NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ELAINE LA PENNA,

Complainant,

v.

SANDERS, SANDERS, BLOCK, WOYCIK, VIENER & GROSSMAN, P. C.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10103418

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 19, 2008, 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 11th day of April, 2008.

KUMIKI GIBSON
COMMISSIONER

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ELAINE LA PENNA,
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SANDERS, SANDERS, BLOCK, WOYCIK, VIENER & GROSSMAN, P. C.,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10103418**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her because of her bronchitis and pregnancy by terminating her employment on December 9, 2004. Although Respondent denied these allegations, the record establishes that the instant complaint must be sustained. Accordingly, Complainant is entitled to relief in the form of lost wages in the amount of $28,542.00, reimbursement for COBRA expenses in the amount of $6,000.00 and compensatory damages for mental anguish in the amount of $50,000.00.

PROCEEDINGS IN THE CASE

On January 6, 2005, 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 17 and 18, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Raymond Nardo, Esq. Respondent was represented by Aaron M. Woskoff, Esq.

The parties filed timely post-hearing briefs.

FINDINGS OF FACT

1. Respondent operates a law firm that employs approximately 70 people. (Tr. 190)

2. Complainant was hired by Phyllis Sanders, Esq., a partner at Respondent, to work as a legal secretary in or about January 2003. (Tr. 21-22, 190, 192) Prior to this, Complainant had worked as a legal secretary from 1993 until approximately 1999. (Tr. 16-20)

3. At times, Respondent asked Complainant to attend independent medical examinations ("IME") with the firm's clients. (Tr. 25) Complainant's primary role at the IME's was to provide translation services for the firm's Spanish speaking clients and to assist them in answering questions. (Tr. 26)

4. In or about October 2004, Respondent had an increased number of IME's and began to assign them to Complainant on a regular basis. (Tr. 32-33, 194, 200)

5. Complainant advised her secretarial co-workers that she was pregnant in early November 2004. (Tr. 39-40) Complainant testified that on November 17, 2004, she informed

Sanders and Susan Guterding, Respondent's new case coordinator and office manager, that she was pregnant and that her pregnancy was a high risk pregnancy because she has type 1 diabetes. (Tr. 37-38, 42, 161) Complainant testified that she told Guterding and Sanders that, because of her condition, she could not travel anymore to New York City to attend IME's. (Tr. 37) Complainant maintained that Sanders told her that she should look for employment elsewhere if she could not attend the IME's scheduled for her. (Tr. 38)

6. Respondent denied that it knew Complainant was pregnant while she was employed by Respondent. (Tr. 176-77, 207-08, 227, 301-02; ALJ's Exh. 2)

7. On December 7, 2004, Respondent gave Complainant a $250.00 bonus. (Tr. 300) Later that day, Complainant attended Respondent's Christmas party. (Tr. 49-50) Viergelie Bienaime, Respondent's calendar clerk in charge of assigning IME's, and Gail Lesman, Respondent's bookkeeper, testified that Complainant informed them at the Christmas party that she was pregnant. (Tr. 269-70, 272, 339, 351) Bienaime also testified that other people at the party were aware that Complainant was pregnant. (Tr. 272)

8. The record establishes that Complainant had suffered from bronchitis while working for Respondent in March 2003. (Complainant's Exh. 2) On the morning of December 8, 2004, Complainant testified that her chest felt very heavy and she had difficulty breathing. (Tr. 51) Complainant immediately made an appointment to see her doctor that morning. (Tr. 51) At about 8:00 a.m., Complainant left a telephone message for Bienaime stating that she was ill and that Bienaime should arrange for someone to cover an IME that Complainant was scheduled to attend that day at 12:15 p.m. in New York City. (Tr. 52, 108, 110) Complainant then left a similar voicemail message for Elizabeth La Mountain, Respondent's office manager at the time. (Tr. 52, 111, 291-92)

9. That day, Complainant visited her doctor at approximately 9:00 a.m. Complainant's doctor examined her and diagnosed her with bronchitis. The doctor gave Complainant a note dated December 8, 2004, stating that he diagnosed Complainant with bronchitis and that Complainant could not attend work for the next two days. (Tr. 53; Complainant's Exh. 3A) Complainant then called Bienaime to inform Respondent of her diagnosis and told Bienaime that she would not be able to attend the IME scheduled for later that day. (Tr. 53, 111-12) Bienaime confirmed that Complainant informed her that morning that Complainant had bronchitis. Bienaime arranged for another employee, Richard Borgia, who had nothing scheduled that day, to cover the IME. (Tr. 274, 289)

10. On the way home from the doctor's office, Complainant stopped at Respondent's office and left a copy of the doctor's note with La Mountain's receptionist. (Tr. 54-55) La Mountain was not in the office that day. (Tr. 55, 302) Respondent denied that it received the doctor's note. (Tr. 209; ALJ's Exh. 2)

11. On December 9, 2004, Guterding called Complainant and told her that Sanders decided to terminate Complainant's employment. (Tr. 56) Sanders testified that she made the decision to terminate Complainant's employment because Complainant "crossed the line" when she called in sick on December 8. (Tr. 212) Sanders stated that she felt compelled to discharge Complainant because the IME Complainant was scheduled to attend that day was scheduled for 10:00 a.m. and it was very difficult for Respondent to find a replacement for her. (Tr. 212) Although Sanders insisted that Complainant's IME on December 8 was scheduled to begin at 10:00 a.m., the credible record establishes that the IME that day was scheduled to begin at 12:15 p.m. (Tr. 54, 110, 214, 216-17, 252-53, 286; ALJ's Exh. 2)

12. La Mountain testified that she believed that Complainant's employment was terminated because she called in sick that day. (Tr. 302)

13. Respondent also maintained that a motivating factor for the termination of Complainant's employment was that Complainant socialized too much and had excessive absences. (Tr. 169, 195-99, 212, 225, 238-39, 293-98, 303; ALJ's Exh. 2) Although Respondent maintained that Complainant was verbally disciplined for these infractions, Respondent did not produce any corroborating documentation. (Tr. 175, 197-99, 239, 292-95, 324-25) Respondent proffered Complainant's payroll records from February 2004 through December 2004 showing that Complainant did not receive full pay for many weeks early that year. (Respondent's Exh. 1) However, these records establish that Complainant was absent from work only one day between July 24, 2004 and December 7, 2004 and that Complainant worked overtime for many of those weeks. (Tr. 359; Respondent's Exhibits 1, 2)

14. Respondent also averred that Complainant's employment was terminated due to her poor work performance. (Tr. 244; ALJ's Exh. 2) However, Respondent continued to assign IME's to Complainant up until the date of her discharge. (Tr. 271)

15. After Respondent terminated her employment, Complainant searched for work as a legal secretary using the internet and *Newsday*, a local newspaper, and she submitted her resume to various law firms and an employment agency. (Tr. 63-64, 148) Complainant interviewed with one law firm, but was not hired. (Tr. 64, 147)

16. Complainant earned $600.00 per week working for Respondent at the time of her discharge. (Tr. 24, 94; Respondent's Exh. 1)

17. Complainant testified that she collected unemployment benefits in the amount of $333.00 per week for 26 weeks. (Tr. 145-46)

18. Complainant gave birth to her son, Christopher, on June 4, 2005. (Tr. 64) She stated that she would have missed approximately 8 weeks of work due to the birth. (Tr. 148-49)

19. Complainant testified that, approximately 10 months after her son was born, she stopped looking for work and decided to help her husband with his mortgage banking business. (Tr. 65)

20. It is undisputed that Complainant made COBRA payments for 18 months after her discharge. (Tr. 89) The record establishes that Complainant made approximately $6,000.00 in COBRA payments over that 18 month period. (Tr. 88-89; Complainant's Exh. 7)

21. Complainant testified that, as a result of Respondent's termination of her employment, she felt "depressed", "upset" and "angry". She recalled that she felt sad and depressed as a result of losing her job, rather than joyful during her pregnancy. (Tr. 66)

22. Complainant stated that she sought medication for her feelings of depression after her discharge, but her physicians would not prescribe such medication for her during her pregnancy. (Tr. 66, 140) Complainant's primary care physician eventually prescribed Fluoxetine to Complainant for her feelings of depression. The record establishes that Complainant began taking Fluoxetine after she finished breastfeeding her son and she continued to take it up until the dates of the public hearing. (Tr. 66-68, 141-43; Complainant's Exh. 6) Complainant testified that she did not seek counseling for her feelings of depression after Respondent terminated her employment because it was not covered by her insurance. (Tr. 140-41, 369)

OPINION AND DECISION

The record establishes that Respondent unlawfully discriminated against Complainant because of her bronchitis and her pregnancy by terminating her employment on December 9, 2004.

It is unlawful for an employer to discriminate against an employee on the basis of gender or 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 she 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 discrimination. As a pregnant female, Complainant is member of a protected class. *See Mittl v. N.Y. State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). The credible record establishes that Complainant informed Respondent about her pregnancy on November 17, 2004.

Furthermore, bronchitis is a disability under the Human Rights Law. 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 clearly establishes that Complainant's physician diagnosed her with bronchitis on December 8, 2004. Moreover, Complainant informed Respondent about her diagnosis of bronchitis that day when she informed Bienaime and left a copy of the doctor's note with La Mountain's receptionist.

Next, the record establishes that Complainant was qualified for the position she held when Respondent terminated her employment on December 9, 2004.

Finally, Respondent's decision to terminate Complainant's employment arose under an inference of discrimination. Sanders terminated Complainant's employment approximately three weeks after Complainant told Sanders and Guterding that she was pregnant and could no longer attend IME's in New York City. Additionally, Respondent discharged Complainant the day after she called in sick with bronchitis. 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).

The burden of production then shifts to Respondent to show that Complainant's discharge was motivated by legitimate, nondiscriminatory reasons. Respondent maintained that Complainant's employment was terminated because she socialized too much, had excessive absences, displayed poor work performance and called in sick and missed an IME scheduled for December 8, 2004.

Although Respondent maintained that Complainant was verbally disciplined for socializing and having excessive absences, Respondent failed to produce any corroborating documentation.

Respondent's averment that Complainant's job performance was substandard is contradicted in the record. Once again, Respondent did not produce any documentation to corroborate this allegation. Next, Respondent paid a $250.00 bonus to Complainant just days before terminating her employment. Finally, Respondent continued to assign IME's to Complainant up to the date of her discharge.

Finally, Sanders testified that she made the decision to terminate Complainant's employment because Complainant "crossed the line" when she called in sick on December 8. Sanders maintained that it was an extreme hardship for Respondent when Complainant called in sick that morning. Sanders emphatically stated that Complainant had an IME scheduled for 10:00 a.m. in New York City that day and it was extremely difficult for Respondent to get someone to cover the IME. However, the record firmly establishes that the IME was scheduled for 12:15 p.m. and Bienaime had no trouble arranging for another employee to cover the IME that day.

Respondent's proffered explanations for Complainant's discharge are not credible. It is well settled that "a [complainant's] prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Mittl* at 331, 763 N.Y.S.2d at 521 (citations and internal quotation marks omitted). Accordingly, the Division finds that Respondent unlawfully discriminated against Complainant because of her bronchitis and her pregnancy by terminating her employment on December 9, 2004.

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence and be comparable to awards for similar injuries. *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

In the instant case, Complainant is entitled to compensation for back pay. Respondent paid Complainant a salary of $600.00 per week when her employment was terminated on December 9, 2004. Complainant made reasonable efforts to seek comparable employment until she removed herself from the workforce in April 2006, approximately 10 months after her son was born. Complainant would have earned approximately $42,000.00 during this 70 week period. Complainant's unemployment benefits ($8,658.00) and the earnings she would have lost during the 8 weeks surrounding her son's birth ($4,800.00) are offset against the amount Complainant would have earned from Respondent during this time period. Therefore, Complainant is entitled to $28,542.00 in damages for back pay.

Complainant is also entitled to receive reimbursement for her COBRA expenses. It is undisputed that Complainant made COBRA payments for 18 months after her discharge. The record establishes that Complainant paid approximately $6,000.00 in COBRA payments over that 18 month period.

Finally, Complainant is entitled to recover compensatory damages for mental anguish caused by Respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries.

State Div. of Human Rights v. Muia, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge No. 196 v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991).

In the case at bar, Complainant credibly testified that, as a result of Respondent's termination of her employment, she felt "depressed", "upset" and "angry". At a time when she should have been experiencing great joy, Complainant was instead depressed, sad and worried. Complainant's primary care physician prescribed Fluoxetine to Complainant for her feelings of depression but she did not take this medication while she was pregnant and breastfeeding. She began taking Fluoxetine after she finished breastfeeding her son and she continued to take it up until the dates of the public hearing. Complainant did not seek counseling for her feelings of depression after Respondent terminated her employment because it was not covered by her insurance.

Accordingly, the Division finds that an award of $50,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See State Div. of Human Rights v. ARC XVI Inwood, Inc.*, 17 A.D.3d 239, 796 N.Y.S.2d 238 (1st Dept. 2005); *Greenville Bd. of Fire Comm'rs v. New York State Div. of Human Rights*, 277 A.D.2d 314, 716 N.Y.S.2d 685 (2d Dept. 2000); *Marcus Garvey Nursing Home, Inc. v. New*

York State Div. of Human Rights, 209 A.D.2d 619, 619 N.Y.S.2d 106 (2d Dept. 1994); *Gleason v. Callanan Indus. Inc.*, 203 A.D.2d 750, 610 N.Y.S.2d 671 (3d Dept. 1994).

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 Respondent, and 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 action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $28,542.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from June 15, 2006, a reasonable intermediate date, until the date payment is actually made by Respondent.

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $6,000.00 as reimbursement for Complainant's COBRA expenses. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

3. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $50,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination against her. Interest shall accrue on the award at the rate

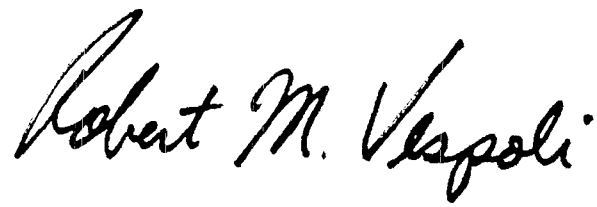
of nine percent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

4. The aforesaid payments shall be made by Respondent in the form of three certified checks made payable to the order of Complainant, Elaine La Penna, and delivered by certified mail, return receipt requested, to her attorney, Raymond Nardo, Esq., at 129 Third Street, Mineola, New York 11501. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained within this Order.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall promulgate policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting mechanism for employees in the event of discriminatory and/or harassing behavior or treatment, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. Training shall be provided to all employees. A copy of these policies and procedures shall be provided, simultaneously, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: March 19, 2008
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge