

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

MICHAEL A. KENNY,

Complainant,

v.

KOHL'S CORPORATION,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10117088

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 August 19, 2008, by Thomas S. Protano, 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 30 2000**
Bronx, New York


GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10117088**

SUMMARY

Complainant suffers from a developmental disability. He worked for Respondent as a maintenance worker for about seven years. In February, 2007, his employment was terminated by Respondent. Complainant alleges he was fired because of his disability, but Respondent has shown that Complainant was dismissed for failing to get approval for his vacation. The case must, therefore, be dismissed.

PROCEEDINGS IN THE CASE

On April 4, 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A Public hearing session was held on April 14, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Jane M. Stack, Esq. Respondent was represented by Stephen F. Goldstein, Esq.

Permission to file post-hearing briefs was granted. Division counsel and Respondent’s counsel filed timely submissions.

FINDINGS OF FACT

1. Complainant is developmentally disabled. He is unable to read or write. (ALJ Exhibit 2; Tr. 14, 45) Complainant can communicate, however, because “[h]e’s a very good speaker,” according to his father, Liam Kenny. (Tr. 45)
2. Liam Kenny is Complainant’s guardian. (Tr. 3)
3. For about seven years, until February, 2007, Complainant worked for Respondent as a maintenance worker. (ALJ Exhibit 2; Tr. 9)
4. During the winter, Complainant and his father, Liam Kenny, routinely took annual vacations to Hawaii. (Tr. 19, 60-61) Complainant knew he needed permission to take the vacation time away from work. (Tr. 19)
5. From January 26, 2007 to February 13, 2007, Complainant and Liam Kenny vacationed in Hawaii. (Tr. 52) Upon returning from Hawaii, Complainant and his father took another trip to Puerto Rico for one week. (Tr. 53)
6. Respondent’s records show that Complainant’s vacation request was approved from January 26, 2007 through February 14, 2007. (Respondent’s Exhibit 2)

7. Upon his return from Puerto Rico, Complainant was informed that his employment was terminated. He had failed to receive prior approval for the second portion of his vacation. As a result, Complainant failed to appear for his regularly scheduled shifts and was fired. (Tr. 54, 75)

8. Liam Kenny asserts that Complainant had permission to take the second vacation. He stated that Complainant called the Respondent's store and spoke to Chad Pettitte, Complainant's supervisor, who granted Complainant permission. (Tr. 63) He also stated that he did not check to make sure Complainant had permission because he felt Complainant "could take care of it." (Tr. 64)

9. When Complainant was asked whether he secured permission to take the Puerto Rico vacation, he stated, "my supervisor said, 'when you come back from Hawaii, which your Hawaii trip has been approved by Kohl's, we will talk about it and I will get back to you;' but when I came back from Hawaii, and I called the store, he was never – he was a hard person to get in touch with." Complainant stated he "never could" speak with his supervisor but left a message with the secretary that was never returned. (Tr. 15-16)

10. Although Liam Kenny had stated that Complainant had permission to take the additional vacation time, he admitted that he only heard from Complainant that Pettitte had said "we will talk about it." (Tr. 63-64)

11. Respondent has fired more than 20 employees who worked in the same store during 2007 for the same reason as Complainant was fired. (Tr. 75)

OPINION AND DECISION

An employer may not fire or otherwise discriminate against an employee on the basis of his or her disability unless that disability precludes the employee from performing the essential

duties of the job. 18 Executive Law §296.1(a). See also, *Miller v. Ravitch*, 60 N.Y.2d 527 (1983).

In order to prevail, the Complainant must first make out a prima facie case by showing that she is a member of a protected class, he was capable of performing the duties of the job in a reasonable manner and Respondent terminated Complainant's employment under circumstances that could lead one to infer that he had been discriminated against. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 93 S.Ct. 1817 (1973); *McEniry v. Landi*, 84 N.Y.2d 554, 620 N.Y.S.2d 328 (1994). If the complainant succeeds in establishing a prima facie case, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its actions. Thereafter, the complainant must demonstrate that the reasons offered by the respondent are merely a pretext for unlawful discrimination. *Matter of Pace University v. New York City Comm. On Human Rights*, 85 NY2d 125, 128 (1995); and, *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999).

Complainant in the instant case was clearly disabled within the meaning of the Human Rights Law and was qualified to hold his maintenance worker's position. Assuming one can infer he was fired under circumstances that were discriminatory, he has established a prima facie case. In response, Respondent states that Complainant overstayed his approved vacation and was dismissed from his employment when he failed to properly seek and receive approval for the extended vacation. Complainant has not shown this to be pretextual and there has been no evidence presented to connect the termination of Complainant's employment with his disability. The mere fact that Complainant has a disability and was fired from his employment by Respondent does not establish a pretext for discrimination. The evidence also shows that

Respondent has terminated the employment of many other employees for the same infraction, which suggests that Respondent was not motivated by discrimination when it fired Complainant.

In her post-hearing submissions, Division Counsel Stack seems takes issue with the fact that Liam Kenny was sequestered outside the hearing room while Complainant testified. Stack states that "Complainant was not allowed to be represented by his guardian..." Stack fails to note, however, that she could have called Liam Kenny to testify first, which would have obviated the need to sequester him. Stack asserts that because Liam Kenny was sequestered, "Complainant's testimony as to verifiable dates and times, as well as money, should be disregarded in its entirety," and "his father's testimony should be given full credence." Even if Complainant's testimony is disregarded and Liam Kenny's testimony is given full credence, the fact remains that Complainant did not secure permission to take the additional vacation time and his employment was terminated as a result of that. Although Liam Kenny claimed Complainant had permission to take his vacation, Liam Kenny's statements regarding this were contradictory and he never stated that he heard Pettite give Complainant permission to take additional vacation time. There is no evidence of discrimination.

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 case be, and the same hereby is, dismissed.

DATED: August 19, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read 'Thomas S. Protano', with a long horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge