

--- N.Y.S.2d ----, 2009 WL 857992 (N.Y.A.D. 3 Dept.), 2009 N.Y. Slip Op. 02521
(Cite as: 2009 WL 857992 (N.Y.A.D. 3 Dept.))

Supreme Court, Appellate Division, Third Department, New York.
In the Matter of REGAL ENTERTAINMENT GROUP, Petitioner,
v.
NEW YORK STATE DIVISION OF HUMAN RIGHTS et al., Respondents.
(And Another Related Proceeding.)

April 2, 2009.

Background: Employer petitioned for annulment of a determination of the State Division of Human Rights, which found it guilty of disability discrimination in violation of Executive Law. The proceeding was transferred by order of the Supreme Court, Broome County.

Holding: The Supreme Court, Appellate Division, Mercure, J. held that former employee failed to demonstrate a prima facie case of disability discrimination.
Petition granted.

Hinman, Howard & Kattell, L.L.P., Binghamton (Paul T. Sheppard of counsel), for petitioner.

Caroline J. Downey, New York State Division of Human Rights, New York City (Arlyne R. Zwyer of counsel), for New York State Division of Human Rights, respondent.

Before: CARDONA, P.J., MERCURE, MALONE JR., KAVANAGH and McCARTHY, JJ.

MERCURE, J.

*1 Proceeding pursuant to Executive Law § 298 (transferred to this Court by order of the Supreme Court, entered in Broome County) to review a determination of respondent State Division of Human Rights which found petitioner guilty of an unlawful discriminatory practice based on disability.

Respondent Doudou B. Janneh was employed at a movie theater owned by petitioner beginning in 1999. In June 2005, Janneh became ill and failed to report for his scheduled work shifts. Subsequently, Janneh's wife presented a doctor's note to the theater manager, who forwarded the note to petitioner's benefits administrator for a determination of whether Janneh was eligible for leave under the Family and Medical Leave Act (*see* 29 USC § 2601 *et seq.*). Determining Janneh to be ineligible, the benefits administrator informed him by letter that if he was unable to return to work, he would be considered to have "voluntarily resigned for personal reasons," but he could reapply for employment with petitioner at any time. As a result, Janneh was effectively terminated.

--- N.Y.S.2d ----, 2009 WL 857992 (N.Y.A.D. 3 Dept.), 2009 N.Y. Slip Op. 02521
(Cite as: 2009 WL 857992 (N.Y.A.D. 3 Dept.))

Subsequently, Janneh filed a verified complaint, which was later amended, with respondent State Division of Human Rights (hereinafter SDHR) charging petitioner with, among other things, disability discrimination in violation of Executive Law article 15. After investigation, SDHR determined that it had jurisdiction and that there was probable cause to believe that petitioner had engaged in an unlawful discriminatory practice. Following a hearing, an Administrative Law Judge determined, as relevant here, that Janneh failed to establish a prima facie case of discrimination and recommended dismissal of the complaint. Thereafter, SDHR issued an alternative proposed order sustaining the complaint to the extent that it alleged discrimination based upon disability, but finding that Janneh sustained no damages inasmuch as he remains unable to return to work. The Commissioner of Human Rights adopted that order, and petitioner thereafter commenced this proceeding seeking to annul the determination. SDHR cross-petitions for enforcement of its order. We now annul the determination and dismiss the cross petition.

[1][2] To establish a prima facie case of disability discrimination, a complainant must "demonstrate that he [or she] suffers from a disability, he [or she] was discharged, he [or she] was qualified to hold the position, and the discharge occurred under circumstances giving rise to an inference of discrimination based on his [or her] disability" (*Engelman v. Girl Scouts-Indian Hills Council, Inc.*, 16 A.D.3d 961, 962, 791 N.Y.S.2d 735 [2005]; see *Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 794 N.E.2d 660 [2003]; see also *Roberts v. Ground Handling, Inc.*, 499 F.Supp.2d 340, 357 [2007]). Notably, a disability that prevents an employee from performing the job requirements in a reasonable manner is not a protected disability within the meaning of the statute; the Human Rights Law should not be interpreted to prevent termination of a worker who is unable to perform his or her duties even with reasonable accommodation (see Executive Law § 292[21]; *Staskowski v. Nassau Community Coll.*, 53 A.D.3d 611, 611, 862 N.Y.S.2d 544 [2008]; *McKenzie v. Meridian Capital Group, LLC*, 35 A.D.3d 676, 677, 829 N.Y.S.2d 129 [2006]; *Sherman v. Kang*, 275 A.D.2d 1016, 1016-1017, 713 N.Y.S.2d 597 [2000]; *Giaquinto v. New York Tel. Co.*, 135 A.D.2d 928, 929, 522 N.Y.S.2d 329 [1987], *lv. denied* 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101 [1988]; *McAuliffe v. Taft Furniture Warehouse & Showroom*, 116 A.D.2d 774, 775, 497 N.Y.S.2d 170 [1986], *lv. denied* 67 N.Y.2d 609, 503 N.Y.S.2d 1025, 494 N.E.2d 458 [1986]).

*2 [3] Here, Janneh testified that he was unable to return to work when he was contacted by petitioner in June 2005 and that, indeed, he never sought medical clearance to return to work. Moreover, SDHR's order acknowledged that Janneh remained dependent upon the care of others for all of his needs from the date of his termination through early summer 2006, and that he was unable to return to work through the date of the hearing. Accordingly, Janneh failed to demonstrate a prima facie case of discrimination against petitioner and, thus, the determination by SDHR was not supported by substantial evidence (see *Matter of Delta Air Lines v. New York State Div. of Human Rights*, 91 N.Y.2d 65, 72-73, 666 N.Y.S.2d 1004, 689 N.E.2d 898 [1997]; *Matter of Lindsay Park Hous. Corp. v. New York State Div. of Human Rights*, 56 A.D.3d 477, 478-479, 866 N.Y.S.2d 771 [2008]; *Matter of New York State Off. of Mental Health, Manhattan*

--- N.Y.S.2d ----, 2009 WL 857992 (N.Y.A.D. 3 Dept.), 2009 N.Y. Slip Op. 02521
(Cite as: 2009 WL 857992 (N.Y.A.D. 3 Dept.))

Psychiatric Ctr. v. New York State Div. of Human Rights, 223 A.D.2d 88, 93, 645 N.Y.S.2d 926 [1996], *lv. denied* 89 N.Y.2d 806, 654 N.Y.S.2d 716, 677 N.E.2d 288 [1997]; *Matter of Milonas v. Rosa*, 217 A.D.2d 825, 828-829, 629 N.Y.S.2d 535 [1995], *lv. denied* 87 N.Y.2d 806, 641 N.Y.S.2d 597, 664 N.E.2d 508 [1996]).

The parties' remaining contentions are either rendered academic by our decision or, upon consideration, have been found to be lacking in merit.

ADJUDGED that the determination is annulled, without costs, petition granted, complaint dismissed and cross petition dismissed.

CARDONA, P.J., MALONE Jr., KAVANAGH and McCARTHY, JJ., concur.

--- N.Y.S.2d ----, 2009 WL 857992 (N.Y.A.D. 3 Dept.), 2009 N.Y. Slip Op. 02521

END OF DOCUMENT