ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **CHRISTINE MAZZARELLA,** Complainant, v. **SCHENECTADY COUNTY, DEPARTMENT OF SOCIAL SERVICES,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10161746

Federal Charge No. 16GB303020

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 February 19, 2015, by Robert J. Tuosto, 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 HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENTS:

- To the extent the Recommended Order ("RO") can be read as sustaining the complaint based on Respondent's failure to engage in the interactive process, that portion of the RO is not hereby adopted. The instant complaint is sustained because Respondent denied Complainant a reasonable accommodation for her disability during the period when it failed to reassign her to a cubicle by a window. *See* Human Rights Law § 296.3.
- Nothing in the statute "requires" the Division to assess a penalty greater than $50,000 as stated in the Recommended Order. The Division may, in its discretion, assess a civil fine and penalty not to exceed $50,000 against a respondent found to have committed an unlawful discriminatory act and up to $100,000 where the act was found to be willful, wanton or malicious. *See* Human Rights Law § 297.4(c)(vi); *State Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514, 949 N.Y.S.2d 459, 462 (2d Dept. 2012) (Administrative penalty not an "abuse of discretion").

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, <u>within sixty (60) days after service of this Order</u>. 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: APR 14 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **CHRISTINE MAZZARELLA,** Complainant, v. **SCHENECTADY COUNTY, DEPARTMENT OF SOCIAL SERVICES,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10161746**

SUMMARY

Complainant alleged that she was unlawfully discriminated against by Respondent, her former employer, when it denied her request to work in a cubicle with natural light as a reasonable accommodation of her vision disability. Complainant has proven her case and emotional distress damages are hereby awarded, and a civil fine payable to the State of New York is also imposed.

PROCEEDINGS IN THE CASE

On May 3, 2013, 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.

On May 15, 2013 Complainant amended her complaint. The amended complaint was entered into the record as ALJ Exh. 2.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on November 5, 2014.

Complainant and Respondent appeared at the hearing. The Division was represented by Robin Nussbaum, Esq., Senior Attorney. Respondent was represented by the law firm of Goldberg Segalla, LLP, Albany, New York by Jonathan M. Bernstein, Esq. and the Office of the Schenectady County Attorney, and by Deputy County Attorney Jared Hickey, Esq.

During the public hearing Complainant proceeded solely on the allegation that Respondent failed to reasonably accommodate her disability, and that she was entitled to emotional distress damages for the several months (April-July, 2013) that it failed to do so. (Tr. 30)

FINDINGS OF FACT

Background

1. Complainant was employed as a full-time Employment Training Specialist for Schenectady County until her retirement in April, 2014. (Tr. 12-13, 42, 158-59)

2. Complainant's job required her to sit in a work cubicle to interview clients, and conduct computer and data entry tasks. (Tr. 44)

3. Complainant's office had fourteen work cubicles, seven of which had windows. (Complainant's Exh. 1; Tr. 44)

4. During the relevant time period there had been one unused work cubicle with a window which was used to store files. This work cubicle was also occasionally used by an outside organization. (Tr. 96-97, 167, 305-06)

5. Respondent's policy ("the policy") mandates that when an employee requests a reasonable accommodation its Director of Human Resources or his/her designee engage in an interactive process with an employee with a disability in order to arrive at a reasonable accommodation which is acceptable to both sides. (Complainant's Exh. 4; Tr. 122)

6. From February 1 to April 1, 2013 Complainant was out of work on sick leave. (Tr. 15-16)

7. While Complainant was out on sick leave her supervisor, Jennifer Bargy, approved a coworker's move into Complainant's work cubicle. This work cubicle, which Complainant had worked at for approximately five years, had a window which allowed natural light into the workspace. (Tr. 14, 20-21, 42)

Complainant Returns from Sick Leave

8. Upon her return Complainant asked to be placed in a coworker's work cubicle with natural light as that person was out on maternity leave for approximately ten months. Bargy refused to allow Complainant to move to this work cubicle. Instead, Bargy assigned this work cubicle to another coworker. (Tr. 54, 98-100, 168)

9. After Complainant was moved to her new work cubicle without a window, she was told by Bargy that she needed to produce a doctor's note requiring a work cubicle with natural light. (Tr. 21, 26)

10. Complainant found fluorescent light in the workplace to be harsher on her eyes than natural light. (Tr. 189, 202, 208)

11. Complainant was unable to utilize a light fixture in her work cubicle as all of the employees at her location had previously received a memo prohibiting the use of any item that could be plugged into an electrical socket. (Tr. 46)

Complainant is Diagnosed by Her Physician

12. On April 8, 2013 Complainant was diagnosed by her physician, Mabel Cheng, M.D., with "incipient cataract," "dry eye syndrome" and "corneal abrasion." On that same day Complainant received a doctor's note requesting that she be given a work cubicle with natural light. (Complainant's Exhs. 2, 9; Tr. 11, 22)

13. Complainant, in an attempt to deal with her vision issues, used prescription eye drops on a daily basis both before and after April, 2013. (Tr. 112, 122)

14. On April 9, 2013 Complainant sent an e-mail to Schenectady County Commissioner of Social Services, Dennis J. Packer, noting that she had submitted a doctor's note for a work cubicle with natural light, and requesting a response from him. Packer replied that her request had been transmitted to the Schenectady County Department of Civil Service, and that they should "await their input." (Complainant's Exh. 3; Tr. 25, 34, 153, 263, 295)

15. Packer was not otherwise involved in Complainant's request for a reasonable accommodation and was unfamiliar with the required interactive process. (Tr. 289, 299)

16. On April 10, 2013 Complainant sent an e-mail to Schenectady County Director of Human Resources, David McGraw, inquiring if he had made a decision regarding her request for a work cubicle with natural light. (Complainant's Exh. 3; Tr. 22, 34, 80, 232)

17. McGraw was not "completely familiar" with the reasonable accommodation process under the Human Rights Law. McGraw conceded that most reasonable accommodations requested by county employees are informally granted. (Tr. 243, 245, 251, 259)

18. On April 10, 2013 McGraw sent an e-mail to Complainant, in reply to her e-mail. McGraw stated that Bargy "had made an offer for a change that you determined was not appropriate." McGraw invited Complainant to call him to discuss making a formal request through the Americans with Disabilities Act ("ADA"). McGraw enclosed ADA paperwork to Complainant in a subsequent e-mail. (Respondent's Exh. 3; Tr. 231, 234-35, 237)

19. McGraw, in his e-mail, was referencing a possible move to a work cubicle which Complainant declined because it lacked natural light. (Tr. 142, 200, 266)

Complainant Formally Requests a Reasonable Accommodation

20. On April 11, 2013 Complainant made a formal written request for a reasonable accommodation ("the request") due to "vision issues due to inadequate lighting" and "anxiety due to denial of adequate accommodations." Complainant specifically requested that she be placed in "a cubicle on the window wall side of the room for natural light & full ceiling light." (Complainant's Exh. 5; Respondent's Exh. 4; Tr. 114, 180)

21. On April 12, 2013 Complainant sent e-mails to her union Labor Relations Specialist, Michael Campon. The emails referenced, among other things, that Complainant had refused an offer from Bargy to move to another work cubicle because it was just as dark as the one to which she was assigned, and that she would seek a reasonable accommodation under the ADA. (Complainant's Exh. 3; Tr. 27, 34)

22. On April 15, 2013 Complainant sent McGraw an e-mail inquiring if the paperwork that she had dropped off at his office was enough to begin the ADA process. McGraw replied in a

subsequent e-mail that he had received the paperwork and it was "enough to begin the process." (Respondent's Exh. 3; Tr. 146)

23. On April 16, 2013 Bargy sent Complainant an e-mail informing her that "we will be moving your cubicle tomorrow at noon." (Complainant's Exh. 3; Respondent's Exh. 1; Tr. 142-43, 201, 266)

24. Complainant's new work cubicle did not have a window nor did it allow natural light. (Tr. 27-28, 60, 143)

25. On May 2, 2013 McGraw wrote a letter to Dr. Cheng noting the request, and asking that she complete and return an attached Request for Medical Information for Reasonable Accommodation form ("RA form"). (Complainant's Exhs. 6, 7)

Complainant Files Her Division Complaint

26. On May 3, 2013 Complainant filed her Division complaint. (ALJ Exh. 1)

27. On May 14, 2013 Complainant sent an e-mail to Bargy, Packer and McGraw informing that her work cubicle "has insufficient lighting" and requesting a move to "a cubicle on the window wall side of the room thus providing the natural light that I require." Bargy responded by directing her to contact Packer with her request. McGraw responded by noting that "a request for information was sent to your ophthalmologist (*sic*) several weeks ago. We have not yet received a response." (Complainant's Exh. 3; Respondent's Exh. 3; Tr. 84, 121, 238)

Complainant's Reasonable Accommodation Request is Denied

28. On June 6, 2013 McGraw wrote Complainant to inform her that her reasonable accommodation request had been denied because Dr. Cheng, in response to the RA form, had written that her disability "did not substantially limit a major life activity as compared to most people in the general population." (Complainant's Exhs. 7, 8; Tr. 23, 90, 165, 240, 245)

29. Dr. Cheng left blank that portion of the RA form that requested a description of the physical or mental impairment. Although she checked "no" in the box asking whether the impairment substantially limited a major life activity, she also checked the affected major life activity of "seeing." (Complainant's Exh. 7; Tr. 146-50)

30. Respondent's personnel did not ask Complainant to provide either further information or clarification. (Tr. 203-07, 247, 253, 298)

31. Throughout this process McGraw could not recall if he ever spoke to Bargy, did not speak to Complainant to ascertain why she felt the lighting in her work cubicle was insufficient, and never clarified whether the light in her work cubicle was natural or artificial. (Tr. 251, 253)

32. McGraw could not recall why he refused Complainant's reasonable accommodation request. (Tr. 252)

33. McGraw conceded that there would have been no undue hardship to Respondent to allow Complainant a reasonable accommodation. (Tr. 253-54)

Complainant is Given an Acceptable Work Cubicle

34. On or about July 19, 2013 Complainant was given a work cubicle with a window because the worker who had been assigned to it felt too cold while sitting there. (Tr. 31-32, 266, 285-86)

35. In 2008 Complainant was diagnosed with depression and was prescribed Xanax. (Tr. 193-95)

36. Complainant, as a result of her inability to receive a reasonable accommodation from Respondent, suffered from increased depression, received counseling and was taking anti-anxiety medication on an increased basis. (Tr. 123-24, 126-27)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of an individual's...disability...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

In order to make out a prima facie case on the basis of disability discrimination based upon an employer's failure to provide a reasonable accommodation, a complainant must show that: 1) the employee was an individual who had a "disability" within the meaning of the Human Rights Law; 2) the employer had notice of the disability; 3) with reasonable accommodation the employee could perform the essential functions of the positions; and 4) the employer refused to make such accommodations. *Pimentel v. Citibank, N.A.,* 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dept. 2006).

Should a complainant make out a prima facie case, the burden shifts to a respondent to show that the provision of a reasonable accommodation constitutes an undue hardship. Human Rights Law § 296.3(b); *Engelman v. Girl Scouts-Indian Hills Council, Inc.,* 16 A.D.3d 961, 791 N.Y.S.2d 735 (3d Dept. 2005). This constitutes an affirmative defense which, if shown, allows a respondent to escape liability. *Rodal v. Anasthesia Group of Onondaga, P.C.,* 369 F.3d 113 (2d Cir. 2004).

Here, Complainant established a prima facie case. First, Complainant was "disabled," as that word is used in the Human Rights Law, given the multiple diagnoses made of her by Dr. Cheng on April 8, 2013. Second, on April 11, 2013 Respondent was formally on notice of Complainant's request to reasonably accommodate her vision issues when she made the request.

Third, Complainant had rendered acceptable work performance prior to going out on sick leave when she was allowed to work in a cubicle with a window which afforded her natural light. Finally, in June, 2013 Respondent officially denied Complainant's reasonable accommodation request after Dr. Cheng responded to its Request for Medical Information for Reasonable Accommodation.

However, Respondent failed to engage in the required interactive process with Complainant. *See* 9 N.Y.C.R.R. § 466.11 [j], [k]. That process requires both the employer and employee to engage in a good faith dialogue which considers the appropriateness of the accommodation requested based on all of the information pertinent to such a decision. Here, the record is devoid of any proof that Respondent fairly considered Complainant's request for a reasonable accommodation. Instead, the record shows that Respondent's own policy was not followed. Further, Respondent's personnel, admittedly unfamiliar with both the Human Rights Law and its legal responsibility to engage in the required interactive process, saw fit to "wash its hands" of Complainant's request once it was denied. The result was a take-it-or-leave-it response which led directly to an exacerbation of Complainant's preexisting depression and the use of anti-anxiety mediation. All of the aforementioned could have easily been avoided had Respondent chosen to have an ongoing dialogue with Complainant as part of the legally required interactive process; such a process would very likely have led to her being able to work at the unused cubicle with a window, thereby solving the problem.

Therefore, given that there admittedly was no undue hardship which relieves Respondent of liability, the complaint has been proven.

Damages

The "make whole" provisions of the Human Rights Law provide various remedies to

restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. *See* Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.,* 458 U.S. 219 (1982).

Here, Complainant seeks damages solely for the emotional upset which she suffered in the less than four month period in question (April-July, 2013). The record shows that Complainant suffered an exacerbation of preexisting depression and an increased use in anti-anxiety mediation. As a result, Complainant is awarded $5,000 as an amount which is reasonably related to the discriminatory conduct she experienced, as well as consistent with case law in this regard. *Quality Care, Inc. v. Rosa,* 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept 1993) (award could not exceed $5,000 in absence of, among other things, any medical treatment); *Club Swamp Annex v. White,* 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dept. 1990) ($5,0000 award to waiter based solely on his testimony); *Port Washington Police Dist. v. State Div. of Human Rights,* 221 A.D.2d 639, 634 N.Y.S.2d 195 (2d Dept. 1995), *lv denied* 88 N.Y.2d 807 (award of $5,000 after "brief" discussion by complainant as to her mental anguish); *Wantagh Union Free School Dist. v. New York State Div. of Human Rights,* 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dept. 1986) ($5,000 award to complainant discriminated against on the bases of age and sex not grossly excessive).

Civil Fine

Human Rights Law § 297 (4)(e) requires that "any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability;

any relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require. *See, Gostomski v. Sherwood Terr. Apts.,* SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff'd, Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *119-121 East 97th Street Corp, et. al. v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996).

Human Rights Law §297 (4)(c)(vi) directs the Division to assess civil fines and penalties, "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious." Statutory directives require a civil fine and penalty of greater than $50,000.00 for cases in which a respondent's actions were willful, wanton, and malicious.

The record shows that, of the relevant factors to be considered, the imposition of a civil fine would promote deterrence and create an incentive for Respondent to more adequately address its employees' requests for reasonable accommodations. Additionally, the nature and the circumstances of the violation suggest that Respondent was ignorant, rather than wilful, concerning its responsibilities under the Human Rights Law; this militates against the imposition of anything other than a minimal civil fine. Finally, the record does not include any information concerning the relevant history of Respondent's actions, Respondent's financial resources or other matters as justice may require. Therefore, Respondent is ordered to pay a civil fine to the State of New York in the amount of $5,000.

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 Complainant, Christine Mazzarella, as an award of compensatory damages for mental pain and suffering, the amount of $5,000.00. Respondents shall pay interest on said award at the rate of nine (9) percent per annum from the date of the Commissioner's Order;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay a civil fine to the State of New York in the amount of $5,000.00 for having violated the Human Rights Law. Interest shall accrue at a rate of nine percent per annum on any amount paid after sixty days from the date of this Final Order until payment is made. *See* 9 N.Y.C.R.R. § 466.12(e). Payment of the aforementioned civil fine shall be made in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, N.Y.S. Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458;

3. Respondent shall pay post-judgment interest;

4. The aforesaid payment to Complainant, Christine Mazzarella, shall be made by Respondent in the form of a certified check made payable to her order and delivered by certified

mail, return receipt requested, to her address at 1566 Heidelberg Ave., Rotterdam, New York 12306. Respondents shall furnish written proof of payment to Caroline Downey, Esq., General Counsel, N.Y.S. Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order;

5. Within sixty days of the date of the Final Order of the Commissioner, Respondent shall put in place those policies and procedures necessary to educate its employees in the Human Rights Law and its responsibilities to reasonably accommodate employees with disabilities including, but not limited to, its responsibility to engage in the legally required good faith, interactive process when considering requests for reasonable accommodations;

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

DATED: February 19, 2015
Bronx, New York

Robert J. Tuosto
Administrative Law Judge