ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

DIANE JEANITE,

Complainant,

v.

DR. MICHAEL KAPLAN,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10115251

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 August 20, 2010, by Margaret A. Jackson, 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") WITH THE FOLLOWING AMENDMENT:

- Due to a typographical error, the back pay damages awarded in number one of the Order section is incorrectly stated. The correct damage award is ten thousand

eight hundred and eighty dollars ($10,880).

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: FEB 28 2011
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

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DR. MICHAEL KAPLAN,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10115251**

SUMMARY

Complainant, an African-American military reservist, alleges Respondent unlawfully discriminated against her on the basis of her military reservist status and retaliated against her. Respondent's reasons for terminating Complainant's employment were pretextual. Therefore, Complainant is awarded compensatory damages.

PROCEEDINGS IN THE CASE

On December 14, 2006, 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 Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on March 10, 2010.

Complainant and Respondent appeared at the hearing. Complainant was represented by William J. Sipser, Esq. Respondent was represented by Matthew Muraskin, Esq.

Permission to file post-hearing briefs was granted. Both parties submitted findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 21, 2003, Complainant began a full time military career. (Tr. 8)

2. From August of 2005 through the present, Complainant has been in military reserve status. She is an E-4 specialist with certification in Emergency Medical Technician (EMT) Basic and Cardio-Pulmonary Resuscitation (CPR). (Tr.8-11)

3. The military classification of EMT Basic is equivalent to a civilian medical assistant. (Tr.10)

4. In August of 2005, Complainant contacted Respondent after a fellow soldier, Shannon Jones, told Complainant that she had worked for Respondent as a medical assistant and if she could not find a job she could use her as a reference. (Tr. 16-7, 89, 156, 165)

5. Respondent maintains medical offices on Long Island, New York in the towns of Westbury and Smithtown. (Tr.239)

6. Complainant contacted Respondent's office to arrange an appointment to meet with Respondent. Complainant met with Respondent was offered and accepted a position as a medical assistant in his Westbury office. (Tr.16-7, 20)

7. On August 25, 2005, Complainant began working earning $11.00 per hour plus a $6.00 bonus every time she set a consultation. Complainant was scheduled to work 30 hours per week. (Tr.18, 21, Respondent's Exhibit 3)

8. Complainant was the only African-American employee who worked for Respondent. (Tr.205-6)

9. Complainant complained that she was being paid less than the other office employees. However, the qualifications of the other employees exceeded Complainant's both educationally and experientially. (Tr. 111-12, 167)

10. Complainant informed Respondent that, as a reservist, she was required to attend military drills one weekend a month and two weeks out of the summer and she could be called for military duty at any time. Respondent did not object to Complainant's military commitments. (Tr. 19)

11. After three months, Respondent gave Complainant a promotion and a raise. Her salary was raised to $11.50 per hour. Respondent also asked Complainant to work with him to create a power hour which was an exercise program offered to patients on Sundays at the Westbury office. She complied.(Tr. 79-81, 243)

12. Through December 2005, Complainant reported to work on time. (Tr.236, 274)

13. On or about January 8, 2006, Staff Sergeant Ken Holloway (Sergeant Holloway) faxed Complainant a written request to work with him for two weeks performing recruiting services. On January 9, 2006, Complainant brought the request to work and spoke with the Office

Manager, Dawn Moss, advising her that she may have to perform two weeks of recruiting duty at some point. The request did not indicate specific dates. (Tr. 25, Complainant's Exhibit 2)

14. Moss did not give Respondent the written request regarding Complainant's need for release time for military duty. (Tr. 299)

15. Two weeks later, Complainant was ordered to recruiting duty with Holloway. She gave Moss the request and talked to Respondent who told her that it would be a problem because he had no one to replace Complainant for two weeks and she should somehow work her recruitment duty around the office schedule and come to work. (Tr. 32)

16. Complainant spoke with Sergeant Holloway who became upset because military protocol dictates that military personnel are required to perform their duty between 7:30 a.m. and 5:00 p.m. Despite his displeasure, Sergeant Holloway made an exception and allowed Complainant to leave two hours earlier than scheduled so that she could go to work at Respondent's office.(Tr. 33)

17. Between February 6-10, 2006 and February 13-17, 2006, Complainant reported for duty with Sergeant Holloway at the recruiting station in Harlem, New York City in the morning and traveled to Westbury to work from 3:30pm to 8:00pm in the evening. (Tr.35-6)

18. As a result of the commute, Complainant was often late reporting to work during the two week period. (Tr. 36)

19. On February 17, 2006, Complainant received a telephone call on her cell phone from Respondent inquiring about her whereabouts. Complainant explained that she was with Sergeant Holloway and that she would report to work as soon as she was released from duty. (Tr. 37-8)

20. Sergeant Holloway spoke to Respondent on Complainant's cell phone and explained that he did not have to let Complainant leave early and that military personnel are not to be

penalized for performing a military duty. Respondent replied that he never received notification that Complainant would be performing military duty. Sergeant Holloway then offered to fax a letter with his name and business card to Respondent. (Tr. 38, 277)

21. Respondent was upset about receiving a telephone call from someone identifying himself as Sergeant Holloway because he had no knowledge about the letter requesting release time and could hear Complainant's voice in the background. Respondent told Complainant that he needed her at work immediately. (Tr. 278)

22. Complainant immediately left Sergeant Holloway at the recruiting office and went to Respondent's office to work. (Tr.41)

23. Shortly thereafter, nurse practitioner Carol Gramse told Complainant and another coworker, Renee Seavey, that she did not want to be disturbed when she was with a patient. Specific instructions were given not to call or come in until she was finished with the patient because doing so showed a lack of professionalism. (Tr.44)

24. The next day, Complainant was working alone with Gramse when Jeanine Cussen, another medical assistant, called to speak with Gramse. Complainant explained that she could not disturb Gramse. Cussen hung up. Cussen called back to speak with Gramse and again Complainant told her that Gramse was with a patient and she could not disturb her. Cussen then proceeded to say, "Well, why can't you just get her on the phone? I don't understand. You know why can't you just follow instructions like you do in the military, just freaking go ahead and do it, you stupid black fucking bitch." She continued to rant about how Complainant thought she was "all of that" because she was in the military, that was the only reason why she was hired, and that "she was stupid, ignorant and incompetent and she should get her on the phone like she was telling her to do, like they do in the military." (Tr. 46-7, 281)

25. There was a patient in the waiting area while the conversation was taking place. Complainant told the patient that she was having a disagreement with a co-worker and she wanted to put the other party on speaker phone. The patient agreed and the patient overheard Complainant being berated. (Tr.48-9, 114)

26. Complainant notified Moss and Respondent about the incident. Respondent was not in the office. (Tr.49) A few days later, when Respondent returned to the office, he called a meeting with Complainant, Moss, and Cussen to discuss the incident. (Tr. 252-54)

27. Respondent told Complainant and Cussen that if they did not get along with each other, both would be fired. (Tr. 220-21)

28. Respondent's policy was that all employees should act professionally. Respondent did not have a written policy to address issues of discrimination before 2008. (Tr. 232, Respondent's Exhibit 7)

29. Cussen admitted that she called Complainant a "fucking bitch" and was told to apologize to Complainant. She did. (Tr. 182-83)

30. Respondent gave Complainant and Cussen one hundred dollars each for them to go to dinner together. Respondent also told Complainant that she was late the week before. Complainant explained that she was on military duty and that she was late driving from military duty in upper Manhattan to Long Island due to heavy traffic conditions. (Tr.51-2, 184)

31. Respondent was unaware that Complainant was late reporting to work on prior occasions and had never reprimanded her for lateness before the meeting. (Tr. 130, 262-63)

32. Following the meeting, Cussen was verbally placed on probation and Complainant was placed on written probationary status for her unprofessional behavior. Complainant and Cussen did not go to dinner together. (Tr. 184, 214, 285-86, 294)

33. Complainant was the only employee in the Westbury office who was directed to clock out and take a two-hour lunch on Wednesdays. (Tr.124) Complainant decided that she would take a class during this time. As stated during the Unemployment Insurance (UI) hearing which was held on March 29, 2006, approximately a month after the telephone incident, Moss asked Complainant to return to the office early so that Moss could take care of a personal matter. However, during the Division's hearing on March 10, 2010, Moss said that she wanted Complainant to return early so that she could get her work done. After further questioning, Moss could not recall why she wanted Complainant to return to the office early. (Tr. 227-28, Respondent's Exhibit 7)

34. Nonetheless, Complainant was unable to return to the office early because she was delayed in traffic. As a result, Moss became upset and fired her. Complainant immediately went to Respondent and told him that she did not understand why she being fired. Complainant told him that she was asked to come back early but she couldn't. In response, Respondent said, "Well, you know what, she's right, I'm sick and tired of you as well. You are a big inconvenience to us. We had to deal with the military, we had to deal with your complaint with Jeanine (Cussen) I think it's best that we just fire you and stop the job for you..." On March 29, 2006, Respondent terminated Complainant's employment for lateness. (Tr. 67-8)

35. Complainant applied for unemployment insurance benefits and received them through July of 2006 when Respondent appealed the UI decision. Respondent did not have Complainant's time cards with him at the UI hearing and inaccurately testified that Complainant was on probation and had been late for almost every shift two weeks prior to her employment termination. As a result, the UI Appeal Board overturned the decision and ruled that Complainant was overpaid $6,698.00. (Tr. 70, 288-89)

36. Complainant was so disturbed by the situation at Respondent's office that she did not want to work as a medical assistant again. Complainant became uncomfortable and stressed. (Tr. 76)

37. Complainant is being medicated for Grave's disease and hyperthyroidism. Additional stress exacerbates her condition. Complainant takes additional medication because of the experience of working for Respondent. (Tr.147)

38. After speaking to her endocrinologist, Complainant consulted with her pastor and her family about her employment termination. (Tr. 148)

39. Complainant continued to look for work and secured part-time employment earning $10.00 an hour from November 2006 through January 2007. In January 2007, Complainant secured full time comparable employment. (Tr.72)

OPINION AND DECISION

The Human Rights Law prohibits discrimination in employment on the basis of "race... military status...sex"...Executive Law Section 290. Both New York State and federal law grant employees a leave of absence for ordered military duty. Specifically, the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA") and the New York State Military Law, were enacted (1) "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian employment which can result from such service", (2) to provide for prompt reemployment of persons returning to civilian jobs from military service and to "minimize the disruption [of their] lives ... as well as [to those of] their employers, fellow employees and communities"; and (3) "to prohibit discrimination against

persons because of their service in the uniformed services." 38 U.S.C. § 4301 (2007).

Complainant alleges that she was treated differently because of her race and military status. To make out a prima facie case of disparate treatment under the Human Rights Law, a complainant has the initial burden of showing : (1) that she belonged to a protected class; (2) that she was qualified for the position at issue; (3) that she suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. *See, Collins v. New York City Transit Auth.*, 305 F.3d 113, 118 (2d Cir. 2002).

If the Complainant has established her prima facie case, a presumption of discrimination or retaliation is established which "places the burden of production on the employer to proffer a nondiscriminatory [or non-retaliatory] reason for its action." *James v. New York Racing Assoc.*, 233 F.3d 149, 154 (2d Cir. 2000). If the employer fails to present such a reason, complainant prevails. But, "the employer can rebut that presumption by offering legitimate, non-retaliatory [or non-discriminatory] reasons for the contested actions; if it succeeds, the burden reverts to the Complainant to demonstrate that those reasons are merely pretextual." The ultimate burden of proving discrimination is always with the Complainant. *St. Mary's Honor Ctr. v.. Hicks*, 509 U.S. 113 S. Ct. 2742 (1993)

Complainant meets the "minimal" burden of establishing a prima facie case. First, Complainant is an African-American woman and therefore a member of protected class. Second, it is undisputed that she was qualified to work for Respondent; she was hired because she met the basic prerequisites for the job, and she worked successfully without incident until she began reporting for ordered military duty. Third, her employment was terminated. Fourth, Complainant was fired under circumstances giving rise to an inference of discrimination. The circumstances

surrounding her employment raise the inference that her termination was motivated by discrimination. *Dawson v. Bumble & Bumble*, 398 F. 3d 211, 216 (2005).

Respondent's comments concerning the inconvenience of dealing with the military, on its face, appear to have resulted from the need for office coverage. However, Complainant was late because she was fulfilling her military obligation. Complainant did not take additional time or days leave when she reported for military duty. Thus, Complainant has established a prima facie case of military status discrimination.

Once the Complainant establishes her prima facie case the burden shifts to the Respondent to proffer a legitimate non-discriminatory reason for terminating Complainant's employment. Here, Respondent's contention that Complainant was consistently late after she was placed on probation must be looked at in context. Complainant did not report to work late prior to her assignment with Sergeant Holloway. Although Respondent claimed that he was unaware of the assignment, Complainant gave his office manager, Moss, a copy of the order directing her to report for military duty. This knowledge can be imputed to Respondent. Therefore, I find Respondent's position pretextual and that he acted in retaliation because of Complainant's military status.

The isolated comment by Cussen referring to Complainant as a "black fucking bitch," refers to Complainant's race but Complainant's race was not taken into consideration by Respondent when he terminated her employment. Respondent's statements to Complainant imply that he did not want to be inconvenienced dealing with military leave issues. Complainant failed to show that her race was a factor when Respondent terminated her employment.

Complainant is entitled to compensation for her lost wages. Complainant earned $11.50 per hour for a 30 hour work week totaling $345.00 per week or $1,380.00 per month. Her

employment ended on March 29, 2006. Complainant did not obtain employment until November, 2006, at which time she began earning $10.00 per hour. (Eight months x $1,380.00 = $10,760). Complainant continued in this position through January 7, 2007 when she secured comparable employment. Between November, 2006, and January, 2007, Complainant's $1.50 per hour lost wages totaled $120.00. In total, Complainant's lost wages amount to $10,880.00.($10,760.00 + 120.00 = 10,880.00)

Complainant is also entitled to compensation for the mental anguish she suffered as a result of Respondent's unlawful actions. Generally, complainants under the Human Rights Law are awarded between $5,000 and $15,000 for "garden variety" mental anguish claims. *Palmblad v. Gibson*, 63 A.D.3d 844, 881 N.Y.S.2d 139 (2nd Dept. 2009). However, the full range of possible awards for "garden variety" mental anguish is much larger. *Gatti v. Cmty. Action Agency of Greene County, Inc.*, 263 F. Supp. 2d 496, 512 (N.D.N.Y. 2003) (finding that awards for "garden variety" mental anguish in cases interpreting the Human Rights Law vary from "as low as $5,000 to a relative high of $125,000"). Mental anguish is defined as emotional distress that is "devoid of any medical treatment or physical manifestation." *Id.*

In the instant case, Complainant credibly testified that her medical condition became exacerbated and her endocrinologist increased her medication as a result of her unlawful termination. Complainant should be awarded fifteen thousand dollars ($15,000) for emotional distress. Such an award is consistent with cases where complainants exhibited similar symptoms while, at the same time, not receiving psychological treatment or counseling. *Argyle Realty Associates v. State Div. of Human Rights,* 65 A.D.3d 273, 882 N.Y.S.2d 458 (2nd Dept 2009), *New York State Dept. of Correctional Services v. New York State Div. of Human Rights,* 265 A.D.2d 809, 695 N.Y.S.2d 647 (4th Dept. 1999).

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 Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED THAT Respondent shall take the following affirmative action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days from the date of this Order, the Respondent shall pay to the Complainant a back pay award composed of the difference in salary she would have earned, together with all the increases, rights, benefits and privileges to which she would have been entitled, from the period of March 29, 2006 through January 7, 2007, which has been calculated at eight thousand five hundred and twenty dollars ($10,880.00). The Respondent shall pay back pay interest accruing from a reasonable intermediate date of August 15, 2006, in the amount of nine (9%) percent per annum, until the date of payment, in accordance with CPLR §§ 5001 and 5004.

2. Within sixty (60) days from the date of this Order, the Respondent shall pay to the Complainant damages for mental anguish and humiliation, without any deductions or withholding whatsoever, in the amount of fifteen thousand dollars ($15,000.00), with interest from the date of the Commissioner's Order.

3. Respondent shall pay post-judgment interest.

4. The aforesaid payments shall be made by the Respondent in the form of certified check made payable to the order of the Complainant, Diane Jeanite, and delivered to her attorney William Sipser, Esq. at 120 Broadway, 18th Floor, new York, New York 10271, by certified mail, return receipt requested.

5. Within ten (10) days of such payments, the Respondent shall furnish written proof to Barbara Buoncristiano, Order Compliance Unit of the New York State Division of Human Rights, at her office at One Fordham Plaza, 4th floor, Bronx, NY 10458, of their compliance with the directives contained in this Order.

6. Respondent shall cooperate with the representatives of the Division during any investigation into their compliance with the directives of this Order.

7. Within sixty (60) days of the date of the Final Order of the Commissioner, Respondents shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights Is...") in a place where employees are likely to view it. Respondents shall also establish in its workplace both anti-discrimination training and procedures. Respondents shall provide proof of the aforementioned to the Division upon written demand.

DATED: August 20, 2010
Hempstead, New York

Margaret A. Jackson

Margaret A. Jackson
Administrative Law Judge