

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

NORMAN D. TROICKE,

Complainant,

v.

**NEW YORK STATE, DEPARTMENT OF
TRANSPORTATION,**

Respondent.

**and NEW YORK STATE, DEPARTMENT OF
CIVIL SERVICE, NEW YORK STATE, OFFICE
OF THE STATE COMPTROLLER, Necessary
Parties.**

**NOTICE AND
FINAL ORDER**

Case No. 10110886

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 November 30, 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: **MAY 14 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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OFFICE OF THE STATE COMPTROLLER,**
Necessary Parties.

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

Case No. **10110886**

SUMMARY

Complainant alleges that he was discriminated against and denied a reasonable accommodation for his disability of dysautonomia. Respondent denied said allegations. Complainant was unable to perform the essential functions of his job, with or without an accommodation. Therefore, it is recommended that the complaint be dismissed.

PROCEEDINGS IN THE CASE

On April 18, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing session was held on April 28, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Lawrence J. Zyra. Respondent was represented by Beth O'Connor, Esq.

Permission to file post-hearing briefs was granted, and Recommended Findings of Fact and Conclusions of Law were timely filed by both parties.

FINDINGS OF FACT

1. Complainant suffers from dysautonomia, a disorder which afflicts him with chronic nausea, periods of vomiting, intense perspiration, chronic pain in the joints, and bowel problems. At all times relevant to the complaint, Complainant has been under medical treatment for this condition. (Tr. 17-19)

2. As a result of his disorder, Complainant was disabled from November 5, 2002 up to, and including, the date of the public hearing. (Tr. 77)

3. Respondent New York State Department of Transportation ("NYSDOT") is a state agency, whose main offices are located at 50 Wolf Road, Albany, New York. (Tr. 8-9)

4. At all times relevant to the complaint, Respondent NYSDOT maintained a written policy on reasonable accommodation requests for current and prospective employees, and made this policy available to all employees through NYSDOT's Intradot. Upon being hired by

NYSDOT, each employee is provided with a copy of the employee handbook in which section 2.19-22 addresses the policy of NYSDOT regarding "Reasonable Accommodation."

(Respondent's Exhibit 2; Tr. 9, 160-62)

5. Complainant was hired by Respondent as a seasonal employee in 1986, and began permanent employment with Respondent as a Senior Engineering Technician in 1990. At that time, he was provided with a copy of Respondent's employee handbook. (Tr. 10, 19-20)

6. Complainant's job title was changed to Senior Computer Analyst in 2001. (Tr. 21-22)

7. From September 1996 through November 5, 2002, Complainant worked at the Binghamton State Office Building. (Tr. 22)

8. In November 2002, Complainant's immediate supervisor was Information Technology ("IT") manager Eric Eiche ("Eiche"). (Tr. 22-23, 102-03)

9. On or about November 5, 2002, Complainant became unable to work at the Binghamton State Office Building due to severe vomiting, chronic fatigue and bowel problems. (Tr. 20-21) Complainant provided Respondent with medical documentation indicating a diagnosis of dysautonomia. (Tr. 11)

10. Complainant was out of work from November 5, 2002 until January 1, 2004, charging a combination of accruals, SLHP (sick leave at half pay), and leave donation. (Tr. 11)

11. In accordance with § 73 of the Civil Service Law, Respondent advised Complainant by letter dated October 1, 2003, that his employment would be terminated on the basis that he had been continuously absent from and unable to perform the duties of his position for one year or more. (Joint Exhibit 5; Tr. 11-12, 80-82)

12. On or about November 7, 2003, Complainant made application to the New York State and Local Employees Retirement System for disability retirement. (Joint Exhibit 7)

13. In January of 2004, Complainant resumed work, pursuant to an arrangement agreed to by his superiors Eiche, Respondent's regional personnel director David Staff ("Staff"), Respondent's regional director Jack Williams ("Williams"), and assistant director of personnel Carol Cross ("Cross") in which Complainant would work from his home. (Tr. 27, 30, 31, 79, 85, 86-87)

14. This assignment was intended by Respondent to be a temporary one, during which Complainant would be able to maintain his health insurance while he applied for Social Security Disability and for disability retirement from Respondent's employ. (Joint Exhibit 2; Tr. 30, 80-84, 85, 89-90, 104, 117)

15. A written agreement memorializing this work at home arrangement was sent to Complainant. No executed copy of said agreement was presented at the public hearing. (Joint Exhibit 6; Tr. 86, 95-98, 144)

16. In November of 2002, Complainant's assignments as a senior computer analyst included performing as CAD (computer aided design and drafting) manager and Windows NT systems manager. (Tr. 23-24) The job duties of a senior computer programmer analyst included troubleshooting computer problems, installing hardware and software, setting up and deploying hardware and software, printers, and peripherals, time server administration, and visiting remote locations to provide computer support. Complainant was unable to perform these duties while working at home. (Tr. 108-12)

17. During the period when Complainant worked at home, his job title was changed to that of Information Technology Specialist 2, grade 18. (Tr. 22, 74, 114-15)

18. The job duties of an Information Technology Specialist 2 include the following: implementing new and revised computer systems, conducting or assisting in training users and

IT staff and participating in post implementation review of applications for effectiveness; maintaining systems after implementation and meeting with computer users and IT management; and conducting or assisting in systems analysis and design by participating in meetings and working with agency management, users, vendors, consultants and IT staff. (Joint Exhibit 1, pp. 3-4)

19. During the work at home assignment, Complainant was unable to attend any meetings in person. He could only attend by telephone conference. (Tr. 57) However, Complainant was not able to meet with all of Respondent's computer users using this method, and was not able to resolve certain computer problems in a telephone conference even if he was able to make contact with the computer user. (Tr. 58, 60)

20. Complainant was also unable to meet with vendors, physically manipulate IT equipment, or travel to remote locations to provide support, all of which were duties of an Information Technology Specialist 2. (Joint Exhibit 1; Tr. 59-61)

21. At all times relevant to the complaint, Respondent did not have video conferencing capability at Complainant's workplace. (Tr. 72)

22. Complainant was also unable to perform many of the duties of his position while working at home due to the fact that he was not able to obtain a proper Internet connection to Respondent's computer system from his home, preventing him from obtaining full access to Respondent's virtual private network ("VPN"). (Tr. 61, 88-89, 100, 120, 158) Complainant asserted at the public hearing that he would have been able to perform most of his job duties (other than those which required his presence at the Binghamton State Office Building, and physical effort), if he had been able to obtain full access to the Respondent's VPN. However,

Complainant did not resolve his Internet connection problem until April of 2007, approximately one year after the filing of the verified complaint. (ALJ Exhibit 2; Tr. 29, 31, 39)

23. At the public hearing, Eiche testified credibly that even if Complainant had been able to access a proper Internet connection, he would still have been unable to perform the majority of his job duties. Although Eiche had considered re-assigning certain duties done by other employees to Complainant, such as Web site maintenance, he concluded that these duties could also not be fully accomplished from Complainant's home. (Tr. 122-25, 131)

24. The tasks which Complainant was able to perform while working from his home included form creation, file conversion from one computer application to another (such as converting an Excel file to Word), and database development. These duties were not consistent with Complainant's job title of Information Technology Specialist 2, grade 18, and were equivalent to those performed by a lower grade 12 employee, such as an information technology assistant. (Tr. 115-16)

25. Complainant's hours of work varied greatly during his work at home assignment; occasionally he worked in the morning, and/or late at night. (Tr. 33)

26. Complainant was required to verify the hours he worked by daily E-mail to Eiche. He did not do so consistently, and this became a matter of concern to Eiche due to the difficulty of verifying the hours that Complainant actually worked. (Tr. 105-07, 130-31)

27. By letter dated January 14, 2005, Complainant was advised by Respondent that the work at home assignment would end on January 27, 2005. (Joint Exhibit 2; Tr. 33-35)

28. February 12, 2005 was Complainant's last day of work for Respondent. (Tr. 44, 66)

29. In or about October 18, 2005, Complainant requested that Respondent accommodate his disability by permitting him to work from home with a modified work schedule and duties.

(Complainant's Exhibit 1; Tr. 36-37)

30. Complainant testified at the public hearing that if the physical tasks associated with his job, such as cabling, tape backup and recovery, and travel, were done by other employees, and if he was able to resolve the Internet connection problem with Respondent's VPN network, that he would then have been able to perform duties such as creating web pages, server maintenance, and NT systems maintenance. (Tr. 25-26, 39-41) However, Complainant's October 18, 2005 accommodation request did not identify any specific change in his duties. (Complainant's Exhibit 1; Tr. 156)

31. Richard Ciulla, M.D., ("Dr. Ciulla") is director of the Employee Health Service of the New York State Department of Civil Service. On or about January 13, 2006 Complainant was examined by a medical doctor. Based on a review of that evaluation, Dr. Ciulla concluded that Complainant was unable to work in an office environment, but that he could perform the essential duties of a senior computer analyst if he was permitted to work at home and to take frequent breaks. Dr. Ciulla further opined that these accommodations would likely be a permanent requirement. (Joint Exhibit 4)

32. Louis DeSol ("DeSol"), Respondent's director of human resources management, participated in Respondent's review of the accommodation request. (Tr. 133, 141-42) DeSol credibly testified that Respondent considered Complainant's request, and denied it because his job duties were not compatible with working from home, and because Respondent did not permit its employees to work from home on a permanent full-time basis. (Tr. 94, 142, 146-50)

33. By letter dated February 3, 2006, after consideration of Dr. Ciulla's report, Respondent denied Complainant's requested accommodation, stating that the majority of job functions of an Information Technology Specialist 2 were of a physical nature, which could not be performed from a remote site. Respondent also cited the difficulty of supervising an employee working from home as a permanent assignment as a reason for denying the accommodation. (Joint Exhibit 3)

34. On December 2, 2005, the New York State and Local Employees Retirement System determined Complainant to be permanently incapacitated from the performance of duties and approved his November 7, 2003 application for Article 15 Disability Retirement. The disability retirement application was approved retroactively to October 1, 2005. Complainant's application for Social Security disability was also approved. (Joint Exhibit 7; Tr. 12, 44-45)

35. At the time of his disability retirement on December 29, 2005, Complainant held the title of Information Technology Specialist 2, Grade 18. The Complainant's disability retirement was made retroactive to October 1 of 2005. (Tr. 10)

OPINION AND DECISION

The Human Rights Law declares it to be an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to the known disabilities of an employee. Human Rights Law § 296.3.

The statute defines the term disability as a "physical, mental or medical impairment... which... is demonstrable by medically accepted clinical or laboratory diagnostic techniques or ... a condition regarded by others as such an impairment." However, the term "disability" is limited to those 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. Human Rights Law § 292.21.

In the instant case, Complainant's disability of dysautonomia prevented him from performing his essential job duties at the Binghamton State Office Building, his normal work location. As clearly set forth in the record, and as conceded by Complainant, he was permitted by Respondent to work at home for approximately one year in order to give him time to apply for Social Security benefits and disability retirement.

Complainant was unable to perform the essential functions of a senior computer analyst while working at home. He was unable to perform such duties as troubleshooting computer problems, installing and setting up computer hardware and software, and visiting remote locations to provide computer support.

Complainant's promotion to Information Technology Specialist failed to rectify this problem. Complainant could not attend meetings and training sessions, a core function of his position, and he was unable to physically manipulate IT equipment, or to reliably diagnose computer problems via telephone conference. However, even if Complainant's presence in the

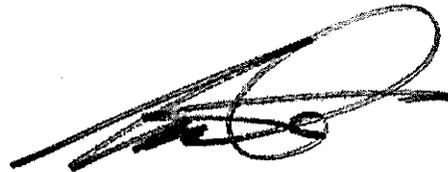
office had not been required, it is clear that he was unable to obtain access to Respondent's VPN computer network. Although Complainant asserted at the public hearing that he would have been able to perform most of his job duties with proper access to the VPN network, he conceded that this access was unavailable to him until more than one year after Respondent denied his accommodation request. Complainant's supervisor testified credibly that even with access to this VPN network, Complainant would have been unable to perform his job duties while working from home. It is clear from the record that during the year Complainant was permitted to work from home he was performing the duties of a lower grade employee. Finally, Complainant's supervisor testified credibly that he was not always able to verify Complainant's hours worked, due to Complainant's lack of physical presence in the office and his failure to make timely reports.

When Complainant made his October 18, 2005 request for accommodation, Respondent was able to perform its individualized assessment in light of this experience, and it reasonably concluded that Complainant could not perform the essential duties of his position while working from home. In order to approve Complainant's request to continue working from home, Respondent would have had to permit him to assume the job duties of a lower grade employee. However, the Human Rights Law does not require, as a reasonable accommodation in the form of job restructuring, the creation of a completely unique position with either qualifications or functions tailored to the disabled individual's abilities. 9 NYCRR § 466.11 (f)(6). Respondent's denial of the accommodation request was not an act of 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 complainant be and hereby is, dismissed.

DATED: November 30, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Michael T. Groben", with a large, stylized flourish at the end.

Michael T. Groben
Administrative Law Judge