



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

LAURA M. BAXTER,

Complainant,

v.

**SUFFOLK COUNTY, DEPARTMENT OF SOCIAL
SERVICES,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10156074

Federal Charge No. 16GB203768

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 April 11, 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, 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: **AUG 04 2014**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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**SUFFOLK COUNTY, DEPARTMENT OF
SOCIAL SERVICES,**

Respondent.

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

Case No. **10156074**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her because of her disabilities and retaliated against her because she opposed discriminatory practices. Because the record does not support Complainant's allegations, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On June 28, 2012, 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 was held on December 18-19, 2013.

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

Permission to file post-hearing briefs was granted. Respondent filed a post-hearing brief.

FINDINGS OF FACT

1. On July 11, 2011, Complainant was appointed to work for Respondent as a social services examiner I (“SSE I”). (Tr. 13, 16; Complainant’s Exh. 1)
2. This appointment was subject to a twenty-six week probationary term. (Tr. 15, 155; Complainant’s Exh. 1)
3. Complainant’s responsibilities as a SSE I included interviewing and obtaining information from clients in order to determine whether they qualified for financial assistance and support services. (Tr. 13)
4. Complainant began working for Respondent with a group of other trainees at the Mary Gordon Building in Hauppauge, New York. (Tr. 13-15)
5. After two weeks, Respondent transferred Complainant and her training group to Respondent’s facility in Deer Park, New York, for additional training. (Tr. 16-17)

6. Cheryl Varley and Christine Palmer supervised Complainant at the Deer Park facility. (Tr. 16)

7. Respondent provided training to Complainant at the Deer Park facility. This training included one-on-one training sessions with supervisory personnel, offsite training programs, observing another experienced worker in the performance of her job duties, and continued training and feedback from Respondent's training personnel. (Tr. 17-19, 221, 223-24, 227-28, 242-43, 250-51, 255; Complainant's Exh. 2)

8. Complainant testified that, on or about July 21, 2011, during her first week at the Deer Park facility, she was admitted to the emergency room at a local hospital and had a cyst removed from the side of her head. (Tr. 20-21) The record does not contain any medical documentation providing a diagnosis for Complainant's alleged disabilities.

9. Complainant went home early the following morning and called Palmer to inform her that she could not go to work. (Tr. 21-22)

10. Palmer credibly denied Complainant's claim that she threatened to terminate Complainant's employment if Complainant did not return to work. (Tr. 22-23, 247, 259; ALJ's Exh. 1)

11. Palmer did not have the authority to terminate Complainant's employment. (Tr. 247, 254)

12. Complainant provided contradictory statements regarding this claim. In the instant complaint, Complainant averred that Palmer "basically led her to believe" that her employment would be terminated because she called in sick. (ALJ's Exh. 1) At the public hearing, Complainant testified that Palmer explicitly threatened to terminate her employment if she did not return to work. (Tr. 23)

13. On or about July 26, 2011, Complainant returned to work. (Tr. 25-27)

14. Respondent provided Complainant with one-on-one training sessions to make up for training that Complainant missed during the days that she was out of work. (Tr. 220-23, 255; Complainant's Exh. 2)

15. In August 2011, Respondent sent Complainant and her co-workers to Albany, New York, for two weeks of additional training. (Tr. 29, 160-61, 226-27, 242-44)

16. Complainant and her co-workers went to the Albany training in two separate groups. While one group of trainees was in Albany, the other group stayed at the Deer Park facility and worked on their interviewing skills. (Tr. 243-44, 260)

17. All of the trainees received the same training pursuant to a pre-approved curriculum. (Tr. 242, 260)

18. Complainant's work performance at the Deer Park facility was substandard. (Tr. 223-24, 244-45, 247-57)

19. In August 2011, Complainant's supervisors distributed e-mail messages regarding deficiencies in Complainant's work product. (Tr. 223-24, 255-56)

20. On or about August 29, 2011, Complainant received her first performance evaluation. (Tr. 48, 157; Complainant's Exh. 2) This standard eight-week evaluation provided ratings for eleven different "job factors." Complainant received a rating of "meets expectations" for three job factors: "punctuality," "attendance," and "public contact." Complainant received a rating of "needs improvement" for two job factors: "initiative" and "quantity" of work. Complainant received a rating of "unsatisfactory" for six job factors: "cooperation," "job knowledge," "organization of work," "quality" of work, "reliability," and "supervision." (Complainant's Exh. 2)

21. The performance evaluation addressed Complainant's work deficiencies in substantial detail. The evaluation concluded by stating that Complainant's identified work deficiencies "hinder case production and case accuracy, cause delays in application processing and the issuance of benefits to needy families and individuals, and may also result in inappropriate authorizations or denials being issued. It is essential that [Complainant] immediately demonstrate improvement in the identified areas." (Complainant's Exh. 2)

22. On August 30, 2011, the day after she received her first evaluation, Complainant went out of work on medical leave until March 27, 2012. (Tr. 81, 157, 159; Complainant's Exh. 4)

23. Complainant testified that she took this medical leave because she was experiencing high blood pressure, kidney stones, neurological testing, and a heart condition. These medical conditions were not related to the medical condition which caused Complainant to take her first medical leave at the end of July 2011. (Tr. 74-75, 157) The record does not contain any medical documentation providing a diagnosis for Complainant's alleged disabilities.

24. By letter to Respondent's Commissioner dated September 1, 2011, Complainant submitted a lengthy, disjointed response to the performance evaluation. (Tr. 77; Complainant's Exh. 5) This response contains, among other things, conclusory allegations of a "violation of HIPPA [*sic.*]," "deformation [*sic.*] of [Complainant's] character," and "discrimination against someone with a disability." This letter concludes with Complainant's request for a job transfer. (Complainant's Exh. 5)

25. Respondent notified Complainant that her probationary period must be extended to cover the time period that Complainant was out of work on medical leave. (Tr. 78, 166; Complainant's Exh. 4)

26. On March 23, 2012, Complainant presented Respondent with a doctor's note authorizing her to return to work without restrictions. (Tr. 165-66)

27. Complainant acknowledged that she did not ask Respondent for any accommodations to help her perform her job duties. (Tr. 163-64, 168)

28. When Complainant returned to work on March 27, 2012, Respondent assigned her to a different work site located in Smithtown, New York. Complainant was no longer under the supervision of either Varley or Palmer. (Tr. 81-83, 159, 166-67)

29. Veronica Robinson and Lisa Badagliacca were Complainant's supervisors at the Smithtown facility. (Tr. 82-83, 187)

30. At the Smithtown facility, Complainant worked on public assistance programs that were different than those she worked on at the Deer Park facility. (Tr. 168-69)

31. Respondent provided Complainant with the same training that other SSE I trainees received at the Smithtown facility. (Tr. 272, 278-79, 282) Badagliacca assigned Complainant to work directly with different workers for two days to learn how to process cases. Badagliacca also personally provided Complainant with one-on-one training for two days. Complainant then watched Badagliacca interview clients. Badagliacca also watched Complainant perform client interviews and provided her with relevant feedback. (Tr. 271-73)

32. Robinson also provided one-on-one training to Complainant for several days. (Tr. 283)

33. Badagliacca gave Complainant additional one-on-one training after Complainant's first week of work at the Smithtown facility. Badagliacca also answered Complainant's questions and provided Complainant with notes on how to handle specific cases. (Tr. 272-73)

34. Respondent provided Complainant with the same work supplies that it provided to other SSE I trainees. (Tr. 280)

35. Complainant's attendance at the Smithtown facility was "very poor." Complainant was absent from work twenty of her next thirty work days after returning from her medical leave. (Tr. 273; Complainant's Exh. 12; Respondent's Exh. 4)

36. Because Complainant did not have sufficient leave accruals to cover her absences, Respondent recorded these absences as "leave without pay." (Tr. 188; Complainant's Exh. 12)

37. Complainant's work performance at the Smithtown facility was substandard. (Tr. 188-89, 277-87; Complainant's Exh. 12)

38. On May 11, 2012, Badagliacca prepared Complainant's performance evaluation. (Tr. 281-82; Complainant's Exh. 12) Complainant received a rating of "meets expectations" for three job factors: "punctuality," "cooperation," and "public contact." Complainant received a rating of "unsatisfactory" for eight job factors: "attendance," "job knowledge," "initiative," "organization of work," "quality" of work, "quantity" of work, "reliability," and "supervision." (Complainant's Exh. 12)

39. Complainant's substandard work performance and excessive absences caused problems at Respondent's understaffed Smithtown facility. This made it very difficult for other employees there to help Respondent's needy clients obtain benefits in a timely fashion. (Tr. 278, 282; Complainant's Exh. 12)

40. The May 11, 2012, performance evaluation addressed Complainant's work deficiencies in great detail. This evaluation concluded by stating that Complainant's poor work performance "hinders case production and case accuracy, causes delays in benefits issuance decisions, and may result in authorizations or denials being issued with incorrect food stamp benefits. It also prevents the clients from receiving their benefits in a timely manner." Accordingly, Badagliacca did not recommend that Complainant be retained as a SSE I. (Complainant's Exh. 12)

41. As a result of this performance evaluation, Respondent terminated Complainant's employment on May 11, 2012. (Tr. 188-89; Complainant's Exh. 13)

OPINION AND DECISION

Complainant alleged that Respondent discriminated against her because of her disabilities and retaliated against her by denying her training, subjecting her to a hostile work environment, denying her leave time, issuing negative evaluations to her, and terminating her employment. For the reasons discussed more fully below, this claim is dismissed.

It is unlawful for an employer to discriminate against an employee on the basis of disability. N.Y. Exec. Law, art. 15 ("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).

In order to sustain a claim of discrimination based on a hostile work environment, Complainant must demonstrate that she was subjected to conduct that produced a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working

environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50-51, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant also alleged that Respondent subjected her to unlawful retaliation. It is unlawful for an employer to retaliate 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 protected activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse employment 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).

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

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.

Complainant offered only conclusory, self-serving testimony about her alleged disabilities. Complainant did not produce any medical documentation establishing that she suffered from a condition or conditions “varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity.” *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Moreover, Complainant’s alleged disabilities prevented her from performing her job duties in a reasonable manner. Human Rights Law § 292.21. The Human Rights Law is “designed to prevent discrimination against a person who has a disability but who is or can be a productive worker.” *Giaquinto v. New York Tel. Co.*, 135 A.D.2d 928, 928-29, 522 N.Y.S.2d 329, 330 (3d Dept. 1987), *lv. denied*, 73 N.Y.2d 701, 535 N.Y.S.2d 595 (1988) (citations omitted).

Complainant’s attendance at work was very poor. Complainant began her employment with Respondent on July 11, 2011. She missed several work days that month. On August 30, 2011, the day after she received her first performance evaluation, Complainant went out of work on medical leave for almost seven months. On March 27, 2012, Complainant returned to work at the Smithtown facility. Complainant then missed twenty of her next thirty work days leading up to the termination of her employment. Complainant’s excessive absences and substandard work performance at the Smithtown facility made it very difficult for Respondent’s other employees to adequately service individuals in immediate need of assistance. Under these circumstances, Respondent could lawfully terminate Complainant’s employment because her continued,

excessive absences prevented her from performing her job in a reasonable manner. *Id.* at 929, 522 N.Y.S.2d at 330-31.

Even if Complainant could establish a *prima facie* case of disability discrimination, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons.

Complainant received appropriate training from Respondent. This training included one-on-one training sessions with other workers and supervisory personnel; offsite training programs; and ongoing training, feedback, and case processing notes from supervisory personnel. The record does not show that Complainant received less training than similarly situated employees.

Complainant acknowledged that she did not request any accommodations for her alleged disabilities. Nevertheless, Respondent provided Complainant with a substantial amount of leave for her alleged medical conditions. Respondent also provided Complainant with training sessions to make up for training that Complainant missed while she was out of work. The record also shows that Respondent granted Complainant's request for a transfer after she returned from a long period of medical leave.

Respondent terminated Complainant's employment because her work performance was consistently deficient in key areas. These performance deficiencies were addressed in substantial detail in performance evaluations prepared by different supervisors at different work locations. The supervisors who prepared these evaluations had firsthand knowledge of Complainant's work product and the training that was provided to Complainant. There is nothing in the record supporting Complainant's conclusory allegations that these evaluations were unwarranted or that they were motivated by unlawful discriminatory animus.

The burden then shifts to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet her burden.

Next, the record does not support a showing that Respondent subjected Complainant to a hostile work environment because of her alleged disabilities or because she opposed discriminatory practices. Notably, Complainant proffered testimony at the public hearing that was inconsistent with the allegations contained in the instant complaint regarding her interactions with Palmer while she was out of work in July 2011. Whether this inconsistency was caused by Complainant's faulty memory or an intentional lack of honesty, it diminished her credibility. Complainant's self-serving, unsupported allegations cannot establish her hostile work environment claim.

Finally, Complainant alleged that Respondent subjected her to unlawful retaliation after she submitted her September 1, 2011, response letter to her first performance evaluation. This claim is not supported in the record. Assuming that Complainant's September 1, 2011, response letter constitutes protected activity, Complainant has not provided any direct or indirect proof establishing a causal connection between the protected activity and the alleged adverse employment actions.

Even if Complainant could establish a prima facie retaliation case, Complainant's retaliation claim must fail. For the reasons discussed more fully above, Respondent has presented legitimate, nondiscriminatory reasons in support of its actions.

Complainant has failed to show that Respondent's proffered reasons are a pretext for unlawful retaliation.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant cannot rely

on supposition and conclusory allegations to satisfy this burden. *Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

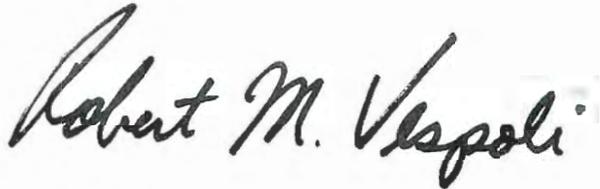
Complainant has failed to meet her burden. Accordingly, the instant complaint must be dismissed.

ORDER

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

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

DATED: April 11, 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