



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JEFF DARTON,**

Complainant,

v.

**NEW YORK STATE OFFICE FOR PEOPLE WITH  
DEVELOPMENTAL DISABILITIES,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10147755

Federal Charge No. 16GB102592

**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 June 30, 2013, by Michael T. Groben, 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:

8/9/13

Bronx, New York

  
GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
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on the Complaint of

**JEFF DARTON,**

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v.

**NEW YORK STATE OFFICE FOR PEOPLE  
WITH DEVELOPMENTAL DISABILITIES,**  
Respondent.

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

Case No. **10147755**

**SUMMARY**

Complainant alleges that he was subjected to unlawful discriminatory treatment when Respondent suspended him and sought his termination from employment in retaliation for his support of a fellow employee's complaint of discrimination. Respondent denies the charges. Complainant has failed to sustain his burden of proof, and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On March 28, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on June 4 and June 5, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by D. Jeffrey Gosch, Esq. Respondent was represented by Christine M. Galvin, Esq., Deputy Counsel.

At the hearing, Respondent moved to dismiss the complaint by undated Motion to Dismiss. Decision on the motion was reserved for after the hearing. (Tr. 292)

Permission to file post-hearing briefs was granted, and both parties filed proposed findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Respondent New York State Office for People with Developmental Disabilities maintains a Central New York Developmental Disabilities Services Office ("CNY DDSO") to provide services for people with developmental disabilities in central New York State. (Tr. 31-32, 297)

2. John Gleason ("Gleason") is the director of CNY DDSO. As such, he oversees CNY DDSO's provider network including group homes and residences, patient programs, and services to disabled persons. Gleason also acts as the appointing authority, supervising the hiring,

promotion, and firing of employees, and disciplinary actions against employees. CNY DDSO has approximately 2,700 employees. (Tr. 297-98, 307-08)

3. Anthony DiNuzzo ("DiNuzzo") was the CNY DDSO deputy director for quality assurance until his retirement in August or September 2011. Gleason was DiNuzzo's supervisor. (Tr. 38, 161, 320-21)

4. DiNuzzo and Complainant were friends. (Tr. 239-40, 321-22)

5. CNY DDSO operations are split into a western region, headquartered in Syracuse, and an eastern region, headquartered in Rome. (Tr. 85, 300-301)

6. Each region maintains the personnel files for the CNY DDSO employees who work within that region. These files contain sensitive personal information, including disciplinary actions, time and attendance records, performance Social Security numbers and employee background information, including criminal history. (Tr. 299-01)

7. Kay Scharoun ("Scharoun") is the director of CNY DDSO's department of human resources. She oversees all personnel operations. (Tr. 298-99, 388)

8. Karen Marriam ("Marriam") has been a senior personnel administrator in the CNY DDSO personnel department, Syracuse office, for approximately 4 years. (Tr. 120, 309-10, 311) Her duties include hiring employees, employee investigations, and misconduct investigations. (Tr. 310)

9. Marriam is regarded as a good employee by her supervisors. (Tr. 311; Respondent's Exhibits 12 and 17)

10. Complainant is employed as a staffing services specialist for CNY DDSO's western region in the Syracuse office. His duties as a staffing services specialist include ensuring that Respondent's group homes and residences are fully staffed, with associated duties regarding

budgeting, overtime management, and staff training. Complainant's civil service title is developmental assistant 3. Complainant performs his duties as a staffing service specialist out of title. (Tr. 34-35, 134-36, 302-03, 360-61; ALJ Exhibit 3, Complainant's Exhibit 7)

11. Complainant is regarded as a good employee by his supervisors. (Tr. 139-42, 307, 359; Complainant's Exhibits 9, 10, 11 and 12)

12. Because of the close interaction required between staffing services employees and employees of Respondent's personnel department, they were located in the same suite of offices in Syracuse. Complainant was aware that personnel matters are confidential, and not be shared outside the office. (Tr. 229, 304, 388-89)

13. Until his retirement in August or September of 2010, Tom Cerio was Complainant's supervisor. Gleason then became Complainant's supervisor. (Tr. 136-37, 303, 306-07)

Complainant was hired for the staffing services position by Cerio and Gleason. (Tr. 304-05)

14. Johnny Davis ("Davis") is CNY DDSO's affirmative action administrator. His duties include the investigation and resolution of discrimination complaints. (Tr. 154, 322, 377-78)

15. John Kennedy ("Kennedy") is an associate personnel administrator in CNY DDSO's western office, in Syracuse. Scharoun is his supervisor. (Tr. 27-28, 85, 299, 312-13)

16. Kennedy is a close friend of Complainant and often socializes with Complainant outside of work. (Tr. 33-34, 67, 142)

**December 2009 Incident and Respondent's Investigation**

17. In December 2009, while Kennedy was at home with his wife and daughter, Kennedy's daughter answered a telephone call from Kennedy's former girlfriend, who was also employed by CNY DDSO. The former girlfriend angrily denounced Kennedy and his wife. Complainant

was also present, and he heard portions of this tirade when the telephone was placed on speakerphone. (Tr. 35-37, 39, 142-46, 299)

18. In discussions with his superiors shortly after the December 2009 incident, Kennedy advised that Complainant had been present during the incident. (Tr. 37-39)

19. On August 3, 2010, Kennedy was interrogated by Respondent in connection with a misconduct investigation against him, relating to the former girlfriend. Shortly after that he was placed on administrative leave, and then suspended. Charges were brought against him in April 2011. At the time of the public hearing, Kennedy was on administrative leave pursuant to the misconduct investigation. (Tr. 32-33, 58, 64, 78, 153, 299-300, 312, 375-76)

### **The Kennedy DHR Complaint**

20. Respondent maintains an antidiscrimination policy which forbids discrimination and requires managers and supervisors to take action on any complaint of discrimination. Respondent also maintains a policy entitled "Domestic Violence in the Workplace Policy" which is intended to promote safety in the workplace and respond effectively to the needs of victims of domestic violence. (Tr. 148, 277; Complainant's Exhibit 3A and 3C)

21. Complainant and Kennedy believed that these policies required Respondent to take certain actions to protect Kennedy against domestic violence in the workplace, and that Respondent did not take the required actions. (Tr. 42, 44, 50-51, 148, 150-53, 230-32, 277-79, 284; Complainant's Exhibit 3C)

22. On or about August 17, 2010, after he was placed on administrative leave, Kennedy filed a verified complaint (the "Kennedy complaint") with the Division against Respondent's CNY DDSO, alleging that he had been discriminated against as a victim of domestic violence. In a form filled out contemporaneously with the verified complaint and submitted to the Division,

Kennedy listed Complainant as a witness to the alleged discrimination. (Tr. 58-59, 61-62, 77-78, 154, 313, 322, 367-68; Complainant's Exhibit 4)

23. Davis was assigned to investigate the Kennedy complaint and prepare a response on behalf of Respondent. In September 2010, Davis sent a confidential questionnaire to "12 or 13" employees, including Complainant. The questionnaire, *inter alia*, requested information about the December 2009 incident and whether Kennedy had been treated differently or discriminated against since said incident. (Tr. 157, 234, 276-77, 322-23, 378-381; Complainant's Exhibit 13C)

24. Complainant indicated to Davis that he was uncomfortable with filling out the questionnaire, and Davis advised Complainant that he did not have to fill out the questionnaire. By e-mail dated September 17, 2010, Complainant responded to the questionnaire. Complainant's answers were generally supportive of Kennedy, and stated Complainant's belief that Kennedy was being discriminated against by Respondent. (Tr. 154-56, 386-87; Complainant's Exhibit 13A) I find that Complainant reasonably believed that Kennedy was a victim of unlawful discrimination.

25. Davis considered some of Complainant's answers to be vague, and on November 22, 2010, he sent Complainant a second questionnaire. Complainant answered that questionnaire, stating that he would "hate for management to look at me in a different 'light,' (sic) or retaliate against me because I was present when these events took place." (Tr. 157-58, 160, 381-82, 383-84, 385-86; Complainant's Exhibit 14)

26. Davis did not take any action with respect to Complainant's statement about retaliation. (Tr. 385)

27. Davis kept Complainant's answers to both questionnaires confidential, secured them in his office, and did not disclose them to Gleason. (Tr. 235-36, 322-23, 382)

28. Although Complainant became concerned that his association with Kennedy or his answers to the questionnaire might reflect negatively on him, he did not complain to Davis that he believed he feared being discriminated against because of the questionnaires, or for any other reason. (Tr. 159, 234-35, 236, 383)

29. Complainant alleged that Davis had said to him on one occasion "the agency has a long memory. You take action against your employer and that's going to be tough and it's going to be limiting." Davis credibly denied making this statement. (Tr. 208, 383-84)

30. Kennedy subsequently filed two more complaints with the Division. Davis did not query Complainant regarding the facts or circumstances of those complaints. (Tr. 383)

### **The Stark Investigation**

31. Dean Stark ("Stark") was employed by CNY DDSO. During his probationary period, Stark's supervisor recommended his termination. (Tr. 314-15)

32. Stark and Kennedy were friends. Complainant, Stark and Kennedy often socialized together after work, and exercised at the same gym. (Tr. 163-64, 220-26, 228, 279-82, 315; Complainant's Exhibit 34)

33. The employee termination process employed by CNY DDSO includes a review of the proposed termination by the human resources department. Human resources sends a copy of its recommendation regarding the proposed termination, together with associated file documents, to Gleason. Gleason received the file documents for the Stark case, but not the review and recommendation of human resources. (Tr. 315-16)

34. On August 6, 2010, in response to an e-mail inquiry from Gleason, Marriam recommended against terminating Stark and apologized for not providing her recommendation earlier. (Tr. 127-28, 131, 316-18, 359-60; Respondent's Exhibit 8)

35. In early August, 2010, Gleason met with Stark and terminated his employment. (Tr. 318-319) At the end of the meeting, Stark left Gleason's office. Gleason then observed Stark, Complainant, and two other persons seated at a table in the office cafe area. (Tr. 319-20)

36. Stark then filed a complaint against Respondent with the Division. The Division requested that Respondent review its actions towards Stark. (Tr. 320)

37. By letter dated October 14, 2010, Stark's attorneys filed a rebuttal to Respondent's response to Stark's Division complaint, and attached a copy of Marriam's August 6, 2010 e-mail to Gleason, with sender and recipient information redacted. (Tr. 323-24; Respondent's Exhibits 8 and 22)

38. On January 31, 2011, DiNuzzo questioned Marriam regarding her knowledge of how the August 6, 2010 e-mail had come to be in Stark's possession. Marriam stated that Complainant advised her that he wanted to make a copy of the e-mail and "cut the heading off," and that she had allowed Complainant to do so. DiNuzzo advised Gleason of this and provided him with Marriam's statement. (Tr. 124-27, 325-26; Respondent's Exhibit 10)

39. Gleason was aware that Complainant, Kennedy, and Stark were acquaintances outside of work. (Tr. 315, 365-66)

40. At all times relevant to the complaint, Matt Guinane ("Guinane") was Respondent's director of employee relations at its main office in Albany. (Tr. 62-63, 360)

41. The usual procedure at CNY DDSO is for the local personnel office to investigate misconduct charges. Because Gleason believed that it was inappropriate to have local CNY DDSO personnel office staff investigate possible misconduct occurring in their own office, he asked Guinane to conduct the investigation. (Tr. 328-330)

42. On February 1, 2011, DiNuzzo informed Complainant that he had been identified as the person who "leaked" the August 6, 2010 e-mail. Complainant denied this, and repeated his denial in a subsequent conversation with DiNuzzo and Davis. Davis advised Complainant that he would probably be interrogated and that his career could be threatened. (Tr. 160-63, 165, 241-42, 373)

43. DiNuzzo was not Complainant's supervisor, and in having this discussion with Complainant, he was acting outside his normal job duties. (Tr. 240-41, 363-64)

44. On Friday, February 4, 2011, Complainant e-mailed Gleason, expressing his opinion that he was being targeted and that Davis's remarks were "threaten (sic) and retaliatory." Gleason responded that he could meet with Complainant on the following Monday to discuss the matter. (Tr. 165-67, 351-53; Complainant's Exhibit 15)

45. Complainant had scheduled leave for that day, and he did not meet with Gleason, respond to his e-mail, or request another date to meet. (Tr. 167-68, 236-8, 327-28, 355-56; Complainant's Exhibit 15) Complainant's testimony that he had requested another meeting was not credible.

