NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

RICHARD F. POHL,

Complainant,

v.

UNITED HEALTH SERVICES HOSPITALS, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10116274

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 June 9, 2008, by Michael T. Groben, 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: AUG 12 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10116274**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him on the basis of disability in the provision of services for Complainant's pre-employment physical examination and test. Complainant did not prove a prima facie case of illegal discrimination. The complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 22, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to public accommodation 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 19 and March 20, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Rosalind M. Polanowski. Respondent was represented by Levene Gouldin & Thompson, LLP, by Maria E. Lisi-Murray, Esq., of counsel.

Permission to file recommended findings of fact and conclusions of law was granted, and briefs were timely filed by both parties.

FINDINGS OF FACT

1. Complainant suffered back, shoulder and arm injuries from accidents occurring prior to the events set forth in the complaint, and claims a 50% permanent loss of the use of his left arm and shoulder, and a 50% permanent/partial loss of the use of his back as a result. (ALJ Exhibit 1, page 8; Respondent's Exhibit 1; Tr. 105-09)

2. In July of 2006, Complainant received a job offer from Vail-Ballou Printing Presses ("Vail-Ballou"), in Conklin, New York. The job offer, for a binder position, was conditioned on completion of a pre-employment screening and physical test. (Tr. 15; 44; 66; 79)

3. Vail-Ballou, also known as Maple Vail, hired Respondent United Health Services Hospitals, Inc. to perform pre-employment screening and physical tests on prospective employees. (Tr. 141; 202-03)

4. Complainant reported to Respondent's facility for his pre-employment screening and physical test on July 10, 2006. (Tr. 140-42)

5. On that date, Complainant completed the entire pre-employment screening and physical test, with the exception of the lifting test. (Tr. 20; 142-43)

6. Michele Cerra ("Cerra") is a nurse practitioner, employed by Respondent's occupational medicine office to perform pre-employment screening and physical tests. (Tr. 140)

7. Cerra reviewed complainant's medical chart, which included a medical history indicating the use of several medications including a Fentanyl patch, Hydrocodone, Ativan, Soma, and Previcid. Complainant indicated that he was taking these medications as a result of a back injury which had occurred some two and a half years before while he was operating a lawnmower which tipped over. (Respondent's Exhibit 1; Tr. 145-46)

8. Complainant did not disclose to Respondent that he had incurred a 50% permanent loss of the use of his left arm and shoulder, and a 50% permanent/partial loss of the use of his back as a result of his accidents. (ALJ Exhibit 1, page 8; Respondent's Exhibit 1; Tr. 105-09; 173-74)

9. Cerra observed that Complainant's speech was slow and delayed, and that he appeared to be drowsy or sedated. (Tr. 175)

10. Due to Complainant's appearance, the number and type of medications he was using, and his back injury, Cerra requested that he provided a note from his treating physician describing any work restrictions for Complainant before taking the lifting test. (Tr. 147-48;150; 175)

11. The lifting test to be performed by Complainant for the binder position would have included repetitive trunk rotation in different positions, stooping, and reaching, lifting and replacing weights of up to 50 pounds. (Respondent's Exhibit 6; Tr. 200-204)

12. Cerra was concerned that Complainant might injure himself during the lifting test. (Tr.150; 177-85)

13. The binder position at Vail-Ballou involved heavy physical labor, including repetitive lifting of to 50 pounds, and working around forklifts and heavy machinery. (Tr. 151-155; 194-96)

14. Complainant sent a physician's note to Respondent, which was received. The note indicated that complainant suffered from chronic lumbar discogenic pain, that hyperextension of Complainant's back should be done infrequently, that he could lift 25 pounds frequently, and 50 pounds only on occasion (Complainant's Exhibit 1; Tr. 151; 158-60)

15. Cerra concluded on the basis of that physician's note that Complainant had not been cleared by his physician to take the lifting test or to perform the essential functions of the binder position, and Complainant was not permitted to take the lifting test. (Complainant's Exhibit 1; Tr. 152-61; 175-85)

