NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

STEVEN JACKSON,

Complainant,

v.

YONKERS RACING CORPORATION,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10118857

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 17, 2009, by Katherine Huang, 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 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10118857**

SUMMARY

Complainant alleges that Respondent unlawfully discriminated against him in the conditions of employment and was discharged due to his disability. However, Complainant has failed to satisfy his legal burden and the complaint is therefore dismissed.

PROCEEDINGS IN THE CASE

On June 14, 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 Katherine Huang, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on

March 4, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Joseph DeGiuseppe, Jr., Esq.

Proposed findings of fact and conclusions of law were submitted by Respondent after the public hearing session. A request for extension from the Division was received and a one week extension to file proposed findings was granted. None were received from the Division, despite the extension, and time to file expired.

For consistency, all exhibits marked "Complainant and Respondent Exhibits" have been marked "Joint Exhibit."

FINDINGS OF FACT

1. Respondent operates a raceway and casino incorporated under the laws of the State of New York. (Joint Exh. 1)

2. Respondent requires personnel to provide constant around-the-clock security protection. (Joint Exh. 1, Tr. 23)

3. On October 18, 2006, Respondent hired Complainant as a full time security officer. (Joint Exh. 1, Tr. 23)

4. As a security officer, Complainant had to be prepared to use physical force necessary to apprehend a person engaging in criminal behavior or physically restrain a guest or intoxicated patron. (Tr. 111, 161) Security officers, regardless of where they are assigned for a shift, may be required to quickly leave their post and assist other security officers anywhere throughout Respondent's casino. (Tr. 112, 161)

5. Complainant was a member of Local 153, Office and Professional Employees International Union, AFL-CIO ("Local 153"). (Joint Exh. 1, Tr. 22)

6. Respondent and Local 153 entered into a collective bargaining agreement ("CBA") covering all members for the period September 1, 2006 through September 1, 2009. (Joint Exh. 1, Tr. 22-23, 156) The CBA provides that all assigned post locations are interchangeable and officers may not choose the post location of their assignments. (Resp. Exh. 4, Tr. 161)

7. Respondent maintained three shifts, A, B, and C, in which they assigned security officers. Officers received their post assignments from their shift supervisor. (Tr. 156, 161)

8. Complainant was assigned to the "A" shift, from 12:00 midnight to 8:00 am, Tuesday through Saturday. (Joint Exh. 1)

9. Complainant received Respondent's Absenteeism/Lateness policy at his employment orientation. (Tr. 121) This policy informs employees of their absences and lateness, and the consequences of accumulating additional absences and lateness. (Res. Exh. 5)

10. The CBA provides that employees must call in if they will be absent from a scheduled shift. Respondent may discharge an employee who fails to call in prior to and is absent for a scheduled shift twice in a six-month period. (Resp. Exh. 4, Tr. 157)

11. On or about April, 2007, Complainant began to experience pain in his back. (Tr. 32) Complainant had previously been diagnosed with scoliosis in or about 1994 or 1995. (Tr. 30)

12. Complainant experiences back pain when he overexerts himself, or bends in a certain way. Complainant's back pain worsens with exertion or over activity. (Tr. 32)

13. On April 14, 2007, Complainant experienced back pain as a result of standing on his feet for the initial two and a half hours during his shift as a casino "rover." As a result, Complainant could not stand further for the remainder of his shift. (Tr. 34) Complainant told his supervisor, Craig MacKernan, that he was in pain and that his spinal condition prevented him from standing any longer that shift. (Tr. 34)

14. MacKernan asked Complainant if he needed medical treatment before his next assignment with the "drop team" to retrieve money from the slot machines. (Tr. 38-39)

15. Complainant opted to go home rather than accept the "drop team" assignment. (Tr.39-40). Complainant wanted to be reassigned to a "door" post, where he could be seated during his shift. (Tr. 39, 107-08)

16. Security officers are not allowed to sit while on the "drop team" assignment. (Tr. 163-165, 212)

17. Security officers are also not allowed to sit on the benches located by the "door" posts, as they tend to fall asleep when seated. (Tr. 163-165, 212)

18. Complainant is unable to both run at full speed to react to an emergency and use force to restrain individuals because of his back pain. (Tr. 111-12)

19. On April 16, 2007, Complainant went to a hospital emergency room to have his back evaluated. (Tr. 41). Complainant was seen by Dr. Sharon Frankle. (Tr. 42)

20. Dr. Frankle gave Complainant a note directing his employer to assign him to "light duty" for one week. (Comp. Exh. 4, Tr. 42, 59) Dr. Frankle advised Complainant to request jobs that he could perform to get off his feet. However, Dr Frankle did not specify on the note what "light duty" meant. (Tr. 42)

21. Complainant understood "light duty" to mean sitting down at an assigned post. (Tr. 107)

22. Complainant gave Dr Frankle's note to his supervisor, Sharon Arnold, who assigned him to work for the next three days at Complainant's preferred posts. (Tr. 43) Complainant wanted to be assigned to posts where he could sit down during his shift. (Tr. 37)

23. On April 18-19, 2007 Complainant was assigned to the security "key box" post, which he had never worked before. Complainant had to be trained for the post by another officer. (Tr. 45, 213)

24. On April 20, 2007 Complainant was assigned to a "door" post. (Tr. 48)

25. On April 21, 2007 Complainant was assigned to a "door" post when he was called in to speak with supervisors Joan Lewis and Andrew Ball. (Tr. 48) Lewis and Ball sent Complainant home that night because Complainant was still working under the "light duty" restriction. (Tr. 49)

26. Lewis and Ball informed Complainant that Assistant Security Director Jason Bittinger informed them there was no "light duty" assignment for a security officer. All officers had to be fit to perform all of the essential functions of their job while on full duty. (Resp. Exh. 9, Tr. 49)

27. On April 24, 2007 Complainant called Bittinger and asked to return to work given that his doctor's note for "light duty" work expired the following day. (Tr. 51) Bittinger welcomed Complainant back to work and memorialized this conversation with Complainant in an incident report. (Resp. Exh. 10, Tr. 160)

28. Complainant worked from April 25, 2007 through April 29, 2007 without incident. (Tr. 52)

29. On May 2, 2007 Complainant visited Dr. Ira Kirschenbaum, an orthopedist, who directed his employer to assign Complainant to "light duty" for two weeks. (Joint Exh. 2) The note specified that Complainant complained of back pain and difficulty with his range of motion. Dr. Kirschenbaum diagnosed Complainant with a "lumbar sprain". (Joint Exh. 2, Tr. 54-5)

30. On May 5, 2007 Complainant handed Dr. Kirschenbaum's note to Assistant Chief Whalen. (Tr. 55) Complainant was not scheduled to work until May 8, 2007. (Tr. 54-6)

31. On May 7 2007 Complainant received a call at home from the head of Human Resources, Kevin Bogle. Bogle informed Complainant he could not return to work until he had a doctor's note that cleared him for full duty. (Tr. 56)

32. Complainant did not work from May 8 through 12, 2007. (Tr. 56)

33. On May 11, 2007 Dr. Kirschenbaum wrote Complainant a note clearing him to return without restrictions. (Joint Exh. 3, Tr. 58)

34. On May 14, 2007 Complainant received an MRI from White Plains Radiology Associates. The MRI revealed that Complainant suffered from moderate scoliosis of his lower lumbar spine. (Comp. Exh. 5) Complainant did not give a copy of this MRI report to Respondent until June 4, 2007. (Tr. 60)

35. On May 15, 2007 Complainant returned to work. (Tr. 59)

36. On May 18, 2007 Complainant was absent from work without notice. (Resp. Exh. 7)

37. On June 4, 2007, Chief of Security Joe Kostik implemented a new short sleeve shirt policy for all uniform personnel. (Resp. Exh. 14) This policy required personnel to wear a short sleeve shirt, which Respondents would pay for, or not be allowed to work post assignments. (Resp. Exh. 14, Tr. 67, 120) The policy was put out in letter form and posted in Respondent's security office. (Tr. 94-5) All personnel, Complainant included, were given vouchers to purchase short sleeve shirts. (Tr. 96)

38. On June 6, 2007 Complainant reported to work in a long sleeve shirt because he had not picked up his short sleeve shirts. (Tr. 67) Arnold allowed Complainant to finish his shift that day but told him not to return to work after the completion of his shift unless he had the proper uniform. (Resp. Exh. 15, Tr. 68)

39. On June 7, 2007 Complainant called in and informed Respondent he would not report to work because he did not obtain the required short sleeve shirt. (Resp. Exh. 15, Tr. 69)

40. Complainant refused to obtain the short sleeve shirt because Respondent failed to personally ask Complainant if he wanted this uniform change. (Tr. 97)

41. On June 8, 2007 Complainant failed to call in and failed to report to work. (Resp. Exh. 7, 15)

42. On June 9, 2007 Complainant failed to call in and failed to report to work. (Resp. Exh. 7, 15)

43. Complainant conceded he did not call in and did not report to work on June 8 and 9, 2007. (Tr. 70-1) Complainant was aware of Respondent's Absenteeism/Lateness policy which required him to call in when he did not show up for work. (Tr. 103)

44. On June 11, 2007 Complainant was issued a written Notice of Unsatisfactory Performance letter, and terminated from his employment due to his failure to report to work without notification on two consecutive work days, June 8 and 9, 2007. (Resp. Exh. 16, Tr. 72-3, 186, 188-9)

OPINION AND DECISION

The Human Rights Law defines the term "disability" as a "physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function...which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." Human Rights Law §296.21. 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) §296.21(a); *see also Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983), *Fama v. American Int'l Group, Inc.*, 306 A.D.2d 310, 760 N.Y.S.2d 534 (2nd Dept. 2003), *lv. denied*, 1 N.Y.2d 508, 777 N.Y.S.2d 17 (2004).

Complainant established that his doctor diagnosed him with a "lumbar sprain" which was later confirmed to be scoliosis after further tests.

However, Complainant's diagnosed condition prevents him from performing the essential functions of his job as a security officer with or without an accommodation. Complainant could not run at full speed nor restrain someone without suffering back pain. Complainant concedes that as a security officer he would be called upon in situations to use physical force to apprehend an individual or quickly respond to assist other officers with unruly patrons regardless of where he was assigned. No accommodation by Respondent would allow Complainant to perform this aspect of his job because his disability prevents him from doing so. Therefore, Complainant is not a person with a disability as defined by the Human Rights Law.

Complainant further argues that Respondent engaged in unlawful discrimination by refusing to accommodate his disability after initially allowing him to work after he submitted documentation asking for a "light duty" restriction. It is true that Respondent is obligated to provide a reasonable accommodation for Complainant's disability. Human Rights Law §296.3. Forms of reasonable accommodation include, but are not limited to: "making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position." 9 N.Y.C.R.R. § 466.11(a)(2). Furthermore, 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).

Complainant requested an accommodation to be assigned to specific posts which did not require him to stand. This request that a "light duty" position be created which would allow Complainant to determine which post he can be assigned while sitting is not a reasonable accommodation. Complainant would be able to avoid performance of an essential element of the job's function, i.e., to have to stand, run and quickly respond to Respondent's security needs as a security officer. An accommodation that eliminates an essential function of the job is not reasonable. *Hall v. United States Postal Service*, 857 F.2d 1073 (6th Cir. 1988), *Hardy v. Village of Piermont*, 923 F.Supp. 604 (1996). The law does not obligate an employer to create a light-duty position to accommodate, as Complainant requested. *Mair-Headley v. County of Westchester*, 41 A.D.3rd 600, 837 N.Y.S.2d 347 (2007).

Lastly, Complainant claims Respondent fired him because of his disability. The record does not support this position. Rather the record, replete with Complainant's own admissions, established that he was terminated for failure to call in on two consecutive days when he failed to report to work. Complainant concedes that he violated Respondent's policy when he did not report to work and failed to notify Respondent. Hence, Respondent had a legitimate explanation for Complainant's termination- namely, that Complainant violated policy, and was not a pretext for unlawful discrimination. Complainant's claim that he could not have worked those two consecutives days without the proper short sleeve shirt uniform is unavailing, since not having such a uniform did not prevent Complainant from following policy and calling in when he failed to report to work. Therefore, I conclude that Complainant's termination was for legitimate, non-

discriminatory reasons.

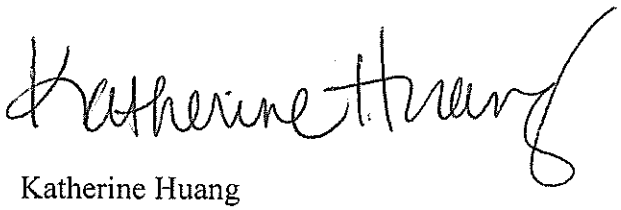
Because Complainant's termination was unrelated to his disability, his disability discrimination claims fails and the complaint is dismissed.

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: June 17, 2009
Bronx, New York



Katherine Huang
Administrative Law Judge