani, again, via walkie-talkie, brought to the attention of Williams that packages were not moving out of the same tractor trailer. Williams then made the same observation. Pisani instructed Williams to inform Complainant that she was to leave the tractor trailer. Williams went to the tractor trailer, told the unloader to get back to

work, and told Complainant to leave the truck because Pisani felt that she was slowing the work of the unloader by talking to him. Complainant felt humiliated by being asked to leave the tractor trailer. (Respondent's Exhibit 54; Tr. 80-81, 1588-90, 2128, 2143-2153, 2157)

9. Complainant had a traumatic, abusive childhood, living with an alcoholic mother who told Complainant she was nothing. Complainant's mother never showed approval of Complainant and preferred that Complainant not talk to her. According to Lee Nagel ("Nagel"), a clinical psychologist who saw Complainant as a patient, Complainant put the memories of her traumatic childhood with the anger she carried toward her mother in a "box somewhere inside of her where she didn't think about it, didn't deal with it" and "sealed that box shut." As of December of 2007, Complainant had never told anyone about her childhood trauma but, according to Nagel, Complainant had a "vulnerability in her" where "certain kinds of experiences, such as being, shamed" "would have kind of opened that box." (Tr. 252, 343, 355, 361-62, 1165, 1633-34, 1655-56, 1690)

10. When Complainant was asked to leave the tractor trailer, however, it was not a form of discipline. It was not uncommon for a supervisor of the unloaders to remove an RA, male or female, from a tractor trailer if it was perceived that the RA was slowing the process of unloading packages. When Complainant left the tractor trailer, she moved to another tractor trailer to continue her work. This, however, was the first time Complainant had been removed from a tractor trailer and she was offended by the act. (Respondent's Exhibit 51; Tr. 93-94, 98-100, 916, 935-36, 2154, 2158, 2162-63, 2177, 2586-87) On the same day, Complainant reported to her supervisor, Michael Johnson ("Johnson"), who was a part-time supervisor of the RAs, that she was "kicked off a truck" for talking. Johnson responded by telling Complainant that she should avoid doing anything to hinder the work of the unloader because the supervisors

of the unloaders would remove her if they thought she was hindering the unloader's work. (Respondent's Exhibit 51; Tr. 47, 53, 125-26, 331-33, 405, 2592-93, 2597, 2605)

11. On November 30, 2007, Complainant informed Johnson that she was very upset by the way Pisani spoke to her that day and that she would be filing a grievance against Pisani with the union. Complainant informed Johnson that she felt that the female auditors were being targeted by Pisani because they were the only employees removed from the trucks. Complainant left early from work that day. When Complainant arrived home early, her husband asked her why she was home early. When Complainant told her husband that Pissani was attacking only the old women, her husband told Complainant that Pisani was sexually discriminating. (Respondent's Exhibits 3, 51, 54, 76; Tr. 125-26, 2596-97)

12. Over the weekend of December 1 and 2, 2007, Complainant drafted her first grievance ("first grievance"), against Pisani, which was three pages long. In this first grievance Complainant accused Pisani of sexual discrimination and sexual harassment, alleging that only female auditors were not allowed to talk during the twilight shift. Complainant made a point of noting that "I am consistently one of the highest money making revenue auditor (sic) in the building." On December 3, 2007, after Complainant confirmed with Johnson that she was going to file a grievance, Johnson informed his supervisor, John Porter ("Porter"), a full-time supervisor located in Syracuse, that Complainant intended to file a grievance against Pisani for sexual discrimination and sexual harassment. On December 3, 2007, Johnson also talked to Dan Gavitt ("Gavitt"), the full-time supervisor of Pisani, informed him that a grievance was going to be filed against Pisani for sexual discrimination and harassment, and asked Gavitt to contact him if there were any problems with RAs. On December 4, 2007, Complainant gave this first

grievance to Tom Schlutow ("Schlutow"), a shop steward for the union. (Respondent's Exhibit 7; Tr. 129-33)

13. Respondent had a Professional Conduct and Anti-Harassment Policy and procedure in effect that Complainant received and that informed its employees that they could report objectionable conduct to a Human Resources ("HR") representative and that an investigation would ensue. Complainant chose to file a grievance rather than make a report to HR because HR was involved in a four day suspension that Complainant received in 2005 related to an accusation of workplace violence against her for pushing an unloader. Complainant felt she was treated unfairly regarding that accusation and had no confidence that she would be successful going to HR with her complaint. In fact, Complainant felt that Respondent wanted to get rid of her back in 2005 when she received the suspension and that, when Pisani had her removed from the tractor trailer, it was part of Respondent's "MO" to get rid of her. (Respondent's Exhibits 4, 46, 75; Tr. 94-98, 120-21, 279-80, 606, 1835-43, 2511-20, 2534-35, 2542, 2544, 2549-50, 1554-57)

14. Sometime between December 4 and December 10, 2007, James LaRose ("LaRose"), another shop steward for the union, spoke with Complainant regarding her first grievance and began an investigation. After LaRose spoke with Complainant, he spoke with Pisani. Pisani told LaRose that Complainant was interfering with his operation when she was asked to leave the truck. LaRose also spoke with Frank Kearney ("Kearney"), a Business Agent for the union, to discuss the union's position regarding an employee's right to talk at work. (Tr. 973-74, 1564-65, 1613-14)

15. On December 6, 2007, Complainant asked Johnson to sign a statement indicating that Pisani was still working in the primary after Complainant had filed a grievance against him. It

was Complainant's position that Pisani should not be working in the primary after her grievance was filed. Johnson declined to sign the statement but told Complainant that, if she felt uncomfortable working around Pisani, Johnson would relocate Complainant to another area in the building where the likelihood of contact with Pisani was minimal. Complainant could have worked in the metals area where RAs audit metal shipments that travel on the metals conveyer belt through the building. Also, Complainant could have worked in the metro area where RAs audit packages coming off of Respondent's smaller trucks. Further, Complainant could have worked as a rover roaming throughout the building auditing packages in various locations. Often, Respondent moves its RAs around the building. An RA's responsibility in the various areas is the same. Such a move would have no effect on Complainant's salary and no effect on any evaluations of her performance. Complainant, however, wouldn't discuss a move from the primary. (Respondent's Exhibit 51; Tr. 608, 614-15, 2598-2604)

16. When shop stewards are unable to resolve a grievance with management, Kearney intervenes, contacts the Labor Relations Manager, and sets up a meeting to hopefully resolve the grievance. Sometime prior to December 10, 2007, Kearney contacted Pratt, who was located in Syracuse, and requested a meeting. (Tr. 970-74)

17. On December 7, 2007, Complainant gave her second grievance to Schlutow. The second grievance was also signed by Maria Mochrie ("Mochrie") and Angela Anderson ("Anderson"), the other part-time RAs on the twilight shift. The second grievance alleged that Pisani was discriminating against them and was harassing them on a daily basis. The second grievance requested that the "company decease (sic) and desist immediately." (Complainant's Exhibit 2; Tr. 136-39, 2582-84)

18. On December 10, 2007, Pratt came to the Albany facility and met with Kearney and Complainant. At the meeting, Pratt listened to Complainant's complaints about Pisani and gave assurances that the complaints would be addressed with Pisani. When the meeting ended, Complainant and Kearney were under the impression that Pratt said that Pisani would be removed from the primary. (Tr. 976-78, 980-81, 985-86) Also on December 10, 2007, Porter sent an e-mail message to Johnson and Dawn Mazucca ("Mazucca"), a part-time supervisor of RAs in the Albany facility who usually worked the night shift but who sometimes worked the twilight shift, informing them that an investigation was underway regarding Complainant's harassment allegations and asking them to send statements to him setting forth anything they knew which would be helpful in such an investigation. (Respondent's Exhibit 50; Tr. 2590-95)

19. On or about December 10, 2007, Lola Delans ("Delans"), an Employee Relations Manager for Respondent who was located in Syracuse, was informed by her supervisor, Rudy Louhisdon ("Louhisdon"), a Human Relations Manager for Respondent who was also located in Syracuse, that she had to go, as soon as possible, to the Albany facility and interview Complainant. (Tr. 1829-30, 2036-37, 2040-41, 2051)

20. On December 12, 2007, Porter came to the Albany facility and met with Complainant. Complainant told Porter that she felt uncomfortable working in the same area as Pisani and that she understood from Pratt that Pisani would be removed from the area. Porter, as did Johnson on December 6, offered to relocate Complainant to another area of the facility but Complainant did not want to relocate. Complainant told Porter that she wanted to be "compensated" for "3½ years of harassment" and demanded a "full benefit package" that "continues through her life." Complainant also told Porter that she was going to follow through with a class action lawsuit. Complainant was visibly upset during her meeting with Porter and was loud and insistent that her

demands be met. Porter offered Complainant the opportunity to go home early on December 12 and Complainant accepted this offer, vowing not to return until Pisani was removed from the primary. Later that day, Porter spoke with Pisani and Gavitt. They informed him that Pisani was not going to be moved to another location during peak season while an investigation was conducted. Thereafter, on the same day, Porter sent an e-mail message to his supervisor, Brian Weber ("Weber"), a Finance Manager for Respondent who was located in Syracuse, informing Weber of the meeting he had with Complainant and forwarding the statements of Johnson and Mazucca that he had received. Weber forwarded Porter's e-mail message with the statements to Delans and Pratt and asked how HR wanted to handle Complainant's allegations. Complainant did not return to work on December 13. Porter spoke with Complainant on December 13 and informed her that Delans would meet with her on December 14. (Complainant's Exhibit 3; Respondent's Exhibits 3, 51, 52, 76; Tr. 156-59, 2609-13, 2631-32, 2655, 2661-66, 2673)

21. On December 14, 2007, Delans came to the Albany facility and met with Complainant. In her conversation with Delans, Complainant said the following: that when she was told to leave the tractor trailer she was humiliated; that she was a valued worker not a slug; that she had experienced abuse from supervisors for 3½ years; that being kicked out of the truck by Pisani was the "straw that broke the camel's back;" that "Pandora's box has been opened;" and, that what was going on was a class action grievance. (Respondent's Exhibit 54; Tr. 2045-46, 2051-59, 2121-23, 2129-30) On December 17, 2007, Complainant returned to work and filed her third grievance, alleging that Pisani was still on the primary, that his harassment continued, and that it was extremely stressful to work "due to his past abusive & intimidating behavior." Mochrie and Anderson also signed this grievance. (Complainant's Exhibit 3; Respondent's Exhibits 3, 76; Tr. 156-59)

22. On December 18, 2007, Delans met separately with eight employees, including employees that Complainant mentioned during her interview. Delans met with Mocherie, Anderson, Pisani, Johnson, Matt Baumeister, who was an RA, Linda Martin, an employee in the area known as small sort, Rob DeCarlo, an RA on the night shift, and Shane Bloom, Complainant's son who worked as an unloader. During Delans' meetings with Mocherie and Anderson, they both withdrew their names from the third grievance from the day before. During Delans' meeting with Pisani, he denied any wrongdoing and said that Complainant was lying. After concluding the interviews of December 18, Delans determined that Complainant's claims of sexual harassment and sexual discrimination by Pisani were unsubstantiated. (Respondent's Exhibits 54; Tr. 276-77, 845-46, 848-49, 851-52, 854, 858, 2059-78) On December 19, 20, and 26, 2007, Complainant filed her fourth, fifth, and sixth grievances, using identical language indicating that she was "grieving Jeff Pisani for still being on the primary despite a class act (sic) grievance against him" and alleging that his presence on the primary "is extremely stressful due to his past and continuous abusive and intimidating behavior." (Complainant's Exhibits 4, 5, 6; Tr. 160-69)

23. On December 27, 2007, at the end of the twilight shift, Complainant went to Mazucca and complained that Pisani had used profanity during the twilight shift. Complainant was angry and loud and demanded that Mazucca do something about Pisani. Complainant said that she wasn't going to tolerate Pisani anymore and that, if Mazucca wasn't going to do anything about it, she was "spineless" and "useless." After trying with no success to calm Complainant, Mazucca told Complainant to go to her shop steward with her complaint. After Complainant left Mazucca's office, Complainant encountered Jerry Boysit ("Boysit"), a supervisor of Pisani who had overheard the exchange between Complainant and Mazucca. Complainant asked Boysit for

his name. Boysit said he wasn't involved in the situation and that if Complainant was finished working she should be "off the clock." Complainant left the area and Mazucca officially ended Complainant's work day by "punching out" Complainant's time card. On December 27, Complainant filled out her seventh and eighth grievances, alleging that Pisani used "excessive fowl (sic) language on the primary" and, again, for Pisani still being on the primary despite a "class act" grievance against him. Complainant was not certain that she filed her eighth grievance. On December 28, 2007, Complainant filed her ninth and tenth grievances, accusing Boysit of threatening her and accusing Mazucca of illegally clocking her out. After Complainant filed her tenth grievance, Kearney contacted Pratt and requested that a meeting be scheduled to try to resolve Complainant's grievances. (ALJ's Exhibit 11; Complainant's Exhibits 7, 8; Respondent's Exhibits 15, 56; Tr. 216-17, 984-85, 2757-67, 2796, 2798, 2805)

