

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

RUSKIN MARTINEZ,

Complainant,

v.

INTERSTATE BRANDS CORPORATION,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10117414

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal ("Recommended Order"), issued on December 17, 2008, by Lilliana Estrella-Castillo, 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: **FEB 02 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. 10117414

SUMMARY

The complaint alleging unlawful disability discrimination is denied. Respondent terminated Complainant's employment because he failed to make himself available for work after he was warned that such conduct could result in his employment termination. Moreover, Complainant failed to establish a nexus between his absences from work and his prior back injury and respiratory problems.

PROCEEDINGS IN THE CASE

On April 26, 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on August 4-5, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Senior Attorney, of Counsel. Respondent was represented by Bressler, Amery & Ross, P.C., by Kirsten Grossman.

Respondent’s timely submission, proposed findings of fact and conclusions of law, was received, considered and where appropriate, adopted. The Division did not make a post-hearing submission.

FINDINGS OF FACT

1. Complainant suffered a work related back injury, which resulted in lumbo-sacral spine disc syndrome. Complainant also developed respiratory problems. (ALJ Exhibit 1)
2. Complainant alleged that Respondent unlawfully discriminated against him based on his disability when Respondent terminated his employment. (ALJ Exhibit 1)
3. Respondent denied unlawful employment discrimination, and countered that Complainant’s employment was terminated because Complainant failed to make himself available for work. (ALJ Exhibit 4)
4. Respondent is a manufacturer and distributor of baked goods and employs about 130 production employees. (Tr. 149)
5. Complainant became employed by Respondent in 2004, as a “jobber.” (Tr. 12)
6. A jobber is a permanent employee who is on call to replace any regularly scheduled employee, on any shift, who is not able to report to work, for any reason. (Tr. 13, 150)

7. A jobber is required to be available to report to work within two hours of a call. (Tr. 13) Although jobbers are not required to always be available, it is not acceptable for them to be unavailable for long periods of time, such as consecutive days. (Tr. 159)

8. From April 2006 thru October 2006, Complainant was on disability leave as a result of an injury he suffered on the job. (Tr. 20-23, 152; Complainant's Exhibit 1),

9. Complainant returned to work on October 17, 2006, without restrictions. (Tr. 37-38, 104, 156; Respondent's Exhibit 1)

10. Complainant worked from October 17, 2006 thru November 27, 2006. (Respondent's Exhibit 1)

11. Complainant did not make himself available for work from November 28, 2006 thru December 29, 2006. (Tr. 39-40, 158; Complainant's Exhibit 5)

12. On December 29, 2006, as a result of Complainant's failure to make himself available for work during December 2006, Respondent met with Complainant and Complainant's union representative. At the end of the meeting, Complainant agreed to a two week retroactive suspension instead of termination. (Tr. 64, 96-97, 119, 158, 160; Respondent's Exhibit 5)

13. Respondent always had two contact numbers for Complainant, his home telephone number and his cellular telephone number. (Tr. 97, 108-09)

14. After the December 29, 2006 meeting, Complainant worked on December 30 and 31, 2006 and January 2, 2007. (Respondent's Exhibit 1)

15. On January 3, 2007, Complainant was not available for work because he was having breathing problems and was on his way to the hospital when Respondent called. (Tr. 42-43, 109; Complainant's Exhibit 8; Respondent's Exhibit 1)

16. On January 4, 2007, Respondent called Complainant for work, but Complainant advised that he would be unavailable for work until January 15, 2007, pursuant to his doctor's instructions. (Tr. 45-47, 109-10; Complainant's Exhibit 6) Complainant's absences from work for that time period were excused by Respondent. (Tr. 182; Respondent's Exhibit 4)

17. Complainant was unavailable for work after January 15, 2007, although he had been warned on December 29, 2006, that his unavailability for work could result in his employment termination. (Tr. 61-62; Respondent's Exhibit 5)

18. Respondent called Complainant for work on January 16, 17, 18, 19 and 20, 2007. (Tr. 60-62; 110-12; Complainant's Exhibit 8; Respondent's Exhibit 4) Complainant was not available for work on those dates. (Respondent's Exhibits 1 and 4)

19. Respondent called Complainant for work on January 21, 2007, and Complainant was not available because it was his son's birthday. (Tr. 63, 110-12; Complainant's Exhibit 8) Complainant did not work on January 21, 2007. (Respondent's Exhibits 1 and 4)

20. Respondent called Complainant for work on January 22 and 23, 2007, but Complainant was not available. (Respondent's Exhibit 4)

21. Respondent called Complainant for work on January 24, 2007, three times. Each time Complainant asked for the day off and did not work. (Tr. 113; Complainant's Exhibit 8)

22. Respondent called Complainant for work to start at twelve midnight on January 25, 2007, and Complainant asked for the day off because he had a workers' compensation hearing. (Tr. 113; Complainant's Exhibit 8)

23. Respondent called Complainant for work on January 26, 2007, and again Complainant was not available for work. (Tr. 114-15; Complainant's Exhibit 8; Respondent's Exhibits 1 and 4).

24. Complainant became available for work on Saturday, January 27, 2007, at 11:00 p.m. (Tr. 115; Respondent's Exhibit 4)

25. On Sunday, January 28, 2007, at 7:00 a.m., after Complainant's shift ended, Hayden French, Respondent's Assistant Production Manager, called Complainant into a meeting with Complainant's union representative, to again discuss that Complainant was not making himself available for work. (Tr. 51-52, 168-69)

26. Complainant told French that he was available for work, but that Respondent had either not called him, had called him but did not leave a message, or that he had been granted time off. (Tr. 52, 169) Complainant also told French that his immediate supervisors had approved the time off for January 21, January 24, and January 25. (Tr. 126)

27. During the meeting, Complainant offered to produce his telephone records which, according to Complainant, would prove that Respondent had not called him for work. (Tr. 52-55, 169; Complainant's Exhibit 8)

28. After the meeting, French spoke with Complainant's supervisors, both of whom confirmed that they had not granted Complainant time off as he claimed. (Tr. 170)

29. At the hearing, Complainant testified that when he asked for time off on January 24 and January 25, 2007, he was told that he had to make his request to the Production Manager. (Tr. 82) It is not clear that Complainant did so. (Tr. 172)

30. Complainant was instructed by Respondent and his union to produce the telephone records which would help support his position that he was not called for work. (Tr. 175-76) Complainant never produced the telephone records to Respondent as he said he would until after he was terminated, and then, he only produced the home telephone records and never produced the cellular phone records. (Tr. 55, 287 ; Complainant's Exhibit 8) And, contrary to

Complainant's expectations that they would prove that he was not called, the records produced proved that he was called by Respondent. (Complainant's Exhibit 8)

31. In early February 2007, French attempted to contact Complainant in the presence of the union representative on at least two occasions, regarding the telephone records that Complainant said he would produce, but was unable to reach Complainant. (Tr. 173-75, 206)

32. On March 8, 2007, after Complainant had not been in contact with Respondent since January 28, 2007, Respondent wrote to Complainant and advised him that unless he produced the telephone records by March 19, 2007, Respondent would terminate his employment. (Tr. 180-81; Respondent's Exhibit 3)

33. Complainant never produced the telephone records to Respondent, and Respondent terminated his employment. (Tr. 55, 287)

OPINION AND DECISION

The Human Rights Law prohibits an employer from discriminating against an employee because of a disability. *Matter of McEniry v. Landi*, 84 N.Y.2d 554, 558, 644 N.E.2d 1019, 620 N.Y.S.2d 328 (1994), *citing* Human Rights Law § 296 (1). The statute defines the term "disability" as a "physical, medical or mental impairments that 'do not prevent the complainant from performing in a reasonable manner the activities involved in the job.'" *Pembroke v. New York State Office of Court Administration*, 306 A.D.2d 185; 761 N.Y.S.2d 214, 215 (1st Dept. 2003), *citing* Human Rights Law §292 (21). The protection only applies to "disabilities which, upon provision of reasonable accommodations, do not prevent the [Complainant] from performing in a reasonable manner the activities involved in the job or occupation . . . held." Human Rights Law §292 (21); *Burton v. Metropolitan Transportation Corp.*, 244 F.Supp.2d 252

(2003); *see also*, *Fama v. American International Group, Inc.*, 306 A.D.2d 310, 760 N.Y.S.2d 534 (2003), lv denied 1 N.Y.3d 508, 808 N.E.2d 1276, 777 N.Y.S.2d 17 (2004). Therefore, the employer has a statutory duty to “provide reasonable accommodations to the known disabilities of an employee . . .” Human Rights Law § 292 (21).

To establish a *prima facie* case of unlawful disability discrimination under the Human Rights Law, Complainant must show that (1) he was disabled within the meaning of the Human Rights Law; (2) he was otherwise qualified to perform the essential functions of the job with or without a reasonable accommodation; (3) he suffered an adverse employment action; and (4) he suffered the adverse employment action because of his disability. *See, Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Complainant failed to establish a *prima facie* case of unlawful disability discrimination. Complainant is disabled as that term is defined under the Human Rights Law. Complainant suffered from a prior back injury and respiratory problems. However, Complainant failed to establish a nexus between his back injury and breathing problems, and his unavailability to work. Complainant’s initial absences due to his back injury were excused by Respondent. Once Complainant was released to return to work, he did so without any restrictions and never presented Respondent with a note from a doctor seeking any type of accommodation after his release to work in October 2006. Complainant returned to work and worked without incident until the end of November 2006. Complainant, then without excuse, did not make himself available for work almost the entire month of December. On December 29, 2006, Complainant was warned by Respondent, after Complainant accepted a two week suspension in lieu of termination that if he continued to make himself unavailable for work his employment would be

terminated. Once again Complainant was excused for the first half of January 2007, because of respiratory problems, and was released to work without restrictions, but he continued to make himself unavailable for work.

Complainant's burden to make out a prima facie case is de minimus. Complainant must at least establish that the "discharge occurred under circumstances giving rise to an inference of discrimination." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 196 (1st Dept. 1998). No inference was established in this case.

Even assuming that Complainant made out a prima facie case of unlawful disability discrimination, Respondent established a legitimate, non-discriminatory reason for terminating Complainant's employment, which was his lack of availability for work. It is undisputed that poor attendance and failure to be available for work are legitimate, non-discriminatory reason for discharging an employee. "Certainly, an employer is entitled to discharge an employee who fails to follow company rules and fails to appear for work without notification, even if the absences are attributable to a medical problem." *Jackson v. Nor Loch Manor Healthcare Facility*, 287 F. Supp. 633, 636 (W.D.N.Y. 2004), *aff'd* 134 Fed. Appx. 477 (2d Cir. 2005).

Complainant failed to show that the reason offered by Respondent for Complainant's employment termination was a pretext. For example, Complainant did not allege that other jobbers, who were not disabled and continued to make themselves unavailable for work were not similarly terminated. Instead, Complainant continued to maintain that Respondent did not call him or called and left no message or had granted the day off. Complainant's excuses are not credible, especially because Complainant's own records showed that Respondent called him at home on the days that Respondent said they called and he was unavailable. Furthermore,

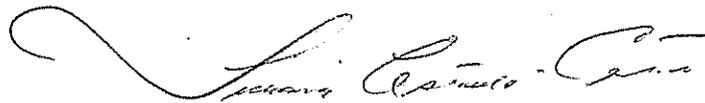
although Complainant produced the home telephone records, he failed to produce the telephone records for his cellular phone, which was the second number that Respondent called.

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 is, hereby dismissed.

DATED: December 17, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Lilliana Estrella-Castillo". The signature is fluid and cursive, with a large initial flourish on the left side.

Lilliana Estrella-Castillo
Administrative Law Judge