NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

VIRGINIA REITANO,

Complainant,

v.

LANSING CENTRAL SCHOOL DISTRICT,
CALVIN LANGE, AIDER AND ABETTOR,

Respondents.

NOTICE AND FINAL ORDER

Case No. 10112693

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 April 28, 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: JUN 22 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
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VIRGINIA REITANO,
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LANSING CENTRAL SCHOOL DISTRICT, CALVIN LANGE, AIDER AND ABETTOR,
Respondents.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10112693**

SUMMARY

Complainant alleged that Respondents subjected her to sexual harassment and retaliated against her for complaining about the alleged harassment. Because Complainant failed to sustain her burden of proof, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On July 25, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on August 13, 2008,

August 14, 2008, September 5, 2008, December 5, 2008, January 30, 2009, and February 11, 2009.

Complainant and Respondents appeared at the hearing. Complainant was represented by Raymond M. Schlather, Esq. Respondent Lansing Central School District ("Respondent") was represented by Miles G. Lawlor, Esq. Respondent Calvin Lange ("Lange") was represented by Kevin A. Jones, Esq.

On the first day of the hearing, Complainant introduced into evidence records from two medical providers. Complainant declined to consent to the release of additional medical records, and she obtained an order from the Supreme Court, Onondaga County, quashing subpoenas Respondent had issued for such records. In response to the Supreme Court's order, Respondent asked ALJ Luban to direct Complainant to provide information about her medical providers, to issue subpoenas for her medical records, and to direct her to provide releases for those records. ALJ Luban declined to do so, but he advised the parties that he would strike the medical records already in evidence and would disregard Complainant's testimony about medical treatment she received unless Complainant agreed to release the records Respondent sought. (ALJ's Exh. 7) Complainant declined to release the records. She then withdrew the medical records that she had previously introduced. (Tr. A 838, 1128-29) [1]

Complainant and Respondents filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

[1] "Tr. A" refers to the transcript of the hearings held August 13-December 5, 2008. "Tr. B" refers to the transcript of the hearings held January 30 and February 11, 2009.

FINDINGS OF FACT

1. Complainant has been employed as a third and fourth grade teacher at Respondent's Buckley Elementary School ("Buckley") since 2001. (Tr. A 176, 186; Complainant's Exh. 1)

2. Respondent has employed Lange as a teacher for 11 years. For most of that time, Lange has worked at Buckley, where he has taught second, third, and fourth grades. From September 2007 to March 2008, Lange served as a technology integration specialist for all three of Respondent's schools. (Tr. B 296-97)

3. During most of the time period relevant to the complaint, Complainant's classroom was located next door to Lange's classroom. Complainant and Lange saw each other daily. (Tr. A 394-95, 891-92)

4. Complainant and Lange became friends soon after Complainant began working at Buckley. They developed a close personal relationship. They frequently left school together for coffee, and they socialized outside of school. They confided in each other about their personal lives, family, and relationships. To their co-workers they appeared flirtatious, and their interest in each other appeared to be mutual. (Tr. A 38, 42-43, 46, 112, 128-29, 160-62, 189, 191, 200-01, 208, 400-02, 410, 418-19, 565, 595-97, 610-11, 632-33, 635, 659, 712-13; Tr. B 299-304, 367-68)

5. On one occasion in 2004, Lange told teachers at a grade-level meeting that Complainant was not at the meeting because she "didn't feel like it." Lange was aware that Complainant was actually in a parent-teacher conference at the time. Lisa Peters, another Buckley teacher, agreed that Lange lied to the other teachers at the meeting about the reason Complainant did not attend. (Tr. A 204-05, 470, 664)

6. On one occasion in or around the spring of 2004, a male teacher who was substituting for Complainant asked Lange for Complainant's phone number. Lange refused to give the teacher the number, because he only had Complainant's cell phone number and he did not want to give that number out without Complainant's permission. Lange told the substitute that he could contact Complainant through the office. Complainant felt that Lange did not give the substitute her number because he knew the substitute was interested in her. (Tr. A 206, 871; Tr. B 308-09)

7. One morning in or around the fall of 2004, Complainant came into school with her hair dyed red. Lange told Complainant that he did not like red hair because that was the color of his ex-wife's hair. Complainant was angry and upset at Lange's comment. (Tr. A 213, 508-10, 868-69)

8. During the 2004-05 school year, the relationship between Complainant and Lange changed. Colleagues noticed tension between them. (Tr. A 131-32, 139, 560, 599-600, 667, 673, 680-82, 701, 714-16)

9. The evidence is conflicting as to why the relationship between Complainant and Lange changed. Complainant testified that Lange wanted a relationship that was more than friendship, that she repeatedly rejected his efforts, and that eventually this caused their friendship to end. Lange testified that he and Complainant dated casually for five or six months, that they remained close friends after they stopped dating, and that their friendship diminished when he started dating the woman who later became his wife. Several other teachers observed a change in the relationship around the time Lange began seeing his future wife and Complainant began seeing her current boyfriend. (Tr. A 196, 202, 210, 215-17, 416, 539-40, 599, 701; Tr. B 299-303, 307, 367, 370)

10. In October 2005, Lange arranged with Jennifer Miner, an Academic Intervention Services ("AIS") teacher, for one of his students to receive an hour of math instruction daily from Miner in Complainant's classroom. Lange did not discuss this arrangement with Complainant. Complainant was concerned that Lange had not discussed the arrangement with her, and she felt the student was receiving more services than he was supposed to receive. After several days, the student told Lange that he would only be going to Complainant's classroom for half an hour a day. Lange went into Complainant's classroom and complained loudly to Miner, in front of Complainant and her students. (Tr. A 218-19, 424; Tr. B 313-17, 376-79)

11. Complainant complained to Earlene Carr, Buckley's principal, about this incident. Carr spoke with Lange and told him that the AIS student should not remain in Complainant's classroom for more than the required half hour. (Tr. A 218-19, 767-68; Tr. B 28-29)

12. At around the same time, Complainant told Carr that Lange was criticizing her to other staff members for "trying to blow off" the AIS student. Complainant told Carr that Lange had been making such comments about her for several years and that she believed he was doing so because she had refused to have a romantic relationship with him. This was the first time Complainant had complained to Respondent about Lange's behavior. (Tr. A 219, 420, 427, 753-5)

13. Carr considered Complainant's allegations to involve unprofessional conduct, not sexual harassment, because the allegations did not involve "physical intimidation, touching, feeling, [or] threatening that had to do with a sexual kind of thing." (Tr. B 19-20, 23, 39-40)

14. On October 28, 2005, Carr met with Complainant and Lange. Carr told Lange that he should "cease and desist" from unnecessary communication with Complainant. (Tr. A 222-23, 758-61, 804, 807, 809-810; Tr. B 31, 53,312, 343-45)

15. On November 6, 2005, Complainant wrote to Tiffany Phillips, Respondent's Interim Superintendent, about "a form of harassment in the workplace that . . . has been an ongoing problem for the past 3 years. Calvin Lange has continually talked about me behind my back to other employees." Complainant said she had spoken to Lange about this behavior "time and time again, over the last 3 years." Complainant described in detail the incident involving the AIS student, said "this has been happening ever since Mr. Lange had had romantic feelings for me that I did not return," noted negative comments Lange allegedly made about her absences, and described her efforts to address the problem with Carr and Lange. (Tr. A 224; Complainant's Exh. 2)

16. On November 19, 2005, Complainant met with Phillips and Carr. At Complainant's request, Katherine Bevington, another Buckley teacher, attended the meeting to take notes. Phillips and Carr took Complainant's concerns seriously. Carr mentioned the possibility of Complainant moving to another building. Phillips offered Complainant the choice of a full-blown investigation or a meeting between Complainant, Lange, Phillips, and Carr. Complainant requested a formal investigation. (Tr. A 145-47, 153-55, 167-69, 226-28, 452, 456-57, 889, 899; Complainant's Exh. 3)

17. On or about December 7, 2005, Phillips assigned Pam DiPaola, Respondent's Title IX officer, to investigate Complainant's complaint, which Phillips described to DiPaola as a complaint of hostile work environment. (Tr. B 102-05)

18. On December 19, 2005, DiPaola interviewed Complainant. Complainant described her complaints about Lange, and she identified people she said had witnessed Lange's conduct. Complainant did not identify any specific sexual advances Lange allegedly made or any specific instance in which she rebuffed his advances, but she said that he pressured her to do things with

him and his sons and that he was jealous when she went out with or spoke with other men. Complainant told DiPaola that the previous spring, Lange had told her that she did not know what she was missing, and that "any girl" he had ever been with said he was the best they'd ever had. Complainant did not give DiPaola dates for any incidents she reported, but she said that the incidents occurred, on average, once a month. (Tr. A 459; Tr. B 113-15, 131, 230; Complainant's Exhs. 4, 6)

