NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

DOLORES L. HANRAHAN,
Complainant,

v.

RIVERHEAD NURSING HOME, INC.,
Respondent.

NOTICE AND FINAL ORDER

Case No. 6842424

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 November 30, 2007, 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 KUMIKI GIBSON, 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, this 26th day of December, 2007.

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KUMIKI GIBSON
COMMISSIONER

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DOLORES L. HANRAHAN,
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RIVERHEAD NURSING HOME, INC.,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **6842424**

SUMMARY

Complainant claims that Respondent discriminated against her by failing to provide a reasonable accommodation for her disabilities and terminating her employment because of her disabilities. Respondent denied unlawful discrimination. The New York State Division of Human Rights ("Division") finds that Respondent did not discriminate against Complainant. Accordingly, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On January 8, 2004, Complainant filed a verified complaint with the 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 an unlawful discriminatory practice. 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. Public hearing sessions were held on July 11, 12, 13, 17, 19, and 31, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Anthony C. Donofrio, Esq. Respondent was represented by Roger H. Briton, Esq. and Ian B. Bogaty, Esq. of the law firm Jackson Lewis LLP.

Timely post-hearing briefs were filed by Complainant and Respondent on August 24, 2007.

FINDINGS OF FACT

1. Complainant has been a registered nurse since 1961. (Tr. 1003-04) Complainant was an employee of Respondent, a nursing home, from 1995 until October 22, 2003. (Tr. 1008)

2. Complainant started working for Respondent in 1995 as the head nurse of A unit. (Tr. 1008) In 1997, she was moved to E unit, the largest unit in the facility. (Tr. 59, 1008)

3. At that time, Complainant began requesting additional help in E unit because it was too large for her to care for all of the patients alone. (Tr. 358, 363, 1121) She complained to Respondent that her unit was overworked and understaffed. (Tr. 238, 336-37)

4. In January 2003, the title of head nurse, a non-management position, was eliminated by Respondent and was replaced with the position of unit manager, a management position. (Tr. 69, 72, 1009, 1011-12; Complainant's Exh. 3)

5. Respondent became aware that Complainant suffered from allergies from her yearly health assessment forms beginning in 1996. (Tr. 1037-39; Complainant's Exh. 13) From May through September 2003, renovations were being performed throughout Respondent's facility,

including Complainant's unit. (Tr. 185-86) Complainant stated that during this period, her allergies were bothered by the dust and dirt created by the construction. (Tr. 354, 1049-50) Complainant brought in a physician's note and requested that she be moved from the E unit nurse's station. (Tr. 219-20; Complainant's Exh. 6)

6. Complainant's co-workers credibly testified that they did not recall Complainant specifically complaining about her allergies, but did recall her discussing the fact that she had allergies. (Tr. 314, 321, 338, 354, 364-65, 833, 837)

7. During the construction period, Complainant requested air filters and claims that Lou Ann Ruthinoski, the nursing home risk manager, agreed to look into it, but Respondent never installed air filters. (Tr. 1048-49)

8. Complainant also made a request to Rosemary Czulada, the assistant director of nurses, to be moved away from the construction area. (Tr. 221, 354, 838) Czulada brought this request to Ina Marose, the director of nursing for Respondent at that time. (Tr. 838, 843-44) Marose discussed this request with Ruthinoski and Respondent offered Complainant alternate work locations. Specifically, Respondent offered Complainant the choice to work in a portion of Marose's office, the supervisory area outside of Marose's office, or a conference room. (Tr. 67-68, 98-99, 103, 105, 107-08, 222, 224-25, 838) Complainant selected the conference room as her temporary work station. (Tr. 224, 634)

9. Complainant claimed that moving from her work space was difficult and stressful because she had to gather all the materials she needed to perform her tasks and then physically relocate. (Tr. 354-55, 1054) However, Marose followed up with Complainant during this time to ensure that the new location was sufficient. Complainant stated that the new location was satisfactory. (Tr. 222, 233-34)

10. In July 2003, Complainant and all other management employees were informed by Ruthinoski that, due to the impending New York State Board of Health survey ("survey"), all management staff would not be allowed to take vacation time beginning in September 2003 until after the surveyors had completed their review of Respondent's facility. (Tr. 166-69, 172, 183, 383, 878-79)

11. The survey is a vital part of Respondent's business operations which Respondent must satisfy in order to continue to operate and receive government funds. (Tr. 175-76, 180, 192) The surveyors arrive at a random date to evaluate medical facilities to determine what deficiencies, if any, exist regarding the care and maintenance of the facilities. (Tr. 172, 175-76, 192)

12. It was Respondent's policy that management level employees were required to come into work on the day the surveyors arrived, regardless of whether or not they were scheduled to work. (Tr. 56, 189-90, 383) Prior to the creation of the unit manager position, head nurses were held to the same standard as management regarding attendance for the survey. (Tr. 76, 170-71)

13. Complainant requested vacation time from Marose in September 2003 so Complainant could visit her sister. (Tr. 383-84) Respondent denied this request in accordance with its policy regarding the survey. (Tr. 166-70, 384-85)

14. In July or August 2003, Complainant began having intermittent chest pains. Complainant maintains that she spoke with both Ruthinoski and Marose regarding these pains. (Tr. 1043-44, 1059, 1179-81) However, Complainant's supervisors and co-workers credibly testified that they did not recall Complainant ever discussing her chest pains. (Tr. 187, 236, 346, 368-69)

15. On August 28, 2003, Complainant had chest pains and thought she was having a heart attack. She was admitted to the hospital and was held for observation to determine the cause of

the chest pains. (Tr. 1061-62, 1428; Complainant's Exh. 20) No specific cause has been determined for that incident and the record does not establish that Complainant suffered a heart attack at that time. (Tr. 682-83, 1429-30)

16. Upon her release from the hospital, Complainant gave Respondent a physician's prescription for four weeks of medical leave due to "stress, resulting in emotional distress and chest pains". (Tr. 135, 236, 242, 392, 1186; Complainant's Exh. 6) During Complainant's consultation with Dr. Fulvio Mazzucchi, a cardiologist, she complained of stress in her work environment. (Tr. 1427) Complainant's supervisors were not aware of Complainant's chest pains until after they received the doctor's note. (Tr. 136, 236, 510)

17. Respondent granted Complainant's leave request and she was out of work from August 30, 2003 until September 29, 2003. (Tr. 392, 492, 1067, 1191) It is noted that a portion of Complainant's medical leave covered the dates in September for which her vacation request was denied by Respondent. (Tr. 392, 485) Complainant followed through with her vacation plans, flying to North Carolina to visit her sister for a week. (Tr. 393, 485, 488, 1188-89)

18. Complainant returned to work without restrictions. (Tr. 250, 394, 399, 1191) Complainant maintains that she discussed her stress level and suspected heart attack with Marose and Ruthinoski. (Tr. 1069) However, Marose denies this and Ruthinoski does not recall being told about Complainant's stress, chest pains, or suspected heart attack. (Tr. 136, 142, 248)

19. A few days after returning to work, Complainant participated in a CPR training course that all nurses attended. (Tr. 254, 1074) During the training course, Complainant injured her back. Immediately after the course, Complainant informed Marose of her injury. (Tr. 254, 394-95; Complainant's Exh. 6) Marose testified that she told Complainant that Complainant would have been given an accommodation if she had asked for one, stating that other nurses had their

needs accommodated for that course. (Tr. 460-61, 463-64) Complainant then requested time to see a physician for her injury. This request was granted. (Tr. 395, 464) Complainant saw a physician, was treated, and returned to work. Complainant's physician wrote a prescription for 72 hours of desk work, which was presented to Respondent. Respondent assigned Complainant accordingly. (Tr. 255, 395, 464-65)

20. As a follow-up to her treatment at the hospital for chest pains and as a result of minor EKG changes found on September 29, 2003, Complainant was given a nuclear stress test on October 9, 2003. (Tr. 1428, 1430-31; Respondent's Exh. 8) The results of this test came back abnormal on October 15, 2003. (Tr. 685, 1070, 1433; Respondent's Exh. 8)

21. Consequently, Mazzucchi scheduled Complainant to have an angiogram on October 23 and 24, 2003. (Tr. 1401-03, 1437) Complainant claims that Marose and Czulada knew about the procedure. (Tr. 1079, 1082-83) This is undisputed by Marose. (Tr. 265) Ruthinoski did not know about Complainant's scheduled angiogram. (Tr. 127)

22. At some point following Complainant's return to work, but before the week of October 23, 2003, Complainant approached Marose requesting sick time for the days scheduled for her procedure. (Tr. 265, 284) Marose told Complainant that it was Respondent's policy not to allow scheduled sick time, however, Complainant could take personal time, vacation time, or call in sick the morning of the procedure. (Tr. 284, 504) The record establishes that Marose was the only employee of Respondent who was aware of Complainant's pending angiogram. (Tr. 127, 319, 343, 861)

23. The surveyors arrived to conduct the survey of Respondent on Sunday, October 19, 2003. At that time, Respondent called all management employees who were not scheduled to work that day to come into the facility. (Tr. 56, 186) Complainant, who took off that day to visit her

daughter living in Darien, Connecticut, was called by Respondent to come to work in accordance with Respondent's policy. (Tr. 55, 428-29)

24. When Respondent told Complainant she had to come to work that day, Complainant stated that her car was packed, her husband was waiting for her, and she was going to Connecticut to visit her daughter. (Tr. 187, 260, 325, 368, 431, 865, 1219-20) Testimony provided by Czulada stated that Complainant was going to visit her sister. (Tr. 865) However, the record establishes that Complainant was going to visit her daughter. (Tr. 325, 431) Complainant then stated that she was not coming to work that day and would be there the following morning. (Tr. 187, 431-32, 1078)

25. Complainant maintained that she emphasized her stress and exhaustion as part of her reason for not coming to work that day. (Tr. 1076) However, this claim is contradicted in the record. None of Complainant's co-workers substantiated Complainant's claim that she refused to come to work that day because of her health. (Tr. 187, 189, 269, 326-27, 368, 433-34, 880) Moreover, Complainant's own cardiologist testified that he did not give her any instructions to take time off or rest in preparation for the angiogram. (Tr. 1439)

26. Marose specifically instructed Complainant that if the surveyors arrived on her day off, Complainant must come in to work. (Tr. 261-62, 430) At first, Complainant claimed to have no recollection of this instruction. (Tr. 1196) However, Complainant later changed her testimony when confronted with a document written by Complainant stating that she was aware of this instruction. (Tr. 1318; Respondent's Exh. 14A)

27. Complainant showed up for work the following morning and participated in the remainder of the survey. (Tr. 432) The surveyors were on the premises from Sunday, October 19 through Wednesday, October 22, 2003. (Tr. 1083-84)

28. In the afternoon of October 22, 2003, the surveyors held an exit interview with management to state their findings. (Tr. 1084) Immediately following that meeting, Complainant was called to Marose's office and dismissed. (Tr. 329-30, 344-45, 359, 432, 1084-85) Respondent's reasons for terminating Complainant's employment were disloyalty, lack of commitment to her position, and insubordination due to her failure to report to work on October 19, 2003. (Tr. 55, 149, 151, 261-62, 281, 330, 359-60, 433, 435-37, 642, 1085)

29. The morning after Complainant was fired, she had her scheduled angiogram. (Tr. 1085-87) She may have had a heart attack, as her angiogram results were abnormal. (Tr. 690-91, 1403-04, 1087, 1483-84) There are conflicting opinions from expert witnesses regarding Complainant's cardiac health, her disability, and whether she had a heart attack at all. (Tr. 691, 695, 703-04, 727-28, 1406-08, 1448, 1483-84) Complainant presented medical testimony that she suffered a myocardial infarction sometime "between when she had the stress test and when she had the angiogram." (Tr. 1483) Furthermore, the testimony of both medical experts establishes that Complainant had some form of cardiac anomaly during the relevant time period. (Tr. 692-93, 1401-04, 1406, 1483)

OPINION AND DECISION

Complainant has failed to establish that Respondent unlawfully discriminated against her based on her disabilities by denying her reasonable accommodations and terminating her employment.

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 by showing that she is a member of a protected group,

that she was qualified for the position held, that she 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. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

In the instant case, Complainant has established a prima facie case of disability discrimination. 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 record establishes that Complainant was disabled under the Human Rights Law. Complainant presented medical testimony that she suffered a myocardial infarction sometime between her stress test and her angiogram. Furthermore, the testimony of both medical experts establishes that Complainant had some form of diagnosable cardiac anomaly during the relevant time period. Although Complainant's exact condition was disputed, the record establishes that her impairment falls within the broad definition of disability because it is an impairment or

condition that is capable of medical diagnosis. *See Id.*

Furthermore, Complainant claims that she discussed her cardiac condition and scheduled angiogram with her supervisors on numerous occasions. Specifically, Complainant asserts that she discussed having had chest pains and a possible heart attack with Marose and Ruthinoski after returning from her month off from work. The record shows that Marose did have knowledge of Complainant being out on medical leave due to stress and chest pains. The record also shows that Respondent had knowledge of Complainant's scheduled angiogram as she requested time off from Marose. Therefore, the record establishes that Respondent had knowledge of Complainant's disability.

Next, the record establishes that Complainant was qualified for the position of unit manager. Complainant has over forty years of experience as a registered nurse and worked for Respondent for over eight years.

Complainant also established that she suffered an adverse employment action when Respondent terminated her employment.

Finally, Respondent's termination of Complainant's employment arose under an inference of discrimination. Respondent terminated Complainant's employment approximately one month after Complainant took time off of work for medical reasons, 2 weeks after Complainant's stress test results came back abnormal, and one day before Complainant was scheduled for an angiogram. This temporal proximity creates an inference of discriminatory discharge. *See Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months).

Therefore, Complainant has established a prima facie case.

The burden of production then shifts to Respondent to show that Complainant's discharge was motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

Respondent states that Complainant's employment was terminated because she was disloyal and insubordinate when she refused to report to work on October 19, 2003, the day the survey began. The record is replete with references establishing the importance of the survey to Respondent's business operations. Complainant, a registered nurse with over forty years of experience, clearly knew the significance of this survey. Complainant claims that she needed the day off to rest in preparation for her scheduled angiogram. However, the credible record supports the conclusion that Complainant's real reason for taking the day off was to visit her daughter in Connecticut. Furthermore, Complainant's own cardiologist testified that he did not prescribe time off or rest to Complainant in advance of the angiogram.

The record firmly establishes that even though Complainant had that day off, she knew that she was expected to report to work if the surveyors appeared that day. By refusing to report to work, Complainant clearly acted in an insubordinate manner and defied Respondent's established employment policy. Therefore, Respondent has met its burden in articulating a legitimate reason for Complainant's discharge.

The burden then shifts back to Complainant to show that this reason is pretextual and that discrimination was the real reason behind the termination of her employment. The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to meet her burden.

Next, Complainant claims that Respondent failed to reasonably accommodate her disabilities. Under the Human Rights Law, an employer is obligated to provide a reasonable

accommodation for an employee's known disability. Human Rights Law § 296.3.

The record establishes that Complainant's allergies qualify as a disability under the Human Rights Law. *See* Human Rights Law § 292.21. Moreover, Respondent had knowledge of this disability since 1996 through Complainant's yearly health assessment forms. During the construction period in the summer of 2003, Complainant claims that she requested air filters and relocation away from the construction area. Respondent offered Complainant a choice of three alternate work locations, of which Complainant chose one. Although Complainant claims that moving from her normal work location was difficult, the credible record establishes that Complainant was satisfied with the relocation. Although Respondent did not install air filters, Respondent "has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need." 9 N.Y.C.R.R. § 466.11(j)(6).

In the instant case, Respondent reasonably accommodated Complainant's allergies by temporarily relocating her during the construction period. The record establishes that this accommodation was swift and effective in comparison to other possible accommodations. Accordingly, the Division finds that Respondent provided a reasonable accommodation for Complainant's allergies.

Complainant also claims that Respondent did not provide a reasonable accommodation for her cardiac condition, which is a disability that was known to Respondent. This claim must fail because the Division finds that Complainant did not request a reasonable accommodation for her cardiac condition. *See* 9 N.Y.C.R.R. § 466.11(k)(1).

With regard to Complainant's scheduled day off on October 19, 2003, Complainant's claim that she needed the day off to rest in preparation for her angiogram is not substantiated. The credible record establishes that Complainant refused to come to work on October 19, 2003

because she wanted to visit her daughter in Connecticut. Complainant's own cardiologist testified that he did not instruct Complainant to rest or take time off in advance of her angiogram. Moreover, Respondent did not refuse Complainant's request for two days off of work for her scheduled angiogram on October 23 and 24, 2003. Marose told Complainant to take personal time, vacation time, or call in sick on the morning of the procedure as sick time was not scheduled in advance according to Respondent's established policy.

The record establishes that Respondent was responsive to Complainant's medical needs. Respondent gave Complainant four weeks of medical leave from August 30, 2003 to September 29, 2003 for Complainant's "stress, resulting in emotional distress and chest pains" even though this occurred during the period when management staff were not permitted to take vacation time due to the impending survey.

Finally, Complainant cannot sustain her claim that Respondent did not reasonably accommodate her back injury. Complainant never requested an accommodation for the CPR course where Complainant claims that she injured her back. The record establishes that Respondent made accommodations available for the CPR course to nurses who requested them. Furthermore, when Complainant informed Respondent about her back injury, Respondent temporarily reassigned Complainant according to her doctor's instructions.

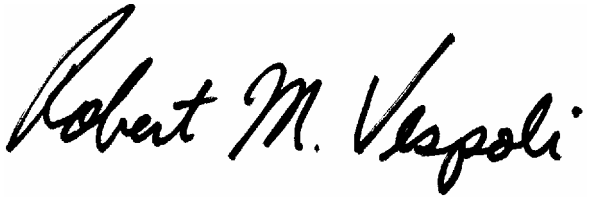
Accordingly, the Division finds that Complainant has failed to establish that Respondent violated the Human Rights Law.

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: November 27, 2007
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge