DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

SAMUEL A. DONNINI, JR.,

Complainant,

v.

NEW YORK STATE, DEPARTMENT OF TAXATION & FINANCE,

Respondent.

and NEW YORK STATE, OFFICE OF THE STATE COMPTROLLER, NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE, Necessary Parties.

NOTICE AND FINAL ORDER

Case No. 10131831

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 July 2, 2010, by Edward Luban, 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: SEP 17 2010
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
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NEW YORK STATE, DEPARTMENT OF TAXATION & FINANCE,
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and **NEW YORK STATE, OFFICE OF THE STATE COMPTROLLER, NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE**, Necessary Parties.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10131831**

SUMMARY

Complainant alleged that Respondent discriminated against him on the basis of his disability, denied him reasonable accommodations, and constructively discharged him from employment. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 27, 2009, 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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on April 28, 2010.

Complainant and Respondent appeared at the hearing. Complainant was represented by Anne-Jo Pennock McTague, Esq. Respondent was represented by Michael J. Glannon, Esq.

Complainant, who has a hearing impairment, waived the provision of a sign language interpreter for the hearing. (Tr. 8; ALJ's Exh. 4) After Complainant testified, he left the hearing room and waived his right to be present. (Tr. 73)

Permission to file post-hearing briefs was granted, and timely briefs were received from both parties.

FINDINGS OF FACT

1. Complainant has had a hearing impairment since birth. Complainant is deaf in his right ear and wears a hearing aid in his left ear. (Tr. 12, 20, 77)

2. Complainant began employment with Respondent on December 31, 1970. (Tr. 12; Complainant's Exh. 14)

3. Complainant describes himself as "a slow learner because I cannot keep up with the average person." Complainant required much repetition to learn tasks at work. However, Complainant never provided Respondent with any documentation that he has learning disabilities, and he did not produce such documentation at the public hearing. (Tr. 52, 53, 144)

4. In 1997, Complainant was employed as a Calculations Clerk 2, a Grade 9 position, in Respondent's Albany district office. In April 1997, as part of a personnel realignment, Complainant was promoted to Tax Compliance Representative 1 ("TCR 1"), a Grade 11 position, in Respondent's Bankruptcy Unit. (Tr. 15-16, 156; Complainant's Exh. 17)

5. A TCR 1's primary responsibility is speaking with taxpayers on the telephone. (Tr. 115, 155)

6. Complainant did not use the telephone in the Bankruptcy Unit because he could not hear. He performed clerical duties instead. (Tr. 14, 15, 54, 156)

7. In 2003, Complainant transferred to the Collections Resolutions Center ("Call Center"), which is part of Respondent's Collections and Civil Enforcement Division ("CCE"). Complainant was placed in the Correspondence Unit. The Correspondence Unit responds to taxpayer correspondence about bills, requests for payment plans, and requests for penalty waivers. The Correspondence Unit also reviews responses from banks, County Clerks, and employers to Respondent's collection actions, including levies, tax warrants, and wage garnishments. (Tr. 115-16, 141, 155, 156, 164-65)

8. Complainant continued to perform clerical duties when he joined the Correspondence Unit. Respondent never required Complainant to perform telephone work. (Tr. 14, 17, 55, 114, 155-56)

9. Complainant, Willie Terry, and an unnamed person who worked in the Work Force Management section were the only TCR 1s who did not do telephone work. (Tr. 55, 114, 165)

10. In July 2005, Ron Czwakiel became Complainant's supervisor. (Tr. 112)

11. Czwakiel provided Complainant with "quite a bit" of individual training. Czwakiel supervised five or six TCR 1s, but he spent approximately 20 to 25 percent of his time each week working with Complainant. (Tr. 117, 119)

12. In December 2008, Czwakiel verbally counseled Complainant about socializing and being disruptive in the workplace. (Tr. 124, 168)

13. On or about December 15, 2008, Complainant met with Ellen Mindel, an Affirmative Action Administrator in Respondent's Office of Diversity and Affirmative Action. Complainant was upset about Czwakiel's informal counseling. He also told Mindel that he needed a quieter work area and that he was not getting the training he needed. (Tr. 123-25)

14. The next day, Mindel met with Czwakiel, Michelle Dreaney, who also supervised Complainant, and Kathleen Arkison, a manager in the Call Center. Czwakiel, Dreaney, and Arkison told Mindel that Czwakiel had counseled Complainant because of complaints from co-workers, that Complainant received the training he needed and had never been denied training, and that Complainant already worked in a quiet area in the office. (Tr. 126-27)

15. Czwakiel, Dreaney, and Arkison also expressed concerns to Mindel about Complainant's job performance. They were concerned about Complainant's retention rate and comprehension, they had to repeat instructions, and they had to check his work closely to make sure it was accurate. (Tr. 127)

16. Mindel told the supervisors that she would speak with Complainant to find out what he needed to improve his job performance. Mindel said that the supervisors could follow up with Respondent's Labor Relations Bureau ("Labor Relations") if they wanted. (Tr. 128-29)

17. Mindel met with Complainant approximately six more times. She referred Complainant to the New York State Education Department's Office of Vocational and Educational Services

for Individuals with Disabilities ("VESID"). She also found an adult literacy tutor who could work with Complainant during work hours. Complainant did not follow through with the tutor. (Tr. 21, 39, 44, 129-31, 144)

18. In early January 2009, Respondent's Audit Section was issuing an "unprecedented" number of bills because of the budget crisis and the need to increase collections. In response to the increased billing, the Call Center was "hammered" with telephone calls and was backlogged. Respondent asked supervisors and employees from other units to help answer the telephones. Respondent assigned Terry, but not Complainant, to answer telephones. (Tr. 116-17, 161, 165-67)

19. In January 2009, Dreaney asked Jennifer Bernstein, who was then a Senior Personnel Administrator in Labor Relations, for assistance with respect to Complainant and another employee who were not able to perform the essential functions of their job title. (Tr. 102, 105-06)

20. On or about January 15, 2009, Bernstein met with Dreaney, Arkison, Kevin Holmes, another supervisor, and Gary Zweibach, Assistant Director of CCE. Bernstein saw no need for Complainant to be counseled or disciplined. She recommended instead that Complainant be referred to the Employee Health Service ("EHS") of the New York State Department of Civil Service to make sure he was fit to do his job, pursuant to Civil Service Law § 72 ("Section 72"). (Tr. 103, 105, 106)

21. Respondent regularly refers employees to EHS. In 2009, Respondent made 14 such referrals. As of the date of the public hearing, Respondent had made four such referrals in 2010. (Tr. 107)

22. On January 21, 2009, Bernstein asked EHS to perform a medical examination to determine Complainant's "General [sic] fitness for duty." Bernstein's request noted Complainant's hearing impairment, concern about his retention skills, a decreased need for the type of clerical work Complainant was performing, and an increased need for all TCRs "to handle the full realm of duties associated with their positions." Bernstein asked EHS to determine if Complainant met "the medical, psychological, neurological, cognitive learning, and auditory requirements" of his position. (Tr. 102-03, Complainant's Exh. 6; Respondent's Exh. 4)

23. On January 22, 2009, EHS notified Bernstein that it could not process her request because she had not indicated the "legal authority" for her request on Form EHS-707, Agency Request for Medical Examination. Bernstein sent the request back to EHS after checking the box for "Involuntary Leave (CSL 72)." Bernstein checked this box only for purposes of communication with EHS. Respondent never placed Complainant on involuntary leave. (Tr. 107-08; Respondent's Exhs. 5-6)

24. In January 2009, Complainant was notified to report for a hearing evaluation, an audiological examination, and a psychological examination, pursuant to Section 72. Complainant became very upset when he received this notice. He believed that Respondent would force him to use up his accrued leave time, then put him on leave at half pay, then terminate his employment. (Tr. 18, 20, 22, 26, 27, 48, 76, 86; Complainant's Exh. 7)

25. Mindel tried to reassure Complainant that Respondent was not trying to fire him. Despite this reassurance, Complainant continued to believe that Respondent intended to fire him. (Tr. 133, 138-39)

26. Respondent did not intend to terminate Complainant's employment, and Respondent did not tell Complainant that he would lose his job. (Tr. 26, 36, 128)

27. Complainant filed his Division complaint on February 27, 2009. In his complaint, Complainant alleged, "I have informed Respondent that I was [sic] wished to be demoted back down to a Grade 9, as I never had trouble performing the duties of this position. Respondent has not yet responded to my request." (ALJ's Exh. 1)

28. Mindel was surprised when she read this allegation, because Complainant had told her that he wanted to remain a Grade 11. When Mindel expressed her surprise to Complainant, he said that Grade 9 work would be easier. (Tr. 141, 150)

29. Mindel informed Ann Whydra, a senior personnel administrator, of Complainant's request to be demoted to Grade 9. (Tr. 148-49)

30. In February and March 2009, EHS conducted psychological, comprehensive, and otolaryngological examinations of Complainant. (Tr. 18-19; Complainant's Exhs. 7, 11; Respondent's Exh. 7)

31. On March 20, 2009, John E. Hargraves, M.D. of EHS notified Bernstein that Complainant "was found medically fit for his duties as a TCR 1. The use of a captioned telephone (Cap-Tel through NYS Relay Service) would be necessary for his telephone communication given his hearing loss." (Tr. 108; Respondent's Exh. 7)

32. Bernstein asked Jack McCaffrey, who is one of Respondent's Division directors, and Respondent's Office of Information Technology Services ("IT") whether the Cap-Tel system was a viable option. McCaffrey said it was not because of the secrecy and confidentiality provisions of the tax laws. IT said that the relay system would not work with incoming calls, which is what the Call Center handled. (Tr. 109)

33. Bernstein also informed Mindel of Hargraves' recommendation. Mindel asked Zwiebach and IT if they could implement the recommendation. Deb Heaphy, Director of IT,

told Mindel that IT could not get the relay system to work with the Call Center's automated telephone system. (Tr. 134-35; Respondent's Exh. 9)

34. Respondent also sought assistance from the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities and the Verizon company to see whether Complainant could be accommodated in the Call Center. These efforts were unsuccessful. (Respondent's Exhs. 8, 10)

35. Mindel told Kathy Azadian, Director of the Collection Resolutions Center, that IT could not implement Hargraves' recommended accommodation. Azadian told Mindel that she would find Complainant another Grade 11 assignment. (Tr. 135-36, 141, 145)

36. In his Division complaint, Complainant also alleged that Respondent denied him training, including "new-employee training sessions for my position." In response to this allegation, Respondent enrolled Complainant in a training class for new TCR 1s ("TCR class") that was to start in March 2009. (Tr. 63, 156-57; ALJ's Exh. 1)

37. Complainant asked Mindel for an individual tutor for the TCR class. Mindel asked Sandra Schneider, training director, if she could provide a trainer to sit with Complainant. Schneider said that three trainers were already assigned to the class and no other trainers were available. However, Schneider said the trainers would give Complainant the class handouts in advance, that Complainant was sitting in the front row, and that the trainers were told they had to face him so he could read their lips. (Tr. 38, 60-61, 131-32)

38. Prior to his request for a tutor for the TCR class, Complainant had not requested any accommodations during his tenure as a Grade 11 employee. (Tr. 62, 127)

39. The TCR class included training in how to use the telephones. Elaine Fickies, one of the trainers, sat next to Complainant while he listened in on taxpayer calls to the Call Center.

Complainant had difficulty understanding the callers, which he attributed to their "broken English." (Tr. 31-32, 41, 63, 65-68, 161-62)

40. On April 22, 2009, Azadian learned that Respondent could not implement the relay service. That same day, she and Zwiebach met with Complainant. Azadian told Complainant that he would not be doing telephone work because Respondent could not use the relay system. Azadian said that she would find Complainant work that was similar to what he did before the TCR class. (Tr. 158-59)

41. Complainant's status as a Grade 11 employee was not in jeopardy. Azadian intended to leave Complainant in a Grade 11 position doing non-telephone work; she did not intend to demote him. (Tr. 145, 147, 159-61)

42. Complainant told Azadian that he still wanted to be demoted to Grade 9. When Azadian asked him why, Complainant said he thought it would be easier than performing the Grade 11 tasks. Azadian told Complainant that Respondent would place him in a Grade 9 position as soon as one was available. (Tr. 159-61)

43. Respondent placed Complainant in a Grade 9 Clerk 2 position in CCE effective May 28, 2009. Complainant accepted this position voluntarily. (Tr. 45-46, 48, 141-42; Complainant's Exh. 13)

44. On Complainant's first day as a Clerk 2, he reviewed the essential functions of the position. These include supervising clerical support staff and preparing letters, memoranda, and reports. Complainant told Kate Koslow, his supervisor, that he did not feel he could supervise anybody. Complainant also said that he would have a difficult time composing letters. (Tr. 171-72, 176; Respondent's Exh. 11)

45. Koslow and her supervisor decided that Complainant would not supervise anybody. For three weeks, Koslow trained Complainant daily to review powers of attorney ("POAs"). This was significantly more training than other Clerk 2s received. Despite this training, Complainant had a difficult time reviewing POAs and making "judgment calls." Koslow then gave Complainant tasks he had been able to do previously, including purging income execution files. Complainant was also assigned to clean and rebuild telephone headsets, dismantle display stands and prepare them for storage, and dismantle old flip charts. (Tr. 46-48, 59-60, 172-76, 178; Respondent's Exhs. 11-15)

46. Complainant testified that as a Clerk 2, he was assigned work that was "humiliating." However, the work Koslow assigned Complainant was work that was normally given to Clerk 2s. (Tr. 46, 50, 58, 176, 178)

47. Complainant believed that he had a "great" working relationship with Koslow. In an email message he sent Koslow on October 13, 2009, Complainant said "Working with people like you have [sic] made the world nicer for people like me." (Tr. 59; Respondent's Exh. 16)

48. Complainant accepted a $20,000.00 retirement incentive and retired effective November 12, 2009. (Tr. 48-49, 94; Respondent's Exh. 16)

49. Complainant testified that during the time Koslow was his supervisor, other employees, including Aaron Cohen, Sean Dunleavy, Chris Bauer, and Dave (last name unknown), stalked him "no matter where I walked" on Respondent's campus. Complainant never complained to his supervisor or to the Affirmative Action office about the alleged stalking. (Tr. 50-51, 69-70)

50. Complainant never complained to Czwakiel, Mindel, or Koslow about discrimination or a hostile work environment. (Tr. 55-56, 60, 119, 127, 136, 152, 177)

OPINION AND DECISION

Disability Discrimination

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of disability. Human Rights Law § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association,* 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes out a prima facie case of discrimination, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its actions. If Respondent does so, Complainant must show that the reason presented was merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.,* 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant's hearing impairment is a disability under the Human Rights Law. Therefore, Complainant is a member of a protected class. Complainant was qualified for his

position, which he occupied for many years. Complainant did not suffer an adverse employment action, which requires "a materially adverse change in the terms and conditions of employment" (*Forrest* at 306, 786 N.Y.S. 2d at 391), when Bernstein referred him to EHS for the Section 72 medical examination. Respondent did not place Complainant on involuntary leave or otherwise change the terms and conditions of his employment when Bernstein made the referral. Complainant did suffer an adverse employment action when he was demoted to Grade 9. However, Complainant was demoted at his own request. When Respondent determined that it could not provide the telephone relay system Hargraves recommended, it intended to leave Complainant in a Grade 11 position doing non-telephone work. Respondent demoted Complainant only because he asked to be demoted. Therefore, the circumstances of Complainant's demotion do not give rise to an inference of discrimination, and Complainant failed to establish a prima facie case of disability discrimination.

Reasonable Accommodation

It is also an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to an employee's known disabilities. Human Rights Law §296.3(a). It is the employee's responsibility to propose an accommodation. The employee and the employer must then engage in an interactive process, which includes the discussion and exchange of pertinent medical information, in order to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job requirements. *Pimentel v. Citibank, N.A.*, 29 A.D. 3d 141, 148-49, 811 N.Y.S. 2d 381, 387 (1st Dept. 2006), *lv. to appeal den.*, 7 N.Y.3d 707, 821 N.Y.S.2d 813 (2006); 9 N.Y.C.R.R. §466.11(j)(4).

Although Complainant did not request an accommodation before 2009, Respondent accommodated his hearing impairment by allowing him to remain in a Grade 11 TCR 1 position

for more than 11 years without performing the primary duties of that position. Complainant argues that Respondent denied him a reasonable accommodation when it refused to provide him with the telephone relay system Hargraves recommended. Respondent investigated Hargraves' recommendation and determined that it could not provide the telephone relay system. Azadian then told Complainant that he could remain in Grade 11 but would perform other duties similar to those he performed previously. This accommodation satisfied Respondent's obligation: when an employee is entitled to a reasonable accommodation, "the employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need." 9 N.Y.C.R.R. § 466.11(j)(6). The employer is not required to provide the accommodation the employee requests or prefers. *Pimentel* at 148, 811 N.Y.S. 2d at 386.

Complainant also alleged that Respondent denied him a reasonable accommodation to his learning disability by failing to provide him with adequate training. However, Complainant did not establish that he had a learning disability, that he had a record of a learning disability, or that others perceived him as having a learning disability. Therefore, Complainant failed to establish that he had a learning impairment that was a disability under the Human Rights Law.

Constructive Discharge

Complainant alleged that Respondent created an environment that was sufficiently hostile to compel him to retire. In order to sustain such a claim of constructive discharge, Complainant must show that Respondent deliberately made his working conditions so intolerable that a reasonable person in his position would have felt compelled to leave. *Albunio v. City of New York*, 67 A.D. 3d 407, 408, 889 N.Y.S. 2d 4, 6 (1st Dept. 2009); *Nelson v. HSBC Bank USA*, 41 A.D. 3d 445, 447, 837 N.Y.S. 2d 712, 714 (2d Dept. 2007). Complainant made no such showing. On the contrary, the evidence shows that Complainant retired voluntarily when he

received a $20,000.00 retirement incentive.

Complainant claims that in his Grade 9 position he was assigned duties he found humiliating. However, the record shows that Complainant and Koslow had a good working relationship; that Koslow gave Complainant extensive training to enable him to be successful as a Clerk 2; that Complainant told Koslow he could not and did not want to perform essential functions of the Clerk 2 position; that in response, Koslow assigned Complainant tasks he could handle; and that these tasks were normally performed by employees in Complainant's pay grade. Complainant presented no evidence that Respondent assigned such tasks to humiliate or demean him.

Complainant also alleged that he was subject to ridicule, demeaning comments, and demeaning treatment. Complainant offered no evidence to substantiate this allegation.

The ultimate burden of proving unlawful discrimination always remains with Complainant. *Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 630, 665 N.Y.S. 2d 25, 29 (1997). Because Complainant failed to sustain his burden, the complaint 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 complaint be, and the same hereby is, dismissed.

DATED: July 2, 2010
Syracuse, New York

Edward Luban
Administrative Law Judge