



DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

PATRICK H. KELLEHER,

Complainant,

v.

NEW YORK STATE, DEPARTMENT OF
CORRECTIONAL SERVICES,

Respondent.

and NEW YORK STATE, DEPARTMENT OF
CIVIL SERVICE, NEW YORK STATE, OFFICE
OF THE STATE COMPTROLLER, Necessary
Parties.

NOTICE AND
FINAL ORDER

Case Nos. 10119004, 10121828

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 5, 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.

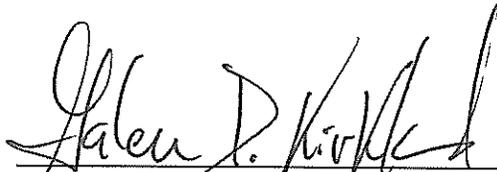
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE

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: **JAN 29 2010**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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**NEW YORK STATE, DEPARTMENT OF
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CIVIL SERVICE, NEW YORK STATE,
OFFICE OF THE STATE COMPTROLLER,**
Necessary Parties.

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

Case Nos. **10119004, 10121828**

SUMMARY

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

PROCEEDINGS IN THE CASE

On July 13 and November 29, 2007, Complainant filed verified complaints 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 complaints 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 November 19 and 20 and December 15 and 16, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent was represented by Herman Reinhold, Esq.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

FINDINGS OF FACT

1. Complainant was born on November 16, 1948. Complainant joined the United States Marine Corps in 1968 and served a tour of duty in Vietnam. Complainant has been diagnosed with Cervical Radiculopathy, Cervical Stenosis, Cervical Degenerative Disc Disease, Lumbosacral Radiculopathy, Post-concussion Syndrome, Posttraumatic Stress Disorder, Vietnam related, mild high frequency neurosensory hearing loss in the right ear, and moderate high frequency neurosensory hearing loss in the left ear.

(Complainant's Exhibits 10, 14, 21; Tr. 66, 290-91, 315-16, 318, 322, 325-29)

2. In May of 1996, Complainant began his employment with Respondent as an Alcohol and Substance Abuse Treatment ("A.S.A.T.") Program Assistant ("P.A.") at the Lake View Shock Incarceration Correctional Facility. In August of 1997, Complainant transferred to the Gowanda Correctional Facility ("Gowanda"). (Complainant's Exhibit 15; Tr. 300-03)

3. In February of 2006, Complainant was prepared to transfer to Attica Correctional Facility ("Attica"). Complainant had passed a Civil Service promotional test for A.S.A.T. Corrections Counselor ("C.C.") and, by transferring to Attica, Complainant would take a position as a C.C. On February 8, 2006, before the transfer, Complainant was interviewed by Senior Corrections Counselor ("S.C.C.") Wendy Cully ("Cully") at Gowanda for a C.C. position. In her interview notes, S.C.C. Cully indicated that Complainant admitted that he was a difficult employee but that Complainant said that a promotion would change him. S.C.C. Cully also noted that, rather than recommend Complainant for the position, she recommended that Respondent find a more suitable candidate for the position. By letter dated February 16, Complainant was informed that he was not selected for the C.C. position at Gowanda. (Respondent's Exhibit 4; Tr. 277., 877-79) Complainant transferred to Attica on February 16, 2006 and, as a new C.C., Complainant was placed on probation. (Complainant's Exhibit 15; Tr. 303-04, 332- 33)

4. While at Attica, Complainant contacted Steven Klippert ("Klippert"), an S.C.C. at Gowanda. Complainant told S.C.C. Klippert that he wanted to return to Gowanda. Complainant wanted S.C.C. Klippert to advocate for Complainant's return. S.C.C. Klippert was hesitant to do so because Complainant had been difficult to work with when he was previously at Gowanda and employees did not want him back. Complainant told S.C.C. Klippert, similar to what he told S.C.C. Cully during his failed interview in February, that the promotion changed him. He told S.C.C. Klippert, "When I was a P.A. I was a real asshole. Now that I'm a 19 (C.C.) it's what I need to be." S.C.C. Klippert recommended to the Superintendent that they take a chance that Complainant had changed. S.C.C. Klippert told the Superintendent, "He's a remarkable counselor when he decides to be." (Tr. 534-36, 538, 977)

5. S.C.C. Klippert did not contact anyone at Attica to see how Complainant was performing before advocating for Complainant's return to Gowanda. (Tr. 980-81)

6. Complainant returned to Gowanda on August 3, 2006, and, since he was still on probation, he received an evaluation for his performance during his first six weeks back. S.C.C. Klippert was disappointed in Complainant's performance. During the first six weeks back at Gowanda, Complainant was threatening and intimidating in his interactions with other employees. (Complainant's Exhibit 15; Respondent's Exhibit 4; Tr. 977-78)

7. In October of 2006, S.C.C. Klippert spoke with S.C.C. John Whiteford ("Whiteford"), Complainant's supervisor at Attica, regarding Complainant's performance while at Attica. S.C.C. Klippert learned from S.C.C. Whiteford that P.A.s that worked with Complainant at Attica felt intimidated by him.

(Complainant's Exhibit 15; Respondent's Exhibit 4; Tr. 980-83, 1111-16)

8. S.C.C. Klippert discussed with Complainant the problems with Complainant's behavior and the need for change and Complainant initially complied. (Tr. 554-55, 983)

9. In January or February of 2007, Complainant was supervising P.A. Kimberly Zahm-Fraser ("Zahm-Fraser"). This was a temporary assignment for Complainant. P.A. Zahm-Fraser was concerned that C.C. Timothy Braugher ("Braugher") would become her supervisor. P.A. Zahm-Fraser spoke with both S.C.C. Klippert and S.C.C. Cully, separately, indicating that she felt uncomfortable around C.C. Braugher. P.A. Zahm-Fraser was concerned that C.C. Braugher had a sexual interest in her. P.A. Patricia Allen was promoted to C.C. and became P.A. Zahm-Fraser's supervisor, taking over Complainant's temporary assignment. C.C. Braugher never became P.A. Zahm-Fraser's supervisor. Complainant contends that he made S.C.C. Klippert aware of P.A. Zahm-Fraser's concern and that S.C.C. Klippert threatened

Complainant with demotion if Complainant didn't "mind (his) own business." Complainant never made S.C.C. Klippert aware of P.A. Zahm-Fraser's concern regarding C.C. Braughler. S.C.C. Klippert never threatened Complainant regarding any alleged advocacy expressed by Complainant on behalf of P.A. Zahm-Fraser. Complainant's alleged advocacy of P.A. Zahm-Fraser was not the reason the supervision of Zahm-Fraser changed from Complainant to C.C. Allen. (ALJ's Exhibit 1; Respondent's Exhibit 5; Tr. 186-90, 332, 679-80, 901, 963-64, 966)

10. On February 16, 2007, Complainant successfully completed his probationary period as a C.C. (Complainant's Exhibit 15)

11. On April 19, 2007, S.C.C. Rachel Young ("Young") from Respondent's Central Office visited Gowanda to inspect program activities. S.C.C. Klippert took S.C.C. Young to observe Complainant. Complainant was disrespectful toward S.C.C. Young, loudly arguing with her, questioning her experience and her education. (Tr. 555-60, 564-65, 570)

12. On April 27, 2007, S.C.C. Klippert conducted a meeting with staff to discuss professional behavior. Complainant was disruptive at the meeting, yelling at S.C.C. Klippert. When the meeting ended, Complainant loudly confronted C.C. Braughler. S.C.C. Cully stepped in front of Complainant and directed him to back away. Complainant did not comply with S.C.C. Cully's direction. S.C.C. Cully then directed Complainant to accompany her to her office. Complainant complied with this direction. While in S.C.C. Cully's office, Complainant questioned S.C.C. Cully in an aggressive manner and appeared unable to control his emotions. When Complainant left, S.C.C. Cully informed Deputy Superintendent for Programs ("D.S.P.") Jose Melendez ("Melendez") what had happened and S.C.C. Cully and others completed memos regarding what happened. (Respondent's Exhibit 5; Tr. 383-94, 569, 572)

