NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

DARREN G. SHAW,

Complainant,

v.

CITY OF WHITE PLAINS, DEPARTMENT OF PUBLIC WORKS,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10113250

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 August 8, 2008, by Thomas J. Marlow, 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: SEP - 9 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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CITY OF WHITE PLAINS, DEPARTMENT OF PUBLIC WORKS,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10113250**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his disability. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 9, 2006, 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 Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on February 13, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Daniel K. Spencer, Esq., Deputy Corporation Counsel, City of White Plains.

Permission to file proposed findings of fact and conclusions of law was granted. Respondent so filed after the conclusion of the public hearing.

FINDINGS OF FACT

1. In March of 2003, Complainant began his employment with Respondent as a sanitation worker. (ALJ's Exhibit 1; Tr. 29-31)

2. In January of 2004, in an evaluation report, Complainant's supervisor found his attendance unacceptable and recommended that his probation be extended. (Joint Exhibit 3)

3. In June of 2004, Complainant was warned by William Hill, Jr. ("Hill"), superintendent for Respondent, about abusing his leave time. (Respondent's Exhibit 5; Tr. 248-49) Complainant had used 15 sick days over a 9 month period and had taken 1 day off when he had no right to do so. (Respondent's Exhibit 5; Tr. 248-49) He was also informed that there would be a follow-up meeting about his attendance. (Respondent's Exhibit 5) Respondent's practice is to have follow-up meetings with an employee when attendance is considered a problem. (Tr. 146-49, 266-67)

4. On or about December 14, 2004, Complainant was injured while working. (ALJ's Exhibit 1; Tr. 12-13) On December 20, 2004, Complainant had a surgical procedure as a result of the injury to remedy a left tibial plateau fracture and was out of work, on disability, until February 24, 2005. (Complainant's Exhibit 1; Tr. 12-14)

5. On February 24, 2005, Complainant returned to work without any restrictions. (Tr. 12-13) In March of 2005, Hill had a follow-up meeting with Complainant about attendance. (Respondent's Exhibit 5; Tr. 265-66) Hill decided to have another follow-up meeting in September of 2005. (Respondent's Exhibit 5)

6. Complainant experienced pain in the area of his surgery, and was out of work in May, June, and most of July of 2005. On July 21, 2005, Complainant again returned to work without any restrictions. (Joint Exhibit 4; Tr. 12-15) After Complainant returned in July, Hill again spoke with him about attendance. (Tr. 48, 123-26) Complainant attributed some of his absences to his work-related injury. (Tr. 48, 123-26)

7. Complainant testified that he felt that the conversations concerning attendance were a form of harassment because of his disability. (Tr. 46-47)

8. Complainant testified that on August 12, 2005, he told Hill and Jerry Prioleau ("Prioleau"), an assistant superintendent for Respondent, that he would not be in work on Monday, August 15, 2008, because of family obligations. (Tr. 49-52) I do not find this testimony credible.

9. Hill testified that Complainant did not speak to him on August 12 about not coming to work on August 15. (Tr. 240-41) I find this testimony credible. At the time of the hearing Prioleau was not an employee of Respondent. (Tr. 159)

10. Michael Coy ("Coy"), a foreman for Respondent, testified that, on August 15, 2008, Complainant called and informed him that he was sick and would not be at work on that day. (Joint Exhibit 1; Tr. 49, 86, 136-38, 267-68) I find this testimony credible. Complainant denied that he called in sick on August 15. (Tr. 55-56) I do not find this denial credible.

11. On August 16, 2008, Complainant provided Respondent with a letter from Westchester Family Court indicating that he was in the Court on August 15, 2008. (Joint Exhibit 6)

12. Joseph J. Nicoletti, Jr. ("Nicoletti"), the Commissioner of Public Works for the City of White Plains, was informed that Complainant had called in sick and had, thereafter, brought in a letter indicating that he was in court. (Tr. 164-68)

13. By letter dated September 23, 2005, Nicoletti terminated the employment of Complainant, effective at the end of business on September 30, 2005, because he determined that Complainant was dishonest regarding his reason for not coming to work on August 15. (Joint Exhibit 7; Tr. 167-68, 171-72)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability. *See* Human Rights Law § 296.1(a)

Complainant raised an issue of unlawful discrimination in the terms, conditions, and privileges of employment because of disability. Complainant can sustain his burden of proving discrimination in the conditions of employment because of disability by showing that there was a hostile work environment at his place of employment and it existed because of his disability.

To establish that a hostile work environment existed, Complainant would have to show that he was a member of a protected class, that the conduct or words upon which the claim of discrimination is based were unwelcome, that the conduct or words were prompted because of his disability, that the conduct or words were "sufficiently severe or pervasive to alter the conditions of the victim's employment," and that Respondent is responsible for the conduct or

words. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup. Ct. N.Y. County 1997), *appeal dismissed*, 256 A.D.2d 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 691 N.Y.S.2d 383 (1999), *lv. to appeal denied*, 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999). In evaluating a work environment to determine if it was hostile, one must consider the totality of the circumstances from both a reasonable person's standpoint as well as from the Complainant's subjective perspective. *See Father Belle*, 221 A.D.2d at 51.

The evidence establishes that Complainant was injured while working and, as a result of this injury, Complainant had surgery to remedy a left tibial plateau fracture. Complainant has also shown that, because of this injury and subsequent surgery, he occasionally experiences pain in the area of his surgery and cannot work. He clearly has shown that he is a member of a protected class in that he suffers from a disability. *See State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985)

The evidence, however, does not establish that Respondent subjected Complainant to a hostile work environment because of his disability. Respondent has established through credible testimony that, before Complainant had a disability, he had attendance problems that caused his probation to be extended. Also, before he had a disability, he was warned about abusing his leave time and informed that there would be follow-up meetings about attendance. Although Complainant may have felt harassed because of disability by conversations concerning his attendance, he has failed to establish that Respondent's behavior was prompted by his disability or was "sufficiently severe or pervasive to alter the conditions of (his) employment." *See Father*

Belle at 50. The credible evidence shows that such conversations regarding attendance were the common practice in Respondent's workplace when there was a problem with an employee's attendance, were related to Complainant's employment history before he had a disability, and were not attributable to his disability.

The complaint also raised the issue of unlawful discrimination in the termination of Complainant's employment. To prove a claim of unlawful discrimination arising from the termination of employment, Complainant must initially show that he is a member of a protected class, that he was qualified for the position, that he suffered an adverse employment action, and that this adverse action occurred under circumstances giving rise to an inference of unlawful discrimination because of his status as a member of a protected class. *See Ferrante v. American Lung Assn.,* 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997).

Complainant has established that he had a disability and, further, has shown that Respondent spoke to him about his attendance after he had his disability. In some of these conversations, Complainant would explain that, at times, he missed work because of the pain from his disability. Complainant's employment was terminated shortly after his second extended leave from work related to his disability. Complainant has established a prima facie case, the burden of which has been described as "de minimus." *Schwaller v. Squire Sanders & Dempsey,* 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998) Because Complainant has established a prima facie case of unlawful discrimination because of a disability, the burden shifts to Respondent to establish a legitimate, nondiscriminatory basis for terminating the employment of Complainant. *See Ferrante,* 90 N.Y.2d at 629.

The credible evidence establishes that Complainant's employment was terminated because of dishonesty. He had a history of abusing his leave time, and on August 15 he called in

sick. The next day he appeared at work with a letter showing he had been in Westchester Family Court on August 15. Complainant testified that he did not call in sick and that, on August 12, he told Hill and Prioleau that he would not be in work on August 15 because he had family obligations. Hill denied that Complainant told him on August 12 that he wouldn't be in on August 15 and Coy testified that Complainant called in sick on August 15. Clearly, "room for choice exists" in choosing to accept one of the conflicting versions of what happened on August 12 and one of the conflicting versions of what happened on August 15. After weighing all of the evidence and considering the demeanor of the witnesses, however, I credit the testimony of Coy and Hill. *See Mittl v. N.Y. State Div. of Human Rights,* 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

Since Respondent has established a valid, nondiscriminatory reason for its action, the burden shifts back to Complainant to prove that the reason proffered by Respondent was merely a pretext for unlawful discrimination. *See Ferrante,* 90 N.Y.2d at 629-30. Complainant has not met his burden of showing that Respondent's reason for terminating him was a pretext for unlawful discrimination.

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 hereby is, dismissed.

DATED: August 8, 2008
Bronx, New York

Thomas J. Marlow
Administrative Law Judge