NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

TERRI SELDEN,

Complainant,

v.

ONEIDA COUNTY DEPUTY MARK NICOLAICHUK, COUNTY OF ONEIDA, ONEIDA COUNTY SHERIFF'S DEPARTMENT,

Respondents.

NOTICE AND FINAL ORDER

Case No. 7942669

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 February 20, 2009, by Robert J. Tuosto, 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 20 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

TERRI SELDEN,

Complainant,

v.

ONEIDA COUNTY DEPUTY MARK NICOLAICHUK, COUNTY OF ONEIDA, ONEIDA COUNTY SHERIFF'S DEPARTMENT,

Respondents.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **7942669**

SUMMARY

Complainant alleged that Respondents County of Oneida ("Oneida") and Oneida County Sherriff's Department ("OCSD") exposed her to a sexually hostile work environment; Complainant also alleged that she suffered retaliation. However, Complainant has failed to prove her case and the complaint is dismissed against all Respondents.

PROCEEDINGS IN THE CASE

On November 27, 2000 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 Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held in Albany, New York on November 19-20, 2007.

Complainant and Respondents appeared at the hearing. Complainant was represented by Susan F. Bartkowski, Esq. of the law firm of Towne, Bartkowski & Defio Kean, P.C., Saratoga Springs, New York. Respondents Oneida and OCSD were represented by Gregory J. Amoroso, Esq., and James S. Rizzo, Esq. of the law firm of Saunders, Kahler, Amoroso & Locke, L.L.P., Utica, New York. Respondent Oneida County Deputy Mark Nikolaichuk ("Nicolaichuk") was represented by Richard J. Mauro, Esq., Utica, New York.

Permission to file post-hearing briefs was granted and both sides made post-trial submissions.

This case was subsequently reassigned to ALJ Robert J. Tuosto pursuant to N.Y.C.R.R. § 465.12 (d)(2).

FINDINGS OF FACT

1. Complainant alleged that Respondents Oneida and OCSD exposed her to a sexually hostile work environment; Complainant also alleged that she suffered retaliation. (ALJ Exhs. 1, 3)

2. Respondents denied unlawful discrimination in their verified Answers. (ALJ Exhs. 6, 7)

Background

3. From 1990 to 2001 Complainant, a female, was employed as a corrections officer ("CO") at the Oneida County Correctional Facility ("OCCF"). OCCF, run under the auspices of the OCSD, is a medium security prison housing both male and female inmates; it employs

approximately 250 people. Complainant's duties included supervising and maintaining safety and control over the 56 inmates in her unit. (Tr. 39-40, 193, 206, 270, 390-91)

4. Complainant was aware of Respondent Oneida's sexual harassment policy. Complainant received in-service sexual harassment training on at least two occasions in 1993 and 1999. Despite believing that she should not let comments from coworkers bother her, in February, 1997 Complainant made at least two complaints against a fellow CO who had allegedly screamed at her and threatened her. After an investigation the CO in question was sent to an alcohol rehabilitation facility and, upon his return, was transferred to another location outside of the OCCF. Complainant did not know about this outcome because confidentiality attached to referring the CO in question for alcohol rehabilitation. (Joint Exhs. 34, 60, 70; Tr. 41-43, 46-47, 60, 143, 145-48, 156, 236, 257-59, 271-74, 303-05, 320-21, 411, 436-37, 446, 475, 477-78, 518-19, 520-26, 536)

Interactions with Respondent Nicolaichuk

5. In 1998, Respondent Nicolaichuk, a coworker who was also a CO, made reference to Complainant's breasts. From 1998-2000 Respondent Nicolaichuk would continuously refer to Complainant's body parts. Sometime during the time period of 1999-2000 Complainant was referred to as "jugs" by Respondent Nicolaichuk while she was in the presence of 25-30 other individuals, including supervisors. In May, 2000 Respondent Nicolaichuk asked Complainant if he could warm his hands on her breasts. Complainant did not file a complaint after any of these incidents. Complainant credibly testified that she was not physically afraid of Respondent Nicolaichuk until July 29, 2000. (Joint Exhs. 2, 4, 5; Tr. 50-51, 57-60, 160-61, 172, 268, 379, 418, 451, 622)

The Events of July 29, 2000

6. On July 29, 2000 Complainant was assaulted by Respondent Nicolaichuk after he asked to feel her breasts. Respondent Nicoliachuk placed Complainant in a chokehold, reached into her shirt and bra, and jiggled her left breast while moaning and groaning. On August 1, 2000, her last day at work, Complainant filed a complaint about this incident. On August 9, 2000, after an internal investigation which was substantiated, Respondent Nicolaichuk was both formally counseled and placed on a separate shift which was intended to remove him from contact with Complainant. On August 23, 2000 Respondent Nicolaichuk was arrested after two other female CO's came forward with complaints against him for similar conduct previous to his assault on Complainant; Respondent Nicolaichuk was also suspended without pay. In March, 2001 Respondent Nicolaichuk was acquitted of criminal charges relating to this arrest. After Respondent Nicolaichuk's acquittal Respondent OCSD successfully pursued administrative charges against him arising from these allegations which resulted in his employment being terminated on February 19, 2003. (Joint Exhs. 2, 3, 4, 4a, 5, 6, 8, 10, 11, 12, 14, 17, 18, 19, 39, 66, 69, 74; Tr. 60-92, 99, 101, 103, 167, 190, 232, 242-43, 246-50, 274-80, 290, 313, 344, 382-84, 386-87, 414-25, 453, 481-83, 495-96, 511-13, 528, 548, 564, 577-80, 582-87, 602, 624-35, 650-51)

7. Starting in August, 2000 Complainant was out of work due to a combination of medical leave of absence and jury duty. Complainant never returned to her job after the assault by Respondent Nicolaichuk, and she had no further contact with him other than seeing him at his criminal trial. Complainant was out on medical leave until her employment was terminated on September 28, 2001. Complainant was deemed to have abandoned her position, pursuant to N.Y.S. Civil Service Law § 73, when she failed to produce a doctor's note that would clear her

for a return to duty. (Joint Exhs. 20, 21, 22, 23, 40, 55; Tr. 85, 90, 115, 191, 212-14, 286, 299-300, 530-33, 549, 559-60, 587, 629, 636)

8. In August, 2000 Complainant, in the wake of her complaint, received one anonymous, threatening phone call which originated from the OCCF; Complainant also received "hang up" phone calls for about one and one half months after her complaint. A "block" was placed on Complainant's phone number at the OCCF after her complaint about the threatening phone call. On August 18, 2000 Complainant requested a transfer to either the courthouse, or the transportation unit. However, Complainant conceded that she did not check to see if there were any open courthouse positions, nor did she make a request for such a transfer in writing; additionally, a CO assigned to the transportation unit was required to have firearms training and Complainant lacked such training. (Joint Exh. 66; Tr. 79-83, 117, 204-05, 208-11, 444-45, 483-86, 492-93)

Complainant Files Her Division Complainant

9. On November 27, 2000 Complainant filed her Division complaint. (ALJ Exhs. 1, 3)

10. In January, 2002 Complainant applied for a position with the Madison County Sheriff's Department ("MCSD") but was unsuccessful. Respondent OCSD's otherwise satisfactory recommendation to the MCSD rated Complainant "fair" for the attributes of 'Attendance, Punctuality, Dependability'. In the years 1994-1999 Complainant had 68 occasions of absenteeism, and 11 occasions of lateness which were also considered as the equivalent of being absent from work. (Joint Exhs. 25, 26, 27, 28; Tr. 123-24, 136, 371-73)

11. Both sides stipulated that Respondent Nicolaichuk was not correctly named as a respondent in this case, and that no potential liability should attach to him.[1] (Tr. 94-95)

[1] It appears that Respondent Nikolaichuk should have been named in the caption as an aider and abettor.

12. Prior to the end of the public hearing Complainant withdrew her retaliation claim concerning the alleged failure of Respondents Oneida and OCSD to promote her to a sergeant's position. (Tr. 645)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "because of the...sex...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1.(a). The Human Rights Law also makes it an unlawful discriminatory practice for an employer, "...to discharge, expel or otherwise discriminate against any person because he or 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).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is

sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004)), *quoting Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993). 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. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *See id* .at 21.

In order to establish a prima facie case based upon retaliation, a complainant must show that: 1) she engaged in protected activity; 2) the respondent was aware that she engaged in protected activity; 3) an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action. *Pace,* 692 N.Y.S.2d at 223, 224.

