STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST:	)	
FOR REVIEW BY:	)	CHARGE NO.: 2008CF3260
		EEOC NO.: 21BA82028
	)	ALS NO.: 09-0014
YVONNE BESYK,	)	
Complainant.	)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon the Complainant's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Department") of Charge No. 2008CF3260, Yvonne Besyk, Complainant, and Bank of America Corporation, Respondent; and the Commission having reviewed *de novo* the Department's investigation file, including the Investigation Report and the Complainant's Request and supporting materials, and the Department's response to the Complainant's Request, and the Complainant's Reply; and the Commission being fully advised of the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Department's dismissal of the Complainant's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. The Complainant filed a charge of discrimination with the Department on May 15, 2008, in which she alleged that her former employer Bank of America Corporation (Respondent) had discriminated against her because of her physical disability, Trigeminal Neuralgia with Anesthesia Dolorosa (TNAD). After an investigation, on December 22, 2008, the Department dismissed the charge for Lack of Substantial Evidence. The Complainant filed a timely request for review on January 20, 2009, as well as a reply brief on March 5, 2009.

2. The undisputed evidence in the investigation file shows that the Complainant was a Credit Review Manager. The Complainant became the Respondent's employee in January of 2008 when the Respondent merged with the Complainant's former employer.

As a result of the merger, the Complainant was scheduled to be released from her position on June 30, 2008.

3. On February 5, 2008, the Complainant signed a document titled: ―Bank of America: Global Risk management WARN Notice." The Notice stated that employees who remained ―in good standing" through their termination date and who did not ―acquire another position" prior to their termination date would be eligible to receive certain severance benefits. In the case of the Complainant, upon her release from employment on June 30, 2008, she would be entitled to a severance payment of $ 74,000, which was one year's salary.

4. The Complainant worked in Chicago, Illinois. The Respondent's Credit Review LOB Manager, Richard Gantt, supervised the Complainant remotely from Texas. The Complainant also reported to Scott Thiede, who was located in California.

5. The Respondent has in place an Accommodations policy, which indicates that the employee should request the accommodation and that the Respondent's Accommodations Case Manager will then discuss the potential accommodation with the employee.

6. The Complainant's disability sometimes caused her to have painful attacks. On February 7, 2008, the Complainant sent Gantt an e-mail in which she described her condition, however she did not make any accommodation request in the e-mail. Beginning in March 25, 2008 and extending through April 29, 2008, the Complainant was on medical leave for an injury unrelated to her TNAD.

7. In March and April of 2008, the Complainant made requests to various people regarding the possibility of being granted an earlier termination date, prior to June 30, 2008, due to her medical condition. From the file, it appears that the Complainant talked specifically to Ganttt; to the Respondent's Human Resources Manager, Kathy Short, and to Andrea Friedman, SVP, Senior Credit Risk Management Executive.

8. In an e-mail dated March 16, 2008, Gantt wrote to the Complainant: ―I talked to Andrea on Friday and she said that Kathy Short from Human Resources will be calling you to discuss your request for an early departure."

9. In an e-mail dated March 17, 2008, the Complainant wrote (in part) to Gantt: ―Thank you for the message below. I had a disturbing conversation with Kathy Short this morning. She said that the release can't be done by 3/31, if at all. When I asked when it could be done, she was very evasive. When I asked what needed to occur to make the release happen, she said that first the Line needs to agree to it, then she has to talk to Legal!?!. I told her that everyone was in agreement on our end including Andrea. The legal issue apparently has to do with making sure the Bank is not accused of letting me go after discovering a disability. I assured her that this was not the case (and I would sign whatever was necessary in that regard) and the Line had already signed. I don't understand why the release isn't a cut and dry issue if we are all in agreement."

10. On March 31, 2008, the Complainant sent an e-mail to Friedman in which she stated in part: ―Hi Andrea. I spoke with Rick this morning and he passed on the news that Credit Review has decided not to release me early…I don't know how much was

passed on to you, or whether it matters in the outcome, but I hope to be able to explain my situation….I know this is only a few months time for you, but it includes some very big decisions for me, including whether to start the long-term disability process."

11. In an e-mail dated April 5, 2008 from the Complainant to Friedman, the Complainant stated: "Knowing my circumstances and that I won't be able to come back to help with the business needs I was hoping you could see your way clear to severing me early….Please let me know whether Credit Review would consider severing me following release from short term disability related to the shoulder injury. If that cannot be done, please let me know your decision and I'll begin planning my next steps with the Doctors and Metlife."

12. In the end, the Respondent advised the Complainant that, for business reasons, it could not release her prior to June 30, 2008. However, the Respondent offered the Complainant the option of going on long-term medical leave from May 2 until June 30, 2008. Had she accepted this option, the Complainant would have remained employed by the Respondent until June 30, 2008, and therefore eligible to receive her severance payment.

13. However, the Complainant declined this option. On May 2, 2008, the Complainant sent an e-mail to Gantt and Thiede in which she tendered her resignation, effective May 16, 2008. Several weeks after she resigned, the Complainant began working for a new employer.

14. On May 15, 2008, the Complainant filed her charge of discrimination with the Department, in which she alleged that the Respondent denied her reasonable accommodation when it discontinued certain accommodations that had initially been provided by her former employer—specifically, being allowed to work from home several days per week, and being provided with a room in which to wait out her attacks. The Complainant also alleged that the Respondent forced her to resign by refusing to release her early due to her disability, and that the Respondent denied her severance pay due to her disability.

15. In her Request and her Reply, the Complainant acknowledges that she did continue to work from home a few days per week, but now contends that she never sought early termination as her sole accommodation. The Complainant also contends that the Respondent did not follow its Accommodations policy because it did not assign her an Accommodations Case Manager.

16. In its Response, the Department recommends that the Commission sustain its dismissal of the charge for lack of substantial evidence because the Complainant did not meet her burden of demonstrating that she requested a reasonable accommodation for her physical disability. The Department further argues that the Respondent was not required to accommodate the Complainant by granting her an early termination, and that there was no substantial evidence that the Respondent forced the Complainant to resign prior to June 30, 2008.

17. The Commission's review of the investigation file leads it to find that the Department properly dismissed the Complainant's charge for Lack of Substantial Evidence because she failed to present evidence that she ever requested any accommodation for

her disability other than early termination. Further, there is no evidence that the Complainant was forced to resign. The Complainant voluntarily resigned prior to June 30, 2008, and thereafter began working for another employer, thus disqualifying herself from receiving her severance.

18. In order to establish a case of disability discrimination under the Act, the Complainant has the burden of proving in the first instance that she requested an accommodation:

> **Employee's Burden** – It is the duty of the individual seeking an accommodation to apprise the employer or labor organization involved of the employee's disabling condition and submit any necessary medical documentation. The individual must ordinarily initiate the request for accommodation and must cooperate in any ensuing discussion and evaluation aimed at determining the possible or feasible accommodations.
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> 56 Ill. Admin. Code Ch. II, section 2500.40(c).

19. The file shows that the Respondent was made aware of the Complainant's disability. The file shows that there was extensive communication between the Complainant and various representatives of the Respondent concerning what accommodations she sought for her disability. The file demonstrates that the Complainant only asked for early termination, as evidenced by the e-mails quoted extensively in this Order. The Complainant never referenced an alternative to early termination, even once it became clear that early termination was not option.

20. Further, while the Complainant in her Request and Reply now contends that she did want an accommodation other than early termination, there is no evidence in the file to substantiate this claim. There is no substantial evidence that the Complainant ever requested access to a room to wait out her attacks. The evidence demonstrates that the Complainant only requested early termination as an accommodation for her disability. As the Department correctly points out in its Response, there is no decisional law which provides that a reasonable accommodation for a disabled employee is in fact to grant the employee early termination from work.

21. The Complainant's other contentions, that the Respondent forced her to resign early and denied her severance payment because of her disability, are also not supported by the file. The Complainant only asked to be terminated early. The file clearly shows that this request was discussed extensively. The request was deemed not feasible for business reasons, but the Complainant was offered an alternative option: go on long-term medical leave, remain employed by the Respondent until June 30, 2008, and therefore remain eligible to collect her severance. The Complainant declined this option, resigned, and went to work for a different employer. There is simply no proof that the Respondent forced the Complainant to resign and forfeit her severance when the evidence shows that the Respondent in fact offered the Complainant a reasonable alternative to early termination.

22. Accordingly, it is the Commission's decision that the Complainant has not presented any evidence to show that the Department's dismissal of her charge was not in accordance with the Act. The Complainant's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Complainant's charge is **SUSTAINED.**

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and the Respondent, Bank of America Corporation, as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)
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HUMAN RIGHTS COMMISSION)

Entered this 22nd day of April 2009.

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini