

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

KERRI MCGRATH,

Complainant,

v.

THE CHILDREN'S HOME OF KINGSTON,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10113581

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 25, 2008, by Christine Marbach Kellett, 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"). 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: **OCT 02 2008**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10113581

SUMMARY

Complainant charged the Respondent with discrimination based upon a disability when it denied her short term medical leave and terminated her probationary employment because she had epilepsy. Respondent denied the charges of discrimination and claimed it terminated Complainant due to performance issues, after accommodating her various requests. Complainant failed to show that Respondent's explanation was a pretext for illegal discrimination. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On August 30, 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 Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on December 10 and 11, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by John G. Rusk, Esq. Respondent was represented by Margaret Comard Lynch, Esq.

Permission to file post-hearing briefs was granted. Post-hearing submissions were timely received.

FINDINGS OF FACT

1. Complainant charged the Respondent with unlawful discriminatory practices in employment when it denied her short term medical leave and terminated her probationary employment because she had epilepsy. (ALJ’s Exh. 1)

2. Respondent denied the charges of illegal discrimination, and justified its termination of Complainant based upon performance issues. (ALJ’s Exh. 3)

3. Respondent operates a residential treatment center for boys with severe emotional, psychiatric disabilities who can no longer live at home, whose lives are full of crisis, and who require supervision 24 hours a day. (Tr. 129, 220-21)

4. Respondent hired Complainant as a Therapist effective August 22, 2005. (Complainant’s Exh. 2; Tr. 22, 33, 36, 39)

5. The duties of a Therapist include providing individual therapy on a weekly basis to a caseload of between 10 and 14 children, crisis intervention, behavior modification, home assessment contacting families to keep them informed of their child’s progress, attend clinical treatment team meetings, interfacing with County Social Workers and Case workers, running

treatment conferences and family sessions and attending necessary Court appearances. (Tr. 40, 130-31, 139, 222, 347)

6. All contact and services rendered to the clients must be documented. (Tr. 223-24)
Documentation of the Therapist's work is essential, both to meet State mandates and support funding, and to insure the continuity of necessary services to the children; indeed, without documentation of the services provide to the children, the agency could be sanctioned by the State. (Tr. 86, 132, 139, 146-47, 211, 224, 347-50, 412)

7. As an employee, Complainant had a six month probationary period. (Tr. 254, 270-71)

8. Shortly after beginning her employment, Complainant advised her supervisor, David Bunn ("Bunn") that she was experiencing difficulty multitasking during therapy sessions and requested assistance. (Tr. 58)

9. Bunn accommodated this request by asking Arlene Nightingale, the outreach coordinator, to take notes during the therapy sessions conducted by Complainant. (Tr. 250-51)

10. Complainant continued to experience ever increasing and more debilitating symptoms including headaches, muscle fatigue, memory loss, inability to concentrate or take notes, and speech dysfunction. (Tr. 57-59, 193-98, 288)

11. Complainant told Bunn she was having problems, mentioning Lyme disease, but never told him she was being tested for epilepsy and never requested an accommodation for epilepsy. (Tr. 238-39,255, 288-90)

12. Bunn accommodated Complainant's leave requests to go to medical appointments and medical testing although as a probationary employee, Complainant was not technically eligible for such leave. (Tr. 181, 372)

13. By mid-October Bunn was receiving calls from the County workers telling him Complainant had not completed required family assessment service plans, or the therapeutic progress notes. (Tr. 240-42)

14. In response to Complainant's request to have her caseload lessened, Bunn reassigned two other Therapists, Kerri McArdle and Pia Kelly to take several of Complainant's cases in an effort to allow Complainant to catch up with her paperwork. (Tr. 243-245, 413)

15. But as Complainant's friend, Victoria Lowe ("Lowe"), who began work as a Therapist in mid-October reported, by this time Complainant could not function at work. (Tr. 212)

16. Lowe described how Complainant was totally focused on her own health issues, particularly as she continued to experience more symptoms, need more and more tests, and to receive inclusive results. (Tr. 213)

17. By the end of October, Complainant had fallen significantly behind in her required reports with only about half her paperwork up-to-date, despite the assistance from the other Team members. (Respondent's Exh. 6; Tr. 409)

18. Although Complainant claimed problems with her computer were why she could not document, the other Therapists did keep up to date on their entries. (Tr. 225-27)

19. Complainant also admitted that the various medications she was taking, together with the neurological symptoms she was experiencing, "significantly affected my cognitive abilities" and made "my ability to work impossible." (Respondent's Exh. 6; Tr. 14, 74-75, 89)

20. At the end of October, Nightingale reported to Bunn that Complainant had asked her if she would be willing to take a few of Complainant's cases, but Bunn refused as he had already re-assigned and reduced Complainant's case load and Nightingale did not report directly to him. (Tr. 249, 297-98)

21. Bunn perceived Complainant's job performance was poor:

"...she wasn't seeing her children as she was supposed to, which was a job requirement. She wasn't getting her paperwork done on time like she was supposed to which was a job requirement. She was absent a lot for medical appointments and I gave her a lot of leeway to come in late, to leave early and to take full days off to address the medical issues in an effort to be supportive. Over the time that she was employed there, which was two months, give or take, this started as a problem that did nothing but escalate. Her performance never improved as she promised that it would..." (Tr. 252-53)

22. On November 5, 2005, Respondent was advised that Complainant had missed a deadline for a client report, which impacted the child's ability to go on home visits. (Tr. 366-67)

23. When Bunn called Complainant, who was at home, to find out about the report, Complainant informed him she knew nothing about it. (Tr. 84)

24. Respondent conducted a review of the computer entries made by Complainant and determined that for 27 working days between August 22, 2005 and Tuesday, November 8, 2005 Complainant had documented no work at all. (Respondent's Exh. 3)

25. Complainant admitted that though she had handwritten notes, she had not made the necessary computer documentation of her meetings with many of the children. (Tr. 368, 446)

26. Complainant's doctors were unable to diagnose exactly what was wrong with Complainant, as they ruled out numerous conditions including Multiple Sclerosis (M.S.) myasthenia gravis, underlying rheumatologic diseases, epilepsy and Lyme disease. (Complainant's Exhibits 11,12,13,14,15; Respondent's Exh. 2; Tr. 127-128)

27. Although Complainant identified epilepsy as her disability in her complaint and in her testimony, the medical documentation submitted established epilepsy was ruled out by the specialists. (Complainant's Exhibits 11,12,13,14,15; Respondent's Exh. 2)

28. Complainant admitted she has not been diagnosed with epilepsy, but claimed she have another type of seizure disorder which affects cognitive functions. (Tr. 360, 386-87, 400) The

medical reports reveal there was no evidence of epilepsy or epileptiform activities as the findings were not correlating to the clinical symptoms. (Respondent's Exh. 2; Tr.391-93, 395)

29. In light of the lack of documentation of contact with her assigned children, the missing reports and the failure to meet crucial deadlines, the Respondent decided to terminate Complainant on November 9, 2005. (Complainant's Exh. 9; Tr. 48)

30. Complainant was not at work on November 9, 2005, so her supervisor left her a message to call him.

31. On November 9, 2005, Complainant's doctor advised her she was unable to work at all. (Respondent's Exh. 1).

32. During her one of her hospitalizations in November and December 2005, Complainant was referred for a psychiatric consult, but declined. (Tr. 388, 391) Complainant has been treated for depression on numerous occasions, although this is not the disability she claimed affected her employment. (; ALJ's Exh. 1; Tr. 118-19, 127, 375-77, 380-81)

33. After her extensive testing in November and December 2005, Complainant was diagnosed with depressive mood disorder. (Respondent's Exh. 2; Tr. 396, 404-06) Complainant has never requested an accommodation for depression. (Tr. 424)

OPINION AND DECISION

Human Rights Law § 296.1 (a) prohibits employers from discriminating against an employee on the basis of disability. NY Executive Law §296.1 (a)

Human Rights Law §292.21 defines the term disability as "a physical, mental or medical impairment ...which...is demonstrable ... provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable

manner the activities involved in the job or occupation...” NY Executive Law §292.21.

Complainant charged Respondent with violating the Human Rights Law by denying her the reasonable accommodation of a short term medical leave of absence and by terminating her because she had epilepsy. The record at the public hearing failed to support Complainant’s allegations of discrimination. The complaint should be dismissed.

In disability discrimination cases, New York follows the federal analysis for determining whether or not an employer has committed an unlawful discriminatory act. *See Miller Brewing Co. v. State Division of Human Rights*, 66 N.Y.2d 937, 498 N.Y.S.2d 776, 489 N.E.2d 745 (1985); *Matter of Pace College v. Commissioner of Human Rights*, 38 N.Y.2d 28, 377 N.Y.S.2d 471, 399 N.E.2d 880 (1975). A claimant establishes a prima facie case of discrimination in employment based upon a disability by showing that she had a disability and that she was treated less favorably than other employees for reasons that are related to her disability. *Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558, 458 N.E.2d 1235 (1983)

Complainant’s admission that she could not work at all, means that Complainant failed to establish a prima facie case of discrimination based upon a disability. Her cognitive abilities were impaired. She was reacting poorly to medication. She could not perform the essential functions of her position with or without the accommodations already given her. Her doctor was telling her she was unable to work at all.

Human Rights Law §296.3(a) prohibits an employer from refusing to reasonably accommodate the known disabilities of an employee. NY Executive Law §296.3(a) Complainant failed to establish a violation of that provision of the law also. Significant aspects of her job duties have already been taken over by other employees. Not only had Respondent reasonably accommodated Complainant’s requests for assistance in several ways during her probationary

period including assistance during therapy sessions in writing notes, and reassignment of responsibilities for several cases, it had already extended to her leave benefits permitting her to attend doctor's appointments and take sick days to which she was not otherwise entitled as a probationary employee. Complainant admitted she was still unable to perform her job duties.

The Division will not act as a super-Personnel Office and second-guess an employer absent a nexus to a discriminatory motive. *Citibank N.A. v. New York State Division of Human Rights*, 227 A.D.2d 322 (1st Dept., 1996). The complainant failed to show that nexus. The record at the hearing established Respondent made every attempt to meet Complainant's increasing needs by extending to her leave time, by reassigning tasks, by providing assistance and by reducing her case load. Complainant remained unable to perform the essential functions of the job. There is no evidence that Respondent discriminated against the Complainant because she had epilepsy as charged by the Complainant. She does not have epilepsy. The complaint should be dismissed.

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 complaint and the same hereby is, dismissed.

DATED: March 25, 2008
Bronx, New York



Christine Marbach Kellett
Administrative Law Judge