NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

DUANE E. WALL,

Complainant,

v.

ASSET PROTECTION AND SECURITY SERVICES, LP,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10119866

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 29, 2009, by H. Larry Vozzo, 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 16 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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ASSET PROTECTION AND SECURITY SERVICES, LLP,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10119866**

SUMMARY

Complainant alleged that Respondent terminated his employment because he had a disability and as retaliation for his filing of a complaint with Respondent relating to racial slurs. Complainant failed to prove a prima facie case of either disability discrimination or retaliation, and therefore the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 24, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing session was held on August 20, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Steven E. Carr, Esq.

At the public hearing, ALJ Groben amended the complaint to reflect Respondent's correct legal name, "Asset Protection and Security Services, LLP".

Permission to file post-hearing briefs was granted. Respondent submitted a timely brief. The Division's brief was submitted three days late and exceeded the page limit set by ALJ Groben, who accepted Complainant's brief over Respondent's objections.

On February 3, 2009 this case was reassigned to ALJ H. Larry Vozzo.

FINDINGS OF FACT

1. Respondent employed Complainant at the Federal Detention Facility in Batavia, New York (the "Batavia facility") as a custody officer from 2003 to March 12, 2007. (Respondent's Exh. 2; Tr. 9-10, 13, 37)

2. Respondent is a private company that has a contract with the United States Department of Homeland Security, Bureau of Immigration and Customs Enforcement ("ICE") to provide custody officers at the Batavia facility. The facility is operated by ICE. (Respondent's Exh. 3; Tr. 136-38)

3. Complainant is an African-American. (ALJ Exh.1)

4. Complainant was a member of a union which had a collective bargaining agreement ("CBA") with Respondent. (Respondent's Exh. 3; Tr. 77-78)

5. As a condition of employment, Respondent's custody officers must not only meet minimum physical qualifications established by ICE, but must also have a federal security clearance issued by ICE. (Respondent's Exh. 3; Tr. 139-41) One of the physical qualifications established by ICE is that a custody officer must have uncorrected distant vision equal to or better than 20/200 in each eye, and correctable binocular vision to 20/20 in each eye. (Respondent's Exh. 3 [p.C-12]; Tr.84, 139-40,163-64,168) All jobs with Respondent at the Batavia facility require employees to meet these physical qualifications. (Tr. 168)

6. ICE has the authority to direct Respondent to remove from the Batavia facility any custody officer who has been determined to be unqualified for duty. (Respondent's Exh. 3; Tr. 175-76)

7. Complainant's uncorrected distant vision was 20/400 and his corrected distant vision was no better than 20/30. (Complainant's Exh. 2, 4; Tr. 19-20, 79, 90-92,)

8. Complainant admitted that his eyesight does not meet ICE standards and that, according to federal standards, he is not physically qualified to work as a custody officer in the Batavia facility. (Tr. 83, 96)

9. From a room at the Batavia facility known as the "alpha sub control room", custody officers monitor the safety of other officers, operate the control board which opens and closes security doors, and monitor radio transmissions and the activities of inmates and officers. (Tr. 12, 14-18, 28, 30-31)

10. While Complainant was working in the alpha sub control room on January 19, 2007, a "10-10" call came in on the radio. (Tr. 27-29, 148) A "10-10" call means that an officer is in distress. (Tr. 27)

11. Federal ICE Agent Maniccia, who responded to the January 19, 2007 10-10 call, voiced concern to Respondent that Complainant was slow to open the doors for the second group of officers responding to the 10-10. Maniccia's concern was that it took Complainant one and one half to two minutes to open the locked doors to allow the second group of officers into the unit to assist other officers, and that Complainant appeared to have problems operating the control board. (Respondent's Exh.1, Tr. 33-34, 148-50, 186-88)

12. On January 20, 2007, Major Chris Beck, Respondent's Project Manager, observed Complainant working in the control room and noted that Complainant took his glasses off and placed his head very close to the control board to look at the control buttons. (Tr. 5, 152)

13. That same day, Complainant stated to Beck that it was dark in the control room and he had trouble seeing the control board. (Tr. 151)

14. The head of detention, Chief Marty Herron, of ICE, then ordered a "fit for duty examination" for Complainant to test Complainant's vision. (Tr. 138,153)

15. Complainant had two eye examinations; one at United Memorial Medical Center and the other at Empire Vision. (Complainant's Exh. 2, 4; Tr. 57, 89-92, 161-63) Both eye examinations showed that Complainant's uncorrected distant vision was 20/400 and his corrected vision was 20/30 in one eye, and 20/35 in the other. (Complainant's Exh. 2, 4; Tr. 89-92, 162-63)

16. Based on the results of the eye examinations, Herron revoked Complainant's security clearance. (Respondent's Exh. 2; Tr. 80, 164-65)

17. Beck verbally informed Complainant that his security clearance had been revoked by Herron and that his employment with Respondent would be terminated. (Tr. 52, 164, 170)

18. Complainant also spoke with Herron, who told Complainant that his security clearance had been revoked because Complainant had failed to meet the vision requirements. (Tr. 57-58, 80).

19. After Complainant's employment with Respondent was terminated, Complainant's union steward requested that Respondent provide the union with details. (Tr. 165)

20. The chief union steward then informed Beck that based on the revocation of the security clearance, Complainant had no grievable issue under the CBA. (Tr. 167)

21. Upon being notified that Complainant's security clearance had been revoked, Ron Gates, Respondent's General Manager, sent an email to Beck advising that Complainant had to be discharged per the CBA. (Respondent's Exh.3, Tr. 170)

22. The January 19, 2007 "10-10" incident was not the first time Complainant was delayed in opening and closing doors while manning the alpha sub control room. (Tr. 117,119, 121-24)

23. In July 2006 Complainant complained to the union steward that a fellow custody officer, David Hall, used the term "nigger" three times. (Tr. 40-46)

24. Hearing those statements bothered Complainant and made him feel disappointed, and that he was working with unprofessional people. However, he did not seek counseling. (Tr.65-66)

25. On July 13, 2006 Complainant had a counseling meeting with Captain Richard Zydel, Beck, the union steward, and Hall to discuss the racial slurs Hall had used. (Complainant's Exh. 3; Tr.50)

26. Hall admitted to making the racial slurs, and received a two day suspension without pay. Following the meeting Hall apologized to Complainant and the two shook hands. (Tr.142-44)

27. Complainant admitted that his termination in March 2007 was not related to, or in retaliation for, the complaint he made against Hall. (Tr.85)

OPINION AND DECISION

Disability Discrimination

It is an unlawful discriminatory practice for an employer to discharge or otherwise discriminate against an employee on the basis of disability. N.Y Exec. Law, art. 15 (Human Rights Law) §296.1(a); *Matter of McEniry v. Landi,* 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 330 (1994).

To establish a prima facie case of unlawful discrimination under the Human Rights Law; a complainant must show that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.2d 382, 390 (2004).

A "disability" is defined as "... a physical, mental, or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques..." Human Rights Law §292.21. In order to meet this definition, an employee must only show he suffers from some diagnosable impairment. *Novak v. EGW Home Care, Inc.*, 82 F.Supp.2d 101, 111 (W.D.N.Y. 2000) (citing *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106 (1985); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3rd 144, 154-56 (2d Cir. 1998).

The proof establishes that the Complainant has uncorrected distant vision of 20/400 and

correctable binocular vision to only 20/30 in one eye, and 20/35 in the other eye. As such, Complainant has a disability as that term is defined by the Human Rights Law. The record also establishes that Complainant suffered an adverse employment action when Respondent terminated his employment. However, Complainant has failed to prove that he was qualified for the position of custody officer at the Batavia facility.

The proof establishes that as a condition of employment, and pursuant to a contract between Respondent and ICE, Respondent's custody officers must meet certain minimum physical qualifications established by ICE, as well as have a security clearance from ICE. Respondent has no authority to issue or revoke security clearances for its employees or to alter or lower the minimum physical qualifications for custody officers.

The contract between Respondent and ICE requires that each custody officer employed by Respondent at the Batavia facility have uncorrected distant vision equal to or better than 20/200 in each eye and correctable binocular vision to 20/20. Complainant does not dispute that his uncorrected vision is worse than 20/200 and that his correctable vision is less than 20/20. Two vision examinations performed by independent medical professionals, following a "10-10" incident in which Complainant was slow to open security doors, demonstrate that Complainant does not meet the vision requirement established by ICE.

Complainant did not meet the physical qualifications for the position of custody officer, his security clearance was revoked by ICE, and he was not qualified for the position. Therefore Complainant has failed to establish a prima facie case of disability discrimination.

Retaliation

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an employee because he opposed behavior he reasonably believed to be

discriminatory. Human Rights Law §296.7; *New York State Office of Mental Retardation and Developmental Disabilities v. New York Div. Human Rights,* 164 A.D.2d 208; 563 N.Y.S.2d 286 (3rd Dept. 1990).

In order to establish a prima facie case of retaliation, Complainant must demonstrate that he: (1) engaged in activity protected by Human Rights Law § 296; (2) Respondent was aware that Complainant participated in the protected activity; (3) Complainant suffered an adverse employment action based on his protected activity; and (4) there is a casual connection between the protected activity and the adverse action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.2d 220 (3rd Dep't., 1999).

Complainant did not establish a prima facie case of retaliation. Complainant's filing of a formal complaint about the use of racial slurs by a co-worker was a protected activity. The Respondent was aware of the filing of that complaint. However, Respondent took prompt corrective action in response to the complaint. Respondent held a counseling session which included the Complainant and Hall. As a result of the counseling session, Hall was disciplined and apologized to Complainant.

Complainant's complaint about Hall's use of racial slurs occurred more than six months before Complainant's employment was terminated by Respondent, and Complainant admitted at the public hearing that he did not believe that his discharge was related to, or in retaliation for, his filing a complaint about the racial slurs.

Complainant failed to establish a nexus between his discharge from employment and the filing of a formal complaint about the racial slurs. To the contrary, the proof establishes that Respondent did not retaliate against Complainant for engaging in a protected activity, and even Complainant acknowledges that there is no causal connection. As such, Complainant has failed

to make a prima facie case of retaliation.

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 the same is herby dismissed.

DATED: May 29, 2009
Bronx, New York

H. Larry Vozzo
Administrative Law Judge