Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

KIMBERLY A. SEIPEL,

Complainant,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10202204

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 26, 2024, by Sharon A. Sorkin, 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.

Pursuant to 9 N.Y.C.R.R. § 465.17(c)(3), Chief of Staff Belkis Alonso-Ortiz, Esq., has been designated by the Commissioner as the person who is fully empowered to decide this case.

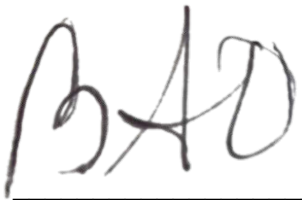
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY BELKIS ALONSO-ORTIZ, ESQ., CHIEF OF STAFF, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION

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: 07/18/2024
Bronx, New York



BELKIS ALONSO-ORTIZ
CHIEF OF STAFF

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NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10202204**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her at work based on her sex and retaliated against her after she complained of unlawful discrimination. The record does not support Complainant's allegations and, therefore, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On June 24, 2019, Complainant filed a 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. Virtual public hearing sessions were held on March 28 and March 29, 2022. Thereafter, ALJ Erazo left state service and the case was reassigned to ALJ Sharon A. Sorkin, pursuant to 9 N.Y.C.R.R § 465.12(d)(2). Subsequent virtual public hearing sessions were held before ALJ Sorkin on November 1 and November 2, 2023.

Complainant and Respondent appeared at the hearing. At the March 2022 hearing sessions, Complainant was represented by Jennifer A. Shoemaker, Esq., and Respondent was represented by Daniel Figueroa III, Esq. Subsequently, Attorney Shoemaker withdrew as Complainant's counsel. At the November 2023 hearing sessions, the Division was represented by Catherine Ostrowski Martin, Senior Attorney, and Respondent was represented by Thomas M. Finnerty, Esq.

Permission to file post-hearing briefs was granted. Respondent timely submitted a post-hearing brief, which was reviewed and, where appropriate, adopted.

FINDINGS OF FACT

1. Complainant is female. (Tr. 376)

2. Respondent New York State Department of Corrections and Community Supervision operates correctional facilities for incarcerated persons across New York State. (Joint Exhs. 3, 4)

3. Complainant began her employment with Respondent in 1996. (Tr. 52)

4. In October 2001, she was assigned to Wyoming Correctional Facility ("Wyoming"), which is a medium security prison for incarcerated males. (Tr. 52, 58, 88-89, 381, 543)

5. Complainant is a member of a union, the Civil Service Employees Association (CSEA). (Respondent's Exhs. 2, 5)

6. If Respondent's bureau of labor relations believes discipline against an employee is warranted, it serves a notice of discipline on the employee and the union, which is settled by agreement or resolved before an arbitrator. (Tr. 556-58; ALJ's Exh. 4; Respondent's Exhs. 2, 5, 6, 7)

7. In 2013, Complainant began working in Wyoming's commissary as an office assistant 2. Her duties were to process purchases and maintain inventory. (Tr. 53-54, 131-32, 185, 282)

8. The commissary is like a grocery store. Incarcerated individuals stand in one of two lines at the front of the commissary to obtain items from a commissary employee at a window. (Tr. 65, 140, 185-86, 188, 400, 543; Complainant's Exh. 9)

9. The commissary has three employees: two office assistants and one supervisor. Several incarcerated individuals also work there to unload deliveries. (Tr. 333, 421, 482, 543, 565)

10. Incarcerated individuals are only permitted a certain type and number of purchases depending on their circumstances (their "buy limit"), which is indicated on a paper "buy sheet." (Tr. 64-66, 183-85, 187-89, 296, 300, 326-27, 421-22, 543; Complainant's Exh. 9)

11. If an incarcerated individual is on a disciplinary sanction, their buy sheet is labelled as "restricted," and they cannot purchase certain items. (Tr. 300-02, 309-10, 313, 395, 422, 472)

12. Only incarcerated individuals housed in "honor dorm," who have a history of good behavior, may purchase certain items, such as cooking oil, because hot oil can be used as a

weapon and cause serious injury. (Tr. 182, 187, 345-46, 395, 453-54, 502, 551-53; Complainant's Exh. 3)

13. The commissary building presents security risks because incarcerated individuals can steal or exchange contraband there. (Tr. 482-83, 512-13)

14. Favoritism of certain incarcerated individuals by commissary employees, including by providing them with impermissible commissary items or giving them items for free can undermine the disciplinary system, lead to manipulation and blackmail, and facilitate prisoner escape. (Tr. 194, 291-96, 297-300, 302, 394, 551-52, 554-55)

15. In 2016, Christopher Yehl began serving as the deputy superintendent of security and was responsible for all security related concerns at Wyoming. (Tr. 539, 541-43, 546)

16. On June 8, 2017, Complainant was appointed to the position of store and mail operations supervisor and oversaw the commissary. Her responsibilities were substantially the same as when she was an office assistant 2, except she also supervised one to two commissary employees. (Tr. 54-55, 58-59, 62-64, 67, 82, 86, 271-72, 276, 369; Respondent's Exh. 1)

17. Her appointment had a probationary term of six months to one year. (Tr. 58-59)

18. While Complainant was a supervisor, she was supervised by Vicki Hansen, institution steward, who oversaw the fiscal and storage area. (Tr. 59, 67-68, 275-76, 474)

19. In November 2017, corrections officer Todd Merkle, who is male, was assigned to the commissary building. His duty was to maintain security, which included preventing contraband from leaving the building by monitoring and frisking incarcerated individuals after their purchases. (Tr. 127, 184, 303, 381-82, 480-82, 479-84, 509-10, 520, 540-41, 544, 553-54)

20. There are two doors to the commissary: an exterior back door, which is used for deliveries, and a front door that leads to the building's lobby. (Tr. 240, 244, 493, 506-07)

21. When there were no deliveries or incarcerated individuals working in the commissary, Merkle would padlock the rear door for security reasons, usually between 2:00 p.m. and 3:15 p.m. (Tr. 506-08, 520, 523)

22. When Merkle first began working at the commissary building in November 2017, he made remarks on approximately three occasions regarding "how nice [Complainant] looked." (Tr. 246, 353)

23. In November and December 2017, Complainant received three evaluations that covered her work as a supervisor from June through December 2017. Her overall rating began as "good," but then degraded to "fair" and "unsatisfactory" in later ratings, because her inventory was inaccurate, and she allowed purchases that were not permitted. (Tr. 68-69, 76-80, 276-83; Respondent's Exh. 1)

24. In 2017 through the beginning of 2018, Yehl investigated why the commissary's inventory was "consistently off over $2,000 per month." (Tr. 541, 543, 547-49, 565-66)

25. On multiple occasions during that time, Yehl observed Complainant outside the commissary building, while the rear door was unsecured and accessible to incarcerated individuals. He told her to stop that practice because it left no oversight of the commissary. (Tr. 548-49)

26. On or about December 18, 2017, Respondent's office of special investigations ("OSI") began investigating Complainant's work. (Tr. 136-37, 288-90; ALJ's Exh. 1; Complainant's Exh. 1)

27. On December 21, 2017, Respondent demoted Complainant to her prior office assistant position because she did not satisfactorily complete her probationary period, citing the issues identified in her evaluations. (Tr. 80, 82, 131, 283; Complainant's Exh. 1; Respondent's Exh. 1)

28. Complainant does not claim that the demotion related to her sex. (Tr. 128, 270, 283)

29. When Complainant was demoted, Respondent assigned another employee to temporarily act as the commissary supervisor. (Tr. 85-86)

30. In January 2018, Jonathan Karan,[1] who is male, began working in the commissary as an office assistant 1 and handled his own commissary line. (Tr. 86, 128, 140, 167)

31. As an office assistant 1, Karan was "less senior" than Complainant, and Complainant trained Karan. (Tr. 86, 431)

32. In March 2018, Jason Pearl, who is male, filled Complainant's prior position and began serving as the store and mail operations supervisor. He directly supervised Complainant and Karan. (Tr. 86, 88, 127, 390, 419, 420-21, 423, 460, 474)

33. Pearl soon noticed that the commissary faced negative inventories and financial losses. (Tr. 424-25)

34. In approximately March 2018, Pearl began a weekly audit of the buy sheets processed by Complainant and Karan. (Tr. 140, 427, 429-30)

35. As a result of his audits, Pearl found that both Complainant and Karan gave honor dorm items to non-honor dorm individuals. (Tr. 472)

36. In late March 2018, Pearl counselled Karan for permitting a non-honor dorm individual to buy an honor dorm item. Pearl did not find Karan made any further mistakes after this counselling. (Tr. 431, 459-61)

37. In late March 2018, Pearl counselled Complainant for similar mistakes. (Tr. 429, 432, 458, 461)

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[1] The transcript often misspells Karan's last name as "Karen." (Tr. 329, 333, 421, 424-72).

38. On April 12, 2018, OSI performed a search of Complainant's commissary work area related to its investigation into Complainant's conduct. (Tr. 136-37; Complainant's Exh. 1)

39. On April 20, 2018, an incarcerated individual told Complainant that when she was off from work the previous day, he heard Merkle say, "how nice it was not to have [Complainant] there because [Merkle] didn't have to listen to [her] mouth." (Tr. 128-29; Complainant's Exh. 1)

40. On April 20, 2018, Complainant made a complaint to Respondent's office of diversity management alleging that "the fishing expedition" by OSI, Yehl, and Pearl was harassment. (Tr. 359-60, 372-74; Complainant's Exh. 1)

41. She did not allege she was harassed based on her sex. (Tr. 374; Complainant's Exh. 1)

42. From April 25, 2018, through July 3, 2018, Respondent placed Complainant on administrative leave during OSI's continuing investigation into her work and suspected ongoing inappropriate interactions with incarcerated individuals. (Tr. 139-40, 155-56, 289-90, 331, 369, 437; ALJ's Exh. 1; Respondent's Exh. 2)

43. On May 23, 2018, OSI interviewed Complainant as part of its investigation. Her examination was under oath and transcribed. (Tr. 138, 313, 316-17, 324, 329; Respondent's Exh. 8)

44. As a result of what OSI discovered in its investigation, on July 2, 2018, Respondent issued Complainant a notice of discipline that proposed a 45-day suspension because she neglected to follow procedures and showed favoritism to incarcerated individuals by allowing impermissible purchases on seven occasions between December 13, 2017, and April 5, 2018. (Tr. 312, 323, 327-28, 371-72, 422, 435-36, 491-93; Respondent's Exh. 2)

45. That same day, Complainant agreed to a 10-day suspension and one-year disciplinary evaluation period to resolve the notice of discipline. (Respondent's Exh. 2)

46. On July 5, 2018, Complainant returned to work and was retrained on commissary procedures. (Respondent's Exh. 3)

47. On July 5 and 6, 2018, Complainant processed buy sheets and did not charge for items. (Tr. 157-59, 331; Respondent's Exh. 3)

48. As result, on July 11, 2018, Hansen issued Complainant a counselling letter which stated, "if an inmate receives an item from the commissary without paying for it, the commissary suffers a financial loss [...] it's a serious offense." (Tr. 59, 155-57; Respondent's Exh. 3)

49. During July and August 2018, at least once per week, Pearl and Merkle monitored Complainant's commissary line, and either stood inside the commissary behind Complainant as she processed purchases, or in the foyer near her window. They did not stand in Karan's commissary line. (Tr. 141, 148-49, 382-83, 390-91, 400)

50. While monitoring Complainant's line, Merkle observed Complainant facilitating the transfer of unauthorized items to incarcerated individuals so that they could obtain the items after they passed his checks and frisks. (Tr. 486-87, 493; Complainant's Exh. 15)

51. Throughout July 2018, Merkle frisked individuals who obtained items from Complainant, outside the commissary building. He did not appear to do so for individuals coming from Karan's line. (Tr. 167, 382, 384, 487)

52. In comparing the items with their associated receipts, Merkle found Complainant impermissibly gave extra items to certain individuals. (Tr. 487)

53. Merkle reported to Yehl that Complainant was improperly giving items to individuals whose purchases were restricted or who were non-honor dorm, and placing items for individuals in an area where they could bypass his frisks. (Tr. 550-51; Complainant's Exh. 15)

54. Around that time in 2018, Yehl reviewed a large number of buy sheets and determined that Complainant gave individuals items they were not permitted to have. He compiled a report for his supervisor, superintendent Thomas Sticht. (Tr. 550-51, 561-62, 569, 572-73, 575-76)

55. At some point between March and August 2018, Karan, another civilian employee, and unidentified incarcerated individuals told Complainant that Pearl and Merkle made remarks like, "Corrections is no place for a female," when Complainant was not around. (Tr. 128, 141-48, 246, 353-55, 457-58, 509-10)

56. I do not credit Complainant's testimony that she heard the remarks personally. Her testimony was inconsistent and contrary to her testimony that she could not hear what Pearl and Merkle were saying over the commissary's loud exhaust fans and only heard the comments as relayed by "other people." (Tr. 129, 141, 145-48, 354-55)

57. On July 10, 2018, Complainant gave an incarcerated individual a free chocolate bar. (Tr. 333-34, 340; Respondent's Exh. 7)

58. On July 12, 2018, Respondent issued Complainant a notice of discipline for her conduct on July 10, 2018, and proposed a 90-day suspension as a penalty. (Respondent's Exh. 7)

59. On July 19, 2018, when Merkle told Complainant that he was going to stand in the commissary area for safety reasons, she told him to "get [his] ass out of" there. (Tr. 336-37, 441, 487-88, 497; Complainant's Exh. 15; Respondent's Exhs. 2, 5, 9)

60. On July 31, 2018, Complainant left the rear door unsecured and gave an incarcerated individual free cheese puffs. The individual gave the cheese puffs back when he saw Merkle standing behind him. (Tr. 339-41, 446-49, 499-500, 513-14; Respondent's Exhs. 5, 9)

61. That same day, Complainant told Yehl that she felt she was being harassed by Merkle. Yehl directed her to write to her supervisor. (Tr. 168-71, 182; Complainant's Exh. 2)

62. That afternoon, Complainant sent an email to Hansen and Thomas Krone, acting deputy superintendent of administration, alleging harassment because Merkle stood outside her window when an individual was making a purchase. (Tr. 168-69; Complainant's Exh. 2)

63. Complainant's testimony that she told Yehl that Merkle was harassing her because she was female was not credible. She testified that she could not recall what she told Yehl. Her contemporaneous email did not claim sex-based harassment. (Tr. 169-70; Complainant's Exh. 2)

64. On August 1, 2018, Complainant made a complaint to Krone that Merkle was harassing her because he frisked two individuals when they left her window. She did not claim his harassment was based on sex. (Complainant's Exh. 6)

65. On approximately six occasions, between July and August 2018, Complainant told Hansen that she felt that she was being treated differently than Karan. (Tr. 161-62, 165, 166, 168, 175, 333; Respondent's Exh. 3)

66. On August 15, 2018, Complainant gave cooking oil to a non-honor dorm individual for free. (Tr. 182-84, 190-91, 347, 357, 452-53, 502, 514-15; Complainant's Exhs. 3, 9; Respondent's Exh. 5)

67. I credit Pearl's testimony that he witnessed Complainant give the cooking oil to the individual over Complainant's implausible testimony that the individual found the oil in the walkway. Pearl's testimony was specific and corroborated. He immediately informed Merkle; two other corrections officers searched the individual and found the oil; and the individual told the officers that Complainant gave him the oil. (Tr. 348-49, 452-53, 502; Complainant's Exh. 9)

68. After the cooking oil incident, at approximately 1:25 p.m., Merkle padlocked the rear door of the commissary, about 35 minutes earlier than he usually did. (Tr. 523; Complainant's Exh. 10)

69. Minutes later, Complainant entered the commissary's front door. While inside, she discovered that Merkle had padlocked the rear door. (Tr. 191, 198, 206, 240-42, 351, 385)

70. Although the front door was unlocked, instead of exiting, Complainant stayed inside the commissary to write an email to Krone that she felt unsafe when the rear door was padlocked. (Tr. 191, 194-95, 197, 201-02, 205, 241, 243, 350-52, 507-08; Complainant's Exh. 13)

71. Afterwards, Complainant left the commissary unattended to sit outside. At about 1:35 p.m., when Merkle attempted to enter the rear door to conduct a security check, Complainant blocked his access, told him that he was not going in, and to "stay the fuck out." (Tr. 206, 244, 246-47, 350, 386-87, 398-99, 503-05, 521; Complainant's Exhs. 13, 15; Respondent's Exh. 5)

72. Merkle called his supervisor, and Yehl proceeded to the area. (Tr. 504, 559, 575; Complainant's Exh. 15)

73. Complainant told Yehl that she would not permit Merkle to enter the commissary. Yehl ordered her to accompany him to the administrative office and write down what had transpired, which she did. (Tr. 200-01, 206-08, 247-49, 559-60; Complainant's Exhs. 3, 13)

74. Yehl collected memoranda from employees with knowledge of the incidents that day and sent them to Sticht and Respondent's bureau of labor relations. (Tr. 559, 573-75)

75. At approximately 4:00 p.m., Sticht served Complainant with a notice that she was immediately suspended without pay because, earlier that day, she had "undermined security procedures" and engaged in "theft of state resources." She never returned to work. (Tr. 200-01, 205, 208, 239, 249-50; ALJ's Exh. 4)

76. On August 20, 2018, Respondent issued Complainant a notice of discipline for her acts of misconduct between July 18, 2018, and August 15, 2018, including giving incarcerated individuals cooking oil and other items for free. (Tr. 528, 530-31, 533; Respondent's Exh. 5)

77. The notice of discipline's proposed penalty was "dismissal from service and loss of any accrued annual leave." It stated in pertinent part:

> [Y]our actions compromised the safety and security of the facility by directly interfering with a Correction Officer attempting to perform his duties. Furthermore, you were recently disciplined (NOD July 2, 2018) for inappropriate interactions with inmates and were provided additional training to ensure your compliance with procedure. You were subsequently disciplined (NOD July 12, 2018) for misconduct of the same and/or similar nature. Despite disciplinary action, you are still unable or unwilling to follow the DOCCS rules and regulations.

(Respondent's Exh. 5)

78. At the public hearing, Complainant admitted that she committed some of the conduct described in the August 20, 2018, notice of discipline. (Tr. 335-50)

79. On August 24, 2018, an arbitrator issued their decision on Complainant's July 12, 2018, notice of discipline, found her guilty of giving an incarcerated individual a free chocolate bar, and reduced the penalty to forfeiture of 40 hours of leave accruals. (Respondent's Exh. 7)

80. Although Complainant did not believe that the August 20, 2018, notice of discipline would result in her termination from employment, on October 16, 2018, Complainant voluntarily resigned because, according to her testimony, the arbitrator told her that Respondent "could set her up with drugs." (Tr. 250-52, 269, 360-61, 531, 533; Complainant's Exh. 7, p. 23; Respondent's Exh. 6)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of sex. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). To make out a prima facie case of unlawful discrimination in employment, Complainant must show that (1) she is a member of a

protected class, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. Am. Lung Ass'n,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If Complainant makes out a prima facie case of unlawful discrimination, the burden shifts to Respondent to articulate a legitimate, independent, and non-discriminatory reason for its actions. *Id.* If Respondent does so, Complainant must show that the reasons presented by Respondent were merely a pretext for the unlawful discrimination by demonstrating both that Respondent's stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The "burden of persuasion of the ultimate issue of discrimination always remains" with Complainant. *Stephenson v. Hotel Empls. and Rest. Empls. Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant is a member of a protected class based on her sex. Complainant was qualified for the position, which she held for approximately five years. Complainant suffered adverse employment actions when she was demoted, suspended, forfeited accrued hours, and was served with a final notice of discipline that proposed her dismissal from employment.

Complainant established that the adverse actions gave rise to an inference of discrimination based on sex. Complainant and her male co-worker both distributed honor dorm items to non-honor dorm incarcerated individuals, but her male co-worker did not receive any discipline. Respondent treated Complainant differently than her male co-worker by more closely monitoring her work, standing in or around her commissary line, but not in or around the line of her male co-worker, and searching individuals after they left her window, but not those leaving

her male co-worker's window. Under these circumstances, Complainant established that she suffered adverse actions occurring under circumstances giving rise to an inference of unlawful discrimination.

Complainant has met the "de minimis" burden of establishing a prima facie case of unlawful discrimination. *See Schwaller v. Squire Sanders & Dempsey*, 249 A.D. 2d 195, 196, 671 N.Y.S. 2d 759, 761 (1st Dept. 1998).

Respondent articulated a legitimate, independent, and non-discriminatory reason for its actions. Respondent's burden here is one of production only; it does not involve any evaluation of credibility. *See Stephenson* at 270-71, 811 N.Y.S.2d at 636 (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

Respondent's commissary inventories were "off." After separate investigations by OSI, Yehl, and Pearl into negative inventories, Respondent learned that Complainant gave items away for free on several occasions. Most seriously, Complainant gave cooking oil to an incarcerated individual who was not supposed to have it and did not charge for it. Cooking oil can be used as a weapon when heated. Complainant continued to give items to individuals for free or above their buy limits, after having been warned and disciplined for similar conduct.

Complainant failed to establish that Respondent's stated reasons were a pretext. Respondent offered substantial evidence in the form of notices of discipline and counselling, an OSI investigation transcript, and contemporaneous memoranda establishing that Respondent had ongoing concerns about Complainant's conduct in the commissary. Karan had no further incidences of misconduct after his counselling, while Complainant's disciplines did not curb her behavior. There is no evidence that Respondent harbored any discriminatory animus towards Complainant based on sex. This claim is dismissed.

Complainant alleged that Respondent subjected her to a hostile work environment. For claims accruing prior to October 11, 2019, in order to establish a hostile work environment claim under Human Rights Law § 296.1(a), Complainant must show that the workplace was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive[2] to alter the conditions of the victim's employment and create an abusive work environment. *Forrest*, 3 N.Y.3d at 310, 786 N.Y.S.2d at 394 (quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21, 114 S.Ct. 367 (1993)). Whether an environment is hostile or abusive can be determined only by looking at all 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 on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Id.* at 311 (quoting *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." *Id.* at 311, 786 N.Y.S.2d at 395 (quoting *Harris*, at 21). Complainant must show that the discriminatory conduct occurred because of her protected class membership. *See Arcuri v. Kirkland,* 113 A.D.3d 912, 914, 978 N.Y.S.2d 439, 441 (3d Dept. 2014).

Complainant failed to establish that she was subjected to a hostile work environment based on sex. There is no evidence that Respondent was motivated by sex when it monitored her

[2] Effective October 11, 2019, Human Rights Law § 296.1(h) amended the definition of harassment and the standard applied to such claims. "Harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more . . . protected categories." *Id.* This is so "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." *Id.* Because the allegations of this complaint occurred before October 11, 2019, the amendment is not applicable to this case.

conduct in the commissary, by standing in or around her commissary line, and searching individuals after they left her window. Prior to that time, Complainant was already the subject of a months-long investigation that revealed she gave individuals items that they were not supposed to have. Respondent's treatment of her was directly related to her improper workplace conduct, not her sex. *See Carson v. Niagara County*, DHR Case No. 10205703 (July 19, 2023).

There is no evidence that Respondent was motivated by sex when it padlocked the rear commissary door after the non-honor dorm individual was found with the cooking oil. The door was padlocked only about 30 minutes earlier than usual, and closely following the incident where the individual impermissibly obtained an item that could be used as a weapon. *See id.*

The few comments that Complainant cites, including that Merkle said she looked "nice" on a few occasions, that someone once told her that Merkle said "it was nice" when he "didn't have to listen to [her] mouth," and that some people told her that Pearl and Merkle said, "Corrections is no place for a woman," fail to rise to the level of severe or pervasive to qualify as "harassment" under the Human Rights Law. *See Rosario v. New York State Unified Court System*, DHR Case No. 10200965 (May 5, 2023). At best, the remarks were mere offensive utterances, not sufficiently hostile or abusive so as to establish a hostile work environment under the pre-October 2019 standard. *See Forrest*, 3 N.Y.3d at 311, 786 N.Y.S.2d at 395 ("the 'mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment,'" (quoting *Harris*, 510 U.S. at 21)); *Kelso v. SSM&RC, Inc.*, DHR Case No. 10208008 (June 24, 2022). This claim is dismissed.

While Complainant does not make a claim of constructive discharge, to the extent that the claim should be inferred based on the circumstances presented, the claim was not established. To establish a claim of constructive discharge, Complainant must show that Respondent

deliberately made her working conditions so intolerable that a reasonable person in her position would have felt compelled to resign. *See Lambert v. Macy's East, Inc.*, 84 A.D.3d 744, 746, 922 N.Y.S.2d 210, 212 (2d Dept. 2011). The standard for establishing a constructive discharge claim is very high. *See Gaffney v. City of New York*, 101 A.D.3d 410, 411, 955 N.Y.S.2d 318, 319 (1st Dept. 2012), *leave to appeal denied*, 21 N.Y.3d 858, 970 N.Y.S.2d 748 (2013). The record does not support that Complainant's working conditions were intolerable. Complainant admitted that she resigned because, according to her, an arbitrator told her that Respondent might at some point "set her up with drugs," and for no other reason. This claim is dismissed.

Complainant also alleged that Respondent subjected her to unlawful retaliation. It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed unlawful discriminatory practices. Human Rights Law § 296.7.

To make out a prima facie case of retaliation, Complainant must show that (1) she engaged in activity protected by the Human Rights Law, (2) Respondent was aware that Complainant participated in the protected activity, (3) she suffered an adverse employment action, and (4) there is a causal connection between the protected activity and the adverse employment action. *Adeniran v. State of New York*, 106 A.D.3d 844, 844, 965 N.Y.S.2d 163, 164-65 (2d Dept. 2013).

In a retaliation context, an adverse employment action is one which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Mejia v. Roosevelt Is. Med. Assoc.*, 31 Misc.3d 1206(A), 927 N.Y.S.2d 817 (Table) (Sup. Ct. N.Y. Co. 2011), *aff'd.*, 95 A.D.3d 570, 944 N.Y.S.2d 521 (1st Dept. 2012), *lv. to appeal dismissed*, 20 N.Y.3d 1045, 961 N.Y.S.2d 374 (2013) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

If Complainant makes out a prima facie case of retaliation, the burden shifts to Respondent to articulate a legitimate, independent, and non-discriminatory reason for its actions. If Respondent does so, Complainant must show that the reasons presented by Respondent were merely a pretext for discrimination. *Adeniran* at 845, 965 N.Y.S.2d at 165.

Complainant did not make out a prima facie case of retaliation. Complainant alleged that Respondent subjected her to retaliation after she made multiple harassment complaints between April and August 2018. While Complainant did not mention harassment based on sex specifically, she told Hansen that she felt that she was being treated differently than her male co-worker. This is sufficient for a finding that she engaged in protected activity of which Respondent was aware. As discussed above, Complainant suffered adverse employment actions.

Complainant did not establish that there was a causal connection between her protected activity and Respondent's actions. Complainant's demotion, Yehl's investigation, and OSI's investigation, all occurred in 2017, months before her first harassment complaint. Respondent continued to monitor her conduct between December 2017 and August 2018, as a result of its investigations. Complainant's retaliation claim is not actionable because there can be no causal relationship when the employer's adverse employment actions began prior to the employee's engagement in any protected activity. *E.g.*, *Koester v. New York Blood Ctr.*, 55 A.D.3d 447, 449, 866 N.Y.S.2d 87, 89 (1st Dept. 2008). *Accord Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 95 (2d Cir. 2010). Moreover, Respondent established that it took the challenged actions for legitimate, independent, and non-discriminatory reasons, and there is no evidence that would support a finding that unlawful retaliation was a motivating factor behind its actions. This claim is 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 this case is dismissed.

DATED: April 26, 2024
Bronx, New York

Sharon A. Sorkin
Administrative Law Judge