

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MACK A. FINLEY,

Complainant,

v.

**OFFICE OF THE DISTRICT ATTORNEY,
COUNTY OF WESTCHESTER,**

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 1251079

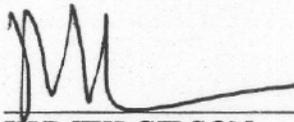
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on April 5, 2007, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”).

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, 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, this 11th day of May, 2007.



KUMIKI GIBSON
COMMISSIONER

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on the Complaint of

MACK A. FINLEY,

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OFFICE OF THE DISTRICT ATTORNEY,
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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 1251079

SUMMARY

Complainant, a black male who is an alcoholic, alleges that Respondent discriminated against him because of his race, sex, and disability. For the reasons that follow, I find that he has not proven his claims of discrimination.

PROCEEDINGS IN THE CASE

On May 11, 1993, 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 the Human Rights Law of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

Prior to hearing, Respondent filed a motion to dismiss. Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division issued a Recommended Order denying the

motion. Thereafter, Commissioner Michelle Cheney Donaldson issued an Order denying the motion and remanding the case for a public hearing.

After due notice, the case came on for hearing before ALJ Protano. Public hearing sessions were held on June 29, 2004, July 13, 2006, July 14, 2006, and September 15, 2006.

Complainant and Respondent appeared at the hearing. The Division was represented at the June 29, 2004, session by former General Counsel, Gina M. Lopez Summa, Esq., by Albert J. Kostelny, Esq. At the subsequent sessions, Complainant was represented by Margaret M. Shalley, Esq. Respondent was represented by Irma W. Cosgriff, Esq., Senior Assistant County Attorney.

Permission to file post-hearing briefs was granted. Counsels for both parties filed timely briefs.

FINDINGS OF FACT

Complainant is a recovering alcoholic. (Tr. 29) He started drinking when he was 14 or 15 years old and lost control of his drinking in 1989 or 1990. (Tr. 29-30)

Respondent is an agency of the government of Westchester County. Complainant began working for Respondent on July 22, 1991, as a senior information systems clerk. At that time Complainant was an active alcoholic. (Complainant's Exhibit 1; Tr. 29-30, 33) Complainant came to work for Respondent because his prior job, at the Westchester County Department of Health had been abolished. His name was placed on a preferred civil service list, from which he was hired by Respondent. (Tr. 275) As a senior information systems clerk, Complainant was responsible for entering data used by Assistant District Attorneys for trial purposes. The data had to be updated on a daily basis. (Tr. 302)

Because of his alcoholism, Complainant's attendance was very poor while he worked for

Respondent, from July 22, 1991 until September 18, 1991. He was often late and sometimes didn't come into work at all. During that period Complainant continued to drink. He used cocaine as well. (Tr. 31, 43, 53)

While Complainant worked for Respondent, his direct supervisor was Linda Onjack. Ms. Onjack's supervisor was Barton Walsh. (Tr. 35) Complainant was the only black male working in his job title. However, he was neither the only black nor the only male. (Tr. 51, 346) He has alleged that Ms. Onjack treated him differently because of his race and sex by scrutinizing his attendance more carefully than other employees and criticizing him when he was late. (Tr. 42) Complainant alleged that others were not subjected to such treatment when they were late. At the public hearing, he could recall one other senior information systems specialist who was late. He did not know her name but he "think[s] she was Hispanic." He saw that she came in late "at least once." (Tr. 167, 169)

Ms. Onjack admitted that she carefully scrutinized Complainant's time and kept a diary of his time records, but stated that it was because his time and attendance was poor. Complainant had a "zero balance" of accruals, which is Respondent's term to describe an employee who has used all of his leave accruals that include vacation leave, sick leave and personal leave. In such situations, a supervisor must keep track of the employee's hours in order to insure that the employee's pay is docked when he is out. (Tr. 310-311, 496, 529) In addition, because the work had to be entered on a daily basis, unplanned absences put a strain on the unit. (Tr. 303)

In September of 1991, Complainant left Respondent and went to work for the Westchester County Department of Social Services ("DSS"). The appointment was a promotion for the Complainant. (Complainant's Exhibit 6; Tr. 53, 57) In December of 1991, while he

was working for DSS, Complainant went to Arms Acres, a rehabilitation center, for rehabilitation for his alcoholism and cocaine abuse. He stayed there for 30 days. (Tr. 30-31, 54)

When he was released from rehabilitation, Complainant received discharge papers with instructions for his continued care. Included in those instructions were the recommendations that he abstain from alcohol and mood altering drugs, attend 90 meetings of Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") in 90 days and obtain a sponsor and home group within 30 days of his discharge. (Complainant's Exhibit 7; Tr. 55)

Complainant did not successfully maintain his sobriety in 1992. He did not attend 90 AA meetings as recommended; he did not get a sponsor; and, significantly, he did not abstain from alcohol. Complainant began drinking again in February of 1992. (Tr. 262, 266, 283) In or about September of 1993, Complainant again went into a rehabilitation program. He did not drink after that, except for one sip of alcohol, which he drank in 1999 or 2000. (Tr. 286, 427)

After completing his December 1991 rehabilitation, Complainant returned to work at DSS. (Tr. 56) He was considered a probationary employee in his position at DSS and, because of his absences, his probationary period was extended, on January 15, 1992. Subsequently, he failed probation in April of 1992, and returned to work for Respondent. (Tr. 57-59)

When Complainant returned to work for Respondent, he was served with charges seeking to terminate his employment with Respondent. The charges are dated May 5, 1992; however, Complainant received them on May 13, 1992. (ALJ Exhibit II; Complainant's Exhibit 10; Tr. 61) The charges sought to terminate Complainant's employment because of his poor attendance record while he worked for Respondent in 1991. Complainant's attendance was poor in 1991 because of his alcoholism. (Tr. 72-74) Complainant grieved the charges. On June 4, 1992, a hearing was held on the charges, pursuant to Section 75 of the Civil Service Law. Complainant's

termination was upheld and, effective July 13, 1992, Respondent released Complainant from his employment. (Complainant's Exhibit 13; Tr. 83) Even after he received the charges against him, during the period between May 13, 1992 and June 22, 1992, Complainant was either late or absent several times. (Respondent's Exhibit Q)

Mr. Walsh and Ms. Onjack have asserted that they did not know Complainant was an alcoholic when the charges were brought against Complainant. Complainant said he told Ms. Onjack in August of 1991 that he was an alcoholic. (Tr. 208, 398) Ms. Onjack has denied this and has produced notes from a conversation she had with Complainant during which he only mentioned that he had "personal problems." (Respondent's Exhibit Q; Tr. 502) Complainant also asserted that he told Mr. Walsh that he was an alcoholic during a phone conversation. Mr. Walsh denied any knowledge of Complainant's alcoholism. (Tr. 208, 336) Because Mr. Walsh and Ms. Onjack deny that Complainant told them about his alcoholism and Ms. Onjack's copious notes about her dealings with Complainant make no mention of alcoholism, I cannot credit Complainant's assertion that he told Mr. Walsh and Ms. Onjack that he had an alcohol problem. (Respondent's Exhibit Q)

Both Mr. Walsh and Ms. Onjack knew Complainant had gone to the Respondent's employee assistance program ("EAP") to deal with his problems. But, the EAP is a confidential program and the details of a participant's problems are never shared with his or her employers. (Tr. 334, 505, 579) Complainant has not alleged that he told either Mr. Walsh or Ms. Onjack that he had gone to Arms Acres for rehabilitation. He did not tell DSS, which was his employer when he entered Arms Acres, about his alcoholism. (Tr. 220)

OPINION AND DECISION

An employer may not fire or otherwise discriminate against an employee with a disability

unless that disability precludes the employee from performing the essential duties of the job. N.Y. Exec. Law, Art. 15 ("Human Rights Law") §296.1(a). See also, *Miller v. Ravitch*, 60 N.Y.2d 527 (1983). 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...." Human Rights 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). Alcohol dependency is a disability under Human Rights Law. *McEniry v. Landi*, 84 N.Y.2d 554 559, 620 N.Y.2d 328, 330 (1994); 9 NYCRR § 466.11(h)(1).

The Complainant in the instant case was brought up on charges in May of 1992 that resulted from his attendance records prior to his stint at Arms Acres. An employer may not terminate an employee based upon his past alcohol abuse or for pre-rehabilitation alcohol abuse. *Id.*, at 560. However, a complainant must be seeking rehabilitation at the time of his termination in order to qualify for protection under Human Rights Law. The Law does not protect an individual who attends rehabilitation but thereafter suffers relapse and is not being rehabilitated when the employer terminates the employee. *Sills v. Kerik*, 5 A.D.3d 247, 773 N.Y.S.2d 289 (1st Dept., 2004). In the spring of 1992, Complainant had suffered a relapse and was actively drinking again. Therefore, he is comparable to the plaintiff in *Sills*, who was not rehabilitating at the time of his termination and was not protected by Human Rights Law. He is not comparable to the plaintiff in *McEniry*, who had successfully maintained his sobriety and was deemed by the

Court to be a qualified employee under the statute.

Alcoholism is defined as "a chronic illness in which the ingestion of alcohol usually results in the further compulsive ingestion of alcohol beyond the control of the sick person to a degree which impairs normal functioning." Mental Hygiene Law § 1.03 (13). Complainant is afflicted with alcoholism and has admitted that he cannot control his drinking. He has also admitted that he was drinking in the periods before, during and after Respondent brought charges seeking his termination and that he had not complied with the recommendations given to him upon his release from Arms Acres. In 1992, he was not a "recovering alcoholic," which is defined as "a person with a history of alcoholism whose course of conduct over a sufficient period of time reasonably justifies a determination that the person's capacity to function normally within his social and economic environment is not, and is not likely to be, destroyed or impaired by alcohol." Mental Hygiene Law § 1.03 (14). Complainant had not exhibited such a course of conduct in May or June of 1992. Because Complainant cannot control his drinking, and drinks "to a degree which impairs normal functioning," it is clear that he was unable to perform his job duties in the spring of 1992 and, in fact, his attendance had not improved upon his return to Respondent.

It also appears that neither Mr. Walsh nor Ms. Onjack knew about Complainant's disability. In order to discriminate against Complainant because of his disability, Respondent must have knowledge of his disability. *Matya v. Dexter*, 2006 U.S. Dist. LEXIS 18358 *24 (W.D.N.Y. April 3, 2006). Even though it is clear Complainant's supervisors knew he had personal problems, Complainant has not proven they knew about his alcoholism before he went to Arms Acres and he has not shown that they knew he had gone for rehabilitation while he worked for DSS.

Complainant also alleges that, in addition to the termination, he received disparate treatment in the terms of his employment because of his race and sex during his 1991 tenure with Respondent. Specifically, he claims that, as the only black male in his unit, his time and attendance was scrutinized more closely than the time and attendance of other employees. In order to prevail on a claim of disparate treatment, the Complainant must first make out a prima facie case by establishing that he belongs to a protected class, that he was capable of performing in the position he held, and that he suffered an adverse employment action under circumstances that would give rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Ferrante v. American Lung Association*, 665 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25, (1997), citing, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Complainant fails to make out a prima facie case. The behavior he complains of—scrutinizing his time more closely than others'—is not an adverse employment action under Human Rights Law, because there was no material adverse change in his working situation. He did not suffer a demotion or reduction in pay because of Respondent's action. Excessive scrutiny does not constitute an adverse employment action. *Bennett v. Watson Wyatt & Company*, 136 F. Supp. 2d 236, 248 (S.D.N.Y. 2001); see also, *Henriquez v. The Times Herald Record*, 165 F.3d 14, U.S. App. LEXIS 36196 (2nd Cir. 1998). In addition, Complainant is time barred from asserting the claims of disparate treatment during his first tour of duty with Respondent, since they occurred more than one year before the filing of his complaint. Human Rights Law § 297.5; *Queensborough Community College of City University of New York v. State Human Rights Appeal Board*, 41 N.Y.2d 926, 394 N.Y.S.2d 625, 363 N.E.2d 349 (1977).

Respondent continues to argue that Complainant's claim of discrimination is barred by the doctrine of collateral estoppel and that the Section 75 decision must be given preclusive

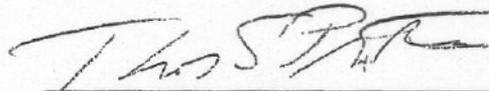
effect. This issue was disposed of in the Commissioner's Remand Order (ALJ Exhibit XIII). It is not necessary to revisit the issue here.

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: April 5, 2007
Bronx, New York



THOMAS S. PROTANO
Administrative Law Judge