

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

LAVERNE STEVENSON,

Complainant,

v.

CITY OF NEW YORK, DEPARTMENT OF  
CORRECTION,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10115544

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 October 14, 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: **FEB 13 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**LAVERNE STEVENSON,**

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**CITY OF NEW YORK, DEPARTMENT OF  
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Respondent.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10115544**

**SUMMARY**

Complainant alleges that Respondent unlawfully discriminated against her on the basis of disability by refusing to allow her to resume full duty work as a correction officer, in violation of Article 15 of the New York Executive Law. Complainant fails to state a prima facie case, and it is recommended that the complaint be dismissed.

**PROCEEDINGS IN THE CASE**

On February 2, 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 Tammy Collins, an Administrative Law Judge (“ALJ”) of the Division. The public hearing session was held on January 2, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Robert Alan Meisels. Respondent was represented by Jamie Zinaman, Esq., and Ruby Bradley, Esq.

On the day of the hearing, the Division attorney received a notarized letter from the Complainant, dated December 30, 2007, which requested, inter alia, that the complaint be amended to add additional parties. The Division attorney opposed said application. Complainant's application was not granted, and the hearing proceeded. Following the hearing, by letter dated January 5, 2008, Complainant again requested that her application be granted.

At the hearing, Respondent moved to dismiss the complaint as moot, and for collateral estoppel. The ALJ reserved decision regarding said motion.

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

At the request of ALJ Collins, following the hearing, Respondent’s attorney submitted copies of certain documents pertaining to Complainant’s employment, including payroll records and a copy of Respondent’s Sick Leave regulations. The documents were annexed to a copy of an undated affidavit of Respondent’s Assistant Commissioner for Personnel, Alan Vengersky (the “Vengersky Affidavit”). These documents were served on the Division attorney and Complainant. The documents, including the Vengersky Affidavit, are received in evidence as Respondent’s Exhibit 17.

Also at the request of ALJ Collins, after the hearing, Complainant submitted copies of her credit card statement summaries to the ALJ. This submission does not indicate service on the

Division attorney or on Respondent. In view of this, and because the issue of damages is not reached in this recommended order, Complainant's post-hearing submission is not received in evidence.

### **FINDINGS OF FACT**

1. Complainant began work for Respondent Department of Correction as a correction officer in 1987. At all times relevant to the complaint, she has been assigned to Respondent's Anna M. Kross Center, a detention facility. (Tr. 19-20, 83)

2. Complainant was diagnosed with depression in 1989; since that date, she has been diagnosed with bipolar disorder. At all times relevant to the complaint, Complainant suffered from bipolar disorder. (Respondent's Exhibit 2 [pp. 13, 113]; Tr. 19)

3. Respondent's Health Management Division (the "HMD unit") is responsible for evaluating the fitness of Respondent's employees to work. (Respondent's Exhibit 2 [p. 11]); Tr. 21)

4. Respondent was aware of Complainant's bipolar disorder, and Complainant received evaluations by medical personnel from the HMD unit. (Tr. 21)

5. In December of 2005, Complainant called in sick for the date of December 15, 2005. (Complainant's Exhibit 1; Tr. 23)

6. Complainant testified at the public hearing that on or about December 15, 2005, she was advised by Respondent that she would not be permitted to return to work because her bipolar disorder prevented her from performing her duties as a correction officer. (Tr. 23-24 )

7. On December 15, 2005, Complainant was cleared for light duty pending a psychiatric evaluation and recommendation. On or about December 19, 2005, following that examination, Complainant was placed on sick leave. (Respondent's Exhibit 3)

8. Arthur Sternberg, M.D., ("Dr. Sternberg") is a physician in private practice, who examined and treated Complainant for her bipolar disorder. Between January 14, 2006 and September 2006, Dr. Sternberg submitted to Respondent a series of written Treating Physician's Summary Reports, in which he advised that Complainant was capable of being returned to full duty as a correction officer. (Respondent's Exhibit 6)

9. John Grubea, M.D. ("Dr. Grubea") is a psychiatrist in private practice who examined and treated Complainant for her bipolar disorder. Between October 16, 2006, and May 2007, Dr. Grubea submitted to Respondent a series of written Treating Physician's Summary Reports, in which he advised that Complainant was capable of being returned to full duty as a correction officer. (Respondent's Exhibit 6)

10. On or about October 19, 2006, Respondent filed an application with the New York City Employees Retirement System Medical Board, seeking disability retirement for Complainant. After an interview and examination of Complainant, the Medical Board recommended denial of Respondent's application. (Complainant's Exhibit 4)

11. By letter dated October 30, 2006, Respondent advised Complainant that it would pursue a Medical Separation/Termination proceeding pursuant to New York Civil Service Law § 73. (Respondent's Exhibit 16) On July 13, 2007, a hearing was held before Administrative Law Judge Julio Rodriguez of the New York City Office of Administrative Trials and Hearings ("OATH"). By decision dated October 24, 2007 ALJ Rodriguez determined that Complainant had been continuously absent from her position as a correction officer in excess of one year due

to her bipolar disorder, and that she was unfit to perform the duties of a correction officer.

(Respondent's Exhibits 1,2)

12. At the public hearing, counsel for Respondent Department of Corrections advised ALJ Collins that the recommended determination of ALJ Rodriguez at the OATH hearing had been first adopted by the Commissioner of Respondent Department of Corrections, but that the Commissioner had then rescinded said adoption. The Commissioner did not adopt the ALJ's recommendation as his final determination, and instead permitted Complainant to retire from her position as a correction officer, effective January 4, 2008. (Respondent's Exhibits 14, 15; Tr. 13-17)

13. Rose Agro-Doyle ("Agro-Doyle") is a Deputy Warden assigned to the Anna M. Cross Center. (Tr. 82-83) She testified credibly at the OATH hearing that the job duties of Respondent's correction officers require an officer to be responsible for the care, custody and supervision of anywhere from 30 up to 100 inmates at a time, to monitor their behavior, ensure their safety and security, and to promptly respond to alarms and violent incidents. Officers are also required to be vigilant regarding the possibility of depression or suicidal behavior among inmates, and are required to be on guard at all times, aware of their surroundings, and able to make quick decisions in the event of violence or other emergency. (Respondent's Exhibit 2 [pp.84-87, 89-90, 91-93])

14. Correction officers normally work on a rotating "wheel" assignment system, in which the hours and days during which they are assigned to work may change each week. The nature of their assignment may also change. (Respondent's Exhibit 2 [pp.87-88])

15. Dr. Grubea testified at the OATH hearing. (Respondent's Exhibit 2 [p. 105]) Dr. Grubea had first examined Complainant on September 25th, 2006. (Respondent's Exhibit 2 [pp. 110, 138])

16. Dr. Grubea determined that despite Complainant's bipolar disorder, she was capable of performing the duties of a correction officer, so long as she continued to take her medication. (Respondent's Exhibit 2 [pp. 114, 120, 122, 124, 138]) Dr. Grubea admitted that he had relied on Complainant's representations to him that she was competent to return to work in formulating his opinion. (Respondent's Exhibit 2 [p. 125]) Dr. Grubea had only a layman's knowledge of the duties and stresses faced by a correction officer, and so could not opine regarding Complainant's ability to function in a correction facility environment. (Respondent's Exhibit 2 [pp. 121-23])

17. Faouzia Barouche, M.D. ("Dr. Barouche"), a psychiatrist, and David A. Safran, PhD., ("Safran"), a psychologist, are both employed by Respondent's HMD unit, and both testified at the OATH hearing. (Respondent's Exhibit 2 [pp.10, 65, 67])

18. Dr. Barouche's duties at HMD included evaluating Respondent's employees to see whether they were able to work. (Respondent's Exhibit 2 [pp.11, 47-48]) She was familiar with Complainant's medical history and condition, having first examined her in February of 2005. Unlike Dr. Grubea, Dr. Barouche was also familiar with the job duties of a correction officer and the stresses associated with said duties. (Respondent's Exhibit 2 [pp. 11, 14, 47])

19. Dr. Barouche found that Complainant suffered from bipolar disorder, and that her medical regimen included taking various medications including Lithium, Welbutrin, and Geodon. (Respondent's Exhibits 2 [pp. 18, 19-22], 3) Dr. Barouche also found that Complainant had a history of "noncompliance" with her medications, in which she refused to take them. (Respondent's Exhibits 2 [pp.21-23, 29], 10, 11)

20. Dr. Barouche found that Complainant was unable to perform the duties of a correction officer, and did not clear her to return to work. Dr. Barouche testified at the OATH hearing that Complainant had a long history of mood disorder with a propensity to relapse, an occurrence which could be dangerous to Complainant and others if it occurred in the correction facility. Said relapses were generally sufficiently severe to require a visit to a hospital or hospitalization. (Respondent's Exhibit 2 [pp. 21, 29-30])

21. Dr. Barouche further determined that Complainant's job duties were not compatible with the various medications she was taking to stabilize her mental state, and that Complainant must take said medication in order to avoid a relapse. (Respondent's Exhibit 2 [pp.30-31, 32]) Finally, Dr. Barouche found it significant that, although Complainant's doctors had recommended that she be returned to duty, none had concluded that Complainant was stabilized or in remission. Although Dr. Barouche determined that a diagnosis of bipolar disorder, in and of itself, would not automatically bar a person from working as a correction officer, she concluded that in the face of Complainant's continuing symptoms of depression, anxiety, tiredness, and crying, and her history of remission (including the fact that said remissions had become more frequent in recent years), Complainant would be unable to work as a correction officer. (Respondent's Exhibits 2 [pp. 32-35, 50, 56, 64], 6)

22. Following Dr. Barouche's examination and evaluation of Complainant, Complainant requested a second opinion from the HMD unit. Safran was assigned to render that opinion. (Respondent's Exhibit 2 [pp. 66, 75, 80]) Safran, who was familiar with the stressful working conditions of correction officers, performed a review of Complainant's medical records, interviewed her, and completed an evaluation of Complainant on April 22, 2006. (Respondent's Exhibits 2 [pp. 67, 75], 4)

23. Safran testified at the OATH hearing that as a result of the evaluation, he had determined Complainant to be unfit to perform the duties of a correction officer. (Respondent's Exhibit 2 [pp. 67-68]) Safran found that the many relapses suffered by Complainant, her failure to take her medication, the stress which she would encounter as a result of being assigned to rotating shifts (the "wheel"), as well as the ordinary stresses of performing the job duties of a corrections officer, all led him to conclude that Complainant could not return to duty. (Respondent's Exhibit 2 [pp. 68-72, 76])

24. Complainant testified at the public hearing that her only request regarding a reasonable accommodation for her disability occurred prior to December 15, 2005 when she asked Safran if she could come back on "light duty" or "regular duty", and that Safran had replied that she could not. (Tr. 32-34)

25. As of the date of the public hearing, Complainant had not been permitted to return to work by Respondent. (Tr. 39)

### OPINION AND DECISION

#### Respondent's motion to dismiss

Respondent moved for dismissal of the complaint on the grounds that Complainant was collaterally estopped from proceeding, due to a previous determination of the OATH administrative law judge ("ALJ"). Respondent further argued that the verified complaint was moot, since Complainant had been permitted to retire at a full service pension, and that said retirement was the only relief identified in the verified complaint.

It is well settled that the doctrine of collateral estoppel is applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies. Such determinations, when final, become conclusive and binding with respect to later actions and proceedings. *Ryan v New York Telephone Company*, 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 825 (1984).

At the public hearing, Respondent's counsel argued that although the Commissioner had rescinded his original decision, it was nevertheless a final decision for the purposes of estoppel. Respondent cannot have it both ways.

It is clear that the Commissioner of the Department of Corrections did not adopt the recommended findings and determination of the OATH ALJ as his own final determination, and in fact, rescinded said decision and permitted Complainant to retire. Therefore, there is no final determination for the purposes of collateral estoppel.

With respect to Respondent's claim that the verified complaint is moot, it is clear that the relief which may be afforded a complainant in a case of a violation of the Human Rights Law is not limited by the four corners of the verified complaint. The Commissioner's decision to allow Complainant to retire did not foreclose the possibility that other relief, such as money damages, could have been awarded to Complainant in the instant case. N.Y. Exec. Law art. 15 ("Human Rights Law") § 297.4(c), 9 N.Y.C.R.R. § 465.12(f)(14) The Commissioner's decision did not render the verified complaint moot.

Respondent's motion is denied.

#### Complainant's application to add parties

By notarized letter dated December 30, 2007, Complainant sought an order to amend her verified complaint to add the following persons as respondents: ALJ Julio Rodriguez and Chief ALJ Roberto Velez of OATH; an attorney, Steven Isaacs; and Norman Seabrook, now or

formerly the President of the Correction Officer's Benevolent Association. The application was based on Complainant's perception that the above persons had violated, inter alia, the New York Civil Rights Law, the New York Civil Service Law, and certain duties owed by them to Complainant, which were not clearly specified.

It is noted that ALJ Collins did not grant said application, and the hearing proceeded as against the Respondent. Although the issue is now arguably moot, it is appropriate to note that there were no allegations in said application that any of the persons named had committed violations of the Human Rights Law which aggrieved Complainant. Therefore, the ALJ had no basis on which to amend the verified complaint. Human Rights Law § 296, 9 N.Y.C.R.R. § 465.12(c)(2)

The application is denied.

The discrimination complaint

The Human Rights Law declares it to be an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of disability. Human Rights Law § 296.1(a)

A reasonable accommodation is an action taken which permits an employee with a disability to perform in a reasonable manner the activities involved in the job; provided that such action does not impose an undue hardship on the business of the entity from which action is requested. Human Rights Law § 296.21-e

The verified complaint does not allege that Complainant sought a reasonable accommodation. However, she alleged at the public hearing that she had sought a reasonable accommodation from Respondent which was wrongfully denied. Once an employee has

requested a reasonable accommodation, the employer must engage in an interactive process regarding the feasibility of said accommodation, and may refuse such accommodation if the employee cannot perform the job in a reasonable manner. See *Miller v. Ravitch*, 60 N.Y.2d 527, 534, 470 N.Y.S.2d 558, 561 (1983). Complainant's sole proof of this allegation was that she had asked once asked one of the HMD unit doctors whether she could return to work on full duty or light duty. Complainant failed to set forth facts demonstrating that she had sought an accommodation in a manner which would give Respondent adequate notice of her request.

However, Complainant's case suffers from a more fundamental flaw. The statute defines a "disability" as a physical or medical impairment, a record of such impairment, or a condition regarded by others as an impairment. The term "disability" is limited to those disabilities, which, upon the provision of reasonable accommodations, do not prevent complainant from performing in a reasonable manner the activities involved in the job. Human Rights Law § 296.21

Respondent's doctors examined Complainant on a number of occasions, and reasonably concluded that she was incapable of performing the duties of a correction officer given her chronic condition. Employment may not be denied based on speculation and mere possibilities, especially when such determination is premised solely on the fact of an applicant's inclusion in a class of persons with a particular disability. *Granelle v. City of New York*, 70 N.Y.2d 100, 517 N.Y.S.2d 715 (1987). However, it is clear from the record that Respondent's HMD unit medical personnel carefully and thoroughly evaluated her condition in the context of her employment as a correction officer, and concluded that in light of her history of relapses and the powerful medication she was required to take, she would be unable to work in a correction facility environment with reasonable safety. This was in sharp contrast with the conclusions of

Complainant's own personal doctor, who was candid in admitting that he had no familiarity with the conditions or stresses of Complainant's job.

The record establishes that Respondent performed the required individualized assessment to determine if Complainant's medical condition prevented her from performing the essential functions of her job in a reasonable manner. Respondent reasonably concluded that she could not.

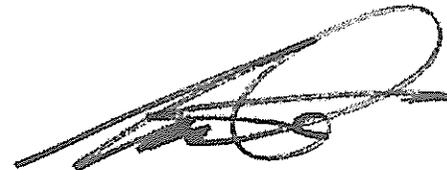
Complainant has failed to state a prima facie case of discrimination, and it is recommended that the complaint be dismissed.

**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 hereby is, dismissed.

DATED: October 14, 2008  
Bronx, New York

A handwritten signature in black ink, appearing to read "Michael T. Groben", written over a horizontal line.

Michael T. Groben  
Administrative Law Judge