

**Ohio Civil  
Rights Commission**

# Memo

**To:** Desmon Martin, Director of Enforcement & Compliance

**From:** Denise M. Johnson, Chief Administrative Law Judge

**Date:** 5/29/2013

**Re:** *Styls Carter v. Hickory Health Care, Inc.*

**AKR B3 (32624) 07112007 22A-2007-055441 C**

**Complaint No. 08-EMP-AKR-32624**

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**CONSIDERATION OF  
ADMINISTRATIVE LAW JUDGE'S REPORT**

**ALJ RECOMMENDS CEASE & DESIST ORDER**

Report Issued: May 22, 2008

Report Mailed: July 24, 2008

**\*\*\*Objections Due\*\*\* May 6, 2013**



# Ohio Civil Rights Commission

Governor  
John Kasich

## Board of Commissioners

Leonard J. Hubert, Chairman  
Stephanie M. Mercado, Esq.  
William W. Patmon, III  
Tom Roberts  
Rashmi N. Yajnik

April 11, 2013

## Hearings Division

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Styla Carter  
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Cleveland, Ohio 44114-2518

**Re:** *Styla Carter v. Hickory Health Care, Inc.*

AKR B3 (32624) 07.112007 22A-2007-05541 C Complaint No. 08-EMP-AKR-32624

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report) in the above-captioned matter.

Pursuant to Ohio Admin. Code §4112-1-02, you may submit a "Statement of Objections" to the enclosed to the Commission no later than **(23 days after the date mailed)**. Consequently, no extensions of time will be granted beyond **Monday May 6, 2013**. A request to appear before the Commission must also be submitted by this date.

Any objections received after this date will be untimely filed and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance; Ohio Civil Rights Commission - State Office Tower 5<sup>th</sup> Floor, 30 East Broad Street, Columbus, Ohio 43215-3414**

**NOTE:** All parties and the Administrative Law judge MUST receive copies of your "Statement of Objections."

FOR THE COMMISSION

*Desmon Martin /s/*

**Director of Enforcement and Compliance**

cc: Lori Anthony: Head Civil Rights Section  
David A. Oppenheimer, Esq. / Commission  
Patrick Lewis, Esq. / Respondent  
Styla Carter / Complainant  
Denise M. Johnson, Chief Administrative Law Judge

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**OHIO CIVIL RIGHTS COMMISSION**

**IN THE MATTER OF:**

**STYLA CARTER**

Complainant

Complaint No. 08-EMP-AKR-32624

v.

**HICKORY HEALTH CARE, INC.**

Respondent

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

**MIKE DeWine  
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**Counsel for Respondent**

Styla Y. Carter  
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Akron, Ohio 44301

**Complainant**

**ALJ'S REPORT BY:**

Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
State Office Tower, 5<sup>th</sup> Floor  
30 East Broad Street  
Columbus, OH 43215-3414  
Ph: (614) 466-6684  
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## **INTRODUCTION AND PROCEDURAL HISTORY**

Styla Carter (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 11, 2007.

The Commission investigated the charge and found probable cause that Hickory Health Care, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on May 22, 2008.

The Complaint alleged that Respondent suspended and terminated Complainant from employment because she requested a reasonable accommodation for her disability, asthma.

Respondent filed an Answer to the Complaint on October 2, 2008. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on April 1-2, 2009. The record consists of the previously described pleadings, a transcript of the hearing consisting of 411 pages, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on February 16, 2010 and by Respondent on March 12, 2010, and a reply brief filed by the Commission on March 25, 2010.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the ALJ's assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on July 11, 2007.
2. The Commission determined on February 21, 2008 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).
3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.
4. In April 2004 Complainant started working as a state tested nursing assistant (STNA) for Valley View, a skilled residential facility for the elderly and ill.
5. STNAs are directly responsible for patient care.
6. STNA's were required to "smoke the residents" at Valley View which provides an opportunity for residents to smoke cigarettes.
7. Smoking the residents is a task that requires the STNA's to accompany the residents to a designated location outside of the facility and observe and monitor them so that did not injure themselves.

8. Complainant explained to her superiors at Valley View that she suffered from asthma as the basis for her not smoking the residents.

9. Her request was granted because there were STNA's who volunteered to cover the assigned task for Complainant. STNA's who themselves smoke saw it as an opportunity to smoke while watching the residents.

10. Respondent purchased Valley View in 2005. Complainant had to re-apply for a position as an STNA with Respondent.

11. Respondent continued to permit Complainant to not smoke the residents because of her asthma. the process of determining who would smoke the residents was very informal, and often the STNAs would decide among themselves who would smoke the residents. Tr. 43-45, 150, 163, 179-181, 191, 227, 294-296, 323, 346, 349, 384-385 13.

12. Complainant was off of work from February 2007 until mid-to-late May of 2007 due to a car accident.

13. On June 6, 2007 Carolyn Garritano, Director of Nursing, (Garritano) implemented a "Smoke Time Assignment Sheet" to be used as a guide by the nursing supervisors in scheduling smoke breaks for the residents.

14. The policy also said that anyone who had a doctor's excuse would not be required to smoke the residents.

15. The Smoke Time Assignment Sheet was posted at the central nurses' desk/circle which serves as a hub for the nursing halls which radiate like the spokes of a wheel. (Tr. 39-42, 303).

16. The RN Supervisors chose who covered the smoke breaks and still could use volunteers to smoke the residents. (Tr. 117-118, 221-228, 273, 316, 324-325, 345-346, 387-388; Comm. Exh. 11-12)

17. Complainant worked on the 11:00 PM-6:00 AM shift. (Tr. 27, 36-39; Comm. Exh. 3 & 4)

18. STNAs clocked in at the central nurses' desk.

19. Complainant initially worked as a floater and was eventually permanently assigned to 400 Hall. (Tr. 39-40, 46-48, 50)

20. Linda Gaugler (Gaugler) was the Charge Nurse on hall 400.

21. Gaugler's duties were to pass medications, administer treatments, perform assessments, process paperwork, and be in charge of the STNAs. Tr. 292-293

22. On July 5, 2007 Susan Bruah (Bruah), the night shift supervising nurse, scheduled Complainant to smoke the residents starting at 11:00 PM. (Tr. 201-202)

23. Complainant first approached Gaugler about the assignment and how she had never had to smoke the residents because of her asthma.

24. Gaugler referred Complainant to Bruah, saying that she could not change the assignment as it was made by the Supervising Nurse.

25. Complainant went to the nurses' station where Bruah was located.

26. Complainant told Bruah that she could not smoke the residents because of her asthma.

27. Bruah informed her that she had to smoke the residents unless she brought in a doctor's excuse.

28. Complainant retrieved her asthmas medications and brought them back to the nurses' station and showed them to Bruah.

29. This did not change Bruah's position on Complainant needing a doctor's note before she was released from smoking the residents.

30. Two other STNAs, Linda Oliver and Mercedes Jones, who observed the exchange, offered to volunteer to smoke the residents for Complainant. Bruah refused their offer. (Tr. 67-69, 160-163, 203-205, 219, 237-238, 240-241, 303-305; Comm. Exh. 17)

32. Complainant went down 400 Hall and Bruah came down the hall and told Complainant to clock out and go home.

33. Complainant asked to speak to the Director of Nursing before leaving.

34. Complainant talked to the Assistant Director of Nursing, Tammy Sirianni (Sirianni), who was on call that night.

35. Complainant explained to Sirianni what happened. Sirianni told Complainant to clock out and go home and come back in the morning to speak to Garittano and Kim Coleridge (Coleridge) the Facility Administrator.

36. On the morning of July 6, 2007 Complainant, Coleridge, Garritano and union representative Mary Knox (Knox) met in Coleridge's office.

37. Complainant was suspended pending further investigation.

38. During the investigation, Garritano spoke to Oliver and Jones, in addition to other employees. (Tr. 308, 332, 356, 368, 398).

39. Complainant called her doctor on July 6 to obtain a doctor's note to not smoke the residents.

40. On July 9, 2007 Complainant picked up the note from the doctor's office and called Garritano.

41. Garritano told Complainant that she had been terminated for insubordination. Tr. 82-84, 338-339, 367, 403; Comm. Exh.21

## **CONCLUSIONS OF LAW AND DISCUSSION**

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.<sup>1</sup>

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<sup>1</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaint that Complainant was suspended and discharged for requesting a reasonable accommodation for her disability.

2. These allegations, if proven, would constitute violations of R.C. Chapter 4112 and the Commission's rules embodied in the Ohio Administrative Code (Ohio Adm.Code). R.C. 4112.02 provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the... disability, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. R.C. 4112.01(A)(13) defines "Disability" as:

. . . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569.

5. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

6. Reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

7. The ADA's definition of disability under 42 U.S.C. § 12102(2) is substantially the same as R.C. 4112.01(A)(13). 42 U.S.C. § 12102(2) provides:

The term "disability" means, with respect to an individual-

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

8. Therefore, the Commission can establish that Complainant is disabled if it can introduce credible evidence that the Complainant has a "physical or mental impairment that substantially limits" at least one "major life activity." *McGlone, supra*.

9. Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments.

An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual.

*Interpretive Guidance of Title I of the Americans with Disabilities Act (EEOC Interpretive Guidance), 29 C.F.R. pt. 1630 App., § 1630.2(j).*

10. Major life activities are “those basic activities that the average person in the general population can perform with little or no difficulty.” *EEOC Interpretive Guidance*, at § 1630.2(i).

Such activities include, but are not limited to, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working, . . . sitting, standing, lifting, and reaching.”

*Id.* (legislative citations omitted).

11. Three factors should be considered when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) The nature and severity of the impairment;
- (2) The duration or expected duration of the impairment; and
- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

12. The order of proof in a disability discrimination case requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

- (1) Complainant was disabled under R.C. 4112.01(A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant's disability.

*McGlone, supra* at 571 (citation omitted).

13. The Commission introduced credible evidence that Complainant has asthma, a permanent medical condition that affects her major life activities of breathing, caring for herself, and walking. (Tr. 27-31; Comm. Exh. 2)

14. Dr. Bouchard, who was a treating physician for Complainant, diagnosed Complainant as having the medical condition of asthma in the late 1990's.

15. Asthma is a chronic condition of the lungs that cannot be cured, only managed. It is a permanent condition. (Bouchard Evidentiary Depo., pp. 16-17; Commission Exh. 2, 17, 18 & 20)

16. Asthma results in spasms of the muscles surrounding the small breathing tubes. An individual with asthma can have an attack when the breathing tubes narrow and the person has difficulty getting air into the lungs. A person experiencing an asthma attack feels a smothering sensation.

17. Cigarette smoke triggers asthma in a large majority of persons with asthma. Tr. 27-31. Comm. Exh 2, Bouchard's Evid Depo pp. 10-16, 20-21 and Evid Depo Exh 2-4. Tr. 31-32, Dr. Bouchard's Evid. Depo. 11-12

18. Complainant controls her asthma symptoms by using and inhaler, Advair, twice a day and a rescue inhaler for emergencies. She also takes Singlar once a day and uses an aerosol machine. (Tr. 31-32; Dr. Bouchard's Evidentiary Depo, pp. 11-12)

19. Complainant gave examples of having problems with walking and performing task to care of herself. She has difficulty walking up and down her stairs to do laundry and has to use her rescue inhaler to complete the task. Her condition prevents her from being able to clean her house and mow the lawn.

20. Complainant has to use motorized carts at the grocery store.

21. Complainant's children have to assist her in doing the laundry by carrying the clothes baskets up and down the stairs in order for Complainant to wash the clothes.

22. Complainant's asthma affects her ability to breathe which prevents her from running, walking on an exercise track, swimming, or risking exposure to cigarette smoke.

23. Complainant's asthma affected her breathing which makes it difficult for her to perform household chores, such as laundry, cutting grass and taking out garbage. (Tr. 33-34, 121)

24. The Commission provided credible evidence to establish that Complainant is disabled because she has a medically diagnosed condition that is permanent that prevents her from being able to perform the major activities of walking, breathing, and caring for herself.

If a person's medical condition prevents them from being able to perform everyday routine activities without significantly increased hardship and vulnerability to what are considered everyday obstacles and hazards encountered by the non-disabled then they are substantially limited.

*McGlone supra* at 571-572

A substantial limitation on major life activities does not mean "utter inabilities".

*Bragdon v. Abbot* (1998), 524 U.S. 624, 641

25. On the day that Bruah assigned Complainant to smoke the residents, Bruah was aware that Complainant had not smoked the residents and could not use cleaner with bleach due to her asthma. (Tr. 38, 43, 48-49; Comm. Exh. 4 & 6; Tr.55-56, 193,230,300-301)

26. Complainant had been performing the job as STNA with the accommodation of not smoking the residents.

26. Respondent alleges that it did not terminate Complainant because she has asthma or requested an accommodation.

27. The Respondent asserts that it had in place a reasonable accommodation and that Complainant's insubordination was the cause of her suspension and termination.

28. An employer has a duty to engage in an interactive process with an employee to determine available reasonable accommodations. *See Beck v. University of Wisc. Bd. of Regents*, 5 AD Cases 304 (7<sup>th</sup> Cir. 1996) (employer must make a reasonable effort to determine appropriate accommodation in an interactive process that requires participation by both parties). EEOC regulations state that it "may be necessary" for the employer to initiate "an informal, interactive process" with the disabled employee to determine possible reasonable accommodations. 29 C.F.R. § 1630.2(o)(3).

29. The steps of this process are provided in the *EEOC Interpretive Guidance*:

- (1) Analyze the particular job involved and determine its purpose and essential functions

- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the person to perform the essential functions of the position and,
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

*EEOC Interpretive Guidance*, at §1630.9, (“Process of Determining the Appropriate Reasonable Accommodation”).

30. The language of 29 C.F.R. § 1630.2(o)(3) suggests that this interactive process is not necessary in all cases. As the last step indicates, the primary goal of this process is to identify the reasonable accommodation that is most appropriate for both the employer and the employee. *See Sieberns v. Wal-Mart Stores*, 6 AD Cases 403, 409 (N.D. Ind. 1996) (“[t]he entire purpose of the interactive process is to find a reasonable accommodation if one exists”).

31. Further, the *EEOC Interpretive Guidance* recognizes that “in many instances” the appropriate accommodation is “so obvious” there is no need to proceed in a step-by-step manner. *EEOC Interpretive Guidance*, at §1630.9

When an employee approaches her employer and seeks an objectively reasonable accommodation, the employer’s duty to make a reasonable accommodation also mandates that the employer interact with an employee in a good faith effort to seek a reasonable accommodation. *Conneen v. MBNA Bank* (3<sup>rd</sup> Cir. 2003, 334 F. 3d. 318 at 329-330. see also *Feliberty v. Kemper Corporation* (7<sup>th</sup> Cir. 1996), 98 F.3d 274, 280 citing *Beck v. University of Wisconsin Bd. Of Regents* (7<sup>th</sup> Cir. 1996), 75 F.3d 1130; *White v. Honda of America Mfg. Inc.* (S.D. Ohio 2002), 1919 F. Supp.2d 933, 950-951; *Thompson v. E.I. DuPont Denemours & Co.* (E.D. Mich. 2001), 140 F. Supp. 2d 764, 773-774..

32. The circumstances which led up to Complainant’s termination establish that Respondent failed to engage, in good faith, in an interactive process to seek a reasonable accommodation at the beginning of Complainant’s 11:00 pm-7:00 am shift on July 7, 2007.

33. In June of 2007 Bruah created a "Smoke Time Assignment Sheet". The policy permitted STNAs to avoid smoking the resident's if they produced a doctor's excuse.

34. Following the creation of the policy Bruah did continue to allow STNAs to volunteer to smoke the residents. (Tr. 117-118, 221-228, 273, 316, 324-325, 345-388; Comm. Exh. 11-12)

35. When Complainant first became aware of the posted schedule immediately prior to the beginning of her 11:00 PM shift, she went to her managers and supervisors in an attempt to not smoke the residents as she had been permitted to do in the past.

36. STNAs Oliver and Jones volunteered to smoke the residents for Complainant but Bruah refused their offer. (Tr. 67-69, 129-130, 163, 239-240, 304)

37. Although Bruah testified that the Schedule had been posted in the nurses' area prior to July 7<sup>th</sup>, STNA Mercedes Jones had not seen the schedule sheet until her deposition was taken by the Commission and Guagler had never seen a smoke break assignment schedule prior to July 7<sup>th</sup>. (Tr. 148, 150-155, 324; Comm. Exh. 11, 12, Tr. 298)

38. Complainant left the nurses' station to get her medication to show them to Bruah thinking that this would get Bruah to grant Complainant a waiver until she could obtain a doctor's excuse.

When a disabled employee seeks an objectively reasonable accommodation the employer is obligated to engage in good faith in an interactive process to determine if an accommodation is possible. *Conneen v. MBNA America Bank* (3<sup>rd</sup> Cir. 2003), 334 F.3d 318, 329-330.

39. I found the testimony of Complainant and Guagler credible, that although Complainant was upset, she was not yelling nor did she put her hand in Bruah's face. (Tr. 76-69, 129, 160—163, 2390240, 304)

40. Gaugler was present that night and either personally heard or observed the conduct of Complainant. Complainant asked Gaugler to write a witness statement for her to use in her grievance meeting regarding her termination:

July 17, 2007

Re: Styla Carter

Termination For Insubordination Relating To  
Incident of July 5, 07

As Styla's Charge Nurse the night in question I was an eye witness to the incident involving her and the RN Supervisor. When Styla found out she was scheduled to do the "smoke break" she came and told me (following the correct chain of command by going to her charge nurse first). I am the one who told Styla she had to go and speak with the R.N. Supervisor (We have previously been told that we cannot make changes to the schedule), and Styla did this. Styla's concern with doing the "smoke break: is the fact that she is on medication for asthma and cigarette smoke bothers her greatly. I overheard the RN Supervisor tell Styla that everyone had to take a turn unless they had a doctor's excuse. Styla has never been scheduled for the "break" previously, so of course she did not have a doctor's excuse with her right then and there. But she did have her medication which she took to the RN Supervisor to show she legitimately had a medical excuse. Instead of telling Styla "bring in an excuse from the doctor tomorrow and

I'll switch you tonight", she said Styla had to have a doctor's excuse to be taken off the break listing. Styla told her she could not do the smoke break.

Styla was told to clock out and go home. Styla said "fine, but first I want to call Caroline or Kim. RN Supervisor told Styla that neither one was taking calls, that Tammy was on call. Styla said "OK then I want to talk to Tammy."

There is a bone of contention that Styla walked away from the RN Supervisor while the RN Supervisor was still talking. I did not see this and I was right there. There was a point where the RN Supervisor stopped talking and Styla turned around and walked down the 400 Hall. At this point, the RN Supervisor started talking again. But she re-started talking; she was not "continuing talking." It cannot be said that Styla was doing anything other than possibly going for her purse and belongings which were in the lounge on the 400 Hall. Who knows?

The RN Supervisor called Tammy and then told this nurse [Gaugler] and an STNA [Mercedes Jones] to “come along as witnesses.” Styla asked if a different STNA could witness due to personal problems she had with this particular STNA in the past. This was not permitted by the RN Supervisor. We all went to an empty office on 300 Hall and Styla spoke with Tammy on the telephone. After the conversation, Styla clocked out and left the building.

At no time did Styla raise her voice or “yell and scream” at the RN Supervisor. At no time was inappropriate language used. At no time was verbal disrespect shown. Styla was nervous and upset and when this happens to any of us, the pitch in our voice changes. But this does not constitute yelling.

If Styla was insubordinate by not turning on her heel and immediately clocking out, this is negated/voided by the fact that the RN Supervisor herself made the call to Tammy and let Styla speak with her. (...)

41. I found Respondent's witnesses seriously lacking in credibility.

42. Respondent's reasons for terminating Complainant are not credible. Respondent failed to engage in good faith in an interactive process to seek a reasonable accommodation for Complainant.

43. The Respondent engaged in illegal discriminatory conduct in violation of R.C. 4112.02(A).

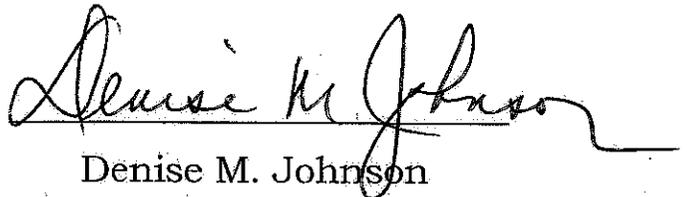
## **RECOMMENDATIONS**

For all of the foregoing reasons, it is recommended in Complaint No. 32624 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
  
2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of State Tested Nursing Assistant (STNA) and accommodate Complainant's need to not smoke the residents. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a STNA on July 9, 2007 and continued to be so employed up to the date of Respondent's offer of employment; and
  
3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a STNA on July 9, 2007 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits

she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.<sup>2</sup>

4. Within six months of the date of the Commission's Final Order the Respondent's management staff takes training in Ohio's laws against discrimination, with a focus on how to respond to requests for an accommodation of a disability.<sup>3</sup>



Denise M. Johnson  
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed

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April 11, 2013

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<sup>2</sup> Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

<sup>3</sup> The Commission offers training at no cost to the Respondent or the Respondent can utilize its own resources in complying with the training requirement of this recommendation.

MAY 06 2013

STATE OF OHIO  
CIVIL RIGHTS COMMISSION

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

STYLA CARTER )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 HICKORY HEALTH CARE, INC., )  
 )  
 Respondent. )

Complaint No. 08-EMP-AKR-32624  
**Chief Administrative Law Judge**  
**Denise M. Johnson**

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**RESPONDENT'S STATEMENT OF OBJECTIONS TO THE CHIEF  
ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSION OF LAW,  
AND RECOMMENDATIONS AND REQUEST FOR A HEARING BEFORE THE OHIO  
CIVIL RIGHTS COMMISSION**

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**Counsel for Respondent**

## INTRODUCTION

On May 22, 2008, the Ohio Civil Rights Commission ("Commission") filed a Complaint in the above captioned matter. Respondent timely answered on October 2, 2008. The Complainant alleged that the Respondent suspended and then terminated her on July 7, 2007, after she requested a reasonable accommodation for her disability, asthma. In its Answer, the Respondent Hickory Ridge, denied that it had discriminated against Mr. Carter on the basis of an alleged disability. On April 1 and 2, 2009, a public hearing was held at the Commission's Regional Office in Akron, Ohio, before Chief Administrative Law Judge Denise M. Johnson. Four years and 9 days after the hearing, the Chief Administrative Law Judge issued her Findings of Fact, Conclusions of Law and Recommendations.

The following is Respondent's Statement of Objection to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendations.

### A. Respondent's Objections to Findings of Fact

**Finding of Fact No. 11.** Respondent continued to permit Complainant to not smoke the residents because of her asthma. the (sic) process of determining who would smoke the residents was very informal, and often the STNAs would decide among themselves who would smoke the residents.

**OBJECTION** Respondent objects to the finding based upon the testimony of a witness which the Chief Administrative Law Judge has credited as being credible in her testimony. The Chief Administrative Law Judge in Conclusions of Law No. 36 accepts the testimony of witness, Mercedes Jones. With respect to an offer made by Ms. Jones to substitute herself for Complainant so that Complainant would not be required to expose herself to smoke. Ms. Jones' credibility should extend then to her testimony that Complainant smoked the residents while employed by Respondent. Complainant had been observed by Ms. Jones to smoke the residents prior to July 5, 2007. (Tr. 169)

**Finding of Fact No. 26** Complainant told Bruah that she could not smoke the residents because of her asthma.

**OBJECTION** As evidenced by the credited testimony of Mercedes Jones, Complainant had previously smoked the residents at Hickory Ridge. (Tr. 167) Additionally, witness Leticia Young corroborated witness Mercedes Jones' testimony when she indicated that Young, while working at Hickory Ridge with Complainant, had observed her on more than one occasion smoking the residents and thereby exposing herself to cigarette smoke. (Tr. 174)

**Finding of Fact No. 33** Complainant asked to speak to the Director of Nursing before leaving.

**OBJECTION** As accepted by the Chief Administrative Law Judge, following an exchange with her Supervisor Ms. Bruah, Complainant was instructed to clock out and go home. (Finding of Fact No. 32) The Complainant refused to follow the clear directive of her superior. Complainant testified that she was specifically told to clock out and go home by her superior, Ms. Bruah. Complainant acknowledged that Ms. Bruah had the authority to send her home but that Complainant did not follow the directive of her supervisor to immediately clock out and go home, instead insisting as a condition of compliance with the instruction to leave the facility, she first be allowed to speak with someone in administration. Complainant demanded to speak with management or she would not leave the facility. (Tr. 106-107)

**B. Respondent's Objections to Conclusions of Law**

**Conclusion of Law No. 13** The Commission introduced credible evidence that Complainant has asthma, a permanent medical condition that affects her major life activities of breathing, caring for herself and walking.

**OBJECTION** The Commission called as it's expert medical witness the treating physician of Complainant, Lawrence F. Brouhard, M.D. Dr. Brouhard testified that after November 16, 2006, that he could offer no evidence that asthma had any effect on Complainant's daily life. (Brouhard Evidentiary Deposition 52-53) Additionally, Complainant testified that

she walks all day on her job without any assistance. (Tr. 111) The citation to the transcript, pp. 27-31 supporting Conclusion of Law No. 13, does not refer to Complainant's specific life activities of breathing, caring for herself or walking. There is no evidence of record that Complainant's asthma affects her ability to care for herself. Complainant testified that the major life activities impacted by asthma were limited to walking, shopping, and cutting the grass. (Tr. 111-112) Complainant conceded that she does shop and that her children cut the grass and take out the trash. Complainant could not specify any other specific life activities impacted by her asthma. (Tr. 112) Complainant has offered no evidence that she ever suffered from asthma symptoms while working at Hickory Ridge and her physician, in his last examination prior to her termination, opined that her asthma was well-controlled. (Dr. Brouchard's Evidentiary Depo., p. 51).

**Conclusion of Law No. 24** The Commission provided credible evidence to establish the Complainant is disabled because she has a medically diagnosed condition that is permanent that prevents her from being able to perform major activities of walking, breathing and caring for herself. (If a person's medical condition prevents them from being able to perform everyday routine activities without significantly increased hardship and vulnerability to what are considered everyday obstacles and hazards encountered by the non-disabled, then they are substantially limited. *McGlone, supra* at 571, 572. A substantial limitation on major life activities does not mean "utter inabilities". *Bragdon v. Abbot* (1998), 524 U.S. 624, 641.

