



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**EILEEN M. BABICH,**

Complainant,

v.

**THOMAS HARTMAN FOUNDATION FOR  
PARKINSON'S RESEARCH, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10141127

Federal Charge No. 16GB003214

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on March 10, 2014, by Robert M. Vespoli, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

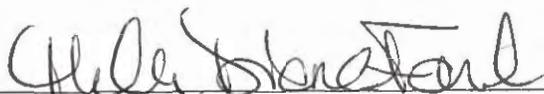
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **APR 16 2014**  
Bronx, New York

  
HELEN DIANE FOSTER  
ACTING COMMISSIONER



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**THOMAS HARTMAN FOUNDATION FOR  
PARKINSON'S RESEARCH, INC.,**

Respondent.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. 10141127

**SUMMARY**

Complainant alleged that Respondent unlawfully discriminated against her because of her marital status by denying her medical benefits. Complainant also alleged that Respondent terminated her employment because of her disability and because she opposed unlawful discriminatory practices. Because Complainant failed to sustain her burden of proof, the complaint must be dismissed.

**PROCEEDINGS IN THE CASE**

On April 29, 2010, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on November 8, 2013.

Complainant and Respondent appeared at the hearing. The Division was represented by Sandra S. Oneil, Esq. Respondent was represented by Michael A. Miranda, Esq.

Permission to file post-hearing briefs was granted. The Division and Respondent filed timely post-hearing briefs which were considered and, where appropriate, adopted.

#### **FINDINGS OF FACT**

1. Respondent was a non-profit corporation that received grants and contributions to promote and support research to find a cure for Parkinson’s disease. (Complainant’s Exh. 22)
2. Respondent has no assets, has filed for dissolution with the New York State Department of State, and is no longer conducting business. (Tr. 19-20)
3. The Division has been unable to identify any entities that could be deemed to be successors in interest to Respondent. (Tr. 20)
4. In 2004, Complainant began working for Respondent as a part-time office assistant. At that time, Respondent employed four individuals. (Tr. 20, 27-28)
5. At all relevant times, Complainant “was fully covered under her husband’s employer’s (UPS) family health insurance for any medical treatment she needed.” (Joint Exhibit 1)
6. In September 2007, Kathleen Scarpinella became Respondent’s president. (Tr. 214)

7. At that time, Scarpinella hired Complainant as a full-time office assistant. (Tr. 31-32, 222)

8. Scarpinella was Complainant's only supervisor. (Tr. 261)

9. Scarpinella informed Complainant that she was eligible to receive medical benefits from Respondent. (Tr. 278)

10. Complainant declined the offer of medical benefits because she was covered under her husband's UPS family health insurance plan. Complainant told Scarpinella that she would like to receive a pay increase in lieu of medical benefits from Respondent. (Tr. 278-79)

11. Scarpinella then increased Complainant's hourly rate of pay from \$19.00 per hour to \$23.00 per hour. (Tr. 31-32, 278)

12. In or about September 2007, Scarpinella hired her daughter-in-law, Melissa Scarpinella ("Melissa"), as a part-time employee of Respondent. (Tr. 32-34)

13. At that time, Respondent employed four individuals: Scarpinella, Complainant, Melissa, and John Pavone, a part-time bookkeeper. (Tr. 33, 224)

14. In February 2008, after Pavone left Respondent's employ, Respondent hired Doris Viola as a full-time bookkeeper. (Tr. 34-35, 228, 230)

15. Until the time that Respondent terminated Complainant's employment in March 2010, Respondent employed four individuals. (Tr. 43-44, 168, 300-01; ALJ's Exh. 1; Complainant's Exh. 22)

16. Complainant assisted in the hiring of Viola for the bookkeeper position. Scarpinella gave Complainant a sheet of paper outlining the work hours for the position as well as the pay and medical benefits that Respondent offered. (Tr. 35-36)

17. I do not credit Complainant's allegation that this was the first time she became aware that Respondent offered medical benefits to its employees. (Tr. 36)

18. Complainant alleged that she subsequently approached Scarpinella and asked why she was not being offered the same medical benefits as Viola. (Tr. 36) At the hearing, Complainant testified that Scarpinella told her that Respondent's medical benefits were only offered to single employees. (Tr. 37) However, in her complaint, Complainant asserted that Scarpinella told her that she was not receiving medical benefits because "[Complainant] had a husband who was providing [her] with benefits." (ALJ's Exh. 1)

19. I do not credit Complainant's allegation that she continuously asked Scarpinella about the availability of medical benefits from February 2008 until January 2010. (Tr. 40)

20. Viola elected to receive medical benefits and was paid \$18.00 per hour at the time that she was hired. (Tr. 164, 229-30)

21. In July 2008, Scarpinella increased Complainant's pay to \$28.00 per hour. (Tr. 142)

22. In October 2008, Complainant had sinus surgery. (Tr. 211; ALJ's Exh. 1) Around that time, Complainant asked Scarpinella about the availability of medical benefits. Scarpinella reminded Complainant that Respondent paid her a higher hourly rate because she did not receive medical benefits. (Tr. 139)

23. Scarpinella told Complainant that Respondent would provide her with medical benefits, but her hourly rate of pay would have to be reduced. (Tr. 232; ALJ's Exh. 1)

24. Complainant told Scarpinella that she would rather receive the higher pay. (Tr. 232)

25. Although Complainant regularly attended meetings with Respondent's board of directors ("BOD"), she acknowledged that she never raised the issue regarding health care availability with the BOD. (Tr. 146-47)

26. In late 2009, Scarpinella asked Viola and Complainant if they were willing to work one day less per week while Respondent's fund raising activity was slow. (Tr. 160-61, 289-90; Respondent's Exh. 3) At that time, Viola agreed to this proposal; Complainant did not. (Tr. 234, 289-90)

27. In January 2010, Complainant wrote a letter to Scarpinella asking if she could reduce her work hours from forty hours per week, four days per week, to thirty hours per week, three days per week. (Tr. 155-56, 235; Respondent's Exh. 3) Complainant also asked for a raise in pay to help compensate for the reduced hours. (Tr. 161, 235; Respondent's Exh. 3)

28. I do not credit Complainant's allegation that, in January 2010, at the same time that she asked for a raise in pay and a reduction in her work hours, she also complained to Scarpinella that she did not receive medical benefits from Respondent. (Tr. 41, 166, 235; ALJ's Exh. 1)

29. In her January 2010 letter, Complainant did not mention the subject of medical benefits. (Tr. 163, 165; Respondent's Exh. 3)

30. Scarpinella denied Complainant's request to reduce her work hours and increase her pay. (Tr. 162, 235-36)

31. Subsequently, Scarpinella observed that Complainant became "angry." Complainant's work performance began to deteriorate because she was unhappy that Scarpinella had denied her request for reduced hours and an increase in pay. (Tr. 233, 235-37, 241)

32. Complainant's deteriorating work performance included refusing to answer telephone calls and frequent errors inputting data into Respondent's honoree lists, mailing lists, and other important donor information lists. Complainant also refused to follow Scarpinella's instructions to make donor solicitation calls, update Respondent's website, and prepare a list of responsibilities for volunteers. (Tr. 237-38, 240-50, 253-54; Respondent's Exh. 4)

33. On Wednesday, March 10, 2010, Scarpinella spoke to Complainant about her work performance issues. Scarpinella told Complainant that she was not happy with Complainant's declining work performance and that Complainant was "working herself out of a job." (Tr. 250-54; ALJ's Exh. 1)

34. Complainant did not accept responsibility for her poor work performance. (Tr. 254)

35. After this conversation, Complainant went outside of the office. Complainant then returned to the office with a tissue on her nose. Complainant told Scarpinella that her nose was bleeding, and she left work for the day. (Tr. 252)

36. Scarpinella did not observe any blood coming from Complainant's nose. (Tr. 252)

37. Complainant did not come to work on Thursday, March 11, 2010, because she had a doctor's appointment. (Tr. 256; Complainant's Exh. 2)

