**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

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| **NEW YORK STATE DIVISION OF HUMAN RIGHTS** on the Complaint of<br><br>**PHYLLIS E. OGDEN,**<br>Complainant,<br>v.<br><br>**COUNTY OF ONONDAGA,**<br>Respondent. | **NOTICE AND FINAL ORDER**<br><br>Case No. 5753967 |

**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 6, 2009, by Edward Luban, 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: JUL 28 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF HUMAN RIGHTS**
on the Complaint of

**PHYLLIS E. OGDEN,**

Complainant,

v.

**COUNTY OF ONONDAGA,**

Respondent.

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

Case No. **5753967**

## SUMMARY

Complainant alleged that Respondent retaliated against her for opposing racial discrimination against a co-worker, by discontinuing accommodations it had previously provided to her disabilities; by treating her in a hostile, belittling, emotionally and physically abusive manner; and by terminating her employment. Complainant failed to sustain her burden of proof. Therefore, the complaint should be dismissed.

## PROCEEDINGS IN THE CASE

On January 15, 2004, 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 Migdalia Pares, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on May 22, 23, 24, 2007 and June 11, 12, 13, and 14, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Jason A. Richman, Esq. Respondent was represented by Michael J. Gauzza, Esq.

Complainant and Respondent filed briefs after the conclusion of the public hearing.

After the hearing and receipt of briefs, the case was reassigned to Edward Luban, another ALJ of the Division.

## FINDINGS OF FACT

1. Complainant is white. (ALJ's Exh. 1) Complainant is a New York State licensed dental hygienist. (Tr. 382; Respondent's Exh. 44)

2. Respondent operates Onondaga Community College ("College"), which is a unit of the State University of New York. (Tr. 695, 697)

3. On February 9, 1998, the College hired Complainant to serve as clinic manager in its Dental Hygiene Department ("Department"). (Tr. 385; Respondent's Exh. 44) Complainant was a temporary, part-time employee until October 30, 2000, when the College made her a permanent part-time employee. (Tr. 173, 388; Complainant's Exh. 10)

4. Complainant had previously worked as a dental hygienist in a private dental practice for several years. (Tr. 383-84) She had to leave that position because she injured her back and neck. As a result of her injury, she could not sit for prolonged periods of time, which she had to do when treating patients. (Tr. 181-82, 384, 543-44)

5. Judith Lambert, the Department's chairperson, and other faculty members knew before the College hired Complainant that Complainant could not sit for long periods of time. The Department was willing to accommodate Complainant's need to get up and sit down as needed. Complainant did not request any other accommodations. (Tr. 182, 202, 971, 1055-56)

6. Complainant did not request any accommodation in writing, and she did not provide the College with documentation of any disabilities. (Tr. 202, 849, 1215, 1544)

7. In 2001, the Department's full-time faculty members were Lambert, Betty Rouse, and Denise Heater. (Tr. 226-27) Rouse is black. (Respondent's Exh. 53)

8. In August 2001, the faculty nominated Lambert for another term as Chairperson. Debbie Sydow, College President, declined Lambert's nomination. The faculty then nominated Rouse. Sydow rejected Rouse's nomination as well. (Tr. 169-70, 225-27)

9. In August 2001, Sydow appointed Pamela Quinn chairperson of the Department. (Tr. 172, 223, 1119)

10. At the time the College appointed Quinn, it was concerned about its graduates' low pass rate on national board examinations and the Department's high cost. The College wanted Quinn to make changes in the Department. (Tr. 280, 282, 558, 1000, 1120-21)

11. Quinn tried to implement changes in the curriculum and in the clinic program. Lambert and Rouse opposed these changes. (Tr. 899-902, 1001, 1006, 1152, 1154, 1158-59, 1418)

12. In September 2001, Quinn and Complainant developed a job description for a full-time clinic manager. (Tr. 465-66, 1161-63)

13. On September 13, 2001, at Quinn's request, the College made Complainant a permanent full-time employee in a ten-month position. (Tr. 1170-71); Respondent's Exh. 21)

14. On September 26, 2001, Complainant and Quinn witnessed a verbal confrontation between Rouse and Larry Reader, a College Vice-President. (Tr. 238-39, 1262-63) Margaret Powers, another College Vice-President, asked Quinn to get statements from anyone who witnessed the incident. (Tr. 1268) Complainant said she did not want to provide a statement because she did not want to be put in the middle of the situation. (Tr. 393-94).

15. At the public hearing, Complainant testified that Quinn observed her writing a statement and insisted that Complainant change her statement because what she had written was not consistent with what Quinn had said. (Tr. 395-96) Quinn denied that she saw what Complainant had written or that she asked Complainant to change it. (Tr. 1268-70)

16. Complainant told Leonard Foster, her union president, that she felt she was being pressured to write something she had not witnessed. (Tr. 51-52)

17. Sydow assigned Robert Jokajtys, the College's Director of Human Resources, to investigate the incident between Reader and Rouse. (Tr. 653) Jokajtys interviewed Complainant on October 16, 2001. Complainant said that Quinn told her to document what happened and that Complainant responded, "Please don't put me in the middle of this." (Tr. 396, 398, 656, 658; Complainant's Exh. 44)

18. At the request of her attorney, Rouse asked Complainant for a statement about what she had seen because Rouse was filing a case against the College. (Tr. 277, 407, 523) Complainant testified that she wrote a statement on September 26, 2001. (Tr. 407) However, the statement Complainant offered, which is undated, describes events that allegedly occurred on September 26, September 27, and October 1, 2001. The statement bears Complainant's signature on two separate pages. The first signature is undated; the second signature is dated October 2, 2002.

(Complainant's Exh. 14) Complainant also testified that her daughter typed the statement for her and that Rouse "had it done over" before Complainant signed it. (Tr. 408-09)

19. At the public hearing, Complainant testified that on a daily basis after the incident on September 26, 2001, Quinn went through her desk drawers, her lunch bag, and her coat pockets; barged in and interrupted her when she was on the telephone; changed her job duties; made her lift and move heavy objects; changed her hours; screamed at her; called her stupid, ignorant, incompetent, and uneducated; and interrupted her lunch. Complainant also testified that Quinn had the lock on the bathroom door removed so she could "barge in whenever she wanted to" and that on one occasion, Quinn opened the locked door to Complainant's office in front of two dentists when Complainant was changing her clothes. (Tr. 418-20, 422-23, 441)

20. Complainant further testified that every time Quinn spoke to her, her tone was "demanding or demeaning" and that it was worse if students or patients were present. Complainant testified that if someone worked at the clinic during the 2001-02 academic year, they could not have missed Quinn's treatment of Complainant. (Tr. 564-65)

21. On September 17, 2002, Quinn held an informal "pre-discipline counseling meeting" with Complainant. Complainant was not getting some of her responsibilities done. Several students and faculty members had expressed concern that Complainant was making negative comments about the Department. During the meeting, Complainant complained that Quinn called her "Phyllis" instead of "Mrs. Ogden." Complainant said that she felt conflicted between wanting to be part of the changes in the Department and her allegiance to Lambert and Rouse. Complainant also expressed disappointment that she did not have a teaching position. Quinn explained that all faculty had to have at least a bachelor's degree but that Complainant only had an associate's degree. (Tr. 442-445, 1224-34)

22. On September 26, 2002, Quinn sent Complainant a memo about the meeting. The memo included an action plan for both Quinn and Complainant. (Tr. 1240-41; Respondent's Exh. 27)

23. In October 2002, Complainant told Quinn that she had been called to serve grand jury duty beginning October 22, 2002 and that she could be out as much as four weeks. (Tr. 1244, Complainant's Exh. 47)

24. On October 21, 2002, Complainant and Quinn had a disagreement about where to place a bottle of Listerine to avoid possible contamination. They began talking over each other. (Tr. 1251-54, 1451) At the public hearing, Complainant testified that Quinn became enraged, screamed at her, grabbed her upper arms, and then let go. (Tr. 468-69, 487) In her testimony, Quinn insisted that she did not touch or grab Complainant, that no physical confrontation occurred, and that she did not scream at Complainant or berate her. (Tr. 1254-55, 1541)

25. Dawn Fremont, a Department faculty member, saw Complainant when she was leaving the clinic that day. Complainant did not appear upset or distraught. (Tr. 1017)

26. When Complainant got home from work that evening, she showed her husband large bruises on both biceps. (Tr. 15-16)

27. According to Complainant, Kathy Noonan, a student, witnessed the incident between Complainant and Quinn. (Tr. 468, 649-50) Complainant did not call Noonan to testify at the public hearing.

28. Before she left work on October 21, 2002, Complainant filled out her time card for the two-week pay period ending November 1, 2002. Complainant wrote "Jury Duty 8 ¾" for each of her eight days during the pay period. She signed the card, left it in her office, and asked the

receptionist to turn the card in to Quinn, so Complainant's pay would not be delayed if she was chosen for grand jury duty. (Tr. 499, 570, 1247; Complainant's Exh. 29)

29. Complainant served jury duty a full day on October 22 and half days on October 23 and 24. She did not serve at all the following week. (Tr. 489, 506, 578, 580; Complainant's Exh. 47) Complainant did not return to work in the afternoons on October 23 or 24, she did not come in to work on October 28, 29, 30, or 31, and she has not returned to the College since. (Tr. 17, 506; Complainant's Exh. 29)

30. On October 23, 2002, Complainant saw Deborah Schu, a nurse practitioner who worked with Dr. Caroline Keib, Complainant's physician. Complainant had bruises on her upper arms, and she was emotionally distraught. Schu diagnosed Complainant with acute anxiety, placed her on anti-anxiety medication, took her out of work, and referred her for psychological health care services. (Tr. 606, 608-09, 611, 616, 622; Complainant's Exh. 36)

31. On October 29, 2002, Schu excused Complainant from work from October 23 to October 31, 2002 "for medical reasons." (Tr. 624; Complainant's Exh. 37)

32. Complainant's daughter, who was a student in the Department, brought Complainant's time card home. Complainant then called Foster because she did not know how to fill out the card. Although she had a voucher for three full days of jury duty, she had only served one full day and two partial days. (Tr. 500-01)

33. Complainant went over her time card with Foster. She wrote "1/2 day medical" for October 23 and 24, wrote "medical" for October 28, 29, 30, and 31, and crossed out "Jury Duty" for October 28, 29, 30, and 31. (Tr. 57, 501; Complainant's Exh. 29) Foster made a copy of the card, then submitted it to Quinn's secretary. At the time he did so, Quinn had not yet signed the card. (Tr. 58, 66, 501-02, 506; Complainant's Exh. 29)

34. Complainant changed the time card after she signed it but before it was submitted. (Tr. 570-71) Quinn signed the card before November 5, 2002, but she did not date it. (Tr. 758; Complainant's Exh. 29) Quinn did not complain that the card was confusing, illegible, or inaccurate. (Tr. 758)

35. On November 1, 2002, Jokajtys charged Complainant with violating Respondent's Work Rule 41, falsification of forms or records, because her time card reflected jury duty for the entire day on October 22, 23, 24, 28, 29, 30, and 31, 2002 while she performed jury duty in the mornings only on October 23 and 24 and no service at all the following week. Jokajtys noted that Complainant had submitted a medical statement that provided no diagnosis and excused Complainant from work retroactively; that if Complainant was too ill to work, it was "inconceivable" that she was well enough for jury duty; that Complainant modified her time card by crossing out "jury duty" and inserting medical leave for October 28 through 31; that Complaint had spent less time on a business trip to Oregon than her time record claimed; and that Complainant's department chair had discussed with her "numerous performance deficiencies." Jokajtys suspended Complainant without pay, effective immediately, and he said he was reviewing the case for discharge. (Tr. 454, 676, 755-56; Complainant's Exh. 22)

36. At the public hearing, Jokajtys conceded that Complainant's time card was accurate with respect to the reasons for her absence and the number of hours for October 28, 29, 30, and 31. However, he contended that crossing out the words "jury duty" and replacing them with "medical" constituted falsification, as did claiming half a day medical leave and 8 ¾ hours jury duty for October 23 and 24. (Tr. 755-56, 772-74)

37. Complainant's union filed a grievance challenging the charges against Complainant. (Tr. 63, 454) On November 21, 2002, Michael Sorrell, Employee Relations Officer, issued a

Step 2 decision sustaining the charge and sustaining Complainant's termination. (Tr. 65; Respondent's Exh. 49) On November 26, 2002, based on Sorrell's decision, Sydow notified Complainant that her employment was terminated effective that day. (Respondent's Exh. 44, p. 14)