19. In January and February 2006, DiPaola interviewed Reid Dewey, Michelle Negley, Sybil Bush, Debbie Nichols, and Patty Jennings, all of whom Complainant had identified as witnesses to incidents involving herself and Lange. Several of the interviewees acknowledged tension between Complainant and Lange, but none of them identified any mistreatment of Complainant by Lange or any misconduct on Lange's part. None supported Complainant's allegations that Lange had sexually harassed Complainant. (Tr. B 118-25; Complainant's Exh. 5)

20. DiPaola did not interview Melanie Sauer or Maureen Kelly, who Complainant also identified as witnesses, and she did not work on the investigation during March or April 2006. At the hearing, DiPaola could not explain why she did not interview Sauer or Kelly or why she did not continue her investigation during those months. (Tr. B 180-81, 212, 229)

21. On May 5, 2006, DiPaola met with Complainant again. DiPaola and Complainant reviewed DiPaola's notes from the interview on December 19, 2005. (Tr. B 132, 138-143; Complainant's Exhs. 5, 14)

22. On May 5, 2006, DiPaola interviewed Lange. Lange said that he and Complainant had a romantic involvement years ago and had been friends after that, but that their relationship had changed over a year before. Lange denied that he made advances toward Complainant. He

acknowledged that he had raised his voice and chastised Miner in Complainant's classroom. He denied several of Complainant's allegations, and he said he did not remember other incidents Complainant had described to DiPaola. (Tr. B 126-30, 249; Complainant's Exh. 5)

23. Between April and June 2006, Complainant made additional complaints about Lange to DiPaola, Carr, and Mark Lewis, who was then Respondent's Interim Superintendent. Complainant reported that while Buckley students and teachers were on a field trip, Lange gave menus from a local restaurant to all the Buckley teachers present except Complainant and then got lunch for everyone but her; that when Lange brought his class down the stairs for lunch, he did not move out of Complainant's way and forced her to "squeeze sideways" to avoid him when her class was coming up the stairs; that Lange followed Complainant's class to her classroom door and spoke loudly to one of her students; that Lange interrupted a conversation Complainant was having with another teacher; that Lange made a sarcastic comment about a question Complainant had asked another teacher; that Lange initially refused to share a video with Complainant's class; that Lange called every teacher on the grade level team but Complainant about a time change for a presentation about the school band; that Lange had "borrowed" one of Complainant's students to pass out programs at a moving-up ceremony without notifying Complainant; and that on the last day of school, Lange came into Complainant's classroom to talk to an instructional support teacher, without Complainant's permission. (Tr. A 263-64, 272-76, 281-82, 284-86, 320, 333-35,795-96; Tr. B 55, 60, 70-71, 73-74, 82, 135-37; Complainant's Exhs. 9, 10, 11)

24. DiPaola intended to investigate these allegations before completing her report, but she was very busy because it was the end of the school year. In July 2006, after Complainant filed her Division complaint, Lewis told DiPaola to stop her investigation. DiPaola never made a

determination about Complainant's allegations, and she never completed a report. (Tr. B 145-48, 227-28, 246)

25. During the 2005-06 school year, Lynnea VandePoel and Lange served as grade level co-coordinators for the third grade teachers at Buckley. Grade level coordinators are responsible for informing teachers about meetings. Carr asked VandePoel, instead of Lange, to communicate grade level information to Complainant, "to help alleviate tensions" between Complainant and Lange. (Tr. A 705-09, 720-22; Tr. B 322-24)

26. In July 2007, Chris Pettograsso became Buckley's principal. Between February and June 2008, Complainant made complaints to Pettograsso about Lange. Complainant reported that on one occasion when Respondent's teachers were at another school grading a test, Lange joined a circle of teachers and stood next to Complainant; that on one occasion Lange drove toward Complainant's car in the Buckley parking lot and did not move out of the way; that Lange spoke to Complainant's students while they were waiting in the lunch line; that on one occasion when Complainant went to get a salad from the cooler, Lange was talking to a cafeteria worker and would not move out of Complainant's way; that on another occasion Lange reached in front of Complainant to get ice cream from the cooler; that Lange attended a third and fourth grade placement meeting and sat at a small table with Complainant; and that on two occasions Lange overstayed his time in the school library and delayed the library time of Complainant's class by five to ten minutes. (Tr. A 270-71, 339-40, 903, 907-08, 911, 921-23, 946, 973-74, 985-86; 997-1002, 1007-08; Complainant's Exhs. 22, 31)

27. On March 10, 2008, Maureen Johnson, a Buckley fourth grade teacher, retired unexpectedly. Stephen Grimm, who became Respondent's Superintendent in January 2008, decided to place Lange in Johnson's classroom for the remainder of the school year. Respondent

was facing financial problems and had already decided to eliminate Lange's technology position the following year. Assigning Lange to Johnson's position saved Respondent approximately $8,000 and enabled it to place an experienced, certified, and tenured teacher in the classroom. (Tr. A 1016, 1027, 1049-51, 1053, 1098, 1101, 1109-10)

28. Complainant was "very upset" that Respondent would place Lange in Johnson's classroom, which was next door to Complainant's classroom. She asked Pettograsso to reconsider the decision. Respondent declined to change its decision, but Pettograsso and Grimm directed Lange to minimize his contact with Complainant for the remainder of the school year. Grimm also arranged that Complainant could bring complaints about Lange to Dave Cerillio, a Labor Relations Specialist from BOCES, if she was not satisfied with Pettograsso's response to those complaints. (Tr. A 323-24, 878, 980, 1051, 1083-84, 1093, 1105; Complainant's Exhs. 19, 20, 31, 33)

29. After Lange was reassigned to Johnson's class, Complainant observed him walking back and forth past her classroom when he could have taken alternate routes. Lange walked past Complainant's classroom to get to the gym, to get books from the AIS room, to take his class to recess, and to speak with other teachers, not to harass Complainant or to make her uncomfortable. (Tr. A 331; Tr. B 401-02)

30. In the spring of 2008, Complainant observed Lange working with one of his students at a desk she had placed outside the door of her classroom. Complainant felt Lange had put the student at that desk to harass her. In fact, Lange had sent the student into the hallway to read. The student was supposed to be sitting on a rug Lange had placed in the hallway for that purpose but had moved to the desk instead. (Tr. A 331-32; Tr. B 403, 415-16)

31. In or about late May 2008, Respondent posted an internal notice that it was seeking four summer school teachers for grades four, five, and six in reading, writing, and math. The only qualification stated was New York State certification in elementary education. (Tr. A 1056; Complainant's Exh. 23)[2]

32. Complainant applied for a summer school position, but Respondent did not hire her. Because most of the summer school students had reading problems, Respondent selected candidates who had reading certification or who had been reading teachers. Complainant did not have a reading certification, and she was not a reading teacher. (Tr. A 343, 346-48, 916-18, 1011-12, 1054-55)

33. At the end of the 2007-08 school year, Complainant and Lange went to Meyers Park with their students for a school picnic. One of Lange's sons was also present with his class. At one point, Lange and his son walked over to a picnic table to get a drink which his son had left on that table. Complainant was seated nearby. Lange and his son remained at the table for several minutes. (Tr. A 336-37, 862-64; Tr. B 337-38)

34. The incidents about which Complainant complained occurred monthly on average. (Tr. A 889-91; Complainant's Exh. 4) Lange offered credible explanations that his actions in many of these incidents did not involve sexual harassment or other mistreatment directed at Complainant. (Tr. B 308-09, 313-21, 323-25, 329-31, 333-37, 380, 383-86, 399-404)

35. Between 2005 and 2008, Carr, Pettograsso, Lewis, and Grimm directed Lange to minimize contact with Complainant and to keep his contact with her on a professional basis. They did not direct Lange to avoid all contact with Complainant, to stay out of Complainant's classroom, to avoid walking past Complainant's classroom, to avoid speaking with

[2] Complainant's Exh. 23, the notice presented at the hearing, is dated 5/28/07. Respondent did not dispute Complainant's testimony that this was the notice for the summer 2008. (Tr. A 344-47)

Complainant's students, or to avoid using the stairway that Complainant's class used. (Tr. A 761-63, 782, 826, 909, 974, 989-90, 1018-19 1052-53, 1083, 1085, 1089, 117-19, 1123-24; Tr. B 91, 332-33, 339, 351-52, 359-61; Complainant's Exh. 33)

36. Sandra Rapp, Patti Jennings, Dan Elberty, Bevington, and VandePoel are Buckley teachers who have worked with and socialized with Complainant and Lange. They did not observe any conduct toward Complainant on Lange's part that they considered to be sexual harassment, mistreatment, or otherwise inappropriate. Peters did not see Lange sexually harass Complainant, but she considered it a "snub" when Lange gave other teachers a menu to order lunch without giving a menu to Complainant. (Tr. A 166, 542, 601-02, 632, 660-61, 681-82, 703-04, 742)

OPINION AND DECISION

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. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Cmty. College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977). Respondent contends that Complainant's hostile work environment claim is time-barred because all of Lange's alleged sexually harassing conduct occurred before the end of June 2005, which was more than one year before Complainant filed her complaint with the Division. Respondent bases this contention on the fact that Complainant has not alleged that Lange made any sexual advances or comments after the end of the 2004-05 school year. However, the conduct that can support a claim of sexual harassment need not be sexual in nature, as long as the conduct is based on the victim's

gender. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc. 2d 795, 806, 669 N.Y.S. 2d 122, 130 (Sup. Ct. N.Y. Co. 1997), *appeal dismissed* 93 N.Y.2d 919, 691 N.Y.S.2d 383 (1999). In addition, "if the alleged unlawful discriminatory practice is of a continuing nature, the date of its occurrence shall be deemed to be any date subsequent to its inception, up to and including the date of its cessation." 9 N.Y.C.R.R. §465.3(e). Complainant has alleged that Lange engaged in a continuing course of conduct. The conduct that she alleged took place "within the limitations period [was] sufficiently similar to the alleged conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice." *Henderson v. Town of Van Buren*, 281 A.D.2d 872, 723 N.Y.S.2d 282 (4th Dept. 2001) (quoting *Walsh v. Covenant House*, 244 A.D. 2d 214, 215, 664 N.Y.S. 2d 682 (1st Dept. 1997). Therefore, I deem the complaint timely.

Hostile Work Environment

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 alleges that Respondents unlawfully discriminated against her by subjecting her to sexual harassment that created a hostile work environment. In order to sustain 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 Lange "continually" made derogatory comments about her to other teachers, that he engaged in harassing and abusive conduct toward her, and that he made such comments and engaged in such conduct in retaliation for her rejection of his alleged sexual advances. However, Complainant did not identify any specific sexual advance or any specific instance when she rejected Lange's advances, and she did not connect any conduct on Lange's part to her rejection of a particular sexual advance. With respect to alleged comments made behind Complainant's back, Peters testified that on one occasion in 2004, Lange lied to other teachers about the reason Complainant did not attend a meeting. No other witnesses corroborated Complainant's allegation that Lange spoke negatively about her to other teachers, let alone that he did so "continually."

Lange testified credibly that many of the incidents Complainant described did not involve harassment or mistreatment. Even accepting Complainant's allegations as true, Complainant established at most that Lange engaged in a series of petty slights. Animosity on the job may be an unpleasant experience, but it is not actionable as discrimination. *See Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 298, 786 N.Y.S.2d 382, 385 (2004); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283-84 (1998).

In the fall of 2005, Complainant told Carr and DiPaola that Lange had "continually" engaged in such conduct for three years. This allegation is belied by Complainant's own testimony that for much of this time she continued to have a close relationship with Lange.

Complainant also testified that such incidents occurred on a monthly basis. However, because Complainant and Lange worked in close proximity and interacted on a daily basis, I find that the conduct did not occur with sufficient frequency to constitute pervasive conduct.

The burden of persuasion of the ultimate issue of discrimination always remains with Complainant. *See Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 6 N.Y. 3d 265, 271, 811 N.Y.S. 2d 633, 637 (2006). The conduct that Complainant described as harassment was neither severe nor pervasive, and it was insufficient 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 and Lange retaliated against her for complaining about Lange's sexual harassment. To prove a prima facie case of retaliation, Complainant must establish that she engaged in protected activity, that Respondent and Lange were 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).

Complainant engaged in protected activity when she complained to Carr, Phillips, DiPaola, and the Division about alleged sexual harassment. Respondent and Lange were aware of these complaints. However, Complainant failed to show that she suffered an adverse employment action based on her complaints. An adverse employment action requires "a

materially adverse change in the terms and conditions of employment." *Forrest* at 306, 786 N.Y.S.2d at 391. 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). Complainant alleges that Lange's continuing conduct, Respondent's failure to investigate and remediate Lange's conduct, Carr's proposal that she move to a different building, and Respondent's decision to assign Lange to Johnson's classroom were all in retaliation for her complaints about Lange. Even accepting Complainant's allegations as true--and there is credible evidence to the contrary--none of these actions rose to the level of adverse employment actions. Complainant is still employed by Respondent. She was not demoted, her pay was not reduced, her responsibilities were not diminished, and she showed no other material change in the terms and conditions of her employment. Therefore, Complainant failed to show that she suffered an adverse employment action, and she failed to establish a prima facie case of retaliation.

Respondent's Investigation

Complainant argues that Respondent is liable for sexual harassment because its response to Complainant's complaints was inadequate. However, whatever the inadequacies of Respondent's investigation, Respondent is not liable because no sexual harassment occurred. *See Karibian v. Columbia University*, 930 F. Supp. 134, 147-48 (S.D.N.Y. 1996).

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: April 28, 2009
Syracuse, New York

Edward Luban
Administrative Law Judge