

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MYLES D. FISHMAN,

Complainant,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10122042

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 23, 2009, by Thomas J. Marlow, 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 18 2009**
Bronx, New York


GALEN D. KIRKLAND
COMMISSIONER

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

Case No. 10122042

SUMMARY

Complainant alleged that Respondent discriminated against him because of his disability, his marital status, his sex, and because he opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On December 5, 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 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 Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on May 6 and 7, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Martin B. Schnabel, General Counsel, New York City Transit Authority, by Robert K. Drinan, Assistant General Counsel.

At the public hearing session held on May 6, 2009, on the record, the complaint was amended to reflect the correct name of Respondent: New York City Transit Authority.

Permission to file proposed findings of fact and conclusions of law was granted. Respondent so filed after the conclusion of the public hearing.

FINDINGS OF FACT

1. In January of 1989, Complainant began his employment with Respondent as a staff analyst. (Tr. 25-27) Complainant is an unmarried male. (ALJ’s Exhibit 1; Tr. 150) As of the last date of the public hearing, Complainant was still employed by Respondent. (Tr. 471)

2. By March of 2006, Complainant had filed two complaints (Case Nos. 10110397 and 10109868) with the Division alleging that Respondent had unlawfully discriminated against him. (ALJ’s Exhibit 8) Subsequently, Complainant withdrew those complaints. (ALJ’s Exhibits 6, 7, 8; Tr. 275)

3. In late March or early April of 2006, Respondent reassigned Complainant from its document control unit to its electrical unit. (Respondent’s Exhibits 4, 24; Tr. 60-61, 151-52, 176, 442-45, 471) The document control unit was commonly known as the mail room where mail was received and distributed and copying of documents was performed. (Tr. 179-80) Both units

were part of Respondent's Capital Program Management department ("CPM"). (Tr. 58, 382-85) Respondent reassigned Complainant because employees that Complainant supervised in the document control unit complained that they were being intimidated by Complainant. In February of 2006, Louis Alessi ("Alessi"), a Computer Aide II for Respondent, reported that Complainant threatened him by saying, "If any of you go against me, I will write you all up to the EEO." Respondent determined that the effectiveness of the document control unit was being negatively impacted by Complainant's behavior.

(Respondent's Exhibits 22, 23; Tr. 180-81, 355-58, 361-63, 375-77, 435-38)

4. Also in March or early April of 2006, pursuant to a reorganization of CPM, the electrical unit became part of the Division of Infrastructure and Facilities ("DIF"). William Ciaccio ("Ciaccio") became the Senior Director of DIF and Complainant's supervisor.

(Tr. 25, 381-85, 469, 471-73, 537)

5. Employees working in CPM have a "flex-time" schedule. Under a "flex-time" schedule, the normal working hours can start from 7:30 am to 9:30 am and end from 3:30 pm to 5:30 pm. An employee works a seven-hour work day with an additional hour for lunch.

(Tr. 390-91) The normal business of DIF concludes at 5:30 pm. (Tr. 192-94, 336-37, 398, 473)

6. Complainant's responsibilities in DIF include coordinating the training of approximately 400 employees and working on special projects assigned to Ciaccio by the Senior Vice-President. (Tr. 472-73, 487-91) Complainant works closely with Ciaccio and a team of approximately ten employees ("the team"). (Tr. 573-74) A few members of the team have a higher title than Complainant while the rest of the members have comparable titles. Team members often share responsibilities to get the work done. In the teamwork approach employed by Ciaccio in DIF, work often passed from one employee to another, regardless of the

employee's title, to assure completion in a timely manner. (Tr. 503-04, 574-76, 584-85)

Throughout Complainant's tenure in DIF, Respondent has assigned Complainant work that is both essential to the proper functioning of DIF and appropriate for an employee with Complainant's title. (Tr. 186-87, 431-32, 497-98, 528-29, 571, 576-78)

7. For at least the first fifteen months of working with Ciaccio in DIF, Complainant expressed no complaints about his work experience. When asked, Complainant indicated that he was satisfied with his work experience and was happy working in DIF. Complainant described his work experience as "working together harmoniously." (Respondent's Exhibits 9, 25; Tr. 186-87, 451-52, 499-502, 579) However, Complainant often failed to adhere to the time and attendance rules. He frequently arrived late, failed to notify Ciaccio when he was going to be late, and failed to promptly notify Ciaccio when he arrived late. Complainant was late more than any other employee that Ciaccio supervised in DIF. Respondent addressed Complainant's attendance in a manner consistent with Respondent's handling of all employees. (Respondent's Exhibits 3, 6, 30; Tr. 208, 221-23, 476-80, 482-88, 576-77, 585)

8. In July of 2007, Complainant requested an adjustment of his work schedule as a reasonable accommodation to a disability he has. (Respondent's Exhibit 8; Tr. 60, 71-74, 79-82) Complainant contends that his lateness was often related to his disability. (Tr. 72-74, 79-82) Respondent's Office of ADA Compliance ("OADAC"), upon reviewing medical documentation provided by Complainant which included a diagnosis of Complainant's condition, granted an accommodation ("OADAC accommodation"), allowing Complainant to arrive up to 10:00 am and complete his regular work day up to 6:00 pm, on an "as-needed" basis. (Respondent's Exhibit 9; Tr. 73-79, 82-83, 219-20, 387-89, 480)

9. By August 2, 2007, Anne-Marie Romano (“Romano”), Respondent’s Chief Administrative Officer in CPM, was informed of the OADAC accommodation granted to Complainant. Romano was not opposed to the granting of an accommodation, but considered the OADAC accommodation, which had no end date, unreasonable. Pursuant to Respondent’s policy and procedure for reasonable accommodations, Romano requested a review by Respondent’s Job Accommodations Committee (“JAC”). (Respondent’s Exhibits 7, 8; Tr. 332-38, 390, 393-95) Romano thought that Respondent’s “flex-time” schedule provided a reasonable balance between allowances for the needs of employees to vary their arrival times and the need to accomplish the essential responsibilities of CPM. Romano considered the OADAC accommodation as an improper extension of the “flex-time schedule.” Romano thought that the OADAC accommodation ignored the balancing analysis that led to the creation of the “flex-time” schedule and would have a negative effect on the essential functioning of CPM. (Tr. 336-37, 393-95, 398, 473-74) On October 4, 2007, JAC held its first meeting regarding Romano’s request for review. (Respondent’s Exhibit 8)

10. Complainant learned that JAC was reviewing the OADAC accommodation. (ALJ’s Exhibit 1) It was after JAC held its first meeting that Complainant began to complain of his work experience in DIF. (Tr. 499-502) On November 9, 2007, JAC held its second meeting regarding Romano’s request for review. (Respondent’s Exhibit 8)

11. On December 5, 2007, Complainant filed this complaint (Case. No. 10122042) with the Division. Complainant contended that Respondent discriminated against him because he has a disability, because of his marital status, because he is a male, and because he opposed unlawful discrimination. The alleged discrimination included reassigning Complainant to DIF, assigning Complainant menial work that was not appropriate to his title, not allowing Complainant to work

overtime, failing to promote Complainant, handling Complainant's attendance in a manner different from other employees, and challenging OADAC's accommodation. (ALJ's Exhibits 1, 7; Tr. 30-31, 35-36, 38, 45-47, 51-54, 58-60, 63, 69-70, 72, 85-86, 88, 95, 97, 101-04, 128-29, 135, 139-40, 142, 150-52, 302-04)

12. By letter dated December 12, 2007, Respondent informed Complainant that JAC reviewed the OADAC accommodation and determined that the accommodation was not reasonable. JAC rescinded the OADAC accommodation and offered ("JAC accommodation") Complainant both the opportunity to change his work location to a location closer to his house and the opportunity to designate his late arrivals as a leave pursuant to the Family Medical Leave Act ("FMLA leave"). (Respondent's Exhibit 8; Tr. 228-29) Complainant chose not to move his work location closer to his house but utilized the accommodation of charging lateness as FMLA leave. (Tr. 228-30)

13. In fact, for the time period from August 3, 2007 through April 24, 2009, Complainant arrived to work after 10:00 am on 185 days. Those arrivals would not have been covered by the OADAC accommodation and, therefore, could have been considered violations of Respondent's time and attendance rules; however, with the creation of the JAC accommodation, those arrivals, although violations of Respondent's time and attendance rules, would be considered as protected by the JAC accommodation. (Respondent's Exhibit 8, 9; Tr. 73-79, 82-83, 219-20, 228-29, 387-89, 480) On 78 of those 185 days, Complainant arrived after 10:30 am. On 61% of the work days during that time period, Complainant arrived after 10:00 am. (Respondent's Exhibit 26) With the creation of the JAC accommodation, Respondent's "flex-time" schedule remains the same, Respondent has never questioned Complainant's designation of lateness as FMLA

leave, and Respondent has never disciplined Complainant for lateness.

(Tr. 131-34, 230, 352, 477)

14. During Complainant's tenure in DIF, two female employees in DIF were promoted. They were promoted from titles considered lower than Complainant's title to titles comparable to Complainant's title. They were promoted because they were performing work commensurate to a higher title and their work was of a high quality. (Tr. 171, 505-06, 573-76) At the same time the two female employees were promoted, Ciaccio discussed with Complainant the possibility of a promotion that would have increased Complainant's salary by approximately \$8,000.00. Complainant told Ciaccio that he wasn't interested in part because he wanted to keep his medical benefits and was not sure if his medical benefits would change with the new position.

(Tr. 166-69, 506-09)

15. In 2006, Complainant and 27 other employees of Respondent who were not managers were promoted to the position of Administrative Staff Analyst ("ASA") with a raise in pay. At that time, there were employees with management responsibilities who also received promotions to the position of ASA while retaining their management responsibilities. No employees who were promoted at this time to ASA received management responsibilities if they were not already performing management responsibilities.

(Respondent's Exhibits 1, 2; Tr. 123-24, 173-75, 179, 328-32)

16. During Complainant's tenure in DIF, employees would only have the opportunity to work overtime if they were working on a "time-sensitive" assignment that could not be completed in the normal work day. An assignment would be "time-sensitive" if it had to be completed according to a strict deadline. Often, "time-sensitive" work required an employee to be at work early. (Tr. 263-64, 347-48, 462-63, 466-68, 524-26)

17. Ciaccio determined that, due to the uncertainty of Complainant's arrival time and his history of failing to complete assignments in a timely manner, he could not assign "time-sensitive" work to Complainant. (Respondent's Exhibit 4; Tr. 147, 487-95, 504-05, 526, 564-67)

18. During Complainant's tenure in DIF, Paul Gallo ("Gallo"), a married man with children, was an Access and Protection Coordinator responsible for "time-sensitive" work. (Tr. 150, 525) Because of the volume of "time-sensitive" work for which Gallo was responsible, he often had to work overtime to complete his responsibilities. (Tr. 524-27)

19. At times, the team was responsible for doing the paper work for budget modifications. This paper work was known as a W.A.R. certificate, indicating a willingness to accept risk. (Tr. 130-31, 430-31, 488-89, 500-04) W.A.R. certificate work was "time-sensitive." (Tr. 504-05)

20. During Complainant's employment with Respondent, Complainant was a member of a union known to him as Organization of Staffed Analysts. Complainant never caused a grievance to be filed by his union concerning his complaints in this case. (Tr. 40-41, 134, 142-43, 156-62, 168-69, 307-08, 428-29)

21. Complainant's testimony, at times, was evasive and contradictory. I do not find Complainant's testimony credible. (ALJ's Exhibit 1; Respondent's Exhibit 9; Tr. 46-49, 96-97, 131-34, 157-62, 166-69, 186-87, 192, 213-14, 244-45, 259, 266-67, 290-91, 311-14)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation to an employee's disability. *See* Human Rights Law § 296.3(a).

The credible evidence establishes that Complainant was working in Respondent's DIF for at least 15 months without any complaints. During this time period, Complainant failed to adhere to Respondent's time and attendance rules. In July of 2007, Complainant requested an adjustment of his work schedule as a reasonable accommodation to a disability he has, contending that his lateness was often related to his disability. OADAC granted the OADAC accommodation which was reviewed by JAC and found unreasonable. JAC created an alternative accommodation that Complainant has utilized.

Clearly, Respondent accepted its responsibility to consider a reasonable accommodation to Complainant's disability. Pursuant to the Human Rights Law, the employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting Complainant's need. *See* 9 N.Y.C.R.R. § 466.11(j)(6) The evidence establishes that the JAC accommodation provided by Respondent was reasonable and effective in meeting Complainant's need. Complainant has failed to present evidence that Respondent committed unlawful discrimination by refusing to provide a reasonable accommodation to his disability.

The Human Rights Law also makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability, marital status, or sex, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant has also failed to present evidence that Respondent committed unlawful discrimination because of Complainant's disability, marital status, or sex, or that Respondent committed unlawful discrimination by retaliating against him because he opposed unlawful discrimination. Complainant presented no credible evidence to support the contention that he

suffered any adverse employment action, such as termination or demotion, which would amount to a materially adverse change in the terms and conditions of his employment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004) Further, no credible evidence was presented to establish that any action of Respondent occurred under circumstances giving rise to an inference of unlawful discrimination. *See id.* Complainant's claims that he was denied promotion, that he was assigned menial tasks, and that he was treated differently from other employees were unsubstantiated. Additionally, there was no credible evidence presented to establish a causal connection between any action of Respondent and any act by Complainant in which he opposed unlawful discrimination. *See id.* at 312-13.

After considering all of the evidence presented and evaluating the credibility of the witnesses, I find that the credible evidence does not support a finding that Respondent engaged in unlawful discrimination. Conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995). Complainant has the burden to establish by a preponderance of the evidence that discrimination occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). Since Complainant has failed to meet this 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 23, 2009
Bronx, New York



Thomas J. Marlow
Administrative Law Judge