38. On December 11, 2002, Complainant submitted a discrimination complaint to Sorell's office. Complainant alleged that she had been subjected to general harassment based on disability in that Quinn had "for months subjected me to emotional abuse in front of students, patients, and co-workers." Complainant further alleged that on October 21, 2002, Quinn grabbed her by her upper arms and shook her slightly, leaving bruises. (Tr. 492; Complainant's Exh. 40)

39. When Sorrell received the complaint, he immediately returned it to Complainant and directed her to address her complaint to the College because she was a College employee. Sorrell also sent Jokajtys a copy of the complaint. (Tr. 492-93; Complainant's Exh. 26)

40. On December 13, 2002, after Jokajtys received a copy of Complainant's complaint, he called Complainant and left a message asking her to meet with him. Jokajtys followed up his telephone call with letters to Complainant on December 13 and 23, 2002. (Tr. 660-664; Respondent's Exh. 3, 4) Complainant did not meet with Jokajtys, and she did not respond to his letters. She said her physicians had directed her not to come to campus or participate in an interview. (Tr. 467, 496-97, 662-64)

41. Jokajtys interviewed Quinn, Noonan, and Tovi Gereau, the Department's secretary. Noonan said she did not see Quinn assault Complainant. Based on his investigation and on Complainant's refusal to meet with him, Jokajtys told Complainant he could not substantiate her complaint of harassment. (Tr. 660, 665, 666; Respondent's Exh. 4)

42. On April 21, 2003, Complainant's grievance was scheduled for arbitration. The union attorney, D. Jeffrey Gosch, told Jokajtys that Complainant was permanently disabled and that she would not come back to work. Based on Gosch' representation, the College withdrew the charges against Complainant without prejudice and agreed to purge the matter from her file. (Tr. 65, 68, 679; Complainant's Exh. 5)

43. On October 21, 2003, Complainant contacted the Division with respect to the notice of termination Sydow issued on November 26, 2002. Based on the information Complainant provided, the Division prepared a complaint and sent it to Complainant. (Tr. 481-82; Complainant's Exh. 24)

44. Complainant reviewed the complaint and contacted Robert Ferri, a Division employee. Complainant told Ferri the complaint had some incorrect dates and misspellings. Ferri asked Complainant for the corrections, and he said he would get the complaint back to her so she could sign it, have it notarized, and return it to the Division. (Tr. 484)

45. On December 5, 2003, the Division sent complainant a revised complaint. Complainant received the complaint on December 7, 2003. (Tr. 484; Complainant's Exh. 25)

46. On December 31, 2003, Complainant signed the complaint and had it notarized. On the same day, Complainant visited the Syracuse building in which the Division's office is located. (Tr. 484-85; ALJ's Exh. 1, Complainant's Exh. 25) At the public hearing, Complainant testified that she delivered the complaint to the Division that day. (Tr. 484-85) However, the complaint is date-stamped January 15, 2004. (ALJ Exh. 1)

47. On January 13, 2004, Sydow notified Complainant that she was suspended without pay and terminated for violating Work Rule 41. The charges were the same as the November 2002 charges which Respondent withdrew at arbitration. (Tr. 98; Complainant's Exh. 4)

48. The College did not intend to pursue the charges against Complainant. Sydow issued the January 13, 2004 letter to protect the College's rights to pursue the charges if Complainant ever returned to work. (Tr. 681) Pursuant to the collective bargaining agreement, charges had to be brought within 15 months after the alleged violation. That period was about to toll. (Tr. 87, 682; Complainant's Exh. 3)

49. Complainant's union reactivated her case after Respondent refiled the charges, but it did not pursue a grievance because Complainant was not working. (Tr. 68-69, 780-81)

50. On December 5, 2002, Complainant filed a claim with the Workers' Compensation Board ("WCB"). Complainant described her injury/illness as "bruising both arms, stress." (Tr. 497-98; Complainant's Exh. 27)

51. Respondent did not participate in Complainant's WCB case. Traveler's Insurance Company ("Traveler's"), Respondent's insurance carrier, contested Complainant's claim. (Tr. 842)

52. On February 9, 2004, a WCB panel found that although Traveler's had obtained a statement from Complainant's supervisor on December 10, 2002, it withheld the statement and did not dispute Complainant's allegations about the altercation with Quinn until the fourth WCB hearing, which was held on August 12, 2003. (Complainant's Exh. 30)

53. On July 14, 2005, Complainant and Traveler's stipulated to a settlement of Complainant's claim. On the same day, a WCB judge issued a decision awarding Complainant benefits in accordance with the stipulation. (Complainant's Exh. 30)

54. On January 21, 2004, Complainant and her husband, David Ogden, commenced an action against Respondent, Quinn, and the College in Supreme Court, Onondaga County. Complainant alleged causes of action for assault and battery, intentional infliction of emotional

distress, retaliatory discharge in violation of the United States and New York State Constitutions and 42 U.S.C. §1983, discrimination on the basis of disabilities in violation of the Human Rights Law, and termination of employment in violation of the collective bargaining agreement. (Respondent's Exh. 51)

55. On June 14, 2006, in an oral decision, the Hon. Anthony J. Paris dismissed Complainant's Human Rights Law cause of action because Complainant had elected to pursue her claim through the Division. On September 8, 2006, Justice Paris issued an order incorporating the terms of his oral decision. (Respondent's Exh. 52)

56. On October 9, 2003, Complainant filed an application for disability insurance benefits with the Social Security Administration (SSA"). On June 19, 2004, SSA issued a decision finding that Complainant had been disabled since October 21, 2002 and that she was entitled to benefits. (Tr. 512-13; Complainant's Exh. 31)

## OPINION AND DECISION

*Election of Remedies*

A person claiming to have been aggrieved by unlawful discrimination may seek redress either in an administrative proceeding before the Division or in court. Human Rights Law §297 (9). These remedies are intended to be mutually exclusive. *Universal Packaging Corp. v. New York State Division of Human Rights*, 270 A.D.2d 586, 587, 704 N.Y.S.2d 332, 333 (3rd Dept. 2000). Respondent requests that this proceeding be dismissed because Complainant has brought an action against Respondent in Supreme Court. However, Complainant did not commence the Supreme Court action until January 21, 2004, after she filed her complaint with the Division. Moreover, the Supreme Court has dismissed Complainant's Human Rights Law claim.

Therefore, the pendency of the Supreme Court action does not bar this proceeding.

*Statute of Limitations*

A complaint under the Human Rights Law must be filed within one year after the alleged unlawful discriminatory practice. Human Rights Law §297 (5). Respondent argues that the complaint is untimely because it was not filed within one year of November 26, 2002, the date Sydow notified Complainant her employment was terminated. However, the courts recognize an exception to the one-year rule where the delay in formal filing of the complaint was caused by the Division's own failure to render "effectual assistance" to the complainant. *See Matter of Stacey v. McDaniel*, 54 A.D. 2d 645, 646, 387 N.Y.S. 2d 631, 632 (1st Dept. 1976; *Matter of Crayton v. County of Suffolk*, 139 A.D. 2d 577, 578-79, 527 N.Y.S. 2d 79, 80 (2nd Dept. 1988); *Matter of Bemis v. New York State Division of Human Rights*, 26 A.D. 3d 609, 611, 809 N.Y.S. 2d 274, 276 (3rd Dept. 2006).

The *Stacey* exception is applicable to this case. Although Complainant did not file her complaint until after the one-year period expired, she gave the Division all the information necessary to prepare her complaint on October 21, 2003, within the one-year period. The initial complaint, dated October 21, 2003, is virtually identical to the complaint dated December 5, 2003 that was ultimately filed. The record does not contain the date the Division sent the initial complaint to Complainant or the date she notified the Division of her corrections. However, it appears that the Division was responsible for some delay, because it did not return the revised complaint to Complainant until after the one-year period expired. Therefore, in accordance with *Stacey*, I find that Complainant filed her complaint timely.

However, Complainant's allegations of retaliation that occurred before October 21, 2002, one year before she filed her complaint, are time-barred. The only issues that survive are

Complainant's allegations that Quinn assaulted her and that the College suspended, then terminated her employment in retaliation for her refusal to give a false statement against Rouse.

