NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

FRANCIS A. MIRANTO,

Complainant,

v.

CITY OF NORTH TONAWANDA, TONAWANDA WATER DEPARTMENT,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10104366

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 December 20, 2007, by Martin Erazo, Jr., 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 KUMIKI GIBSON, 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, this 14th day of January, 2008.

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KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

FRANCIS A. MIRANTO,
Complainant,
v.

CITY OF NORTH TONAWANDA, TONAWANDA WATER DEPARTMENT,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10104366**

SUMMARY

Complainant is a diabetic. Complainant's right leg was amputated below the knee. Complainant alleged that Respondent terminated his employment because of his disabilities. The Division finds that Respondent discriminated against Complainant. Complainant is entitled to an award of $171.48 for lost wages and $50,000 for mental anguish.

PROCEEDINGS IN THE CASE

On March 4, 2005, 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 Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on August 22-23, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Robert Sondel, Esq.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

1. Complainant worked for Respondent since November 6, 1968. Complainant last held the position of Chief Pumping Station Operator. Complainant held that position for several years. (ALJ Exhibits 1, 3)

2. Complainant has diabetes. (ALJ Exhibits 1, 3)

3. Complainant was on a medical leave of absence from July 2004 to January 31, 2005, during which his lower right leg was amputated because of complications with diabetes. (ALJ Exhibit 1)

4. Complainant was fitted with a prosthetic device. (ALJ Exhibit 1)

5. Complainant alleged that on January 31, 2005, Respondent's supervisor, Paul Drof ("Drof"), unlawfully prevented his return to work because of his diabetes and his amputation. (ALJ Exhibit 1)

6. Respondent denied discriminating against Complainant. (ALJ Exhibit 3)

7. Respondent stated that Complainant's amputation caused "permanent medical restrictions" that impeded his "ability to tolerate full duty work." (ALJ Exhibit 3)

8. Respondent also stated that Complainant's diabetes caused "associated safety risks" during "the performance of solitary work." (ALJ Exhibit 3)

9. Respondent's consultant, Disability Management Associates ("DMA"), provided Respondent with four separate reports on Complainant's ability to perform his job, during the period of August 6, 2004 through December 17, 2005. (Respondent's Exhibits 4,5,7,9)

10. Respondent relied on the final conclusions made by DMA on December 17, 2005, in order to terminate Complainant's employment. (Respondent Exhibit 9)

11. Based on its physical assessment reviews, DMA found in its second report of September 24, 2004, that Complainant "demonstrated sufficient proficiency" with the "right leg prosthetic to return to his full duty as a Senior Pumping Station Operator." (Respondent's Exhibit 5)

12. DMA's second report is consistent with the August 30, 2004 return to work statement made by Complainant's surgeon, Miguel Rainstein ("Rainstein"). Rainstein stated that Complainant could return to his regular full time duties. (Joint Exhibit 1)

13. DMA's second report is also consistent with the findings made by Complainant's prosthetic and orthotic specialists that found Complainant had "excellent balance," "no limitation barriers when walking up stairs, ramps, or curbs," and "could outperform many able bodied people his age." The prosthetic specialists also found that Complainant was not visibly "an amputee" when ambulating. Complainant demonstrated "level 4" ability, "the highest level for amputees." (Complainant's Exhibit 2)

14. However, DMA's September 24, 2004 report also raised a new line of medical inquiry related to Complainant's ability to "work safely alone" due to "the effects of chronic diabetes." DMA specifically requested permission from Respondent to pursue this new line of medical inquiry. (Respondent's Exhibit 5) Based on Respondent's grant of further inquiry, DMA produced the two additional reports that eventually caused Complainant's dismissal. (Respondent's Exhibits 7,9)

15. DMA's concern with Complainant's diabetes arose during Complainant's August 2, 2004 visit with Dr. Costanza ("Costanza"), one of DMA's consulting physicians. Costanza observed Complainant's fainting spell caused by his diabetes. (Complainant's Exhibit 1; Tr. 39-40)

16. The credible evidence established that Complainant's fainting spell was a singular incident. Complainant encountered a longer than expected wait time at Constanza's office that morning, causing Complainant not to eat lunch at his regular time. (Complainant's Exhibit 1; Tr. 41)

17. Complainant's physician, Clementina Lewis ("Lewis") described Complainant's diabetes was "well controlled." (Complainant's Exhibit 1)

18. Respondent's two former supervisors, covering a period of over 30 years, stated that Complainant's health was never an issue in the performance of his duties. (Complainant's Exhibits 3, 4)

Damages

19. Complainant earned $55,694 in 2004 from Respondent. (Complainant's Exhibit 5) Complainant was fired on January 31, 2005.

20. Complainant earned $58, 829 in 2005, in wages, pension, and Social Security Disability benefits. (Complainant's Exhibit 5; Tr.62-3)

21. Complainant earned $54,008 in 2006, in pension and Social Security Disability income. (Complainant's Exhibit 5; Tr. 64-5)

22. Complainant expected to retire in March 2006. (Tr. 51)

23. There is no documentary evidence to indicate that Complainant would have received pay increases in 2005 or 2006.

24. There is no concise testimony or any documentary evidence to indicate how Complainant's retirement benefits would have increased, if at all, if Complainant had retired in March 2006.

25. Complainant testified that he was "pretty upset" because he was forced to take retirement earlier than what he planned. (Tr. 66) Complainant was "devastated" because he wanted to return to work after surgery. (Tr. 91) Complainant became "depressed" and "quiet" because he "couldn't believe" that he "could not return to his job." (Tr. 91) The feeling of depression lasted "a few months." (Tr. 92)

OPINION AND DECISION

Respondent discriminated against Complainant by denying him equal terms, conditions and privileges of employment, by terminating his employment, because of his disability.

Under the Human Rights Law §296.1(a), it is an unlawful discriminatory practice for an employer "because of the ...disability…of any individual to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

In order to establish a prima facie case of unlawful discharge based on disability, Complainant must demonstrate that: (1) he meets the definition of an individual with a disability; (2) his disability did not prevent him from performing his duties in a reasonable manner, upon the provision of a reasonable accommodation; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *McKenzie v. Meridian Capital Group, LLC,* 35 A.D.3d 676, 829 N.Y.S.2d 129 (2d Dept. 2006)

If Complainant establishes a prima facie case of disability discrimination, the burden shifts to Respondent to produce evidence that the adverse employment decision resulted from a legitimate non-discriminatory reason. *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)

If Respondent articulates a legitimate non-discriminatory reason for the adverse employment action, the burden again shifts to Complainant. Complainant must show that a discriminatory reason more likely motivated Respondent or that Respondent's tendered explanation was unworthy of credence. Under the Human Rights Law, the burden of proving discrimination always remains with Complainant. *Ferrante v. American Lung Assoc.*, 90 N.Y.2d 623, 655 N.Y.S.2d 25 (1997)

Complainant established a prima facie case of disability discrimination. Complainant has disabilities within the meaning of the Human Rights Law. Complainant has diabetes and an amputation to his right leg. The disabilities did not prevent him from performing his duties in a reasonable manner. Complainant's doctors and prosthetic specialist indicated that he could perform the duties of the job with his disabilities. Complainant was qualified for the Senior Pumping Station Operator position that he held with Respondent. He successfully held that position for several years. Respondent terminated Complainant's employment when he attempted to return from disability leave.

Although Complainant sought Social Security Disability benefits after his dismissal, Complainant did not fail in establishing a prima facie case of disability discrimination. *Engelman v. Girl Scouts-Indian Hills Council, Inc*., 16 A.D.3d 961; 791 N.Y.S.2d 735 (3rd Dept. 2005), also see, *Cleveland v. Policy Mgt. Sys. Corp*., 526 US 795, 797, 119 S Ct 1597, 1443 L Ed 2d 966 (1999)

The termination gave rise to an inference of unlawful discrimination. Respondent's supervisor, Drof, prevented Complainant from returning to work because Drof believed that Complainant's disabilities prevented Complainant from performing the duties of the job.

Respondent articulated a business reason for the adverse employment action. Respondent stated that the DMA reports concluded that Complainant's physical abilities did not allow him to perform his duties. Respondent argued that it properly relied on the assessments made by DMA.

Complainant demonstrated that Respondent's business reason for his dismissal is not worthy of credence. Prior to Complainant's dismissal, DMA had initially resolved, in its September 2004 report, that Complainant demonstrated sufficient proficiency with the right leg prosthetic to return to his full duty as a Senior Pumping Station Operator. However, Respondent was aware that DMA also raised, in the same September 2004 report, a separate, specific safety concern, about Complainant's diabetes. DMA believed that Complainant could not work alone, as the job often required. DMA's concern was solely based on a single diabetic episode that occurred in August 2004. Complainant fainted during an appointment with a DMA doctor. The diabetic episode was caused by Complainant's delay in eating lunch, because of an extended waiting time at the doctor's office. Respondent specifically granted DMA's request to start a new line of inquiry, based on DMA's safety concern about Complainant's diabetes.

Respondent improperly relied on DMA's conclusions.

Employment may not be denied based on speculation and mere possibilities of an individual's disability. *N.Y. State Div. of Human Rights (Granelle) v. City of New York*, 70 N.Y.2d 100, 517 N.Y.S.2d 715, 510 N.E.2d 799 (1987) Contrary to DMA's conclusions, the credible evidence indicates that Complainant's diabetes never prevented him from performing his duties in a reasonable manner. The evidence also established that Complainant's prosthetic device did not prevent him from performing his job in a reasonable manner. Reasonable performance does not mean perfect or flawless performance. *Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558, 458 N.E.2d 1235 (1983) Complainant's former supervisors, spanning a

period of 30 years, corroborated that Complainant's diabetes never impacted on his work performance. Most importantly, Complainant's own doctors stated that he could return to work and that his diabetes was well controlled. Respondent's reliance on a single diabetic incident was too speculative in order to deny Complainant's return to work. In addition, Respondent's conclusion that Complainant could not reasonably perform the job duties, with his prosthetic device, was also not supported by the credible evidence.

Damages

The Human Rights Law attempts to restore a complainant to a situation comparable to the one he would have occupied, had no unlawful discrimination occurred. Complainant is entitled to lost wages he suffered during the period of his unemployment. Human Rights Law §297.4(c) Lost wage awards are entitled to pre-determination interest from a reasonable intermediate accrual date. *Aurecchione v. N.Y. State Div. of Human Rights***,** 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002)

Complainant's total lost wages amount to $171.48.

In 2004, Complainant earned $55,694 with Respondent. Complainant was fired in January 2005. However, Complainant did not have lost wages in 2005. Complainant earned $58, 829 in 2005, in wages, pension, and Social Security Disability benefits.

In 2006, Complainant earned $54,008 in 2006, in pension and Social Security Disability income. $54,008 amounts to $4,584 a month. In comparison, Complainant earned $4,641.16 a month, in 2004. Since Complainant did not expect to work beyond March 2006, his 2006 lost wages amount to $171.48.

Complainant suffered humiliation and mental anguish as a result of Respondent's discrimination. Complainant worked for Respondent for 36 years. Complainant was

"devastated" by his dismissal. Complainant became "depressed" and "quiet" because he "couldn't believe" that he "could not return to his job." Complainant's feelings of depression lasted several months. Given the degree and length time Complainant endured suffering, an award of $50,000 for emotional distress is appropriate. This award is reasonably related to Respondent's discriminatory conduct and will effectuate the purposes of the Human Rights Law of making Complainant whole. *Gleason v. Callahan Industries, Inc., 203 A.D. 750, 610 N.Y.S.2d 671 (3rd Dept. 1994) (*the court is to consider the duration and severity of the mental anguish*).*

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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment because of disability; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay Complainant the gross sum of $171.48, as lost wages. Interest shall accrue on this award at the rate of nine per cent per annum, starting from August 31, 2005, until payment is actually made by Respondent. August 31, 2005 is a reasonable intermediate date between the start of the accrual period of January 31, 2005, and the end of the accrual period of March 31, 2006.

2. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay

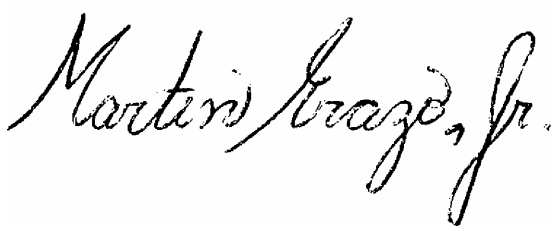
Complainant the gross sum of $50,000 as compensatory damages for mental anguish and humiliation he suffered as a result of Respondent's unlawful discrimination against him. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order, until payment is actually made by Respondent.

3. The payments shall be made by Respondent in the form of certified checks, made payable to the order of Francis A. Miranto, and delivered by certified mail, return receipt requested, to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Within sixty days of the date of the Commissioner's Final Order, Respondent shall establish policies regarding the prevention of unlawful discrimination based on disability. These policies shall include the formalization of a reporting mechanism for employees in the event of discriminatory behavior or treatment. The policies shall also contain the development and implementation of a training program for all of Respondent's staff in the prevention of unlawful discrimination in accordance with the Human Rights Law. Respondent shall simultaneously furnish written proof of its compliance with the directives contained in this Order, to Caroline Downey, General Counsel of the Division, at her office address of One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: December 14, 2007
Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge