NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of REBECCA E. OZOLINS, Complainant, v. NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, Respondent.	NOTICE AND FINAL ORDER Case Nos. 10121359 & 10129831

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on September 11, 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: OCT 27 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

REBECCA E. OZOLINS,
Complainant,

v.

NEW YORK STATE, DEPARTMENT OF CORRECTIONAL SERVICES,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Nos. **10121359, 10129831**

SUMMARY

Complainant alleged that Respondent discriminated against her on the basis of sex, subjected her to a hostile work environment, and retaliated against her for complaining about the alleged discrimination. Because Complainant failed to sustain her burden of proof, the complaints should be dismissed.

PROCEEDINGS IN THE CASE

On November 1, 2007 and November 26, 2008, Complainant filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Edward Luban, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 25, March 26, April 15, April 16, and May 14, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by Raymond M. Schlather, Esq. Respondent was represented by Herman Reinhold, Esq.

At the first hearing session held on March 25, 2009, Respondent renewed motions it had made previously, and that ALJ Luban had denied, to dismiss the complaints and to bar Complainant from presenting any evidence or witnesses. (ALJ's Exhs. 7, 8) ALJ Luban again denied these motions. (Tr. 15-16). Respondent also made a separate motion to dismiss or to preclude Complainant from presenting evidence about damages and from receiving any award of damages. (ALJ's Exh. 6) ALJ Luban reserved decision on this motion. (Tr. 24)

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

FINDINGS OF FACT

1. Respondent operates prison facilities throughout New York State. Respondent's employees are classified as "security," including correction officers ("COs"), or "civilian." As of January 2007, Respondent had 32,492 employees, of whom 24,634 were men and 7,858 were women. Respondent's security personnel included 19,507 men and 2,221 women. Respondent's civilian personnel included 5,127 men and 5,637 women. (Tr. 70, 1410; Respondent's Exh. 13)

2. Respondent's female employees work in facilities for male inmates, facilities for female inmates, and facilities for both male and female inmates. Approximately three of Respondent's facilities house only female inmates. (Tr. 180-81, 1121)

3. Respondent has employed Complainant as a civilian vocational instructor in horticulture since 1998. In June 2004, Complainant transferred to Respondent's Willard Drug Treatment Campus ("Willard"). Willard is a secure facility that offers parole violators a 90-day "shock" program. The program is organized on a military model, with classroom and vocational components. Parolees learn vocational skills to prepare them for employment upon their release. In addition to horticulture, Willard offers vocational education in floor covering, cabinet-making, masonry, and painting. (Tr. 431-32, 435, 1054)

4. Respondent's facilities are organized in nine regional hubs. Willard is part of the Elmira hub. (Tr. 77, 101, 277)

5. Complainant has a two-year degree in horticulture. She does not have a bachelor's degree but has taken additional classes at SUNY Oswego and Empire State College. (Tr. 426, 739, 745-46)

6. Effective September 1, 2006, the Education Department of the University of the State of New York certified Complainant as a teacher of plant science for grades 7-12. After Complainant obtained her teaching certification, she became a Grade 17 employee. (Tr. 426, 434; Complainant's Exh. 17)

7. Since 2003, Complainant has been a volunteer instructor for cultural diversity classes in Respondent's facilities. In 2004, Complainant joined Willard's Diversity Management Committee ("DMC"). Complainant also participated in quarterly meetings of the Elmira hub DMC. On September 23, 2005, Complainant completed Respondent's Cultural Diversity Trainer Preparation Course. Complainant volunteered for these activities; they were not part of her responsibilities as a vocational instructor. (Tr. 106, 138, 229, 241-42, 441, 445-46, 448, 768-69; Complainant's Exh. 16)

8. Complainant must receive at least 40 hours of training per year. Except for certain mandatory trainings, employees may request the opportunity to attend particular training programs. Such requests are subject to the approval of the facility superintendent. (Tr. 255, 311)

9. Complainant has received many hours of optional training throughout her tenure with Respondent. Complainant received 70.75 hours of training in 2003-04, 354.5 hours in 2004-05, 125 hours in 2005-06, 111 hours in 2006-07, 112.25 hours in 2007-08, and 152.25 hours in 2008-09. (Complainant's Exh. 14)

The Handbook

10. In the 1980's, Respondent published the *Orientation Handbook for Female Staff Working in an Institutional Setting* ("Handbook"). The Handbook was "an attempt to familiarize new female employees to this unique environment as they first enter the correctional setting." The Handbook did not contain strict rules, but it was intended to give new recruits "basic guidelines in . . . how to comport themselves." Respondent used the Handbook to teach both male and female CO recruits. Complainant first received a copy of the Handbook in 1999. She received another copy of the Handbook when she transferred to Willard in 2004. (Tr. 437-39, 1195, 1373-76; Respondent's Exh. 19)

11. The Handbook was written when Respondent did not have many female employees. The Handbook contained important security advice for people working in the corrections environment, but it also included outdated terminology and some stereotypes in its description of women. (Tr. 1014-15, 1195)

12. Complainant and several other women believed the problems the Handbook sought to address affected both male and female recruits. They believed the Handbook should be gender-neutral. (Tr. 109, 112, 438; Complainant's Exhs. 1, 63)

13. In 2004, Complainant told Deputy Superintendent Bogan (first name unknown), Willard's then Deputy Superintendent for Programs, that she was offended by the Handbook. At Bogan's suggestion, Complainant joined Willard's DMC to work on rewriting the Handbook. (Tr. 440-41)

14. The Elmira hub's DMC reviewed the Handbook and drafted revisions. Complainant was an active participant in this process. (Tr. 120, 123, 453-54, 463)

15. On May 15, 2006, Mary Mayville, an Affirmative Action Administrator ("AAA") in Respondent's Office of Diversity Management ("ODM") who worked with the Elmira hub's DMC, submitted the proposed Handbook revisions to Charlie Harvey, Director of ODM. Harvey asked Kim Ghatt, another AAA, to review the Handbook and to make it gender-neutral. Ghatt reviewed Mayville's proposed revisions, which she found were "pretty similar" to Ghatt's own revisions, and she rewrote the Handbook. Harvey submitted Ghatt's revision to Respondent's Counsel. (Tr. 118, 130, 143, 1215, 1223, 1225-27, 1239, 1378-79, 1438, 1442, 1471-72, 1475; Complainant's Exhs. 62, 63, 67, 68)

16. In October 2007, Respondent removed the Handbook from circulation. (Tr. 82, 197, 1414-15; Respondent's Exh. 22)

17. In 2009, Respondent issued a new, gender-neutral handbook entitled *Correction Dynamics*. (Tr. 1379; Respondent's Exh. 20)

The April 2007 Class

18. On April 19, 2007, Complainant attended a class at Willard presented by CO Kathy Hughes. Complainant was offended at comments Hughes and Melvin Williams, Willard's Superintendent, made during the class. Complainant felt she was being talked down to, that

Hughes was engaged in "male bashing," and that Hughes was making generalizations about men and women that were "very polarizing." (Tr. 502-03, 506-10).

19. Complainant did not file a complaint about the April 19 class because she was probationary and was afraid she would be retaliated against. (Tr. 511)

The Albany Class

20. On August 28, 2007, Complainant attended a class at Respondent's Training Academy in Albany ("Academy") called "Females in Corrections" ("Albany class"). Complainant was not required to attend the class; she did so at Mayville's suggestion. (Tr. 168, 253, 473, 514-15, 1124, 1199; Complainant's Exh. 25)

21. "Females in Corrections" was developed by Kate Whittaker, a CO, and Michele O'Gorman, a civilian employee of Respondent. Whittaker and O'Gorman identified specific problems female employees had working in all-male institutions and working with a male-dominant staff. Their goal was "to educate female corrections staff to be more successful in their careers by making them more aware of their surroundings and how their interactions with staff and inmates affect their abilities to perform their jobs and the role their gender plays in accomplishing this." Whittaker and O'Gorman wanted female employees "to be safe and secure." (Tr. 1121, 1151, 1180; Respondent's Exh. 13).

22. Whittaker and O'Gorman presented the class six times at different facilities. All the attendees were women, except for two men who attended the Albany class. The feedback Whittaker received from women who attended the classes was overwhelmingly positive. (Tr.1103, 1104, 1151-52; Respondent's Exh. 16)

23. Complainant was offended that the Handbook was distributed to students in the Albany class. Complainant also identified various comments made by the instructors and other students

that she found offensive. These comments included "it's different for us (women) in corrections;" "young ladies coming in off the street need to know;" references to women being more sensitive, weaker, "catty," and "horrible creatures at times;" a reference to women's bodies as having "lumps and bumps;" and "male staff can make 15 mistakes with no retribution but a woman makes one and all women are held accountable." (Tr. 474, 477-78; Complainant's Exh. 9)

24. The comments Complainant found offensive were intended to address the particular needs of women working in all-male institutions, especially the need to conduct themselves in a way that would ensure their own safety. The comments were made in a "very dynamic" class, with "a good bit" of interaction between the students and instructors. (Tr. 1121-23, 1125-27, 1129-37, 1201, 1204)

25. Complainant testified that both the Albany class and the Handbook made her feel she and other women were to blame for difficulties they experienced in Respondent's facilities. Based on the plain language of the Handbook, on Whittaker's and Ghatt's testimony about the Albany class, and on the feedback from other participants, I find that Complainant's interpretation is not reasonable. (Tr. 439, 477, 809, 858-59, 1121-37; 1151, 1180; Complainant's Exh. 64; Respondent's Exhs. 13, 16)

Complainant's Internal Complaint

26. In the first week of September 2007, Complainant delivered a letter to Sandra Polakow, Willard's Deputy Superintendent for Programs, complaining about the Albany class. Polakow told Complainant to send the complaint to Harvey. Complainant did so. (Tr. 482, 485-86; Complainant's Exhs. 9, 35)

27. Harvey assigned Ghatt to investigate Complainant's complaint. On October 23, 2007, Ghatt met with Complainant. Complainant said that Ghatt could not be impartial because Ghatt had attended the Albany class and had previously conducted training with Complainant. At Complainant's request, Ghatt recused herself from the investigation. (Tr. 488-490, 1218, 1236, 1409; Complainant's Exhs. 10, 12, 13)

28. Harvey would have assigned Mayville to replace Ghatt as the investigator, but Mayville had also attended the Albany class. Around the same time, Harvey learned that Complainant had filed her first complaint with the Division. Harvey realized that the subject matter of Complainant's internal complaint would be investigated regardless of what ODM did. For these reasons, Harvey did not assign another investigator to the complaint. (Tr. 491, 1410-11)

Complainant Applies for Additional Training

29. On August 31, 2007, Complainant asked Williams for permission and funding to attend the New York State Affirmative Action Advisory Council's training program to be held in Scotia, New York September 17-18, 2007. Williams said Complainant's application was late and he had already picked someone else to attend the program. Willard did pay Complainant's $175 registration fee for the program, but she had to pay her hotel expenses of $235.20. (Tr. 555-56, 558-60, 1037-39; Complainant's Exhs. 30-32)

30. Around the same time, Willard paid for CO Robert McLean, the chair of Willard's DMC, to attend a five-day training program in Buffalo. (Tr. 562)

31. In the fall of 2008, Complainant asked Robert Guido, Willard's Vocational Education Supervisor, for permission to attend a Train the Trainer ("TTT") program at the Academy. Complainant believed completing this program would enable her to teach prevention of sexual harassment. (Tr. 681, 687)

32. The TTT program is a two-week, 80-hour class that provides general training for new instructors in basic instructional techniques, including how to present material and how to prepare lesson plans. (Tr. 1542-44)

33. Guido asked Michael Cobb, the Regional Training Lieutenant for the Elmira hub, whether the TTT program would be appropriate for Complainant. Cobb determined that because Complainant was a vocational instructor and a diversity management instructor, she already had the skills she would learn in the TTT program. (Tr. 1544)

34. Attending the TTT program would not have qualified Complainant to teach prevention of sexual harassment. To become certified to teach prevention of sexual harassment, Complainant would have to take a different course offered by the Governor's Office of Employee Relations ("GOER"). (Tr. 273, 890-91, 895-96, 1214, 1418, 1548, 1554)

35. Each year, Respondent's Commissioner chooses a topic for a training mission called the Commissioner's Initiative ("Initiative"). All employees are required to attend the training on that topic. For 2008-09, the Initiative topic was "How to Identify and Prevent Discrimination, Harassment, and Retaliation in the Workplace." (Tr. 312-13, 325, 1206; Respondent's Exh. 2)

36. General topic instructors ("GTIs"), weapons training officers ("WTOs"), and cultural diversity instructors were eligible to serve as trainers for the 2008-09 Initiative. Trainers were volunteers. They received no financial or fringe benefits. (Tr. 336-38, 1206, 1210-13, 1250)

37. Six Willard employees, including Complainant, volunteered to be Initiative trainers. On October 10, 2008, Willard's training advisory committee reviewed the applications. The committee considered the candidates' seniority, time and attendance, training experience, credibility with staff, and availability to conduct training without disrupting the activities of the facility. The training advisory committee recommended WTO Michael Thomas; COs Emily

Twarderski, Rhonda Moore, and Robert McLean; and Ben Laughlin, who was a civilian vocational instructor, to Williams. Williams selected Thomas, Twarderski, Moore, and McLean. (Tr. 313-15, 328, 329, 332-33, 350-52, 667; Respondent's Exh. 2).

Changes to the Vocational Program

38. In January 2007, Polakow became Willard's Deputy Superintendent for Programs. At the time, only six of the 14 platoons of parolees received vocational instruction. Polakow and Guido wanted to expand the availability of vocational programming. In March or April 2007, Polakow and Guido proposed that Willard add a vocational program in painting. Polakow wanted to transfer Willard's platoon of female parolees from the horticulture program to the proposed painting program, because she believed painting would be a more practical skill. Polakow also proposed that a platoon of parolees with various medical needs ("medical platoon") be moved to the hortieulture program as part of the program change. At the time, the medical platoon had no vocational programming. Because the schedules of the female and medical platoons mirrored each other, it was easy to match up the two platoons and make the proposed changes. (Tr. 587, 824, 991-94, 997, 1043, 1061, 1304, 1306-07)

39. It took approximately six months for Respondent's headquarters to approve Polakow's proposal. On October 26, 2007, Respondent approved the program change, including moving the medical platoon to horticulture. (Tr. 992, 1043, 1062, 1067, 1342; Respondent's Exh. 11)

40. Because Complainant was off work during the summer, she did not learn of the program change until it was approved. Complainant was concerned that parolees in the medical platoon would be unable to meet the physical requirements of the horticulture program. Complainant believed she was assigned the medical platoon "because they [sic] were difficult," in retaliation for her complaints about the Albany class. (Tr. 584-85, 596, 822, 825, 1044, 1367)

41. In September 2008, the medical platoon was transferred from horticulture to the masonry program. The medical platoon has since been transferred to the floor covering program. (Tr. 597, 823, 1347)

The AAA Position

42. In December 2007, Ghatt transferred to a position with the Academy. On February 5, 2008, Complainant sent Harvey her resume and a letter of interest in Ghatt's previous AAA position. Harvey forwarded Complainant's application to Respondent's Personnel office, who determined that Complainant was not qualified for the position. Complainant never received a response to her letter. (Tr. 582, 1224, 1401, 1403; Complainant's Exh. 45)

43. To qualify for the position by promotion, a candidate needed "one year of permanent service in an affirmative action, personnel, minority business, employment compliance, labor relations, or training position allocated at or above Grade 18." Complainant did not have the required work experience, and she was only a Grade 17. To qualify for the position on an open competitive basis, a candidate needed "a bachelor's degree and three years of experience in the field of equal employment opportunity, human rights, or affirmative action." Complainant did not have a bachelor's degree or the required work experience. While Complainant has participated in voluntary diversity activities since 2003, she acknowledged that she spends only 15 to 20 days a year on these activities. (Tr. 735, 738-39, 865-66, 870; Complainant's Exh. 46)

44. Respondent selected Michael Washington for Ghatt's position. At the time Washington was selected, he had a bachelor's degree, had worked for an affirmative action program for six years, had been a CO for ten years, had been an instructor at the Academy for six years, had training in and had conducted investigations, and had served in a Grade 18 position for one year. (Tr. 583, 873-75, 877, 882-83, 887)

Lt. Rivera's Comments

45. On April 2, 2008, Complainant attended a training at Willard on "Diversity and Security in Corrections." At the training, Lt. Ernesto Rivera, who has been employed by Respondent for more than 31 years, described how difficult things were for Respondent's Black, Hispanic, and female employees when he started working for Respondent and how the situation had evolved. (Tr. 597, 617, 1624-27; Complainant's Exh. 37)

46. Rivera's comments were well received by the audience. However, Lynn Anderson, who was then a correction counselor for Respondent, objected to Rivera's comment that women who worked in corrections were far more open to being manipulated by male inmates than men were. Complainant also found some of Rivera's comments offensive. (Tr. 408, 617-18, 1625)

NCCER Training

47. On June 11-13, 2008, Complainant attended a training program at Willard put on by the National Center for Construction Education and Research ("NCCER"). At one point, the class was discussing distractions. A student said, "Oh, a big distraction is women." The instructor, who was not an employee of Respondent, said "Oh, yeah. That's a big distraction." Complainant was offended by these remarks, but she did not complain about them or challenge the instructor. (Tr. 620, 622-23, 625-26; Complainant's Exh. 19)

The July 24, 2008 Meeting

48. On July 24, 2008, Washington attended the Elmira hub DMC meeting at Willard to meet DMC members, including Complainant. (Tr. 628, 766, 905)

49. Washington wanted Respondent's employees to receive training in prevention of sexual harassment more than once in their careers. He believed increased training would cut down on complaints of harassment. In this context, he talked about a need to prevent "copycat lawsuits."

Complainant felt Washington's remark was directed at her, in response to her Division complaint. However, at the time of the meeting, Washington was unaware of Complainant's complaint. Washington's comment was not directed at Complainant. (Tr. 633-34, 638, 912, 938-39; Complainant's Exh. 41)

50. Later in the same meeting, Washington referred to DMC members who used the DMC's "umbrella" for their own protection. Complainant believed Washington directed this comment at her. However, Washington was referring to DMC members who did not attend meetings, not to Complainant. (Tr. 942-43)

The State Fair

51. Every year, Respondent has a booth at the State Fair ("Fair"), which runs from late August through Labor Day. Volunteers from Respondent's work force staff the booth. These volunteers are not paid for their time at the Fair. (Tr. 563-65, 567, 571)

52. In July 2008, Cobb sent an email to the facilities in the Elmira hub requesting volunteers for the Fair. Complainant told Guido she wanted to volunteer. Williams' secretary sent Cobb a list of volunteers, with dates Willard had assigned to each volunteer. Because Cobb already had an employee from another facility assigned to the day Willard had chosen for Complainant, he could not use Complainant. (Tr. 570, 572, 1536-38, 1562-65, 1567, 1569; Complainant's Exh. 47; Respondent's Exh. 27)

The Tool Shed

53. On April 16, 2008, Willard delivered a new tool shed for Complainant. Other vocational instructors and parolees helped set up the shed. Unlike the previous shed Complainant had used, the new shed did not have a lock employees could open with a common

key. Complainant had a key to the shed, but other employees had to get a key from the watch commander. (Tr. 367, 649-50, 831, 1291-92, 1297, 1325)

54. When Complainant arrived at work on a Monday in early May 2008, she discovered that the shed had been turned around. Complainant felt the shed was less secure because the door now faced the back of the facility grounds, toward a main road. The door also opened over a woodchuck den. (Tr. 370-72, 652-53, 659)

55. The shed was moved over the weekend immediately after Complainant received a copy of the Division's determination finding probable cause with respect to her November 1, 2007 complaint. The Division sent the determination to ODM in Albany but not to Willard. It is not ODM's practice to notify the facility involved when it receives a probable cause determination from the Division, and there is no evidence that ODM did so in this case. The record contains no evidence that anyone at Willard was aware of the Division's determination before the shed was turned around. (Tr. 652, 834, 1389-91, 1394, 1399-1400; ALJ's Exh. 12)

56. Complainant told Guido the shed had been turned around, and she asked him to move it back. Guido asked John Shaw, another vocational instructor, and the maintenance department to move the shed back. (Tr. 373, 653, 655, 1291, 1296)

57. Complainant also told Robert Edwards, Willard's outside crew sergeant, that the shed had been turned around. Edwards did not know what happened, but another officer told him a platoon had moved the shed as a motivational exercise. Edwards expected the same platoon to turn the shed back around the following weekend. (Tr. 1575-79)

58. Edwards told Complainant what he had found out about the shed. Complainant said she wondered if moving the shed was retaliation for a complaint she had filed against Willard. Edwards was unaware of Complainant's complaint or its subject. Edwards did not report to his

superiors what Complainant had said, and he did not investigate the incident further. (Tr. 1579-80, 1582, 1585, 1606-07, 1614)

59. Complainant also asked Edwards to remove woodchucks from the vicinity of the shed. Edwards did so. (Tr. 1596-98)

60. Complainant repeatedly asked Guido to turn the shed around. Finally, in July 2008, another vocational instructor and a platoon of parolees turned the shed partway around. In late July or early August 2008, Shaw moved the shed back to its original position. (Tr. 374, 655, 661-62, 663, 667, 1300; Complainant's Exhs. 43, 44)

61. Complainant told Guido she thought the shed had been turned around to retaliate against her. Complainant did not tell Guido why she thought Respondent would retaliate against her. At the time, Guido was not aware that Complainant had made complaints about sex discrimination. He did not learn about these complaints until Respondent's attorney contacted him in August or September 2008. Guido thought Complainant meant retaliation for changing the lock so the shed was no longer accessible to other staff. Guido did not investigate Complainant's claim of retaliation, and he did not report her claim to Polakow. (Tr. 658-59, 1047, 1332-3, 1335, 1368; Complainant's Exhs. 43)

Comments from Co-Workers

62. After Complainant returned from the April 19, 2007 class taught by Hughes, she heard several negative comments from co-workers about the class. Thomas Beatrice, another vocational instructor, said to Complainant, "Oh, didn't get it right the first time. You've got to go again, do you?" When Complainant was walking into work, she heard over the loudspeaker, "Oh, what did we learn today? Did we learn how to behave as women?" A cleaning officer

Complainant did not identify by name made several comments about women "being dumb and having to take extra training." (Tr. 515-17)

63. In early 2009, Complainant carpooled to work with Steven Beaver, another vocational instructor. On March 27, 2009, after the first two days of the public hearing, Beaver told Complainant he would no longer carpool with her because he was afraid of retaliation. (Tr. 839-40, 854)

OPINION AND DECISION

Disparate Treatment

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of sex. Human Rights Law §296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association,* 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.* The ultimate burden of proof always remains with Complainant. *Id.* at 630, 665 N.Y.S. 2d at 29.

Complainant, a female, is a member of a protected class, and she was qualified for her position as a vocational instructor. Complainant alleges that Respondent engaged in "per se" unlawful sex discrimination by distributing the Handbook and offering training programs

intended solely or primarily for female employees. However, Complainant failed to show that she suffered an adverse employment action when she was issued the Handbook or when she attended the Albany class, which she was not required to attend. An adverse employment action requires "a materially adverse change in the terms and conditions of employment." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 306, 786 N.Y.S.2d 382, 391 (2004). This may be shown by "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.*, quoting *Galabya v. New York City Board of Education*, 202 F. 3d 636, 640 (2d Cir. 2000). Both the Handbook and the Albany class were intended to improve conditions for women working in Respondent's male-dominated environment. Complainant did not show that either the Handbook or the class adversely affected the terms or conditions of her employment, let alone that they treated her less favorably than male employees. Therefore, Complainant failed to establish a prima facie case of discrimination.

Hostile Work Environment

Complainant also alleges that Respondent unlawfully discriminated against her by subjecting her to a hostile work environment. To prevail on this claim, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an

employee's work performance." *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 23, 114 S. Ct. 367, 371 (1993). The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant alleges that the Handbook and the Albany class created a hostile work environment for her. While Complainant took offense at certain language in the Handbook and at comments made during the Albany class, I find that neither the language nor the comments were sufficiently severe to create a hostile work environment.

Complainant also alleges that she was subjected to demeaning comments from co-workers. Complainant established only that she heard several negative comments after she returned from the April 19, 2007 class and that an instructor and a student made offensive comments in the NCCER class. These comments were neither sufficiently severe nor pervasive to create an abusive working environment. Therefore, Complainant has failed to establish that she was subjected to a hostile work environment because of her sex.

Retaliation

It is an unlawful discriminatory practice for an employer to retaliate against an employee because she has complained about discrimination. Human Rights Law §296.1(e). Complainant alleged that Respondent retaliated against her for her internal complaint about the Albany class and for her Division complaint. 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, 692 N.Y.S. 2d 220, 223-24 (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.* As with a claim of disparate treatment, Complainant has the ultimate burden of proving discrimination. *Ferrante* at 630, 665 N.Y.S.2d at 29.

Complainant engaged in protected activity when she filed her internal complaint and her Division complaint. Although Respondent was aware of these complaints, Complainant did not prove that every individual employee she accuses of retaliating against her was aware of her complaints. However, with respect to all but one of her allegations, Complainant failed to show that she suffered an adverse employment action based on her complaints. Complainant alleges that Respondent's denial of payment of her hotel expenses for the Albany affirmative action training in October 2007, its failure to select Complainant for the TTT program, its failure to select Complainant as a trainer for the Initiative, its failure to select Complainant to volunteer at the Fair, the assignment of the medical platoon to horticulture, the turning around of the tool shed, Rivera's comments at the April 2008 meeting, and Washington's comments at the July 2008 meeting were all in retaliation for her complaints. The training opportunities and hotel reimbursement Complainant alleges she was denied did not involve her responsibilities as a vocational instructor but her volunteer activities in the area of diversity. The Fair was another volunteer opportunity that was not related to Complainant's job responsibilities. Thus, the denial of these opportunities did not constitute a materially adverse change in the terms or conditions of Complainant's employment. The assignment of the medical platoon to Complainant and the turning around of the tool shed did not materially change Complainant's teaching

responsibilities. Finally, neither Rivera's nor Washington's comments had any effect on Complainant's job responsibilities. Thus, Complainant failed to establish a prima facie case of retaliation with respect to these allegations.

Complainant did suffer an adverse employment action when Respondent did not hire her for Ghatt's AAA position. However, the evidence is clear that Complainant was not qualified for the position. Complainant lacked the experience required for promotion to the position, and she had neither the education nor the experience required for selection on an open competitive basis. Thus, Complainant cannot establish a causal connection between her complaints and her failure to obtain the AAA position, and her retaliation 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: September 11, 2009
Syracuse, New York

Edward Luban
Administrative Law Judge