ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

BENITO A. QUEZADA-PANTALEON,
Complainant,

v.

CITY OF NEW YORK, POLICE DEPARTMENT,
Respondent.

NOTICE AND FINAL ORDER

Case No. 10145448

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 March 28, 2012, by Thomas J. Marlow, 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: 5/23/12
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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CITY OF NEW YORK, POLICE DEPARTMENT,
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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10145448**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his disability and because he opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On November 30, 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 Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on November 14, 15, and 30, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by Delmas A. Costin, Jr., Esq., of The Law Office of Delmas A. Costin, Jr. Respondent was represented by Eileen Flaherty, Esq., and Katie M. Flaherty, Esq.

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

FINDINGS OF FACT

1. On September 10, 2007, Complainant began his employment with Respondent as a Traffic Enforcement Agent, Level I ("TEA, I"). In December of 2007, Complainant was assigned to work in the Bronx Parking Enforcement Unit, T-201 ("T-201"). (Tr. 25-30)

2. As a TEA, I, Complainant's responsibilities included walking in an assigned area and preparing and issuing summonses for violations of the traffic laws, rules, and regulations of the City of New York. (Respondent's Exhibit 5; Tr. 26-27, 30, 37-38, 85-86, 246-47, 296, 619-20, 718)

3. After two months of working as a TEA, I in T-201, issuing summones, Complainant was selected to work in a special assignment squad ("X squad") with responsibilities that included working with T-201's computers. (Tr. 34-35, 38-39, 53-55, 496-97, 695-96) For the

rest of 2008, Complainant worked inside T-201 in the X-squad, occasionally working outside when working overtime. (Tr. 36-38)

4. In 2009, Respondent started to assign Complainant and others from the X-squad to go outside to write summonses one day during the week, unless there were pressing needs in the office. (Tr. 37-38, 85-86)

5. On March 5, 2009, Complainant reported to Respondent that he slipped and fell ("March 5th fall") while working outside as a TEA, I. A Workers' Compensation claim was made and, after March 5, Complainant was out of work for approximately one month because of pain in his right foot that he attributed to the March 5th fall. Shortly after Complainant returned to work, he informed one of his supervisors, Traffic Manager Garcia ("Garcia"), that he could not go outside to perform his responsibilities because of pain he continued to feel in his right foot. Garcia, without going through a formal accommodation process, excused Complainant from having to go outside and write summonses. (Respondent's Exhibits 11, 13; Tr. 48, 84-85, 95-111, 121, 712-14)

6. On June 26, 2009, Complainant was promoted to TEA, II. A TEA, II has the additional responsibility of directing traffic. (Tr. 27, 159, 610, 619-22, 712-13)

7. By early August of 2009, Stuart Katchis, M.D. ("Dr. Katchis"), had determined that Complainant had arthritis in the subtalar joint of his right foot and that surgery should be performed to fuse together the talus and calcaneus bones in the foot ("fusion surgery"). In August of 2009, Complainant went out of work on medical leave pursuant to the New York Workers' Compensation Law ("WCL"). On September 15, 2009, Dr. Katchis performed the fusion surgery. (Complainant's Exhibit 7; Tr. 111, 278-89)

8. On July 19, 2010, Dr. Katchis determined that Complainant could return to work. Dr. Katchis testified that he knew that, when Complainant returned to work, he would be "on his feet a good portion of the day either walking or standing, either controlling traffic or giving violations and things like that." Dr. Katchis was confident that Complainant could perform the responsibilities of a TEA, II without any risk of serious injury. Dr. Katchis also expected that there could be pain in the area of the fusion that could be managed according to Complainant's tolerance. (Respondent's Exhibit 14; Tr. 296-98, 329)

9. Complainant returned to work on August 3, 2010, knowing that Respondent would assign him according to its needs. (Tr. 111-12, 116, 122-23, 147-48, 501)

10. Again, Complainant was assigned to T-201 with the responsibility "to work in the streets." Complainant, who had been out of work for approximately one year, and was cleared by Dr. Katchis to return to work without any restrictions, was expected to perform all of the responsibilities of a TEA, II. (Tr. 124, 628-32, 718, 724, 735-36)

11. On and after August 3, as Complainant performed his responsibilities as a TEA, II, Complainant experienced pain and swelling in his right foot. Complainant took medication for pain and, at the end of the day, would use ice to reduce the swelling. Complainant went back to see Dr. Katchis and reported the pain he was feeling while working. On August 10, 2010, Dr. Katchis wrote a note ("Dr. Katchis' August 10 note") on his prescription pad that reads as follows, "Benito needs to be on light duty at work until surgery has been performed to remove the screws from his foot/ankle. Any questions please contact the office." After Complainant received Dr. Katchis' August 10 note, he went to Respondent's office at One Police Plaza in Manhattan to obtain the proper papers ("RA request") to seek a reasonable accommodation from Respondent to address the pain he was feeling in his foot while working. At that time,

Complainant was aware of the proper procedure to apply for a reasonable accommodation. Complainant completed the RA request in which he requested that he not be required to "stand or walk for over two hours and nor drive for over three hours." Complainant submitted his RA request, with Dr. Katchis' August 10 note and other papers, to Respondent on August 11, 2010. (Respondent's Exhibits 17, 18; Tr. 137, 155-57, 166-71, 298-302, 567-70)

12. Respondent has a policy and procedure for handling reasonable accommodation requests and an Office of Equal Employment Opportunity ("OEEO") which is responsible for addressing such requests. OEEO processes approximately 200 requests for reasonable accommodation per year. On August 16, 2010, OEEO received Complainant's RA request and attendant papers. Complainant's RA request was handled in the normal course of business according to Respondent's procedure. Cynthia Francis, the Executive Officer of OEEO, credibly testified that no one from T-201 attempted to influence OEEO with regard to its handling of Complainant's RA request or its final determination. (Respondent's Exhibits 1, 18; Tr. 406-14, 424-44, 486)

13. While Complainant's RA request was being processed, supervisors of Complainant at T-201 agreed to try to provide Complainant with a vehicle while he worked in the streets to address his request of limiting the time he spent on his feet or in a vehicle. While Complainant's RA request was being processed, Respondent often provided Complainant with a vehicle. When Complainant was not provided with a vehicle, he complained to supervisors. Bernice Forte, a supervisor of Complainant, credibly testified that, in August of 2010, T-201 had no need for Complainant to perform work inside. (Respondent's Exhibits 1, 18, 25; Tr. 179-83, 187, 406-13, 424-44, 508-09, 559-60, 640-41, 666-72, 697-702, 718-27)

14. On August 31, 2010, according to Respondent's procedure, a doctor examined Complainant and recommended ("recommendation") that, with regard to Complainant's "duty capability," it would be "ok to limit standing walking kneeling squatting while waiting for hardware removal with Dr. Katchis." This recommendation was handled in the ordinary course of business and, by memorandum dated September 24, 2010, OEEO informed T-201 ("RA determination") that Complainant was found suitable for the following accommodation: he was to be "exempt from prolonged standing and walking," he was to be "provided a vehicle," and, if a vehicle was not available, he was to be "assigned an inside position." The RA determination did not preclude T-201 assigning Complainant to direct traffic. No one from T-201 sought a delay by OEEO in reaching a determination with regard to Complainant's RA request. (Respondent's Exhibits 1, 18; Tr. 406-13, 418-19, 424-47, 451, 488-89)

15. On September 13, 2010, before OEEO made the RA determination, Complainant was working a shift scheduled from 12:00 noon to 8:00 p.m. On that day, Respondent provided Complainant with a vehicle. On that day, Complainant's responsibilities included directing traffic. On that day, Complainant directed traffic from approximately 1:00 p.m. to 5:00 p.m., with a lunch break of 30 minutes and two personal breaks. Complainant experienced pain in his foot that day while working and, around 5:00 p.m., when he "really couldn't stand anymore" pain, he informed a supervisor that he was stopping his work for that day. Complainant was on sick leave for the remainder of that work day. (Respondent's Exhibit 22; Tr. 261-67, 507-10)

16. September 13, 2010, was the last day that Complainant performed the duties of a TEA, II. On September 15, 2010, while Complainant was still out on sick leave, Dr. Katchis examined Complainant and ordered a bone scan ("SPECT") of Complainant's right foot. The SPECT suggested to Dr. Katchis that there was a partial nonunion of the bones involved in the

fusion surgery. Dr. Katchis could give no professional medical opinion with a reasonable degree of medical certainty regarding the causation of the partial nonunion. (Complainant's Exhibits 7; Tr. 269, 302-10, 332-33)

17. Complainant continued on sick leave until October 27, 2010, when he went out of work on medical leave pursuant to the WCL. On November 18, 2010, Dr. Katchis performed surgery to remove the screws in Complainant's foot and to correct the nonunion. (Complainant's Exhibit 18; Respondent's Exhibit 15; Tr. 302-08, 332-33)

18. On November 30, 2010, Complainant filed the instant complaint (Case No. 10145448) with the Division, alleging that Respondent unlawfully discriminated against him because of his disability. Complainant included the allegations that Respondent disregarded the recommendation of his doctor and sent him to the street to walk, drive, and direct traffic while standing for long hours. Complainant further alleged that Respondent did not follow through on its offer to allow Complainant to work in a car with another person driving. Complainant also alleged that Respondent forced him to direct traffic on the last day that he performed the duties of a TEA, II. (ALJ's Exhibit 1; Complainant's Exhibit 1; Tr. 6-9)

19. On June 23, 2011, Dr. Katchis performed surgery to repair Complainant's right peroneal tendon. Dr. Katchis could give no professional medical opinion with a reasonable degree of medical certainty regarding the causation of the tendon damage. (Complainant's Exhibit 7; Tr. 315-16, 320-23, 340)

20. By letter dated November 21, 2011, Respondent informed Complainant ("Section 71 letter") that, if he did not provide a doctor's note indicating that he was physically fit to perform the duties of his position, it intended to act pursuant to Section 71 of the New York Civil Service

Law to terminate his employment since he had been on medical leave for over one year. (Complainant's Exhibit 18; Tr. 607-09)

21. As of November 30, 2011, Complainant testified that he was not physically able to perform the duties of a TEA, II on the street which would include writing summonses and directing traffic. Dr. Katchis testified that there has been adequate time for Complainant's injuries to heal and that he did not expect any further improvement. (Tr. 324-25, 610-11)

22. At the public hearing, Complainant also alleged that Respondent retaliated against him because he sought a reasonable accommodation and because he filed the instant complaint. (Tr. 14-22)

23. Sol Lopez ("Lopez"), one of Complainant's supervisors, never gave an order that Complainant was not to go outside on foot patrol to write summonses after she learned of Complainant's RA request. Complainant gave inconsistent testimony with regard to what Lopez said after she learned of Complainant's RA request. I do not credit Complainant's testimony that Lopez ordered that Complainant not go outside on foot patrol to write summonses. (Tr. 48-49, 174-80, 187, 246-50, 252-60, 582-86, 588-90, 655-56, 724-27, 734-36)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability, to refuse to provide a reasonable accommodation to an employee's disability, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.3(a), 296.7.

Complainant raised issues of unlawful discrimination, alleging that Respondent refused to provide him with a reasonable accommodation and that he has experienced unlawful retaliation because he opposed discrimination.

Under the facts and circumstances of this case, the fact that Complainant received benefits under the WCL does not preclude the Division from entertaining jurisdiction over Complainant's allegations of unlawful discrimination. *See Paone v. Wynantskill Detention Center*, 25 Misc.3d 1225, 906 N.Y.S.2d 774 (Sup. Ct. Rensselaer Co. 2009).

After considering all of the evidence presented, however, and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support Complainant's allegations. I credit the testimony of Francis, Forte, and Lopez and find that the evidence presented does not establish that any actions attributed to Respondent were motivated by or determined by discriminatory animus.

When Complainant returned to work on August 3, 2010, after a leave of one year, he understood that Respondent expected him to be able to perform all of the duties of a TEA, II. There was no open position in the X squad and Complainant understood that Respondent had no obligation to make a position available in the X squad upon his return to full duty. When, within a week of returning from a year's leave, Complainant sought a reasonable accommodation, Respondent appropriately addressed Complainant's RA request with its established interactive procedure. I find that Respondent's efforts in trying to provide Complainant with a vehicle to limit the time that Complainant spent on his feet while his RA request was pending was reasonable. I also find that the RA determination, which did not preclude directing traffic, was reasonable. *See Hayes v. Estee Lauder Companies, Inc.,* 34 A.D.3d 735, 825 N.Y.S.2d 237 (2d Dept. 2006); 9 N.Y.C.R.R. § 466.11(j)(6).

In addition, Respondent's issuance of a Section 71 letter was also appropriate, especially considering Complainant's testimony that he was not physically able to perform the duties of a TEA, II on the street which would include writing summonses and directing traffic. *See Abram v. New York State Div. of Human Rights,* 71 A.D.3d 1471, 896 N.Y.S.2d 764 (4th Dept. 2010); 9 N.Y.C.R.R. §§ 466.11(d), 466.11(e), 466.11(f). I find no causal connection between Complainant's filing of the instant complaint and Respondent's issuance of the Section 71 letter. *See Abram*, 71 A.D.3d at 1474. Further, I find no causal connection between any actions of Respondent and any complaints made by Complainant regarding his assignments or his right to be accommodated. *Id.*

When a complainant raises issues of unlawful discrimination, he has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Mittl v. New York State Div. of Human Rights,* 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). In all cases involving allegations of unlawful discrimination, conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp,* 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

Complainant has failed to meet the burden of showing that any conduct attributed to Respondents constituted unlawful discrimination in violation of the Human Rights Law. 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: March 28, 2012
Bronx, New York

Thomas J. Marlow
Administrative Law Judge