

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D33292  
W/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - October 28, 2011

WILLIAM F. MASTRO, A.P.J.  
CHERYL E. CHAMBERS  
SANDRA L. SGROI  
ROBERT J. MILLER, JJ.

2010-09247

DECISION & JUDGMENT

In the Matter of Arthur J. Herbert, petitioner, v  
Galen D. Kirkland, etc., et al., respondents.

(Index No. 6329/09)

Wolin & Wolin, Jericho, N.Y. (Alan E. Wolin of counsel), for petitioner.

Fulbright & Jaworski, LLP, New York, N.Y. (Douglas P. Catalano and Neil G. Sparber of counsel), for respondent New York Institute of Technology.

Proceeding pursuant to Executive Law § 298 to review a determination of the Commissioner of the New York State Division of Human Rights dated September 9, 2010, which adopted the recommendation and findings of an administrative law judge dated January 20, 2010, made after a hearing, finding that the petitioner did not establish that New York Institute of Technology discriminated against him in the terms, conditions, and privileges of his employment based upon his disability, in violation of Executive Law § 296, and dismissed the administrative complaint.

ADJUDGED that the petition is denied, the determination is confirmed, and the proceeding is dismissed on the merits, with costs to the respondent New York Institute of Technology, payable by the petitioner.

Even had the petitioner established a prima facie case of discrimination (*see Matter of McEniry v Landi*, 84 NY2d 554, 558; *Koester v New York Blood Ctr.*, 55 AD3d 447, 448), substantial evidence supports the determination of the Commissioner of the New York State Division of Human Rights that the petitioner's employer, New York Institute of Technology, had

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a legitimate, nondiscriminatory reason for terminating the petitioner from its employ, and that he did not show that this reason was a pretext for discrimination (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *Matter of Sauer v Donaldson*, 49 AD3d 656, 657; *Genesky v Local 1000, AFSCME, AFL-CIO, CSEA*, 287 AD2d 594, 595).

MASTRO, A.P.J., CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court