ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

PAUL N. LEVOS,

Complainant,

v.

MAINES PAPER & FOOD SERVICE, INC.,

Respondent.

Federal Charge No. 16GB301909

NOTICE AND FINAL ORDER

Case No. 10160242

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 March 31, 2015, by Michael T. Groben, 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 HELEN DIANE FOSTER, 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: JUN 02 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

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MAINES PAPER & FOOD SERVICE, INC.,
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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10160242**

SUMMARY

Complainant alleges that Respondent discriminated against him in employment when it denied him a reasonable accommodation for his disability and suspended him because of his disability. Respondent denies the allegations. Complainant has failed to sustain his burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 21, 2013, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on June 1 and 2, October 1 and 2, and October 14, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Cohen Compagni Beckman Appler & Knoll, PLLC, by Laura L. Spring, Esq., of counsel. Respondent was represented by Frank W. Miller, Esq.

At the public hearing, counsel stipulated to a withdrawal of the fourth and fifth affirmative defenses in Respondent's verified answer with the understanding that the issues addressed in those affirmative defenses are the subject of a another case pending before the Division. (Tr. 130-33; ALJ Exhibit 3)

Permission to file post-hearing briefs was granted, and both parties timely filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant suffers from multiple sclerosis ("MS"). (Tr. 30, 169)

2. Peter Levos is Complainant's brother. (Tr. 27)

3. Prior to his employment by Respondent, Complainant worked as a salesman for CFM, a food service company owned by his family and employing a number of members of his family, including Peter Levos. (Tr. 26-27, 68, 984)

4. CFM was a "broad line" distributor, meaning that it sold a broad range of wholesale food and food service products, including all products that a food service establishment, such as a restaurant, diner or school, might require. (Tr. 26, 612-13)

5. On December 6, 2010, Respondent acquired CFM's assets and hired some of its employees, including Complainant and Peter Levos. (Tr. 27-29, 38, 68-70, 792; Complainant's Exhibit 1)

6. During acquisition discussions before Complainant was hired by Respondent, Peter Levos disclosed Complainant's MS to Stephanie Wyatt ("Wyatt"), Respondent's vice president of human resources ("HR"), and Christopher Mellon, Respondent's chief executive officer. (Tr. 28, 30–32, 58-60, 65, 176, 789-90, 870-71)[1]

7. Guy Zehner ("Zehner") has been Respondent's vice president of sales for 13 years. (Tr. 612)

Respondent's Reasonable Accommodation Policy

8. Respondent maintains an employee handbook which is distributed to all employees, including Complainant. (Tr. 72, 287, 291-93, 606-07; Respondent's Exhibit 1)

9. The handbook sets forth a procedure for compliance with the Americans with Disabilities Act ("ADA") and requests for reasonable accommodations. Pursuant to the procedure, employees are to request accommodations through Respondent's HR department. (Tr. 302-03, 572, 596-97, 795, 873-74; Respondent's Exhibit 1 [pp. 62-63])

10. The handbook further states that when an employee submits a request for accommodation, he or she should include any suggested means "of providing the accommodation." (Tr. 320-21; Respondent's Exhibit 1 [p. 63])

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[1] On one occasion the transcript incorrectly records the acronym "MS" as "a mask." (Tr. 60)

11. Respondent's procedure is to review the accommodation request in light of the employee's job functions and to discuss the accommodation with the employee. (Tr. 881)

Respondent's Central New York Operation

12. Respondent's headquarters, known as Corporate Park, is located in Binghamton, New York. (Tr. 33-34)

13. Respondent divides up the territories in which it does business into "regions." (Tr. 35-36)

14. Respondent used the terms account manager, territory manager, salesperson and district sales representative ("sales representative") interchangeably to describe Complainant's job. (Tr. 37, 44-45, 265, 271, 615-16, 983)

15. Peter Levos was hired by Respondent as the regional manager for its Watertown region (otherwise known as Region 17). Three of the sales representatives hired from CFM, including Tony Derrigo ("Derrigo"), Mike Doldo ("Doldo"), and Complainant, reported to Peter Levos. (Tr. 29-30, 33-36, 76, 985, 986)

16. Leon Schwartz ("Schwartz") worked with Complainant at CFM from 2008-2009. Schwartz was aware of Complainant's MS. (Tr. 984, 999-1000)

17. In or about July 2011, Schwartz was hired by Respondent as a sales representative, and in December 2011, Schwartz replaced Peter Levos as Respondent's Watertown regional manager and Complainant's supervisor. (Tr. 60, 84-85, 260-65, 614, 982, 985-86, 1044, 1102)

18. Schwartz's duties included the general management of his sales representatives, developing sales budgets which set goals for each of his sales representatives to achieve, and monitoring each sales representative's performance on a monthly basis. (Tr. 614-15, 627-29, 982, 1024, 1027)

Complainant's Position and Responsibilities

19. Each of Respondent's sales representatives had a specific territory to service. During the relevant time period, Complainant's customers included approximately 30 to 35 food service establishments located in the area of Watertown, Alexandria Bay, Sackets Harbor, Clayton, Harrisville, Canton and Potsdam, New York.[2] (Tr. 272-73, 307, 793-94, 988–89)

20. Complainant was regarded by Respondent as a good employee, who increased Respondent's sales in his territory. (Tr. 49-50, 76-82, 137-38, 421, 687, 718-19, 720, 747, 1152, 1084, 1088, 1142, 1156; Complainant's Exhibits 2, 3, and 18)

21. Respondent maintains a job description for Complainant's position of sales representative. (Tr. 309-10, 616-18, 794, 801; Complainant's Exhibit 27 [pp. 2-3])

22. Complainant's duties as a sales representative included visiting existing customers in order to offer new products (known as "penetrating" an account), resolving customer complaints, attempting to get an existing customer to become a "prime vendor customer" (in which a customer orders over 80% of his purchases from Respondent), making deliveries to a customer when necessary, collecting payments from customers, interacting with manufacturers' representatives (known as "brokers") to demonstrate new products to customers, providing the customer with Respondent's food service publications and discussing same with the customer in person, and visiting prospective customers to open new accounts. (Tr. 269-71, 274, 279-80, 630, 654-57, 658-68, 697-98, 744-46, 747-49, 982-93, 986-987, 992-95; Respondent's Exhibits 5 and 6)

23. The development of new business was an important part of Complainant's job. (Tr. 274, 346-47)

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[2] Alexandria Bay is referenced as "Alex Bay" in the transcript. (Tr. 272)

24. Respondent's strategy for its sales representatives is known as the "consultive sales" *(sic)* approach. Pursuant to this strategy, sales representatives were expected to educate themselves as to all aspects of the business of the customer or prospective customer, including the physical setting of the establishment, menu, labor costs, and sanitation, so that they could act as full-service consultants, not just as salespersons. (Tr. 623-24, 630-32, 670)

25. Respondent's sales representatives, including Complainant, received extensive training in obtaining and retaining customers as part of Respondent's sales strategy. Personal contact with the customer, at the customer's premises, is essential in order to evaluate and understand the customer's needs, and is a crucial element of the sales strategy. (Tr. 54-55, 266-67, 619-20, 622-23, 632-34, 1017-40, 1150, 1152-53, 1162-63, 1165-67; Respondent's Exhibit 9 [pp. 10, 17-18, 23-24, 30-33])

26. Respondent required its sales representatives to visit customers on a regular basis in order to accomplish the above-noted job duties. (Tr. 307, 654, 673, 674, 989-93, 995, 1042-43)

27. These visits to customers required extensive travel by car. (Tr. 354-60, 634-42, 643-44, 646-53, 654, 738, 739, 773, 995-99, 1099; Respondent's Exhibits 2, 4, and 7)

28. Approximately twenty per cent of a sales representative's work time was spent driving. (Tr. 744, 771-72)

29. Respondent also required its sales representatives to travel to attend its annual major marketing event, known as the Food Show, in order to meet and make presentations to customers, and to travel to frequent sales meetings. The Food Show and the meetings are held in various locations, including Oneida, Binghamton, and other locations in central New York. (Tr. 275-79, 675-78, 781-82, 982-83, 1100-02)

Complainant's 2012 Vacation Leave

30. On October 14, 2012, Complainant sent an e-mail message to Schwartz requesting a combination of personal leave and vacation during October 19-22, November 12-30, and December 10-28, 2012, a period of over six weeks. Schwartz approved the request, and Complainant went out on leave. (Tr. 95-96, 295-96, 1000-01; Complainant's Exhibit 7)

31. Complainant did not supply Respondent with any medical reports in support of his leave request. (Tr. 298-99)

32. During November, 2012, Complainant experienced a "flare-up" of his MS symptoms, including fatigue, visual impairment and "issues" with concentration. (Tr. 96-97, 296)

33. While Complainant was on vacation pursuant to his October 14, 2012 request, he did not come to work or visit customers. Complainant contacted customers by telephone from his home. Complainant was thus able to perform approximately 10 to 15 % of his duties. (Tr. 693-95, 698, 867-68, 1002-1004, 1009)

34. While Complainant was on vacation, the majority of his responsibilities, such as visiting customers to negotiate agreements, collect payments and make deliveries, were done by Schwartz, Doldo, and Derrigo, in addition to their regular duties. (Tr. 775-76, 1002-05, 1020, 1022-23, 1056, 1077-78)

Complainant's January 2013 Leave

35. Complainant continued to experience the flare-up of his MS. On January 2, 2013, Complainant sent an e-mail to Schwartz requesting sick leave for January 2 through January 4 for "MS Issues." *(sic)* (Tr. 112-13, 299-300, 1006; Complainant's Exhibit 13)

36. On January 6, 2013, Complainant sent an e-mail to Schwartz, requesting to take his entire 2013 vacation time for January 7 through 25, 2013. Complainant advised in that e-mail

that he was experiencing fatigue, weakness, double vision, numbness and cognitive dysfunction, and that he required an "accommodation… to recuperate" from MS issues. (Tr. 117, 173, 423-25, 1007; Complainant's Exhibit 15)

37. Complainant did not supply any medical information in support of this request. (Tr. 334)

38. Following Complainant's submission of vacation time request forms on January 7 and 8, 2013, Schwartz approved the vacation request. (Tr. 118-22, 876-77, 1007-08; Complainant's Exhibits 16 and 17)

39. During Complainant's January vacation leave, Complainant continued making telephone calls from home, and Schwartz, Doldo, and Derrigo continued to perform the majority of his duties. (Tr. 122-24, 1006-09)

40. In late December 2012 or early January 2013, Schwartz informed Zehner that Complainant had been on extended vacation leave because of his MS, and that Schwartz did not know when he would come back to work. (Tr. 686-89)

41. In late January 2013, Schwartz ascertained that during November, December, and January, Doldo and Derrigo had been unable to visit Complainant's customers once per week as required, and that therefore those accounts were not being properly serviced. Schwartz also realized that the acquisition of new accounts in Complainant's territory had come to a "standstill." (Tr. 1019, 1023-24, 1076-77, 1079)

42. On or about January 27, 2013, Schwartz sent Complainant's budget for February 2013, in the expectation that Complainant would soon return to work. (Tr. 138-39, 1025-28; Complainant's Exhibit 19)

43. The February 2013 budget included projected increases for sales, penetrating accounts, and bringing in new customers. (Tr. 1026–27; Complainant's Exhibit 19 [pp. 2-4])

44. In order to fulfill the goals of the February 2013 budget, Complainant would have had to make many personal visits to existing customers and prospective customers. Complainant could not do this while working from home. (Tr. 629-31, 720-21, 724, 737, 1026-27)

Complainant's Leave Time Is Exhausted

45. In or about the end of January 2013, Zehner and Schwartz called the HR department and advised that Complainant had exhausted all of his leave time and would not be able to return to work immediately. Until then, Wyatt had not been aware of Complainant's six weeks of vacation leave. (Tr. 377-78, 389-90, 797-98, 874-80, 966, 975)

46. Jessica Kohut is employed by Respondent's HR department. Her duties encompass workers' compensation, disability benefits, payroll, and conflict resolution responsibilities. Kohut's duties do not include requests for reasonable accommodations. (Tr. 477-78, 503, 505)

47. Wyatt directed Kohut to ascertain from Complainant when he could return to work and what his "issues" were. (Tr. 477, 479, 513-14, 515, 576, 798-99)

48. On February 4, 2013, Complainant and Kohut spoke by telephone. In response to Kohut's statement that he had exhausted his leave time, Complainant advised that he had MS. Complainant did not advise further regarding his medical condition, or request an accommodation. Kohut advised Complainant that she would send him Family Medical Leave Act ("FMLA") and disability paperwork to fill out so that he would have a source of income while not at work. (Tr. 144-45, 304-05, 316, 425-26, 480-82, 506-08, 517-18, 541, 576, 589-90, 597, 602-03, 608-09)

49. On February 4, 2013, in response to Complainant's request, Kohut e-mailed to Complainant disability paperwork, and a statement advising of Complainant's right to disability and FMLA. Kohut also stated that she would send Complainant his job description to review with his doctor. (Tr. 153-55, 483-84, 959-60, 962-63; Complainant's Exhibit 24)

50. In her February 4, 2013, e-mail Kohut also stated that "in order to return to work you would need a return to work note from your doctor full duty without restrictions, " and "if you talk to your dr. *(sic)* and they have specific restrictions please have them document those and send those to me." (Tr. 311-13, 465-66, 485-86, 507, 582, 586; Complainant's Exhibit 24) At the public hearing, Kohut was unable to explain why she included those apparently contradictory statements in the e-mail.

51. On February 5, 2013, Kohut e-mailed Complainant a copy of his job description. (Tr. 163-64, 305, 486-87, 577-78, 582-87; Complainant's Exhibit 27)

52. On February 7, 2013 Kohut e-mailed Complainant a statement advising of his responsibility to pay for benefits while on leave of absence, FMLA application paperwork with approval for 12 weeks FMLA leave, and further advising that Complainant would need to present a "fitness for duty" certificate to be restored to employment. (Tr. 170-71, 488, 528-33, 889-90; Complainant's Exhibit 30)

53. Kohut's February 7, 2013 e-mail again advised Complainant that he would need a "return to work note without restrictions" to return to work. Kohut did not understand Complainant's telephone and e-mail communications to her to constitute a request for a reasonable accommodation. (Tr. 488-89, 586-87, 594, 599; Complainant's Exhibit 30)

54. On February 7, 2013, Respondent placed Complainant on disability leave and stopped his salary because he was unable to work and had no paid leave available. (Tr. 228-29, 314-15, 479, 524-25, 548, 592-94)

Complainant's Reasonable Accommodation Request

55. On February 18, 2013, Complainant sent an e-mail to Kohut reciting his MS symptoms including fatigue, weakness, double vision, numbness and cognitive dysfunction, and requesting an accommodation to "work from home." This was the first time Complainant had made such a request. (Tr. 172-74, 337-39, 406, 489-90, 600, 808-09; Complainant's Exhibit 31)

56. Recognizing Complainant's e-mail as a request for accommodation, Kohut referred the request to Wyatt. (Tr. 490, 587, 594-95, 597, 600-01, 609, 802-03; Complainant's Exhibit 31)

57. Wyatt then became aware of the statement in Kohut's previous e-mails to Complainant that he would need a doctor's note "without restrictions" in order to return to work. Wyatt acknowledged at the public hearing that this did not reflect Respondent's reasonable accommodations policy. (Tr. 800-02, 881-82, 888-91, 895-97; Complainant's Exhibits 24 and 30)

58. On February 19, 2013, Wyatt sent an e-mail to Complainant acknowledging receipt of the February 18 accommodation request and stating "we are unable to consider your request until we have a clear understanding of your work status." Wyatt further requested that Complainant return the completed disability paperwork in order to allow her to assess his condition, and the FMLA paperwork in order to preserve Complainant's employment in the meantime. (Tr. 174-75, 343, 804-05, 898-901; Complainant's Exhibit 32)

59. The disability paperwork in question included a section for the Complainant's medical provider to describe any applicable restrictions. Wyatt believed that the completed disability

paperwork would contain medical information needed to make a decision regarding Complainant's accommodation request. (Tr. 805-06, 899-903, 906)

60. Complainant did not respond to Wyatt's February 19 e-mail request. (Tr. 807-08, 956)

61. On February 21, 2013, Complainant filed his Division complaint, alleging that his accommodation request had been denied. (Tr. 340-42; ALJ Exhibit 2)

62. By letter dated February 22, 2013, Wyatt requested that Complainant return the completed disability and FMLA paperwork, and stated a March 1 deadline for same. (Tr. 365, 807-09, 904-05; Complainant's Exhibit 33)

63. On March 1, 2013, Respondent received the partly completed FMLA paperwork back from Complainant, who had written thereon "The company has denied request for a reasonable accommodation." (Tr. 182-84, 186-90, 192, 335-36, 809-11; Complainant's Exhibit 34)

64. Complainant was aware that it is Respondent's policy to place an employee on FMLA leave if said employee qualifies for disability or workers compensation benefits. (Tr. 457-59; Respondent's Exhibit 1 [p. 56])

65. Complainant did not include any medical information with the FMLA paperwork. As of March 1, 2013, the only information Respondent had on file regarding Complainant's symptoms or ability to perform his duties was his February 18, 2013, e-mail to Kohut. (Tr. 300-01, 810-12; Complainant's Exhibits 31 and 34)

66. On March 8, 2013, Wyatt again e-mailed to Complainant, requesting the completed disability and FMLA paperwork or a doctor's note, and advising that Complainant had exhausted his paid leave time, and that Respondent would consider Complainant's job "abandoned" if he did not respond by March 13, 2013. (Tr. 190, 811-14, 907-09, 913, 917-18; Complainant's Exhibit 35)

67. Dr. Luis Mejico, M.D. ("Dr. Mejico"), is associated with the Upstate Neurology Department at University Hospital in Syracuse, New York. (Tr. 313-14)

68. On or about March 14, 2013, Respondent received Complainant's completed disability paperwork. Complainant's physician, Dr. Mejico, stated thereon that Complainant's symptoms included cognitive decrease, fatigue, imbalance, and diplopia, as a result of his MS. (Tr. 195-96, 301, 310, 313, 318-20, 432-33, 814-16, 904, 927; Complainant's Exhibit 37)

69. Dr. Mejico's statement also noted as restrictions and limitations "Driving, tasks that require concentration & attention." (Tr. 821-23; Complainant's Exhibit 37)

70. Dr. Mejico's statement also noted as the date Complainant would be able to perform his usual work full-time "will be reevaluated 06/3/2013." (Tr. 825-26; Complainant's Exhibit 37)

71. Dr. Mejico's statement noted as a necessary accommodation "the ability to work from home to conduct various job duties." (Tr. 826; Complainant's Exhibit 37)

72. Complainant attributed his delay in furnishing Wyatt with completed disability paperwork to Dr. Mejico's unavailability during February. Complainant admitted that he had not asked anyone else at Dr. Mejico's office to furnish the requested medical information. (Tr. 314, 316)

73. Wyatt was familiar with Complainant's job duties. Wyatt concluded that Dr. Mejico's statements did not supply sufficient information as to how Complainant's various symptoms would affect his ability to do his job, including driving, interacting with customers, carrying objects, placing orders, and using a computer, or how many days per week or hours per day Complainant could work, what specific job duties he could or could not accomplish, and when he could resume his full duties. (Tr. 794, 817-30, 903-04, 940, 965; Complainant's Exhibits 27 and 37)

74. By letter and e-mail dated March 29, 2013, Wyatt responded to Complainant regarding Dr. Mejico's statements. Based on Complainant's job description, Wyatt advised that the information Dr. Mejico supplied was not specific enough to decide Complainant's request, and asked the following: (1) whether Complainant could work full-time, and if not how many hours he could work; (2) which of Complainant's duties he could perform at home; (3) whether Complainant could attend company meetings and the Food Show; and (4) whether Complainant could operate a vehicle to visit customers. (Tr. 366-67, 440, 829-31, 918-25; Complainant's Exhibits 27 and 39 [pp. 2-3], Respondent's Exhibit 3)

75. Wyatt also advised in that e-mail "We are happy to send these questions to (your doctor) or have you continue to work directly with your doctor." Wyatt requested a response to her questions by April 5, 2013. (Tr. 831, 833, 926; Complainant's Exhibit 39 [pp. 2-3], Respondent's Exhibit 3)

76. Wyatt also advised in that e-mail that Complainant's disability paperwork had been received and provided to Respondent's disability provider, and that he had five weeks remaining on his FMLA leave. (Complainant's Exhibit 39 [p. 3], Respondent's Exhibit 3)

77. Complainant did not respond to Wyatt's offer to communicate directly with his doctor, nor did he send a permission slip authorizing same. Complainant was aware that Respondent could not communicate directly with Dr. Mejico without his permission. (Tr. 381, 453-55, 832-33, 956-66)

78. On April 10, 2013, Complainant e-mailed to Wyatt a copy of Dr. Mejico's March 13 statement, and responded to Wyatt's questions as follows: (1) "As per the attached I can work from home;" (2) "My limitations are having the ability to drive all of the time to see customers which again as outlined on the attached by my doctor. I also have difficulty with stooping,

kneeling, crouching and crawling and lifting heavy weight;" (3) "Yes. I always ride with someone to attend sales meetings and the Food Show;" (4) "Depending on the severity of my symptoms listed on the attached form depends if I can operate a vehicle. As per the attached physician statement is clearly lists driving as one of my limitations." *(sic)* (Tr. 199-201, 204-05, 366-68, 833-35; Complainant's Exhibit 39 [p. 1])

79. On April 15, 2013, Dr. Mejico sent a response to Wyatt's questions as follows: (1) "Paul can work from home;" (2) "Paul's limitations include excessive driving and decrease physical stamina from chronic fatigue; " *(sic)* (3) "Paul has been able to attend such meetings in the past by riding with someone else and he may continue to do so;" (4) "Paul can drive a vehicle on a limited basis, such as back and forth from home." (Tr. 196-97, 368-69, 380-81, 439-42, 835, 926; Complainant's Exhibit 36)

80. Wyatt reviewed Dr. Mejico's April 15 response, and concluded that it was insufficient to answer whether Complainant could work full-time, and which duties he could and could not do, particularly related to driving and visiting customers, and attending required meetings. (Tr. 835-43; Complainant's Exhibit 36)

81. On April 17, 2013, Wyatt sent an e-mail to Complainant, advising that Dr. Mejico's responses were insufficient to assess how Complainant could fulfill the essential functions of his job, such as his ability to work full-time or part-time. Wyatt again requested answers to her questions and stated that Respondent would consider Complainant's accommodation request when it received said answers. (Tr. 208, 392-97, 843-45, 936-37; Complainant's Exhibits 39 and 40)

82. Complainant did not respond until May 16, 2013, when he stated in an e-mail to Wyatt: "I can work from home with the same schedule that I have followed since the start of my

employment with (Respondent)." (Tr. 209-10, 398-99, 845-46, 937-38; Complainant's Exhibit 41)

83. Respondent received no further communication from Complainant regarding his ability to perform his duties or his physical condition, and concluded that he had abandoned his accommodation request. (Tr. 846-47, 858, 863, 871-72)

84. Complainant received FMLA leave starting February 2013 for the full 12 weeks, and disability benefits over a total of 26 weeks. (Tr. 859-63, 927-28, 958)

85. Respondent terminated Complainant's employment on September 3, 2013. (Tr. 958)

OPINION AND DECISION

It is an unlawful act for an employer to discriminate against an employee on the basis of disability. N.Y. Exec. Law, art. 15 (Human Rights Law) § 296.1(a).

An employer may not discriminate against an employee with a disability which, with or without reasonable accommodations, does not prevent the employee from performing the duties of the job in a reasonable manner. 9 N.Y.C.R.R. § 466.11 (c) (1); *Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983). A "disability" is "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques..." Human Rights Law § 292.21. In order to meet this definition, an employee must only show he suffers from some diagnosable impairment. *See State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985).

A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21.

In order to make out a prima facie case on the basis of disability discrimination, a

complainant must show that he suffered from a disability, and that the disability engendered the behavior for which he was terminated or otherwise discriminated against in the terms, conditions, or privileges of his employment. *McInery v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328 (1994); *Thide v. New York State Dep't of Transp.*, 27 A.D.3d 452, 811 N.Y.S.2d 418 (2d Dept. 2006).

If the complainant succeeds in establishing a prima facie case, the burden of proof shifts to the employer to demonstrate that the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employer's action was motivated by legitimate nondiscriminatory reasons. If the respondent establishes that it had valid nondiscriminatory reasons for its action, the burden shifts back to the complainant to show that the stated reasons were pretextual. *Thide* at 453.

In the instant case, Complainant suffered from MS, and he is thus a person with a disability. On February 7, 2013 Complainant was placed on disability leave, due to the flare-up of his MS symptoms and his consequent inability to come to work. Complainant has demonstrated a prima facie case of disability discrimination. However, the record evidence showed that Complainant was unable to attend to many, if not most, of the duties of his sales representative position. Complainant requested, and received, extended vacation leave during the latter months of 2012 through January, 2013. During this time, Respondent found it necessary to assign most of Complainant's responsibilities to other employees, and its business in Complainant's sales territory suffered as a result. Because Complainant had no paid leave time left at the end of January 2013, and was still unable to perform, Respondent had no choice but to place him in unpaid leave status. Respondent demonstrated that during the flare-up of his MS symptoms, Complainant was unable to perform many, if not most of the duties of his job,

particularly those relating to travel, meeting with customers or prospective customers, demonstrating new products, collecting payments from customers, and other important responsibilities. Respondent offered Complainant the opportunity to apply for disability, an opportunity which he took, and approved FMLA leave for Complainant. Respondent found it necessary to take the above actions in order to protect its business in Complainant's sales territory, and to preserve Complainant's employment while he recovered from the flare-up. Respondent demonstrated that its actions were motivated by legitimate nondiscriminatory reasons, and Complainant failed to demonstrate that these reasons were pretextual in nature. This claim is dismissed.

Reasonable Accommodation

An employer is obligated to provide a reasonable accommodation for an employee's known disability. Human Rights Law § 296.3.

Forms of reasonable accommodation include, but are not limited to: "... 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(2). Both 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.

On February 4, and again on February 7, 2013, Respondent's HR personnel had communicated to Complainant that he could only return to work if he was restored to full duty with "no restrictions," a clearly erroneous statement of Respondent's reasonable accommodation policy. In an effort to preserve Complainant's job, Respondent did approve FMLA leave, and it

provided him with the information necessary to apply for disability payments. Once Complainant made a reasonable accommodation request on February 18, 2013, Respondent promptly reviewed the information Complainant had supplied, and engaged in the interactive process by requesting both medical documentation regarding the need for this accommodation, and more specific information regarding Complainant's ability to perform his job duties, as set forth in Complainant's job description. Over a period of approximately six weeks, Respondent repeatedly requested this information. Complainant responded, after some delay, with vague and nonspecific responses, both from himself, and eventually, from his medical provider. Complainant never provided Respondent with information as to the hours or days he could work, which of Complainant's duties could be performed at home, whether Complainant could travel to meetings, and whether he could visit customers. In the context of Complainant's position as a sales representative, these were significant questions, and Respondent's request was reasonable under the circumstances. Complainant failed to provide the requested information. As a result, Respondent was unable to grant said accommodation.

Complainant failed to provide the information which Respondent required in order to evaluate his request for a reasonable accommodation. Once Respondent made its request for information, it was incumbent on Complainant to provide same. Complainant failed to engage in the interactive process. As a result, his employment was eventually terminated. An employee who was responsible for the breakdown of the interactive process may not recover for a failure to accommodate. *Vinikoff v. New York State Division of Human Rights*, 83 A.D.3d 1159, 1163, 920 N.Y.S.2 458, 462 (3d Dept. 2011). This claim 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 hereby is, dismissed.

DATED: March 31, 2015
Bronx, New York

Michael T. Groben
Administrative Law Judge