NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

FRANK TAPLER,

Complainant,

v.

SMITHTOWN CENTRAL SCHOOL DISTRICT,

Respondent.

NOTICE AND FINAL ORDER

Case No. 6842045

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 September 18, 2007, 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: JUN 30 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. 6842045

SUMMARY

Complainant claims that Respondent discriminated against him based on his disability by failing to provide him a reasonable accommodation for his disability and terminating his employment. Respondent denied unlawful discrimination. The complaint is sustained and Complainant is awarded relief as set forth below.

PROCEEDINGS IN THE CASE

On October 8, 2002, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on April 18-19, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Anton Antomattei, Esq., of Counsel. Respondent was represented by Peter G. Albert, Esq.

Respondent filed a belated post-hearing brief on May 25, 2007. The Division did not file a post-hearing brief.

FINDINGS OF FACT

1. Respondent hired Complainant in or about 1989 as a Custodial Worker I ("CW I"). (Tr. 23) He worked at the Great Hollow Middle School in Smithtown. (Tr. 23, 31)

2. In or about 1990 or 1991, Complainant was promoted to Custodial Worker II ("CW II") and continued to work at the same location. (Tr. 25-26, 31) His job duties involved cleaning and maintaining school premises, furniture and equipment; opening and securing work areas; moving furniture and equipment; and assisting the Custodial Worker III with recordkeeping, training of new employees and distributing cleaning supplies. (Complainant's Exh. 1)

3. On September 18, 2001, while painting in the school gymnasium, Complainant fell off a ladder and sustained injuries to his left leg, left hip, right knee and neck. (Tr. 26-27; Complainant's Exh. 2) He filed an accident report with Respondent on September 19, 2001. (Complainant's Exh. 2)

4. At that time, Complainant was covered by the collective bargaining agreement ("CBA") between the Board of Education Smithtown Central School District and the Smithtown Schools Employees Association in effect from 1998-2002. (Complainant's Exh. 16)

5. Complainant was examined by and received treatment from his personal physician, Dr. Enrico Mango, who determined that Complainant suffered an L-S sprain and injured his knees. (Tr. 32; Complainant's Exh. 3) Dr. Mango issued a doctor's note stating that Complainant was unable to work from September 19, 2001 through October 16, 2001. (Complainant's Exh. 3)

6. Wright Risk Management Company, Inc. ("Wright"), Respondent's workers compensation benefits administrator, acknowledged that Complainant's claim of injury was undisputed and Respondent paid Complainant full wages during his disability. (Tr. 35-36; Complainant's Exh. 5) Wright also approved ongoing physical therapy for Complainant's continuing disability for four to six weeks beginning in November 2001. (Complainant's Exh. 4)

7. Dr. Robert Moriarty examined Complainant on December 13, 2001on behalf of Respondent. (Tr. 37-39; Complainant's Exh. 6) Dr. Moriarty concluded that Complainant demonstrated a moderate, partial disability and could be engaged in a modified duty position. (Complainant's Exh. 6)

8. Dr. Mango issued a second doctor's note on January 2, 2002 stating that Complainant was able to return to work "as tolerated." (Tr. 42; Complainant's Exh. 7) Wishing to return to work as a CW II, Complainant then presented this note to Camille Bilitto, the secretary for Joseph Piro, the plant facilities manager for Respondent. Although Complainant felt that he could perform the essential functions of the CW II job at that time, Respondent did not allow Complainant to return to work until he was "100 percent." (Tr. 42-43) Furthermore, Respondent did not offer light duty work for the CW I and CW II positions. (Tr. 331-34, 342, 349)

9. Dr. Mango issued a third doctor's note on January 25, 2002 stating that Complainant could not work until March 1, 2002. (Tr. 49-50; Complainant's Exh. 8)

10. Beginning in or about 1990 or 1991, Complainant also performed security duties for Respondent involving daily, weekend, and rotational weekend functions. Complainant continued this function during the period of his disability until March 2002. (Tr. 55-57; Complainant's Exhibits 9, 10) These security duties were less physically demanding than Complainant's custodial duties, but did require some kneeling and climbing. (Tr. 61-62, 65) As part of his security duties, Complainant lived in a trailer located on school premises. (Tr. 182)

11. Complainant also held a part-time position with a tow truck company since 1989, and Respondent knew about Complainant's part-time work for this company. (Tr. 44, 47, 354-55) In or about February 2002, Complainant attempted to perform tow truck work one day, but was not physically able to continue. (Tr. 44, 48, 50-51)

12. Complainant met with Bob Clark, Respondent's director of finance and operations, on April 16, 2002 and requested to return to work as a CW II. (Tr. 81-82, 94-95; Complainant's Exh. 12) Since the school had an elevator, Clark asked Complainant if he could do his job without climbing stairs. Complainant told Clark that he could perform his job at that time. (Tr. 82; Complainant's Exh. 12) Clark then told Complainant to obtain a doctor's note stating that Complainant could return to work with limited kneeling and stair climbing. (Tr. 83)

13. On April 19, 2002, Complainant provided Respondent's facilities office with a note from Dr. Mango stating that Complainant may return to work with limited kneeling and stair climbing. (Tr. 83-84; Complainant's Exhibits 12, 13)

14. On April 22, 2002, Bilitto left a telephone message with Complainant stating that Clark would not let Complainant return to work. (Tr. 86, 91-93; Complainant's Exh. 12)

15. On April 23, 2002, Complainant was served with a Notice of Hearing dated April 22, 2002 pursuant to Section 75 of the New York Civil Service Law. The Notice of Hearing

contained charges alleging that Complainant was fraudulently seeking workers compensation benefits through Respondent's insurance carrier and fraudulently obtaining extended salary benefits pursuant to the terms of Article XXXI of the CBA. (Tr. 94; Complainant's Exh. 12; Respondent's Exh. 1) Pursuant to the Notice of Hearing, Complainant was "suspended without pay for a period not to exceed thirty (30) days, commencing April 22, 2002." (Respondent's Exh. 1)

16. The Section 75 hearing was conducted on June 7, 2002. (Respondent's Exh. 2) During the months of February and March 2002, Respondent engaged an outside organization to conduct surveillance of Complainant's activities. (Respondent's Exhibits 6, 7, 8, 9) A DVD recording of these surveillance activities played at the public hearing in the instant case disclosed that, on February 11, 2002, Complainant placed and positioned a car on a flatbed truck. (Respondent's Exhibits 2, 6, 7) Further surveillance of Complainant did not disclose any other work activities. (Respondent's Exhibits 2, 6, 7, 8, 9)

17. The Hearing Officer at the Section 75 hearing issued a recommendation on June 25, 2002 finding Complainant guilty of the charges alleged and recommended termination of Complainant's employment. (Respondent's Exh. 3)

18. Respondent terminated Complainant's employment on July 9, 2002. (Complainant's Exh. 17)

19. The record establishes that there are custodians with other disabilities employed by Respondent, including two at the school where Complainant worked, whose job duties were modified by Respondent to accommodate their disabilities. (Tr. 147-51, 160-61)

20. Complainant's wife, Lucretia Tapler, a former transportation supervisor for Respondent, credibly testified that, in 2001, Respondent provided work related accommodations for a bus

driver with an injured knee. (Tr. 232) Further, around the time Complainant sustained his injuries, Respondent employed a mechanic with a "very bad back" whose job duties were modified. Respondent accommodated this employee by sending out work requiring heavy lifting to an outside mechanic. (Tr. 232-37)

21. The record shows that Respondent allowed many employees to work a second job. (Tr. 313) Indeed, Respondent knew that Complainant operated a tow truck for many years while he worked for Respondent. (Tr. 343)

22. Although Respondent maintains that it did not provide light duty work, it did provide accommodations to hearing and visually impaired employees. (Tr. 330-31)

23. Shortly after Respondent terminated his employment, Complainant began working for Delea L. & Sons ("DLS"). (Tr. 132-33; Complainant's Exh. 18)

24. Complainant admitted that by January 10, 2005, he was physically unable to perform the duties of a custodian. (Tr. 125-26; Complainant's Exh. 18) The salary difference between the amount Complainant would have earned if he had not been discharged by Respondent until January 10, 2005 and the amount of money he actually earned at DLS until January 10, 2005 is $21,326.27. (Complainant's Exh. 18) Although Complainant claims a $3,939.45 loss in contributions to his retirement plan, he provides no reliable basis for this calculation. (Complainant's Exhibits 18) Complainant also claims that he is entitled to remuneration for certain "benefit days" as result of his discharge, but provides no reasonable calculation of alleged loss. (Complainant's Exh. 18)

25. Complainant stated that he suffered emotional distress as a result of being discharged by Respondent, including stress, loss of sleep and loss of concentration. (Tr. 127) Lucretia Tapler

testified that Complainant was "devastated" as a result of being discharged by Respondent. She stated that Complainant was depressed and that he had trouble sleeping and eating. (Tr. 239)

OPINION AND DECISION

Complainant has established that Respondent unlawfully discriminated against him based on his disability by denying him reasonable accommodations and terminating his employment.

It is unlawful for an employer to discriminate against an employee on the basis of disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). A complainant has the burden of establishing a prima facie case by showing that he or she is a member of a protected group, that he or she suffered an adverse employment action, that he or she was qualified for the position held, and that the respondent's action occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to the respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with the complainant to show that the respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

In the instant case, Complainant has established a prima facie case of disability discrimination. A disability is defined under the Human Rights Law as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." A disability may also be a record of such impairment or the perception of such impairment. However, the definition of disability is limited

to "disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." Human Rights Law § 292.21

The record establishes that Complainant was disabled under the Human Rights Law. Respondent did not dispute that Complainant was diagnosed by licensed physicians. Indeed, one of the physicians who diagnosed Complainant, Dr. Moriarty, was an agent of Respondent. Respondent did not controvert the accuracy or reliability of Complainant's diagnosis, nor did Respondent advocate that such diagnosis was not based on medically accepted diagnostic techniques. *See Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 156 (2d Cir. 1998). Furthermore, it is undisputed in the record that Respondent knew about Complainant's disability.

Next, Complainant was qualified for the CW II position. Complainant presented Respondent with a doctor's note dated January 2, 2002 stating that Complainant could return to work "as tolerated." Complainant credibly testified that he was able to perform the functions set forth in the CW II job description and sought to return to work at that time. However, Respondent flatly denied this request. Respondent told Complaint that there were no light duty positions available and that he could not return to work until he was "100 percent." Moreover, Complainant again requested to return to work on April 16, 2002. Complainant credibly testified that he told Clark that he could perform his job as a CW II at that time. Clark then told Complainant to obtain a doctor's note stating that Complainant could return to work with limited kneeling and stair climbing. On April 19, 2002, Complainant provided such a note to Respondent's facilities office. Approximately three days later, Respondent refused to allow Complainant to return to work and began the Section 75 hearing leading to the termination of

Complainant's employment.

Next, Complainant suffered an adverse action when Respondent terminated his employment.

Finally, Complainant has established the appropriate nexus between the termination of his employment and his disability by demonstrating that his disability was the proximate cause of his discharge. Respondent never allowed Complainant to return to work after he sustained his injuries on September 18, 2001. Complainant requested to return to his CW II position in January and April 2002 and Respondent summarily denied his request. Respondent initiated the Section 75 hearing, which ultimately led to Complainant's termination, within one week after Complainant's second request to return work in April 2002. This temporal proximity creates an inference of discriminatory discharge. *See 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).

Therefore, Complainant has established a prima facie case.

The burden of production then shifts to Respondent to show that Complainant's disability prevented him from performing his job as a CW II in a reasonable manner or that Complainant's discharge was motivated by legitimate, nondiscriminatory reasons. *See McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 330 (1994). Respondent has failed to meet its burden.

The record does not establish that Complainant's disability rendered him unable to perform the essential functions of his job as a CW II in a reasonable manner. Respondent was obligated to provide a reasonable accommodation for Complainant's known disability. Human Rights Law § 296.3. Seeking to return to work as a CW II, Complainant presented Respondent with a doctor's note dated January 2, 2002 allowing him to return to work "as tolerated."

Respondent was then obligated to enter into an interactive dialogue with Complainant in an attempt to fashion a reasonable accommodation so that Complainant could return to work. *See* 9 N.Y.C.R.R. § 466.11(j)(4).

Forms of reasonable accommodation include, but are not limited to: "making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position." 9 N.Y.C.R.R. § 466.11(a)(2). Furthermore, both the employee and the employer are obligated to engage in an interactive process, which includes the discussion and exchange of pertinent medical information, in order to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job requirements. 9 N.Y.C.R.R. § 466.11(j)(4).

Rather than engaging in an exploratory, constructive dialogue with Complainant, Respondent summarily denied Complainant's request to return to work. Respondent provided a doctrinaire response stating that Complainant could not return to work until he was "100 percent" and that no light duty positions were available. Additionally, Respondent again rejected Complainant's invitation to enter into an interactive dialogue in April 2002. Within days of Complainant's request to return to work in April 2002, Respondent initiated the Section 75 hearing leading to the termination of Complainant's employment.

The record establishes that Respondent did make reasonable accommodations for other disabled employees both within and outside Complainant's generic job classification, including modification of job duties. However, when Complainant requested to return to his CW II position, Respondent refused to enter into discussions and effectively shut down the interactive process by inflexibly responding that there were no light duty positions available. Therefore, the

Division finds that Respondent failed to reasonably accommodate Complainant's known disability

Respondent maintains that Complainant was terminated because, during the period that Complainant was receiving workers compensation benefits and contractually provided extended salary benefits, he performed tow truck work for an independent employer. The record establishes that Complainant performed one day of towing work in February 2002. However, it is undisputed that Respondent had prior knowledge of Complainant's towing job and accepted his second job duties for a number of years. Furthermore, Complainant informed Respondent that he was able to return to work as a CW II in early January 2002, more than one month prior to his one day of work as a tow truck operator.

Accordingly, the Division finds that Respondent's business reason for Complainant's discharge was a pretext for unlawful discrimination.

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence and be comparable to awards for similar injuries. *State of New York v. N.Y. State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

Complainant mitigated his damages by finding employment at DLS within a reasonable period of time after he was discharged by Respondent. Complainant admitted that by January 10, 2005, he was physically unable to perform the duties of a custodian. The salary difference between the amount Complainant would have earned if he had not been discharged by Respondent until January 10, 2005 and the amount of money he actually earned at DLS until

January 10, 2005 is $21,326.27. Therefore, Complainant is entitled to $21,326.27 in back pay damages.

Although Complainant claims a $3,939.45 loss in contributions to his retirement plan, he provides no reliable basis for this calculation. Finally, Complainant claims that he is entitled to remuneration for certain "benefit days" as result of his discharge, but provides no reasonable calculation of alleged loss.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondent's discriminatory conduct. When considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Mula*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge No. 196, etc. v. N.Y. State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *N.Y. State Dep't of Correctional Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

In the case at bar, Complainant credibly testified that he suffered emotional distress as a result of being discharged by Respondent, including stress, loss of sleep and loss of

concentration. Furthermore, Complainant's wife testified that Complainant was "devastated" as a result of being discharged by Respondent. She stated that Complainant was depressed and that he had trouble sleeping and eating. Accordingly, the Division finds that an award of $15,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See, e.g., R & B Autobody & Radiator, Inc. v. N.Y. State Div. of Human Rights*, 31 A.D.3d 989, 819 N.Y.S.2d 599 (3d Dept. 2006), *New York City Health & Hospitals Corp. v. N.Y. State Div. of Human Rights*, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997), *Consolidated Edison Co. of New York, Inc. v. N.Y. State Div. of Human Rights*, 77 N.Y.2d 411, 568 N.Y.S.2d 569 (1991).

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 Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $21,326.27 as compensatory damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from November 26, 2004, a reasonable intermediate date, until the date payment is actually made by Respondent.

2 Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $15,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish suffered by Complainant as a result of Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Frank Tapler, and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order.

4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: September 18, 2007
Hempstead, New York

Robert M. Vespoli

Robert M. Vespoli
Administrative Law Judge