

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

IDELLA ABRAM,

Complainant,

v.

CITY OF BUFFALO/BUFFALO POLICE DEPT.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10101691

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 November 12, 2008, by Edward Luban, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

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

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

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

ADOPTED, ISSUED, AND ORDERED.

DATED: **APR 22 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10101691**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her on the basis of disability by denying her a reasonable accommodation and by denying her Injured On Duty (“IOD”) status in retaliation for a prior discrimination complaint she filed with the Equal Employment Opportunity Commission (“EEOC”). Complainant failed to sustain her burden of proof under either theory, and the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On September 23, 2004, 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 October 9-11 and 31, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent was represented by Brendan P. Kelleher, Esq. and Jeffrey Weiss, Esq.

Both parties filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division.

FINDINGS OF FACT

1. From 1985 until 2004, Complainant was employed as a police officer with the Buffalo Police Department (“BPD”). (Tr. 213)
2. In 2000 or 2001, Lieutenant Guy Zagara became Complainant’s supervisor. (Tr. 213-14, 403)
3. On September 30, 2002, Complainant and Zagara had a verbal confrontation at a school crossing to which Complainant had been assigned. (Tr. 287-88, 332-33; Complainant’s Exh. 44; Respondent’s Exh. C, CC). BPD brought disciplinary charges against Complainant for her conduct during the incident. (Tr. 289-90; Respondent’s Exh. C)
4. Complainant was involved in prior BPD disciplinary proceedings in which Zagara pressed charges against her. (Respondent’s Exh. C, D, E) Several proceedings resulted in Complainant being suspended without pay (Respondent’s Exh. C, D, E, G)

5. On May 23, 2003, Complainant filed a complaint against Zagara with the EEOC. (Tr. 217-18, 221; Complainant's Exh. 24).

6. Zagara became aware of Complainant's EEOC complaint during the summer of 2003. (Tr. 430; Complainant's Exh. 24)

7. On September 1, 2003, Complainant was injured when she pulled on a previously stuck door on a police vehicle and the door struck her left knee. (Tr. 226-28)

8. Complainant was treated for her injury at Erie County Medical Center ("ECMC") the same day. (Tr. 226; Complainant's Exh. 5). ECMC diagnosed Complainant with a knee contusion and recommended that she use an Ace wrap and crutches. (Complainant's Exh. 5) Complainant was advised to stay out of work until September 4, 2003. (Complainant's Exh. 5)

9. Complainant notified Zagara of her injury, and she applied for IOD status. (Tr. 229, 435; Complainant's Exh. 6, 7)

10. Zagara examined the vehicle which Complainant said caused her injury and found that all the doors were operating normally. (Tr. 404-05). Zagara recommended that Complainant's application for IOD be denied. (Tr. 405)

11. Zagara had not denied an IOD request from any other police officer. (Tr. 435) However, other officers in Complainant's station were denied IOD status. (Tr. 142)

12. Tracy Healy-Barker, Respondent's Director of Compensation and Benefits, reviewed Complainant's IOD application. (Tr. 348-49) Healy-Barker was not aware that Complainant had filed an EEOC charge. (Tr. 351)

13. On September 8, 2003, Leonard Matarese, Commissioner of Respondent's Department of Human Resources ("HR"), denied Complainant's IOD request on the grounds that her injury did not fall within the meaning of N.Y. General Municipal Law §207-c. (Tr. 348-49;

Complainant's Exh. 8, 9) At the time, Respondent relied on the *Balzerak* [sic] court decision, which it interpreted as holding that police officers and firefighters who were not performing their duties, or who were not at heightened risk at the time of their injuries, were not eligible for IOD status. (Tr. 348-49, 353). Respondent considered on-duty injuries to be those sustained while an officer was on a call, engaged in activities such as chasing or wrestling with a suspect, jumping out of a car, and jumping a fence. (Tr. 143, 357-58)

14. Complainant re-submitted her IOD request, claiming that her injury exacerbated a pre-existing knee injury. (Complainant's Exh. 10) On September 10, 2003, upon a second review of Complainant's request, Matarese adhered to his denial. (Complainant's Exh. 10, 11)

15. Complainant was out of work from September 1, 2003 until October 28, 2003. All but six of these days were charged to other reasons for absence. (Complainant's Exh. 3, 40)

16. Complainant grieved the denial of IOD status. (Tr. 231) On February 18, 2005, an arbitrator sustained her grievance and found that Complainant's injury occurred while she was on duty. (Complainant's Exh. 40) The arbitrator directed that Complainant be credited five days' sick leave and that she be paid for the remaining day. (Complainant's Exh. 40)

17. On October 31, 2003, Nathaniel Webster, M.D., Complainant's family physician, reported that Complainant was totally disabled and unable to work from September 1, 2003 to November 3, 2003. (Complainant's Exh. 13) Webster recommended that Complainant return to work with the following restrictions: no stairs, no running, a maximum of one hour weight-bearing, and that she be allowed to walk with a cane. (Complainant's Exh. 13)

18. Complainant brought Webster's note to Nancy Forrest, a nurse case manager with HR. (Tr. 236, 306) Forrest made a copy of the note and told Complainant to take it to her commander. (Tr. 236) Complainant gave Zagara a copy of the note. (Tr. 236-37)

19. Complainant did not specifically request light duty, and she did not tell Zagara she could not perform her regular duties. (Tr. 415-16)

20. On November 3, 2003, Complainant returned to work. (Tr. 236-37) Complainant was not given light duty or other accommodations, but returned to regular duty in a patrol car. (Tr. 184, 237, 336-37)

21. At the time, officers returning to work were supposed to provide medical documentation to HR, not to their immediate supervisor. (Tr. 306-07, 338-39) Requests for light duty were also supposed to go through HR and the Commissioner's office, not the officer's immediate supervisor. (Tr. 415)

22. Complainant had a neck brace and a cane when she returned to work. (Tr. 149) She had difficulty walking and getting in and out of vehicles. (Tr. 183-84) Complainant's partner, John Sanders, witnessed her limping to houses from their patrol car. (Tr. 184)

23. On November 18, 2003, Complainant responded to the scene of an accident. (Tr. 237-38) Several police officers were walking up Bailey Street struggling with a large man who had been involved in the accident. Complainant helped Officers George Fletcher and Sollie Boone take the man down and handcuff him. (Tr. 79, 92-93, 99-100, 238; Complainant's Exh. 18) Complainant, Fletcher, Boone, and the man all fell to the ground. (Tr. 79, 81, 99-100, 238-40)

24. Zagara and another lieutenant, Patrick O'Mara, arrived on the scene after the man was subdued. (Tr. 239, 406-07) Zagara did not see Complainant physically engaged with the man. (Tr. 407, 437-38)

25. Complainant was injured when she got up from the ground. (Tr. 240) Complainant drove to ECMC, where she was treated for a left knee contusion and a cervical strain. (Tr. 240-

41, 316; Complainant's Exh. 16) ECMC recommended that Complainant be off work through November 20, 2003. (Complainant's Exh. 16)

26. None of the officers involved in the November 18 incident filed an arrest report or a use of force report. (Tr. 81, 87, 101, 240; Complainant's Exh. 23)

27. Complainant requested IOD status for the injuries she sustained in the November 18 incident. (Tr. 408, 439, Complainant's Exh. 15) Healy-Barker again reviewed Complainant's request. (Tr. 350-51)

28. Zagara believed Complainant's request for IOD status was "a false claim." (Tr. 408, 439) On November 19, 2003, he asked Police Commissioner Rocco Diina to deny the claim. Zagara said that he was at the scene of the incident and "observed no sign of injury to the officer's neck, back, or left knee;" that he did not observe her struggling with the subject; that he had not received a use of force report or crime report; and that the subject was not committed under the N.Y. Mental Hygiene Law. Zagara concluded that "no legitimate police function was being performed nor was there an elevated danger involved in this incident." He also asserted that this was the second IOD claim Complainant had filed "in the last two months where the facts don't fit the circumstances presented," and he concluded that Complainant was seeking injured status "using false pretenses." (Respondent's Exh. I)

29. On November 24, 2003, Matarese denied Complainant's request for IOD status. Based on Zagara's report, he concluded that her claim was "not verifiable and without merit." (Tr. 241, 351; Complainant's Exh. 23)

30. Complainant was considered absent without leave on November 19, 20, 21, and 25, 2003. (Complainant's Exh. 3) She was granted a medical leave of absence from November 26 to December 25, 2003. (Tr. 249, 322; Complainant's Exh. 3)

31. Complainant grieved the denial of IOD status. (Tr. 242) On December 7, 2005, an arbitrator sustained the grievance and directed that Complainant be paid 45 sick leave days. (Complainant's Exh. 41)

32. On December 16, 2003, Complainant filed a complaint against Zagara with BPD's Professional Standards Division. She accused Zagara of misconduct and harassment for the statement he submitted in opposition to her IOD claim for November 18, 2003. (Tr. 220, 373)

33. Lieutenant Richard Ortiz investigated the complaint and took sworn statements from Complainant, Fletcher, Boone, and Zagara. (Tr. 373-77; Respondent's Exh. BB) Ortiz concluded that there was insufficient evidence to support the complaint. (Tr. 378-79).

34. On October 21, 2004, Diina determined that Complainant's allegations against Zagara were not sustained. (Respondent's Exh. BB)

35. Complainant did not return to work on December 26, 2003, when her medical leave ended. (Tr. 322) She was subsequently granted "performance of duty" retirement. (Tr. 275; Complainant's Exh. 33)

OPINION AND DECISION

Disability Discrimination

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 disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). It is also an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to an employee's disabilities. Human Rights Law §292.3(a). Complainant alleges that she was the victim of disability discrimination because Respondent did not offer her light duty as a reasonable accommodation when she

returned to work from her knee injury.

Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she has a disability and that the disability caused the behavior for which she was discriminated against in the terms, conditions, or privileges of employment. *Matter of McInery v. Landi*, 84 N.Y.2d 554, 558 (1994); *Thide v. New York State Department of Transportation*, 27 A.D. 2d 452, 453 (2d Dept. 2006). A disability includes a medical impairment which prevents the exercise of a normal bodily function but which, upon the provision of reasonable accommodations, does not prevent Complainant from performing in a reasonable manner the activities involved in her job. Human Rights Law §292(21). This provision bars discrimination against an impaired individual who is reasonably able to do what the position requires. *Miller v. Ravitch*, 60 N.Y. 2d 527, 532 (1983).

If Complainant has a disability and requires a reasonable accommodation, she must establish that she proposed an accommodation and that Respondent refused to make such accommodation. *Pimentel v. Citibank, N.A.*, 29 A.D. 3d 141, 148 (1st Dept. 2006); 9 N.Y.C.R.R. §466.11 (k)(1). Once the need for an accommodation is known, Respondent must “move forward to consider accommodation.” 9 N.Y.C.R.R. §466.11 (j)(4). This is an interactive process between the employer and the employee. The employer has the responsibility to investigate the employee’s request for accommodation and determine its feasibility. *Pimentel*, 29 A.D. 3d at 149.

Dr. Webster’s note, the accuracy of which Respondent did not dispute, established that Complainant had a disability. Before Complainant returned to work from her knee injury on November 3, 2003, she presented Dr. Webster’s note to Human Resources and to Zagara. However, Complainant did not request light duty or another accommodation when she presented

the note. In fact, Complainant returned to regular duty. While Sanders, Complainant's partner, testified that she had some difficulty getting in and out of cars, Complainant produced no evidence that she was unable to perform the essential functions of her job. Thus, not only did Complainant fail to prove that she requested an accommodation; she failed to prove that she needed one. Therefore, Complainant failed to establish a prima facie case.

Retaliation

It is an unlawful discriminatory practice for an employer to discharge an employee because she has complained about discrimination. Human Rights Law §296.1(e). To prove a prima facie case of retaliation, Complainant must establish that she engaged in protected activity, that Respondent was aware she engaged in such activity, that she suffered an adverse employment action based on such activity, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D. 2d 101, 104 (3d Dept. 1999). If Complainant meets this burden, Respondent must present legitimate, non-discriminatory reasons for its action. *Id.* If Respondent does to, Complainant must show that the reasons Respondent has presented were merely a pretext for discrimination. *Id.*; *Matter of Pace University v. New York City Commission on Human Rights*, 85 N.Y. 2d 125, 128 (1995).

Complainant engaged in a protected activity when she filed her EEOC complaint. Respondent was aware of this complaint. Complainant also suffered an adverse employment action when she was denied IOD status. Denial of IOD status was "a materially adverse change in the terms and conditions" of Complainant's employment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 306 (2004). However, Complainant failed to establish a causal connection between her EEOC complaint and the denial of IOD status.

A causal connection may be shown "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by defendant." *Gordon v. New York City Board of Education*, 232 F. 3d 111, 117 (2nd Cir. 2000). Complainant filed her EEOC complaint on May 23, 2003. She was denied IOD status in September 2003, more than three months later, and again in November 2003, six months later. The passage of more than two months between a complaint and alleged retaliatory action has been held insufficient to establish a causal connection. *Pace*, 257 A.D. 2d at 105-06; *Murray v. Visiting Nurse Services of New York*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007). Therefore, the adverse actions Complainant suffered occurred too long after the complaint to support an inference of retaliation.

Complainant did not present other evidence that the denials of IOD status were retaliatory. While Zagara was aware of Complainant's EEOC complaint, he did not decide either IOD claim. Healy-Barker, who denied the IOD claims, testified that she had no knowledge of the EEOC complaint at the time she made her determinations. Moreover, Healy-Barker's determinations were based on Respondent's legal interpretation of employee eligibility for benefits under General Municipal Law §207-c. Respondent believed that only officers who were injured while they were on calls or at heightened risk were eligible for IOD status. For this reason, Respondent denied McDaniel's claim for IOD as well as Complainant's.

In denying Complainant's November 18, 2003 claim for IOD, Healy-Barker did rely strongly on Zagara's report because he was at the scene of the incident. The evidence shows that Zagara did not find Complainant to be a satisfactory employee and that he did not trust her. However, the animus between Complainant and Zagara was long standing; it began long before

Complainant filed the EEOC complaint. The record contains evidence of several disciplinary hearings that resulted from charges brought by Zagara against Complainant. Eight months before the EEOC complaint, Complainant and Zagara had a verbal confrontation that resulted in Complainant's suspension and subsequent discipline. Given this history, Complainant did not meet her burden to establish that Zagara's recommendation and Respondent's denial of IOD status were made in retaliation for the EEOC complaint Complainant filed in May 2003.

Complainant has failed to show that a connection between the adverse employment action she suffered and her discrimination complaint. Therefore, she has failed to establish her prima facie case, and her retaliation claim 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: November 12, 2008
Syracuse, New York



Edward Luban
Administrative Law Judge