ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MELODY MARIE POLAK,
Complainant,

v.

NEW YORK STATE HIGHER EDUCATION SERVICES CORP.,
Respondent.

NOTICE AND FINAL ORDER

Case No. 10148996

Federal Charge No. 16GB103464

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on December 21, 2012, by Matthew Menes, Adjudication Counsel, after a hearing held before 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 Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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: 1/24/2013
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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ALTERNATIVE PROPOSED ORDER

Case No. **10148996**

SUMMARY

Respondent unlawfully discriminated against Complainant by failing to reasonably accommodate Complainant's disability. Complainant is awarded $5,000 for emotional distress damages. Complainant did not present sufficient evidence to support a race or retaliation claim, therefore, those claims are dismissed.

PROCEEDINGS IN THE CASE

On June 8, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices (disability and retaliation) relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law"). Subsequently, the complaint was amended to add race as a basis.

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. A public hearing was held on April 23, 2012. Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Senior Attorney. Respondent was represented by Donna Fesel, Associate Attorney.

On August 2, 2012, ALJ Kellett issued a recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"). Division Counsel filed Objections to the Recommended Order on behalf of the Division.

FINDINGS OF FACT

1. Respondent is a state agency charged with issuing and managing educational grants, scholarships and loans. (Tr. 118)

2. Complainant, a white woman, worked for Respondent since 1993 as a Student Loan Control Representative I (SLCR). (Tr. 31, 62) Over the years, Complainant has suffered injuries to her shoulders and chest which have left her with permanent limitations in her right shoulder and pain management issues. (Tr. 33-35, 37, 42-45, 83, 86-90) Pain management is an ongoing concern. (Tr. 58-61) Complainant takes pain medications (tramadol, acetaminophen with codeine, and skelaxin) and anxiety medications (Xanax and Prozac). (Tr. 86-91; Respondent's Exhs. 8, 9, 10)

3. Prior to 2008, all SLCRs were in one large unit with each individual handling all aversion and collection activities. (Tr. 122-27) Starting in 2008, pursuant to a federal regulation, SLCRs were assigned to one of two areas: Aversions, managing pre-default loans, or

Collections, managing post-default loans. (Tr. 122-27) Complainant was assigned to Collections. (Tr. 31)

4. Respondent requires SLCRs to work evening hours each week. (Tr. 119-21; Respondent's Exh. 5) SLCRs in Aversions are expected to work one evening per week. SLCRs in Collections are expected to work two evenings per week. (Tr. 123)

5. SLCRs are asked to work evening hours because those are periods when borrowers can be contacted at home. (Tr. 31-32, 127-28) The standard hours for Collections SLCRs are 9 a.m. to 5 p.m., three days per week and 12:30 p.m. to 8:30 p.m., two days per week. (Tr. 123, 194-95)

6. Respondent's Attendance and Leave policies offer any employee opportunities to obtain work schedule flexibility. (ALJ's Exh. 5) Respondent has two formal paths to modified work schedules. The first route is entitled Alternate Work Schedules (AWS) and requires manager approval only. (ALJ's Exh. 4) The AWS process is used by any employee requesting a scheduling adjustment. The second route is the Reasonable Accommodation (RA) process handled by Respondent's Affirmative Action Officer (AAO) Elgin Taylor. (Tr. 193) The RA process is used by employees requesting a schedule accommodation specifically for medical reasons.

7. Respondent grants accommodations under the RA process for a period of six months, renewable for another six months based on the same medical information. It must be reapplied for each year with new medical support required. (Tr. 195, 223-24)

8. In the past, Respondent has accommodated Complainant's disabilities with extended leaves as well as both reductions to and modifications of her work schedule including daytime-only schedules for extended periods of time. (Tr. 32-33, 37-40; Complainant's Exh. 2)

9. Since 2008, reductions in state budgets resulted in Respondent losing SLCRs in both the Collections and Aversions units. (Tr. 124-28, 168-69; Respondent's Exh. 7) Overtime pay was eliminated. (Tr. 126-27)

10. In September 2010, Respondent changed its RA policy. Respondent no longer accommodated requests for daytime-only schedules. From September forward, any SLCR requesting a reasonable accommodation of no "night" shifts (12:30 p.m. to 8:30 p.m.) would automatically be offered the alternate schedule of 11 a.m. to 7 p.m. (Tr. 20-21)

11. In January 2011, using the AWS process, Complainant received permission from her supervisor to work an 8:45 a.m. to 4 p.m. schedule with no evening hours for a period of time to expire June 12, 2011. (Tr. 38-40; Complainant's Exhs. 2, 8)

12. On May 23, 2011, Complainant filed an AWS application requesting continuation of the 8:45 a.m. to 4 p.m. schedule she had been working. She based the request on her medical needs. Her supervisor recommended that Respondent deny Complainant's request because of her poor attendance and because not having Complainant work two evenings would be detrimental to the unit. Formal denial was made by Elsa Magee due to Complainant's use of the AWS form for what was a medical-based accommodation request, as well as her failure to comply with the part-time schedule previously provided. (Tr. 40, 44; Complainant's Exh. 3)

13. On June 9, 2011, Complainant filed a RA request to continue her daily schedule of 8:45 a.m. to 4 p.m. (no evenings) and supported this request with a doctor's note stating Complainant was unable to work after 4 p.m. "due to the effects of the medications taken throughout the day." (Tr. 44; Complainant's Exhs. 1, 4)

14. On June 15, 2011, in response to Complainant's RA request, Responded issued Complainant the following full-time schedule: three day shifts from 9 a.m. to 5 p.m. and two

modified evening shifts of 11 a.m. to 7 p.m. (Tr. 50-52; Complainant's Exhs. 1, 6, 7; Respondent's Exh. 14)

15. Other SLCRs, Nancy Turner-Smith and William Mitchell, were permitted to work daytime-only schedules during the same time Respondent denied Complainant's request. (Tr. 61-62, 76)

16. Turner-Smith was permitted by Respondent's president to have no evening hours in order to work a second job for a period of six months. (Tr. 63, 130-31; Respondent's Exh. 4) At least part of the time Turner-Smith was excused from working evening hours coincided with Complainant's renewed request for and Respondent's denial of a daytime-only schedule.

17. Mitchell had a second job as a high school football coach and was permitted by Respondent to work daytime-only hours between August 15 and the end of November each year including 2012. (Tr. 63-64, 180-81; Complainant's Exh. 9) He was approved for a daytime-only schedule to coach football after Respondent denied Complainant's request for a daytime-only schedule based on disability.

18. Neither Turner-Smith nor Mitchell was identified as having a disability. Both of them are African-American. (Tr. 62) Both work in Aversions. (Tr. 63)

19. In January 2012, Complainant was offered an alternate schedule (8 a.m. to 12 p.m. on Fridays and Saturdays) in lieu of evening hours, but in March 2012, Complainant rejected the offer due to childcare and bus transportation issues. (Tr. 61, 96-99)

20. In March 2012, Complainant reapplied for a reasonable accommodation to work the modified evening schedule: three day shifts from 9 a.m. to 5 p.m. and two modified evening shifts of 11 a.m. to 7 p.m. (Tr. 50-52; Complainant's Exhs. 1, 6, 7; Respondent's Exh. 14)

21. As a result of not being able to adjust her schedule to accommodate her medical needs, Complainant felt her job was being threatened. Complainant had trouble functioning, was upset, and felt stressed. At the time of the hearing, Complainant continued to suffer distress. (Tr. 72, 75-76)

OPINION AND DECISION

A disability is defined under the Human Rights Law as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." Human Rights Law § 292.21. This definition has been interpreted to include medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.,* 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant suffers from chronic pain due to injuries to her chest and shoulders. The medications Complainant takes to mitigate the pain result in Complainant's decreased ability to concentrate at work as the day progresses. Complainant's condition was diagnosed by medically acceptable techniques. These facts were not disputed by Respondent. Therefore, Complainant's shoulder and chest injuries, which have left her with permanent limitations in her right shoulder and pain management issues, constitute a disability under the Human Rights Law.

Once an employer is aware of an employee's disability, that employer is obligated to provide a reasonable accommodation. *See* Human Rights Law § 296.3(a). Forms of reasonable accommodation include, but are not limited to: ". . . job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position." 9 N.Y.C.R.R. § 466.11(a)(2).

In determining a reasonable accommodation, employee and employer are obligated to engage in an individualized interactive process, which includes discussion and exchange of pertinent medical information in order to arrive at a reasonable accommodation which allows a disabled employee to perform the necessary job requirements. *See* 9 N.Y.C.R.R. § 466.11(j)(4). A failure to consider the accommodations is a violation of the Human Rights Law. *See Phillips v. City of New York*, 66 A.D.3d 170 (1st Dept. 2009)

In September 2010, Respondent made a policy decision to deny any future SLCR requests for a daytime-only schedule. Anyone requesting such a schedule change would instead be offered a modified schedule of 11 a.m. to 7 p.m. instead of 12:30 p.m. to 8:30 p.m. In June 2011, Complainant used the AWS form to request a continuance of her then current schedule of both a shortened work week and no evening hours. Respondent denied her request. Complainant applied using the RA process for a schedule without evening hours. Per its policy, Respondent denied her request and provided Complainant with a full-time schedule of 11 a.m. to 7 p.m., twice per week. At the time Complainant's RA request was denied, Respondent was aware of Complainant's doctor's order that Complainant not work past 4 p.m. due to the effects of the medications taken throughout the day.

Respondent failed to conduct an individualized assessment of Complainant's needs and failed to provide her with a reasonable accommodation of a modified schedule. Respondent simply assigned Complainant its pre-conceived alternative schedule available to any SLCR requesting a schedule change. On all days, Complainant was required to work past 4 p.m. Saturday hours, in lieu of evening hours, were not offered to Complainant until approximately six months after Complainant had applied for and was denied the accommodation.

Respondent argues that it could not accommodate Complainant because her modified

schedule would impose an undue hardship on Respondent's business. *See* Human Rights Law § 296.3(b). Respondent based this assertion on the fact that it had fewer SLCRs, the importance of the Collections Unit as compared to the Aversions Unit and the need to have SLCRs work evenings which were the prime contact hours.

An undue hardship is defined as significant difficulty or expense to the employer. In determining whether an accommodation would result in undue hardship, consideration is given to any relevant factor including the nature and cost of the accommodation needed. *See* 9 N.Y.C.R.R. § 466.11(b)(2).

Here, Respondent failed to show that allowing Complainant to modify her schedule constituted an undue hardship. There is no evidence that Complainant's proposed accommodation would cost Respondent anything. Additionally, two other SLCRs were allowed to work a daytime-only schedule in the same time frame that Complainant was denied her request. And, Complainant herself had been allowed to work a reduced schedule in the past with no impact on Respondent's business. Respondent argues that SLCRs in the Collection Unit should be treated differently from SLCRs in the Aversions Unit without providing support for that contention. Both units' employees were required to work nights, both performed similar duties and until recently, all SLCRs were assigned to a single unit wherein each individual SLCR was responsible for job duties related to both collections and aversions. Respondent's argument that allowing the requested schedule change for a SLCR in Collections was an undue hardship, while simultaneously allowing such schedule changes for SLCRs in Aversions is unavailing.

Accordingly, Respondent is liable for failing to provide Complainant with a reasonable accommodation for her disability.

Additionally, Complainant alleged she was the victim of discriminatory retaliation and

race discrimination. Complainant failed to produce satisfactory evidence to supports these claims. Accordingly, these claims are dismissed.

An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, which may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989).

Here, Complainant testified that being denied a reasonable accommodation and having to work the schedule provided by Respondent caused her stress. She also testified that she was upset by the new schedule. Complainant felt her job was being threatened. She had difficulty functioning. It is apparent that up to the date of the hearing, Complainant continued to feel anguish as a result of Respondent's discriminatory actions.

Accordingly, Complainant is entitled to $5,000 for the mental anguish she suffered as a result of Respondent's discriminatory actions. *See Mohawk Valley Orthopedics, LLP v. Carcone,* 66 A.D.3d 1350 (4th Dept. 2009) ($7,500 award supported by Complainant's testimony she felt humiliated and attacked); *see also, Niagra Falls v. New York State Div. of Human Rights*, 94 A.D.3d 1442 (4th Dept. 2012) ($4,000 supported by Complainant's testimony he was frustrated and angry, but no evidence related to depth of experience); *New York State Div. of Human Right v. Caprarella,* 82 A.D.3d 773 (2d Dept. 2011) ($7,500 supported by Complainant's testimony she was upset, hurt, disappointed and felt violated).

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 retaliation and race discrimination claims are hereby dismissed; and

it is further

ORDERED, that the disability claim is hereby sustained; and it is further

ORDERED that the Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of $5,000 as compensatory damages for the mental anguish Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Final Order until payment is actually made by Respondent.

2. Respondent shall make payment by certified check, made payable to Melody Marie Polak and delivered by certified mail, return receipt requested to Complainant's home address. A copy of the certified check shall be mailed to Caroline Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: December 21, 2012
Bronx, New York

Matthew Menes
Adjudication Counsel