

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

MILAGROS GUARDADO,

Complainant,

v.

BARTON L. SCHNEYER, M.D., PLLC,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10117960

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 November 18, 2008, 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.

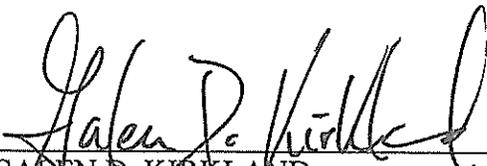
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **JAN 22 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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**MILAGROS GUARDADO,**

Complainant,

v.

**BARTON L. SCHNEYER, M.D., PLLC,**

Respondent.

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

Case No. **10117960**

**SUMMARY**

Complainant alleged that Respondent unlawfully discriminated against her by terminating her employment because of her pregnancy. Since the record does not support Complainant's allegations, the instant complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On May 22, 2007, 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 June

11, 2008. Complainant and Respondent appeared at the hearing. The Division was represented by Darin Bazar, Esq. Respondent was represented by Sima Asad Ali, Esq.

Respondent's supplemental answer was verified on the record by Dr. Barton L. Schneyer *nunc pro tunc*. (Tr. 273; ALJ's Exh. 3)

Respondent filed a timely post-hearing brief. Neither the Division nor Complainant filed a post-hearing brief.

### FINDINGS OF FACT

1. Dr. Barton L. Schneyer is a physician who has been practicing pulmonary and critical care medicine for approximately 29 years. (Tr. 247-48)
2. Complainant began working for Dr. Schneyer on or about June 19, 2000 as a full-time medical assistant. (Tr. 25, 160) At that time, Dr. Schneyer practiced medicine in a partnership with another physician. (Tr. 22, 252)
3. In or about June 2005, Dr. Schneyer began a solo practice under Respondent's name. (Tr. 34-35, 252) At that time, Complainant became employed by Respondent and continued to work for Dr. Schneyer as a full-time medical assistant. (Tr. 33-34, 160)
4. Complainant was qualified to work for Respondent as a medical assistant. (Tr. 17)
5. Dr. Schneyer's wife, Gina Schneyer ("Gina"), is the office manager for Respondent and was the office manager when Complainant began working for Dr. Schneyer in 2000. (Tr. 25)
6. Complainant was pregnant twice during her employment with Dr. Schneyer in his previous practice. (Tr. 29-33) Each time, Complainant informed Gina that she was pregnant and Gina completed the necessary forms for Complainant. (Tr. 31, 33)

7. Complainant went out on maternity leave during her first pregnancy in March 2002 and returned to her prior position approximately 8 or 9 weeks later. (Tr. 30-32) Complainant went out on maternity leave during her second pregnancy in 2005 and returned to her prior position approximately 9 weeks later. (Tr. 32-34) Gina hired a temporary worker to perform Complainant's office duties each time Complainant was out on maternity leave. (Tr. 170-71)

8. During the period of Complainant's employment with Respondent and Dr. Schneyer's previous practice, some of Complainant's co-workers went out on pregnancy or disability leave and returned to work. (Tr. 116-17, 165-68, 277-78)

9. Complainant became pregnant with her third child in or about May 2006. (Tr. 35) She informed Gina about this pregnancy 2 or 3 months later. (Tr. 36-37)

10. In or about August 2006, Gina gave Complainant and one other employee a bonus consisting of 1 week of additional vacation time. (Tr. 26, 171-72, 227-28) It is not disputed that Gina was aware that Complainant was pregnant at the time she gave Complainant her bonus. (Tr. 115-16, 171-72)

11. In or about October 2006, Respondent hired Shayna Nieves as a part-time medical assistant. (Tr. 38) Nieves was hired to replace a medical assistant who had separated from employment with Respondent. (Tr. 103, 215-16, 277) Complainant trained Nieves as she had trained other new medical assistants in the past. (Tr. 38-39, 103-05, 165)

12. In late December 2006, Respondent gave pay raises and Christmas bonuses to its employees. (Tr. 120, 172, 176) Respondent gave its employees smaller raises and bonuses in 2006 than it had in the previous year. (Tr. 122, 172-74)

13. Gina presented the applicable raise and bonus amounts to each employee privately in her office. (Tr. 172-73) Gina testified that Complainant became angry about the amount of

money she received, abruptly left the office and slammed the door in Gina's face. (Tr. 174-75) Gina stated that she was "devastated" and very hurt by Complainant's conduct, and she spoke to other employees about the incident that day. (Tr. 174-76, 239) This testimony was corroborated by Dana Rottmann, a medical biller employed by Respondent. (Tr. 275, 281-84) Rottmann observed that Complainant was angry when she left the meeting with Gina that day, and Gina was visibly upset by Complainant's conduct. (Tr. 281-83) Rottmann confirmed that Gina told her and other employees that Complainant acted inappropriately and slammed the door in Gina's face. (Tr. 282-84)

14. Shortly after this incident, Gina told Dr. Schneyer what had occurred. (Tr. 203, 253) Dr. Schneyer testified that Gina was "disappointed and upset" by Complainant's conduct that day. (Tr. 253)

15. At that time, Gina and Dr. Schneyer agreed that they wanted to terminate Complainant's employment because of her misconduct, and they consulted with an accountant and an attorney on this issue. (Tr. 182-85, 254-55) Respondent's accountant, David F. Newton, submitted a corroborating affidavit. (Respondent's Exh. 2)

16. On January 2, 2007, Complainant went to Respondent's office and met with Dr. Schneyer. (Tr. 53, 256) Gina was not in the office at that time, and Complainant gave Dr. Schneyer a disability form. (Tr. 53, 256-57; Complainant's Exh. 1) Dr. Schneyer testified that Complainant told him that she could not work anymore, "thanked [him] for all that [he] had done for her" and said "a final good-bye." (Tr. 257) This testimony was corroborated by Rottmann who testified that Complainant expressed finality when she said farewell to the office staff that day. (Tr. 287)

17. Dr. Schneyer gave the disability form to Gina to complete and told her that he believed that Complainant did not intend to return to work for Respondent. (Tr. 187) Gina filled out a portion of the disability form that day and answered "No" to a question asking whether Complainant's employment had terminated. Complainant's doctor filled out a portion of the disability form stating that Complainant was unable to work after January 3, 2007 and would not be able to perform her usual work until approximately March 20, 2007. (Complainant's Exh. 1)

18. On January 10, 2007, Complainant came to the office and met with Gina and Dr. Schneyer. (Tr. 49-52, 188-89, 260) That day, Complainant told Gina and Dr. Schneyer that Respondent should have paid her wages for January 2, 2007. (Tr. 49-51, 189, 260-61) Complainant then provided a letter from her doctor dated January 10, 2007. This letter states that Complainant saw her doctor on January 2, 2007 and could not work for the remainder of her pregnancy due to pregnancy related complications. (Tr. 50; Complainant's Exh. 2)

19. After this incident, Complainant did not speak with Gina or Dr. Schneyer until March 7, 2007. (Tr. 54-56, 193) On March 7, Complainant spoke to Gina and asked if she could return to work for Respondent. (Tr. 58, 195) Gina told Complainant that she did not have a position available for Complainant. (Tr. 58, 195-96)

20. Around this time, Respondent was having trouble with a part-time medical technician who was hired in January 2007. (Tr. 189-90, 193) Gina testified that she did not rehire Complainant in March 2007 because of Complainant's prior "disrespectful and rude" conduct. (Tr. 196)

## OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of sex or 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 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 ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

As a pregnant female, Complainant is a member of a protected class. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). The record also establishes that Complainant was qualified to work as a medical assistant, and she informed Respondent about her pregnancy in July or August 2006. Complainant took disability leave in January 2007 and Respondent did not permit her to return to her position in March 2007.

Assuming Complainant established that Respondent terminated her employment, Complainant failed to show that her discharge was causally related to her pregnancy. *See McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 330 (1994). Complainant did not establish that Respondent acted with discriminatory animus. However, Complainant "can indirectly establish a causal connection to support a discrimination or retaliation claim by

showing that the protected activity was closely followed in time by the adverse [employment] action.” *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (citations and internal quotation marks omitted). In the instant case, Complainant went out on disability leave 5 or 6 months after she informed Respondent that she was pregnant. Respondent did not permit her to return to her position in March 2007, 7 or 8 months after Complainant announced her pregnancy. Without any additional evidence of causation, the temporal relationship is too remote to establish causation. *See Id.*

Even if Complainant successfully established a prima facie case of discrimination, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent averred that it did not rehire Complainant in March 2007 because of her disrespectful and rude conduct toward Gina, Respondent’s office manager, at the end of December 2006.

The burden then shifts back to Complainant to show that this reason is a pretext for unlawful discrimination. It is not enough for Complainant to show that Respondent made an unwise personnel decision or that Respondent’s explanation is not persuasive. Complainant must establish that Respondent intentionally discriminated against her because of her pregnancy. *See Ferrante* at 630, 665 N.Y.S.2d at 29. Complainant has failed to meet her burden.

Complainant did not establish that Gina, Dr. Schneyer, or anyone else associated with Respondent, acted with discriminatory animus. The record shows that Gina gave Complainant and only one other employee a bonus after Complainant announced her pregnancy in July or August 2006. Furthermore, Complainant was pregnant twice during her employment with Dr. Schneyer when Gina was the office manager. On both of those occasions, Complainant went out on maternity leave and returned to her prior position. Complainant also had co-workers who

went out on pregnancy or disability leave and returned to work for Respondent. Finally, the record does not support the conclusion that Respondent hired Nieves to replace Complainant.

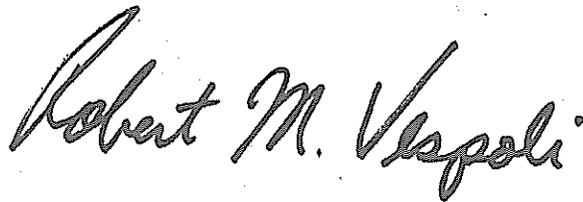
The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1<sup>st</sup> Dept. 2007). Complainant has failed to establish that Respondent treated her in an unlawful manner because of her pregnancy.

**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: November 18, 2008  
Hempstead, New York



Robert M. Vespoli  
Administrative Law Judge