NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **SUSANA RODRIGUEZ,** Complainant, v. **INSTITUTE HOMECARE SERVICES, INC.,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10108597

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal ("Recommended Order"), issued on December 29, 2008, by Michael T. Groben, 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: FEB 02 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

SUSANA RODRIGUEZ,
Complainant,

v.

INSTITUTE HOMECARE SERVICES, INC.,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10108597**

SUMMARY

Complainant charged the Respondent with violations of the Human Rights Law on the basis of disability. Complainant alleged that she had suffered an injury at work, resulting in disability, and that Respondent had failed to grant her a reasonable accommodation which would allow her to continue to work while disabled.

PROCEEDINGS IN THE CASE

On November 2, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

On May 21, 2007, the complaint was amended as follows: Respondent's name was corrected from "Institute Home Care Services, Inc." to "Institute Homecare Services, Inc."

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 Tammy B. Collins, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on September 19 and 20, 2007, October 26, 2007, and November 9, 2007. The case was then re-assigned to ALJ Michael T. Groben, and a public hearing session was held before ALJ Groben on January 30, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Christopher R. Knauth for the first four hearing sessions. At the January 30, 2008, hearing session, Senior Attorney Jane M. Stack appeared for the Division. Respondent was represented by Jeffrey A. Russ, Esq.

During the September 20, 2007 session of the hearing, the Division attorney requested permission to amend the verified complaint to expand the allegations against Respondent, and permission was granted by ALJ Collins for submission of a proposed amended complaint. (Tr. 148-53, 183-88, 246-50) Testimony regarding said allegations was permitted during the October 26, 2007 hearing session. However, no proposed amendment to the complaint was received by either ALJ Collins or ALJ Groben, nor was it served on Respondent. (Tr. 436)

Permission to file post-hearing briefs within thirty (30) days of the close of the January 30, 2008 hearing was granted. No proposed findings of fact and conclusions of law were received from Respondent. Proposed findings of fact and conclusions of law were received from the Division attorney following the conclusion of the above noted 30-day period. This document was considered untimely by presiding ALJ Groben and was not considered in his decision.

On April 16, 2008, ALJ Groben promulgated a Recommended Findings of Fact, Opinion and Decision and Order (the "Recommended Order"), which was served on the parties on April 18, 2008. By letter dated May 7, 2008, Adjudication Counsel Peter G. Buchenholz granted Complainant's request for an extension of time to May 23, 2008 to file objections to the Recommended Order. On May 16, 2008, Complainant filed her objections. These objections included the claim that Complainant had been unable to fully present her case, including documentary evidence and testimony, at the January 30, 2008 public hearing session. Complainant attributed this, in part, to the substitution of a new Division attorney and ALJ at said hearing.

On May 23, 2008 Senior Attorney Knauth filed additional objections to the Recommended Order. Senior Attorney Knauth also asserted the need for Complainant to provide additional documentary evidence, and testimony, including that of witnesses who had not testified at the January 30, 2008 public hearing.

By letter dated July 28, 2008, Commissioner Kirkland, by Adjudication Counsel Peter G. Buchenholz, notified the parties that pursuant to Rule 20(a) of the Rules of Practice of the Division of Human Rights, the Commissioner, on his own motion and in the interests of justice, reopened the hearing record for the purpose of returning the case to the Administrative Law Judge to allow both parties the opportunity to present necessary evidence and witnesses, and to conclude any witness examinations or cross-examinations not completed at the January 30th, 2008 public hearing.

Pursuant to the Commissioner's order, a final hearing session was held before ALJ Groben on October 30, 2008. Senior Attorney Jane M. Stack appeared for the Division, and Respondent was represented by Jeffrey A. Russ, Esq. At that hearing, both parties were provided

the opportunity to present necessary evidence and witnesses and to conclude witness examinations pursuant to the Commissioner's order. The parties were permitted to submit proposed findings of fact and conclusions of law, and both parties timely filed said documents.

FINDINGS OF FACT

1. Joan Shockness ("Shockness") is the Executive Director of Respondent Institute Homecare Services, Inc. (Tr. 439, 622) At all times relevant to the complaint, Respondent maintained a Policy on Disabilities, which permits the grant of a reasonable accommodation to an employee when said employee can perform the essential functions of her job. Shockness's duties as Executive Director include the evaluation and approval of employee requests for reasonable accommodations. (Respondent's Exhibit 28; Tr. 489)

2. Respondent is an agency which employs home attendants to provide care in the home for elderly and handicapped persons (referred to as "clients"). Respondent provides these services solely by contract to the Community Agency of the Vendor Assignment Unit ("CASA") of the Social Services Department of the City of New York. (Tr. 439-42)

3. Respondent had over 700 employees during the time period relevant to the complaint. (Tr. 440)

4. Complainant was employed by Respondent as a home attendant, starting in late October of 2003. (Tr. 192, 482)

5. Upon applying for employment with Respondent, Complainant requested work as a "sleep in" home attendant, in which she would provide care to the client on a 24-hour basis. (Respondent's Exhibit 8; Tr. 453)

6. Complainant was assigned to work as a home attendant at the home of client Milagros Coste ("Coste"), and commenced said assignment on or about August 8, 2005. (Respondent's

Exhibit 32; Tr. 197, 260) *

7. Complainant was assigned to work on a 24-hour basis as a "sleep in" home attendant; client Coste could not be left alone at any time. (Tr. 193, 202, 261, 283, 448)

8. In August of 2005, while under the care of Complainant, Coste fell. Complainant injured her back while attempting to lift Coste. (Respondent's Exhibits 9, 11, 20; Tr. 209-10, 215, 226)

9. Complainant has variously reported the date of said accident as August 12, 2008 and August 28, 2008, and has also testified that she does not remember the date of the accident. (Respondent's Exhibits 4, 5, 6, 9, 10, 18, 19, 20; Tr. 215)

10. Complainant called Respondent the night of the accident to report that Coste had fallen, and requested a replacement so that Complainant could return to her family. (Tr. 215-16, 414-15)

11. Complainant continued to work as a home attendant at the home of Coste until Wednesday, September 14, 2005; she then left, and was reported sick for the remaining two days of that week. (Respondent's Exhibit 32; Tr. 311, 476-77) Complainant's last day of work for Respondent as a home attendant was September 14, 2005. (Respondent's Exhibit 32)

12. By letter dated September 12, 2005, postmarked September 16, 2005, Complainant advised Respondent that she required a replacement since she was sick, in pain "from working so long", noting that she had worked for over three and one-half weeks consecutively without a day off, and needed to see a doctor. (Respondent's Exhibit 31; Tr. 471)

13. On or about September 20, 2005, Respondent's employee, Maribel Moriollo advised Complainant that she would be given a replacement. (Respondent's Exhibit 31; Tr. 472)

14. Complainant testified that she provided a note dated September 15, 2005 from her doctor

* The name "Milagros Coste" is incorrectly reported as "Milagros Cotez" at several locations in the transcripts of the October 26, 2007 and November 9, 2007 public hearing sessions. (Tr. 199-202, 260, 275)

Marco Perez, M.D., ("Dr. Perez") to Respondent's employee Rosa Medina ("Medina") and that at that same time, Complainant asked for an assignment with shorter hours which would require less physical exertion. Complainant further testified that the note directed that Complainant be moved from the 24 hour shift, and placed on light duty. No such note appears in the record. (Tr. 233, 253-59)

15. On September 21, 2005, Complainant received an annual employment health assessment by Daniel Schlusselberg, M.D., who concluded, inter alia, that Complainant did not have chronic back pain or difficulty lifting heavy objects, and that she was fully employable. At the public hearing, Complainant failed to address this apparent contradiction. (Respondent's Exhibit 14)

16. Complainant was seen by Dr. Perez on September 22, 2205, complaining of back pain. Dr. Perez issued a letter in which he noted "severe functional limitations" and recommended that Complainant rest during evaluation of her condition. (Respondent's Exhibit 11)

17. On cross-examination at the public hearing, Complainant admitted that this letter "could have been" the note from Dr. Perez which she had previously testified was dated September 15, 2005, and submitted to Respondent to request that Complainant be moved from the 24 hour shift and placed on light duty (see Finding of Fact No. 14 above). The letter contains no such request. (Respondent's Exhibit 11; Tr. 325-26)

18. At the final October 30, 2008 hearing session, Complainant produced a letter dated September 15, 2005, from Adam A. Karen, PA-C, of New York-Presbyterian Hospital. That letter advised that Complainant would be unable to work until cleared by her primary care physician. (Complainant's Exhibit 6; 551-56)

19. Complainant testified that in September of 2005 she had asked Medina for a shift of less than 24 hours. (Tr. 264-65)

20. On further examination, Complainant qualified this statement by stating that her request occurred during the "first week" after she had left Respondent's employ, and that after she visited her doctors, she had advised Respondent that she would not accept "even a 12 hour shift." (Tr. 309-10)

21. Respondent was first advised of Complainant's back injury on or about September 29, 2005, by letter. (Respondent's Exhibits 19, 30A; Tr. 466)

22. On or about October 4, 2005, Complainant wrote to Respondent to advise of the circumstances of her injury, and repeated her assertion that she had worked for three and one-half weeks without a replacement. (Respondent's Exhibit 20; Tr. 376)

23. Complainant's payroll records revealed that she had worked for no more than 19 days consecutively, rather than the three and one-half weeks to one month claimed by Complainant. (Respondent's Exhibit 32; Tr. 429, 471)

24. The verified complaint filed by Complainant alleged that on October 4, 2005, her physician had written to Respondent, indicating that she could return to work with a reduced work schedule. (ALJ Exhibit II) At the final October 30, 2008 hearing session, Complainant produced a note dated October 4, 2005 from Dr. Perez, which stated, in pertinent part, that Complainant continued to have "severe functional limitations", that she was "limited with range of motion, sitting, standing and squatting", that she was awaiting the results of an MRI of the spine, and that she was on pain medication. Dr. Perez recommended that she work for "no more than 12 hours per shift". (Complainant's Exhibit 8)

25. Complainant testified that she had provided Dr. Perez's October 4, 2005 note to Respondent, requesting a shift of less than 24 hours, and that Respondent had refused to provide same. (Tr. 564-69) Shockness testified credibly that Respondent had not received said note,

and that any such notes would have been referred to her for review and action as part of her job duties. (Tr. 624-27)

26. At the final October 30, 2008 hearing session, Complainant also produced a note dated October 18, 2005 from Dr. Perez, which stated that she was strong enough to return to work. (Complainant's Exhibit 9) However, Complainant did not allege that she had presented this note to Respondent. (Tr. 570-72)

27. At the final October 30, 2008 hearing session, Complainant was given an opportunity to present additional witnesses and testimony on her own behalf. Complainant attempted to call Milagros Coste and her daughter, Celines, to testify on her behalf, via telephone. Milagros Coste was unable to testify, due to illness. (Tr. 603-04) Presumably, Ms. Coste could have testified regarding the fact, and severity, of Complainant's injuries. However, there was already adequate evidence in the record regarding same prior to the October 30, 2008 final hearing session. There having been no representation, either in the verified complaint, or in the testimony of Complainant, that Coste herself played any role in Complainant's purported attempt to secure a reasonable accommodation from Respondent, I find that her testimony would not have been useful in resolving this issue. Celines Coste did testify, by telephone. Her testimony did not shed light on any matter at issue. (Tr. 603-18)

28. On November 14, 2005, Complainant was examined by Gideon Hedrych, M.D., ("Dr. Hedrych"). He noted that Complainant suffered various symptoms as a result of her back injury, that she had been unable to work since September 15, 2005 as a home attendant as a result thereof, and that she was totally disabled. (Respondent's Exhibit 9)

29. In a note dated November 14, 2005, and another dated November 28, 2005, Dr. Hedrych observed that Complainant was unable to work until further notice, and that her condition would

be re-evaluated in the following weeks. (Complainant's Exhibit 4)

30. Complainant subsequently filed for Workers Compensation Benefits, and received payment for same pursuant to an award. (Respondent's Exhibit 4; Tr. 306, 351)

31. In November of 2006, Complainant was examined by Paul Kleinman, M.D., ("Dr. Kleinman"), in connection with her application for Workers Compensation Benefits. Dr. Kleinman concluded that Complainant was capable only of "full-time sedentary work with no repetitive bending and no lifting more than 10 pounds." (Respondent's Exhibit 10)

32. On May 8, 2006, Complainant filed an application for Supplemental Security Income benefits through the Social Security Administration. (Respondent's Exhibit 6; Tr. 313)

33. Complainant admitted at the public hearing that she had claimed in her application for Social Security that she was disabled and could not do any work. (Tr. 308-09)

34. By decision dated March 20, 2007, ALJ Newton Greenberg of the Social Security Administration, Office of Disability Adjudication and Review, found that Complainant was limited to sedentary work, that she was unable to work as a home attendant, and that she had been disabled since August 28, 2005. (Respondent's Exhibit 5)

35. On or about May 5, 2008, Dr. Hedrych again determined that Complainant was totally disabled, and had been in this condition since September 15, 2005. (Respondent's Exhibit 37)

36. The job of "home attendant" requires attending to all of the client's needs, including cooking, bathing the client, shopping, washing, and cleaning; physical demands include, inter alia, lifting clients weighing 100 pounds or more, exerting up to 50 pounds or more of force occasionally, or up to 20 pounds or more of force frequently. (Respondent's Exhibits 26, 27; Tr. 193, 439-40)

37. The tasks required of a home attendant are determined by CASA, and Respondent has no

authority to vary the hours that the City assigns or the treatment the City requires for a client. (Respondent's Exhibit 24; Tr. 443-44)

38. Respondent does have assignments for shifts of less than 24 hours available, however, the essential job duties for a home attendant on said shifts are the same as those for a 24 hour assignment, and there are no "light duty" assignments for home attendants due to the nature of the work. (Tr. 450-52, 458-59, 488-90, 492)

39. Respondent was unable to assess an accommodation for Complainant, since she went out sick after she left Costes's home, and never came back to work. (Respondent's Exhibit 32; Tr. 490)

OPINION AND DECISION

The Human Rights Law declares it to be an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to the known disabilities of an employee. N.Y. Executive Law § 296.3

The statute defines "disability" as a physical or medical impairment, a record of such impairment or a condition regarded by others as impairment. However, the term "disability" is limited to those 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. N.Y. Executive Law § 296.21

A reasonable accommodation is an action taken which permits an employee with a disability to perform in a reasonable manner the activities involved in the job; provided that such action does not impose an undue hardship on the business of the entity from

which action is requested. N.Y. Executive Law § 296.21-e

The Complainant alleges that she sought a reasonable accommodation from Respondent, which was wrongfully denied, resulting in her unemployment. Her complaint fails on several interrelated grounds.

First, Complainant failed to set forth facts demonstrating in any concrete fashion that she had sought an accommodation from Respondent, or even that she would have accepted an accommodation, if one had been made available to her. Complainant's testimony throughout the hearing was vague, confused , and often contradictory regarding how long she had worked prior to her injury, the date and severity of her injury, the date, nature and extent of her contacts with Respondent following her injury, and whether or not she would have accepted an accommodation in her work duties from Respondent. Complainant's testimony was not credible, and was not supported by the documentary evidence in the record. The additional documentary evidence, and testimony proffered by Complainant at the final October 30, 2008 hearing session failed to establish, by a preponderance of the evidence, that Complainant had been subjected to discriminatory treatment by Respondent due to disability.

Once an employee has requested a reasonable accommodation, the employer must engage in an interactive process regarding the feasibility of said accommodation, and may refuse such accommodation if the employee cannot perform the job in a reasonable manner. *Miller v. Ravitch*, 60 N.Y.2d 527, 534, 470 N.Y.S.2d 558, 561 (1983) (Jasen, J., concurring). As noted above, Complainant failed to establish that she requested the accommodation. Further, Complainant's own statements, and those of her physicians, establish that she could not have performed the essential functions of the job (see below).

Complainant failed to explain the apparent contradiction between her application for, and award of, payments for Workers Compensation and Social Security Disability Income. Although such an award does not, in and of itself, rule out a finding that the disabled person could have performed the essential functions of her job, the finder of fact should be provided with an explanation of any apparent inconsistency with the necessary elements of the claim. *Cleveland v. Policy Management Systems Corporation, et al.*, 526 U.S. 795; 119 S. Ct. 1597 (1999). Complainant failed to offer any explanation as to how she would have performed the essential job functions of a home attendant given the nature and severity of her injuries as set forth in the medical documentation, her applications for Workers Compensation and Social Security, and the various administrative determinations in the record, in which it was adjudicated that she had been disabled and unable to perform other than sedentary work since the date of her injury.

Finally, it is clear, based upon Complainant's medical records, and Complainant's own testimony, that during the period when she had allegedly sought an accommodation, she would nevertheless have been unable to perform the essential functions of a home attendant. Those essential functions included frequent lifting and physical exertion, even during a shift of less than to 24 hours duration, activities which are incompatible with Complainant's injuries. For that reason, Respondent could not have offered a reasonable accommodation to Complainant. As of the date of her injury, Complainant was unable to perform the essential job functions of a home attendant as required by Respondent.

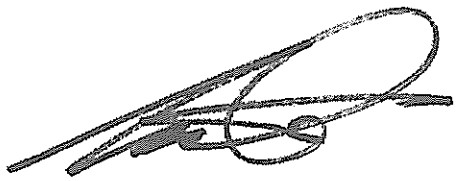
The record does not support a finding that Complainant was the victim of discrimination. The ultimate burden of establishing discrimination is on the complainant. Complainant failed to meet that burden and the complaint should be dismissed.

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 be, and hereby is dismissed.

DATED: December 29, 2008
Bronx, New York



Michael T. Groben
Administrative Law Judge