NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of LARRY FOGLE, Complainant, v. MONROE COUNTY, Respondent.	**NOTICE AND FINAL ORDER** Case No. 10124057

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, 2009, 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: SEP 16 2009
Bronx, New York

GAREN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **LARRY FOGLE,** Complainant, v. **MONROE COUNTY,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10124057**

SUMMARY

Complainant alleged that Respondent discriminated against him in employment on the bases of age and disability. Respondent denied the allegations. Complainant has failed to prove his claims and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 11, 2008, 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. The public hearing session was held on May 12, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by William E. Burkhart, Jr., Esq. Respondent was represented by Paul D. Fuller, Esq.

At the public hearing, Respondent moved for dismissal of the complaint pursuant to Human Rights Law § 297.4(a), on the grounds that more than 270 days had elapsed between the filing of the complaint and the service of the notice of hearing. Complainant opposed the motion, and ALJ Groben reserved decision until after the hearing. (Tr. 10-11)

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

FINDINGS OF FACT

1. Complainant was born on March 19, 1953. At all times relevant to the complaint, Complainant was 54 years old. (ALJ Exhibit 1)

2. Respondent County operates a Children's Center in Rochester, New York. (ALJ Exhibit 1)

3. In 1996, Complainant was hired by Respondent to work at the Children's Center as a *per diem* child care worker. He became a full time child care worker in 2000. On August 17, 2007, Respondent terminated Complainant's employment. (ALJ Exhibit 1; Tr. 7, 157)

4. Complainant's duties included supervision and observation of adolescent children, ages 10 through 15, residing at the Children's Center. Occasionally, Complainant would be called upon to physically restrain an adolescent child. (Joint Exhibit 9; Tr. 24, 34, 104-05, 129-30)

5. At all times relevant to the complaint, Complainant was also employed by DePaul Addiction Services ("DePaul") in its Community Residence Program as a night staff member, serving on the midnight to 8:00 a.m. shift. His responsibilities included observation of the adult residents, and resident support and crisis intervention as necessary. Unlike Complainant's job at the Children's Center, his work at DePaul did not require any strenuous physical activity. (Joint Exhibit 3; Tr. 22-25, 26, 32-33, 91-92, 106-07)

Personnel at the Children's Center

6. At all times relevant to the complaint, Michael Marinan ("Marinan") was the Coordinator of the Children's Center. (Tr. 44, 156-57)

7. At all times relevant to the complaint, Reynaldo "Reggie" DeJesus ("DeJesus") was Complainant's shift supervisor at the Children's Center. (Tr. 43, 109-10) At the time of the public hearing, he was no longer employed by Respondent, having resigned his position as a result of sexual harassment allegations made against him by a fellow employee. When questioned about whether sexual harassment allegations had been made against him by that employee, DeJesus claimed that he did not know. Upon further inquiry, DeJesus then acknowledged that said allegations had been made, that he had resigned, and that he had been "disgusted" with Respondent as a result. (Tr.147-49) I find that DeJesus was not a credible witness.

8. At all times relevant to the complaint, Ernie Kellenberger ("Kellenberger") was the Principal Child Care Worker at the Children's Center. The shift supervisors reported to him. (Tr. 193-94)

Complainant's Injury

9. Complainant testified at the public hearing that he had injured his back during the morning of either May 22, 23, 24, 25, or 26, 2007. Complainant was initially unable to recall the date of his injury. (Tr. 30-32, 74-75, 88)

10. On the morning of May 25, 2007, Complainant injured his back, and called in sick to Respondent. Complainant did not go to work at the Children's Center that day, but did continue to work at DePaul. (Joint Exhibits 8 and 10; Tr. 30-32, 259)

11. At the time of his injury, Complainant had significant sick leave accrued, and he remained on paid sick leave from the Children's Center until August 8, 2007, when he returned to work. (Joint Exhibit 10)

12. On June 1, 2007, Complainant was examined by his physician Bharat Gupta, M.D. ("Dr. Gupta"), who provided Complainant with a note advising that he would be unable to work due to back pain until June 16. (Complainant's Exhibit 1; Tr. 33-34, 202-03) Complainant provided that note to Respondent. (Tr. 35-36, 202)

13. Dr. Gupta again examined Complainant on June 15, 2007, and gave Complainant another note, advising that he should consult a chiropractor and rest until July 7, 2007. That note was provided to Respondent. (Complainant's Exhibit 2; Tr. 37-38, 203-05).

14. On or about June 25, 2007, Complainant filed an application for temporary Disability Benefits with Respondent (Joint Exhibit 1; Tr. 48-49, 169) In that application, Complainant stated the date of his injury as "5/22/07 5/23/07." (sic) (Joint Exhibit 1 [p. 4]; Tr. 169-72)

15. On July 5, 2007, Complainant was examined by Dr. Perlman, a chiropractor, who provided Complainant with a note stating that Complainant could do "no work" until July 20,

2007, due to a low back sprain. That note was provided to Respondent. (Complainant's Exhibit 3; Tr. 38-40, 205)

16. On July 19, 2007, Complainant was again examined by Dr. Perlman, who gave Complainant a note stating that he could do "no work" until August 1, 2007 due to low back pain. That note was provided to Respondent. (Complainant's Exhibit 4; Tr. 45, 207)

17. On July 30, 2007, Complainant was again examined by Dr. Perlman, who provided Complainant with a note stating that he could not work at the Children's Center until August 6, 2007 due to low back pain. That note was provided to Respondent. (Complainant's Exhibit 5; Tr. 45-46, 208)

18. Complainant testified that both Dr. Gupta and Dr. Perlman advised him that his condition allowed him to work at DePaul, but not at the Children's Center. (Tr. 34-35, 38, 39-40, 45, 46)

Complainant's Credibility

19. On September 26, 2005 Complainant was disciplined and given a formal counseling for failure to give Respondent adequate notice of an absence. (Respondent's Exhibit 11; Tr. 111, 122-23, 134-35) Complainant testified at the public hearing that, prior to his termination by Respondent, he had had "no discipline". (Tr. 64-65) Under cross examination, Complainant became evasive regarding this issue. (Tr. 96)

20. Complainant also denied that he had been physically removed and escorted out of the Children's Center. (Tr. 96-97) On March 25, 2006, after being asked to leave several times, Complainant had to be relieved of his duties and escorted from the premises for insubordination by DeJesus and another employee. (Respondent's Exhibit 11; Tr. 135-41, 151) I found Complainant not to be a credible witness.

Complainant's Light Duty Request

21. Respondent has permitted its employees to work light duty while recovering from an injury or illness. In order to accommodate a light duty request, Respondent requires medical documentation describing any work restrictions. (Tr. 43-44, 114-19, 159-67)

22. Respondent's procedure was that a request for a light duty assignment at the Children's Center would be initially received by Marinan, who would then forward the request to Robert Bilsky ("Bilsky") of Respondent's Human Resources Department. Bilsky would then oversee the approval or denial of the light duty request. (Tr. 161-62)

23. Complainant testified that after June 1, 2007, he called DeJesus and asked him whether light duty was available for him. DeJesus testified that in response to an inquiry from Complainant, he had asked Marinan about the availability of light duty and had been advised that it was not available. (Tr. 42-44, 113-14, 119, 141, 258) DeJesus acknowledged that although he had testified earlier that he created memos on "everything" at work, he had not made this inquiry in writing, nor had he kept any written record of it. DeJesus was unable to recall the date or time he made this inquiry of Marinan. (Tr. 141-44)

24. Complainant never contacted Marinan directly to ask for light duty although he was aware that light duty could be offered by Respondent. (Tr. 87-88, 97-98, 208)

25. Marinan denied that DeJesus or anyone else had ever advised him that Complainant wanted to work light duty. (Tr. 208, 212) I credit Marinan's testimony.

26. Complainant never discussed with his doctor whether he could have worked light duty. (Tr. 105)

27. None of the five medical notes which Complainant submitted to Respondent between June 1, 2007 and July 30, 2007 either referenced light duty or mentioned Complainant's job at

DePaul. Upon receipt and review of each of those notes, Marinan concluded that Complainant would be unable to work at all for the period specified in each note. A sixth note from Dr. Gupta, dated October 31, 2007, also indicated that Complainant had not been able to work for the month of June 2007. (Complainant's Exhibits 1, 2, 3, 4, 5 and 6; Tr. 202-03, 205, 206, 207-11)

28. Complainant was evasive when being questioned about the contents of several of these notes. (Complainant's Exhibits 1, 3, and 4; Tr. 76-86)

The Disciplinary Proceeding

29. Complainant was represented by a union in his employment at the Children's Center; said union and Respondent had negotiated a Collective Bargaining Agreement ("CBA"). The CBA states in pertinent part that "(a)ny employee engaging in gainful outside employment while on sick leave from the County shall not be entitled to sick leave payment." (Joint Exhibit 6 [Art. 29, Section 292.2, p.26]; Tr. 177-79, 233-34)

30. The CBA sets forth a schedule of progressive discipline, including such disciplinary actions as written reprimand, suspension without pay, and demotion, and directs that Respondent shall follow a policy of progressive discipline "whenever appropriate." (Joint Exhibit 6 [Art. 22, pp. 19-20] However, the CBA permits Respondent to immediately terminate an employee rather than imposing a lesser penalty. (Joint Exhibit 6 [Art. 22]; Tr. 146-47, 172-77)

31. Complainant testified at the public hearing that although he had worked for Respondent for nine years at the time of his discharge, he had never received a copy of the CBA, and had been unaware that he was not permitted to claim sick pay from Respondent while working for another employer. (Tr. 54, 93-94, 265)

32. Bilsky investigated to determine whether Complainant was employed at another job while on sick leave, and verified that he had been working full-time at DePaul between May 25 and July 14, while he was on sick leave from the Children's Center. (Respondent's Exhibits 4, 5, 6 and 7; Tr. 189, 195-96, 233-39, 248, 252-53, 254)

33. On July 26, 2007, Complainant was given notice that Respondent had scheduled him for an investigatory interview relating to his use of sick credits, and that he was entitled to union representation at the interview. (Joint Exhibit 5; 58-59) That interview, at which Complainant's union representative was present, took place on July 31, 2007. (Tr. 59-61, 211)

34. At the July 31 investigatory interview, Complainant's union representative asked to be allowed to send additional documents to Respondent regarding Complainant's case. These documents were faxed on August 9, 2007 to Respondent's representative Joe Martino. (Joint Exhibit 4; Tr. 62-63, 183-88, 211-12) That fax included a note dated August 2, 2007 from Dr. Gupta and another dated August 9 from Dr. Perlman. Both notes advised that Complainant was permitted to work his second job at DePaul. (Joint Exhibit 4) These notes were reviewed and considered by Respondent prior to its decision. (Tr. 187-88)

35. On or about July 30, 2007, Complainant obtained a Certification of Health Care Provider pursuant to the Family and Medical Leave Act ("FMLA") from Dr. Perlman, and filed that certification with Respondent. (Joint Exhibit 2; Tr. 50-54) Dr. Perlman's certification stated that Complainant was unable to perform the essential job function of "restraining children", that he could not do physical activity such as bending, lifting or reaching, and that he would not be able to return to work until August 6, 2007. (Joint Exhibit 2; Tr. 54-56, 166-68) At the time of the July 31 investigatory interview, Marinan had not received the FMLA Certification, though he acknowledged that it was received "at some point" by Children's Center. (Tr. 189-90)

36. On August 8, 2007, when he had used all of his sick time, Complainant returned to work with no restrictions. (Joint Exhibit 10; Tr. 168, 190-91, 217) The sick time pay earned by Complainant during his absence was approximately $7,100. (Tr. 212-13)

37. On or about August 17, 2007, Respondent determined that Complainant had been engaged in employment at DePaul while on paid sick leave and that Complainant's actions had served to defraud Respondent by falsely representing his inability to perform his job. Respondent terminated Complainant's employment. (ALJ Exhibit 1, Joint Exhibit 7; Tr. 7, 65, 191-92)

Comparators

38. Mark Robinson ("Robinson") and Jose Reyes ("Reyes") were child care workers employed at the Children's Center in 2007. Both were involved in an incident in which a child was allowed to escape from the Children's Center. Robinson was not terminated, but was disciplined with a five-day suspension. (Tr. 65-68, 181-83, 214-15, 218-19) Reyes was terminated. (Tr. 97, 215) No evidence was presented as to the age or disability status of either Robinson or Reyes.

39. Kevin Dash ("Dash") was an employee of the Children's Center. At the time of the public hearing, he was 43 years of age. Dash once received a formal counseling because he was frequently absent from work due to his condition as a diabetic. (Tr. 125-26, 193-94, 227)

40. During 2007, Dash had a second job as a *per diem* worker in the New York State Office of Children and Family Services, and DeJesus was aware of this second job. (ALJ Exhibit 1; Tr. 127, 228) Marinan was also aware that some of Respondent's employees had second jobs. (Tr. 191) There was no evidence presented that Dash had ever worked at his second job while on sick leave from Respondent, and Dash denied ever doing so. (Tr. 127, 215-16, 227)

OPINION AND DECISION

Respondent's Motion

Respondent moves for dismissal pursuant to Human Rights Law § 297.4(a), on the grounds that more than 270 days elapsed between the filing of the complaint on March 11, 2008, and the April 24, 2009 service of the notice of hearing. Respondent's calculation is correct. However, it is well settled that the time schedules set forth in § 297 for the performance of certain acts by the Division, including the service of the notice of hearing, are directory only. Absent some showing of substantial prejudice, non-compliance with such schedules will not divest the Division of jurisdiction. *Sarkisian Brothers, Inc., Rothchild Project v. State Division of Human Rights*, 48 N.Y.2d 816, 424 N.Y.S.2d 125 (1979). Respondent has not shown substantial prejudice, and the motion is denied.

The Complaint

Age Discrimination-To make a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind* , 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant is a member of a protected class due to his age, he was qualified for his position, and Respondent's termination of his employment was an adverse job action. However, Complainant presented no direct evidence of age discrimination, and his termination did not occur under circumstances which would permit an inference of such discrimination. Complainant

did not present any evidence that his age had ever been an issue of concern to Respondent, or even that any of Respondent's employees or managers had ever commented upon his age. Therefore, Complainant failed to present a prima facie case of age discrimination.

Disability Discrimination-It is unlawful to discriminate against an employee on the basis of disability. Human Rights Law § 296.1 (a). A disability is defined under the Human Rights Law as "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." However, the definition is limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing the activities involved in the job in a reasonable manner. Human Rights Law § 292.21.

In the instant case, there is ample proof, in the form of notes from Complainant's chiropractor and doctor, to show that Complainant was unable to perform his job at the Children's Center from May 25, 2007 until on or about August 6, 2007, two days before he returned to work with no restrictions. Therefore, Complainant did not suffer from a disability as defined by the statute during that period, and thus did not belong to a protected class during this period. Complainant failed to present any proof that he suffered from a disability after August 6, 2007. Respondent, however, amply demonstrated that it had terminated Complainant's employment because he had collected sick pay in violation of the Collective Bargaining Agreement.

Reasonable Accommodation-Complainant did not set forth a cause of action for failure to grant a reasonable accommodation in his verified complaint. However, he did produce evidence of such at the public hearing, in the form of a purported request for light duty. Pursuant to the

Rules of Practice of the Division, I hereby amend the complaint to conform to the proof adduced at the public hearing. 9 NYCRR § 465.12(f)(14).

A respondent is obligated to provide a reasonable accommodation for a complainant's known disability. Human Rights Law § 296.3.

Both the employee and the employer are obligated to 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. 9 N.Y.C.R.R § 466.11(j) (4). The employee must make the disability and the need for an accommodation known to the employer. 9 N.Y.C.R.R § 466.11(k).

As noted above, Complainant's doctors were in agreement that he was not able to perform his job duties between May 25 and August 6, 2007. At the public hearing, Complainant produced testimonial evidence to support his claim that Respondent had refused his request for light duty without engaging in the required interactive process. Complainant presented no proof, however, as to when this request was made, what specific accommodation he proposed to Respondent, and what medical documentation he could have produced, if any, that would support his request. Complainant conceded that he had never even discussed the possibility of light duty with his doctor.

Respondent's witness Marinan credibly denied that Complainant, or anyone else, had ever proposed a light duty assignment, and the record is devoid of any documentary support for Complainant's claim. Complainant has failed to set forth a prima facie case for disability discrimination. Therefore, 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 hereby is, dismissed.

DATED: June 30, 2009
Bronx, New York

Michael T. Groben
Administrative Law Judge