16. The physician's note, along with a copy of the physical examination results for Complainant, was sent by Respondent to Vail-Ballou shortly after the physical examination (Complainant's Exhibit 1; Respondent's Exhibit 5; Tr. 158-9; 161-62; 168)

17. It was the responsibility of Vail-Ballou, as Complainant's prospective employer, to determine whether a reasonable accommodation to his physical condition would be appropriate for either the lifting test or the binder position. Respondent was not responsible for making this determination, only to report to Vail-Ballou whether the pre-employment screening and physical test had defined a limitation. (Tr. 155; 160-1; 187; 207)

18. Complainant testified that at Cerra's request he had sent to Respondent a second physician's note which reduced the physical restrictions placed on him. On further examination he acknowledged that he hade not sent the note, but thought it had been sent by facsimile from

his physician to Respondent. Complainant was unable to provide any proof that the note had been sent to Respondent (Complainant's Exhibit 2; Tr. 57; 62)

19. Cerra did not request or receive Complainant's Exhibit 2. Had she received the note, Cerra would have asked Complainant to furnish her with a release in order to obtain his medical records, so that she could ascertain whether Complainant could be medically cleared to take the lift test. (Tr.175-77)

20. In or about August of 2007, Complainant sent a letter to Respondent, annexing to the same a copy of a third note written by his personal physician, in order to prove that his physician gave him permission to take the lifting test. That note is dated April 6, 2002. (Respondent's Exhibit 4;Tr. 115-123)

21. Complainant did not take the lifting test, and was never hired by Vail-Ballou. (Tr. 67-68)

22. Complainant was often not sure of the dates when particular events in his testimony occurred, and was even uncertain regarding what year a particular significant event had taken place. (Tr. 67-68)

OPINION AND DECISION

It is an unlawful discriminatory practice for "any person, being the owner, lessee, proprietor, manager, superintendant, agent or employee of any place of public accommodation, resort or amusement, because of the ...disability...of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . ." Human Rights Law § 196.2(a). Respondent operates a place of public accommodation. Human Rights Law § 196 (9); *Cahill v. Rosa.* , 89 N.Y.2d 14, 21-2 (1996).

Complainant in this case has produced no credible evidence that Respondent discriminated against him by refusing, withholding or denying to him any of the accommodations, advantages, facilities or privileges of Respondent's facility. As credibly testified to by Respondent's witnesses, it was not Respondent's responsibility to determine whether a reasonable accommodation should be proffered to Complainant with respect to either the lifting test or the binder position. That issue was referred to Vail-Ballou, as Complainant's prospective employer, which apparently concluded that Complainant was ineligible for the position.

With respect to Respondent's own determination, Respondent reasonably concluded on the basis of Complainant's pre-employment examination that further documentation regarding his ability to take the lifting test was required. The physician's note received by Respondent from Complainant supported Respondent's opinion that Complainant's physical condition would expose him to a substantial risk of injury were he to take the lifting test, and would also have prevented him from performing the essential functions of the binder position, absent an accommodation by Vail-Ballou. Respondent had a legitimate, non-discriminatory reason for

refusing to allow Complainant to take the lifting test.

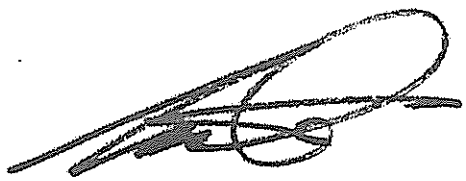
Complainant himself claims a 50% permanent loss of the use of his left arm and shoulder, and a 50% permanent/partial loss of the use of his back as a result of his various accidents, information which he concealed from Respondent. Complainant failed to explain how he could have performed any heavy physical labor, such as the binder position, or the lifting test itself, with these alleged severe functional limitations.

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 ordered that the complaint be and hereby is dismissed.

DATED: June 9, 2008
Bronx, New York



Michael T. Groben
Administrative Law Judge