

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**  
on the Complaint of  
**CRAIG HERNANDEZ,**  
Complainant,  
v.  
**CITY OF YONKERS,**  
Respondent.

**NOTICE OF FINAL  
ORDER AFTER HEARING**

Case No. 10102833

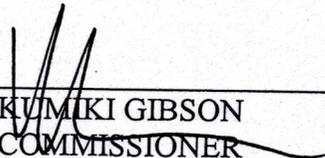
**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on May 25, 2007, by Lilliana Estrella-Castillo, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity 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 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 5th day of July, 2007.

  
KUMIKI GIBSON  
COMMISSIONER

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**On the Complaint of**

**CRAIG HERNANDEZ,**

**Complainant,**

**v.**

**CITY OF YONKERS,**

**Respondent.**

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

**CASE NO: 10102833**

**SUMMARY**

Complainant claims that Respondent failed to provide him with a reasonable accommodation and unlawfully terminated his employment in violation of the Human Rights Law. It is my opinion and decision that Respondent did not unlawfully discriminate against Complainant in violation of the Human Rights Law.

**PROCEEDINGS IN THE CASE**

On December 1, 2004, Complainant filed a verified complaint with the New York State Division of Human Rights (Division), charging Respondent with an unlawful employment discriminatory practice 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.

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge of the Division. Public hearing sessions were held on November 28, and November 29, 2006. Complainant was represented by the law firm of Grimes & Zimet, by John J. Grimes, of counsel. Respondent was represented by the City of Yonkers, Corporation Counsel Frank J. Rubino, by Thomas Cathcart, Assistant Corporation Counsel.

### **FINDINGS OF FACT**

1. Complainant was employed on October 16, 1991, by the City of Yonkers, Department of Parks Recreation and Conservation, as an Environmental Maintenance Worker (EMW) (Tr. 10, 149, 165; ALJ Exhibit I).
2. In 2003, Complainant worked in the ball field division, which is responsible for grooming the football, soccer and baseball fields every day (Tr. 15-16, 27, 165).
3. Respondent employs about one hundred fifteen employees (Tr. 150). About sixty of those employees are EMW (Tr. 150).
4. Complainant enjoyed certain rights and benefits which were outlined in a collective bargaining agreement (CBA) entered into between Respondent and Local 456 International Brotherhood of Teamsters, Complainant's union (Tr. 38-39).
5. The parties stipulated to the language of Articles 13 and 33 of the CBA, which are relevant to this complaint.
6. Article 13 of the CBA states "that employees who have worked continuously for three years and have exhausted all pay leave may be granted an extended sick leave upon approval of the City Manager of half pay for a period not to exceed three months. Also, that the

employee may receive an extended sick leave period for an additional three months at half pay, making it a total of six months half pay.” (Tr. 38-39).

7. Employees are not entitled to a second extension of three months at half pay (Tr. 184).

8. Article 33 of the CBA, entitled Unpaid Leave of Absence, states “that an employee may be granted a leave of absence for up to one year without pay at the sole discretion of the City Manager.” (Tr. 39).

9. Complainant does not challenge that Respondent has discretion to grant a leave of absence (Tr. 108).

10. On February 28, 2003, Complainant was diagnosed with interstitial lung disease (Tr. 20-21; ALJ Exhibit I; Complainant Exhibits 2 and 3).

11. Complainant’s treating physician, Joseph J. Brill, M.D. informed Respondent that Complainant “cannot be exposed to paint fumes, dust and chemicals and should only be doing light duty work due to his diagnosis of interstitial lung disease.” (Tr. 24-26; Complainant Exhibits 2 and 3).

12. After this diagnosis, Complainant worked only one week (Tr. 23, 34).

13. Complainant’s last date of actual work is disputed, but is not relevant to this decision (Tr. 34; Complainant Exhibits 14, 15, 16).

14. Complainant did not seek light duty work and, as a result, used all of his sick, personal and vacation leave by April 29, 2003 (Tr. 35-36; Complainant Exhibit 4).

15. When Complainant’s leave accruals were exhausted, Respondent granted Complainant’s request to be placed on “sick half pay” per the CBA (Tr. 36-39, 176).

16. After the initial three months of "sick half pay" expired, Complainant requested an additional three months in August 2003, which was also granted after Complainant's examination by the City Medical Doctor, Roger Chirugi, M.D. (Tr. 40-41, 168; Complainant Exhibit 4).

17. Dr. Chirugi, after examining Complainant and in consultation with Complainant's physician, determined that "in light of the fact that [Complainant's] job specifications requires [sic] that he may work with or be exposed to certain dust, chemicals or paints, in my professional opinion, [Complainant] is not fit to perform his work duties, now or in the foreseeable future." (Complainant Exhibits 5 and 6).

18. Complainant told Mitchell Tutoni, Respondent's commissioner, that he was unable to work in any capacity and needed assistance from Respondent in filing for medical disability (Tr. 153, 171).

19. As a result, a meeting was held on October 2, 2003, to address Complainant's concerns and Complainant's employment status (Tr. 53, 152, 161-162, 171).

20. Dawn Merritt, assistant to the commissioner of personnel, and director of workers' compensation, attended the meeting of October 2, 2003, to help answer Complainant's questions (Tr. 57, 154, 191, 200). During the meeting, Merritt explained to Complainant the different options available to him since he did not wish to return to work (Tr. 57, 154).

21. At the end of the meeting no final decision was made regarding Complainant's employment status (Tr. 212). Respondent, however, had no expectation that Complainant would be returning to work (Tr. 185).

22. Complainant claimed that it was never his intention to resign when he attended the meeting of October 2003. Instead, Complainant wanted to “weigh his options” and see if Respondent would transfer him to another department (Tr. 56, 60).

23. Respondent’s witnesses agreed that the purpose of the meeting was to discuss the options available to Complainant because he was not returning to work (Tr. 54, 153, 195).

24. During the meeting there were no discussions regarding any other job offer (Tr. 153, 195). Respondent’s witnesses testified that any job offer would have been inconsistent with the purpose of the meeting, namely, to help Complainant figure out his options because he could not return to work (Tr. 153, 195-198, 199).

25. I find that during the meeting of October 2, 2003, Complainant did not ask Respondent for a transfer to any other position, and did not ask for another job (Tr. 156, 185, 190, 195).

26. Complainant’s testimony that he wanted to return to work is inconsistent with the medical evidence produced at the hearing and the actions taken by Complainant after the October 2, 2003, meeting.

27. After the October 2, 2003, meeting, Complainant applied for disability retirement and for Workers’ Compensation benefits (Tr. 73).

28. Complainant filed a disability retirement application with the New York State and Local Retirement System on October 20, 2003 (Tr. 93, 95; Respondent Exhibit B). The application was denied on February 24, 2004, because Complainant had less than ten years of total service credit (Tr. 73; Respondent Exhibit C).

29. Complainant also retained the services of an attorney to file a Workers’ Compensation claim (Tr. 90-91; Respondent Exhibit A). In the application, which is dated

November 13, 2003, Complainant described himself as “totally disabled.” (Complainant Exhibit 8, Respondent Exhibit A).

30. An independent medical examination was performed at the request of the Workers’ Compensation Board. The examination found that Complainant had a “permanent, mild, partial disability which restrict [sic] him from working in an area where respiratory irritants are present.” (Complainant Exhibit 12).

31. As a result, the Workers’ Compensation Board found that Complainant suffered from a “permanent partial disability” and was entitled to an award of three hundred dollars a week (Tr. 79-80; Complainant Exhibit 16). Complainant continues to receive this award (Tr. 79-80).

32. Complainant retained an attorney to apply for Social Security Disability Insurance benefits, but was informed by the Social Security Administration that he did not qualify (Tr. 112, 125, 127-128).

33. Complainant also stayed in contact with Merritt throughout this entire period following up on the status of his applications. Complainant never told Merritt that he wanted to return to work or that he wanted to be transferred to another department (Tr. 219-220, 222, 224-225).

34. Complainant alleged that in January 2004, he had a conversation with Tutoni, in which he again expressed to Tutoni that he wanted to “weigh his options” (Tr. 63, 65). Complainant testified that he meant that he wanted to explore whether there were other places where he could be placed by Respondent. Complainant, however, acknowledged that he did not verbalize this to Tutoni, who was convinced that Complainant was seeking to leave his employment permanently (Tr. 65).

35. Complainant remained out on leave. On February 24, 2004, Gerard Serpico, Respondent's deputy commissioner for human resources, wrote to Complainant inquiring about his intentions to return to work (Tr. 66, 238-239; Complainant Exhibit 9).

36. Complainant called Serpico and asked for an extension of his leave of absence to continue to "weigh his options." Complainant did not indicate to Serpico that he wanted to return to work, nor did he ask for a transfer (Tr. 239, 243, 257).

37. Complainant's leave request to "weigh his options" was denied on March 5, 2004, because Respondent determined that it did not make sense to grant a leave of absence to Complainant since he had no intention of returning to work (Tr. 240-241, 257; Complainant Exhibit 10).

38. It was also Respondent's understanding that at the time that Complainant asked for the additional leave Complainant had been out of work for almost a year. Respondent's witnesses testified that Respondent would have been able to terminate Complainant at that time based on a medical separation (Tr. 240, 252).

39. Respondent terminated Complainant's employment on March 9, 2004 (Complainant Exhibit 10).

40. Neither, Complainant, nor his union, ever filed a grievance regarding Complainant's employment termination (Tr. 98-100).

41. Complainant argued that Respondent terminated him prematurely because his actual last date of work is different than the date Respondent believed it to be. However, Complainant never challenged his employment termination with Civil Service or with the union.

42. Complainant's testimony that he hoped to return to work is not credible. During the same time period he allegedly sought to return to work, he applied for a variety of benefits where he indicated that he was totally disabled (Tr. 119-123).

43. Complainant has not worked since he was terminated by Respondent (Tr. 112, 144-146). Complainant testified that he "tried" to look for work. He also testified that he had custody of his children and was "working on getting a job that fit that schedule." (Tr. 145-146).

### OPINION AND DECISION

Complainant maintained that Respondent failed to provide him with a reasonable accommodation and unlawfully terminated his employment in violation of the Human Rights Law. It is my opinion and decision that Respondent did not unlawfully discriminate against Complainant in violation of the Human Rights Law.

The Human Rights Law prohibits an employer from discriminating against an employee because of a disability. *Matter of McEniry v. Landi*, 84 N.Y.2d 554, 558, 644 N.E.2d 1019, 620 N.Y.S.2d 328 (1994), *citing* Human Rights Law § 296 (1). The statute defines the term "disability" as a "physical, medical or mental impairments that 'do not prevent the complainant from performing in a reasonable manner the activities involved in the job.'" *Pembroke v. New York State Office of Court Administration*, 306 A.D.2d 185; 761 N.Y.S.2d 214, 215 (1<sup>st</sup> Dept. 2003), *citing* Human Rights Law §292 (21). The protection only applies to "disabilities which, upon provision of reasonable accommodations, do not prevent the [Complainant] from performing in a reasonable manner the activities involved in the job or occupation . . . held." Human Rights Law §292 (21); *Burton v. Metropolitan Transportation Corp.*, 244 F.Supp.2d 252 (2003); *see also*, *Fama v. American International Group, Inc.*, 306 A.D.2d 310, 760 N.Y.S.2d

534 (2003), lv denied 1 NY3D 508, 808 N.E.2D 1276, 777 N.Y.S.2d 17 (2004). Therefore, the employer has a statutory duty to “provide reasonable accommodations to the known disabilities of an employee . . .” Human Rights Law § 292 (21).

A “reasonable accommodation” is defined as actions taken by an employer which “permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . . provided, however, that such actions do not impose an undue hardship on the business.” Human Rights Law § 292 (21-e).

The burden is on Complainant to establish that he suffered from a disability, that he proposed a reasonable accommodation and that Respondent refused to make such an accommodation. *Pembroke v. New York State Office of Court Administration*, 306 A.D. at 185, citing, *Moritz v. Frontier Airlines, Inc.*, 147 F. 3d 784, 787 (8<sup>th</sup> Cir. 1998).

Complainant failed to state a cause of action for disability discrimination. Complainant argued that Respondent discriminated against him by refusing to accommodate his disability. The accommodation that Complainant sought was additional leave time to “weigh his options.” Although extensions of medical leave can constitute a reasonable accommodation (*see Rogers v. New York University*, 250 F.Supp2d 310, [S.D.N.Y. 2002]), “the duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee’s position open indefinitely while the employee attempts to recover, nor does it force an employer to investigate every aspect of an employee’s condition before terminating him based on his inability to work.” *Scott v. Memorial Sloan-Kettering Cancer Center*, 190 F.Supp.2d 590 (S.D.N.Y. 2002). If an employee makes a request for an accommodation while still on leave, the employer is required to make an attempt to determine the feasibility of the accommodation proposed, including the availability of an extended leave of absence. *See, Gina Raisley v. First Manhattan*

Co., 4 Misc. 3d 1022A, 798 N.Y.S.2d 347 (2004). The employer is not required to provide either extended paid leave or indefinite unpaid leave.

In this case, Complainant presented himself to the employer as being totally disabled and unable to perform his job. Complainant's and Respondent's doctors agreed that Complainant could not perform his job "now or in the foreseeable future." Complainant did not challenge the doctors' medical opinions. Complainant did not seek to return to work. Instead, Complainant applied for benefits which are more consistent with someone who is not seeking to return to work.

When Respondent asked Complainant about his intentions about returning to work, Complainant had been out from work for almost twelve months. Complainant did not respond with a specific return to work date or with a request that additional time would render him capable of reasonably performing his job. Rather, he stated that he needed a year to "weigh his options".

Granting or denying leaves of absence is discretionary. Respondent decided that in Complainant's case it did not make sense to grant him an additional leave because he had no intention of returning to work. Complainant's failure to allege that the provision of such additional time would render him capable of performing his job necessitates that his complaint be dismissed.

I find that Respondent did not unlawfully discriminate against Complainant when it denied him the requested leave of absence because there was no expectation that he would be able to return to work.

Complainant also alleged that he requested that instead of terminating his employment Respondent allow him to transfer to another position. Complainant alleged that Respondent's

refusal to transfer him to another position as a reasonable accommodation violated the Human Rights Law. While it is true that Respondent's obligation to provide a reasonable accommodation extends to reassignments and transfers, (*see*, Human Rights Law §292 (21-e) and 9 NYCRR §466.11(a) (1) and (2), which require that employers transfer disabled employees to other vacant positions where they are capable of performing), it is also clear that under the Human Rights Law Complainant has the burden of demonstrating that a vacant funded position existed and that he was qualified to fill that position. *See, Sonia Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 146-148, 811 N.Y.S.2d 381 (2006).

Complainant was not credible when he testified that he asked for a transfer. His actions were inconsistent with his testimony. Moreover, not only did Complainant fail to prove that he requested a transfer, he also did not prove that a position actually existed into which he was qualified to be transferred. Complainant, both at the hearing and in his post-hearing brief, made generalized statements that Respondent had "hundreds" of positions available where he could have been transferred. Complainant however, did not identify a position that was available and that he was qualified and capable of doing, in light of his disability.

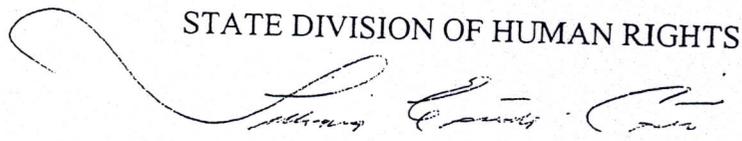
**ORDER**

Based on 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: May 25, 2007  
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



Lilliana Estrella-Castillo  
Administrative Law Judge