

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**ANDREA M. SHELTON,**

Complainant,

v.

**NEW YORK STATE, OFFICE OF CHILDREN &  
FAMILY SERVICES,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10124830

**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 August 20, 2009, by Thomas J. Marlow, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

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

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

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

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **OCT 09 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**ANDREA M. SHELTON,**

Complainant,

v.

**NEW YORK STATE, OFFICE OF  
CHILDREN & FAMILY SERVICES,**

Respondent.

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

Case No. 10124830

**SUMMARY**

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

**PROCEEDINGS IN THE CASE**

On April 14, 2008, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on May 11 and 12, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondent was represented by Michael J. O’Brien, Esq.

Permission to file proposed findings of fact and conclusions of law was granted.

### **FINDINGS OF FACT**

1. In April of 1999, Complainant began her employment with Respondent as a Youth Division Aide at Respondent’s Ella McQueen facility. (Tr. 32-33, 200, 405) In September of 2000, Complainant was transferred to Respondent’s Pyramid Facility (“Pyramid”) to perform the duties of a Transportation Agent. (Tr. 33)
2. Complainant frequently violated Respondent’s time and attendance rules. As a result of these violations Respondent often counseled Complainant. (Respondent’s Exhibit 1; Tr. 155-63, 238-43, 250-55, 258-90, 352, 358-62, 465-66, 469-70, 472-73, 475-83)
3. In 2006 Complainant paid a fine of \$150.00 as a penalty imposed under a Notice of Discipline regarding violating Respondent’s time and attendance rules. (Respondent’s Exhibit 1; Tr. 283-85)
4. Complainant’s violations of Respondent’s time and attendance rules had a negative impact on the operation of Respondent’s Transportation Unit. (Respondent’s Exhibit 1; Tr. 358-62)
5. In June of 2007, Complainant received her Annual Performance Evaluation (“June, 2007 Evaluation”). Respondent evaluated Complainant as Unsatisfactory. During the

evaluation period, Complainant was referred for disciplinary actions five times for violating Respondent's time and attendance rules. (Respondent's Exhibit 2; Tr. 292-95)

6. In August of 2007, Respondent informed Complainant that, if Complainant did not comply with the time and attendance rules, Complainant might be reassigned from her position of Transportation Agent. (Respondent's Exhibit 1; Tr. 358, 664-66)

7. In or around August of 2007, Complainant, pursuant to Respondent's procedure regarding performance evaluations, appealed her June, 2007 Evaluation. Complainant, with her union representative present, participated in a hearing regarding her appeal. During the hearing, Complainant vowed to improve her time and attendance record. After the conclusion of the hearing, the Unsatisfactory evaluation was upheld. (Tr. 465-74)

8. In September of 2007, Complainant filed a complaint ("E.O.D.D. complaint") with Respondent's Office of Equal Opportunity and Diversity Development alleging that a supervisor, Gregory Jones ("Jones"), had sexually harassed her and that another supervisor, Emanuel Alvarez ("Alvarez") had also acted inappropriately toward her. In her complaint, Complainant also alleged that she was being threatened with removal from her position because she did not submit to the advances of Jones. (Complainant's Exhibit 3; Tr. 153-54, 318-19, 324)

9. On April 14, 2008, prior to a determination of her E.O.D.D. complaint, Complainant filed this complaint (Case No. 10124830) alleging that Jones and Alvarez had sexually harassed her "throughout the past few years." (ALJ's Exhibit 1)

10. Complainant contended that Jones tried to force Complainant to engage in a sexual act while at work in 2001 and made inappropriate sexual comments to her over a six-year period. Complainant further contended that Alvarez made one inappropriate sexual comment to her. (Tr. 34-38, 102-03, 114-15, 120-29, 146-49, 151-52, 324)

11. When Complainant was assigned to Pyramid she received training about Respondent's policy against sexual harassment at the workplace and the procedure to follow in reporting sexual harassment in the workplace when it occurred. (Tr. 131-33, 217-20)

12. Complainant never reported to Respondent an act of sexual harassment until September of 2007, more than six years after Complainant contended that the harassment began. (Complainant's Exhibit 3; Tr. 34, 102, 121, 131-33, 220, 229, 253-54, 268-69, 284-85, 288)

13. During the time period when Complainant was counseled and disciplined for violating Respondent's time and attendance rules, Complainant spoke with Patricia Moses ("Moses"), the Director of Pyramid, about experiences that were causing stress in her life. Complainant never told Moses that Complainant was experiencing sexual harassment in the workplace. (Tr. 156-58, 219-20, 239, 257, 259-60, 264-65, 268, 284-85)

14. Complainant's testimony was, at times, evasive and contradictory. I do not credit Complainant's testimony or the testimony in support of Complainant's complaint. (ALJ's Exhibit 1; Complainant's Exhibit 3; Tr. 112, 121-22, 152-53, 155, 216, 243-44, 263-66, 268-69, 270-72, 552-53, 558-61, 591-92)

### **OPINION AND DECISION**

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

*See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Respondent unlawfully discriminated against her in the terms, conditions, and privileges of employment because of her sex when she was subjected to sexual harassment at her workplace. Complainant has the burden to establish by a preponderance of the evidence that such discrimination occurred. To meet her burden of proof, Complainant must establish that either “unwelcome sexual conduct--whether sexual advances, request for sexual favors, or other verbal or physical conduct of a sexual nature—[was] used as the basis for employment decisions affecting compensation, terms, conditions, or privileges of the complainant’s employment” or she was subjected to a sexually hostile work environment. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Although Complainant alleged that she was being threatened with removal from her position because she did not submit to the advances of Jones, the credible evidence establishes that Complainant was warned that she risked being reassigned from the Transportation Unit only because, for years, she had violated the time and attendance policies of the unit and her continued violations were having a negative impact on the operation of the unit. No credible evidence was presented to establish that the possibility of reassignment was raised by Respondent because Complainant rejected sexual advances from Jones.

To establish that she was subjected to a sexually hostile work environment, Complainant must show that Respondent “acquiesced in” or “subsequently condoned” a work environment “permeated” with “intimidation, ridicule, and insult” that was “sufficiently severe or pervasive to alter the conditions” of Complainant’s employment. *See id.* at 50, 53. First, Complainant has failed to credibly establish that her workplace was permeated with intimidation, ridicule, or

insult. Further, the evidence establishes that, for the six years that Complainant claimed that she was being sexually harassed, Complainant never so informed Respondent.

Complainant also raised an issue of unlawful discrimination alleging that Respondent retaliated against her because she opposed unlawful discrimination. Although Complainant has established that, in September of 2007, she filed her E.O.D.D. complaint, Complainant has failed to present any evidence that she experienced any materially adverse change in the terms or conditions of her employment such as termination, demotion, decrease in wage or salary, loss of benefits, or diminished responsibilities after said filing. Absent proof of an adverse employment action taken against Complainant by Respondent after the filing of Complainant's E.O.D.D. complaint, the evidence presented does not support a finding of unlawful discrimination in the form of retaliation. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 298, 786 N.Y.S.2d 382, 385 (2004).

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support a finding that Respondent engaged in unlawful discrimination. Complainant has the burden to establish by a preponderance of the evidence that discrimination occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). Since Complainant has failed to meet this burden, the complaint must be dismissed.

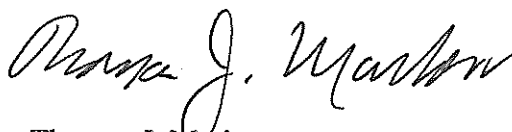


**ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same hereby is, dismissed.

DATED: August 20, 2009  
Bronx, New York

A handwritten signature in cursive script, appearing to read "Thomas J. Marlow".

Thomas J. Marlow  
Administrative Law Judge