NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

BRUCE T. WILLIAMS,

Complainant,

v.

VILLAGE OF HEMPSTEAD, POLICE DEPARTMENT,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10102536

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 January 28, 2009, by Edward Luban, 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 22 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10102536**

SUMMARY

Complainant alleged that Respondent discriminated against him on the basis of race/color and disability, and that it retaliated against him for complaining about discrimination. Because Complainant failed to sustain his burden of proof, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On November 10, 2004, 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 Margaret Jackson, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on April 2-3, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Valerie M. Cartright, Esq. Respondent was represented by Terry O'Neil, Esq. and Christopher T. Kurtz, Esq.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division, pursuant to 9 NYCRR § 465.12(d)(2).

FINDINGS OF FACT

1. Complainant is African-American. (Tr. 92)

2. In 1999, Respondent hired Complainant as a police officer. Complainant had previously worked as a police officer in New York City. (Tr. 73-74, 207)

3. At all times relevant to the complaint, James Russo was Respondent's Chief of Police ("Chief"), Vincent Neefus was Deputy Inspector, and Willie Dixon was a lieutenant. (Respondent's Exh. 20, 21, 22) Dixon is African-American. (Tr. 217; Respondent's Exh. 20)

4. In March 2003, Complainant hurt his back while on duty. As a result, Complainant was out of work for two days. (Tr. 87-89)

5. In June 2003, Complainant again injured his back while on duty. Complainant went out on medical leave because of his injury. Complainant did not return to work for Respondent. (Tr. 93-95, 115, 309)

6. As a police officer who was injured in the performance of his duties, Complainant received his full salary, tax-free, while he was on medical leave, pursuant to N.Y. General Municipal Law §207-c ("§207-c"). (Tr. 202, 211, 295-96)

7. Pursuant to the collective bargaining agreement between Respondent and Complainant's union, employees who are out on sick leave may not leave their residences unless they receive permission from the Chief or the watch commander. A supervisor may call or visit any employee on sick leave at any time. (Joint Exh. 1)

8. Employees on sick leave must call the watch commander before they leave their residence and upon their return. (Tr. 80, 115-16)

9. The Chief may grant an exemption from the "restriction to residence" provision. If an exemption is granted, the employee is restricted to his or her residence only from 9:00 a.m. to 5:00 p.m. on days that would otherwise be regularly scheduled workdays. (Joint Exh. 1)

10. Respondent conducts random telephone checks on and home visits to employees who are out on sick leave. On days when Respondent decides to conduct such checks, it checks all employees who report sick or injured, except where it is clear that the injury was job-related and there is no doubt about the injury's legitimacy. (Respondent's Exh. 20, Ex. A)

11. On five or six occasions in 2004 and 2005, Complainant observed police officers in unmarked vehicles parked down the block from his home. Complainant believed the officers were there to monitor his activities. (Tr. 125-27, 218)

12. When Complainant was out on leave, Respondent permitted him to leave his residence "numerous times" for medical appointments, to take his children to and from school, to go to the bank, to go to the supermarket, and for other activities. (Tr. 116, 237-38; Respondent's Exh. 18, 20)

13. Respondent has permitted officers who were injured off duty, and officers who were injured on duty but who had non-permanent injuries, to return to work on limited or light duty. These officers included John Panimen, Chris Lamont, Jack Gerveckian, Donald Simone, Kevin Galvin, and James Morris. Morris is black; the other officers are white. Complainant also worked light duty after two earlier injuries, one sustained off duty and one on duty (Tr. 172-73, 186, 283-84; Respondent's Exh. 21, 22)

14. Respondent does not offer light duty positions to officers who are injured on duty and who claim permanent injuries. Respondent's position is based on a New York State and Local Retirement System ("Retirement System") regulation which provides that where an officer who applies for disability retirement has been continuously assigned to a light duty position for at least two years prior to the date of his/her application, the officer's permanent incapacity will be determined based on the light duty position rather than the officer's previous full duty position. Respondent is concerned that it will be deemed to have created a permanent light duty position if it allows an officer who is injured on duty to work light duty for at least two years. (Respondent's Exh. 7, 21, 22)

15. Complainant discussed a light duty position with Neefus on at least one occasion, although Complainant's own testimony was inconsistent as to whether he did so before November 2004, when he filed his Division complaint. (Tr. 169, 216, 245, 267, 280-81, 293, 363; Respondent's Exh. 21)

16. Dr. David Benatar, an orthopedist, treated Complainant for his back injury. Benatar reported consistently that Complainant could not return to work as a police officer and that he was unlikely ever to resume his prior position. (Tr. 395; Joint Exh. 3)

17. Benatar thought Complainant might be able to perform sedentary light duty for a short period of time if he had a flexible schedule and could get up and walk around every 45 minutes to an hour. However, Benatar also noted that it was unclear if Complainant could even tolerate a sedentary type position. (Tr. 413, 436, 439-40, 482-83; Joint Ex. 3)

18. On July 17, 2003, November 18, 2003, and March 4, 2004, Dr. David Palmer, an orthopedic surgeon, examined Complainant at the request of Respondent's insurance carrier. After each examination, Palmer recommended that Complainant continue to receive physical therapy. (Tr. 115; Complainant's Exh. 3, 4, 5)

19. In January 2004, Complainant applied to the Retirement System for Accidental Disability Retirement and for Performance of Duty Disability Retirement. (Tr. 221, 234; Respondent's Exh. 2, 5)

20. On January 14, 2004, Complainant notified Russo that he was "filing for disability." (Respondent's Exh. 10)

21. On January 15, 2004, Benatar completed a Duty Status/Exemption Certification for Complainant. Benatar certified that Complainant would be unable to perform any police duties for at least 180 days, that he was unlikely to return to work as a police officer, and that allowing Complainant to leave his residence would not impede his recovery. Benatar did not certify that Complainant could perform limited duty. Russo approved the request for sick leave exemption. (Tr. 444-45, 447; Respondent's Exh. 3, 22)

22. On February 9, 2004, Neefus issued Complainant a Report of Violation for failing to notify the Duty Officer that he was going to an auto repair shop. Perry Pettus, the shop's owner, was also the Deputy Mayor of the Village of Hempstead. Complainant did not appeal the violation. Pettus "made (the violation) go away." (Tr. 120-23; Complainant's Exh. 7)

23. On November 2, 2004, Complainant had an appointment with Benatar at 10:30 a.m. That morning, Complainant called Respondent to report that he was going to see Benatar. Sgt. Patrick Cooke and Dixon later called Benatar's office to confirm that Complainant was there. They received contradictory information from Benatar's staff. Later that day, Cooke visited the office and was told by Benatar that Complainant did show up for his appointment. (Tr. 30-35, 134-38, 140-42, 399, 402, 404-07; Complainant's Exh. 1, 2; Respondent's Exh. 1, 15)

24. Nevertheless, later that afternoon, Dixon issued Complainant a Report of Violation for obtaining permission to leave his residence under false pretenses. (Tr. 144, 498-99, 528; Respondent's Exh. 14, 20)

25. Complainant spoke to Pettus about the violation. Pettus said he would take care of it. Pettus later told Complainant that he had spoken to Russo and nothing else was going to be done about the violation. (Tr. 154-55)

26. Respondent did not file formal charges for Complainant's alleged violation. Complainant was not disciplined for either the February 9, 2004 or the November 2, 2004 incident. (Respondent's Exh. 21)

27. On November 13, 2004, Palmer examined Complainant. Palmer found that no additional physical therapy was reasonable or necessary because "maximum medical benefit has been reached." (Complainant's Exh. 6)

28. On April 21, 2005, the Retirement System approved Complainant's application for Performance of Duty Disability Retirement. (Respondent's Exh. 2) On May 5, 2005, Complainant retired from Respondent. (Tr. 73, 214)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee on the basis of race or color. Human Rights Law § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action occurred in circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association,* 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.S. 2d 382, 390 (2004). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reasons Respondent has presented were merely a pretext for discrimination. *Id.* The ultimate burden of proof always remains with Complainant. *Ferrante* at 630, 665 N.Y.S. 2d at 29.

Complainant, an African-American, is in a protected class. Complainant alleged that Respondent discriminated against him by denying him light duty and other benefits it offered white officers and by "over-monitoring" and disciplining him compared to those officers. These allegations require separate analyses under the prima facie standard.

Light Duty and Physical Therapy

Complainant did not clearly establish that he was qualified to perform light duty. Benatar, his own treating physician, was uncertain whether Complainant could tolerate light duty. On January 15, 2004, Benatar certified that Complainant could not perform any police duties for at least 180 days. When Benatar completed that certification, he chose not to certify that Complainant could perform limited duty.

Nevertheless, Complainant established that Respondent told him no light duty position was available, while it did offer light duty to other officers, including white officers. Therefore, Complainant suffered an adverse employment action in circumstances giving rise to an inference of discrimination. Assuming Complainant could perform light duty, he has established a prima facie case.

However, Respondent has presented evidence of a legitimate, non-discriminatory reason it did not create a light duty position for Complainant. Respondent does not create such positions for employees who are injured on duty, receiving benefits under §207-c, and permanently disabled. Complainant failed to rebut this explanation. He admitted that he did not know whether any of the officers who did receive light duty were permanently disabled or had received §207-c benefits. Complainant also offered no evidence that the unavailability of light duty was motivated by unlawful discrimination. He admitted that he himself and at least one other African-American officer had received light duty assignments in the past. Accordingly, Complainant has failed to sustain his burden of proof.

Complainant also alleged that the refusal of Respondent's insurance carrier to authorize additional physical therapy was attributable to Respondent and that the refusal was motivated by discrimination. Complainant produced no evidence to support either contention. On the contrary, the record shows that Palmer, the independent medical examiner, found after his examination that Complainant had achieved the maximum benefit from physical therapy.

Monitoring/Discipline

For purposes of Complainant's allegation that he was monitored and disciplined more than similarly situated white officers, the relevant comparators are officers who were on leave and receiving §207-c benefits. Complainant was clearly qualified for these benefits. However,

Complainant failed to show that he suffered an adverse employment action. An adverse employment action requires "a materially adverse change in the terms and conditions of employment." *Forrest* at 306, 786 N.Y.S. 2d at 391. Such a change may be shown by "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id., quoting Galabya v. New York City Board of Education*, 202 F. 3d 636, 640 (2d Cir. 2000).

Complainant received two violation notices, but he was not disciplined, his pay was not reduced, he continued to receive benefits under §207-c, and he did not suffer any other material change in the terms or conditions of his employment. Thus, the issuance of the violations did not rise to the level of an adverse employment action. The same is true of the fact that Respondent's officers telephoned and visited Complainant's doctor on one occasion and may have parked on Complainant's street to monitor his activities on five or six occasions. Therefore, Complainant failed to establish that he suffered an adverse employment action, and he failed to establish a prima facie case of discrimination.

Disability Discrimination

It is an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to an employee's disabilities. Human Rights Law §296.3(a). Complainant contends that Respondent denied him a reasonable accommodation by not providing him with a light duty position. The Division's regulations provide that assignment to an available light duty position may be required to reasonably accommodate a temporary disability, "where the individual will be able to satisfactorily perform the duties of the job after a reasonable accommodation in the form of a reasonable time for recovery." 9 N.Y.C.R.R. §466.11(i)(3).

However, Complainant's disability is permanent, not temporary. An employer is not required to create a permanent light duty position to reasonably accommodate an employee's disability. *Mair-Headley v. County of Westchester*, 41 A.D. 3d 600, 602-03, 837 N.Y.S. 2d 347, 349 (2d Dept. 2007). Therefore, Complainant's claim of disability discrimination must be dismissed.

Retaliation

It is an unlawful discriminatory practice for an employer to discriminate against an employee because he has complained about discrimination. Human Rights Law §296.1(e). To prove a prima facie case of retaliation, Complainant must establish that he engaged in an activity protected by the Human Rights Law, that Respondent was aware he engaged in such activity, that he suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D. 2d 101, 104, 692 N.Y.S. 2d 220, 223-24 (3d Dept. 1999).

In his amended complaint, Complainant alleged that he was retaliated against for complaining about discriminatory treatment. Neither in his complaint nor in his testimony did Complainant identify the circumstances in which he complained about unlawful discrimination. The only protected activity in the record is Complainant's filing of his complaint with the Division on November 10, 2004. The conduct that Complainant alleged was discriminatory—monitoring, discipline, and denial of light duty—took place before Complainant filed his complaint. Therefore, the conduct could not have been retaliatory.

In his post-hearing submission, Complainant argues that Palmer's recommendation to discontinue physical therapy was retaliation for Complainant "complaining about the discriminatory behavior he was subjected to on November 2, 2004." (Complainant's Proposed Findings of Fact and Law, p. 22) Again, Complainant failed to establish how he complained

about discrimination. If he refers to the filing of his complaint with the Division, Complainant must show that by November 13, 2004, the date Palmer examined him, Respondent was aware of the complaint Complainant filed just three days earlier, that Respondent made its insurance carrier aware of the complaint, that the carrier made Palmer aware of the complaint, and that Palmer's medical report was motivated by retaliatory animus toward Complainant. Complainant offered no evidence to establish these facts, and no evidence of any connection between Palmer's report and any protected activity. Therefore, his retaliation claim 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: January 28, 2009
Syracuse, New York

Edward Luban
Administrative Law Judge