



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

PATRICIA SHINGLEDECKER,

Complainant,

v.

**NEW YORK STATE, DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10174593

Federal Charge No. 16GB502286

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 9, 2017, by Martin Erazo, Jr., 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 HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- Considering the severity, frequency and duration of the conduct and the degree of

the Complainant's suffering, \$20,000 is a more appropriate award to compensate Complainant for the mental anguish she suffered. Interest shall accrue on this amount at a rate of nine percent per annum from the date of this Order until the date payment is made. *See e.g., West Taghkanic Diner II, Inc. v. State Div. of Human Rights*, 105 A.D.3d 1106 (3d Dept. 2013); *State v. State Div. of Human Rights*, 284 A.D.2d 882 (3d Dept. 2001).

- It is noted that interest is to accrue on the lost wage award from July 21, 2015, as stated on page 21 of the Recommended Order and not June 21, 2015 as stated on page 28.

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: AUG 22 2017
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



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**NEW YORK STATE, DEPARTMENT OF
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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10174593**

Federal Charge No. 16GB502286

SUMMARY

Respondent subjected Complainant to a sexually hostile work environment and retaliated against her for having filed a prior complaint. Respondent also constructively discharged Complainant. Respondent is liable to Complainant for lost wages and emotional damage awards. Respondent is directed to reinstate Complainant. Respondent is assessed civil fines and penalties.

PROCEEDINGS IN THE CASE

On April 14, 2015, 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 Martin Erazo, Jr., an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 18 - 19 and June 22 - 23, 2016.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq., Senior Attorney. Respondent was represented by Daniel Figueroa III, Esq., Confidential Legal Assistant, Counsel’s Office.

FINDINGS OF FACT

1. Complainant is female. (ALJ’s Exh. 1)
2. Respondent operates prison facilities throughout New York State. (Respondent’s Exh. 1, pp. 9-10)
3. On November 23, 2006, Respondent hired Complainant as a grade 6 keyboard specialist
1. From 2006 to 2014, Complainant worked at Respondent’s Attica, Wende, and Wyoming Correctional Facilities. (Tr. 19, 283, 285, 286-87; Respondent’s Exhs. 9, 14)
4. On May 1, 2014, Complainant was promoted to a grade 9 full-time clerk 2 position at the Wende Correctional Facility (“the facility”). (Tr. 20, 283; Respondent’s Exhs. 9, 14)

5. Respondent maintains policies, regulations, and procedures on discrimination, harassment, sexual harassment, and retaliation, including complaint procedures. (Respondent's Exhs. 1, 2, 3, 4)

6. During the relevant time period, Complainant was aware of these policies and received yearly training about the subjects the policies covered. (Tr. 307, 630, 632; Respondent's Exh. 14)

7. Respondent's policies state that any employee who believes he/she is the victim of sexual harassment may file a complaint with her "immediate supervisor or anyone in a management-level position with the facility or work unit. Alternatively, the employee has the option to file a complaint directly with the Office of Diversity Management." (Respondent's Exh. 2)

8. Respondent's policies provide the e-mail, phone number, and address for the Office of Diversity Management ("ODM"), as alternate methods to communicate with that unit. (Respondent's Exh. 2)

9. Respondent's policies direct all "supervisor[s] or anyone in management" who has heard or received a complaint of sexual harassment to immediately notify the superintendent, regional director, or division head, who must then report the complaint to ODM. (Respondent's Exh. 2)

10. Respondent's policies also direct "any employee who is aware of any act of harassment, discrimination, or retaliation against another employee" to notify the superintendent, regional director, or division head, who must then report the complaint to ODM. (Respondent's Exh. 3)

11. Complainant's job duties at the facility were to maintain Respondent's time keeping records and supervise Darryl McAdory, grade 6, clerk 1. (Tr. 21-23, 574; Respondent's Exhs. 9, 14)

12. Complainant's immediate supervisor at the facility was Donna Weekly, principal clerk. (ALJ's Exh. 1, p.4; Respondent's Exh.9)

13. As Complainant's supervisor, Weekly had the authority to direct her daily tasks, review and evaluate her work, and recommend her termination, retention, or extension of probationary status. (Respondent's Exh. 12)

14. At the end of June 2014, Weekly went on a three week vacation and gave Complainant instructions regarding McAdory's supervision during her absence. (Tr. 24-25, 28)

15. In line with Weekly's instructions, Complainant directed McAdory to return to his desk to perform a task. McAdory reacted negatively to Complainant's directive, raised his voice, and rejected Complainant's attempts to monitor his work activity. (Tr. 24-25, 28)

16. Upon Weekly's return from vacation in July 2014, Weekly informed Complainant that her immediate focus should be on the time keeping backlog. (Tr. 24-25, 28)

17. Weekly removed Complainant's supervisory duties from her and explained that Complainant needed supervision training. (Tr. 27-28)

18. Complainant felt "upset" when Weekly interfered in Complainant's supervision of McAdory. (Tr. 240, 242)

19. Throughout Complainant's employment, Weekly regularly directed the phrase "what the fuck" at her. (Tr. 30, 314)

20. In December 2014, Weekly informed McAdory, in Complainant's presence, that she was having a rough day. Weekly stated that she might feel better if Weekly sat on McAdory's lap. (Tr. 37-38, 135, 30-04, 308; Respondent's Exh. 9)

21. McAdory replied that he wouldn't mind. Weekly proceeded to dance in a sexually provocative manner and then sat on McAdory's lap. (Tr. 37-38, 135, 308; Respondent's Exh. 9)

22. When Weekly sat on McAdory's lap she stated, "how good you feel. I'm feeling better already." (Tr. 38)

23. Complainant felt that Weekly's lap dance was "inappropriate." Complainant felt "disgusted." (Tr. 247-48)

24. John Snyder is a lieutenant assigned to work in the facility's attendance unit. (Tr. 104-05, 127, 133)

25. Snyder was a Respondent manager. One of Snyder's job duties was to monitor the attendance of the 800 employees at the facility. If there were attendance problems, Snyder issued informal counseling, formal counseling, and warnings, appropriate to the severity of the particular matter. (Tr. 127-28)

26. Starting in the fall of 2014, on a biweekly basis, Complainant approached Snyder on several occasions asking for advice on how to address her workplace conflicts with McAdory and Weekly. (Tr. 108-09)

27. Complainant complained to Snyder that she was being treated rudely, leave requests were being denied unfairly, and about Weekly's lap dance. (Tr. 110-11)

28. Immediately after the lap dance occurred, Complainant went to Snyder "crying" and informed him of how Weekly performed "a lap dance simulating intercourse, in the office, in front of [Complainant], and it greatly upset her." (Tr. 112)

29. Snyder did not take any formal action with regard to Weekly's sexually laced activity because he did not supervise any of the civilian employees in the attendance unit. (Tr. 136, 145-46)

30. Susan Schumacher was the deputy superintendent of administration at the facility and Weekly's supervisor. Schumacher is currently retired. (Tr. 619-20)

31. Snyder advised Complainant "not to let it bother you," "get a little thicker skin," and file a formal complaint with Schumacher. (Tr. 113)

32. Schumacher was one of three deputy superintendents, each with different responsibilities. Schumacher's responsibilities included addressing personnel matters at the facility, including investigating discrimination complaints. (Tr. 621, 628-29, 630-31)

33. At that time Complainant did not file a complaint with Schumacher. (Tr. 39; Respondent's Exh. 9)

34. In December 2014, when Weekly decorated their office for Christmas, she placed two bulbs in the crotch area of a Santa Claus figurine. (Tr. 33-34; Respondent's Exh. 6)

35. Complainant felt "disgusted" and "appalled" at the bulbs. (Tr. 247)

36. Complainant did not complain to anyone about the bulbs. Complainant was "afraid" to complain as she saw that Schumacher had found the decorations to be funny. (Tr. 35-36, 325)

37. On December 31, 2014, Complainant informed Schumacher that she was concerned about catching up with the time keeping backlog. Complainant asked for assistance. (Respondent's Exh. 14)

38. Complainant told Schumacher that Weekly and McAdory were "overfriendly" and made her feel uncomfortable. (Tr. 40, 249)

39. Complainant told Schumacher about Weekly sitting on McAdory's lap, and she stated that she was working in a hostile environment. (Tr. 40, 249)

40. Complainant was upset and crying as she talked to Schumacher. (Tr. 249)

41. Schumacher told Complainant not to worry and that she would address the situation while Complainant was on vacation. (Tr. 40, 249)

42. Complainant was on vacation from December 31, 2014 to January 14, 2015. (Tr. 40-42, 44; Complainant's Exh.7, p.4)

43. In early 2015, Weekly, McAdory, and Schumacher were having a discussion in the hallway area, near the attendance unit. (Tr. 88, 91, 114-15)

44. Weekly told Schumacher that Complainant was upset, running down the hallway, "crying like her hair was on fire." They laughed as Weekly told the story. (Tr. 114-15, 153)

45. Schumacher replied, "Good work, keep up the good job" and "maybe this time she'll resign." (Tr. 86-87, 115, 155-56)

46. Snyder overheard Schumacher's conversation and did not report it. (115-17)

47. Michael Cleesattel was a Respondent manager. Cleesattel was the plant superintendent of the facility in charge of the maintenance department, building engineers, medical unit, and capital construction. (Tr. 84-85)

48. Cleesattel overheard the Schumacher's conversation with Weekly and McAdory and did not report it. (Tr. 86-87)

49. As Schumacher spoke with Weekly and McAdory, Snyder turned to Cleesattel and commented, "Wow. [Schumacher's] supposed to be the one in charge of preventing harassment in the workplace. That's [Schumacher's] program and she's giving accolades for having harassed [Complainant]." (Tr. 115, 154-56)

50. When Complainant returned from vacation on January 14, 2015, Weekly immediately pressured Complainant on her lack of progress in clearing the time keeping backlog. Weekly repeated the words “pick it up,” “let’s go,” interlaced with the “fuck” word. (Tr. 45-47)

51. Complainant began to feel “afraid to go to work.” Complainant did not “feel good” about her work environment. (Tr. 250-51)

52. Snyder witnessed Weekly yell at Complainant and call her “you fucking idiot.” (Tr. 121)

53. On January 21, 2015, at Complainant’s request, Complainant met with Schumacher and the Superintendent of the facility, Lemke (first name unknown), and informed them that she had too much work and needed assistance. (Tr. 323; Complainant’s Exh.7, p.4, Respondent’s Exh. 14)

54. That same day, Respondent provided Complainant the assistance of Lisa Lista to help Complainant catch up with her work. (Respondent’s Exh. 14)

55. In January 2015, Weekly and McAdory had a conversation about one of Weekly’s friends misinterpreting Weekly’s comments about shopping at Dick’s Sporting Goods. (Tr. 31, 324-25; Complainant’s Exh. 7, p.3, Respondent’s Exh. 9)

56. Weekly told McAdory that her friend had misunderstood Weekly to be speaking of the male sexual organ when she was not. (Tr. 31, 324-25; Complainant’s Exh. 7, p.3, Respondent’s Exh. 9)

57. Weekly also told McAdory that she did not mind her friend’s misinterpretation, stating that she liked larger male sexual organs. Weekly stated, “the bigger the better and black.” (Tr. 31; Respondent’s Exh. 9)

58. At that time, Complainant felt uncomfortable with the conversation but did not complain to anyone. (Tr. 32; Respondent's Exh. 9)

59. Snyder witnessed two conversations in which Weekly described to McAdory the details of her sexual encounters. (Tr. 118, 146-47)

60. On several occasions, Snyder observed how Weekly and McAdory engaged in "overfriendly hand holding and forearm stroking." (Respondent's Exh. 9, p.4)

61. Snyder found Weekly's sexually laced interactions to be inappropriate for the workplace but did not attempt to stop them as he was not a civilian supervisor. (Tr. 146-47)

62. On January 26, 2015, Complainant sought to leave the hostile work environment in her unit. On that day, Complainant submitted a letter of interest to a different department within the facility for a job opening in her pay grade. Complainant received no response. (Complainant's Exh. 10, pp. 2, 4)

63. In February 2015, Weekly told McAdory, in Complainant's presence, that her finger hurt as she had cut it the previous night. (Tr. 37-38; Respondent's Exh. 9)

64. At Weekly's direction, McAdory kissed Weekly's finger to make it better. (Tr. 37-38; Respondent's Exh. 9)

65. Complainant felt uncomfortable with the conversation but did not complain to anyone at that time. (Respondent's Exh. 9)

66. On February 6, 2015, Complainant became current with her work and Lista's assistance was removed. (Tr. 322, 331; Respondent's Exh. 14)

67. Weekly had promised Complainant to allow her to perform the full scope of her duties and supervise McAdory when the time card backlog was cleared. (Tr. 332-33)

68. However, Weekly did not allow Complainant to supervise McAdory. (Tr. 557)

69. I do not credit Weekly's claim that Complainant was not ready to supervise because she was not trained. Weekly never provided or recommended the training Complainant allegedly lacked while Complainant worked for her. (Tr. 557; Respondent's Exh. 12)

70. On February 9, 2015, Complainant asked McAdory to lower the volume of his radio. (Respondent Exh. 9).

71. McAdory became upset at Complainant's request. He did not lower the radio and yelling said, "Pick your battles!" (Tr. 148-49; Respondent's Exh. 9)

72. Complainant was smaller in stature than McAdory. (Tr. 122-23, 381-82: ALJ's Exh.1, p.5)

73. McAdory was screaming and yelling at Complainant while waving his hands in the air. (Tr. 191, 252)

74. Complainant felt in fear of her safety. (Tr. 252, 382)

75. In response to the situation, Complainant moved to another room. (Tr. 346-47; Respondent's Exh. 9)

76. Snyder witnessed McAdory's angry outburst and reported it to Schumacher. (Tr. 122, 148-50)

77. On February 9, 2015, Complainant filed a complaint with Schumacher concerning McAdory's reaction when Complainant asked him to lower the radio. (Respondent's Exh. 14)

78. On February 10, 2015, Weekly directed Complainant to return to her assigned work area. (Tr. 347-49, 351; Respondent's Exh. 14)

79. On February 10, 2015, Complainant was stressed out about work and went out on sick leave. (Tr. 379-80; ALJ's Exh.1, p.5; Respondent's Exh. 14)

80. Manju Ceylony is Complainant's primary care medical doctor at the Women's Primary Care Wellness Clinic of the Veteran's Administration Hospital in Buffalo, NY. (Complainant's Exhs. 7, p.8; 10, p.2)

81. On February 11, 2015, Ceylony removed Complainant from work until her medical conditions of insomnia, headaches, elevated blood pressure and severe anxiety symptoms could be re-evaluated. (Complainant's Exhs. 7, p.8; 10, p.2)

82. Ceylony also referred Complainant to a licensed clinical social worker for counselling to address the symptoms observed by Ceylony. (Complainant's Exhs. 7, p.8; 10, p.2)

83. Thomas Brent is a licensed clinical social worker at the Veteran's Administration Hospital in Buffalo. (Tr. 254-56, 259)

84. Complainant received counselling services from Brent on seven occasions. Five of those sessions occurred during Complainant's employment and two occurred after Complainant left in March 2015. (Tr. 254, 256)

85. Russell Ferguson is the ODM director located in Albany, NY. (Complainant's Exh.7)

86. On February 19, 2015, Complainant filed a complaint with Ferguson, dated February 13, 2015. (Complainant's Exh.7)

87. The complaint alleged that Weekly and McAdory subjected her to a sexually hostile work environment. (Complainant's Exh.7; Respondent's Exh. 9)

88. Complainant also alleged that Weekly and McAdory belittled her, yelled at her, and spoke to her in an unprofessional manner. (Complainant's Exh.7; Respondent's Exh. 9)

89. Bryan Bradt, ODM affirmative action officer at the facility, was assigned to investigate Complainant's complaint. (Tr. 420; Respondent's Exh. 9)

90. On February 24, 2015, Bradt informed Weekly and McAdory of Complainant's internal complaint and that he would be interviewing them in the near future. (Complainant's Exh. 10, p.3; Respondent's Exh. 9)

91. Bradt also informed Schumacher of Complainant's internal complaint. (Tr. 438)

92. Bradt's investigation was delayed because he was working on several other investigations at the same time. (Tr. 429-31)

93. Respondent's policies require the completion of internal complaints of discrimination within 30 days. (Tr. 421, 427)

94. Bradt conceded that it would have taken him 90 days to complete the investigation. (Tr. 427)

95. On March 2, 2015, Complainant returned to work from sick leave. (Tr. 380; Respondent's Exhs. 9, 14)

96. On March 2, 2015, Bradt interviewed Weekly and McAdory. (Respondent's Exh. 9)

97. On the same day, Bradt met with Complainant and asked if she had anything further to add to her complaint. (Respondent's Exh. 9)

98. In response to Complainant's concerns about the status of the investigation, Bradt responded that Weekly and McAdory denied the allegations. (Tr. 70)

99. Bradt also told Complainant that it was "two against one and usually the odd man out loses." (Tr. 70)

100. Complainant asked Bradt if she could be moved to another office space that appeared to be unutilized so that she would not have to work in a hostile environment. (Tr. 69)

101. Bradt replied that relocation was up to Schumacher. (Tr. 70)

102. On March 3, 2015, Complainant reported to Bradt that McAdory had rudely thrown office keys in her direction, landing in the in-basket on his desk, located near where she was standing at the time. (Tr. 76-77, 430)

103. Bradt told Complainant that he could not take a complaint about the key incident because it was not a protected class status issue. (Tr. 430-31)

104. McAdory was angry and upset with Complainant because she had filed a complaint against him with ODM. (Tr. 616; Complainant's Exh. 10, p.4)

105. On March 3, 2015, Complainant felt that she could no longer take the "overpowering" stress in her working environment. (Tr. 233-34, 252)

106. Complainant felt that she was going to die, have a heart attack or a stroke, or that her cancer would recur. (Tr. 252)

107. Complainant was suffering from loss of sleep, loss of appetite, severe headaches, and trembling. Complainant felt she could not "deal with it anymore." (Tr. 252-53)

108. On March 4, 2015, Complainant submitted a letter of resignation to Elizabeth Blake, the acting deputy superintendent of administration in Schumacher's absence. The letter was addressed to Weekly. (Tr. 381, 453-54, 456; Complainant's Exh.9, Respondent's Exhs. 9, 14)

109. Complainant told Blake that she had to protect her health and well-being from bullying and a hostile work environment. (Tr. 381, 453-54, 456; Respondent's Exhs. 9, 14)