24. On January 14, 2008, Complainant again complained to Johnson that she could not work in the primary with Pisani. Johnson again offered Complainant the opportunity to work in another area of the building. Complainant refused this offer and, with the permission of Johnson, left work early. (Respondent's Exhibits 3, 59, 76; Tr. 2655-58)

25. On January 15, 2008, Louhisdon came to the Albany facility to conduct meetings regarding Complainant's allegations. The first meeting included Louhisdon, Jacquelyn Thompson ("Thompson"), an Employee Relations Manager who was located in Buffalo, and the management team for the primary at the Albany facility which included Pisani and Norm Wynne ("Wynne"), the Division Manager who was located in Syracuse and who had ultimate responsibility for the primary at the Albany facility. All of the participants reviewed the Professional Conduct and Anti-Harassment Policy. Louhisdon made it clear that the policy would be enforced and that all participants were on notice that no inappropriate language would

be tolerated anywhere in the facility. The second meeting directly concerned Complainant and her allegations. This meeting included Louhisdon, Thompson, Wynne, Pratt, Kearney, LaRose, and Complainant. Complainant voiced her concerns during this meeting. When Complainant was asked how her allegations could be resolved, she presented a list of demands, in writing, which included the payment of ten million dollars, each, to Complainant, Mocherie, and Anderson. The following was at the bottom of her list of demands, "These have to be taken care of in order to resolve grievance (sic). If ALL conditions are met grievance (sic) will be resolved." The third meeting was with Williams and included Louhisdon, Thompson, and Wynne. Louhisdon, Thompson, and Wynne questioned Williams regarding his knowledge of Complainant's allegations and Pisani's overall behavior. Williams stated that he didn't think there would be an opportunity during the twilight shift for Pisani to be alone with an RA. Williams added Pisani "is intense. He does go after a goal. He is cool, he does yell; I don't feel threatened by him." In the fourth, fifth, and sixth meetings, Louhisdon, Wynne, and Thompson met separately with Bloom, Lori Moriarty, a part-time supervisor, and Laura Hummer, a part-time supervisor. No information was received to substantiate a sexual discrimination or sexual harassment allegation. In the seventh meeting of the day, Louhisdon, Wynne, Gavitt, and Thompson met with Pisani. Pisani acknowledged some isolated issues not directly related to Complainant that were raised, and admitted that, in the past, he had cursed while on the twilight shift. Pisani said that Wynne and Delans had recently confronted him regarding cursing, instructed him to stop, and that he had stopped. Pisani denied the allegations made by Complainant. It was made clear to Pisani that he was to conform to the Professional Conduct and Anti-Harassment Policy and that he was subject to discipline including termination of employment if he engaged in any inappropriate conduct. Louhisdon made clear to Pisani that

Respondent did not want to hear his name mentioned again with regard to inappropriate behavior. At the conclusion of these meetings, it was determined by Respondent that Complainant's allegations were not substantiated. By January 15, 2008, the union did not have the necessary corroboration of Complainant's allegations to go forward with the grievances. (Respondent's Exhibits 18, 22, 55; Tr. 1030, 1595-97, 1804, 1808-09, 1811-12, 1816, 1818-30, 1835-39, 1843-54, 1871-87, 1893-96, 2060-61)

26. In speaking to management and union representatives, Complainant complained that Pisani used such profanity as "cunt," "bitch," "piece of shit," and "fucking cunt" in addressing her and that he "ranted and raved" and screamed at her. Complainant also complained that other supervisors were making negative comments to her. In the grievances she wrote, however, Complainant never set forth the language that Pisani was using and never indicated that other supervisors were making negative comments to her. When Complainant met with Delans, Complainant never said that Pisani called her a "bitch" or a "cunt" or that other supervisors called her a "bitch." (Complainant's Exhibits 2, 3, 4, 5, 6, 7, 8; Respondent's Exhibits 7, 51, 54; Tr. 125, 136, 974-80, 985-86, 1021, 1030-31, 1568-69, 2058-59, 2120, 2477-79, 2482-83)

27. After the meeting of January 15, 2008, Complainant filed no further grievances although she had the right to do so. LaRose never told Complainant that she couldn't file a grievance and never told Complainant that he wouldn't accept a grievance from her. After January 15, Complainant took as much time off from work as she could "to stay away from UPS," including sick time, vacation time, personal time, and time off without pay. Complainant last worked at the Albany facility on or about February 29, 2008. As of March 10, 2008, Complainant was on a Workers' Compensation leave of absence. By a decision filed on July 13, 2009, the Administrative Review Division of the Workers' Compensation Board determined that

Complainant sustained an accident arising out of and in the course of employment in that she suffered from stress greater than that normally occurring in the workplace. (Respondent's Exhibits 3, 27, 76; Tr. 31, 263-64, 1010, 1594-95, 2566-71)

28. In May of 2008, Pratt moved his office from Syracuse to Rochester when he became the Business Manager of the Rochester facility. Pratt thinks he may have taken notes regarding what was said at the times he met with Complainant. Pratt testified that his normal practice is to write his notes, if he takes any, on his copy of the grievances and, when he left his Syracuse office, he thinks that all of his copies of grievances were in a file cabinet drawer in his office. The copies of grievances related to Complainant, which were found in the file cabinet associated with Pratt when his office was in Syracuse, do not contain any notes. I do not credit Pratt's testimony that he made notes regarding his meetings with Complainant. (ALJ's Exhibits 12, 13; Tr. 2381-82, 2398-99, 2451-54, 2481, 2491-93)

29. No evidence was presented to corroborate Complainant's allegation that Pisani called her a "cunt," a "bitch," a "piece of shit," or a "fucking cunt."

30. Complainant's testimony was inconsistent and lacking in credibility. The inconsistencies included the following: Complainant testified that her relationship with Pisani prior to returning to work in November of 2007 was "fine" and that she had no problems with him (Tr. 77, 407); however, Complainant also testified that she complained about Pisani to Spring before returning to work in November of 2007 because Pisani denied Complainant water in the summertime when it was 118 degrees in the back of the truck (Tr. 120-21, 446-50, 596-603); also, Complainant testified that she complained to Spring about Pisani's "aggressive behavior" and his "anger" before November of 2007 (Tr. 596-603); thereafter, Complainant testified that she didn't complain to Spring regarding Pisani (Tr. 735); but later, Complainant

testified that the complaint about the denial of water was made to Spring (Tr. 740); Complainant testified that her first interaction with Pisani after she returned to work in November was on November 29 when she was removed from the tractor trailer at his direction (Tr. 80-81); however, Complainant also testified that, after she returned to work in November and before November 29, Pisani had told her to "shut up" two or three times (Tr. 83); in addition, Complainant testified that she could only recall Pisani talking to her once after she returned to work and before November 29 when he informed her that there would be no talking (Tr. 413-14); Complainant testified that, after she told Pisani on November 30 that she was going to file a grievance against him for having her removed from the tractor trailer, he responded by screaming at her and threatening to have her escorted out of the building (Tr. 94-95, 124-25); however, Complainant also testified that it wasn't until after Pisani screamed at Complainant and threatened to have her escorted out of the building that Complainant told him she was going to file a grievance against him (Tr. 579-80); Complainant testified that she didn't go to HR with her allegations because she didn't have confidence in HR because of the way she was treated concerning the suspension in 2005 (Tr. 606); however Complainant also testified that she was unaware that she could go to HR with her allegations (Tr. 751-53).

31. Complainant gave inconsistent, evasive, and misleading testimony regarding her right to file grievances. (Tr. 171-81, 222-25, 509-27)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's sex, or to retaliate against an individual in the terms, conditions, or privileges

of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised issues of unlawful discrimination, alleging that Respondent unlawfully discriminated against her in the terms, conditions, and privileges of employment because of her sex, and unlawfully retaliated against her because she opposed unlawful discrimination. Complainant alleges that, because of her sex, Pisani harassed her and treated her differently than male employees of Respondent. Complainant further alleges that she experienced additional harassment from Pisani and others after she started filing her grievances alleging discrimination.

When a complainant raises issues of unlawful discrimination, she has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.,* 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997). In all cases involving allegations of unlawful discrimination, conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp,* 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

The credible evidence establishes that Complainant held a position with Respondent that was considered secondary to the movement of packages. It was a position that was not held in high regard, regardless of the sex of the employee. And, if an RA was inclined to talk to an unloader while working, that RA was likely to be moved if the talking was perceived to be slowing productivity. According to the credible testimony of Williams, that is what happened on November 29: Complainant's talking to an unloader was slowing productivity and she was asked to move to another truck. There was no discipline involved; Complainant was simply directed to move on and continue her work on another truck. Although Complainant

acknowledges talking to the unloader, she denies that there was work to be done at the time of the conversation. I do not credit this testimony.

This was the first time Complainant was asked to leave a truck. The credible evidence establishes that Complainant, who took great pride in the way she did her work, had a particular sensitivity to a showing of disapproval and that Complainant was humiliated by this experience. The credible evidence further establishes that, when Complainant experienced this humiliation, her "Pandora's box" was opened and the trauma and the anger of her childhood were released.

The credible evidence also establishes that Respondent took Complainant's allegations seriously. Respondent's workforce is unionized, and Complainant chose to pursue her allegations through her union. I credit the testimony of LaRose and Kearney and find that the union acted swiftly to try to resolve Complainant's concerns with supervisors and higher level management. I credit the testimony of LaRose that the union could not corroborate Complainant's allegations. I further credit his testimony that he never told Complainant that she couldn't file any more grievances and that he never told Complainant that he wouldn't accept a grievance from her. I find that Complainant's testimony about LaRose refusing to accept any more grievances lacked credibility.

I also credit the testimony of Porter and find that Respondent acted diligently in responding to Complainant's allegations, with supervisors offering to Complainant on three different occasions the opportunity to work in another area of the building, with supervisors of the RAs engaging the supervisors involved with the unloaders, with Louhisdon dispatching Delans from Syracuse to Albany in peak season, with Porter and Delans coming from Syracuse to meet with Complainant, with Delans conducting an investigation and speaking to eight employees, including Mocherie, Anderson, and Pisani, and with Louhisdon convening meetings

in Albany where managers from Syracuse and Buffalo gathered not only to confirm Respondent's commitment to its Professional Conduct and Anti-Harassment Policy but also to try to resolve the matter. When Respondent brought the managers together to meet with Complainant to try and resolve the matter and learned that Complainant was looking for thirty million dollars, in total, to settle her allegations, Respondent realized there would be no resolution.

Clearly, Respondent did not acquiesce in or condone any form of unlawful discrimination. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997); *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 311, 786 N.Y.S.2d 382, 395 (2004).

I credit the testimony of Delans that after conducting her investigation there was no evidence to substantiate a sexual discrimination or sexual harassment allegation. I do not credit the testimony of Complainant with regard to the behavior of Pisani and other supervisors, and find that there was no credible evidence to support a finding that Complainant experienced an adverse employment action or that Complainant's workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [Complainant's] employment and create an abusive working environment." *See Father Belle,* 221 A.D.2d at 50; *Forrest,* 3 N.Y.3d at 310; *Barnum v. New York City Transit Authority,* 62 A.D.3d 736, 878 N.Y.S.2d 454 (2nd Dept. 2009).

When considering only the credible evidence, Pisani's behavior was aggressive, intense, and loud. The credible evidence established that, at times, Pisani used inappropriate language, but there was no credible evidence that Pisani called anyone a vulgar name. The behavior of

Pisani that has been credibly presented may not meet a "general civility code," but it does not constitute unlawful discrimination. *See Forrest,* 3 N.Y.3d at 309.

Complainant's request for an adverse inference for the failure of Respondent to produce notes allegedly taken by Pratt is denied. After considering the testimony of Pratt, and the evidence presented with regard to his copies of Complainant's grievances, I do not credit Pratt's testimony that he made notes regarding his meetings with Complainant. It should be noted that Complainant had a full and fair opportunity to testify about her meetings with Pratt and to testify as to what was said at those meetings, and no additional clarity concerning those meetings would affect my evaluation of Complainant's credibility.

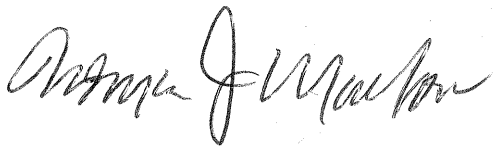
After considering all of the evidence presented, I find that the evidence does not support a finding that Respondent engaged in unlawful discrimination. Since Complainant has failed to meet her burden, the complaint must be dismissed.

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 the same hereby is, dismissed.

DATED: June 7, 2011
Bronx, New York



Thomas J. Marlow
Administrative Law Judge