*Res Judicata/Collateral Estoppel*

Complainant argues that the determinations made in her workers' compensation case are binding in this proceeding. Respondent disagrees, contending that it was not a party to the workers' compensation case. A party may not relitigate "an issue clearly raised in a prior action or proceeding and decided against that party or those in privity." *Ryan v. New York Telephone Company*, 62 N.Y. 2d 494, 500, 478 N.Y.S. 2d 823, 826 (1984). The party must have had a "full and fair opportunity" to contest the decision in the the prior proceeding. *Id.*, 62 N.Y. 2d at 501, 478 N.Y.S. 2d at 826-27.

Whether or not Respondent was in privity with Traveler's, the issues before the Division were not "clearly raised" in the compensation case. The compensation proceeding focused on medical issues and disability. The parties did not litigate the circumstances surrounding Complainant's employment or the incident of October 21, 2002, because Traveler's did not raise these issues timely. Traveler's failure to adequately contest the issues meant Respondent did not have a full and fair opportunity to litigate them in the WCB proceeding.

Further, the WCB did not determine the factual issues before the Division. The WCB found that Complainant had an occupational disease arising out of an altercation with her supervisor and that she was totally disabled from work. Contrary to the arguments in Complainant's brief, the WCB did not "conclusively determine" that Quinn assaulted Complainant or that she harassed Complainant for a year before the alleged assault. *Cf. Matter of Metro-North Commuter Railroad Company v. New York State Division of Human Rights*, 271 A.D. 2d 256, 257, 707 N.Y.S. 2d 50 (1st Dept. 2000).

*Retaliation*

It is an unlawful discriminatory practice for an employer to discharge or otherwise discriminate against an employee because she "has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law §296.1(e). To prove a prima facie case of retaliation, Complainant must establish that she engaged in protected activity, that Respondent was aware she engaged in such activity, that she suffered an adverse employment action based on such activity, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D. 2d 101, 104 (3d Dept. 1999). If Complainant meets this burden, Respondent must present legitimate, non-discriminatory reasons for its action. *Id.* If Respondent does so, Complainant must show that the reasons Respondent has presented were merely a pretext for discrimination. *Id.*; *Matter of Pace University v. New York City Commission on Human Rights*, 85 N.Y. 2d 125, 128, 623 N.Y.S. 2d 765, 766 (1995).

Complainant alleges that Respondent retaliated against her because she refused to give a false statement against Rouse. Even if Quinn did ask Complainant to change the wording of her statement, Complainant's refusal to do so was not a protected activity. There is no evidence that Complainant was motivated by opposition to discrimination. On the contrary, the evidence is that Complainant did not want to be put in the middle of the ongoing dispute between Lambert and Rouse, on one side, and Quinn, on the other. When Jokajtys interviewed Complainant about the incident, she did not mention race or allege that discrimination was involved. It is noteworthy that not once during her extensive testimony at the public hearing did Complainant make any reference to discrimination or opposition to discrimination.

In her brief, Complainant claims that her refusal to give a false statement against Rouse

was connected to Rouse's discrimination claims, including a claim before the Equal Employment Opportunity Commission ("EEOC"). There is no evidence that any such claims were pending at the time. Complainant's alleged refusal to give a false statement occurred in connection with Respondent's own investigation of the incident, not in an EEOC or Division proceeding. As such, her conduct was not covered by the anti-retaliation language of §296.1(e). *See Unotti v. American Broadcasting Companies, Inc.*, 180 Misc. 2d 543, 546, 689 N.Y.S. 2d 870, 872 (Sup. Ct. N.Y. Co. 1999), *aff'd.*, 273 A.D. 2d 68, 710 N.Y.S. 2d 822 (1st Dept. 2000); *Dorvil v. Hilton Hotels Corp.*, 25 A.D. 3d 442, 443, 807 N.Y.S. 2d 369, 370 (1st Dept. 2006).

Even if Complainant later provided a statement to Rouse, Complainant failed to establish that Respondent was aware of the statement. Thus, even if providing the statement could be considered a protected activity, Complainant did not prove that Respondent was aware of the activity. Absent such proof, Complainant has failed to establish a prima facie case.

Complainant did not meet her burden of establishing a prima facie case of retaliation. Therefore, 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: January 6, 2009
Syracuse, New York

Edward Luban
Administrative Law Judge