NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

RICHARD D. MACE, HARRY W. DORR, SR.

Complainant,

v.

NORTHERN AGGREGATES, INC.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10125964, 10126356

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 September 22, 2009, by Edward Luban, 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: OCT 20 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Nos. **10125964**
10126356

SUMMARY

Complainants alleged that Respondent unlawfully discriminated against them on the basis of their disabilities, by laying off Complainant Dorr and by not rehiring Complainant Mace after a seasonal layoff. Because Complainants failed to sustain their burden of proof, the complaints should be dismissed.

PROCEEDINGS IN THE CASE

On June 16, 2008, Complainant Richard D. Mace 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"). On June 26, 2008, Complainant Harry W. Dorr, Sr. filed a verified complaint with the Division, charging Respondent with unlawful discriminatory practices relating to employment in violation of the Human Rights Law.

After investigation, the Division found that it had jurisdiction over both complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for a combined hearing before Michael Groben, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on June 17, 2009.

Complainants and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by John J. Marzocchi, Esq.

At the hearing, the Division elected not to proceed on Complainant Dorr's allegation of age discrimination. (Tr. B, 6)[1] Both cases proceeded solely on claims of disability discrimination.

The Division and Respondent filed Proposed Findings of Fact and Conclusions of Law after the conclusion of the public hearing.

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division.

FINDINGS OF FACT

Background

1. Respondent operates a plant in Fulton, New York ("plant") that processes sand and gravel to make concrete and aggregates. (Tr. A, 15-16, 110-11, 117-18, 173)

[1] Although the cases were combined for hearing, the allegations involving each Complainant were heard separately. "Tr. A" refers to the transcript of proceedings involving Complainant Mace. "Tr. B" refers to the transcript of proceedings involving Complainant Dorr.

2. Thomas Venezia is Respondent's President. (Tr. A, 110, 142) At all relevant times, Terry Lund supervised the plant. (Tr. A, 20, 77, 100, 172, 174; Tr. B, 28)

3. The plant operates on a seasonal basis; its normal season is from April to November. Employees are usually laid off while the plant is closed. (Tr. A, 22-23, 111, 173)

4. Each spring, employees must attend a federal mine safety class ("MSHA class") before they can return to work at the plant. Respondent notifies the employees when the class will be held, and it pays them to attend the class. (Tr. A, 42, 93-94, 121-22, 191; Tr. B, 68)

5. In the summer of 2006, the plant operated in three shifts, twenty-four hours a day. In 2007, Respondent's business began to decrease. As a result, the plant operated on just two shifts when it opened that spring. The plant continued to operate on two shifts in 2007 and 2008. (Tr. A, 116, 177; Tr. B, 125-26)

6. Respondent reduced its work force substantially between 2007 and 2008. During July and August 2007, the plant had between 48 and 54 employees. During July and August 2008, the plant had between 29 and 36 employees. The bulk of these reductions occurred among drivers, loaders/operators, and mechanics. (Tr. A, 176-78; Respondent's Exhs. 2, 3)

7. The downturn in Respondent's business continued in 2008 and 2009, and Respondent further reduced its work force. As of June 17, 2009, the date of the public hearing, Respondent had not even started up the plant for 2009. (Tr. A, 114, 119-20, 251; Respondent's Exh. 3)

8. Respondent's employees are represented by Local 545-C of the International Union of Operating Engineers ("Union"). The collective bargaining agreement ("CBA") between Respondent and the Union does not protect employees from layoffs on the basis of seniority. (Tr. A, 63, 167; Tr. B, 93; Respondent's Exh. 5)

Complainant Dorr

9. Respondent employed Complainant Dorr as a crusher operator from May 1971 to July 20, 2007. Complainant Dorr's duties included running the crushing plant, maintenance, operating a payloader, and working in other plants operated by Respondent. (Tr. B, 8-9, 85) During the winter, when the plant was closed and Complainant Dorr was on seasonal layoff, he plowed snow for Respondent as needed. (Tr. B, 72-73, 85, 90)

10. In 2002, Complainant Dorr hurt his left shoulder and back in a fall at work. (Tr. B, 21)

11. In September 2005, Complainant Dorr was struck by a rock on his left shoulder while at work. Complainant Dorr worked the rest of the 2005 season and returned to work in 2006. (Tr. B, 9-11)

12. In September 2006, Complainant Dorr had surgery on his left shoulder. Complainant Dorr was out of work for six to eight weeks following surgery. (Tr. B, 12-13)

13. On October 25, 2006, Dr. Ronald W. Baker, M.D., Complainant Dorr's physician, released Complainant Dorr to return to work on October 30, 2006 but restricted him from lifting more than four pounds with his left shoulder or arm. Complainant Dorr returned to work in accordance with Baker's release. (Tr. B, 13-16; Complainants' Exh. 3)

14. On November 14, 2006, Baker reported that Complainant Dorr would be unable to work until a re-evaluation on November 27, 2006. (Tr. B, 18; Complainants' Exh. 3)

15. On November 27, 2006, Baker released Complainant Dorr to return to work the following day, with the same restriction Baker previously recommended. However, Complainant Dorr did not return to work because the plant closed for the season and he was laid off. (Tr. B, 19; Complainants' Exh. 3)

16. Respondent called Complainant Dorr back to work in April 2007. (Tr. 20, 22-23)

17. Complainant Dorr continued to experience pain in his shoulder. On June 1, 2007, Complainant Dorr saw a physician at Upstate Pain Medicine ("UPM"). Pending further tests, the physician gave Complainant Dorr a lifting restriction of 20 pounds and recommended "no excess bending, lifting, twisting activities." Complainant Dorr gave UPM's report to Lund. (Tr. B, 20-24, 35; Complainants' Exh. 3)

18. Complainant Dorr's lifting restriction did not prevent him from performing his job duties. When Complainant Dorr returned to work in 2007, he was able to perform all his job duties except picking up large pieces of steel. This was a task Complainant Dorr previously had to do approximately every two weeks. Respondent did not ask Complainant Dorr to do such lifting after he returned to work. Other employees performed this task for him. (Tr. B, 25-28, 60-61, 120, 132)

19. On July 20, 2007, Lund gave Complainant Dorr a note that Complainant Dorr was laid off "due to lack of work." (Tr. B, 36; Respondent's Exh. 7)

20. The Union filed a grievance seeking Complainant Dorr's reinstatement. The Union alleged that Respondent had replaced Complainant Dorr with a back-up operator Complainant Dorr had trained, in violation of the CBA. The grievance was dismissed. (Tr. B, 85-86, 88; Respondent's Exh. 8)

21. Complainant Dorr was the only crushing plant employee Respondent laid off in 2007. Respondent kept on two recently hired plant operators, Robert Gudermount and Matt Murdoch. Gudermount had a commercial driver's license ("CDL"), and Murdoch was a certified welder. Venezia and Lund believed that Gudermount's CDL and Murdoch's certification made them more "versatile" employees. (Tr. A, 155; Tr. B, 121-23, 124, 127, 143-44)

22. Respondent did not notify Complainant Dorr about the 2008 MSHA class. Respondent did notify Complainant Dorr about the 2009 MSHA class. Complainant Dorr attended the 2009 class, and Respondent paid him for his attendance. (Tr. B, 67-69)

Complainant Mace

23. Respondent hired Complainant Mace as a crushing plant operator in 1986. Complainant Mace had previously lost four fingers on his right hand. Respondent hired Complainant Mace with knowledge of his missing fingers. In 2003 or 2004, Complainant Mace's job title changed to maintenance. Complainant Mace's duties included greasing the plant, general repair to the plant and equipment, operating a payloader and excavator, and maintenance on Respondent's blacktop and ready mix plants. Complainant Mace was able to perform all his duties despite his missing fingers. (Tr. A, 13, 15, 17, 21, 75, 112, 174-75)

24. On June 12, 2006, Complainant Mace lost his right thumb in a work accident. Complainant Mace was out of work for a period of time following the accident. (Tr. A, 14, 25, 113)

25. On July 12, 2006, Dr. Michael Nancollas, M.D., Complainant Mace's physician, released Complainant Mace to return to work July 17, 2006 on light duty with no use of his right hand. On August 28, 2006, Nancollas saw Complainant Mace again and continued the same restrictions. (Complainants' Exh. 1)

26. Before Complainant Mace lost his thumb, he was required to climb ladders or walk on catwalks every day. Mary Micek, RN, the case manager for Complainant Mace's Workers' Compensation case, advised Respondent that Complainant Mace was not to climb ladders or walk on catwalks because he was unable to grip with his right hand. (Tr. A, 26, 34, 201; Complainants' Exh. 1)

27. Complainant Mace was able to perform his assigned duties after he returned to work. His duties consisted primarily of monitoring the crushing plant. He could not do maintenance work because his hand was still bandaged. Complainant Mace worked the rest of the season, until his seasonal layoff in November 2006. (Tr. A, 35, 36, 38-39, 99)

28. In March 2007, Respondent called Complainant Mace back to work. By that time, Complainant Mace's hand had healed. From March to June 2007, Complainant Mace operated heavy equipment, helped assemble a new washing plant, worked in the washing and crushing plant, and cut up scrap steel. Complainant Mace was able to perform his job duties. (Tr. A, 41, 43, 44-47, 75-76, 181)

29. In June 2007, Lund placed Complainant Mace on the second shift. Complainant Mace's duties were to run the crushing plant and operate a payloader. Complainant Mace performed these duties through October 2007, when the plant shut down for the season and all employees were laid off. (Tr. A, 47-50, 190, 201).

30. The only way to get into Respondent's payloader is to walk up a ladder. Complainant Mace was still able to get into and operate the payloader after he lost his thumb. Complainant Mace did not request any modification or assistance in operating the payloader. (Tr. A, 46, 201-02)

31. The parties agree that at the end of the 2007 season, Complainant Mace's restriction on climbing ladders was lifted. (Tr. A, 35, 211-12)

32. During 2007, Lund and Complainant Mace had several disagreements over Complainant Mace's job performance. On one occasion, Lund screamed at Complainant Mace, told Complainant Mace that he was fired, then immediately retracted the firing and apologized. In another incident, Lund fired Complainant Mace, but Venezia reinstated him several days later,

after the Union intervened. Complainant Mace acknowledged that after one incident, he said that "someone had ought [sic] to drop the payloader on (Lund's) legs and break them." (Tr. A, 52-53, 103, 141, 180, 187-89, 261-63)

33. On July 24, 2007, in response to a Union grievance, Venezia informed the Union that Complainant Mace "has repeatedly and consistently been defiant towards management" and that Complainant Mace had failed to perform his job duties, causing backups at the plant and hindering productivity. However, Respondent did not discipline Complainant Mace for his conduct. (Tr. A, 141, 266; Respondent's Exh. 4)

34. In the spring of 2008, Respondent notified Complainant Mace about the MSHA class. Complainant Mace attended the class and was paid for his attendance. During the class, Lund told Complainant Mace that the plant might not open in 2008. (Tr. A, 59-61, 122, 190-91)

35. The plant did open in 2008, but Respondent did not call Complainant Mace back to work. Lund told Venezia that he did not want Complainant Mace called back because Complainant Mace was insubordinate. At that time, Lund believed that Complainant Mace was cleared to climb ladders and that he did not have any restrictions on his job duties. (Tr. A, 59, 61, 114, 148-49, 178-79, 210-14)

36. Other employees also were not called back in 2008. Respondent did not bring back any other maintenance employees for 2008. (Tr. A, 62, 84)

37. The union filed a grievance with respect to Respondent's failure to call back Complainant Mace for the 2008 season. The grievance was later dropped. (Tr. A, 120-21)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discharge or otherwise

discriminate against an employee on the basis of disability. Human Rights Law § 296.1(a). Complainants have the initial burden to prove a prima facie case of discrimination. Each must show 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 discrimination. *Ferrante v. American Lung Association,* 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainants make out a prima facie case of discrimination, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its actions. If Respondent does so, Complainants must show that the reason presented was merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with Complainants. *Ferrante,* 90 N.Y. 2d at 630, 665 N.Y.S. 2d at 29.

A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.,* 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant Dorr's shoulder injury and Complainant Mace's missing fingers and thumb are disabilities under the Human Rights Law. Therefore, both Complainants are members of a protected class. Both were qualified for their positions, which they held for many years. Complainant Dorr suffered an adverse employment action when Respondent laid him off in 2007, and Complainant Mace suffered an adverse employment action when Respondent did not

call him back in 2008. Whether the circumstances surrounding these events give rise to inferences of discrimination require separate analyses for each Complainant.

Complainant Dorr

The parties agreed that Complainant Dorr's shoulder injury did not affect his ability to perform his job duties. Nevertheless, Respondent laid off Complainant Dorr the month after a UPM physician gave Complainant Dorr a new restriction about the work he could perform. Complainant Dorr informed Respondent of this restriction. Complainant Dorr was the only crushing plant employee Respondent laid off during 2007. At the same time, Respondent continued to employ Gudermount and Murdoch, two recently hired employees who were not disabled, as well as other employees without disabilities. These circumstances are sufficient to give rise to an inference of discrimination. Therefore, Complainant Dorr has established a prima facie case.

However, Respondent has presented a legitimate, non-discriminatory reason why it laid off Complainant Dorr. Respondent contends that it laid off Complainant Dorr for business reasons. In 2007, as a result of a decrease in its business, Respondent eliminated one shift at the plant and reduced its work force substantially. Although Gudermount and Murdoch had far less seniority than Complainant Dorr, Gudermount had a CDL and Murdoch was a certified welder. Respondent believed these qualifications made Gudermount and Murdoch more valuable to its business.

Complainant Dorr failed to show that Respondent's explanations were pretexts for unlawful discrimination. Complainant Dorr questioned why Respondent kept on employees with far less seniority, but the CBA does not have a seniority provision. Moreover, the focus of the inquiry is not whether Respondent acted with good judgment in laying off Complainant Dorr

instead of the less senior employees without disabilities, but whether this decision would not have been made but for a discriminatory motive. *See Ioele v. Alden Press, Inc.*, 145 A.D.2d 29, 36, 536 N.Y.S.2d 1000, 1004 (1st Dept. 1989). Complainant Dorr failed to make such a showing. Accordingly, Complainant Dorr failed to sustain his burden of proof, and his complaint must be dismissed.

Complainant Mace

Unlike Complainant Dorr, Complainant Mace did not show that Respondent's failure to call him back to work in 2008 occurred under circumstances giving rise to an inference of discrimination. Respondent's failure to call back Complainant Mace did not occur in temporal proximity to Complainant Mace's development of a disability. On the contrary, Respondent had hired Complainant Mace some twenty years earlier knowing that he was missing four fingers. While Complainant Mace incurred a further disability when he lost his thumb in 2006, he returned to work after his injury, and he worked the entire 2007 season. Complainant Mace was able to perform his assigned job duties during that period.

Respondent notified Complainant Mace about the spring 2008 MSHA class, and it paid for him to attend the class. This suggests that Respondent intended to bring Complainant Mace back to work. Finally, unlike Complainant Dorr, Complainant Mace was not the only employee Respondent did not call back for 2008. No other maintenance employees were called back to work that year.

These circumstances support Respondent's claim that economic reasons were the cause of its failure to call Complainant Mace back to work in 2008. Therefore, Complainant Mace failed to establish a prima facie case of unlawful discrimination, and his complaint must be 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 that the complaints be and the same hereby are dismissed.

DATED: September 22, 2009
Syracuse, New York

Edward Luban
Administrative Law Judge