

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MILTON CRUZ,**

Complainant,

v.

**NEW YORK CITY DEPARTMENT OF  
SANITATION,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10105148

**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 October 31, 2008, by Thomas S. Protano, 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: **JUN 02 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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

Case No. **10105148**

**SUMMARY**

Complainant suffers from bipolar disorder. He was separated from his employment with Respondent as a sanitation worker. Complainant alleges he was fired because of his disability in violation of Human Rights Law. The evidence at hearing established that Complainant was unable to perform the essential functions of his position and his complaint is, therefore, not covered by Human Rights Law.

**PROCEEDINGS IN THE CASE**

On April 14, 2005, 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 Migdalia Pares, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on July 11, 2007 and January 7, 2008. After the hearing, pursuant to 9 NYCRR § 465.12(d)(2), the case was re-assigned to ALJ Thomas S. Protano to render a decision.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Joshua Fay, Esq.

### **FINDINGS OF FACT**

1. Complainant, who suffers from Bi-Polar Disorder, began working for Respondent as a sanitation worker in October, 1999. (ALJ Exhibit 1; Tr. 231)
2. Respondent is an agency of the City of New York, responsible for picking up household trash and recyclables and keeping the streets free of debris and snow. (Tr. 148-49)
3. Sanitation workers are called upon to haul trash, drive garbage trucks and operate the push packers and blades attached to them, operate mechanical street sweepers, drive salt spreaders and snow plows during snow emergencies and operate front-end loaders. (Tr. 148-54)
4. A commercial driver’s license is required for all sanitation workers. In Complainant’s words, the job entails “a lot of driving.” (Respondent’s Exhibit 1; Tr. 154, 233)
5. Safety is a major concern for Respondent. Whether one is driving a truck, operating or standing near the blade or directing a worker who is driving the truck, the sanitation worker must be safety conscious. Even in the garage area, the potential for injury and danger is present. For these reasons, Respondent considers the job of sanitation worker to be a “safety-sensitive” position. (Tr. 155-59)

6. Aside from a few clerk positions, which require computer skills, verbal and telephone abilities, Respondent has no jobs which do not require operating machinery and/or vehicles. (Tr. 163-64) Even the clerical personnel are sometimes called upon to operate vehicles and machinery or to respond to a snow emergency. (Tr. 165-66)

7. Complainant has been described as “boisterous,” “eccentric,” “inappropriate,” “argumentative” and “paranoid” by medical professionals who have examined him. (Respondent’s Exhibits 6, 7, 8, 9, 10, 11)

8. While working for Respondent, Complainant exhibited erratic behavior. In May, 2001, he was cited for driving his vehicle too close to co-workers on a highway, such that the co-workers had to jump out of the way to avoid being hit. (Respondent’s Exhibit 3; Tr. 53) In July, 2001, Complainant was walking in circles while “yelling [and] screaming.” (Respondent’s Exhibit 4; Tr. 60) In February, 2002, Complainant “became angry and hostile, raising his voice,” while “being verbally aggressive toward [his] superior.” (Respondent’s Exhibit 5; Tr. 63)

9. Because of his behavior, Complainant was referred to Respondent’s medical clinic for evaluation. Respondent has a procedure by which a supervisor can fill out a “reasonable suspicion form,” which refers an employee to the medical clinic if the supervisor believes the employee to be unfit for duty. (Respondent’s Exhibits 3, 4, 5; Tr. 57, 197-98)

10. On July 27, 2001, Dr. Jochanan M. Weisenfreund examined Complainant. Respondent had referred Complainant to Weisenfreund, a consulting psychiatrist of Respondent, for evaluation. Weisenfreund diagnosed Complainant as hypomanic with a personality disorder. (Respondent’s Exhibit 6)

11. Weisenfreund examined Complainant a second time on July 25, 2003. At that point, Complainant was on an extended leave of absence from work due to health reasons.

Weisenfreund noted that it was “not clear whether the patient is pursuing psychiatric treatment and medication management. Compliance with medication is unknown. Weisenfreund determined that Complainant was manic and was unable to return to work. (Respondent’s Exhibit 7)

12. On December 22, 2003, Weisenfreund again examined Complainant. This time, he determined that Complainant suffers from “Bipolar Disorder, chronic and recurrent.” Weisenfreund recommended that Complainant be returned to his regular duties, but stated that “[c]onsidering the chronicity of his illness, poor insight and the relapsing episode, the prognosis is guarded.” (Respondent’s Exhibit 8)

13. Complainant did not remain on the job for very long. On January 29, 2004, just seven days after he returned to work, Complainant drove his own car into a parked sanitation truck. Thereafter, he was, once again, placed on leave. (Tr. 243, 350-52)

14. On March 29, 2004, Weisenfreund examined Complainant again. He determined that Complainant was hypermanic and should not drive a vehicle. Weisenfreund further stated that Complainant’s medications needed to be adjusted and that because of “the chronicity of his illness and the frequency of relapsing episodes his prognosis remains guarded.” (Respondent’s Exhibit 9)

15. On September 17, 2004, Dr. Ramy Obas, prepared an evaluation of Complainant’s record. He noted that Complainant had been hospitalized from June 20, 2004 through July 18, 2004 for “decompensation of his psychiatric state.” Obas concluded that “in view of the employee’s history of Bipolar Disorder and the chronic non remitting nature of his psychiatric disease, Medical Separation is recommended.” (Respondent’s Exhibit 14)

16. Complainant remained absent from work throughout 2004 except for the one week in January. During that period he was fully paid and received his full medical benefits. (Tr. 120)

17. In December of 2004, Complainant sought to return to work. His treating psychiatrist, Dr. Leonard J. Rubin, determined that Complainant was “fully competent to resume all the duties of his job title...” Rubin determined that Complainant could “driv[e] heavy equipment.”

