NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **WILLIAM A. SHADES,** Complainant, v. **KENYON PRESS, INC.,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10117432

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 February 28, 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 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 26th day of March, 2008.

KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

WILLIAM A. SHADES,

Complainant,

v.

KENYON PRESS, INC.,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10117432**

SUMMARY

Complainant charged Respondent violated the Human Rights Law when it terminated him after he was injured on the job. Respondent denied unlawful discrimination, and offered lawful reasons for Complainant's termination. Complainant failed to show the reasons offered were a pretext for unlawful discrimination. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On May 14, 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 January 30, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Paul M. Longeretta, Esq. Respondent was represented by Ronald Mittleman, Esq.

FINDINGS OF FACT

1. Complainant charged Respondent violated the Human Rights Law when Respondent terminated him three days after he was injured on the job. (ALJ's Exh.1)

2. Respondent admitted terminating Complainant three days after he was injured on the job, but stated the reason for the termination was the loss of a significant customer to bankruptcy. (ALJ's Exh. 2)

3. Respondent is a commercial printing company wholly owned by Ray Kenyon ("Kenyon"). (Tr. 127, 134)

4. In the middle of February, 2007, Kenyon hired Complainant as an apprentice maintenance mechanic in anticipation of the retirement of another employee. (Tr. 80, 123, 146-47, 151, 198-99).

5. Kenyon found Complainant a courteous, motivated and honest individual. (Complainant's Exh. 2)

6. On April 6, 2007, Respondent's principal customer, Rockaway Bedding ("Rockaway"), notified Kenyon it was filing for bankruptcy protection. (Respondent's Exh. 1; Tr. 96, 139-40, 209)

7. Rockaway represented some four million dollars in gross sales, or forty percent of Respondent's business, and owed Respondent in excess of $758,000 in accounts receivable which could not now be collected. (Tr. 96, 110-11, 140-41, 143)

8. On April 9, 2007, Respondent employed 72 workers. (Respondent's Exh. 2; Tr. 153)

9. On April 9, 2007, Complainant was injured on the job when he suffered an electric shock to his right hand and arm. (Complainant's Exhibits 4 and 5; Tr. 14-16)

10. The parties stipulated that Complainant's injury resulted in a disability as defined under the Human Rights Law. (Tr. 35)

11. On April 12, 2007, Kenyon terminated Complainant, explaining to Complainant it was the result of Rockaway's bankruptcy and the expected impact of that bankruptcy on Respondent's business. (Tr. 17, 44-45, 180-81, 198-99, 203)

12. Kenyon had determined that Rockaway's bankruptcy would significantly impact his business, and that Complainant, who was the last person hired in the maintenance department, would be the first to go. (Tr. 150-51)

13. At the time Kenyon decided to terminate Complainant, Kenyon was considering the financial hit to be taken by his company and not Complainant's injuries. (Tr. 174)

14. It turned out, however, that Complainant was totally disabled by the injury to his arm and unable to work. (Complainant's Exh. 4; Tr. 54-55)

15. By June 9, 2007, Kenyon had terminated or laid off seven employees including Complainant. (Respondent's Exh. 2; Tr. 153)

16. By August 9, 2007, Kenyon had reduced his workforce to 47, as Rockaway had liquidated its assets. (Respondent's Exh. 2; Tr. 154-55)

17. In addition to the loss of Rockaway's business, Respondent lost the Ads Creative account. (Tr. 128-29)

18. As of January 9, 2008, Respondent employed 26. (Respondent's Exh. 2; Tr. 156).

19. Respondent is currently working with its own lender to reorganize and right-size. (Tr. 158)

20. All the full-time maintenance mechanic positions have been either eliminated or absorbed into other positions. (Tr. 181, 214, 230)

21. Of the six maintenance mechanics employed on April 9, 2007, three remain, but in other positions, and three including Complainant have been terminated. (Tr. 181, 214, 230)

22. Complainant admitted he knew others were terminated due to the loss of Rockaway's business. (Tr. 47)

23. But Complainant claimed Respondent's explanation was a pretext because Lory Irwin ("Irwin"), its former general manager, reported that on April 12, 2007, at 8 a.m. she had overheard Kenyon say to Mike Shepard ("Shepard"), Complainant's supervisor, that Complainant was a medical liability and needed to be terminated. (Tr. 107)

24. Although Complainant had left work early on April 10, 2007, in order to see a doctor, and had called in sick on April 11, 2007, in order to see more doctors, Complainant was undergoing testing, and was uncertain as to the extent of his injuries. (Complainant's Exh. 2)

25. Irwin admitted that no other employee of the numerous employees injured while she worked for Respondent had been terminated or laid off because of their injuries prior to this time. (Tr. 103)

26. Irwin testified to the number of accommodations Respondent made for other employees injured on or off the job and needing accommodation in the past. (Tr. 104-107)

27. At least eight other individuals were identified as receiving accommodation or having been injured and their jobs kept for them in the past. (Tr. 161-64, 165, 166-70, 171, 172)

28. Complainant continues on Workers' Compensation disability. (Complainant's Exh. 5)

29. Complainant remains unable to perform the essential functions of an apprentice maintenance mechanic. (Tr. 54-55, 77,81)

OPINION AND DECISION

Under the Human Rights Law it is an unlawful discriminatory practice for an employer to discharge from employment an individual on the basis of disability. NY Exec. § 296.1 (a)

Complainant charged Respondent with violating the Human Rights Law when it terminated him three days after he suffered a disabling on-the-job injury. Respondent explained its termination of Complainant with the loss of its major customer, the subsequent loss of another major customer and the resulting reductions in workforce. Complainant has failed to show the Respondent's explanation was a pretext and the complaint should be dismissed.

To make out a prima facie case of unlawful discrimination under the Human Rights Law, complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *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, 479, 399 N.E.2d 880, 885-886(1975), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 668 (1973).

If complainant establishes a prima facie case of discrimination, respondent must articulate a legitimate, non-discriminatory business reason for its actions. *St. Mary's Honor Ctr.*

v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L. Ed. 2d 407(1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed. 105 (2000).

Upon respondent's production of a legitimate, non-discriminatory business reason for its actions, the burden of proof requires complainant to show respondent's reason is a pretext for illegal discrimination. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25 (1997).

Complainant is a person with a disability. Complainant sustained an on-the-job injury which the parties agreed met the definition of a disability under the Human Rights Law. See N.Y Exec. Law § 292 (21). He is therefore in a protected class. Complainant was hired for a position of apprentice maintenance mechanic, and his employment infers he was qualified for that position. Complainant's subsequent termination is an adverse employment action. The circumstances, including Complainant's termination within three days of suffering the on-the-job injury and the alleged comment by Kenyon that Complainant was a medical liability, give rise to an inference of disability discrimination. Complainant established a prima facie case of discrimination based upon disability.

This is not a case in which Complainant was requesting a reasonable accommodation for his injury. Complainant admitted he could not perform the duties of a maintenance mechanic and indeed could not work at all. Had Complainant argued reasonable accommodation, he would have failed to make a prima facie case as he admitted he could not work at all, and was totally disabled. *See Dantonio v. Kaleida Health*, 288 A.D.2d 866, 732 N.Y.S.2d 322 (4th Dept, 2001), *reargument denied* 737 N.Y.S.2d 911, *leave to appeal denied*, 98 N.Y.2d 604, 746 N.Y.S.2d 278, 773 N.E.2d 1016. Complainant simply did not expect to be terminated after he was injured. Given the history Respondent had for taking care of its employees when they were injured, there

may have been a basis for such an expectation. But times and finances change. Respondent's loss of its major customer and forty per cent of its gross revenues impacted not only Complainant but many other employees.

Complainant has failed to show that the Respondent's explanation, that it faced substantial losses as a result of the bankruptcy of its major customer, was a pretext for illegal discrimination. The evidence produced at the hearing, and acknowledged by Complainant, established that many, many individuals were laid off or terminated by Respondent as a result of the loss of Rockaway's business, and the additional loss of Ads Creative as a customer. These layoffs occurred over several months, as the conditions worsened and the impact of the losses became apparent. These losses affected the entire work force. The maintenance department in which Complainant worked has been dismantled and does not exist, and the position of maintenance mechanic is gone, with the work redistributed or reassigned. The number of employees has gone from 73 to 26. As the last maintenance mechanic hired, it is not illegally discriminatory to have Complainant as the first maintenance mechanic to be terminated.

The testimony presented by Respondent and by Complainant's own witness, Irwin, revealed an employer with a history of accommodating its injured employees and protecting their positions. In terms of any medical liability represented by Complainant's injury, Respondent's obligations to Complainant for his on-the -job injury were fixed on the day of his injury, and are governed by the Workers' Compensation Laws of the State of New York. Complainant failed to establish that Respondent's explanation was a pretext for illegal discrimination under the Human Rights Law.

As the ultimate burden of proof is Complainant's, and he has failed to meet that burden, the complaint should be 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: February 28, 2008
Bronx, New York

Christine Marbach Kellett
Administrative Law Judge