



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JOHN C. BENJAMIN,**

Complainant,

v.

**FREQUENCY ELECTRONICS, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10148651

Federal Charge No. 16GB103203

**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 December 20, 2012, by Margaret A. Jackson, 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”) WITH THE FOLLOWING AMENDMENT:**

- Complainant’s ultimate burden of proof is to show that discrimination occurred,

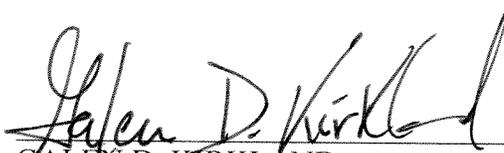
not that “Respondent’s proffered explanations are a pretext,” as stated in the Recommended Order. *See Ferrante v. American Lung Ass’n.*, 90 N.Y.2d 623, 630 (1997).

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: 2/27/2013  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



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on the Complaint of

**JOHN C. BENJAMIN,**

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**FREQUENCY ELECTRONICS, INC.,**

Respondent.

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

Case No. **10148651**

**SUMMARY**

Complainant alleged that Respondent unlawfully discriminated against him based on his age and disability. Complainant failed to establish an age based claim. Therefore, his age claim is dismissed. In addition, Complainant failed to produce evidence that he was discriminated against because of his disability. Therefore, his disability claim must also be dismissed.

**PROCEEDINGS IN THE CASE**

On May 4, 2011, 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on April 30, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Raymond Nardo, Esq. Respondent was represented by Alan B. Pearl, Esq. and Gina Ianne Garth, Esq.

#### **FINDINGS OF FACT**

1. Complainant was born on October 20, 1939. (Tr. 7)
2. Complainant began working for Respondent in December 1999, as an associate engineer/rubidium test technician in Respondent’s Commercial Rubidium Department (CRD). (Tr. 9, 66)
3. In 2006, Complainant was diagnosed with breast cancer. He underwent surgery and returned to work after two weeks. (Tr. 10)
4. In 2010, Complainant learned that his cancer had returned and metastasized affecting various parts of his body. (Tr.10-12)
5. In May of 2010, Complainant notified Respondent about his physical condition. Complainant requested, and was granted, medical leave pursuant to the Family Medical Leave Act (FMLA). Complainant took intermittent leave from work due to his illness through and October of 2010. In November of 2010, Complainant returned to work. (Tr.12-13, 28, 70, 125-26)

6. One week after returning to work in November 2010, Complainant requested and was granted additional medical leave. (Tr. 29)

7. In November 2010, Respondent's production was down and shipments had decreased by 80%. (Tr.125-127)

8. By January 2011, Complainant's FMLA benefits were exhausted and his medical leave ended. (Tr. 71, 113)

9. In February 2011, Complainant contacted Respondent's Human Resources manager, Nicole Mingo, and told her that he intended to return to work, but without explanation, he did not return to work. (Tr. 104)

10. Sometime during the first week of March 2011, Respondent's Director of Human Resources, Robert Klomp, spoke with Complainant's supervisor, John Caufield, about Complainant's intention to return to work and he was informed that due to the reduced production Complainant's position was no longer needed. (Tr. 72)

11. On March 14, 2011, Complainant visited his treating physician, Dr. Misciagno, and was given a note stating that he was "clinically stable and able to return to work on March 21, 2011". (Tr. 14; Complainant's Exhibit 1)

12. On March 16, 2011, Respondent sent Complainant notice that his employment was terminated and that he could elect to receive different, COBRA, medical benefits. (Tr. 71-72; Respondent's Exhibit 2)

13. On March 18, 2011, per the postal return receipt requested, Complainant received the notice of termination of employment from Respondent. (Tr. 72)

14. On March 21, 2011, Complainant alleged that he went to his place of employment but he did not meet with anyone from the Human Resources department. Respondent's swipe card

record did not evidence Complainant's presence on that day. (Tr. 42-43; Complainant's Exhibit 3)

15. On March 23, 2010, Complainant returned to his place of employment, brought his doctor's note, and met with Klomp and Mingo, to discuss re-employment because he wanted his benefits reinstated. Complainant told Respondent that he would be able to work an eight or nine hour per day schedule resulting in eighty hours biweekly as he did before he took the medical leave of absence. He also inquired whether part-time employment was available. (Tr.16, 52, 73, 77, 79, 92, 107)

16. Klomp told Complainant that there was no part-time work available. Complainant was reminded that his FMLA leave was exhausted, his employment had been terminated and that it was because his position had been eliminated. Complainant was escorted from the building, and was given an application to complete and return to Respondent for future employment. (Tr. 17, 52, 76, 79,107)

17. Although Complainant was not Respondent's only associate engineer/technician, he was Respondent's oldest employee when his employment was terminated. (Tr. 35-36, 132; Respondent's Exhibit 5)

18. Sometime in early 2012, Respondent hired someone who was retained following the acquisition of another company, into Complainant's former position. Complainant did not submit an application and was not considered for the position. (Tr. 74)

### **OPINION AND DECISION**

It is unlawful for an employer to discriminate against an employee on the basis of age or disability. Human Rights Law § 296.1(a).

Complainant has the burden of establishing a prima facie case of age or disability discrimination by showing that he is a member of a protected group, that he was qualified for the position held, that he suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See, Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Where a Complainant fails to show that an adverse employment action occurred under circumstances giving rise to an inference of discrimination, that complaint must be dismissed. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

Complainant has failed to produce evidence that would establish a prima facie case of age discrimination. The fact that Complainant was the oldest employee in his department does not automatically give rise to an inference of discrimination and is insufficient to establish that Respondent's decision to terminate his employment was motivated by unlawful discrimination. Therefore, Complainant's age based claim is dismissed.

Further, Complainant did not establish a prima facie case of disability discrimination. Complainant has a disability within the meaning of the Human Rights Law in that he suffers from metastasizing cancer. Complainant was qualified for the position he held. Respondent hired him as a rubidium test technician in December 1999, and did not raise any work performance issues. Complainant did not suffer an adverse employment action under circumstances giving rise to an inference of discrimination.

In November 2010, Respondent's production and shipments declined. Complainant's FMLA benefits were exhausted in January 2011. Complainant contacted Human Resources manager Mingo and advised her that he intended to return to work in February 2011. However, without explanation, he did not return to work. Respondent eliminated Complainant's position.

On March 14, 2011, Complainant obtained a doctor's note that cleared him to return to work on March 21, 2011. However, on March 18, 2011, Complainant received notification that his employment was terminated. Complainant did not return to work to meet with Human Resources on March 21, 2011. Complainant returned to his former place of employment on March 23, 2011, producing his doctor's note for the first time to Human Resources. Complainant then advised Respondent that he was interested in re-employment because he wanted his benefits reinstated. Complainant was informed that his position had been eliminated and he was given an application to be considered for future employment. Complainant never submitted the application. Complainant's termination of employment occurred because his FMLA leave benefits were exhausted and his position was eliminated.

**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: December 20, 2012  
Hempstead, New York



Margaret A. Jackson  
Administrative Law Judge