46. Gleason did not consider Complainant's mention of the word "retaliatory" to be a complaint of discrimination pursuant to Respondent's antidiscrimination policy. (Tr. 370-73; Complainant's Exhibits 3A and 15)

47. On February 24, 2011, Marriam was interrogated by Guinane. In her interrogation, Marriam stated that Kennedy, who was her supervisor at the time, had attempted to convince her not to make a recommendation regarding Stark's termination, so that Stark's probation would run out and he would thus become a permanent employee without further action. Marriam also repeated her charge that Complainant had copied the August 6, 2010 e-mail in her presence, and

redacted it, and that she believed that he had given the e-mail to either Stark or Kennedy. (Tr. 121, 123-24, 128-29, 332, 374-75; Complainant's Exhibit 17, Respondent's Exhibit 8)

48. On February 24, 2011, Complainant was interrogated by Guinane. He admitted that he socialized with Stark and Kennedy. He denied that he had seen the August 6, 2010 e-mail before or that he had copied the e-mail. (Tr. 168, 241, 332; Complainant's Exhibit 16; Respondent's Exhibit 8)

49. Gleason regarded both Complainant and Marriam as truthful people. (Tr. 327, 366) Gleason was aware that Complainant and Marriam were acquainted. (Tr. 310-11)

**Complainant is Charged with Misconduct**

50. Based on Respondent's beliefs as a result of the February 24, 2011 interrogations, Complainant was placed on administrative leave with pay on March 2, 2011. Marriam was not placed on leave, because the interrogator believed her version of events. (Tr. 169, 333-34)

51. Article 33, §33.3(g)(1) of the Collective Bargaining Agreement governing Complainant's employment at CNY DDSO states in pertinent part that an employee may be suspended without pay if CNY DDSO determines that there is probable cause to believe that the employee's presence on the job represents a potential danger or would severely interfere with operations. This determination is reviewable in arbitration. (Tr. 28, 164, 338-39, 340-41; Complainant's Exhibit 1)

52. On March 11, 2011, Gleason received Guinane's recommendation that both Marriam and Complainant be disciplined, and that Complainant, due to the serious nature of the alleged misconduct, should be suspended with proposed penalty of termination. (Tr. 334-37; Respondent's Exhibit 7)

53. Based on his review of the interrogation transcripts, his belief that Guinane was an expert and objective investigator, and his knowledge that Complainant, Kennedy, and Stark were social acquaintances and friends, Gleason decided to adopt Guinane's recommendations regarding Complainant. He was concerned about the possibility that Complainant might be a "leak" in the CNY DDSO personnel office who could give confidential documents to others of his acquaintance, such as Kennedy. (Tr. 341-48, 356-58, 363)

54. On March 16, 2011, Marriam was issued a Non-Suspension Notice of Discipline, accusing her of permitting Complainant to copy the e-mail. (Tr. 121, 361-62; Complainant's Exhibit 22)

55. Gleason considered and accepted Guinane's recommendation to discipline Marriam by issuance of a letter of reprimand. He did so because he believed that she had been truthful and admitted her error. She agreed to the proposed penalty, and received a letter of reprimand on or about March 31, 2011. (Tr. 122, 341-43, 344; Complainant's Exhibit 23)

56. On March 17, 2011, Complainant was issued a Notice of Intent to Suspend Without Pay. (Tr. 153-54, 169-70; Complainant's Exhibit 18) The next day, Complainant met with Gleason to rebut the charges. Complainant denied the charges, but did not state that he believed he was being discriminated against. (Tr. 171-73, 238-39, 348-49)

57. Gleason credibly testified that he did not suspend Complainant because of the Kennedy complaint, or as retribution because of Complainant's friendship with Stark and Kennedy. At the time of the suspension, Gleason was not aware that Complainant had been questioned by Davis regarding the Kennedy complaint, or of Complainant's answers. Gleason was also not aware that Complainant had any plans to file his own Division complaint. (Tr. 235, 349-50, 353, 366-67; Complainant's Exhibits 13A, 13C, and 14)

58. By notices dated March 23, 2011, Complainant was suspended without pay and charges were brought against him for allegedly providing or causing to be provided the August 6, 2010 e-mail to Stark, and for offering false statements during his February 24, 2011 interrogation. (Tr. 169, 173-74; Complainant's Exhibits 19 and 20)

59. In late April, 2011, after he was suspended, Complainant attended the investigative conference at the Division regarding the Kennedy complaint. (Tr. 63, 65-66, 83)

60. Complainant's union filed a grievance regarding the suspension and misconduct charges on his behalf, and the matter was heard before arbitrator Daniel J. Arno on October 27 and November 10, 2011. (Tr. 174-79, 183-85; Complainant's Exhibits 25, 26, and 27)

61. At the close of the November 10, 2011 session, Arno issued a verbal decision, *inter alia*, finding that Respondent had failed to cite any direct evidence that Complainant actually transferred the August 6, 2011 e-mail; that in any case Respondent had not demonstrated any specific rule or policy that Complainant would have violated by doing so, and that therefore Respondent had failed to sustain its burden of proof. The arbitrator further opined that Respondent had probable cause to suspend Complainant, and that it had proceeded in "good faith." Complainant was acquitted of all charges and ordered restored to his job and benefits. The arbitrator advised that he would follow this with a written decision. (Complainant's Exhibit 27 [pp. 233-37])

62. After surgery, Complainant returned to work on January 3, 2012. (Tr. 193, 258, 390)

### **Complainant Is Not Promoted**

63. In addition to his qualifications as a supervising staffing services specialist, Cerio possessed expertise in computer applications and analysis of staffing problems. (Tr. 305-06) When Cerio retired late in 2010, Respondent was under a hiring freeze. Because of that, and

because Gleason had acquired an employee with expertise in computer applications, he did not hire someone to fill Cerio's position. (Tr. 137, 308-09)

64. Complainant believed that he was not offered Cerio's position because Respondent suspended him in retaliation for participation in opposing discrimination. However, Gleason never promised Complainant that he would be promoted to Cerio's position. (Tr. 137-39, 255-57, 275-76, 307-08)

65. Complainant's civil service title of developmental assistant 3 would have met the minimum qualifications to perform in Cerio's position. However, Complainant never took the civil service test required for promotion to Cerio's position. (Tr. 309, 368-69)

**Complainant Returns to Payroll and Receives Reimbursement**

66. Complainant believed that Respondent deliberately delayed his return to the payroll and reimbursement for monies owed to him while on suspension in retaliation against Complainant, and that he had been damaged thereby. (Tr. 187, 189-95; Complainant's Exhibits 28, 29, 30, and 32)

67. However, Scharoun's credible testimony, supported by documentary evidence, demonstrated that Complainant was restored to the payroll and received his benefits almost immediately after the arbitrator's decision, and that any delay in his receipt of monies owed to him was due to the process employed by New York State, and not to any retaliatory intent on the part of Respondent. (Tr. 108-09, 244-48, 265-67, 270, 389-90, 394-417; Complainant's Exhibits 28 and 29, Respondent's Exhibits 16 and 19)

**Complainant's Credibility**

68. Complainant was occasionally evasive or argumentative in his testimony. (Tr. 231-32, 235, 236, 237, 245-48, 286) Complainant was not a credible witness.

## OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to retaliate or discriminate against an employee because he has opposed any practices forbidden by the Human Rights Law or because he has filed a complaint, testified or assisted in any proceeding pursuant to the Human Rights Law. Human Rights Law § 296 (7).

### The Motion

In its motion to dismiss, Respondent urges that the issue of whether Respondent had a retaliatory motive in suspending Complainant is precluded by the arbitrator's decision in Complainant's prior misconduct hearing. Conclusive effect is given to quasi-judicial administrative determinations when the issue upon which collateral estoppel is sought is identical to an issue necessarily resolved in a prior decision. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 499-500, 478 N.Y.S.2d 823 (1984); *Matter of Bartenders Unlimited (Commissioner of Labor)*, 289 A.D.2d 785, 786, 736 N.Y.S.2d 119 (3d Dept. 2001), lv. denied 98 N.Y.2d 601 (2002). The collateral estoppel doctrine applies to determinations rendered in arbitration proceedings. *Matter of New York State Department of Labor (Unemployment Ins. Appeal Bd.) v. New York State Div. of Human Rights*, 71 A.D.3d 1234, 1236, 897 N.Y.S.2d 740 (3d Dept. 2010), lv. denied 15 N.Y.3d 714 (2010). The analysis "turn(s) on the identity of the issues involved and whether there was a full and fair opportunity to litigate the issue in the prior proceeding." *Matter of Guimaraes (New York City Bd. of Ed.-Roberts)*, 68 N.Y.2d 989, 991, 510 N.Y.S.2d 598 (1986).

The arbitrator in Complainant's misconduct proceeding framed the issues as follows: was there probable cause to suspend Complainant, was Complainant guilty of the charges set forth in his notice of discipline, and if so, what was the appropriate penalty? The arbitrator ruled that

Respondent did have probable cause to suspend Complainant, but that proof that he had provided the e-mail in question to another was lacking, and that in any case Respondent had not demonstrated the existence of any rule or policy that prohibited Complainant from doing so. The arbitrator, in *dicta*, also stated that Respondent had acted "in good faith" when it suspended Complainant. This last issue was not central to the arbitrator's inquiry in the case, and is not identical to the inquiry undertaken in this Division proceeding. Respondent did not meet its burden, as the proponent of collateral estoppel, "to demonstrate the identity and decisiveness of the issue(s)." (*Ryan v. New York Tel. Co.*, 62 N.Y.2d at 501). Complainant did not have a full and fair opportunity to litigate the issue of retaliation in the prior proceeding. The motion is denied.

### **Retaliation**

In order to establish a prima facie case of retaliation, a complainant must show that: (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected entity; (3) he suffered an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v. Guiding Eyes for the Blind*, 742 F. Supp. 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v. New York State Div. of Human Rights*, 229 A.D.2d 631, 636, 644 N.Y.S.2d 864 (3d Dept. 1996).

In the instant case, Respondent was aware that Complainant had been present during the December 2009 incident. Kennedy listed Complainant as a witness in documents filed with his Division complaint against Respondent. Shortly thereafter, Complainant received a questionnaire from Respondent's affirmative action officer regarding his knowledge of the December 2009

incident, to which he replied with answers that supported the Kennedy complaint. Complainant also participated in a Division conference regarding the complaint during his suspension. Complainant participated in protected activity, and Respondent was aware of his participation. Complainant's participation, and his reasonable belief that Kennedy was a victim of discrimination, entitles him to the protection of the Human Rights Law. *New York State Office of Mental Retardation and Developmental Disabilities (Staten Island Development Center) v. New York State Div. of Human Rights*, 164 A.D.2d 208, 563 N.Y.S.2d 286 (3d Dept. 1990).

Complainant suffered an adverse employment action when he was suspended without pay. The short time, a period of a few months, between Respondent's first awareness that Complainant would be a witness in Kennedy's Division proceeding, its receipt of Complainant's questionnaire answers indicating his support of Kennedy's position, the commencement of Respondent's investigation regarding Complainant's involvement in the Stark matter, and the commencement of Complainant's suspension and termination charges, is sufficient to give rise to an appearance of a causal connection between Complainant's protected activity and the adverse action, and thus gives rise to an inference of discrimination. *See: Little v. National Broadcasting Co. Inc.*, 210 F. Supp. 2d 330 (S.D.N.Y. 2002) (causal connection may be established indirectly by showing that the protected activity was followed closely in time by alleged discriminatory conduct), *Gorzynski v. JetBlue Airways Corp.*, 596 F. 3d 93, 110 (2d Cir. 2010) (adverse employment action approximately two and one half months after complainant filed his complaint is sufficiently close in time to permit an inference of causation between the complaint and complainant's termination). Complainant has established a prima facie case of discrimination, a burden which has been described as *de minimis*. *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998).

However, Respondent was able to demonstrate that its inquiry regarding the Kennedy complaint and the investigation regarding the copying and transmittal of the Stark e-mail were conducted by different persons, and that the employee who suspended Complainant and sought his termination was not involved in the Kennedy inquiry, and did not have knowledge of that inquiry until after Complainant's suspension. Complainant failed to demonstrate that Respondent's various acts or failures to act, including the misconduct charges brought against Complainant, the delay in reimbursing Complainant for his lost wages after the arbitrator's decision, and Respondent's failure to promote Complainant, were motivated by retaliatory animus. For the purposes of this case, it does not matter whether Respondent's reasons for its actions were good or bad. What matters is that Respondent's reasons were non-discriminatory. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 308, 786 N.Y.S.2d 382, 392 (2004). The complaint 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 the complaint be, and hereby is, dismissed.

DATED: June 30, 2013

Bronx, New York



Michael T. Groben  
Administrative Law Judge