NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MELISSA MORTENSON,
Complainant,

v.

SUFFOLK COUNTY POLICE DEPARTMENT,
Respondent.

NOTICE AND FINAL ORDER

Case No. 3505992

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 June 20, 2007, by Patricia L. Moro, 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 13th day of August, 2007.

KUMIKI GIBSON
COMMISSIONER

TO:

Complainant
Melissa Mortenson
10 Pidgeon Court
Manorville, NY 11949

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STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the Complaint of **MELISSA MORTENSON,** **Complainant,** **v.** **SUFFOLK COUNTY POLICE DEPARTMENT,** **Respondent.**	**RECOMMENDED FINDINGS OF FACT, OPINION AND ORDER AND DECISION** **CASE NO: 3505992**

SUMMARY

Complainant charged she was denied a reasonable accommodation for her disability of depression. Complainant was unable to do her job as a police officer, with or without an accommodation. Complainant also charged she was discriminated based on sex/gender and retaliated against for engaging in protected activity in violation of the Human Rights Law. Complainant failed to show she was discriminated against. Therefore, it is recommended that the Complaint be dismissed.

PROCEEDINGS IN THE CASE

On December 22, 2000, Melissa Mortenson, ("Complainant"), filed a verified complaint with the State Division of Human Rights ("Division") charging Respondent Suffolk County Police Department ("Respondent") with an unlawful discriminatory practice in employment in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York. The complaint was amended on September 19, 2005 to include the charges of sex discrimination and retaliation (ALJ Exhibit X). The complaint was also amended on September 20, 2005 to include

charges of gender discrimination related to pregnancy and postpartum depression (ALJ Exhibit VIII).

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that Respondents had engaged in an unlawful employment discriminatory practice. Thereafter, the Division referred the case to Public Hearing.

After due notice, a hearing was held before Thomas Protano, an Administrative Law Judge of the Division, on February 9, 10 and 11 of 2004.

Thereafter, the Public Hearing was continued before Patricia L. Moro, an Administrative Law Judge of the Division, on the following dates: November 9, and December 22 of 2004; March 8, 9, 10, May 4, 6, June 17, August 11, November 9, 18 of 2005; February 16, 22, April 6, 11, May 17, June 20, 27, 28, August 1 and September 5 of 2006.

The law firm of John Ray & Associates, by John Ray, Esq., represented Complainant. Suffolk County Department of Law, by William G. Holst, Esq., Jennifer McNamara, Esq. and Brian Callahan, Esq., represented Respondent. Gina M. Lopez Summa, Former General Counsel of the Division of Human Rights, by Veanka S. McKenzie, Esq., represented the Division.

Respondent filed its brief on November 2, 2006, in a timely fashion. (ALJ Exhibit XIII). Complainant's request for additional time to file her brief was granted, and Complainant filed her brief on January 10, 2007. (ALJ Exhibit XIV). On January 10, 2007, Complainant also filed a Motion to Strike Respondent's Brief. (ALJ Exhibit XV). Complainant's motion is hereby denied.

FINDINGS OF FACT

Complainant

1. Complainant is a female. (Tr. 15). In 1995, Complainant married Steven Mortenson ("Mortenson"), a Suffolk County Police Officer ("SCPO"). (Tr. 19, 420-422). Complainant is a certified paralegal and has a Bachelor's degree in Criminology. Complainant completed the Suffolk County Police Academy and entered regular patrol duties as a SCPO in November 1995 (Tr. 16-18).

2. Complainant was diagnosed with depression in 1998. (Tr. 22). Complainant's depression was associated with relationship problems, adjustment difficulties in marrying a man with two children and the responsibilities of being a working mother and police officer (Tr.60).

3. The record shows that neither Complainant nor Mortenson told Respondent that she was diagnosed with depression. A diagnosis of depression meets the definition of a disability under HRL §295. (Complainant's Exhibit 17, Tr. 242, 246, 409).

Respondent

4. Respondent is a police force of approximately 2500 sworn officers and civilian employees.

5. Respondent police officers are members of a labor union whose terms and conditions of employment are contained in a collective bargaining agreement ("contract") (Complainant's Exhibits 15, 16).

Job Duties of a Police Officer

6. Under the union contract, Respondent retained the right to assign, transfer or reassign an officer at will, and to determine the job duties (Complainant's Exhibits 15, 16)).

7. The job description for a police officer includes the following essential duties:

> "Pursue, apprehend and forcibly restrain suspects,
> Operate a police vehicle for long periods of time,
> Patrol assigned areas in a car or on foot,
> Respond to reported incidents requiring police action, intervention or mediation.,
> Respond to auto accidents or emergencies,
> Administer first aid,
> Intervene and take required action,
> Locate and arrest criminal, investigate crimes."
>
> " It is the duty of a police officer to protect the public; enforce the Laws of the State of New York and Local Laws, aid persons in need; and assure the safety and protection of property of persons residing and working within the jurisdiction of the officer's area of patrol."

(Respondent's Exhibit I)

8. The duties of a police officer are inherently stressful, dangerous and have a high risk of confrontation with the public. Complainant was aware of the essential functions of a police officer. (Tr. 355).

The Policy regarding Light Duty

9. Respondent and the union take the position that no job in the SCPD is classified as a light duty position (Tr. 1414)

10. This policy of no light duty positions is modified by the NYS General Municipal Law §207-c ("Statute"). By statute, a police officer injured on the job is entitled to full pay and benefits without charging leave accruals. In order to permit the employing police department to obtain some benefit from the injured officer, both the statute and the contract permit a police department to require those officers injured on the job and covered under the statute to return to work in those assignments they can perform. NYS General Municipal Law §207-c. According to Respondent's policy, an officer injured on the job and receiving full pay and benefits under

the Statute can be ordered to be evaluated by the department's Medical Evaluation Unit (MEU). If found fit for duty, an officer could be assigned to report for limited or light duty.

11. Unofficially, desk duty assignments in the patrol division were considered suitable for limited or light duty assignments. Desk duty can involve the risk of confrontation with the public, therefore, desk officers are usually armed.

12. Officers injured off the job did not have the benefit of the statute §207-c. If the officer was unable to report to work, the officer would have to charge their leave accruals in order to be paid. For years, Respondent extended light duty positions to officers injured off the job. This was seen by the union as a way to take care of its members (Tr. 1210). Many officers were given assignments to limited or light duty positions without going through a formal medical evaluation process. As a result, officers injured off the job were able to avoid exhausting leave credits or being without a salary. (Tr. 2723-2725). If an officer was subjected to the medical evaluation process, it could mean being deemed unfit for work and the officer would have to use their leave credits or take a medical leave.

13. Respondent kept a list of officers formally designated through the MEU as injured on the job but coming to work (designated "401") and a list of officers injured off the job but coming to work (designated "301") in limited or light duty positions (Respondent's Exhibits S though CC). The listing of officers coming to work in 401 or 301 status is distinguished from the use of the codes 401 and 301 in the attendance records kept by the individual precincts. The daily attendance records kept by the precinct, an entry was made for disclosing the officer was present and what shift was worked. (Respondent's Exhibits S though CC).

14. A police officer's work year was limited by the contract to 232 days. Within that year, an officer might charge various leave credits including vacation, personal and sick. Due to

the rotations of certain tours and differences in hours attached to certain tours, there was also team leave to be charged, and a code for normal days off (Tr. 2591-2595; Respondent's Exhibit O).

15. On April 11, 2000, Respondent changed its policy regarding limited or light duty assignments (Complainant's Exhibits 13. 14). Effective April 12, 2000, only police officers injured on the job would be afforded the opportunity to work in limited or light duty status (Complainant's Exhibits 13, 14). Officers unable to perform full duties, due to off-duty injuries or a non-job related disability, would have to remain out and charge leave, until they could perform the full range of police officer duties (Complainant's Exhibits 13 and 14). However, officers in 301 light duty status (non-job related injury or disability) as of April 11, 2000, were grandfathered in their positions for a one year period. Grandfathered means that officers injured off the job and in limited or light duty positions prior to April 11, 2000, were permitted to remain in those positions for one year. (Tr. 1829, 2075).

16. This change in policy was the result of several factors, including, public concerns raised in a series of news media articles reporting on the high pay accorded to officers duties. (Tr. 2264-2265; 2722-2723). With between eight and ten percent of the force in limited or light duty status, overtime demands on full duty officers had increased, and over-time costs had mounted beyond budgetary provisions (Tr. 2265-2266; Respondent's Exhibits S through CC)). Respondent was also looking at changing some positions from ones occupied by armed sworn officers to ones civilian employees might perform (Tr. 2575; Respondent Exhibit DD). Civilian employees cost the Respondent less in both base pay and benefits, and were required to work more days in the year ((Tr. 2587-2591). Additionally, freeing up police officers from paperwork

and administrative tasks would enable more sworn officers to be on the road patrolling (Respondent Exhibit DD).

THE COMPLAINT

Events that occurred in 1997 and 1998 are mentioned for their historical value, however, these events are outside the one year statute of limitations and are not actionable. HRL §297(5)

Discrimination based on sex (gender)

17. In 1997, Complainant reported to her supervisor, Philip Robolitto ("Robolitto"), that she was pregnant. She was assigned to clerical duties, with regular hours between Monday and Friday (Tr. 68-69, 71, 74, 2240-2241). In October of 1997, Complainant began maternity leave after submitting a medical note to Robollito. (Tr. 25-26).

18. While on maternity leave, Complainant began experiencing fatigue, a loss of concentration and the reoccurrence of sleeping problems, which she experienced for much of her life (Tr. 22). In February of 1998, Complainant sought counseling for problems she was having at home (Tr. 29-32). On March 4, 1998, Complainant reported to her counselor at Federation Employment and Guidance Services ("FEGS"), that she had marital difficulties and problems with family members (Complainant's Exhibit 17).

19. On March 5, 1998, Complainant returned to work full time at the sixth precinct in full duty status with no restrictions (Tr. 22, 23). Complainant testified that she had not informed her physician that she was depressed, tired or having marital difficulties (Tr. 242).

20. On March 17, 1998, Robollito granted Complainant a transfer to the seventh precinct, where there was a vacant desk assignment. Complainant testified that she found "… this an interesting assignment" (Tr. 81, 251; Complainant's Exhibit 18.24; Respondent's Exhibit E).

21. On April 29, 1998, Complainant reported to her FEGS counselor that she no longer wanted to be a police officer. Complainant and Mortenson were in conflict about this due to the financial issues involved. (Respondent's Exhibit A).

22. On May 17, 1998 Complainant was granted a transfer back to the sixth precinct's midnight shift, when she informed Robollito, that she and Mortenson wanted to work alternate shifts so they could arrange child care (Tr. 253-254, 410-414, 443-444, 2244, 2255). On May 31, 1998, after seven days in the midnight shift assignment, Complainant found herself exhausted, unable to get up, depressed and crying (Tr. 258). Complainant began calling in sick and charging leave credits (Tr. 258, 2245).

23. Between March 1998 and June 1998, Complainant had not told anyone that she was being treated for depression Complainant was receiving counseling for personal reasons and second thoughts about entering the police force. Complainant was unsure about continuing in her career and this was a stress for her. (Complainant's Exhibit 17, Tr. 246, 262-263, 409).

24. On June 11, 1998, Mortenson, spoke with Robollito, and advised him that Complainant was tired, overwhelmed by a new baby, and having difficulty returning to work (Tr. 39-43, 444, 2369). Mortenson made the contact because he wanted to see about getting her time off with pay (Tr. 39). Mortenson explained that they needed her salary, but her leave accruals were about to expire (Tr. 444). Robillotto sent Mortenson to Thomas Muratore ("Muratore"), the vice-president of the union, to see what could be done (Tr. 39-43, 1318, 2367). Mortenson told Muratore that Complainant was having difficulties with her recent pregnancy and delivery, the baby was a handful, and she could not work (Tr. 1318). Muratore suggested Mortenson transfer some of his accrued sick leave to Complainant, a practice not specifically authorized under the contract, but considered fairly routine (Tr. 43, 1318, 1326, Complainant's Exhibits 22-

25). On June 18, 1998, Mortenson made a written request to transfer his sick leave to Complainant. (Respondent's Exhibit J).

25. On June 22, 1998, Respondent notified Complainant she was about to run out of accruals and had three options: return to work, take a medical leave of absence or resign (Tr. 264-265, 1652; Respondent's Exhibits C and N). A leave of absence would be without pay and require medical documentation. (Tr. 16, 264, 265-270; Respondent's Exhibit C).

26. On June 25, 1998, Respondent and the union entered a consent agreement to transfer 105 days of sick leave from Mortenson to Complainant because of a "difficult pregnancy" and "post-partum problems" (Tr. 458, 468; Complainant's Exhibits 3 and 32). Complainant's physician, Dr. Covey, had provided the union with a note, stating Complainant should be home for six months due to treatment for depression (Tr. 259, 1337). Complainant's psychiatrist, Dr. Chen had also provided a letter to Robilotto on June 17, 1998, regarding Complainant's depression. However, Mortenson delivered the notes to the union representatives, not to the Respondent's personnel office (Tr. 1335-1336). Robolitto testified that he had not received Complainant's medical documentation but assumed it was going directly to the MEU (Tr. 2419-2420, 2354, 2374). However, the union representatives did not send the documentation to MEU nor to the personnel office (Tr. 1335-1336). The transfer of these sick leave accruals from Mortenson enabled Complainant to be paid regularly and remain out of work. (Tr. 46, 259, 2081, 2162-2163).

27. Robilotto credibly testified that he did not receive Dr. Chen's letter regarding Complainant's depression. Had Robilotto received this letter he would have "signed it, initialed it, dated it… carried it to headquarters and would have taken her weapons." (Tr. 3013-3015).

28. Complainant admitted that she never spoke to Robolitto, Muratore, or Employer Labor Relations specialist David Green regarding the transfer of days. The contact between the union and the SCPD in connection with the transfer of sick leave days from Mortenson to Complainant was initiated solely by Mortenson. (Tr. 146-147, 272, 3122). Mortenson explained that he worked though the union rather than through official channels (Tr. 468). Mortenson reported to the union representatives, that they could not afford to be without Complainant's paycheck. In accommodating Mortenson's request, the union and Complainant circumvented the leave of absence provisions of the contract. This circumvention provided Complainant with two tangible benefits. First, paid maternity leave was effectively extended by the 105 days. Second, her depression was not disclosed. Notification that Complainant suffered from depression would have triggered referral to the MEU (Tr. 269-270; 2162-2163).

29. On November 2, 1998, before she returned to work, Complainant asked Muratore for a desk assignment. (Tr. 77, 3125). Muratore and the Chief of Patrol, Edwin Michel ("Michel") had cordial working relations (Tr. 2089) and two possibilities were available. Michel viewed these possibilities as a temporary assignment for transitional purposes only. (Tr. 2091). Thereafter, Complainant applied for a vacant desk assignment vacant at the seventh precinct, which was granted (Tr. 81-89). On November 11, 1998, Complainant returned to work at the seventh precinct in full duty status (Tr. 77, 81-89).

30. Respondent's seventh precinct was unique. It had only recently opened, was staffed with a skeleton crew, had no conventional sector patrol, and operated from 8 a.m. to midnight rather than 24 hours a day (Tr. 2089). While there was a desk crew, the seventh precinct neither received nor processed prisoners. Additionally, there was only one officer manning the desk.

(Tr. 1207-1209; 2089). Thus, as Michel noted in his testimony, the desk assignment officer had to be in full duty and armed (Tr. 2156).

31. Although Complainant had been out using sick leave accruals for seven months, her supervising officer at the seventh precinct did not require that she be examined by the MEU before returning to work (Tr. 269-270, 3128). At that time, such referral to the MEU was left to the discretion of the supervising officer (Tr. 1830). Commanding officers could not demand explanations from individual patrol officers regarding their status by operation of both past practice and the collective bargaining agreement. (Tr. 2400).

32. The last medical information, provided by Complainant to Respondent, regarding her fitness for duty was in March of 1998. This report from her physician stated that she was fit for full duty (Tr. 244, 3111).

33. Between November 11, 1998 and June 11, 2000, a period of 19 months, Complainant acknowledged she worked in the seventh precinct in full duty status, armed and although assigned to desk duties, with no restrictions from her physician. (Tr. 1280).

34. To summarize between 1997 and June 2000, Complainant requested a transfer on four separate occasions:

(a) within the fifth precinct from regular patrol to a clerical job due to pregnancy;

(b) from the fifth precinct to the sixth precinct for a desk position because she found the work interesting;

(c) at the sixth precinct to a midnight shift for child care purposes, and

(d) from the midnight shift at the sixth precinct to the seventh precinct for a desk assignment.

On each of these occasions, Respondent granted Complainant's request. In addition, Complainant was granted 105 additional days via a transfer from Mortenson.

35. Mortenson testified in a credible manner regarding Complainant's status, and about helping her work through the union rather than administrative channels (Tr. 444-445, 468). Complainant's supervisor, Robilitto testified in a sympathetic manner regarding Complainant's situation and demonstrated a willingness to accommodate requests she made for a more attractive tour of duty and additional leave. Robilotto's testimony was credible regarding his attempts to accommodate Mortenson's report of a new mother overwhelmed by the responsibilities of a young family and her duties as a police officer. (Tr. 2086-2087, 2160-2161, 2353-2367, 2388). The testimony of both Robolitto (Tr. 2248-2251) and Michel (Tr. 2083-2115) was credible in that Complainant did not disclose a psychological disability or ask for limited duty status.

36. The Division finds that between February 1998 and June 2000, Complainant did not indicate that her request for transfers had been because of depression. By utilizing an informal practice of requesting union intervention on her behalf, Complainant was able to circumvent the established process and avoided medical review of her condition by Respondent's MEU.

Discrimination based upon disability (failure to accommodate)

37. In early June 2000, Respondent needed to place an officer injured on the job in a light duty position. Complainant's desk position in the seventh precinct was identified as one appropriate for such a light duty officer. However, before transferring Complainant, Captain "Compitello", reviewed the reason for Complainant's assignment to the seventh precinct desk position. Nothing in her file indicated her transfer had been for light duty reasons (Tr. 2008, 2028-2031). The file was still in Complainant's maiden name, had an old address from her initial

employment as a police officer, and contained no indication of depression. Complainant was responsible for notifying Respondent with changes in personal data. (Tr. 1656-1658).

38. Compitello also checked with the MEU, which had no record of Complainant asking for a light duty assignment for medical or psychological reasons (Tr. 2008). Compitello's investigation revealed Complainant was not in 301 light duty status, and was not covered by any grandfather clause. As was authorized by the contract, on June 11, 2000, Complainant was notified that she had been transferred to the second precinct, in Huntington (Tr. 107).

39. The Division finds that Respondent took reasonable and diligent steps to ascertain if Complainant had a documented light duty reason for assignment to a desk position in the seventh precinct before transferring her from that position in June 2000; Complainant did not. (Tr. 2008)

40. Complainant never reported to the second precinct (Tr. 1236). The second precinct's location was approximately one hour from Complainant's residence. (Tr. 109). Complainant contacted the union (Tr. 118, 1124, 310). The union agreed with Complainant that assignment to the second precinct created a hardship as its distance from her home was approximately one hour. (Tr. 1254).

41. Within one week, Lennon obtained a transfer to the fifth precinct for Complainant (Tr. 118, 1225, 1230). This precinct, located within fifteen minutes of Complainant's home, had a vacancy for a desk assignment for a patrol officer (Tr. 122).

42. However, Complainant did not return to work. On June 28, 2000, Complainant submitted a report from her psychologist, Dr. Wahba, that she was suffering from major depression and unable to work until July 11, 2000 (Tr. 115, 316; Complainant's Exhibit 3; Respondent's Exhibit H). This note went through the appropriate administrative channels, as did

Dr. Wahba's other note dated, July 11, 2000, which indicated that Complainant continued to be depressed and needed light duty (Complainant's Exhibits 3and 4). The reference in Dr. Wahba's notes that Complainant suffered from depression raised a question over the suitability of Complainant's possession of her department issued gun and special license. The special license granted to police officers, allowed them to purchase weapons without going through the gun permit process. Complainant's gun and special license were surrendered. (Tr. 120).

43. On July 25 and July 26, 2000, Dr. Wahba wrote brief notes indicating Complainant could return to work full duty. (Complainant's Exhibits 4 and 5). Before returning Complainant to full duty, Respondent sent Complainant to the MEU (Tr. 1835, 1842). The police surgeon found Complainant physically fit for duty, and sent her for a psychological evaluation. On August 8, 2000, the police psychologist, Dr. William Ryan, found Complainant was suffering from stress, but that Complainant was fit for duty (Tr. 316; Complainant's Exhibit 19). Complainant specifically told Dr. Ryan she could go on patrol if she was required to. (Complainant's Exhibit 19).

44. On August 11, 2000, with both Respondent's physicians and Complainant's physician in agreement as to her fitness for duty, Complainant returned to work in full duty status in the fifth precinct. Complainant was given a desk assignment with no limitations on her abilities to perform the full duties of the position (Tr. 317). Complainant's gun and special license were restored. Between August 11, 2000 and August 22, 2000, Complainant worked in full duty status, at a desk assignment and at a location she requested. (Tr. 317).

45. On August 22, 2000, consistent with its policy regarding patrol responsibilities for desk assigned officers, Complainant was directed to take a patrol ride with another officer, who drove. Complainant was in the patrol car for three to four hours. (Tr. 123-126; 2750).

Complainant found her vest did not fit, but otherwise she completed her tour without incident (123-126).

46. Complainant admitted that on August 22, 2000, when ordered to ride on patrol, she was in full duty status with no restrictions (Tr. 364-365).

47. Complainant did not return to work after this patrol ride. On August 23, 2000, Complainant began charging time to various leave categories (Tr. 3215).

48. On August 30, 2000, Respondent advised Complainant that she was running short of leave time to charge and that she had three options: resign, take a leave of absence or report to duty (Respondent's Exhibit D).

49. Complainant submitted a note, dated August 28, 2000, from Dr. Wahba indicating that Complainant was diagnosed with depression and light duty was recommended. (Complainant's Exhibit 7). Complainant's assignment at this time, was to a desk position at the fifth precinct, which was considered a light duty assignment.

50. On September 18, 2000 Complainant's psychologist, Dr. Aumiller, reported that Complainant needed a position that was regular in hours, preferably in daylight hours, with low conflict, and with low pressure (Tr. 157, 322; Complainant's Exhibits 9 and 19). Complainant had been referred to Dr. Aumiller by the Union after Dr. Ryan recommended counseling. Dr. Aumiller's report of September 18, 2000, for the first time, attributed Complainant's depression to possible unresolved post-partum depression (Tr. 322; Complainant's Exhibit 9). Complainant's other treating physicians and psychologists had attributed her depression to her family history, her relationship with family members and conflicts regarding her career as a police officer. (Complainant's Exhibit 17, Tr. 322-323).

51. Dr. Aumiller specifically noted that Complainant's "needs were inconsistent with the normal workings in the job of a police officer" (Complainant's Exhibit 9).

52. Complainant's testimony that she requested to be relieved of all patrol duties was inconsistent with the medical documentation she submitted from Dr. Wahba. Complainant's medical documentation supports her ability to patrol. Complainant's testimony that she wanted to be relieved of all patrol duties also conflicted with her testimony that she only requested to be relieved of responding to emergency situations. The Division finds that the record shows Complainant was unable or unwilling to perform the essential duties of a police officer. (Tr. 363).

Discrimination based upon retaliation

53. In late September 2000, Complainant attempted to resign as a police officer. However, on the advice of her attorney she modified the resignation form required by Respondent by adding the comment "under protest, resigning because...will not give me light duty". Respondent rejected the resignation form and advised Complainant that its policies prohibited resignation under protest. After the rejection of her resignation, Complainant told Lieutenant Alice O'Callaghan ("O'Callaghan") in SCPD personnel office that she just could not ride in a patrol car, and asked her to send her the leave of absence request forms (Tr.1682**).** Complainant received the forms back but did not submit them. (Tr. 238, 326, 3171-3172).

54. At the Public Hearing, Complainant was questioned about why she did not take a leave of absence (Tr. 238, 326). Complainant testified that she did not apply for such a leave because she believed her physicians would not support this request. (Tr. 3171-3172). Complainant provided nothing to support her belief, nor did she ask her physicians for any support. The record demonstrates that on multiple occasions when Complainant needed a note

from her physician, to support a leave request, Complainant did so. The Division finds that Complainant's reasons for not applying for a leave of absence are not credible.

55. Complainant testified that she did not want to report to work because current policy required that all police officers, even those on limited or light duty assignments had to patrol two days a month. Complainant admittedly found patrol duty too difficult. Complainant was never told by her doctors that she could not drive or ride in a patrol car. She continued to drive for personal reasons throughout this period (Tr. 3176). Complainant testified she feared patrol duty as there was only one other officer with her. On desk duty there were more officers around. Complainant and Mortenson testified that Complainant was fearful she might lose concentration if driving for extended periods, such as on patrol. However, another officer drove when Complainant was on patrol, on August 22, 2000. (Tr. 3158). The Division finds that Complainant's non-compliance with patrol duties, constituted an inability to perform an essential function of a police officer.

56. Complainant had retained counsel and, through her attorney's office tendered another conditional resignation which was also rejected. By September 27, 2000, Complainant had exhausted her leave accruals and remained out of work. After tens days of not reporting to work, and with no accruals against which to charge time, an officer is considered absent without a leave ("awol"). (Tr. 1706, 1788). O'Callaghan sent Complainant an order directing her to return to work or face disciplinary charges (Tr. 1700: Complainant's Exhibit 18.10).

57. Complainant submitted a third resignation form dated October 12, 2000, in which she stated that she was unable to work full time and was not limited duty (Complainant's Exhibits 18.5 and 18.6). This resignation was also rejected (Complainant's Exhibit 18.8).

58. On December 2, 2000, Respondent filed disciplinary charges against Complainant for being awol (Tr. 1734; Complainant's Exhibit 40). Complainant and her attorney attended the hearing on the charges but refused to participate, pointing out she had three times tendered her resignation and claiming Respondent no longer had jurisdiction over her (Complainant's Exhibit 40). The arbitrator rejected Complainant's argument that he had no jurisdiction and determined, after a hearing, that the charges were substantiated. Respondent terminated Complainant on July 30, 2001 (Complainant's Exhibit 40). No appeal was taken from that determination (Tr. 3186).

Other Employment Opportunities

59. Between August 22, 2000, and December 31, 2000, Complainant applied for two temporary sales positions during the Christmas sales season, and turned down one offer of employment resulting from these applications (Tr. 349, 414, 3060). Complainant stated that it was not cost effective for her to work at ten dollar an hour jobs and have to pay child care when her husband could earn more working overtime (Tr. 3077).

60. Between January 2001 and June 2001, Complainant took two college courses in order to begin preparation for certification as a teacher (Tr. 350-352, 3061). Complainant dropped out of the education program because she believed no school district would hire her knowing she had been terminated by Respondent. (Tr. 3035).

61. Between August 22, 2000, and the date of the last public hearing in 2006, Complainant never applied for any paralegal position despite her certification as a paralegal and her prior work experience as a paralegal (Tr. 3063). She testified that when presented with the opportunity to apply for a position as a paralegal in her own attorney's firm, she declined, because it would require too many hours (Tr. 3078). She did not want to work an 8:15AM-5:30PM schedule. (Tr. 2230).

62. In 2006, Complainant obtained work part-time at a day care facility, but after a few weeks she resigned when scheduling became difficult because she and Mortenson decided to divorce. (Tr. 3074).

63. In 2006, Complainant worked very briefly at a local credit union, and then resigned to enrolled in a nursing program for training as a nurse. (Tr. 3075-3076, 3230).

DECISION & OPINION

After evaluating the testimony and documentary evidence presented at the hearing, and assessing the credibility of the witnesses, it is recommended that the Division dismiss the Complaint.

Disability and Accommodation

It is well established that the statutory duty of a New York employer under the HRL is to "provide reasonable accommodation to the known disabilities of an employee in connection with a job or occupation sought or held." HRL, § 296(3)(a). Further, "reasonable accommodation" is defined as actions taken by employer which "permit an employee […] with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held […] provided, however that such actions do not impose an undue hardship on the business." HRL § 292(21-e).

The HRL prohibits an employer from discriminating against an employee because of a disability" Matter of McEniry v. Landi, 84 N.Y.2d 554, 558, 644 N.E. 2d 1019, 620 N.Y.S.2d 328 [1994] citing Executive Law §296[1]. The statute defines the term "disability" as "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such

impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the Complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

In order to establish a ***prima facie*** case of failure to accommodate, the Complainant must show that (1) she was an individual with a "disability" within the meaning of the statute; (ii) the employer had notice of the disability; (iii) that plaintiff with reasonable accommodation could perform the essential functions of her position and (iv) the employer refused to make such accommodation." Conley v. United Parcel Service 88 F.Supp.2d, 16, 18 (EDNY 2000).

The Complainant alleges that Respondent discriminated against her in violation of the HRL by failing to reasonably accommodate her disability of depression. However, the record shows Complainant's allegation that Respondent was on notice of her disability since 1998 is without merit. The record clearly shows that Complainant circumvented Respondent's policies and practices of documenting disabilities in the police officer MEU file. Proper notice and documentation of an officer's disability would cause the MEU to conduct an evaluation of the officers status. In Complainant's case, her depression was subject to evaluation by the MEU. Complainant's ability to use her weapons and perform the essential functions of a police officer, would be scrutinized. Complainant avoided such scrutiny by utilizing the services of the union to assist her with leaves and transfers. In addition, Complainant did not disclose that she was depressed in her requests for transfers, nor did Complainant provide any medical documentation to her commanding officers.

Moreover, Respondent had no obligation to exempt Complainant from patrol, an essential function of her job duties, as a reasonable accommodation under the HRL. There is no dispute

that patrol was an essential function of the Complainants job. The reasonable accommodation Complainant sought was a transfer to a position that did not require being in a patrol car. Complainant maintains that Respondent had an obligation to transfer her to such position as a reasonable accommodation of her disability. However, Complainant's request does not comport with the statute. A non-patrol position will not permit Complainant to perform her job in a reasonable manner

Complainant's FEGS medical records indicate that she had second thoughts about entering the police force and that she was unsure about continuing this career. The record shows that Complainant was unable to perform the essential functions of a police officer, seeking only non-patrol positions with Respondent. Patrol duty is an essential function of the job of a police officer. Caminiti v. New York City Transit Authority Police Department, 125 A.D. 306, 508 N.Y.S. 2d 590 (2d Dept. 1986). Complainant acknowledged that the essential functions of a police officer are inherently stressful, dangerous and have a high risk of confrontation. One of the functions of the position which is listed in the job description, is the ability to operate a police vehicle for long periods of time. Complainant also acknowledged that patrol duty is an essential function of a police officer and testified that patrol function is the "whole job."

The Division finds that Respondent became aware that Complainant was diagnosed with depression in June 2000. Respondent transferred Complainant to the second precinct on June 12, 2000, a patrol unit. It was within Respondent's authority and discretion to do so. Prior to the transfer, Compitello checked with the MEU, which had no record of Complainant requesting a light duty assignment for medical or psychological reasons. Further, Complainant was not classified in 301 light duty and was not covered by the grandfather clause.

Complainant's argument that this transfer was "punitive" because of the distance of the second precinct to her home, is unsupported by the record. At the time of the transfer, her personnel file reflected her old address. When this was brought to Respondent's attention and upon Complainant's request, SCPD transferred Complainant to the fifth precinct on June 19, 2000. Complainant never technically worked at the second precinct.

Complainant objected to the transfer and submitted several doctors' notes to Respondent. The first note from Dr. Wahba, dated June 28, 2000, indicated that Complainant was experiencing "low energy, loss of concentration … depressed mood and is not capable of performing her normal work duties and was advised to stay at home until her next appointment."

The second note from Dr. Wahba, dated July 26, 2000, states that Complainant was reevaluated on July 25, 2000 and although diagnosed with "Major Depression". Complainant's symptoms improved and she was able to resume her normal duties, including operating a patrol car, being out in confrontational situations, and if needed using her weapon.

Pursuant to Respondent's policies, on August 8, 2000, Dr. Ryan, evaluated Complainant. Complainant informed Dr. Ryan that patrol duty and wearing a bullet proof vest was more stressful than desk duty. Dr. Ryan concurred with Complainant's physician that she was able to perform full duty as a police officer, including carrying a weapon. Thereafter, Complainant worked as a full duty officer from August 7, 2000 to August 23, 2000 before she again began using sick time. On August 23, 2000, Dr. Wahba again evaluated Complainant and concluded that she should work in a light duty position full time, without stating any reasons to support his changed opinion from July 26, 2000.

Complainant provided an opinion from Dr. Aumiller, dated September 18, 2000 indicating, that her claims were consistent with someone suffering from post-partum depression.

Dr. Aumiller wrote that Complainant would need "modified duty that would maintain a consistent schedule, preferably with day time hours."

In an apparent attempt to clarify Dr. Wahba's previous opinions, a third opinion, dated October 30, 2000, was submitted by Complainant. Dr. Wahba did not state that Complainant was not capable of working full duty, nor did he explain the change from his previous opinions. Complainant admitted that she was never told by her doctors that she could not drive or ride in a patrol car.

The Division finds that based on Dr. Ryan's evaluation that Complainant was capable of full duty and also based on Dr. Wahba's medical recommendations, Respondent reasonably concluded that no accommodation was required.

Thus, Complainant has failed to establish a prima facie case of failure to accommodate. The record shows that Complainant was conflicted about her position as a police officer. The record is clear that Complainant was unable to perform in a reasonable manner the essential functions of a police officer. Throughout the record, Complainant repeatedly insisted that she could not go out on patrol. Complainant found patrol duty too difficult. Thus, Complainant could not perform her job with or without a reasonable accommodation for her disability.

> "The Human Rights Law does not require, as a reasonable accommodation in the form of job restructuring, the creation of a completely unique position with either qualifications or functions tailored to the disabled individual's abilities." 9 NYCRR Sec 466.11 (f)(6).

Leaves and Transfers

Chief Robollito was sympathetic toward Complainant and Mortenson's requests for leaves and transfers. Both Robollito and Michele's testimony was credible that Complainant did not disclose a disability or request limited duty status. Complainant's allegations that her

depression was exacerbated by Respondent's actions is unsupported by the record. From 1995 forward, Respondent granted all Complainant's requests for leaves and transfers.

From October 7, 1997 through March 5, 1998 Complainant was on maternity leave. In March 1998, Complainant requested to be transferred to a seventh precinct desk assignment stating that she found the assignment "interesting." Complainant did not indicate in her request that she had a disability that prevented her from working as a patrol officer.

On May 17, 1998, Complainant was granted a transfer to the midnight tour at the sixth precinct, citing child-care considerations. Respondent granted the transfer of 105 sick days and Complainant remained on sick leave until November 2, 1998. Upon her return Complainant was assigned to the seventh precinct desk position as a full-duty officer. At no time did any of Complainant's requests for transfers indicate any facts that would give notice to Respondent regarding her depression. Such notice would have triggered Complainant being referred to MEU for evaluation.

Pursuant to Respondent's directive effective April 12, 2000, any officer who suffered an off duty injury or condition that prevented him or her from performing full police duties would not be allowed to work until that officer was able to perform full police officer duties. Officers who were injured off the job and officially in light duty positions were grandfathered in for one year. Complainant did not suffer from an injury or illness that occurred in the line of duty, nor was she officially in the light duty position. Therefore Complainant could not be considered to be grandfathered in.

Discrimination Based On Sex And Gender

Complainant has failed to show that she was discriminated against based on sex and gender. To establish a prima facie case of discrimination based on sex or gender, Complainant

must show that she is a member of a protected class, discharged from a position for which she was qualified and that the discharge occurred under circumstances giving rise to an inference of discrimination. HRL §296(a), Mittl v. NY State Div. of Human Rights, 100 N.Y.2d 326, 330 (2003). Complainant amended her complaint to add a cause of action for sex discrimination on the basis of post-partum depression.

When Complainant returned to work after her extended leave, on November 11, 1998, she was not classified in 301 light duty status. Complainant avers she should have been and that this prevented her from being covered by the grandfather clause, at the time the policy changed in April, 2000. When the directive became effective on April 12, 2000, any officers on code 301 status prior to that time, were allowed to continue in light duty status for one year. Complainant argues that because Respondent granted her the 105 extended leave days in June of 1998, Respondent should have known that she was disabled from depression and classified her as light duty.

Complainant's argument fails for several reasons. First, the record shows that Mortenson presented the documentation to the union representatives and Respondent was unaware of Complainant's depression. Second, Complainant testified that at the time, she did not know that she was depressed. Third, Complainant knew that she was not classified light duty and chose not to seek official review of her full duty status. Therefore, it is unreasonable for Complainant to assume that Respondent should have known that she was disabled from depression and that she should have been grandfathered in.

There is no causal connection in the record between the birth of Complainant's child and post-partum depression. The events were three years apart. Complainant gave birth on October 17, 1997. Post-partum depression is first mentioned in the record on September 18, 2000, in a

letter from Dr. Aumiller. The record does show that Complainant was treated for depression prior to 1997 for marital difficulties, strained family relationships and conflict regarding whether her police career was right for her. The clinical diagnosis section of her 1998 FEGS psychological assessment states that she had been suffering from severe psychological stressors for the past three years, appeared to be suffering from depression, but that she was capable of functioning on a day-today basis.

Nothing in the record indicates that Complainant was treated differently than anyone else when she became pregnant. Respondent offered Complainant a clerical position and maternity leave when she announced she was pregnant. Respondent also permitted the transfer of sick leave credits from Mortenson in order to extend her maternity leave. When Complainant returned to work, she worked nineteen months in full duty status, without incident. Respondent granted Complainant transfer and shift changes. The record shows that Complainant asked for a desk position specifically because she found the work "interesting" not because of depression. Complainant was not being treated by mental health professionals from June 1998 to June 2000.

Complainant's claim of gender discrimination is also without merit. Respondent's directive in April, 2000 did not distinguish between females and males. The directive stated that light-duty positions were unavailable for officers suffering from non-line-of-duty conditions. Such a directive treated all officers the same. In fact, the record shows that more males were affected by the policy than females. In 2000, when Complainant made her last request, she was treated no differently than anyone else.

Retaliation

Complainant alleges two bases for retaliation in violation of the HRL. First, that she was forced to go out on patrol for a few hours while at the fifth precinct in 2000. Second, that

Respondent refused to accept her resignation and filed disciplinary charges against her for being absent without leave. The Division finds that Respondent engaged in the interactive dialogue required by the HRL regarding accommodation, through Respondent's evaluation of Complainant's medical documentation.

Complainant bears the burden of establishing a prima facie case of retaliation. Complainant must show that: (1) she engaged in a protected activity; (2) Respondent knew that she engaged in protected activity; (3) Complainant suffered an adverse employment action; and (4) there was a causal connection between the protected activity and adverse action. Pace v. Odgen Services Corp., 257 A.D.2d 101, 692 N.Y.S.2d 22 (3rd Dept. 1999).

Complainant admits that she was a full-duty patrol officer, when she was assigned to a desk assignment at the fifth precinct. On August 22, 2000, Complainant was directed to take a patrol car out for four hours, with another officer who did the driving. Respondent had a policy regarding desk assigned officers, whereby such officers had to go out on patrol two days per month to maintain their patrol skills. The Division finds this policy non-discriminatory.

Complainant objected and did not return work. On August 27, 2000, Respondent advised Complainant that she was running short of leave time and had three options: resign, take a leave of absence or report to duty. On August 28, 2000, Complainant submitted a note from her psychiatrist, Dr. Wahba, which did not recommend any changes in Complainant's current job status.

On September 18, 2000, Dr. Aumiller wrote that Complainant's "needs were inconsistent with the normal workings in the job of a police officer." Therefore, Respondent was entitled to rely on both Dr. Wahba's and Dr. Aumiller's recommendations.

Complainant refused to comply with any of the three options offered by Respondent. In late September, 2000, Complainant attempted to resign "under protest…because…will not give me light duty." Respondent's policies prohibit resignation under protest. By September 27, 2000, Complainant had exhausted her leave accruals and remained out of work. Thereafter, Complainant was directed to return to work or face disciplinary charges. Respondent then filed disciplinary charges against Complainant for being awol. After arbitration, the charges were sustained and Complainant was terminated.

Constructive Discharge

Complainant alleges that she was constructively discharged when Respondent offered her only three choices when her leave accruals were exhausted. Constructive discharge occurs when an employer deliberately creates working conditions that are so difficult the employee feels compelled to resign. Civil Service Employees Ass'n v. N.Y.S. Public Employee Relations Board, 8 A.D.3d 796, 798 (3rd Dept. 2004); Fisher v. KPMG Peat Marwick, 195 A.D.2d 222, 225 (1st Dept 1994). The aforementioned working conditions must be so difficult or unpleasant as to permit an inference that a reasonable person in the employee's position would have felt compelled to resign. Martinez v. State Univ. of N.Y., 294 A.D.2d 650, 741 N.Y.S.2d 602 (3rd Dept. 2002).

At the hearing, Complainant admitted that she did not want to take a medical leave of absence, as offered by Respondent, because she "could work". The problem was that Complainant was only willing to work provided she did not have to go out on patrol duty. However, patrol duty was a requirement at the job that she was hired for and an essential function of a police officer. Complainant's objection to patrol duty is her assertion that she was not sleeping well. However, her medical records indicate that she had life-long insomnia and

was able to work despite it. Complainant's desire to maintain her job status as a full duty police officer with all the benefits thereof and her objection to patrol, presented Respondent with no other option but to terminate her.

The HRL does not require the hiring of applicants or the retention of employees who are are unable to perform the essential duties of a job in a reasonable manner. The record is clear that Complainant was unable to perform in a reasonable manner the activities involved in the job of a police officer. A police officer is a position whose functions include far more rigorous activities than clerical duties. Feeley v. NYC Police Dept., 2001 US Dis Lexis 25131 (EDNY 2001).

Respondent's Policy Regarding Light Duty

Respondent's policy change regarding light duty for disabled employees is condintioned upon whether the injury is work related or not. However, an employer who is aware of an injury must make reasonable accommodations for an employee to continue employment, regardless of whether the injury is work-related. Under HRL §296.3(a).

> It shall be unlawful discriminatory practice for an employer… to refuse to provide reasonable accommodations to the known disabilities of an employee … in connection with a job or occupation … held …

In an order issued by the Commissioner, Padrao v. County of Onondaga, DHR Case No. 10101982 (November 30, 2006), it was found that Respondent's policy of making accommodations for disabled employees based on whether the injury is work related or not, was unlawfully discriminatory. The complainant in that case, was able to do the job in spite of his disability. In addition, Respondent maintained similarly-situated employees, with greater disabilities.

However, in this case, Complainant was never classified as light duty. Therefore, Respondent's directive, did not apply to her. Moreover, Complainant was unable to do her job