ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

KENNETH DAVIS,

Complainant,

v.

NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10117774

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 May 29, 2009, by , 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:

- Without determining whether Respondent is a covered employer, this Final Order

adopts the Recommended Order insofar as it concluded there is insufficient proof in the record that discrimination occurred in this matter. On this basis, the complaint is dismissed.

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 08 2011
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **KENNETH DAVIS,** Complainant, v. **NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10117774**

SUMMARY

Complainant alleges that Respondent discriminated against him by denying him a reasonable accommodation for a promotional examination. Respondent denied these allegations. Complainant failed to sustain his burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 26, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment and/or public accommodation 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. The public hearing session was held on March 31, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Mark F. Worden, Esq.

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

FINDINGS OF FACT

1. Complainant has been employed by the New York State Office of Children and Family Services as a Youth Counselor 1 since 1988. (Tr. 19-20)

2. Complainant suffers from bulging discs at spinal vertebrae C5 and C6, and had a spinal fusion with insertion of a pin and screws performed at vertebrae C6 and C7 in 2005. (Tr. 14-15, 25) At all times relevant to the complaint, he suffered daily symptoms related to the above condition, including tingling in his hand, stiffness in his upper back, neck and shoulder area, and numbness in his leg. Complainant was also on medication for this condition. (Tr.15-19)

3. In 2006, Respondent New York State Department of Civil Service announced an examination for a promotional test for the position of Youth Counselor 2 (test No. 34-976). The test was to be administered on November 4, 2006. (Joint Exhibit 1; Tr. 21-23)

4. Complainant had taken this test three times previously, and had found that the seating arrangements then provided by Respondent were not comfortable for him. (Tr. 21-22, 26, 45, 65-67, 84-85) On his test application for the upcoming Youth Counselor 2 examination,

Complainant checked a box indicating that he had a need for a reasonable accommodation. (Tr. 141)

5. Complainant received a letter in October 2006 regarding the upcoming Youth Counselor 2 examination from Susan Zehner ("Zehner") of Respondent's Special Accommodations Unit. That letter stated in pertinent part that Respondent had no record of Complainant's disability, and requested that Complainant provide documentation regarding said disability in order to verify the need for a test accommodation. (Joint Exhibit 2; Tr. 23)

6. Shortly after receiving that letter, Complainant called Zehner to advise her of his condition and his concern, and to ask what information he should submit. Complainant advised Zehner that he required a table, and a chair which would support his neck area. Zehner advised Complainant to send a doctor's note. (Tr. 24-26, 71-72)

7. Complainant then instructed his doctor to send a note to Zehner regarding his condition and the requested accommodation. On or about October 15, 2006 Complainant called Zehner to verify that said note been received, and she advised him that it had not. (Tr. 27-28)

8. Complainant contacted his doctor's office again that day and requested a second fax. Personnel at said office then faxed a second note to Zehner. (Tr. 28-30) That note stated that Complainant "needs a comfortable chair to use for taking civil service exam due to severe neck & low back pain." (Joint Exhibit 2 [p.3]; Tr. 29-30, 171-75)

9. Complainant called Zehner again that day; she advised him that the second doctor's note had been received. Complainant explained to her that due to his neck injury, he needed a chair tall enough to support his neck area. Complainant further advised Zehner that he was nearly 6 feet, 7 inches in height. Zehner assured Complainant that the test site personnel would be provided with this information. (Tr. 30-31) Complainant did not receive any further written

communication from Respondent regarding the accommodation prior to the date of the examination. (Tr. 33-34)

10. On November 4, 2006, Complainant reported to Henninger High School in Syracuse, New York, to take the examination. He arrived approximately 15 to 20 minutes prior to the start of the examination. (Tr. 31-32, 101)

11. The examination was held in a classroom at Henninger High School. There were approximately 20 to 30 test-takers present in the test room. (Tr. 35) Individuals taking the test were to be seated at school desks. (Tr. 34-35, 104)

12. Marie Christopher ("Christopher") was Respondent's test monitor in that classroom on the day of the test, with responsibility to oversee the test and to provide accommodations. (Tr. 99-102, 117-18, 124) Her supervisor for that test was known to her as "Dave." (Tr. 104, 119-20)

13. Complainant advised Christopher of his neck and back condition and explained that, per his accommodation request, he was to be provided with a table and a chair which would support his neck; she then advised Dave of this. Both Dave and Christopher were unaware of the accommodation request, and no accommodation arrangements had been made for Complainant. (Tr. 32-36, 40-41, 72, 102-03, 116-17, 119-20)

