

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**
on the Complaint of

VERONICA RINALDI,

Complainant,

v.

DR. CARL PALMBLAD D/B/A SMILE MAKERS,
Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 6842278

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 May 31, 2007, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING CHANGE TO PARAGRAPH 1 OF THE ORDER ON PAGE 22.

- Interest shall begin to accrue on the back pay award at a rate of nine percent per annum from February 18, 2005, a reasonable intermediate date, until the date payment is actually made by Respondent, not from May 7, 2003, as stated in the Recommended 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, this 29 day of June, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

Complainant
Veronica Rinaldi
53 Thunder Road
Miller Place, NY 11764

Complainant Attorney
Raymond Nardo, Esq.
Raymond Nardo Law Office
129 3rd Street

Mineola, NY 11501

Respondent

Dr. Carl Palmbad
Attn: Dr. Carl P. Palmblad, D.D.S.
14 North Country Road
Port Jefferson, NY 11777

Respondent Attorney

Amy T. Kulb, Esq.
Jacobson, Goldberg & Kulb, LLP
585 Stewart Avenue
Garden City, NY 11530-4701

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

Joshua Zinner, Deputy Commissioner for Enforcement
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Administrative Law Judge
Robert M. Vespoli

Sara Toll East
Chief, Litigation and Appeals

Caroline J. Downey
Acting General Counsel

Peter G. Buchenholz
Adjudication Counsel

Mathew Menes
Adjudication Counsel

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

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on the Complaint of

VERONICA RINALDI,

Complainant,

v.

DR. CARL PALMBLAD D/B/A SMILE
MAKERS,

Respondent.

RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 6842278

SUMMARY

Complainant alleges that Respondent unlawfully terminated her employment with his dental practice because she became pregnant. The New York State Division of Human Rights ("Division") finds that the complaint should be sustained. Complainant is entitled to relief in the form of an award of compensatory damages for back pay and mental anguish.

PROCEEDINGS IN THE CASE

On July 22, 2003, Complainant filed a verified complaint with the 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 an unlawful discriminatory practice. 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 ("A.L.J.") of the Division. Public hearing sessions were held on April 11-12, 2006, September 20-22, 2006, October 3, 2006, and December 13, 2006.

Complainant and Respondent appeared at the hearing. Complainant was represented by Raymond Nardo, Esq. Respondent was represented by Jeffrey Granat, Esq.

At the public hearing, Complainant moved to amend the complaint to include pregnancy as a disability under the Human Rights Law. The presiding A.L.J. granted that motion. (Tr. 5-6)

Permission to file post-hearing briefs was granted. On March 19, 2007, Complainant submitted a post-hearing brief. On March 20, 2007, Respondent submitted a post-hearing brief.

FINDINGS OF FACT

1. Complainant alleges that Respondent violated Human Rights Law § 296 when he fired her on May 7, 2003. (A.L.J. Exh. I) Complainant alleges that this decision was due to her pregnancy. (A.L.J. Exh. I)
2. Respondent denies these allegations. (A.L.J. Exh. II)
3. Complainant is a thirty-eight year old female. (Tr. 530) She was qualified for the position of office manager in Respondent's dental office. Since her high school graduation, she has held a variety of positions in several dentists' offices. This includes time as a dental hygienist, a chair-side assistant, a receptionist, and a previous eight-year period as an office manager. As an office manager, Complainant's responsibilities included billing, handling insurance claims, data entry, and mailing correspondence to patients. Complainant became proficient in the use of the dental software system Dentrrix some time before she was employed by Respondent. (Tr. 531-36; Respondent's Exhibits N, M)

4. Immediately prior to working for Respondent, Complainant was employed by Dr. Archer Israel for several months. She decided to leave Dr. Israel because his office was "in shambles" and she preferred to work elsewhere. (Tr. 539-40; Respondent's Exh. N)

5. Respondent began looking for a new office manager for his dental practice, Smile Makers, in February 2002, after his current office manager, Nicole Cacciato, informed him that she was leaving the practice. (Tr. 211) Respondent placed advertisements in *Newsday* and *Yankee Trader* newspapers in an attempt to attract candidates for the position. (Tr. 49-55; Complainant's Exh. 1; Respondent's Exhibits A, B)

6. Complainant saw Respondent's advertisement in *Yankee Trader* newspaper looking for an office manager who had experience with the Dentrix system and dental terminology. (Tr. 541; Complainant's Exh. 1) Complainant called the telephone number listed in the advertisement and spoke with Cacciato. Cacciato spoke briefly with Complainant, asked her to fax a resume to the office, and arranged for a follow-up interview at which Complainant was to meet with Respondent. (Tr. 541-42)

7. During their phone call, Cacciato inquired whether Complainant had experience with the Dentrix system and how long she had worked in the dental field. (Tr. 542) Aside from these factors, Cacciato stated that she told applicants that they would be managing both locations of the practice. However, Cacciato admitted that she does not remember what she told Complainant during their conversation. (Tr. 1070-71)

8. Cacciato testified about her responsibilities and that she expected the new office manager to fulfill them, but she never explained these duties to Complainant. (Tr. 542, 1063, 1066) Furthermore, Complainant's interview with Respondent was primarily to see if they got along and to determine compensation. (Tr. 58) Respondent told Complainant that her

responsibility was "to run the office" and did not provide any specific details. (Tr. 65-66)

Complainant was never given a full description, either in written or verbal form, of the responsibilities of her position. (Tr. 66, 548, 744)

9. Respondent has two dental office locations: one in Port Jefferson, New York and one in Shirley, New York. (Tr. 24) Complainant interviewed with Respondent at the Port Jefferson location during the last week of August 2002. (Tr. 544) The night of her interview, Complainant was offered the office manager position once she demonstrated her knowledge of the Dentrix system. (Tr. 545-46) Complainant accepted the position, with the intention of beginning work after providing her current employer with two weeks notice. (Tr. 546) The position at Smile Makers offered no retirement plan and Complainant did not need health benefits. Respondent agreed to pay Complainant twenty-six dollars per hour. (Tr. 547)

10. Complainant began as the Port Jefferson office manager on or about September 15, 2002. (Tr. 64, 549) On or about April 28, 2003, Complainant informed Respondent that she was pregnant. She told him that she intended to work until the latest possible date and return six weeks after the birth, as she had with her previous two children. (Tr. 567-68, 954) Respondent terminated Complainant on May 7, 2003. (Tr. 569)

11. Complainant claims that she was terminated because of her pregnancy. (A.L.J. Exh. I) Respondent maintains that Complainant was not fired, but was offered another position at lower pay. (Tr. 123-24; Complainant's Exh. 4) Respondent claims that Complainant had to be demoted because, a few months after she joined the office, he realized that she was not living up to the expectations he had for her: she was not increasing office productivity, profit, and efficiency. (Tr. 232, 262, 302, 498-99) Respondent claims that the timing of the change in Complainant's employment status was the result of a combination of factors: his wanting to give

Complainant enough time to become acclimated to the position, discussions with his accountant, and conversations with other employees who complained about Complainant's work. However, Respondent claimed to have been considering Complainant's demotion for several months before May 7, 2003. (Tr. 119, 519, 675-79, 721-22, 862-63, 1035, 1042, 1135; Respondent's Exh. G) Respondent stated that he finally made the decision to eliminate Complainant's position approximately thirty days before May 7, 2003. (Tr. 119) Respondent claims that this move was necessary because of the decreased profits of his practice and Complainant's lack of productivity. (Tr. 491, 499) The Division finds these claims to be without merit.

12. Respondent's accountant, Larry Biblo, advised Respondent that he needed to reduce overhead, which could be accomplished through cutting back on employee compensation, in order to maximize his profit, or at least bring it up to the national average. (Respondent's Exh. G) Respondent argued that Complainant was the natural choice because she was a relatively new employee and the highest paid clerical employee. (Tr. 230, 406) In addition, Respondent believed her productivity was not commensurate with her pay. (Tr. 133) However, this contention is not supported in the record.

13. Aside from one brief conversation about a chart contrasting the two locations of Respondent's practice, Respondent never discussed any issues with Complainant about his accountant's concerns, Respondent's profitability, the growth of the practice, the acceptance or retention rate of either office, or his dissatisfaction with Complainant's job performance. (Tr. 557-62, 566-67) Although Respondent claims he frequently discussed these issues with Complainant, Respondent did not proffer any corroborating documentary evidence. (Tr. 114, 115, 180, 478) In fact, Respondent admitted that he did not believe the office was less productive while Complainant was office manager. (Tr. 83)

14. Respondent contends that Complainant was inadequate as office manager because she only worked in the Port Jefferson office, despite her being hired to handle both offices as past and future office managers have done. (Tr. 114, 666, 887, 1063) However, this contention is contradicted in the record. The credible record establishes that Complainant was hired solely to manage the Port Jefferson office. First, Complainant was never told she was supposed to be the office manager of both locations. (Tr. 564) Next, in a letter subsequently endorsed by ten other employees, Respondent admitted that Complainant's title was office manager of the Port Jefferson office. (Tr. 564; Complainant's Exhibits 4, 18, 23) Furthermore, Respondent told at least one employee, Betty Verin, that Complainant was being hired solely to manage the Port Jefferson office. (Tr. 801-02) Finally, at no time during Complainant's employment did Respondent indicate that she should also be managing the Shirley office. (Tr. 564) In fact, Respondent only suggested that Complainant visit the Shirley office on one occasion in order to teach the office manager there, Laura Daley, about a new recall system created by Complainant. (Tr. 562)

15. Respondent claims that while Complainant was serving as office manager, the profit of Smile Makers decreased, while his debt increased. (Tr. 294-97, 307; Respondent's Exh. F) However, this averment is not supported in the record. Respondent's tax returns show a marginal increase in profit between 2001 and 2002, from \$54,587 to \$65,898, and a significant increase the following year, when his income rose to \$120,249. (Complainant's Exhibits 8, 9, 26)

16. Collection of payments also improved while Complainant was the office manager. In the fall of 2002, the Port Jefferson office collected more money than it produced through dental procedures. In the winter of 2003, the Port Jefferson office collected two percent more than it

did during the same time in the previous year. (Respondent's Exh. H) In fact, in the winter of 2003, the collection in the Port Jefferson office was the highest it had ever been. (Tr. 452; Respondent's Exh. H)

17. While Complainant was the office manager, the number of treatments planned and completed increased, and there was an increase of over one hundred thousand dollars in revenue from treatments completed. (Complainant's Exh. 2)

18. If there were diminished profits during the time Complainant served as office manager, there are other probable causes aside from Complainant's performance or compensation. For example, comparing the winter of 2002 with the winter of 2003, advertising, landscaping, and snow removal costs increased significantly in the winter of 2003. Many other areas saw increases as well, including office insurance, utilities, office cleaning, and dues and licenses. (Respondent's Exh. J)

19. Respondent claims that he never fired Complainant. Instead, he alleges that he decided to terminate her position and offered her a job as an insurance claims coordinator with lower pay. (Tr. 123-24, 456) Respondent claims that Complainant refused his offer and quit on the spot. (Tr. 124) However, this argument is unconvincing. The Division credits Complainant's testimony that if this offer was truly made, Complainant would have accepted it because of her economic circumstances and because she did not think it was likely she would be hired by another employer while three months pregnant. (Tr. 571)

20. In a letter to the Division dated June 23, 2004, Respondent and Biblo represented that Complainant's position (office manager) was "abandoned," that "no new employee was hired as officer manager" and that Complainant was "NOT replaced." (Complainant's Exh. 5) These assertions are contradicted in the record. Respondent's own chart indicates that three employees,

Daley, Dawn Battaglia, and Colleen Moran, served as office managers after Complainant was terminated. (Respondent's Exh. D) Furthermore, Respondent and numerous other witnesses referred to later employees as the "officer manager." (Tr. 172, 407, 464, 722-26, 890)

21. Respondent's credibility was further impugned during his testimony concerning the amount of money he paid to other office managers. Illustrative is the case of Daley's employment. Employee time records show that Daley worked full-time from August 19, 2000 through September 4, 2003. However, her pay does not reflect this. During this time period, Daley worked at both of Respondent's offices. However, Daley worked solely at the Shirley office while Complainant was employed by Respondent. (Complainant's Exh. 13) Daley and Respondent were romantically involved during the majority of the time Daley worked at Smile Makers. (Tr. 502-03)

22. In 2000, Daley worked 367.54 hours. (Complainant's Exh. 13) However, she only earned \$1245.69, which is equivalent to \$3.39 per hour. (Complainant's Exh. 27) In 2001, Daley worked at Smile Makers for a total of 1771.43 hours, but made only \$5409.03 (Complainant's Exhibits 13, 28) This is a pay rate of \$3.05 per hour.

23. Respondent first stated that Daley worked full-time throughout 2002, earning ten dollars per hour. (Tr. 164-65) However, Respondent's own chart lists Daley's pay rate as eighteen dollars per hour. (Respondent's Exh. C) Furthermore, when confronted with a W-2 form which showed that Daley earned only \$5539.86 during 2002, paid entirely during the fourth quarter, Respondent changed his mind, saying Daley worked only the fourth quarter. (Tr. 165; Complainant's Exh. 10) However, records show Daley worked 1812.58 hours, spread throughout the entire year of 2002. (Complainant's Exh. 13) This computes to a pay rate of \$3.06 per hour. During cross examination on the issue of whether Respondent paid Daley in

cash, Respondent's attorney requested an opportunity to confer with his client to discuss a possible Fifth Amendment issue. Respondent left the stand to discuss this issue with his attorney. When he returned to the stand, Respondent explained that Daley was working at his request earlier in the year because they were dating, and that he paid her living expenses as compensation for the work she did at Smile Makers prior to the fourth quarter of 2002. (Tr. 165-70) He testified that he began paying her a salary in the fourth quarter of 2002 because they ended their relationship, and Daley requested formal pay. (Tr. 444) Respondent's disingenuous testimony on this issue further impugned his credibility.

24. In 2003, Daley made \$10,383.80 for 1270.54 hours of work. (Complainant's Exhibits 11, 13) This amounts to \$8.17 per hour, despite that fact that employment records list Daley's pay rate as twenty dollars per hour during at least the month of May, and Respondent's chart shows a pay rate of eighteen dollars per hour. (Complainant's Exh. 13; Respondent's Exh. C)

25. Respondent maintains that Complainant was being overpaid for her position. (Tr. 123-24) Respondent testified that he never paid a clerical employee as much money as he paid to Complainant. (Tr. 230, 406) However, this assertion is not credible and Respondent presented contradictory and misleading evidence on this issue. First, Respondent is a businessman who agreed to these terms of compensation with apparently no argument or hesitation. (Tr. 59-60, 230, 547, 746-47) Furthermore, there is no way of knowing what Respondent truly paid Daley for her services as office manager. Her living expenses have not been quantified and Respondent has not been truthful about her compensation over the course of the three years she worked for him. Respondent's own charts and testimony contradict one another about Daley's compensation making it impossible to ascertain what she actually earned while employed by Respondent. Respondent admitted, at minimum, to under-reporting payroll

through misleading testimony and charts relating to the compensation paid to other office managers. (Tr. 164-65; Complainant's Exh. 10; Respondent's Exh. C)

26. Complainant, with her husband's assistance, looked for new employment after she was terminated by Respondent. She looked through *Yankee Trader* and *Newsday* newspapers and she submitted her resume to a temp agency. However she could not find a job prior to her son's birth on November 21, 2003. (Tr. 579, 580-81, 811, 819-20, 837, 957, 965, 968) After her son's birth, Complainant continued to look for work, and went on three to four interviews before being hired in or about February 2004 as a dental receptionist at Kane, Cuchel & Kane. Complainant currently works at Kane, Cuchel & Kane earning twenty dollars per hour. (Tr. 581-82, 588, 969; Complainant's Exhibits 20, 29; Respondent's Exh. N)

27. Complainant earned \$745.68 per week working for Respondent, based upon a pay rate of twenty-six dollars per hour and a work week of 28.68 hours, which is what Complainant averaged in the 33.5 weeks she was employed by Respondent. (Complainant's Exh. 14) Thus, if she had continued working for Respondent, Complainant would have earned approximately \$38,775.00 annually.

28. After Complainant's termination on May 7, 2003, there were 34 weeks remaining in 2003. Complainant would have earned approximately \$25,353.00 working for Respondent during this time. However, Complainant gave birth to her son on November 21, 2003 and would have missed work for the remaining 6 weeks of 2003. If she was still employed by Respondent, the earnings she would have lost during this period would have amounted to approximately \$4474.00. Additionally, Complainant earned \$11,536.00 in unemployment benefits. (Complainant's Exh. 15)

29. In 2004, Complainant earned approximately \$16,225.00 from a combination of unemployment (\$364.00), limited hours at Dr. Israel's office (\$404.00), and her current job at Kane, Cuchel & Kane (\$15,457.00), which she began in February 2004. (Complainant's Exh. 15)

30. In 2005, Complainant earned approximately \$21,757.00. She worked approximately 1.5 weeks for Dr. Brescia (\$1254.00), limited hours for Dr. Israel (\$143.00), and continued with Kane, Cuchel & Kane (\$20,360.00). (Tr. 586-87; Complainant's Exh. 15)

31. Calculations for back pay damages end on the last day of the public hearing, December 13, 2006. This represents an approximate 49.5 week period in 2006. Complainant would have earned approximately \$36,911.00 had she worked for Respondent during that time period. Complaint offered pay stubs into evidence for her earnings in 2006. (Complainant's Exhibits 15, 20, 29) Based on this information, Complainant earned approximately \$420.00 per week working for Kane, Cuchel & Kane in 2006 (20.99 hours per week at twenty dollars per hour), for a total of approximately \$20,790.00 during that 49.5 week time period.

32. In addition to lost wages, Complainant is seeking other compensatory damages. First, as a result of her family's decreased income due to her termination, both she and her husband withdrew money from their retirement plans. (Tr. 584-85, 813; Complainant's Exh. 30) Upon withdrawal, these amounts were subject to tax and penalties. (Tr. 814; Complainant's Exh. 15) The first withdrawal Complainant made was over a year after her termination. (Complainant's Exhibits 15, 30) The Division finds that the link between these withdrawals and Complainant's termination is too tenuous to merit compensation.

33. Second, Complainant suffered from gestational diabetes while pregnant with her third child, an ailment that she never contracted while pregnant with her first two children. (Tr. 593-

98; Complainant's Exh. 16) However, gestational diabetes is a disease with numerous causes and Complainant did not sufficiently establish a causal link between her termination and this illness. (Complainant's Exhibits 21, 22; Respondent's Exh. R)

34. Finally, in the months leading up to the birth of her son, Complainant was sad and depressed as a result of losing her job, rather than joyful at the upcoming birth. Both she and her husband recalled that Complainant was withdrawn, less happy than she should have been, and constantly nervous about paying the bills because her termination significantly affected the family's income. (Tr. 610-12, 812) Complainant did not seek any treatment because she did not want to take any medication while she was pregnant. (Tr. 974)

OPINION AND DECISION

The record establishes that Respondent unlawfully discriminated against Complainant because of her pregnancy by terminating her on May 7, 2003.

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a) prohibits an employer from discharging an employee because of her pregnancy. *Mittl v. N.Y. State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). A complainant has the burden of establishing a prima facie case by showing that he or she is a member of a protected group, that he or she suffered an adverse employment action and that the respondent's action occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to the respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with the complainant to show that the respondent's proffered explanations are a pretext for unlawful discrimination. *Pace College v.*

Commission on Human Rights of the City of New York, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

In the instant case, Complainant has demonstrated a prima facie case of discrimination. She is a member of a protected class and she was qualified for the office manager position for which she was hired. Although Respondent argues that Complainant was not qualified for the position, the record establishes that she is proficient in the use of the Dentrix system and has over a decade of experience working in dental offices, including over eight years as an office manager. The Division finds that Complainant was hired as the Port Jefferson office manager and was qualified to fill that position.

Next, Complainant suffered an adverse action when Respondent terminated her employment on May 7, 2003. Respondent contends that Complainant was never fired; instead she was offered an alternative position at lower pay. This contention is without merit. If Respondent had offered Complainant another position, it is reasonable to conclude that she would have taken the position given her family's economic circumstances and her uncertainty regarding her ability to find another job while three months pregnant.

Finally, Complainant's termination was done in a manner which gives rise to an inference of discrimination. Complainant had been working for Respondent for approximately nine months before she was fired. Respondent never reprimanded Complainant nor did he tell her that he was unhappy with her job performance or the profitability of the Port Jefferson office. The only significant event that took place around the date of Complainant's termination was that nine days earlier she told Respondent that she was pregnant. Complainant can establish causation by showing that there is sufficient temporal proximity between the time Complainant informed Respondent she was pregnant and her termination. *See Gorman-Bakos v. Cornell*

Coop. Extension, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months). Here, there were only nine days between the time Complainant told Respondent she was pregnant and her termination. The temporal proximity between these two events gives rise to an inference of discrimination.

Respondent has asserted that financial concerns were legitimate, non-discriminatory reasons for his actions. Respondent argues that his practice was suffering financially and that his accountant advised him that he needed to reduce employee salaries. He further contends that altering Complainant's employment was the logical choice because she was earning more than any other clerical employee ever earned, and he did not believe her productivity was commensurate with her pay. He also alleges that this business decision was one he had been considering for several months, not one that was prompted by Complainant's pregnancy announcement.

The Court of Appeals has stated that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Mittl* at 331, 763 N.Y.S.2d at 521 (citations and internal quotation marks omitted).

In the present case, the record establishes that Respondent's dental practice actually had some of its highest grossing quarters while Complainant was the office manager. Furthermore, Respondent has employed several office managers to replace Complainant since her termination. There was also no credible evidence that Complainant was responsible for any decrease in profits. Moreover, if Respondent was truly concerned about the profitability of his business and Complainant's role in that, it is reasonable to conclude that he would have taken the time to sit

down with her and specifically address ways to improve the situation. Respondent did not do this.

Furthermore, if Respondent's business was failing, it is counterintuitive that he would fire the person responsible for running his office. If Respondent truly believed that it was necessary to fire the office manager, he would have needed a replacement. Respondent testified that he did not begin looking for a replacement for Complainant until in or about September 2003. (Tr. 518) When Respondent found out that Cacciato, the previous office manager, was planning to leave, he began searching for a replacement for her almost immediately and placed advertisements in the newspaper. It took Respondent approximately six months to hire a replacement for Cacciato. (Tr. 210-11) Therefore, it is reasonable to conclude that if Respondent had made the decision to eliminate Complainant's position approximately thirty days before May 7, 2003, he would have taken action immediately to find a replacement. However, despite the difficulty he had in the past, Respondent did not place an advertisement or conduct any interviews for an office manager to replace Complainant until in or about September 2003. (Tr. 518)

Respondent's proffered explanations for his business decisions patently lacked credibility, especially where he testified regarding compensation paid to other office managers he employed. Respondent argued that he had to end Complainant's employment as office manager because she was being paid too much. Although Respondent offered charts and diagrams in support of this argument, his testimony ultimately proved those charts to be unreliable and misleading. Consequently, the record is unclear regarding how much Respondent truly paid other office managers, especially Daley, who was receiving compensation in trade or cash which cannot be valued in this record.

Respondent's credibility was further impugned when he admitted to conduct that may reasonably be construed as violations of state and federal wage reporting and tax withholding requirements by under-reporting Daley's actual wages.

The Division concludes that Respondent's asserted justifications for his actions are false. This conclusion, together with Complainant's prima facie case of discrimination, establishes that Respondent unlawfully discriminated against Complainant by terminating her on May 7, 2003.

Damages

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence and be comparable to awards for similar injuries. *State of New York v. N.Y. State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

In the instant case, the Complainant is entitled to compensation for back pay. In 2003, Complainant's unemployment benefits (\$11,536.00) and the earnings she would have lost during the 6 weeks after her son was born (\$4474.00) are offset against the amount Complainant would have earned from Respondent during the remaining 34 weeks of 2003 (\$25,353.00). Therefore, Complainant is entitled to \$9343.00 in back pay damages for 2003.

In 2004, the difference between the amount Complainant would have earned if she was still employed by Respondent (\$38,775.00) and the amount she actually earned in 2004 (\$16,225.00) is \$22,550.00.

In 2005, the difference between the amount Complainant would have earned if she was still employed by Respondent (\$38,775.00) and the amount she actually earned in 2005 (\$21,757.00) is \$17,018.00.

Calculations for back pay damages end on the last day of the public hearing, December 13, 2006. This represents an approximate 49.5 week period in 2006. The difference between the amount Complainant would have earned during this time period if she was still employed by Respondent (\$36,911.00) and the amount she actually earned during this time period (\$20,790.00) is \$16,121.00.

Therefore, Complainant is entitled to \$65,032.00 in compensatory damages for back pay. In order to effectuate the purpose of the Human Rights Law, the Division finds that an award of pre-determination interest in the instant case is warranted in order to make Complainant whole. Respondent is therefore liable to Complainant for pre-determination interest on the back pay amount at a rate of nine percent per annum accruing from May 7, 2003, the date of discrimination, through the date of this Order. *Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 27, 744 N.Y.S.2d 349, 352 (2002); CPLR 5004.

Respondent argues that Complainant failed to mitigate her damages. This argument is unavailing. Complainant has a duty to mitigate her damages. *Bello v. Roswell Park Cancer Inst.*, 5 N.Y.3d 170, 173, 800 N.Y.S.2d 109, 111 (2005). She is required to use "reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). Respondent has the burden of showing that Complainant did not satisfactorily attempt to mitigate her damages. To do so, Respondent must show that "suitable work existed" and that Complainant "did not make reasonable efforts to obtain it." *Dailey v. Societe Generale*, 108 F.3d 451, 456 (2d Cir. 1997). To determine whether Complainant's efforts at mitigation were

reasonable, a court should consider Complainant's individual characteristics, the job market, and the quality and quantity of Complainant's efforts. *Id.*

In the instant case, Complainant and her husband looked in two newspapers for office manager positions after her termination, including the newspaper where she found Respondent's job listing. Complainant also contacted a temp agency, where she submitted her resume, hoping to get work at a dental office. However she did not succeed in obtaining employment until after the birth of her son on November 21, 2003. After her son was born, Complainant went on three to four interviews before obtaining employment at Kane, Cuchel & Kane in February 2004, where she is currently employed.

Respondent admitted into evidence copies of *Newsday* advertisements for the period of time after Complainant's termination, highlighting job opportunities that Complainant should have pursued. However, a majority of these positions were for office receptionists and assistants, not office managers. While Complainant will be denied back pay if she refuses a job that is "substantially equivalent" to the one she lost, she "need not go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co.* at 231-32. In order for Respondent to successfully show that Complainant failed to mitigate her damages by refusing comparable employment, he must "show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment." *Reilly v. Cisneros*, 835 F. Supp. 96, 99 (W.D.N.Y. 1993) (citations and internal quotation marks omitted).

In the instant case, many of the *Newsday* advertisements were for inferior positions at lower pay than Complainant had been earning. Failure to apply for these positions is not "so deficient as to constitute an unreasonable failure to seek employment." *Id.* In the approximately nine months between her termination and hiring at Kane, Cuchel & Kane, Complainant went on

four interviews and filed her resume with a temp agency. In light of the totality of circumstances, including Complainant's depression and pregnancy, Respondent has not established that Complainant's job search efforts were unreasonable or that she failed to accept comparable employment that was available. *See Kuper v. Empire Blue Cross & Blue Shield*, 2003 U.S. Dist. LEXIS 2362, *20 (S.D.N.Y. 2003).

In addition to lost wages, Complainant is seeking other pecuniary damages. Complainant maintains that, as a result of her family's decreased income due to her termination, both she and her husband withdrew money from their retirement plans. However, the connection between these withdrawals and Complainant's termination is too tenuous to award compensation. First, Complainant did not begin to withdraw money from her account until more than a year after her termination. Next, Complainant's lifestyle and family size changed following her termination. There was no evidence that these withdrawals would not have been made even if Complainant had continued working for Respondent. Finally, there is nothing in the record showing how the withdrawn money was spent. Therefore, the Complainant is not entitled to recover monies withdrawn from her retirement account or her husband's retirement account.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondent's discriminatory conduct. When considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous

provision.” *Batavia Lodge No. 196, etc. v. N.Y. State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, “[m]ental injury may be proved by the complainant’s own testimony, corroborated by reference to the circumstances of the alleged misconduct.” *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *N.Y. State Dep’t of Correctional Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

In the present case, Complainant credibly testified that she suffered from depression and anxiety as a result of her termination, which continued until her son was born on November 21, 2003. This testimony was corroborated by her husband. At a time when she should have been experiencing great joy, Complainant was instead withdrawn, sad, and worried. She was concerned about her family’s well-being and how she would be able to support her children. She was anxious that she would not be able to find another job while she was pregnant and she was troubled about the impact this would have on her family. Complainant chose not to seek medical treatment for her emotional suffering because she did not want to be placed on any medication while pregnant.

Complainant claims that this emotional suffering, specifically the stress, manifested itself in the form of gestational diabetes. However, this argument is tenuous. Complainant offered no credible evidence establishing a nexus between her termination and her gestational diabetes. Therefore, Complainant should recover for her emotional suffering, but not for her bout of gestational diabetes.

Generally, complainants under the Human Rights Law are awarded between \$5,000 and \$15,000 for “garden variety” mental anguish claims. However, the full range of possible awards

for “garden variety” mental anguish is much larger. *Gatti v. Cmty. Action Agency of Greene County, Inc.*, 263 F. Supp. 2d 496, 512 (N.D.N.Y. 2003) (finding that awards for “garden variety” mental anguish in cases interpreting the Human Rights Law vary from “as low as \$5,000 to a relative high of \$125,000”). “Garden variety” mental anguish is defined as emotional distress that is “devoid of any medical treatment or physical manifestation.” *Id.*

In the instant case, Complainant and her husband credibly testified she was worried, depressed, anxious, and withdrawn as a result of her unlawful termination. Accordingly, the Division finds that an award of \$30,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See, e.g., Trivedi v. Cooper*, 1996 U.S. Dist. LEXIS 18715 (S.D.N.Y. 1996) (awarding \$50,000 for emotional distress established through plaintiff’s own testimony in an employment discrimination case); *Tanzini v. Marine Midland Bank, N.A.*, 978 F. Supp. 70 (N.D.N.Y. 1997) (awarding \$30,000.00 for mental anguish where plaintiff and his wife testified he was shocked, argumentative, and had trouble sleeping as a result of unlawful age and disability discrimination); *Kim v. Dial Serv. Int’l, Inc.*, 1997 U.S. Dist. LEXIS 12544 (S.D.N.Y. 1997) (awarding \$25,000.00 for mental anguish based solely on the testimony of plaintiff and his wife that he suffered depression and weight loss as a result of employment discrimination).

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 Respondent, and his agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment, and

IT IS FURTHER ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

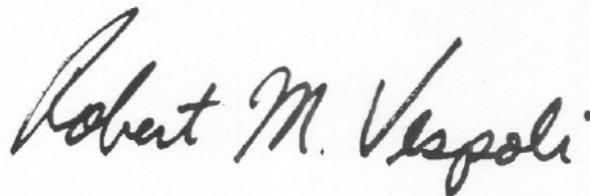
1. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$65,032.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum accruing from May 7, 2003, the date of discrimination, until the date payment is actually made by Respondent.

2. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$30,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish suffered by Complainant as a result of Respondent's unlawful discrimination against her. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until the date payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Veronica Rinaldi, and delivered by certified mail, return receipt requested, to her attorney, Raymond Nardo, Esq., at 129 Third Street, Mineola, New York 11501. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order.

4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: May 31, 2007
Hempstead, 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