Hostile Work Environment

Complainant alleges that her prior complaints in 1997, and the fact that nothing was apparently done in response, created an environment in which she chose not to complain about Respondent Nicoliachuk's conduct towards her which progressively led to the events of July 29, 2000.

Here, Complainant makes out a prima facie case of hostile work environment as to the assault by Respondent Niciolaichuk on July 29, 2000. Respondent Nicolaichuk, emboldened by

his conduct towards Complainant starting in 1998 and recurring on a regular basis, decided on that day to elevate his attentions from the verbal to the physical. By placing Complainant in a chokehold and sexually assaulting her, Respondent Nicoliachuk instantly created a violent and abusive work environment which so impacted his victim that she never returned to a job that she had held for 10 years.

However, although Complainant proved the creation of a hostile environment as a matter of law, Respondents Oneida and OCSD made out the affirmative defense of having a complaint procedure in place and establishing that Complainant did not avail herself of it. The record shows that Complainant, in the time period 1998-2000, failed to report Respondent Nikoliachuk's conduct until she was sexually assaulted despite the existence of both an antidiscrimination policy and a complaint procedure. This allows Respondents Oneida County and OCSD to escape liability. *See Forrest,* 3 N.Y.3d 295, 312, 786 N.Y.S.2d 382, 395 n.10 (2004)(no liability attaches where the employer can show it "exercised reasonable care to prevent...discriminatory conduct...such as by promulgating an antidiscrimination policy with complaint procedure, and that the plaintiff unreasonably failed to take advantage of...corrective opportunities...or to otherwise avoid harm"); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807-808. Once Respondent OCSD was first made aware of Complainant's complaint, it acted responsibly by promptly investigating, counseling Respondent Nikoliachuk, separating him physically from Complainant, and suspending him without pay; notably, all of the aforementioned took place within approximately three weeks of Complainant's complaint. Further, it successfully pursued the termination of Respondent Nikolaichuk's employment after he was acquitted of criminal charges.

This conclusion is not undermined by Complainant's mistaken assumption that nothing

had been done in the wake of her 1997 complaints about another CO. In fact, the record shows that remedial action had been taken against that CO. Unfortunately, this information could not be communicated to Complainant due to legitimate confidentiality concerns.

Therefore, this claim must be dismissed.

Retaliation

Complainant alleges that she suffered retaliation in light of the recommendation for a position with the MCSD which noted excessive absenteeism. Complainant's 'Proposed Findings of Fact and Conclusions of Law', p. 8. However, the record shows that this event occurring in January, 2002 did not fall within the one year statute of limitation, nor was the complaint amended to reflect this claim. As such, it is time barred. Human Rights Law § 297.5. Such a conclusion is also made with respect to Complainant's September 28, 2001 employment termination. Even conforming the complaint to the proof adduced during the public hearing, and assuming the establishment of the first three prongs of the prima facie test, both claims are not actionable as Complainant failed to show that each was causally related to her August 1, 2000 complaint. Specifically, both the recommendation and termination occurred 17 months and 13 months, respectively, after Complainant's complaint. Each is too long a period of time by which to make out a prima facie case of retaliation. *Pace,* at 225 (evidence that adverse employment action took place ten months time after employee's complaint ruled fatal to retaliation claim).

The record shows that two incidents fall within the statute that could be construed as retaliatory: the phone calls which Complainant received after her complaint, as well as the unsuccessful transfer requests. As to the former, Complainant cannot make out a prima facie case given that there was no adverse employment action associated with these events. *See Messinger v. Girls Scouts of the U.S.A.*, 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dep't.,

2005)(adverse employment action found to be a materially adverse change in circumstances such as termination, decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation.) Further, the phone calls were anonymous and cannot definitely be attributed to any Respondent. As to the latter, assuming that the inability of Complainant to be transferred constituted adverse employment actions, Respondents Oneida and OCSD had legitimate, nondiscriminatory reasons for their conduct as Complainant did not formally request a transfer to the courthouse nor was she qualified by training for a transfer to the transportation unit.

Therefore, this claim must also 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: February 20, 2009
Bronx, New York

Robert J. Tuosto

Administrative Law Judge