NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

DOUDOU B. JANNEH,

Complainant,

v.

REGAL ENTERTAIMENT GROUP,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10106528

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on February 27, 2008, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Margaret A. Jackson, 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 Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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 25th day of March, 2008.

KUMIKI GIBSON
COMMISSIONER

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ALTERNATIVE PROPOSED ORDER

Case No. **10106528**

Respondent discriminated against Complainant based on his disability, but not his age. Because there is no evidence of damages suffered, no damages are awarded.

PROCEEDINGS IN THE CASE

On July 18, 2005, 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 referred the case to public hearing.

After due notice, the case came on for hearing before Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. A public hearing took place on November 7 and 8, 2007. Complainant was represented by Rick S. Geiger, Esq. Respondent was represented by Hinman, Howard & Kattell, LLP, by Paul T. Sheppard, Esq. and Dawn Lanouette, Esq.

Post-hearing submissions were filed by Respondent's counsel.

On January 25, 2008, ALJ Jackson issued a recommended Findings of Fact, Opinion and Decision and Order ("Recommended Order"). Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit by Complainant's counsel dated February 13, 2008, and by Respondent's counsel dated February 19, 2008.

FINDINGS OF FACT

1. In the complaint, Complainant alleged that Respondent discriminated against him based on his race and color, age and disability and then subsequently retaliated against him for opposing discrimination. (ALJ's Exhibit 1) The parties stipulated that the only issues in contention by the time of the hearing were Complainant's claims that Respondent discriminated against him based on his age and disability. (Tr. A[1] 12-13)

2. During the relevant period, Respondent operated movie theaters throughout the United States. (Tr. A 101)

3. In 1999, Complainant began working as a floor staff employee at Respondent's movie theatre in Binghamton, New York. Complainant worked two to three shifts per week and earned approximately $400 per month. (Tr. A 9-10, 17, 27, 48, 86-87, 98)

4. Eric Larkin was the Binghamton theater's general manager. (Tr. B 9)

5. In 2005, Complainant suffered from an inflammation in his leg muscles from a neuromuscular disorder. (Tr. A 36, 39) Complainant missed several shifts of work due to his illness. (Tr. A 65, 167; Tr. B 16)

6. Respondent maintained an accommodation and non-discrimination policy for employees with disabilities. (Respondent's Exhibit 13; Tr. A 106). Pursuant to its policy,

[1] "Tr. A" refers to the transcript dated November 7, 2007, and "Tr. B" refers to the transcript dated November 8, 2007.

Respondent was to provide reasonable accommodations unless such accommodations resulted in an undue hardship or created a safety hazard. (Respondent's Exhibit 13).

7. Respondent also maintained an absenteeism policy. Pursuant to its absenteeism policy, Respondent required its employees to call in for any shifts missed. If an absence due to medical reasons was to exceed three days, the benefits department was to be notified. The benefits manager would then, as a matter of course, determine the employee's eligibility for Family Medical Leave Act ("FMLA") leave. If an employee was ineligible, he was notified of such and that he was "voluntarily resigned." In other words, Respondent terminated the employee's employment. (Tr. A 108-09, 115-17, 151-52; Tr. B 37-38)

8. In June of 2005, Complainant informed Larkin that he was ill. (Tr. A 45-47; Tr. B 17) Complainant's wife provided a note from Dr. Shawn Berkowitz, dated June 10, 2005, indicating that Complainant was under his care and being evaluated for muscle pains. The document submitted into evidence is a photocopy of a facsimile and is cut off on the right margin, but presumably reads, "and [is unable] to return to work at this time, due to symptoms. Will re-evaluate on June 14th." (Complainant's Exhibit 4; Tr. B 17) Larkin forwarded the note to Jean Ryan, Respondent's benefits manager, indicating that Complainant's absence had exceeded three days. (Tr. A 122, 156; Tr. B 18)

9. Ryan determined that Complainant did not qualify for FMLA leave. (Tr. A 125) By letter dated June 21, 2005, Ryan informed Complainant that his FMLA leave request was denied as he did not qualify based on his having worked an insufficient number of hours in the previous year. According to the letter, Complainant was "considered to have voluntarily resigned for personal reasons. When [he was] released to return to work by [his] physician, and to the extent

that positions [were] available, [he was permitted] to reapply for employment." (Complainant's Exhibit 2; Tr. A 102, 126)

10. In a response letter dated July 8, 2005, Complainant communicated to Ryan that he did not apply for FMLA leave and that he needed time off to attend to his medical condition. He further indicated that he was not resigning his employment. (Respondent's Exhibit 10; Tr. A 82). Complainant also informed her of this by telephone. (Tr. A 128-29) Ryan testified that Complainant never asked her for an accommodation for a disability and that he never requested leave. She stated that if had she received a request for medical leave of absence, she would have determined FMLA leave eligibility and if she determined ineligibility, she would have forwarded the request to the human resources manager. (Tr. A 127-30)

11. Complainant's July 8th letter, however, is clear that he "never requested a *family leave* [but] has spoken to [his] Manager about taking a few days for medical reasons." (emphasis added) (Respondent's Exhibit 10). Complainant also made clear that he was "under doctor's care." (Respondent's Exhibit 10).

12. Upon determining that Complainant was ineligible for FMLA leave, instead of forwarding his information to the human resources manager, on June 21, 2005, Ryan terminated his employment. (Complainant's Exhibit 2; Tr. A 34-35)

13. The record demonstrates that Complainant was unable to return to work in June when he received the letter from Ryan and was unable to return to work as of the date he wrote the response letter to Ryan. Complainant further admitted that that up to the date of the hearing in this matter, he had yet to request a clearance from his doctor to return to work because he was still undergoing therapy. (Tr. A 83-84)

14. In July of 2005, Complainant was diagnosed with inflammatory necrotizing myopathy. (Respondent's Exhibit 9; Tr. A 65) Complainant was hospitalized from September 5 through December 16, 2005. Thereafter, he remained homebound and reliant on the care of others through the beginning of the summer of 2006. (Respondent's Exhibits 6, 7, 8, 9; Tr. A 40, 65-71, 74) Complainant continued to recover from his illness up to the date of the hearing. (Tr. A 41, 65, 75)

15. Complaint received Social Security Disability benefits in 2005 in excess of $8,000. (Respondent's Exhibit 11; Tr. A 86-87) Complainant continued to receive approximately $665 per month in disability benefits up to the date of the hearing. (Tr. A 88)

16. Complainant also alleged that Respondent's school-leave policy discriminated against him based on his age. (ALJ's Exhibit 1) Respondent's school-leave policy permitted students to attend school and return to work on their school breaks. Respondent's school-leave policy applied to any employee enrolled in a course of study. (Tr. A 120-21) The policy had no restrictions with regard to age. Any student was eligible. (Tr. B. 16) Complainant never registered to take any courses and never requested leave pursuant to the school leave policy. (Tr. A 90)

OPINION AND DECISION

Respondent discriminated against Complainant based on his disability. Respondent did not discriminate against Complainant based on his age.

It is an unlawful practice for an employer to refuse to provide a reasonable accommodation for an employee's known disability. *See* Human Rights Law § 296.3.

Once an employer is made aware that an employee suffers from a disability and may need an accommodation, the employer must engage in an interactive process with the employee to

determine if a reasonable accommodation exists. *See* 9 N.Y.C.R.R. § 466.11(e). Under the Law, an employer must "move forward to consider accommodation once the need for accommodation is known or requested." 9 NYCRR § 466.11(j)(k); *see also Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 218 (2d Cir. 2001) ("ADA envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated"); *Hayes v. Estee Lauder Cos., Inc.*, 34 A.D.3d 735; 825 N.Y.S.2d 237 (2d Dept. 2006) (same as applied to Human Rights Law); *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141; 811 N.Y.S.2d 381 (1st Dept. 2006) (same as applied to Human Rights Law). Moreover, an employee need not utter any particular "magic words" to request an accommodation. *See Coneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 332 (3rd Cir. 2003); *see also Taylor v. Phoenix Sch. Dist.*, 184 F.3d 296, 313 (3rd Cir. 1999). Once the need for an accommodation is communicated, the employer must engage in an interactive process to determine what reasonable accommodations may be available. *Id.* And, reasonable accommodations for temporary disabilities include reasonable recovery time. *See* 9 N.Y.C.R.R. § 466.11(i).

In the instant case, Complainant informed Larkin that he was ill and submitted to Respondent a doctor's note indicating that he was under medical care. Even though Respondent had a reasonable accommodation policy in place, Respondent failed to engage in an interactive process with Complainant. And, while the record makes clear that Complainant's disability was of the nature that he was unable to return to work up to the date of the hearing, Respondent was not aware of the extent of his illness at the time it terminated his employment. Indeed, he had not yet been diagnosed. Thus, by ignoring Complainant's medical condition and failing to engage in an interactive process to determine if it could have accommodated Complainant with temporary leave or in some other manner, Respondent violated the Human Rights Law.

Complainant admitted that he was unable to return to work due to his condition. Further, during the relevant time period, Complainant earned more from Social Security Disability than he would have earned working for Respondent. Moreover, there is no evidence that Complainant suffered any mental anguish as a result of Respondent's discriminatory behavior. Thus, Complainant is not entitled to an award of damages.

Complainant's claim of age discrimination, however, fails as a matter of law. Respondent's student-leave policy applied to all students, regardless of age. Complainant was not enrolled in any classes and did not request student leave. Accordingly, Complainant's age complaint is dismissed.

ORDER

Based on the foregoing, and pursuant to the provisions of the Human Rights Law and the Rules of Practice of the Division, it is

ORDERED, that the complaint relating to age is dismissed; and it is further

ORDERED, that the complaint relating to disability is sustained; and it is further

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices against people with disabilities; and it is further

ORDERED, that Respondent shall take the following actions to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty days of the date of the final Order, Respondent amend its disability policy so that it articulates a lawful means for providing its employees reasonable accommodations for their disabilities. Said policy shall be immediately posted in prominent

places in Respondent's office spaces where employees may view it, and it shall immediately be distributed to all of Respondent's employees.

2. Within sixty days of the date of the final Order, Respondent shall produce a training schedule to all of its employees, including managers on its disability policy.

3. Within sixty days of the date of the final Order, Respondent shall prominently post the Division of Human Rights' poster (available from the Division's offices and on its website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights Is...") in places in Respondent's office spaces across New York State where employees may view it.

4. Respondent shall simultaneously furnish written proof of its compliance with the directives contained in this Order to Caroline J. Downey, General Counsel of the New York State Division of Human Rights, at her office address at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Respondent shall cooperate with the representatives of the Division during any investigation into the compliance with the directives contained within this Order.

DATED: FEB 27 2008
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS

PETER G. BUCHENHOLZ
Adjudication Counsel