110. On March 16, 2015, Schumacher had an exit interview with Complainant. (Tr. 236)

111. Complainant told Schumacher that she wanted to stay. (Tr. 236-37)

112. Complainant still wishes to continue working for Respondent. (Tr. 271)

113. Complainant explained to Schumacher that she would withdraw her resignation if Schumacher could secure different office space where she could work in peace, pending the outcome of the internal investigation. (Tr. 236-37)

114. However, Schumacher responded that she could not help her as Complainant had filed an internal complaint with ODM. (Tr. 237)

115. At the public hearing, Schumacher gave contradictory reasons why she could not offer the particular empty office space that Complainant sought. On the one hand Schumacher testified that the office was a secure area that contained personnel and medical files. On the other Schumacher indicated that the office was a busy area used for a variety of purposes, including administering tests to job candidates. (Tr. 642-43)

116. Complainant's mental health improved shortly after she removed herself from her working environment. (Tr. 254, 259)

117. Complainant's appetite improved and she stopped experiencing frequent headaches. (Tr. 254)

118. By June 2015 her emotional state had returned to normal. (Tr. 260, 262)

119. However, at the public hearing, 12 months after Complainant separated from Respondent's employment, Complainant was upset and distraught s she recalled the events that had taken place. (Tr. 28, 198)

120. On April 14, 2015, Complainant filed the present verified complaint with the Division. (Tr. 381)

121. On April 20, 2015, Bradt stopped his investigation of Complainant's internal complaint because she identified him as a Respondent employee in her Division complaint who ignored her requests for help. (Tr. 436; ALJ's Exh.1, p.5, Respondent's Exh. 9)

122. Respondent transferred Bradt's investigation to another internal unit, the Office of Special Investigations ("OSI"). No proof was provided as to the outcome of OSI's investigation. (Tr. 431-33)

123. Complainant's pay rate with Respondent was \$37,848 yearly or \$145.56 daily. (Complainant's Exh. 4)

124. Complainant earned \$16,202.88 with Respondent in 2015. (Complainant's Exh. 4)

125. Complainant would have earned an additional \$21,645.12 in 2015 if she had not separated from employment: \$37,848 - \$16,202.88. (Complainant's Exhs. 2, 4)

126. In 2015, Complainant received \$2,652.50, or approximately \$43.48 daily, from Selective Staffing for temporary work assignments that lasted from September 15, 2015 to December 25, 2015. (ALJ's Exh. 5; Complainant's Exh. 1)

127. Of the \$2,652.50, \$2000.24 was earned between September 15, 2015 and December 6, 2015. \$652.25 was earned between December 7, 2015 and December 25, 2015. (ALJ's Exh. 5; Complainant's Exh. 1)

128. For the period of April 13, 2015 to December 6, 2015, Complainant received \$10,940 in unemployment insurance. (ALJ's Exh. 4; Complainant's Exh. 3)

129. Complainant did not mitigate lost wage damages beyond December 6, 2015, as she intentionally did not seek full-time employment after her unemployment ended. (Tr. 263, 270-71)

130. Complainant's earnings with Respondent for the period of December 7, 2015 to December 31, 2015 would have been \$2,765.64: \$145.56 x 19 workdays.

131. Complainant's lost wage damages are \$5,939.24: \$21,645.12 (potential 2015 earnings with Respondent) minus \$10,940 in unemployment, \$2000.24 from Selective Staffing, and \$2,765.64 in unmitigated damages.

OPINION AND DECISION

Sexual Harassment

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. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Sexual harassment based upon a hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the terms or conditions of employment. *See Hilal v. N.Y. State Div. of Human Rights (Dilworth)*, 57 A.D.3d 898, 869 N.Y.S.2d 613 (2nd Dept. 2008).

Complainant belongs to a protected group as she is a female. Complainant established she was subjected to an unwelcome sexually hostile work environment. Complainant alleged that she was subjected to a sexually hostile environment from December 1, 2014 until March 4, 2015, when she separated from employment. During that 14 week time frame, Complainant worked for an approximate period of 9 weeks. In those 9 weeks that Complainant was at work, Complainant was subjected to various sexually explicit scenarios created by Weekly, her immediate supervisor. McAdory was a male co-worker and Complainant's subordinate. Weekly performed a sexually provocative lap dance on McAdory, directed McAdory to kiss her injured finger, engaged in inappropriate sexually laced conversations with McAdory, and attached bulbs to the crotch area of a Santa Claus figurine. Snyder, a Respondent manager, corroborates

Complainant's claim that she worked in a sexually hostile work environment. Snyder observed Weekly and McAdory engage in sexually explicit interactions that included inappropriate conversations and "overfriendly hand holding and forearm stroking." Complainant met her burden of proof that she was subjected to a sexually hostile work environment.

Respondent's Liability

Weekly met the definition of supervisor. A supervisor is an employee that is empowered by the employer to take tangible employment actions against the victim, by effecting a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *See Vance v State Ball University*, 133 S.Ct. 2434 (2013). An employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate authority over the employee, where a complainant suffers a tangible employment action. In a case where no tangible employment action was taken by a respondent, as in this matter, an affirmative defense to liability may be raised by Respondent, if Respondent did not have actual notice, subject to proof by a preponderance of the evidence. To establish the affirmative defense, respondent must meet two elements: (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. McAdory meets the definition of a co-worker. Where the harasser is a co-worker, a negligence standard applies. Notice to a respondent is required. Notice then gives rise to a respondent's duty to take corrective action. *See Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998)

Under both negligence and vicarious liability standards, Complainant established Respondent's liability in this matter. Complainant placed Respondent on notice of a sexually hostile work environment as early as the fall of 2014 when Complainant informed Snyder, a manager, that Weekly had performed a sexual dance on McAdory's lap. Snyder failed to take any action although Respondent's policies required him to report the matter. Snyder also observed sexually explicit conversations between Weekly and McAdory and did not report those as required by Respondent's policy. On December 31, 2014, Complainant also reported to Schumacher, deputy superintendent of the facility, about sexual activity between Weekly and McAdory. Schumacher failed to take corrective action. Weekly's and McAdory's sexually explicit interaction continued. Schumacher encouraged Weekly and McAdory to continue in their offending behavior in order to cause Complainant to resign. On February 19, 2015, Complainant filed an internal complaint with Respondent's ODM that included concerns about the sexually hostile work environment in Complainant's unit. Respondent's own proof at hearing established that ODM did not have the time or resources to address Complainant's concerns. Respondent's efforts, in response to Complainant's internal complaints, did not meet the legal standard of "effective corrective action" as Respondent failed to stop the hostile work environment. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

Retaliation

Complainant claims that her work environment became worse after she complained about a sexually hostile work environment. Human Rights Law §296.7 makes it an unlawful discriminatory practice "...for any person engaged in any activity to which this section applies to retaliate or 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.”

In order to establish a prima facie case of retaliation, a complainant must show that: (1) she engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that she participated in the protected activity; (3) she suffered from an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999). There is no requirement that the retaliation only affect compensation, terms, conditions, or privileges of employment. A materially adverse act is one that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Mejia v. Roosevelt Island Medical Assoc.*, 31 Misc.3d 1206, 927 N.Y.S.2d 817 (Sup.Ct. N.Y. Co. 2011). Once a complainant has met this burden, the respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. *Pace* at 104, 692 N.Y.S.2d at 224. If the respondent meets this burden, the complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Id.*

Complainant established that each time she engaged in protected activity she was met with various adverse employment actions that were causally connected. Complainant made an internal complaint with Schumacher on December 31, 2014 that included allegations of a sexually hostile work environment. Immediately thereafter, in early 2015, Schumacher encouraged Weekly and McAdory to continue in their offending behavior to see if Complainant would resign. Weekly increased her use of vulgar language directed at Complainant. On February 6, 2015, Weekly refused to restore Complainant’s supervisory functions. On February 9, 2015, McAdory yelled and screamed at Complainant when she asked him to lower the radio.

Complainant immediately moved to a nearby empty office because she felt threatened. On the following day Weekly directed Complainant back to the office where McAdory was located.

On February 19, 2015, Complainant filed an internal complaint with ODM that included allegations of a sexually hostile work environment. Schumacher, Weekly and McAdory were aware of the complaint. On March 14, 2015 Schumacher refused Complainant's request to work in an empty office away from McAdory so that Complainant could remain employed with Respondent, away from the hostile work environment.

Respondent did not present legitimate, non-discriminatory reasons for its actions after Complainant made internal complaints.

Constructive Discharge

Complainant claims that she was constructively discharged on March 4, 2015. In order to maintain a claim for constructive discharge, a complainant must demonstrate that respondent "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Morris v. Schroeder Capital*, 7 N.Y.3d 616, 621 (N.Y. 2006) quoting *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). When a constructive discharge is found, an employee's resignation is treated as if the employer had actually terminated the employee. Complainant established that Respondent's unlawful discriminatory conduct was intentional and that such conduct created working conditions so intolerable that a reasonable person would have been compelled to resign. *Morris at 622*. Weekly and McAdory became increasingly abusive after she made internal complaints about them. Schumacher encouraged their retaliatory and harassing behavior in order to make Complainant resign. On February 10, 2015, Complainant took sick leave for approximately three weeks in order to deal with the stress. By March 4, 2015, Complainant could no longer tolerate the constant abuse and

left Respondent's employment after Respondent failed to adequately respond to her complaints. Complainant's options were closed for her. Complainant was unsuccessful in transferring to a different department within the facility. Schumacher rejected Complainant's request to work in an empty office away from McAdory's menacing behavior. The ODM investigator, Bradt, told Complainant that he could not help her. In addition, the ODM investigation was delayed with no resolution in sight. Towards the end of her employment, Complainant felt as if she going to die, have heart attack or a stroke, or that her cancer would resurface. Complainant felt that she could not "deal with it anymore."

Lost Wage Damages

Complainant's lost wages are \$5,939.24 for the period of March 4, 2015 to December 6, 2015. After December 6, 2015, Complainant no longer sought to mitigate her lost wage damages as she stopped seeking full time work. Respondent is liable to Complainant for predetermination interest on the back pay award at a rate of nine percent, per annum, from July 21, 2015, a reasonable intermediate date between March 4, 2015 and December 6, 2015, through the date of the Commissioner's Final Order. *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). In addition, Respondent is liable to Complainant for interest on the back pay award at a rate of nine percent, per annum, from the date of the Commissioner's Final Order until payment is made.

Reinstatement

The Division has the authority to order the reinstatement of former employees. Human Rights Law § 297.4(c)(ii). Furthermore, the Division can order a state or local government to restore a discharged employee to his or her former position in the classified civil service. *See State Division of Human Rights v. Onondaga County Sheriff's Dept.*, 71 N.Y.2d 623, 528

N.Y.S.2d 802 (1988). Complainant wishes to be reinstated to her former position as a grade 9 full-time clerk 2. Among the factors to consider whether reinstatement is an appropriate remedy is the availability of the prior position and the hostility between the parties as a result of the litigation. *See Claudio v. Mattituck-Cutchogue Union Free School District*, 955 F.Supp.2d 118 (E.D.N.Y. 2013) There is no issue of post litigation workplace hostility in this matter. The record shows Schumacher is retired and no longer works for Respondent. The facility contains more than one unit with Complainant's grade that does not involve Weekly and McAdory. The record also shows that outside of the facility, Respondent maintains several other facilities within Complainant's geographical location where she has worked in the past. Accordingly, Respondent is directed to offer Complainant reinstatement to her former position at Respondent's Wende, Attica, or Wyoming correctional facilities within 60 days of the Commissioner's Final Order. If Complainant is placed at the facility, Respondent shall not place her in the same unit as Weekly or McAdory. Respondent is also ordered to restore Complainant's seniority status, all other employee benefits, rights and privileges, retroactively to March 4, 2015, as if she had not been constructively discharged. Furthermore, if Respondent fails to offer reinstatement, lost pay will start to accrue until the date Complainant commences re-employment or refuses such offer of reinstatement. *See NYS Department of Correctional Services v. State Division of Human Rights (Garland), et. al.*, 215 A.D.2d 908, 626 N.Y.S.2d 588 (3d Dept. 1995) (Commissioner's order was upheld, in pertinent part, to reinstate a correction officer to the Wende Correctional Facility with the restoration of seniority, rights, benefits and privileges.).

Mental Anguish Damages

Complainant is entitled to recover compensatory damages caused by Respondent's

violation of the Human Rights Law. The award of compensatory damages may be based solely on a complainant's testimony. "Mental injury may be proved by the complainant's own testimony, corroborated by referenced to the circumstances of the alleged misconduct." *New York City Transit Auth. V. N.Y. State Div. of Human Rights (Nash)*, N.Y. 2d 207, 573 N.Y.S.2d 49, 54 (1991); *Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 452, 442 N.Y.S.2d 470 (1981). The severity, frequency, and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. Serv. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996). In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *N.Y. State Div. of Human Rights v. Muia*, 176 A.D.2d 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Respondent's actions had a very strong, negative effect, on Complainant. Complainant withstood a sexually hostile working environment for a period of approximately three months. Respondent's actions made her feel "disgusted" and "appalled." During that same period of time, Complainant's reactions to Respondent's retaliatory behavior was particularly severe. Complainant's emotional response to the abuse was so acute that her medical doctor removed her from work on February 11, 2015, for a period of three weeks. Complainant's medical doctor referred her to a licensed clinical social worker for counseling. Complainant had five sessions with the social worker to address her reaction to workplace stress. Complainant suffered from loss of sleep, loss of appetite, severe headaches, and trembling. Towards the end of her employment, Complainant felt as if she going to die, have heart attack or a stroke, or that her cancer would resurface. At the end of Complainant's employment, she felt that she could not

“deal with it anymore.” At the public hearing, 12 months after Complainant separated from Respondent’s employment, Complainant was upset and distraught as she recalled the events that had taken place. Accordingly, Complainant is entitled to \$65,000 for the pain and suffering she experienced. The award is reasonably related to Respondent’s wrongdoings, supported by the evidence, comparable with other awards for similar injuries, and, therefore, justified in this case. *See Gollel v. Village Plaza Family Restaurant, et.al.*, SDHR Case No. 7943080, November 14, 2006, *aff’d*, *N.Y. State Div. of Human Rights (Gollel) v. Village Plaza Family Restaurant, Inc.*, 59 A.D.3d 1038, 872 N.Y.S.2d 815 (4th Dept. 2009) (\$65,000 award based on similar facts to the present case where a female employee suffered comparable pain and suffering consequences after being subjected to a sexually hostile work environment and constructive discharge).

Civil Fines and Penalties

A civil fine and penalty of \$35,000 is appropriate in this matter. *See State Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 949 N.Y.S. 2d 459 (2d Dept. 2012) (\$25,000 civil fine and penalty confirmed against an individual Respondent landlord); *Rensselaer County Sherriff’s Dep’t v. State Div. of Human Rights*, 131 A.D.3d 777, 15 N.Y.S.3d 227 (3d Dept. 2015) (\$35,000 civil fine and penalty confirmed against a governmental entity. Case remitted on other grounds.).

Human Rights Law § 297 (4)(c)(vi) permits the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.”

Furthermore, Human Rights Law § 297 (4)(e) requires that “any civil penalty imposed

pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.”

The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent’s culpability; any relevant history of respondent’s actions; respondent’s financial resources; other matters as justice may require. *Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff’d*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009), *119-121 East 97th Street Corp. et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996).

The goal of deterrence, Respondent’s degree of culpability, and the nature and circumstances of Respondent’s violation warrant this penalty. Respondent ignored Complainant’s pleas to address a sexually hostile work environment. Complainant sought help from Snyder, Schumacher, and ODM. Snyder failed to correct the situation and ODM did not help Complainant. Complainant’s supervisors retaliated against Complainant for filing internal complaints of discrimination. Schumacher, a high ranking facility official, encouraged Weekly and McAdory to increase the intensity of their harassing behavior in order to force Complainant to resign. Respondent achieved its goal. Complainant was forced to resign in order to save her own health. Respondent, a large governmental entity with varied and extensive resources, purposefully created a toxic environment with the goal of causing Complainant to resign. Unlawful retaliation not only punishes the individual employee for asserting his or her rights, it dissuades all workers from seeking the protection of the Human Rights Law. This discrimination is all the more invidious when it is practiced by the State. *See Koerner v. State of New York, Pilgrim*

Psychiatric Ctr., 62 N.Y.2d 442, 478 N.Y.S.2d 584 (1984). The civil fine serves as an inducement for Respondent to comply with the Human Rights Law and presents an example to the public that the Division vigorously enforces the Human Rights Law. There was no proof that Respondent were adjudged to have committed any previous similar violation of the Human Rights Law or incapable of paying any penalty.

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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent shall offer Complainant reinstatement to her former grade 9 full-time clerk 2 position at Respondent's Wende, Attica, or Wyoming correctional facilities within 60 days of the Commissioner's final order. If Complainant is placed at Wende, Respondent shall not place her in the same unit as Weekly or McAdory. If Respondent fails to offer reinstatement, lost pay will start to accrue commensurate with her title and grade until the date Complainant commences re-employment or refuses such offer of reinstatement.
2. Within sixty days of the date of the Commissioner's Final Order, Respondent shall restore Complainant's seniority status, all other employee benefits, rights and privileges, retroactive to March 4, 2015, as if she had not been constructively discharged.

3. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant, the sum of \$5,939.24 as damages for economic loss. Interest shall accrue on this award at the rate of nine percent per annum, from June 21, 2015, a reasonable intermediate date between March 4, 2015 and December 6, 2015, until the date payment is actually made by Respondent.
4. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$65,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.
5. The lost wage and emotional damage payments shall be made by Respondent, in the form of certified checks, to the order of, Patricia Shingledecker, 723 Exchange Street, Alden, New York 14004. A copy of the certified checks shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.
6. Within sixty days of the Commissioner's Final Order, Respondent shall pay to the State of New York the sum of \$35,000 as a civil fine and penalty for its violation of the Human Rights Law. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.
7. The payment of the civil fine and penalty shall be made by Respondent in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, at 65 Court Street, Buffalo, New York 14202.

8. Within sixty days of the Final Order, Respondent's managers and unit heads at the Wende Correctional Facility shall attend a training session in the prevention of sexual harassment discrimination in accordance with the Human Rights Law. Proof of the training session shall be provided to Caroline Downey, Esq., General Counsel, of the New York State Division of Human Rights, at 65 Court Street, Buffalo, New York 14202.

9. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: January 9, 2017
Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge