



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

TIMOTHY WHITE,

Complainant,

v.

CRETER VAULT CORP.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10147535

Federal Charge No. 16GB102430

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 June 6, 2014, by Robert J. Tuosto, 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 HELEN DIANE FOSTER, 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: **AUG 08 2014**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. **10147535**

SUMMARY

Complainant alleged that Respondent, his former employer, unlawfully discriminated against him on the basis of his race and disability. However, Complainant has failed to prove his case, and the complaint is hereby dismissed.

PROCEEDINGS IN THE CASE

On March 21, 2011, 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 Robert J. Tuosto, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on September 11, 2013.

Complainant and Respondent appeared at the hearing. Complainant, who had previously been represented by John H. Doyle, III, Esq., of the law firm of Reed Smith, L.L.P., New York, New York, appeared ‘pro se’ after Mr. Doyle withdrew from the case. Respondent was represented by Keith J. Frank, Esq. of the law firm of Perez & Varvaro, Uniondale, New York.

On October 11, 2013 the undersigned wrote a letter to Complainant and both attorneys. In said letter the undersigned informed the aforementioned parties that the public hearing would be reopened to allow Complainant the chance to retain private counsel or be represented by a Division attorney. The letter noted that the Division’s director of prosecutions, Robert Goldstein, Esq., had assigned Aaron Woskoff, Esq. to represent Complainant in the event that he did not retain private counsel. Complainant was given ten (10) days by which to inform whether he preferred to retain private counsel or be represented by Mr. Woskoff. The aforementioned letter is admitted into the record as ALJ Exhibit 5.

On October 22, 2013 the undersigned sent a second letter to Complainant noting that he had yet to inform whether he wished to retain private counsel or be represented by Mr. Woskoff. The aforementioned letter is admitted into the record as ALJ Exhibit 6.

On November 1, 2013 the undersigned sent a third letter to Complainant noting that he had yet to inform whether he wished to retain private counsel or be represented by Mr. Woskoff. Complainant was given seven (7) days by which to inform whether he preferred to retain private counsel or be represented by Mr. Woskoff. The aforementioned letter is admitted into the record as ALJ Exhibit 7.

On March 3, 2014 a Notice of Hearing was sent to Complainant, Mr. Woskoff and Mr. Frank noticing a public hearing for April 9-10, 2014 in Hauppauge, New York. The aforementioned Notice of Hearing is admitted into the record as ALJ Exhibit 8.

On April 8, 2014 the undersigned sent a letter to Complainant informing him that Mr. Woskoff and Mr. Frank wished to rest on the record made in the September 11, 2013 public hearing, but that Complainant would have thirty (30) days from the date of said letter by which to submit any written comments or documents which he believed would supplement the record in this case and sustain his claim. The undersigned also gave both attorneys fifteen (15) days after that time to comment, in writing, as to that which Complainant may have submitted. The aforementioned letter is admitted into the record as ALJ Exhibit 9.

Complainant did not submit any written comments or documents to supplement the original record in this case.

FINDINGS OF FACT

1. Starting in 2008 Complainant, an African-American, was employed by Respondent as a full-time tractor trailer driver. Complainant was a union employee and a collective bargaining agreement (“CBA”) governed relations between Respondent and its workforce. (Respondent’s Exh. 1; Tr. 13-14, 126, 128)

Complainant’s Disciplinary History While Working for Respondent

2. On January 9, 2009, Complainant received a letter from his supervisor noting that he failed to call in when he did not appear for work. The letter also advised Complainant that he would be suspended should this occur again. (Respondent’s Exh. 5)

3. During 2010, Complainant was disciplined five times, in writing, for various operational, safety and attendance issues. (Respondent's Exhs. 6, 7, 8, 9, 10)

4. In November 2010 Complainant received two written reprimands for having failed to properly maintain his driver's log book, and failing to return delivery tickets. At this time Complainant was warned that a reoccurrence of such violations would result in disciplinary action up to and including termination of his employment. (Respondent's Exh. 11, 12)

5. On January 24 and February 1, 2011, Complainant was disciplined, in writing, for attendance issues. Both of these documents state that "Further performance issues will result in immediate termination." (Respondent's Exh. 13, 14; Tr. 138)

6. Complainant conceded that at least some of the discipline he received was justified. (Tr. 164)

The Events of February 7, 2011

7. On February 7, 2011, Complainant left a note for his supervisor stating that "While doing my truck inspection I slipped and fell on the ice patch beside the truck fell on the back of my head going home if you want me to go to the hospital I will Im [sic] dizzy I might b [sic]" (Respondent's Exhs. 3, 16; Tr. 25, 52, 54-58)

8. On February 8, 2011, Complainant filled out Respondent's Employee Incident Report in which he stated that he had an injury to the back of his head as a result of an accident the previous day which occurred while he was performing his work duties. Specifically, Complainant wrote "Sliped [sic] and fall. Fall on ice. No serious injury." Complainant also noted that he had been to the hospital and left after waiting there for three hours without receiving medical attention. (Respondent's Exh. 4; Tr. 27, 84)

Complainant's Employment is Terminated

9. Complainant conceded that he could not verify that he visited the hospital on February 7, 2011, and that he never submitted a doctor's note. (Tr. 28, 64, 89, 147)

10. Respondent's human resources personnel contacted the hospital that Complainant claimed he visited and could not verify that he had been there. (Respondent's Exh. 16; Tr. 143)

11. On February 10, 2011, Complainant was informed, in writing, that his employment was being terminated for "unprofessional behavior" for having falsified information when failing to provide documentation to support his absence two days earlier after having been on final warning for attendance issues. Complainant's employment was terminated by the same individual who had previously hired him. (Respondent's Exh. 15; Tr. 16, 29, 62, 110, 130, 132, 137, 167)

12. Complainant's employment would not have been terminated had he provided Respondent with a doctor's note. (Tr. 134)

13. Complainant was replaced by an African American driver. (Tr. 32-33, 139)

14. In March, 2011, Complainant, through his union and pursuant to the CBA, filed a grievance disputing his employment termination. (Complainant's Exh. 10; Tr. 66)

Complainant's Grievance Arbitration

15. On October 17, 2011, counsel for Complainant's union appeared before an arbitrator to present his March, 2011 grievance. (Respondent's Exh. 2; Tr. 75)

16. On January 15, 2012, Complainant's grievance was denied when the arbitrator decided that Respondent's decision to terminate his employment was made for just cause. (Respondent's Exh. 2; Tr. 22, 37)

17. The arbitrator's decision was based on evidence showing that Complainant did not seek medical treatment at the hospital and did not have a valid reason to miss work on February 7,

2011. The arbitrator opined that Complainant, given both his prior disciplinary history and being placed on final notice that any attendance-related violations would result in his discharge, had to have known that his failure to obtain verification of his attendance at the hospital would call into question the veracity of his reason for leaving work. (Respondent's Exh. 2; Tr. 30, 36, 88)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of an individual's...race[or]disability...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

In order to establish a prima facie case of employment discrimination based on protected class membership, a complainant must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004).

An employer may not discharge or otherwise discriminate against an employee with a disability unless that disability precludes the employee from performing the essential duties of the job. Human Rights Law §296.1(a); *see also, Miller v. Ravitch*, 60 N.Y.2d 527 (1983). A “disability” is “... 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. *Nowak 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, (1985)). A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21.

In order to make out a prima facie case on the basis of disability, a complainant must show that he suffered from a disability, and that the disability engendered the discriminatory behavior. *Thide v. New York State Dep’t. of Transp.*, 27 A.D.2d 452, 811 N.Y.S.2d 418 (2d Dep’t. 2006).

Possible Preclusive Effect Given to the Arbitrator’s Prior Decision

Preclusive effect may be given to determinations rendered in arbitration proceedings. *See Matter of New York State Dept. of Labor (Unemployment Ins. Appeal Bd.) v. New York State Div. of Human Rights*, 71 A.D.3d 1234, 1236, 897 N.Y.S.2d 740, 742 (3d Dept. 2010), *lv. denied* 15 N.Y.3d 714 (2010); *Matter of Gooshaw v. City of Ogdensburg*, 67 A.D.3d 1288, 1290, 889 N.Y.S.2d 722, 724 (3d Dept. 2009). The analysis determining whether such a doctrine is applicable “turn[s] on the identity of the issues involved and whether there was a full and fair

opportunity to litigate the issue in the prior proceeding” *Matter of Guimarales (New York City Bd. Of Educ.--Roberts)*, 68 N.Y.2d 989, 991 (1986).

Here, the grievance arbitration does not preclude the Division from adjudicating Complainant’s claims. First, it was Complainant’s union, rather than Complainant, that was seeking relief in the arbitral forum. As such, Complainant himself lacked a full and fair opportunity to litigate the matters central to this proceeding. *See Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 501 (1984). Second, the sole issue in the arbitration, i.e., whether there was just cause by Respondent for Complainant’s employment termination, did not consider the separate issues of unlawful discrimination based on race and disability. Both of these facts militate against binding the Division to the findings made in the grievance arbitration.

Discrimination Analysis

Complainant cannot make out a prima facie case under either theory of unlawful discrimination.

The record shows that Complainant’s discharge did not infer unlawful race-based discrimination because he was replaced by someone within his protected class. As to disability discrimination, Complainant never established that he was disabled as that term is used in the Human Rights Law. Complainant’s failure to be treated at the hospital, or to see a physician outside of the hospital, prevented a diagnosis which could have supported this element of his prima facie case. Further, even assuming that Complainant had established this prong of the test by way of his employer’s *perception* that he was disabled, his February 7 head injury was not the reason for his discharge. The record evidence showed that the sole reason for Complainant’s employment termination was his employer’s belief--mistaken or not--that he had falsified the Employee Incident Report by stating that he was absent from work to go to the hospital when

that fact was never verified. Further, this incident was the last in a series of continuous work performance issues by Complainant which finally caused Respondent to terminate his employment.

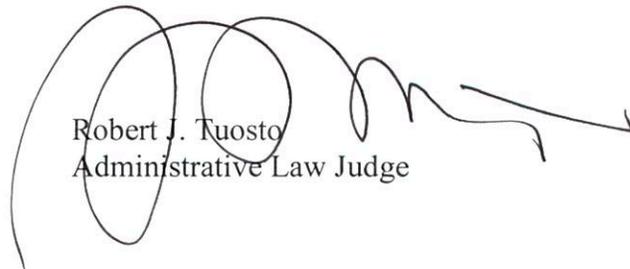
Therefore, the complaint must be dismissed.

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 complaint be, and the same hereby is, dismissed.

DATED: June 6, 2014
Bronx, New York


Robert J. Tuosto
Administrative Law Judge