14. Dave then brought Complainant to other rooms in the school, in search of furniture that would accommodate his needs. Although Complainant did see a table in one of the rooms, he observed that it was loaded with "a whole bunch of stuff" and was not available. Complainant and Dave looked for about 10 minutes, and then returned to the test room because the test was about to begin. (Tr. 36, 41-42)

15. Although Complainant did not present Respondent's test monitor Christopher or test supervisor Dave with any documentary proof that he had made a request for a reasonable accommodation, they made a good faith effort to provide Complainant with the requested accommodation. (Tr. 70-71, 72-73, 109)

16. As a result of this search, Complainant was provided with a wheeled chair, the backrest of which extended approximately up to his shoulder blades. Due to Complainant's height and the nature of his neck and back condition, the chair did not meet his needs. (Tr. 36-39) When Complainant so advised Dave, he apologized to Complainant, and stated that "this is the best I can do". (Tr. 39-40, 73) Christopher was unaware whether or not the high school had chairs available which were high enough to support Complainant's neck. (Tr. 131-32)

17. Dave advised Complainant that a table was not available, and he could sit at the desk located in the test room. (Tr. 39-41, 103-04, 121) This was a wooden teacher's desk with a foot well for the user. However, due to his height, Complainant was unable to get his legs underneath the desk. (Tr. 42-43, 86)

18. As Christopher walked away from Complainant, he stated to her that "you might as well sit here because I can't sit at this desk". Although Christopher was within hearing distance when Complainant made this remark, Complainant did not know whether she had heard him, and she did not respond to Complainant's remark. (Tr. 43-44, 74-77) Christopher did not remember Complainant making any such comment, or indicating discomfort with the seating arrangements in any way. (Tr. 106-07, 124-25, 133) Christopher could see Complainant while he was taking the test. (Tr. 127, 133-35)

19. Complainant took the test, approximately four hours in length, seated at a corner of the desk with his paperwork placed either on the corner of the desk or on his lap. (Tr. 44-45, 73-74,

77, 105) This positioning caused Complainant difficulty and discomfort while taking the test. He attempted to alleviate his discomfort by getting up and stretching during the test. (Tr. 45-47)

20. Complainant's stiffness, pain and numbness hindered his concentration and negatively affected his ability to complete the test. (Tr. 47-49, 91-92) However, Complainant did not make any further complaints to either Christopher or Dave during or after the test. (Tr. 49-50, 78-79, 86, 95-96, 108)

21. Complainant was unaware of any procedure available at the test site to protest or otherwise express dissatisfaction to Respondent regarding the accommodations provided to him. (Tr. 50, 72-73)

22. Respondent's procedures for test taking permit the test monitor to file a "critical incident report" if there were complaints regarding test conditions or accommodations. (Tr. 125-26, 129-31, 136, 156-58)

23. On the Monday following the test, Complainant received a letter dated November 1, 2006 from Zehner in which she advised him that the accommodation to be provided for the November 4, 2006 test (test No. 34-976) was a table and chair. That letter further advised Complainant to contact Zehner if he found said accommodation to be inappropriate. The envelope for said letter bore a postmark of November 3, 2006, the day before the test was given. (Joint Exhibit 3, Complainant's Exhibit 1;Tr. 51-55, 151)

24. Respondent's general procedure regarding accommodations is to notify the applicant for said accommodation and its personnel at the test location of the granted accommodation before the date of the test. In the instant case, Respondent did not send notification in time for it to be received before the date of the test. (Joint Exhibit 3; Tr. 149-53, 168-70)

25. Complainant then called Zehner and explained what had happened at the test. She apologized and told him that Respondent might allow him to take the test again, because he said he had not attended Respondent's "pre-rating review". The pre-rating review is a review session which routinely takes place after a test, during which persons who have taken a test are permitted to review the examination and the answers for same. (Tr. 55-58, 88-91) Complainant then spoke to Zehner's supervisor, and eventually to her replacement, but he did not receive permission to take the test again. (Tr. 58-62)

26. Complainant eventually wrote to Respondent's Director of Testing Services to request permission to take the examination over again. (Joint Exhibit 4; Tr. 62-65, 155-56) Thomas Benton ("Benton"), Respondent's Director of Testing Support and Operations, denied his request because of, inter alia, concerns that Complainant had seen all the information in the examination booklet, and the test answer keys had been available for viewing by test candidates at the pre-rating review. Benton also noted that Respondent had no record that Complainant had expressed displeasure while at the test site with the accommodations which had been provided, and that, had he done so, the test site supervisor would have had the opportunity to consider rescheduling the test in order to provide other accommodations. (Joint Exhibit 5)

27. Complainant was notified that he had received a score of 60 on the test. His score of 60 is not considered a passing score for that test. (Joint Exhibit 6; Tr. 65, 67, 184-85)

OPINION AND DECISION

The Human Rights Law declares it to be an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to the known disabilities of an employee in connection with a job or occupation sought or held. Human Rights Law § 296.3 (a). The statute defines a disability to include a physical or medical impairment resulting from anatomical, physiological, or neurological conditions which prevent the exercise of a normal bodily function, or one demonstrable by medically accepted clinical or diagnostic techniques, or a record of such an impairment. Human Rights Law § 296.21.

In the instant case, there is no doubt that Complainant suffered from a disability as defined by the statute. His history of surgery and continuing treatment, the documentation supplied by his doctor, and his testimony of his symptoms of pain, stiffness, and neuropathy, clearly demonstrate his status as a disabled person. There is also no doubt that he requested an accommodation for his disability. However, Complainant was not employed by Respondent New York State Department of Civil Service, and thus he has no claim as against Respondent pursuant to Human Rights Law § 296.3 (a).

Complainant also seeks relief on an alternative ground, that of a denial of a public accommodation by Respondent. It is an unlawful discriminatory practice for "any person, being the owner, lessee, proprietor, manager, superintendant, agent or employee of any place of public accommodation, resort or amusement, because of the ...disability...of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . ." Human Rights Law § 296.2(a). Such unlawful discriminatory practices include "a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges,

advantages or accommodations to individuals with disabilities" and "a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services". Human Rights Law § 296.2(c) (i) and (ii).

As a threshold matter, it is noted that the definition of a "public accommodation" pursuant to the Human Rights Law excludes high schools. Human Rights Law § 292.9. However, in the instant case, the premises where Complainant took his examination were not being used as a high school at the time, but were employed by Respondent to provide a service for members of the public. Thus, Complainant's claim against Respondent is not barred on this basis.

The record demonstrates that Respondent engaged in an interactive process in good faith to identify Complainant's needs and to make arrangements to accommodate them. Had all gone according to plan, Complainant may well have had satisfactory accommodations provided to him. Although there was an issue raised in the record as to whether the accommodations promised by Respondent would ultimately have met Complainant's needs, that issue is academic. Respondent negligently failed to notify either Complainant or its own personnel at the test site of the accommodations. Thus, Respondent's test personnel were forced to try to meet Complainant's needs on the spot. They attempted to fully accommodate him, but were unable to do so, resulting in discomfort and inconvenience, at least, for Complainant. The record supports Complainant's claim that the requested accommodation was necessary to afford him a full and equal opportunity to take the examination. Had Complainant made his discomfort known to Respondent's employees at the test site, it is possible that some other arrangements could have been made, such permitting him to take the test at a later date. However, he did not.

There is nothing in the record which would indicate that Respondent had any

discriminatory intent. The issue then, is whether Respondent may be liable for an inadvertent failure to provide accommodation for Complainant's disability. I conclude that under the circumstances presented, Respondent is not liable.

Respondent's test site personnel provided a different reasonable accommodation than that originally approved, because they did not have advance notice of the need for said accommodation. In a reasonable accommodation case pursuant to § 504 of the Vocational Rehabilitation Act of 1973, the Second Circuit observed that a testing agency's failure to provide an accommodation does not constitute discrimination merely because the agency's employees did not perform to perfection their assigned role in providing the reasonable accommodation. *Fink v. New York City Department of Personnel, et al.*, 53 F.3d 565 (2nd Cir. 1995). Although not directly applicable in the instant case, the Second Circuit's rationale is persuasive.

It is well-established that precedent under the Americans with Disabilities Act may be used to decide cases under the Human Rights Law. *Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330 (2003). Respondent's delay in providing Complainant with the seating accommodation once he made his wishes known was neither unreasonable nor intentional, and there can be no inference of discrimination from the fact that Complainant received a substitute accommodation only after arriving at the test site and expressing his need for same. *Lyman v. City of New York, Department of Probation, et al.*, 2003 WL 22171518 (S.D.N.Y. 2003). Finally, it is clear from the record that Respondent's personnel made reasonable efforts to provide an accommodation to meet Complainant's needs. Complainant failed to make his dissatisfaction with the desk and chair provided known to Respondent's test site personnel, and thus he failed to participate in the interactive process. Under these circumstances, liability for failure to accommodate will not attach. *Picinich v. United Parcel*

Service, et al. , 321 F. Supp. 2d 485 (N.D.N.Y. 2004).

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: May 28, 2009
Bronx, New York

Michael T. Groben
Administrative Law Judge