EXHIBIT 1000-2

NORTH CAROLINA DEPARTMENT OF LABOR
STANDARDS AND INSPECTIONS
EMPLOYMENT DISCRIMINATION BUREAU

DATE: 2/1/14

TO: File

FROM: Name, Discrimination Investigator

REPORT OF INVESTIGATION

FILE NO: ### - ##
DATE FILED: 5/25/13

COMPLAINANT: Hattie Conner
200 Main Street
Raleigh, NC 27699

REPRESENTED BY: Self

RESPONDENT: Mama's Nursing Facility
100 Martin Way
Durham, NC 27713

REPRESENTED BY: Attorney B. Matlock
Matlock and Associates
PO Box 700
Garner, NC 27529

ALLEGATION: Complainant alleged she was retaliated against by Respondent because she filed a workers' compensation claim, which is a protected activity under the provisions of §95-241(a)(1)a of the North Carolina Retaliatory Employment Discrimination Act (REDA).

FINDING: No Merit

Report of Investigation

File No: ### - ##

SYNOPSIS:

Hattie Conner was terminated from her job on April 30, 2013 and filed a complaint with the DOL on May 25, 2013, within 180 days of the adverse action.

This investigation was initiated based on the timely submission of a written complaint by Hattie Conner (Complainant) alleging that she was retaliated against by Mama's Nursing Facility (Respondent) for engaging in the protected activity of filing a workers' compensation claim.

INVESTIGATIVE FINDINGS:

Complainant's Information and Allegations:

- Complainant was hired in April 2000. She worked as a CNA. See Tab C, Complainant's Questionnaire.

- Complainant was injured at work on August 1, 2012. She immediately informed the Director of Nursing and was taken for medical treatment. See Tab B, Phone Interview with Complainant (1/14/14).

- Due to developing complications from her injury, Complainant was written out of work by her doctor for much of December and January 2013. See Tab B, Phone Interview with Complainant (1/14/14).

- Complainant was permitted to return to work with restrictions as of February 14, 2013. Complainant remained on light duty restrictions until the time of termination. See Tab C, Complainant's Exhibit A (light duty note from doctor).

- Complainant was scheduled for a workers' comp related doctor appointment on April 8, 2013. However, the doctor's office cancelled the appointment. **On April 17, 2013, Complainant learned of the rescheduled date.** Complainant's appointment was rescheduled for April 29, 2013. See Tab B, Phone Interview with Complainant (1/14/14).

- Complainant was absent from work on April 29, 2014, for the rescheduled doctor appointment. Complainant alleges that she informed the floor supervisor, Nurse White, sometime the week prior to her absence. There is no witness to this conversation with White. See Tab B, Phone Interview with Complainant (1/14/14).

- Complainant states she also left a note on Abby Taylor's (the Director of Nursing) desk, letting her know of the rescheduled appointment. Ms. White was allegedly aware of the existence of this note. See Tab B, Phone Interview with Complainant (1/14/14).

- Complainant also contends that she called and spoke with a different floor supervisor, Nurse Smith, on April 28, 2013 to let her know that she would be out April 29, 2013 for a doctor's appointment. There is no witness to this call. See Tab B, Phone Interview with Complainant (1/28/14).

- Complainant was terminated from her job on April 30, 2013. Complainant believes she was fired because of her workers' compensation claim and light duty restrictions. She believes she followed Respondent's attendance policy requirements and was not really fired for that reason. See Tab B, Phone Interview with Complainant (1/14/14).

Respondent's Information and Defense:

- Respondent filed a Form 19 on August 5, 2012. See Tab D, Respondent's Exhibit A (form 19). Respondent's insurance accepted the claim for workers' compensation and worked with Complainant to schedule necessary medical appointments and treatments. See Tab D, Respondent's Exhibit B (emails coordinating medical apts.).

- Respondent has a policy in place that requires employees to call in when they are going to be absent from work. Failure to call in to report the absence results in a "no call, no show" absence being recorded. Two "no call, no shows" result in termination. Complainant was or should have been aware of this policy. See Tab D, Respondent's Exhibit C (policy and Complainant-signed acknowledgement).

- In addition to the regular aforementioned attendance policy, Complainant was required to report any absences for her workers' compensation doctor visits to the Director of Nursing *prior* to the absence. Complainant signed a statement acknowledging this requirement on February 14, 2013. See Tab D, Respondent's Exhibit D (Complainant-signed statement).

- Complainant was warned on March 11, 2013, for violating the above agreement to notify the Director, as Complainant called out, but did not report the absence to the Director before being absent. See Tab D, Respondent's Exhibit E (Complainant-signed warning for not following procedure).

- Respondent alleges that Complainant was a no-call, no show previously on September 14, 2012. Respondent alleges that Complainant was given a warning for this no-call, no show, but Complainant refused to sign it at the time. The warning reminded Complainant that she would be fired if she was a no-call, no show again. See Tab D, Respondent's Position Statement and Respondent's Exhibit F (unsigned written warning).

- Respondent claims that Complainant was a no-call, no-show again on April 29, 2013. See Tab B, Phone Interview with Respondent's Director of Nursing, Abby Taylor (1/25/14).

- The Director of Nursing, Taylor, denies having received a note from Complainant that she would be absent on April 29, 2013. See Tab B, Phone Interview with Respondent's Director

of Nursing (1/25/14).

- Respondent's Nurse White denies having spoken to Complainant the week previous to the April 29, 2013 absence and denies that she was aware of any note to the Director. See Tab D, Respondent's Exhibit F (written statement from White).

- Respondent's Nurse Smith denies that Complainant called in to work and spoke with her on April 28, 2013. See Tab D, Respondent's Exhibit G (written statement from Smith).

- Complainant had a history of tardiness and absenteeism over her years of employment. Complainant received numerous warnings over the years for tardiness specifically. See Tab D, Respondent's Exhibit H (multiple pages of previous warnings for attendance issues).

- Respondent has terminated at least 25 other employees for being no-call, no-shows in the past. See Tab D, Respondent's Exhibit I (list of employees terminated for this reason).

- Between January 1, 2012 and December 31, 2013, two other employees, besides Complainant, filed workers' compensation claims. One employee filed a claim in or around August 2012 and was let go for being a no-call, no-show on February 25, 2013. The other employee filed a claim in or around November 2013 and remains employed with Respondent as of the present date. See Tab D, Respondent's Exhibit J.

Complainant's Rebuttal:

- Complainant does not recall whether she was a no-call, no-show on or around September 14, 2012. She states that she was absent a day in September 2012, but she thought that the absence was approved ahead of time. When she returned to work, she was informed that plans had changed and that she should have been at work the day before. Respondent seemed to have expected her to show up. Complainant claims that she never received a written warning for it, however. See Tab B, Phone Interview with Complainant (1/28/14).

- Complainant admits that she did *not* speak with the Director of Nursing to discuss her rescheduled appointment, despite having known about the rescheduled date as of April 17, 2013 and having had ample time to talk to the Director. She claims she just left a note on the Director's desk approximately a week before the absence. See Tab B, Phone Interview with Complainant (1/28/14).

ANALYSIS OF ESSENTIAL ELEMENTS:

Protected Activity: Complainant engaged in the protected activity of filing a workers' compensation claim. Complainant was injured on August 1, 2012 and a Form 19 was filed on August 4, 2012.

Respondent's Knowledge: Respondent acknowledged awareness of Complainant's protected activity—the filing and light duty. Respondent filed a Form 19 on August 4, 2012.

Adverse Employment Action: Complainant was terminated from her job on April 30, 2013.

Causal Relationship: Complainant believes that she was terminated from her job for having filed a workers' compensation claim in August 2012 and for being restricted to light duty work after her return to work in February 2013.

However, Respondent has offered a plausible, legitimate non-discriminatory reason for Complainant's discharge. It appears that Complainant violated Respondent's agreement and policy regarding absenteeism. Respondent has a general policy for reporting absences—employees are to call in to report when they are going to be out of work. Furthermore, Complainant specifically had an agreement with Complainant that she would *report* any workers' compensation related absences *to the Director of Nursing*. Complainant claims that she left a note for the Director to let her know of the absence; however, the Director denies having received the note. It is important to note that in the time between April 17, 2013 when Complainant learned of her rescheduled doctor's appointment and April 29, 2013 (when she actually had the doctor's appointment), she did not speak with the Director directly, nor did she attempt to confirm that the Director had indeed received the note. In light of her previous warning a month earlier for not properly notifying the Director, it seems odd that she would not have mentioned her absence, at least in passing, after leaving the note. Moreover, the Complainant has not been able to prove that she actually left a note or that she reported her absence to any other member of management. Nurse White does not recall a note and both Nurse White and Nurse Smith deny having spoken to Complainant about her absence.

Respondent argues that Complainant's failure to follow the appropriate call-out procedure for her April 29, 2013 absence put her in violation of Respondent's no-call, no-show policy and mandated termination per policy. Respondent had a policy in place that provided for termination for an employee who was absent but failed to call out of work (was a no-call, no-show) on two separate occasions. Respondent states that in addition to her no-call, no-show on April 29, 2013, Complainant was also a no-call, no-show previously on September 14, 2012 and had received a written warning for the absence. As such, Respondent claims that termination was warranted upon the second violation. Complainant did not sign the alleged warning in September 2012, which suggests that she may not have received it as Respondent claims. However, Complainant admits that she was spoken to about having been absent at the time without permission. Even though she believed her absence in September to have been approved ahead of time, her admission that she was talked to about having been a no-call, no-show that day in September is evidence that Complainant should have been on notice that any future no-call, no-shows could be a problem.

Though Respondent has presented a legitimate, nondiscriminatory reason for termination, it is necessary to consider whether this reason is a pretext. First, the timing should be considered. Complainant filed a workers' compensation claim almost 8 months prior to her termination, so based on the timing of the filing, it is unlikely that the filing itself led to her termination. Too much time lapsed. That being said, however, a workers' compensation related event occurred as late as February 14, 2013--Complainant returned to work and was put on light duty at that time. Since this

event occurred only about 2.5 months prior to termination, other evidence of possible pretext shall be considered.

Specifically, it's important to consider whether Respondent showed any animus toward the protected activity or whether Respondent treated Complainant differently than similarly situated employees. First, Respondent appears to have approved the workers' compensation claim, worked with Complainant to schedule necessary medical treatment, and permitted light duty work—which suggests a lack of *animus* toward her workers' compensation claim. Second, another employee who filed for workers' compensation remains employed this day. Though this person filed her workers' compensation claim after Complainant was terminated and filed her REDA complaint, the fact that the other employee remains employed is still relevant as somewhat of an indicator of lack of *animus* toward employees who file workers' compensation. Lastly, Respondent has fired at least 25 other employees for being no-call, no-shows in the past. It seems that Respondent follows a strict no-call, no-show policy and terminates employees in violation of that policy. This shows that Complainant was not treated any differently than other employees who were no-call, no-shows. Both the lack of animus and equal treatment among no-call, no-show employees suggest lack of pretext and support Respondent's claim for a legitimate, non-discriminatory reason for termination.

As such, the greater weight of the evidence does not support Complainant's claim for retaliatory discharge as a result of her workers' compensation claim and light duty restriction.

DISPOSITION:

This complaint is dismissed and Complainant issued a right-to-sue letter. Complainant and Respondent's attorney were notified accordingly.