13. On May 1, 2007, Superintendent Richard A. Savage ("Savage") spoke with Complainant and ordered Complainant to draft a memo regarding what happened on April 27, 2007. Complainant refused. Superintendent Savage again ordered Complainant to draft the memo and Complainant again refused, saying, "I have a hearing disability." Later that day, Complainant drafted the memo. (Respondent's Exhibit 5)

14. By letter dated May 2, 2007, Respondent informed Complainant that because of his confrontational behavior exhibited on April 27, his presence at the workplace represented a potential danger to others. Respondent further informed him that he was placed on involuntary leave pursuant to Civil Service Law § 72 (5). (Respondent's Exhibit 5; Tr. 581-86) On May 17, 2009, Complainant was evaluated by a psychiatrist to determine Complainant's fitness to return to work. The doctor found Complainant fit to return to work. (Complainant's Exhibit 10) Complainant returned to work on June 5, 2007. (Respondent's Exhibit 5)

15. On June 12, 2007, S.C.C. Klippert was conducting a staff meeting. Complainant left this meeting without permission. Complainant thereafter reported to D.S.P. Melendez that Complainant was leaving the facility to see his physician and his lawyer. Complainant then left Gowanda without authorization. (Complainant's Exhibit 15; Respondent's Exhibit 5; Tr. 587-90) On June 20, 2007, Respondent issued a Notice of Discipline ("June 20 N.O.D.") to Complainant informing him of Respondent's intention to dismiss him from service for his conduct at and after the meeting of April 27, for his failure to timely provide the memo on May 1, and for his conduct at and after the meeting of June 12. The June 20 N.O.D. was grieved and submitted to arbitration. (Respondent's Exhibits 5, 7)

16. On July 13, 2007, Complainant filed a complaint (Case No. 10119004) with the Division alleging that S.C.C. Klippert had been unlawfully discriminating against Complainant

since January of 2007. Complainant alleged that he was discriminated against because of his age, his military service as a Marine in Vietnam, his hearing disability, and because he opposed unlawful discrimination. (ALJ's Exhibit 1)

17. On September 11, 2007, Complainant was at a meeting with S.C.C. Klippert to discuss his behavior. At the meeting, Complainant yelled at S.C.C. Klippert and refused to comply with his directions. (Respondent's Exhibit 6)

18. In September of 2007, Lesley McNamara ("McNamara") became a D.S.P. at Gowanda. (Tr. 753)

19. By a memo dated October 11, 2007, Complainant requested that S.C.C. Klippert transfer Complainant to a different location at Gowanda with different responsibilities. S.C.C. Klippert supported the move and recommended it to D.S.P. McNamara. D.S.P. McNamara was still in the process of assessing the needs of all of the locations under her responsibility and determined that it was too soon to make that decision. D.S.P. McNamara informed S.C.C. Klippert that she would consider the request again at a later time. I do not credit Complainant's testimony that S.C.C. Klippert told Complainant that he was too old to take on new responsibilities. (Respondent's Exhibit 6; Tr. 684-85, 736, 771-74)

20. On October 30, 2007, Complainant attended a mandatory training session at Wende Correctional Facility ("Wende"). During the session Complainant informed C.C. Patricia Hartinger ("Hartinger") that he didn't feel well and that he was going to rest in his car. When C.C. Hartinger returned from lunch, she informed S.C.C. Klippert that Complainant was in his car asleep. S.C.C. Klippert told C.C. Hartinger to let Complainant sleep. S.C.C. Cully asked S.C.C. Klippert where Complainant was and S.C.C. Klippert told S.C.C. Cully that Complainant wasn't feeling well and was sleeping in his car. One of the instructors of the training asked

S.C.C. Cully why Complainant did not return and S.C.C. Cully explained the situation and told the instructor that she would follow up with S.C.C. Klippert and D.S.P. McNamara.

(Respondent's Exhibit 6; Tr. 726-28)

21. On October 31, 2007, D.S.P. McNamara was informed of Complainant's absence from the afternoon training session at Wende. D.S.P. McNamara directed that S.C.C. Cully, S.C.C. Klippert, C.C. Hartinger, and Complainant provide her with memos regarding what had happened at the mandatory training at Wende. At first, Complainant refused to comply. When D.S.P. McNamara was directing Complainant to provide a memo, Complainant was yelling at D.S.P. McNamara, and was belligerent. Complainant finally relented and provided a memo.

(Respondent's Exhibit 6, Tr. 760-64, 831-36) On November 1, 2007, D.S.P. McNamara requested that disciplinary action be taken against Complainant and recommended his dismissal because of his insubordination toward her and because of his absence from the training without permission. (Respondent's Exhibit 6; Tr. 764-66) On November 2, 2007, Complainant informed D.S.P. McNamara that he had been taking medication that caused him, at times, to not know what he was doing. (Respondent's Exhibit 6; Tr. 826)

22. On November 5, 2007, D.S.P. McNamara formally counseled S.C.C. Klippert for exhibiting poor judgment in the way he handled Complainant's absence from the training session at Wende. (Respondent's Exhibit 6; Tr. 768)

23. On November 8, 2007, D.S.P. McNamara informed Respondent's Personnel Department of Complainant's recent behavior and his admission that, at times, he did not know what he was doing, indicating her concern that Complainant could be a danger to himself and others. (Respondent's Exhibit 6; Tr. 826-28) On November 9, 2007, Complainant received a Notice of Discipline informing him of Respondent's intention to dismiss him from service for his

conduct on October 30 and 31. (Respondent's Exhibit 6) By letter dated November 13, 2007, Respondent again informed Complainant that because of his confrontational behavior, his presence at the workplace represented a potential danger to others. Respondent further informed him that he was placed on involuntary leave pursuant to Civil Service Law § 72 (5).

(Respondent's Exhibit 6)

24. On November 29, 2007, Complainant filed another complaint (Case No. 10121828) with the Division alleging that, because Complainant opposed unlawful discrimination by filing Case No. 10119004 with the Division, S.C.C. Klippert and C.C. Braughler had been unlawfully discriminating against Complainant since July 13, 2007. Complainant further alleged that, pursuant to Respondent's letter of November 13, 2007, he was placed on involuntary leave because he filed Case No. 10119004. (ALJ's Exhibit 1)

25. Complainant contends that S.C.C. Klippert and C.C. Braughler harassed Complainant "every single day" Complainant went to work. (Tr. 335-36) Complainant claims many forms of discrimination by S.C.C. Klippert and C.C. Braughler, including flashing the lights in his office on and off knowing that this caused headaches for Complainant, screaming in his ear, whispering during telephone conversations, calling him crazy and psycho, calling him a baby killer, making Complainant work in various locations, delaying the review of Complainant's work, not inviting Complainant to meetings, not providing Complainant specific training, taking Complainant's computer away, telling Complainant that he was too old to learn new ideas, and failing to reasonably accommodate Complainant's disabilities. (ALJ's Exhibits 1, 3; Tr. 275, 334-40, 685, 688-92, 701) Complainant presented contradictory evidence including the way S.C.C. Klippert handled the concerns of P.A. Zahm-Fraser. I do not credit Complainant's testimony or the testimony in support of Complainant's complaints. (ALJ's Exhibits 1, 3; Respondent's

Exhibits 5, 6; Tr. 186-95, 304-05, 311-12, 319-21, 332-33, 652-53, 660-80, 682, 699, 726-28, 830-34, 875-86)

26. S.C.C. Klippert never called Complainant a baby-killer and never made derogatory comments about Complainant's military service. (Tr. 937-38) S.C.C. Klippert and C.C. Braughler did not make derogatory comments to Complainant regarding any of his disabilities. (Tr. 481, 533) C.C. Braughler did not come from behind Complainant and yell in his ear and did not call Complainant on the phone and harass him. (Tr. 352)

27. Respondent made training available to Complainant. I do not credit Complainant's testimony that Respondent ignored Complainant's request for training. (Tr. 339-40, 953-54)

28. In 2007, Respondent was implementing a new computer system at Gowanda. Computers were being replaced. This caused disruption for all C.C.s and C.C.s had to share computers. (Tr. 166-67, 369-70, 463)

29. Respondent has a policy of providing reasonable accommodations to qualified individuals and a procedure to follow for those seeking a reasonable accommodation which includes the requirement that an employee seeking the accommodation provide Respondent with medical documentation to support the request. (Respondent's Exhibit 9)

30. By a memo dated October 9, 2006, Complainant asked for permission to switch the handset of his phone with another one indicating that he needed a handset with a hearing volume adjustment. Complainant failed to submit any medical documentation to support this request and Complainant ceased his pursuit of this request when a maintenance worker provided Complainant with the requested handset. S.C.C. Klippert learned for the first time in 2007 that Complainant claimed a hearing disability. (Complainant's Exhibit 9; Tr. 570, 874-86, 907-08)

31. By a request form dated October 23, 2006, Complainant formally requested a chair with a high back as a reasonable accommodation for cervical radiculopathy. Complainant followed the procedure and provided Respondent with medical documentation to support the request. S.C.C. Klippert approved the request and Respondent complied with the request. (Respondent's Exhibit 28; Tr. 324-25, 856, 869, 943-44)

32. By memo dated June 11, 2007, Complainant requested a reasonable accommodation regarding the light switch in his office. Complainant failed to submit any medical documentation to support this request as he had done for his request in October of 2006 and ceased his pursuit of this request. (Complainant's Exhibit 9; Respondent's Exhibit 6, 9, 10, 29; Tr. 324-25, 756-58, 836-37, 868, 943-44)

33. With regard to the involuntary leave imposed upon Complainant pursuant to Respondent's letter of November 13, 2007, Complainant was cleared to return to work on January 4, 2008. (Respondent's Exhibit 7)

34. On September 10, 2008, a decision was issued with regard to the June 20 N.O.D., with a finding that Complainant was guilty of three of the nine charges brought against him. Respondent's proposed penalty of dismissal was deemed inappropriate and the penalty was a five-day suspension. (Respondent's Exhibit 7)

OPINION AND DECISION

The Human Rights Law 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 age, disability, or military status, 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 raised issues of unlawful discrimination in the terms, conditions, and privileges of employment because of age, disability, and military status and because of retaliation for opposing unlawful discrimination. Complainant can sustain his burden of proving unlawful discrimination in the terms, conditions, or privileges of employment by showing that there was a hostile work environment at his place of employment and that it existed because of his age, disability, or military status or because of retaliation for opposing unlawful discrimination.

To establish that a hostile work environment existed, Complainant must show that he is a member of a protected class, that the conduct or words upon which the claims of discrimination are based were unwelcome, that the conduct or words were prompted because of his age, disability, or military status or because of retaliation for opposing unlawful discrimination, that the conduct or words were “sufficiently severe or pervasive to alter the conditions of the victim’s employment,” and that Respondent is responsible for the conduct or words. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup. Ct. N.Y. County 1997), *appeal dismissed*, 256 A.D.2d 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 691 N.Y.S.2d 383 (1999), *lv. to appeal denied*, 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999). In evaluating a work environment to determine if it was hostile, one must consider the totality of the circumstances from both a reasonable person’s standpoint as well as from the Complainant’s subjective perspective. *See Father Belle*, 221 A.D.2d at 51.

If Complainant was harassed by S.C.C. Klippert and C.C. Braugler “every single day” in ways that disparaged his age, disabilities, or military status or that were caused by Complainant having opposed unlawful discrimination, then a hostile work environment would be established. However, after considering the contradictory evidence presented by Complainant at the hearing, including the way S.C.C. Klippert handled the concerns of P.A. Zahm-Fraser, and Complainant’s demeanor and the demeanor of his witnesses at the hearing, I do not credit Complainant’s testimony or the testimony in support of Complainant’s complaints. I credit the testimony of D.S.P. McNamara, S.C.C. Klippert, and C.C. Braugler. After considering all of the evidence presented and evaluating the demeanor of the witnesses, I find that the credible evidence does not support a finding that there was a hostile work environment at Complainant’s place of employment that existed because of Complainant’s age, disability, or military status or because of retaliation by Respondent for Complainant’s opposition to unlawful discrimination. Complainant’s claims of a hostile work environment that existed because of Complainant’s age, disability, or military status or because of retaliation for opposition to unlawful discrimination are unsubstantiated.

Complainant can also sustain his burden of proving unlawful discrimination in the terms, conditions, or privileges of employment by showing that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997). However after considering the contradictory evidence presented by Complainant at the hearing and Complainant’s demeanor and the demeanor of his witnesses at the hearing, I do not credit the evidence to establish that any adverse action Complainant claimed to have

experienced, occurred under circumstances giving rise to an inference of unlawful discrimination. *Id.*

Further, Complainant can sustain his burden of proving unlawful discrimination in the terms, conditions, or privileges of employment by showing that he engaged in protected activity, that his employer was aware that he engaged in the protected activity, that he suffered an adverse employment action based on his activity, and that there is a causal connection between the protected activity and the adverse action. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 298, 786 N.Y.S.2d 382, 385 (2004). Again, after considering the contradictory evidence presented by Complainant at the hearing and Complainant's demeanor and the demeanor of his witnesses at the hearing, I do not credit the evidence to establish a causal connection between a protected activity on Complainant's behalf and an adverse action taken by Respondent. *Id.*

Finally, Complainant can sustain his burden of proving unlawful discrimination in the terms, conditions, or privileges of employment by showing that Respondent refused to provide a reasonable accommodation to a disability of Complainant. *See Human Rights Law § 296.3(a)*. Respondent has a policy of providing reasonable accommodations to qualified individuals and a procedure to follow for those seeking a reasonable accommodation which includes the requirement that an employee seeking the accommodation provide Respondent with medical documentation to support the request. Complainant was aware of Respondent's policy and procedure and by a request form dated October 23, 2006, Complainant formally requested a chair with a high back as a reasonable accommodation for cervical radiculopathy. Complainant followed the procedure and provided Respondent with medical documentation to support the request. S.C.C. Klippert approved the request and Respondent complied with the request. The other times Complainant claims he requested a reasonable accommodation he failed to provide

Respondent with medical documentation to support the requests and, thereafter, abandoned the requests. Complainant presented no credible evidence to establish that Respondent unlawfully discriminated against him with regard to providing Complainant a reasonable accommodation.

The ultimate burden of proof that Respondent unlawfully discriminated against Complainant is Complainant's burden and Complainant has failed to meet this burden.

See Bailey v. New York Westchester Square Med. Ctr., 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007)

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: May 5, 2009
Bronx, New York



Thomas J. Marlow
Administrative Law Judge



**NEW YORK STATE
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DAVID A. PATERSON
GOVERNOR

GALEN D. KIRKLAND
COMMISSIONER

*Mr. Alan Nolan
Principal
Harvey Milk High School
2 Astor Place, #3
New York, NY 10003*

Dear Mr. Nolan:

It is with pleasure the New York State Division of Human Rights, the preeminent civil rights enforcement agency within the United States, extends an invitation to your school and by extension to your students, an opportunity to participate in a six week program that we have recently developed.

The program affords the students an opportunity to learn about the New York State Human Rights Law and fosters the creation of leadership and advocacy skills in interesting and entertaining manner. The students will also be instructed on how to utilize the information they have learned to teach others within their respective communities while obtaining community service credits, which is a requirement for high school graduation.

Another fascinating component of our program is the opportunity for students to work as part of a statewide team and present a paper at the United Nations International Student Conference.

New York State Division of Human Rights and The United Nations International Student Conference have partnered for the 2010 International Student Conference. The purpose of the conference is to bring together high school students from around the world who are leaders in their schools and communities, to address human rights issues to their peers with possible resolutions.

The goal of our program is to assist educators in developing student leaders and facilitating the process of cultivating advocacy skills and community activism.

Mr. Alan Nolan
January 19, 2010
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Upon receipt of this letter, please contact Ms. Sharon Clarke, Associate Counsel at NYS Division of Human Rights to schedule a meeting to discuss the implementation process.

Your expeditious response is greatly appreciated.

Very truly yours,

Galen D. Kirkland
Commissioner