

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**LOUIS M. COMPITELLO,**

Complainant,

v.

**HAMPTON JITNEY, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10110777

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Order of Dismissal (“Recommended Order”), issued on December 23, 2008, 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”).** 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: **FEB 02 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**LOUIS M. COMPITELLO,**

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**HAMPTON JITNEY, INC.,**

Respondent.

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

Case No. **10110777**

**SUMMARY**

Complainant alleges he was harassed and his employment was terminated by Respondent and retaliated against because he has a disability. The evidence adduced at the hearing indicates that Complainant had a poor work record and that his request to be fired was granted. His case must, therefore, be dismissed.

**PROCEEDINGS IN THE CASE**

On April 13, 2006, 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 March 17, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Darin N. Bazar, Esq. Respondent was represented by Theodore D. Sklar, Esq.

Permission to file post-hearing briefs was granted. Respondent filed post-hearing findings of fact and conclusions of law. The Division did not make a post-hearing submission.

### **FINDINGS OF FACT**

1. Complainant is hearing impaired and requires hearing aids. (Tr. 264-65)

2. Respondent is a motor coach company located in Southampton, New York.

Respondent’s Operations Manager and Vice President of Operations, Brian Cooke, hired Complainant as a mechanic on April 12, 2004. Cooke also has a 50 percent loss of hearing in both ears. (Tr.259, 265-66)

3. The then President of Respondent’s company, Brent Lynch, was completely deaf in both ears. He had a cochlear implant and a prosthetic leg. He ambulated with crutches and canes. (Tr. 267-68)

4. The motor coaches are maintained and repaired in a repair shop located in Respondent’s building in Southampton, New York. Mechanics are responsible for preventive maintenance, oil changes, brake repair, suspension and interior work as well as on road service in the event a bus breaks down. Complainant believed that he was hired as a mechanic’s helper. However, based on Complainant’s job application he was qualified to perform all of the tasks of a mechanic. (Tr. 260-61, Respondent’s Exhib.1)

5. During Complainant's interview, Cooke told him that he was also hearing impaired and asked Complainant if it would present a problem for him. After talking about the shop noise he said, "that's probably going to be a benefit to you." Complainant testified that he felt insulted and humiliated by Cooke's statements. (Tr. 15-7)

6. Complainant does not always wear his hearing aid at work because perspiration will ruin the device. Without the hearing aid Complainant cannot hear the shop phone. Complainant is still able to perform his job without the hearing aid because his co-worker, Brett Bethel, answers the phone. Bethel also serves as the night shift foreman in the repair shop.(Tr. 18-19)

7. Rather than using the shop phone, Complainant brought in his personal Nextel phone radio. However, he stopped using the device because it was at his own expense. He did not ask Respondent to accommodate him by providing another phone radio. (Tr. 44-51,177-80)

8. After Complainant asked the night supervisor, Geoffrey Lynch, for a headset, he began receiving one-man jobs that he felt were assigned in retaliation for making the request. (Tr. 58)

9. There were times when Complainant asked Cooke questions and Cooke walked away. Complainant became offended and thought that he was being mocked when Cooke told him to turn up his hearing aid. Complainant acknowledged hearing Cooke criticize his job performance. (Tr. 28-29, 53)

10. On at least three to five occasions Cooke told Complainant that the brake jobs that he worked on came back with smoking wheels. Each time a bus came back he spoke to Complainant about it and explained to him that that he needed to improve. (Tr. 287-88)

11. Respondent cited a number of incidents in which Complainant was involved in physical altercations with his co-workers and occasions when Complainant refused to perform assignments. (Tr. 293)

12. The night before Complainant's termination of employment, a bus broke down in New Jersey. Goeffrey Lynch told Complainant to take the batteries that were in the shop and go get the bus. Complainant asked if he could take another employee, O'Neal, who was a shop helper, with him on the service call and Lynch said yes. (Tr. 68-9)

13. According to the Complainant, Lynch gave him the wrong batteries and when he reached the bus, the driver didn't know what to do. Complainant then went to the truck stop waiting room and waited for hours for someone to call from the repair shop. Another mechanic told Complainant how to start the bus. Complainant spoke to Cooke when he returned to the shop at 3:30 in the morning and Cooke told him to go home. (Tr. 68-72)

14. After inspecting the bus, it was discovered that the inverter was burned out, the rear J-box door was damaged and the wires on the Start-All were torn apart and disconnected with resulting damage to the service vehicle and the bus. (Tr. 247, 306)

15. Complainant met with Cooke the next day. Cooke told Complainant that he was not pleased with his job performance and that if he didn't improve he would be fired. Complainant told Cooke that he didn't like to be threatened. He said, "Fire me." Cooke said, "Well, you're fired." (Tr. 74-6, 165-68, 307)

16. Complainant never complained to anyone that he was being harassed or discriminated against. (Tr. 197)

17. Complainant is seeking compensatory damages for the humiliation and mental anguish he allegedly experienced during his employment with Respondent. (Tr. 172-73)

## OPINION AND DECISION

To establish a prima facie case of unlawful disability discrimination under the Human Rights Law, (N.Y. Exec. Law §296(1)), complainant must show that (1) he was disabled within the meaning of the Human Rights Law; (2) he was otherwise qualified to perform the essential functions of the job with or without a reasonable accommodation; (3) he suffered an adverse employment action; and (4) he suffered the adverse employment action because of his disability. *See, Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The term “disability” is defined as “physical, medical or mental impairments that ‘do not prevent the complainant from performing in a reasonable manner the activities involved in the job.’” *Pembroke v. New York State Office of Court Administration*, 306 A.D.2d 185; 761 N.Y.S.2d 214, 215 (1<sup>st</sup> Dept. 2003), citing *Executive Law §292 (21)*. All that a complainant has to show is that he suffers from a “medically diagnosable impairment.” *See, Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998). And, when dealing with employment, is limited “to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.” *See, N.Y. Exec. Law §292 (21)*. *See also, McAuliffe v. Taft Furniture Warehouse and Showroom, Ltd.*, 116 A.D.2d 774, 775; 497 N.Y.S.2d 170, 171 (3<sup>rd</sup> Dep’t 1986); *State Division of Human Rights (McDermott) v. Xerox Corporation*, 65 N.Y.2d 213, 218-219, 491 N.Y.S.2d 106 (1985).

If Complainant succeeds in establishing a prima facie case, Respondent must then articulate a legitimate, non-discriminatory business reason for its actions. If Respondent does so, then Complainant must show that the proffered reason is a pretext for discrimination. *Matter of*

*Pace University v. New York City Comm. On Human Rights*, 85 NY2d 125, 128 (1995); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.133, 120, S.Ct. 2097, 147 L.Ed. 105 (2000).

Complainant has a disability within the meaning of the Human Rights Law. Complainant is hearing impaired and requires hearing aids to perform his job. The only question remaining is whether Complainant suffered an adverse employment action because of his disability and whether Respondent has articulated a legitimate, non-discriminatory business reason for its action.

In this case, Respondent has articulated a legitimate, non-discriminatory reason for its actions, which Complainant has not shown to be pretextual. Complainant's work performance was below Respondent's standards. Complainant was told to improve his work performance on several occasions. He did not improve and his employment was terminated upon his request.

In order to establish a prima facie case of retaliation, a complainant must establish that he engaged in protected activity, that he suffered an adverse employment action and that there is a causal connection between his engagement in protected activity and the adverse action. Upon the demonstration of a prima facie case of retaliation, a burden of production shifts to the respondent to articulate a legitimate non-discriminatory reason for its actions. Upon the offer of such explanation, the burden of proof requires the complainant to demonstrate that the reason offered is a pretext for unlawful discrimination. *Pace v. Ogden Services Corp.*, 257A.D.2d 101, 692 N.Y.S.2d 220 (3<sup>rd</sup> Dept., 1999).

The record clearly shows that Complainant was not a victim of retaliation. He never complained that he was being harassed and after he requested the headset, he was assigned jobs that Respondent believed he could handle as a mechanic. Complainant's employment with

Respondent did not end because of the bus incident or his poor work performance. Complainant was given a warning that his employment would be terminated if he did not improve. Complainant perceived the warning as a threat and asked to be fired. His employer complied for legitimate non-discriminatory reasons.

**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 23, 2008  
Hempstead, New York

A handwritten signature in cursive script that reads "Margaret A. Jackson". The signature is written in black ink and is positioned above the printed name and title.

Margaret A. Jackson  
Administrative Law Judge