NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

TOMMY SIMMONS,

Complainant,

v.

LONG ISLAND JEWISH MEDICAL CENTER:
THE ZUCKER HILLSIDE HOSPITAL,

Respondent.

**NOTICE AND
FINAL ORDER**

Case Nos. 10116011
10117848

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 May 8, 2008, by Robert M. Vespoli, 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: JUL 28 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Numbers **10116011 / 10117848**

SUMMARY

In his first complaint, Complainant alleged that Respondent retaliated against him for filing a prior complaint of discrimination and that Respondent failed to provide reasonable accommodations for his disabilities. In his second complaint, Complainant alleged that Respondent terminated his employment in retaliation for filing the first instant complaint. The credible record does not support Complainant's allegations of disability discrimination and retaliation. Accordingly, the instant complaints are dismissed.

PROCEEDINGS IN THE CASE

On February 6, 2007 and May 15, 2007, Complainant filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 7 and 8, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Yanique L. Burke, Esq. on behalf of John L. Sampson, Esq. Respondent was represented by Mark A. Gloade, Esq.

At the public hearing, the presiding ALJ amended the captions in both complaints to identically reflect Respondent's correct legal name as follows: "Long Island Jewish Medical Center: The Zucker Hillside Hospital." (Tr. 5-8, 287-88)

The parties filed timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant was hired by Respondent to work as a housekeeping worker in or about October 1993. (Tr. 14-15) Complainant worked in Respondent's Environmental Services Department where his duties included removing rubbish; moving file cabinets and boxes; sweeping; buffing, waxing, and stripping floors; cleaning; and dusting. (Tr. 41, 44-45, 488)

2. Complainant possessed the requisite qualifications for the housekeeping worker position. (Tr. 15)

3. Respondent effectively terminated Complainant's employment on May 10, 2007. Complainant's last day of work was April 20, 2007. (Tr. 16)

4. In or about 2001, Complainant suffered injuries to his back and knee. (Tr. 16, 43-44; ALJ's Exh. 1) It is undisputed that Respondent was aware of Complainant's injuries at this time and that these injuries qualify as disabilities under the Human Rights Law. (Tr. 16-17)

5. On June 14, 2005, Complainant filed Division Case No. 10106233 claiming that Respondent discriminated against him based on his disabilities. (Tr. 17) The parties agreed to resolve that case on July 26, 2006. (Tr. 17-18, 121; Joint Exh. 1)

6. Complainant filed the first instant complaint, Division Case No. 10116011, on February 6, 2007, claiming that Respondent retaliated against him for filing Division Case No. 10106233 and failing to grant him reasonable accommodations for his disabilities. (ALJ's Exh. 1) Respondent was aware that Complainant filed the first instant complaint when it terminated his employment. (Tr. 18)

7. Dale Arnold worked for Respondent as the director of environmental services from 2004 until August 2007. (Tr. 487-88)

8. Andre Shelborne became Complainant's direct supervisor in July 2006, just before Complainant went out on leave related to his knee injury. (Tr. 51-52, 60, 67-68) Complainant returned from this leave on December 27, 2006. (Tr. 51-52)

9. Complainant submitted a doctor's note to Respondent dated February 1, 2007, stating that he could return to full-time work on modified duty. In his note, Complainant's physician stated that Complainant could "stand/walk for approximately 8 (eight) hours" and may need to elevate his leg to reduce swelling. (Complainant's Exh. 1)

10. Karina Norr, Respondent's executive director of human resources, testified that she met with Complainant around this time and provided him with a copy of his job description so he could consult with his doctor and advise Respondent about any specific accommodations he

required to perform his job duties. (Tr. 426, 453-54) Complainant subsequently met with Norr and Rebecca Gordon, a human resources executive for Respondent, and told them he needed a Brute trash container to help him do his job. (Tr. 48-49, 143, 409-10, 426)

11. Respondent ordered two large Brute trash containers for Complainant to help him perform his duties. (Tr. 143, 309-314, 373-74, 426) Shelborne testified that he personally assembled one of the containers for Complainant so Complainant could use it without delay. (Tr. 312-14)

12. Although Complainant averred that Arnold refused to grant Complainant the accommodations requested in his February 1, 2007 doctor's note, Complainant admitted that Respondent allowed him to take breaks to elevate his legs as needed (i.e. four to five times per day). (Tr. 55-57; ALJ's Exh. 1)

13. Complainant also claimed that Arnold refused to allow Complainant to attend his workers' compensation hearing dates. (Tr. 154-55; ALJ's Exh. 1) However, Shelborne credibly testified that Complainant was allowed to attend these hearing dates even though Complainant did not follow Respondent's established policy. (Tr. 362-66) Complainant admitted that Shelborne allowed him to attend his workers' compensation hearing dates. (Tr. 156-59)

14. Complainant claimed that Respondent assigned him to a larger work area after he returned to work in December 2006. (Tr. 49-57; ALJ's Exh. 1) However, Arnold testified that, except for a period of time in 2006, Complainant's work area remained the same during Arnold's tenure with Respondent. (Tr. 493-96) Shelborne testified that none of Complainant's co-workers had a smaller work area than Complainant during the relevant time period. (Tr. 372-73)

15. Shelborne conducted routine environmental rounds to inspect the departments under his charge. During these rounds, Shelborne met with the department heads to make sure they were

receiving adequate services. (Tr. 330, 469-70) On or about April 19, 2007, Shelborne met with Ken Sokol, Respondent's associate director of pharmacy, to discuss the quality of the cleaning services in the pharmacy, which was assigned to Complainant at that time. (Tr. 329-31, 468) Sokol expressed his displeasure with the cleanliness of the pharmacy, a department that required sanitary conditions at all times. (Tr. 330-31, 468-70) Sokol had previously expressed similar concerns about the sanitary conditions in his department. (Tr. 331, 470)

16. Having first confirmed Sokol's complaints, Shelborne sought out Complainant to discuss these issues, but he could not locate Complainant. (Tr. 332) Shelborne later found Complainant in an unauthorized area, Respondent's library. (Tr. 335) Shelborne testified that Complainant was sitting at the librarian's desk, speaking on the telephone and eating Chinese food, even though he was not entitled to a meal break at that time. (Tr. 335-36)

17. Later that evening, Shelborne prepared a formal disciplinary warning notice for Complainant regarding this incident. (Tr. 344; Respondent's Exh. 8)

18. When Complainant arrived for work the next day, Shelborne instructed him to meet with Shelborne and a union delegate. (Tr. 346) Complainant immediately went to speak to Norr to complain that Shelborne was harassing him. (Tr. 177, 349, 402-05) However, Norr was not available and Complainant told Norr's assistant, Terry Ann Murphy, that he needed to speak to Norr because the situation "could get physical" between Complainant and Shelborne. (Tr. 405-07) Murphy testified that Complainant subsequently made a statement analogizing his feelings to those of the shooter in the mass murders on the campus of Virginia Tech just a few days earlier. (Tr. 406)

19. Although Complainant admitted that he spoke to Murphy that day, he denied making any threats and testified that Murphy misconstrued his statements. (Tr. 175-80)

20. When Complainant went to the meeting, Shelborne formally presented the disciplinary warning notice to Complainant and Ben Gadson, Complainant's chosen union representative. (Tr. 74-75, 250, 350) When Shelborne gave Complainant the disciplinary warning notice, Shelborne testified that Complainant was upset and stated that Shelborne would not be around much longer, and that Complainant "got something" for Shelborne. (Tr. 353-54) Shelborne testified that, while he was seated at his desk, Complainant then approached him in a threatening manner, stood over him and repeated similar threatening statements. (Tr. 354-57) Shelborne stated that Gadson then grabbed Complainant and pulled him away from Shelborne. (Tr. 356)

21. Ann Shaw, an environmental supervisor for Respondent, was also present at this meeting. (Tr. 475-76) Shaw corroborated Shelborne's testimony on this issue and stated that she too felt threatened and frightened by Complainant's conduct at the meeting. (Tr. 476-83)

22. Norr learned about this incident that day, April 20, 2007. She then issued a disciplinary warning notice to Complainant and suspended his employment. (Tr. 432; Respondent's Exh. 11)

23. Norr determined that statements provided to her by Shelborne, Murphy and Shaw substantiated a finding that Complainant engaged in threatening conduct that day. (Tr. 358, 424, 479-80)

24. Norr communicated her findings to Vicki Kahaner, corporate director of labor and employee relations. (Tr. 519, 521) Kahaner testified that she advised Norr to terminate Complainant's employment based on the circumstances surrounding Complainant's threatening behavior. (Tr. 521-22) Norr also consulted with Shantel Weinhold, Norr's executive director and supervisor, who determined that Respondent should terminate Complainant's employment. (Tr. 423-24)

OPINION AND DECISION

Complainant alleged that Respondent retaliated against him because he filed complaints of discrimination with the Division. The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that he engaged in protected activity, Respondent was aware that he participated in this activity, he suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

In the first instant complaint, Complainant charged that Respondent retaliated against him for filing a prior complaint of discrimination on June 14, 2005. However, Complainant has not established that he suffered an adverse action as a result of filing the prior complaint. He claimed that Respondent gave him a larger work area when he returned from his leave in December 2006. This allegation is contradicted by Arnold, who credibly testified that, except for a period of time in 2006, Complainant's work area was unchanged during the relevant time period. Furthermore, Shelborne credibly testified that none of Complainant's co-workers had a smaller work area than Complainant during the relevant time period.

Complainant also averred that Arnold retaliated against him by refusing to grant Complainant the accommodations requested in his February 1, 2007 doctor's note. However, Complainant admitted that Respondent allowed him to take breaks to elevate his legs as needed.

Additionally, Complainant claimed that Arnold refused to allow Complainant to attend his workers' compensation hearing dates. However, the credible record shows that Respondent allowed Complainant to attend his workers' compensation hearing dates, even though Complainant did not follow Respondent's established policy.

Finally, Complainant failed to show any causal nexus between the filing of his prior complaint with the Division and any alleged adverse actions. Complainant did not produce any evidence of subjective retaliatory motive on the part of Arnold, Shelborne or anyone else associated with Respondent.

Causation can be presumed in the absence of retaliatory animus if there is sufficient temporal proximity between the protected activity and the adverse action. *See Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002). There is no "bright line to define the outer limits beyond which a temporal relationship is too attenuated" to establish causation. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months). In this complaint, the gap in time between the June 14, 2005 complaint and the first date of any specific allegations of retaliation (i.e. December 2006) is insufficient to establish causation. Without any additional evidence of causation, the temporal relationship is too remote to sustain this claim of retaliation. *See Id.*

In the second instant complaint, Complainant claimed that Respondent retaliated against him by suspending him (i.e. April 20, 2007) and terminating his employment (i.e. May 10, 2007)

because he filed the first instant complaint on February 6, 2007. Complainant has clearly satisfied the first three elements of a prima facie retaliation claim. In light of the totality of the circumstances, the Division finds that Complainant has also established causation by showing that Respondent suspended his employment roughly two and one-half months after filing his complaint. *See Id.*

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

Respondent produced credible evidence that it suspended Complainant's employment, and subsequently terminated his employment, because he threatened Shelborne, his supervisor. Respondent took Complainant's threats seriously, especially in light of Complainant's statement analogizing his feelings to those of the shooter in the coinciding mass murders at Virginia Tech. Respondent acted immediately and appropriately under these circumstances by removing Complainant from the workplace. Respondent subsequently determined that Complainant had in fact made these threats and acted accordingly.

The burden then shifts back to Complainant to show that this reason is a pretext for unlawful retaliation. Complainant has failed to meet his burden.

In the first instant complaint, Complainant also claimed that Respondent failed to reasonably accommodate his disabilities. Under the Human Rights Law, an employer is obligated to provide reasonable accommodations for an employee's known disabilities. Human Rights Law § 296.3.

The record establishes that Complainant was disabled under the Human Rights Law and that Respondent had actual notice of these disabilities at all relevant times. The record further establishes that Respondent proactively interacted with Complainant in order to ascertain what

accommodations he needed to perform his job duties. Complainant subsequently met with Respondent's human resources executives and told them he needed a Brute container to help him do his job. The record firmly establishes that Respondent provided Complainant with two Brute containers in response to his request.

Furthermore, Complainant presented a note from his physician stating that Complainant could "stand/walk for approximately 8 (eight) hours" and may need to elevate his leg to reduce swelling. Complainant's charge that Arnold refused to grant Complainant these accommodations is contradicted in the record. Complainant admitted that Respondent allowed him to take breaks to elevate his legs as needed.

Therefore, the record establishes that Respondent entered into the requisite interactive process with Complainant and provided him with the accommodations he requested. Accordingly, Complainant's claim that Respondent failed to accommodate his disabilities must 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 instant complaints be, and the same hereby are, dismissed.

DATED: May 8, 2008
Hempstead, New York

Robert M. Vespoli

Robert M. Vespoli
Administrative Law Judge