

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

SILVERIO MESSON,

Complainant,

v.

MFM PROPERTIES LLC,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10119213

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 April 30, 2009, 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: **JUL 08 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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MFM PROPERTIES LLC,

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

Case No. **10119213**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him when it did not grant him Tuesdays and Sundays off after he was diagnosed with cancer. Complainant also alleged that he was unlawfully terminated. Complainant failed to sustain his burden. The complaint is therefore dismissed.

PROCEEDINGS IN THE CASE

On July 10, 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 October 27-28, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Senior Attorney, of Counsel. Respondent was represented by Harry Shapiro.

Respondent timely filed proposed findings of fact and conclusions of law, which were considered and where appropriate adopted. The Division did not make a post-hearing submission.

FINDINGS OF FACT

1. Respondent is the owner of a commercial building located at 135 West 29th Street, New York, New York. (Tr. 243-44) At all relevant times, Respondent employed two lobby attendant/security guards. (Tr. 222, 243)
2. Respondent hired Complainant in January 2002, as a lobby attendant/security guard. (Tr. 11-12)
3. During the first two years of Complainant’s employment with Respondent, Complainant worked Monday through Saturday, from 5:00 p.m. to midnight; and Sunday from 8:00 a.m. to 8:00 p.m. (Tr. 12-14) Then, after the initial two years, Complainant worked Monday to Friday from 5:00 p.m. to midnight; and Sunday from 8:00 a.m. to 8:00 p.m. Complainant no longer worked Saturdays. (Tr. 14-15)
4. Respondent offers its employees overtime on a voluntary basis; if the employees ask for it, they get it. (Tr. 155)

5. Complainant alleges that Respondent did not accommodate his disability because he was not granted Tuesdays, and Sundays off. Complainant alleges further unlawful discrimination because Respondent reduced his hours, assigned him less overtime and then allegedly terminated his employment. (ALJ Exhibit 1)

6. Respondent denies unlawful discrimination. (ALJ Exhibit 5)

7. Complainant was diagnosed with cancer in April 2007. (Tr. 15, 83; ALJ Exhibit 1)

8. In April 2007, Complainant informed the superintendent of the building, Ramon Cartagena, that he had cancer and that he wanted to have every Tuesday off. (Tr. 24-25, 45) Complainant was not told by his doctor that he needed Tuesdays off, but Complainant felt that it would be a good idea to take Tuesdays off for his medical appointments. (Tr. 25, 27)

9. Cartagena informed Complainant that if Complainant wanted a schedule change he had to discuss it with Ilan Mosery, the general manager. (Tr. 24-25)

10. Complainant never spoke with Mosery about taking Tuesdays off. Complainant took whatever Tuesdays he needed off. (Tr. 32, 179, 184-85)

11. Cartagena was very sympathetic towards Complainant regarding Complainant's cancer diagnosis, and told Complainant to take care of himself because his health came first and that he should take "whatever day I needed due to my illness...." (Tr. 120, 123-24, 151-52, 154).

12. Cartagena also suggested that Complainant reduce his hours and work until 11:00 p.m., instead of midnight. (Tr. 152) By July 2007 Complainant's schedule was from 5:00 p.m. to 9:00 p.m. Monday to Friday, and Sunday from 9:00 a.m. to 8:00 p.m. (Tr. 69-70) Respondent, however, continued to pay Complainant his full salary although Complainant was working less than 40 hours per week. (Tr. 270; Respondents' Exhibits 8 and 9).

13. In June 2007, Mosery became aware of Complainant's cancer. (Complainant's Exhibit 2) At that time Complainant also asked Mosery for every Sunday off because he did not want to work by himself. (Tr. 25, 95, 103-06, 113, 151) Mosery told Complainant to work it out with the other employees, but none of the employees wanted to work Sundays. (Tr. 178)

14. On June 11, 2007, while on vacation, Complainant had surgery. (Tr. 94, 235; Complainant's Exhibit 4)

15. On Saturday, July 7, 2007, Complainant was hospitalized with chest pain. (Tr. 54-55)

16. Complainant was scheduled to work, but did not work on Sunday, July 8, 2007, or Monday, July 9, 2007. (Tr. 57, 62-63)

17. Complainant's daughter called Respondent's office on Monday, July 9, 2007, and advised Mosery that Complainant would not be at work until July 11, 2007. (Tr. 131-38, 200-01, 204-05)

18. On Tuesday, July 10, 2007, Complainant's shift was covered by Siley Dia, the same employee that covered during Complainant's previous absences. (Tr. 109, 218) Dia's regular shift began at midnight. (Tr. 219-20, 222)

19. Complainant presented himself to work on Tuesday, July 10, 2007, and found Dia covering his shift. (Tr. 63, 117-18) Mosery suggested that since Complainant was not expected and Dia was already scheduled, that it would not be fair to send Dia home, but that Complainant could report back to work and start the shift at 10:00 p.m. (Tr. 248-49, 263-65, 277)

20. Complainant rejected the offer and went home. Complainant never returned to his employment with Respondent. (Tr. 65, 241-250, 265)

21. Complainant alleges that Respondent replaced him with Dia. (Tr. 222; ALJ Exhibit 1)

22. Respondent did not replace Complainant until December 2007. (Tr. 281)

23. Complainant collected unemployment insurance for a period of four weeks, but the benefits were terminated because Complainant was deemed not to be able to work. (Tr. 70-71)

24. Complainant continues to be unable to work. (Tr. 74)

OPINION AND DECISION

Complainant's allegations of disability discrimination, for failure to accommodate, are without merit. 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* N.Y. Exec. Law, Art. 15 (Human Rights Law) § 296.1. The statute defines the term "disability" as "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 . . . sought." 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 NY3D 508, 808 N.E.2D 1276, 777 N.Y.S.2d 17 (2004).

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 was disabled as that term is defined under the Human Rights Law; he has cancer. Complainant was qualified to perform the essential functions of the job. However, Complainant did not suffer an adverse employment action when Respondent had Dia cover for Complainant during his absence; Complainant's employment was not terminated.

First, Complainant alleges that Respondent did not accommodate his disability because he was not granted Tuesdays, and then Sundays off. Complainant alleges further unlawful discrimination because Respondent reduced his hours, assigned him less overtime and then terminated his employment. However, the record shows that Complainant's hours were cut to accommodate Complainant and his need not to work too many hours. The record also shows that although Complainant's hours were cut after his cancer diagnosis, he continued to get paid his regular salary based on a forty-hour week. Complainant also testified that he did not request overtime, therefore in those instances in which he did not get overtime it was because he did not want to work.

Complainant also alleges that Respondent did not provide a reasonable accommodation when he asked for Tuesdays and Sundays off. Complainant's requests for Tuesdays and Sundays off were not at the request of his doctor, but because Complainant felt that it would be more convenient for him not to work those days. Complainant told Cartagena, the superintendent, that he wanted to take Tuesdays off to take care of his medical appointments. Cartagena did not refuse to accommodate Complainant, on the contrary his hours were reduced

and he was told to take as much time as he needed, but if he wanted every Tuesday off he needed to speak with Mosery. Complainant never spoke with Mosery about taking Tuesdays off, but on those occasions that Complainant needed to take a Tuesday off he did do so.

In June, when Complainant asked Mosery for Sundays off, Complainant was told by Mosery to see if any of the other employees would change days with him; none of the other employees wanted to work Sundays. However, this request, again, was based on Complainant's desire not to work on a particular day of the week, and not because he needed the day off as an accommodation in order to continue to work.

Finally, Complainant's employment was not terminated by Respondent. When Complainant presented himself at work on July 10, 2007, he was not expected and his shift was already covered by Dia. Mosery did not think that it would be fair to send Dia home after he was scheduled to work Complainant's shift. Mosery decided that Dia work until 10:00 p.m. and then Complainant could work the rest of the shift. Complainant did not agree with this arrangement and left. Complainant never returned to work with Respondent.

For the above reasons, the complaint 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 the same hereby, is dismissed.

DATED: April 30, 2009
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.

Lilliana Estrella-Castillo
Administrative Law Judge