

CITY OF NEW YORK  
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS ex rel.  
DIANA CARTER,

Complaint No.: M-E-O-12-1025926

OATH Index No. 0019/15

Petitioner,  
-against-

NEW YORK CITY POLICE DEPARTMENT  
and PETER BROWER,

Respondents.

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**DECISION AND ORDER**

The Law Enforcement Bureau of the New York City Commission on Human Rights (the “Bureau”) initiated this employment discrimination case on behalf of Complainant Diana Carter by filing a verified complaint on October 24, 2011 (“Complaint”). The Complaint alleges that Complainant’s employer, the New York City Police Department, and her supervisor, Lieutenant Peter Brower,<sup>1</sup> (collectively “Respondents”) denied her overtime in retaliation for her requests for a reasonable accommodation for her disability. (ALJ Ex. 1 at ¶ 9; *see also* Bureau Post-Tr. Br. 1, 8-9; Bureau Comments 4.)

Following a three-day hearing, the Honorable John Spooner of the Office of Administrative Trials and Hearings (“OATH”) issued a report and recommendation dated May 12, 2015 (“Report and Recommendation”) to the Office of the Chair of the New York City Commission on Human Rights (“Commission”). The Commission refers readers to the Report and Recommendation for a detailed summary of the facts of the case.

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<sup>1</sup> At the time the Complaint was filed, Lieutenant Brower was a Sergeant.

In his Report and Recommendation, Judge Spooner recommended that the Commission dismiss the Complaint, concluding that Complainant's requests for accommodations did not amount to protected activity for purposes of establishing a claim of retaliation under the New York City Human Rights law ("NYCHRL"). *In re Comm'n on Human Rights ex rel. Carter v. N.Y.C. Police Dep't*, OATH Index No. 0019/15, R&R, 2015 WL 3602370, at \*6 (May 12, 2015).

The parties submitted timely comments responding to the Report and Recommendation. Respondents argue that the Report and Recommendation should be adopted because its factual findings are supported by evidence in the record and the legal analysis is consistent with caselaw. (Resp'ts' Comments 1.) The Bureau argues that the evidence supports a finding of discrimination and that requests for reasonable accommodations should be viewed as protected activity under the NYCHRL, similar to federal law. (Bureau Comments 2-4.)

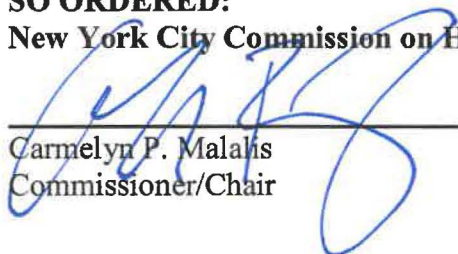
In reviewing a report and recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. When parties submit comments, replies, or objections to a report and recommendation pursuant to 47 RCNY § 1-76, the Commission must review the comments, replies, or objections in the context of the Commission's other determinations of fact and conclusions of law. The Commission reviews a report and recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at \*2 (Apr. 20, 2016); *In re Comm'n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14, 2016 WL 1050864, at \*3 (Mar. 14, 2016); *In re Comm'n on Human Rights v. CU 29 Copper Rest. & Bar*, OATH Index No. 647/15, Dec. & Order, 2015 WL 7260570, at \*2 (Oct. 28, 2015).

Having reviewed the Report and Recommendation, hearing transcript, evidence entered into the hearing record, the parties' post-hearing briefs, and the parties' comments on the Report and Recommendation, the Commission agrees with Judge Spooner's recommendation that the Complaint must be dismissed. The sole legal claim asserted by the Bureau in this case is one of retaliation for Complainant's requests for accommodation. To establish a claim for retaliation, the petitioner must show: (1) the complainant engaged in protected activity; (2) the respondent was aware of the complainant's protected activity; and (3) the respondent reacted in a manner that is reasonably likely to deter someone from engaging in such protected activity. *In re Comm'n on Human Rights ex rel. Martinez v. Joseph "J.P." Musso Home Improvement*, OATH Index No. 2167/14, 2017 WL 4510797, at \*6 (Sept. 29, 2017). Courts interpreting the NYCHRL have universally held that a request for reasonable accommodation alone does not constitute protected activity under the first prong of the test for a claim of retaliation. *See, e.g., Witchard v. Montefiore Medical Ctr.*, 103 A.D.3d 596, 596 (1st Dep't 2013); *Brooks v. Overseas Media, Inc.*, 69 A.D.3d 444, 445 (1st Dep't 2010); *McKenzie v. Meridian Capital Grp., LLC*, 35 A.D.3d 676, 677-78 (2d Dep't 2006); *Hernandez v. Weill Cornell Med. Coll.*, 48 Misc. 3d 1210(A), 2015 WL 4173697, at \*2 (Sup. Ct. Bronx Cty. 2015); *see also* N.Y.C. Admin. Code § 8-107(7) (listing protected activities as "(i) oppos[ing] any practice forbidden under this chapter, (ii) fil[ing] a complaint, testif[ying] or assist[ing] in any proceeding under this chapter, (iii) commenc[ing] a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assist[ing] the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provid[ing] any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of

this chapter"). Accordingly, the Complaint must be dismissed for failure to state a claim. It is hereby ORDERED that the Complaint is dismissed.

Dated: New York, New York  
September 28, 2018

**SO ORDERED:**  
**New York City Commission on Human Rights**

  
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Carmelyn P. Malalis  
Commissioner/Chair

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