38. Complainant was not scheduled to work on Friday, March 12, 2010. (Tr. 256)

39. Shortly after the March 10 conversation between Scarpinella and Complainant, Scarpinella contacted John Danzi, the chairman of Respondent's BOD. Scarpinella informed Danzi that Complainant's work performance was substandard, that Complainant refused to be accountable for her deficiencies, and that Complainant's poor attitude was causing discord in the workplace. (Tr. 256-58; Respondent's Exh. 7)

40. Scarpinella informed Danzi that she wanted to terminate Complainant's employment on Monday, March 15, 2010, Complainant's next scheduled day of work. Danzi approved the termination of Complainant's employment. Scarpinella was prepared to terminate Complainant's employment on March 15. (Tr. 257-58; Respondent's Exh. 7)

41. On the evening of Sunday, March 14, 2010, Complainant sent an e-mail to Respondent which included a letter from her doctor, Robert W. Baker. In his letter, Dr. Baker stated that

Complainant was experiencing physical symptoms such as palpitations, shortness of breath, anxiety, and disrupted sleep. Dr. Baker believed that these symptoms were the result of “significant job-related stress,” and he recommended that Complainant take a two week leave of absence so she could “restore herself.” (Tr. 182; Complainant’s Exh. 4)

42. Dr. Baker’s letter did not mention that Complainant had a bloody nose. (Complainant’s Exh. 4)

43. Respondent granted Complainant’s request for a leave of absence. (Tr. 182-83, 259)

44. At the public hearing, Complainant proffered an undated affidavit from Karin Sabbeth, a licensed clinical social worker, which was notarized on October 31, 2013. Sabbeth met with Complainant on March 22, 2010. (Tr. 70; Complainant’s Exh. 7)

45. Sabbeth diagnosed Complainant as having acute adjustment disorder with anxiety. (Complainant’s Exh. 7)

46. The record does not establish that Sabbeth’s diagnosis was communicated to Respondent while Complainant was employed by Respondent.

47. On March 29, 2010, Complainant returned to work without restrictions. Complainant did not request any accommodations from Respondent to perform her job. (Tr. 183-84)

48. On March 29, 2010, Scarpinella terminated Complainant’s employment. (Tr. 21, 259) Scarpinella informed Complainant that her employment was being terminated because her work performance was deficient, she did not accept responsibility for her performance deficiencies, and her negative work attitude was creating conflict in the workplace. (Tr. 260)

### OPINION AND DECISION

N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 292.5 states that “[t]he term ‘employer’ does not include any employer with fewer than four persons in his or her employ.” The record establishes that Respondent employed four individuals at all relevant times. Accordingly, Respondent is deemed to be an employer under the Human Rights Law.

It is unlawful for an employer to discriminate against an employee on the basis of marital status or disability. Human Rights Law § 296.1(a). Complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondent’s actions occurred under circumstances giving rise to an inference of unlawful discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The burden then shifts to Complainant to show that Respondent’s proffered explanations are a pretext for unlawful discrimination. *Ferrante v. Am. Lung Ass’n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

After considering all of the evidence presented and evaluating the credibility of the witnesses, I find that the record does not support a finding that Respondent acted in an unlawful manner.

Complainant alleged that Respondent unlawfully discriminated against her because of her marital status by denying her medical benefits. This claim cannot be sustained.

Complainant was married during the relevant time period, and she was qualified for the position of office assistant, a position that she held for several years. However, Complainant has

not established that she suffered an adverse employment action. Respondent did not deny medical benefits to Complainant. Scarpinella told Complainant that Respondent would provide her with medical benefits, but her hourly rate of pay would have to be reduced. Complainant received medical benefits from her husband's employer, and she voluntarily declined medical benefits from Respondent in order to receive a higher hourly rate of pay. The record shows that Complainant was paid a significantly higher hourly rate than Viola, who elected to receive medical benefits from Respondent.

Even if Respondent prohibited its employees from receiving medical benefits when their spouses received family medical benefits from a different employer, this would not constitute unlawful discrimination on the basis of marital status. *See Beck, et al. v. Greater Johnstown School District*, DHR Case No. 1200691, et al. (December 29, 2006) (no marital status discrimination where the "disqualifying factor, the [employee]'s double coverage, is distinguishable from the marital status of the participating [employee].").

Accordingly, Complainant's claim of unlawful discrimination based on marital status is dismissed.

Complainant also alleged that Respondent terminated her employment because of her disability. Complainant has not established a prima facie case of disability discrimination.

A disability is defined under the Human Rights Law as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are

merely “diagnosable medical anomalies.” *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

On the evening of Sunday, March 14, 2010, Complainant sent an e-mail to Respondent which included a letter from Dr. Baker. In his letter, Dr. Baker stated that Complainant was experiencing physical symptoms such as palpitations, shortness of breath, anxiety, and disrupted sleep. Dr. Baker stated his belief that these symptoms were the result of “significant job-related stress,” and he recommended that Complainant take a two week leave of absence so she could “restore herself.” On March 22, 2010, Sabbeth diagnosed Complainant as having acute adjustment disorder with anxiety. This condition qualifies as a disability under the Human Rights Law. However, there is nothing in the record showing that Respondent was aware of this diagnosis during the relevant time period. Moreover, Scarpinella decided to terminate Complainant’s employment even before she received Dr. Baker’s letter on March 14 stating that the symptoms experienced by Complainant were the result of “significant job-related stress.”

Even if Complainant successfully established a prima facie case of disability discrimination, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. In or about January 2010, well before Complainant went out on a leave of absence in March 2010, Complainant began to express anger at work. Complainant’s work performance began to deteriorate because she was unhappy that Scarpinella had denied her request for reduced hours and an increase in pay.

Before Complainant took her leave of absence, Scarpinella told Complainant that she was not happy with Complainant’s work performance and that Complainant was “working herself out of a job.” Complainant did not accept responsibility for her poor work performance. As a result, Scarpinella decided to terminate Complainant’s employment because her work performance was

deficient, she did not accept responsibility for her performance deficiencies, and her negative work attitude was creating conflict in the workplace.

The burden then shifts back to Complainant to show that this reason is a pretext for unlawful discrimination. Complainant has failed to meet her burden. Therefore, Complainant's claim of disability discrimination must be dismissed.

Finally, Complainant alleged that Respondent retaliated against her by terminating her employment after she complained that Respondent denied her medical benefits. The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

Complainant cannot establish a prima facie retaliation claim because she did not show that she engaged in protected activity. I do not credit Complainant's allegation that she continuously asked Scarpinella about the availability of medical benefits from February 2008 until January 2010. Similarly, I do not credit Complainant's allegation that, in January 2010, at the same time that she asked for a raise in pay and a reduction in her work hours, she also complained to Scarpinella that she did not receive medical benefits from Respondent.

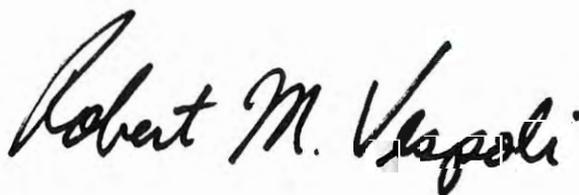
Even assuming, *arguendo*, that these allegations are true, they cannot sustain a claim of unlawful retaliation. Complainant alleged that she began continuously complaining that she did not receive medical benefits from Respondent over two years before Respondent terminated her employment. During that time, she received an increase in pay and her employment continued without incident. It was not until Respondent denied her request for an increase in pay and a reduction of work hours that Respondent terminated her employment. These facts could not support an actionable claim that Respondent was motivated by unlawful retaliatory animus when it terminated Complainant's employment.

**ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the instant complaint be, and the same hereby is, dismissed.

DATED: March 10, 2014  
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli  
Administrative Law Judge