(Respondent’s Exhibit 10; Complainant’s Exhibit 6)

18. In response, Respondent scheduled an independent examination by Dr. Solomon Miskin. Miskin examined Complainant on February 28, 2005 and reviewed reports from Rubin, Weisenfreund and Obas. (Respondent’s Exhibit 11)

19. Miskin concurred with Weisenfreund that Complainant suffered from bipolar disorder. Although Miskin recommended that Complainant could return to work, he placed significant restrictions on Complainant’s ability to work. Miskin noted that Complainant “would not be a candidate for attempting safety-sensitive tasks such as driving or operating large and small vehicles.” In addition, Complainant “would not be a candidate for performing routine maintenance tasks and would not be a candidate for handling inspection and preparation of department vehicles and equipment for operation.” Miskin also noted that Complainant had stopped taking his medications. (Respondent’s Exhibit 11)

20. Based upon the evaluations of the various doctors, Respondent sought Complainant’s medical separation from employment. His last day as an employee of the Respondent was June 25, 2005. (Respondent’s Exhibit 16)

21. Complainant never requested an accommodation for his disability from Respondent. He does not believe he suffers from bipolar disorder and he does not currently take any

medication for bipolar disorder. Despite this, he filed his claim based upon disability because he suffers from bipolar disorder. (ALJ Exhibit 1; Tr. 357-59, 365-66)

### **OPINION AND DECISION**

A disability is "...a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques...." 18 Executive Law §292.21. In order to meet this definition, an employee must only show he suffers from some diagnosable impairment. *Nowak v. EGW Home Care, Inc.* 82 F.Supp.2d 101, 111 (W.D.N.Y., 2000), citing, *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106, 480 N.E.2d 695 (1985), and *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998).

An employer may not fire or otherwise discriminate against an employee on the basis of his or her disability unless that disability precludes the employee from performing the essential duties of the job. Human Rights Law §296.1(a). See also, *Miller v. Ravitch*, 60 N.Y.2d 527 (1983). The term "disability," as it is defined in Human Rights Law, 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." Human Rights Law § 292.21. Thus, in certain circumstances, the law requires reasonable accommodations to be made, if the employee needs such accommodations in order to satisfactorily perform his or her job. Satisfactory performance means "minimum acceptable performance of the essential functions of the job as established by the employer." 9NYCRR 466.11(f)(2) Moreover, "a function is

essential if not performing that function would fundamentally change the job or occupation for which the position exists.” 9 NYCRR 466.11(f)(3)

Complainant worked in a job that Respondent considered “safety sensitive.” Whether a sanitation worker is driving or not, he or she must be conscious of the dangers involved. Operating machinery and working together with those who are driving large vehicles is a constant part of the job. Complainant, based upon the findings of Weisenfreund, Miskin and Obas, was not capable of handling such safety sensitive tasks. As a result, Respondent felt he needed to be discharged from his employment.

Although Complainant did not request a reasonable accommodation, the Human Rights Law does require employers to provide accommodations to employees who need them. The Division’s General Regulations on Reasonable Accommodation specifically state that “reasonable accommodation is not required where the disability or the accommodation itself poses a direct threat.” A “direct threat,” is “a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.” 9 NYCRR 466.11(g)(2)(i) Moreover, “heightened consideration of direct threat is to be encouraged in bona fide safety sensitive jobs.” 9 NYCRR 466.11(g)(2)(iii) Based upon the job description in the record and the testimony at hearing, the sanitation worker position can be considered a bona fide safety sensitive position, given that it requires the frequent operation of dangerous vehicles and machinery.

Complainant was unable to safely perform the required tasks of a sanitation worker. His actions and the reports of the psychiatrists bear this fact out. The fact that Complainant was not diligent about taking his medications further establishes this point. Complainant did not request

an accommodation to his disability, but even if he had, the record shows that there were no accommodations available to the Complainant that would have allowed him to remain on the job. Even the clerical personnel were sometimes called upon to work outside the office setting. Moreover, Complainant has not established that he has office skills and his personality, which has been described as “boisterous” and “inappropriate” would not be suitable for a position that requires speaking and telephone skills.

In sum, the record has not established that any reasonable accommodation could have been fashioned for Complainant. In the absence of any accommodation that would allow Complainant to perform, his claim is not covered under Human Rights Law. Although Complainant clearly has a disability, he is not disabled within the meaning of Human Rights Law, because he cannot perform the duties of the sanitation worker position with or without accommodations. Thus, his 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 case be, and the same hereby is, dismissed.

DATED: October 31, 2008  
Bronx, New York



Thomas S. Protano  
Administrative Law Judge