

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JOSEPH P. MULHERN,

Complainant,

v.

XLI CORPORATION,

Respondent.

**NOTICE AND
FINAL ORDER**

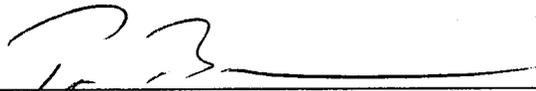
Case No. 10107775

PLEASE TAKE NOTICE that the attached is a true copy of an Order issued by Peter G. Buchenholz, Adjudication Counsel, as designated by the Honorable Kumiki Gibson, Commissioner of the New York State Division of Human Rights ("Division"), after a hearing held before Robert J. Tuosto, an Administrative Law Judge of the Division. 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.

DATED: August 30, 2007
Bronx, New York



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Adjudication Counsel

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FINAL ORDER

Case No. **10107775**

Complainant alleged that he was unlawfully discriminated against on the basis of his disability when his employer terminated his employment. Because the credible evidence does not show discrimination, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 4, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with an unlawful discriminatory practice 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 an unlawful discriminatory practice. The Division referred the case to a public hearing.

After due notice, the case came on for public hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on June 6 and 7, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented Richard J. Van Coevering, Esq. and Respondent was represented by Arnold R. Petralia, Esq. of the law firm of Petralia, Webb & O'Connell, P.C.

Counsel for both parties filed post-hearing briefs.

ALJ Tuosto issued a recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order") on July 31, 2007.

Respondent's counsel filed Objections to the Recommended Order with the Commissioner's Order Preparation Unit by letters dated August 8 and 9, 2007.

FINDINGS OF FACT

1. Complainant was placed by Express Personnel ("Express"), an employment placement agency, with Respondent in a "temp-to-hire" position. (Tr. 56, 103-05)
2. As a temp-to-hire, Complainant was paid by Express. After a minimum of 500 work hours, Respondent would make a decision as to whether it wanted to hire Complainant or not. Respondent had the ability to control Complainant's employment and to make the decision to hire or fire him. It is not disputed that Respondent, therefore, was Complainant's employer for the purposes of the Human Rights Law. (Tr. 103-05, 240, 276, 293-94)
3. Complainant began his temp-to-hire position on May 9, 2005, as a machinist. (ALJ's Exhibit 3; Tr. 81)
4. In this position, Complainant's job duties consisted of setting up and operating Respondent's milling machines. This involved programming the machines to produce parts to certain specifications. (Tr. 118, 306-07)
5. Curtis Hampton, Respondent's manger, testified that Complainant had been involved in confrontations with people. He was argumentative with employees. He was difficult to work

with. Hampton received complaints from employees and supervisors. Complainant failed to complete jobs or failed to execute them in the manner Respondent expected. Complainant was warned against reprogramming Respondent's machines. (Tr. 312, 325-29, 352, 486)

6. Prior to working for Respondent, Complainant was diagnosed with degenerative osteoarthritis in his knee. As a result, his knee felt sore and achy, and the pain increased over time. (Tr. 76-78) While working for Respondent, Complainant would limp at times. (Tr. 82)

7. During his second week of employment, Complainant notified Hampton that he suffered from depression and anxiety. (Tr. 83-84, 219).

8. As a result of the pain in his knee and his depression and anxiety, Complainant took prescription medication while working for Respondent. (Tr. 95-96, 238, 288, 292)

9. In approximately mid-August 2005, Complainant attended a football game with several co-workers, some of whom noticed him taking his medication. Complainant subsequently became the subject of rumors that he was addicted to pain medication. (Tr. 85-93)

10. The rumors about Complainant were "rampant." Management instructed the shift supervisors to ask the employees of each shift whether illegal drugs were being used on the premises. It was never determined whether such was the case. (Tr. 169, 238-40, 375-76, 391-95, 472-73, 484)

11. On September 1, 2005, Complainant worked on a machine during the 10 p.m. to 6:30 a.m. shift. Kevin Vacca, the worker following Complainant on the machine that morning, credibly testified that he informed Hampton that the machine's program had been physically altered. The result of the program change was that it caused the machine to be out of specification while a job was in progress. Thus, parts it produced were incorrectly made. (Tr. 308-13, 315, 330, 427-34, 454)

12. The change to the machine's program was considered "critical to the function of the part" being manufactured. (Tr. 340)

13. After learning that the program had been changed, Hampton concluded that Complainant had "sabotaged" the machine. This incident was "the straw that broke the camel's back." On September 2, 2005, based on Hampton's belief that Complainant sabotaged the machine and the other difficulties Complainant had with co-workers and supervisors, Hampton terminated Complainant's temporary employment. At the time of the termination, Complainant was still in a temp-to-hire position and being paid by Express. (ALJ's Exhibit 1; Tr. 56, 136, 145, 252-53, 312-313, 329, 342, 386, 407, 416, 468)

14. Complainant testified that he believed his employment was terminated because:

... misinformation came up from the front office about [*sic*] I'm soliciting illegal drugs and rather than investigate it like they should have done [*sic*] and found it not to be true, they went with the first thing they heard and just decided, boom, we're going to make up something on this guy, we're not going to say anything about drugs because we don't want to bring the police into it, we're just going to say he sabotaged the machine, end of story.
(Tr. 250)

OPINION AND DECISION

Complainant claimed that he was discriminated against on the basis of his disability when Respondent terminated his temporary employment. Because the credible evidence fails to demonstrate that Respondent discriminated against Complainant, the complaint is dismissed.

Section 296.1 of the Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an employee because that employee has a disability.

In the instant case, Complainant produced no evidence that his employment was terminated as a result of a disability. Indeed, Complainant testified that he believed that his employment was terminated as a result of rumors being spread regarding his alleged solicitation

of illegal drugs. Respondent asserted that Complainant's employment was terminated after a series of problems with Complainant, culminating in his sabotaging a machine. No matter which version of events is believed, there was no evidence that the termination was based on Complainant's disability. Because Complainant has failed to demonstrate that Respondent discriminated against him, the complaint is dismissed.

ORDER

Pursuant to 9 NYCRR § 465.17(c)(3), Adjudication Counsel Peter G. Buchenholz has been designated by Commissioner Kumiki Gibson to issue this Final Order. The Adjudication Counsel has not taken part in any of the prior proceedings with respect to this case.

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: August 30, 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS


PETER G. BUCHENHOLZ
Adjudication Counsel