

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MICHAEL L. PISANO,

Complainant,

v.

VERIZON NEW YORK, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10118434

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal (“Recommended Order”), issued on December 23, 2008, by Christine Marbach Kellett, 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. 10118434

SUMMARY

Complainant alleged discrimination based upon disability (failure to provide reasonable accommodation) and wrongful termination. Respondent denied the allegations. Complainant failed to appear at the public hearing despite proper notice. No explanation of his non-appearance has been provided. Respondent did appear and provided documentary evidence contradicting Complainant's assertions in the complaint. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On June 5, 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 Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. The public hearing was held on November 5, 2008.

Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Scott H. Casher, Esq. Complainant failed to appear for the public hearing. The record was left open for Complainant to be contacted and to explain his absence. (Tr. 33) Complainant has failed to respond to the Division Attorney’s contacts. (ALJ Exh. 6, Tr.33)

FINDINGS OF FACT

1. On June 5, 2007, Complainant filed a complaint with the Division charging Respondent with violations of the Human Rights Law based upon disability when it allegedly failed to provide him with a reasonable accommodation, and when it terminated him. (ALJ Exh. 1)
2. Respondent denied the charges. (ALJ Exh.3)

Reasonable accommodation allegation

3. Complainant was working for Respondent as a Customer Service Agent (“CSA”) in October of 2000, when he suffered a traumatic brain injury and neurological damage to his arms as a result of a motor vehicle accident unrelated to work. (ALJ Exh. 1; Tr. 12)
4. Traumatic brain injury and neurological damage diagnosed by physicians constitute disabilities under the Human Rights Law. (Tr. 12-13; See: NY Exec. Law § 292.21)
5. Complainant alleged that between 2000, when he was injured, and 2002, when he was separated from the payroll, Respondent failed to reasonably accommodate his disability by either finding him another position whose essential functions he could perform, or by providing him with special equipment and programs. (ALJ Exh. 1; Tr. 13)

6. As a result of his injuries, Complainant could not perform the essential functions of his position as a CSA and was terminated by Respondent after he had exhausted Respondent's short and long term disability programs. (ALJ Exhibits 1, 3; Respondent's Exhibits 1, 3, 5; Tr. 13-14)

Return to Work

7. Sometime in 2004 or 2005, Complainant's union went to arbitration regarding Complainant's separation from payroll, denial of benefits and termination. (Respondent's Exh. 8; Tr. 14-15)

8. Complainant obtained medical release from psychologist Michael Long to return to work as a CSA without any limitations. (Respondent's Exh. 2)

9. William Holub, M.D. considered whether Complainant needed reasonable accommodation to perform the essential duties and determined he did not and recommended he return to work without restrictions. (Respondent's Exh. 2; Tr. 16-17).

10. Joan Gold, Ph.D., cleared Complainant to return to work for Respondent without restrictions. (Respondent's Exh. 5)

11. On April 17, 2006, Complainant, his union and Respondent executed a return to work agreement for Complainant's return to work as a CSA on April 24, 2006. (ALJ Exh. 3; Respondent's Exh. 8).

12. The return to work agreement is silent as to a need for reasonable accommodation. (Respondent's Exh.8)

13. After returning to work, Complainant did not ask for a reasonable accommodation. (Tr. 28, 33)

14. Complainant's assertion in the complaint that Respondent put Complainant back to work "only to give me a job back in customer service again knowing well I couldn't do it." is

contradicted by the documentary evidence produced at the hearing. This evidence established that Complainant and his union negotiated his return to work as a CSA after he had been fully cleared by his own doctors and by Respondent's doctors to perform the tasks of CSA with no need for a reasonable accommodation. (ALJ Exh. 1, Respondent's Exhibits 2, 3, 4, 5, 8)

Termination

15. After his return to work, Complainant violated the performance expectations for employees: on April 28, 2006, Complainant changed his status code to returned from break, but was found watching television in the break room (Respondent's Exh. 9); on August 14, 2006, Complainant was verbally abusive to a customer on the telephone (Respondent's Exh. 11); and on August 28, 2006, Complainant abused the break provisions by taking three excessive breaks of 15 minutes or more in the three hour period from 9 a.m. to noon. (Respondents Exh. 12). This last violation was coupled with coding himself being on a bathroom break, when he was in the break room responding to his private phone calls. (Respondent's Exh. 12)

16. At the discipline discussion occurring after these events, Complainant did not claim the violations were the result of his traumatic brain injury or his neurological damage. (Respondent's Exhibits 9, 11, 12; Tr. 24)

17. After the April 28, 2006 violation, Complainant, his union and Respondent modified the back to work agreement warning Complainant that he was in a last chance situation and that his probationary period was extended. (Respondent's Exh. 10)

18. After the third infraction, on September 1, 2006, Respondent suspended Complainant pending termination. (Respondent's Exh. 13)

Notice to Complainant

19. The parties received various notices that a public hearing would be held on the complaint. (ALJ Exhibits 1, 2, 4 , 5)

20. Between October 29, 2008 and November 3, 2008, Complainant and the assigned Division Attorney had detailed conversations about the presentation of the complaint, and discussed the materials sent to the Division Attorney by the Respondent's attorney as proposed documents, including the medical reports and the discipline reports. (Tr. 6-8)

21. At no time in the conversations with the Division Attorney did Complainant indicate he needed an adjournment of the public hearing. (Tr. 5)

22. The Complainant was asked to provide documents in response to those provided to the Division Attorney by Respondent's attorney but failed to produce any. (Tr. 27-28, 31)

23. Respondent came to the hearing prepared to present its case. (Tr. 2)

24. Complainant did not appear for the public hearing despite receiving notice of the hearing and despite the preparations for the hearing made with the Division Attorney. (Tr. 2-3)

25. Several attempts to reach Complainant were made during the public hearing, but Complainant did not answer the phone. (Tr. 3, 5, 8-9, 31)

26. The presiding hearing officer left the record open for additional time and opportunity for the Division Attorney to contact Complainant to see about his non-appearance and see if there was a reasonable explanation for not appearing at the public hearing. (Tr. 31, 33)

27. Complainant has not responded to these contacts. (ALJ Exh. 6)

28. Complainant has not contacted the Division to provide an excuse for his non-appearance despite time, opportunity and contact. (ALJ Exh. 6). Under these circumstances it is reasonable to determine that Complainant chose not to attend the public hearing.

29. Respondent made an oral motion to dismiss the complaint with prejudice. (Tr. 31-32)

OPINION AND DECISION

Complainant has failed to establish a prima facie case of discrimination. Some of complainant's claims are barred by the statute of limitations. Respondent's motion to dismiss should be granted and the complaint dismissed with prejudice.

Disability (Reasonable accommodation) charge

Employers are prohibited from discrimination in employment on the basis of a person's disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") §296.1 (a) Further, employers in New York are required to reasonably accommodate the known disabilities of their employees. Human Rights Law §296.3(a) There is a one year statute of limitations for the filing of a complaint with the Division. Human Rights Law §297.5

The complaint alleges that between 2000 and 2002, Respondent failed to reasonably accommodate Complainant's known disability by either finding him another position with the company or by providing adaptive equipment, and wrongfully terminated Complainant when he exhausted long and short term disability leave programs.

Complainant knew his initial employment with the Respondent was terminated in 2002. Although Complainant apparently challenged his separation from service through the union's grievance process in 2004, he did not file a complaint with the Division alleging disability discrimination for failure to accommodate his disability or for his termination in 2002 until June 5, 2007. Therefore, Complainant's allegations of disability discrimination for the time period 2000- 2002 when he was initially terminated are time barred.

Complainant, the union and Respondent entered into an agreement on April 17, 2006 as to his return to work on April 24, 2006. Complainant's signature appears on the return to work agreement. Any allegations regarding the failure to return Complainant to work before April 24,

2006, or that the return to work agreement itself failed to provide for a reasonable accommodation or violated the Human Right Law were required to be filed before April 17, 2007. The complaint was filed on June 5, 2007. Those allegations regarding returning Complainant to work or the agreement itself to return Complainant to work are time barred.

Complainant also claimed that with respect to returning him to work, Respondent knew he needed a reasonable accommodation in order to do his job as a CSA. The documentary evidence contradicts this claim. Complainant's doctors returned Complainant to work without restriction after considering whether he needed accommodations, and after determining he did not. After his return to work, Complainant did not ask for any accommodations. Complainant's claims of discrimination based upon a failure to accommodate are not supported by the documentary evidence produced at the hearing.

Wrongful Termination

Employers are prohibited from terminating an employee because of a disability. Human Rights Law §296.1(a).

In disability cases, a complainant must establish that he is a person with a disability that does not prevent him from performing the essential functions of the position with or without a reasonable accommodation, that he was either denied the reasonable accommodation or was treated differently than other persons without the disability. *See: New York City Transit Auth. v. State Div. of Human Rights (Nash)*, 78 NY 2d 207, 573 NYS2d 49 (1991)

Complainant is a person with a disability. His employer knew he had suffered a traumatic brain injury and neurological damage in 2000, and had medical information on his capabilities through individualized medical assessments. However, Complainant cannot show he needed a reasonable accommodation. Complainant was returned to employment after a series of

individualized assessments from both Complainant's providers and Respondent's physicians. These assessments permitted Complainant to return to work without restriction. *See: Matter of State Division of Human Rights (Granelle)* 70 N.Y.2d 100, 517 N.Y.S.2d 715 (1987)

Complainant's termination occurred after three violations of the workplace rules. The circumstances of Complainant's termination do not lead to an inference of disparate treatment or illegal discrimination based upon a disability. Rather the documents produced at the public hearing established that Complainant was terminated after a progressive discipline process resulting from three episodes of misconduct and violations of the work place rules unrelated to his traumatic brain injury or neurological damage. The complaint must be dismissed because under the circumstances established at the public hearing by the documentary submissions, this complainant cannot make out a prima facie case of disability discrimination. His termination was the result of misconduct, not his disabilities.

Under the totality of the circumstances here, and given the documentary evidence produced, Respondent's motion to dismiss the complaint with prejudice should be granted. The complaint should be dismissed on its merits with prejudice.

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: December 23, 2008
Bronx, New York



Christine Marbach Kellett
Administrative Law Judge