



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHARLES DAVIS,

Complainant,

v.

EXPRESS VALENTINE INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10142375

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 26, 2012, by Robert M. Vespoli, 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: **MAR 20 2012**
Bronx, New York


GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. **10142375**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him by terminating his employment because he pursued a workers' compensation claim against Respondent. Complainant also alleged that Respondent failed to provide a reasonable accommodation for his disability. Because the evidence does not support Complainant's allegations, the complaint must be dismissed

PROCEEDINGS IN THE CASE

On June 16, 2010, 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 M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on October 12, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by Adrienne S. Greenberg, Esq. Respondent was represented by its owner and president, Valentine Uwode.

At the public hearing, Complainant’s attorney made an application to amend the complaint to add an additional Respondent, and the presiding ALJ reserved decision. (Tr. 15-17)

Complainant filed a timely post-hearing closing brief.

FINDINGS OF FACT

1. Complainant alleged that Respondent unlawfully discriminated against him by terminating his employment because he pursued a workers’ compensation claim against Respondent. Complainant also alleged that Respondent failed to provide a reasonable accommodation for his disability. (Tr. 145; ALJ’s Exh. 1)
2. Respondent denied Complainant’s allegations. (Tr. 333-34; ALJ’s Exh. 5)
3. Respondent operates a business that employs taxi drivers for hire. (Tr. 69, 268, 316-17)
4. Valentine Uwode is the owner and president of Respondent. (Tr. 268)
5. Complainant began working for Respondent as a taxi driver in or about 2007. (Tr. 69)

6. In August 2009, Complainant was involved in a car accident while he was operating one of Respondent's taxi cabs. (Tr. 59, 273, 297)

7. Complainant alleged that, as a result of this car accident, he suffered from disabilities in the form of injuries to his back, neck, and right foot. (Tr. 59) Complainant proffered a copy of the "electrodiagnostic results" from his medical testing performed on October 27, 2009. Igor Stillier, M.D., the treating neurologist, concluded that Complainant's testing showed "evidence of a bilateral L5 radiculopathy." (Complainant's Exh. 1)

8. Complainant did not tell Uwode, or anyone else associated with Respondent, that he was injured or that he needed any type of accommodations in order for him to perform his duties as a taxi driver. (Tr. 84-85, 107-08, 146, 274, 284-85)

9. From August 2009 until April 21, 2010, Complainant continued working for Respondent as a taxi driver. He performed the same duties and worked the same number of hours he had worked before the car accident. (Tr. 85-86, 100-01, 104-05, 131, 297)

10. In or about September 2009, Complainant filed a workers' compensation claim against Respondent. (Tr. 62)

11. Complainant alleged that Uwode intimidated him by telling him that he would terminate Complainant's employment if Complainant appeared at the scheduled hearing on his claim at the Workers' Compensation Board. (Tr. 60-64; ALJ's Exh. 1)

12. The workers' compensation hearing was held on April 21, 2010, in Hempstead, New York. (Tr. 64)

13. On the morning of April 21, 2010, Complainant appeared for work as usual, and he drove his taxi to the workers' compensation hearing later that day. (Tr. 64, 108, 194, 226-28)

14. Complainant and Uwode appeared at the workers' compensation hearing with their respective attorneys. (Tr. 283)

15. At the workers' compensation hearing, Complainant alleged that he was totally disabled and could no longer perform his duties as a taxi driver. (Tr. 283-85)

16. This was the first time Uwode or anyone else associated with Respondent became aware of the nature and extent of Complainant's alleged disability. (Tr. 145-46, 283-85)

17. Uwode contested Complainant's allegations and requested that Complainant provide him with the keys to the taxi and the taxi receipts for the day. Uwode then called the police claiming that Complainant had stolen Respondent's property. (Tr. 283-88)

18. After the workers' compensation hearing, a heated exchange took place between Complainant and Uwode. Complainant then returned the keys to the taxi and left the hearing location. (Tr. 72, 287-89)

19. Complainant believed that Uwode had terminated his employment that day. (Tr. 73, 79, 105, 144-45)

20. On April 21, 2010, after the workers' compensation hearing, Complainant went to see his chiropractor, Dr. Elliot Strauss. (Tr. 146, 156; Respondent's Exh. 1) Dr. Strauss subsequently sent a letter dated April 21, 2010, to Uwode via facsimile. This letter stated that Complainant saw Dr. Strauss that day and exhibited "severe lumbosacral pain, extensive muscle spasm and is manifesting extreme stress." Dr. Strauss also stated that he was "putting [Complainant] out of work; his prognosis is guarded." (Respondent's Exh. 1)

21. Complainant was unable to work as a taxi driver after April 21, 2010. (Tr. 81, 105-06)

22. Complainant's last day of work for Respondent was April 21, 2010. (Tr. 79, 145)

23. From August 2009 through April 21, 2010, Respondent did not have workers' compensation insurance. (Tr. 308-10)

OPINION AND DECISION

Complainant alleged that Respondent unlawfully discriminated against him by terminating his employment because he pursued a workers' compensation claim against Respondent. In the instant complaint, Complainant alleged disability discrimination. The evidence adduced at the public hearing can reasonably be interpreted to include a claim of retaliatory discharge. Although this claim of retaliatory discharge is not specifically raised in the instant complaint, the pleadings are conformed to the proof, and this finding is made consistent with that pleading and that proof. *See* 9 N.Y.C.R.R. § 465.12(f)(14).

It is unlawful for an employer to discriminate against an employee on the basis of disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the burden of establishing a prima facie case of discrimination by showing that he is a member of a protected group, that he was qualified for the position he held, that he suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

A disability is defined under the Human Rights Law as "a physical, mental or medical

impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are “merely diagnosable medical anomalies.” *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

The Human Rights Law also prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that he engaged in protected activity, that Respondent was aware that he participated in this activity, that he suffered an adverse employment action, and that there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

Complainant's claim that Respondent terminated his employment because of his disability and in retaliation for filing a worker's compensation claim cannot be sustained. Complainant established that the injury to his back qualifies as a disability under the Human Rights Law. However, Respondent was not aware of Complainant's disability until the day of the workers' compensation hearing, at which time Complainant was unable to continue working as a taxi driver. Furthermore, Complainant did not show that he suffered an adverse employment

action that was causally related to his disability. *See McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 330 (1994).

Complainant argued that Respondent terminated his employment because he pursued a workers' compensation claim against Respondent. *See* Closing Brief for Complainant dated November 18, 2011, p. 5. Such a claim is contrary to Complainant's Human Rights Law claim, and it is not actionable in these proceedings. *See Brook v. Overseas Media, Inc.*, 69 A.D.3d 444, 445, 893 N.Y.S.2d 37, 38 (1st Dept. 2010) (holding that plaintiff's allegation that defendant terminated her employment because of her disability and in retaliation for her having filed a workers' compensation claim does not state a cause of action for retaliatory discharge under the New York City Human Rights Law); *see also Jiminez v. Potter*, 211 Fed.Appx. 289, 290 (5th Cir. 2006) ("a workers' compensation claim is not a protected activity under Title VII."). Complainant's exclusive remedy for such a claim is to file a complaint with the Workers' Compensation Board. *Brook* at 445, 893 N.Y.S.2d at 38.

Accordingly, this claim must be dismissed.

It is also an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations for an employee's known disabilities. Human Rights Law § 296.3(a). It is the employee's responsibility to request an accommodation. The employee and the employer must then engage in an interactive process, which includes the discussion and exchange of pertinent medical information, in order to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job requirements. *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 148-49, 811 N.Y.S.2d 381, 387 (1st Dept. 2006), *lv. to appeal den.*, 7 N.Y.3d 707, 821 N.Y.S.2d 813 (2006); 9 N.Y.C.R.R. § 466.11(j)(4).

From the date of the car accident until the date Complainant left Respondent's employ,

Complainant was able to fully perform his duties as a taxi driver without any accommodations. Moreover, Complainant did not tell Uwode, or anyone else associated with Respondent, that he was injured or that he needed any type of accommodations in order for him to perform his duties as a taxi driver. Therefore, this claim must also fail.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against him. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Because Complainant failed to sustain his burden, the complaint must be dismissed.

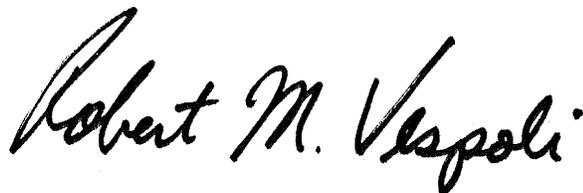
The Division need not address Complainant's application to amend the complaint to add an additional Respondent as that application has been rendered moot by this decision.

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 instant complaint be, and the same hereby is, dismissed.

DATED: January 26, 2012
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli
Administrative Law Judge