**OBJECTION** The Chief Administrative Law Judge is correct in concluding that federal case law applies to alleged violations of Revised Code Chapter 4112. [Conclusion of Law No. 4]

To prevail in a case of disability discrimination, Complainant must be proved to be a person with a disability. Complainant must prove that her asthma substantially impairs a major life activity. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483, 144 L.Ed. 2d 450, 119 S. Ct. 2139 (1999). In determining whether a person is substantially limited in any major life activities, the finder of fact must consider any corrective measures that the Complainant takes to ameliorate

her asthma symptoms, such as Ms. Carter's breathing medications. To be a disability, an impairment must "limit an individual, not in a trivial or even moderate manner, but in a major way. *Gonzales v. Nat'l Board of Medical Examiners*, 225 F.3d at 620, 627 n 12 (6th Cir. 2000). Impairments which merely affect major life activities must be distinguished from those that substantially limit those activities. *Ryan v. Gray & Rabicki, P.C.*, 135 F.3d 867, 870 (2nd Cir. 1998).

The Sixth Circuit Court of Appeals has determined that an individual's asthma did not substantially limit their major life activities when they had difficulty breathing with exposure to fumes similar to cigarette smoke. *Ventura v. City of Independence*, (1997 U.S. at LEXIS 4102, No. 95-3582, 1997 Westlaw 94688 at 2 (6th Cir. March 4, 1997) (unpublished opinion). The Second Circuit Court of Appeals has decided that a plaintiff was not substantially limited in any major life activities because she was able to breathe and work without substantial limitation. As indicated, the record is devoid of any evidence that the Complainant suffered from asthma symptoms while at work. *Heilweil v. Mt. Sinai Hospital*, 35 F.2d 718, 724 (2nd Circuit 1994). Additional federal courts have determined that asthma does not substantially limit the major life activities of employees suffering from it. *Moon v. Reno*, 121 F. Supp. 2d, 109, 111 (D.C. 2000); *Castro v. Local 119, Nat'l Health and Human Services Employees Union*, 964 F. Supp. 719, 725 (S.D.N.Y. 1997). In *White v. Honda of America Manufacturing, Inc.*, an individual's asthma was found not to be a disability because it affected her, as allegedly with Ms. Carter, only when she breathed certain irritants. *Hoyt v. Honda of America Manufacturing, Inc.*, 241 F. Supp. 2d 852, at 857. Complainant did not suffer from a disability as defined by federal law.

**Conclusion of Law No. 25**                      On the day that Bruah assigned Complainant to smoke the residents, Bruah was aware that Complainant had not smoked the residents and could not use cleaner with bleach due to her asthma.

**OBJECTION** As previously indicated, a witness, Mercedes Jones, credited by the Chief Administrative Law Judge, has testified that Complainant had previously smoked the residents at Hickory Ridge such that Bruah could not have been aware that Complainant had not smoked the residents. (Tr. 174)

**Conclusion of Law No. 26** Complainant had been performing the job as STNA with the accommodation of not smoking the residents.

**OBJECTION** As indicated by the credited witness, Mercedes Jones, Complainant had been smoking the residents at Hickory Ridge and had not requested an accommodation. (Tr. 174)

**Conclusion of Law No. 32** The circumstances which led up to Complainant's termination establish that Respondent failed to engage in good faith in an interactive process to seek a reasonable accommodation at the beginning of Complainant's 11:00 pm-7:00 am shift on July 7, 2007.

**OBJECTION** The Chief Administrative Law Judge has concluded that in June of 2007, a smoke-time assignment sheet was created which set out an accommodation for those STNAs who wished to avoid the assignment of smoking the residents. [Conclusion of Law No. 33]. In June of 2007, this smoke-time assignment sheet required the STNAs to produce a doctor's excuse as part of the accommodation to avoid smoking the residents and constituted an existing accommodation.

**Conclusion of Law No. 36** STNAs Oliver and Jones volunteered to smoke the residents for Complainant but Bruah refused their offer.

**OBJECTION** STNA Jones testified that she did not tell Bruah that she would volunteer to smoke the residents. (Tr. 169)

**Conclusion of Law No. 37** Although Bruah testified that the Schedule had been posted in the nurses' area prior to July 7th, STNA Mercedes Jones had not seen the schedule sheet until her deposition was taken by the Commission and Guagler had never seen a smoke break assignment schedule prior to July 7th.

**OBJECTION**

STNA Jones testified that the first time she saw Commission Ex. 11 "in this form", that is the form offered by Complainant, was in March of 2009, but that the document, ostensibly in a similar form, was posted at the desk at her place of employment. (Tr. 150)

**Conclusion of Law No. 38** Complainant left the nurses' station to get her medication to show them to Bruah thinking that this would get Bruah to grant Complainant a waiver until she could obtain a doctor's excuse.

When a disabled employee seeks an objectively reasonable accommodation, the employer is obligated to engage in good faith in an interactive process to determine if an accommodation is possible. *Conneen v. MBNA America Bank* (3rd Cir. 2003), 334 F.3d 318, 329-330.

**OBJECTION**

Assuming arguendo that Complainant had a known disability, Hickory Ridge had in place a reasonable accommodation. Prior to July 5, 2007, the night of Complainant's insubordinate behavior, other STNAs had availed themselves of the policy of providing medical documentation and avoiding the assignment of smoking the residents. (Tr. 326-327). Ms. Carter did not provide such documentation until July 9, 2007, after her termination. (Tr. 327; Commission Ex. 20).

If as Complainant asserts when she first approached Bruah, she was unaware of this available accommodation, the first thing Bruah did was to attempt to explain it to her. Ms. Bruah began by indicating that the policy required that Complainant provide medical documentation. (Tr. 205). Before Bruah could complete her explanation of the policy, that is the accommodation, to Complainant, Complainant began to argue with Bruah. (Tr. 207, 209-210, 212, 215).

Complainant cannot complain about this policy because it would require her to produce medical documentation of disability. In light of Bruah previously having observed Carter in the

area where she would be exposed to second-hand smoke, Complainant's expressed need for an accommodation was not an obvious one. Bruah might reasonably have asked how it was that Complainant could stand outside with the colleagues while they smoke, while her asthma prevents her from standing outside with residents if they smoke. In that light, it is completely legitimate for Respondent to ask Complainant for medical documentation regarding both her disability and the functional limitations it places on her which is what Bruah was trying to request from Complainant. 29 C.F.R. 1638, pp. § 1630.9 (1997). It is not required that Respondent provide the Complainant with the accommodation she demands immediately, but only with a reasonable and effective accommodation. *Harkins v. The Gap, Inc.*, 84 Fed. 3d 797, 800 (6th Cir. 1996). The policy available to Complainant as set out in Commission Exhibits 11 and 12 was both a reasonable and effective, as evidenced by Complainant's production of required medical documentation on July 9, 2007. (Finding of Fact No. 40).

**Conclusion of Law No. 39** I found the testimony of Complainant and Guagler credible, that although Complainant was upset, she was not yelling nor did she put her hand in Bruah's face.

**OBJECTION** STNA Jones, who the Chief Administrative Law Judge has previously credited with providing credible testimony, testified that Complainant threw her hand up in front of her supervisor's face while they were discussing Ms. Carter's refusal to smoke the residents. (Tr. 144, 145).

**Conclusion of Law No. 41** I found Respondent's witnesses seriously lacking in credibility.

**OBJECTION** Despite the obvious objection that the Administrative Law Judge has credited one of Respondent's witnesses, STNA Jones, and now in this conclusory statement contradicts that finding of credibility, the finding itself is also devoid of explanation or rationale. It is also highly unlikely that an adequate determination of credibility be made following a four

year and nine day delay between the in-person testimony of Respondent's witnesses and the date of the Chief Administrative Law Judge's recommendations.

**C. Respondent's Recommendations to Recommendations.**

**Recommendation No. 1.** The Commission order [sic] Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 2112.

**OBJECTION** For the reasons set forth in the previous objections, as well as the record of the hearing, the hearing exhibits and the arguments made in Respondent's Post-Hearing Brief, no discriminatory practices occurred which could form the basis for Recommendation No. 1.

**Recommendation No. 2** The Commission order [sic] Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of State Tested Nursing Assistant (STNA) and accommodate Complainant's need to not smoke the residents. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a STNA on July 9, 2007 and continued to be so employed up to the date of Respondent's offer of employment.

**OBJECTION** It has now been seven years since the Complainant was terminated. It is no longer certain whether the Complainant has maintained those skills necessary to function in an accredited position or whether the Complainant has maintained the required state certification.

**Recommendation No. 3** Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a STNA on July 9, 2007 and continued to so be employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at a maximum rate allowed by law.

**OBJECTION** The delay of the Chief Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations for over four years, necessarily resulting in the delay of any final Order, may have improperly increased the amount of back pay and interest recommended by the Administrative Law Judge, thereby prejudicing Respondent. Moreover, the

payment of back pay and interest is inappropriate in the instant case where no discriminatory practices have been committed.

**Recommendation No. 4** Within six months of the date of the Commission's final Order the Respondent's management staff takes training in Ohio's laws against discrimination, with a focus on how to respond to requests for an accommodation of a disability.

**OBJECTION** As Respondent had in place both a reasonable and effective accommodation, the reasonableness and effectiveness of the accommodation is demonstrated by the employees who took advantage of the accommodation prior to Complainant's rejection of the accommodation on July 7, 2007.

**D. Respondent's Request for a Hearing Before the Commission**

In light of the foregoing Objections, the Respondent requests a hearing before the Ohio Civil Rights Commission.

Respectfully submitted,



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Counsel for Respondent  
HICKORY RIDGE HEALTH CARE

**CERTIFICATE OF SERVICE**

A copy of the foregoing has been sent by regular U.S. Mail, postage prepaid, on this 3rd day of May 3, 2013, to:

Desmon Martin  
Director of Enforcement and Compliance  
Ohio Civil Rights Commission  
State Office Tower, 5th Floor  
30 East Broad Street  
Columbus, Ohio 43215-3414

Lori Anthony  
Head Civil Rights Section  
Ohio Civil Rights Commission  
State Office Tower, 5th Floor  
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Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
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Styla Carter  
1374 Curtis Street  
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Patrick H. Lewis

RECEIVED

MAY 21 2013

STATE OF OHIO  
CIVIL RIGHTS COMMISSION

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

IN THE MATTER OF:	)	
	)	COMPLAINT NO. 08-EMP-AKR-32624
STYLA CARTER,	)	
	)	
Complainant	)	ADMINISTRATIVE LAW JUDGE:
	)	DENISE JOHNSON
v.	)	
	)	
HICKORY HEALTH CARE, INC,	)	
	)	
Respondents	)	

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**REPLY IN OPPOSITION TO RESPONDENT'S OBJECTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATION**

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OFFICE OF THE ATTORNEY GENERAL  
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Complainant

The Administrative Law Judge (ALJ), based on the Record created at a two day hearing and an accurate legal analysis, determined that Styla Carter was disabled due to her asthma, that she requested the reasonable accommodation of not being subjected to cigarette smoke, and was fired rather than accommodated. Based on these conclusions, the ALJ has recommended that the Commission issue a Cease and Desist Order requiring Respondent to offer to reinstate Complainant, provide her with backpay and train its management staff on anti-discrimination law.

Respondent has objected to the ALJ's Findings of Fact, Conclusions of Law and Recommendations. Respondent insists on trying to substitute its view of the facts for that of the ALJ, argues that Complainant was not disabled, asserts that its actions were reasonable and insists that it should not be required to offer Complainant reinstatement or provide backpay for terminating her. All of these arguments are flawed, and Respondent has not provided a viable basis for the Commission to reject the ALJ's Report and Recommendation.

**I. THE ALJ IS IN THE BEST POSITION TO ASSESS CREDIBILITY OF WITNESSES**

Respondent takes exception to the ALJ's determination that she did not find Respondent's witnesses credible. (Respondent's Objections, pp. 8-9) This underlies a number of Respondent's other objections as well, with Respondent insisting that its witnesses be believed, and thus that its version of the facts be adopted by the Commission.

The ALJ was the person who sat as a neutral arbiter and personally observed all of the testimony. She observed the demeanor of the witnesses and was in the best position to make credibility assessments. As with most cases, there were many disagreements on the facts, and someone must determine who is and is not credible. The ALJ has made her assessment, and Respondent provides no basis for overturning that credibility assessment.

It should also be noted that Respondent's witnesses had serious problems with their credibility. Two of its key witnesses, Ms. Bruah<sup>1</sup> and Mr. Coleridge,<sup>2</sup> were impeached with their deposition transcripts during the hearing. (Tr. 224-226, 246-249; 339-401) Ms. Bruah lied under oath at least twice, and Mr. Coleridge at least once, which is often fatal to a witness' credibility. The ALJ reasonably concluded that someone who had lied under oath at least once on a key issue could not be believed.

As will be set out in more detail below, the record supports the ALJ's factual conclusions and therefore those conclusions should be adopted by the Commission.

## **II. THE RECORD SUPPORTS THE ALJ'S FACTUAL CONCLUSIONS.**

Respondent, in citing the testimony it wishes credited, argues the following facts: (1) Complainant had escorted residents living at Hickory Health Care outside to smoke prior to the night of July 5, 2007; (2) A Smoke Time Assignment sheet had been at the main desk for some period of time prior to July 5, so Complainant should have known that she had to have a doctor's note to avoid smoking the residents; (3) Ms. Jones did not volunteer to smoke the residents; (4) Complainant put her hand in Ms. Bruah's face when Ms. Bruah was talking; and (5) Complainant demanded, rather than asked, to speak with the Director of Nursing prior to leaving the facility as ordered. However, the Record supports the ALJ's conclusions to the contrary, and those factual determinations should be upheld. (Respondent's Objections, pp. 2-3, 6-8)

### **A. Complainant Had Not Taken The Residents Outside To Smoke During Her Employment At Hickory Health Care, Inc.**

Contrary to Respondent's claims, Complainant had not taken residents outside to smoke (known as "smoking the residents") prior to the evening of July 5, 2007, when she saw her name on the new Smoke-Time Assignment sheet.

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<sup>1</sup> Ms. Bruah was the nursing supervisor in charge of Complainant's shift on the night she was terminated.

<sup>2</sup> Mr. Coleridge was the Administrator of the facility where Complainant worked.

Shortly after she started working as an STNA at the facility, then known as Valley View, Ms. Complainant was asked to smoke the residents. She explained that she suffered from asthma and could not do so. Her request was honored. This was not a problem because there were enough STNAs who volunteered to cover the smoke breaks. While STNAs were not supposed to smoke during these breaks, many of them did smoke, and appreciated the opportunity to take what effectively became an additional smoke break. The process of determining who would smoke the residents was very informal, and often the STNAs would simply decide amongst themselves who would smoke the residents. (Tr. 43-45, 150, 163, 179-181, 191, 227, 294-296, 323, 346, 349, 384-385)

In 2005, Valley View was purchased by Hickory Health Care, Inc., and the name of the facility was changed to Hickory Ridge Nursing & Rehabilitation Center. Complainant had to re-apply for her position, but her pay, hours and duties did not change. However, smoking the residents continued to be covered by volunteers up until July 5, 2007. At no time did Complainant smoke the residents, and up until July 5, 2007, Complainant was not assigned to smoke the residents. (Tr. 27, 43-44, 48-50, 126; Comm. Exh. 6)

The fact that Complainant did not smoke the residents was supported by the testimony of Complainant, Ms. Oliver, Ms. Gaugler Ms. Sirianni and even Ms. Bruah, who admitted that she'd never seen Complainant smoking the residents. (Tr. 43, 126, 231, 274, 299, 315) Ms. Jones admitted that when she and Complainant worked together at Summer Villa, another care facility, Complainant explained that she could not smoke the residents due to her asthma. (Tr. 156)

Therefore, the Record supports the ALJ's proposed finding that Complainant had not smoked the residents prior to July 5, 2007.

**B. Prior To July 5, 2007, STNAs Were Not Assigned To Smoke The Residents, Either By An Assignment Sheet Or Instruction, But Rather The Assignment Was Filled By Volunteers.**

Respondent argues that Ms. Jones did see a Smoke Time Assignment Sheet prior to her deposition in March of 2009. Ostensibly, Respondent is arguing that such sheets were posted prior to the night of July 5, 2007, and therefore it was known that STNAs would be assigned to smoke the residents if they did not have a doctor's note absolving them from that duty.

In fact, the first Smoke Time Assignment sheet was not created until June of 2007. (Tr. 324, 345-347; Comm. Exh. 11, 12)<sup>3</sup> Furthermore, the assignments remained on a volunteer basis until July 5, 2007, with Complainant as the very first person formally assigned to that duty, and therefore she had no basis for believing she would need a doctor's note prior to that date. Assigning STNAs to smoke the residents was a definite change in policy. (Tr. 117-118, 226-228, 272-273, 323-325)

Ms. Jones, the person Respondent relies on to support its argument, testified that assignments for smoking the residents were filled by volunteers, and prior to July 5, 2007, she had never observed anyone be assigned to smoke the residents. (Tr. 150) She then testified that the Smoke Time Assignment sheet was on the main desk, and had been there for some time. At her deposition in March of 2009, she admitted she had not seen that sheet until the day of her deposition. (Tr. 150-155) Thus, her testimony as to when she first saw the Smoke Time Assignment sheet was inconsistent, confused, and does not support Respondent's argument.

The record again supports the ALJ's proposed finding and does not support Respondent's position.

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<sup>3</sup> Respondent attempts to make much of Ms. Jones' statement that she had not seen a Smoke Time Assignment sheet "in that form" prior to her deposition. However, the Director of Nursing, Ms. Garritano, testified that the sheet Ms. Jones was referring to was the very first version of a Smoke Time Assignment sheet, created in June of 2007, so no other form would have existed prior to that time. (Tr. 345-347; Exh. 11-12)

**C. Ms. Jones Did Volunteer To Smoke The Residents.**

Respondent next claims that Mercedes Jones did not volunteer to smoke the residents.<sup>4</sup>

However, the record is uncontroverted that Ms. Jones did volunteer to smoke the residents. Ms. Oliver, Ms. Bruah and Ms. Jones all testified that Ms. Jones volunteered to smoke the residents. (Tr. 130, 163 & 239) In fact, Ms. Jones' testimony was as follows:

Mr. Oppenheimer: (I)sn't it true that you believe that you did in fact volunteer to cover the smoke break at some point for Complainant?

Ms. Jones: I told her I would do the smokes.

(Tr. 163, l. 11-14)

When questioned by Respondent's counsel, she clarified that while she did volunteer, she did not directly tell Ms. Bruah that she would smoke the residents. (Tr. 169) However, Ms. Bruah said she overheard Ms. Jones say she would smoke the residents. (Tr. 239) Therefore, Ms. Bruah had an option for covering the smoke break other than demanding Complainant cover that duty. She could have had either Ms. Oliver or Ms. Jones smoke the residents that night and given Complainant the opportunity to get a doctor's note for other nights. The fact that Ms. Jones did not direct her offer to Ms. Bruah is irrelevant: she volunteered to smoke the residents and Ms. Bruah heard her volunteer, so she knew that was an option.

**D. Complainant Did Not Put Her Hand In Ms. Bruah's Face.**

On the next issue, whether Complainant put her hand in Ms. Bruah's face, there was again contradictory testimony calling for a credibility assessment. Complainant specifically testified that she did not put her hand in Ms. Bruah's face. (Tr. 69, 73) Ms. Oliver also testified that she did not see Complainant put her hand in Ms. Bruah's face. (Tr. 130) Ms. Gaugler's testimony about the conversation between Ms. Bruah and Complainant did not include a

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<sup>4</sup> Respondent does not argue that Ms. Oliver did not volunteer, thus leaving at least one person Respondent apparently agrees volunteered to smoke the residents.

statement that Complainant put her hand in her supervisor's face, but rather the two discussed the issue and once the conversation ended, Complainant walked away. (Tr. 304-305)

On the other side of the equation, Respondent cites to Ms. Jones' testimony. However, Ms. Jones simply stated that at the end of the conversation Complainant "threw her hand up and walked away." (Tr. 145) Even if this is deemed more credible than the testimony of Complainant, Ms. Oliver and Ms. Gaugler, it does not support the conclusion that she put a hand in her supervisor's face.

This objection is nothing more than Respondent once again trying to force through its version of events based on a record that does not support that position.

**E. Complainant's Request To Speak With Upper Management Was Done In An Appropriate Manner.**

Finally, Respondent takes issue with the ALJ's conclusion that Complainant asked to speak with the Director of Nursing before leaving. (Objections, p. 3) As everyone agreed that she made this request, it appears that Respondent's real issue is whether she made this request in an appropriate manner, or in a belligerent and insubordinate manner: i.e., whether she "asked" to speak with the Director or "demanded" to speak to the Director.

After Complainant was relieved of her shift, she knew that this meant her job was in jeopardy. She was not told to clock out, go home and not speak to anyone before leaving, so she asked to speak with the Director. Such a request was fully appropriate under Respondent's practices and procedures. Ms. Bruah said that Ms. Sirianni was on call, and Ms. Bruah herself made the call to Ms. Sirianni so that Complainant could talk to her. (Tr. 72-73, 212, 246, 355, 396-397)

As to Complainant's demeanor when asking to speak with the Director of Nursing, Complainant testified, exactly in line with the ALJ's determination, that she "asked" to speak with higher management. (Tr. 72) Ms. Oliver's testimony also supported this conclusion.

Mr. Oppenheimer: Did Complainant ask or demand to talk to (upper management)?

Ms. Oliver: She asked.

(Tr. 131, l. 13-15)

Ms. Bruah also agreed that Complainant asked to speak with upper management.

Mr. Oppenheimer: And Complainant asked to speak with Tammy Sirianni?

Ms. Bruah: Yes.

(Tr. 253, l. 14-16)

Ms. Gaugler was also clear that Complainant was making a request, not refusing to leave if she didn't get her way.

Mr. Oppenheimer: Did Complainant ever say I am refusing to leave if I'm not allowed to talk to someone else?

Ms. Gaugler: No. No.

(Tr. 306, l. 19-21)

Therefore, the Record once again supports the ALJ's proposed finding, and there is no reason it should not be adopted by the Commission.

### **III. COMPLAINANT'S ASTHMA IS A DISABILITY.**

Respondent next argues that Complainant was not disabled. (Respondent's Objections, pp. 3-5) However, this argument must also fail. First, Complainant's asthma was a disability. Second, on an issue that did not need to be reached below, even if she were not disabled Respondent would still have violated the law by terminating her for requesting a reasonable accommodation. Therefore, Respondent cannot show that it did not violate the law.

**A. Complainant's Asthma Was A Disability.**

Respondent, as it did before the ALJ, attempts to minimize and discount Complainant's asthma as not being a disability. However, the Record and the law establish that she was disabled.

**1. Complainant Suffers From The Impairment Of Asthma.**

Complainant suffers from asthma. Asthma is a chronic condition of the lungs that results in spasms of the muscles surrounding the small breathing tubes. During these episodes, often called "asthma attacks," the breathing tubes narrow and the person with asthma will have difficulty getting air into his or her lungs. A person experiencing an asthma attack feels a smothering sensation. (Tr. 27-31; Comm. Exh. 2; Dr. Bouchard's Evid. Depo. pp. 10-16, 20-21 & Evid. Depo. Exh. 2-4) Because Complainant has asthma she has an impairment, and thus meets the first requirement of having a disability.

**2. Complainant's Asthma Substantially Limits The Major Life Activities Of Walking, Breathing And Caring For Herself.**

When an impairment substantially limits one or more major life activities then a person meets the definition of disability pursuant to R.C. 4112.01(A)(13). This means "substantial limitations on major life activities, not utter inabilities." *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). In determining whether an individual is substantially limited in a major life activity, it is important to look at the nature, duration and severity of the impairment and the permanent or long-term impact of or resulting from the impairment. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196 (2002), *citing* 29 C.F.R. §1630.2(j).

In this case, Complainant's impairment was first diagnosed in the late 1990's. Asthma is a chronic condition that cannot be cured, only managed. Someone with asthma will have it for the rest of her life. Thus, Complainant's impairment is permanent, which supports the

conclusion that Complainant is disabled. (Dr. Bouchard's Evidentiary Depo., pp. 16-17; Tr. & Commission Exh. 2, 17, 18 & 20)

**a. Complainant's asthma substantially limits the major life activity of walking.**

Walking is specifically listed as a major life activity in R.C. 4112.01(A)(13). Complainant testified that her asthma limits her by preventing her from walking long distances, going up stairs, walking with her daughters on a nearby track or running. She has to take her children with her to the grocery store because of difficulties she might encounter at the store due to her asthma. She also has had to use motorized carts at the store. Furthermore, her children have to take laundry baskets down to the basement where the machines are, and then back upstairs because of Complainant's asthma. (Tr. 33-34, 121-122)

When a person has more than moderate difficulty walking any length of distance then she is substantially limited in the major life activity of walking. *Taylor v. Art Iron, Inc.*, 2002 U.S. Dist. LEXIS 17557 (N.D. Ohio 2002). In *Meling v. St. Francis College*, 3 F. Supp.2d 267 (E.D.N.Y. 1998), the court found that Ms. Meling was substantially limited in the major life activity of walking when she was able to walk two blocks at a time, taking 10-15 minutes to do so. *Meling*, 3 F. Supp.2d at 273-274. Furthermore, if a person is unable to perform most household chores and unable to walk sufficiently to do grocery shopping then she is substantially limited in the major life activity of walking. *Vicki Coy v. Campbell's Fresh, Inc.*, Case Number 7954, p. 16 (OCRC 1998). Thus, Complainant's asthma substantially limits her in the major life activity of walking.

**b. Complainant's Asthma substantially limits the major life activity of breathing.**

Complainant's asthma most directly impacts her breathing.<sup>5</sup> Complainant testified that the breathing issues related to her asthma cause her to be unable to wrestle with her children, walk on an exercise track with her daughters, swim or risk exposure to cigarette smoke. She also talked about the household chores she has to have her children perform because of problems her asthma causes with her breathing, including laundry, cutting grass and taking out garbage. (Tr. 33-34, 121)

Such limitations on breathing are substantially limiting. When someone must avoid cigarette smoke, sports, physical activities and household chores due to the impact asthma has on her breathing, this is sufficient to establish that the person is substantially limited in the major life activity of breathing. *Russell v. National Amusements, Inc.*, 2009 U.S. Dist. Lexis 11598, p. 11 (N.D. Ohio, 2009). It is not necessary that the asthma be symptomatic every day. *Khalil v. Rohm and Hass Company*, 2008 U.S. Dist. Lexis 10169, p. 9 (E.D. Pa., 2008). When asthma impacts a person's ability to breath to the extent that it restricts her from participating in activities outside of the workplace, this supports the conclusion that she is substantially limited in the major life activity of breathing, and therefore is disabled. *Bond v. Sheahan*, 152 F. Supp.2d 1055, 1065 (N.D. Ill., 2001).

**c. Complainant's asthma substantially limits the major life activity of caring for herself.**

Complainant also testified about how her asthma limits her in the major life activity of caring for herself, which is also listed in R.C. 4112.01(A)(13) as a major life activity. Caring for oneself encompasses activities such as cleaning and performing household chores. *Toyota Motor Manufacturing, Inc. v. Williams*, 151 L.Ed.2d 615, 634 (2002); *Ryan v. Grae & Rybicki, P.C.*,

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<sup>5</sup> Breathing is also listed in R.C. 4112.01(A)(13) as a major life activity.

135 F.3d 867, 871 (2<sup>nd</sup> Cir. 1998); *In the Matter of: City of Cleveland*, 2004, OCRC Case No. 9208, pp. 20-22. It is not necessary for a person to be completely unable to perform such tasks in order to be disabled. *Fenny v. Dakota, Minn. & Railroad Co.*, 327 F.3d 707, 715-716 (8<sup>th</sup> Cir. 2003).

Complainant testified about limitations on performing household chores such as laundry, cutting the grass and taking out the garbage. She has had to have her children perform these responsibilities. Thus, she is substantially limited in the major life activity of caring for herself. (Tr. 33-34)

### **3. The Cases Respondent Cites Do Not Demonstrate That Complainant Is Not Disabled.**

Respondent cites the same cases in its Objections that it cited to the ALJ in arguing that Complainant is not disabled. However, those cases are all factually distinguishable from Complainant's limitations.

First, Respondent cites to *Venture v. City of Independence*, 1997 U.S. App. Lexis 4102 (6<sup>th</sup> Cir. 1997). However, Mr. Venture's asthma did "not preclude() him from playing baseball and football, performing calisthenics, walking, playing the saxophone, occasionally running, singing, and water skiing." *Venture*, p. 6. This is very different from Complainant, who is much more limited than Mr. Venture.

Respondent also cites to *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718 (2<sup>nd</sup> Cir. 1994). However, in that case, Ms. Heilweil's asthma only impacted her if she worked in a particular portion of a hospital that emitted specific fumes. Furthermore, her asthma "did not bar her from exercising." *Heilweil*, 32 F.3d at 723. Again, this is different from Complainant.

Respondent cites a similar case in *White v. Honda of America Mfg., Inc.*, 241 F. Supp.2d 852 (S.D. Ohio 2003). Ms. White was also not limited in any way unless exposed to very

specific irritants. Otherwise, she was not limited in exercising, other “normal life activities” and could even smoke cigarettes. *White*, 241 F. Supp.2d at 857.

Respondent then cites to *Boone v. Reno*, 121 F. Supp.2d 109 (D.D.C. 2000). In that case Ms. Boone had applied to the FBI but was deemed unable to perform the essential functions of the job because her asthma prevented her from engaging in “physical confrontations.” The court found that not being an FBI agent and being unable to engage in physical confrontations were the only limitations her asthma imposed. *Boone*, 121 F.Supp.2d at 111-112. Again, this is very different from Complainant.

Finally, Respondent cites to *Castro v. Local 1199*, 964 F. Supp. 719 (S.D.N.Y., 1997). In that case, Ms. Castro only suffered limitations if she went outside in extreme temperatures, extreme humidity or strong winds. Otherwise her asthma did not impact her ability to perform any major life activity. *Castro* at 725.

A determination of disability is an individualized inquiry. Thus, the cases Respondent cites do not support its argument. Complainant is a person with a disability, and thus firing her for requesting a reasonable accommodation violated the law.

**B. Even If Complainant Did Not Have A Disability, Respondent Still Violated The Law When It Fired Her For Requesting A Reasonable Accommodation.**

In an issue that did not need to be reached by the ALJ, even if a person requesting an accommodation does not have a disability, it is still unlawful to terminate her for requesting a reasonable accommodation so long as she requested that accommodation in good faith.

An impressive body of Federal courts have found that taking adverse action against an employee for requesting a reasonable accommodation is unlawful. *See, e.g. A.C. v. Shelby County Board of Education*, 2013 U.S. App. Lexis 6426, 2013 Fed. App. 0086P, (6<sup>th</sup> Cir. 2013); *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 106 (1<sup>st</sup> Cir., 2007); *Mayers v.*

*Laborers' Health & Safety Fund*, 478 F.3d 364, 369 (D.C. 2007); *Cassimy v. Bd. of Educ. Of Rockford Pub. Sch.*, 461 F.3d 932, 938 (7<sup>th</sup> Cir. 2006); *Coons v. Secretary of U.S. Dept.*, 383 F.3d 879, 887 (9<sup>th</sup> Cir. 2004); *Shellenberger v. Summit Bancorp., Inc.*, 318 F.3d 183, 191 (3<sup>rd</sup> Cir. 2003); *Heisler v. Metropolitan Council*, 339 F.3d 622, 632 (8<sup>th</sup> Cir. 2003); *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249, 1264-1265 (10<sup>th</sup> Cir. 2001); and *Russell v. National Amusements, Inc.*, 21 Am. Disabilities 883 (N.D. Ohio, 2009).

This has been held to be true even if the individual did not have a disability, so long as the request was made in good faith. The “evidence . . . supports the conclusion that Ms. Selenke had a reasonable, good faith belief that she was disabled under the ADA.” *Selenke*, 248 F.3d at 1265. “An individual who is adjudged not to be a ‘qualified person with a disability’ may still pursue a retaliation claim under the ADA’ . . . as long as she had a good faith belief that the requested accommodation was appropriate . . . .” *Heisler*, 339 F.3d at 632. *Accord Coons*, 383 F.3d at 887; and *A.C.*, 2013 U.S. App. Lexis 6426, p. 26.

Therefore, even if Respondent were correct that Complainant did not have a disability, the Commission could still follow the ALJ’s recommendation that Respondent violated the law for terminating Complainant based on her requesting an accommodation.

#### **IV. RESPONDENT DID NOT ENGAGE IN THE INTERACTIVE PROCESS IN GOOD FAITH WHEN COMPLAINANT ASKED FOR THE ACCOMMODATION OF NOT SMOKING THE RESIDENTS.**

Respondent takes issue with the ALJ concluding that Respondent did not act in good faith, arguing that a policy of allowing an STNA to avoid smoking the residents if she has a doctor’s note is a *per se* good faith policy. (Respondent’s Objections, pp. 6, 7-8)

While the policy of requiring a doctor’s note may be reasonable, how that policy was put into effect in this case was unreasonable. Up until July 5, 2007, Complainant had been allowed

to avoid smoking the residents without having to submit a doctor's note because the process of assigning that duty had been very informal. The very first time Complainant was told that she had to submit a doctor's note was on the evening of July 5, 2007, when she saw her name on the Smoke Time Assignment sheet and Ms. Bruah told her she had to smoke the residents unless she had a doctor's note saying she could not. (Tr. 61-64, 117-118, 221-228, 272-273, 316, 323-325; Comm. Exh. 11, 12)

Having specific STNAs assigned to smoke the residents in the absence of a doctor's note was a change in policy. Ms. Garritano, who created the new policy in the summer of 2007, stated that the prior policy had been "unorganized and pretty chaotic." (Tr. 323, l. 24) While the new policy may have been reasonable, the way in which it was imposed on Complainant with no warning was unreasonable. (Tr. 316, 323-325, 345-346)

Respondent would suffer no hardship had Ms. Bruah allowed Ms. Oliver or Ms. Jones to smoke the residents on the night of July 5, 2007, and given Complainant a few days to get a doctor's note. It was her stubborn, unnecessary, and unreasonable refusal to do so that resulted in the instant case. Thus, Respondent's argument must be rejected.

**V. RESPONDENT SHOULD OFFER COMPLAINANT REINSTATEMENT AND PROVIDE BACKPAY DUE TO HER UNLAWFUL TERMINATION.**

Respondent argues that it should not be ordered to do anything to correct its unlawful conduct, and specifically should not have to offer Complainant reinstatement or backpay. (Respondent's Objections, pp. 9-10) To the extent this argument is based on Respondent claiming it did not violate the law, as demonstrated above, that is incorrect.<sup>6</sup> The relief the ALJ recommends the Commission order is appropriate, lawful and necessary.

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<sup>6</sup> This is Respondent's sole argument with regards to not ordering Respondent to cease and desist from unlawful conduct and to have its management staff undergo training.

R.C. 4112.05(G)(1) states that if the Commission determines that a Respondent has violated the law, then it shall issue an “order requiring the respondent to cease and desist from the unlawful discriminatory practice, requiring respondent to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, . . . reinstatement . . . with . . . back pay . . . .”

Like Title VII, one of the purposes of R.C. §4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). This “make whole” remedy provides a strong presumption in favor of reinstatement. *Ford v. Nicks*, 48 FEP Cases 1657, 1664 (6th Cir. 1989). There is also a strong presumption in favor of back pay. *Albemarle, supra*, 422 U.S. at 421. Respondent has not shown that these presumptions should be overcome in this case.

**A. Respondent Must Offer To Reinstatement Complainant**

Respondent argues that it must not be required to offer to reinstate Complainant because she might not have retained the skills and certification needed for the job. Respondent does not state that she has lost the skills or certification, only that she might have done so. However, such speculation is not a viable basis for refusing to reinstate Complainant. If she accepts the job, Respondent can ensure she has maintained the proper certification, and if she does not perform properly she can face the same discipline as anyone else. Mere speculation is not a viable basis for refusing to reinstate her.

**B. Respondent Must Provide Backpay To Complainant**

Respondent argues that the delay in the Report & Recommendation may have improperly increased the amount of backpay and interest owed to Complainant. Respondent does not state

that it made any efforts to secure a report any more quickly, nor does it provide any basis for this argument.

Furthermore, in the instant case the actual backpay amount is not affected by when the Report and Recommendation came out because Complainant did an effective job mitigating her damages. In August of 2007, the month after Respondent terminated her, Complainant accepted a job at Essex Healthcare of Tallmadge as an STNA. In January of 2008, her hours at Essex increased so that her pay was greater than what she would have been making at Hickory Ridge, and her back pay would cut off. That was well before the hearing in this matter, which was in April of 2009, so the amount of backpay is not impacted by when the ALJ's Report was issued.

This leaves Respondent arguing over a minimal amount of interest for some unidentified time. While Respondent places blame upon everyone else, it was Respondent's own actions in terminating Complainant and then refusing to voluntarily take corrective action that has created its obligation to pay Complainant.

**VI. WHILE RESPONDENT HAS THE RIGHT TO AN APPEARANCE BEFORE THE COMMISSION, IT DOES NOT HAVE THE RIGHT TO ANOTHER HEARING.**

Finally, Respondent asks for a "hearing" before the Commission. (Objections, p. 10) While it has the right to ask for an appearance to argue its position before the Commissioners, there has already been an evidentiary hearing. Witnesses testified under oath for 2 days before the Commission's ALJ, documents were submitted, and each side had every opportunity to present its case. Thus, this matter should be set for an appearance, not another hearing.

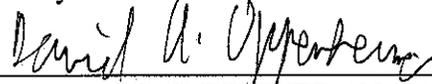
**VII. THE COMMISSION SHOULD ADOPT THE ALJ'S RECOMMENDATIONS AND ISSUE A CEASE AND DESIST ORDER.**

Styla Carter asked to not be exposed to cigarette smoke due to her asthma. Respondent could easily have granted this request, but instead terminated her for her supposed audacity in protecting her rights. The ALJ listened to two full days of testimony, observed the demeanor of the witnesses, reviewed the documents and legal arguments in this case and has issued a Report & Recommendation. This is what the Commission has appointed her to do, and Respondent has presented no basis for the Commission to reject her findings.

The Commission should issue a Cease and Desist Order adopting the ALJ's Report and Recommendations, and require Respondent to offer reinstatement, provide backpay and have its management staff undergo training on Ohio's anti-discrimination law.

Respectfully submitted,

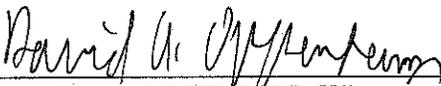
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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing REPLY IN OPPOSITION TO RESPONDENT'S OBJECTIONS has been served upon counsel for Respondent Patrick Lewis, Littler Mendelson, PC, 1100 Superior Ave., 20<sup>th</sup> Floor, Cleveland, Ohio 44114 and Complainant Styla Carter, 1374 Curtis Street, Akron, Ohio 44301 by placing said copies in the United States Mail, postage prepaid, on this 14<sup>th</sup> day of May, 2013.

  
\_\_\_\_\_  
DAVID A. OPPENHEIMER  
Assistant Attorney General  
Civil Rights Section



Governor  
John Kasich

# Ohio Civil Rights Commission

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**Board of Commissioners**

Leonard J. Hubert, Chairman  
William Patmon, III  
Stephanie M. Mercado, Esq.  
Tom Roberts  
Rashmi N. Yajnik

G. Michael Payton, Executive Director

November 29, 2013

Styla Carter  
1374 Curtis Street  
Akron, Ohio 44301

RE: Styla Carter v. Hickory Health Care, Inc.  
AKRB3(32624)07112007  
22A-2007-05541C  
Complaint No. 08-EMP-AKR-32624

The enclosed Order dismissing Complaint No. 08-EMP-AKR-32624 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting November 14, 2013.

This case is closed.

FOR THE COMMISSION

*Desmon Martin/tms*

Director of Enforcement & Compliance  
Ohio Civil Rights Commission

DM/tms  
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge  
Lori A. Anthony, Esq., Chief – Civil Rights Section



# Ohio Civil Rights Commission

Governor  
John Kasich

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**Board of Commissioners**

Leonard J. Hubert, Chairman  
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Tom Roberts

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November 29, 2013

Patrick H. Lewis, Esq.  
LITTLER, MENDLESON, P.C.  
1100 Superior Avenue, 20<sup>th</sup> Floor  
Cleveland, Ohio 44114

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*Desmon Martin/tms*

Director of Enforcement & Compliance  
Ohio Civil Rights Commission

DM/tms  
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge  
Lori A. Anthony, Esq., Chief – Civil Rights Section



John Kasich, Governor

IN THE MATTER OF: )  
 )  
 STYLA CARTER )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 HICKORY HEALTH CARE, INC. )  
 )  
 Respondent. )

COMPLAINT NO: 08-EMP-AKR-32624

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CEASE AND DESIST ORDER

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This matter came before the Commission upon Complaint and Notice of Hearing No. 08-EMP-AKR-32624; the official record of the public hearing held on April 1-2, 2009, before Denise M. Johnson, the duly appointed Chief Administrative Law Judge; all exhibits therein; the Post-Hearing Brief submitted by the Commission on February 16, 2010; the Post-Hearing Brief submitted by Respondent on March 12, 2010; the Reply Brief the Commission submitted on March 25, 2010; Judge Johnson’s Findings of Fact, Conclusions of Law and Recommendations dated April 11, 2013; Respondent’s Objections to Judge Johnson’s Findings of Fact, Conclusions

of Law and Recommendations; and the Commission's Reply in Opposition to Respondent's Objections.

The Complaint in this case alleged that Complainant is a person with a disability who worked for Respondent, requested a reasonable accommodation for her disability, and in response Respondent denied that request, instead terminating Complainant's employment. These allegations laid out a violation of R.C. 4112.02. After the public hearing, the Chief Administrative Law Judge recommended that the Commission find that Respondent did engage in unlawful conduct and order Respondent to provide the following relief:

- (1) Cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
- (2) Offer to re-instate Complainant to the position of State Tested Nursing Assistant (STNA) and, if Complainant accepts the offer, accommodate her by allowing Complainant to not be required to escort residents on smoke breaks, and pay her the wage she would have been earning had she not been terminated on July 9, 2007, but instead had continued to be employed by Respondent;
- (3) Provide the Commission with a certified check payable to the Complainant in the amount she would have earned had she not been terminated on July 9, 2007, up through the date she either begins her employment with Respondent or rejects Respondent's offer of employment, minus interim earnings. Interest shall accrue at the maximum rate allowed by law until Complainant either rejects an offer of employment or begins working for Respondent; and
- (4) Respondent's management staff shall take training on Ohio's laws against discrimination, with a focus on how to respond to requests for an accommodation of a disability.

After careful consideration of the entire record, the Commission adopted the Chief Administrative Law Judge's report at its public meeting on August 15, 2013.

With all matters now before it and carefully considered, the Commission hereby adopts and incorporates, as if fully rewritten herein, the findings of fact, conclusions of law, and recommendations contained in the Chief Administrative Law Judge's Report and Recommendation dated April 11, 2013.

This ORDER issued by the Ohio Civil Rights Commission on this 14<sup>th</sup> day of November, 2013.



Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Director of Enforcement and Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.



Desmon Martin  
Director of Enforcement and Compliance  
Ohio Civil Rights Commission

DATE: 11/29/2013